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September 14, 2023

Via Electronic Mail

Sherri L. Golden, Board Secretary
NJ Board of Public Utilities
44 South Clinton Avenue, 1st Floor
P.O. Box 350
Trenton, NJ 08625-0350

**Re: In the Matter of the Verified Petition of the College of New Jersey for Relief
From a Penalty Assessed by Public Service Electric and Gas Company
BPU Docket No. GC18111234**

Dear Secretary Golden:

Please accept for filing this letter, Notice of Motion and supporting Brief submitted on behalf of the Division of Rate Counsel ("Rate Counsel") in support of its Motion for Summary Decision pursuant to N.J.A.C. 1:1-12.5. Rate Counsel's Motion and supporting Brief are being filed in accordance with the procedural schedule adopted in the June 27, 2023 Prehearing Order, as amended by agreement of the parties as indicated in the August 31, 2023 e-mailed communication to the parties from Deputy Attorney General Terel L. Klein.

In accordance with the Order by the Board in connection with I/M/O/ the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations, BPU Docket No. EO20030254 (March 19,

Sherri L. Golden, Board Secretary

September 14, 2023

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2020), this notice and supporting brief are being filed electronically. No paper copies will follow.

Respectfully submitted,

BRIAN O. LIPMAN

DIRECTOR, DIVISION OF RATE COUNSEL

By: /s/ Sarah H. Steindel

Sarah H. Steindel, Esq.

Assistant Deputy Rate Counsel

Enclosures

c: Service List

**STATE OF NEW JERSEY
BEFORE THE BOARD OF PUBLIC UTILITIES**

IN THE MATTER OF THE VERIFIED)	
PETITION OF THE COLLEGE OF NEW)	DOCKET NO. GC18111234
JERSEY FOR RELIEF FROM A)	
PENALTY ASSESSED BY PUBLIC)	MOTION FOR SUMMARY
SERVICE ELECTRIC & GAS COMPANY)	DECISION

PLEASE TAKE NOTICE that the undersigned attorneys for the Division of Rate Counsel (“Rate Counsel”), as soon as counsel may be heard, shall move in this case before the Board, for an Order granting its Motion for Summary Decision pursuant to N.J.A.C. 1:1-12.5.

PLEASE TAKE FURTHER NOTICE that Rate Counsel relies upon the attached Brief in support of this request.

Respectfully submitted,

BRIAN O. LIPMAN
DIRECTOR, DIVISION OF RATE COUNSEL

By: /s/ Sarah H. Steindel
Sarah H. Steindel, Esq.
Assistant Deputy Rate Counsel

Dated: September 14, 2023

**STATE OF NEW JERSEY
BEFORE THE BOARD OF PUBLIC UTILITIES**

IN THE MATTER OF THE VERIFIED)	
PETITION OF THE COLLEGE OF NEW)	
JERSEY FOR RELIEF FROM A)	DOCKET NO. GC18111234
PENALTY ASSESSED BY PUBLIC)	
SERVICE ELECTRIC & GAS COMPANY)	

**BRIEF OF THE NEW JERSEY DIVISION OF RATE COUNSEL
IN SUPPORT OF MOTION FOR SUMMARY DECISION**

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September 14, 2023

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PRELIMINARY STATEMENT

In this proceeding, Petitioner The College of New Jersey (“TCNJ” or the “College”) is seeking to avoid responsibility for paying a penalty incurred when it failed to interrupt its usage of natural gas to fuel its on-campus cogeneration facility (the “Cogen”). The Cogen receives interruptible natural gas distribution and supply service from Public Service Electric and Gas Company (“PSE&G”) at a deeply discounted rate as a “grandfathered” customer under a special tariff that closed to new customers in 2009. For a 48-hour period from January 5 through 7, 2018, TCNJ used natural gas to operate the Cogen despite the fact it was not authorized to do so under the terms of the tariff.

TCNJ is seeking a waiver of the penalty based on allegations that the interruption was the result of an unforeseeable mechanical breakdown of the Cogen’s fuel oil backup system that occurred despite TCNJ’s proper maintenance and testing of the system, and TCNJ had “no choice” but to continue using gas to protect the health and wellbeing of its campus community. TCNJ also asserts that the penalty amount of approximately \$2.359 million is excessive. TCNJ asks the Board to determine a “just and reasonable assessment” for the gas it used without authorization, and establish a “fair payment plan” for that amount.

The relief requested by TCNJ should be denied. As was recognized in the Board’s 2000 Order that mandated strong penalties for interruptible customers’ failure to interrupt, these penalties are in place to protect the integrity of the State’s natural gas distribution systems during times of constrained supply. A waiver of an interruptible penalty for one customer would send a message to interruptible gas customers statewide that interruption events are not to be taken seriously, placing the State’s most vulnerable natural gas service customers at risk of adverse

consequences such as curtailments and outages. Such a waiver also would be unfair and discriminatory to the other interruptible customers who paid the penalty for their failure to interrupt, and to the firm customers who pay a premium year after year for the resources needed to assure they will have gas available 365 days a year. In addition, PSE&G's Basic Gas Supply Service ("BGSS") customers were previously credited with 75% of the penalty amount when the penalty was assessed, and this amount, plus Sales and Use Tax ("SUT") would have to be paid back by the PSE&G's BGSS customers should the penalty be waived.

Contrary to the allegations in TCNJ's Verified Amended Petition TCNJ's unauthorized use of gas was not the result of an unforeseeable emergency. It was the result of TCNJ's failure to properly maintain the fuel oil backup system, and the lack of any contingency plans to deal with a reduction in steam capacity during extreme cold weather. Further, the amount of the penalty is not excessive given the potential consequences of a failure to interrupt, and given the fact that the penalty amount is roughly the incremental costs TCNJ would have paid for two years of firm service. TCNJ has not demonstrated a need for a deferred payment arrangement beyond the extended period of time that has already elapsed without payment of any portion of the penalty.

