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Governor

Sheila Y. Oliver
Lt. Governor

State of New Jersey
BOARD OF PUBLIC UTILITIES
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Joseph L. Fiordaliso
President

Aida Camacho-Welch
Secretary of the Board

January 11, 2019

Justin B. Incardone Esq.
Associate General Regulatory Counsel
Public Service Electric and Gas Company
80 Park Plaza -T5G
Newark, New Jersey 07102

**Re: College of New Jersey v. Public Service Electric & Gas Company
Billing Dispute
Docket No. GC18111234**

Dear Mr. Incardone:

Enclosed is a copy of the petition in the above-captioned matter.

You may contest the petition or make representations to the Board in connection therewith. To do this, you must file an original and three (3) copies of a written answer with the Board and serve a copy of the answer on the petitioner and all other parties named in the petition within twenty (20) days after service of the petition upon you.

Parties may reply to an answer by filing an original and three (3) copies of the reply with the Board and serving a copy on all other parties within ten (10) days after service of the answer.

Proof of service of the answer and replies, if any, must be filed with the Board at the time of filing or immediately thereafter.

After an answer has been filed, the Board will determine: (1) if the matter is a "contested case"; (2) whether to transfer it to the Office of Administrative Law ("OAL") for hearing; or (3) whether to hear the case itself. If appropriate, before transferring a "contested case" to the OAL, the Board may attempt to settle the case in consultation with the parties.

Please include the above docket number on all filings and correspondence relating to this matter.

Sincerely,

Aida Camacho-Welch
Secretary of the Board

Enclosure
c: Petitioner

CMS
Legal
DAG
RPA

S. Peterson
Energy



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November 9, 2018

VIA FEDERAL EXPRESS

Aida Camacho, Secretary
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor
Post Office Box 350
Trenton, New Jersey 08625-0350

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NOV 13 2018

BOARD OF PUBLIC UTILITIES
TRENTON, NJ

GC 1811234

Re: Verified Petition of The College of New Jersey
for Relief from a Penalty Assessed by Public Service Electric & Gas Company
Docket No.

Dear Secretary Camacho:

Enclosed for filing on behalf of The College of New Jersey please find an original and 11 copies of the Verified Joint Petition for Relief from a Penalty Assessed by Public Service Electric & Gas Company. Enclosed also is our check in the amount of \$25.00 to cover the filing fee.

Please return a copy of the filed petition with the assigned docket number in the enclosed self-addressed, stamped envelope.

CMS
Legal
DAG
RPA
S. Peterson
ENERGY

Very truly yours,

NORRIS McLAUGHLIN, P.A.

James H. Laskey

JHL/l
Enclosures

cc: Tamara L. Linde, Esq.
Stefanie A. Brand, Esq.



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STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

RECEIVED
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NOV 13 2018

BOARD OF PUBLIC UTILITIES
TRENTON, NJ

I/M/O Verified Petition of

The College of New Jersey

for Relief from a Penalty Assessed by Public Service
Electric & Gas Company

Docket No. GC/8111234

VERIFIED PETITION

The College of New Jersey ("TCNJ" or the "Petitioner") hereby petitions the Board of Public Utilities ("Board") for relief from a penalty assessed by Public Service Electric and Gas ("PSE&G") regarding the consumption of natural gas during a period of interruption in January 2018. Although TCNJ had properly maintained and tested the back-up fuel oil system and successfully switched to fuel oil in advance of the PSE&G interruption start time, approximately 30 minutes into the interruption a mechanical failure shut down the fuel oil system. Left with no choice, TCNJ properly declared an emergency and notified PSE&G that TCNJ needed to go back on natural gas in order to protect the health and wellbeing of the campus community.

The penalty is in place to ensure that interruptible customers maintain and test their alternative fuel supplies in accordance with the terms of this program. TCNJ complied with this maintenance and testing requirement, and certified its compliance with this requirement in its annual affidavit to PSE&G. Despite complying with the intent of the program, a mechanical failure beyond TCNJ's ability to predict or control occurred and prevented continuation of the interruption. As part of its declaration of an emergency, TCNJ immediately contracted for repairs to the failed fuel oil system. The nature of the failure was such that this emergency contractor was unable to make repairs in time for TCNJ to resume compliance with the PSE&G interruption.

