

Ensuring Adequate Utility Allowances in Federal Housing

National Housing Law Project

May 1, 2009

FORECASTED U.S. REGIONAL UTILITY PRICES

2007 - 2009

Source: Energy Information Administration - November 2008

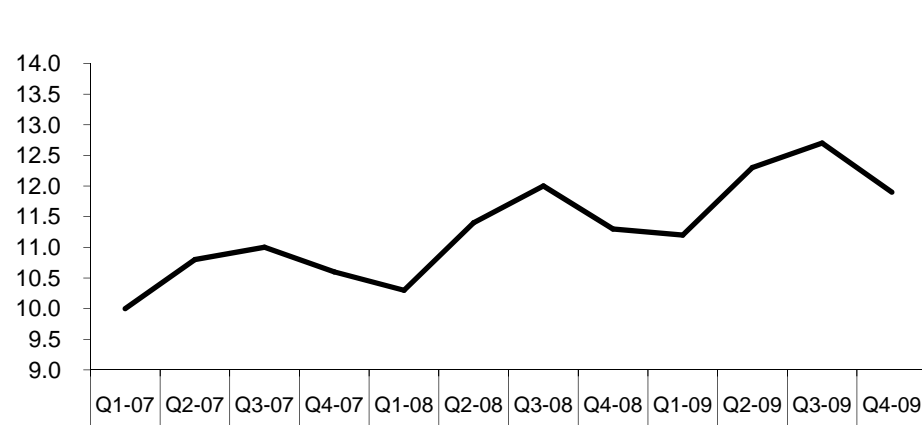
Residential Electricity (Cents per Kilowatthour)

	Quarterly Averages												Total Year Average			Percent Change		
	Q1-07	Q2-07	Q3-07	Q4-07	Q1-08	Q2-08	Q3-08	Q4-08	Q1-09	Q2-09	Q3-09	Q4-09	2007	2008	2009	07:08	08:09	07:Q4-09
East	14.8	15.5	15.6	15.0	15.2	16.3	17.4	16.5	16.3	17.3	17.8	17.0	15.3	16.3	17.1	6.9%	4.9%	14.9%
North	8.3	9.4	9.5	8.9	8.6	9.9	10.2	9.3	9.3	10.6	10.9	9.9	9.0	9.5	10.2	5.0%	7.4%	20.0%
South	9.3	10.0	10.1	9.9	9.5	10.6	11.2	10.6	10.3	11.4	11.8	11.1	9.8	10.5	11.2	7.1%	6.6%	19.7%
West	9.8	10.7	11.4	10.2	10.1	10.9	11.7	10.8	10.7	11.7	12.2	11.1	10.6	10.9	11.4	3.3%	4.6%	13.3%
Total	10.0	10.8	11.0	10.6	10.3	11.4	12.0	11.3	11.2	12.3	12.7	11.9	10.6	11.3	12.0	6.6%	6.2%	19.0%

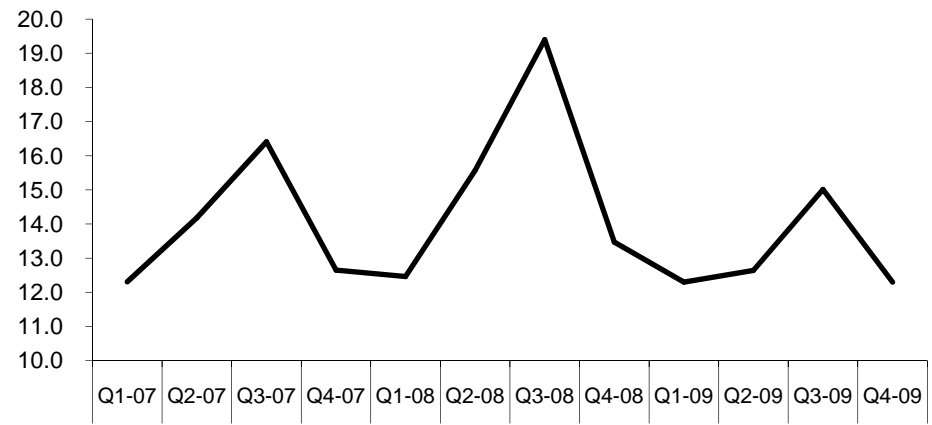
Residential Natural Gas (Dollars per Thousand Cubic Feet)

	Quarterly Averages												Total Year Average			Percent Change		
	Q1-07	Q2-07	Q3-07	Q4-07	Q1-08	Q2-08	Q3-08	Q4-08	Q1-09	Q2-09	Q3-09	Q4-09	2007	2008	2009	07:08	08:09	07:Q4-09
East	15.1	16.3	18.8	15.8	15.4	17.7	21.7	16.7	15.6	15.3	18.0	15.4	15.8	16.6	15.6	5.4%	(5.8%)	1.7%
North	11.2	13.1	16.3	11.4	11.3	14.7	19.9	12.3	11.0	11.8	14.8	11.1	11.8	12.6	11.4	6.2%	(9.4%)	(0.8%)
South	12.9	16.2	19.9	14.6	13.5	18.8	23.4	15.4	13.1	14.6	18.4	14.5	14.3	15.5	14.0	8.0%	(9.2%)	12.1%
West	11.2	12.2	13.5	10.9	11.3	13.4	15.9	11.8	11.4	10.9	12.6	10.8	11.5	12.2	11.2	6.7%	(8.6%)	(3.7%)
Total	12.3	14.2	16.4	12.7	12.5	15.6	19.4	13.5	12.3	12.6	15.0	12.3	13.0	13.7	12.6	5.7%	(8.7%)	(0.1%)

U.S. Residential Electricity Prices (2007-2009)



U.S. Residential Natural Gas Prices (2007-2009)



What's the Problem?

- Under housing programs with:
 - (1) income-based rents and
 - (2) tenant-paid utilities,
 - (3) recent increases in utility costs that are
 - (4) not reflected in adequate utility allowances
- may result in tenants paying more than the federal rent limits.

Review: Federally Assisted Programs With Income-Based Rents

- Public Housing
- HUD-Subsidized Mortgages (e.g. 236)
- Project-Based Section 8
- Section 8 Vouchers
- HOME program
- Low-Income Housing Tax Credit
- Rural Development (e.g., 515 & RA)

Federally Assisted Housing Programs

Detailed descriptions for each of these programs can be found at: NHLP, HUD Housing Program: Tenants' Rights (3d ed. 2004) ("Greenbook").

- Public Housing (p. 1/23)
- HUD-Subsidized Mortgages (p. 1/29)
- Project-Based Section 8 (p. 1/42)
- Section 8 Vouchers (p. 1/37)
- HOME (p. 1/59)
- Low-Income Housing Tax Credit (p. 1/64)
- Rural Development (RHS) (p. 1/54)

Review: Income-Based Rents

- Usually 30% of adjusted income
 - Public Housing, Project-Based Section 8 or RD Rental Assistance
- Variations:
 - Voucher tenants
 - LIHTC tenants
 - some HUD-Subs 236 and RD 515 tenants paying more than basic rent

Straight Income-Based

- Tenant's 30% of income contribution must cover both rent *and* reasonable amount of utilities
 - Rent limit in statute, 42 USC Sec. 1437a(a)
 - Utility allowances and required adjustments usually set by agency regulations
 - Base allowances: “**reasonable**” consumption
 - Required adjustments for **rate increases >10%**

Tenant-paid Utilities

- Common utility metering systems:
 - Retail-metered (T pays utility bill)
 - Master-metered (LL pays)
 - Master-metered with check-meters (rare)
- Different utilities for a unit can have different metering systems (e.g., water & sewer vs. gas & electric)
- Where tenant-paid, need to provide “utility allowance” as credit against rent contribution

Utility Allowance Regulations: Public Housing and Project-Based Section 8

- Utility allowance should cover reasonable consumption of energy-conservative household for basic functions: heating, cooking, refrigeration, lighting, hot water, and use of other small appliances
 - PHAs: 24 C.F.R. § 965.505 (but *not* air conditioning)
 - Project-Based Section 8: 24 C.F.R. § 5.603(b)
- PHA or Section 8 project owner must review utility allowance schedules at least annually
 - PHAs: 24 C.F.R. § 965.507(a)
 - Project-Based Section 8: 24 C.F.R. § § 880.610 and 881.601
- If applicable utility rates have increased by more than 10% since the previously established allowance, PHA or owner must immediately increase the utility allowance accordingly.
 - PHAs: 24 C.F.R. § 965.507(b)
 - Project-Based Section 8: 24 C.F.R. § § 880.610 and 881.601
- Unfortunately, the latter 10% trigger-adjustment rarely occurs, shifting to tenant interim cost burden until next annual adjustment

Sample Rent/Utility Allowance Schedule: Project-Based Section 8

EXHIBIT A

IDENTIFICATION OF UNITS ("CONTRACT UNITS") BY SIZE AND APPLICABLE CONTRACT RENTS

Contract Number _____

Effective Date 09/19/04

Number of Contract Units	Number of Bedrooms	Contract Rent	Utility Allowance*	Gross Rent
5	1 BR	\$896	\$24	\$920
32	2 BR	\$1,514	\$29	\$1,543
24	3 BR	\$1,804	\$35	\$1,839
2	4 BR	\$2,352	\$39	\$2,391

*gas heating, gas cooking, other electric

NOTE: This Exhibit will be amended by Contract Administrator notice to the Owner to specify adjusted contract rent amounts as determined by the Contract Administrator in accordance with section 6b of the Renewal Contract

Basis Renewal Contract

EXHIBIT A

Variations: Vouchers

- Voucher statute requires assistance payment to include utility allowance, 42 USC Sec. 1437f(o)(2)
- BUT max. asst'ce pymt limited by Payment Standard
- Tenant's actual rent contribution is 30% of income ***plus*** any excess in unit rent over the local Payment Standard
 - Payment Standard 90-110% of HUD-published FMR: ***what's yours?***
 - Each unit has its own actual rent

