BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Proposed Amendments to Commission Rule 4 CSR 240-13.055.	**)** **)**	Case No. GX-2006-0434

PUBLIC COUNSEL'S COMMENTS
ON THE PROPOSED AMENDMENT

1. Introduction

On June 15, 2006, the *Missouri Register* published the Commission's proposed amendment to the Cold Weather Rule ("CWR"), 4 CSR 240-13.055. The Office of the Public Counsel ("Public Counsel") submits the following comments on the proposed amendment. Public Counsel supports proposed Subsections (14)(A) through (14)(E), and recommends specific changes to increase consumer protections. Public Counsel opposes the Accounting Authority Order ("AAO") cost recovery mechanism in Subsections (14)(F) and (14)(G) because an AAO is designed to recover extraordinary expenses, not expenses incurred by a permanent rule that offers disconnection and reconnection protections for low-income consumers. The proposed amendment simply adds to existing protections that do not require an AAO. These issues are explored in more detail below.

2. Background

The Commission first adopted a Cold Weather Rule on June 13, 1984, effective November 15, 1984. The purpose of the cold weather rule is to protect "the health and safety of residential customers receiving heat-related utility service by placing restrictions on discontinuing and refusing to provide heat-related utility service from November 1 through

March 31 due to delinquent accounts of those customers."[1] The Commission made changes to the CWR in 1993, 1996, 2001, 2003, 2004 and 2005. The 2001 and 2005 changes were emergency amendments and expired at the end of the winter heating season. The 2001 emergency CWR amendment was in response to a large number of disconnected customers. The Commission was concerned that a substantial number of households would be forced to forego space heating during the winter of 2001-2002. The 2001 emergency CWR amendment allowed customers to be reconnected by paying down past due balances.

In 2004 the Commission opened an "inquiry" into the CWR and energy affordability by creating a Cold Weather Rule & Long Term Energy Affordability Task Force. The Task Force included Legislators, PSC Staff, the Public Counsel, and representatives from the Department of Natural Resources, utility companies, low-income advocates and action agencies, and others. On March 31, 2005, the Task Force issued its Final Report to the Commission. The Report determined that according to the U.S. Census 2000, Missouri had 637,891 residents under the Federal Poverty Guideline measure. Among the reasons cited by the Task Force as to why Missouri needs to address long term energy affordability was the recognition that Missouri consumers are unable to pay, rather than are unwilling to pay:

> One of the crucial hurdles that the task force was able to overcome early in its discussions was the recognition that many customers, due to their income level, are unable to pay their increasing household energy burden. By recognizing that most low-income households in Missouri who fail to pay their full energy bills on time each month are unable to pay, rather than are unwilling to pay, the task force was able to move to a discussion regarding possible solutions. The persons in this category include low income disabled and elderly Missourians, and families with young children on public assistance. In addition, the utility customers who find themselves unable to pay their energy bills include those who are known as the "working poor." These customers live in households where one or more members work at least 1,000 hours per year, yet find themselves living under the federal

[1] 4 CSR 240-13.055 *Purpose.*

> poverty level, or only slightly above it. These customers increasingly find that their household energy burden exceeds their resources.
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> Without developing some way to make energy more affordable, utility bill increases will lead to more sacrifices of medication, nutrition, and other necessities. Final Report, pp. 3-5.

