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HUD Public Housing Utility Allowances

NOTE TO READERS

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NEW HUD PUBLIC HOUSING GUIDEBOOK SHOULD HELP REIN IN UTILITY ALLOWANCE ABUSES

In June 2003, the U.S. Department of Housing and Urban Development (HUD) released its revised Public Housing Occupancy Guidebook. As HUD indicates in the introduction, the objective of the Guidebook is to provide assistance on all aspects of HUD public housing operations.

One critical component to the revised Guidebook involves the changes that HUD made with respect to the calculation by Local Housing Authorities (LHAs) of utility allowances for tenant-paid utilities. Utility service includes electricity, home heating, and water/sewer, but not telephone, cable television, or internet access.

In October 2002, Fisher, Sheehan & Colton, Public Finance and General Economics (FSC) submitted comments to HUD proposing several modifications to how the HUD Guidebook addressed utility allowance issues. The Revised Guidebook adopted virtually all of these recommendations. The discussion below reviews the new modifications to the Guidebook's discussion of utility allowances and presents a synopsis of the basis advanced for making the recommendations in the first instance.

Luxury vs. Necessary Usage

HUD included a new statement in Section 14.3 of the Guidebook (page 170). The Guidebook now states: "In making the determination of what consumption is to be attributed to an energy conscious household, a PHA should distinguish between necessary appliances and luxury appliances. . . This distinction should reflect local usage and custom patterns."

Price Changes for Bulk Fuels

FSC had urged to HUD that “modification of the Revised Guidebook in this fashion simply reflects the current state of the law with respect to developing utility allowances for public housing.” *Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 629 (1993), *citing* 49 *Fed. Reg.* 31404.

Actual Energy Usage

HUD included a new statement in Section 14.1 (page 170). The Guidebook now states: "When the actual energy consumption by tenants routinely exceeds a utility allowance, the PHA shall increase the allowance unless the PHA can provide evidence that the energy consumption can be attributed to a lack of non-energy conservative consumption. The fact that tenant consumption is routinely in excess of the PHA's utility allowance is material evidence that the PHA allowance is insufficient or that excess consumption may be due to factors not within the control of the tenants."

FSC had urged to HUD that the law as articulated in the *Dorsey* case cited above provides two clear legal obligations for a PHA: (1) to determine whether tenant consumption is routinely in excess of the PHA's proposed utility allowance; and, if so, *either*: (a) to provide evidence of "non-energy conservative consumption" on the part of the tenants to rebut the inference that the utility allowances are inadequate, *or* (b) to modify the allowance to cover the tenant's consumption.

According to FSC: “These obligations are mandatory. A PHA does not have the discretion to adopt a utility allowance that fails to take this inference into account or that fails either to rebut or to respond to this inference should it arise.” HUD adopted the mandatory language (“shall”) in the Revised Guidebook.

HUD included a new statement in Section 14.3 (page 171). In addressing the requirement that utility allowances be increased when “rates” increase by 10% or more, the Guidebook now states: "This requirement applies to non-tariffed home energy sources as well as to tariffed utility costs. If at the end of the current winter heating season (October 1 through April 30 of each year), the average price of a non-tariffed fuel has increased by 10 percent or more relative to the price of the same fuel for the winter heating season in or immediately preceding the date on which the resident payment became effective, the PHA shall readjust the resident payment retroactive to the first day of the just-completed winter heating season."

A problem arises, FSC told HUD, when a HUD tenant does not use a tariffed energy source as his or her primary heating fuel. One example of a non-tariffed fuel commonly used in public housing is fuel oil. Fuel oil prices vary, often substantially, on a monthly (if not weekly) basis.

It is critical that the 10 percent rule be applied to bulk fuel (such as fuel oil) as well as to tariffed utilities (such as natural gas and electricity). Being an unregulated commodity, prices for bulk fuels can often demonstrate substantially greater volatility than tariffed utility charges (particularly, *regulated* tariffed utility charges).

