CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
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NEW YORK, N. Y. 10003

460- 3497

April 6, 1965

Richard Denzer, Esq.
Temporary Commission on the
Revision of the Penal Law
Criminal Court Building - Room 654
New York, N. Y.

Dear Mr. Denzer:

Pursuant to our conversation of this morning, I have enclosed a copy of the memorandum outlining the Company's position on the Revised Penal Law in so far as it applys to utility equipment and service.

Please do not hesitate to call me at any time concerning any of the above matters.

Very truly yours,

Garrett E. Austin
Attorney

Enc.
GEA:ko'b

Re: Assembly Int. No. 4924
Senate Int. No. 3064
Revised Penal Law

These companion bills would establish a new Penal Law which would be effective on September 1, 1967. The bills represent the work of the Temporary Commission on the Revision of the Penal Law and Criminal Code established by the Legislature in 1961.

The proposed Revised Penal Law makes substantial changes to sections 1431 and 1431-a of the existing Penal Law concerning interference with gas, electric and steam service and meters. In addition, certain changes have been made in the crime of larceny by setting up a new category called "theft of services", a misdemeanor, which covers stealing of gas, electricity and steam from a customer's premises.

This Company is opposed to the revisions briefly outlined above for the following reasons:

1. <u>The theft of gas, electricity or steam, from any premises in any amount can be at most a misdemeanor under the Revised Penal Law.</u>

Title J, of the Revised Penal Law covers offenses involving theft and includes larceny, robbery and other offenses relating to theft. In defining terms within this title the code provides:

§155.00 Larceny; definitions of terms.
The following definitions are applicable to this title:
1. "Property" means any money, personal property,

> real property, thing in action, evidence of debt or contract, or article of value of any kind. Commodities of a public utility nature such as gas, electricity, steam and water constitute property, but the supplying of such a commodity to premises from an outside source by means of wires, pipes, conduits or other equipment shall be deemed a rendition of a service rather than a sale or delivery of property.

This distinction between "property" and "services" is new to the Penal Law. There is no explanation why gas or electricity or steam, which had always been considered property under the Penal Law, is now considered a service if it is supplied to a premises from an outside source. This same gas, electricity and steam is property up to the building line but now becomes a "service" thereafter.

Larceny under the Revised Penal Law is defined in §155.05 as follows:

> §155.05 Larceny; defined.
> 1. A person steals <u>property</u> and commits larceny when, with intent to deprive another of <u>property</u> or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such <u>property</u> from an owner thereof.
>
> 2. Larceny includes a wrongful taking, obtaining or withholding of another's <u>property</u>, with the intent prescribed in subdivision one of this section. * * *

Also, sections 155.25 through 155.40 of the Revised Penal Law which set out the various degrees of larceny speak in terms of the value of <u>property</u> stolen without mention of <u>service</u>.

It is clear that the revisors purposely excluded the theft of gas, electricity and steam from a premises from the larceny provisions of the law.

A new section (new to the existing Penal Law) has been set up

under Title J of the Revised Penal Law entitled "theft of services" (§165.15). Subdivisions 5 and 6 of §165.15 deal with tampering with gas, electric and steam supplier's equipment to obtain service and avoid payment thereof. Theft of services, however, in any amount whatsoever, is a Class A misdemeanor, despite the fact that such a theft might amount to thousands of dollars.

Section 145.15 of the Revised Penal Law deals with criminal tampering in the second degree and prohibits tampering or making connection with property of a gas, electric or steam corporation for a larcenous or other unlawful purpose. This crime is a Class B misdemeanor. These are the only sections which cover the theft of gas, electricity or steam from a customer's premises.

While it might sometimes be difficult to ascertain the amount of gas, electricity or steam which is obtained through meter tampering or by-passing, this is no reason to exclude it from the felony section of the Penal Law. Gas, electricity and steam while not visible, are tangible, valuable commodities the same as food, clothing, jewelry, etc. There is no reason why their theft should be treated in a manner different from the theft of other tangible property.

