

**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.)	

**PUBLIC COUNSEL'S POSITION REGARDING
LACLEDE'S REQUEST FOR DETERMINATION OF COSTS**

COMES NOW the Missouri Office of the Public Counsel and for its response to Laclede Gas Company's request for determination of costs under the Commission's Cold Weather Rule (CWR), states that Laclede's \$2,667,870 identified as its incremental costs to comply with the Cold Weather Rule amendment is unlawful, unjust, and unreasonable because this request would allow Laclede to recover over \$1.5 million not caused by the CWR amendment. In support of its position, Public Counsel suggests the following:

A. Introduction

On October 31, 2007, Laclede Gas Company filed a request for a determination by the Commission of Laclede's costs to comply with the Cold Weather Rule amendment promulgated in Case No. GX-2006-0434, *In the Matter of Proposed Rule Amendments to Commission Rule 4 CSR 240-13.055*. The Commission previously granted Laclede an Accounting Authority Order (AAO) authorizing deferred accounting treatment for costs to comply with the CWR amendment. The Commission's December 7, 2006 *Order Granting Accounting Authority Order Relating to the Costs of Complying With the 2006 Amendment to the Cold Weather Rule* authorizes Laclede to "book to Account 186 for

review, audit and recovery all incremental expenses incurred and incremental revenue that are caused by compliance with Commission Rule 4 CSR 240-13.055(14).”

Now Laclede requests a cost determination by the Commission to determine the incremental expenses Laclede claims were incurred as a result of the CWR amendment. Laclede identifies \$2,667,870 as its incremental costs of complying with the CWR amendment.¹ For the reasons discussed below, Public Counsel believes that granting this request allows Laclede to unjustly and unlawfully recover over \$1.5 million not caused by the CWR amendment.

B. History of the Cold Weather Rule Amendment

1. Proposed Amendment

The Commission filed the proposed 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 proposed amendment allowed utilities to recover the costs of complying with the rule change. Subsection (14)(G) provided for recovery of the costs of compliance through an AAO, whereas Subsection (14)(F) established the requirements for determining the costs of compliance. The proposed Subsection (14)(F) stated:

- (F) A gas utility shall be permitted to recover the costs of complying with this section as follows:
 - a. The cost of compliance with this section shall include any reasonable costs to comply with the notice requirement of this section.
 - b. No gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section.

¹ Request for Determination of the Cost of Compliance with the Permanent Amendment to the Cold Weather Rule, Laclede Gas Company, October 31, 2007, Schedule 1.

- c. Any net cost resulting from this section as of June 30 each year shall accumulate interest at the utility's short-term borrowing rate until such time as it is recovered in rates.
- d. No bad debts accrued prior to the effective date of this section may be included in the costs to be recovered in this section.

The Commission received written comments on these proposed changes, including comments from Laclede and Public Counsel, and received additional comments during a July 19, 2006 public hearing. Public Counsel's comments urged the Commission to retain the provision prohibiting utilities from recovering costs that would have been incurred in the absence of the rule change.

2. Final Order of Rulemaking

On August 11, 2006, the Commission issued its Final Order of Rulemaking that had new cost provisions that were not included in the proposed rule, were not addressed in the comments, and were not discussed at the public hearing. This new Subsection 14(F) read as follows (The underlined text highlights the cost provisions that did not appear in the original text of the proposed rule and were not specifically addressed by comments or during the public hearing.):

- (F) A gas utility shall be permitted to recover the costs of complying with this section as follows:
 - 1. The cost of compliance with this section shall include any reasonable costs to comply with the notice requirement of this section.
 - 2. No gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section, provided that the costs calculated in accordance with paragraph (14)(F)1. shall be considered the costs of complying with this section;
- c. Any net cost resulting from this section as of June 30 each year shall accumulate interest at the utility's short-term borrowing rate until such time as it is recovered in rates.

- d. No bad debts accrued prior to the effective date of this section may be included in the costs to be recovered in this section, provided that a gas utility may continue to calculate and defer for recovery through a separate Accounting Authority Order the costs of complying with the commission's January 1, 2006 emergency amendment to this rule upon the same terms as set forth herein. 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.

