

RESIDENTIAL ELECTRICAL SUBMETERING
AND PUBLIC POLICY IN NEW YORK: LEGISLATIVE SOLUTIONS

Remarks of Assembly Member Micah Z. Kellner

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My name is Assembly Member Micah Kellner, and I represent the 65th Assembly District of New York, which includes parts of the Upper East Side, Yorkville, and Roosevelt Island. Thank you to the New York State Bar Association for inviting me to participate today; it is an honor and a pleasure to be here with my distinguished fellow panelists.

Residential submetering of electricity is a practice with significant implications for areas of longstanding concern to public policy: most particularly, with respect to tenant protection, consumer protection, and environmental conservation. Yet despite the high stakes, it is an issue that has received relatively little attention from policymakers, regulators, or the media. While submetering has proliferated under the political radar, changing the lives of low- and middle-income tenants, few attempts have been made to address the issue systematically.

In the absence of critical attention and oversight, some landlords have abused submetering for profit, justifying their practices under the banner of environmental conservation. After a submetering plan was approved for a major building in my district, it quickly became clear to me that there was a need for legislative and regulatory remedies to reform submetering in New York State, in order to balance the needs of tenants with the goal of protecting the environment.

Submetering at Roosevelt Landings

The full extent of the tenant protection problems associated with residential electrical submetering first came to my attention in late 2008, when a submetering plan was proposed for Roosevelt Landings, a 1,003-unit apartment building on Roosevelt Island, which is in the district I represent.

Roosevelt Landings, formerly known as Eastwood, is the largest of the four apartment complexes constructed on the island in the 1970s under the Mitchell-Lama affordable housing program. The island was conceived of by the State of New York as an experimental community that would offer a better standard of living to working- and middle-class New Yorkers regardless of race or physical disability. Over the years, even as Mitchell-Lama expired and market rate housing was constructed on Roosevelt Island, preserving the affordability of the community's core residential buildings has been a central priority guiding policy making with respect to the island.

Roosevelt Landings left Mitchell-Lama in 2005, the first (and so far the only) of the island's original buildings to do so. Ownership of the building changed hands shortly thereafter; the complex is currently owned by an investment group known as the Putnam Portfolio, and, along with a number of Putnam-owned buildings in Harlem, it is managed by Urban American Management Corp. A large majority of the building's tenants are low-income; after the conversion from Mitchell-Lama, these low-income tenants hold Section 8 enhanced vouchers, administered by the New York State Division of Housing and Community Renewal (DHCR). A much smaller number of middle-income tenants are enrolled in the building's Landlord Assistance Program (LAP), which offers

protections similar to rent stabilization. There are also a number of market-rate units in the complex.

In late 2008, several tenants expressed to my office their concerns about Urban American's plans to introduce electrical submetering at Roosevelt Landings. Among those concerns were that:

1. Submetering would expose tenants to the costs of poor insulation and general energy inefficiency in the complex;
2. It was unclear whether the rent reductions mandated by DHCR would be sufficient to offset increased electricity costs to tenants;
3. No sample billing had been conducted, meaning tenants could not estimate what the cost of electric submetering would be for the typical household;
4. It was unclear whether utility charges would be deemed "added rent," which could expose tenants to the possibility of eviction based on unpaid electric bills; and
5. The complex was electrically heated; baseboard heaters were inefficient and lacked thermostats, effectively denying tenants the ability to control their electricity usage during winter months.

On November 25, 2008, I, along with Representative Carolyn Maloney, State Senator José Serrano, and Councilmember Jessica Lappin, wrote to the New York State Public Service Commission (PSC), outlining the tenants' concerns and stating that submetering should not proceed at Roosevelt Landings until certain conditions had been met, including:

1. The completion of a comprehensive energy usage and efficiency analysis of the complex by the New York State Energy Research and Development Authority (NYSERDA);
2. A comparison of the proposed rent reduction to the bulk electricity rate;
3. Completion and analysis of at least two winter months of sample billing;
and
4. Completion of all efficiency upgrades and apartment repairs requested by tenants.

When, in December of 2008, my staff reached out to the PSC in order to ascertain the status of Urban American's Petition to Submeter Electricity, they were surprised to learn—after initially being told that no such application had yet been filed—that the PSC had in fact approved the owners' Petition on November 21st. The building's tenants—including its tenant association leaders—were unaware not only that submetering had already been approved by the PSC, but that there had been a public comment period in effect before the approval. Urban American had been required, as part of its submetering application, to notify tenants about the application process. However, the letter that was distributed to tenants—which Urban American had adapted directly from a sample letter provided by the PSC—made no mention of the public comment period, or of any other way for tenants to make their opinions about submetering known to the PSC.

