

ADVOCATING  
FOR HIGHER UTILITY ALLOWANCES  
IN FEDERALLY SUBSIDIZED HOUSING:  
A PRACTICAL GUIDE



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## FOREWORD AND ACKNOWLEDGMENTS

This guide is intended to provide sufficient instruction to allow even the greenest legal services attorney to successfully find, develop and litigate a utility allowance case. Do not be daunted by its length — it's organized so that you can take only what you need. Though basic, we also hope that this guide will prove helpful for seasoned housing attorneys -- as a one-stop shop for sample pleadings, case references, and pointers from those who have already invested considerable effort on these issues.

Numerous others made significant contributions to this guide, including: National Housing Law Project staff Alaric Degrafinried, Todd Espinosa, and Erin Gerrard; Roger Colton of Fisher Sheehan & Colton, who provided his especially helpful utility allowance and utility rate expertise, and the many legal services attorneys who have recently litigated utility allowance issues or earlier blazed the trail. We especially thank our colleagues at Lawyers for Equal Justice (Hawaii), Alston Hunt Floyd & Ing, Community Legal Services (Philadelphia), Southeast Louisiana Legal Services (formerly New Orleans Legal Assistance Corporation), and Bay Area Legal Aid (Oakland). NHLP also appreciates the vital support of its funders for this initiative, including The State Bar of California -- Equal Access Grant Fund, the Retirement Research Foundation, the VanLobenSels/RembeRock Foundation, and the Foundation of the State Bar of California.

We hope that this guide encourages others to further this good work.

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## SECTION 1

### INTRODUCTION

Advocating for higher utility allowances is one of the most effective ways you can improve housing affordability for subsidized housing tenants. Utility allowance cases can be surprisingly simple, yet reap tremendous beneficial results. A single utility allowance case, brought on an individual basis or as a class action, can make housing more affordable for hundreds or thousands of tenants and prevent the evictions of families who are teetering on the edge of being able to make their rent payments.

Recent utility allowance advocacy efforts have resulted in multi-million dollar rent reductions or damage recoveries. A case filed in 2004 on behalf of a class of public housing residents in Hawaii resulted in the lowering of individual residents' rents by as much as \$150 per month and an agreement to reimburse approximately 3,000 public housing families \$2.3 million for past rent overcharges.<sup>1</sup> A class of public housing tenants filed suit against the Philadelphia Housing Authority (PHA) in 1997 and obtained a settlement of approximately \$2 million in retroactive payments for the PHA's failure to raise the utility allowance when gas rates increased.<sup>2</sup> Recently, the PHA again failed to adjust utility allowances and tenants are currently seeking approximately \$4.5 million in sanctions for the PHA's violation of the terms of the earlier settlement agreement.<sup>3</sup> Also, utility allowance litigation in New Orleans has resulted in reimbursements of \$3.3 million for subsidized housing residents and rent reductions averaging

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<sup>1</sup> *Smith v. Hous. & Cmty. Dev. Corp. of Hawaii*, Civil No. 04-1 0069K (Haw. Circuit Ct. 2004). The adjustment of the utility allowances made as a result of *Smith* resulted in a savings of over \$1,000,000 each year for public housing residents. See also, Kevin Dayton, *State Agrees to Settle Housing Suit with \$2.3M*, HONOLULU ADVERTISER, April 15, 2006 (available on-line at <http://the.honoluluadvertiser.com/article/2006/Apr/15/In/FP604150333.html>).

<sup>2</sup> October 12, 2006 email from G. Gould, attorney for plaintiffs in *McDowell v. Philadelphia Housing Authority*, 97 cv 2302 (E.D.Pa. 1997).

<sup>3</sup> *Id.*

between \$40 and \$50 for the 9,000 families affected by the suit.<sup>4</sup> A separate New Orleans suit has resulted in utility allowance increases of \$10 to \$12 per month for 2,700 Section 8 voucher recipients, with additional increases of approximately \$20 anticipated.<sup>5</sup> These results demonstrate the need to prioritize utility allowance advocacy.

This guide focuses on the simplest type of utility allowance case: a “rate increase case,” which challenges a subsidized landlord or PHA’s failure to update utility allowances to account for recent significant increases in utility rates. For most federally subsidized housing programs, tenants that pay their own utilities are supposed to be provided with a utility allowance to cover reasonable utility costs. In recent years, while utility rates have skyrocketed across the nation, many owners and administrators of subsidized housing have failed to make corresponding increases in their utility allowances. Yet, for most subsidized housing, applicable federal law mandates utility allowance increases when rates increase by ten percent or more. Thus, to establish that a particular utility allowance is insufficient, one need only show: (1) when the utility allowance was last updated and (2) that utility rates have increased by 10 percent or more since the last update. Since these two inquiries are not likely to be the subject of much factual dispute, this type of case is relatively simple to bring and resolve. The returns on your invested effort will often be exponential. While this guide focuses on the simple rate-increase case, it also includes helpful information and resources on other comparatively more difficult types of utility allowance advocacy (e.g., challenging the adequacy of the base allowance).

This guide helps you identify whether there is a problem with utility allowances in your area and provides direction on what you can do to resolve any problem. The discussion covers

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<sup>4</sup> October 10, 2006 email from L. Tuggle, attorney for plaintiffs in *Desire Area Resident Council v. Hous. Auth. of New Orleans*, No. 01-1458 (E.D.La. 2001) and *Renfro v. Hous. Auth. of New Orleans*, No. 03-3613 (E.D.La. 2003).

<sup>5</sup> October 10, 2006 email from L. Tuggle, attorney for Plaintiffs in *Johnson v. Housing Authority of Jefferson Parish*, 442 F. 3d 356 (5th Cir. 2006), *cert den.* 2006 U.S. LEXIS 5846 (U.S. Oct. 2, 2006).

utility allowance advocacy for most types of federally subsidized housing, while emphasizing public housing since most litigation regarding utility allowances has involved public housing.<sup>6</sup> Section 2 of the guide provides a brief background on utility allowances in subsidized housing including what utility allowances are, how they are determined and how they are adjusted. Section 3 provides you with the tools you need to identify whether utility allowance problems exist in your area and includes: sample public records requests to send to public housing authorities or project owners, help on finding and understanding utility rate information, and spreadsheets to help you determine the magnitude of any problems you find. Section 4 contains materials helpful for resolving the problems once identified and includes sample pleadings, discovery requests, and other helpful materials. The final section, Section 5, contains references to the abundance of other resources that can help your utility allowance advocacy efforts.

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<sup>6</sup> In addition to public housing, this guide also contains information and references relevant to HUD-subsidized mortgages, project-based Section 8, Section 8 vouchers, the Low-Income Housing Tax Credit, and USDA Rural Development subsidies (e.g., Section 515 projects ). Though utility allowance cases involving each of these programs are fundamentally the same, you should be aware of the differences between the statutes and regulations governing utility allowances for the various subsidies. For example, unlike most other federal housing subsidies, Rural Development projects do not have a clear requirement that allowances be adjusted where rates have increased by 10% or more. Instead, allowances must be “adjusted for accuracy” on an annual basis. *See* 7 C.F.R. § 3560.202(d). You should feel free to borrow from the utility allowance advocacy that has already been done for one subsidy for your work with another, but you should do so with caution and an awareness of the differences between the different programs.

## SECTION 2

### BACKGROUND ON UTILITY ALLOWANCES

#### 2.1 WHAT UTILITY ALLOWANCES ARE

To keep subsidized housing affordable for lower-income households, federal law for most federally assisted housing programs limits rent to no more than 30 percent of the household's adjusted monthly income;<sup>7</sup> in some cases, a rent ceiling not based on a particular household's actual income is imposed.<sup>8</sup> The tenant rent contribution in these programs includes both shelter and the costs for reasonable amounts of utilities.<sup>9</sup> Where utilities are tenant-paid, a tenant must be provided with a "utility allowance" to cover reasonable utility costs, which is generally credited against the otherwise payable tenant's share of the rent.

The following example illustrates how utility allowances work. A public housing tenant with an adjusted gross income of \$667 per month will pay 30 percent of that amount—\$200—for rent. Assume that the public housing authority ("PHA") for the project set the utility allowance (based on "reasonable consumption of utilities by an energy-conservative household of modest circumstances")<sup>10</sup> at \$80. That \$80 utility allowance is subtracted from the tenant's rent obligation each month. Therefore, the tenant will pay \$120 per month as rent, while paying the utility bills directly to the utility providers.<sup>11</sup> These bills may or may not equal the \$80

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<sup>7</sup>See e.g., 42 U.S.C.A. § 1437a(a) (West Supp. 2006) (pertaining to public housing); 42 U.S.C.A. § 1437f(o) (pertaining to Section 8 vouchers).

<sup>8</sup>See e.g., 26 U.S.C.A. § 42(g)(2)(B)(ii) (West 2003) (setting rents for the Low-Income Housing Tax Credit program at levels based on a percentage of the "area median gross income").

<sup>9</sup>See, 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).

<sup>10</sup>24 C.F.R. § 965.505(a) (2006).

<sup>11</sup> A tenant whose rent was less than \$80 per month (i.e., whose utility allowance exceeded the amount of rent due from the tenant) would be eligible for a "utility reimbursement" from the PHA. See 24 C.F.R. § 965.253(c)(3). For example, if the tenant's monthly adjusted gross income were only \$200, and thus the tenant's rent was only \$60, the tenant would be entitled to a \$20 utility reimbursement (\$60 rent - \$80 utility allowance = -\$20 owing = \$20 utility



allowance. If the tenant has used energy costing less than the PHA's \$80 allowance, she profits. However, if her utility costs exceed \$80, the excess must come out of her own pocket, bringing the total tenant expense for rent and utilities above the 30 percent of income she should pay. Whether this excess payment represents a legal violation depends on whether the utility allowance has been established and adjusted in accordance with applicable requirements, or instead whether the tenant has consumed more energy than is covered by a proper allowance. Rising utility costs without a corresponding adjustment to the utility allowance both reduce the value of the allowance, by inaccurately reflecting the cost of utilities for a given unit, and increase the amount of money tenants must pay for their shelter costs.

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 a more costly housing burden than a tenant whose rent includes utilities (assuming the two rents are the same). Thus, utility allowances ensure shelter costs do not exceed the applicable rent maximums by providing compensation to tenants who pay utility bills out of their own pockets. These utility allowances can be small or large, ranging from less than \$20 to over \$200 monthly, depending on the entity setting the allowances, the climate zone, local utility rates, the number of utilities and uses covered, and the dwelling unit and/or household size. The crucial point, however, is that where utility allowances are insufficient to cover utility costs, the rents for subsidized housing tenants become increasingly less affordable and may exceed the maximum rent levels set by federal law.

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reimbursement) every month in the form of a check to the tenant or a payment by the PHA towards the tenant's utility bills.

## 2.2 WHO RECEIVES UTILITY ALLOWANCES

Whether a federally subsidized tenant receives a utility allowance depends primarily on whether the tenant pays for at least some portion of their utilities.<sup>12</sup> This, in turn, depends on the type of utility metering system used in the building where the tenant resides: master, check, or individual metering.

