STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 15th day of December, 2005.

In the Matter of Proposed Emergency Amendment)
to Commission Rule 4 CSR 240-13.055) **Case No. GX-2006-0181**

ORDER DENYING APPLICATIONS FOR REHEARING

Issue Date: December 15, 2005 Effective Date: December 15, 2005

On October 21, 2005, the Office of the Public Counsel petitioned the Commission to open the above-captioned case. After receipt of written comments, a technical conference and a hearing, the Commission issued an Order approving the Emergency Amendment on December 13, 2005, effective December16, 2005. On December 15, 2005, AmerenUE and Aquila, Inc. each sought rehearing, asserting that the cost recovery mechanism included in the Emergency Amendment is insufficient. Also on December 15, 2005, Missouri Gas Energy, Atmos Energy Corporation and Laclede Gas Company filed a joint Application for Rehearing, Motion for Reconsideration, Motion for Stay and Motion for Expedited Treatment (the "Joint Application"), asserting myriad deficiencies in the Emergency Amendment. The various assertions and the Commission's responses thereto are discussed, by topic, below:

1. Cost Recovery. The cost recovery mechanism included in the Emergency Amendment is sufficient. The Emergency Amendment specifically allows the recovery of all costs reasonably incurred in compliance with the Emergency Amendment and even goes

so far as to specifically apply interest to those amounts incurred for the period of time between when they are incurred and when they are recovered. The other cost recovery mechanisms proposed by participants in this matter suffer from other deficiencies, including the potential for compensation to the utilities in excess of the costs incurred because of the promulgation of this Emergency Amendment.

The Joint Application asserts that the insufficiency of the cost recovery is confiscatory. However, as has been noted above, the Emergency Amendment provides for complete recovery of all of the reasonably incurred costs of complying with it, including those costs associated with the $500 cap on payment necessary for reconnection, and even allows recovery of the costs associated with delayed receipt of that revenue. The Joint Application asserts that the "Emergency Rule creates an "unconstitutional taking of revenues without due process and is a revenue reduction imposed by the Commission without consideration to all relevant factors.'"[1] Those entities subject to the Emergency Amendment have had substantial process granted to them not only through notice-and-comment process, but through a hearing on the matter. The Commission has reviewed all of the alternatives presented to it carefully and determined that the cost recovery mechanism set forth in the Emergency Amendment is the most appropriate, not the least reason for which is that it, more than any other method, considers the relevant revenue "reduction" among all other relevant factors.

2. Purportedly Consecutive Emergency Rule. The Joint Application includes an assertion that the Emergency Amendment is unlawful because in 2001, the Commission adopted a similar Emergency Amendment. The Commission notes that the

[1] Joint Application, p.6.

amendment to which the Joint Application refers was stayed over four years ago. Moreover, non-emergency amendments have been made to the rule in the interim. Section 536.025(8), RSMo 2000, provides that emergency rules "shall not be renewable, nor shall an agency adopt consecutive emergency rules that have substantially the same effect, although a state agency may, at any time, adopt an identical rule under normal rulemaking procedures." The Commission understands this provision to preclude agencies from using the streamlined review and procedures of emergency rulemaking to circumvent the safeguards inherent in normal notice-and-comment rulemaking. The Commission attempts no such circumvention here. Four years ago, the Commission found that an emergency existed. Then the emergency went away. The Commission now finds that a similar emergency has arisen, to be dealt with in much the same way as it attempted to do in the prior emergency. "Consecutive" means "1.a: following esp. in a series: one right after another often with small intervening intervals: successive … b: having no interval or break: continuous" [2] or "[s]uccessive; succeeding one another in regular order; to follow in uninterrupted succession."[3] An intervening period of more than four years is no "small intervening interval," rather the term of the interval dwarfs the term of the previous amendment and the present amendment combined. This Emergency Amendment does not contravene §536.025(8).

3. Purportedly Improper Method of Addressing Tariffs. The Joint Application asserts that the Commission does not have the authority to take any action inconsistent with an effective tariff without resort to the "contested case" procedures in

[2] Webster's Third New International Dictionary, 1986.

[3] Black's Law Dictionary, 6th Ed, 1990.

§§ 386.390 - .610, RSMo 2000. Section 386.310, RSMo 2000, grants the Commission broad powers to address situations concerning the health and welfare of utility consumers, including the promulgation of rules that can extend to "requir[ing] the performance of any other act which the health or safety of … the public may demand." In addition, it is not clear that the Commission need engage in contested case proceedings to effect effective tariffs, if it does so through a rulemaking.[4]

4. Procedural Issues. The Joint Application raises several procedural issues that purportedly deny utilities due process protections. It is asserted that the brief time frame between issuance and effectiveness of the Order Approving Emergency Amendment provides no reasonable opportunity to request rehearing. As four utilities have filed timely requests for rehearing, it begs the question whether three days is sufficient. Three days sufficed.

The Joint Applicants assert that there is no "emergency" as there is no finding of "immediate" danger. The Commission found that without access to a heating source this winter, people will suffer and may die. We have already experienced temperatures this winter in the single digits. There is no certainty that the temperature will fall below freezing for the rest of the winter. The Commission cannot predict the weather, no more than can it be certain that promulgation of the Emergency Amendment will prevent the harm it fears. However, the Commission can reasonably assert that, without the benefit of this Emergency Amendment, customers are likely to either be disconnected from or be unable to reconnect to their gas supplier. The Commission can reasonably expect that without home heating, people will suffer and may die. The Commission can be reasonably certain

[4] See *State ex rel. Atmos Energy Corp. v. PSC of Missouri, et al.*, 103 S.W. 3d753 (Mo. Banc 2003)

that following the normal notice-and-comment process will take too long to adequately address the problem.

The Joint Applicants assert that the Emergency Amendment is not sufficiently restricted to the emergency situation. It cites the "clean slate" and the $500 cap provisions as examples. Both these provisions lower the amount necessary for customers to reconnect to the system. Many customers rely on various kinds of assistance to help them pay their utility bills. As was noted at the hearing, certain public assistance money will be depleted by the end of this month. Both provisions are intended to help stretch those public assistance dollars as far as possible, to help as many customers as possible get reconnected to their gas supplier. These provisions further the intent of the rule and are not overly broad in their application.

The Commission shall grant a rehearing or reconsider the order if in its judgment there is sufficient reason to do so.[5] AmerenUE and the Joint Application raise no issues that were not considered in the Commission's Order Approving Emergency Amendment. Therefore, the Commission does not find sufficient reason to rehear or reconsider this case. The application for rehearing is denied.

As the rehearing is denied, there is no need for a stay pending rehearing; therefore, such motion for stay is denied.

The Joint Application requests that the Commission issue its Order on the Application for Rehearing on December 15, 2005. The Commission will do so.

[5] Section 386.410, RSMo.

IT IS THEREFORE ORDERED:

1. That the Applications for Rehearing filed on December 15, 2005, by AmerenUE, Aquila, Inc., Missouri Gas Energy, Atmos Energy Corporation and Laclede Gas Company are denied.

2. The Motion for Stay is denied as unnecessary.

3. The Motion for Expedited Treatment is granted.

4. That this order shall become effective on December 15, 2005.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Gaw, Clayton,
and Appling, CC., concur.
Murray, C., dissents.

Dale, Chief Regulatory Law Judge