PROCEDURAL HISTORY

On November 9, 2018 TCNJ filed its original Verified Petition in this matter. On December 4, 2018 PSE&G filed a motion to intervene pursuant to N.J.A.C. 1:1-16 et seq. TCNJ filed a response to PSE&G's motion stating that it had no objection to the granting of the motion, but that it believed a motion was not necessary because PSE&G was already a party by virtue of the filing of the Verified Petition. TCNJ's response requested that PSE&G be required to file an answer to the Verified Petition pursuant to N.J.A.C. 14:1-6.1. PSE&G filed an Answer on

February 8, 2019, asserting that the penalty was in accordance with PSE&G's Board-approved tariff for gas service and the Board's October 2, 2000 Order Requiring Tariff changes in I/M/O The Board's Review of Energy and Home Heating Oil Markets, BPU Docket No. GO00020088 (2000) ("October 2000 Order"), and further asserting that the penalty provisions of its gas tariff are just and reasonable.

On February 17, 2023, the Board issued an Order granting PSE&G's motion to intervene, determining that the matter should be retained by the Board for hearing, and designating President Joseph L. Fiordaliso as the Presiding Officer.

On March 10, 2023 TCNJ filed a Verified Amended Petition including additional factual allegations and legal arguments in support of the relief requested by TCNJ. PSE&G filed an Answer to the Verified Amended Petition on April 19, 2023.

A Prehearing Order was issued by President Fiordaliso on June 27, 2023. In accordance with the procedural schedule established in the Prehearing Order, Stipulated Facts and Exhibits were due to be filed on August 4, 2023. The parties were not able to reach agreement on the Stipulated Facts and Exhibits by that date. Stipulated Fact and Exhibits agreed to by TCNJ, PSE&G, and Rate Counsel were filed with the Board on September 6, 2023. In accordance with Paragraph 51 of the Stipulated Facts and Exhibits, the stipulated facts are subject to amendment by the parties, and additional exhibits may be added subject to other parties' right to raise objections. In accordance with the Prehearing Order, the Stipulated Facts and Exhibits, subject to any amendments and additional exhibits, will constitute the evidentiary record in this matter.

STATEMENT OF FACTS

Background

TCNJ is a public college with a 289-acre residential campus located in Ewing, New Jersey. TCNJ enrolls approximately 7,400 students, including 6,790 undergraduates and 610 graduate students. PSE&G is a combination electric and gas utility that provides gas distribution service to approximately 1.9 million customers in New Jersey, in addition to its unrelated electric services. Stipulated Facts, par. 1, 2.

The (“Cogen”) supplies electricity and steam for heating throughout TCNJ’s campus. The Cogen receives natural gas delivery and supply service as a “grandfathered” customer under PSE&G’s Rate Schedule CIG – Cogeneration Interruptible Service. Customers under this tariff must have continuously received service under this rate schedule or PSE&G’s former Rate Schedule CEG since January 8, 2002, or, alternatively, must have received a commitment from PSE&G before January 9, 2002. TCNJ has received service under Rate Schedule CIG or former Rate Schedule CEG since 1995. Stipulated Facts, par. 3; Exh. J-1.

CIG is an interruptible service offered at a rate that is substantially discounted compared to both the interruptible service that would otherwise be applicable to the Cogen, under PSE&G’s Rate Schedule TSG-NF – Non-Firm Transportation Gas Service, or the firm service available under Rate Schedule LVG – Large Volume Service. Based on the tariffs in effect in January 2018 TCNJ’s estimated annual savings were \$1,011,636 compared to what it would have paid for distribution and supply under Rate Schedule LVG, and \$636,142 to what it would have paid under Rate Schedule TSG-NF. Based on current tariff rates, the estimated savings are \$1,267,406 compared to LVG, and \$841,695 compared to TSG-NF. Stipulated Facts, par. 4.

One of the conditions of receiving the discounted rate under Rate Schedule CIG is that it is subject to interruption during periods of constrained supply, typically during extreme cold weather. A CIG customer must discontinue its use of gas upon advance notice of eight hours or more, from any hour of any day, given to the customer by PSE&G. Stipulated Facts, par. 5; Exh. J-1. After an allowance of one hour's maximum requirement per day of interruption that is charged at \$1.89 per therm, any unauthorized usage during the interruption is charged at a penalty rate in the amount of the greater of (1) ten times the highest price of the daily ranges for delivery in Transco Zone 6, New York, or Texas Eastern Zone M-3 which are published in Gas Daily on the table "Daily Price Survey," and (2) the maximum penalty charge for unauthorized daily overruns as provided for in the FERC-approved gas tariffs of the interstate pipelines which deliver gas into New Jersey. Id.

Rate Schedule CIG provides for a service known as Extended Gas Service which is supplied during interruptions, at PSE&G's option, at a price tied to PSE&G's highest cost of gas during the applicable period. Customers are notified of the availability and price of Extended Gas Service at least eight hours prior to the availability of this service, and at least eight hours prior to any change in the price of this service, and customers have two hours to notify PSE&G of their acceptance. Any gas used during an interruption when Extended Gas Service is not available is charged at the penalty rate. Stipulated Facts, par. 6; Exh. J-1.

In addition to the Cogen, steam to the campus is provided by two boilers that receive service on a separate meter and on a separate account under PSE&G's Rate Schedule TSG-NF – Non-Firm Transportation Service. TSG-NF customers are required to certify annually either that they will suspend operations during an interruption event, or that they have an alternative fuel source that can be legally used at the customer's facilities. In addition, customers using specified

alternate fuels including No. 2 Fuel Oil are required to certify further that they have and will maintain the availability of at least seven days of alternative fuel available, either on-site or through additional firm contractual supply. TCNJ maintains an alternate fuel backup system using No. 2 Fuel Oil for the two boilers serviced under Rate Schedule TSG-NF. Stipulated Facts, par. 8, Exh. J-3, Special Provision (a).