In “master-metered” buildings, a single meter measures consumption for the building as a whole rather than for individual dwelling units or households.<sup>13</sup> Where utilities are master-metered, the building’s owner pays the utility bills to the utility company and utilities are included in rent; thus utility allowances are not necessary or appropriate.<sup>14</sup>

In “check-metered” buildings, separate sub-meters (called “check-meters”) are installed in previously master-metered buildings to measure consumption by individual dwelling units.<sup>15</sup> The building’s owner pays the utility bills to the utility company while monitoring each resident’s individual consumption with a check-meter. A resident may be required to pay a “utility surcharge” if their consumption level of utilities exceeds the amount of consumption allotted by the utility allowance.<sup>16</sup>

The utility allowance provided check-metered buildings is usually set in terms of units of utility consumption such as kilowatt hours of electricity (kWh) or therms of gas. For example, if a tenant has an allowance of 400 kWh of electricity per month and consumes 450 kWh in a given

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<sup>12</sup> In the Public Housing program, the term “utilities” may include electricity, gas, heating fuel, water and sewage services, and trash and garbage collection services. 24 C.F.R. § 5.603(b). It does not include telephone service, for which each tenant is individually responsible. *Id.* This guide focuses on electricity, gas, and heating fuel as opposed to the other types of utility services because it is relatively rare for subsidized housing residents to pay for the other types of service. Furthermore, the insufficiencies of utility allowances are most pronounced for electricity, gas, and heating fuel because of recent rate increases for those utilities.

<sup>13</sup> U.S. DEPT OF HOUS. AND URBAN DEV., UTILITY ALLOWANCE GUIDEBOOK 2 (Sept. 1998) (hereinafter “Utility Allowance Guidebook”) (found in [Appendix K](#)).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> *Id.*

month, the tenant will be assessed a utility surcharge for the excess 50 kWh of consumption. Since the utility allowances for check-metered buildings are set in terms of units of utility consumption and not a dollar amount, utility rate increases will generally not adversely affect tenants.<sup>17</sup>

In “individually metered” (also known as “retail metered”) dwellings, each household has a separate account with the utility company and pays the utility company directly.<sup>18</sup> Tenants residing in individually metered units should be provided with a utility allowance in terms of a dollar amount (referred to hereafter as a “monetary allowance”).<sup>19</sup> Where the monetary allowances are not updated as utility rates increase over time, the allowance becomes insufficient to cover utility costs. Thus, it is the tenants residing in individually metered dwellings who may benefit from a “rate-increase” utility allowance case.

***A note on Section 8 vouchers:** Section 8 voucher tenants can, and frequently do receive utility allowances. Whether or not a Section 8 voucher recipient receives a utility allowance depends on two factors: (1) whether the rent for the unit includes utilities or not—in other words, like other subsidized housing tenants, whether or not the dwelling is individually metered, and (2) whether the rent paid to the owner is less than the local voucher payment standard. If both of these factors are present, the tenant will receive at least some utility allowance.*

Utility allowances are usually calculated by first determining the “consumption allowance” – an allowance in terms of units of utility consumption (i.e., the number of kilowatt hours of electricity, therms of gas, or gallons of fuel oil allotted to each tenant per month). Then PHAs and project owners calculate the cost of the quantity of utilities covered by the

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<sup>17</sup> There may be a cause of action if the “consumption allowance” for a check-metered building is set too low, but this type of case is more difficult than the “rate-increase” case that is the focus of this guide. Another violation could result from an owner’s assessment of surcharges that reflect utility rates higher than what the owner actually pays.

<sup>18</sup> Utility Allowance Guidebook at 3.

<sup>19</sup> *Id.*

consumption allowance to derive a “monetary allowance” (i.e., the amount of money provided to each tenant monthly for utilities). The consumption allowances, which are based on factors that stay relatively constant over time (e.g., unit size, climactic conditions, type of construction and design of the housing development, etc.), do not often change from one year to the next.<sup>20</sup> However, the monetary allowances, if based on utility rates that fluctuate frequently (in some cases, on a monthly basis), need to be adjusted frequently.

Sample consumption allowances and monetary allowances can be found in [Appendix A](#).

### **2.3 HOW UTILITY ALLOWANCES SHOULD BE DETERMINED**

Federal regulations usually govern the setting of utility allowances in subsidized housing, although additional guidance may be found in guidebooks put out by the U.S. Department of Housing and Urban Development (HUD). The regulations vary depending on the type of housing subsidy involved. However, for most housing subsidies, the basic standard for utility allowances is similar: utility allowances must be calculated 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.”<sup>21</sup>

HUD has issued fairly extensive guidance regarding the setting of utility allowances in public housing.<sup>22</sup> However, for most other subsidized housing programs, there are very few requirements beyond the basic “reasonable consumption” standard. Even the more extensive public housing guidelines leave substantial discretion to the PHAs setting the allowances, stating

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<sup>20</sup> In variable climates consumption allowances may fluctuate on a seasonal basis, but the allowances and their seasonal fluctuations will usually remain constant from one year to another.

<sup>21</sup> 24 C.F.R. § 965.505(a) (pertaining to public housing). *See also* 24 C.F.R. § 5.603(b) (pertaining to FHA-subsidized and project-based subsidies); 24 C.F.R. § 982.517 (pertaining to Section 8 vouchers); 26 C.F.R. § 1.42-10 (setting forth the requirements for the utility allowance for LIHTC developments, which rely mostly on utility allowances already set by HUD programs in the area).

<sup>22</sup> 24 C.F.R. §§ 965.501 *et seq.* *See also* U.S. DEPT OF HOUS. AND URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK, Chapter 14 (2003) (available at <http://www.nhlp.org/html/pubhsg/genauth.htm>) and U.S. DEPT OF HOUS. AND URBAN DEV., UTILITY ALLOWANCE GUIDEBOOK (Sept. 1998) (found in [Appendix K](#)).

the allowances “shall be final and valid unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>23</sup> Thus, challenging the initial determination of the utility allowance can be a difficult endeavor, though advocates challenging allowances set at arbitrary or unreasonable levels have succeeded. The easier challenge, and the focus of this guide, is the “rate increase” case -- where the utility allowances promulgated, whether initially adequate or not, have become illegally inadequate utility rate increases of 10 percent or more since the allowances were last adjusted.

While regulations regarding the setting of utility allowances vary across the various housing programs, utility allowances are generally set in one of two ways: (1) allowances may be based on actual consumption data of the residents; or (2) allowances may be based on engineering calculations.<sup>24</sup> These methods are briefly discussed below.<sup>25</sup>

#### Consumption-Based Methodology

To create a utility allowance using a consumption-based methodology, the responsible entity collects actual utility consumption data from dwelling units at the applicable projects.<sup>26</sup> This data is in the form of billing records or, in the case of check-meter projects, check-meter records.<sup>27</sup> The data is then “cleaned” to get rid of data not representative of “normal” consumption, such as units that were vacant or units where the tenant runs an air conditioner (air conditioning is often not included in the allowance, but may be required in some climates).<sup>28</sup> Once cleaned, the data is then analyzed and a utility allowance for each size unit in a project is

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<sup>23</sup> 24 C.F.R. § 965.502(e).

<sup>24</sup> A combination of both methods may be used.

<sup>25</sup> HUD’s Utility Allowance Guidebook (*supra* note 13) provides an in depth analysis of how utility allowances in public housing may be calculated. The Guidebook is careful to point out that it is not binding and that other methods not set forth in the Guidebook may be used to determine utility allowances as long as the methods used are consistent with HUD regulations.

<sup>26</sup> Utility Allowance Guidebook at 25.

<sup>27</sup> *Id.* at 29.

<sup>28</sup> *Id.* at 31.

computed, often setting the allowance at an amount close to the average consumption for each size unit.<sup>29</sup> Note however, if the average consumption is used as the standard, then in all probability a sizable percentage of resident households will consume above this level.<sup>30</sup> In this case, the entity setting the allowance should ask whether the “excess consumption” of these other households is actually wasteful and within the residents’ ability to control.<sup>31</sup> If the answer to either part of this question is “no,” then the entity should consider establishing the allowances at some level above the mean (average) consumption figure.<sup>32</sup>

To illustrate the proper use of the consumption-based methodology, consider the following example. A particular Section 8 building has 35 one-bedroom units, 25 two-bedroom units, and 10 three-bedroom units. To establish the utility allowance for the one-bedroom units in the building, the owner will start by gathering consumption data from the residents of the one-bedroom units (usually by getting residents to sign releases to get the previous 12 months consumption data from the utility company). The owner might gather consumption data for only 25 or 50 percent of the units. The owner will “clean” the data by throwing out the consumption data that is inordinately high or low. The owner will then analyze the data to determine the appropriate utility allowance. The owner may find, for example, that the average monthly utility consumption for tenants in one-bedroom units is 300 kWh per month. The owner may also find that 90 percent of the residents consumed less than 330 kWh per month. Based on this analysis, the owner might set the utility allowance at 330 kWh per month. The “consumption allowance” of 330 kWh per month will be converted into a “monetary allowance” by determining how much

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<sup>29</sup> *Id.* at 31-32.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> If the allowances are calculated properly, the average consumption amount should include a “confidence range” of plus or minus some amount (e.g. an average consumption amount of 600 kWh may have a confidence range of +/- 90 kWh), in which case, at minimum, the allowance should be set at the upper end of the confidence range.

it would cost a tenant to purchase 330 kWh at the time the allowance was created. The owner will then perform the same analysis for each size unit in the project.

### Engineering-Based Methodology

When utility allowances are created using the engineering-based methodology, the allowances are based on engineering calculations, standardized consumption tables, and/or in-house information.<sup>33</sup> There is a broad spectrum of methods of varying complexity that may be used to determine utility allowances. In some cases, PHAs or owners may simply set the allowances at the average utility consumption levels calculated by a local utility company, or may base the allowances on monthly utility consumption estimates promulgated by HUD.<sup>34</sup> In other cases, the entity setting the allowances may hire an expert consultant to calculate the allowances by examining a number of factors determining the level of utility consumption at the applicable project or projects including: unit size, climactic conditions, number of occupants, type of construction and design of the housing development, energy efficiency of appliances and equipment, physical condition of the development, indoor temperature, and hot water temperature.<sup>35</sup> Either of these engineering-based methodologies may lead to the calculation of a utility allowance that is not in line with actual consumption. Ideally, the entity setting the allowances will compare the engineering-based estimates with actual consumption data to make sure there is no significant variance between the two. In fact, at least one court has explicitly stated that evidence that tenant consumption is routinely in excess of a local housing authority's

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<sup>33</sup> *Id.* at 25.

<sup>34</sup> Form HUD-52667, pertaining to the Section 8 voucher program, sets out estimates of utility consumption. HUD notes that the utility consumption estimates on form HUD-52667 are “inexact averages and must be used with caution” and lists a number of caveats regarding the accuracy of the estimates. The form is available at [http://www.hudclips.org/sub\\_nonhud/cgi/pdf/forms/52667.pdf](http://www.hudclips.org/sub_nonhud/cgi/pdf/forms/52667.pdf).

<sup>35</sup> Utility Allowance Guidebook at 25-28.

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."<sup>36</sup>

[Appendix B](#) contains a sample of how the engineering-based methodology might be used to estimate the amount of electricity consumption for lighting.

### Deriving a Monetary Allowance

The consumption-based and engineering-based methodologies are used to derive consumption allowances set in terms of units of utility consumption (such as kilowatt hours of electricity, therms of gas, or gallons of fuel oil). For individually metered units, the entity calculating the allowances must then take the additional step of figuring out how much it costs to purchase the quantity of utilities set forth in the consumption allowances. To do this, the entity must simply apply the current utility rate to the consumption allowances to derive the “monetary allowances” for the project.<sup>37</sup> The monetary allowances are the amount of credit tenants who pay their own utilities will get towards their rent each month.<sup>38</sup>

## **2.4 HOW UTILITY ALLOWANCES SHOULD BE UPDATED**

When a monetary allowance is properly determined, it should cover a tenant’s reasonable utility costs so the tenant does not pay a rent in excess of the statutory limit. Unfortunately, where utility rates are continually rising, the allowance will not remain adequate for long. To address this problem, the federal regulations require the entity setting the allowances to review the utility allowance schedule at least annually.<sup>39</sup> In addition, for most housing subsidies, the

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<sup>36</sup> *Dorsey v. Hous. Auth. of Baltimore*, 984 F.2d 622, 631 (4th Cir. 1993).

