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Cover: Residents at Mandela Gateway, a 168-unit mixed-income, mixed-use development completed in 2005 by the Oakland Housing Authority and BRIDGE Housing, a California developer of affordable housing. Photo courtesy of the Oakland Housing Authority.

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Utility Allowance Adjustments: How Housing Advocates Can Proactively Address Skyrocketing Energy Costs

Over the last few weeks the cumulative effect of Hurricanes Katrina and Rita has been chronicled by numerous television and print sources, focusing on the general devastation to the region and the cost of rebuilding. However, only a few of these same media sources have begun to address a related topic which will have much broader geographic and financial consequence to low-income families—the hurricanes' impact on short-term energy costs.

On the eve of the 2005-2006 heating season (October through March), industry forecasts projected that the additional costs associated with restoring Gulf Coast oil and natural gas production, oil refining, and natural gas processing will further strain the already-tight natural gas and petroleum product markets. Consequently, this winter's residential space-heating expenditures are expected to increase for all fuel types compared to last year's levels. Specifically, government officials are forecasting an almost 50% increase in natural gas consumer prices and an approximately 30% increase for heating oil over last winter.¹ As a result, this winter's unchecked home-heating costs will surely have a substantial impact upon the affordability of shelter and play a critical role in the low-income household's budget, along with direct housing costs.

Some tenants may benefit from the federal Low-Income Energy Assistance program, although the Congressional leadership has targeted that program in its efforts to cut spending to provide tax cuts. Even those tenants fortunate enough to benefit from federal housing assistance will experience significant additional financial strain from imminent utility cost spikes. Therefore, for those programs, it is imperative that advocates take full advantage of the rules and procedures for reviewing and adjusting utility allowances to alleviate the impacts of these rising costs for subsidized housing residents.

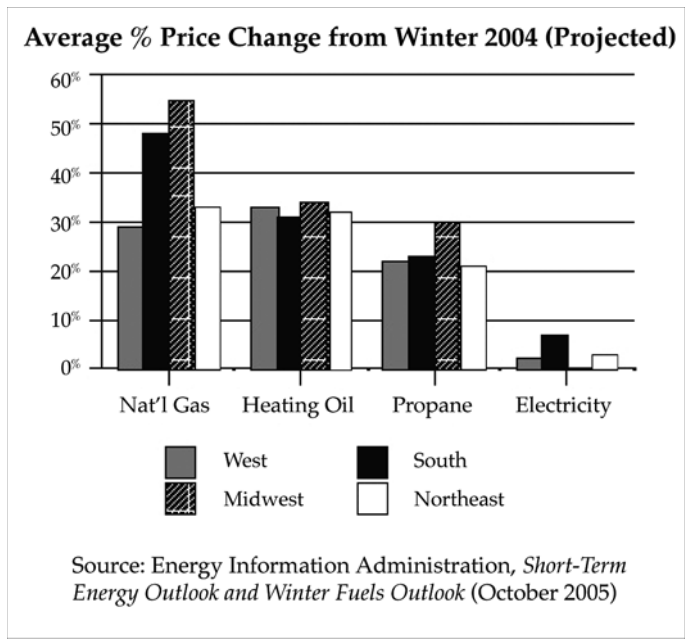
Utility Allowances: Background

To keep assisted housing affordable for lower-income households, the United States Housing Act directs that the resident's share of rent in most federally assisted housing programs usually be limited to no more than 30% of the household's adjusted monthly income.² In interpreting

¹ENERGY INFORMATION ADMINISTRATION, SHORT-TERM ENERGY OUTLOOK AND WINTER FUELS OUTLOOK (2005).

²42 U.S.C.A. § 1437a(a) (West Supp. 2003).

the statute, the Department of Housing and Urban Development (HUD) has always defined the tenant rent contribution to include both shelter and the costs for reasonable amounts of utilities.³ Where utilities are tenant-paid, an amount that a public housing authority (PHA) or Section 8 project owner determines necessary under the rules to cover the resident's reasonable utility costs is the "utility allowance," which is generally credited against the tenant's share paid to the owner, for those tenants paying an income-based rent.



Utility allowances are based on an estimate of the reasonable cost of different types of utilities, depending upon the quantity allowed in light of their end uses.⁴ The covered utilities requiring allowances, if tenant-paid, include electricity, natural gas, propane, fuel oil, wood or coal, and water and sewage service, as well as garbage collection. The functions, or end-uses, covered by an allowance include space heating, water heating, cooling, refrigeration, lighting, or appliances, but not telephone or cable TV service. Utility allowances can be small or large, ranging from less than \$20 to over \$200 monthly, depending on the PHA, the climate zone, local utility rates, the number of utilities and uses covered, and the dwelling unit and/or household size.

³See, e.g., Tenant Allowances for Utilities, 49 Fed. Reg. 31,399, 31,400 (Aug. 7, 1984); *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 420 (1987).

⁴See generally NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS, ch. 6 (3d ed. 2004).

Nevertheless, in order to maintain the resident's rent-to-income share within the statutory limit, the PHA (for public housing and vouchers) or Section 8 project owner must review the utility allowance schedule at least annually.⁵ In addition, if the applicable utility rates have increased by 10% or more since the previously established or adjusted allowance, the PHA or Section 8 owner must immediately increase the utility allowance accordingly.⁶ Unfortunately, in reality, this later adjustment often fails to occur in a timely fashion, thus leaving the tenant with the burden of paying any cumulative rate increase until the next adjustment.

For voucher tenants, the voucher program's structure may impede certain tenants from realizing the full benefit of a properly adjusted allowance. Voucher participants receive no dollar benefit from increases in the allowance once the sum of the rent paid to the owner plus the utility allowance exceeds the current payment standard established by the PHA.⁷ Households will only benefit where their "gross rent" (which includes the utility allowance) is less than the local voucher payment standard.⁸ Therefore, utility allowance increases without a corresponding increase in the payment standard may only be of help to a limited number of households.