2. The theft of gas, electricity or steam by means of by-passing meters or other measuring devices is no crime.

Subdivisions 1 and 4 of Section 1431 of the existing Penal Law specifically cover situations where gas or electricity is obtained through meter by-passing. These two subdivisions state that a person who wilfully with intent to injure or defraud:

"1. Connects a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for the conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or instrument provided for registering the quantity consumed, or uses such gas or electricity obtained by reason of the making of such connection; or

"4. Makes any connection or re-connection with the gas mains, service pipes or wires of any person, company or corporation furnishing to consumers natural or artificial gas or electricity, or turns on or off or in any manner interferes with any valve or stopcock or other appliances belonging to such person, company or corporation and connected with its service or other pipes or wires, or enlarges the orifice of mixers, or uses natural gas for heating purposes except through mixers, or uses electricity or artificial gas for any purpose before it has passed through an instrument for measuring the quantity consumed, without first procuring from such person, company or corporation a written permit to turn on or off such stopcock or valve, or to make such connections or re-connections, or to enlarge the orifice of mixers to use for heating purposes without mixers, or to interfere with the valves, stopcocks, wires, or other appliances of such person, company or corporation as the case may be. . . is guilty of a misdemeanor."

Subdivision 3 of Section 1431 covers instances where a meter or measuring device has been removed and service is obtained through the use of "jumpers" or other devices. The broad language of this section covers the changing, extending or altering of any wires, pipes or attachments through which gas or electricity is furnished from the gas mains, pipes or wires of a utility. This section precludes changing, altering or extending any service pipe or attachment whether or not the pipes or wires are owned and maintained by the utility. Subdivision 3 provides that a person who wilfully with intent to injure or defraud:

"3. In any manner whatever, changes, extends or alters any service or other pipe, wire or attachment of any kind, connecting or through which natural or artificial gas or electricity is furnished from the gas mains or pipes or wires of any person, company or corporation without first procuring from said person, company or corporation written permission to make such change, extension or alterations, or uses gas or electricity obtained by reason of such changes, extensions or alterations without first procuring the written permission aforesaid. . . is guilty of a misdemeanor." (emphasis added)

These three subdivisions of §1431 clearly cover the fraudulent obtaining or use of gas or electricity through the by-passing of meters or through the use of "jumpers" or other devices. No distinction is made as to who owns the equipment, wires or pipes which are tampered with in order to obtain free service. In fact, gas and electric corporations bring their lines and pipes to the customer's property line and the pipes and lines from that point on are the property of the building owner. Meters, shut-off valves and other similar equipment are the property of the utility.

Under the proposed Revised Penal Law there are two sections which deal with the theft of gas, electricity and steam from customers' premises:

§145.15 Criminal tampering in the second degree.
"A person is guilty of criminal tampering in the second degree when, having no right to do so nor any reasonable ground to believe that he has such right, he:

* * *

2. Tampers or makes connection with property of a gas, electric, steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality; except that in any

prosecution under this subdivision, it is an affirmative defense that the defendant did not engage in such conduct for a larcenous or otherwise unlawful or wrongful purpose.

Criminal tampering in the second degree is a Class B misdemeanor."

Section 165.15 provides that a person is guilty of theft of services when:

"5. With intent to avoid payment by himself or another person for a prospective or already rendered service the charge or compensation for which is measured by a meter or other mechanical device provided by the supplier of the service, he tampers with such device or with other equipment related thereto, or in any manner attempts to prevent the meter or device from performing its measuring function, without the consent of the supplier of the service. * * *

"6. With intent to obtain, without the consent of the supplier thereof, gas, electricity, water, steam or telephone service, he tampers with any equipment of the supplier thereof designed to supply or to prevent the supply of such service either to the community in general or to particular premises."

Theft of services is a Class A misdemeanor. Strict construction of these sections, which is required with all penal laws, reveals that they deal with the property, meters and other equipment <u>of the supplier only</u>, i.e. tampering with the supplier's equipment, etc., in order to avoid paying utilities for gas, electricity and steam services.

These sections do not, however, prohibit the misappropriating, stealing or otherwise defrauding a utility of gas, electricity or steam by attachments, connections, jumpers, etc. attached to the customer's or landlord's own equipment. As long as the utilities' equipment, meters, etc. are not tampered with in any way there is no crime involved.

Since gas and electric utilities' facilities normally go only to the customers' property line, there is ample means and opportunities

for a customer to obtain gas, electricity and steam by making connections with his own or his landlord's lines, pipes, and wires which by-pass the utilities' meters, without fear of penal sanction.

Enactment of these sections of the Revised Penal Law would substantially change the existing law to the serious detriment of gas and electric utilities. The utilities' products would be fair game for any customer who does not wish to have his consumption metered.

3. The presumption concerning meter tampering under §1431-a of the existing Penal Law has been replaced by a more limited and less effective presumption under §165.15(5) of the Revised Penal Law.

Section 1431-a of the existing Penal Law states:

> "The existence of any of the conditions with reference to meters, or attachments described in section fourteen hundred and thirty-one of this article is presumptive evidence that the person to whom gas, electricity, water or steam is at the time being furnished by or through such meters or attachments has, with intent to defraud created or caused to be created with reference to such meters or attachments, the condition so existing."