The new changes included in this revision were proposed by Laclede off the record and after the comment period. This language creates an ambiguity in the rule that mistakenly opens the door for Laclede to seek recovery as costs of the rule certain expenses that Laclede would have incurred in the absence of the rule, a recovery prohibited by Subsection (14)(F)2 and (14)(G)1.

C. Rule Ambiguity

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." This restriction protects ratepayers from paying more than the actual expenses incurred by the gas utility as a result of the CWR amendment. Unfortunately, subsection (14)(F)4 would appear to allow a gas utility to claim as CWR amendment compliance costs certain amounts owed by a customer before the customer opted to reconnect or retain service under the CWR amendment. The example below explains in more detail how this creates an ambiguity that would allow recovery of amounts in direct conflict with subsection (14)(F)2 and (14)(G)1.

When a customer reconnects under the CWR amendment, that customer's *preexisting* arrears 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. Therefore, the costs incurred by Laclede related to those arrearages were incurred even without the CWR amendment.

A simple example helps illustrate this point. If a customer that owes Laclede \$900 in arrearages reconnects under the CWR with a \$450 payment (50% preexisting arrears), Laclede recovers \$450 to compensate Laclede for costs that were previously incurred. If this customer subsequently fails to make any payments towards the preexisting arrears and only pays for current usage, Laclede can disconnect the customer for the \$450 balance owed prior to the CWR amendment reconnection. In this example, Laclede has incurred no incremental costs subsequent to the reconnection under the CWR amendment.

However, under the altered Subsection (14)(F)4, Laclede claims as the costs of the CWR amendment "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 provision of Section (10) of this rule." The "previously enacted provision" would have allowed reconnection with a payment of \$720 (80% of preexisting arrears). The unpaid portion of the difference between these two amounts (\$720 and \$450) is \$270. Under the altered Subsection (14)(F)4, Laclede claims \$270 is its cost of compliance with the CWR amendment despite the fact that Laclede would have incurred that cost even without the CWR amendment. Therein lies the ambiguity between subsections (14)(F)2, *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.

This example also shows how (14)(F)2 is inconsistent with the language of (14)(G)1 which only allows the AAO to book the incremental expenses and incremental revenues that are caused by the CWR amendment. Subsection (14)(G)1 states:

The commission shall grant an Accounting Authority Order, as defined below, upon application of a gas utility, and the gas utility may book to Account 186 for review, audit and recovery all incremental expenses incurred and incremental revenues that are caused by this section. Any such Accounting Authority Order shall be effective until September 30, of each year for the preceding winter.

Incremental expenses are *additional* or *increased* expenses, not expenses the utility has already incurred. Accordingly, Laclede should have booked to Account 186 no more than the additional expense caused by the CWR amendment, offset by the additional revenues realized by the CWR amendment.

Another unjust result of Laclede's method of calculating its incremental expenses is that Laclede can attempt to recover more than the amounts owed by the customers. In the example above, despite recovering \$270 as its cost of compliance with the CWR amendment, Laclede could argue that it can still pursue collection against the customer for the full \$450. If Laclede is successful, Laclede will effectively recover \$1,170 for a \$900 bill (the original \$450 payment plus the \$270 recovered as a cost of the CWR amendment, and plus the \$450 Laclede later collects for a total of \$1,170). Forcing ratepayers to pay more than the amount owed to Laclede creates an unlawful, unjust and unreasonable rule and application of the rule that results in a violation of the requirement that all orders of the Commission be lawful and reasonable. §§ 386.270 and 393.130 RSMo (Cum. Supp 2007). 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 between now and the time the CWR amendment costs are included in rates.

D. “Eligible” Costs are Not Mandatory

Public Counsel also notes that (14)(F)4 states that the additional arrearage costs and the difference in the initial payment to reconnect or retain service costs are only “eligible” for recovery. There is no foregone conclusion that the utility is entitled to such costs without a Commission determination that these eligible costs are appropriate. Determining whether such costs are appropriate requires a consideration that looks at the entire Section (14), and must be considered in harmony with the meaning of (14)(F)2 and (14)(G)1. In other words, all eligible costs must also satisfy the requirement that they be limited to incremental costs the utility would not have incurred in absence of the CWR amendment.

