

LSNJ BASIC CONSUMER LAW TRAINING 2011
APRIL 7, 2011
UTILITY TERMINATIONS
KEY STATUTORY AND REGULATORY PROVISIONS

SCOPE

This outline primarily applies to investor-owned electric, gas, telephone, and water companies under the jurisdiction of the New Jersey Board of Public Utilities. Public utilities have a duty to provide service to any member of the public within their service area, which cannot be arbitrarily, unreasonably, or unjustly withheld. *See* N.J.S.A. 48:3-2; N.J.A.C. 14:3-3.1 (“It shall be the duty of every utility to furnish safe, adequate and proper service, including furnishing and performance of service in a non-discriminatory manner.”). Concomitantly, termination of vital utility services for non-payment is a constant threat to low-income households.¹

RECENT AMENDMENTS TO BPU REGULATIONS

The BPU recently revised many of the regulations discussed in this outline. For the agency proposals, responses to comments, and final versions of amendments, see

- 39 N.J. Reg. 4077(b) (Oct. 1, 2007) (proposal) (www.bpu.state.nj.us/bpu/pdf/rules/20071001genericrule.pdf);
- 40 N.J. Reg. 2481(a) (May 19, 2008) (adoption) (www.bpu.state.nj.us/bpu/pdf/rules/allutilitiesreadoption.pdf);
- 40 N.J. Reg. 2414(a) (May 19, 2008) (proposal) (www.bpu.state.nj.us/bpu/pdf/rules/allutilitiescompanion.pdf);
- 41 N.J. Reg. 270(a) (Jan. 5, 2009) (adoption) (www.bpu.state.nj.us/bpu/pdf/rules/compamend.pdf);
- 41 N.J. Reg. 3204(a) (Sept. 8, 2009) (proposal) (<http://www.bpu.state.nj.us/bpu/pdf/rules/chap3.pdf>); and
- 42 N.J. Reg. 2771(a) (Sept. 20, 2010) (adoption) ([http://www.bpu.state.nj.us/bpu/pdf/rules/ F %20R.2010%20d.200%20 BPU%2014_3 .pdf](http://www.bpu.state.nj.us/bpu/pdf/rules/F%20R.2010%20d.200%20BPU%2014_3.pdf))

¹ Beyond the scope of this outline are the few municipal electric companies, many municipal water companies, and the one rural electric cooperative in New Jersey, none of which are regulated by the BPU. Each has its own termination rules, and due process protections apply with respect to municipal utility terminations. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978); *Pilchen v. City of Auburn*, 728 F. Supp. 2d 192 (N.D.N.Y. 2010) (municipal water utility violated tenant’s due process and equal protection rights; no rational basis for requiring tenant to assume landlord’s obligation before restoring service and opening new account in tenant’s name); *Lindsey v. Memphis Light, Gas & Water*, 2010 WL 1576700 (W.D. Tenn. Feb. 25, 2010) (plaintiff stated due process claim based on municipal utility’s failure to provide adequate notice of pre-termination hearing rights). Providers of unregulated deliverable fuels, such as oil and propane, are also beyond the scope of this outline –they are covered in §§ 1.5 and 1.6 of the NCLC *Access to Utility Services* manual.

The BPU has also recently amended its rules of practice at N.J.A.C. 14:1. See

- 39 N.J. Reg. 4551(a) (Nov. 5, 2007) (proposal) (<http://www.bpu.state.nj.us/bpu/pdf/rules/20071022chapter1.doc>) and
- 40 N.J. Reg. 1917(a) (Apr. 7, 2008) (adoption) (http://www.bpu.state.nj.us/bpu/pdf/rules/Chapter1_20080407.pdf).

All of these changes are reflected in the outline below.

BASES FOR DISCONTINUANCE OF SERVICE

- “The utility shall have the right to suspend or curtail or discontinue service for any of the following reasons:

...

3. **For nonpayment of a valid bill** due for service furnished at a present or previous location, in accordance with N.J.A.C. 14:3-3A.2;
4. For nonpayment of a deposit, in accordance with N.J.A.C. 14:3-3A.9; or
5. For any of the following acts or omissions on the part of the customer:
 - i. Refusal of reasonable access to the customer’s premises in accordance with N.J.A.C. 14:3-3.6;
 - ii. Tampering with any facility of the utility;
 - iii. Fraudulent representation in relation to the use of service . . .”

N.J.A.C. 14:3-3A.1(a).

- “Except for residential telephone service that is covered at N.J.A.C. 14:3-3A.8 [arrearage for local telephone service exceed \$30.00], . . . a public utility may discontinue service for nonpayment only if one or both of the following criteria are met, and shall not discontinue service for nonpayment for any other reason:

1. The customer's arrearage is more than \$100.00; and/or
2. The customer's account is more than three months in arrears.

N.J.A.C. 14:3-3A.2(a).