Following the PSE&G interruption event, PSE&G calculated the penalty at approximately \$2.4 million. In order to provide context, this amount is greater than the annual amount spent on natural gas by TCNJ under this rate and is greater than one-third of TCNJ's annual cost for all utilities. In short, the penalty does not compensate for damages or costs incurred by PSE&G. Because the penalty is calculated using a multiplier from the peak spot price, the magnitude of the penalty was both unforeseeable and unreasonable. Imposing the penalty on TCNJ is unjust and unreasonable, because the intent of the penalty is to incentivize behavior that TCNJ fully complied with, through its testing, maintenance and certification of the alternative fuel systems, its making every effort to restore its ability to participate in the PSE&G interruption, and its declaration of emergency and immediate communication with PSE&G.

In support of this Petition, TCNJ provides the following information:

I. DESCRIPTION OF THE PETITIONER AND RESPONDENT

1. TCNJ is a highly selective institution that is consistently recognized as one of the top comprehensive public colleges in the nation. Founded in 1855 as the New Jersey State Normal School, TCNJ maintains the fifth highest four-year graduation rate among all public colleges and universities. It is ranked by Money as one of the top 15 public colleges "most likely to pay off financially," and U.S. News & World Report rates it the No. 1 public institution among regional universities in the north. TCNJ enrolls approximately 7,400 students including approximately 6,790 undergraduates and 610 graduate students. At a time of constrained monetary support from the State and the increasingly limited ability of families to pay for a college education, TCNJ strives to provide high-quality higher education at an affordable price.

2. PSE&G is New Jersey's oldest and largest regulated gas and electric delivery utility, serving nearly three-quarters of the state's population. PSE&G is a subsidiary of Public

Service Enterprise Group Incorporated (PSEG), a diversified energy company. PSEG also owns PSEG Power, a company that competes in energy markets through five main subsidiaries: PSEG Nuclear, PSEG Fossil, PSEG Energy Resources & Trade, PSEG Power Ventures and PSEG Energy Solutions.

II. DESIGNATED CONTACTS

3. Questions, correspondence or other communications concerning this Petition should be directed to:

Thomas Mahoney
Vice President and General Counsel
The College of New Jersey
PO Box 7718
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609-771-2734 (tel)
tmahoney@tcnj.edu

James H. Laskey
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III. BACKGROUND

4. TCNJ owns, maintains and operates an on-campus cogeneration plant (the “Cogen”) that supplies electricity and steam for heating throughout its campus. The Cogen produces approximately 42,500 pounds of steam per hour.

5. The Cogen receives service from PSE&G under a tariff known as Basic Gas Supply Service – Cogeneration Interruptible, or CIG. The CIG tariff requires customers, upon advance notice of not less than 8 hours, to discontinue natural gas use.

6. Consistent with this requirement, TCNJ maintains a fuel oil backup for the Cogen. It tests and maintains this system and has had no failures to comply with PSE&G interruption notices in over 20 years. As recently as December 31, 2017, it interrupted its use of gas and relied on oil, complying with the full 27 hours of the PSE&G interruption.

7. Until a recent redesign described in more detail below, the oil back-up system utilized a large outdoor storage tank for oil, and a smaller day tank located inside the Cogen facility. The day tank was equipped with a float device that would trigger a fill command when the day tank was getting low. At that point, a pump would transfer oil from the large storage tank until a second float device at the top of the day tank would trigger a stop command. A full day tank would provide approximately 30 minutes of operation and in conjunction with the refillable large storage tank the system could run for at least 7 days as required under the terms of the CIG tariff.

8. Paragraph (n) of the CIG tariff also provides for an optional service described in the tariff as Extended Gas Services, and also occasionally referred to as "CEG." The rate for this service, which is described as being offered at PSE&G's option, is tied to PSE&G's highest cost of gas. However, if PSE&G does not make CEG available, but the customer still does not interrupt, the CIG tariff calls for a penalty rate of *ten times the highest* price of the daily ranges for delivery in various zones, as published in a publication known as "Gas Daily."

9. On January 4, 2018, TCNJ received a notice to switch over to oil effective the following morning. It was told without explanation that CEG would not be available.

10. TCNJ switched to its oil backup on January 5, 2018, prior to the published PSE&G interruption time. The system worked as designed on its alternate fuel source until approximately 30 minutes into the PSE&G declared interruption. The root cause of the failure was later determined to be a failure of the day tank float device system. Despite having a full and ready large storage tank, the float device system failure prevented fuel oil from being delivered to the day tank and therefore prevented the Cogen from being able to be run on its alternate fuel supply.

11. The Cogen provides steam to the campus which is used for heating. The extreme cold that was the reason for the PSE&G interruption order also caused great risk to the campus community absent that steam heating. Faced with an uncertain penalty and a certain risk to the health and wellbeing of its campus community, and completely in good faith and in keeping with best practices TCNJ declared an emergency, properly informed PSE&G of the nature of the emergency and switched the Cogen back to its natural gas fuel source. Upon information and belief, this decision did not cause any other customer of PSE&G to lose gas service. Despite the cold weather, PSE&G was able to procure additional gas, and presumably did so at or below the highest price reported by the Gas Daily publication.

