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October 5, 2023

**VIA ELECTRONIC DELIVERY**

Sherri L. Golden, Secretary  
New Jersey Board of Public Utilities  
44 South Clinton Avenue, 1<sup>st</sup> Floor  
P.O. Box 350  
Trenton, New Jersey 08625-0350

**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:

In accordance with N.J.A.C. 1:1-12.5 and with the procedural schedule established in this case, Public Service Electric and Gas Company ("PSE&G" or the "Company") hereby submits this letter brief in opposition to the motion of The College of New Jersey ("TCNJ", the "College", or the "Petitioner") filed September 14, 2023 ("TCNJ Motion"). In that motion, TCNJ requests that the New Jersey Board of Public Utilities (the "Board" or "BPU") issue a summary decision finding that the penalty assessed by PSE&G related to TCNJ's consumption of natural gas during a period of interruption in January 2018 was not just and reasonable, and is therefore unenforceable.

PSE&G notes that also on September 14, 2023, both the Company and the New Jersey Division of Rate Counsel ("Rate Counsel") filed motions for summary decision dismissing the Amended Petition filed by TCNJ and directing TCNJ to pay the full amount of the penalty, as required under the terms of PSE&G's gas tariff, plus appropriate interest.<sup>1</sup>

**Preliminary Statement**

In January 2018, TCNJ failed to follow the Board-approved tariff under which it receives service, and is therefore responsible for paying the penalty clearly provided for in that tariff. TCNJ continues to assert the same positions it has taken in its Amended Petition to avoid paying the penalty, but as already explained in PSE&G's and the Rate Counsel's motions for summary decision, their arguments are contrary to law and inconsistent with the facts in the record. TCNJ's motion should be dismissed, and PSE&G's and Rate Counsel's motions should be granted.

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<sup>1</sup> Tariff Gas Service B.P.U.N.J. No. 15 effective Jan 1, 2018, Sheet Nos. 107-111.

In its motion, TCNJ ignores substantial portions of the record, as well as legal arguments PSE&G made in this matter several months ago. Among other things, TCNJ ignores the Board's order establishing the penalty provision at issue and the purpose of that provision, which was to ensure the adequacy of gas supply to firm customers. The Board imposed the penalty provision on all New Jersey Gas Distribution Companies ("GDCs") so that their tariffs would incent behavior that ensures the continued availability of firm gas; TCNJ's claim that, after the fact, it is possible to calculate the actual cost incurred by PSE&G during the emergency, and that the penalty should be limited to that amount, is beside the point; the purpose of the tariff is to ensure that interruption requests are honored, not to compensate the utility for excess cost.

As PSE&G previously discussed in its Answer to TCNJ's Amended Petition, in light of the purpose of the tariff provision and the evidence in the record, TCNJ's arguments about liquidated damages clauses and strict liability should be dismissed. TCNJ continues to rely on caselaw discussing whether contract clauses in various private commercial contracts are enforceable "liquidated damages" provisions, or unenforceable penalties for breach. These cases are inapposite here, where the administrative agency has established a penalty for the purpose of dissuading breaches that could seriously impact public health, not as a means of estimating the non-breaching party's damages.

In its Answer, PSE&G also pointed out that the issue of strict liability, and TCNJ's lengthy case discussion of the subject, need only be addressed once TCNJ establishes, if it can, that it is without fault in respect of the tariff breach. Here, in light of the undisputed record evidence documenting TCNJ's practices and its failure to behave reasonably in operating and maintaining the cogeneration unit, there is no need for the Board to consider whether or not the tariff impermissibly imposes a strict liability standard.

Finally, the penalty provision at issue here was established in a broad stakeholder proceeding open to all interested parties, including all of the state's GDCs. TCNJ may not unilaterally and retroactively challenge the terms of the tariff under which it was receiving service in 2018, while other customers receiving service under that tariff have, abided by its terms and either paid the penalty, or avoided the penalty by moving off interruptible service.<sup>2</sup> The proper forum for challenging the tariff would be in a proceeding involving all stakeholders, and TCNJ's motion, as well as its Amended Petition, should be dismissed.