The 2005 emergency CWR amendment was a response to record-high gas prices. After receiving comments from numerous parties, it was apparent that gas prices would be at record high levels during the crucial winter heating season. As a result, consumers on low fixed incomes would experience difficulties paying for their gas service and would likely drop off the system. Without protections in place, an extremely cold winter could result in suffering, harm and even death. The Commission issued the following emergency statement with the 2005 amendment:

> The price of natural gas has risen sharply throughout the fall to a new high level, requiring many households to spend a much higher percentage of their overall budgets on home heating than in previous winters. This amendment offers options for level payments throughout the year and lessens the financial requirements for those customers disconnected for non-payment to be reconnected to a natural gas supply. As the heating season progresses, without this emergency relief, some customers will not be able to pay their bills in a timely manner, which may result in termination of heating service to their homes. This emergency amendment is necessary to protect the public safety, health and welfare, as without home heating during the winter months, people will suffer and may die…

Missouri Gas Energy, Laclede Gas Company, and Atmos Energy Corporation appealed the 2005 emergency CWR. Upon review, the Circuit Court reversed the rulemaking order.[2] The Circuit Court concluded that the emergency rule will lower the gas companies' "existing revenues, income and achieved returns" and that this "amounts to a taking of property (i.e., the revenues and earnings) without due process of law." The Circuit Court held that the PSC is obligated to

[2] *Findings of Fact, Conclusions of Law and Judgment*, Case No. 05AC-CC01138, February 8, 2006.

ensure utility companies recover lost revenues should a PSC decision adversely affect revenues and earnings. The Commission disagreed with the Circuit Court and appealed to the Missouri Court of Appeals for the Western District, Case No. WD66666. That case has been briefed, but oral argument has not been scheduled.

3. Public Counsel's Comments on the Proposed Amendment

Public Counsel supports changes to the CWR that make permanent many of the provisions included in the 2005 emergency CWR amendment adopted in Case No. GX-2006-0181. However, Public Counsel opposes other changes and recommends additional changes as discussed in detail below.

A. Subsection (14)(A) – Restoring and Retaining Service

The Commission's proposed Subsection (14)(A) amendment allows gas utility customers to have their service restored, or avoid disconnection, during the cold winter months by making an initial payment. This proposed subsection also defers certain fees and allows customers threatened with disconnection to enter into a payment plan. The proposed subsection states:

> (A) From December 1 through March 31, notwithstanding section (10)(C)(2) of this rule to the contrary, a gas utility shall restore service upon initial payment of fifty (50) percent of the preexisting arrears, with the deferred balance to be paid as provided in Section 10(B). Any reconnection fee, trip fee, collection fee or other fee related to reconnection, disconnection or collection shall also be deferred. Between December 1 and April 1, any customer threatened with disconnection may retain service by entering into a payment plan as described in this paragraph. Any payment plan entered into under this paragraph shall remain in effect (as long as its terms are adhered to) for the term of the payment plan. However, a gas utility shall not be required to offer reconnection or retention of service under this section 14(A) more than once for any customer.

Public Counsel supports this proposal and recommends the following changes to Subsection (14)(A).

First, the amendment proposes to apply the Section (14) protections from December 1 through March 31. Public Counsel recommends these dates be changed to November 1 through March 31, which is consistent with the cold weather period under Section (2) of the existing CWR. A shorter time period was used in the emergency cold weather rule because the rule was adopted late in the year. Using consistent dates would allow customers to benefit from the Section (14) protections during the entire winter heating season.

Second, the rule should allow service to be restored, or disconnection avoided, by an initial payment of 50% or $250, whichever is less. The proposed rule removed the $500 payment option from what was adopted in the 2005 emergency CWR. A $250 payment option, also proposed by the Public Counsel in the 2005 emergency amendment, would help keep low income customers on the system. A $250 payment option is critical considering at least one gas utility's interpretation of the Commission's rule regarding rebilling for undercharges in 4 CSR 240-13.025(1)(B). In Case No. GC-2006-0318, consolidated with Public Counsel's complaint in Case No. GC-2006-0431, Laclede Gas Company acknowledges that it allows customers to accumulate substantial undercharges due to Laclede's practice of estimating customer gas usage for extensive periods.[3] As a result, customers receive steep bill adjustments for a year or more of underestimated usage, which threatens the ability of customers on a low fixed income to maintain service. Such practices do not allow the consumer to curtail gas usage and avoid such bills. This problem is further compounded in that many customers continue to struggle with their ability to pay accumulated arrearages that resulted from the recent record high gas prices. For these reasons, customers should be given the option to restore service or avoid disconnection

