

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) DOCKET NO. GC19111234
PENALTY ASSESSED BY PUBLIC)
SERVICE ELECTRIC & GAS)
COMPANY)

REPLY BRIEF OF THE COLLEGE OF NEW JERSEY IN
FURTHER SUPPORT OF MOTION FOR SUMMARY
DECISION

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October 25, 2023

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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. RATE COUNSEL’S ARGUMENTS IN OPPOSITION TO TCNJ’S MOTION ARE UNAVAILING AND INEFFECTIVE.

In its opposition to TCNJ’s motion for summary decision, the Division of Rate Counsel (“Rate Counsel”) first argues that TCNJ is somehow advancing the position that “its obligation to interrupt would be extinguished in the event all of PSE&G’s TSG-NF customers were to elect to purchase their gas supply from third-party suppliers.” See Rate Counsel Opposition, page 2. Rate Counsel invents this position for TCNJ in response to TCNJ’s argument that the penalty appears to provide no comfort to CIG customers in light of the fact that PSE&G was unwilling to disclose which of its customers actually take TSG-NF plus BGSS-I service. PSE&G’s failure to disclose all of the relevant information regarding who exactly takes TSG-NF plus BGSS-I service and how, if at all, they were impacted by TCNJ’s failure to interrupt is fatal to this argument.

Next, Rate Counsel argues that TCNJ is incorrect in its assertions that PSE&G denied without explanation the availability of CEG service during the relevant interruption period and that PSE&G has declined to provide sufficient details that would enable the Board to fully evaluate this matter.” See Rate Counsel Opposition, page 2. Rate Counsel then simply recites the terms of Rate Schedule CIG Special Provision (n), the as-written language of which is not in dispute, before

noting that PSE&G included a copy of a weather forecast with its denial and then declaring that “it should have been clear to TCNJ that Extended Gas Service would be unavailable due to gas supply constraints expected to result from the forecasted weather.” Id. at page 3. Respectfully, a copy of a weather forecast is not sufficient explanation as to why PSE&G mercurially decided not to offer TCNJ Extended Gas Service on an emergent basis due to the crisis on campus which would have resulted from cutting off gas use entirely during an extreme weather event. It cannot be disputed that PSE&G failed to provide a specific explanation for its denial; simply pointing to the weather forecast, without more, is not a sufficient explanation.

Rate Counsel also contends that “PSE&G’s decision not to offer Extended Gas Service to TCNJ on January 5-6, 2018 during an extremely cold weather event is consistent with its statutory obligation to offer safe, adequate, and proper services to the 1.9 million customers it supplies.” Id. Rate Counsel leaves unaddressed the simple fact that TCNJ’s inability to continue its interruption did not in fact adversely impact the rest of PSE&G’s customers in any way whatsoever. If there was a true risk that any class of PSE&G customers would have lost gas service a result of TCNJ’s failure to interrupt, PSE&G could have simply cut off the supply to TCNJ itself. There is nothing in the record which establishes otherwise. Further, even if there was no risk of other PSE&G customers losing gas as a result of TCNJ’s failure to interrupt, which there indisputably was not in this instance, PSE&G could have still shut off TCNJ’s gas anyway simply to prevent TCNJ from burning penalty gas at all. The fact that PSE&G did not do this likely stems from its realization that to cut off TCNJ’s gas during such an extreme weather event would have caused catastrophic damage to TCNJ’s infrastructure and put the innocent people on TCNJ’s campus needlessly in harm’s way. As a result, rather than shut off TCNJ’s gas itself and thereby open itself up to potential liability for the inevitable resulting harms, PSE&G tacitly allowed TCNJ to burn penalty

gas knowing it could have its cake and eat it too: it would avoid being responsible for damage to TCNJ's infrastructure, and harm to TCNJ's students and faculty, while simultaneously winning itself an exorbitant, disproportionate penalty payment in the process.

