

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of)	
Laclede Gas Company for an Accounting)	
Authority Order Authorizing the Company)	
to Defer for Future Recovery the Costs of)	Case No. GU-2007-0138
Complying with the Permanent)	
Amendment to the Commission's Cold)	
Weather Rule.)	

BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

The Office of the Public Counsel contests Laclede Gas Company's claim that \$2,494,311 represents the incremental expense Laclede incurred complying with the Commission's amendment to the Cold Weather Rule (CWR). The Commission cannot approve this amount without first reaching the illogical conclusion that the incremental expense of the CWR amendment should include customer arrearages incurred *prior* to the implementation of the rule. Such a finding would unjustly force customers to pay for expenses Laclede never incurred as a cost of complying with the CWR. Laclede's cost calculation also fails to adjust for the additional arrearages Laclede would have incurred under the old CWR, violating a prohibition in the CWR amendment against including costs the utility would have incurred without the CWR amendment. Furthermore, Laclede's costs calculation inflates Laclede's expenses by including accounts that were not reconnected or retained under the CWR amendment, and by including customer arrearages that accumulated after Laclede could have disconnected the customer and avoided additional arrearages. Lastly, Laclede's cost calculation would allow double-recovery because Laclede would recover arrearage amounts regardless of whether all or a portion of the arrearage was later paid by the customer.

A. Background

The Commission filed the CWR amendment with the Secretary of State on May 15, 2006 to protect consumers by making it easier to reconnect or remain connected to natural gas services during the cold winter months. The CWR amendment was aimed at customers that had fallen behind on their bills and were either disconnected or in threat of disconnection. The Commission lowered the initial payment required to reconnect or reinstate service to allow more customers to be reconnected during the cold winter months.

When the Commission promulgated the rule in 2006, the Commission was facing claims that the similar 2005 emergency amendment to the Cold Weather Rule denied utilities their right to “revenue neutrality.” The utilities argued that they had a property right to a defined level of revenues. Their argument was rejected by the Missouri Court of Appeals, Western District, when it upheld the Commission’s emergency cold weather rule and concluded that the Court could “find no statute, rule, or case supporting the assertion of revenue neutrality, i.e., that they have a property right to a defined level of revenue.” Missouri Gas Energy, et al. v. Public Service Commission, 210 S.W.3d 330 (Mo.App. W.D. 2006). However, at the time the Commission promulgated the CWR amendment, the Commission could not foresee that the concept of “revenue neutrality” would be rejected by Missouri Courts.

The Commission included a mechanism in the CWR amendment to allow utilities to recover their incremental costs of complying with the amendment. Seemingly more important than the Commission’s concern with utilities recovering their incremental costs was the Commission’s concern with preventing a utility from recovering more than its

true incremental cost of compliance. To protect consumers from overpaying the utility company's true incremental cost of compliance, the Commission added the following provisions to the rule:

1. "The commission shall establish the amount of costs it determines have been reasonably incurred in complying with this section" 4 CSR 240-13.055(14)(G)(2).
2. "[T]he utility may book to Account 186 for review, audit and recovery all incremental expenses incurred and incremental revenues that are caused by this section." 4 CSR 240-13.055(14)(G)(1).
3. "No gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section" 4 CSR 240-13.055(14)(F)(2).
4. "No bad debts accrued prior to the effective date of this section may be included in the costs to be recovered under this section" 4 CSR 240-13.055(14)(F)(4).

The CWR amendment allows compliance costs to be recovered through an Accounting Authority Order (AAO), a mechanism used to book extraordinary expenses to be recovered in subsequent years. AAOs have been used by the Commission in the past and upheld by Missouri Courts. In Missouri Office of the Public Counsel v. P.S.C., 858 S.W.2d 806, 811 (Mo.App. W.D. 1993), the Missouri Court of Appeals held the following regarding the use of AAOs:

Because rates are set to recovery continuing operating expenses plus a reasonable return on investment, only an extraordinary event should be permitted to adjust the balance to permit costs to be deferred for consideration in a later period.

And in Missouri Gas Energy v. P.S.C., 978 S.W.2d 434, (Mo.App. W.D. 1998), the Missouri Court of Appeals concluded that "AAOs are not a guarantee of an ultimate recovery of a certain amount by the utility."

