STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

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	))))))	DOCKET NO. GC19111234

BRIEF OF THE COLLEGE OF NEW JERSEY IN OPPOSITION TO MOTIONS FOR SUMMARY DISPOSITION OF PSE&G AND THE DIVISION OF RATE COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATUTES

REGULATIONS

CONSTITUTIONAL PROVISIONS

INTRODUCTION

This matter arises out of the Petition brought before the Honorable Board of Public Utilities (the "Board") by The College of New Jersey (hereinafter "TCNJ" or "Petitioner"), seeking a ruling by the Board that a penalty assessed by Public Service Electric and Gas ("PSE&G") of approximately $2.4 million related to the consumption of natural gas by TCNJ during a period of interruption in January 2018 is at odds with the statutory requirement that all rates charged by utilities such as PSE&G be just and reasonable.

LEGAL ARGUMENT

I. LEGAL STANDARD FOR SUMMARY DECISION.

N.J.A.C. § 1:1-12.5 provides as follows:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The Supreme Court of New Jersey, in *In re Uniform Admin Procedure Rules*, 90 N.J. 85, 106 (1982), held that the summary decision rule, N.J.A.C. 1:1-12.5, is "indeed essential to the proper conduct of administrative hearings in contested cases." The New Jersey Appellate Division, in *IMO Robros Recycling Corp*., held that "[a] contested matter can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular decision is required as a matter of law." 226 N.J. Super. 343, 350 (App. Div. 1988).

Here, as discussed more fully below, the undisputed material facts indicate that, as a matter of law, this Board should issue an Order finding that the penalty assessed by PSE&G is not just and reasonable.

II. RATE COUNSEL'S MOTION FOR SUMMARY DECISION SHOULD BE DENIED.

Rate Counsel attempts to portray TCNJ as a bad faith actor advancing an unreasonable waiver request. The Board cannot rule in favor of Rate Counsel on this issue, because TCNJ disputes the inferences that Rate Counsel would have the Board draw from the stipulated facts. Moreover, Rate Counsel's arguments are without merit as a matter of law. Application of the relevant legal standards demonstrates that TCNJ is entitled to an exception under the specific and strict circumstances of the instant dispute.

1. As Applied to TCNJ, the PSE&G Tariff Is An Unjust And Unreasonable Penalty.

Rate Counsel begins its argument by, in part, conceding as it must the language of N.J.A.C. 14:3-1.3(d), which states in relevant part that public utilities "shall operate in accordance with [their] tariff[s] at all times, **unless specifically authorized in writing by the Board to do otherwise**." (emphasis added). The Board is permitted to grant waivers, "**in accordance with the general purpose and intent of its rules**", in a number of circumstances, including but not limited to situations in which "full compliance with the rule(s) would adversely affect . . . the interests of the general public . . ." N.J.S.A. 14:1-1.2(b)(1) (emphasis added). In order to obtain such a waiver, the party seeking same must 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", along with supporting documentation. N.J.S.A. 14:1-1.2(b)(2). While Rate Counsel contends that TCNJ does not meet these criteria, the

record in this matter establishes that TCNJ is in fact entitled to a waiver under the specific circumstances presented here.

By its terms, 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, and with no consideration as to whether the amount charged bears any reasonable relationship to the damages suffered by PSE&G or its other customers. The tariff is therefore no different from contract penalty clauses that New Jersey courts have considered for many years, and that have been denied enforcement when they bear no relationship to the damage that flows from a purported breach of contract.

TCNJ's opening brief comprehensively analyzed New Jersey law related to the imposition of contractual penalties and how it applies to the CIG penalty here. See TCNJ opening brief at 17-22.

Under the controlling case law, the existing tariff provision, at least as applied in the present case, is manifestly unreasonable in several respects. First, the actual damages from a breach in this case are decidedly not difficult to measure, as PSE&G knows exactly how much gas was used by Petitioner during the interruption period, and also knows exactly how much PSE&G needed to pay to procure that gas (assuming that all gas procured for TCNJ's benefit was the highest price paid by PSE&G over the period in question). In contrast, the penalty 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 and which therefore prevents the Board from verifying the accuracy of the results reported in Gas Daily. The price in question is not published until after the days of interruption have already passed, meaning when TCNJ was forced to decide not to continue its interruption, it had no idea as to what the penalty might be.