NOTICE

Timing of Notice

- “Before discontinuing a customer's service for nonpayment, a utility shall notify the customer that the bill has not been paid and that the service will be discontinued, in accordance with this section.” N.J.A.C. 14:3-3A.3(a).
- “Before sending a notice of discontinuance to the customer for nonpayment of an outstanding past due bill, a utility shall have allowed the customer an initial period of at least 15 days to pay the bill after the original postmark date of the outstanding bill Each notice of discontinuance shall meet all of the following criteria:
 1. The notice shall be in writing;
 2. The written notice shall be sent by first class mail, apart from the bill and as a separate mailing. However, should a utility find that compliance with this rule would result in financial harm and/or would negatively impact the utility's daily operations, the utility may file a written request for exemption with the Secretary of the Board, setting forth the basis for such request; and
 3. The notice shall be postmarked no earlier than 15 days after the original postmark date of the outstanding bill. In the absence of a postmark for the outstanding past due bill, the burden of proving the original mailing date of the bill shall be upon the utility.” N.J.A.C. 14:3-3A.3(b).
- “The notice of discontinuance for nonpayment shall provide the customer with an additional period of at least 10 days to pay the outstanding past due bill. The 10 days shall begin on the postmark date of the notice of discontinuance.” N.J.A.C. 14:3-3A.3(c).
- “A new notice shall be served by the utility each time it intends to discontinue service for nonpayment of an outstanding past due bill, except that no additional notice shall be required when, in response to a notice of discontinuance, a customer pays the outstanding past due bill by check and the check is subsequently dishonored. Each new notice of discontinuance shall meet the same requirements that apply under this section to the initial notice of discontinuance.” N.J.A.C. 14:3-3A.3(d).

Separate Mailing of Notices

- “[W]ritten notice [of discontinuance] shall be sent by first class mail, apart from the bill and as a separate mailing. However, should a utility find that compliance with this rule would result in financial harm and/or would negatively impact the utility's daily operations, the utility may file a written request for exemption with the Secretary of the Board, setting forth the basis for such request.” N.J.A.C. 14:3-3A.3(c).

Bilingual Notices

- “A public utility shall, upon request of the customer, send a Spanish language version of the notice of discontinuance.” N.J.A.C. 14:3-3A.3(e).
- “[Unless it provides all written notices of discontinuance in both Spanish and English], each utility shall provide an option for discontinuance notices in Spanish, by including on each bill a statement, written in Spanish, informing the customer that they may request that any notice of discontinuance be provided to them in Spanish. The bill shall provide a toll free telephone number for the customer to call in order to make such a request. Once the utility receives a request to provide a written notice of discontinuance in Spanish, all subsequent written notices of discontinuance to the requesting customer shall be provided in both Spanish and English.” N.J.A.C. 14:3-7.1(b).

In-Person Contact Prior to Termination

- “After the end of the notice period in the notice of discontinuance, but before discontinuance of residential service, [an] electric or gas utility representative shall notify an adult occupant of the premises, or leave a sealed note in the event that no adult is on the premises. The note shall include information as to how the customer's service may be reconnected.” N.J.A.C. 14:3-3A.2(d)(4).
- “If a residential customer offers payment of the full amount or a reasonable portion of the amount due at the time of discontinuance, a utility representative shall to accept payment without discontinuance of service. Whenever such payment is made, the utility representative shall provide the customer with a receipt showing the date, account number, customer's name and address and amount received.” N.J.A.C. 14:3-3A.2(d)(5).

Notice to Tenants

- “(a) Electric, gas, water and wastewater public utilities shall make every reasonable attempt to determine when a landlord-tenant relationship exists at premises being serviced. If such a relationship is known to exist, and if the tenants are not the customers of record but are end-users, as these terms are defined at N.J.A.C. 14:3-1.1, discontinuance of service is prohibited unless the utility has, notwithstanding the time periods set out in N.J.A.C. 14:3-3A.5, given a 15-day written notice to the owner of the premises or to the customer of record to whom the last preceding bill was rendered. Further, the utilities shall use their best efforts to determine the names and addresses of each tenant, in order to provide such notice, for example, through mailings to landlords requesting a list of tenants. The utility shall use its best efforts to provide copies of the discontinuance notice to all tenants. In addition, the utility shall provide the tenant(s) with a 15-day written notice which shall be hand-delivered, mailed, or posted in a conspicuous area of the premises and in the common areas of multiple family premises.

(b) If a utility uses posting as the method of notice, each utility shall use its best efforts to also place a copy of the notice on each tenant's car windshield or under the door of each tenant's dwelling. In the case of tenants of single and two-family dwellings, each tenant shall also be provided with a 15-day individual notice. Each utility shall offer the tenant(s) continued service to be billed to the tenant(s) unless the utility demonstrates that such billing is not feasible. The continuation of service to a tenant shall not be conditioned upon payment by the tenant of any outstanding bills due upon the account of any other person. The utility shall not be held to the requirements of this provision if the existence of a landlord-tenant relationship could not be reasonably ascertained.

(c) When a landlord-tenant relationship is known to exist, an electric and/or gas utility, at the landlord's request, shall send written notice to the landlord that a tenant's electric or gas service is being voluntarily or involuntarily discontinued.

(d) When a landlord-tenant relationship is known to exist, an electric and/or gas utility, at the landlord's request, shall place the service in the landlord's name if the tenant's electric and/or gas service is being voluntarily or involuntarily discontinued.