Now Laclede is asking the Commission to determine its cost of complying with the CWR amendment. To be consistent with the relevant case law, the cost amount approved by the Commission must be extraordinary and must not guarantee recovery in a future rate case. Laclede's cost calculation includes amounts that are not extraordinary and, without a future adjustment, would be a guarantee of future recovery. In other words, Laclede's cost calculation violates the underlying purpose of an AAO as determined by Missouri Courts. Fortunately, the Commission can interpret its CWR amendment in a manner that protects consumers and avoids a cost calculation that allows Laclede to recover more than its incremental expenses and revenues caused by the CWR amendment.

B. Argument

The issue identified by the parties asks the Commission to determine Laclede's incremental expenses, if any, for complying with the terms of the permanent amendment to the CWR, promulgated in Case No. GX-2006-0434. Public Counsel suggests that the Commission either reject Laclede's cost calculation outright or order the offsets recommended below.

1. Laclede Includes Prior Bad Debts Not Caused by the CWR Amendment

Laclede's claim of \$2.5 million in expenses caused by the CWR amendment includes debts owed to Laclede prior to the effective date of CWR amendment and prior to when customers were reconnected or reinstated under the CWR amendment. Prior bad debts are included in Laclede's calculation when it claims the difference between 80% and 50% or \$500 of a customer's preexisting bad debt as an incremental cost of the rule. On Laclede's spreadsheet, this amounts to \$1,529,432 of the costs claimed by Laclede.

Laclede's witness Mr. James Fallert acknowledged that Laclede's cost calculation includes amounts owed to Laclede prior to implementing the CWR amendment. (Tr. 42). Mr. Fallert also testified that the arrearage included in Laclede's calculations began accumulating "over some period of time prior to the point where they entered the cold weather rule" and represented a customer's "entire balance at that point in time." (Tr. 42).

Approving Laclede's cost calculation would require a conclusion that expenses Laclede incurred distributing gas several months if not several years before the Commission amended its CWR are the incremental expenses Laclede incurred complying with the CWR. This is akin to allowing Laclede to include foregone revenue from a prior period into the next rate case by mislabeling it as an expense. This would constitute retroactive ratemaking, a concept that has been well settled by the Supreme Court of Missouri as unlawful. State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. 1979).

In addition to the retroactive ratemaking issues, allowing prior bad debts as an incremental expense caused by the CWR violates three provisions of the CWR amendment. First, it violates the provision prohibiting bad debts accrued prior to the effective date of the CWR amendment (Section (14)(G)(4)). Second, it violates the provision allowing only incremental expenses and incremental revenues to be booked to Account 186 under the Accounting Authority Order (Section (14)(G)(1)). Lastly, it violates the provision prohibiting expenses Laclede would have otherwise incurred without the CWR amendment (Section (14)(F)(2)). Each violation is discussed below in more detail.

a. The CWR Excludes Prior Bad Debts from Cost Recovery

Including prior bad debts in Laclede's cost calculation is prohibited by 4 CSR 240-13.055(14)(F)(4) which states "no bad debts accrued prior to the effective date of this section may be included in the costs to be recovered under this section." Mr. Russ Trippensee, a Certified Public Accountant and the Office of the Public Counsel's Chief Utility Accountant, testified that Laclede reversed prior bad debt write-offs and included them in Laclede's cost calculation. (Tr. 131-132; 144). Laclede's witness Mr. Fallert acknowledged this when he testified that "most" of the amounts included in its cost calculation had not been previously written off. (Tr. 44). The CWR expense approved by the Commission is prohibited from including any bad debts accrued prior to September 30, 2006, the effective date of Section (14). Laclede's cost calculation should be rejected for including prior bad debts.

b. Laclede May Only Book Incremental Expenses and Incremental Revenues to Account 186.

The second example of where the CWR amendment explicitly prohibits Laclede from recovering prior bad debts is the limitation on what Laclede can book to Account 186 under its AAO. Laclede is limited to booking to Account 186 for review and recovery only the incremental expenses incurred and incremental revenues that are caused by the CWR amendment. 4 CSR 240-13.055(14)(G)(1). Incremental or additional expenses, offset by incremental or additional revenues received. Consistent with this rule, the Commission's Order giving Laclede AAO authority only authorizes Laclede to book the incremental expenses and incremental revenues of compliance. Prior bad debts

are not incremental expenses caused by the CWR amendment and may not be booked to Account 186.

c. The CWR Prohibits Costs Laclede Would Incur Anyway

In the past Laclede incurred certain costs for complying with the old CWR, which represents costs that Laclede would have incurred in the absence of the CWR amendment. These costs include the prior bad debts and additional arrearages that would have been incurred under the terms of the old CWR.

