



National
Consumer Law
Center

*Fighting Together
for Economic Justice*

COMMENTS OF THE NATIONAL CONSUMER LAW CENTER,
ON BEHALF OF ITS LOW-INCOME CLIENTS
RE: FOOD AND NUTRITION SERVICE PROPOSED
REGULATION 7 C.F.R. 273

(84 Fed. Reg. 52809 – October 3, 2019)

I. INTRODUCTION

On behalf of its low-income clients, the National Consumer Law Center (“NCLC”) submits these comments in response to the proposal of the U.S. Department of Agriculture Food and Nutrition Service (“FNS”) to revise 7 C.F.R. 273 regarding “Standardization of State Heating and Cooling Standard Utility Allowances.” In essence, our comments will point out that FNS is proposing to prohibit states from using the more current and more accurate data that is available in many states at a state-specific level and, instead, mandate that state standard utility allowances (“SUAs”) be based on less current and less accurate data drawn from national survey sources and data bases, without the agency even specifying exactly which data sources will actually be used.¹ This proposed methodology guarantees that the FNS-set SUAs will be less accurate than if willing states were allowed to continue relying on better information available to them. To the extent FNS is concerned that current state SUA methodologies may not be sufficiently consistent with one another,² or that some states set SUAs that appear too high or too low to FNS, the solution is not to impose a one-size-fits all federal methodology that ensures SUAs will be inaccurate,³ but to improve on the timeliness and accuracy of state SUAs, to the extent any states are lagging in those areas.

NCLC’s comments will focus, in part, on data unquestionably available in Massachusetts regarding the utility and energy expenditures of low-income households in that state, as we are extremely familiar with energy data specific to that state. However, we also intervene in utility

¹ Proposed 7 C.F.R. § 273.9(d)(6)(iii)(B)(1) reads: “For the HCSUA described in paragraph (d)(6)(iii)(A)(2), standards **will be calculated by FNS** based on the 80th percentile of low income households’ utility costs in the State. FNS will use the **best-available utility cost information from national Federal surveys, such as the American Community Survey (ACS) and the Residential Energy Consumption Survey (RECS).**” FNS has thus failed to clearly inform interested stakeholders which data sources will actually be used; nor the basis on which FNS would determine what is the “best utility cost information” data.

² As discussed below, energy expenditures can in fact vary significantly state-to-state, so variation in state SUAs is not surprising.

³ See 84 Fed. Reg. 52810, for a summary of FNS concerns.

proceedings around the country and have decades of experience reviewing various energy data sources. As our comments below will explain, the data sources available in Massachusetts for heating, cooling, miscellaneous electric loads (e.g., refrigerator, computer, lighting, appliances and devices) and cooking gas expenditures are available in almost all (if not all) states.⁴ Moreover, to the extent any state decides that it does not have sufficiently current and accurate data from state-specific sources, those states of course could then use the national survey data sources and methodologies that FNS has decided are acceptable.⁵ It is both highly irrational and bad public policy to prohibit states from using more accurate data sources.

II. STATES HAVE ACCESS TO TIMELY AND ACCURATE ENERGY CONSUMPTION AND EXPENDITURE DATA FOR RESIDENTIAL HOUSEHOLDS

A. Electric and gas data

In order to properly operate their businesses and account for dollar amounts billed and payments received, electric and gas companies need to keep precise track of the quantities of energy (e.g., therms of gas or kWh of electricity) their customers consume and the dollar amount of the bills rendered for those quantities of energy delivered. Utilities are also able to generate “bill frequency” reports that allow one to determine the average dollar amounts billed at specific frequency levels, that is, to determine the average bills for the lowest (e.g.) 80%, 90%, or 95% of bills rendered. NCLC has intervened in a large number of utility rate cases over the years and has seen detailed reports on quantities of energy consumed, dollar amounts billed, and bill frequency analyses. We have confirmed in recent conversations with knowledgeable utility personnel that collecting timely and accurate billing data is standard utility industry practice. In any state, an agency wishing to set the electric and gas components of accurate SUAs based on current information could obtain that data from local gas and electric utility companies.⁶ Since

⁴ For example, in FNS Notice 79-47, “Food Stamp Program Standard Utility Allowances Requirements and Methodologies,” page 4 & Attachment 1, (May 25, 1979), FNS favorably cites “the Colorado method” as an acceptable method for setting SUAs. The Colorado method relied primarily on data from Public Service Company of Colorado for determining the electric and gas components of its SUAs, and data from local water departments for setting the water component.

⁵ E.g. the Residential Energy Consumption Survey and American Community Survey.

