BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Working Case to Consider the Establishment of a Low-Income Customer Class or Other Means to Help Make Electric Utility Services Affordable.	))))	EW-2013-0045
In the Matter of a Working Case to Consider the Establishment of a Low-Income Customer Class or Other Means to Help Make Water Utility Services Affordable.	))))	GW-2013-0046
In the Matter of a Working Case to Consider the Establishment of a Low-Income Customer Class or Other Means to Help Make Water Utility Services Affordable.	))))	WW-2013-0047

STAFF'S REPLY COMMENTS

COMES NOW the Staff of the Missouri Public Service Commission, and for its Reply Comments states the following:

In the following Reply Comments, Staff reiterates its position that the Commission lacks express statutory authority to establish a specific rate for low-income customers. Staff replies to comments which suggest that the Commission could set a low-income rate under existing statutory authority and case law. As explained below, such comments do not reflect a full and complete characterization of existing law.

In addition, Staff provides samples of authorizing legislation from other states. While Staff has not conducted an in-depth review of all 50 states, all the states Staff examined have specific legislation to authorize their programs, and it appears that many—if not all—the state assistance programs mentioned in the comments proceed from express statutory authority. Given that programs in other states proceed from express authority, Staff reiterates its position that a low-income rate established without

legislative authority carries the risk that a court will strike down such a rate as unlawful discrimination.[1]

Finally, Staff's Reply Comments provide an update on public comments received in this docket to date.

Regarding the comments of other parties, Staff notes that AARP in its comments at page 7, first full paragraph, last sentence, makes broad statements about two recent Missouri appellate cases whose fact situations are very narrow:

> . . . Recent appellate court cases have found it appropriate for the Commission to make determinations with regard to usage patterns and characteristics of low income customers that distinguish them from other residential customers, recognizing that it is appropriate for the Commission to examine whether specific rate design decisions unreasonably impact low income utility customers.[2]
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> [2] State ex rel. Public Counsel v. Missouri Public Service Com'n (Atmos Energy), 289 S.W.3d 240 (Mo.App. W.D., 2009); State ex rel. Office of Public Counsel v. Public Service Com'n (Missouri Gas Energy), 367 S.W.3d 91 (Mo.App. S.D., 2012).

The connection between AARP's characterization of the two Missouri appellate court cases and the actual fact situations and holdings of the two Missouri appellate courts is quite attenuated as indicated below.

The Atmos Energy case in the Western District Court of Appeals is the earlier case. On appeal OPC argued that the Commission erred in adopting a straight fixed variable ("SFV") rate design because the decision was not based on competent and substantial evidence, was arbitrary, and was an abuse of discretion.[2] Based on the testimony of a Staff witness, the Commission concluded that the cost of serving each

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[1] See *The Office of The Public Counsel's Comments*, p. 9-10 for a summary of the law of rate discrimination.

[2] *State ex rel. Public Counsel v. Public Serv. Comm'n*, 289 S.W.3d 240, 247 (Mo.App. W.D. 2009).

residential customer was the same regardless of the customer's usage and that, therefore, under the traditional rate structure, high-use customers were subsidizing low-use customers.[3] The Staff witness' testimony was *not* based on an intra-class study conducted to determine the cost to serve high volume versus low volume residential users or to establish that one group of residential users was subsidizing another.

The Court held that in the absence of such a study the Staff witness' testimony did not constitute competent and substantial evidence upon which the Commission could conclude that high volume customers were currently subsidizing low volume customers.[4] The Court noted that although the Staff witness' argued that all residential customers have the same equipment outside of their homes, the Staff witness did not take all costs into account and as a consequence the Staff witness' testimony "does not constitute competent and substantial evidence upon which the Commission could find that the cost to serve all residential customers is the same."[5] The Court reversed the Commission's decision to adopt the SFV rate design and remanded for further proceedings.[6]

The Missouri Gas Energy ("MGE") case in the Southern District Court of Appeals is the more recent case. The Office of Public Counsel argued to the Court that the Commission's Report and Order erred because the Commission's finding that "'an average low-income . . . consumer uses above[-]average amounts of natural gas'" is not

[3] *Id.* at 248.

[4] 289 S.W.3d at 249.