<sup>37</sup> See Section 3.3.1 for information regarding how to determine the appropriate utility rate for deriving a monetary allowance.

<sup>38</sup> Sample monetary and consumption allowances can be found in [Appendix A](#).

<sup>39</sup> 24 C.F.R. § 965.507(a) (2006) (pertaining to public housing); 24 C.F.R. § 880.610 and 881.601 (2006) (pertaining to the project-based Section 8 program); 24 C.F.R. § 982.517(c) (2006) (pertaining to the Section 8 voucher program); 7 C.F.R. §§ 3560.202 (2006) (pertaining to RHS Section 514 and 515 properties). The utility



regulations mandate that if the applicable utility rates have increased by 10 percent or more from the rates used for the previous allowance adjustment, the utility allowance must immediately be adjusted accordingly.<sup>40</sup> Note that the requirement to adjust the utility allowance hinges on whether there has been a change in *rates* not *bills*. Extreme weather temporarily requiring greater consumption does not trigger a change in a utility allowance, even if bills are higher than normal.

The 10 percent increase requirement provides a simple enforcement mechanism to ensure utility allowances are updated. A rate-increase case simply requires: (1) identifying when the utility rates were last updated and (2) showing rates have increased over 10 percent since that time—both issues are unlikely to involve much factual dispute.

## **2.5 THE MAGNITUDE OF THE PROBLEM**

It is likely the tenants you work with receive utility allowances that are too low. A 1991 U.S. General Accounting Office report found that approximately 61 percent of public housing households received a utility allowance.<sup>41</sup> It is likely an even higher percentage of Section 8 voucher holders also receive utility allowances. The report also found that more than half of the PHAs surveyed failed to annually review their utility allowances, and the cases cited in this guide are illustrative of the improper adjustment problem.

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allowances for LIHTC developments are generally dependent on the allowances used for other housing subsidies. See 26 C.F.R. § 1.42-10 (2006).

<sup>40</sup> 24 C.F.R. § 965.507(b) (2006) (pertaining to public housing); 24 C.F.R. § 880.610 and 881.601 (2006) (pertaining to the project-based Section 8 program); 24 C.F.R. § 982.517(c) (2006) (pertaining to the Section 8 voucher program). The RHS regulations lack a 10 percent rate increase trigger, though it is clear from the regulations that the allowances need to be updated as utility rates increase. See 7 C.F.R. §§ 3560.202(d) (2006).

<sup>41</sup> General Accounting Office, *Assisted Housing Utility Allowances Often Fall Short of Actual Utility Expenses*, REPORT TO CONGRESSIONAL COMMITTEE (Vol. 1) (Mar. 1991) at 2 (hereinafter “GAO Report”). The report is available at: <http://archive.gao.gov/t2pbat8/143503.pdf> (Volume 1 of 2) and <http://archive.gao.gov/d21t9/143504.pdf> (Volume 2 of 2).

If the statistics indicating that PHAs generally fail to annually review their allowances hold true, then inadequate utility allowances likely abound nationwide in light of soaring utility rates in recent years. The average cost of natural gas for residential consumers during the first three months of 2006 increased by 28 percent from the same period in 2005, and 43 percent since 2004.<sup>42</sup> For the same periods, the residential prices for fuel oil increased by 29 percent (from 2005 to 2006) and 82 percent (from 2004 to 2006).<sup>43</sup> Propane rates have undergone similar increases.<sup>44</sup> For electricity, although the increases were significantly smaller, rates nevertheless increased by 12 percent from 2005 to 2006 and 16 percent from 2004 to 2006.<sup>45</sup> Thus, under the 10 percent increase rule, if allowances were not updated between 2005 and 2006 for subsidized housing located in areas with rate increases similar to the nationwide averages, the allowances would be insufficient. Further, the allowances for natural gas, fuel oil, and propane should likely have been updated two or three times during that period; it is extremely unlikely that occurred in most areas.

Your odds of finding a utility allowance problem are depressingly good. In all likelihood, some of the clients you are already assisting are unwittingly being overcharged for their rent because they receive insufficient utility allowances. The following section explains what you need to do to uncover utility allowance insufficiencies and provides helpful tools to do so.

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<sup>42</sup> Energy Information Administration, Monthly Energy Review, June 2006 at 137 (available on-line at <http://www.eia.doe.gov/emeu/mer/pdf/mer.pdf>).

<sup>43</sup> *Id.* at 129.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 134.

## SECTION 3

### **DETERMINING WHETHER THERE IS A PROBLEM**

Determining whether there is a utility allowance “rate-increase” problem for subsidized housing in your area is a two-step process. First, you will need to determine when the utility allowances were last updated. Next, you will need to establish whether utility rates have increased by 10 percent or more since that time. This section will help you gather the information you need to complete this analysis.<sup>46</sup>

#### **3.1 DETERMINING THE UTILITY ALLOWANCES FOR FEDERALLY SUBSIDIZED HOUSING IN YOUR AREA**

This section will help you identify and gather information regarding the utility allowances used in your area. Sample letters and forms to assist you with your information collection efforts are included.

##### **3.1.1 Locating Subsidized Housing in Your Area**

Utility allowance issues arise in public housing, project-based Section 8, Section 8 vouchers, Low-Income Housing Tax Credit, and Rural Development projects. If you wish to broaden your search for utility allowance problems beyond the subsidized housing with which you are already familiar, you can identify additional projects using the internet resources below.

- List of PHAs by state: <http://www.hud.gov/offices/pih/pha/contacts/><sup>47</sup>
- HUD Multifamily Project Data: <http://www.hud.gov/offices/hsg/mfh/mfdata.cfm>  
*Includes links to:*
  - Mortgages Currently Insured

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<sup>46</sup> As explained further in Section 3.1.2.1, usually it will also be useful to examine the history of updates over the past three to five years to ensure that the timing and amount of rate increases roughly matches the timing and amounts of the adjusted allowances.

<sup>47</sup> You may then have to get the public housing project list and voucher utility allowance schedules from each PHA.

- Active Section 202 Loans
- Active Section 236 Projects
- Multifamily Assistance and Section 8 Contracts Database
- List of LIHTC projects nationwide: <http://www.huduser.org/datasets/lihtc.html#data><sup>48</sup>
- List of expiring Section 8 contracts, active Section 515 loans, LIHTC properties, and active Section 202/811 loans: [http://www.nhtinc.org/data\\_map.asp](http://www.nhtinc.org/data_map.asp)
- Contact information for State and Local Rural Development Offices: [http://www.rurdev.usda.gov/recd\\_map.html](http://www.rurdev.usda.gov/recd_map.html)<sup>49</sup>

### 3.1.2 Requesting Information About Utility Allowances

The best way to get information regarding utility allowances is to request the information directly from your local PHAs, contract administrators for HUD project-based Section 8 properties, or subsidized project owners. This information will usually be far more reliable and comprehensive than from any other source.

#### 3.1.2.1 Identifying Who Has the Information You Need

The location of the necessary utility allowance information depends on the type of housing subsidy involved. For example, to obtain utility allowance information for public housing or section 8 vouchers, you should contact the PHA(s) administering these programs.

The following list should be helpful in determining what entity you should contact:

- **Public Housing and Section 8 Vouchers**: Applicable PHA  
*For a list of PHAs by state go to:* <http://www.hud.gov/offices/pih/pha/contacts/>
- **Privately-owned HUD Multifamily Buildings**: Contract Administrator, local HUD Office or Property Owner/Manager  
*For a list of Contract Administrators go to:* [http://www.hud.gov/offices/hsg/mfh/rfp/ca\\_assigned.cfm](http://www.hud.gov/offices/hsg/mfh/rfp/ca_assigned.cfm)

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<sup>48</sup> Note that the HUD data on LIHTC properties may be less accurate than lists maintained by the each state credit allocation agency, which are often available on the state agency's website.

<sup>49</sup> You may then have to get the property list from the RD state office.

- **LIHTC Properties:** Property Owner/Manager or Tax Credit Allocation Agency  
*For a list of LIHTC Tax Credit Allocation Agencies go to:*  
[http://www.novoco.com/Federal\\_LIHCs/2006\\_federal\\_lihtc.shtml](http://www.novoco.com/Federal_LIHCs/2006_federal_lihtc.shtml)
- **Rural Development Housing:** Property Owner/Manager or State Rural Development Office  
*For a list of State and Local Rural Development Offices go to:*  
[http://www.rurdev.usda.gov/recd\\_map.html](http://www.rurdev.usda.gov/recd_map.html)

Some resources for utility allowance information may be better than others. For example, you can probably find the information you need for a HUD multifamily building from either the Property Manager or the local HUD Office or Contract Administrator responsible for the building. However, the local HUD Office or Contract Administrator may be the better source of information because it will likely be responsible for multiple buildings in your area and will have utility allowance information for each building. However, there is probably not a “one-stop-shop” for all the information. Advocates who have tried to gather the information from HUD have often been told that HUD does not collect information regarding utility allowances, though it is possible practices vary between field offices.

### 3.1.2.2 The Information You Need

The date on which a utility allowance was last updated is all that you really need to know about a utility allowance in order to determine whether it is insufficient due to rate increases. If the utility rates have increased by 10 percent or more since that time, then you have an issue. However, if you want a fuller understanding of the problem, you will need additional information. Just because the allowance has been adjusted after the most recent rate increase(s) totaling more than 10 percent does not mean that it was properly adjusted.<sup>50</sup> You should probably look deeper, bearing in mind that the general objective is to determine whether

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<sup>50</sup> For example, an adjustment of 15 percent three years ago in the wake of a rate increase of 20 percent may be insufficient to fulfill the legal duty, especially where additional smaller increases have followed.

allowances have been legally established during the period covered by any applicable statute of limitations on the tenants' claims.

Information you may want to request includes:

- The type of housing subsidy for each project
- Number of units per bedroom size at each project
- Type of metering system used for each project
- All utility allowance schedules used in the past and present (e.g., for the most recent five years)
- All surcharge schedules used in the past and present
- Date of last utility allowance update
- Supporting documentation used to establish utility allowances and updates
- Utility rate data collected by the PHA, owner or administrator
- The utility rate(s) used when the last two or three updates were completed
- Section 8 voucher payment standards
- Copies of Form HUD-92458 (for project owners of certain multifamily projects)<sup>51</sup>
- Copies of Form HUD-52667 (for PHAs with Section 8 voucher programs)<sup>52</sup>
- Criteria and procedures for making individual utility allowance adjustments<sup>53</sup>
- Notices given to residents regarding utility allowances and individual adjustments to utility allowances<sup>54</sup>

Sample public records requests that include more detailed lists of information you may want to request are located in [Appendix C](#).

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<sup>51</sup> Project owners of certain multifamily projects are required to submit a Form HUD-92458 each time that they request an adjustment to the project's contract rents. Owners are required to list the utility allowance provided at the project, and the form is also used by the owner to request approval of utility allowance adjustments from HUD. The form is available at [http://www.hudclips.org/sub\\_nonhud/html/pdfforms/92458.pdf](http://www.hudclips.org/sub_nonhud/html/pdfforms/92458.pdf).

<sup>52</sup> PHAs administering a Section 8 voucher program are required to set out their monetary allowances on Form HUD-52667. The form is available at [http://www.hudclips.org/sub\\_nonhud/cgi/pdfforms/52667.pdf](http://www.hudclips.org/sub_nonhud/cgi/pdfforms/52667.pdf).