12. Under the relevant New Jersey procurement statute, N.J.S.A. 18A:64-57, TCNJ declared an emergency which allowed the immediate contracting of repair services so that TCNJ could resume participation in the PSE&G interruption. The responding contractor, who specializes in these types of mechanical systems, was unable to restore the system to full operation until after the PSE&G interruption had ended, despite TCNJ paying emergency contractor rates totaling over \$20,000 for this service.

13. The interruption condition ended on the morning on January 8, 2018, having lasted for approximately 72 hours.

14. In February 2018, TCNJ asked for a determination of the penalty. PSE&G provided two prices reported in Gas Daily, one for Friday, January 5, 2018, and one for Monday, January 8, 2018. It asked TCNJ to accept at face value the calculations set forth, explaining that "Due to copyright restrictions copies of the applicable 'Gas Daily's' are not available for distribution." This was the first time that TCNJ learned that the penalty could exceed \$2.2 million.

15. PSE&G recomputed the penalty at least two more times. Its final determination, communicated in June 2018, was for \$2,359,532.03. To understand the magnitude of this penalty, it exceeds TCNJ's entire CIG expense for all of 2017, and represents an approximately \$300 additional cost to be borne by the families of each and every TCNJ student.

16. The price per therm under the various tariffs in effect as of January 2108 was as follows:

<u>Service</u>	<u>Price Per Therm</u>
CIG	\$0.299159
CEG	\$0.522597
Penalty Rate with multiplier	\$120.706503
Penalty Rate as % of CIG	40,349%
Penalty Rate as % of CEG	23,097%

17. PSE&G agreed to meet to discuss the matter, and advised that in the meantime TCNJ should not pay the penalty charges. TCNJ has continued to pay all current charges from PSE&G. See N.J.A.C. 14:3-7.6.

18. In March 2018, TCNJ's Major Customer Consultant advised TCNJ that he had obtained authorization for a 5-year pay-out. However, this offer was subsequently repudiated by PSE&G as not authorized.

19. TCNJ and PSE&G have had further discussions regarding a reasonable outcome, but such discussions have not led to any agreement.

IV GROUNDS FOR RELIEF

20. N.J.S.A. 48:3-1 prohibits all public utilities from imposing or exacting any rate or charge that is unjust and unreasonable. N.J.S.A. 48:3-3 also prohibits a public utility from withholding or refusing any service, which reasonably can be demanded or furnished.

21. What might be an unjust or unreasonable rate is initially the responsibility of the Board to determine, subject to normal judicial review procedures. N.J.S.A. 48:2-23; N.J.S.A. 48:2-43. The same is true for withholding of service.

22. The Board has the broadest possible scope of jurisdiction over public utilities, N.J.S.A. 48:2-13, including the power to investigate “any matter concerning any public utility” initiated on its own motion or by complaint. N.J.S.A. 48:2-18.

23. The fact that a particular rate is set forth in a tariff does not necessarily mean that such rate is automatically just and reasonable for all time. Facts and circumstances change, which can warrant reexamination of a rate previously thought to be just and reasonable.

24. The existing tariff provision, at least as applied in the present case, is manifestly unreasonable in several respects. First, it is tied to a price that is published in Gas Daily, a private publication that costs several thousand dollars per year and that is not available through usual library sources. Presumably, the publishers collect data in good faith, but there have been instances where third parties were found to have engaged in activities in an attempt to manipulate the index for their own good.¹

¹ See, e.g., *BP America, Inc.*, 156 FERC ¶ 61.031 (2016); *Direct Energy Services, Inc.*, 148 FERC ¶ 61.114 (2014). TCNJ is not alleging that any manipulation took place during the days in question. Rather, the point is that it has no way of verifying the accuracy of what was reported. However, the Board, with its broad investigatory powers, could undertake such an inquiry.

25. Second, the price in question is not published until after the days of interruption have already passed, so when TCNJ reached the decision not to continue its interruption, it had no idea as to what the penalty might be.

26. Third, whatever the reasons might have been for selecting *ten times the highest* price as the penalty rate, those reasons do not withstand scrutiny under current legal requirements in New Jersey, which distinguish between reasonable liquidated damages provisions and unreasonable penalties that are grossly excessive relative to any reasonable measure of damages sustained by the non-breaching party. The latter have been consistently struck down as contrary to public policy.

