



Legal Services of New Jersey

100 Metroplex Drive at Plainfield Avenue
Suite 402, P.O. Box 1357
Edison, New Jersey 08818-1357
Phone: (732) 572-9100
Fax: (732) 572-0066
www.lsnj.org
www.lsnjlaw.org

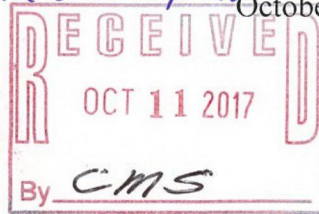
Melville D. Miller, Jr.
President and General Counsel

Vice Presidents and
Assistant General Counsel
Dawn K. Miller
Claudine M. Langrin

David McMillin

Final Oct. 12, 2017

October 6, 2017



BOARD OF PUBLIC UTILITIES

OCT 11 2017

MAIL RECEIVED

Via Regular Mail and Email to rule.comments@bpu.nj.gov

Irene Kim Asbury, Secretary
New Jersey Board of Public Utilities
ATTN: BPU Docket Number: AX17050468
44 S. Clinton Ave., 3d Floor, Suite 314
PO Box 350
Trenton, NJ 08625-0350
E-mail: rule.comments@bpu.nj.gov

**Re: BPU Docket Number: AX17050468
Proposed Amendment: N.J.A.C. 14:1-5.12**

Dear Ms. Asbury:

On behalf of the New Jersey’s low-income consumers, Legal Services of New Jersey, Inc. (“LSNJ”) submits the following comments on the Board’s proposed amendments allowing utilities to charge unapproved provisional rates prior to the Board’s final decision in a base rate case.¹

By way of background, LSNJ did not receive the notice provided to stakeholders of the Board’s straw proposal in late April 2017, and was not a participant in the May 4, 2017 stakeholder meeting at the Board’s headquarters. Accordingly, our review of the proposal has been circumscribed.

LSNJ urges the Board not to implement the interim rate proposal for the reasons set forth below. In addition, we note that other advocates, notably Rate Counsel and AARP-NJ, have made numerous suggestions of substantive protections for ratepayers that the Board should

¹ LSNJ coordinates New Jersey’s Legal Services system, a network of six independent non-profit corporations providing free essential legal services in civil matters to low-income people through offices in all 21 counties. When appropriate, LSNJ makes available information and perspectives on matters of broad public importance in the lives of people in poverty based on its experience in representing tens of thousands of low-income people each year.

*Case mgmt
Legal* *C. Vachier
T. Walker*

implement if it determines that it should move forward. While LSNJ likely would support many or all of these additional protections, we have not had the opportunity to evaluate them fully, and to engage in the necessary dialogue to make that evaluation in an effective manner. Accordingly, in addition to urging the Board not to implement the interim rate proposal, LSNJ strongly urges the Board, if it does decide to move forward

- (1) to engage in further fact-finding in conjunction with a robust comment and dialogue process, beyond the limited meeting held with little notice in May, allowing participation by an appropriate array of affected parties, and
- (2) in addition to adopting other ratepayer-protection measures that have been proposed, for the reasons set forth below, to provide that any unapproved provisional rate increase implemented by a regulated utility shall not apply to any residential ratepayer who (a) is eligible for USF, LIHEAP, Lifeline, or any other means-tested utility rate assistance program, or (b) otherwise demonstrates that the unapproved increased rates would cause undue hardship.

LSNJ also requests that the Board add LSNJ to any stakeholder or other similar list in this and other pending and future matters raising issues of concern to low-income ratepayers.

1. Many Low-Income Utility Customers Would Face Dangerous, Irreparable Harm as a Result of Unapproved Temporary Rate Increases, Even if They Are Later Rescinded

Approximately 25% of all New Jersey workers – more than a million people – earn less than enough to meet basic necessities.¹ Other households on limited fixed incomes also lack the resources to meet basic needs. The consequences of the Board’s proposal are simple: for more than a quarter of residential customers, funds to pay unilaterally-imposed and unapproved rate increases could only be found by forgoing other basic necessities. While it may be a concept far removed from the experience of many well-to-do households, substantial numbers of New Jersey ratepayers live every day with the very real possibility of facing a choice between heating and eating.