TCNJ's response to Rate Counsel's argument regarding the College's purported "annual savings under its current interruptible CIG tariff" is outlined in its opposition to Rate Counsel's moving brief; as a result, TCNJ will not repeat that argument here. That said, Rate Counsel's baseless argument that TCNJ is somehow on the wrong tariff must be rejected. As noted unequivocally in the factual stipulation signed by all parties to this dispute,

From 1995 until the January 4-8, 2018 interruption that is the subject of this Petition, TCNJ **had complied with every gas interruption notice from PSE&G**, either by curtailing its use of gas or by using Extended Gas Service. The discovery responses provided by TCNJ do not include information on whether, prior to January of 2018, TCNJ used Extended Gas Service or not when required to interrupt gas service.

...

TCNJ has complied with all gas interruption notices from PSE&G subsequent to the January 2018 interruption event. The remaining gas interruption notices during the 2017-2018 winter season were complied with by using the Extended Gas Service that was available during those interruptions. Since the 2017-2018 winter [t]here have been four interruptions of gas service to customers served under Rate Schedule CIG, two in January of 2022, one in December of 2022 and one in February of 2023. TCNJ's usage or discontinuance of gas during each of these four interruptions was as indicated in Exhibit J-15.

See Factual Stipulation at ¶¶ 11, 49 (emphasis added). The record is therefore clear that the January 2018 weather event that is the subject of these proceedings was an isolated incident that is in no way indicative of TCNJ's well-documented history of otherwise full compliance with its obligations as a PSE&G CIG customer.

Accordingly, because the arguments in Rate Counsel's brief are unavailing, TCNJ's motion for summary decision should be granted in its entirety.

II. PSE&G'S ARGUMENTS IN OPPOSITION TO TCNJ'S MOTION ARE UNAVAILING AND INEFFECTIVE.

In its own opposition to TCNJ's motion, PSE&G attempts to secure its receipt of the unjust and unreasonable CIG penalty monies from an arm of the state. Rather than bolster its position, however, PSE&G's arguments actually provide further support for TCNJ's assertion that the CIG penalty should be waived or modified in this specific instance.

1. The Purpose Of The Tariff, Which TCNJ Does Not Dispute Is Intended As A Penalty, Is The Exact Reason Why It Is Unjust And Unreasonable.

To begin, TCNJ does not dispute any of PSE&G's exhaustive discussion of the intentions behind the unjust and unreasonable CIG penalty, nor does TCNJ dispute that the CIG penalty was implemented following a "legislative type hearing", as PSE&G takes great pains to note. See PSE&G Brief, page 3. Contrary to PSE&G's pronouncements that TCNJ's arguments are "red herrings", however, these facts are precisely why the CIG penalty is unjust and unreasonable. Much like Rate Counsel, PSE&G concedes that the CIG penalty, as currently implemented, is designed "not necessarily to compensate PSE&G for its direct costs", but is instead intended to "incentivize behavior that ensures the continued availability of firm gas" by imposing an exorbitant penalty on those who fail to interrupt, a penalty which does not even pretend to be proportional to the actual damages, or lack thereof, which may occur. Id.

Accordingly, as the purpose of the tariff as admitted by PSE&G is in and of itself manifestly unjust and unreasonable, TCNJ's motion for summary decision should be granted.

2. PSE&G's Attempts To Distinguish The Tariff From Unenforceable Liquidated Damages Provisions, As Well As From The Similar Tariff At Issue In New Jersey American Water, Should Be Rejected.

PSE&G next attempts to argue against the cases cited by TCNJ in support of its motion, contending that cases involving “liquidated damages terms in privately[]negotiated commercial agreements” are inapplicable here because they “generally concern whether the contractual liquidated damages at issue were reasonably related to the damages contemplated or actually incurred by the non-breaching party.” Id. at page 4. According to PSE&G, “the private disputes discussed in those cases are irrelevant in this administrative context” and that “[i]n establishing the penalty, it was clear that the Board was concerned primarily about risk to the system if requests to interrupt are not honored.” Id. Rather than actually argue why the CIG penalty should not be treated functionally as the impermissible penalty damages clause that it is, PSE&G simply declares that this is the way things have been for twenty years and, as a result, the status quo (in which PSE&G is enriched off the backs of TCNJ’s tuition-paying students) should remain in place indefinitely.