Given the serious unresolved concerns we shared about the potential effects of electrical submetering on vulnerable populations at Roosevelt Landings and elsewhere, my colleagues and I felt that we had no choice but to ask the PSC to revisit its approval of Urban American's plan. On February 9, 2009, we filed a Petition for Re-Hearing of

the PSC's orders approving submetering at Roosevelt Landings and three other Urban American developments. Our petition set forth a number of grounds for a rehearing:

1. **The mismatch between DHCR-mandated utility allowances and actual electricity costs to tenants:** A review of sample billing conducted between December 2008 and February 2009 showed tenants, including Section 8 tenants, receiving electricity bills for as much as \$1000 per month. DHCR's utility allowances were sufficient to offset only a fraction of the actual average bill amounts; for instance, the utility allowance for a 1-bedroom apartment was \$119, while the actual average electricity bill for a 1-bedroom apartment in the Roosevelt Landings complex during winter was \$418.04.
2. **The PSC's mistaken assumption that Roosevelt Landings tenants were protected by rent stabilization:** Roosevelt Landings and the three other Urban American buildings at issue are all former Mitchell-Lama developments. The majority of the tenants hold Section 8 "sticky" vouchers; none are covered by the protections of New York's rent stabilization laws, yet in its Order approving Urban American's submetering plan, the PSC stated that all of the units in question were rent stabilized, and "subject to the rent regulations and guidelines of DHCR." The PSC's confusion on this point underscored the way in which submetering sits uncomfortably at the intersection of significantly different policy areas: experts in energy regulation, the PSC did not have a

clear understanding of the mechanisms by which affordable housing may or may not be protected.

3. **The failure of Urban American to complete basic energy efficiency upgrades:** While the owners had replaced the windows at Roosevelt Landings, major energy inefficiencies remained there and at the other developments—indeed, no efficiency upgrades of note had been completed at the other three Putnam buildings. By far the most worrisome problem was the buildings’ baseboard electric heating systems—an inherently inefficient method of heating made worse by the fact that the baseboard heaters lacked thermostats, so that the only way for tenants to control their output was to bend down to floor level (difficult to do for many elderly and disabled residents) and switch the heaters on or off. Apartments were poorly insulated, and many lacked covers to keep cold air from leaking in through air conditioner sleeves. Hallways and other common areas were left unheated, further reducing the thermal efficiency of the building’s apartments. What is more, few of the apartments were equipped with Energy Star-rated appliances.
4. **The inappropriateness of DHCR’s standard rent reduction formula given the unique circumstances at Roosevelt Landings:** As the local housing authority, DHCR is charged by the United States Department of Housing and Urban Development (HUD) with setting utility allowance schedules for Section 8 tenants, “based on the typical cost of utilities” using “normal patterns of consumption for the community as a whole and

current utility rates.” However, DHCR’s calculations assumed a rate of 14 cents per kilowatt hour, while the sample bills delivered to tenants at Roosevelt Landings were charged at a rate of 18 cents per kilowatt hour. Additionally, Roosevelt Landings is distinctly unlike other buildings in the “community as a whole” because of its highly inefficient baseboard electric heating system, the cost of which would be passed on to tenants under electrical submetering.

5. **The deeming of utility charges as “added rent”:** The updated leases circulated to Urban American’s tenants indicated that electricity charges would be considered “added rent,” undermining the consumer protections of the Home Energy Fair Practices Act (HEFPA) and potentially exposing tenants to eviction based on unpaid utility bills. The PSC’s Order approving submetering made contradictory statements as to this point: while repeating the owners’ assertion that HEFPA would be adhered to for all residents, it opened the door for the owners to undercut HEFPA by affirming that tenant complaints about utility service would be referred to landlord/tenant court—neglecting even to mention the PSC complaints process.

On February 12, 2009, the PSC stayed the orders granting permission to submeter in the four cases at issue, pending a decision on the Petition for Rehearing. As the two sides conducted discovery, I went to work on legislation to address a number of the serious problems that had become apparent to me during the dispute over submetering at Roosevelt Landings.

Submetering and Public Policy

The controversy over submetering arises at the intersection of two broad public policy goals: the promotion of environmental conservation measures on the one hand, and the protection of low- and middle-income residential tenants on the other. However, the relationship between these two goals as they relate to submetering has never been fully explored; submetering practices have in general been loosely regulated, and the legislature has historically shown little interest in the issue.

While environmental conservation was not a consideration in the initial development of electrical submetering during the early 20th century, it has become an increasingly important justification since the practice was revived in the 1970s. Supporters of submetering have promoted it as a practice that would, on its own, reduce energy usage in a typical residential building by as much as 20%--a significant achievement in an era when the increasing urgency of countering global climate change continues to run up against the technical and political difficulties of taking serious measures to reduce carbon output. However, the efficiency gains attributed to electrical submetering have not been proven. In a June 24 Order, the PSC estimated that the typical reduction in a building's energy usage under submetering could be as low as 8%. To date, there has been no comprehensive audit of submetered buildings to determine the actual extent of any efficiency gains associated with the practice.