Variations: Vouchers

- Tenants paying some or all of utilities *may* receive benefit for a utility allowance (UA)
- Each Tenant's UA depends on PHA's matrix for different uses and fuel sources
- Because max. voucher subsidy is PS – 30% of income, Tenant benefits from UA or higher UA only if gross rent (Unit rent plus UA) is less than Payment Standard (see example)
- Tenants with gross rents already above Pymt Std must bear all utility cost increases

Effect of Utility Allowance Increase on Section 8 Housing Choice Voucher Participants

Rent w/o Utilities	1,250
Monthly Utility Costs	125
Family's Monthly Income	1,333
30% of Income	400
PHA's Payment Standard	1,350

	Utility Allowance (UA)	Total Rent to Owner (RTO) RTO=HAPO + FRTO	Gross Rent (GR) GR=RTO+ UA	Total Tenant Payment (TTP) TTP = 30% of Income	Housing Assistance Payment (HAP) Lesser of: GR-TTP <u>or</u> PS -TTP	Family Rent to Owner (FRTO) FRTO=RTO-HAPO	Family Share (FS) FS=GR-HAP	Family Share % of Income	Actual Shelter Costs %
Scenario 1	50	1,250	1,300	400	900	350	400	30.0%	35.6%
Scenario 2	75	1,250	1,325	400	925	325	400	30.0%	33.8%
Scenario 3	100	1,250	1,350	400	950	300	400	30.0%	31.9%
Scenario 4	200	1,250	1,450	400	950	300	500	37.5%	31.9%

Variations: Vouchers

- Adequacy of PHA's Payment Standard will determine which and how many tenants actually benefit from higher UA
- Need for advocacy on Payment Standards in **annual PHA Plan process** to counter pressure from inadequate or uncertain federal funding

Utility Allowance Regulations: Section 8 Voucher Program

- Utility Allowance should cover reasonable consumption of energy-conservative household for basic functions: heating, cooking, refrigeration, lighting, hot water, and use of other small appliances
 - 24 C.F.R. § 982.517
- Utility Allowance schedules must be reviewed at least annually and must be increased if utility rates have risen more than 10% since last established
 - 24 C.F.R. § 982.517(c)
- Need to advocate for increases in both the utility allowance and the applicable payment standard.
 - PHAs may establish their payment standard at 90% - 110% of the published FMR, and possibly higher with HUD approval. 24 C.F.R. 982.503(b)(1)(I)

**Allowances for
Tenant-Furnished Utilities
and Other Services**

U.S. Department of Housing
and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0169(esp. 400/2001)

See Public Reporting Statement and Instructions on Back

Locality San Francisco Housing Authority		Unit Type Dwelling Unit				Date 09/02/08	
Utility or Service		Monthly Dollar Allowances					
		0 BR	1 BR	2BR	3BR	4BR	5 BR
Heating	a. Natural Gas	39	54	70	85	109	124
	b. Bottle Gas						
	c. Oil/Electric	39	55	71	86	110	126
	d. Coal/Other						
Cooking	a. Natural Gas	6	9	12	14	18	21
	b. Bottle Gas						
	c. Oil/Electric	6	9	11	14	18	20
	d. Coal/Other						
Other Electric		19	26	34	41	53	60
Water Heating	a. Natural Gas	17	24	31	37	48	54
	b. Bottle Gas						
	c. Oil/Electric	20	28	35	43	55	63
	d. Coal/Other						
Water (includes Sewer)		22	28	33	39	48	56
Sewer							
Trash Collection		25	25	25	25	25	25
Range/Microwave		4	4	4	4	4	4
Refrigerator		10	10	10	10	10	10
Other -Specify							
CCS CODE = UDS							
Actual Family Allowances: To be used by the family to compute allowance Complete below for the actual unit rented.				Utility or Service		Per Month Cost	
Name of Family				Heating			
				Cooking			
Address of Family				Other electric			
				Air Conditioning			
				Water Heating			
Number of Bedrooms				Water			
				Sewer			
				Trash Collection			
				Range/Microwave			
				Refrigerator			
				Other			
				Total		\$	

Previous Editions are obsolete

Form HUD-52667 (12/97)
Ref. Handbook 7420.8

**Allowances for
Tenant-Furnished Utilities
and Other Services**

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and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0169(exp. 4/30/2001)

See Public Reporting Statement and Instructions on Back

Locality San Francisco Housing Authority		Unit Type Apartment Unit					Date 09/02/08
Utility or Service		Monthly Dollar Allowances					
		0 BR	1 BR	2BR	3BR	4BR	5 BR
Heating	a. Natural Gas	16	22	28	34	43	50
	b. Bottle Gas						
	c. Oil/Electric	16	22	28	35	44	50
	d. Coal/Other						
Cooking	a. Natural Gas	6	9	12	14	18	21
	b. Bottle Gas						
	c. Oil/Electric	6	9	11	14	18	20
	d. Coal/Other						
Other Electric		19	26	34	41	53	60
Water Heating	a. Natural Gas	15	21	27	34	43	49
	b. Bottle Gas						
	c. Oil/Electric	18	25	32	39	50	57
	d. Coal/Other						
Water		7	8	10	12	14	17
Sewer							
Trash Collection		25	25	25	25	25	25
Range/Microwave		4	4	4	4	4	4
Refrigerator		10	10	10	10	10	10
Other -Specify							
CCS CODE = UAs							
Actual Family Allowances: To be used by the family to compute allowance				Utility or Service		Per Month Cost	
Complete below for the actual unit rented.				Heating			
Name of Family				Cooking			
				Other electric			
Address of Family				Air Conditioning			
				Water Heating			
				Water			
				Sewer			
Number of Bedrooms				Trash Collection			
				Range/Microwave			
				Refrigerator			
				Other			
				Total		\$	

Previous Editions are obsolete

Form HUD-52667 (12/97)
Ref. Handbook 7420.8

PHA Plan Process: Public Housing and Vouchers

- Aside from the UA itself, PHA Plans address many issues that are of particular importance to advocates when analyzing a PHA's PH & Section 8 UA schedules, including:
 1. the Voucher payment standard calculations; and
 2. effective date of changes to the payment standard.
- Your PHA's most recent and past PHA plans are on HUD's website: <http://www.hud.gov/offices/pih/pha/approved/>
- Assisting a tenant organization in the PHA Plan process represents an opportunity to find joint solutions to common problems and for creating a better living environment for many tenants

Variations: LIHTC & HOME

- Rent limits *for LIHTC units* established by formula and election in LIHTC Reg Agreement between agency (CA TCAC) and each owner
 - 30% of 60% of AMI, or
 - 30% of 50% of AMI, or
 - 30% of 40% of AMI or perhaps lower
- Under LIHTC statute, rent limit must include a utility allowance
- HOME program is similar
- Per IRS regulations, allowance often derived from local PHA's UA for Sec. 8 Voucher

Utility Allowance Regulations: LIHTC & HOME Program

- LIHTC: The statutory maximum rents include a utility allowance for any tenant-paid utilities.
 - 26 U.S.C.A. § 42(g)
- LIHTC: The utility allowance to be deducted is often determined by a public agency depending on the type of property involved. Where the unit or tenant is not otherwise regulated or assisted, the rules in effect until mid-2008 (still used by most LIHTC owners) required use of the PHA utility allowance, unless otherwise provided by the utility supplier under specified procedures. In July of 2008, the regs were revised to permit owner choice of one of four methods.
 - 26 C.F.R. § 1.42-10 (2007) & 26 C.F.R. § 1.42-10 (2008), 73 Fed. Reg. 43863 (July 29, 2008)
- LIHTC: Changes in the allowance must become effective within 90 days.
- HOME: 24 C.F.R. § 92.252(c) (2008) (formula rents & UAs ~ LIHTC)
- Any increased allowance directly reduces the owner's rental income on a dollar-for-dollar basis with no prospect of increased public subsidy from federal appropriations.

Review: Utility Allowances

- Vary by program, by LL, & by property
- Separate components for each tenant–paid utility fuel source
- Base allowance set per applicable program rules
- Adjustments required for >10% rate increases
- To determine current allowance, get lease, tenant recertification form and LL or PHA’s allowance schedule (on various documents)
- Seek historical info from LL, PHA or regulatory agency (e.g., HUD, RD or Sec. 8 Contract Admin.)

Local Utility Rate Increases

- Get data from local utility suppliers; factor in any special rate structure for low-income or elderly
- Check most recent one-year period
 - E.g, Jan. 2008 to Jan. 2009, PG&E Gas Down 5%, Electricity Up 4%
- Check prior periods since ?? (statute of limitations)
 - Gas Up XX%
 - Electricity Up YY%
 - Fuel Oil Up ZZ%
- Specific increases depend on utility supplier(s)
- Will utility price level decline? If so, how far? Need to evaluate averages over relevant period

FORECASTED U.S. REGIONAL UTILITY PRICES

2005 - 2007

Source: Energy Information Administration - September 2006

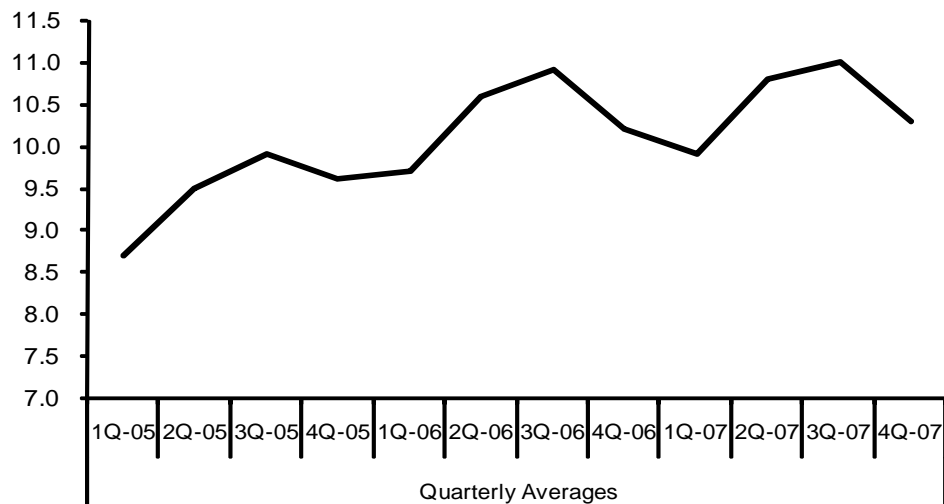
Residential Electricity (Cents per Kilowatthour)