PSE&G then proceeds to advance its favorite baseless arguments, first centered around how TCNJ has somehow benefitted from a “delay associated with [its] challenge” of the tariff, as if TCNJ was not within its rights to file its petition here and have its arguments heard. See PSE&G Brief, page 5. PSE&G also once again brings up its argument that “there is also no evidence that PSE&G’s residential customers . . . are more capable of absorbing this loss than is TCNJ” (despite the fact the record is clear that PSE&G’s residential customers will barely see any effects of a waiver or modification of the tariff in this instance, if at all). Finally, PSE&G advances for the first time the same hardship argument put forward by Rate Counsel in its own moving brief, arguing that that “there is no evidence in the record that TCNH would be harmed if it were required to abide by the tariff”; this, of course, is in spite of the fact that a hardship argument had not been

raised by either Rate Counsel or PSE&G until this late stage in the litigation and, regardless, TCNJ has remedied this gap in the record by way of TCNJ's motion to supplement the record filed alongside its opposition brief.

PSE&G's attempts to distinguish the decision in I/M/O The Request By New Jersey American Water Company For A Temporary Waiver, Docket No. WT21101160 (Order, January 12, 2022), which are cut-and-pasted verbatim from PSE&G's Answer, are just as futile now as they were when first filed. As a plain reading of the New Jersey American Water decision demonstrates, both Rutgers and Princeton were subjected to unprecedented challenges with regard to calculating rates for water usage on campus when the Covid-19 pandemic necessitated a switch to remote learning. When the campus became essentially vacated, water usage plummeted, bringing down the schools' usage averages with it. When students were eventually allowed to return to campus in 2021, the sudden increase in water usage well exceeded the averages that had been used for months to calculate the schools' usage rates; this would have triggered a highly burdensome and onerous penalty for the schools, which penalty would have been assessed through no fault of their own. As PSE&G admits in their own words, the intent of the tariff at issue in New Jersey American Water "simply did not contemplate" a situation that had arisen "for reasons completely out of the customers' control" and, as a result, a modification of the tariff was deemed warranted there. See PSEG& Brief, page 5.

Here, similarly, the intent of the CIG penalty, with its lack of any flexibility whatsoever, clearly did not contemplate the kind of unforeseen catastrophic equipment failure that suddenly caused TCNJ to be unable to interrupt gas service at essentially the exact moment such an interruption was called. TCNJ (which otherwise had a spotless record for interruption compliance and has had a spotless record since that time) did everything it could in the moment to apprise

PSE&G of the situation and work out an arrangement which took into account the extreme circumstances in which it found itself. Despite PSE&G being aware that TCNJ needed to continue burning gas for the safety of the people on its campus, PSE&G refused to make any accommodation whatsoever. Further, PSE&G states that the CIG penalty should be treated differently from the tariff at issue in New Jersey American Water because the CIG penalty here was “ordered . . . for the purpose of protecting public health and safety under emergency gas supply conditions”, yet PSE&G provides no evidence to support their contention that the tariff in New Jersey American Water was not intended for the purposes of protecting health and safety as well.

What must be emphasized in the context of this analysis is that the case law on unenforceable penalties in this State arises out of an application of equitable principles. These equitable principles should apply with equal, if not more, force to a statute that requires just and reasonable rates, which represents an explicit statement by the Legislature equivalent to the implied covenant of good faith and fair dealing embedded in every contract. By logical extension, therefore, the Legislature must also have expected the Board to exercise equitable powers in evaluating or re-evaluating provisions such as the CIG penalty, just as a court would when evaluating a contract.

Accordingly, because strict application of the CIG penalty here would lead to a similarly absurd and unintended result as the application of the tariff in New Jersey American Water, TCNJ’s motion for summary decision should be granted.

3. PSE&G’s Arguments Against Strict Liability Are Belied By The Very Factual Record Upon Which It Purports To Rely.

Next, PSE&G argues that the record here is “abundantly clear” about two critical questions: (1) whether or not the emergency conditions which caused TCNJ’s failure to interrupt were “easily predictable”; and (2) whether TCNJ acted reasonably under the circumstances. See PSE&G Brief,

page 6. PSE&G, unsurprisingly, argues that the conditions which caused the failure to interrupt were in fact easily predictable and that TCNJ did not act reasonably under the circumstances. Id. PSE&G is wrong on both fronts, however, and the record conclusively establishes same.