(e) To participate in this program, the landlord shall complete a form provided by the utility, indicating a choice as specified in (a) or (b) above.”

N.J.A.C. 14:3-3A.6.

TIME OF TERMINATION

- **“Public utilities shall not discontinue residential service involuntarily except between the hours of 8:00 A.M. and 4:00 P.M. Monday through Thursday, unless there is a safety related emergency. There shall be no involuntary discontinuance of service on Fridays, Saturdays, and Sundays or on the day before a New Jersey State holiday or on a New Jersey State holiday absent such emergency.”** N.J.A.C. 14:3-3A.1(c).

DISPUTES

No Termination While a Dispute Is Pending

- **“A utility shall not discontinue service because of nonpayment of bills in cases where a charge is in dispute, provided the undisputed charges are paid and the has requested that the Board investigate the disputed charge, in accordance with N.J.A.C. 14:3-7.6(b).”** N.J.A.C. 14:3-3A.2(e)(5).

Emergent Relief in Court

- The BPU generally has primary but not exclusive jurisdiction over service disputes. *Muise v. GPU*, 332 N.J. Super. 140 (App. Div. 2000); *Newton v. PSE&G*, 2009 WL 153530 (App. Div. Jan. 23, 2009); 40 N.J. Practice § 3.24.

- This means that exhaustion of administrative remedies is not a prerequisite to seeking an injunction against termination of service or a reconnection order in the Chancery Division. The judge then has discretion as to whether to stay litigation pending referral of contested issues that are not “[p]ure questions of law” to the BPU. *Newton*, 2009 WL 153530 at *3.
- Challenges to filed rates set pursuant to the public ratemaking process are different – they are within the exclusive jurisdiction of the BPU, and not subject to challenge in court. *See Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267 (1978).

BPU Dispute Procedures:

1. Filing an Informal Dispute

- “[An] informal complaint may be made by letter, e-mail, fax or other writing; or by telephone call.” N.J.A.C. 14:1-5.13(a).
- **Thus, lodging an informal oral or written dispute with the BPU, and paying any amounts not in dispute, is sufficient to prevent a threatened termination until the matter is resolved**, unless the BPU correctly determines that the dispute is frivolous.
- “While no form of informal complaint is prescribed, to be considered by the Board such informal complaint must state the name and address of the complainant and the party complained of as well as the essential facts upon which the complaint is based, including the dates of acts or omissions complained of.” N.J.A.C. 14:1-5.13(c).
- The toll-free number for the BPU customer service office is **800-624-0241**.
- An informal dispute can also be submitted on-line at the BPU web site at <http://www.bpu.state.nj.us/bpu/assistance/complaints/inquiry.html>.
- “Informal complaints are usually assigned to . . . the Board's Division of Customer Assistance[, which] brings the matter to the attention of the regulated entity and directs the latter to submit information deemed to be pertinent as well as a statement of its position.” N.J.A.C. 14:1-5.13(d).
- “Following a study and review of the complainant's and regulated entity's positions and supporting data and after such informal conferences as may be held, an attempt is made to effect an amicable adjustment of the dispute.” N.J.A.C. 14:1-5.13(e).
- “Depending upon the type of informal complaint initiated, Board staff shall telephone, e-mail or send a letter to the complainant, and shall e-mail or send a letter to the regulated entity reflecting the results, if any, of the processing of the informal complaint.” N.J.A.C. 14:1-5.13(f).
- Informal complaints shall be without prejudice to the right of any party to file a petition or of the Board to institute a formal proceeding. N.J.A.C. 14:1-5.13(g).

- “[N]o mandatory or prohibitory order will be issued on an informal complaint.” N.J.A.C. 14:1-5.13(h).
- “A party desiring a decision or order of the Board must file a petition in accordance with N.J.A.C. 14:1-4, 5 and 6. Also see N.J.A.C. 14:1- 1.5(a).” N.J.A.C. 14:1-5.13(i).

2. Filing a Formal Petition; Right to a Hearing

- **A formal dispute, which triggers administrative hearing rights**, is invoked by filing a verified petition pursuant to N.J.A.C. 14:1-4.1, *et seq.* and 14:1-5.1.
- The administrative hearing will typically be held before an ALJ, where the matter will proceed much like a welfare fair hearing.

Procedures for Resolving BPU Disputes

- “(a) A customer that disputes a charge shall so notify the utility, and shall pay all undisputed charges.

(b) If the utility and the customer do not resolve the dispute, the utility shall notify the customer that:

1. The customer may make a request to the Board for an investigation of the disputed charge;
2. The request for investigation shall be made within five business days after the customer contacts the utility to dispute the charges; and
3. If the customer does not make a request for investigation within five days, the customer's service will be discontinued for nonpayment in accordance with N.J.A.C. 14:3-3A.

(c) Once a formal or informal dispute is before the Board, all collection activity on the charge in dispute shall cease until Board staff notify the utility and the customer that the dispute has been resolved in accordance with (e) below.

(d) Each utility shall provide the Board's Division of Customer Assistance with responses to written complaints within five days of receipt of the complaint, and within three days of receipt of verbal complaints.