<sup>53</sup> Public housing regulations require that PHAs adopt criteria and procedures for making individual adjustments to the utility allowance where the standard utility allowance as applied to an individual tenant is insufficient for reasons out of the tenant's control. 24 C.F.R. § 965.508 (2006). For example, tenants with disabilities that require them to use medically prescribed equipment that consumes electricity, such as an oxygen concentrator or air conditioner, should be eligible for an increased utility allowance. Where a PHA fails to adopt the required criteria and procedures for making individual adjustments, tenants may be able to obtain relief. *See Amoné v. Aveiro*, 226 F.R.D. 677 (D. Haw. 2005) (Certifying class in challenge to PHA's refusal to increase public housing utility allowance for disabled tenants with special needs. The Court in *Amoné* ultimately granted an injunction requiring the PHA to adopt the necessary criteria and procedures for individual adjustments).

<sup>54</sup> In addition to adopting criteria and procedures for granting individual utility allowance adjustments for tenants with special needs (see note 53), PHAs must provide notice of the availability of such adjustments. *See* 24 C.F.R. § 965.508 (2006).

Exactly how much information you will want to request in the initial stages of your efforts is a judgment call. You may want to request just enough information to find out whether there is a rate-increase issue to improve your chances of a prompt response. Alternatively, you may decide you want more extensive information to thoroughly evaluate your case and determine its full scope. This decision will likely be based on your relationship with the relevant parties and local practices.

You will also need to decide how far back you want to go with your information request. You might want to base your decision on the applicable statute of limitations, which will likely be the statute of limitations for a breach of contract claim, or for a Section 1983 claim, which is the limitations period for personal injury torts. This will permit you to gather a more complete picture of the rate changes and allowance adjustments that were actually made, as well as those legally required.

Regardless of what information you request, the information you get back is likely to vary significantly from one PHA or owner to another. With respect to public housing, the federal regulations require that a PHA “maintain a record that documents the basis on which allowances and scheduled surcharges, and revisions thereof, are established and revised.”<sup>55</sup> Interpretations of this requirement undoubtedly vary, as do the capabilities of various PHAs and project owners. Thus, you may just get a copy of the most recent monetary allowance schedule, (which hopefully indicates the date it was adopted), or you may get a mountain of information including: (1) utility allowance schedules and utility rate information for the past five or 10 years, (2) the expert consultant’s analysis that supported the allowances, and (3) actual

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<sup>55</sup> 24 C.F.R. 965.502(b) (2006). There are similar requirements for the other federal housing subsidies. See 24 C.F.R. § 880.610 (2006) (pertaining to project-based Section 8), 24.C.F.R. § 982.517(a)(2) (2006) (pertaining to Section 8 vouchers), and 7 C.F.R. § 3560.202(d) (2006) (pertaining to Rural Development projects).

consumption data from residents. While the latter may be preferable, it is certainly not necessary.

### 3.1.2.3 Requesting the Information

The best way to find the utility allowance information you need is by making a phone call to the person who has the information. It is quick, easy, and offers you a chance to answer questions about the information you want. Additionally, you may be able to get information over the phone that does not exist in the utility allowance records.

If you are unable to get the utility allowance information by these less formal means, you should be able to get what you need by way of information requests under the federal Freedom of Information Act (FOIA) or the state or local equivalent. PHAs are usually subject to state or local public records acts. However, private owners of HUD, RD or LIHTC multifamily buildings are not, though that should not prevent you from simply writing a letter to request the information you want. If a private owner refuses to respond to informal requests, you may want to try to send a FOIA or other public records request to the responsible administrative agency, whether it be HUD, the state credit allocation agency or the project's contract administrator (who may or may not be subject to FOIA or the state public records act).

However, there are a few issues to keep in mind regarding public records requests. First, the agency responding to the request need only provide you with existing documents. If there is no document in existence to satisfy your query, the agency need not create one. Second, you should try to describe the information you are seeking in a way that increases the likelihood that the person searching for the records will find them. Third, the requestor is generally required to pay search and copy fees. However, most public records acts provide a fee waiver where the records will be used for the public interest. Low-income housing advocates have succeeded in



getting these fees waived in the past. Finally, the agency you request the information from is generally required to respond within a certain amount of time. If the agency does not comply, you should check the applicable public records act to see what steps you need to take for enforcement (though you may wish to consider alternative methods of getting the information you need instead of getting sidetracked by a public records dispute).<sup>56</sup>

[Appendix C](#) contains two sample public records requests: (1) a “Short Request” seeking all utility allowance schedules used by a PHA and all documentation supporting the schedules; and (2) a “Long Request” that is more detailed and technical, which includes a request for information regarding individual adjustments to utility allowances based on a tenant’s special needs.<sup>57</sup>

### **3.1.3 Reviewing Client Documents**

An alternative to contacting the entity setting or monitoring the utility allowances is to review the documents of current clients. Insufficient utility allowances may be used as a defense to non-payment of rent evictions, so it is always a good idea to review whether a tenant’s utility allowance was properly updated in non-payment of rent cases. If the client has been residing in the project a long time, the client records or the client’s tenant file should contain sufficient information to determine whether the client’s utility allowance has been regularly updated.

For HUD-subsidized housing, the surest source of the information you need is HUD Form 50058 or HUD Form 50059, which both indicate the amount of the utility allowance a

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<sup>56</sup> For example, a request from a federal, state or local legislator performing constituent service to ensure compliance with applicable rules governing taxpayer-funded programs may prompt a more fruitful response.

<sup>57</sup> See note 53 for more information regarding utility allowance adjustments for tenants with special needs.

tenant receives at the time of recertification.<sup>58</sup> These forms, or their equivalent, are required for all tenants of HUD subsidized housing and all Section 8 voucher tenants. For LIHTC developments, the “Tenant Income Certification” forms used during annual recertifications should have what you need.<sup>59</sup> Rural Development subsidies should have similar forms. By comparing the amount of the utility allowance from one year to the next, you should be able to determine whether the allowances have been appropriately updated.<sup>60</sup>

For public housing tenants, the utility allowances may be incorporated as an appendix in tenants’ leases each year. If so, you can determine the current allowance and whether it has been updated by reviewing a tenant’s current and past leases.

Later on, if you believe the utility allowances are inadequate, you may want to survey subsidized housing residents to gather utility bills and other information relevant to the utility allowances. You can then use this information to determine the disparity between their utility costs and the allowance they receive. This method is particularly helpful to get a sense of whether the consumption allowances are adequate. [Appendix D](#) contains a sample letter to tenants regarding potential utility allowance insufficiencies, a utility allowance survey for tenants to complete, and a release form that will allow you to retrieve a tenant’s utility bill information directly from the utility company.

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<sup>58</sup> A blank form HUD 50058 is available on-line at <http://www.hud.gov/offices/pih/systems/pic/50058/pubs/form50058.pdf>. A blank form HUD 50059 is available on-line at [http://www.hudclips.org/sub\\_nonhud/html/pdfforms/50059.pdf](http://www.hudclips.org/sub_nonhud/html/pdfforms/50059.pdf).

<sup>59</sup> Note that not all LIHTC developments require annual recertifications, so you may need to go elsewhere for the information.

<sup>60</sup> However, note that this method fails to pin down the exact date that the allowance was adjusted, for purposes of comparing it to the date of the rate change, as well as the date that the adjusted allowance was first made available to the tenant.

## **3.2 DETERMINING THE UTILITY RATES**

Once you have gathered the necessary information to determine when the utility allowances were last updated, you will need to determine how much utility rates have increased since that time. Ideally, you will have gotten accurate utility rate information in response to your information request regarding how the utility allowances were set. Alternatively, you may be able to extract sufficient information regarding utility rates from the residents' utility bills, though you will ultimately want the rate information from the utility company if you intend to pursue litigation.<sup>61</sup> If you did not already get the rate information from either of these sources, the following sections discuss several other possible sources for the information you need.

### **3.2.1 Getting Nationwide Information Regarding Rate Increases**

Before gathering actual local utility rate information, which may be relatively time-consuming to track down, you may want to review internet sources of general nationwide rate information to get a general sense of utility rate fluctuations over recent months or years. One source of nationwide utility rate information is the website for the Energy Information Administration (“EIA”), a branch of the U.S. Department of Energy. The EIA puts out a monthly report called the “Monthly Energy Review” that contains tables that set out nationwide average residential utility rates for electricity, natural gas, propane, and fuel oil. The tables include average monthly rate information for the most recent two to three years, and average yearly rate information as far back as the 70’s. The Monthly Energy Review can be found at: <http://www.eia.doe.gov/emeu/mer/contents.html>.

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<sup>61</sup> It is highly recommended that you review at least one tenant’s utility bill (or perhaps your own bill) to double-check your work and make sure that you understand how a utility consumer’s bill is ultimately calculated.

Another source for general nationwide utility rate information is the Department of Labor website. The Department of Labor gathers utility rate information as part of its effort to determine fluctuations in the Consumer Price Index. This utility rate information is available to the general public at: <http://data.bls.gov/cgi-bin/dsrv?ap>.<sup>62</sup>

Though this information is helpful to get a general sense of whether or not a problem may exist with the utility allowances, you will need the actual rate information from the utility companies in your area to determine the existence of a violation and the precise amount of an appropriate adjustment prior to making a demand or filing a lawsuit.

### **3.2.2 Getting Specific Information Regarding Local Utility Rates**

You will need to get accurate information regarding the utility rates applicable to the tenants you are assisting to make accurate calculations regarding: (1) when the utility allowances at a given project should have been updated, (2) what the allowances should be in light of rate increases, and (3) how much residents have been overcharged because of past insufficiencies. If the entity calculating the allowance did not already supply you with accurate utility rate

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<sup>62</sup> The information on the website allows you to obtain the average consumer prices of a given amount of utility consumption (e.g., 500 kWh electricity) in certain urban areas (e.g., Seattle-Tacoma-Bremerton, WA) or based on city size (e.g., “Northeast size A,” “City size B/C,” etc.) over a period of years. The cities are categorized into Size A (population of 1,500,000 or greater), Size B/C (50,000 – 1,500,000), and Size D (below 50,000). See <http://data.bls.gov/PDO/outside.jsp?survey=cu>.

The information on the Department of Labor website will provide you with a general idea of how utility rates have fluctuated in recent years. For example, you can get data showing that the average cost of fuel oil in a “Size A” city in the Midwest went from \$1.825 per gallon in January 2005 to \$2.352 per gallon in January 2006, an increase of almost 30 percent. If you determine that utility allowances for fuel oil in the same area have not been updated since sometime before January 2005, it is very likely the utility allowances are insufficient and violate federal law.

**Note:** The areas you can choose to search on the Department of Labor website are numbered (e.g., “0100 Northeast urban,” and “A100 Northeast Size A,”). The areas with numbers that are preceded with a letter (e.g., “A100 Northeast Size A”) will provide you with utility rate information. The areas with numbers that begin with a “0” (e.g., “0100 Northeast urban”) will provide you with information regarding the cost of groceries, which is not particularly helpful to your inquiry into the sufficiency of utility allowances.

information, there are two other good sources: (1) your state's "PUC"; and (2) your local utility company.