### **Argument**

#### **A. TCNJ Ignores The Purpose Of The Tariff, Which Is To Ensure The Adequacy Of Gas Supply To Firm Customers, Not To Provide Monetary Compensation**

PSE&G agrees with TCNJ that "[w]hat 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."<sup>3</sup> However, TCNJ completely ignores the Board's purpose in requiring

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<sup>2</sup> Stipulated Facts and Exhibits dated August 31, 2023 ("SFE"), at ¶ 41.

<sup>3</sup> TCNJ Motion, at 16.

that GDCs include in their tariffs a significant penalty for interruptible customers that fail to interrupt gas usage when called up to do so.

We note that during this proceeding TCNJ has ignored the Board Order requiring the penalty provision notwithstanding that PSE&G, nearly six months ago in its April 19, 2023 Answer to TCNJ's Amended Petition in this proceeding ("Answer"), pointed out that the penalty provision was imposed by the Board in I/M/O The Board's Review of Energy and Home Heating Oil Markets, BPU Docket No. GO00020088 (Order Requiring Tariff Changes, October 2, 2000).<sup>4</sup> In that case, following a legislative-type hearing, the Board required all New Jersey GDCs to modify their tariffs to impose a penalty on customers that benefit from a lower tariff rate in exchange for agreeing to accept utility interruption, but who fail to interrupt service when requested. The Board noted that those customers receive "substantial economic benefit" from reduced, interruptible rates, but was "concerned that [GDCs] continue to operate reliably." Regarding system reliability in particular, the Board stated that

[i]t is imperative to the integrity of the natural gas systems that interruptible customers abide by the terms and conditions of interruptible service tariffs. One way to provide added assurance that this will occur is for interruptible gas customers to maintain alternative fuel supplies to have them readily available for use.

Order Requiring Tariff Changes, at 2. "As a step to promote stability and reliability generally", the Board imposed several additional requirements, including the penalty provision that TCNJ now challenges. *Id.*, at 3-4.

Thus, TCNJ's insistence that the Board consider "whether the amount charged bears any reasonable relationship to the damages suffered by PSE&G or its other customers", and the fact that "PSE&G knows exactly how much gas was used by Petitioner during the interruption period, and also knows how much PSE&G needed to pay to procure that gas" are all red herrings.<sup>5</sup> The purpose of the tariff is "to promote stability and reliability generally", not necessarily to compensate PSE&G for its direct costs. The Board actually considered potential damages to all GDCs and all of their customers, particularly their firm customers, when establishing the industry-wide penalty provision, which is designed to incent behavior that ensures the continued availability of firm gas by ensuring that interruption requests are honored, not to compensate the utility for excess cost.

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<sup>4</sup> In light of TCNJ's failure to dispute PSE&G's characterization of the penalty provision's purpose, the remainder of this discussion of Energy and Home Heating Oil follows the discussion in PSE&G's Answer. This occurs several times in this letter brief, where TCNJ has completely ignored without acknowledging – or disputing – PSE&G's positions set forth clearly nearly six months ago in the Answer. While TCNJ is entitled to follow its own litigation strategy, in the event that TCNJ waits until its reply brief to respond for the first time to legal arguments that PSE&G made in the Answer, the Company reserves its right to file a sur-reply brief to respond to any newly-raised arguments. TCNJ should not have the right to submit its own sur-reply brief.

<sup>5</sup> TCNJ Motion, at 17, 19.

**B. In Light Of The Purpose Of The Tariff Provision And The Evidence In The Record, TCNJ's Arguments About Liquidated Damages, Penalties, And Strict Liability Are Inapplicable**

**a. TCNJ's Discussion Of Liquidated Damages And Penalties Is Inapplicable To The Administrative Context And The Facts Of This Case**

As they did in their Amended Petition, TCNJ assumes that the industry-wide penalty provision should be treated by the Board – and would be treated by a court -- like a private contract between two parties. Thus the College discusses, as it did in the Amended Petition, how “New Jersey courts” determine whether a contract clause “is an enforceable liquidated damages provision, as opposed to an unenforceable penalty for breach . . . .”<sup>6</sup>

And again, as in the Amended Petition, TCNJ has relied on case law from New Jersey and elsewhere in support of its belated assertion, more than two decades after the tariff’s adoption, that the penalty provision is an impermissible penalty for breach and is therefore not just and reasonable. However, none of the cases cited by TCNJ are remotely comparable to this case, where the challenged provision was imposed by the regulatory agency with jurisdiction over the subject matter, to prevent the precise situation for which TCNJ has been penalized, in order to protect the integrity of the natural gas delivery system.