Subsection (14)(F)(2) of the CWR amendment states: “No gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section.” Without the CWR amendment, Laclede’s witness Mr. Fallert acknowledged that Laclede would have reconnected customers under the old CWR. (Tr. 48). A portion of these reconnected customers would have incurred additional unpaid arrearages as result of the CWR reconnection. These additional arrearages and the resulting bad debts that Laclede would have incurred without the CWR amendment should be offset from the additional arrearages incurred under the CWR amendment.

It appears that Laclede attempts to account for the arrearages Laclede would have incurred without the CWR amendment when it includes a sixty percent (60%) offset to its cost calculations. Laclede claims this offset estimates the percentage of CWR bad debts already recovered in rates. (Tr. 71). Laclede’s has not satisfied its burden of proving that its method of calculating this offset is appropriate. Laclede should have estimated the additional arrearages that would have been caused by the old CWR and used that amount to offset the additional arrearages incurred under the CWR amendment. Instead, Laclede simply provides unverified and unsupported claims that it is recovering only sixty percent

of its current bad debt levels. In concept Public Counsel supports a calculation that takes the uncollectible offset into account, but Laclede has not provided sufficient support for the basis of its calculation. Evidence relied upon by the Commission must be competent and substantial, and Laclede's evidence of its offset for additional arrearages is neither.

d. Resolving the Ambiguity between Cost Recovery Provisions

The Commission's Final Order of Rulemaking adopting the CWR amendment included a new cost recovery provision that was not included in the proposed rule, was not addressed in the comments, and was not discussed at the public hearing. Laclede relies upon this new language to support Laclede's claim to recover prior bad debts. 4 CSR 240-13.055(14)(F)(4) states in relevant part:

The costs eligible for recovery shall be the unpaid charges for new service received by the customer subsequent to the time the customer is retained or reconnected by virtue of this section plus the unpaid portion of the difference between the initial payment paid under this section and the initial payment that could have been required from the customer under the previously enacted payment provisions of section (10) of this rule, as measured at the time of a subsequent disconnection for nonpayment or expiration of the customer's payment plan.

This provision cannot be read in harmony with the many requirements limiting Laclede to recovery of only the incremental expenses and revenues caused by compliance with the rule. Laclede cannot recover as a cost of the CWR amendment the difference between the initial payment made and the initial payment allowed under the old CWR without violating the following:

- "The commission shall establish the amount of costs it determines have been reasonably incurred in complying with this section" 4 CSR 240-13.055(14)(G)(2).
- "[T]he utility may book to Account 186 for review, audit and recovery all incremental expenses incurred and incremental revenues that are caused by this section." 4 CSR 240-13.055(14)(G)(1).

- “No gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section” 4 CSR 240-13.055(14)(F)(2).
- “No bad debts accrued prior to the effective date of this section may be included in the costs to be recovered under this section” 4 CSR 240-13.055(14)(F)(4).

Therein lies the ambiguity between subsections (14)(G)(1), (14)(G)(2), (14)(F)(2), and (14)(F)(4) *prohibiting* recovery of costs Laclede would have incurred without the CWR amendment, and (14)(F)(4), *allowing* recovery of costs Laclede would have incurred without the CWR amendment. When a customer reconnects under the CWR amendment, that customer’s *prior* bad debts existed before employing the CWR amendment. If the customer never reconnected under the CWR amendment, the customer would still owe Laclede the full amount of their accumulated arrearages. The costs incurred by Laclede related to those arrearages would have been incurred even without the CWR amendment. As such, those costs are not incremental expenses caused by the CWR amendment and are not eligible for recovery under 4 CSR 240-13.055(14)(F)(2).

The rule also creates an ambiguity in that it uses two forms of accounting systems. The Uniform System of Accounts (USOA) adopted by the Commission prescribes uniform methods of keeping accounts, records, and books for natural gas corporations. 4 CSR 240-40.040. Under the USOA and Generally Accepted Accounting Principles (GAAP), Laclede operates under an accrual accounting system. (Ex.4, p.3). The Commission reaffirmed the accrual accounting system by specifically requiring the use of the USOA and Account 186 to book the incremental expenses and revenues caused by the CWR amendment. 4 CSR 240-13.055(14)(G)(1) and (14)(G)(3). However, the cost recovery provision of 4 CSR 240-13.055(14)(F)(4) is based on a cash accounting

system, which is not compatible with an accrual accounting system. (Ex.4, p.4). Mr. Trippensee testified that using both a cash system and accrual system could create a situation where Laclede would have been paid but the AAO deferral would still reflect a “cash based cost.” (Ex.4, p.9). It does not appear that the Commission intended this result, which would be a significant departure from the accrual accounting system used by the Commission per 4 CSR 240-40.040.