(e) When Board staff have determined that a formal or informal dispute has been resolved, Board staff shall notify the utility. If the resolution of the dispute results in discontinuance of the customer's service, the utility shall provide notice to the customer in accordance with N.J.A.C. 14:3-3A.3 before service may be discontinued.

(f) In appropriate cases the Board may require that the customer place all or a portion of disputed charges in escrow pending the resolution of the dispute.

(g) When the amount of an electric, gas, water or wastewater bill is significantly higher than the customer's established consumption history, and there is no apparent explanation for the increase (for example, severe weather conditions; changes in the make-up or the lifestyles of the members of the household), the customer's established consumption shall be given consideration, in addition to the results of any tests on the customer's meter, in the evaluation of whether the bill is correct and appropriate.

N.J.A.C. 14:4-7.6.

Additional Notice Prior to Termination

- “When Board staff have determined that a formal or informal dispute has been resolved, Board staff shall notify the utility [sic]. If the resolution of the dispute results in discontinuance of the customer's service, **the utility shall provide notice to the customer in accordance with N.J.A.C. 14:3-3A.3 before service may be discontinued.**” N.J.A.C. 14:3-7.6(e); *cf.* N.J.A.C. 14:1-5.13(f) (providing for notice of the Board’s resolution to both parties).

WINTER MORATORIUM

- If service is not yet disconnected: “An electric or gas utility shall not discontinue service during the period from **November 15 through March 15** (referred to in this section as the "heating season"), unless otherwise ordered by the Board, to those residential customers **who demonstrate at the time of the intended termination** that they are:
 1. Recipients of benefits under the **Lifeline Credit Program**;
 2. Recipients of benefits under the Federal Home Energy Assistance Program (**HEAP**), or certified as eligible therefore under standards set by the New Jersey Department of Human Services;
 3. Recipients of Temporary Assistance to Needy Families (**TANF**);
 4. Recipients of Federal Supplemental Security Income (**SSI**);
 5. Recipients of Pharmaceutical Assistance to The Aged and Disabled (**PAAD**);
 6. Recipients of General Assistance (**GA**) benefits;
 7. Recipients of the Universal Service Fund (**USF**); or
 8. **Persons unable to pay their utility bills because of circumstances beyond their control.** Such circumstances shall include, but shall not be limited to,

unemployment, illness, medically related expenses, recent death of an immediate family member, and any other circumstances, which might cause financial hardship.”

N.J.A.C. 14:3-3A.5(a) (emphases added).

- If service has already been disconnected: “Those residential electric or gas customers whose service has been discontinued for non-payment and not reconnected as of November 15, and who are otherwise eligible for protection under the Winter Termination Program, shall be required to make a down payment of up to 25 percent of the outstanding balance as a condition of receiving electric and/or gas service during the current heating season. The customer shall be notified, at the time of enrollment in a budget billing plan . . . that the down payment shall represent a maximum required amount and is not to be regarded as a minimum required payment. The utility **shall consider the customer's ability to pay in determining the appropriate level of the required down payment, but in no instance shall such required payment exceed 25 percent of the outstanding balance.** The utility shall refer to the Board for resolution, all disputes regarding the appropriate amount of down payments.” N.J.A.C. 14:3-3A.5(b) (emphasis added).
- Enrollment in a 12-month budget payment plan and good faith payments during the heating season are required. Utility allegations of failure to make good-faith payment despite ability to do so must be resolved by the BPU before any termination for this reason during the heating season. All energy-related financial assistance must be forwarded to the customer’s major heat supplier, if it is a gas or electric utility. N.J.A.C. 14:3-3A.5(c) – (f); 14:3-7.5(c), (e).
- “During the heating season, an electric or gas utilities shall not request a security deposit or an addition to an existing security deposit from a customer who is eligible for and seeks the protection of the Winter Termination Program.” N.J.A.C. 14:3-3A.5(g).
- “During the heating season, all notices of discontinuance of residential electric or gas services shall be accompanied by a Winter Termination Program fact sheet, printed in both English and Spanish, setting forth all terms and conditions of the Winter Termination Program.” N.J.A.C. 14:3-3A.3(f).

NO TERMINATION ON SUB-FREEZING DAYS

- “A utility shall not discontinue a customer's service for nonpayment . . . [w]henver the high temperature is forecast to be 32 degrees Fahrenheit or below during the next 24 hours, electric and gas utilities shall not, within any portion of their service territories, disconnect residential service for nonpayment, failure to pay a cash security deposit or guarantee, or failure to comply with the terms of a deferred payment plan. This limit applies to all residential customers, including those eligible for or enrolled in the Winter Termination Program at N.J.A.C. 14:3-3A.5” N.J.A.C. 14:3-3A.2(e)(1).

- “In applying the temperature-related limits at (e)1 . . . above, a utility shall rely on forecasts obtained from national weather stations covering the utility's facilities, including the Newark Weather Station and the Atlantic City Airport Weather Station. If a utility's service territory is covered by more than one national weather station, and these weather stations forecast different high temperatures, the utility shall rely on the lowest forecast in applying (e)1.” N.J.A.C. 14:3-3A.2(g).