[3] Laclede states in an answer to a data request in Case No. GC-2006-0318 that it places no limitation on the period for which it may adjust a customer's bill for an undercharge. *See* Public Counsel's *Complaint and Motion to Consolidate,* Attachment A, Case No. GC-2006-0431, filed May 11, 2006.

with a minimum payment of 50% or $250. At a minimum, the amendment should allow a $250 payment to restore service or avoid disconnection for customers with an *undercharge adjustment* arrearage of more than $500.

B. Subsection (14)(B) – Payment Plans

Public Counsel supports the language of proposed Subsection (14)(B). This subsection allows customers that are not disconnected to enroll in the gas utility's equal payment, budget billing or similar payment plan. These plans provide much needed support to low-income households, which tend to be those most likely in need of a payment plan since they often live from paycheck to paycheck.

C. Subsection (14)(C) – Late Payments and Interest

Public Counsel supports proposed Subsection (14)(C). This Subsection prohibits late payment fees and defers interest for customers entering into a CWR payment plan, thus assisting the customer in making the minimum payment required under Subsection (14)(A).

D. Subsection (14)(D) – Clean Slate

Public Counsel supports the "clean slate" provision of proposed Subsection (14)(D). This subsection rewards customers honoring their payment agreement under the CWR by treating the customer as if they had not defaulted on any previous CWR payment plan. It may be impossible to fully understand the circumstances that lead to a customer's default on a previous CWR agreement. Giving customers this incentive may help keep service restored in low-income households, and improve the gas utility's collection practices by encouraging low-income customers to honor their CWR payment plans. In the Recommendations offered by the Commission's Cold Weather Rule & Long Term Energy Affordability Task Force, one of the

unanimous recommendations was to "provide incentives to low-income customers who participate in affordability plans for on time monthly payments."[4]

E. Subsection (14)(E) – Notice to Consumer

Proposed Subsection (14)(E) requires utilities to notify customers of the CWR provisions under Section (14) "in any notice or contact with customers." Public Counsel supports a requirement that notifies consumers of their options under the CWR to restore service or avoid disconnection, particularly those expressing an inability to pay.

F. Subsections 14(F) and (14)(G) – Cost Recovery

Proposed Subsections (14)(F) and (14)(G) would allow a utility to recover the expenses of complying with Section (14) of the CWR through an Accounting Authority Order ("AAO"). These two proposed subsections should be deleted. By making Section (14) a permanent rule, rather than an emergency rule, the process for a utility recovering its expenses should be the same as any other non-emergency rule requiring certain conduct of a utility to protect the public. The expenses associated with compliance with the rule will be the utility company's normal cost of doing business, and should be recovered through the usual rate making process. The primary expense the utilities have attributed to this rule is uncollectible costs. Uncollectible costs are reviewed in each and every rate case. Treatment of uncollectible costs via an AAO will simply mean an adjustment will have to be made to uncollectible expense calculation. It is not a question of recovery, but simply a question of timing and/or method of recovery.

The gas utilities may argue to the Commission, as they argued to the Western District in the 2005 emergency amendment appeal, that the Commission must ensure "revenue

[4] Final Report of the Commission's Cold Weather Rule & Long Term Energy Affordability Task Force, Case No. GW-2004-0452, Issued March 31, 2005, p. 26.

neutrality" when adopting a rule that impacts a utility's earnings. The Commission recently argued before the Missouri Court of Appeals for the Western District that there is no support for the argument that Commission must ensure revenue neutrality. The Commission stated in its brief that the Commission "sets rates, not revenue or earnings levels. No maximum or minimum return was determined when the rate was established."[5] The Commission correctly reasoned that "the law of the state only provides for the fixing of rates and does not fix the maximum return thereunder."[6]

