

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. ER-100, SUB 1

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition for Rulemaking to Implement	)	ORDER GRANTING
North Carolina Session Law 2011-252	)	PETITION FOR
(Senate Bill 533)	)	RULE CLARIFICATION

BY THE COMMISSION: On June 23, 2011, SB 553 was signed into law. SB 553 authorized the Commission to adopt procedures to allow lessors of residential buildings to bill tenants for electric service where there are individual meters for each dwelling unit, the lessor is the account holder for those meters, and the lessor has a separate lease for each bedroom within the dwelling unit. The bill required the Commission to adopt implementing rules. On April 19, 2012, the Commission issued an Order Adopting Final Rules.

On October 29, 2012, the Public Staff – North Carolina Utilities Commission (Public Staff) filed a Petition for Rule Clarification in the above-captioned docket requesting that Rule R22 be clarified to resolve the issue of whether a conservation cap methodology for billing is an appropriate method. Specifically, in its October 29, 2012 filing, the Public Staff stated that certain landlord providers reselling electric service to tenants were using a “conservation cap” billing methodology. Under the “conservation cap”<sup>1</sup> methodology, the landlord pays the first \$30 or \$40 of each tenant’s monthly electric bill, with the tenant paying for usage above that amount. However, if the tenant uses less electricity than the “conservation cap” amount, the landlord does not refund the savings to the tenant. The Public Staff argued that this methodology is unlawful under G.S. 62-110(h)(1) and Rule 22-5 and is unfair to the tenant.

The Public Staff recommended changes to Rules R22-4(a) and R22-5(h) as follows:

R22-4(a) Every application for authority to charge for the costs of providing electric service shall be in such form and detail as the Commission may prescribe and shall include: ...

(10) a statement indicating the particular provisions of the lease forms pertaining to billing for electric service, including any provision that the landlord will pay a portion of the tenant’s electric bill up to a specified amount ...

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<sup>1</sup> Also referred to as a “courtesy credit” by other companies in the industry.

R22-5(h) The Provider may, at the provider's option, pay any portion of any bill sent to a Tenant, in accordance with the provisions of the lease; provided, however, that (i) the provider must still send each tenant bills in accordance with the other provisions in Rule R22-5; the provider must credit tenant bills or otherwise refund to tenants the amount, if any, by which the amount specified in the lease exceeds the amount actually owed by the tenant for electricity usage in the immediately preceding month; and (ii) the provider must comply with G.S. 62-140 regarding non-discrimination in billing for utility service.

The Public Staff summarized that these rule changes will allow the tenant a refund when a tenant's actual electricity usage is below the conservation cap amount.

On November 15, 2012, the Commission issued an Order Requesting Comments On Petition For Rule Clarification requesting comments from interested parties by December 7, 2012 and reply comments on or before December 21, 2012.

On December 6, 2012, the Apartment Association of North Carolina (AANC) filed Apartment Association of North Carolina's Reply Comments to Public Staff's Petition for Rule Clarification. AANC argued that the Public Staff's request contravenes the clear language of the legislation, its purpose and intent, and the collaborative approach used to arrive at acceptable billing practices in North Carolina. AANC argued that SB 533, the bill providing for the current framework permitting landlords to provide electric service to tenants while encouraging conservation at student housing property, was a consensus bill, and that the Public Staff's petition seeks to change, not clarify, a law that was unanimously supported and passed. AANC argued that the conservation cap methodology should remain intact with no requirement to require refunds when actual consumption is below the cap. Finally, AANC argued that if the Commission changes the practice, the conservation cap will go away and the provider will pay no portion of the tenant's electric bill and because of market conditions, the tenant's rent would not be reduced. Thus, the Commission would be ultimately harming the tenant.

On December 7, 2012, Conservice filed Conservice, LLC's Comments Regarding Public Staff Petition For Rule Clarification. Conservice provides utility billing services to landlords throughout North Carolina. Conservice's comments aligned with AANC. Conservice argued that neither G.S. 62-110(h) nor Rule R22 require a provider to provide refunds to a tenant where the landlord agrees to pay a "conservation cap" toward a tenant's electric charges. Conservice posited that R22-5(h) states, "The provider may, at the provider's option, pay any portion of any bill sent to a tenant;" and that this language is fully consistent with G.S. 62-110(h)(1) which provides, "The lessor may, at the lessor's option, pay any portion of any bill sent to a tenant." Conservice argued that nothing in this language requires the landlord to provide a refund to the tenant. Conservice also argued that the Public Staff's proposal does not comport with G.S. 62-23(d). G.S. 62-23(d) states that a public utility shall not include any person who distributes or provides utility service to his employees or tenants when such service or commodity is not resold to or used by others. Thus, Conservice argued that, to the