While there is no alternative fuel requirement for CIG, TCNJ maintains a fuel oil back-up system using No. 2 Fuel Oil for the Cogen. As of the 2017-18 winter season, fuel oil was provided to the Cogen using a small day tank located inside of the Cogen plant and a larger outdoor holding tank. The day tank was equipped with a float probe that would trigger a fill command when the oil level in the day tank was low. At that point, a pump would transfer oil from the large storage tank until the second float probe 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 system, could run for at least 7 days. The day tank mechanism was installed at the initiation of the Cogen in 1995. Verified Amended Petition, par. 7; Stipulated facts, par. 8.

December 31, 2017 to January 2, 2018 Interruption

Service to customers served under Rate Schedules CIG and TSG-NF was interrupted from 10:00 a.m. on December 31, 2017 through 10:00 a.m. on January 2, 2018 due to constraints of the availability of natural gas at that time. TCNJ received informal and formal notice of this interruption at approximately 6:00 p.m. on December 29, 2017. TCNJ advised PSE&G that the interruption “would not work” and requested Extended Gas service. Stipulated Facts, par. 12; Exh. J-17, 12-29-17 0600-1800. TCNJ operated the Cogen using fuel oil from 5:45 a.m. on December 31, 2017 until 8:45 a.m. on January 1, 2018, when the turbine tripped as the result of a

flameout due to high fuel flow. TCNJ's plant operators attempted to re-light the turbine using fuel oil three times but were unable to do so due to low oil flow and low oil pressure. The Cogen was switched to gas at 9:39 a.m. For the remainder of the interruption, the Cogen was operated on gas using Extended Gas Service, which was available during that period. Stipulated Facts, par. 13. Throughout the interruption the two boilers that are served under Rate Schedule TSG-NF were operated on fuel oil. TCNJ operated the Cogen using Extended Gas Service after the failure of the fuel oil delivery system because the boilers alone "won't do it." Stipulated Facts, par. 15; Exh. J-17, 1-1-18 1400-2200.

On January 1, 2018 between the hours of 2:00 p.m. and 10:00 p.m. TCNJ's plant operators confirmed that the Cogen would not run on oil. At 2:00 p.m., on January 1, 2018 a TCNJ plant operator contacted Solar Turbines, the turbine manufacturer, and left a message with their service department. Stipulated Facts, par. 16; Exh. J-17, 1-1-2018 1000-2200.. On January 2, 2018 at approximately 6:52 a.m. a technician from Solar Turbines advised TCNJ's operating personnel that there was a "bad switch" associated with the oil day tank serving the cogeneration unit. Later that day the Cogen was switched to fuel oil twice, and on both occasions turbine tripped off after approximately thirty minutes of operation. Stipulated Facts, par. 17; Exh. J-17, 1-2-18 0600-1400.

As of January 1 and January 2, 2018, snow was in the forecast for January 4, 2018 and very cold temperatures were forecasted for January 5 and 6, 2018. The January 1, 2018 Trenton Times local newspaper reported a forecast high of 15⁰ F and a low of 1⁰ F for Friday, January 5, and the January 2, 2018 Trenton Times reported a forecast high of 15⁰ F and a low of 5⁰ F for Friday, January 5, 2018, and a high of 15⁰ F and a low of 3⁰ F for Saturday, January 6, 2018. Stipulated Facts, par. 18, Exh. J-5.

January 4, 2017 to January 8, 2018 Interruption

On January 3, 2018 at 12:15 p.m., TCNJ received informal notification by e-mail from PSE&G that there would be an interruption of service beginning on January 4, 2018. At 2:38 p.m. TCNJ was advised informally that the interruption would include service to the Cogen under rate schedule CIG. Stipulated Facts, par. 19. On January 3, 2018 TCNJ received formal notification from PSE&G that gas service under Rate Schedule CIG would be interrupted beginning at 10:00 a.m. on January 4, 2018, and that and that Extended Gas Service would be available at that time at \$16.46 per dekatherm. TCNJ acknowledged receipt of this notification by fax at approximately 3:50 p.m. on January 3, 2018. Stipulated Facts, par. 20; Exh. J-6.

On January 3, 2018 at 4:57 p.m., PSE&G e-mailed an additional informal notice of the interruption to all TSGNF Supplied, TSGNF with PSE&G, CIG, CEG, and CSGI customers. The Notice included the following: “Per PSE&G’s gas tariff TSGNF, you MUST stop using gas and switch to your alternative fuel during the above time period or be subject to severe penalty for any natural gas consumed during this period.” Stipulated Facts, par. 21; Exh. J-7.

Based on data available to PSE&G at approximately 7:30 a.m. on January 4, 2018, the average forecast temperature for January 4, 2018 was 19.9⁰ F, and the average forecast temperature for January 5, 2018 was 9.6⁰ F. Stipulated facts, par. 22; Exh. J-8. On January 4, 2018, in at approximately 9:20 a.m., PSE&G transmitted a faxed notification to TCNJ that Extended Gas Service would no longer be available effective January 5, 2018 at 10:00 a.m., and that the customer should be off gas entirely by 10:00 a.m. on January 5. Receipt of this notification was acknowledged by TCNJ by fax transmission. Stipulated Facts, par. 23; Exh. J-8.

The Cogen was operated on gas using Extended Gas Service beginning at 10:00 a.m. on January 4, 2018. Stipulated Facts, par. 24. On January 4, 2018 at 10:40 a.m. the Cogen was

switched to fuel oil to test the fuel oil backup system. The Cogen operated on oil for approximately 30 minutes, then tripped off due to low oil at 11:10 a.m. TCNJ's personnel were aware at that time that the day tank mechanism was not functioning properly. At 11:25 a.m., the Cogen was switched back to gas. Thereafter, the Cogen was operated using Extended Gas Service until January 5, 2018 at 10:00 a.m. Stipulated Facts, par. 25; Exh. J-17, 1-4-2018 0600-1400.