⁶ We did speak with the two largest utilities in Massachusetts, which serve approximately 90% of the customers in the state, and they confirmed their willingness to share such data if requested by a state agency in connection with the setting of SUAs. States that already use state-specific data to set their SUAs in fact draw data from utilities in those states (see fn. 4).

many utilities serve tens of thousands to hundreds of thousands (and more) of residential customers, and maintain their billing records on a highly current basis, states can obtain far more accurate and timely information about residential electric and gas costs from local utilities than from the Residential Energy Consumption Survey (“RECS”),⁷ American Community Survey (“ACS”), or any similar national database. A single, willing utility in a given state could provide a much richer and more accurate data set for that state than whatever could be extracted from the RECS or ACS.

In any state that has low-income discount rates,⁸ the utilities can even provide consumption and expenditure data that is specific to low-income households. To the extent low-income customers in fact differ from non-low-income customers in the amounts of energy they consume,⁹ at least some states would be able to develop SUAs based on data specific to that income demographic – but only if FNS allows states to use that locally-specific data. Moreover, any utility data would have data on gas or electric consumption and expenditures for all ends uses fueled by those utilities -- that is, for space heating, air conditioning, domestic hot water, and miscellaneous appliances and electric loads – and, often, data disaggregated by customers who heat with either electricity or gas, or who do not. Thus, these are much more precise and accurate data sources than the RECS or ACS.

B. Oil and other “deliverable fuels”

Every state in the country operates the Low-Income Home Energy Assistance Program (“LIHEAP”).¹⁰ In accordance with guidance from the federal Department of Health and Human Services (“HHS”), states are required to report to HHS on certain “LIHEAP Performance Measures.”¹¹ Among the states where fuels delivered by vehicle to the household are used for heating (“deliverables,” including oil, propane, wood and coal), data is often collected on the

⁷ As of the 2015 RECS, that data source no longer has large enough representative samples by state to provide state level estimates.

⁸ Based on a recent 50-state analysis NCLC conducted, we identified over two dozen states with some form of discount rates for low-income electric and/or gas customers. However, that means that some 20-plus states do not have any discount rates. Also, not every low-income household is eligible for those rates, as various restrictions (such as an age requirement) may apply.

⁹ Those differences may be due to the fact that low-income households, on average, occupy smaller dwelling units, which tends to decrease total consumption, but they also tend to own older appliances and live in less-well-insulated dwellings, which tends to increase consumption.

¹⁰ 42 U.S.C. §§ 8621 – 8630.

¹¹ See “New LIHEAP Performance Measures” (available at: <https://liheapch.acf.hhs.gov/pm/needtoknow.htm>) for a thorough discussion by HHS as to what is required of states.

volume of such fuels delivered and the average per household expenditure in order to meet the HHS reporting requirements.

States vary somewhat in the level of detailed data they collect. As an example, we attach to these comments data provided by the Massachusetts Department of Housing and Community Development¹² (“DHCD”) in connection with the agency’s operation of LIHEAP. As that data makes clear, Massachusetts collects detailed data from which average volumes (e.g., gallons of oil or propane) and average per household expenditures can be extracted. Moreover, the DHCD data can be sorted at any particular percentage level, e.g., into quintiles by volume of consumption or by expenditures (as represented in the attached data), or at any other percentage level requested (e.g., 95th percentile by consumption or expenditures). This state-specific data is unquestionably far better than the national survey data sources proposed by FNS. For example, the RECS no longer reports data by state, as of the 2015 RECS, rather by aggregated regions. Thus, any state-specific data that a state LIHEAP agency collects is inherently more reliable than what can be extracted from the RECS. Moreover, even if FNS draws data from a recently-released RECS, that data is not current by the time of report release. The 2015 RECS was not fully released until 2018, and may not be updated for a period of years. Thus, any state data, which is collected from the prior year’s program operation,¹³ is inherently more timely and representative of actual expenditures. Similarly, because the American Community Survey does not disaggregate end uses, but rather only collects data on expenditures by fuel type, it jumbles together self-reported data on households that may, for example, use electricity for only appliances and miscellaneous end uses with households who also use it for heating. The RECS and ACS are highly limited and flawed data sources, compared to state-specific sources available in many – if not most – states.

To the extent that a state either does not possess timely and accurate data for deliverable fuels, or chooses not to extract that data for purposes of establishing SUAs, it of course could use – at its discretion – any SUAs derived by FNS, even if those SUAs would likely be less accurate

¹² Attached Excel spreadsheets, “DHCD Request for LIHEAP Heating Data 11-2019,” with three tabs, including (1) summaries of “Average Total Billed” and “Average Quantity Consumed” for the past two LIHEAP program years; (2) “Quintiles – Cost”; and (3) “Quintiles – Consumption.” We submit these spreadsheets not for the actual numbers contained therein, but to demonstrate that many state LIHEAP agencies have access to detailed and current data on home heating costs when the household does not use electricity or gas for heat, but a delivered fuel.