When a rule is ambiguous, it is necessary to interpret the rule to determine the Commission’s intention. Department of Social Services v. Senior Citizens Nursing Home District of Ray County, 224 S.W.3d 1 (Mo.App.W.D. 2007). The objective of the CWR amendment is to protect consumers and allow the utility to recover the incremental expenses incurred by the utility when carrying out those consumer protections. When rules are ambiguous, the appropriate method to interpret those rules requires a look beyond the plain and ordinary meaning if such a reading leads to an illogical or absurd result. State ex rel. Maryland Heights Fire Protection District v. Campbell, 736 S.W.2d 383 (Mo. 1987); Budding v. SSM Healthcare Systems, 19 S.W.3d 678 (Mo. 2000). When the intention of the rule is to allow the utility to recover no more than the expenses the utility would not otherwise incur, it is unreasonable to allow a utility to recover more than its true incremental expenses because that would defeat the intent and purpose of the rule. An interpretation that conflicts with the intent and purpose of the rule and the general principles of recovery of costs must fail.

The heart of utility regulation is to ensure the practices employed and rates charged by the utility are in all respects just and reasonable. § 393.140(5) RSMo 2000. When interpreting a Commission rule, there is a presumption that the Commission did

not intend an unjust and unreasonable result. Both (14)(F)(2) and (14)(G)(1) prove the Commission's intention to restrict recovery to only those incremental expenses Laclede would not otherwise incur. Accordingly, the CWR amendment is ambiguous and must be interpreted to prohibit recovery of prior bad debts.

2. Laclede's Calculation Would Allow Double Recovery and Would Constitute Single-Issue Ratemaking

If the Commission determines a cost amount in this proceeding, that amount will be used in the next rate case to establish the expenses reasonably incurred by Laclede. The customer accounts that Laclede claims caused it to incur CWR compliance costs are no longer connected under the CWR and will cause no additional arrearages or incremental expenses on Laclede as a result of the CWR amendment. (Tr. 39). This is not true for incremental revenues. Customers have continued and will continue to pay off the arrearages to restore their heating source. In fact, the customers on Laclede's spreadsheet had a huge incentive to pay off their arrearages prior to the winter of 2007-2008 and restore their heating service. Laclede wants the Commission to ignore all payments received by Laclede between September 30, 2007 and the future date the CWR amendment costs are included in rates. If the Commission follows Laclede's proposal, Laclede will be allowed to recover double the cost incurred to serve the customers that ultimately pay off their arrearage. (Tr. 91). Laclede's witness Mr. Fallert admitted that the accounts listed on Laclede's spreadsheet seek recovery on arrearages that may have already been paid by the customer. (Tr. 46). If the customer is current, or becomes current before the next rate case, Laclede will not have incurred any CWR amendment expenses for reconnecting or reinstating this customer.

From an accounting perspective, Mr. Trippensee testified that Laclede's calculations would allow over-recovery under the CWR amendment recovery mechanism. (Tr. 112-113). Mr. Trippensee explained that the problem created by the rule is that it tries to reconcile a cash collection in a receivable account, which can never be reconciled to an accrual basis system. (*Id.*). Mr. Trippensee testified that absent a lot of work, amounts subsequently paid by customers "will not be recognized in any way, shape or form in the subsequent rate case." (Tr. 117-118). Mr. Trippensee also testified that use of an AAO for uncollectible expense significantly complicates the traditional analysis that gives consideration to actual costs as recorded in the USOA accounts using accrual accounting practices. (Tr. 125-126).

To avoid double recovery, the Commission should only establish the incremental expenses incurred in this proceeding, with explicit direction that the amount will be adjusted in the next rate case for additional payments received. Allowing recovery in a future rate case of amounts that the customer ultimately pays off before the rate case would violate the requirement that all relevant factors be considered. Utility Consumers Council of Missouri, Inc. v. PSC, 585 S.W.2d 41 (Mo. 1979). By not considering the relevant factor of additional payments, a decision allowing such recovery in the future outside of the rate case would constitute single-issue ratemaking. Whatever amount the Commission determines as Laclede's incremental expenses for complying with the CWR amendment should be offset by subsequent payments made by customers before the CWR amendment costs are included in rates.