E. Evidence of Laclede’s Calculations

Attachment A shows a small portion of a spreadsheet provided by Laclede of the customers that Laclede claims opted to reconnect or retain service under the CWR amendment. Laclede’s spreadsheet calculates the costs Laclede claims resulted from complying with the CWR amendment. Attachment A is the last of a multiple page spreadsheet and shows seven specific customer accounts and the totals for all customer accounts. The differences between the 80% reconnection fee under the old CWR rule and the 50% reconnection fee under the CWR amendment, offset for payments applied to the original balance, are shown in the first “Total” column and make up \$1,529,432.06 of

the \$2,667,870 Laclede claims as CWR amendment costs. Public Counsel believes the \$1,529,432.06 should be disallowed from Laclede's costs.

Specific examples of how Laclede's cost calculations would allow Laclede to recover more than its incremental expenses are also shown on Attachment A. Laclede claims preexisting arrearages as incremental expenses for three of the seven customers listed in Attachment A. For example, the account shown in the second row includes a calculation as follows:

Customer's balance before reconnection:	\$280.89
Customer's initial 50% payment:	(\$140.00)
Total balance when reconnected:	\$140.89

The remaining \$140.89 balance after the initial payment would have existed in absence of the CWR amendment. The only true incremental expenses are any additional arrearages the customer accumulates after being reconnected. Laclede calculates this customer's current arrearages as follows:

Customer's balance when reconnected:	\$140.89
Customer arrearages added after reconnection:	\$97.99
Total arrearages when disconnected:	\$238.88

The customer was disconnected still owing Laclede \$140.89 in preexisting arrearages and \$97.99 in arrearages accumulated as a result of being reconnected under the CWR amendment. Laclede, however, rather than claiming the \$97.99 of expenses incurred after reconnection, claims \$182.26 in incremental expenses caused by the rule, calculated as follows:

80% reconnection payment under old CWR rule:	\$224.71
Less the 50% reconnection collected under CWR amend:	(\$140.00)
Difference between the 80% and the 50% payments:	\$84.27
Additional arrearages after reconnection:	\$97.99
Total amount claimed as CWR cost:	\$182.26

In this example, Public Counsel contests including the \$84.27 as a cost caused by the CWR amendment. Laclede incurred the costs associated with this preexisting debt before the customer reconnected under the CWR amendment. In addition, if Laclede is later successful in collecting the full \$238.88 from the customer, Laclede would recover as follows:

Current arrearages:	\$238.88
Cold Weather Rule recovery:	\$182.26
Total collected for \$238.88 debt:	\$421.14

This result is unjust and unreasonable, and subjects ratepayers to paying far more than Laclede's cost of serving its customers. Every charge made or demanded by a gas corporation must be just and reasonable. § 393.130 RSMo (Cum. Supp. 2007).

F. Intent of the Cold Weather Rule Amendment

As explained above, the CWR amendment is ambiguous in that it both prohibits non-incremental costs from recovery and allows non-incremental costs to be recovered. 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 absurd to allow a utility to recover more than its true incremental expenses, and defeats the intent and purpose of the rule. As such, 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 preexisting arrearages.

G. Foregone Recovery of Arrearages

Laclede may claim in response to this filing that Public Counsel's position would require Laclede to forego revenue that it would have otherwise recovered under the old CWR. And Laclede may base this on its assumption that every customer that reconnected or retained service under the CWR amendment would have also made an 80% payment under the old CWR. There are several errors to this reasoning.

