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Notice to Residents who are not also Customers when Service is to be Disconnected for Nonpayment

NOTE TO READERS

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Non-Customer Tenants Need Protections When Utility Proposes to Terminate Service for Non-Payment

Fisher, Sheehan and Colton (FSC) was recently asked to prepare an annotated model state utility commission regulation governing the disconnection of service to properties where the customer was not also the resident of the premises which would lose service.

Its model regulation governing service disconnections to residential tenants is presented below:

UTILITY SERVICE SHUTOFF PROTECTIONS FOR RESIDENTIAL TENANTS: A MODEL STATE COMMISSION REGULATION

January 2015

Section 1. Applicability

- A. In situations where service is rendered at an address different from the mailing address of the bill, or¹ where the utility knows that a landlord/tenant relationship exists and that the landlord is the customer of the utility,² or where the utility

¹ The use here of the disjunctive "or" is intentional. The regulation establishes three alternative circumstances under which the procedures of the regulation are triggered.

² This is the only one of the three disjunctive tests that explicitly refers to a "landlord/tenant" relationship. The protections of this regulation extend to the *user* of utility service, irrespective of whether or not that user is a "tenant." In future references, this regu-

has actual or constructive knowledge³ that the customer to whom service is billed or members of his or her household are not the exclusive occupants of said premises,⁴ and where the customer of record would otherwise be subject to disconnection of service, the utility may not disconnect service for nonpayment until the actions specified in this regulation have been taken.⁵

- B. Without limitation,⁶ this regulation applies to any apartment complex, trailer park, or other grouping of individual residential dwelling units to which service is provided directly or indirectly through a master meter without individual meters.⁷

Section 2. Notice of pending disconnection.

- A. Except in the circumstances listed in Section 2(D) below, no utility shall disconnect service to a customer if any part of the service is provided in a situation listed in Section 1 above, unless the util-

lation applies to a tenant or occupant of a dwelling unit.

³ Constructive knowledge simply applies the standard “known or should have known” test to utility knowledge. See, e.g., S.D. Admin. R. 20:10:20:09 (2014) (“ . . . if the utility has reason to know that a landlord and tenant relationship exists. . . ”)

⁴ Conn. Agencies Reg. § 16-3-100(i) (2014).

⁵ This regulation applies only to the disconnection of service for nonpayment. It does not, in other words, apply to circumstances where a property owner who is the customer, but not the user, voluntarily seeks to have service terminated. Those circumstances of a voluntary disconnection of service would need to be covered by separate regulation.

⁶ This paragraph further explicates on a multi-unit dwelling. The regulation as a whole, however, does not apply exclusively to multi-unit dwellings served through a master-meter. The customer and the user of utility service can easily involve a single-family dwelling unit as well. Hence the “without limitation” language.

⁷ 26 Del. Admin. Code 3002-5.1 (2014).

ity gives written notice to the user of the utility service.⁸

- B. Delivery of a written notice of a pending disconnection of service shall be made on tenants or occupants at least fifteen calendar days in advance of the proposed disconnection in the following manner:

i. By posting a conspicuously lettered notice in a place on or within the residential dwelling as is likely to receive the attention of the tenants or occupants; and⁹

ii. In situations where service to two or more units is to be disconnected because of non-payment, in addition to (i) above, a utility shall choose to deliver written notice by at least one of the following methods:

(a) Posting or hanging the notice on the front or back door of each dwelling unit subject to the loss of service;

(b) Sliding the notice under the front or back door of each dwelling unit subject to the loss of service; or

(c) By mail which is postmarked not less than 20 calendar days prior to the proposed date of disconnection¹⁰ and addressed

⁸ N.H. Code Admin. R. Proc. 1203.12(g)(1) (2014).

⁹ The conjunctive “and” indicates that subsections (i) and (ii) are supplemental. *Both* notice provisions must be met. Subsection (ii), however, applies only to “situations where service to two or more units is to be disconnected because of non-payment.”