Utilities in Low Income Housing Tax Credit (LIHTC) units present yet another wrinkle. The LIHTC program requires that the statutory maximum rents (expressed as a percentage of area median income for a hypothetical family size derived from the number of bedrooms) include a utility allowance for any tenant-paid utilities.⁹ The utility allowance to be deducted, however, is often determined by some public agency, depending on the type of property involved.¹⁰ Where units or tenants are not

⁵E.g., 24 C.F.R. § 965.507(a) (2005) (PHAs); 24 C.F.R. § 880.610 and 881.601 (2005) (project-based Section 8 program); 24 C.F.R. § 982.517(c) (2005) (housing choice voucher program). Utility allowances for those tenants paying income-based rents in RHS Section 514 and 515 properties (i.e., those with rental assistance or paying in excess of the minimum basic rent) present the same problem, but are covered by different rules. 7 C.F.R. §§ 3560.202 and 3560.205 (2005).

⁶E.g., 24 C.F.R. § 965.507(b) (2005) (PHAs); 24 C.F.R. § 880.610 and 881.601 (2005) (project-based Section 8 program); 24 C.F.R. § 982.517(c) (2005) (housing choice voucher program). The RHS regulations apparently lack a 10% rate increase trigger.

⁷For a more thorough discussion, including five hypothetical tenant scenarios, see Michael L. Hanley, *Effect of Utility Allowance Increases on Section 8 Housing Choice Voucher Participants*, at <http://www.gulphny.org/Housing/Utility-Allowances.html> (last visited Oct. 21, 2005).

⁸*Id.*

⁹The LIHTC maximum allowable rent calculation, like HUD affordable housing programs, includes an allowance for costs to be paid by the tenant for utilities inclusive of heat, electricity, air conditioning, water, sewer, oil or gas where appropriate. 26 U.S.C.A. § 42(g) (2005).

¹⁰Internal Revenue Service regulations (26 C.F.R. § 1.42-10 (2005)) establish the following guidance: for buildings assisted by Rural Development

regulated or assisted, the “PHA utility allowance” must be used, unless either the owner or the tenant has obtained an allowance from the local utility provider under specified procedures.¹¹ Changes in the allowance are to be effective within ninety days.¹² Thus, for LIHTC units, increased allowances directly reduce an owner’s rental income dollar for dollar, while offering no prospect of increased public subsidy from federal appropriations. As a result, the LIHTC owner has little incentive to ensure that the other agencies involved make timely increases to utility allowances, or that allowances initially obtained from utilities themselves are properly adjusted for rate increases.

Advocates working with federal housing tenants should now consider taking the following steps to alleviate the imminent financial burdens for millions of low-income families this winter.

Steps Advocates Can Take Now

Facing these looming rate increases, advocates working with federal housing tenants should now consider taking the following steps to alleviate the imminent financial burdens for millions of low-income families this winter.

- Advocates should contact their local utilities providing natural gas, electricity and fuel oil to verify the effective date of any scheduled rate increases.¹³
- Next, contact the PHAs and private Section 8 and LIHTC property owners to ascertain their plans for the prompt utility allowance adjustments required by federal law, especially those in the HUD programs for rate increases in excess of 10%.
- For voucher tenants, advocates should adopt the two-step approach of reviewing the adequacy of their utility

(RD), formerly FmHA, the RD-approved utility allowance must be used; for HUD-assisted buildings, the HUD-approved allowance. If a tenant has a voucher, then the PHA’s voucher utility allowance must be used. If neither HUD or RD assists the building, and the tenant lacks a voucher, the utility allowance may be obtained from the local PHA or from the local utility provider. The LIHTC statute (26 U.S.C.A. § 42(g) (2005)), however, requires owners to use the allowance under “Section 8,” which arguably means either the PHA’s voucher allowance or the allowance used by neighboring project-based Section 8 developments.

¹¹26 C.F.R. § 1.42-10(b)(4)(ii) (2005).

¹²26 C.F.R. § 1.42-10(c) (2005).

¹³Historical utilities price information, sorted by region and/or major metropolitan area, is available through the Bureau of Labor Statistics and can be found at <http://www.bls.gov>.

allowances while simultaneously urging PHAs to increase their respective payment standards—keeping in mind the fact that each PHA has sole discretion to increase payment standards up to 110% of the published Fair Market Rent, and possibly higher.¹⁴ Moreover, the PHA’s affirmative mandate to maintain a “reasonable rent” for voucher holders¹⁵ warrants a concomitant increase in the payment standard.

Analyzing Historical Energy Cost Increases and Required Utility Allowance Adjustments

While attention to this winter’s allowances is critical in light of the 2005-2006 projected heating costs, advocates should remain aware of the opportunity to pursue the issue on a broader scale—analyzing allowances and rates, and seeking reimbursement for previously inadequate allowances.¹⁶ Look for additional articles in the *Bulletin* or for materials posted on the NHLP Web site addressing these issues in greater detail. ■

¹⁴The regulations state that each “PHA may establish the payment standard amount for a unit size at any level between 90 percent and 110 percent of the published FMR for that unit size. HUD approval is not required to establish a payment standard amount in that range (‘basic range’).” 24 C.F.R. § 982.503(b)(1)(I) (2005). In order for the PHA to establish their payment standard outside the “basic range” they must request HUD approval; and HUD has the sole discretion of granting or denying this approval. 24 C.F.R. § 982.503(b)(2) (2005).

¹⁵24 C.F.R. § 982.507 (2005).

¹⁶See generally *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) (recognizing tenants’ § 1983 claim to challenge improper utility allowances in public housing).