First, there is no basis for assuming that Laclede would have reconnected and retained the same number of customers under the old CWR. The purpose of the amendment was to increase the ability of customers to reconnect or retain service, and unless the rule was ineffective, one must assume that Laclede reconnected and retained *more* customers under the CWR amendment than it would have under the old CWR. Accordingly, Laclede may have actually received more in reconnection payments from

customers under the CWR amendment than it would have from customers under the old CWR. In Laclede's 2006 challenge to the Commission's emergency cold weather rule, Laclede opposed the reduction in initial payments from 80% to 50% or \$500 and argued that "[b]ecause the customers to whom the rule applies have already demonstrated the inability or unwillingness to pay...the likelihood that such customers will now become able or choose to make good on their past bills is remote."² By Laclede's own admission, the likelihood that Laclede would recover an 80% payment from the customers that reconnected under the CWR amendment is remote. In addition, the data provided by Laclede to support the present case is insufficient to determine whether Laclede recovered less in reconnection payments under the CWR amendment than it would have under the old CWR. Laclede has provided no data to help determine what Laclede would have collected from these same customers under the old CWR, and in that respect has failed to satisfy its burden of proving it would have collected more under the old CWR.

The second response to an argument that Laclede would forego revenue under the CWR amendment is that the intention of the rule was to only allow recovery of *incremental expenses*, and foregone revenue is not an added expense. Any such argument is essentially a revenue neutrality argument, which this Commission and the Missouri Court of Appeals for the Western District have clearly found has no legal basis. When Laclede challenged the Commission's emergency CWR promulgated in Case No. GX-2006-0181, Laclede made the same argument when it argued on appeal that the change from reconnection with an 80% payment of arrears to only 50% payment or \$500 would reduce "revenues, income and achieved returns that [Laclede] would otherwise be

² Public Service Commission v. Missouri Gas Energy, et al., Missouri Court of Appeals, Western District, Case No. WD66666, Appellants' Brief of Respondent, p. 20.

entitled to under the existing Rule and their lawful tariffs.”³ The Commission responded to Laclede’s attempt to achieve revenue neutrality and argued in the Commission’s brief:

It thus appears from the cases cited above, that a circuit court “doctrine” of “revenue neutrality” cannot be sustained as the right of a public utility to a particular level of earnings or revenue. Likewise, there is no need for this Court to adopt a new, and confusing, label for a long-established and acknowledged principle of law. This Court should reject the purported “doctrine” of “revenue neutrality.”

The Court of Appeals agreed and held that “[w]e find no statute, rule, or case supporting the utilities assertion of revenue neutrality, i.e., that they have a property right to a defined level of revenue.” State of Missouri, ex rel. Missouri Gas Energy, et al v. Public Service Commission, 210 S.W.3d 330, 335 (Mo.App.W.D. 2006). The Court further held that “a Commission decision may permissibly affect revenue negatively because there is no requirement to provide a particular return on rates.” *Id.* By convincing the Commission to include language in the rule that would, when read in isolation, allow Laclede to recover the difference between the 80% payment and the 50% payment or \$500, Laclede has attempted a backdoor approach to achieve the very revenue neutrality that the Commission and the Western District Court of Appeals rejected.

Laclede’s current revenues are more than sufficient to recover any foregone revenue; if not, the method in place for the last century to deal with any revenue shortfalls is through a request to increase rates under § 393.150 RSMo 2000. To do otherwise would allow 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

³ *Id.*, p. 17.

unlawful. State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. 1979).

H. Additional Arrearages After Reconnection

Laclede also claims that additional arrearages accumulated after reconnecting or retaining customers are incremental expenses caused by the CWR amendment. Public Counsel does not dispute that additional arrearages are an incremental expense that should be included under the CWR amendment, but only if three offsets are applied.

First, Laclede should provide data to show that Laclede disconnected each defaulting customer at its earliest opportunity. Otherwise, any additional arrearage beyond that date did not accumulate as a result of the CWR amendment. On February 27, 2008, Public Counsel submitted a data request to Laclede requesting data that shows the earliest date each defaulting customer could have been disconnected. Without this data, Laclede has not satisfied its burden of proving the additional arrearage amounts are appropriate. Laclede's response to the data request is due March 18, 2008.

Second, Laclede should apply an offset to account for the portion of these additional arrearages that Laclede's rates were set to recover through Laclede's bad debt expense. This is required by Section (14)(F)2 of the CWR amendment, which prohibits Laclede from recovering costs that Laclede would have otherwise incurred. In Laclede's spreadsheet shown in Attachment A to this pleading, Laclede identifies \$2,391,843.68 as the additional arrearages that accumulated after reconnecting and retaining customers under the CWR amendment. Laclede offsets that amount by \$1,355,155.70 to account for the portion of these arrearages that Laclede's rates were set to recover through its bad debt expense. Public Counsel agrees with this offset, but only as applied to an arrearage

amount that does not include arrearages accumulated after Laclede could have disconnected the customer.