To illustrate, FSC presented monthly winter fuel oil prices for the State of New York as a whole as well as for several sub-regions within the state. The data demonstrated, among other things, that winter fuel oil prices vary substantially from year-to-year. Even after the state average fuel oil price spiked up to more than \$1.60 per gallon in December 2000/January 2001, the prices did not then return to historic levels.

Rate Changes and Utility Adjustment Clauses

HUD provided important clarification to the requirement that utility allowances be adjusted if

rates change by 10% or more. HUD's Guidebook previously stated: "PHAs are required to revise their schedule of allowances before the end of the year if there is a change in the utility rate of 10 percent or more from the rate on which the allowance was based. A PHA would then be required to readjust the resident payment retroactive to the first day of the month following the month in which the last rate change taken into account became effective."

The revised Guidebook (section 14.3, page 171) adds the following clarification: "Changes in costs passed through an automatic adjustment clause (such as, for example, a fuel adjustment clause, a purchase gas adjustment clause, or a gas recovery clause) shall be considered a 'rate change' for purposes of this procedure."

FSC had asked for the change because of the "apparent focus [of the Guidebook] on the base rates of a utility." With natural gas utilities, in particular, FSC argued, a substantial part (if not *the* substantial part) of "rate increases" today will not accrue through changes in base rates, but rather through changes in gas commodity costs that will be passed on to consumers through automatic adjustment clauses.

FSC provided data that showed the spike in natural gas prices that occurred from 2000 to 2001 throughout the nation for a sampling of six states across the United States (east to west, north to south). Residential gas prices in Colorado went from \$5.04/MCF in January 2000 to \$13.57/MCF in August 2001. Massachusetts prices nearly doubled (from \$8.88/MCF to \$16.03/MCF). Kentucky prices nearly tripled (from \$5.53 in January 2000 to \$15.16 in June 2001).

This spike in natural gas prices did not uniformly lead to base rate increases throughout the nation. Filing a base rate case, of course, opens a utility up to rate case litigation regarding its entire cost of service (including its allowed rate of return). The price spikes did not result in substantive changes in the underlying basic expenses of a utility. Distribution costs remained relatively constant.

The changes occurred in the commodity cost of natural gas. This is precisely the type of price volatility that an automatic adjustment clause is designed to address. As a result, residential ratepayers throughout the nation, including public housing tenants using tenant-paid gas, paid hundreds of dollars a month in increased bills during the winter heating season without new rates being filed by the local gas utility.

FSC had suggested the change because "under the current language of Section 14.3, it is not absolutely clear that, in the absence of a rate case with new base rates being filed, PHAs are being directed to consider a 10 percent change in prices that are charged to consumers through an automatic adjustment clause."

How Demographic Factors Affect Energy Usage

HUD adopted new language recognizing that demographic factors, in addition to physical attributes of a building, can affect energy consumption. The HUD Guidebook previously stated: "Utility allowance amounts will vary by the rates in effect, size and type of unit (single family, duplex, row, town home), climatic location and siting of the unit, type of construction, energy efficiency of the dwelling unit, and other factors related to the physical condition of the unit." HUD added the following language to Section 10.7 (page 138): "Utility allowance amounts will also vary by residential demographic characteristics affecting home energy usage."

FSC had suggested this modification "to make clear that it is not merely "factors related to the physical condition of the unit" that will affect home energy consumption." FSC used hot water consumption as one illustration. FSC cited the American Society of Plumbing Engineers statement regarding how to determine hot water demand:

"The first step the designer must take in calculating demand is to determine the demographic profile of the project and building

occupants. Different types of building occupant have been found to have fairly predictable patterns of hot water consumption. Users can be divided into three categories—"low," "medium," and "high volume" water consumers (LMH)—as a function of the building and occupant demographics."