### 3.2.2.1 PUC

In most cases you will be able to get the needed rate information from the agency in your state responsible for regulation of the utility industry, often called the "public utilities commission" or "public service commission" (hereinafter referred to as a "PUC"). The following is a link to the websites of each state's PUC:

<http://www.naruc.org/displaycommon.cfm?an=15>.<sup>63</sup> Some of the needed rate information may be located on-line at the PUC's website, but probably you will need to call and request it.<sup>64</sup>

Unfortunately, the format of the utility rate information collected by the PUC varies from state to state, so it is not possible to include a comprehensive explanation of how to interpret the utility rate data you receive in this guide. What you really need to know is how to figure out what a residential utility customer would pay for a set amount of utilities (e.g., 500 kWh) each month for the current month and  $x$  number of months in the past. Hopefully you will be able to convince someone at the PUC to give you a primer on utility rates in your area. Along with learning what utility rate data you need and how to interpret it, you may also be able to find out what rate information is collected by the PUC, whether there are any utility companies that service the area for which the PUC does not collect rate information, or other rate-related information you might need to know for your situation.

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<sup>63</sup> Note that your state's PUC will not have information regarding "deliverable fuels," such as propane, kerosene, and home heating oil. Additionally, PUCs generally will not have information regarding "deregulated" utility companies (i.e. competitive retail utility companies) or unregulated utility companies, such as municipally-owned companies or rural electric cooperatives. If your state's PUC does not have the information that you need, you will need to try to get the information you need directly from the fuel or utility provider.

<sup>64</sup> Since PUCs are state agencies, they should be subject to your state's public records request laws.

### 3.2.2.2 Utility Companies

If you are unable to get the rate information you need from your state's PUC, you should seek the information directly from the applicable utility companies. An internet search will likely reveal the applicable utility companies operating in the geographical area you are interested in. Unfortunately, your state or local public records request laws are unlikely to apply to utility companies. However, a utility company may still be willing to provide you with the needed rate information upon request. You may want to try contacting someone in the customer relations department for assistance. The utility company may also have the necessary information on their website, though it may be a good idea to speak with someone from the utility company anyway to make sure that you have an adequate understanding of the rate structure.

### **3.2.3 Understanding the Utility Rate Data**

The way that utility rates are determined and how they affect what consumers pay for their utility consumption varies from utility company to utility company. The rate structure discussed below will likely be similar to that of the utility companies in your area, but it may not be identical. For that reason, it is advisable to speak with someone at your local PUC or utility company to get a clear understanding of how the rates in your area work.

For many utilities, a consumer's bill will be broken down into two separate parts. First, the consumer will be charged with a "Customer Charge," which is a flat charge assessed on a monthly basis simply for being a utility customer. This charge remains the same regardless of the quantity of utilities consumed. For example, *all* residential electric utility customers in

Honolulu, Hawaii were charged a Customer Charge of \$7.46 for the month of November 2005, regardless of whether the customer consumed one kWh of electricity or one-thousand.<sup>65</sup>

The second component of a consumer's bill is sometimes known as the "Energy Charge." The Energy Charge is the amount a consumer pays per unit of consumption used over the month.<sup>66</sup> For example, in November 2005 in Honolulu, residential customers were charged \$0.188488 per kWh of electricity consumed. Thus, a residential customer who consumed only one kWh of electricity in October 2005 would have had a utility bill of \$7.65 as calculated as follows:

$$\$7.46 \text{ Customer Charge} + (1 \text{ kWh consumed} \times \$0.188488 \text{ per kWh Energy Charge}) = \$7.65$$

During the same month, a residential customer who consumed one-thousand kWh of electricity would have had a utility bill of \$195.95:

$$\$7.46 \text{ Customer Charge} + (1000 \text{ kWh consumed} \times \$0.188488 \text{ per kWh Energy Charge}) = \$195.95$$

There may be some variations regarding how a resident's utility bill is calculated in your area (e.g., some states levy taxes and surcharges on utility consumption, which would also need to be added to the bill), but most likely, the calculation will be similar.

Unfortunately, determining how much a certain quantity of utility consumption will cost each month will probably not be as simple as plugging a Customer Charge and Energy Charge

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<sup>65</sup> Some utility companies charge different rates based on different amounts of consumption. See Section 3.3.1.3 for further discussion regarding this issue.

<sup>66</sup> The "Energy Charge" is usually based on a number of variables that fluctuate on a monthly or quarterly basis, through which changes in fuel costs can be passed through to the consumer. Because of these variables, utility rates may change by 10% or more even if there has been no official "rate change" (often known as a change in the "Base Rate"). The variables that factor into the calculation of the energy charge may include the following:

- Energy Cost Adjustment Factor (per kWh)
- Interim Rate Increase
- Integrated Resource Planning (IRP) Cost Recovery Adjustment
- Rate Adjustment
- Residential Demand-Side Management (DSM) Adjustment

If the utility rates in your area are based on similar variables, then you may be able to use the Effective Rate Calculators in Appendix E to help you determine the appropriate rates. Otherwise, you may need to get help from the utility company, the PUC, or an expert.

into the equation above. This is because there is a good chance that the Customer Charge and Energy Charge (or whatever the charges are known as in your area) will not already be calculated for you; you may need to derive these charges from the utility rate data you receive.

The method of calculating the Customer Charge and Energy Charge paid by residents will probably vary depending on where you are, so the information in this guide regarding the calculation of the “effective rate” (i.e., the amount of money a tenant pays per unit of consumption) may not be entirely accurate in some areas. However, the basic concepts will likely be the same. The utility rates paid by end users such as subsidized housing residents are sometimes based on “base rates” that do not change frequently. However, utility rates may fluctuate on a regular basis because a number of variables (e.g., the current cost of fuel for the utility company) are used in determining the price of utilities for the end user. Thus, the cost to an end user for a certain quantity of utilities will be determined by a formula that considers the base rates and the regularly fluctuating variables.

Appendix E contains the following spreadsheets and instructions that you may find useful when calculating effective rates.

**Effective Rate Calculator (electric)**

- [Instruction Sheet](#)
- [Spreadsheet](#)

**Effective Rate Calculator (gas)**

- [Instruction Sheet](#)
- [Spreadsheet](#)

*Note that the spreadsheets may not work for all areas because the methods used to calculate the effective rates may differ.*



### 3.3 ANALYZING WHETHER THE UTILITY ALLOWANCES HAVE BEEN PROPERLY UPDATED

Once you have gathered all the utility allowance information and the utility rate information, you can determine whether the allowances have been properly updated to account for rising rates. If not, you will need to calculate what the new allowances should be and the amount residents should be reimbursed for past utility allowance insufficiencies. Depending on the magnitude and complexity of your case, you may need to retain an expert to help, especially if your case is going to go to trial. However, you should be able to get a general idea about the extent of the utility allowance deficiencies in your case using basic math skills and the tools and guidance provided with this guide.

Determining whether utility allowances have been properly adjusted to account for rate increases can be fairly simple. Any of the following ways may be used to complete the analysis:

- **If you know the utility rate used for the most recent adjustment**  
*Compare the rate used for the most recent adjustment with the current rate. If there is a 10% difference, the utility allowance has likely not been properly adjusted.*
- **If you know when the most recent adjustment took place**  
*Compare the rate in place at the time of the last adjustment with the current rate. If there is a 10% difference, the utility allowance has likely not been properly adjusted.<sup>67</sup>*
- **If you know what the consumption allowance and monetary allowance are**  
*You may be able to derive the utility rate that was used to calculate the monetary allowance.<sup>68</sup> If there is a 10% difference between the rate you derive and the current rate, the utility allowance has likely not been properly adjusted.*

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<sup>67</sup> This method is not ideal because it will not tell you for certain the rate used in the most recent utility allowance update. It will, however, provide a general idea of whether it is likely that there is a problem.

<sup>68</sup> This can be complicated because often the utility rate has two variables: the customer charge and the energy charge. Your review of past rate information may show that the customer charge has not fluctuated significantly over a period of years. If so, you may be able to ballpark the customer charge, in which case the equation used to derive the utility rate from the consumption and monetary allowances may look something like this:

$$\begin{aligned} \text{Customer Charge (ballpark)} + (\text{Consumption Allowance} \times \chi \text{ (Energy Charge)}) &= \text{Monetary Allowance} \\ \text{or} \\ (\text{Monetary Allowance} - \text{Customer Charge (ballpark)}) \div \text{Consumption Allowance} &= \chi \text{ (Energy Charge)} \end{aligned}$$

Unfortunately, several complicating issues may arise when trying to determine what utility rate is the appropriate rate to use when conducting this analysis. Ultimately, the rates used to set and adjust the allowances should be the rates that tenants actually pay for their utilities. Some of these possible issues in determining the appropriate rates to use are discussed below. The subsections that follow also provide additional guidance and tools for determining the appropriate allowances once you have figured out the correct rates to use.

### **3.3.1 Issues Arising When Determining the Appropriate Utility Rates to Use**

If the consumption allowances are an accurate reflection of the amount of utilities tenants consume, then for the monetary allowances to adequately cover a tenant's utility costs, the rate that tenants are actually paying must be used. Determining the appropriate rate to use may become complicated where utility rates regularly fluctuate (e.g., monthly or seasonally) or where different rates are applied to households with certain characteristics, such as households that consume a certain level of utilities or elderly, disabled, or low-income households. Though the analysis may be complicated by these factors, ultimately you should be able to determine the most appropriate rate to use to calculate and update the utility allowances, which will be the rate that tenants in the applicable buildings are actually paying.

#### **3.3.1.1 Using Past Utility Rates**

In some areas, utility rates remain fairly constant for a long period until the utility company adopts a rate change, at which time the allowances would need to be adjusted if there has been a cumulative change of 10% or more from the rate last used to calculate the allowance. In other areas, rates may fluctuate regularly, on a seasonal or monthly basis. When that is the case, calculating new allowances based on the utility rate only in effect for the month or months

in which the allowances are being updated may seem arbitrary because that rate will be in effect for only a short period. In light of this, some PHAs and project owners use the average utility rates from a particular period to complete their calculations. For example, if the allowances are being updated in March in an area where rates fluctuate monthly, instead of basing the allowance on March's rate alone, the average rate from the previous year might be used. Since utility rates generally increase over time, the rate used to calculate the allowance will often be lower than the rate the tenant is actually paying at the time when the allowance is being adjusted. As a result, the utility allowance will be lower than what the tenant should be entitled to.

The preferable method during times of increasing rates would be to use the rates tenants are currently paying instead of relying on past rates to determine the amount of the monetary allowances. For example, if an allowance is being adopted in March, the utility rate in place during March of that year should be used to determine the amount of the monetary allowance. As soon as rates change 10% or more from the March rate, the allowances should be adjusted. Again, the focus of your inquiry into whether the appropriate rates are being used to determine the allowances should be, "What is the rate that the tenants are actually paying for their utilities for the relevant period?"<sup>69</sup>

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<sup>69</sup> This issue of whether it is appropriate to use past rates may be dispute by the PHA or owner. Indeed, parts of the HUD Utility Allowance Guidebook appear to add credence to the idea that an average of past rates may be considered when determining the rate to use for updates. The Guidebook states that most PHAs provide equal monthly allowances during the year, and arguably implies that this method may be acceptable even where there are seasonal adjustments to utility rates. HUD's Utility Allowance Guidebook (*supra* note 13) at 60-61. If true, that would mean that a PHA would not need to make adjustments to its rates even if the seasonal rate adjustments are in excess of 10% of the previous rates. It might also mean that PHAs could use past utility rates to estimate what the future seasonally adjusted rates might be. However, the Guidebook is not binding and there are numerous arguments that can be levied against this interpretation. Ultimately, the issue should come down to whether the rate used for utility allowances adjustments is equivalent to the rates tenants are actually paying. If not, a different method of determining the rate should be used.

### 3.3.1.2 Retail Competition

Your efforts to identify the appropriate utility rates to use for your analysis could also be complicated if there is more than one utility company that provides service in the applicable area, and thus more than one rate from which to choose. In recent years, utilities have been “deregulated” to allow for retail competition among utility providers. As a result, a tenant may have more than one option regarding what company to purchase utilities from, and each company will charge different rates. Thus, you may be left in the unenviable position of trying to determine which utility company’s rates should be used to determine the utility allowances and when updates should be made to the allowances.