TCNJ determined that the day tank mechanism failed because the day tank float probes, which are designed to sense when the tank requires refilling, did not function properly during the interruption period. Spare float probes were not available. Between the hours of 2:00 p.m. and 10:00 p.m. on January 4, 2018 it was determined that Liberty Mechanical Contractors, Inc., would come to service the oil tank for the turbine. However, TCNJ was not able to obtain emergency service from Liberty Mechanical during the interruption period due to the inclement weather which made travel difficult. Stipulated Facts, par. 26. TCNJ's plant operators attempted to repair the day tank mechanism between the hours of 6:00 a.m. and 2:00 p.m. on January 5, 2018 but were unsuccessful. Stipulated Facts, par. 29; Exh. J-17, 1-4-2018 0600-1400.

On January 5, 2018 at 10:26 a.m., Robert Foster, Key Customer Advisor/Major Account Consultant at PSE&G, sent an e-mail reminder to interruptible customers to continue to operate on alternative fuel until notified by PSE&G to resume normal operations, and to contact him or his back-up contact in the event of an issue with compliance. Stipulated Facts, par. 30; Exh. J-9. On January 5, 2018 at 1:09 p.m., Lori Winyard TCNJ's Director of Facilities informed Mr. Foster by e-mail that the Cogen plant back-up fuel system had malfunctioned the previous evening and was unable to operate on fuel oil. The e-mail stated that the boilers served under rate schedule TSG-NF were operating on fuel oil, but that the Cogen could not be taken offline

since the campus's steam load exceeded the capacity of the boilers. Ms. Winyard requested that the Company waive the gas use penalty until the issue is resolved. The request for a waiver was denied. Stipulated Facts, par. 31.

TCNJ operated the Cogen using penalty gas from 10:00 a.m. on January 5, 2018 through 10:00 a.m. on January 7, 2018. Stipulated Facts, par. 36, 38. On January 6, 2018 at approximately 10:00 a.m., TCNJ received notice that Extended Gas would be available at \$15.98 per dekatherm beginning at 10:00 a.m. on January 7, 2018. TCNJ used Extended Gas Service beginning January 7, 2018 at 10:00 a.m. and continuing through the conclusion of the interruption. Stipulated Facts, par. 37.

Penalty Amount and Accounting

TCNJ operated the Cogen during the interruption while Extended Gas Service was not available for 48 hours or 2 "gas days" from January 5, 2018 at 10:00 am to January 7, 2018 at 10:00 am. The amount of the penalty, as calculated by PSE&G, was \$2,359,532. Usage in the amount of one hour's maximum requirement for each of the two days of the interruption was charged at rate of \$1.89 per therm. The remaining usage was charged based on the penalty rate specified in Special Provision (c) of the CIG Tariff, which was \$175 per therm for usage on the gas day beginning at 10 am on January 5, 2018 and \$65 per therm for usage on the gas day beginning at 10 am on January 6, 2018. Stipulated Facts, par. 38; Exh. J-11.

The CIG tariff allows the customer, at any time during the months of November through March, to request to change from interruptible to firm service. In that event the customer will be switched to firm service, subject to the availability of supply and delivery capacity, retroactive to November 1. On April 6, 2018 TCNJ was advised in a meeting with representatives of PSE&G that it could switch to Rate Schedule LVG as of November 1, 2017 and then, after remaining on

firm service for one year, switch to interruptible service under Rate Schedule TSG-NF. TCNJ was advised that, due to the requirement for continuous service under Rate Schedule CIG, TCNJ would not be permitted to return to Rate Schedule CIG after one year of firm service. TCNJ did not elect to use this option. Stipulated Facts, par. 39, Exh. J-1. Other PSE&G customers that failed to interrupt during the interruption events on December 31, 2017 to January 2, 2018 and January 4 to 8, 2018 either switched to firm service, or paid the penalty in accordance with the applicable tariffs. Stipulated Facts, par. 41; CONFIDENTIAL Exh. J-12.

Under PSE&G's Board-approved gas supply agreement with PSEG Energy Resources & Trade ("ER&T"), 25% of the \$2,359,532 penalty amount was paid to ER&T which supplied the gas burned by TCNJ, and 75% was flowed through to PSE&G's BGSS customers in PSE&G's 2018-2019 BGSS filing.¹ In the event of a waiver or reduction in the penalty amount, these transactions would be reversed in whole or in part, thereby requiring all current PSE&G BGSS customers to pay an increase on their bills to essentially pay back to PSE&G the credit which they already received predicated on PSE&G receiving the full TCNJ penalty. Stipulated Facts, par. 40.

ARGUMENT

I. TCNJ Is Not Entitled to a Waiver of the Penalty.

It is fundamental that a public utility's filed tariff is not a mere contract, it has the force of law. Application of Saddle River, 71 N.J. 14, 29 (1976); Essex County Welfare Board v. New Jersey Bell Telephone Co., 126 N.J. Super. 417, 421-22 (App. Div. 1974). Under the Board's rules, a public utility "shall operate in accordance with its tariff at all times, unless

¹ I/M/O Public Service Electric and Gas Company's 2018/2019 Annual BGSS Commodity Charge Filing for its Residential Gas Customers Under its Periodic Pricing Mechanism, BPU Dkt No. GR18060606, Petition at PDF page 49 (June 1, 2018).

specifically authorized in writing by the Board to do otherwise.” N.J.A.C. 14:3-1.3 (d). While the Board’s rules do not specify the criteria to be applied in considering requests for waivers of utility tariff provisions, guidance is provided by N.J.S.A. 14:1-1.2, which addresses requests for waivers of the Board’s rules. The Board may permit deviations from its rules only “[i]n special cases and for good cause shown.” N.J.S.A. 14:1-1.2(b). The Board is directed to grant waivers of specific sections of its rules “in accordance with the general purposes and intent of its rules ... if full compliance with the rule(s) would adversely affect the ratepayers of a utility or other regulated entity, the ability of said utility or other regulated entity to continue to render safe, adequate and proper service, or the interests of the general public;” N.J.S.A. 14:1-1.2(b)(1). An entity seeking a waiver is required to provide “[t]he reasons for the request of waiver, including a full statement setting forth the type and degree of hardship or inconvenience that would result if full compliance with the rule(s) would be required;” and to provide supporting documentation. N.J.S.A. 14:1-1.2(b)(2). TCNJ does not meet these criteria.