According to ASPE, ". . . a low-income housing project will generally fall somewhere between the "low-income" and "no occupants work" categories of high-volume water consumption." The classification by demographics is critical to ensuring appropriate utility allowances. According to ASPE, while a household falling into the "low" category can be expected to use 14 gallons of hot water per person per day, a household falling into the "medium" category would use 30 gallons of hot water per person per day, and a household falling into the "high" category can be expected to use 54 gallons of hot water per person per day.

In sum, FSC told HUD, it is not merely "factors related to the physical condition of the unit" that affect the appropriate "utility allowance amount." Demographic characteristics will also affect what the appropriate allowance would be.

Reliance on Technical Guidelines

HUD's Guidebook previously said: "The allowance amount must be sufficient to maintain the requirements of a safe, sanitary, and healthful living environment." HUD added language to Section 10.7 (page 138) stating: "Existing technical standards (i.e., local building codes) should be used where available in determining what is necessary to provide for safe, sanitary and healthful living."

FSC had argued to HUD that this language was needed because "a determination of what energy consumption is needed for safe, sanitary, and healthful living should not be done in a vacuum. PHAs should be placed on notice that an abundance of technical standards exists that define what energy consumption is necessary to provide for health and safety."

FSC cited lighting consumption as one example. Standards exist for the amount of light needed for particular activities of daily living. According to the Design Criteria for Lighting Interior Living Space, adopted by the Illuminating Engineering Society of North America, casual reading and general kitchen work, for example, generally require 30 footcandles of light. Dining requires 15 footcandles. A "footcandle" of light is a measure of light (measured in lumens per square foot). A lumen is a unit of light output from a particular bulb (and is generally reported on the box in which the bulb is sold). As a general rule, the higher the wattage of a light bulb, the greater number of lumens that light bulb will produce.

Consider a light bulb of 60 Watts. A 60 Watt bulb will have a light output of 800 to 900 lumens. If placed in a room with dimensions of ten feet by eight feet, this bulb will be required to light 80 square feet. Assuming no degradation in illumination as a function of distance, and assuming the light bulb is unshaded, this 60 Watt light bulb will produce from 10 to 11 footcandles of light ($800 \text{ lumen} / 80 = 10 \text{ fc}$; $900 \text{ lumen} / 80 = 11.25 \text{ fc}$). Under the national standards for lighting interior spaces, clearly, this single light is insufficient to provide safe and healthful living for reading or for other activities of daily living.

In fact, however, the light bulb *will* be shaded and illumination *does* degrade over distance. It is even more evident that, using existing national technical standards for lighting, a single 60 Watt bulb provided in a living room or bedroom (for example) would be insufficient to provide for safe and healthful living when considering the purposes for which those spaces are intended to be used.

In sum, when HUD states that utility allowances are to be sufficient to provide for "a safe, sanitary and healthful living environment," it should be made clear that substantial technical standards have been established by a variety of standard-setting bodies regarding what energy consumption is needed for safe, healthful and sanitary living. HUD has now made clear that those standards should be used when available.

The use of the “i.e.” by HUD, however, is curious. It would seem that if HUD intended to limit “technical standards” exclusively to “local building codes,” it would have said so directly (“Local building codes should be used where available. . .”). The tenor of the statement would seem to indicate that the “i.e.” was meant to be an “e.g.” instead, using “local building codes” as one, but only one, illustration, of the types of “technical standards” that should be used.

Recognition of Cooling Needs

HUD provided some recognition of the importance of cooling in the Revised Guidebook. HUD added language to Section 14.1 (page 169) stating that when the supplier offers a budget billing plan, residents should be suggested to use such a plan, with the new language being the underlined as follows: “This protects the resident from large seasonal fluctuations in utility bills and ensures adequate heat in the winter and cooling in the summer.”