In addition, 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. As the D.C. Circuit concluded when reviewing an agency's use of a seven percent factor, the particular number was found to be arbitrary and capricious when the only justification was that it was "reasonable." See *San Antonio, Tex. v. United States*, 631 F.2d 831, 852 (D.C. Cir. 1980) ("There is nothing in the record in the way of findings, evidence, or rationale to support the seven percent solution or any percentage solution. The Commission's general allusion to the need to consider the revenue requirements of the carriers and the economics of differential pricing is so broad as to be meaningless as a standard this rationale could be put forth just as readily in an attempt to justify a 1%, 21%, 45%, or even a 99% additive. The Commission here defends its action on the ground that adoption of the appropriate additive involves a policy judgment that is not susceptible to precise quantification. Concededly the problem is a difficult one, but that does not excuse the Commission from articulating 'fully and carefully the methods by which, and the purposes for which, it has chosen to act.'").

Indeed, Rate Counsel outright admits that the CIG penalty is an unenforceable punishment based on New Jersey common law. As Rate Counsel describes in its brief, the CIG penalty "**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**." See Rate Counsel's Brief, pages 13-14 (emphasis added). In other words, Rate Counsel is conceding that the purpose of the tariff provision is to impose a

punitive penalty that is inconsistent with the statutory requirement that all tariff provisions be just and reasonable.

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 that led to the assessment of the penalty. Indeed, the failure to interrupt which serves as the inciting incident for these proceedings was a one-time episode that had never occurred before, and has never occurred since.

In sum, 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 guaranteeing a windfall to PSE&G and its BGSS-I suppliers, which include PSE&G Power. The penalty rate being assessed by PSE&G at present is also far outside the norm of other energy providers operating in this region of the country. 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, the record does not disclose that there are actually any customers who take TSG-NF plus BGSS-I service. This tariff provision is thus meaningless in terms of providing comfort to CIG customers.

Contrary to Rate Counsel's framing of this litigation, the notion that TCNJ is "seek[ing] to escape payment of the penalty" is fundamentally inaccurate. TCNJ has represented multiple times throughout these proceedings that it is fully willing to make sure that PSE&G is made whole by TCNJ's failure to interrupt, and that it is not opposed to making additional penalty payments as a general concept; TCNJ's only objection is that there is no sound support in either public policy or

statute for requiring TCNJ, a not-for-profit component unit of the State of New Jersey, to pay such an exorbitant, unjust, and unreasonably penalty seemingly designed solely for the purpose of unjustly enriching PSE&G and other related parties.

Accordingly, the Board should find that TCNJ is entitled to a waiver of the penalty at issue here.

2. TCNJ's Requested Waiver Would Not Undermine The Purpose Of The Penalty Provisions.

Rate Counsel next argues that TCNJ's requested waiver would somehow undermine the purpose of the penalty provisions here, despite the fact that such a waiver would be based on the extremely specific, narrow circumstances at issue in the present case and would therefore not be generally applicable.

Much is made in Rate Counsel's motion papers of the process by which the current CIG penalty was drafted, as well as the policy rationales for the imposition of such an admittedly burdensome, onerous, and unreasonable penalty rate. As Rate Counsel describes in its brief, the CIG penalty "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**." See Rate Counsel's Brief, pages 13-14 (emphasis added). Setting aside the fact that this statement constitutes an admission that the CIG penalty is an unjust and unreasonable punishment inconsistent with the public policy of this state, the fact that TCNJ is seeking a narrow exemption from the full force of the CIG penalty based on the specific circumstances present here would do nothing to diminish the punitive effect of the CIG penalty, a penalty which is apparently so important to utilities like PSE&G that they will engage in protracted litigation before the Board solely to ensure a public university is forced to pay it.

As outlined plainly in the facts on record here, and as explained in detail in TCNJ's opening brief, TCNJ in no way acted in bad faith, with malice, with intent to deceive, or with intent to escape responsibility for compensating PSE&G for failing to interrupt. It is important to recall the specific facts to which the parties have stipulated here in order to assess the likelihood of similar facts repeating themselves in the future, therefore setting the likelihood that a waiver for TCNJ here would provide some kind of precedential value for future bad actors to abuse.