¹⁰ In contrast to the posted notice, which is subject to a fifteen day timeline, a mailed notice must be postmarked sufficiently far in advance (20 days) that it is reasonably ensured of being delivered within fifteen days. The extra time is to provide for the mailing time lag.

to each tenant or occupant by name or to the “occupant” of each dwelling unit subject to the loss of service.¹¹

- C. A utility must make every reasonable attempt with respect to each potentially affected dwelling unit to deliver a notice three days prior to the scheduled disconnection to at least one adult occupant of that dwelling unit.¹²
- D. A utility may disconnect service without giving notice to tenants or occupants in the following circumstances:¹³
 - i. When necessary to avoid danger to life, health, or property; or
 - ii. Upon the order of a duly constituted public authority such as police, fire-fighters, public health officers, and building inspectors.¹⁴
- E. A disconnection notice containing a newly established disconnection date shall be provided to a tenant or occupant at least fifteen days prior to a newly established disconnection date.¹⁵ If the

¹¹ N.H. Code Admin. R. Proc. 1203.12(g)(2) (2014).

¹² Due to the inherently dangerous circumstances of the loss of utility service when the user of service is not the customer, there is a three-step notice provision: (1) posting at the residence to be disconnected (Section (2)(B)(i)); (2) one of the three alternative means of delivering a notice directly to the occupants of the unit subject to the loss of service (Section (2)(B)(ii)); and (3) a three-day personal notice prior to the disconnection of service (Section 2(C)).

¹³ The circumstances identified in this section involve “something more” than the mere nonpayment of a utility bill.

¹⁴ N.H. Code Admin. R. Proc. 1203.12(e)(2) (2014).

¹⁵ The purpose of a notice of disconnection extends beyond an attempt to collect the bill. The notice is designed to provide a warning to the users of the utility service of whether and when the loss of service is to be expected. Accordingly if a shutoff is rescheduled from the date that had been previously provided

disconnection is due to the failure of the non-occupant customer to pay an overdue amount, the non-occupant customer shall be responsible for usage during the additional fifteen-day notice period.¹⁶

Section 3. Individually-metered premises: independent service.

- A. Where it is feasible to so provide service, the utility shall offer the tenant or occupant the opportunity to subscribe for service in his or her own name.¹⁷
- B. Where a tenant or occupant of a unit notifies the utility of his or her desire to subscribe for service in his or her own name, the tenant or occupant shall be permitted to do so.¹⁸
- C. If the tenant or occupant declines to so subscribe, the utility may disconnect service pursuant to otherwise applicable regulations.¹⁹

Section 4. Master-metered premises.

In situations where service to two or more units is to be disconnected because of non-payment:

- A. No utility shall disconnect service so long as the tenants or occupants²⁰ of such multiple dwellings continue to make timely payments for such service in accordance with procedures filed by the utility and approved by the Public Service Commission.

in a notice, a new notice providing the new date must be provided.

¹⁶ Vt. Admin. Code 18-1-4:3.302 (2014).

¹⁷ Note the affirmative obligation to “offer the opportunity,” not merely to respond to a request from the occupant.

¹⁸ Conn. Agencies Reg. § 16-3-100(i)(4) (2014).

¹⁹ Ariz. Admin. Code R 14-2-211(F) (2014).

²⁰ This language again ensures that it any “occupant,” not merely a “tenant,” that is protected by the regulation.

- i. All notices provided pursuant to this regulation shall contain the intended date of discontinuance of service to such multiple dwellings and a utility contact, including a telephone number, who will advise occupants of the amount due for service and who will arrange meetings with occupants to attempt to work out a mechanism for avoiding the disconnection of service in the event that the non-occupant customer continues to fail to make requisite payments or arrangements for such payments.
 - ii. The notice shall inform the tenants or occupants that they may seek the assistance of the Commission or its authorized designee in negotiating an agreement with the utility to prevent disconnection of service.²¹
- B. If occupants in a multiple dwelling find they are unable to reach an agreement with the utility to avoid disconnection of service, they may contact the authorized designee of the Commission. After such a request is received, an authorized designee will attempt to work out such an agreement and will, if necessary, arrange a meeting with occupant representatives, the utility, and the non-occupant customer responsible for making payment for service; provided, however, that such a meeting will be required only if the authorized designee receives a written petition signed by at least 25 percent of the occupants in a multiple dwelling.