TCNJ’s Petition seeks to escape payment of the penalty based on its allegations that it properly maintained and tested the fuel oil backup system for the Cogen, but that there was “a mechanical failure beyond TCNJ’s ability to predict or control,” which could not be repaired in time to allow TCNJ to comply with the interruption without endangering the health and wellbeing of its campus community. Verified Amended Petition, p. 1-2. TCNJ’s request for relief should be rejected. Excusing TCNJ from payment of the penalty for the reasons asserted by TCNJ would undermine the purpose of the penalty provision and, moreover, the facts that emerged during discovery do not support the alleged factual basis for the requested waiver.

A. The Requested Waiver Would Undermine the Purpose of the Penalty Provisions.

The penalty provisions in PSE&G's CIG tariff were mandated by the Board following a legislative-type proceeding initiated by the Board in response to sharp increases in fuel oil prices. October 2000 Order at 2. During those proceedings representatives of the State's gas distribution companies ("GDCs") expressed concerns that they might not be able physically to serve interruptible customers who failed to interrupt rather than buy fuel oil on the spot market "because to do so could result in insufficient fuel to supply their firm customers, including their residential natural gas customers." Id. Finding that "[i]t is imperative to the integrity of the natural gas systems that interruptible customers abide by the terms and conditions of interruptible tariffs," the Board directed the GDCs to file revised tariffs containing provisions to assure that was the case. These included alternate fuel requirements for most interruptible customers. Id. Some customers, including cogeneration customers, were exempted from these requirements, but all interruptible customers were subject to the following:

- E. Customers who fail to discontinue natural gas use, consistent with the terms and conditions of the relevant interruptible tariff, shall be charged a penalty equal to:

10 times the highest price of the daily ranges that are published in Gas Daily on the table "Gas Price Survey" for delivery in Transco Zone 6 or Texas Eastern Zone M-3. This rate shall not be lower than the maximum penalty charge for unauthorized daily overruns as provided for in the FERC-approved gas tariffs of the interstate pipelines, which deliver gas into New Jersey.

Id. at 4.

Since this provision applies to all interruptible customers—including customers that are not subject to alternate fuel requirements—it is clear that its purpose goes beyond incentivizing the proper maintenance of alternate fuel systems and supplies. It is intended to provide a strong

deterrent to the unauthorized use of gas during an interruption by all interruptible customers. In other words, the purpose of the penalty provision is not merely to incentivize proper maintenance of alternate fuel systems, it is to incentivize interruptible customers to take whatever steps are necessary to interrupt.

TCNJ's proposed interpretation of the penalty provisions is simply unworkable. If the Board were to excuse TCNJ's failure to comply with its obligation to interrupt, this would undermine the effectiveness of the penalty provisions statewide. Interruptible customers could delay and potentially avoid payment of penalties by asserting that their failure to interrupt was justified. The Board would be required to initiate contested case proceeding to evaluate evidence of the customer's reasons for the failure to interrupt, and determine whether those reasons outweighed the need to maintain the integrity of the GDCs' distribution systems. Instead of a clear signal for interruptible customers to comply with their obligation to interrupt, the payment of penalties would become flexible obligation that could be delayed and potentially avoided by petitioning the Board for a waiver.

According to a PSE&G discovery response, the Company has a total of 187 interruptible gas customers. Exh. J-18. Of these, only a relative few failed to comply with PSE&G's interruption notices during the end of December 2017 and the beginning of January 2018, and all of them either left the interruptible rate or paid the assessed penalty. Stipulated Facts, par. 41; CONFIDENTIAL Exh. J-12. These results could change if the Board sends a signal that that penalties for non-compliance will not be strictly enforced.

The Board's recent Order granting a temporary waiver of conditions in New Jersey American Water Company's tariff for water service, I/M/O the Request by New Jersey American Water Company for a Temporary Waiver of Optional Industrial Wholesale Tariff Condition,

Rate Schedule F, Due to Impact of COVID on Water Consumption, BPU Dkt. No. WT21101160 (Jan. 12, 2022) (“NJAWC Waiver Order”), does not apply to the circumstance of this case. In that proceeding, the utility requested a temporary waiver of a tariff condition requiring customers under its Optional Industrial Wholesale (“OIW”) rate schedule to maintain a load factor not exceeding 1.2 times their monthly consumption over the last rolling 12 months. Two such customers, Princeton University and Rutgers University, exceeded that load factor when they began holding classes on campus after conducting classes online during the COVID-19 pandemic. In the absence of a waiver, both customers would have been required to switch to the utility’s General Metered Service, resulting in an 82% rate increase for a minimum of 12 months. NJAWC Waiver Order at 1-2. The waiver was granted based on the Board’s finding that both universities’ “changes in usage and load factors were the direct result of their shift to online learning in response to the COVID-19 Pandemic and Governor Phil Murphy’s declaration of a Public Health Emergency and State of Emergency” Id. at 3.

In the NJAWC Waiver Order, the waiver was applied to avoid penalizing the customers for a temporary drop in usage caused by the customers’ compliance with Executive Orders issued to protect the public health and safety. Under these circumstances, it was reasonable for the Board to conclude that granting the waiver was consistent with the purpose of the tariff provision, which was to limit its application to customers using water at a steady rate. See, NJAWC Waiver Order at 2. Further, the COVID pandemic and the resulting Executive Orders were clearly beyond the customers’ ability to control. Thus, unlike the present circumstances, the granting of a waiver did not create a risk of incentivizing other customers to violate the term of the tariff.