Based upon the facts in the record, it is clear that a waiver on behalf of TCNJ under the specific circumstances here would have an exceedingly small, if not nonexistent, chance of creating any precedent which future bad faith actors could rely upon to escape payment of the unjust and unreasonable CIG penalty. Contrary to Rate Counsel's hyperbolic rhetoric on page 14 of its Brief, granting TCNJ a waiver here would not "undermine the effectiveness of the penalty provisions statewide", allowing interruptible customers to "delay and potentially avoid payment of penalties by asserting that their failure to interrupt was justified." The payment of penalties would not "become flexible obligation[sic] that could be delayed and potentially avoided by petitioning the Board for a waiver", as Rate Counsel contends on page 14 of its Brief. Further, if TCNJ were per se not permitted to seek a waiver of the CIG penalty based on these circumstances, it would render the provisions of N.J.S.A. 14:1-1.2(b) essentially meaningless, as extreme circumstances such as these are the precise reason why the Board is permitted to relax its own rules on occasion.

Accordingly, because TCNJ's waiver would not create a harmful precedent which would render the unjust and unreasonable CIG penalty meaningless, the Board should deny Rate Counsel's motion and instead grant TCNJ's motion.

3. Rate Counsel's Argument As To Hardship, Raised For The First Time At This Late Stage, Is Unavailing.

Rate Counsel next attempts to introduce an entirely new argument as to the purported nonexistence of any hardship that would inure to TCNJ should it be forced to pay the unjust and reasonable CIG penalty. Not only is this argument not part of the relevant analysis which must be conducted by the Board here, it actually weighs in favor of TCNJ even if it were.

Rate Counsel first contends, rightly that "there is no documentation in the record that TCNJ does not have or cannot obtain the funds to pay the penalty." Rate Counsel's Brief, page 20. This is true, but what Rate Counsel fails to mention is that there is nothing in the record at present for the sole reason that no party has raised any argument as to financial hardship prior to the filing of Rate Counsel's motion papers. In order to supplement the record, therefore, TCNJ is producing alongside the instant brief a motion to supplement the record to introduce the Certification of Richard Schweigert, TCNJ's interim Treasurer ("Schweigert Cert."). As detailed in the Schweigert Cert., the financial hardship that would be suffered by TCNJ were it forced to pay the CIG penalty as currently assessed would be immense. Like virtually all public institutions of higher education, the COVID pandemic and subsequent inflation have had a devastating impact on TCNJ. Its budgets have been significantly reduced, and its reserves have still fallen below normal levels. Its Board is considering further operating budget reductions that would enable it to add $15 million to its depleted reserves. To pile another $2.4 million on top of that would require increases in tuition or slashes in scholarships and/or programs that the students and professional staff at TCNJ can ill afford.

Rate Counsel also makes the baseless and uninformed assumption that "TCNJ has the resources of the State behind it" based on nothing more than the fact that it was awarded a budget of $54.5 million in for fiscal year 2024. As detailed in the Schweigert Cert., however, the State

appropriation is only a fraction of TCNJ's operating budget for fiscal year 2024, which is already almost entirely spoken for, meaning the hardship that would be caused by forcing TCNJ to pay the CIG penalty as currently assessed would be immense.

Accordingly, because the hardship on TCNJ would be immense should it be forced to pay the current unjust and unreasonable CIG penalty, Rate Counsel's motion should be denied and TCNJ's motion should be granted.

4. The Penalty As Applied To TCNJ Here Is Unjust And Unreasonable.

Rate Counsel finally asserts that TCNJ's arguments regarding the unjust and unreasonable application of the CIG penalty as applied to TCNJ should be rejected. Rate Counsel's arguments are unavailing, however.

Rate Counsel concedes on page 21 of its Brief that "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". (emphasis added). As noted above however, despite the fact that PSE&G was comfortably able to secure enough gas to maintain the integrity of its system during the period in which TCNJ failed to interrupt, PSE&G nevertheless denied without explanation the availability of CEG service to TCNJ during the period of interruption. As a result, even though CEG service is offered at PSE&G's discretion, an abuse of that discretion (which is what occurred here) would be inconsistent with PSE&G's statutory obligation to offer safe, adequate, and proper service at just and reasonable rates. PSE&G has declined to provide sufficient details that would enable the Board to fully evaluate this issue.