By way of contrast, the cases cited by TCNJ involve liquidated damages terms in privately negotiated commercial agreements concerning, for example, a property lease,<sup>7</sup> an employment agreement,<sup>8</sup> membership in a country club,<sup>9</sup> and a commercial loan.<sup>10</sup> See TCNJ Motion, at 17-19. Those decisions generally concern whether the contractual liquidated damages at issue were reasonably related to the damages contemplated or actually incurred by the non-breaching party.

The private disputes discussed in those cases are irrelevant in this administrative context, where in furthering a broad policy goal the Board established a rule applicable to all GDCs and intended to protect their firm customers. In establishing the penalty, it was clear that the Board was concerned primarily about risk to the system if requests to interrupt are not honored.

TCNJ has not identified any prior cases in which a state agency or a court struck down application of a tariff provision as unreasonable where the purpose of the provision was to prevent the precise action requiring application of that provision. PSE&G is not aware of any precedent, and TCNJ has presented none, where a penalty provision was struck down as unreasonable notwithstanding the fact that every other customer to whom the provision applied had abided by it, some paying substantial penalties.<sup>11</sup> And TCNJ has presented no examples of cases where a

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<sup>6</sup> TCNJ Motion, at 18.

<sup>7</sup> Wasserman's Inc. v. Middletown, 137, N.J. 238 (1994)(involving a liquidated damages clause that would compensate the tenant for the landlord’s breach).

<sup>8</sup> Wassenaar v. Panos, 111 Wis. 2d 518 (1983).

<sup>9</sup> Westmount Country Club v. Kameny, 82 N.J. Super. 200, 205 (1964).

<sup>10</sup> CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 121 (App. Div. 2009) (involving a non-recourse carve-out clause in a mortgage note).

<sup>11</sup> SFE, ¶ 41.

penalized party successfully challenged a penalty where that party, as a result of delay associated with the challenge, was benefiting from discounted rates to the extent that in approximately two years, its savings exceeded the amount of the penalty.<sup>12</sup> While TCNJ, despite those savings, asserts that it is particularly egregious to assess the penalty “against a not-for-profit institution of higher education which is a component unit of the State of New Jersey,” there is no evidence in the record that TCNJ would be harmed if it were required to abide by the tariff, and there is also no evidence that PSE&G’s residential customers – the group most directly impacted by TCNJ’s refusal to abide -- are more capable of absorbing this loss than is TCNJ.<sup>13</sup>

Rather than present any relevant precedent, TCNJ relies, as they did in their Amended Petition, on I/M/O The Request By New Jersey American Water Company For A Temporary Waiver (“New Jersey American Waiver”), Docket No. WT21101160 (Order, January 12, 2022). PSE&G previously explained, in its Answer to the Amended Petition, that that case is distinguishable from this one:

In [the New Jersey American Waiver] case, Rutgers University and Princeton University were served under New Jersey American’s discounted OIW tariff, which provides that customers whose monthly consumption on an average daily basis exceeds a load factor of 1.2 times the last (rolling) 12 months average monthly consumption on an average daily basis for three (3) consecutive months, between April 1 and September 30 are to be removed from the discounted rate and are billed under Rate Schedule A-1 General Metered Service. When students at Rutgers University and Princeton University vacated campus at the outset of the COVID-19 pandemic in March 2020, the shift to online learning caused Rutgers’ and Princeton’s usage to decline. This had “an unanticipated impact on the load factor . . . used to determine” continuing eligibility for the discounted rate after students returned and water usage increased back to historic levels; during the billing months for June, July and August of 2021, both Rutgers and Princeton exceeded their load factor for three (3) consecutive months. Absent a waiver of the tariff condition, the result would have been the worst of both worlds for the Rutgers and Princeton – higher rates applied to higher usage – and a windfall for New Jersey-American, directly contrary to the intent of the tariff, which simply did not contemplate a temporary decrease followed by a return to historic usage, for reasons completely out of the customers’ control.