	Quarterly Averages												Total Year Average			Percent Change	
	1Q-05	2Q-05	3Q-05	4Q-05	1Q-06	2Q-06	3Q-06	4Q-06	1Q-07	2Q-07	3Q-07	4Q-07	2005	2006	2007	1Q-05:3Q-06	1Q-05:4Q-07
East	12.2	12.9	13.5	13.4	14.3	15.0	15.3	14.8	14.6	15.8	16.1	15.1	13.0	14.9	15.4	25.9%	23.9%
North	7.5	8.5	8.7	7.9	8.0	9.1	9.3	8.6	8.4	9.1	9.2	8.6	8.1	8.8	8.9	24.2%	15.4%
South	8.0	8.8	9.1	9.1	9.2	10.0	10.1	9.5	9.1	10.0	10.2	9.6	8.7	9.7	9.7	26.8%	20.9%
West	8.7	9.6	10.0	9.3	9.5	10.5	10.9	9.9	9.7	10.6	10.8	10.3	9.4	10.2	10.3	25.3%	18.4%
Total	8.7	9.5	9.9	9.6	9.7	10.6	10.9	10.2	9.9	10.8	11.0	10.3	9.4	10.4	10.5	25.3%	18.4%

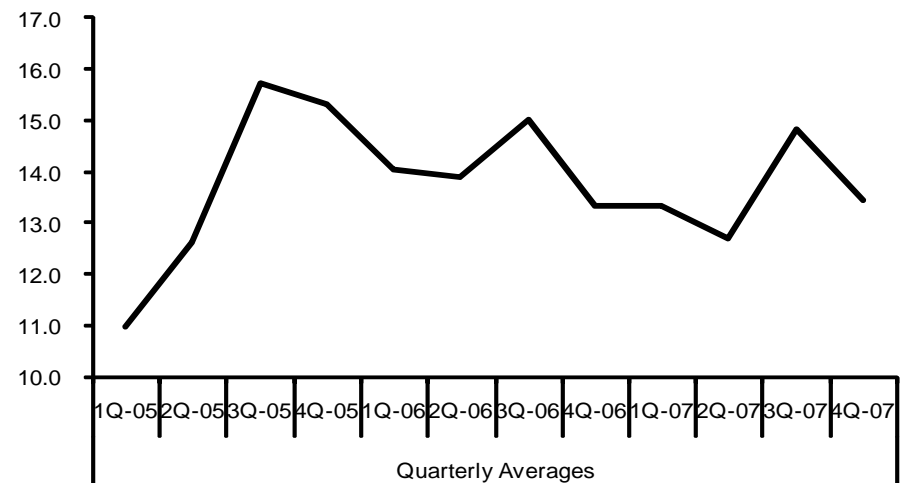
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East	13.1	14.1	17.8	17.9	16.8	16.6	17.4	15.8	15.3	14.8	17.3	15.8	14.8	16.5	15.4	33.3%	20.7%
North	9.9	12.0	16.0	14.0	12.7	12.9	14.6	12.4	12.4	11.9	14.5	12.6	11.8	12.7	12.5	47.3%	26.6%
South	11.6	14.3	18.8	17.5	15.2	16.4	18.0	14.8	14.3	14.4	17.2	14.8	14.2	15.5	14.7	54.9%	27.2%
West	10.1	10.7	12.8	13.2	12.3	12.0	12.5	11.9	12.3	11.1	12.6	12.3	11.3	12.1	12.1	23.7%	21.3%
Total	11.0	12.6	15.7	15.3	14.0	13.9	15.0	13.3	13.4	12.7	14.9	13.5	12.8	13.9	13.4	36.8%	22.5%

U.S. Residential Electricity Prices (2005-2007)



U.S. Residential Natural Gas Prices (2005-2007)



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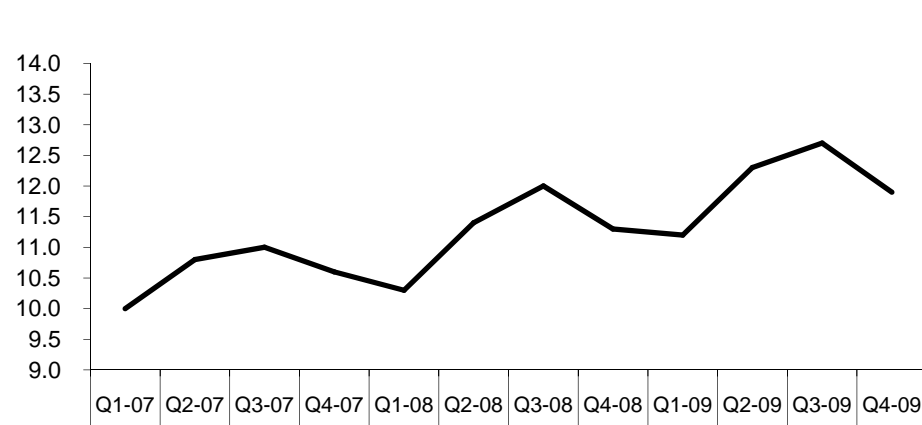
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South	9.3	10.0	10.1	9.9	9.5	10.6	11.2	10.6	10.3	11.4	11.8	11.1	9.8	10.5	11.2	7.1%	6.6%	19.7%
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Total	10.0	10.8	11.0	10.6	10.3	11.4	12.0	11.3	11.2	12.3	12.7	11.9	10.6	11.3	12.0	6.6%	6.2%	19.0%

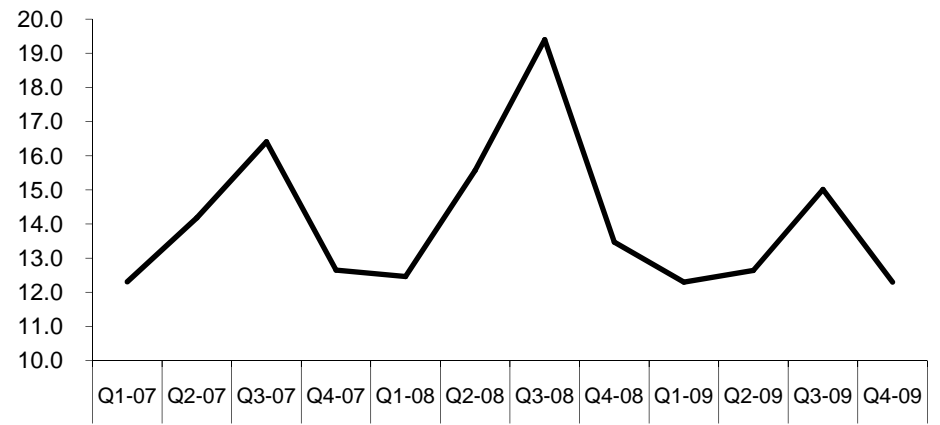
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West	11.2	12.2	13.5	10.9	11.3	13.4	15.9	11.8	11.4	10.9	12.6	10.8	11.5	12.2	11.2	6.7%	(8.6%)	(3.7%)
Total	12.3	14.2	16.4	12.7	12.5	15.6	19.4	13.5	12.3	12.6	15.0	12.3	13.0	13.7	12.6	5.7%	(8.7%)	(0.1%)

U.S. Residential Electricity Prices (2007-2009)



U.S. Residential Natural Gas Prices (2007-2009)



Your analysis

- **Get Key Info:**
 - **Historical rate information** from tenants' utility suppliers
 - **Utility allowance schedule(s)** for the tenants' particular housing program and/or provider:
 - For P-B Section 8, check the lease, Section 8 Renewal Contract, or HUD Form 92458
 - For Vouchers, check PHA's HUD Form 52667 (Ref. Handbook 7420.8)
 - Other programs may not have a specific form
- Compare changes in rates and UAs over time
- For Vouchers, also need current FMR & Pymt Std schedules; pursue ***the two-step approach*** of reviewing the adequacy of UAs while urging PHAs to increase Payment Standards as necessary

Jokers

- PHAs and owners claiming that base allowance was overly generous so adjustment not required
- Role of any local utility asst'ce program (PG&E CARE)? LIHEAP?
- Impact of increased allowance and reduced tenant rents on PHA or owner; who pays?
 - varies substantially by program & subsidy system
 - Note historical experience for 2001 utility cost spike
 - For project-based Section 8, HUD granted rent subsidy adjustments
 - For Public Housing, Operating Fund insufficient
 - For Vouchers, \$\$ for renewal & formula were OK
 - Did owners and PHAs properly adjust allowances?
- Enforceability in court
- “Moving To Work” (MTW) jurisdictions for PH and Vs

Program Subsidy Systems

- Public Housing: federal operating subsidies through Operating Fund -- *tight*
- Project-based Section 8:
 - projects on annual renewal: federal annual appropriations for contract rents -- *tight*
 - projects with unexpired initial contracts have contract authority & possible reserves
- Vouchers: annual appropriations for ACC under adjusted snapshot – *maybe tight*
- LIHTC: subsidy conferred at front end over 10 yr. period, but no annual or add'l \$\$

Enforceability

- Eviction defense in nonpayment of rent cases (see Bay Legal demurrer in UA Guide pleadings)
- Affirmative claims:
 - What is source of tenants' rights?
Statute, regulation, lease, other contracts
 - Who is defendant? PHA or private subsidized owner; fed'l or state agency too?
- Public Housing or Vouchers, Section 1983 should be available vs. PHA or state agency to enforce statute and regs
 - *Wright v. Roanoke HA* – Public Housing
 - *Johnson v. Hous. Auth. of Jeff. Parish* -- Vouchers
- Framing legal claims for project-based Sec. 8, RHS RA or LIHTC more problematic due to rare availability of 1983 vehicle
- BUT most cases never reach enforceability issue, with settlement after demand letter or complaint