Third, Laclede's additional arrearage amount should be further offset by additional payments received by Laclede on these accounts between now and the time these expenses are included in rates. Without this offset, Laclede would be allowed to over-recover its incremental expenses. It would also raise single-issue ratemaking concerns because rate cases must consider "all relevant factors." State ex rel. Utility Consumers Council of Mo., Inc. v. Public Service Commission, 585 S.W.2d 41, 56 (Mo. banc 1979).

I. Administrative Costs

Public Counsel does not believe Laclede has met its burden of proof that the alleged administrative costs are truly incremental expenses caused by the rule. Laclede retains personnel to perform all of the functions that would be needed to implement the CWR amendment, and there is no evidence to suggest Laclede's administrative expenses increased as a result. Laclede filed a schedule that includes cost figures, but provides nothing to suggest these are not costs Laclede would have incurred even in the absence of the CWR amendment.

J. Conclusion

Public Counsel believes the Commission included the language to allow preexisting arrearages as costs of the rule under the mistaken belief that it was only allowing Laclede to recover an incremental expense caused by the rule. 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.

WHEREFORE, the Office of the Public Counsel respectfully offers this position statement and urges the Commission to: 1) Disallow the \$1,529,432.06 that customers owed Laclede before employing the CWR amendment; 2) Order Laclede to update its additional arrearage calculations to remove any arrearages that accumulated after Laclede could have disconnected customers; 3) Require Laclede to offset its additional arrearage calculation by the portion of such arrearages already included in rates through Laclede's bad debt expense; and 4) Disallow Laclede's administrative costs unless Laclede can provide supporting documentation to justify such costs.

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 28th day of February, 2008:

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CWR Accounts

Laclede Gas Company

Cold Weather Rule Cost Calculation Applicable to November 1, 2006 through March 31, 2007

Using OPC Method from GR-2007-0208

Acct .	Beginning Balance	Initial Payment	CWR-E Beg Balance	Current Balance	Incr.(Decr) in Balance	Old Rule	CWR-E Rule	Rule Variation	Upfront Payments Foregone			Additional Balances	Total
									80% vs. 50%/\$500	Balance Paydown	Total		
	\$450.73	\$249.00	\$201.73	\$35.34	(\$166.39)	\$360.58	\$225.37	\$135.22	111.58	(111.58)	-	-	-
	\$280.89	\$140.00	\$140.89	\$238.88	\$97.99	\$224.71	\$140.45	\$84.27	84.27	0.00	84.27	97.99	182.26
	\$1,136.56	\$200.00	\$936.56	\$888.53	(\$48.03)	\$909.25	\$500.00	\$409.25	409.25	(48.03)	361.22	-	361.22
	\$1,047.66	\$300.00	\$747.66	\$318.46	(\$429.20)	\$838.13	\$500.00	\$338.13	338.13	(338.13)	-	-	-
	\$341.29	\$171.00	\$170.29	\$424.00	\$253.71	\$273.03	\$170.65	\$102.39	102.03	0.00	102.03	253.71	355.74
	\$326.96	\$227.00	\$99.96	\$42.26	(\$57.70)	\$261.57	\$163.48	\$98.09	34.57	(34.57)	-	-	-
	\$844.76	\$422.38	\$422.38	\$0.00	(\$422.38)	\$675.81	\$422.38	\$253.43	253.43	(253.43)	-	-	-
	\$5,874,743.47	\$2,201,356.60	\$3,673,386.87	\$5,344,096.96	\$1,670,710.09	\$4,699,794.78	\$2,521,837.10	\$2,177,957.68	\$2,100,030.16	(\$570,598.10)	\$1,529,432.06	\$2,391,843.68	\$3,921,275.74
											-	(1,355,115.70)	(1,355,115.70)
											<u>\$1,529,432.06</u>	<u>\$1,036,727.98</u>	<u>\$2,566,160.04</u>