The reasoning in that case is not applicable here, where the Board expressly ordered the tariff provision for the purpose of protecting public health and safety under emergency gas supply conditions, the tariff includes a clearly stated penalty for violations, and the penalty is now being applied as intended under the plain language of the tariff.<sup>14</sup>

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<sup>12</sup> See SFE, ¶ 4; Answer, at 3-4.

<sup>13</sup> See PSE&G’s Answer, at 7. Note also that TCNJ’s suggestion that by enforcing the penalty, “the Board is automatically guaranteeing a windfall to PSE&G” is false, as TCNJ previously acknowledged. The SFE is clear that, while ER&T does receive a portion of the penalty payment, the majority of the penalty amount has already been credited to PSE&G’s BGSS customers, and would have to be retrieved from those customers to the extent the penalty is reduced or waived. SFE, ¶ 40.

<sup>14</sup> Answer to Verified Amended petition, at 11.

Now, rather than addressing these key distinctions or suggesting that PSE&G's reading of New Jersey American is incorrect in any way, TCNJ simply re-asserts its reliance on that case, where the Board did indeed waive the penalty. However, the fact that the Board properly granted a waiver in a prior case where applying the tariff would have led to an absurd, unintended result is no reason not to apply the tariff here, where the behavior penalized is precisely the type of behavior the Board sought to penalize when establishing the penalty provision in the first place.

**b. In Light Of Record Evidence Documenting TCNJ's Practices, There Is No Need For The Board To Consider Whether Or Not The Tariff Imposes Strict Liability**

Ignoring the well-developed record to which it has stipulated, TCNJ asserts toward the end of its motion that "[t]he 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."<sup>15</sup> Similarly, the College states that "the tariff in question here purports to be a strict liability penalty, with no consideration as to whether the PSE&G customer acted in good faith and reasonably, or in contrast with deliberate disregard for the requirements under the tariff . . . ."<sup>16</sup>

Yet common sense as well as the record are abundantly clear that (1) the emergency – extremely cold weather in early January requiring that TCNJ interrupt service – was easily predictable; and (2) TCNJ failed to act reasonably under the circumstances, which encompass more than just the period from January 4 to January 5, 2018. Indeed, the record is clear that TCNJ was on notice by no later than mid-2016 that potential upgrades to the aging cogen unit's controls, fuel system and starter system were required to improve plant reliability, yet that work was not performed.<sup>17</sup> As discussed in PSE&G's pending motion for summary decision and further below, there is substantial undisputed evidence that TCNJ did not act reasonably in operating the cogen unit.

TCNJ itself has always recognized that in order to establish that it is being held to a strict liability standard, the College must establish that it is blameless, and that the failure to interrupt was out of its reasonable control. In the Amended Petition, TCNJ asserts that at the time of the interruption event, "TCNJ had properly maintained and tested the back-up fuel oil system"; that TCNJ had "maintain[ed] and test[ed] their alternative fuel supplies in accordance with the terms of [relevant] maintenance and testing requirement[s]", that TCNJ had "compl[ied] with the intent of" those requirements; that TCNJ has "fully complied with" the behavioral standards the penalty provision are "intend[ed] . . . to incentivize . . . ."; and that the mechanical failure that occurred was "beyond TCNJ's ability to predict or control".<sup>18</sup> Presumably cognizant of the importance of establishing the College's blamelessness, in January 2019 Lori Winyard, TCNJ's Director of Energy and Central Utilities, executed an affidavit stating that "[p]rior to January 4, 2018, during

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<sup>15</sup> Motion, at 25.

<sup>16</sup> Id., at 17

<sup>17</sup> SFE, at ¶ 43 (citing Exhibit J-13 [TCNJ attachment TCNJ\_RCR\_1 Boiler & Machinery Evaluation 2016.pdf]).

