



State of New Jersey  
DIVISION OF RATE COUNSEL  
140 EAST FRONT STREET, 4<sup>TH</sup> FL.  
P.O. Box 003  
TRENTON, NEW JERSEY 08625

PHIL MURPHY  
*Governor*

TAHESHA L. WAY  
*Lt. Governor*

BRIAN O. LIPMAN  
*Director*

October 25, 2023

**Via Electronic Mail**

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

**Re: I/M/O/ the Verified Petition of the College of New Jersey for Relief  
from a Penalty Assessed by Public Service Electric & Gas Company  
BPU Docket No. GC18111234**

Dear Secretary Golden:

Please accept this letter as the reply of the Division of Rate Counsel ("Rate Counsel") to the Brief filed on October 5, 2023 by Petitioner The College of New Jersey ("TCNJ" or "College") in opposition to Rate Counsel's Motion for Summary Disposition in the matter. Consistent with the March 19, 2020 Order of the New Jersey Board of Public Utilities ("Board") in I/M/O the New Jersey Board of Public Utilities' Response to the COVID-19 Pandemic for a Temporary Waiver of Requirements for Certain Non-Essential Obligations, BPU Docket No. EO20030254, copies of this comment letter are being filed with the Secretary of the Board and provided electronically to each person on the service list by electronic mail only. No paper copies will follow. **Please acknowledge receipt of this filing.** Thank you for your consideration and attention in this matter.

## **INTRODUCTION**

On September 14, 2023, Rate Counsel submitted a Motion for Summary Disposition and supporting Brief. On October 5, 2023 TCNJ filed a brief (“TCNJ Response Brief”) in opposition to Rate Counsel’s Motion and a similar motion filed by Respondent Public Service Electric & Gas Company (“PSE&G”). TCNJ’s responsive brief in large part repeats the arguments that were made in TCNJ’s Amended Verified Complaint and have already been addressed in Rate Counsel’s September 14, 2023 brief in support of Rate Counsel’s motion (“Rate Counsel Motion Brief”) and in Rate Counsel’s October 5, 2023 letter responding to response to TCNJ’s Motion for Summary Disposition (“Rate Counsel Response Brief”).

TCNJ’s Response Brief makes a number of confusing and contradictory arguments, including the following:

- TCNJ asserts at page 2 of its Response brief that it “disputes the inferences that Rate Counsel would have the Board draw from the stipulated facts.” However, instead of specifying the inferences it disputes and why these are not supported by the stipulated facts, TCNJ launches into its arguments regarding the legality of the penalty provision under New Jersey law.
- TCNJ asserts at page 5 of its Response brief that it is “not opposed to making additional penalty payments as a general concept,” yet continues to insist at page 3 that its only obligation is to compensate PSE&G for the cost of procuring the improperly used gas.
- TCNJ at page 8 of the Response brief dismisses as “uninformed” Rate Counsel’s argument that the College has access to the resources of the State, yet it argues at pages 5 and 6 that it is entitled to special consideration because it is public entity.

Rate Counsel will not attempt to rebut each and every point contained in TCNJ’s Response Brief or repeat the arguments contained in Rate Counsel’s previously filed briefs. Instead, this reply will be limited to issues that warrant additional explanation or clarification.

**I. The Penalty Provisions are Not Unjust or Unreasonable.**

TCNJ devotes much of its response to Rate Counsel's motion to various arguments that the penalty is "unjust and unreasonable." TCNJ Response Brief at 2-6, 9-12. These arguments should be rejected.

Initially, Rate Counsel notes that TCNJ has argued that Rate Counsel's Motion Brief "outright admits that the CIG penalty is an unenforceable punishment based on New Jersey law." TCNJ Response Brief at 4. This statement is simply untrue. While Rate Counsel acknowledges that the CIG tariff provides for a penalty, Rate Counsel did not concede that these are an "unenforceable punishment" under New Jersey law. At pages 20 and 21 of its Motion Brief, Rate Counsel explicitly addressed TCNJ's argument that the penalty provisions are unenforceable, explaining why the decisions cited by TCNJ for that proposition did not apply to a tariff provision mandated by the Board. Rate Counsel argued that the tariff was in place to protect the integrity of the State's natural gas distribution system, and cited the Appellate Division's decision in Hotham v. Lucas, 460 N.J. Super. 308 (App. Div. 2019), as supporting authority for upholding the penalty provisions. Instead of addressing Rate Counsel's argument, TCNJ chose to misrepresent Rate Counsel's position. The Board should not give any credence to TCNJ's suggestion that Rate Counsel is in agreement with TCNJ on this issue.