Public Counsel raised a similar argument in the same case before the Court of Appeals. Public Counsel illustrated that the Commission's rulemaking procedures are not an exercise of its ratemaking authority:

> When the PSC issues rules that aim to protect the public welfare, the PSC should be considered no different than any other regulatory agency that exercises its police power to issue health and safety rules. For example, if the Missouri Department of Natural Resource's Air Conservation Commission ("ACC") adopted a rule imposing additional industry air quality standards that required the Respondents to incur additional upgrade costs, the Respondents would not be allowed to change tariff rates to recover such upgrade costs without looking at all relevant factors in the determination of a just and reasonable rate of return. Just as the PSC would not be required to ensure revenue neutrality related to Department of Natural Resources rules, the PSC's rules aimed at protecting the public welfare are also not required to ensure revenue neutrality. If either agency's actions threaten the public utility's opportunity to earn a fair return, the proper and historical procedure is for the regulated utility to petition the PSC for a rate increase.
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> The Supreme Court of Missouri recently addressed the issue of whether a rule adopted pursuant to the PSC's rulemaking authority must first apply ratemaking principles. In *Atmos*, the utility companies argued that the PSC may not adopt a rule setting a maximum price without first determining whether the utilities current rates are "unjust, unreasonable, unjustly discriminatory, or unduly preferential" under Section 393.140(5). *State ex rel., Atmos Energy Corp., et al.*

[5] Public Service Commission v. Missouri Gas Energy, et al., Case No. WD66666, Respondent's Brief of Appellant, July 3, 2006, p. 14.

[6] *Id., citing Straub v. Bowling Green Gas Co.,* 227 S.W.2d 666 (Mo. 1950).

> *v. P.S.C.*, 103 S.W.3d 753 (Mo. 2003). The Court rejected this argument and explained that the PSC was setting a rate standard for the entire pubic utility industry and was not addressing the "legal rights, duties or privileges of specific parties." *Id.*

Arguing in support of the Commission's emergency CWR amendment, Public Counsel further explained to the Court of Appeals that there is absolutely no indication that utility companies will lose any earnings under the 2005 emergency CWR amendment, which is substantially similar to the current proposed amendment:

> [T]here is no way to know whether the emergency amendment itself causes an increase in bad debt expense. As previously discussed, allowing more customers to be connected to the system cannot result in lower revenues as suggested by the Respondents because revenues equal the tariffed rate multiplied by the volume of gas sales – and the emergency amendment does nothing to lower either. If the PSC is correct and the amendment helps low-income consumers get reconnected with a 50% payment of their arrears or $500, which may not have been collected without the rule, this would result in a decrease in the Respondents' bad debt expense. If a customer takes advantage of the rule by reconnecting, staying on the system, and continuing to make payments, there would be an additional increase in sales and therefore revenues, and a decrease in bad debt expense.
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> It is possible that the emergency amendment could increase earnings by lowering the bad debt expense actually incurred and will increase revenues by bringing more customers back onto the system. The point to be made here is that there is no way for the Respondents to accurately predict in advance the impact of the emergency amendment on the Respondents earnings, but if additional customers are connected to the system additional revenues will be realized.

The analysis above also applies to the proposed CWR amendment before the Commission in the present case. It is impossible to know what, if any, impact the proposed CWR amendment will have on utility company earnings. If the rule operates as intended, customers will reconnect or avoid disconnection and will continue making payments through a structured payment plan. As a result, the gas utilities will realize an increase in earnings.

