

Utility Allowances in Public and Subsidized Housing: An Overview and Refresher Course¹

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Shelter Costs (Rent Plus Utilities) Are Out of Reach for Too Many Americans

Finding affordable housing is like searching for the Holy Grail, for too many Americans. Twenty-eight million people live in households that pay more than 50% of family income toward rent. Another 27 million people spend between 30% and 50% of family income on housing.² Average rents in many major cities are higher than the annual incomes of a large percentage of families. In high-cost cities like Boston and San Francisco, average rents for two-bedroom apartments are in the range of \$1,600 to \$2,000 per month, or \$19,200 to \$24,000 per year. A wage-earner who earns \$12 per hour, 40 hours per week, 52 weeks per year (no vacations, no sick days) would spend 100% of his or her income just on the average rent in these high-cost cities, assuming the worker somehow paid no social security or other taxes. As of 2002, fully 30% of all households had median annual incomes at or below \$25,000, and for these households just paying the rent is a crushing burden.³

But to stay housed in safe and sanitary housing, a family also needs to pay for essential utility services: electricity for lights and appliances, and some form of heating and/or cooling (gas, oil, electricity, etc.). Most families will pay between \$1,000 and \$2,000 for basic utilities, excluding additional amounts they may pay for cable, telephone, or water service.⁴ These costs will vary significantly with geographic location, size of the home, and consumption patterns.⁵ For “very low-income” households (those living at or below 100% of the federal poverty guideline), expenditures on energy bills consume more than 20% of family income.⁶ “Low-income households” (those with income between 100%

¹ Chapter 8 of NCLC’s treatise, “Access to Utility Service” (2nd Ed. 2001 & 2003 Supp.) addresses the topic of utility allowances at length. To order a copy, contact our publications unit at (617)542-9595 or visit our web site at www.nclc.org and click on “publications.”

² National Low Income Housing Coalition, “America’s Neighbors: The Affordable Housing Crisis and the People it Affects” (Feb. 2004), available at www.nliec.org/research/neighbors.pdf.

³ The U.S. Census reports that 29.3% of households had income of \$25,000 or less in 2002; 41.4% had incomes of \$35,000 or less. Median income that year was \$42,409, a decline of 1.1% from 2001. U.S. Census Bureau, “Income in the United States:2002,” Current Population Reports #P60-221 (Sept. 2003), available at www.census.gov/prod/2003pubs/P60-221.pdf.

⁴ Residential heating fuel costs have been rising sharply over the past few years. Natural gas prices in the Midwest are projected to be 60% higher this heating season than the average price in 1997-1999. Home heating oil prices in the Northeast are up around 59% this year, compared to the average price in 1997-1999, and propane prices in the Midwest are up 54% for this same period. EIA Short Term Energy Outlook, Fig. 1. Winter Heating Bills, February 2004.

⁵ Energy Information Administration, “A Look at Residential Energy Consumption in 1997,” DOE/EIA-0632 (Nov. 1999), Table 3.3. As of 1997, 25% of households spent less than \$885 annually on basic utilities, and 25% spent more than \$1,676. The 2001 Residential Energy Consumption Survey, Table CE1-1e, “Total Energy Expenditures in U.S. Households by Climate Zone” shows a nationwide average of \$1,488 for household energy expenditures.

⁶ Meg Power, “A Profile in the Energy Usage and Energy Needs of Low-Income Americans” (1999).

and 150% of the poverty guideline) spend 9% of their income on energy bills.⁷ Unaffordable energy bills lead to “forced mobility” for many low-income families living in private housing. The combination of high rents and energy bills leads many to move from one apartment to another in order to avoid termination of utility service.⁸

Utility Allowances Are Intended to Make Housing More Affordable for Publicly-Assisted Tenants

The public and subsidized housing systems, however, provide “utility allowances” to tenants who pay their own utility bills in order to moderate the burden of having to pay for rent and utilities. The underlying theory of a utility allowance is that when a government-funded housing program is trying to provide tenants with an affordable rent, a tenant whose utilities are not included in rent has more of a housing burden than a tenant whose rent includes utilities (assuming the two rents are the same). A utility allowance provides compensation to a tenant who pays utility bills out of his or own pocket.

