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VIA ELECTRONIC DELIVERY
Sherri L. Golden, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 1st 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 reply to the brief filed on October 5, 2023 by The College of New Jersey ("TCNJ", the "College", or the "Petitioner") ("TCNJ Opposition") opposing the motions for summary disposition filed on September 14, 2023 by PSE&G ("PSE&G Motion") and the New Jersey Division of Rate Counsel ("Rate Counsel"). In its motion, PSE&G requested that the Board find and determine that enforcement of the penalty amount billed by PSE&G is just and reasonable, dismiss TCNJ's Amended Petition with prejudice, and direct TCNJ to make payment in accordance with the terms set forth in the PSE&G Motion.

Preliminary Statement

In its brief opposing PSE&G's and Rate Counsel's motions for summary disposition, TCNJ acknowledges for the first time that it "bears 'at least some responsibility' for its failure to interrupt service in 2018," and offers to "mak[e] additional penalty payments as a general concept." This admission undermines the College's challenge to the tariff as an unenforceable "strict liability" provision, and also undermines the argument that the College is immune from paying any interest. Since TCNJ has failed to pay *any* portion of the penalty despite its admission of some responsibility, equitable principles dictate that interest should be due on at least the amount ultimately determined to be due, since the penalty was incurred in January 2018.

Second, TCNJ's attack on PSE&G's reasonable decision to credit customers with the benefit of the penalty in 2018 is a red herring. Whether TCNJ seeks to claw back funds already credited to customers, or to prevent PSE&G from crediting customers going forward (as TCNJ

presumably believes they should have been in the position to do), the result is identical: a customer that improperly failed to interrupt would benefit at the expense of firm residential customers.

Third, TCNJ's repeats its claims that the penalty is unjust and unreasonable as applied, again ignoring the purpose of the tariff provision and relying on inapplicable case law relating to private commercial arrangements rather than industry-wide rule-making. Notwithstanding PSE&G's repeated demonstrations that TCNJ's analysis is out of place, the College continues to present precisely the same argument without acknowledging, let alone responding to, PSE&G's position.

Fourth, TCNJ's suggestion that this long-pending matter should now be continued for further development of the record is self-serving and inconsistent with basic principles of administrative law. The very facts that TCNJ suggests are in dispute (e.g., the "true extent" of TCNJ's maintenances practices leading up to the failure to interrupt, and "whether they were sufficient and reasonable under the circumstances") are things that TCNJ – the petitioner in this case, with the burden of proof – could have and should have established on the record already. It is well-past time to end this dispute, dismiss the Amended Petition, and direct TCNJ to pay the reasonable penalty due and owing under these circumstances.

Argument

A. TCNJ's Belated Admission Of Fault Undermines Its Tariff Challenge And The Claim That It Is Immune From Paying Interest

In its opposition to PSE&G's motion for summary disposition, TCNJ begins with an admission that is not surprising in light of the record evidence: TCNJ "does not dispute" that it "bears 'at least some responsibility' for its failure to interrupt service in 2018."[1] This position, asserted by TCNJ for the first time in the TCNJ Opposition, is distinctly different than the uncompromising position taken in the Amended Petition and throughout this matter:

> Imposing the penalty on TCNJ is unjust and unreasonable, because the intent of the penalty is to incentivize behavior that TCNJ *fully complied* with, through its testing, maintenance and certification of the alternative fuel systems, its making every effort to restore its ability to participate in the PSE&G interruption, and its declaration of emergency and immediate communication with PSE&G.[2]

Similarly, in the Amended Petition TCNJ asserts that at the time of the interruption event in question, "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]", and that TCNJ had "compl[ied] with the intent of" those requirements; and that the mechanical failure that occurred was "beyond TCNJ's ability

[1] TCNJ Opposition, at 13.
[2] Amended Petition (March 10, 2023), at 2 (emphasis added).

to predict or control".[3] TCNJ has failed to prove any of these assertions; to the contrary, the record is clear that TCNJ's operating and maintenance practices fell short.[4]

The belated admission that TCNJ bears some responsibility, which TCNJ now suggest should have obvious to the parties all along, has several implications. First, as anticipated in PSE&G's Answer to the Amended Petition and detailed in PSE&G's briefing in this matter, the lengthy discussion of New Jersey case law allegedly governing strict liability set forth in both the Amended Petition and in TCNJ's motion for summary disposition is utterly irrelevant.[5] 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.