Key Cases: Utility Allowance Litigation

- ***Wright v. City of Roanoke Redev. and Hous. Auth.***, 479 U.S. 418, 107 S.Ct. 766 (1987) (Brooke Amendment utility allowance requirements enforceable under §1983)
- ***Dorsey v. Hous. Auth. of Baltimore***, 984 F.2d 622 (4th Cir. 1993) (same, including challenge to PHA's determination of reasonable utility allowance)
- ***McDowell v. Philadelphia Hous. Auth.***, 423 F.3d 233 (3d Cir. 2005) (Alito, J., affirming interpretation of consent decree requiring PHA to adjust UAs for rate increases more than 10%)
- ***Johnson v. Hous. Auth. of Jefferson Parish***, 442 F.3d 356 (5th Cir. 2006) (finding §1983 claim for Voucher participants to challenge calculation and adjustment of UAs), pet'n for cert filed May 06

Resource List

- NHLP and Legal Aid Society of Hawaii, *Advocating for Adequate Utility Allowances In Federally Assisted Housing: A Practical Guide* (Oct. 2007) (to obtain, see attached sheet)
- NHLP, *Utility Allowance Adjustments: How Housing Advocates Can Proactively Address Skyrocketing Energy Costs*, 35 Hous. L. Bull. 350 (2005)
- NHLP, HUD Housing Programs: Tenants' Rights, ch. 6 (3d ed. 2004) ("Greenbook")
- Michael L. Hanley, *Effect of Utility Allowance Increases on Section 8 Housing Choice Voucher Participants* (enclosed)
- HUD FMR Schedules <http://www.huduser.org/datasets.fmr.html>
- HUD Utility Allowance Guidebook (Sept. 1998) (two-part publication covering utility allowance methodologies, principles, and regulations, available from PIH Information and Resource Center at (800) 955-2232).

Looking Ahead

- New \$\$ from stimulus bill may impact UAs
 - \$250 M for HUD-assisted (202 and Sec. 8) retrofits
 - \$4 B for PH capital rehab
 - Add'l \$5 B in DOE Weatherization Funds (if used for affordable multifamily properties)
- Climate change leg'n may raise energy prices & may include “social equity” provisions
- To join ad hoc HJN working group on utility & energy issues, e-mail Meliah Schultzman at NHLP, mschultzman@nhlp.org

Challenging Utility Allowances: Tools for the Poverty Advocate

Roger D. Colton

Fisher, Sheehan & Colton

Public Finance and General Economics

Belmont, MA

May 2009

It is relatively easy to check fuel price increases

1

Natural Gas Monthly
(Jan 2009)

Table 18

Table 18. Average Price of Natural Gas Sold to Residential Consumers
2006-2008
(Nominal Dollars per Thousand Cubic Feet)

State	2008 11-Month YTD	2007 11-Month YTD	2006 11-Month YTD	2008		
				November	October	September
Alabama	18.75	18.23	19.12	20.25	24.50	25.71
Alaska	8.56	8.73	6.67	8.36	8.51	8.91
Arizona	17.68	17.41	16.49	18.79	21.46	23.40
Arkansas	14.47	13.09	14.45	13.10	18.57	21.11
California	13.18	11.63	11.89	10.06	12.45	13.51
Colorado	10.04	8.95	10.65	8.70	9.47	10.31
Connecticut	NA	16.42	17.86	18.27	21.82	24.41
Delaware	16.25	16.71	17.48	15.04	19.86	23.21
District of Columbia	NA	15.75	17.15	16.65	16.95	20.21
Florida	21.55	20.79	21.90	21.47	24.57	25.71
Georgia	18.81	17.82	18.79	16.84	21.26	29.41
Hawaii	46.01	33.78	35.43	41.08	46.82	54.11

2

Electric Power
Monthly
March 2009

Table 5.6.B. Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State, Year-to-Date through December 2008 and 2007
(Cents per Kilowatthour)

Census Division and State	Residential		Commercial ¹		Industrial ¹		Transportation ¹		All Sec
	2008	2007	2008	2007	2008	2007	2008	2007	2008
New England	17.57	16.70	15.48	14.71	13.27	12.74	11.66	10.87	15.84
Connecticut	19.36	19.11	15.93	15.39	13.90	12.92	15.46	14.18	16.95
Maine	15.96	16.52	12.95	12.94	11.80	14.11	--	--	13.71
Massachusetts	17.50	16.23	16.05	15.20	14.21	13.03	9.65	9.24	16.22
New Hampshire	15.69	14.88	14.28	13.91	13.17	12.27	--	--	14.64
Rhode Island	17.57	14.05	15.49	12.67	14.22	12.04	--	--	16.13
Vermont	14.62	14.15	12.51	12.29	9.00	8.92	--	--	12.32
Middle Atlantic	15.15	13.95	14.01	13.22	8.72	7.78	12.46	10.35	13.38
New Jersey	15.95	14.14	14.72	12.99	12.42	10.08	16.26	11.14	14.91
New York	18.79	17.10	16.45	15.92	11.97	8.71	13.50	10.96	16.74
Pennsylvania	11.39	10.95	9.42	9.20	7.02	6.87	7.64	7.72	9.35

These reports are available on the WWW through the Energy Information Administration (EIA): www.eia.doe.gov

It is relatively easy to check usage benchmarks.

HUD has provided usage benchmarks.

Utility Allowance Guidebook

For Optional Use
By Public
Housing Agencies

September 1998

1

Table 5.2. Monthly Electric Consumption Requirements for Lighting, Typical Ranges^a

	0-1 Bedroom	2 Bedrooms	3 Bedrooms	4+ Bedrooms
Range	70-90 kWh	90-135 kWh	105-185 kWh	120-235 kWh

^a These ranges are based on consumption levels that various HAs, HUD field offices, and national consulting firms have used to calculate allowances.

2

Table 5.3. Monthly Electric Consumption Requirements of Miscellaneous Appliances, Typical Ranges^a

	0-1 Bedroom	2 Bedrooms	3 Bedrooms	4+ Bedrooms
Range	50-135 kWh	65-170 kWh	80-205 kWh	100-240 kWh

^a As was the case in Table 5.2, these ranges are based on consumption levels that various HAs, HUD field offices, and national consulting firms have used to calculate allowances.

Other useful resources are available through any library.

Professional associations publishing standards:

- American Society of Plumbing Engineers: Westlake Village (CA).
- American Society of Heating Refrigeration and Air-conditioning Engineers: Atlanta (GA).
- Illuminating Engineering Society of North America: New York (NY).

Advocacy tips: Challenging utility allowances is not unlike challenging other government decisions.

- **The point is not to demonstrate that a utility allowance is incorrect. The point is to demonstrate that it is unlawful.**
- **In addition to the nine mandatory factors that HUD regulations require that a PHA must “take into account” (public housing), know the two additional mandatory factors that courts have held a PHA must take into account.**
- **Know the legal inferences that must be rebutted by a PHA under appropriate circumstances.**

Be cognizant of the tension between energy and housing prices.

(Is there a need for joint advocacy regarding adequacy of FMRs?)

One thing to do for affordable energy beyond challenging utility allowances

Promote the Earned Income Tax Credit

- **What is it:**
 - Country’s primary anti-poverty program.
 - Refundable tax credit (cash back).
 - Average refund: around \$2,000.
 - 3-year retroactive refund application.
- **Why is EITC an “affordable energy” program:**
 - 1/3 used to pay for past-due utility bills.
 - Only 50 - 80% of eligible claim.
 - Receipt at time of winter heating bills.
 - Every jurisdiction can increase penetration by 5%.

For further information, check out: *Five Things to Do* series on FSC web site.

For more information:

<http://www.fsconline.com>

(News *** Library)

<http://www.HomeEnergyAffordabilityGap.com>

Lessons Learned: Public Records Act Requests

Meliah Schultzman

Attorney/EJW Fellow

National Housing Law Project

NHLP's CA Utility Allowance Project

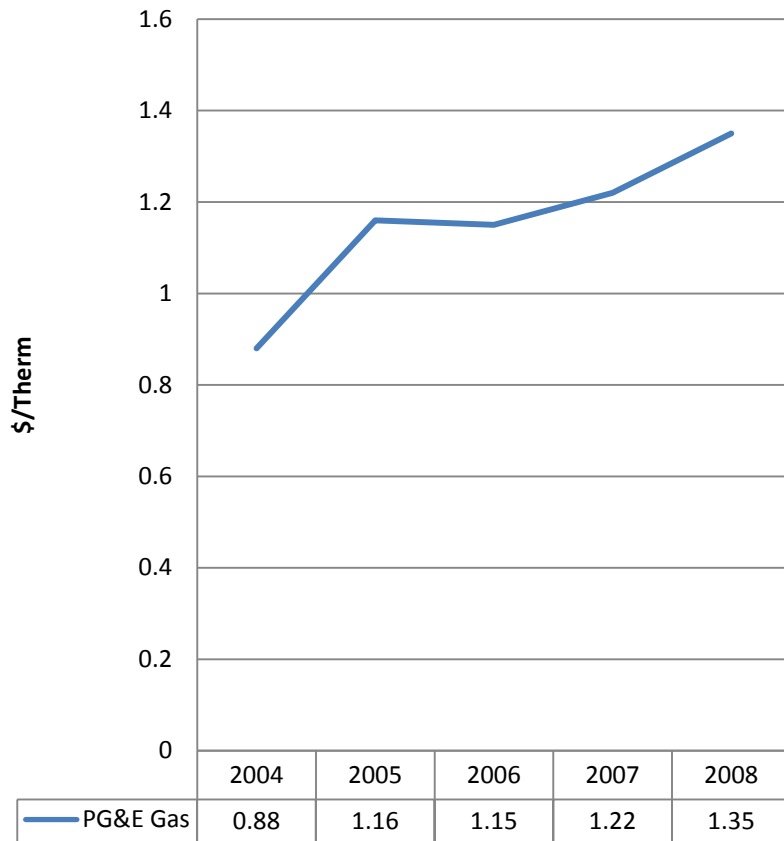
- Sent public records act requests to 41 PHAs throughout Northern California
- Sought records under Cal. Gov't Code §§ 6250-6270
- Sought to obtain UA schedules and supporting data from 2004 to present
- We identified two sets of issues:
 - Local level issues
 - Regional level issues