²¹ N.Y. Comp. Codes R. & Regs. tit. 16, § 11 (2014); See also, Ohio Admin. Code 4901:1-18-08 ("Each utility that delivers notice pursuant to paragraph (A) of this regulation shall provide to each tenant, upon request, the procedures to avoid disconnection or to have service reconnected. . .")

- C. The authorized designee shall stay a threatened disconnection of service to an entire multiple dwelling where it concludes that good faith efforts are being made by the occupants to arrange for the payment of current bills.²²

Section 5. Notice to public officials.

In addition to the notice prescribed by Section 2 of this regulation, 15 days written notice shall be²³ mailed to the local health officer and to the director of the social services district for the political subdivision in which the multiple unit dwelling is located.²⁴

Section 6. Limitation on occupant liability.

In circumstances where the tenant or occupant requests to have service established in his or her own name:

- A. The tenant or occupant shall not be required to pay a security deposit as a condition of establishing the account in his or her name.²⁵

²² N.Y. Comp. Codes R. & Regs. tit. 16, § 11 (2014); see also, NH Code Admin. R. Proc. 1203.12 (2014).

²³ This regulation identifies the public officials to whom a utility "shall" provide notice. The regulation does not preclude the utility from providing notice to other relevant public officials. Notice to the Commission is already implicit within the procedures set forth in Section 4 and need not be re-stated here.

²⁴ N.Y. Comp. Codes R. & Regs. tit. 16, § 11.7(a)(3) (2014); see also, 26 Del. Admin. Code 3002-5.4 (2014) (not less than fourteen (14) calendar days prior to termination of service to a multiple occupancy dwelling unit, the covered utility shall provide written notice of its intention to so terminate to the Public Service Commission, to the Division of the Public Advocate); see also, Or. Admin. R. 860-021-0326 (2014) ("When an energy utility's records show that a residence is a master-metered multi-family dwelling (including rooming houses), the utility must notify the Commission's Consumer Services Division at least five business days before disconnecting the service.")

²⁵ Conn. Agencies Reg. § 16-3-100(i)(4)(C) (2014).

- B. The tenant or occupant shall not be liable for any portion of the amount billed for service to the premises previous to the establishment of the account in the occupant's name.²⁶ The utility may not attempt to recover from the tenant or condition service to the tenant on the payment of any outstanding bills or other charges due from the outstanding account of the non-occupant customer.²⁷
- C. If, however, the tenant or occupant has a previously outstanding balance at the same service address,²⁸ the utility may condition service to that tenant or occupant on terms acceptable to the utility for repayment of the outstanding balance plus a deposit in compliance with the utility's tariff. If the tenant or occupant declines to arrange for payment of the outstanding balance, if applicable, the utility may disconnect service without further notice, no earlier than the date scheduled for disconnection.²⁹

²⁶ Conn. Agencies Reg. § 16-3-100(i)(4)(A) (2014).

²⁷ This paragraph imposes two separate limitations. In the first sentence, the regulation makes clear that the tenant or occupant is not liable for any portion of the bill incurred prior to placing the bill in the name of the tenant or occupant. In contrast, the second sentence constrains utility collection efforts. It forbids a utility from even attempting to collect any portion of the bill for which the tenant or occupant is not liable. No "agreement" to pay for a prior bill is thus allowed, since the utility is barred from seeking any collection from the tenant or occupant. See e.g., Ariz. Admin. Code R 14-2-211(F) (2014).

²⁸ An important limitation is included here, that the unpaid prior bill must have been incurred at the "same service address."

²⁹ Being exempt from liability for the landlord's non-payment does not extend any exemption for collection of a past-due bill by the tenant or occupant. Alaska Admin. Code, tit. 3, § 52.450(c)(4)(A) (2014). This regulation, of course, does not supersede otherwise applicable limitations on the collection of past-due liabilities (e.g., statute of limitations).

Section 7. Cost recovery from landlord/owner.

The utility may charge the landlord/owner of the master-metered premises, or of a single-occupancy dwelling, a reasonable fee, as set forth in the utility's tariffs, designed to pay the utility's incurred cost for providing the notice to tenants and occupants required by Section 2 of this regulation. The utility has the burden of collecting from the landlord/owner any billed amounts unpaid at the next billing cycle.³⁰

Section 8. Offset to rent.³¹

Each tenant or occupant shall be notified of his or her right to deduct all future payments made by the tenant for utility services from rent owed as provided by statute.³²

Section 9. Reconnection.