Secondly, while it is true that 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," the College now vaguely claims for the first time that "it is not opposed to making additional penalty payments as a general concept."[6] This unquantified, belated offer is disingenuous. TCNJ, the party with the burden of proof in this proceeding, has an obligation to present evidence in support of its request. While the Board has the ability to direct the payment of a modified penalty amount, the College – the party with the burden of proof in this matter -- has not suggested what "additional penalty payments" would be appropriate, or how the Board should make that determination.

Similarly, TCNJ's admission that it bears at least some responsibility for the tariff violation, and that it is "not opposed" to making "some" additional penalty payments, undermines its claim that the College is immune from paying any interest. First, the statutory and tariff provisions precluding imposition of a "late payment charge" on "rate schedule[s] applicable to a State, county or municipal government entity" do not preclude the payment of reasonable interest by TCNJ in this case.[7] Moreover, given its belated admission of liability, as an equitable matter TCNJ should not be able to avoid any interest payments over the 6+ years of this dispute through reliance on a statutory provision that precludes interest on claims against public entities "prior to the entry of judgment in a court of competent jurisdiction".[8] Permitting TCNJ to shield itself from any interest payments in this matter nothwithstanding its belated admission that the College has owed at least some penalty payment since January 2018 would be inconsistent with the intent of the statute, which is to shield public entities from interest payments where those entities can defend those claims in good faith. The Board should take these factors into account in its final resolution in this case.

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[3] Amended Petition, at 1-2, ¶ 35.
[4] See, e.g., PSE&G's Motion for Summary Disposition, dated September 14, 2023, at 8-9.
[5] See Amended Petition, at ¶¶ 42-48; TCNJ Motion for Summary Disposition, dated September 14, 2023, at 22-24.
[6] TCNJ Opposition, at 5.
[7] TCNJ Opposition, at 17 (citing N.J.S.A. 48:3-2.3, N.J.A.C. 14:3-7.1(e)).
[8] TCNJ Opposition, at 17 (citing N.J.S.A. 59:13-8).

B. TCNJ's Attack On PSE&G's Reasonable Decision To Credit Customers With The Benefit Of The Penalty In 2018 Is Incorrect And Irrelevant

TCNJ claims it is "not responsible" for PSE&G's allegedly "unilateral decision" to accrue the penalty as a receivable and credit customers with the anticipated revenue prior to the resolution of these proceedings. TCNJ claims that this "problem" is "one of PSE&G's own creation"; that the amount at issue is material to TCNJ, but not material to PSE&G's budget for BGSS supply; and that PSE&G should have waited to accrue the penalty until such time as the Board determined what a just and reasonable penalty should be.[9]

TCNJ's argument is a red herring. First, whether or not the amount at issue is "material to PSE&G's budget for BGSS supply" is irrelevant. As discussed elsewhere, the monetary impact on the utility of a failure to interrupt is not the primary purpose of the penalty; rather, the purpose is to incent proper behavior by interruptible customers. Indeed, the fact that "the amount at issue is material to TCNJ" is precisely the point; by imposing serious consequences the Board intended to incent compliance.

Second, TCNJ's inexplicable accusation that PSE&G was unduly "hasty" in providing benefits to its customers is of no moment. Whether TCNJ seeks to claw back funds already credited to customers, or to prevent PSE&G from crediting customers going forward (as TCNJ presumably believes they should have been in a position to do), the result is identical: a customer that improperly failed to interrupt would benefit at the expense of firm residential customers.

C. TCNJ's Repeated Claim That The Penalty Is Unjust And Unreasonable As Applied Is Based On Inapplicable Case Law, And Ignores The Purpose Of The Provision

TCNJ continues to claim that use of "ten times the highest price as the penalty rate" – in a rate that was established more than twenty years ago and has been continuously in force – does "not withstand scrutiny under current legal requirements in New Jersey . . . ."[10] TCNJ appears to assert that the provision is unenforceable because it fails to properly estimate the non-breaching party's losses, and that the ten-times factor is arbitrary and capricious;[11] in either case, TCNJ's arguments fail.