extent the cost of electricity is covered by the rent, G.S. 62-23(d) excludes the landlord from the definition of “public utility.” Clearly, under this scenario, in some months, the tenant will use less service than the landlord has budgeted for and built into the base rent, yet the tenant is not entitled to any credit or refund for the rent paid those months. Conservice argued that the present case is similar and therefore, the Commission does not have the authority to require refunds. Conservice further argued that the leases that have been entered into do not provide for refunds, and that granting Public Staff’s petition would deter, if not eliminate, the conservation cap billing method in future leases in North Carolina. Lastly, Conservice argued that if the Commission adopts Public Staff’s requested revisions which accepts the refund/credit concept, that any order requiring refunds or credits apply to future ER applications only. Conservice reasoned that the current lease agreements do not contemplate a refund to the tenant and that it is inequitable to apply this rule mid-lease where the concept was not contemplated by the parties or budgeted for by property managers.

On December 7, 2012, Duke Energy Carolinas, LLC (DEC) and Progress Energy Carolinas, Inc. (PEC)(collectively Duke) filed Duke Energy Carolinas, LLC’s and Progress Energy Carolinas, Inc.’s Comments In Support Of Public Staff’s Petition For Rule Clarification. In its comments, Duke agreed with the Public Staff’s position that the conservation cap methodology is unfair to tenants and is unlawful due to the fact that the landlord collects more from the tenant than a pass-through of the bill of the utility provider.

On December 21, 2012, AARP filed its Reply Comments where it reiterated that if the Commission grants the Public Staff’s request that the negative impact will be that the landlord will stop paying the first portion of the tenant’s monthly bill, which ultimately does not benefit the tenant.

On December 21, 2012, Conservice filed its Reply Comments Regarding Public Staff Petition For Rule Clarification. In its filing, Conservice reiterated many of its original arguments and provided a few additional thoughts. Conservice stated that the conservation cap merely provides an economic incentive for students to mindfully conserve electricity when they know it may result in no billing for electric usage at the end of the month. Conservice stated that such a program ultimately reduces the costs borne by tenants and the wasteful use of electricity. Conservice argued that changing the law, would discourage landlords from offering such incentives. Conservice also modified its argument that if the Public Staff’s request is adopted that it should be applied prospectively to future leases as opposed to future ER applications.

Conservice further stated that its understanding is that the Public Staff does not want to seek refunds for properties which are the subject of Docket Nos. ER-1, Sub 0 through ER-4, Sub 0 but that the Public Staff does want to seek refunds for the properties which were the subject of Docket Nos. ER-5, Sub 0 through ER-7, Sub 0 when the Public Staff began advancing its current position on the conversation cap. Conservice argued that it is inequitable to treat the landlords of ER-1, Sub 0 through ER-4, Sub 0 differently from the landlords in ER-5, Sub 0 through ER-7, Sub 0.

Conservice argued that all leases entered into prior to any Order issued on this matter should be exempted from any rule change. Conservice further contended that the elimination of the caps in future leases should be a discussion by the Legislature, not the Commission.

On December 21, 2012, the Public Staff filed Public Staff Reply Comments. In its comments, the Public Staff argued that nothing in Senate Bill 533 or Commission Rule R22 state that landlords may recover from tenants more than the utility company charges them, apart from an administrative fee and a late payment fee. The Public Staff further argued that a “conservation cap” of \$30.00 is a misnomer. There is no financial incentive for the tenant to conserve by using less than \$30.00 of electricity per month. The Public Staff stated any argument that the removal of the conservation cap will ultimately harm tenants is speculative at best and ignores that tenants will have a choice for looking for a less expensive rental. Lastly, in response to Conservice’s argument that any clarification not be applied to current leases, the Public Staff argued that all reseller certificates granted by the Commission from Docket No. ER-5, Sub 0 to the present have been subject to the Commission’s ruling in this docket; therefore, the landlords have been on notice of potential refunds. With respect to Docket Nos. ER-1, Sub 0 through ER-4, Sub 0, the Public Staff argued that the clarification apply to bills after the date of the Commission’s ruling in the present docket.