Local Level Issues

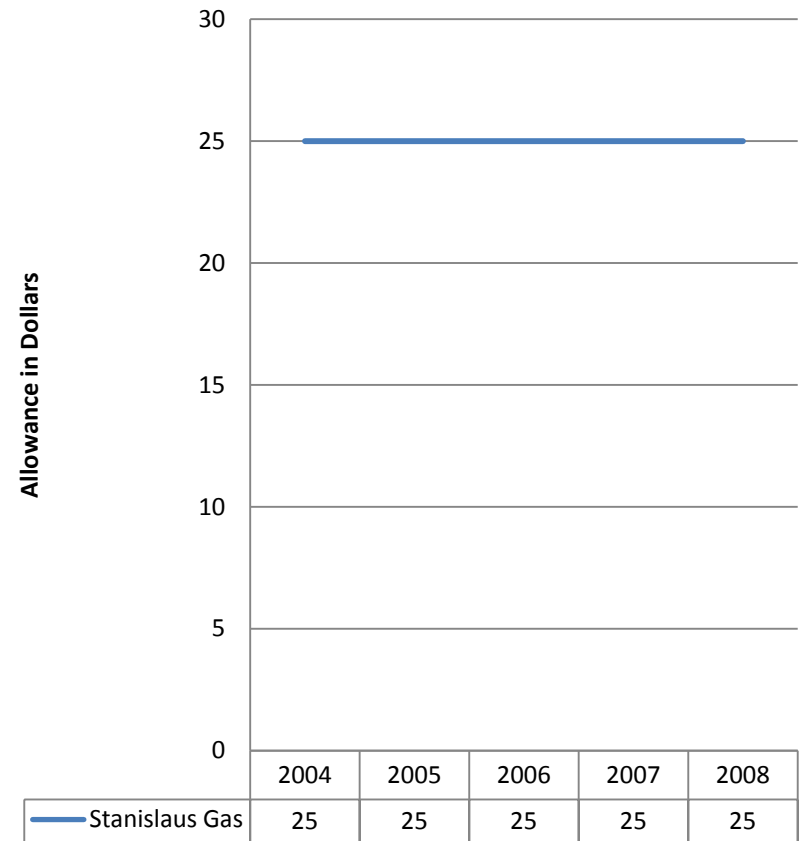
- Failure to adjust allowances for rate changes
- Incomplete public housing records
- Failure to provide allowances for water, sewer or trash
- Failure to distinguish between apartments and single-family homes
- Flawed methodology in adjusting allowances
 - E.g., calling up customer service at the local utility

Allowances v. Gas Rate Data: Stanislaus County Public Housing

PG&E Gas Rates



Gas Allowance



Comparing Allowances to Rate Data

Stanislaus Pub Hsg Gas Allowance, in \$					Percentage Change				
2004	2005	2006	2007	2008	04:05	05:06	06:07	07:08	04:08
25	25	25	25	25	0	0	0	0	0

PG&E Gas Rates, in \$/Therm					Percentage Change				
2004	2005	2006	2007	2008	04:05	05:06	06:07	07:08	04:08
0.88	1.16	1.15	1.22	1.35	32	-1	7	11	53

Regional Level Issues

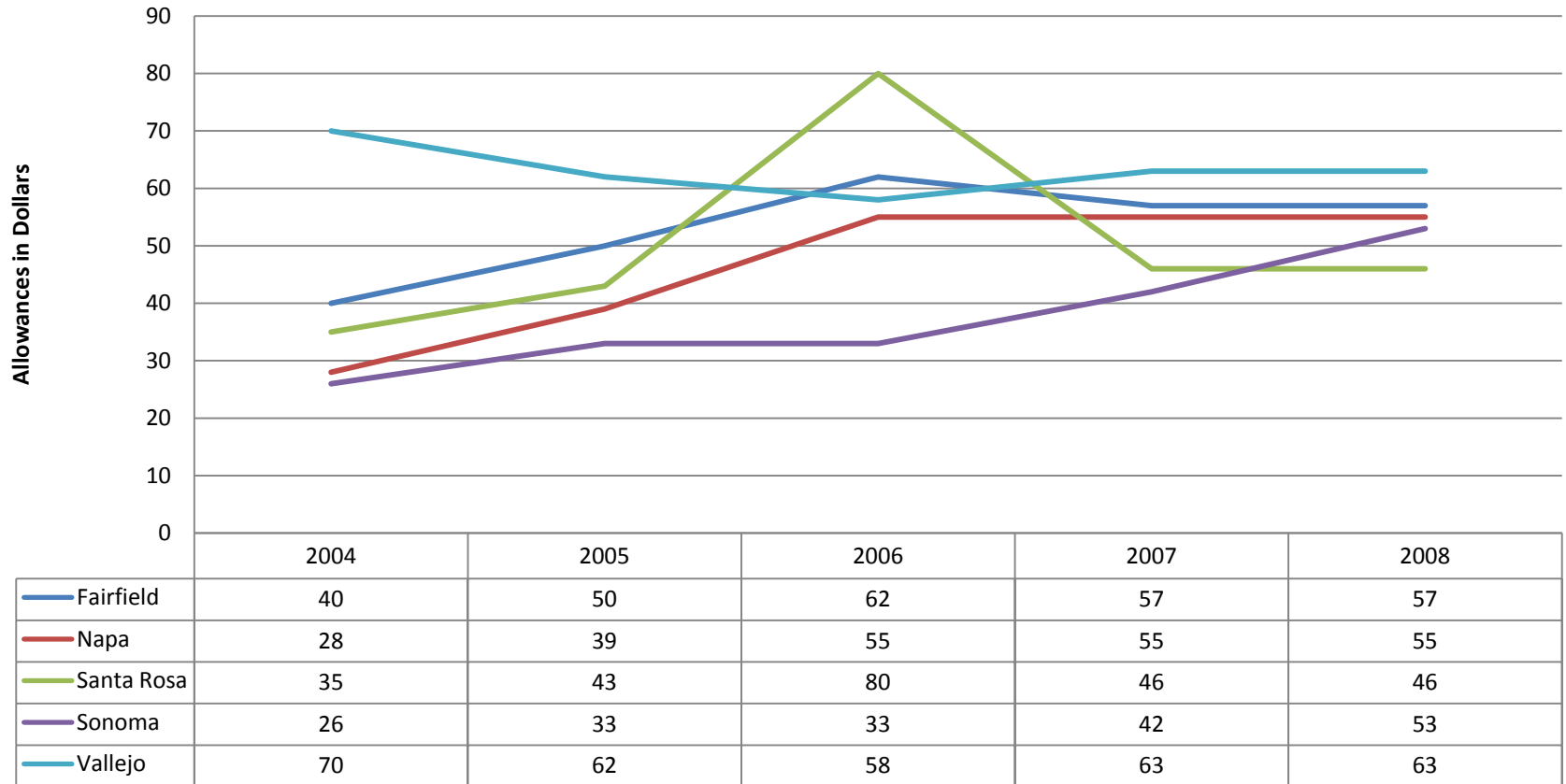
- Some PHAs had significantly lower allowances than neighboring PHAs.
- Some PHAs adopted neighboring PHAs' allowances wholesale, or adopted an average of the neighboring PHAs' allowances.
- Some PHAs did not provide an allowance for AC, while neighboring PHAs did.

Sec 8 Allowances Over Time

- The following 2 charts represent changes in gas UAs from 2004 to 2008 for a 2-BR Sec 8 apartment
- The allowances charted are the total dollar amounts for cooking, heating, & water heating
- The charts offer a quick comparison of UAs of 5 PHAs in two loosely defined regions: Wine Country and Bay Area