3. Laclede Includes Accounts Not Reconnected or Reinstated under the CWR Amendment

Laclede's cost calculation includes many accounts that were reconnected or retained during the CWR period, but that were *not* reconnected or retained under the *terms* of the CWR amendment. Only those accounts that were reconnected or retained service under the terms of the CWR can be considered for expense purposes. Accounts that Laclede reconnected or reinstated for something less than the 50%/\$500 requirement have not incurred incremental expenses caused by compliance with the CWR amendment. Mr. Fallert agreed that accounts Laclede claims as costs of the CWR amendment were reconnected or reinstated for an amount less than what was prescribed by the CWR amendment. (Tr. 44-45). A search of Laclede's spreadsheet indicates that many accounts were not reconnected or reinstated under the terms of the CWR amendment. Laclede cannot rightly claim that the CWR amendment caused Laclede to incur costs regarding accounts that were not reconnected or reinstated under the terms of the CWR amendment. These accounts should be deleted from Laclede's cost calculation.

4. Laclede Includes Additional Arrearages Incurred After Laclede Could have Disconnected the Customer

Laclede did not offset its cost calculation for customers that could have been disconnected following non-payment, and therefore incurred additional usage not caused by the CWR amendment. Accounts included in a utility's CWR compliance calculation must have been connected or reinstated under the terms of the CWR amendment. If the customer violates their CWR agreement, they are no longer eligible for protection from disconnection under the CWR amendment. The expenses caused by the CWR amendment are the incremental expenses and revenues up to the earliest date on which

Laclede can disconnect service. If Laclede chooses to keep the customer connected beyond their earliest opportunity to disconnect, the customer is continuing to accumulate arrearages for reasons other than compliance with the CWR amendment. At that time the additional arrearages would be the result of Laclede's business decision not to disconnect the customer.

An analysis of a specific customer account from the first page of Laclede's cost calculation shows how Laclede's decision to leave a customer connected impacted the amount Laclede wishes to recover as a CWR amendment cost. The spreadsheet Exhibit 3HC shows a customer account that is labeled Number "4" for ease of reference. This customer was either reconnected or reinstated under the CWR amendment and subsequently incurred \$6,469 in additional arrearages. Laclede has not provided any evidence to support a finding that this entire balance was incurred as a result of the CWR amendment. At some point prior to the customer running up an additional \$6,000, Laclede made a business decision to keep this customer connected rather than disconnect at the earlier point possible. As a result of Laclede's decision, and not as a result of the CWR amendment, the customer ran up a huge amount of arrearages. Until Laclede can show that each account with an additional arrearage amount could not have been disconnected prior to accumulating the additional arrearages, Laclede has not satisfied its burden of proving the costs were caused by the CWR amendment.

C. Conclusion

Laclede's cost calculation is not supported by Laclede's evidence. Public Counsel identified many flaws in the cost calculation testimony of Laclede's witness. Laclede's cost evidence includes prohibited prior bad debts and other accounts that failed

to qualify for CWR recovery. Furthermore, the amounts Laclede claims as its incremental expense is not supported by the spreadsheet evidence that purports to support Laclede's cost calculation. A review of the final page of that spreadsheet shows Laclede's totals, which do not support Laclede's claim of \$2,494,311 in costs. Laclede has failed to satisfy its burden of supporting the \$2,494,311 cost calculation, and its cost claim must be rejected.

Fortunately, all of the costs claimed by Laclede are only "eligible" cost under the rule and must also satisfy the requirement that they be incremental costs that Laclede would not have incurred in the absence of the CWR amendment. The Commission now has an opportunity to interpret the rule in a way that allows Laclede to recover its incremental expenses and protects ratepayers from funding false expenses.

Laclede will likely argue in its brief that Public Counsel's decision to settle a past case using Laclede's cost formula is relevant to the Commission's decision in this case. That argument is irrelevant to interpreting the rule based on the arguments and the facts before the Commission today. It is disappointing to see Laclede ignore the clear agreement that no party to that agreement "shall be deemed to have approved or acquiesced in any ratemaking or procedural principle, including, without limitation, any method of cost determination or cost allocation."

Public Counsel admittedly made the mistake of not providing sufficient scrutiny over the costs Laclede claimed under the emergency cold weather rule. Today Public Counsel and the Commission are fortunate to have an opportunity to avoid repeating that mistake. Public Counsel asks that the Commission prevent an injustice and ensure that

Laclede recovers only the true incremental expenses caused by compliance with the CWR amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 7th day of April, 2008:

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