On May 31, 2013, the Public Staff filed a non-unanimous Agreement and Stipulation of Settlement (Agreement) resolving issues in Docket Nos. M-89, Sub 8, and ER-100, Sub 1. The parties signing on to the Agreement were the Public Staff, Campus Apartments, LLC, Campus-Raleigh, LLC, Conservice, LLC, Campus Edge Raleigh JV, LLC, the Apartment Association of North Carolina, Duke Energy Carolinas, LLC, and Duke Energy Progress, Inc., formerly Progress Energy Carolinas, Inc. The pertinent portions of the Agreement to Docket No. ER-100, Sub 1 are located in paragraphs 4, 5, 6, 8 and 10.

In Paragraph 4 of the Agreement, the parties agree that in any month in which a tenant does not consume at least the dollar amount of the electric allowance provided for in any lease with Campus/Conservice entered into more than 30 days after the date of the Commission’s approval of the Agreement, the provider will refund such underage to the tenant. The parties agree that this refund provision shall not, in any event, apply to any lease entered into prior to the date of the Commission’s approval of the Agreement.

In Paragraph 5 of the Agreement, the parties agree that the Public Staff shall recommend like treatment for any claims made against other landlords and/or apartment owners relating to billings for electricity.

In Paragraph 6 of the Agreement, the parties agree to the Public Staff’s proposed revision to the language of Commission Rule R22-5(h).

In Paragraph 8 of the Agreement, the parties agree that if the Commission does not accept the Agreement in its entirety that Campus Raleigh and Campus Apartments reserve the right to appeal any and all aspects of the Commission's decisions in this docket.

In Paragraph 10 of the Agreement, the parties acknowledge that the Agreement is only binding if accepted in its entirety.

The Commission has reviewed the Agreement and agrees with a majority of it. The Commission, however, disagrees with the portion of Paragraph 4 of the Agreement which states that refunds for underages shall not apply to any lease entered into prior to the date of the Commission's approval of the Agreement. A more appropriate benchmark is that the rule clarification which requires refunds for underages should not apply to any bills that have been issued prior to the Order in the present docket. Stated another way, the rule clarification shall apply to all bills issued after the date of the Order in the present docket. If the rule clarification is tied to the lease agreement, as opposed to the issuance of bills, the rule clarification may not take full effect for another full school year. All of the parties to this agreement, including the landlords have had notice of the Public Staff's requested rule clarification since the Public Staff filed comments in Docket No. ER-5, Sub 0 on August 16, 2012. Furthermore, the parties entered into the settlement agreement and filed the Agreement on May 31, 2013. Therefore, any argument of unfair surprise, or any argument that the property managers did not have notice of a possible rule clarification while entering into leases with tenants over the past couple of months is baseless. Furthermore, other billing agents, not a party to this Agreement, have already changed their lease agreement to remove any type of conservation cap billing methodology to obtain Commission approval of its electric reseller application. For these reasons, the Commission finds it is in the best interest of all parties to accept the Agreement, with the one modification to change the implementation of the rule clarification from future leases to future bills.

Based upon the filings, the Commission finds good cause to accept the Agreement, with the one modification stated immediately above and to accept the Public Staff's proposed revision to the language of Commission Rule R22-5(h) and to require all electric resellers to comply with this rule clarification as of the date of this Order provided that this Order will not apply to any bills issued prior to the issuance of this Order.

IT IS, THEREFORE, ORDERED as follows:

1. That the Commission accepts the Agreement, except as modified herein, and that Commission Rule R22-5(h) be clarified to read as follows:

R22-5(h) The Provider may, at the provider's option, pay any portion of any bill sent to a Tenant, in accordance with the provisions of the lease; provided, however, that (i) the provider must still send each tenant bills in accordance with the other provisions in Rule R22-5; the provider must credit tenant bills or

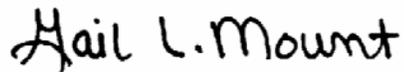
otherwise refund to tenants the amount, if any, by which the amount specified in the lease exceeds the amount actually owed by the tenant for electricity usage in the immediately preceding month; and (ii) the provider must comply with G.S. 62-140 regarding non-discrimination in billing for utility service.

2. This rule clarification becomes effective on the date of the issuance of this Order and shall apply to all current providers that have been granted a certificate of authority to resell electric service and to all future providers of service; provided, however, that this Order shall not apply to any bills issued prior to the issuance of this Order.

ISSUED BY ORDER OF THE COMMISSION.

This the 4<sup>th</sup> day of September, 2013.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Gail L. Mount". The signature is written in a cursive, slightly slanted style.

Gail L. Mount, Chief Clerk