The controlling case regarding the Commission's use of an AAO is *State of Missouri, ex rel., Missouri Office of the Public Counsel v. P.S.C., et al.,* 858 S.W.2d 806 (Mo. App. W.D. 1993) (*OPC).* In *OPC,* Public Counsel appealed a Commission order granting an AAO to MGE to defer and record depreciation expenses and carrying costs for two construction projects. Public Counsel argued that the expense was not unusual or extraordinary. The Western District disagreed and held:

> The Commission's decision to grant authority to defer the costs associated with the Sibley reconstruction and coal conversion projects by recording the costs in Account No. 186 was the result of the Commission's determination that the construction projects were unusual and nonrecurring, and therefore, extraordinary. The Commission determined the projects to be unusual because of their size and substantial cost. The Commission expressed that deferral of costs just to support the current financial status distorts the balancing process utilized by the Commission to establish just and reasonable rates. Because rates are set to recover continuing operating expenses plus a reasonable return on investment, only an extraordinary event should be permitted to adjust the balance and permit costs to be deferred for consideration in a later period. [emphasis added].

This same analysis applies to the Commission's rulemakings. It is a fact that Missouri has a large number of low-income households below the federal poverty guidelines. Unfortunately, that "event" is ordinary for Missouri and rules meant to protect such households will become the ordinary course of business for utility companies. Low-income households struggling to keep their gas service is not unusual, and is certainly "recurring." As stated by the Western District, only extraordinary events should be permitted to defer cost recovery through an AAO. There is nothing extraordinary about the protections offered by the proposed amendment.

An AAO was used in the emergency amendment because increased expenses would be extraordinary due to the temporary application of the rule. By making Section (14) provisions permanent, any costs incurred by the requirements of Section (14) will now be the normal costs of doing business under the Commission's rules. No additional cost recovery

mechanism is needed, just as no cost recovery mechanism is necessary in the current version of the CWR that restricts the company's practices during the winter heating season as follows:

- Section (3) places notice requirements upon the utility from November 1 to March 31.
- Section (5) prohibits a utility from disconnecting in the coldest weather.
- Section (6) prohibits a utility from disconnecting a customer that enters into a payment plan and makes the initial payment.
- Section (9) requires the utility to reconnect without requiring a deposit provided the customer enters into a payment agreement and makes an initial payment.
- Section (10) places restrictions on the payment plans between the customer and the utility company.

A gas utility's compliance with the above cited CWR sections may increase expenses for the utility companies, yet such expenses are not allowed to be recovered through an AAO. All that is needed to recover expenses incurred by Section (1) through proposed Section (14) is provided for in Section (12), which states that "[t]he commission shall recognize and permit recovery of reasonable operating expenses incurred by a utility because of this rule." This same cost recovery provision will also apply to Section (14) expenses and should be relied upon rather than an "extraordinary" AAO cost recovery mechanism, which should not apply to what will now become the Commission's "ordinary" rule.

If contrary to Public Counsel's recommendation the Commission includes Subsections 14(F) and 14(G), at a minimum the Commission should consider the following recommendations. First, Subsection (14)(G)3 together with Subsection (14)(F)3 would allow a utility to accumulate interest on net costs indefinitely. This could create significant opportunities to game the financial statements for both public and regulatory purposes. To help avoid this,

these provisions should be changed to limit a utility's recovery of net costs to one year. If the utility fails to file a rate case within that timeframe, it loses its AAO recovery option.

Second, if the Commission adopts the proposed cost recovery mechanism, Public Counsel urges the Commission to keep the language of Subsection (14)(F)2, which states that "[n]o gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section." This Subsection is essential in ensuring that utility companies are prevented from inflating their expenses.

4. Conclusion

Public Counsel supports the proposed amendments to the Cold Weather Rule in Subsections (14)(A) through Subsection (14)(E), and asks that the Commission include the changes it recommends to these subsections. And as stated above, Public Counsel opposes the use of an AAO and urges the Commission to delete Subsections (14)(F) and (14)(G) from the amendment. If the Commission approves an AAO provision for this proposed amendment, the Commission should expect requests for AAO provisions in every rulemaking and order that could potentially require a utility to incur additional expenses since the concept of "extraordinary" expense would no longer apply to an AAO.

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 14th day of July 2006:

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