[5] *Id.* at 250.

[6] *Id.* at 251.

supported by competent and substantial evidence, is against the weight of the evidence, and is arbitrary, capricious and an abuse of the Commission's discretion.[7]

MGE and the Staff proposed a SFV rate design and OPC proposed a fixed+volumetric rate design. OPC asserted that the SFV subjected customers in each rate class who use lower than average amounts of natural gas to undue and unreasonable prejudice and disadvantage in violation of Sections 393.130 and 393.140.[8] OPC contended that high-use customers in MGE's Residential Service and Small General Service rate classes cost more to serve than low-use customers within the class, and a fixed+volumetric rate design accurately allocates the cost of service to a particular customer, to that customer.

The Commission in its Report and Order found that a fixed+volumetric rate design subsidizes low-usage customers.[9] The Commission chose to resolve the conflict of expert factual conclusions by accepting the conclusions of MGE's experts as competent and substantial evidence, not clearly contrary to the overwhelming weight of the evidence. The Court held that the Commission's choice was not arbitrary, capricious, or an abuse of discretion.[10] The Commission found that under MGE's rate design, no customer is prejudiced or disadvantaged because each customer is charged that customer's true cost of service regardless of whether the customer uses lower-

[7] *State ex rel. Public Counsel v. Public Serv. Comm'n*, 367 S.W.3d 91, 105 (Mo.App. S.D. 2012).

[8] 367 S.W.3d at 106.

[9] 367 S.W.3d at 103-04.

[10] 367 S.W.3d at 105.

than-average, higher-than-average, or average amounts of natural gas. OPC failed to persuade the Court that the Commission erred.[11]

Also on page 7 of its comments, AARP notes that the Commission has the authority pursuant to Section 386.250(6) RSMo. to promulgate rules of general applicability, governing "'the conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service and billing for public utility service.'" The St. Louis University School of Law Child Advocacy Clinic ("SLUSLCAC") beginning on page 12 of its comments proposes a "regulation" to low-income families in St. Louis and surrounding counties if Ameren Missouri's proposed rate increase is accepted by the Commission. SLUSLCAC appears to be proposing ratemaking by rulemaking which is not lawful. Section 536.010(6) defines "rule" as:

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of an agency. The term . . . does not include:
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> (d) A determination, decision or order in a contested case;

Section 393.150 RSMo. provides for a "full hearing," respecting the "propriety" of a new electric rate or charge, unless the rate or charge goes into effect pursuant to Section 393.140(11) RSMo. on less than 30 days notice for good cause shown, and Section 393.270 RSMo. provides for a full hearing respecting a complaint. A complaint may involve a rate or a charge. Section 536.010(4) defines "contested case" as:

> . . . a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing;

[11] 367 S.W.3d at 106.

A rate case is a contested case. SLUSLCAC's proposal must be implemented in a rate case, not a rulemaking.[12] SLUSLCAC's proposal also would constitute unlawful single-issue ratemaking by rulemaking.[13]

The Community Action Agency of St. Louis County, Inc. ("CAASTLC") submitted comments and attachments. At page 2 of its comments it referred to "A National Study of Ratepayer-Funded Low-Income Energy Programs" by David Carroll, Jacqueline Berger, and Roger Colton. At page 3 of its comments, CAASTLC referred to a multi-state evaluation of affordability programs performed by APPRISE Institute ("APPRISE") titled "Ratepayer-Funded Low-Income Energy Programs: Performance and Possibilities, 2007," which document is an attachment to CAASTLC's filing. Mr. Carroll and Ms. Berger were / are with APPRISE. Apparently, the two aforementioned documents are the same document. At pages v and vi of the APPRISE attachment of CAASTLC appears the following relevant language:

> **Legislative Authorization**
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> Our research found that states have frequently mandated the creation of low-income affordability programs by statute, thus rendering moot the question of whether the state utility commission has the authority to pursue such programs. Maryland, California, Nevada and New Jersey, for example, all had utility commissions act after the legislature enacted a statute directing the implementation of a low-income program.
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> Even state utility commissions that have expressed doubt about their regulatory authority to implement permanent statewide programs have

[12] *See generally*, *State ex rel. Missouri Gas Energy v. Public serv. Comm'n*, 210 S.W.3d 330 (Mo.App. W.D. 2006); *State ex rel. Atmos Energy Corp. v. Public Serv. Comm'n*, 103 S.W.3d 753 (Mo.banc 2003).