NO TERMINATION WHEN TEMPRERATURE FORECAST TO EXCEED 95°

- “If a customer is eligible for the Winter Termination Program and the high temperature is forecast to be 95 degrees Fahrenheit or more at any time during the following 48 hours, an electric utility shall not discontinue residential service to a customer for reasons of nonpayment, failure to pay a cash security deposit or guarantee, or failure to comply with a deferred payment agreement. N.J.A.C. 14:3-3A.2(e)(3).
- “In applying the temperature-related limits at . . . (e)3 above, a utility shall rely on forecasts obtained from national weather stations covering the utility's facilities, including the Newark Weather Station and the Atlantic City Airport Weather Station. If a utility's service territory is covered by more than one national weather station, and these weather stations forecast different high temperatures, the utility . . . shall rely on the highest forecast in applying (e)3.” N.J.A.C. 14:3-3A.2(g).

MEDICAL EMERGENCY

- “(i) Discontinuance of residential service for nonpayment is prohibited for up to 60 days if a medical emergency exists within the residential premises, which would be aggravated by a discontinuance of service. The following conditions apply to this 60-day prohibition on discontinuance:
 1. The utility may require the customer to provide reasonable proof of inability to pay;
 2. The utility may require the customer to submit a written physician's statement to the utility, stating the existence of the emergency, its nature and probable duration, and that discontinuance of service will aggravate the medical emergency;
 3. The utility may require submittal of a recertification by the physician as to the continuing nature of the medical emergency after 30 days;
 4. At the end of such period of emergency, the customer shall remain liable for payment for all service(s) rendered, subject to N.J.A.C. 14:3-7.6; and
 5. If, during the period of medical emergency, the customer incurs telephone charges in excess of the customer's average telephone bills of

the six months preceding the first 30-day period, the utility may require the telephone customer to pay those excess charges during the medical emergency.

(j) The Board may extend the 60-day period in (i) above for good cause. The customer shall request such an extension from Board staff in writing. The request shall be accompanied by an updated physician's note that meets the requirements of (i)2 above. Pending the Board's consideration and decision regarding the request for extension, utility service shall not be discontinued.”

N.J.A.C. 14:3-3A.2.

DEFERRED PAYMENT PLANS

- (a) “Whenever a residential customer advises the utility that the customer wishes to discuss a deferred payment agreement because said customer is presently unable to pay a total outstanding bill and/or deposit, the utility shall make a good faith effort to provide the customer with **an opportunity to enter into a fair and reasonable deferred payment agreement(s) which takes into consideration the customer's financial circumstances.**”

(b) The following shall apply to a deferred payment agreement(s) under this section:

1. The utility shall not require a residential customer to pay, as a down-payment, more than 25 percent of the total outstanding bill due at the time the agreement(s) is made or executed;
2. In the case of a residential customer who received more than one utility service from the same utility, if the amount, which is in arrears is a combination of those services, the utility shall offer a separate deferred payment agreement for each service based on the outstanding balance for that service;
3. The utility shall not require a customer described under (b)2 above to accept two or more deferred agreements that extend over the same time period;
4. A customer described under (b)2 above shall have the option to enter into a deferred payment agreement(s) for one service and have the remaining service(s) disconnected until satisfactory arrangements for payment can be made;
5. A utility shall renegotiate and/or amend the deferred payment agreement of a residential customer if said customer demonstrates that his or her financial circumstances have changed significantly because of factors beyond his or her control;

...

(c) Any deferred payment agreements, which extend for more than two months shall

be in writing and shall provide that a customer who is presently unable to pay an outstanding debt for utility services may make reasonable periodic payments until the debt is liquidated while continuing payment of current bills.

(d) While a deferred payment agreement for each separate service need not be entered into more than once a year, the utility may offer more than one such agreement in a year.

(e) The Board may order a utility to accept more than one deferred payment agreement in a year if said action is reasonable.

(f) If the customer defaults on any of the terms of the agreement, the utility may discontinue service after providing the customer with notice of discontinuance in accordance with N.J.A.C. 14:3-3A.3. In the case of a residential customer who receives more than one utility service from the same utility and has entered into a separate agreement for each separate service, default on one such agreement shall constitute grounds for discontinuance of only that service.

N.J.A.C. 14:3-7.7.

BUDGET BILLING PLANS

- “Each gas, electric, water and wastewater utility . . . shall . . . have available to the public on request, a budget billing plan program description for residential accounts. The budget billing plan program shall allow a customer to pay a predetermined monthly rate for a set time period (known as the budget plan year), based on the customer's average usage. At the end of the budget plan year, the public utility shall "true up" the customer's account, in accordance with (g) below, and will adjust the customer's charges to reflect the actual usage over the budget plan year.” N.J.A.C. 14:3-7.5(b).
- The projected monthly budget amount that a customer owes under a budget billing plan shall be determined by the following factors:
 1. Monthly usage on the customer's account for the past season;
 2. Actual weather conditions encountered during the past season, adjusted to normal year;
 3. Base rate increases and levelized energy or levelized gas adjustment charges actually granted by the Board; and
 4. Projected changes in the levelized energy or levelized gas adjustment charges.