There is no clear answer to this problem. However, you should be aware that approximately 95 percent of residential electric utility consumers use the “local distribution utility company,” or the “default” utility company, for their utility service. More residential consumers use retail competitive alternatives for natural gas, but the vast majority still use the local distribution company. Thus, it is likely that the utility allowances should be based on the rates of that company.<sup>70</sup>

### 3.3.1.3 Different Consumption Levels

Some utility companies charge different rates based on the amount of utilities a tenant consumes. For example, some electric utility companies charge a certain rate for customers that consume 500 kWh of electricity per month or less, and a lower rate for customers that consume more than 500 kWh of electricity. Utility allowances should take into account these different

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<sup>70</sup> A potential issue, outside the scope of this guide, might arise if the entity setting the utility allowance bases its allowances on rates from a utility company that is not used by a majority of residents (which happens to have lower rates than the utility company used by the majority of residents).

rates structures. Alternatively, some do the opposite, with lower “lifeline” rates for a limited quantity, and higher rates as consumption escalates.

#### 3.3.1.4 Reduced Rates Based on Special Status

Utility companies in many jurisdictions have special rates for certain customers, such as tenants that are elderly, disabled, or extremely low-income. If specific tenants actually benefit from reduced rate schedules for a particular fuel source because of their age, disability or income status, it may be appropriate to use those reduced rate schedules, not those ordinarily applicable. Doing so may result in a lower allowance than if the ordinary rates were used. Note that the fact that such reduced rate schedules might be available is insufficient to require their use in calculating the allowances; *the tenant must actually be receiving those rates.*<sup>71</sup>

None of the above scenarios should prevent you from calculating an appropriate utility allowance, though they may make the calculation slightly more complicated.

### **3.3.2 Determining Whether Rates Have Increased by 10 Percent or More**

Once you have gathered the information regarding the utility allowance and rates, determining whether you have a utility allowance case is a matter of simple math. Ideally, you will know the utility rate used for the most recent allowance adjustment. If you know that, you can simply compare the old utility rate with the current rate to determine whether rates have increased by 10 percent. If you do not know the exact rate used, but you know the date of the most recent update, you may want to simply use the utility rate in effect at the time of the update.

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<sup>71</sup> Some tenants may also be eligible for the Low Income Home Energy Program (LIHEAP), which provides certain low-income assistance with their utility bills. More information on the LIHEAP program and the interplay between LIHEAP and utility allowances can be found in the following two books: NATIONAL CONSUMER LAW CENTER, ACCESS TO UTILITY SERVICE, Ch. 7 (3<sup>rd</sup> ed. 2004); and NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS’ RIGHTS, § 6.7.3 (3d ed. 2004).

To determine the percentage of increase in utility rates since the last adjustment, use the following equation:

$$(New\ Rate - Old\ Rate) \div Old\ Rate = percentage\ increase$$

For example, if the new rate is .92/therm and the old rate was .75/therm, the equation would be:

$$(.92 - .75) \div .75 = .17 \div .75 = .226 = 22.6\%$$

Even apparently minor rate shifts can trigger the duty to adjust the allowance. If the percentage increase is anything greater than 10 percent, you can establish a violation and pursue a rate-increase claim.<sup>72</sup>

### **3.3.3 Determining the Amount of New Allowances and Reimbursements**

Once you determine that the allowances were not updated as required, then you will need to figure out what the new utility allowance should be and how much tenants have been overcharged. If your case is going to trial, you will almost certainly need an expert to calculate the reimbursements due tenants and to testify at trial. In fact, it is a good idea to get an expert before or during the negotiation stage who can calculate the new utility allowances and damages, especially if you do not want to devote a large chunk of time to doing the calculations yourself or brushing up on your math and spreadsheet skills. This section will at least help you make a rudimentary determination of the amount of overcharges so that you can also determine the amount of resources to expend on your case.

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<sup>72</sup> Note that you may have difficulty deciding whether to calculate the percentage increase by just analyzing the increase in the Energy Charge (e.g., \$.16 per kWh) or by evaluating the percentage increase in the cost of a certain amount of electricity (e.g., the amount provided for in the consumption allowance), which would be determined using both the Customer Charge and the Energy Charge. The difference is not likely to be substantial, but if rates have increased by 10 percent under only one of these methods, you may want to delay pursuing a lawsuit until additional increases occur or limit your tactics to making a demand.

The task of calculating a new allowance and previous overcharges will be easiest if the utility allowance information you receive includes:

- the consumption allowances;
- the utility rate(s) used to calculate the monetary allowances; and
- the monetary allowances

If you have all of this information, you should be able to determine the appropriate allowance adjustment and the amount of previous overcharges by plugging numbers into an equation. To determine project-wide overcharges, you will also need information regarding the number of units in the projects, to which you will need to make adjustments for vacancy rates or based on actual occupancy information.

Appendix F contains the following tools to assist you in making these calculations:

[Utility Allowance Deficiency Calculator](#)  
[Instruction Sheet for Utility Allowance Deficiency Calculator](#)

If you are missing some of the information, especially if there are no consumption allowances for the building, it will be more difficult to complete your calculations. If there are no consumption allowances, you should be able to get a ballpark estimate of the extent of utility allowance overcharges and the appropriate amount for updated allowances by comparing the rates in effect when the allowances were last updated with recent rates. For example, if there was a 20% increase from the rate used for the last allowance to the current rate, there should have been a comparable increase in the allowance.<sup>73</sup>

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<sup>73</sup> Because rates will often be a factor of both a Customer Charge and an Energy Charge, a 20% increase in the rates will not necessarily call for an exact 20% increase in the allowances, but you should be able to get a general idea of how much the allowances should have increased using this method.

Appendix G contains the following tools to help you get a rough estimate of the magnitude of your case even if you only know when the allowances were last updated and the utility rates for recent years:

[Utility Allowance Claim Calculator](#)  
[Instruction Sheet for Utility Allowance Claim Calculator](#)

Also note that tenants who have been overcharged because of a utility allowance deficiency may be entitled to recover an additional amount to account for inflation or prejudgment interest. For example, assuming a 3% rate of inflation, a tenant who was overcharged by \$400, may be entitled to recover an inflation-adjusted amount of \$424 two years later. State law may establish a much higher prejudgment interest rate than the inflation rate, especially for breach of contract claims. Such prejudgment interest awards can make a considerable difference in the amount recovered for tenants.



## SECTION 4

### **FIXING THE PROBLEM**

This section is meant to help you address some common issues once you discover a potential utility allowance violation, including potentially problematic issues that may arise in pursuing a utility allowance claim. Sample pleadings and discovery requests are also included.

#### **4.1 IMPORTANT CONSIDERATIONS**

This subsection discusses several issues you should consider before (or while) pursuing a utility allowance claim.

##### **4.1.1 Will Increasing the Allowances Help or Hurt?**

In almost all utility allowance cases (other than vouchers, which present unique issues, *see* Section 4.1.2), increasing the allowances necessarily means less rental income for the project owner. While these rent reductions could be offset by using operating reserves or increases in the amount of federal subsidy, those sources may not be available, either immediately or even in the long term. Reductions in rental income can restrict revenues available for necessary operating expenses, which could result in reduced services or less net income for owner profits. So there is often a risk that increasing the allowances, without a commensurate increase in federal subsidy, can affect project operations in ways that could potentially harm tenants. While that is not necessarily a reason to allow tenants to be illegally overcharged, it may demonstrate the need for additional advocacy on related issues, such as obtaining additional subsidy funds or ensuring compliance with other legal requirements such as habitability and security.

For properties with project-based Section 8, knowing the status of the Section 8 contract may be especially important for assessing these potential risks. If the contract is a long-term

contract with some years left to run, an increased utility allowance may be offset by any funds currently sitting in project operating reserves. Alternatively, an owner could draw down more of the contract authority earlier than intended, thus creating a possible need to obtain an amendment (with additional subsidy) later on. In contrast, these sources to pay for increased allowances may not be available if the original contract has expired and the renewal contract is for a one-year term, or a longer term, subject to annual appropriations. For one-year contracts, how tenant contributions are treated, as well as the overall contract authority and applicable rent adjustment rules, may assume special importance, particularly where reimbursements for prior years' inadequate allowances are in question. If increasing allowances will cause a decrease in tenant rent contributions, revenue available for cash flow profit or other operating costs may be affected, unless additional subsidy sources materialize.

The analysis is slightly different for developments funded with low-income housing tax credits (LIHTC). While each tenant does not pay an income-based rent, but instead a flat rent based upon an agreed formula between the owner and the credit allocation agency (e.g., 30% of 50% of AMI), those formula rents are supposed to include a utility allowance, which reduces the tenant's net rent contribution accordingly. So all LIHTC tenants will benefit from increasing the allowances. However, since there's no mechanism for obtaining an offsetting subsidy increase from the federal government, the owner will receive less rental income, and may therefore adamantly resist making the adjustment.

Keep in mind that you can always change your approach after you begin pursuing a utility allowance claim. Even if it ultimately appears that adequate utility allowance increases and full reimbursements for residents would, for some reason, have adverse affects on the

residents that outweigh the financial relief available, you can still use the utility allowance claim as leverage to improve the residents' circumstances.

#### **4.1.2 The Section 8 Voucher Dilemma**

For Section 8 voucher tenants, because of the voucher program's structure, an increase in the utility allowance may not provide immediate financial benefit to all tenants in the PHA's program. Voucher participants receive no dollar benefit from increased allowances once the sum of the total rent paid to the owner plus the utility allowance exceeds the current payment standard established by the PHA.<sup>74</sup> Households will only benefit where their "gross rent" (which includes the current utility allowance) is less than the local voucher payment standard.<sup>75</sup> In every jurisdiction, some families' gross rents will be less than the local payment standard; others' rents will be higher. The proportion of families in each group depends upon the relationship between the adequacy of the PHA's local payment standard (between 90 and 110% of the HUD-published FMR for the area), and the actual contract rents of the units rented by voucher holders. Payment standards that are more adequate for the actual rental market will increase the size of the group that will benefit from any allowance increase. Even if current payment standards are inadequate for many households, seeking simultaneous increases in both the utility allowance and the payment standard will bring financial benefits to more existing voucher recipients. Also remember that certain changes in an individual tenant's circumstances, such as moving to a unit with a lower rent, may enable them to realize more dollar benefit from an adequate allowance than previously available, if their prior gross rent approximated or exceeded the payment standard.

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<sup>74</sup>For 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.empirejustice.org/content.asp?contentid=1425> (last visited January 23, 2007).

<sup>75</sup>*Id.*

## **4.2 TOLLING THE STATUTE OF LIMITATIONS**

When working on any utility allowance case that involves long-standing violations, you should be aware that subsidized housing tenants are losing the right to recover rent reimbursements with the passage of each month that the statute of limitations has not been tolled. Depending on the size of the case, this could mean the loss of hundreds of thousands of dollars for tenants. Thus, once you find a problem, you should act quickly. If you can file the suit as a class action, you should consider filing a complaint to toll the statute even before going to the negotiation table. You may also want to consider trying to get the opposing party to enter into a “tolling agreement.” You should make sure that this agreement will be binding with respect to all tenants with insufficient utility allowances and not just your individual client. Note that while LSC regulations prohibit involvement in class action suits, they do not appear to prohibit a tolling agreement that would bind the opposing party with respect to a large group of tenants.

A sample tolling agreement is located in [Appendix H](#).