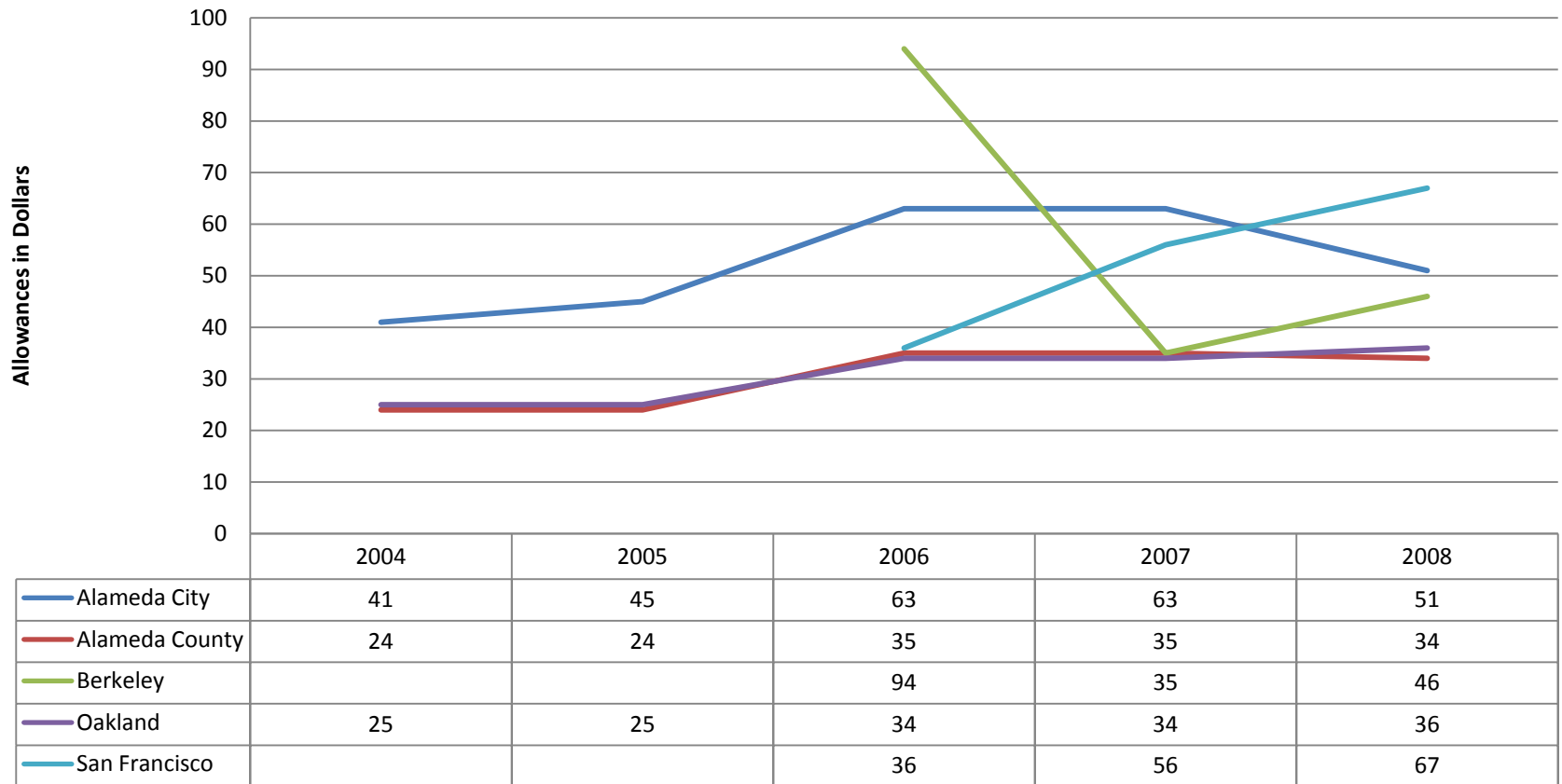
Wine Country: Gas Allowances

Gas Allowances Over Time for Sec 8, 2 BR Apt



Bay Area: Gas Allowances

Gas Allowances Over Time for Sec 8, 2 BR Apt



What Do These Two Charts Show?

- Some PHAs failed to regularly adjust their allowances, even though neighboring PHAs had done so
- Neighboring PHAs sometimes had significantly different allowances

In Sum

- Some issues can be readily identified in isolation
- If you work with multiple PHAs, it may be useful to obtain records from all PHAs to determine whether there are outliers
- Note that PHAs often share information—but is the information that they're sharing correct?

5 things to do!!!

To help low-income people afford their home energy service:



1. 5 things to do before October
2. 5 things to do before February
3. 5 thing to do before your winter moratorium ends
4. 5 things to do before June
5. 5 non-energy programs to promote

For more information, contact

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Worried about how high heating bills will affect the poor next winter?

October may be too late to act!!!

Five things to do before October to help winterize your state:

- 1. Have you “reserved room” in your local utility’s bill insert/newsletter to promote the Earned Income Tax Credit (EITC) in January or February 2007?** Space in newsletters and bill inserts must often be “reserved” six months (or more) in advance. By October, it will be too late. The average EITC tax credit nationwide is about \$2,000, coming just at the time most needed for payment of winter heating bills.
- 2. Have you contacted your State Food Stamp Director about revising the state’s Standard Utility Allowance (SUA) for purposes of the Excess Shelter Deduction?** SUA revisions are generally *effective* October 1 of each year. The SUA revisions are thus done in late summer and early fall. Shelter costs exceeding 50% of income are an income deduction for purposes of Food Stamps. But SUA revisions are generally made after-the-fact. This past winter’s natural gas (fuel oil/propane/electric) price increases have not yet been taken into account. Now is the time to make sure that *last year’s* fuel price increases are reflected in *next year’s* SUAs.
- 3. Have you contacted your utilities with an EITC script for them to produce for callers “holding” at their call center during January through April?** Customers who contact a utility call center are often calling because they are experiencing trouble paying their bills. A simple script encouraging people to claim their EITC credits, if eligible, may put money in the pockets of exactly those utility customers who need it the most. But it takes time to produce a “message” to be used in your local call center. Waiting until tax season is upon us will not allow time for the message to be produced and implemented.
- 4. Have you talked to your State Housing Agency about how energy price increases relate to rents in your state?** Each year, the U.S. Department of Housing and Urban Development (HUD) revises its Fair Market Rents (FMRs) for every Metropolitan Area and non-metropolitan county in each state. FMRs drive the housing subsidies available to some of the nation’s lowest income households. FMRs include not only “rent,” but all utility costs (except telephone). If FMRs do not take energy price increases into account, HUD’s utility assistance will be *underpaid*. Comments on FMRs, however, are generally sought in the late summer. If you wait until October to worry, you will miss the comments deadline.
- 5. Have you contacted your local clergy about a special “holiday” collection to support your winter crisis intervention fund?** Many clergy support a special collection around the holiday season to support specific social service remedies within the community. A special collection at a Thanksgiving Day service, for example, is not uncommon. However, decisions about scheduling special collections are generally made in September. Approaching clergy only when cold weather approaches will likely mean that you will *miss* getting on to the schedule.

For assistance on any one or more of these actions, contact:

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Worried about how to prevent post-moratorium shutoffs for low-income customers this winter?

February may be too late to act!!!

Five things to do before February to help prevent post-winter shutoffs:

1. **Have you identified and publicized your local VITA sites?** The Internal Revenue Service (IRS) helps fund free tax preparation sites each year. Known as Volunteer Income Tax Assistance (VITA) sites, these locations help income-eligible households prepare tax returns. For low-income households having difficulty paying their winter heating bills, the ability to claim the Earned Income Tax Credit (EITC) which they qualify for could make the difference between keeping their heat or not. EITC credits nationwide average \$2,000 and can come just at the time that heating bills are highest.
2. **Have you ensured that deposit refund requests have been made?** Most utilities provide that customers with clean payment records—defined in different ways by different utilities—are entitled to a refund of their cash security deposit. Many utilities, however, require customers to ask for their deposit return. January and February are good months to encourage customers to seek deposit refunds. If a maximum deposit has been posted, a refund of that deposit might pay a substantial part of that customer's winter heating bill.
3. **Have you found allowable substitutes for cash security deposits?** Even if a customer is not entitled to a refund of a cash security deposit previously posted, utilities nearly universally allow a customer to post a third-party guarantee in lieu of a deposit. The third party would, without posting cash, agree to be liable for an unpaid bill up to the level of a deposit. January is a good time to encourage customers to substitute third-party guarantees from friends or family for cash deposits. The refunded cash deposit can then be used to help pay current bills.
4. **Have you circulated your “A Little Bit Helps a Lot” flyers?** January can often be a dangerous month for bill payers. Some customers have bill *credits* due to LIHEAP benefit payments and thus make no payment. Some people have holiday expenses that compete for scarce household financial resources. Some people are overwhelmed by their first heating bill of the season and are thus tempted to pay nothing. January is the time to emphasize to customers that paying even a little now (even if they have a bill credit) will help a lot later on. Paying even \$30 a month in January, February and March could help lower later payments by \$15 to \$20 a month if winter arrears are retired through a payment plan that must be completed before the start of the next heating season. Agencies can obtain “A Little Bit Helps a Lot” flyers from FSC.
5. **Have you targeted special EITC outreach to customers in arrears?** Putting additional money in the hands of customers that are in arrears serves everyone's interests. It helps the customer become current and helps the utility avoid collection expenses and reduce bad debt. Targeting EITC outreach to customers owing a minimum level of arrears (e.g., \$250, \$300) serves both of these goals. Even if three of four households receiving such outreach are not eligible, the return (in bills paid for a utility; in crisis grants avoided for a community organization) from the customers that are eligible is tremendous. The likelihood that a customer carrying winter arrears will qualify for the EITC is high.

For assistance on one or more of these actions, contact:

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*Worried about how to prevent
warm-weather shutoffs based on
cold-weather arrears this spring?*

March may be the time to act!!!

**Five things to do in
[negotiating deferred payment plans](#)
for cold weather arrears when your winter moratorium ends:**

1. **Have you negotiated the level of the downpayment?** The regulations of most state utility commissions allow a utility to require a downpayment in order for a customer to enter a deferred payment plan. Those regulations do not allow a utility, however, simply to apply the maximum downpayment permitted under the regulations. Most state commission regulations provide that a downpayment may be “up to” or “not to exceed” a certain amount. Language like that means an amount “at or below” the maximum. Do not forget the “or below” part of that sentence. Do not feel that you have to accept the maximum just because that’s what is requested.
2. **Have you negotiated the length of the payment plan?** Virtually all state utility commission regulations provide that in negotiating deferred payment plans, a utility is to take certain factors into account. Those factors include things like the customer’s ability to pay, why the customer fell behind, and the length of time the customer has been behind on his or her bill. Many commissions have regulations that provide minimum payment terms. When a regulation says a payment plan must be “at least 12 months,” for example, that means 12 months or more. Do not forget the “or more” part of that sentence. In these cases, a utility may not offer simply a 12-month plan. Do not feel that you have to accept the shortest payment term just because that’s what is offered.
3. **Have you negotiated based on the cause of the arrearage?** Virtually all state utility commissions have regulations requiring a utility to consider the reason for bill nonpayment in negotiating a deferred payment plan. Many times, a bill nonpayment is caused by what is termed a “triggering event,” a loss of job, an extraordinary medical expense, or some such thing. In instances of a temporary triggering event, it may make sense to ask that a deferred payment plan offer one or two months of limited payments on the arrears (not no payments but lower payments), with higher payments later on when the customer is back on sounder financial ground. This approach, called “forbearance,” allows the customer to recover from the triggering event, and then to repair his or her credit. Contact your local mortgage foreclosure prevention clinic to learn about the forbearance approach. Forbearance is common in foreclosure prevention programs.
4. **Have you negotiated the level of each month’s payment?** Virtually all state utility commissions have regulations requiring a utility to consider the “ability to pay” of a customer entering a deferred payment plan. “Ability to pay” is more than simply the level of the customer’s income. Without question, “ability to pay” should take income into account. But the customer’s income may be seasonal. “Ability to pay” should also take into account household expenses. Most families with children, for example, have substantially higher back-to-school expenses in certain months known ahead of time. A deferred payment plan need not involve the same level of payment each month simply because that’s what is offered. It may make sense to have the payment plan recognize the decreased “ability to pay” in the months where you know income will be down or expenses will be up.
5. **Have you negotiated the level of any deposit request?** One of the significant financial obstacles in meeting payment plan obligations, especially in the early months, is paying any deposit that is demanded as part of the payment plan. Many states allow their utility to require a deposit “up to” (there’s that phrase again) two times the maximum monthly bill. Be sure to remember that almost everywhere, a utility will accept a guarantee in lieu of a cash deposit. In addition, a person on a leveled payment plan will have a lower deposit than one who is not (in states where the deposit is based on the maximum monthly bill), since the budget amount is lower than the maximum monthly bill. If bills have been extraordinarily high due to extreme weather or extraordinary prices, they should not be used as the basis for a deposit.