First, PSE&G makes the bizarre argument that TCNJ has somehow “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.” Id. While TCNJ does maintain that it is blameless here, and while the record does conclusively establish that the failure to interrupt was out of TCNJ’s control, neither of these things needs to be true in order to establish that the CIG penalty is an unjust and unreasonable strict liability penalty here. In a hypothetical situation where there was no dispute between the parties that TCNJ properly maintained all equipment and did all it could to prevent its failure to interrupt from happening, PSE&G would still be arguing for the full force of the CIG penalty to be brought to bear on TCNJ simply because the penalty is one of strict liability, that is the status quo, and PSE&G makes a significant sum of money from the status quo being maintained regardless of any attenuating circumstances.

That aside, however, PSE&G’s attempts to portray TCNJ as having failed to properly maintain its system are belied by the simple fact, **as stipulated by PSE&G itself**, that TCNJ’s interruption record was spotless both before and after the single isolated incident which forms the basis of these proceedings. See Factual Stipulation at ¶¶ 11, 49. By extension, if the system had always been capable of properly interrupting both before and after the single unforeseen event that occurred in January 2018, then the system had to have been properly maintained before and since. PSE&G simply ignores this, however, and instead relies on an after-the-fact report prepared by TCNJ’s property insurer in support. PSE&G also simply hand waives away TCNJ’s decision to

redesign its backup system in the wake of its failure to interrupt as evidence that TCNJ is somehow a bad faith actor “trying to game the system”. See PSE&G Brief, page 7. PSE&G here expects the Board to simply take TCNJ’s bad faith acts for granted and side with PSE&G simply because it wants to enrich itself at the expense of TCNJ’s students. The Board should decline this invitation.

Accordingly, because PSE&G’s strict liability arguments are contradicted by the record here, the Board should grant TCNJ’s motion in its entirety.

4. These Proceedings Are The Proper Forum In Which To Challenge The Tariff.

Finally, PSE&G argues now for the first time that these proceedings are not the proper forum to assess whether or not TCNJ should be entitled to a waiver or modification of the CIG penalty. To accomplish this, PSE&G attempts to re-frame this dispute as somehow being about TCNJ asking for the repeal or modification of the CIG penalty in general, as applied to all utility customers. This is simply inaccurate.

As noted in TCNJ’s brief in opposition to the motions for summary decision filed by both Rate Counsel and PSE&G, TCNJ is not asking for the eradication of the CIG penalty in its entirety by way of these proceedings. Instead, TCNJ is making the argument that the CIG penalty is unjust and unreasonable both in general but, more importantly, as applied specifically under these circumstances. Nor is TCNJ attempting to obtain a “windfall” by “continu[ing] to enjoy a discounted interruptible rate and not pay the penalty it has incurred.” See PSE&G Brief, page 8. Indeed, while TCNJ does maintain it should not be subject to any penalty as a result of its failure to interrupt, TCNJ has at all times expressed its willingness to pay **some** penalty, in an amount to be determined by the Board, which is just, reasonable, and takes into account both TCNJ’s good faith throughout the interruption event and the actual, calculable damages suffered by PSE&G as

a result of TCNJ's admitted failure to interrupt. While TCNJ does not dispute PSE&G's assertion that the CIG penalty itself should perhaps become the subject of an "industry-wide proceeding" to re-assess same, that is not and never has been TCNJ's goal with this proceeding. Nor does TCNJ believe that a result waiving or modifying the CIG penalty following these proceedings should or would become precedential moving forward due to its highly fact-intensive nature. Instead, TCNJ merely seeks to prevent its innocent, tuition-paying students from being forced to subsidize a significant windfall to PSE&G, one that has no basis in fact and is in no way proportional to any alleged damages suffered by PSE&G, which is what would occur should TCNJ be forced to bear the full CIG penalty in this instance.

WHEREFORE, 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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Dated: October 25, 2023