While the environmental benefits of submetering remain uncertain, the effects of the practice on low-income residential tenants have, until very recently, mostly escaped the attention of legislators and regulators. In the absence of strict regulation or oversight,

landlords have essentially functioned as monopoly utility providers to their captive tenants, while significant tenant protection problems have remained unresolved. While public policy on electrical submetering has remained ambiguous, this ambiguity has allowed a situation to develop in which other clear public policy goals—tenant protection, the protection of utility consumers as mandated by the Home Energy Fair Practices Act, and even the goal of energy conservation itself—are routinely contradicted by unfair and irrational landlord practices.

New York State has consistently sought to protect and preserve the housing of low- and middle-income renters. Rent Stabilization not only sets limits on the amount by which landlords can raise tenants' rents, it provides tenants with a host of other rights and protections designed to enable ordinary New Yorkers to remain in their apartments on a long-term basis. Meanwhile, Mitchell-Lama is one of a number of programs that the State has created to encourage the development and maintenance of affordable housing in New York City and elsewhere. This is a goal that endures even with the expiration of Mitchell-Lama, and indeed it was precisely this goal that underlay the agreement to provide Roosevelt Landing's low-income tenants with a mechanism by which they could remain in their apartments even after the building exited Mitchell-Lama. Given these priorities, it is clear that a practice by which tenants' monthly home expenses are suddenly increased by hundreds of dollars runs directly counter to the established intent of New York's public policy. The enormous utility bills set to take effect at Roosevelt Landings would have amounted to a massive *de facto* rent increase, driving residents from their homes and completely undermining the purpose of the Section 8 and LAP subsidies being provided to tenants.

Additionally, the tenants' ability to be secure in their own apartments was directly threatened by a lease clause deeming utility charges under submetering to be "added rent." This practice would have meant that the owners could seek eviction of tenants unable to pay their electricity bills—and it contravenes the remedies contained in the Home Energy Fair Practices Act of 1981, the state's "bill of rights" for utility consumers, as well as 2002's Energy Consumer Protection Act, which clarifies that HEFPA protections apply to submeterers. Moreover, the dispute resolution process outlined by Urban American would have diverted residents' complaints about electricity bills into the court system, exposing tenants to needless risk and expense, and bypassing the PSC's own dispute resolution process. Again, this practice would be contrary to the provisions of HEFPA. Here, too, submetering practices were violating the clear intent of New York State's policymakers, circumventing consumer protections provided for in law.

Finally, it is likely that submetering under the plan submitted by Urban American would have failed even to contribute toward the goal of achieving significant energy efficiency gains, simply because tenants were not being given the tools to improve efficiency. Lacking meaningful control over heating consumption, energy efficient appliances, and effective insulation, the tenants could do little to limit their electricity usage. Instead of incentivizing efficiency improvements, submetering was simply providing an incentive for the landlord to shift the costs of continued inefficiency onto tenants.

None of these issues were unique to Roosevelt Landings or the Putnam Portfolio buildings. As I worked to protect tenants in my district, I was increasingly made aware of the extent to which ill-conceived and dangerous submetering practices were affecting

tenants across New York State. It was clear to me that both regulatory and statutory remedies were needed.

Neither path had been much explored. Historically, the PSC has been reluctant to assert much regulatory authority over submeterers, instead looking to the legislature for guidance. The legislature, for its part, has declined to provide such guidance.

Legislative Solutions

My intent in drafting legislation to fill this void was not to favor the public policy goal of tenant and consumer protection over the goal of environmental conservation, but to reconcile the two. Inasmuch as submetering can meaningfully contribute to environmental protection without unduly burdening vulnerable populations, it is a worthy practice. However, as the experience with the Putnam Portfolio buildings has made clear, a number of fixes are needed in order to strike the right balance, so that submetering is not abused.

To that end, in April of this year, I introduced a package of bills designed to reform residential electrical submetering practices in New York State. Each of these bills is carried in the State Senate by Senator Bill Perkins, who also represents a number of Urban American tenants.

A. 7814/S. 5009 imposes a one-year moratorium on all new submetering orders, pending a PSC audit of all submetering orders issued from January 1, 2004 to the effective date of the act. The purpose of the audit is to determine whether utility price caps and tenant protection provisions have been complied with, and to compare the rate and cost of utility usage prior to and after submetering orders. This bill will allow

the legislature to review current submetering practices and ensure that the goals of energy conservation are more than theoretical, that tenants are being protected as per the submetering orders, and that all applicable utility price caps are adhered to.

