

When Sparks Fly

By Robert Machson and James Rosenzweig

Within the last five years, energy costs have become the subject of frequent landlord-tenant disputes and high-voltage litigation. With a better understanding of electrical costs and how they are charged, landlords and tenants can produce a lease that precludes many common disagreements.

Common area charges. Common area utility charges are among the most troublesome energy costs for tenants. In the absence of a separate meter for the common area, many landlords simply estimate their common area electricity costs based upon a percentage of their total energy bill and a rough calculation of common area square footage and equipment costs.

The most effective way for landlords to obtain accurate common area charges is to meter the common area separately from the rest of the center.

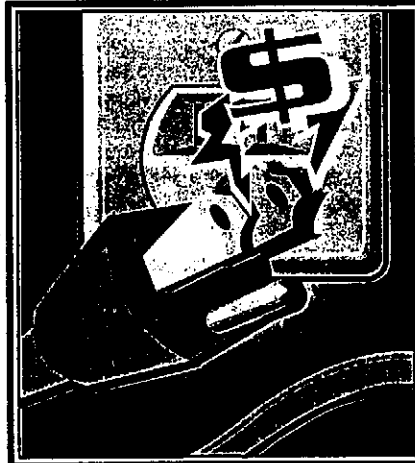
In centers without separate meters, energy costs can be calculated manually. The landlord can use its own engineers and mechanics to collect the information to be used in the calculation; however, an independent, professional engineer may be a worthwhile investment to ensure that landlords and tenants are comfortable with the outcome.

At a minimum, a common area energy survey should show HVAC usage as determined by the ASHRAE "modified bin method," which can be verified easily by the tenants. In addition, a utility expert can perform an hour-by-hour simulation of the energy used for HVAC. Any calculation should separate heating and cooling costs from other electrical loads (e.g., exterior lighting, elevators, trash compactors).

In-line energy use. In any shopping center, tenants receive electricity in one of two ways: through the landlord or directly from the utility. In many leases, tenants are required to purchase electricity from the landlord as long as the rate charged does not exceed the rate the tenant would otherwise pay the utility company.

However, increased energy costs coupled with more sophisticated auditing techniques are prompting some tenants to reject energy provisions dictated by the landlord. Instead, they are opting for the utility company, its rates and, most importantly, its meters.

Accurate metering and full disclosure of energy costs are at the heart of most landlord-tenant energy disputes. Even when the landlord makes



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every effort to calculate in-store usage accurately, it is likely that the tenant will have its own set of methodologies for conducting a survey.

Although the tenant may prefer the accuracy of direct metering, it may pay more to get it. For example, the tenant that purchases electricity from the landlord is likely to benefit to some degree from the landlord's ability to negotiate economies of scale with the utility.

Landlords that want to retain the "utility" role can reinforce tenant confidence by installing a "check meter" on the tenant's premises to verify actual usage. Both parties must agree on:

- the duration of the check (at least one year is advisable);
- the type of check meter to be used (preferably one that can be read by the landlord's and tenant's representatives and, optimally, one that produces a permanent record);
- how the consumption and demand data will be used to calculate the tenant's charge; and
- the rate to be applied.

A "utility grade" check meter — i.e., a meter with accuracy of plus or minus 0.3 percent of actual usage — may cost between \$1,000 and \$1,500. It is probably worthwhile to purchase a meter with modern capabilities that allow all parties to retrieve data remotely. Discounts are usually available for bulk purchases of meters, and landlords may want to consider the possibility of purchasing several meters and distributing them to retailers for a small "rental" fee.

Lease provisions. The best way to avoid disputes over electricity charges is to include detailed riders in the lease. During lease negotiation, the landlord should be prepared to disclose the calculation method for common area and in-line energy usage. If the calculation is not available (because, for example, both parties are rushing to execute the lease, or because the tenant's as-built plans are not complete) the landlord and tenant should agree on a period following execution of the lease, during which the tenant can review survey results and, if necessary, seek an adjustment.

Utility rates and check metering provisions should be part of the lease, in addition to a provision that allows for dispute settlement by an independent engineer. With these elements in place, landlords and tenants can keep energy "charges" in the center and out of the courtroom.