TCNJ also persists in arguing that it had "no idea what the penalty might be" for failing to interrupt when Extended Gas Service was not available. TCNJ Response Brief at 3. This argument was addressed in Rate Counsel's Motion brief, which noted that TCNJ had information provided by PSE&G on the market price of gas that would have informed TCNJ of the potential magnitude of the penalty if they had multiplied that price by ten. Rate Counsel Motion Brief at 21. TCNJ's apparent failure to use the information available is not a valid reason to excuse it

from paying the penalty. In this regard, Rate Counsel notes that the certification provided by the College's former Director of Energy and Central Utilities states that she was personally unaware of the availability of "day ahead" gas pricing information that could have been used to assess the potential magnitude of the penalty. Exh. J-4, par. 56. Rate Counsel has no reason to doubt that this individual, and the Associate Vice President of Facilities and Administration who apparently made the ultimate decision not to interrupt, were personally unaware of the potential magnitude of the penalty. Exh. J-4, par. 19-22, 56. However, TCNJ's decision-making personnel's apparent lack of familiarity with natural gas market is not a valid justification for avoiding payment of the penalty.

Moreover, if the information provided by TCNJ in discovery is taken at face value, it considered the potential harm that would have resulted from discontinuing, or even reducing, its use of gas to be so great that it would have continued to operate its cogeneration facility using penalty gas regardless of the magnitude of the penalty. Exh. J-16; see Rate Counsel Motion Brief at 17-18. If this is the case, it appears that TCNJ's made a deliberate economic decision to continue using gas in violation of a clearly stated obligation in the applicable tariff. Rate Counsel respectfully submits that TCNJ should be held fully responsible for that decision.

The Board should also reject TCNJ's argument that a penalty roughly equivalent to the incremental cost of two year of firm service is "ludicrously disproportionate" to the potential harm caused by TCNJ's failure to interrupt. TCNJ Response Brief at 10-11. This argument reflects a disregard of the nature of firm service. As explained at page 22 of Rate Counsel's motion brief, firm ratepayers pay a premium all year round for access to gas on the coldest days of the year. Seen from this perspective, the cost of firm service is an appropriate indication of the value of TCNJ's use of gas during two days of extreme cold weather. The fact that, on this

occasion, PSE&G was able to supply the gas to the relatively few interruptible customers who used gas without authorization, is immaterial.<sup>1</sup> In essence, the customers who failed to interrupt during the period at issue, including TCNJ, received the value of firm service without paying for it. Those customers, except for TCNJ, appear to have recognized this fact, as all of them either paid the penalty or switched to a firm service. Stipulated Facts, par. 41; CONFIDENTIAL Exh. J-12. Moreover, the College ignores the threat it caused to the rest of the firm gas customers. A gas curtailment is called when there is concern about sufficient gas supply to serve firm customers such as residential customers who rely on gas service for heating during an extreme weather event. TCNJ's failure to comply places those customers at risk.

TCNJ's assertion that payment of the penalty will create a "windfall" to PSE&G's BGSS customers is similarly unfounded. TCNJ Response Brief at 11. Under the terms of Board-approved gas supply agreement between PSE&G and PSEG Energy Resources & Trade ("ER&T"), PSE&G's BGSS customers are entitled to 75% of the penalty, or \$1,769,629. Stipulated Facts, par. 40.<sup>2</sup> This provides BGSS customers with a measure of compensation for interruptible customers' use of the resources that BGSS customers pay for to assure uninterrupted gas supply, and it is not a "windfall." See Rate Counsel Motion Brief at 22. Further the impact of the penalty may be small in comparison with PSE&G's revenues, but \$1,769,629 is not an "inconsequential" amount for BGSS customers as argued at page 11 of TCNJ's Response Brief.

TCNJ's reference to the penalty as a subsidy to BGSS customers is particularly ironic. TCNJ Response Brief at 11. For many years, TCNJ has been the recipient of a subsidy as a "grandfathered" customer on a discontinued tariff that is no longer available to new customers

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<sup>1</sup> TCNJ's assertion at page 9 of its Response Brief that PSE&G was "comfortably" able to supply the gas is not supported by any citation to the record

<sup>2</sup>  $\$2,359,532 \times .75 = \$1,769,629$ .

with usage characteristics similar to TCNJ. Stipulated Facts, par. 3, 4. It is not a subsidy to hold TCNJ to the penalty provisions that were an essential part of the quid pro quo for the deeply discounted rate TCNJ enjoys under the outdated CIG tariff.

## **II. TCNJ Is Not Entitled to a Waiver of the Penalty.**

TCNJ also argues that it meets the requirements for a waiver of the penalty. TCNJ Response Brief at 6-9. These arguments also should be rejected.