## **4.3 ADMINISTRATIVE ADVOCACY**

In addition to dealing with the landlord or the PHA, it may be helpful to bring in the regulatory agency with jurisdiction over the subsidized housing in question, since that agency may have responsibilities to enforce the regulatory or contractual requirements involved and may play an important role in encouraging the landlord to follow the rules. To the extent that problems remain uncorrected and you need to seek judicial or political solutions, your prior attempts to obtain the regulator’s involvement may also prove important.

For public housing or Section 8 vouchers, the regulator of the PHA may be the local HUD office. For properties with HUD-subsidized mortgages or project-based Section 8 contracts, the regulatory agency may be HUD or a HUD contractor, known as the contract administrator. For

properties subsidized by the U.S. Department of Agriculture Rural Development program (RD), it will be the state office of RD. For LIHTC properties, it will be the tax credit allocation agency, which is usually the state housing finance agency.

In some cases, depending on the specific statutes, rules or contracts involved, the regulatory agency itself may have colorable legal duties that may encourage greater effort on its part to resolve any significant problems of noncompliance by specific landlords or PHAs.

## **4.4 LITIGATION**

### **4.4.1 Sample Pleadings**

Sample pleadings can be found in [Appendix I](#). If you click on the links to [Appendix I](#) throughout this section, you will link to the Sample Pleadings Index, which contains a brief description of each pleading included in the guide and a link to the pleading.

### **4.4.2 Eviction Defense**

Illegally inadequate allowances mean that tenants have been overpaying rent for the entire period that the allowance has been improperly set. In many jurisdictions, evictions for nonpayment of rent must be predicated upon a notice setting forth the amount of rent due. If the amount claimed due is not owing for any reason, including a tenant's past overpayments due to inadequate allowances, you might be able to reduce the amount owing via an affirmative defense, and possibly cure a lesser nonpayment. Alternatively, if the rent allegedly owed is entirely offset by the overpayments, you may defeat the eviction altogether with this affirmative defense. Usually, since proof of the inadequate allowances must be provided within the very short time frame of most eviction proceedings, it will be helpful to develop some of that information prior to filing responsive pleadings on behalf of individual clients. Those programs

where evictions for nonpayment also permit some kind of administrative pre-judicial hearing or meeting (such as public housing, HUD-subsidized and Section 8-assisted, or RD properties) -- where you could request this information from the PHA or owner before or at the meeting or hearing -- may provide greater opportunities to develop this information if necessary.

A sample demurrer (motion to dismiss) is located in [Appendix I](#).

*Note: Where circumstances require, you could use this demurrer to fashion an affirmative defense to be filed as part of an answer.*

#### **4.4.3 Causes of Action**

Because of the changes in enforceability doctrines and the philosophy of sitting judges, many claims for inadequate allowances may encounter a motion to dismiss, often challenging the existence of a cause of action. Where defendants seek to avoid liability by raising such defenses, careful pleading will be especially important to get your claims heard on the merits.<sup>76</sup> In cases where a federal forum is desirable, a federal claim must be pleaded in order to secure federal jurisdiction. Of course, it is vital to remember that, in many cases, culpable defendants fail to raise these issues, or adjust allowances prospectively in response to the demand or the filing of suit. In others, the extent of the underlying violations may also persuade the court of the importance of judicial review. Because each claim may have drawbacks that may undercut recovery, most cases will involve several claims seeking redress for the same violations.

##### **4.4.3.1 Section 1983**

Where the alleged violations of federal law were performed by parties acting under color of state law, Section 1983 provides an express right of action for the claim, especially where it can be tied to a statutory right. One advantage for some advocates is that Section 1983 also

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<sup>76</sup> On claims generally, see Gutman, ed., FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS (Sargent Shriver National Center on Poverty Law, 2004); NHLP, HUD HOUSING PROGRAMS, TENANTS' RIGHTS, Sec. 16.5 (3d ed. 2004 and Suppl, 2006).

supports a claim for attorneys' fees; disadvantages may include the need to show a sufficient statutory hook, as well as a relatively short statute of limitations in many jurisdictions. To date, despite increasingly restrictive doctrines, courts have sustained Section 1983 claims against PHAs for inadequate allowances under both the public housing and voucher programs.<sup>77</sup> However, these cases will not support Section 1983 claims against private subsidized owners, such as HUD project-based Section 8, Rural Development or LIHTC owners, unless they also happen to be PHAs or otherwise "state actors." Where a state or local agency is the program administrator with responsibility for ensuring that subsidized owners follow applicable rules, Section 1983 may provide a vehicle for a claim against it, depending on the nature of the applicable statutory language.

#### 4.4.3.2 Other Federal Housing Statutes

Where Section 1983 is unavailable as a vehicle for the claims, or would impose unacceptable limitations, you should consider an implied right of action claim directly under the governing federal statute, such as the U.S. Housing Act (for public housing and all Section 8 programs), the Housing Act of 1949 (for the RD programs), or the Low-Income Housing Tax Credit statute. Although federal courts have been increasingly skeptical of implied rights, the language of each statute requires careful analysis under applicable precedents. In cases where the statute mandates only rent limitations, with only the regulations actually mentioning utility allowance requirements, it will be preferable to frame the claim as one based on the statute itself, as authoritatively interpreted by the regulations.

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<sup>77</sup> *E.g., Wright v. City of Roanoke Redev. and Housing Auth.*, 479 U.S. 418 (1987) (public housing utility allowance regulations and rent limitations enforceable via § 1983); *Dorsey v. Housing Auth. of Baltimore*, 984 F.2d 622 (4th Cir. 1993) (same); *Johnson v. Housing Authority of Jefferson Parish*, 442 F. 3d 356 (5th Cir. 2006), *cert den.* 2006 U.S. LEXIS 5846 (U.S. Oct. 2, 2006) (utility allowance provisions of the voucher statute (42 U.S.C. § 1437f(o)) and implementing regulations privately enforceable via § 1983).

#### 4.4.3.3 Breach of Rental Agreement

Claims under the lease or rental agreement may be important to take advantage of a longer statute of limitations, where the violation is long-standing. Where the language of the contract itself cannot be interpreted to require adequate utility allowances, analyzing whether any statutory or regulatory requirements can be incorporated into the contract by operation of law may be important for obtaining whatever advantages come with a contract claim.

#### 4.4.3.4 Breach of ACC, HAP Contract or Regulatory Agreement

Many of the programs involve contracts between a public agency providing the loan, insurance, tax credit or rental assistance, which should be analyzed. You need to look for two things: (1) the existence of a provision arguably breached by the failure to provide required allowances, and (2) any language in the contract or the governing law concerning third party beneficiary rights that tenants could assert. Depending on the contract language and the governing law, these contract provisions may be supported or even defined by reference to the governing regulations. Third party beneficiary rights could also be asserted against either the owner or the regulatory agency, depending on the nature of the duties established in the contracts and applicable rules. In some programs, asserting third party beneficiary claims has been made more difficult by form language specifically purporting to deny such enforceability rights. Others, e.g., many LIHTC regulatory agreements, specifically recognize enforcement rights by tenants.

#### 4.4.3.5 Other Claims

Miscellaneous claims may be available under state or local law, such as unfair and deceptive business practices law or mandamus procedures to enforce clear legal duties.



Including them may be advantageous to avoid enforceability problems, or for statutory damages and/or attorneys' fees.

#### **4.4.4 Sample Complaints**

Sample complaints can be found in [Appendix I](#).

#### **4.4.5 Class vs. Individual Suit**

Utility allowance cases are well-suited for class action treatment since specific individual issues are rare. If a utility allowance is insufficient for one tenant, it will almost always be insufficient for another, since it's established and adjusted for all tenants in a building or within a PHA. Thus, the best vehicle for litigating such cases will almost always be a class action, unless you are prohibited from doing so. If you cannot engage in class actions, you should not be dissuaded from advocating for higher utility allowances. You could secure other counsel for the tenants. If you are restricted but undertake the representation, you will still be able to obtain prospective relief (i.e., allowance adjustments) for all tenants affected by insufficient allowances, which means you will help return rents to a more affordable level and will prevent the evictions of those on the brink of being unable to afford their housing. The owner or PHA may also agree to provide an adjustment affecting all tenants similarly situated, effectively providing class-wide relief, simply due to the possibility of class-based claims. You may also want to consider joining a large number of tenants together in one action to seek damages on their behalf. Although doing so may be unwieldy, advocates have successfully used this method in the past.

Sample motions for class certification can be found in [Appendix I](#).

#### **4.4.6 Preliminary Relief from Evictions**

Once you determine that tenants have been overcharged for their rent due to insufficient utility allowances, you should immediately seek to have any pending evictions for non-payment of rent stayed until the tenants are appropriately reimbursed. Any pending notices for nonpayment that have not yet been the subject of a judicial complaint should be withdrawn and the proper amount due re-calculated. Where eviction actions have been filed, you may be able to obtain a stay by agreement or by seeking a preliminary injunction, which ideally would be filed along with your complaint.

#### **4.4.7 Discovery**

Even if you received a wealth of information when you made your initial request for information regarding the utility allowances, you will likely want to conduct further discovery to get exactly what you need to prevail on a summary judgment motion.

Appendix J contains the following sample discovery requests:

- [Request for Admissions](#)
- [Interrogatories](#)
- [Requests for Production of Documents](#)

#### **4.4.8 Motions for Summary Judgment**

Depending on the complexity and disputability of the facts, much of your case may be won on a motion for summary judgment. Rate increase cases lend themselves to summary judgment since the relevant facts (i.e., date of the most recent adjustment and how much rates have increased since) are unlikely to be disputed. Sample motions for summary judgment can be found in [Appendix I](#).

#### 4.4.9 Experts

The proper evaluation of utility allowances usually requires the use of outside experts. Legal Services attorneys involved with challenges to allowances have suggested that utility companies may be one source of free expertise. Graduate students in business, engineering, or related areas from local universities, as well as local professionals, may also be helpful.<sup>78</sup> You may also avail yourself of HUD reviews that may have been conducted during the context of an audit or operations review.<sup>79</sup> If you can afford a good expert, consult with other legal advocates for recommendations of experts used in other utility allowance cases.

#### 4.4.10 Statute of Limitations

##### 4.4.10.1 Section 1983

If your case involves a Section 1983 claim for deprivation of federal rights under color of state law (see Section 4.4.3.1, *supra*), under governing case law, that claim will usually be governed by your state statute of limitations for personal injury, which may be as short as one or two years. This will be determined by cases in your jurisdiction applying the applicable standards established by the Supreme Court. Because it's likely to be so short, you should file your claim as soon as possible, and add other claims for the same regulatory violations that carry a longer statute of limitations.

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<sup>78</sup>See, e.g., Stein, *Newnan Public Housing Utility Study* (Georgia Legal Services Program, June 1979) (Clearinghouse No. 29,874), used by plaintiffs in *Leslie v. Mann*, No. C77-49N (N.D. Ga. consent judgment June 20, 1980), 14 CLEARINGHOUSE REV. 776 (No. 23,320, Nov. 1980).

<sup>79</sup>See generally Memorandum prepared in conjunction with *Residents' Central Council v. Cuyahoga Metro. Hous. Auth.*, *supra* note (hereinafter referred to as the Memorandum).

#### 4.4.10.2 Contract

In most states, claims based on written contracts have longer statutes of limitations, often ranging from three to eight years. Thus, being able to plead and sustain such claims may provide extremely important bargaining leverage, as well as higher financial recovery.