Rate Counsel's hypothetical strawman arguments concerning a scenario in which "enough interruptible customers do not interrupt", which "may [cause] sever consequences to customers . . . have paid for firm service" is nothing more than a fiction. See Rate Counsel Brief, page 21. Simply put, nothing of the sort occurred here, nor was anything of the sort at risk of occurring

here. If it were, and PSE&G was perched precariously on a knife's edge and unsure of whether it would have had enough gas to maintain its system in light of TCNJ's failure to interrupt, then PSE&G would have made sure that everyone involved in these proceedings knew about it. Instead, PSE&G has never once asserted that TCNJ's failure to interrupt actually put any aspect of its system at risk. PSE&G has never once asserted that any of its residential customers were in fact at risk of losing heating during TCNJ's failure to interrupt, as Rate Counsel invents on page 21 of its Brief. Rate Counsel's heavy-handed assertion that "TCNJ's disregard for its obligations literally put lives at risk" is therefore nonsensical and not based in any sort of reality here. See Rate Counsel Brief, page 21. Again, if actual lives were at risk as a result of TCNJ's failure to interrupt, PSE&G would have made it the central focus of their arguments in these proceedings, yet they have not. Further, this argument from Rate Counsel once again wholly disregards the lives of each and every individual on TCNJ's campus during the failure to interrupt, who would have been without heat entirely for 48 hours "in temperatures in the teens and single digits", as Rate Counsel repeatedly emphasizes in its brief. See Brief, page 21. Rate Counsel does not explain why the real risk to these innocent lives had TCNJ interrupted is any less serious or relevant than the nonexistent risk to hypothetical residential customers of PSE&G who were not affected by these events in the slightest. TCNJ has also never disputed that its failure to interrupt was an intentional act, meaning Rate Counsel's attempts to use this fact as a sword in favor of its arguments are ineffective.

Next, Rate Counsel further belies the unreasonableness of the CIG penalty by writing that "[t]he 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" before declaring that "this is not an unfair penalty under the circumstances." See Rate Counsel Brief,

page 22. Assessing more than the cost of two years of firm service for a failure to interrupt which lasted a mere two days could not be more ludicrously disproportionate to any purported harm caused by the failure to interrupt; this is compounded even more by the facts that, again, PSE&G was able to maintain the integrity of its system with no issue, there was never any risk of any other PSE&G customers losing heat, and TCNJ did the best it could to negotiate a solution with PSE&G despite those attempts being denied at every turn.

Rate Counsel also makes PSE&G's arguments for it regarding the windfall the utility will receive should the entire penalty amount be assessed here. Rate Counsel claims that, because PSE&G's BGSS customers have already been credited with 75% of the penalty, if the penalty is waived they will have to pay back that amount and therefore "provid[e] TCNJ with a windfall at BGSS customers' expense." See Rate Counsel Brief, page 23. This argument ignores the fact that to subsidize one group of customers with a confiscatory and punitive charge imposed on a single customer is *a priori* an example of an unjust and unreasonable penalty. Rate Counsel's tautological argument that the penalty is reasonable compensation to BGSS customers can be countered by taking the argument on page 23 of its Brief and simply reversing it: "If the confiscatory and punitive penalty is not waived, ratepayers will receive a windfall at TCNJ's expense." Further, based on recent PSE&G filings, the budget for BGSS revenue is on the order of one billion dollars per year, so any benefit to ratepayers from the unjust and unreasonable penalty is ultimately inconsequential. See Petition in Docket GR22060363, Item 7, page 4 of 10.

The argument that "[g]ranting [TCNJ] a waiver . . . would undermine [the principle that rates and other utility service terms and conditions may not be unjustly discriminatory or unduly preferential]" is also unavailing. See Rate Counsel Brief, page 23. This is simply a differently-worded regurgitation of Rate Counsel's earlier argument that the penalty is some kind of ironclad

law which cannot be altered or amended. Again, as described above, the Board is empowered to relax or modify any of its rules on a case-by-case basis and TCNJ meets the criteria for doing so here.