First, even though TCNJ appears to acknowledge at page 2 of its Response Brief that the Board's determination whether to grant a waiver should be guided by the Board's waiver rule, N.J.A.C. 14:1-1.2, TCNJ then attempts to suggest that a different standard should apply. Specifically TCNJ argues at page 7 of its Response Brief that it should be granted a waiver because, according to TCNJ, it did not act in bad faith, with malice or intent to deceive. This is not the standard provided in the Board's rule. A waiver application requires a showing that the waiver would not undermine the purpose of the rule, and a statement of the reasons for requesting the waiver, including the degree of hardship or inconvenience that would result from full compliance. N.J.A.C. 14:1-1.2(b)(1) & (b)(2). The rule does not provide for waivers based on "non-malice." Rate Counsel's Motion Brief, at page 14, cautioned the Board against allowing interruptible customers to seek waivers based upon assertions that their failure to interrupt was justified. Granting waivers based on a standard of "non-malice" would be even more unworkable. TCNJ's subjective intent is irrelevant here, and the Board should reject the College's argument that this is the controlling factor for granting a waiver.

In response to Rate Counsel's observation that TCNJ has not made the showing of hardship that is a required element of a waiver request, TCNJ has sought to supplement the record to include a Certification prepared by the College's Interim Treasurer, Richard

Schweigert. Rate Counsel has opposed TCNJ's motion to supplement the record to include Mr. Schweigert's Certification. However, in the event the Board decides to include this item in the record, it should be given little weight.

As a threshold matter, the certification fails to lay a proper foundation for the witness's statements. The certification indicates that Mr. Schweigert is the College's interim treasurer, but is devoid of information that would allow the Board to determine the source of his knowledge of the matters addressed in the certification. The certification does not specify how long he has been in his current position, or other positions with the College, his past or present job duties, or most important, how much, if any, of the information contained in the certification is within his personal knowledge. While hearsay is allowed in administrative proceedings, the source of a witness's knowledge of the facts testified to is nevertheless important. In addition to the "residuum rule," which requires each of the Board's ultimate findings of fact to be supported by legally competent evidence, the Board has the obligation to weigh the credibility and reliability any hearsay statements. N.J.A.C. 1:1-15.5.

In addition, the Board should consider Mr. Schweigert's many omissions of information that would allow the Board to place his statements in context. The following are just some examples of the facts that have been omitted. First, Mr. Schweigert states that the College experienced a "significant operating deficit" in its most recent fiscal year, but does not provide either the total budget or the amount of the deficit. Schweigert Cert., par. 2. Significantly, he only references the current year. More relevant would be budgets in 2018 or 2019 when the penalty accrued and should have been paid. Second, Mr. Schweigert states that the College reduced its budget by \$15 million for the current fiscal year and anticipates similar reductions next year, but has provided no information that would allow the Board to assess the significance

of the budget cuts in light of the College's total budget. Id., par. 3. Third, he states that the penalty will have to be paid from reserves, but does not indicate whether or not funds have been reserved for the payment of the interruptible penalty, nor does he detail any efforts to secure funds from other sources. Id., par. 5. This penalty has been pending for nearly five years. The College should have reserved some funds to cover this outstanding potential liability. No information on this accounting treatment was provided. Finally, he states that State aid to the College is lower on an inflation-adjusted basis than it was ten years ago, but has not provided the data and calculations that would allow the Board to verify this statement. Id., par. 7.

In short, the Certification provides several conclusory statements about the College's financial condition, with no supporting documentation or calculations that would allow the Board to evaluate whether payment of the penalty would cause "immense" financial harm as asserted by TCNJ. These statements, from a witness who may or may not have personal knowledge, are not sufficient to support a finding that payment of the penalty would create an unreasonable hardship for TCNJ.

### **III. There is No Reason to Further Extend These Proceedings.**

At pages 18-19 of its Response Brief TCNJ argues that there are issues of material fact that preclude the granting of Rate Counsel's and PSE&G's motions for summary disposition. This request is contrary to the process agreed to by the parties and memorialized in the Prehearing Order in this matter. TCNJ agreed with Rate Counsel and Staff that this matter would be submitted to the Board based on stipulated facts and exhibits in lieu of pre-filed testimony and evidentiary hearings. The Prehearing Order reflecting this agreement was issued on June 27, 2023, and the parties spent the next two months completing discovery and



negotiating the contents of the Stipulated Facts and Exhibits that were submitted in early September, 2023.

TCNJ asserts at page 18 of its Response Brief that it has “narrowly tailored these proceedings to avoid consideration” of issues of fact that it now wishes to explore further, which, according to TCNJ, include the following:

... the true extent of TCNJ’s maintenance 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 Response Brief at 18.