N.J.A.C. 14:3-7.5(d).

- The utility shall offer all customers the same budget plan year, which will last 10, 11 or 12 months, except that the budget plan year for all residential electric or gas customers who seek the protection of the Winter Termination Program shall be 12 months. N.J.A.C. 14:3-7.5(e).
- If a customer is a new customer with little or no prior history of utility use, the monthly budget amount shall be determined using a reasonable estimate of likely usage. N.J.A.C. 14:3-7.5(f).
- For each customer on a budget billing plan, the utility shall "true up," or compare the actual cost of service rendered, as determined by actual meter readings, and the monthly budget amount as follows:
 1. The comparison shall be made at the beginning of the budget plan year, and at least once during the budget plan year;
 2. The comparison shall take into account the customer's usage and any rate increases or decreases that have been granted by the Board, including increases or decreases in the levelized energy or levelized gas adjustment charges;
 3. If a comparison performed during a customer's budget plan year reveals an increase or decrease of 25 percent or more in the monthly budget amount, the monthly budget amount shall be adjusted for the balance of the budget plan year to minimize the adjustment required at the end of the budget plan year. There shall be no more than one such adjustment during the budget plan year;
 4. A final bill for a budget plan year shall be issued at the end of the budget plan year and shall contain that month's monthly budget amount plus an adjustment of any difference between said amount and the actual cost of the service rendered during the budget plan year; and
 5. A utility shall notify budget billing plan customers in writing of a revised monthly budget amount at least 10 working days before the due date of the initial bill of the next budget plan year.

N.J.A.C. 14:3-7.5(g).

- The budget billing plan bill shall contain the information required by N.J.A.C. 14:3-7.2, Form of bill for metered service, N.J.A.C. 14:3-7.3 Form of bill for unmetered service and N.J.A.C. 14:3-7.4 Method of billing. In addition, the budget billing plan bill shall show the monthly budget amount, budget balance and, when feasible, the budget billing to date and the actual cost of service rendered billing to date. N.J.A.C. 14:3-7.5(i).
- "Except for Winter Termination Program customers, a customer may go off a budget billing plan at any time, in which event the customer shall pay the amount owed for

service rendered or, in the alternative, agree to a stipulated payment agreement according to N.J.A.C. 14:3-7.6.” N.J.A.C. 14:3-7.5(j).

DIVERSION OF SERVICE

- Each utility shall investigate alleged diversions as follows:
 1. When a tenant-customer alleges in good faith that the level of consumption reflected in his or her utility bill is unexplainably high, the tenant-customer may request the utility supplying gas, electricity, water and/or wastewater service to conduct a diversion investigation at no cost to the customer;
 2. Such request shall be made in writing by the tenant-customer by completing and returning to the utility a diversion investigation application provided by the utility;
 3. The application shall state that, if the tenant-customer has made one or more previous diversion complaints in the previous 12-month period, which failed to uncover a diversion of utility service, the utility may bill the customer for the cost of the second and subsequent investigations;
 4. The utility shall investigate the alleged diversion within two months of the receipt of the investigation request. Each diversion investigation shall include a meter test conducted in accordance with N.J.A.C. 14:3-4.4;
 5. The utility shall have the right of reasonable access pursuant to N.J.A.C. 14:3-3.6. For purposes of utility access, the alleged diversion is presumed to constitute a hazardous condition until the utility investigates;
 6. If, as a result of such investigation, the utility determines that the service from the pipes and/or wires serving the tenant-customer has been diverted, the utility shall notify the landlord or his or her agent and instruct him or her to correct the diversion within 30 days through rewiring or repiping. However, this provision shall in no way prohibit a utility from disconnecting service if the utility determines that an unsafe condition exists;
 7. If a diversion is found, the utility shall attempt to determine the identity of the beneficiary;
 8. A tenant-customer seeking relief shall be responsible for furnishing to the utility the identity and address of the landlord or agent, and of the beneficiary, if known;
 9. Additionally, the tenant-customer shall provide any other information, which may assist the utility in its investigation;
 10. The utility shall furnish to the tenant-customer, the tenant-customer's landlord,

and to the beneficiary (if different from the landlord) within 14 days of the investigation, a written report on the findings of the investigation. This report shall include information on the estimated cost of diverted service based upon prior use, degree day analysis, load study and/or cooling degree hours, whichever is appropriate;

11. If the utility locates a diversion, the utility shall attempt to reach an agreement with the parties involved or, in lieu of such agreement, proceed to the conference described in (f) below; and

12. If no diversion is located, these diversion proceedings shall end when the utility has completed and filed its investigation report pursuant to (j) below.

N.J.A.C. 14:3-7.8(d).