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. TCNJ was also, as Rate Counsel concedes, "in communication with PSE&G during the interruption", keeping it apprised of the situation and attempting to receive a reasonable accommodation based on the extreme and unexpected situation in which the college found itself. Of course, as the record makes clear, PSE&G was not concerned about the integrity of its system at that time; if it were, it could have simply unilaterally shut off TCNJ's service when it learned that TCNJ planned to continue burning gas during the interruption period. Instead, obviously recognizing that such a scenario could not come to pass, PSE&G allowed TCNJ to continue burning gas in order to protect the lives of the people on campus during the extreme cold temperatures of the interruption period. The simple truth here 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.

Accordingly, because the unjust and unreasonable CIG penalty is being applied as against TCNJ in a manifestly unreasonable manner, Rate Counsel's motion should be denied and TCNJ's motion should be granted.

III. PSE&G'S MOTION FOR SUMMARY DECISION SHOULD BE DENIED.

In addition to Rate Counsel's motion meriting denial on the merits, the motion for summary decision brought by PSE&G should also be denied in its entirety.

1. The Benefit of the CIG Rate Does Not Justify The Unjust and Unreasonable Penalty Being Assessed Here Against a Unit of New Jersey's State Government and TCNJ Has Never Denied That It Intentionally Failed To Interrupt Despite the Fact that the Circumstances Leading to that Decision Were Beyond Its Control.

PSE&G begins its legal argument by laying out the regulatory history of the CIG penalty, which is not in dispute. It is also not in dispute that TCNJ intentionally failed to interrupt during the relevant interruption period due to the fact that an interruption would have put the lives of everyone on campus at risk and could have caused catastrophic property damage to the college's infrastructure. Nor is it in dispute that TCNJ should be responsible for paying *some* penalty as a result of its failure to interrupt. The sole question at issue here is whether the CIG penalty, *as applied in this specific circumstance*, is unjust and unreasonable such that TCNJ should receive a waiver of said penalty. As mentioned above, TCNJ has an unblemished record of interruption both before and since the event at issue in these proceedings, meaning the benefits of TCNJ being grandfathered into interruptible status are irrelevant to the extent PSE&G uses them to support their argument here. TCNJ receives the benefit of interruptible status because it has always demonstrated compliance with the requirements of same outside of one isolated 48-hour incident.

PSE&G next contends that TCNJ bears "at least some responsibility" for its failure to interrupt service in 2018. See PSE&G Brief, page 8. TCNJ does not dispute this. The question for the Board to resolve is what would be just and reasonable under the circumstances.

2. TCNJ is not Responsible for PSE&G's Unilateral Decision to Accrue the Penalty as a Receivable Prior to the Resolution of these Proceedings.

The last formal argument made by PSE&G in its Brief is that TCNJ should be held responsible for PSE&G's own unilateral decision to flow the penalty amount through to PSE&G's BGSS customers in its 2018-2019 BGSS proceeding. According to PSE&G, if a waiver were granted to TCNJ, these transactions would be reversed, which would require PSE&G's BGSS-RSG customers to pay an increase on their bills to pay back the credit they already received based on PSE&G's assumption that TCNJ would be required to pay the entire penalty amount.

This "problem" is one of PSE&G's own creation and not the responsibility of TCNJ. First, while the amount at issue is material to TCNJ, it is not material to PSE&G's budget for BGSS supply.[1] Second, the argument that the receivable has already been accrued is a "problem" created unilaterally by PSE&G's decision to accrue the revenue when it knew the penalty was in the process of being challenged. Instead, PSE&G should have waited to accrue the penalty until such time as the Board determined what a just and reasonable penalty should be, at which time TCNJ would pay same (which TCNJ has never argued it would or should not do) and PSE&G's ratepayers would have received the benefit of it (75% of the just and reasonable penalty) at that time. PSE&G now instead wants TCNJ to essentially cover for its own hastiness by paying the full penalty and retroactively causing there to be "no harm, no foul". As noted above, TCNJ should not be forced to subsidize PSE&G's mistake simply because it chose to act as if it had already won these proceedings before they had even truly begun.

Accordingly, because TCNJ should not be held responsible for PSE&G's unilateral decision to flow through the penalty amount to its customers more than three years prior to any

[1] See petition in Docket GR22060363, Item 7, page 4 of 10.

decision being made in these proceedings, PSE&G's motion for summary decision should be denied.