FSC had urged to HUD that “the need for cooling as a health and safety measure has never been more evident.” FSC cited a report by the National Fuel Funds Network, which stated that “while much of the attention relating to home energy assistance today is directed towards the dangers of cold weather, extreme heat is the most deadly weather that consumers face. As a result, additional attention should be paid not only to the dangers associated with extreme heat, but also to addressing the particular problems attributable to an inability-to-pay for the cooling necessary to provide health and safety protections.”

As evidence of HUD’s obligation to consider cooling needs, FSC cited Congressional action to amend the federal fuel assistance (LIHEAP) statute so as to provide a “clarification” on HUD utility allowances. With regard to public housing in particular, the LIHEAP statute provides that: “tenants. . .who are responsible for paying some or all heating or cooling costs shall not have their eligibility automatically denied. A State may consider the amount of the heating *or cooling*

component of utility allowances received by tenants. . .when setting benefit levels under the Low-Income Home Energy Assistance Program.” (emphasis added).

The statute continues to state: “The size of any reduction in Low-Income Home Energy Assistance Program benefits must be reasonably related to the amount of the heating *or cooling* components of utility allowances received. . .” (emphasis added). Clearly, Congress intended utility allowances to have, where appropriate, a “cooling” component. If cooling allowances were not permitted in the first place, the entire LIHEAP language just cited would be entirely superfluous, a result not to be reached.

For these reasons, FSC urged to HUD that the Revised Guidebook language should make clear that budget billing can be used to smooth seasonal home energy billing peaks attributable to home cooling as well as billing peaks attributable to home heating.

Nonpayment as Grounds for Eviction

HUD no longer says that nonpayment of utilities is grounds for eviction. The HUD Guidebook previously stated: “Paying the utility bill is the resident’s obligation under the PHA’s lease. Failure to pay is grounds for eviction.” HUD changed that language in Section 14.1 (page 169) to read: “Retaining utility service is the resident’s obligation. Failure to retain utility service is grounds for eviction.”

FSC had urged this modifications to HUD, arguing that “it is reasonable to expect many low-income households to miss payments on their utility bills. Payment-troubled customers are disproportionately low-income.” National data reported by the U.S. Census Bureau indicates that the proportion of households in arrears at any given point in time is substantially higher for the low-income population than for the population as a whole. One 1995 census study, for example, reported that while 9.8% of

non-poor families could not pay their utility bills in full, 32.4% of poor families could not do so.

FSC urged to HUD that “it should be clear that low-income tenants of public housing have a particular exposure to temporary inability-to-pay their utility bills. A recent paper by the National Fuel Funds Network (NFFN) identified reasonable factors that may result in a temporary inability-to-pay. According to NFFN, one factor particularly contributing to the instability of income of the working poor involves the lack of paid leave benefits.”

FSC argued to HUD that despite the reality of payment problems within the low-income community, there are responsible actions for tenants of public housing to take in response to their nonpayment. As with other utility customers, tenants of public housing may enter into deferred payment plans through which to retire arrears. As with other low-income utility customers, tenants of public housing may seek assistance through the Crisis component of the federal Low-Income Home Energy Assistance Program (LIHEAP).

FSC concluded that: “In sum, it is unreasonable to provide that nonpayment of a utility bill, standing alone, is grounds for eviction. What a PHA should seek is for a PHA tenant that gets behind on his or her bill to act responsibly in seeking additional assistance or in making payment arrangements in order to maintain utility service. So long as the tenant retains utility service, the interests of the PHA, acting in its capacity as a landlord, are satisfied.”

Availability of Comments

The full set of comments to HUD regarding proposed revisions to the Public Housing Occupancy Guidebook, including all underlying data, can be obtained by sending a request for the HUD comments to:

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FSC specializes in providing economic, financial and regulatory consulting. The areas in which *FSC* has worked include infrastructure financing, public enterprise planning and development, natural resource economics, community economic development, telecommunications, public sector labor economics, planning and zoning, regulatory economics, energy law and economics, fair housing, and public welfare policy.