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

TCNJ continues to rely on the claim that the penalty is an "unenforceable penalty" rather than an "enforceable liquidated damages" clause. PSE&G has explained twice before, in its April 2023 Answer to the Amended Petition ("Answer"), and again in its October 2023 letter brief in opposition to TCNJ's motion for summary disposition ("PSE&G Opposition"), that the case law that TCNJ relies on is completely inapposite. None of the cases cited by TCNJ are remotely

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[9] TCNJ Opposition, at 14-15.
[10] TCNJ Opposition, at 2-4.
[11] Id.

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, 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; those decisions, concerning whether the contractual liquidated damages at issue were reasonably related to the damages contemplated or actually incurred by the non-breaching party, are irrelevant here, where in furthering a broad policy goal the Board has established a rule applicable to all GDCs and their interruptible customers.[12]

Notwithstanding PSE&G's repeated demonstrations that TCNJ's "liquidated damages" analysis is out place and does not support summary disposition for the Petitioner, TCNJ continues to present precisely the same argument without acknowledging, let alone responding to, PSE&G's position. Again, PSE&G states that principles of contract interpretation in the context of private commercial contracts that TCNJ relies on are inapplicable in this case, where the broadly applicable penalty provision is intended not necessarily to compensate the utility for its actual damages, but instead is designed to incent behavior consistent with the public good.

b. The Federal Case Cited By TCNJ In Support Of Its Position Is Not Relevant, And Does Not Support Denial Of PSE&G's Motion

In support of its claim that the penalty provision is "arbitrary and capricious" TCNJ provides a lengthy quotation from the federal case San Antonio, Tex. v. United States, 631 F.2d 831, 852 (D.C. Cir. 1980).[13] That case took place in a different jurisdiction and in a completely different regulatory context, and is therefore not controlling or relevant here. In San Antonio, the Interstate Commerce Commission ("ICC") sought to establish a "maximum reasonable rate" for train shipments of coal from a point in Wyoming to a point in Texas. In contrast with the penalty provision at issue here, the ICC was attempting to establish a cost-based rate for those shipments while taking account relevant market factors, including the fully allocated cost of service, and applying a "theory of differential pricing, which postulates that rates on some services must be set at levels higher than full costs to compensate for those services on which the railroads are required to price below full costs to remain competitive." The court found that the ICC failed to adequately explain one item used in the calculation of the rate.

The cost-based rate-setting at issue in San Antonio is very different than the review of energy markets that the Board undertook in the year 2000, when it established the penalty provision to deter unwanted and potentially de-stabilizing behavior and ensure system reliability.[14] TCNJ cannot rely on the dispute over rates to be charged in the future that is addressed in a case like San Antonio to avoid its obligations under a tariff provision long in effect, after TCNJ has violated that

[12] See Answer, at 5; PSE&G Opposition, at 4-5.
[13] TCNJ Opposition, at 4.
[14] See Answer, at 4-5 (discussing 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), where, following a legislative-type hearing, the Board required 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, as part of an effort "to promote stability and reliability generally").

provision while continuing to enjoy the benefit of a discounted, interruptible rate. As PSE&G has noted before in this proceeding, TCNJ may request that the Board reconsider its prior order and the nature of the penalty provision going forward. Nevertheless, 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 switching to higher, non-interruptible rate.

D. TCNJ's Suggestion That This Long-Pending Matter Be Continued For Further Development Of The Record Is Self-Serving And Inconsistent With Basic Principles Of Administrative Law, Which Dictate That The Petitioner Must Come Forward With Evidence Supporting Its Claim

TCNJ's final suggestion, that the motions to dismiss its Amended Petition should be denied because there are disputed issues of material fact, is entirely self-serving. Two points stand out:

> (1) TCNJ has refused to pay any amount of a significant penalty (which it now acknowledges at least some responsibility for), while asserting immunity from paying interest, over a *nearly seven year period*, and now proposes that this case continue, presumably indefinitely, with TCNJ continuing to benefit by nearly $1 million per year and paying no penalty, while "disputed facts" are adjudicated; while
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> (2) the very facts that TCNJ suggests are in dispute (e.g., the "true extent" of TCNJ's maintenances practices leading up to the failure to interrupt, and "whether they were sufficient and reasonable under the circumstances") are things that TCNJ – the petitioner in this case, with the burden of proof – could have and should have established on the record already, via testimony supporting the Amended Petition or in the discovery process. Yet TCNJ has failed to present any evidence that, or even any theory as to how, any of the allegedly disputed facts could possibly be resolved in TCNJ's favor.