¹³ For example, the 2019-20 program year “Average Costs and Quantity” data included in the first tab of the attached DHCD data was collected in August 2019, and based on data provided by vendors who provided oil and other fuels to low-income households in the 2018-19 program year.

than SUAs developed from state-specific data. However, a fundamental problem with the FNS approach is that it precludes states from using more accurate and current data, and offers states that may be lagging in the rigor of their SUA development an inferior methodology.

C. Water, sewer, trash, and telecommunications

While it may be less common that there is in-state, specific data on amounts spent for water, sewer, trash and telecommunications services, it is possible that in some states a state-level agency or organization (for example, a state or regional water authority, or a statewide association of municipalities) collects such information on a reasonably current basis.¹⁴ To the extent such data exists, FNS should not prohibit states from using it since the ACS and RECS methodology proposed by FNs has even more serious data limitations when it comes to water, sewer and trash expenditures, in comparison to ACs and RECS data on electricity and natural gas expenditures. When such state-specific data is not available, the state could of course use the numbers that would be developed by FNS, under its proposed methodology.

III. ENERGY EXPENDITURE DATA IS HIGHLY VARIABLE WITHIN AND ACROSS STATES, WHICH MAKES THE PROPOSED USE OF RECS AND ACS DATA EVEN MORE PROBLEMATIC, AND IN PART EXPLAINS THE STATE-TO-STATE VARIABILITY OF SUAS

Energy expenditures can vary quite significantly, even within a state. For example, for the week of November 19, 2019, the Massachusetts Department of Energy Resources – which collects detailed, weekly data from vendors – reported a 2.2 fold differential between the “Average Low” price for propane (\$2.07) and “Average High” price (\$4.47).¹⁵ The variation in heating oil prices is only slightly narrower, just under 2-to-1, from average high to average low.¹⁶ Because these fuels are unregulated as to price, different vendors offer widely varying prices. Moreover, this wide variation in the price of delivered fuels exists across states as well.

Thus, state-specific data sources, such as the ones noted above for electricity, natural gas, and delivered fuels, are far more likely to accurately reflect expenditures than SUAs drawn from

¹⁴ However, see fn. 4, demonstrating that, as of the time of that FNS notice, Colorado was able to obtain locally-specific data on water bills from the named water departments and utilities.

¹⁵ <https://www.mass.gov/service-details/massachusetts-retail-propane-prices>.

¹⁶ <https://www.mass.gov/service-details/massachusetts-retail-heating-oil-prices>.

the ACS – which is based on self-reported expenditures, not actual bills – modified by inputs from the RECS – which no longer has a large enough sample size to report state-specific results.

While FNS is critical of the variability it sees in SUAs from state to state, much of that variability may reflect actual variability in underlying costs.¹⁷ For example, California has some of the most expensive electricity prices in the country. The federal Energy Information Administration reports the average residential price as 16.06 cents per kWh, in its January 2019 “State Electricity Profiles” report release. Yet two adjoining states – Oregon and Nevada – have reported prices near 8.8 cents per kWh, roughly one-half the reported California price.¹⁸ Electricity and natural gas prices are regulated at the state level, and reflect a host of “facts-on-the-ground” and state policies that can vary quite widely, even in adjoining states. Just to list a few of those differences: (1) Some states have expensive nuclear power plants and subsidy programs to keep those plants operating, while a neighboring state may have no nuclear plants. (2) Some states (including in the Pacific Northwest) have substantial, inexpensive hydro resources, while adjacent states may have very little hydro. (3) Some states have reasonably abundant gas resources (such as Pennsylvania) while nearby states have far fewer such resources.¹⁹ (4) Some states have strong “Renewable Portfolio Standards” and substantially-funded energy efficiency programs that tend to increase rates, while nearby states may have neither.

States are currently permitted to develop their own SUAs in accordance with criteria set forth in 7 CFR 273.9(d)(6)(iii), and are required to “review the standards annually and make adjustments to reflect changes in costs” 7 CFR § 273.9(d)(6)(iii)(B). The statute also permits a state agency to vary the allowance by factors such as household size and geographical area. Given this clear authority (and discretion) granted to states, and the fact that costs in fact do vary widely across states, state-to-state variations in SUAs should not lead FNS to make the drastic decision to force states to accept FNS-derived SUAs drawn from inherently limited and

¹⁷ However, we do not dismiss the notion that some of that variability can be attributed to the different methodologies states use in developing SUAs. As noted in the introduction to these comments, if the FNS concern is to address variability in state SUAs, the solution of prohibiting states from using current and accurate information is a particularly bad one, as it penalizes the very states that are doing a better job of developing accurate SUAs.