- The regulations provide for continuation of the customer's service (upon payment or an agreement to pay amounts not in dispute) and for a conciliation process following the completion of a diversion investigation. N.J.A.C. 14:3-7.8(e)-(h).
- "When the amount of an electric, gas, water or wastewater bill is significantly higher than the customer's established consumption history, and there is no apparent explanation for the increase (for example, severe weather conditions; changes in the make-up or the lifestyles of the members of the household), the customer's established consumption shall be given consideration, in addition to the results of any tests performed on the meter, in the evaluation of whether or not the bill is correct and appropriate." N.J.A.C. 14:3-7.6(g).

NO TERMINATION FOR COLLATERAL MATTERS

- A general principle is there can be no utility service termination for collateral matters -- nonpayment of any charges other than current service charges for the utility service at issue.
- "A utility may discontinue service for nonpayment only of charges for the actual utility commodity itself, that is, for electricity, gas, water, wastewater service, or telephone service. A utility shall not discontinue service for nonpayment of charges for optional services, as defined at N.J.A.C. 14:4-1.1, or for repairs, merchandise, installation of conservation measures, or other non-tariff services contracted for between the customer and the utility, nor shall the utility threaten discontinuance for any of these reasons." N.J.A.C. 14:3-3A.2(b).
- "[N]onpayment for business service shall not be a reason for discontinuance of residential service, except in cases of diversion of service." N.J.A.C. 14:3-3A.2(c).

- No termination of local telephone service for non-payment of long-distance charges: “A telephone utility may terminate [basic residential local telephone service] only for nonpayment of basic residential local telephone service charges, in accordance with N.J.A.C. 14:3-3A.2(b).” N.J.A.C. 14:3-3A.8(d).
- See also **THIRD PARTY LIABILITY** and **BACKBILLING**, below

THIRD PARTY LIABILITY

- A public utility cannot refuse or terminate service to a customer for the non-payment of anyone else’s debt, unless the doctrine of necessities applies or the utility can present clear and convincing evidence of fraud.
- “The customer(s) of record, as defined at N.J.A.C. 14:3-1.1, shall be responsible for payment for all utility service rendered.” N.J.A.C. 14:3-7.1(a).
- “No public utility shall refuse to furnish or supply service to or for any building or premises by reason of a bill remaining unpaid by a previous occupant, providing the person applying for service shall not be in arrears to such company for service previously furnished to or for such building or premises or furnished to or for any other building or premises.” N.J.S.A. 48:3-3.1.
- See Roger D. Colton, *The Legality of Conditioning Utility Service on Payment of a New Roommate’s Old Debt*, Clearinghouse Review, September-October 2001, at 330 and

Roger D. Colton, *Limiting the “Family Necessaries” Doctrine as a Means of Imposing Third-Party Liability for Utility Bills*, Clearinghouse Review, July-August 2001, at 193.

- Limitations on the doctrine of necessities: a non-customer spouse can be held liable only if
 - **A family exists in fact** (e.g. no objective decision no longer to live together as a family)
 - **The expense is on behalf of the family** (e.g. not independent individual, personal, or business expense that does not contribute to the convenience, enjoyment, or comfort of the family)
 - **The debt is for a necessity** (e.g., not 900 or 976 calls)
 - The utility relied on the credit of the spouse (under the *Jersey Shore* case, it is not clear whether this is limited to a priority rule under New Jersey law)
 - An existing child support order may be found to preclude liability.

BACKBILLING (MISTAKEN UNDERCHARGES)

- Backbilling refers to billing for charges that were not billed at the time they were incurred because of a utility's mistake. This can result in a claim that a large, unexpected lump sum is due.
- "If a meter is found to be registering less than 100 percent of the service provided, the utility shall not adjust the charges retrospectively or require the customer to repay the amount undercharged, except if:
 1. The meter was tampered with, or other theft of the utility service has been proven;
 2. The meter failed to register at all; or
 3. The circumstances are such that the customer should reasonably have known that the bill did not reflect the actual usage."

N.J.A.C. 14:3-4.6(d).

- "In cases of a charge to a customer's account under (d)2 or 3 above, the customer shall be allowed to **amortize the payments for a period of time equal to that period of time during which the customer was undercharged.**" N.J.A.C. 14:3-4.6(f).
- Termination of service where backbilling has occurred should not be permitted
 - Bills for metered service must be rendered monthly, bimonthly, or quarterly based on actual meter readings or a BPU-approved estimating procedure. N.J.A.C. 14:3-7.4, -4.6(b).
 - Discontinuance is permitted only for "nonpayment of a valid bill." N.J.A.C. 14:3-3A.1(a)(3).
 - Where there was no valid bill rendered on a periodic basis as required in the regulations, no discontinuance should be permitted, though the underlying debt may still be owed.
 - Additional arguments for challenging termination based on backbilling are discussed in section 11.6 of the NCLC Access to Utility Service manual (2d ed. 2001).
- As in other situations, the utility *must* work out a fair and reasonable deferred payment agreement taking into account the customer's ability to pay, with no more than 25% of the amount outstanding required up front. N.J.A.C. 14:3-7.7.