In summary, this is not a case where “full compliance ... would adversely affect the ratepayers of a utility or other regulated entity, the ability of said utility or other regulated entity to continue to render safe, adequate and proper service, or the interests of the general public.” N.J.S.A. 14:1-1.2(b)(1). In fact, the opposite is the case. The granting of the requested waiver would undermine the ability of the GDCs and the Board to assure continued service to all of their customers.

B. The Record Does Not Support the Alleged Factual Basis for the Requested Waiver.

Even assuming there could be some circumstances that would justify a waiver of interruptible penalty, the facts alleged in the Amended Verified Complaint as a basis for the requested waiver were not borne out by the information provided during discovery. TCNJ was unable to document that the fuel oil backup system for the Cogen was properly maintained and tested, and that its failure to interrupt or even reduce its usage of gas was due to an unavoidable emergency.

When asked in a discovery request to detail the steps TCNJ took to assure that the day tank mechanism would be operational during the 2017-18 winter season, TCNJ responded with a series of objections—that the question was “overbroad,” and that information sought would be “unduly burdensome to produce and ... neither relevant nor likely to lead to admissible evidence.” TCNJ provided a “partial response” notwithstanding its objections, consisting of the production of a Certification executed by Ms. Winyard in 2019 which contains no descriptions of any specific maintenance or testing activities prior to January 2018, and a representation that TCNJ was “continuing to review its files” for additional responsive documents. Exh J-4, Exh. J-19. Similarly, when PSE&G asked TCNJ to describe its maintenance practices with regard to

the day tank float device from January 1, 2017 through January 8, 2018 TCNJ's response was "To be provided." Exh. J-21.

TCNJ ultimately responded to these requests by inviting the other parties to review hundreds of pages of documents, but never articulated the specific factual basis for its verified allegations that the fuel oil backup system had been properly maintained. Exh. J-20, J-22, J-23. TCNJ acknowledged it had no formal log to document maintenance and testing of the fuel oil backup system, and that it had no records that any maintenance was performed on the day tank mechanism during the year preceding the January 4-January 8, 2018 interruption event. Stipulated Facts, par. 46, Exh. J-22, J-23. TCNJ does not dispute a finding by the College's property insurer that, prior to the interruption event, TCNJ had not performed the manufacturer's recommended inspections and maintenance, or kept the recommended spare parts on hand. Stipulated Facts, par. 47; Exh. J-14, p. 6.

It is also apparent that TCNJ had no contingency plan in effect in the event of a failure of the fuel oil backup system. It does not dispute its property insurer's finding that it had no formal standard operating procedures or emergency operating procedures for the Cogen's operators to follow, and had no formal plans for freeze prevention. Stipulated Facts, par. 47; Exh. J-14, p. 6. Moreover in response to an informal discovery request in this proceeding, TCNJ acknowledged that, even now, it has no procedures in place to reduce its steam load in situations such as the interruption event at issue use. According to TCNJ, the steps needed to reduce steam load on its campus "are akin to turning around an ocean liner in terms of pace." Exh. J-16. TCNJ states that it has an "aging campus," making it "difficult to identify which parts of the infrastructure may be vulnerable to reductions in temperature and therefore subject to freezing pipes and other

damage.” Id. TCNJ apparently recognizes that a freeze-up prevention program would be beneficial, but states that such a program “remains a work in progress.” Id.

At the time of the January 2018 interruption event, TCNJ’s practice in the event of inadequate steam generation capacity was to engage steam boiler rental service to provide a temporary boiler to be used on TCNJ’s campus. Based on TCNJ’s experience, there are several suppliers of this service who are able to provide temporary boilers on its campus on short notice. Stipulated Facts, par. 44. As discussed above in the Statement of Facts, TCNJ was aware on January 1, 2018 that there was problem with the fuel oil backup system for the Cogen, was aware on January 2, 2018 that this was due to a “bad switch, and it was also aware on both of those days that snowfall was forecast for January 4, followed by extreme cold weather on January 5 and 6, 2018. Despite this, TCNJ did not secure a temporary boiler at any time between January 1 and January 8, 2018. Stipulated Facts, par. 44.

The effect of TCNJ’s lack of contingency planning was compounded by its delay in advising PSE&G that it was not able to operate the Cogen on fuel oil. It did not communicate this fact when it became apparent on January 1 and 2, 2018 that the day tank mechanism was not operational, when PSE&G notified its CIG customers at 9:20 a.m. on January 4, 2018 that Extended Gas Service would not be available beginning at 10:00 a.m. the following day, or after its two unsuccessful attempts to operate the fuel oil backup systems later that morning. Even after PSE&G sent an e-mail at approximately 10:26 a.m. on January 5, 2018 to remind interruptible customers of the need to advise PSE&G of any issues with compliance, TCNJ waited until 1:09 p.m. to notify PSE&G that the fuel oil backup system for the Cogen had failed. Stipulated Facts, par. 31. This delay likely added to the challenges faced by PSE&G in

maintaining service to its firm customers during the extreme cold weather on January 5 and 6, 2018.

In the Verified Amended Petition TCNJ acknowledges that a purpose of the penalty provisions is to deter customers from “signing up for an interruptible rate and then keeping its fingers crossed that an interruption would not be called.” Verified Amended Petition, par. 48. Based on the record in this proceeding, it is a reasonable inference that TCNJ signed up for and continued to take service under Rate Schedule CIG based on the assumption that it would never have to actually interrupt the Cogen’s use of gas. Instead, it appears TCNJ assumed that Extended Gas Service would always be available, despite the fact that the CIG tariff explicitly states that this service will be provided during an interruption at PSE&G’s option. Exh. J-1, Special Provision (n).² Thus, when Extended Gas Service became unavailable, TCNJ was unprepared. Then, when it was advised that Extended Gas Service would not be available, it did not communicate to PSE&G that there was a problem until more than three hours after it was supposed to have stopped using gas. This is exactly the type of behavior the penalty provisions were intended to deter.