Crucially, New Jersey has in place a largely effective set of utility assistance programs – anchored by the Universal Service Fund, LIHEAP, and Lifeline – to minimize the likelihood of utility terminations based on inability to pay. These programs, however, provide fixed dollar benefits that do not change once they are determined on an annual basis. Nothing in the Board’s proposal would provide for an adjustment in utility assistance benefits to offset the unilateral interim rate increases that utilities would be allowed and encouraged to impose.² The inevitable consequence would be termination of utility service in households where the interim increases tip the scale from ability to inability to pay.

¹ LSNJ Poverty Research Institute, *The Real Cost of Living in New Jersey: What It Takes To Meet Basic Needs and Avoid Deprivation* (2013) 21-22.

² LIHEAP does have a crisis assistance component that can assist in some circumstances, but a separate application is required, processing the application takes additional time, and funding is limited.

The effects of utility termination for residential customers are devastating, and pose real threats to the health and safety of entire families.¹ Lacking light, heat, and/or medically necessary cooling, it is well established that households are forced to turn to unsafe alternatives such as candles or space heaters.

Customers take risks when they turn to alternative heating or light sources, such as space heaters, candles or generators, which can cause fires or emit toxic carbon monoxide. As noted, there have been publicized deaths that resulted from the disconnection of a heat-utility during the winter months. According to the National Fire Protection Association, . . . heaters are involved in 79 percent of home heating fire deaths. Customers face additional health hazards throughout the year particularly when they are left without air conditioning in extreme heat²

These threats are magnified in households with vulnerable members, who are at particular risk or adverse health consequences, including death, at the ordinary extremes of hot and cold temperatures.³

Retroactive refunds, while they may sound like a happy solution to the well-heeled, have no power to prevent the most serious of the harms that unapproved rate increases would cause to low-income utility customers.

2. There Is No Evidence That the Proposal Would Solve Any Existing Problem, or Result in Any Benefit to Ratepayers

More than 35 years ago, the New Jersey Supreme Court – without any indication that it had considered the particularized dangers faced by low-income and other vulnerable ratepayers – decided that a “utility can invoke a third remedy for ‘regulatory lag’: at the end of a suspension period, in the absence of a stipulated extension or waiver, the utility’s proposed rates may immediately become effective subject to conditions, such as refund, dependent upon the Board’s final determination.” *Toms River Water Co. v. Board of Pub. Util. Comm’rs*, 82 N.J. 201, 211, 412 A.2d 430, 435 (1980). To LSNJ’s knowledge, no New Jersey utility has ever invoked this “third remedy” and imposed interim unapproved residential rates, or even made a proposal to the Board to do so.

There may be many reasons why the *Toms River* decision remains dead-letter law. A fuller account of these reasons would entail the kind of public dialogue that has so far been lacking in this proceeding. It does appear, however, that the potential for public outrage is a

¹ See, e.g., Fatal Bronx Blaze Was Caused by Candles, *New York Times*, Oct. 26, 2013 (“A fire in the Bronx on Friday evening that killed three children was caused by candles that were apparently being used for light after power to the apartment was cut off because of unpaid bills, the authorities said on Saturday.”); NAACP, *Lights Out in the Cold: Reforming Utility Shut-Off Policies as if Human Rights Matter 3-5, 14-15* (2017), available at http://www.naacp.org/wp-content/uploads/2017/04/lights_out.pdf.

² *Id.* at 15.