Negotiating payment plans is dependent on state-specific regulations.

For assistance on one or more of these actions, contact:

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Worried about how high cooling bills will affect the poor next summer?

June may be too late to act!!!

Five things to do before June
to get your state ready for extreme hot weather

1. **Have you organized your net work of “congregate cooling facilities”?** At-risk persons (e.g., elderly, physically disabled, infants, obese) should be able to access air conditioning during heat-related emergencies. A network of congregate cooling facilities that may be used by the community to obtain cooling is important. These may include locations such as libraries, malls, churches, office buildings and the like. After-hours access is necessary.
2. **Have you organized a heat emergency hot line?** A heat emergency hot line should provide authoritative information about everything from where congregate cooling facilities may be accessed, to what in-home cooling strategies can and should be used, to where individuals can seek immediate medical attention for heat-related emergencies. One important attribute of a community hot line is its guaranteed access even during non-office hours.
3. **Have you organized an extreme heat registry?** An extreme heat registry allows individuals to enroll in a community-based “buddy” system. A community-based organization would then arrange for regular check-ins by family and friends, or by community members, during heat-related emergencies.
4. **Have you prepared and published your extreme heat community education materials?** Community education should raise the public’s awareness of the “heat index” to the same level of awareness as the “wind chill” factor. The “heat index” combines data on temperature and humidity to capture the dangers of extreme heat. Education should also promote knowledge of the Extreme Weather Registry as well as the availability of the Community Hot Line and Congregate Cooling Facilities.
5. **Have you arranged to have your local health department and media announce and publicize heat-related emergencies?** Recent research suggests that cities that issue heat wave warnings should consider activating such a system when average daily temperatures over a five-day period reach 75° Fahrenheit, particularly when these temperatures are reached early in the heating season. Especially hot days early in the summer season seem to have a more dire impact on health and mortality than similarly hot days later in the season.

For assistance on any one or more of these actions, contact:

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Worried about how high home energy bills will affect the poor next month?

Next month may be too late to act!!!

Five [non-energy programs](#) to promote to help your clients pay high heating/cooling bills.

1. **Have you helped your clients claim their Earned Income Tax Credit (EITC)?** The Earned Income Tax Credit (EITC) has often been referred to as this nation's largest anti-poverty program. It provides a refundable tax credit (putting cash in the household's pocket whether or not he or she owed taxes) just at the time it is often most needed, at the end of the winter heating season. The average EITC credit nationwide is over \$2,000.
2. **Have you enrolled your clients in a Summer Food Service Program?** The ability of low-income households to pay their home energy bills is adversely affected by the loss of their access to the school lunch/school breakfast programs during the summer. Providing summer meals can cost hundreds of dollars each month in out-of-pocket expenses. The Summer Food Service Program (SFSP) provides funds for organizations sponsoring summer programs to serve nutritious meals to low-income children when school is not in session. Most SFSP sites can provide up to two meals (breakfast and lunch or breakfast and dinner) or one meal and a snack.
3. **Have you enrolled your clients in the local telephone Lifeline program?** Local telephone companies offer reduced "lifeline" telephone rates to low-income customers. These price reductions (on local service) can save a household \$100 or more each year. While households must apply for the rate, they will generally be found "categorically eligible" for Lifeline by virtue of their participation in other public benefit programs. They need not independently reveal their income to the telephone company.
4. **Have you helped your clients claim their Food Stamp excess shelter deduction?** Households that receive food stamps should ensure that they have claimed their full "excess shelter deduction." The Food Stamp program will deduct from income shelter costs (rent/mortgage plus energy) that exceed 50% of the household's income (up to a specified maximum). For each \$3 deducted from income, the household will receive, on average, \$2 of additional food stamps.
5. **Have you enrolled you clients in a local "Thrifty Parenting" program?** The *Thrifty Parenting* program is designed for families with young children. Often sponsored by local USDA Extension offices, the *Thrifty Parenting* program shows ways that parents can cut the expense of raising kids, while maintaining health and safety standards. Topics include food and health care; clothing; and equipment, toys and entertainment. *Thrifty Parenting* materials can also be obtained through the National Endowment for Financial Education (www.nefe.org) (click on "site map" and click on "search NEFE" for *Thrifty Parenting*).

For assistance on any one or more of these actions, contact:

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**SIX THINGS TO REMEMBER
WHEN CHALLENGING PUBLIC HOUSING AUTHORITY (PHA)
UTILITY ALLOWANCES IN LITIGATION**

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October 2006

POINTER #1

The point is not to demonstrate that a utility allowance is incorrect. The point is to demonstrate that it is unlawful.

Several legal standards are important to determine whether a utility allowance is reasonable or not. One of these standards is discussed immediately below. This is not an exhaustive discussion. It simply lays out how one might translate the conclusion that something is done "incorrectly" into the conclusion that it is done "unlawfully."

One primary legal question is the extent to which there are factors that the PHA is required to consider but which it has not. Under the famous *Central Hudson* case out of New York, an agency that is required to consider some factor, but which does not, has acted in an arbitrary and capricious fashion. The failure to consider a required factor, in other words, is arbitrary and capricious.

One thing to consider is the extent to which this question of whether PHA action is "arbitrary and capricious" presents a process question or a substantive duty. The resolution of this issue is significant. If it is simply a process issue, then even if you "win," you don't win much. The PHA could make continuing reference to how much "discretion" it has in developing utility allowances, and never seriously seek to incorporate the mandatory factors into their decisionmaking. Under these circumstances, consideration of the nine mandatory factors discussed below becomes simply a procedural hoop that the PHA must jump through.

In contrast, if the standard imposes a substantive obligation, then you have a real issue to litigate. The issue is this: does the "requirement" that a PHA take into account certain enumerated factors impose an objective measure by which to assess the reasonableness of a utility allowance? The discussion below posits that the nine factors are, indeed, mandatory and that the obligation to "take into account" these factors imposes a substantive obligation by which to measure the legal sufficiency of a utility allowance.

In reaching this conclusion, however, it is important not simply to make the challenge into a "numbers game" (though the challenge must obviously rely on numbers). You must make clear that your challenge is not simply a methodological disagreement. You must make clear that you are not

simply using different numbers to reach difference results. You must constantly tie your challenge back to the substantive legal duty that the PHA has failed to perform.

POINTER #2

Know the nine mandatory factors that HUD regulations require that a PHA must “take into account.”

Your review of a PHA utility allowance is not done in a legal vacuum. A local housing authority has mandatory legal requirements with which it must comply in setting utility allowances.¹¹ Rather than making a utility allowance challenge into a “numbers game,” the focus should be on these nine mandatory factors. Objections to a utility allowance should be drafted in a form of how the problem is a failure to take into account one or more of these mandatory factors.

HUD regulations establish nine "relevant factors" which a local housing authority "shall take into account" in setting a utility allowance.¹² These nine mandatory factors include:

1. The equipment and functions intended to be covered by the allowances for which the utility will be used.
2. The climatic location of the housing projects.
3. The size of the dwelling units and the number of occupants per dwelling unit.
4. The type of construction and design of the housing project.
5. The energy efficiency of PHA-supplied appliances and equipment.
6. The utility consumption requirements of appliances and equipment whose reasonable consumption is intended to be covered by the total resident payment.
7. The physical condition, including insulation and weatherization of the housing project.
8. The temperature levels intended to be maintained in the unit during the day and at night, and in cold and warm weather.
9. The temperature of domestic hot water.

The set of requirements set forth above provides the basis for any substantive challenge to a PHA’s utility allowances. Upon a review of a PHA’s allowances in light of these guidelines, the utility allowances will often fail to meet the standards articulated by HUD. It is through application of these factors, however, that you can demonstrate that specific shortcomings do not represent mere differences in methodology or policy, but represent a substantive failing on the part of the PHA to comply with its legal obligations.

¹¹ *Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 624 (1993).

¹² 24 *C.F.R.* §965.505(d)(1) - (d)(9).

POINTER #3

Know the two additional mandatory factors that courts have held a PHA must take into account.

In addition to these nine mandatory factors explicitly listed in HUD's regulations regarding the preparation of utility allowances, two additional factors have judicially been read into the HUD regulations based upon HUD's explanation of its regulations at the time of their promulgation:

10. Utility allowances shall cover energy consumption that is attributable to factors not within the ability of the tenant to control;¹³⁾ and
11. The distinction "between consumption generated by necessary and luxury appliances [is] expect[ed] [to] reflect local usage and custom patterns."¹⁴⁾

At a minimum, therefore, these two factors are additional "relevant factors" that the local housing authority must take into account in setting utility allowances: (1) the extent to which consumption is not "within the ability of the tenant to control"; and (2) the extent to which the energy consumption allowed by the utility allowance "reflects local usage and custom patterns."

It is critical that you also become familiar with Pointer #5 below in assessing the importance of these two additional mandatory factors.

POINTER #4

Don't let a PHA wiggle around on whether it has "considered" each mandatory factor. The "shall take into account" language imposes a stronger legal obligation.

The HUD regulations require more than that a PHA merely "consider" the mandatory factors discussed above. HUD's regulations state quite explicitly that a PHA "*shall* take into account" these factors. (emphasis added). This process has considerable substance to it. Your local PHA may not comply simply by indicating that it has taken some amorphous "consideration" of the factors. Instead, the courts have held that the local housing authority must examine the relevant data and *articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.*¹⁵⁾

¹³⁾ *Dorsey*, at 629, citing 49 *Fed.Reg.* 31406.