27. Using a ten-times multiplier is strikingly punitive. The formula is even more harsh because it uses the highest published price from two different zones, without any consideration for whether those highest prices were within the realm of reasonableness, or simply outliers. Over the days in question, the range reported by Gas Daily for the two zones ran between \$85.00 and \$175.00 per MMBTU for Friday, and between \$15.00 and \$65.00 per MMBTU over the weekend. Despite this huge variation, and no indication of how many trades actually were at the highest level reported, the formula automatically latches on to the highest of all possible prices (rather than the actual price paid by the supplier in question) – and then multiplies that number by ten.

28. The grossly excessive penalty contained in the tariff is even harder to defend when it is assessed against a not-for-profit institution of higher education which is a component unit of the State of New Jersey, which had an unblemished record of complying with interruption directives over a period of decades, and which did everything within its reasonable control to avoid the unfortunate circumstance.

29. In effect, the Board has delegated its responsibility to set just and reasonable rates to a third party over which it has no ability to monitor and no ability to audit. Plus, by setting the penalty at ten times the highest reported rate, the Board is automatically guarantying a windfall to PSE&G and its BGSS-I suppliers, which include PSE&G Power. TCNJ is fully willing to make sure that PSE&G is made whole by TCNJ's failure to interrupt, but there is no sound public policy that would require TCNJ, a not-for-profit component unit of the State of New Jersey, to unjustly enrich others.

30. The CIG tariff also provides that interruption will not occur unless service to all TSG-NF customers receiving BGSS-I default service have already been interrupted. However, TCNJ is unaware as to whether there are actually any customers who take TSG-NF plus BGSS-I service. This tariff provision may thus be meaningless in terms of providing comfort to CIG customers.

31. As noted above, PSE&G denied without explanation the availability of CEG service during the period of interruption. Even though such service is offered at PSE&G's discretion, an abuse of that discretion would be inconsistent with PSE&G's statutory obligation to offer safe, adequate and proper service at just and reasonable rates. Whether PSE&G's decision to withhold CEG service was a reasonable exercise of its discretion is also something that is altogether proper for the Board to investigate.

32. TCNJ hired specialty consultants and contractors who extensively explored the possible causes for the system failure. Having ruled out all obvious causes and without a guarantee that the work of the specialty consultants and contractors could prevent a future occurrence, TCNJ decided to redesign the backup system at its own cost in order to remove the

day tank and therefore pump directly from the large storage tank. The total cost of this upgrade is over \$88,000.

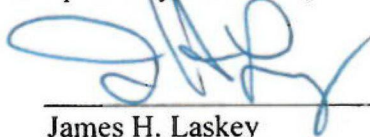
33. In short, this was not a situation where a customer was trying to game the system by signing up for an interruptible rate and then keeping its fingers crossed that an interruption would not be called. TCNJ was fully aware of its obligations under the tariff, and successfully interrupted its use of gas many times over decades including less than one month prior to the interruption in question. The simple truth is that a component unit of the State faced an emergency that was not able to be predicted, and in good faith made the best decision it could under the circumstances. It did so without any way of knowing what the resulting penalty would be, but what it was assessed – after the fact – goes well beyond any reasonable expectation on the part of TCNJ.

V. CONCLUSION

WHEREFORE, TCNJ asks the Board:

- (1) To investigate the circumstances leading up to the assessment of the penalty;
- (2) To determine what a just and reasonable assessment might be for the gas that was used;
- (3) To determine a fair payment plan for whatever assessment is ultimately arrived at; and
- (4) To grant such other relief as may be just and reasonable.

Respectfully submitted,



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Counsel for Petitioner

Dated: November 9, 2018

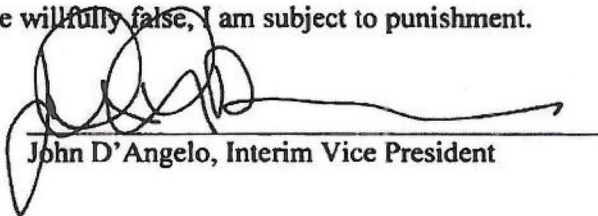
VERIFICATION

I, John D'Angelo, verify the foregoing petition as follows:

I am the Interim Vice President for Facilities Management of The College of New Jersey ("TCNJ") and am authorized to sign this verification on behalf of TCNJ.

I have read the foregoing petition and verify that the facts contained therein relating to TCNJ are true to the best of my knowledge, and the opinions contained therein relating to TCNJ are correct to the best of my belief.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



John D'Angelo, Interim Vice President

Dated: November 9, 2018