¹⁸ <https://www.eia.gov/electricity/state/>.

¹⁹ The Energy Information Administration reports an average electricity price of 10.13 cents per kWh for Pennsylvania, yet a 40%-higher price of 14.74 cents per kWh for the adjoining state of New York, in its January 2019 State Electricity Profiles release. <https://www.eia.gov/electricity/state/>.

outdated data sources. Moreover, and as noted above, the far better solution to any perceived weaknesses in particular states' SUAs is to assist them in using more current and reliable data.²⁰

IV. STATES SHOULD BE ALLOWED TO SET THEIR SUAS SO AS TO BE ADEQUATE FOR 95% OF THE HOUSEHOLDS

FNS is proposing to set the SUAs “at the 80th percentile of utility costs for low-income households in the State.”²¹ However, almost half the states currently set the SUA at a higher percentile. As far back as 1979, FNS held up the “Texas Methodology” as a model that other states could follow in setting SUAs, and that methodology set the SUA amount at “the 95th percentile.”²² In the ensuing 40 years, FNS did not limit the ability of states to set SUAs at the 95th percentile, until release of the October 3, 2019 notice in the Federal Register.

FNS has done little to justify what will result in a fairly drastic reduction in SUAs. If the FNS proposal becomes final, this would tend to reduce SUAs, increase countable net income, and reduce the actual SNAP benefits households receive. NCLC urges FNS to continue allowing states to set the SUAs at percentile levels up to 95%.

The purpose of allowing SUAs as an offset to household income is to ensure that the level of SNAP assistance matches household need, given the household's net income after utility and energy expenses.²³ SUAs should therefore be set high enough so that households are not desperately short of SNAP benefits in high-energy-cost months: winter months in cold climates, and summer months in hot climates. Heating and cooling related costs can be near-zero in shoulder months, yet many times higher than the average monthly cost during peak heating or cooling months.

For example, this past winter, Massachusetts provided a maximum LIHEAP benefit of \$1,660 for households who heat with oil, for the six-month program year of November 1 to April 30. Most households who heat with oil ran out of their benefits well before the program year ended. While these households generally use relatively little heating oil in the shoulder periods of November to mid-December and mid-March through April, they often have heating bills of

²⁰ We are aware of at least one state whose current SUA appears to be far below actual costs, precisely because it relies on the RECS and ACS.

²¹ 84 Fed. Reg. 52810 (3rd column).

²² FNS Notice 79-47, “Food Stamp Program Standard Utility Allowances Requirements and Methodologies,” Attachment 2, “Texas Methodology” (May 25, 1979).

²³ Other allowed deductions from income include, e.g., excess medical expenses and child care costs. 7 C.F.R. § 273.9(d).

over \$600 in the coldest months of January and February.²⁴ If SUAs are set much below the 95% level, they will unquestionably be less than actual utility and energy bills during peak heating and cooling months, and leave households at grave risk of going hungry.

V. CONCLUSION

The FNS proposed method for determining SUAs will prohibit states from using more current and accurate data that may be available to them, and will instead rely on data sources that are not as current, are inherently less reliable, and which do not directly produce state-specific energy costs. In many states, this will result in a substantial reduction in SUAs and, therefore, a substantial loss of SNAP benefits for eligible households. This is bad public policy, based on inherently limited and flawed data.

To the extent that FNS is concerned about alleged state-by-state inconsistencies – which can be explained, in part, by actual variations in costs across states – or about the actual SUAs reflecting real energy costs, FNS should work with those states which cause the concern to improve their methodologies, rather than prohibit all states from using more timely and accurate state-specific data.

Respectfully submitted,

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²⁴ The standard heating oil tank is 275 gallons. [See, for example, <https://www.pointbayfuel.com/right-size-oil-tank-home-heating/>]. Last year's November price in Massachusetts was \$3.18/gallon. [<https://www.mass.gov/service-details/massachusetts-retail-heating-oil-prices>]. Thus, to fill a nearly-empty tank would cost well over \$800. This would be well more than any state's SUA, even if set at the 95% level, and does not reflect the cost of electricity for non-heating end uses, nor the costs of water, sewer, trash, or phone. That full tank might not even last a full month in extremely cold weather, and generally would not last more than 6 weeks in the depths of winter, in states where the average temperature does not exceed 30 degrees. Average temperatures in Boston, Massachusetts, for example, are less than 30 degrees in the month of January. <https://www.usclimatedata.com/climate/boston/massachusetts/united-states/usma0046>