Under this section the person who received gas, electric or steam service is presumed to (1) have created or caused to be created (2) with intent to defraud the irregular condition with regard to the meter and/or its attachments. This interpretation of §1431-a has been upheld by the Appellate Division in Eff-Ess, Inc. v. New York Edison Co., 237 App. Div. 315 where the court stated at page 316:

> "* * * The only proof required to make section 1431-a applicable is 'the existence of any of the conditions with reference to meters * * * described in section

> fourteen hundred and thirty-one * * *'. That the meter under consideration here had been tampered with to the advantage of this plaintiff was established beyond question. Accordingly, the instruction requested should have been given. The error was material since the court charged that there was no direct evidence connecting the plaintiff with the meter. Direct evidence was supplied by force of the statutory presumption."

This presumption under section 165.15(5) of the Revised Penal Law has been reworded in such a manner, however, that the fact that a meter or related equipment is tampered with is no longer presumptive evidence that the person who is supplied through that tampered meter created such a condition. Instead, there is only a presumption that the person who actually tampered with a meter did so to avoid payment for the service involved. Section 165.15(5) provides:

> "5. With intent to avoid payment by himself or another person for a prospective or already rendered service the charge of compensation for which is measured by a meter or other mechanical device provided by the supplier of the service, he tampers with such device or with other equipment related thereto, or in any manner attempts to prevent the meter or device from performing its measuring function, without the consent of the supplier of the service. A person who tampers with such a device or equipment without the consent of the supplier of the service is presumed to do so with intent to avoid, or to enable another to avoid, payment for the service involved."

Since these meters are located on the customer's premises, it is almost impossible for a utility to obtain direct proof of tampering against any person. The presumption proposed under the Revised Penal Law §165.15(5) would be, for all intents and purposes, meaningless.

There is nothing unfair or unreasonable about the presumption in 1431-a. In fact the Court has stated In Eff-Ess case, supra, at page 317:

> "It seems to us that this is an inevitable inference resulting from the fact that the subscriber is the only party who could possibly benefit from tampering with the meter."

and at page 318:

> " * * * We see no reason for holding this statute unconstitutional."

The Court in Eff-Ess also stated that the presumption applied to civil as well as criminal suits. This presumption has been a valuable ally to this Company and other utilities in collecting for electric current or gas which has been consumed but not paid for because of meter tampering. The benefits, in the long run, accrue to the honest consumers who pay regularly for their consumption.

PROPOSED AMENDMENTS TO THE REVISED PENAL LAW

In order to maintain the same protection of utility facilities and products that heretofore existed under §§1431 and 1431-a of the Penal Law, it is respectfully suggested that the Revised Penal Law be amended to read as follows: (New matter has been underscored).

1. §155.00 Larceny; definitions of terms.
The following definitions are applicable to this title:

   1. "Property" means any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind. Commodities of a public utility nature such as gas, electricity, steam and water constitute property.

2. §165.10 Theft of services; definition of terms.
The following definitions are applicable to section 165.15:

   1. "Service" includes, but is not limited to, labor, professional service, public utility and transportation service, the supplying of hotel accommodations, restaurant services, entertainment, and the supplying of equipment for use. <u>Commodities of a public utility nature such as gas, electricity, steam and water supplied to premises from an outside source by means of wires, pipes, conduits or other equipment shall be deemed a rendition of a service rather than a sale or delivery of property</u>.

3. §165.15 Theft of services.
A person is guilty of theft of services when:

   5. With intent to avoid payment by himself or another person for a prospective or already rendered service the charge or compensation for which is measured by a meter or other mechanical device provided by the supplier of the service, he tampers with such device or with other equipment related thereto, or in any manner attempts to prevent the meter or device from performing its measuring function, without the consent of the supplier of

the service. The existence of any of the above conditions with reference to meters and related equipment is presumptive evidence that the person to whom service is at the time being furnished by or through such meters or related equipment has, with intent to defraud created or caused to be created with reference to such meters and related equipment, the condition so existing; or

6. With intent to injure or defraud, and without the consent of the supplier, he makes any connection or re-connection with any equipment used for the conducting, transmission or supplying of gas, electricity, water, steam or telephone service or uses such gas, electricity, water or steam before it has passed through the meter or instrument provided for registering the quantity consumed or tampers or interferes with any equipment designed to supply or to prevent the supply of such gas, electric, water, steam or telephone service either to the community in general or to particular premises;