The rent and utility allowance rules for tenants in public housing (housing that is owned directly by the housing authority) are somewhat different than for tenants in subsidized housing (housing owned by a private landlord, housing corporation or non-profit owner, but where the tenant or owner receives government assistance on condition of making the rents affordable). In public housing, tenant rents are governed by the so-called “Brooke Amendment” (after Massachusetts Senator Ed Brooke, a key sponsor of the legislation), 42 U.S.C. 1437a. Under Section 1437a(a)(1)(A), tenants pay no more than 30% of their income for rent (with some exceptions not relevant here).⁹ In calculating rent, the Public Housing Authority (PHA) must provide a utility allowance to tenants whose rent does not include utilities. The Department of Housing and Urban Development explains this requirement as follows:

The income-based tenant rent must not exceed the total tenant payment (§ 5.628 of this title) for the family **minus any applicable utility allowance for tenant-paid utilities. If the utility allowance exceeds the total tenant payment, the PHA shall pay such excess amount (the utility reimbursement) either to the family directly or directly to the utility supplier. . . .**¹⁰

In simpler terms, the tenant cannot be required to pay more than 30% of income towards the total costs of housing, as specified in 24 C.F.R. § 5.628. Where the tenant pays separately for utilities, the housing authority must provide a “utility allowance” (in effect, a credit against the rent that would otherwise be due) so that the sum of the rent the tenant pays plus the cost of a reasonable amount of utility service does not exceed 30% of the

⁷ *Id.*

⁸ Roger Colton, “A Road Oft Taken: Unaffordable Home Energy Bills, Forced Mobility, and Childhood Education in Missouri” (1995).

⁹ The major exception is that tenants may now choose to be on a “flat rent,” which is literally that --- flat, even if tenant’s income goes up or down. 42 U.S.C. § 1437a(a)(2). If the tenant chooses flat rent, no utility allowance is provided. See 24 C.F.R. § 960.253 for the detailed regulations on “Choice of rent”.

¹⁰ 24 C.F.R. § 960.253(c)(3) (emphasis added).

tenant's income. Further, if the tenant's income is so low that the utility allowance exceeds the amount of the rent due from the tenant, the housing authority must pay the difference directly to the tenant, or pay it to the utility on behalf of the tenant.¹¹

How Allowances Are Established

HUD has extensive regulations governing "Resident Allowances for Utilities."¹² Those regulations broadly require housing authorities to "establish allowances for . . . resident-purchased utilities for all utilities purchased directly by residents from the utility suppliers.[sic]" 24 C.F.R. § 965.502(a). Housing authorities must establish allowances "for each utility and for each category of dwelling units determined by the PHA to be reasonably comparable as to factors affecting utility usage." This means that a housing authority must have separate allowances for electricity, gas, water and sewer service, trash collection, and deliverable fuels (heating oil, propane, etc.) to the extent that tenants are obliged to pay for these costs due to the nature of their apartments and the metering or billing arrangements.¹³ Further, utility allowances must generally vary by bedroom size and other unit features that affect costs. For example, the heating allowance for a two-bedroom unit in a building with several apartments might be lower than for a two-bedroom, one-family house because the latter likely has higher heat loss and, therefore, higher consumption.

The two most common problems that tenants face, and which are often related to each other, is that the housing authority has not revised the utility allowance for years, despite rising prices, and that the authority assumes tenants can get by with less usage (e.g., fewer kWh of electricity, gallons of oil, or ccf of gas) than is reasonable. While the regulations address both of these problems, tenants will have to be organized and persistent to get relief.

Regarding consumption, housing authorities are required to:

design methods of establishing utility allowances for each dwelling unit category and unit size [so as] to approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary and healthful living environment.

24 C.F.R. § 965.505. While this standard leaves a great deal to the housing authority's discretion, it cannot, for example, set a standard which no family could meet, without living in the dark or freezing. In fact, this regulation makes it clear that the housing authority must go through a fairly thorough analysis, including consideration of: the

¹¹ For example, a tenant with \$333 per month of income can only be asked to pay \$100 per month (30% of income) towards rent under 42 U.S.C. § 1437a. The housing authority might calculate that the reasonable cost of utility service (especially if the tenant pays for heat) is \$110 per month. Under 24 C.F.R. § 965.253(c)(3), the housing authority would pay \$10 directly to the tenant or to the tenant's utility company, as the \$110 utility allowance is greater than the tenant's rent.