A. 7871-A/S. 5383 reforms the submetering application process. As we learned with the Putnam Portfolio buildings, inadequate notification procedures put tenants at a serious and unfair disadvantage in the submetering approval process. This bill creates a community-driven process similar to DHCR's Budget/Rent Determination procedures. It requires landlords to provide written notification to tenants when a submetering application is first filed, and it provides for a formal comment period and a community hearing. The bill also requires the owner to replace all landlord-provided appliances that are not Energy-Star rated with ones that are, and requires that every submetering application include the results of a study detailing the thermal characteristics of the building.

A. 7867/S. 5252 requires utility customers to be provided with an annual notice explaining their right to access the PSC's complaints process. In many cases, landlords and the PSC itself have diverted tenant complaints about utility service away from the PSC's own complaints procedures into third-party processes, including the court system. These alternative venues for complaint adjudication all involve time consuming and comparatively formal proceedings. They may also prove to be expensive and risky, for example, if an eviction case is the forum for resolution. These factors may serve to deter customers with legitimate complaints from making them, and impede the PSC's awareness of the nature and quality of customer service actually provided by certain utilities. By diverting consumer complaints away from the PSC resolution process,

landlords and the Commission are circumventing the consumer protections of HEFPA. This bill, which passed the Assembly in June, would ensure that utility customers are better informed of their rights.

A. 7353/S. 4748 forbids landlords from deeming electricity or gas charges as rent. New York State has extensive regulations in place to protect residents against having their electric service shut off. However, many landlords seek to circumvent these protections, preferring instead to take legal action for eviction of residents as the primary enforcement mechanism for nonpayment of submetered electric charges—rather than providing tenants with detailed notices, deferred payment options, and referral to public assistance for elderly and disabled tenants who cannot make payment arrangements. Landlords are being encouraged to evade HEFPA requirements and to bring tenants with unpaid electric charges to court seeking judgments and eviction orders. Housing court is a grossly inappropriate venue for utility disputes: judges are generally unfamiliar with the subject, and court proceedings are expensive and burdensome.

A. 7354-A/S. 5063 prohibits landlords from separately charging tenants for any electricity, natural gas or other fuel used to heat living quarters. This legislation covers both charges related to submetering and heating surcharges based on square footage. Shifting the burden of paying for heating onto tenants exposes those tenants—many of whom are on fixed incomes, especially in buildings like Roosevelt Landings—to unpredictable costs, and eliminates the major incentive for landlords to improve the thermal efficiency of their buildings. Submetering in electrically-heated buildings is considerably more burdensome for low-income tenants than it is in other locations, and

may actually contradict the environmental conservation aims of submetering. This bill would forbid landlords from submetering electric heat.

Along with other legislation introduced by Assemblymembers Andrew Hevesi and Vanessa Gibson, I believe that these bills go a long way toward reforming electrical submetering so that the claims about its environmental benefits can be tested without causing undue harm to tenants. My hope for the passage of this legislation is based on the recognition that submetering, as currently practiced, runs counter in many ways to the clear intent of public policy in New York State, and that only with these reforms can the apparently competing policy goals surrounding submetering be reconciled.

PSC Order of September 17, 2009

I am also encouraged by recent signs of a new direction in regulatory oversight of submeterers. On September 17, 2009, the PSC issued an Order Denying in Part and Granting in Part the Petitions for Rehearing in the Putnam cases. The order made permanent the temporary stays on submetering, but allowed the owners to return to the PSC to request permission to proceed with submetering after successful completion of a multiparty consultation process and provision of a submetering plan meeting certain conditions. The owners were ordered to:

1. Submit plans to PSC demonstrating that tenants as a group, and particularly low-income tenants, are not disadvantaged financially as a result of submetering;
2. Submit documentation that the buildings in question are participating in the NYSERDA Multifamily Performance Program (MPP) and all energy efficiency measures have been or will be fully implemented;

3. Submit documentation showing that individual thermostats have been installed in all apartments;
4. Provide tenants with information concerning ways to reduce electricity usage;
5. Clarify that no tenant can be evicted for non-payment of electric charges; and
6. Refer explicitly to tenants' HEFPA rights and their right to contact the PSC with complaints about utility service.

As a result of this decision, tenants at the four buildings involved in the case will be able to monitor and help shape any new submetering plan so that their interests are protected.

The PSC's order is a good start toward reforming the submetering process in a way that takes account of the interests of low- and middle-income tenants. However, it applies only to the four Putnam Portfolio buildings that were at issue in the case. The Commissioners themselves have expressed concern that complaints in other, similar cases were being diverted into the PSC's Office of Consumer Services, to be handled on an individual, rather than comprehensive basis.

While I am encouraged by signs that the PSC and NYSERDA may be considering a more robust approach toward providing for tenant protections in submetering practice, there is a clear need for these protections to be regularized in New York's public policy. This is the purpose of the legislative solutions I have put forward. It is my hope that, after far too many years of ignoring the problems with residential submetering, the legislature will now act to resolve them.