If TCNJ’s intent is to suggest that it was unaware that these factual issues were part of this case, the Board should reject that assertion. All of the issues cited in TCNJ’s brief were raised in the first instance by TCNJ. Its Verified Amended Complaint included allegations that the fuel oil backup system was properly maintained and tested (p. 1 & par. 6), that the system failed for reasons beyond the College’s ability to predict or control (p. 1-2 & par. 48), that the interruption was not reasonably avoidable (par. 25), and that the damages from the failure to interrupt were easily measurable (par. 30). Moreover, in its Response Brief the College continues to ask the Board to make factual findings that it “did everything within its reasonable control to avoid the unfortunate circumstance that led to the assessment of the penalty” (p. 5) and that “actual damages from a breach in this case are decidedly not difficult to measure” (p. 3).

Rate Counsel’s and PSE&G’s motions and supporting briefs were based on the stipulated facts and exhibits that were agreed to and submitted to the Board. TCNJ had the same opportunity as the other parties to engage in discovery and negotiate the contents of the Stipulated Facts and Exhibits. It should not be permitted another “bite at the apple” to provide

the necessary evidentiary support for its position on issues that have been a part of this proceeding from the outset. Rather, the Board should issue a decision based on the jointly stipulated set of facts and bring this five year old case to a close.

### **CONCLUSION**

For the foregoing reasons and the reasons set forth in Rate Counsel's Motion Brief, the relief requested in the Amended Petition should be denied.

Respectfully submitted,

BRIAN O. LIPMAN  
DIRECTOR, DIVISION OF RATE COUNSEL

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

c: Service List  
Christine Guhl-Sadovy, President

In the Matter of the Verified Petition of  
The College of New Jersey for Relief  
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Sherri L. Golden  
Board Secretary  
NJ Board of Public Utilities  
44 South Clinton Avenue, 1<sup>st</sup> Floor  
P.O. Box 350  
Trenton, NJ 08625

Brian O. Lipman, Director  
Division of Rate Counsel  
140 East Front Street, 4th Floor  
P.O. Box 003  
Trenton, NJ 08625

Maura Caroselli, Esq.  
Division of Rate Counsel  
140 East Front Street, 4th Floor  
P.O. Box 003  
Trenton, NJ 08625

Sarah H. Steindel, Esq.  
Division of Rate Counsel  
140 East Front Street, 4th Floor  
P.O. Box 003  
Trenton, NJ 08625

Mamie W. Purnell, Esq.  
Division of Rate Counsel  
140 East Front Street, 4th Floor  
P.O. Box 003  
Trenton, NJ 08625

Carlena Morrison, Paralegal  
Division of Rate Counsel  
140 East Front Street, 4th Floor  
P.O. Box 003  
Trenton, NJ 08625

Michael Beck  
NJ Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625

Malike Cummings  
NJ Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625

Jacqueline Galka  
NJ Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625

Mike Kammer  
NJ Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625

Stacy Peterson  
NJ Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625

Heather Weisband  
NJ Board of Public Utilities  
44 South Clinton Avenue  
P.O. Box 350  
Trenton, NJ 08625

Matko Ilic, DAG  
NJ Dept. of Law and Public Safety  
Richard J. Hughes Justice Complex  
Public Utilities Section  
25 Market Street, P.O. Box 112  
Trenton, NJ 08625

Terel Klein, DAG  
NJ Dept. of Law and Public Safety  
Richard J. Hughes Justice Complex  
Public Utilities Section  
25 Market Street, P.O. Box 112  
Trenton, NJ 08625

Steven Chaplar, DAG  
NJ Dept. of Law and Public Safety  
Richard J. Hughes Justice Complex  
Public Utilities Section  
25 Market Street, P.O. Box 112  
Trenton, NJ 08625

Joseph Accardo, Esq.  
PSE&G Services Corporation  
80 Park Plaza, T5G  
P.O. Box 570  
Newark, NJ 07102

Stacey Mickles, Esq.  
PSE&G Services Corporation  
80 Park Plaza, T5G  
P.O. Box 570  
Newark, NJ 07102

Matthew M. Weissman, Esq.  
PSE&G Services Corporation  
80 Park Plaza, T5G  
P.O. Box 570  
Newark, NJ 07102

Michael Canavan  
Deputy General Counsel  
The College of New Jersey  
PO Box 7718  
Ewing, NJ 08628-0718

James H. Laskey, Esq.  
Norris McLaughlin, P.A.  
400 Crossing Blvd., 8th Floor  
Bridgewater, NJ 08807-5933

Anthony D'Elia, Esq.  
Norris McLaughlin, P.A.  
400 Crossing Blvd., 8th Floor  
Bridgewater, NJ 08807-5933

Bernard Smalls  
PSE&G Services Corporation  
80 Park Plaza, T5G  
P.O. Box 570  
Newark, NJ 07102