¹² 24 C.F.R. §§ 965.501 *et seq.*

¹³ 24 C.F.R. § 965.505(b) specifically requires authorities to set standards that include heating and hot water (regardless of fuel source) as well for typical appliances.

climatic location of the housing projects; the size of the dwelling units and the number of occupants per dwelling unit; the type of construction and design of the housing project; the energy efficiency of PHA-provided appliances and equipment; the physical condition, including insulation and weatherization, of the housing project; the consumption requirements of the appliances and equipment in the units; and other factors. 24 C.F.R. § 965.505(d).

But HUD also goes to great lengths to protect the housing authority's ultimate discretion. First, HUD notes:

The PHA's determinations of allowances, scheduled surcharges, and revisions thereof shall be final and valid unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

24 C.F.R. § 965.502(e). This is a very high hurdle for tenants to overcome if they intend to challenge particular allowances as too low. HUD reinforces the housing authority's discretion to set allowances by stating that "allowances . . . shall not be subject to approval by HUD before becoming effective, but will be reviewed in the course of audits or reviews of PHA operations." 24 C.F.R. § 965.502(d).

Tenants Remedies: Legal and Practical Advice

Tenants are not without remedies. A successful effort to revise outdated or arbitrary utility allowances must begin with the practical steps of gathering information about the current allowances and comparing them to actual bills. HUD regulations give tenants the absolute right to review the methods by which the current allowances were established.¹⁴ Tenants can then compare the allowances to actual bills through basic organizing: asking tenants to come to a meeting or otherwise share information about the amounts they pay for utility service.

While the utility allowances, by law, need not cover "excessive" usage by tenants,¹⁵ tenants should consider taking further steps if there is a large gap between the current allowances and actual consumption. In the case of *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), the Supreme Court held that public housing tenants can bring a lawsuit in order to enforce their right under the Brooke Amendment to reasonable utility allowances. Tenants have been successful in suing to have their allowances increased.¹⁶ Many of those cases are resolved through settlements. This suggests that many housing authorities simply do not make the effort to keep utility

¹⁴ "The PHA shall maintain a record that documents the basis on which allowances and scheduled surcharges, and revisions thereof, are established and revised. **Such record shall be available for inspection by residents.**" 24 C.F.R. § 965.502(b).

¹⁵ See HUD's "Public Housing Occupancy Handbook," § 14.3. This Handbook section makes clear that utility allowances must be "fair and reasonable" for an "energy conscious household," not for the wider range of actual consumption levels among households covered by the allowances.

¹⁶ For a discussion, with detailed cases citations, of litigation over utility allowances, see "Access to Utility Service" (2nd Ed. 2001 & 2003 Supp.), § 8.4 ("Litigation on Inadequate Utility Allowances in Public Housing"), § 8.9.4.2 (litigation over utility allowances in the section 8 program).

allowances up-to-date and reasonable, and are willing to settle if well-organized tenants and their advocates make a well-founded case for upward revisions.¹⁷

Tenants have a clear right to allowances that are up to date. Housing authorities are required to review their allowances annually, and to revise them if circumstances merit. They are required to revise the allowances even between annual reviews if rates for the underlying utility service (including not only electric and gas, but also fuel oil prices, changes by 10% or more.¹⁸ Many housing authorities, however, have not reviewed their allowances in years.

The first step for any tenant or tenant group should be to organize and gather the facts about allowances and bills. Tenants who identify what appears to be a serious problem with utility allowances should then contact the local legal services program to discuss the possibility of getting legal representation.¹⁹ While many problems can be resolved through negotiations with the housing authority, legal representation may prove critical in achieving a successful result. NCLC is also available for advice and consultation.

¹⁷ For example, the Housing Authority of New Orleans reached a settlement with tenants that included the hiring of an expert who looked at actual consumption patterns in the community as a basis for revising the allowances. (E-mail correspondence with Charles Delbaum, Director of Litigation, New Orleans Legal Assistance).

¹⁸ 24 C.F.R. § 965.507; "Public Housing Occupancy Handbook," § 14.3.

¹⁹ IllinoisProBon.org maintains a sample utility allowance complaint on its web site, http://www.illinoisprobono.org/index.cfm?fuseaction=home.dsp_content&contentID=1212.