TCNJ also continues to argue that whether the failure to interrupt "contributed to damages suffered by PSE&G and/or its customers", and "the actual damages suffered", are relevant issues in dispute. Yet as demonstrated several times in the briefing in this case, after-the-fact compensation for actual damages is at most a secondary consideration underlying the Board-ordered tariff language. Continued litigation on this issue would serve no purpose other than delay and wasted resources.

TCNJ, in the Stipulation of Facts in this case, has in essence acknowledged that the College behaved unreasonably in its operation and maintenance of the cogen unit in the period leading to the failure. The Petitioner has presented no evidence to the contrary, six plus years into this dispute. Rather, TCNJ has presented substantial evidence from which fault can be attributed to the College (as even they have acknowledged), and now suggests that the Board and the parties embark on a new phase of litigation to unearth some evidence of reasonable behavior.

TCNJ's proposal to continue this litigation is inconsistent with principles of administrative law requiring that the petitioner prove its case, and would result in a waste of administrative resources. It is past time to end this dispute, dismiss the Amended Petition, and direct TCNJ to pay the reasonable penalty due and owing under these circumstances.

E. TCNJ Continues To Base Its Positions On Incorrect And/Or Misleading Assertions Regarding The Law And The Record Evidence

Finally, TCNJ's Opposition brief contains numerous mis-statements and baseless assertions; PSE&G responds to some of these below.

- Purpose of the Penalty Provision. Without any citation to the record, TCNJ asserts that "the record makes clear" that if PSE&G was "concerned about the integrity of its system . . . it could have simply unilaterally shut off TCNJ's service" when TCNJ burned through the interruption. There is no evidence in the record supporting those assertions, and PSE&G's ability to "turn off" individual gas customers, particularly in emergency conditions, is limited. If TCNJ's assertion was true, there would arguably be no need for the penalty provision.

- Impact of the Requested Waiver On The Public And Other Interruptible Customers. TCNJ asserts that a waiver should be granted since "full compliance with the rule(s) would adversely affect . . . the interests of the general public." Similarly, TCNJ claims that providing "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" and would not "undermine the effectiveness of the penalty provisions statewide . . . ."[15] There is no record support for any of these assertions; moreover, common sense strongly suggests that granting a waiver in these circumstances could discourage other interruptible customers from engaging in best operating and maintenance practices to ensure compliance.

- Availability of Funds. TCNJ asserts that there is no documentation in the record that TCNJ does not have or cannot obtain the funds required to pay the penalty, since "no party has raised any argument as to financial hardship prior to the filing of Rate Counsel's motion papers." TCNJ goes on to state, without citation to the record, that "[t]o pile another $2.4 million on top of" TCNJ's current budget "would require increases in tuition or slashes in scholarships and/or programs that the students and professional staff at TCNJ can ill afford."[16] That statement is not only unsupported, but is contrary to the evidence that TCNJ seeks to introduce at this late stage. As noted in PSE&G's October 16, 2023 letter brief in opposition to TCNJ's motion to supplement the record, even if that motion were granted, the proffered evidence (the Schweigert Certification) is inconsistent with TCNJ's characterization of its financial situation and the impact of the penalty. Specifically, Mr. Schweigert claims that to address on-going budget pressure, TCNJ has already increased tuition and reduced scholarship money made available to students (Schweigert Cert., at ¶ 4). There is no assertion, however, that compliance with the penalty provision, which PSE&G has already suggested could be paid over time,[17] will result in tuition increases or reduced scholarship money. Similarly, while Mr. Schweigert states that TCNJ is

[15] TCNJ Opposition, at 2, 6-7.
[16] TCNJ Opposition, at 8.
[17] See PSE&G Motion for Summary Disposition dated September 14, 2023, at 10.

"considering programmatic cuts" (Schweigert Cert., at ¶ 6), there is no suggestion that those cuts will actually occur, or that they will occur only if TCNJ is required to comply with the requirements of the tariff.

Conclusion

In light of the foregoing, PSE&G respectfully requests that the Board grant PSE&G's motion for summary disposition, dismiss the Amended Petition, and issue the directives set forth in PSE&G's motion. In addition, for the reasons stated herein and in PSE&G's opposition brief, TCNJ's motion for summary disposition should be denied.

Respectfully submitted,

Matthew M. Weissman

cc: Service List