IV. PSE&G'S REQUEST FOR INTEREST SHOULD BE REJECTED OUTRIGHT, AS TCNJ IS A STATE GOVERNMENT ENTITY.

In its Third and Fourth Requests For Relief, PSE&G contends that it should be entitled to interest in addition to the unjust and unreasonable CIG penalty. PSE&G provides no legal support for this request, nor does PSE&G even attempt to reckon with the fact that TCNJ is a state government entity and, as a result, interest cannot be imposed upon it here.

NJSA 48:3-2.3 provides that "A late payment charge shall not be approved for a rate schedule applicable to a State, county or municipal government entity or any residential ratepayer." N.J.A.C. 14:3-7.1(e) provides the same.

Further, the very PSE&G tariff at issue here provides as follows:

> Late Payment Charge: A late payment charge at the rate of 1.416% per monthly billing period shall be applied to the accounts of customers taking service under all rate schedules contained herein except for Rate Schedule RSG. **Service to a body politic will not be subject to a late payment charge.** The charge will be applied to all amounts billed including accounts payable and unpaid finance charges applied to previous bills, and will not be applied sooner than 25 days after a bill is rendered, in accordance with N.J.A.C. 14:3-7.1(e). The amount of the finance charge to be added to the unpaid balance shall be calculated by multiplying the unpaid balance by the late payment charge rate. When payment is received by Public Service from a customer who has an unpaid balance which includes charges for late payment, the payment shall be applied first to such charges and then to the remainder of the unpaid balance.

See PSEG Tariff, Section 9.12 (emphasis added), available at https://nj.pseg.com/aboutpseg/regulatorypage/electrictariffs.

TCNJ, as a public college, is a state government entity. To the extent that TCNJ's status as a state government entity is not self-evident, there is significant support for this contention in law and fact. In the matter of *Maliandi v. Montclair State University*, the Third Circuit articulated

a three-factor test for determining whether a public college or university qualifies as an "arm of the state":

> (1) the funding factor: whether the state treasury is legally responsible for an adverse judgment entered against the alleged arm of the State; (2) the status under state law factor: whether the entity is treated as an arm of the State under state case law and statutes; and (3) the autonomy factor: whether, based largely on the structure of its internal governance, the entity retains significant autonomy from state control.

845 F.3d 77, 83 (3d Cir. 2016) (citing *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989)). In *Maliandi*, the Third Circuit found that Montclair State University qualified as an "arm of the state" for the purposes of Eleventh Amendment immunity under state law and the Family Medical Leave Act.

The analysis of the *Maliandi* factors with respect to TCNJ here is essentially identical as how they were applied in that case to Montclair State. While the state treasury is not legally responsible for any adverse judgments entered against TCNJ, it was similarly not responsible for any adverse judgments entered against Montclair State; despite this, the *Maliandi* court still held that the weight of the other two factors overwhelmingly favored classifying Montclair State as an arm of the state. Like Montclair State, TCNJ is subject to several statutes that are applicable only to state government entities; these statutes include OPRA, the Administrative Procedures Act, the State College Contracts Law, the Open Public Meetings Act, the State Tort Claims Act, the civil service laws, and the Contractual Liability Act. TCNJ employees also participate in the NJ State Health Benefits Program and the Public Employees' Retirement System and, in most cases, are subject to the State's administrative procedure and civil service laws.

As to the autonomy factor, the *Maliandi* court noted that where "the New Jersey code . . . imposes sufficient constraints on [a college's] autonomy", this factor may be resolved in favor of the college. As with Montclair State University in *Maliandi*, "[t]he Governor looms large in the