Rate Counsel notes also that it was only after the assessment of the penalty that TCNJ undertook a comprehensive evaluation of the reliability of the day tank mechanism which, at the time of the interruption, was over 22 years old. That evaluation, which concluded in approximately August of 2018, resulted in a determination that even with repairs the system would not reliably prevent a future failure. The system was modified to remove the day tank and pump fuel oil directly from the large outdoor storage tank, at a cost of approximately \$88,000.

² Indeed, given TCNJ’s inability to actually discontinue its use of gas during the December 31, 2012-January 2, 2018 and January 4-8, 2018 interruptions, and given its continuing lack of contingency planning to enable it to discontinue its use of gas in the event of a future mechanical breakdown of the fuel oil backup system, it is not clear that TCNJ should be on the CIG tariff at all.

Stipulated Facts, par. 48. This relatively modest expenditure could have prevented the failure of the fuel oil backup system if it had been made on a more timely basis. By affirming the penalty, the Board can incentivize TCNJ, and other interruptible customers, to take the steps necessary to assure reliable operation of their alternative fuel systems before a failure occurs.

C. TCNJ Has Not Demonstrated That Payment of the Penalty Would Create a Hardship.

TCNJ also has not documented that payment of the penalty would create a hardship. N.J.S.A. 14:1-1.2(b)(2). The Amended Verified Petition cites TCNJ's status as a non-profit, public educational institution. Verified Amended Complaint, par. 35. This is insufficient to establish hardship. There is no documentation in the record that TCNJ does not have or cannot obtain the funds to pay the penalty. It is important to note that, as a State institution of higher learning, TCNJ has the resources of the State behind it. Most recently, for the current Fiscal Year, the Legislature passed and the Governor signed into law a budget of \$54.5 billion, including a surplus of \$8.3 billion. See, Press Release "Governor Murphy Signs Fiscal Year 2024 Budget into Law" (June 30, 2023). It has been over five years since the penalty was assessed. There is no basis in the record to conclude that TCNJ could not have obtained the funds needed to pay the penalty during that time, or that it lacks the ability to do so now.

II. The Penalty as Applied to TCNJ is Not Unjust or Unreasonable.

TCNJ's Verified Amended Petition includes a number of arguments to support its position that the amount of the penalty is "unjust and unreasonable." These arguments should all be rejected.

TCNJ argues first that penalty provisions in the CIG tariff are contrary to decisions holding that contractual penalty provisions are unenforceable. TCNJ ignores the fact that the penalty provision involved here are a condition of service that has been mandated by the Board

for all interruptible gas utility customers to protect the integrity of the GDCs' systems during periods of peak demand. October 2000 Order at 2. PSE&G was able to secure enough gas to maintain the integrity of its system during the January 4-8 interruption despite TCNJ's failure to interrupt on the two days when Extended Gas Service was unavailable. However, this does not mean the system was not at risk. If enough interruptible customers do not interrupt, there may be severe consequences such as curtailments or even shutdowns, causing economic damage and other hardships to customers who, unlike TCNJ, have paid for firm service. It is significant to understand the risks here. Residential customers, in temperatures in the teens and single digits, might have lost heating because there was insufficient gas. TCNJ's disregard for its obligations literally put lives at risk. The penalty provisions are in place to avoid such consequences. They are a proper exercise of the Board's authority under N.J.S.A. 48:2-23 and 48:3-3 to assure the continued provision of safe, adequate and proper service by the State's GDCs.

The decisions cited by TCNJ as disallowing penalties all involved contracts negotiated between two parties. Verified Amended Petition, par. 25-29. The Appellate Division's decision in Hotham v. Lucas, 460 N.J. Super. 308 (App. Div. 2019), holding that the "penalty rule" does not apply to invalidate a per-diem penalty for violation of a matrimonial settlement agreement that was incorporate in a judgement of divorce, is irrelevant here. The court recognized that a matrimonial settlement agreement was a contract, but held that the "penalty rule" did not apply in the matrimonial setting because of the strong public policy interest in deterring breaches of matrimonial settlement agreements. Id. at 321-22. Although different policy considerations are involved here, they are no less important. As reflected in the Board's October 2000 Order, the penalty provisions were mandated for all interruptible customers in order to deter tariff violations that could cause disruptions in a lifeline utility service when it is needed most.

The decisions addressing strict tort liability that are cited in paragraphs 43, 44, and 45 of the Verified Amended Complaint are also irrelevant here. There is nothing in the record to suggest that TCNJ's failure to interrupt was anything other than an intentional act.

Furthermore, contrary to TCNJ's argument, the amount of the penalty is not excessive under the circumstances. TCNJ's arguments appear to assume that an appropriate yardstick to measure the reasonableness of the penalty amount is the incremental cost incurred by PSE&G to supply the gas that TCNJ consumed during the interruption when Extended Gas Service was not available. Amended Verified Complaint, par. 30. This assumption ignores the potentially serious consequences of a failure to interrupt. A curtailment or outage could cause residential customers to lose heating as well as additional economic and other damages substantially exceeding the penalties collected from interruptible customers who fail to interrupt.

Further, TCNJ disregards the fact that, in effect, it used firm service without paying for it. Firm customers pay a premium to assure that gas will be available during periods of peak demand. Firm customers pay the higher rates for firm service year after year, even though the resources maintained by the utilities to assure that gas will be available may not be needed every year. Interruptible customers receive a "substantial economic benefit" in return for their agreement to interrupt when called upon to do so. October 2000 Order at 1. As noted in the Statement of Facts above, at the time of the interruption TCNJ was saving approximately \$1 million annually compared to the rates it would have paid for firm service. The penalty assessed by PSE&G was the equivalent of the incremental cost of a little more than two years of firm service based on the rates in effect at the time of the interruption. Rate Counsel respectfully submits that this is not an unfair penalty under the circumstances.