#### **4.4.11 Suits Against HUD or Other Regulatory Agency**

Although for the programs it regulates, HUD may indeed be derelict in ensuring that PHAs and owners properly establish and adjust allowances, it may be difficult to sustain a claim against the agency. It is often hard to show a specific duty that HUD has violated and the agency will no doubt raise many claims on a motion to dismiss, including claims of sovereign immunity, that may cloud the merits of your claims against the housing provider. While there may be good arguments available to counter assertions of federal sovereign immunity, including both the statutory waivers under the housing programs and the APA's waiver for claims other than money damages, showing that HUD has breached a legal duty to the tenants is more difficult, given the language of current statutes and regulations. For the LIHTC program, there's even more uncertainty about any statutory duty incumbent on the Treasury Department, which could also be subject to the APA's sovereign immunity waiver for non-monetary claims. There may be similar problems with claims against the state credit agency, and state law immunity defenses may also be raised.

**SECTION 5**  
**ADDITIONAL RESOURCES**

**5.1 PUBLIC HOUSING**

**5.1.1 Statutes**

- 42 U.S.C.A. § 1437a(a) (West Supp. 2006) (limits rent to 30% of family's monthly adjusted income, and HUD has interpreted rent to include a reasonable allowance for utilities).

**5.1.2 Regulations**

- Definitions, 24 C.F.R. § 5.603(b) (2006) (defines utility allowance).
- Establishment of utility allowances by PHAs, 24 C.F.R. § 965.502 (2006).
- Categories for Establishment of Utilities, 24 C.F.R. § 965.503 (2006).
- Period for which Allowances are Established, 24 C.F.R. § 965.504 (2006).
- Standards for allowances for utilities, 24 C.F.R. § 965.505 (2006).
- Surcharges for excess consumption of PHA-furnished utilities, 24 C.F.R. § 965.506 (2006).
- Review and Revision of Allowances, 24 C.F.R. § 965.507 (2006).
- Individual Relief, 24 C.F.R. § 965.508 (2006).
- Part 965 regulations were adopted by Tenant Allowances for Utilities, 49 Fed. Reg. 31,399, 31,400 (Aug. 7, 1984).

**5.1.3 Cases**

- *Smith v. Hous. & Cmty. Dev. Corp. of Hawaii*, Civil No. 04-1 0069K (Haw. Circuit Ct. 2004) (breach of contract case resulted in \$2.3 million settlement to compensate public housing tenants for low utility allowances).
- *McDowell v. Philadelphia Hous. Auth.*, 423 F.3d 233 (3d Cir. 2005) (affirms interpretation of consent decree requiring PHA to adjust utility allowances for rate increases more than 10%).
- *Amone v. Aveiro*, 226 F.R.D. 677 (D. Haw. 2005) (certifying class in challenge to PHA's refusal to increase public housing utility allowance for disabled tenants with special needs).
- *Armstrong v. Gallia Metropolitan Hous. Auth.*, 2000 WL 1505949 (S.D. Ohio, Sept. 29, 2000) (recognizing tenants' § 1983 claim for PHA's failure to properly calculate utility allowances; whether allowances had been set too low presented factual question).

- *Beckles v. Housing Auth. of Bradenton*, No. 93-1375-CIV-T-15A (M.D. Fla. Aug. 26, 1993), 27 CLEARINGHOUSE REV.1236 (No. 49,488, Feb. 1994) (tenants of individually metered units challenge PHA's failure to set reasonable utility allowances, review them annually and provide required notice to tenants when revision necessary).
- *Dorsey v. Hous. Auth. of Baltimore*, 984 F.2d 622 (4<sup>th</sup> Cir. 1993) (Brooke Amendment utility allowance requirements enforceable under § 1983, including challenge to PHA's determination of reasonable utility allowance).
- *Miller v. Housing Auth.*, No. 87-1286 (C.D. Ill. Feb. 2, 1990), 24 CLEARINGHOUSE REV. 24 (No. 43,223, May 1990) (consent decree (under current regulations) establishing interim utility allowance schedule higher than former 1979 schedule to remain in effect until future allowance adjustments are determined prospectively based on average monthly utility consumption from each preceding year for each bedroom size).
- *Scott v. Hamlet Hous. Auth.*, No. C-88-18-R (M.D.N.C. Aug. 2, 1989) (prospective utility allowance increase based upon the highest average monthly consumption over previous three years and individual relief from utility surcharges beyond tenants' control).
- *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) (recognizing tenants' § 1983 claim to challenge improper utility allowances in public housing).
- *Nelson v. Greater Gadsden Hous. Auth.*, 606 F.Supp. 948 (1985) (in case originally arising from eviction action, public housing tenants consistently overcharged for utilities received injunctive and monetary relief), *aff'd in part, vacated in part by* 802 F.2d 405 (11<sup>th</sup> Cir. 1986) (court enjoined PHA to immediately implement revised utility allowance schedule and make annual adjustments in compliance with all applicable HUD regulations (under pre-1984 regulations)).
- *Housing Auth. v. Shoals*, Civ. 6536 (Cal. Jus. Ct., Hanford Jud. Dist., Kings Cnty., Sept. 6, 1984) (Clearinghouse No. 39,526) (successfully defended eviction action by claiming inadequate utility allowance).

#### 5.1.4 HUD Guidebooks

- PUBLIC HOUSING OCCUPANCY GUIDEBOOK, Chs. 10 and 14 (June 2003), available at <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebook.cfm>.
- HUD, UTILITY ALLOWANCE GUIDEBOOK (Sept. 1998), found in [Appendix K](#).

## 5.2 SECTIONS 8 VOUCHERS

### 5.2.1 Statutes

- 42 U.S.C.A. § 1437f(o) (West Supp. 2006).

## 5.2.2 Regulations

- Definitions, 24 C.F.R. § 5.603(b) (2006) (defines utility allowance).
- Utility Allowance Schedule, 24 C.F.R. § 982.517 (2006).
- Voucher tenancy: Payment standard amount and schedule, 24 C.F.R. § 982.503(b)(1)(i) (2006) (to benefit voucher tenants, seek increases in both utility allowances and the payment standard).

## 5.2.3 Cases

- *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356 (5th Cir. 2006) (utility allowance provisions of the voucher statute, 42 U.S.C. § 1437f(o), as interpreted by HUD regulations, privately enforceable via § 1983).
- *Duquette v. Housing Auth. of Woonsocket, R.I.*, No. 89-0242B (D.R.I. Sept. 21, 1989), 24 CLEARINGHOUSE REV. 372 (No. 45,709, Aug.-Sept. 1990) (denying PHA's motion to vacate judgment ordering refund to tenant-based Section 8 recipient wrongfully denied utility reimbursements, where PHA had sent reimbursements to owner who offset them against alleged unpaid extra charges).
- *Ware v. Housing Auth.*, No. 87-6156 FMS (N.D. Cal. Nov. 4, 1988), 22 CLEARINGHOUSE REV. 1429 (No. 42,982, Apr. 1989) (in suit challenging PHA's failure to properly set and update allowances under the 1984 revised regulations, largely similar to the current rules, settlement provided rebates of about \$600,000 for tenants in program from 1982 through 1985, additional rebates for tenants who did not receive an allowance for tenant-furnished ranges and refrigerators, and attorneys' fees of \$12,000).
- *Kyte v. Housing Auth.*, No. 83-1267 (W.D. Pa. notice of preliminary approval of consent agreement Apr. 9, 1985; final order approving consent agreement Nov. 4, 1985), 19 CLEARINGHOUSE REV. 309 (No. 38,898, July 1985) (originally filed under pre-1984 regulations but subsequent orders incorporated the new regulations; consent decree required PHA updating based upon actual average consumption, PHA efforts to disclose to new tenants their units' past utility use, and retroactive refunds up to \$348,000 for inadequate allowances).

## 5.2.4 HUD Guidebook

- Housing Choice Voucher Guidebook, Ch. 18, *available at* <http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm>

## 5.3 PROJECT-BASED SECTION 8

### 5.3.1 Statutes

- 42 U.S.C.A. § 1437f(c)(1), (3) and (5) (West Supp. 2006) (incorporating 42 U.S.C. § 1437a(a)).

### **5.3.2 Regulations**

- Definitions, 24 C.F.R. § 5.603(b) (2006) (defines utility allowance).
- Adjustment of Utility Allowances, *e.g.*, 24 C.F.R. § 880.610 (2006).
- Other, 24 C.F.R § 881.601 (2006) (providing that Section 8 substantial rehabilitation projects are subject to the requirements of 24 C.F.R § 880.610).

### **5.3.3 Cases**

- *Zellous v. Broadhead Associates*, 906 F.2d 94 (3d Cir. 1990) (Section 8 tenants' claim for monetary relief for inadequate allowances within APA's waiver of sovereign immunity and thus within jurisdiction of district and circuit courts, despite possibility of Tucker Act jurisdiction and Section 1404a waiver; merits of claim not mooted by prospective adjustment of allowance).
- *Walker v. Kemp*, No. 2B-84-4370-RSWL (DX) (C.D. Cal. order of final approval of class action settlement re utility issue July 18, 1990) (Clearinghouse No. 45,132) (in challenge to meter conversion with inadequate allowances, tenants obtained allowances at twice prior levels and reimbursements for inadequate subsidies).

### **5.3.4 HUD Handbook**

- HUD, MULTIFAMILY ASSET MANAGEMENT AND PROJECT SERVICING, 4350.1, REV-1, Chs. 7 (allowances and rent increases) and 12 (meter conversions and energy conservation) (Sept. 1992 through CHG-9 (Jan. 23, 1996)), available from [www.hudclips.org](http://www.hudclips.org).

## **5.4 RURAL DEVELOPMENT PROPERTIES**

### **5.4.1 Statutes**

- 42 U.S.C.A. § 1480(k) (West 2003) (authorizing regulations).

### **5.4.2 Regulations**

- Establishing Rents and Utility Allowances, 7 C.F.R. § 3560.202(d) (2006).
- Rent and Utility Allowance Changes, 7 C.F.R. § 3560.205 (2006) (no clear trigger for rate changes).



### 5.4.3 Handbook

- RD HB-2-3560, ¶ 4.26 C (documentation required, no clear trigger).

### 5.4.4 Cases

- *White v. AJY Management Group, Inc.*, No. 86-LM-30 (Piatt Cnty., Ill. Cir. Ct. Sept. 1, 1988) (Clearinghouse No. 43,783) (FmHA (RD) tenant awarded damages for landlord's failure to adjust utility allowance for nearly eight years).

## 5.5 LIHTC

### 5.5.1 Statutes

- 26 U.S.C.A. § 42(g)(2)(B)(ii) (West 2003).

### 5.5.2 Regulations

- Utility Allowances, 26 C.F.R. § 1.42-10 (2006).

### 5.5.3 Cases

- *Mendoza v. Frenchman Hill Apts.*, No. CS-03-0494-RHW (E.D. Wa. order Jan. 20, 2005) (finding § 1983 claim unavailable to challenge HFA's and owner's failure to include required prohibition of no-cause evictions in regulatory agreement).

## 5.6 OTHER GUIDANCE

- U.S. DEPT. OF HOUSING AND URBAN DEV., UTILITY ALLOWANCE GUIDEBOOK (Sept. 1998), found in [Appendix K](#).
- NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS, Ch. 6 (3d ed. 2004) (includes older cases involving pre-1984 regulations).
- *Utility Allowance Adjustments: How Housing Advocates Can Proactively Address Skyrocketing Energy Costs*, 35 HOUSING LAW BULLETIN 249 (NOV./DEC. 2005), found in [Appendix L](#).
- NATIONAL CONSUMER LAW CENTER, ACCESS TO UTILITY SERVICE, Ch. 8 (3<sup>rd</sup> ed. 2004).
- NATIONAL CONSUMER LAW CENTER, GUIDE TO THE RIGHTS OF UTILITY CONSUMERS (2006).