FAST METERS (MISTAKEN OVERPAYMENTS)

- “Each utility shall, without charge, make a test of the accuracy of a meter upon request of a customer, provided such customer does not make a request for test more frequently than once in 12 months.” N.J.A.C. 14:3-4.5(a); *see also* N.J.A.C. 14:3-4.5(e), (f) (BPU meter tests).
- “When a billing dispute is known to exist, the electric, gas or water utility shall, prior to removing the meter, advise the customer that the customer may have the meter tested by the utility or may have the Board witness a testing of the meter by the utility, and that in any event the customer may have the test witnessed by a third party.” N.J.A.C. 14:3-4.5(c)
- “Whenever a meter is found to be registering fast by more than two percent, or in the case of water meters, more than one and one half percent, an adjustment of charges shall be made . . .” N.J.A.C. 14:3-4.6(a)
- “When the amount of an electric, gas, water or wastewater bill is significantly higher than the customer's established consumption history, and there is no apparent explanation for the increase (for example, severe weather conditions; changes in the make-up or the lifestyles of the members of the household), the customer's established consumption shall be given consideration, in addition to the results of any tests performed on the meter, in the evaluation of whether or not the bill is correct and appropriate.” N.J.A.C. 14:3-7.6(g).
- “A public utility shall pay or credit interest at the rate prescribed by the Board in N.J.A.C. 14:3-3.5, Return of deposits, on any overpayment made by a residential customer due to a billing error, unless the overpayment is fully refunded or credited to the customer's account within two billing cycles after the customer notifies the utility in writing, identifying, describing and documenting the error in detail.” N.C.A.C. 14:3-7.1(d).

NO LATE CHARGES

- “A utility shall not assess a late payment charge on a residential customer . . .” N.J.A.C. 14:3-7.1(e).

THIRD PARTY SUPPLIERS

- Interim standards governing third party electric and gas suppliers have been codified at N.J.A.C. 14:4-1, *et seq.*

BANKRUPTCY

Utility debts are dischargeable in bankruptcy. *See* NCLC, *Access to Utility Service*, ch. 12 (4th ed. 2008 & 2010 Supp.); *Consumer Bankruptcy Law & Practice*, § 9.8 (9th

ed. 2009 & 2010 Supp.). The possibility of a bankruptcy can be helpful in negotiating a repayment plan, as the utility is at risk of getting nothing except possibly a new deposit.

The filing of a bankruptcy petition imposes a 20-day moratorium on disconnection by a monopoly service provider for nonpayment. 11 U.S.C. § 366. It also requires the utility to reconnect any disconnected service immediately. *In re Whittaker*, 882 F.2d 791 (3d Cir. 1989). After that, the utility can discontinue service only (1) if it does not have adequate assurance of payment for postpetition utility service -- e.g., a new deposit under N.J.A.C. 14:3-3.4 (typically about twice the average monthly bill, net of Lifeline or other assistance paid directly to the utility), or (2) on the basis of default on payment for post-petition services. See *In re Nixon*, 419 B.R. 281 (Bankr. E.D. Pa. 2009) (utility willfully violate automatic stay by mistakenly applying post-petition payment to pre-petition arrears). Courts have differed as to whether the debtor loses § 366 protection if adequate assurance is not provided within 20 days, but it appears that there is a strong argument that a deposit accepted after the 20-day period will maintain the protection of the automatic stay. Compare *In re Weisel*, 400 B.R. 457 (Bankr. W.D. Pa. 2009) (no stay violation where utility terminated service after debtor failed to furnish post-petition security deposit within 20 days after filing petition), *aff'd on other grounds*, 428 B.R. 185 (W.D. Pa. 2010) (debtor's non-payment of post-petition utility charges, rather than accepted but late payment of deposit, gave utility the right to terminate service post-petition), with *In re Allen*, 69 B.R. 867, 874 (Bankr. E.D. Pa. 1987) (debtor's submission of adequate assurance payment at any time triggers § 366 right to receive utility service).

If the utility *proves* tampering or unauthorized use by the debtor, some cases have held that the utility may condition continued service on payment of the resulting restitution obligation. See, e.g., *In re Parks*, 2008 WL 2003163 (Bankr. N.D. Ohio May 6, 2008) (collecting cases; finding violation of §366 where prepetition receipt of unbilled service resulted from utility's failure to complete shut off, rather than tampering or illegal reconnection by the debtor). The proofs in any such situation should be required to meet the standards for establishing nondischargeability under 11 U.S.C. §523(a) or §1328(a).

ADDITIONAL RESOURCES

- BPU Web Site <http://www.bpu.state.nj.us>
 - On-line Complaint Form: www.bpu.state.nj.us/bpu/assistance/complaints
 - Formal Disputes: www.bpu.state.nj.us/bpu/pdf/custassistance/formalhearing.pdf
- Division of Rate Counsel (f/k/a the Ratepayer Advocate) Web Site <http://www.nj.gov/rpa>
- PULP Web Site (NY Public Utility Law Project) <http://www.pulpny.org/index.html>
- FCC Consumer Complaint Forms for Interstate and Wireless Telephone-Related Issues http://www.fcc.gov/cgb/complaints_general.html

- NCLC, *Access to Utility Service* (4th ed. 2008 & 2010 Supp.)
- NCLC, *Consumer Bankruptcy Law & Practice*, § 9.8 (9th ed. 2009& 2010 Supp.)

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