³ A 2005 study showed that 70% of low-income households in New Jersey that pay electric or gas bills face are vulnerable households with one or more members who are people with disabilities, elderly, or young children. APPRISE State Report – New Jersey, available at www.appriseinc.org/reports/MSS_NJ.pdf. There is no reason to suggest that this is a figure that has varied significantly over time.

factor, as is the fact that the Board, and the parties that appear before it, have a strong history of expeditious resolution of base rate cases.¹

Indeed, it appears that “regulatory lag” is not a significant problem in New Jersey ratemaking proceedings at all. In a review of all base rate cases concluded in the past 5 years, Rate Counsel found only one (out of 17) that took more than 10 months to resolve, and only 3 others took one or two months more than the standard eight-month suspension period. The one especially long proceeding was notable in that the utility requested a \$31.47 million rate increase – a request so out of touch with reality that the Board ultimately approved a \$115 rate *decrease*. If there is a problem, it is that New Jersey utilities invariably request far higher rate increases than the Board approves.

In addition to the absence of any regulatory lag problem that the current proposal could solve, the record is also devoid of any of the sound economic data and analysis necessary for Board action that is not arbitrary and capricious. As just one example, the Board asserts that “[t]he proposed amendments will have a negligible economic impact, if any, on utility ratepayers” because retroactive refunds will even things out later. As demonstrated above, this conclusion does not hold for low-income ratepayers, who would face significant economic dilemmas, and irreparable harm, regardless of any subsequent refunds.

Also unaddressed in the record is the danger of “pancaking” – a recognized danger of provisional utility rates that occurs when utilities file new rate petitions after putting provisional rates into effect, thus averting a decision on original rate request, and delaying, perhaps in perpetuity, any final action that could result in a refund.

3. The Proposed Amendments Would Unwisely Encourage Utilities to Exact Involuntary Loans From Low-Income Ratepayers; If This Occurs, Interest on Subsequent Refunds Should Be Commensurate

Utility companies have ready access to capital markets at reasonable rates. Low-income consumers, by and large, do not. Instead, financial desperation often leads low-income consumers to high-rate lenders.

Submissions in this proceeding by other stakeholders have demonstrated that utilities routinely file rate petitions seeking far higher rates than the Board ultimately approves as fair and reasonable.² It is readily apparent that utilities implementing the rates they seek prior to Board approval, subject to refund if the full amount is not approved, would in essence be requiring their customers – including the most vulnerable ratepayers – to make them a loan.

Sound public policy demands that utilities should not look to their vulnerable low-income ratepayers for loans (even if they may later be repaid). If, however, the Board determines that existing but never-used law theoretically permitting this to happen warrants proceeding with the current proposal, it should provide for a rate of interest commensurate with the cost of capital to

¹ See Utilities Can Raise Rates Without NJ's OK Under Rule, Asbury Park Press, June 9, 2017.

² See also, e.g., New Jersey Natural Gas Rates Drop After Initially Asking For Increase, Asbury Park Press, Sept. 22, 2017.

the lenders. Further data-gathering would be crucial to this endeavor, though based on the experiences of its clients, LSNJ suggests the appropriate interest rate would likely be somewhere between a typical credit card default APR of 24.9%, and New Jersey's criminal usury cap of 30% per year, a rate that some low-income New Jersey borrowers find they must pay for an unsecured loan.

Conclusion

For all of the foregoing reasons, LSNJ urges the Board not to implement its provisional rate proposal, or in the alternative, if it does decide to move forward,

- (1) to engage in further fact-finding in conjunction with a robust public comment and dialogue process, beyond the limited meeting held with little notice in May, allowing participation by an appropriate array of affected parties, and
- (2) in addition to adopting other ratepayer-protection measures that have been proposed, to provide that any unapproved provisional rate increase implemented by a regulated utility shall not apply to any residential ratepayer who (a) is eligible for USF, LIHEAP, Lifeline, or any other means-tested utility rate assistance program, or (b) otherwise demonstrates that the unapproved increased rates would cause undue hardship.

Thank you for your attention to this matter.

Sincerely,
LEGAL SERVICES OF NEW JERSEY, INC.

By:



David McMillin