¹⁴⁾ *Dorsey*, at 629, citing 49 *Fed. Reg.* 31404.

¹⁵⁾ *Dorsey*, 984 F.2d at 630, quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). (emphasis added).

POINTER #5

Know the legal inferences that must be rebutted by a PHA under appropriate circumstances.

In addition to the mandatory factors that shall be taken into account in setting utility allowances in every instance, an additional legal inference must also be accounted for in the PHA determination of a utility allowance should it arise. The courts have explicitly stated that evidence that tenant consumption is routinely in excess of a local housing authority's proposed utility allowance "gives rise to an inference that the allowances were inadequate to provide for reasonable consumption by an energy-conservative household of modest means."⁶ Given this inference, a local housing authority whose utility allowance is generally exceeded by tenant consumption must provide evidence of "non-energy conservative consumption" on the part of the tenants.⁷

The courts have explained that, in addition, the housing authority must take into account the extent to which tenant consumption exceeds the proffered utility allowance, since excessive consumption is "material evidence that the PHA standard is out-of-line with the Section 965.476⁸ standard, or that excess consumption may be due to factors not within the control of the tenants."⁹

The mandatory legal obligations associated with this inference are thus two-fold: (1) to determine whether tenant consumption is routinely in excess of the proposed utility allowance; and (2) if so, to develop and provide evidence of "non-energy conservative consumption" on the part of the tenants to rebut the inference that the utility allowances are inadequate. These obligations are mandatory. A PHA does not have the discretion to adopt a methodology that fails to take this inference into account or to fail to rebut the inference should it arise.

POINTER #6

Do not forget the requirement that utility allowances must be consistent with the provision of "safe and sanitary housing."

What constitutes "safe and sanitary housing" is not simply set forth in the housing codes of local governments. Nor is "safe and sanitary housing" defined solely by HUD Housing Quality standards. In challenging a utility allowance, it is necessary to become familiar with the various industry guidelines on what usage is necessary for residential consumption. To illustrate, the discussion below presents an assessment made of one PHA's proposed *lighting* allowances.

Failure to Consider Factor #1: Equipment and Functions to be Covered.

A safe and sanitary home must allow for the residents of the home to safely perform the functions to which each of the rooms is to be devoted. In complying with the need to provide a safe and sanitary home, therefore, the PHA "shall take into account" "the equipment and functions intended to be covered by the allowances for which the utility will be used" (mandatory factor #1). Lighting represents one such type of equipment. Illumination is the function to be served.

⁶ *Dorsey*, at 631.

⁷ *Dorsey*, at 631.

⁸ Now Section 976.505(d).

⁹ *Dorsey*, at 629 - 630 citing 49 *Fed.Reg.* 31404.

The first reason that the PHA lighting calculations should be deemed inadequate is that they do not take into account the different illumination functions that lighting serves within a room. This can be demonstrated by showing that the PHA provided for an unreasonable number of fixtures in each room. A review of the "lighting usage tables" provided by the PHA showed that the PHA provided for one fixture per room for rooms such as the bedroom, kitchen and living room. The PHA provided for two lamps, each with a 60 Watt bulb (or one lamp with two 60 Watt bulbs) for the living room.

These lighting allowances were not based on what is "needed" for the activities that occur in each room. Allowing for one fixture per room does not account for the types of lighting needed in a room. To determine how much light is needed in a room, a room should be divided into three zones: (1) the task zone; (2) the immediate surroundings; and (3) the general surroundings.

As a general rule, the immediate surroundings should have an illumination of roughly one-third the task illumination. The general surroundings should not have an illumination of less than one-tenth the task. Because of this, there is generally a need to provide lighting in the visual surrounding that is in addition to the light sources directed to the specific tasks pursued in the room.

As can be seen, providing one light fixture in a room simply does not serve the illumination functions that lighting is intended to serve in a room. Lighting is not simply to serve the "task zone," but is to provide different lighting levels in the immediate surrounding and general surroundings as well. The need for more than one light fixture is not one of luxury. The need is instead a matter of health and safety; the need is a matter of having sufficient light for PHA tenants to engage in normal daily activities in their respective rooms.

The failure of the PHA is not a methodological difference of opinion. It is a failure of the PHA to consider one of the nine mandatory factors.

Failure to Consider Factor #1 and Factor #6

A safe and sanitary home must allow for the residents of the home to safely perform the functions to which the rooms are to be devoted. In complying with the need to provide a safe and sanitary home, therefore, the PHA "shall take into account" both "the equipment and functions intended to be covered by the allowances for which the utility will be used" (mandatory factor #1) and "the utility consumption requirements of appliances and equipment whose reasonable consumption is intended to be covered. . ." (mandatory factor #6).

The second reason that the PHA lighting calculations should be deemed inadequate is because the PHA provides for an inadequate amount of illumination in each room. The amount of illumination is a function of the light produced by the bulb placed in the light fixture as well as the amount of space to be lighted. Standards exist for the amount of light needed for particular activities of daily living. Casual reading and general kitchen work, for example, generally require 30 footcandles of light.¹⁰ Dining requires 15 footcandles.¹¹ 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.

¹⁰ IESNA Residence Lighting Committee, *Design Criteria for Lighting Interior Living Spaces*, at Table 4, American National Standard RP-11, Illuminating Engineering Society of North America: New York (NY).

¹¹ *Design Criteria for Lighting Interior Living Spaces*, *supra*, at Table 4.

Let's take 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 lumen / 80 = 10 fc; 900 lumen / 80 = 11.25 fc). Clearly, this single light is insufficient 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, therefore, that the 60 Watt bulbs provided in the living room and bedroom are insufficient to light the space for the purposes for which those spaces are intended to be used.

In sum, the discussion above is based on authoritative standards on what lighting is necessary to provide "safe and sanitary housing." Moreover, it is based on "taking into account" mandatory factor #1 ("the equipment and functions intended to be covered by the allowances for which the utility will be used"). Finally, it is based on taking into account mandatory factor #6 ("the utility consumption requirements of appliances and equipment whose reasonable consumption is intended to be covered.").

The implicit question is whether lighting consumption in excess of the lighting allowance provided by the PHA is evidence of non-energy conservative behavior on the part of the PHA's tenants. The answers can be summarized as follows:

- The a PHA lighting allowances are too low because a PHA failed to account for the illumination functions intended to be covered by the allowances for which the utility will be used¹²⁾ (i.e., the necessary number of lighting fixtures to provide light for the general surroundings as well as light for specific activities of daily living); and
- The PHA lighting allowances are too low because a PHA failed to account for the utility consumption requirements of appliances and equipment whose reasonable consumption is intended to be covered by the total resident payment¹³⁾ (i.e., the illumination output from light fixtures needed to accomplish the activities of daily living).
- The PHA lighting allowances are too low because they do not provide a safe and sanitary space within which to undertake the common activities of daily living generally pursued in those living spaces.

¹²⁾ 24 C.F.R. §965.505(d)(1).

¹³⁾ 24 C.F.R. §965.505(d)(6).



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-1000

ASSISTANT SECRETARY FOR CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable Jon Kyl
United States Senator
7315 North Oracle Road, Suite 220
Tucson, AZ 85704

AUG 29 2005

Dear Senator Kyl:

Thank you for your letter of August 1, 2005, regarding requests for a regulatory waiver to include the cost of air conditioning in public housing utility allowances.

HUD's general regulation at 24 CFR 965.505 does not provide for federal funding of air conditioning in utility allowances. Under 24 CFR 965.508, relief from surcharges for excess consumption of Public Housing Authority (PHA)-purchased utilities, or payment of utility supplier billings in excess of allowances for resident-purchase utilities, may be granted by the PHA. The PHA may deem appropriate special needs of elderly, ill or disabled residents, or special factors affecting utility usage not within the control of the resident. PHAs may provide such relief to individuals, individual units, or projects.

In order to grant relief under 24 CFR 965.508, the PHA is required to establish criteria for granting relief, which shall be adopted at the time the PHA adopts the methods and procedures for determining utility allowances. Further, the PHA must notify residents upon admission of the procedures in effect. HUD's approval of the procedure to grant relief is not required.

Thank you for your interest in the Department's programs. If I can be of further assistance, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven B. Nesmith".

Steven B. Nesmith
Assistant Secretary for Congressional and
Intergovernmental Relations

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HUD to pay part of public housing air conditioning

By Sarah Garrecht Gassen

ARIZONA DAILY STAR

People living in public housing will be able to keep getting help paying high summer air conditioning bills after federal authorities reversed a decision last spring to not assist low-income residents with cooling costs.

The U.S. Department of Housing and Urban Development initially told public housing authorities nationwide that agency rules didn't allow federal utility allowances to pay for operating air conditioners, although they can be used to install the unit, said Emily Nottingham, director of the city Community Services Department.

HUD does allow heating costs to be covered by public housing programs, which concerned Arizona authorities, who argued our extreme heat can be just as dangerous as extreme cold elsewhere.

Because Tucson, along with other Arizona cities, appealed the HUD decision last spring, the local public housing office continued to pay tenants a stipend to cover some of their cooling costs, so residents were not affected by the decision.

Tucson has 1,500 public housing units, and 337 of those homes and apartments have air conditioning that could have been affected, Nottingham said.

Public housing tenants now pay their utility bills and receive a monthly check reimbursing part of their expenses, ranging from \$17 a month for a one-bedroom unit to \$55 for a six-bedroom home. The most common reimbursement is \$31 a month for a three-bedroom, single-family home.

HUD's new position is that local public housing authorities can make exemptions for the "appropriate special needs of elderly, ill or disabled residents, or special factors affecting utility usage not within the control of the resident," according to a letter from HUD Assistant Secretary Steven B. Nesmith to Arizona Republican Sen. John McCain.

"There was no real change in policy, just a better understanding of what the existing policy said," said HUD spokesman Larry Bush. "I don't think anyone was questioning that air conditioning was an important quality-of-life factor in housing standards.

Contact reporter Sarah Garrecht Gassen at 579-4240 or sgassen@azstarnet.com.

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