affairs of New Jersey state colleges." 845 F.3d at 97. Similar to Montclair State University in *Maliandi*, "[a]ll members of the Board of Trustee are appointed by the governor and confirmed by the state senate" for TCNJ. *Id.* Further, "the Governor is statutorily designated as the public 'employer' of all college employees, which vests him with the sole power to collectively bargain on their behalf". *Id.* Identically to Montclair State University in *Maliandi*, "the Secretary of Higher Education, a member of the Governor's cabinet, has authority to issue master plans for higher education in the State, license and accredit the institutions, impose ethics rules for them, approve certain new academic programs, review budget requests, and issue regulations relating to licensure, outside employment, tuition, personnel, tenure, and retirement programs." *Id.* TCNJ also "must comply with certain limitations on their ability to make deposits in financial institutions absent security from the institution, . . . restrict their government relations and lobbying activities according to statutory bounds, . . . and have their contractual obligations tied to the state coffers under the Contractual Liability Act" *Id.* at 98. TCNJ is also "subject to significant reporting requirements and rules for internal governance.". *Id.* All of the foregoing were sufficient for the Third Circuit to classify Montclair State University as an arm of the state and, as a result TCNJ should be considered one as well.

Finally, N.J.S.A. 59:13-8 provides that, with regard to claims against public entities,

> **No interest shall accrue prior to the entry of judgment** in a **court of competent jurisdiction**, except that the court, in its discretion, may award prejudgment interest on the whole or part of a judgment arising out of or relating to claims for the construction or installation of improvements to real property in accordance with principles of equity.

(emphasis added). Here, as TCNJ is a public entity, and no judgement has been entered against it in a court of competent jurisdiction, PSE&G is not entitled to interest of any kind.

Accordingly, because TCNJ is an arm of the state, PSE&G's request for interest should be denied.

V. ALTERNATIVELY, GENUINE ISSUES OF MATERIAL FACT EXIST WHICH PRECLUDE THE MOTIONS FOR SUMMARY DECISION BY BOTH RATE COUNSEL AND PSE&G FROM BEING DECIDED AT THIS STAGE.

Finally, while the Board may dispense with the motions for summary decision filed by both Rate Counsel and PSE&G on the merits at this time, even if the Board is not convinced they should be denied on the merits then they should nevertheless be denied as a result of the numerous genuine issues of material fact they raise.

As to both Rate Counsel's and PSE&G's motions, a number of genuine issues of material fact exist, including but not limited to: whether the true extent of TCNJ's maintenances practices leading up to the 2018 failure to interrupt and whether they were sufficient and reasonable under the circumstances; whether the failure of TCNJ's system was beyond its ability to predict or control; whether the failure to interrupt was unavoidable; whether any of the foregoing contributed to damages suffered by PSE&G and/or its customers; and what damages, if any, were actually suffered by PSE&G and/or its customers.

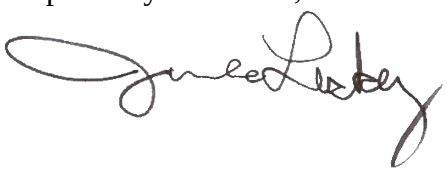
TCNJ endeavored to narrowly tailor these proceedings to avoid consideration of these questions of fact. Indeed, TCNJ has never once claimed that it should be held to have done nothing wrong and that it deserves to pay no penalty whatsoever. TCNJ's aim with regard to these proceedings has been at all times to obtain relief from the unjust and unreasonable application of the CIG penalty in these specific circumstances, as assessed against a taxpayer-funded arm of the state. TCNJ has never argued that it should not have to make PSE&G whole, nor has it argued that it should not have to pay *any* penalty whatsoever. Despite TCNJ's efforts to restrict the instant dispute to one that is purely legal in nature, both Rate Counsel and PSE&G have taken it upon themselves to make this case far more broad, arguing that TCNJ is a bad faith actor that caused

the failure to interrupt by way of its own acts and omissions and is now trying to manipulate its way into paying no penalty whatsoever. In doing so, however, both Rate Counsel and PSE&G have essentially defeated their own motions, because the only way for them to succeed on those motions as written would be for the Board to resolve the aforementioned genuine issues of material fact, which is inappropriate at this stage.

Accordingly, should the Board not be convinced that the motions for summary decision filed by both Rate Counsel and PSE&G should be denied on the merits at this time, the Board may nevertheless deny both motions due to the existence of the aforementioned genuine issues of material fact inherent to same.

WHEREFORE, the motions for summary decision filed by PSE&G and Rate Counsel should be denied in their entirety and the Board should grant TCNJ's motion for summary decision to confirm that the penalty assessed by PSE&G is not just and reasonable, as required by the Public Utility Act.

Respectfully submitted,



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