Contrary to the allegations in the Verified Amended Complaint, requiring TCNJ to pay the penalty will not result in a windfall to or unjust enrichment of PSE&G. Verified Amended complaint, par. 39, 40. PSE&G's BGSS customers have already been credited with 75% of the penalty, thus providing them with a measure of compensation for TCNJ's use of the resources that are paid for through BGSS charges. If the penalty is waived, ratepayers will have to pay back this amount, providing TCNJ with a windfall at BGSS customers' expense.

TCNJ also disregards the interest of the interruptible customers who have paid penalties or switched to a firm rate schedule in accordance with the terms of the applicable tariffs. Under N.J.S.A. 48:3-1, the rates and other terms and conditions under which utility service is provided may not be "unjustly discriminatory or unduly preferential" Granting a waiver to a single interruptible customer would undermine this fundamental principle of utility regulatory policy.

Paragraph 36, 37, and 38 of the Amended Verified Complaint cite some examples of tariff provisions that provide for lower interruptible penalties than those mandated in New Jersey. Preliminarily, tariffs from other States, or even other New Jersey utilities, are irrelevant. The CIG tariff is the tariff TCNJ agreed to and its terms are the ones under consideration here. TCNJ has been of the CIG tariff for over twenty-five years, and has received the benefit of a steeply discounted rate for that entire period. At no time prior to the 2012-2108 winter did TCNJ ever allege that there was an issue with the penalty provisions.

Moreover, the penalties mandated by the Board are not unique. As an example, under Baltimore Gas and Electric's tariff for Interruptible Large Volume Service - Gas Schedule IS, provides for significant penalties for customers who use gas during an interruption.³ Interruptible customers who do not comply with interruptions are charged a monthly Distribution

³ BG&E's Gas Service Tariff is available at:
<https://www.bge.com/MyAccount/MyBillUsage/Pages/GasServiceRatesTariffs.aspx>

Interruption Penalty for a total of 12 months. The amount of the monthly charge is the “Distribution Interruption Penalty Price” applied to the average hourly non-compliant usage during the interruption, times 24 hours, times the number of days in the month. Gas Schedule IS, section 3.4(a). The Distribution Interruption Penalty Price in effect during 2021, the earliest year shown on the current tariff, was \$0.4949 per therm. Id., Sec. 2. This formula if applied to TCNJ’s failure to interrupt would have resulted in a penalty of over \$2 million, paid out over a 12-month period.⁴ The waiver provisions in the BG&E tariff are also notable. Waivers are available, but they are limited to customers who demonstrate a good faith effort to reduce their usage and who substantially reduce their usage during the interruption. Id., Sec. 3.4(b).

Rate Counsel also submits if, as TCNJ alleges in paragraph 32 of the Verified Amended Complaint, it “had no idea as to what the penalty might be” when it used the gas, this was not due to a lack of available information. While the exact market prices used to determine the penalty were not known at the time of the interruption, information about the potential magnitude of the penalty was available to TCNJ. The penalty was determined by applying the “10 times” multiplier to a price of \$17.50 per therm for January 5, 2018 and \$6.50 per therm for January 6, 2018. Stipulated Facts, par. 38; Exh. J-11; Exh. J-24. These prices were in a range comparable to the price quoted by PSE&G for the Extended Gas Service that was available on January 4, 2018, i.e. \$16.46 per therm including a special delivery charge of \$1.50, indicating a market price of \$14.96 per therm without the special delivery charge. Exh. J-6. This specific information was in addition to the informal notice provided by PSE&G on January 3, 2018 interruptible customers failing to interrupt would be “subject to severe penalty for any natural

⁴ Based on the information in PSE&G’s penalty calculation, TCNJ used an estimated 11,540 therms during the first 24 hours when Extended Gas Service was not available, and 11,289 therms during the second 24 hours, for an hourly average of 475.6 therms. This amount, times 24, times the 365 days the BG&E penalty is in effect, multiplied by the \$0.4949 rate from the BG&E tariff, equals \$2,061,880.

gas consumed during this period.” Stipulated Facts, par. 21. The magnitude of the penalty should not have been unanticipated by TCNJ.

In addition, the Board should consider PSE&G’s contention that, at approximately 9:00 p.m. on January 5, 2018 TCNJ’s Director of Facilities was advised in a telephone call that TCNJ was burning penalty gas at a rate of approximately \$100,000 per hour. Stipulated Facts, par. 33. TCNJ does not deny that this telephone call occurred, only that it has no record of this or other communications during the interruption period about the magnitude of the penalty that was being incurred. Id. In any event, whether or not this specific communication did occur, it is clear that TCNJ was in communication with PSE&G during the interruption. Stipulated Facts, par. 31. If TCNJ needed information about the potential magnitude of the penalty, there is nothing in the record to suggest that it could not have requested that information from PSE&G.

III. The Board Should Order Payment of the Full Penalty Amount Without Further Deferral.

TCNJ’s requests for relief include a request for the Board to determine a “fair payment plan” for penalty. Verified Amended Petition, p. 16. TCNJ has not demonstrated a need for a deferred payment plan. The penalty was assessed more than five years ago. This should have been ample time for TCNJ to reserve the necessary funds needed to pay the penalty. As a public entity, TCNJ is exempt from late payment fees, and thus has benefitted from the delay in resolving this matter. PSE&G Tariff for Gas Service, Standard Terms and Conditions sec, 8.13. TCNJ has not established any justification to add to this already lengthy delay.

CONCLUSION

For the foregoing reasons, PetitionerTCNJ's request for a waiver and other relief should be denied.

Respectfully submitted,

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DATED: September 14, 2023

In the Matter of the Verified Petition of
The College of New Jersey for Relief
from a Penalty Assessed by Public
Service Electric & Gas Company
BPU Docket No. GC18111234

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