Whenever a utility has terminated service to a residential dwelling whose occupants are not the persons to whom it usually sends its bills, such utility shall, upon obtaining knowledge of such occupancy, immediately reinstate service and thereafter not effect termination unless it first complies with the provisions of this regulation.³³

³⁰ Ohio Admin. Code 4901:1-18-08(I) & (J) (2014).

³¹ Not every state may have a statute allowing for the deduction from rent.

³² D.C. Mun. Regs. Tit. 15, § 402.1(d); see also, Conn. Agencies Regs. § 16-3-100(I)(4)(c) (2014) ("The occupant shall be notified of his or her right to deduct the full amount of his or her payment for such utility service from his or her rent"); see also, N.Y. Comp. Codes R. & Regs. tit. 16, § 11 (2014) ("The notice shall also refer to the provisions contained in subdivision (1) of section 235-a of the New York Real Property Law authorizing occupants to set off, against their rent, payments to utilities in such circumstances").

³³ Conn. Agencies Reg. § 16-3-100(i)(8) (2014).

Section 10: Resolution of landlord/owner obligations.

Whenever a notice of intention to disconnect service has been made pursuant to the provisions of this regulation and obligations owed the utility have been satisfied, the utility shall notify, in the same manner as it gave such notice of intention, the tenant or occupant of each unit that the intention to disconnect service no longer exists.³⁴

Section 11: Process to identify.

- A. Each utility shall establish and maintain a system of procedures for affirmatively identifying³⁵ on its records those accounts for service to residential dwellings whose occupants are not the persons to whom it usually sends its bills and for ensuring that service to such premises is not terminated prior to compliance with the provisions of this regulation.³⁶
- B. Such procedures shall be submitted by each utility in writing to the Commis-

³⁴ N.Y. Comp. Codes R. & Regs. tit. 16, § 11.7(a)(5) (2014). One possible response to the possible disconnection of service for nonpayment is the need to make plans to procure substitute housing. If the circumstances that give rise to that need have been eliminated, the tenant/occupant should be so notified.

³⁵ This regulation requires utilities to make an affirmative effort to identify the dwelling units to which the regulation might apply. A system of procedures that simply responds to situations when they arise does not comply with this affirmative obligation.

³⁶ Conn. Agencies Reg. § 16-3-100(i)(7) (2014); see also, 220 CMR 25.04 (2014) (“Each utility shall devise procedures reasonably designed to identify, before termination of service for non-payment, landlord customers paying for service to a residential building”); see also, N.J. Admin. Code tit. 14, 14:3-3A.6 (2014) (“Electric, gas, water and wastewater public utilities shall make every reasonable attempt to determine when a landlord-tenant relationship exists at premises being serviced”).

sion.³⁷ The Commission may require, by a written notification, such modifications of a utility's procedures as it considers reasonably necessary to carry out the purposes of this regulation.³⁸

Section 12: Supplemental to Statute.

The procedures and obligations set forth in this regulation are supplemental to, and not in derogation of, the procedures set forth in [Section ___ of the governing statute].³⁹

Fisher, Sheehan and Colton, Public Finance and General Economics (FSC) provides economic, financial and regulatory consulting. The areas in which FSC has worked include energy law and economics, fair housing, affordable housing development, local planning and zoning, energy efficiency planning, community economic development, poverty and telecommunications policy, regulatory economics, and public welfare policy.

³⁷ Connecticut: Conn. Agencies Reg. § 16-3-100(i) (2014) (“No later than 45 days after the effective date of this regulation, each utility shall file with the DPUC procedures reasonably designed to implement the provisions of this subsection. The DPUC may require any modifications in the procedure as it deems necessary”).

³⁸ Massachusetts: 220 CMR 25.04 (2014); see also, Ohio Admin. Code 4901:1-18-08 (“The utility company uses reasonable efforts to determine the status of the customer/consumer as either a property owner, landlord, the agent of a property owner, or a tenant.”)

³⁹ 83 Ill. Admin. Code 280.150 (2014).