<sup>18</sup> Amended Petition, at pp. 1-2, ¶ 35.

my tenure at TCNJ, there was never any failure of the performance of the back-up system during prior interruptions noticed by PSE&G”.<sup>19</sup>

However, the discovery in this case has made clear that each of the assertions in the Amended Petition, as well as Ms. Winyard’s assertion, are not supported. On April 13, 2018, FM Global, TCNJ’s property insurer, visited TCNJ as part of a loss investigation associated with the Cogen. FM Global identified the following negative loss factors: (1) the manufacturer recommended inspections and tests were not performed, (2) the manufacturer recommended spare parts for the level switch were not maintained, (3) there were no formal standard operating procedures (“SOPs”) and emergency operating procedures (“EOPs”) for the plant operators to follow, and (4) TCNJ lacked formal plans for freeze prevention.<sup>20</sup> Moreover, up to and including January 2018, TCNJ had no formal log of maintenance and testing recorded by the Cogen plant operators; in fact, TCNJ has no records that maintenance was performed on the day tank mechanism during the year preceding the January 2018 interruption that is at issue.<sup>21</sup> Similarly, in light of evidence developed during discovery regarding prior difficulties with the fuel oil delivery system, TCNJ has acknowledged that Ms. Winyard’s statement that the system had not failed before the January 5, 2018 event was not correct.<sup>22</sup>

Finally, TCNJ describes its actions – taken after the fact – to “explore the causes for the system failure”, and its ultimate decision to redesign the backup system at a total cost of \$88,000. TCNJ argues that these actions demonstrate that “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.”<sup>23</sup> Yet that is precisely what appears to have happened, and the relatively small amount of investment required to avoid the situation, if anything, makes even more clear that TCNJ had failed to perform reasonably in advance of the January 5, 2018 interruption.

Thus, as anticipated in PSE&G’s Answer to the Amended Petition, the lengthy discussion of New Jersey case law allegedly governing strict liability set forth in both the Amended Petition and now in TCNJ’s motion for summary disposition is utterly irrelevant.<sup>24</sup> As noted in PSE&G’s Answer, “the issue of strict liability need only be addressed once TCNJ establishes, if it can, that it is without fault in respect of the tariff breach.” Having failed to establish blamelessness, TCNJ’s challenge to the tariff as applied should be rejected.

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<sup>19</sup> See Exhibit J-4.

<sup>20</sup> A copy of the report is marked as Exhibit J-14. [2018 FM Global Loss Report, p. 6.] TCNJ does not dispute these findings.

<sup>21</sup> SFE, at ¶ 46 (citing RCR-TCNJ-11, PSEG-TCNJ-2(c)(iii) Revised Response). See also SFE, at ¶ 45 (citing [RCR-TCNJ-21, discovery conference]).

<sup>22</sup> SFE, at ¶¶ 12-14.

<sup>23</sup> Motion, at 24.

<sup>24</sup> See Amended Petition, at ¶¶ 42-48; Motion, at 22-24.

**C. The Proper Forum For Challenging The Tariff Would Be In A Proceeding Before The Board Involving All Stakeholders**

PSE&G cannot dispute TCNJ's assertion that "[f]acts and circumstances change, which can warrant reexamination of a rate previously thought to be just and reasonable." Indeed, PSE&G noted nearly six months ago that TCNJ is "permitted to request that the Board reconsider its prior order and the nature of the penalty provision going forward."

However, TCNJ may not unilaterally and retroactively challenge the terms of the tariff under which it was receiving service in 2018, while other customers receiving service under that tariff have, as noted above, abided by its terms and either paid the penalty, or avoided the penalty by moving off interruptible service.<sup>25</sup> TCNJ's characterization of the basis upon which the penalty is calculated (for which there is no evidence in the record), and its comparison of the penalty provisions in New Jersey GDCs' tariffs with those from other states, could be considered in an industry-wide proceeding.<sup>26</sup> Those self-serving assertions, however, are no basis to allow TCNJ to retain its current windfall, that is, to allow the College to continue to enjoy a discounted interruptible rate and not pay the penalty it has incurred.

**Conclusion**

In light of the foregoing, PSE&G respectfully requests that the Board deny TCNJ's motion for summary disposition. In addition, for the reasons stated herein and in PSE&G's motion to dismiss pending before the Board, the Amended Petition should be dismissed.

Respectfully submitted,



Matthew M. Weissman

cc: Service List

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<sup>25</sup> See Exhibit J-12.

<sup>26</sup> For example, TCNJ states, with no record evidence whatsoever and more than 20 years after the Board adopted the Gas Daily publication as the basis for calculating the penalty, that "there have been instances where third parties were found to have engaged in actions designed to manipulate the index for their own good." Motion, at 19. See also Motion at 19-21 (regarding provisions in other states).