[13] *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 49, 56-57 (Mo.banc 1979).

adopted smaller programs using different aspects of their regulatory authority.

- *Missouri* - The Missouri utility commission, for example, has held that it lacks statutory authority to adopt preferential rates. Nonetheless, that commission has approved multi-million dollar programs by electric and natural gas companies to deliver rate affordability and arrearage forgiveness through specifically-dedicated funds.

Next, below, Staff provides a sample of statutes and language crafted by other state legislatures in order to expressly authorize low-income programs.

California

The CAA's comments call attention to the California Alternative Rates for Energy (CARE) program and the Family Electric Rate Assistance (FERA) program. Both programs are expressly authorized by the state legislature.

For example, California Public Utility Code § 739.1(b)(1) states:

> The commission **shall establish a program of assistance to low-income electric and gas customers** with annual household incomes that are no greater than 200 percent of the federal poverty guideline levels, the cost of which shall not borne solely by any single class of customer. The program shall be referred to as the California Alternative Rates for Energy or CARE program. The commission shall ensure that the level of discount for low-income electric and gas customers correctly reflects the level of need. [Emphasis added.]

The statute provides that CARE rates shall not exceed 80 percent of corresponding rates charged to residential customers not participating in the CARE program, and that "the commission shall authorize recovery of all administrative costs associated with implementation of the CARE program that the commission determines to be reasonable."[14]

[14] *Id*. at (5) and (5)(c).

Section 739.1(5) also states: "The commission shall ensure that an electrical corporation or gas corporation with a commission-approved program to provide discounts based on economic need in addition to the CARE program, including a Family Electric Rate Assistance program, utilize a single application form, to enable an applicant to alternatively apply for any assistance program for which the applicant may be eligible."

Massachusetts

Massachusetts General Law 164 § 1F(4)(i) states:

> The department shall require that distribution companies provide **discounted rates for low income customers** comparable to the low-income discount rate in effect prior to March 1, 1998… The cost of such discounts shall be included in the rates charged to all other customers of a distribution company. Each distribution company shall guarantee payment to the generation supplier for all power sold to low-income customers at said discounted rates. [Emphasis added].

Among other express instructions to the Massachusetts Department of Public Utilities ("Department"), the law directs the Department to set eligibility for low income rates at 200 percent of the poverty level, and directs the Department to promulgate rules requiring utilities to inform their customers of available rebates, discounts, credits and other cost saving mechanisms that can help them lower their monthly utility bills.[15]

Ohio

The Ohio Public Utilities Commission used its statutory emergency powers to develop its Percentage of Income Payment (PIP) plan—which allows eligible low-income residents to prevent gas and electric service disconnections by paying a

[15] *Id.*

percentage of their income in lieu of their monthly bill.[16] In upholding the use of the commission's emergency powers for the purpose of preventing utilities from disconnecting low-income customers who can't afford to pay their bills, the Supreme Court of Ohio stated "it is the opinion of this court that it is clearly within the PUCO's emergency powers under R.C. 4909 to fashion such relief as that provided by the PIP plan and we find the plan of the commission to be manifestly fair and reasonable as a solution to the crisis."[17]

Notwithstanding this court decision, the Ohio legislature codified the PIP plan in its 1999 restructuring legislation.[18] Ohio Revised Code § 4928.01(16) defines "low-income assistance programs" as "the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program." Ohio Revised Code § 4928.51 establishes a universal service fund "for the exclusive purposes of providing funding for the low-income customer assistance programs and for the consumer education program… and paying the administrative costs of the low-income customer assistance programs and the consumer education program."

Ohio R.C. § 4928.53 authorizes the director of development to administer the state's low-income assistance programs, and orders the commission to cooperate and

[16] When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes. Ohio Rev. Code Ann. § 4909.16.

[17] See *Montgomery County Board of Commissioners v. PUC of Ohio,* 503 N.E.2d 167, 170 (Ohio 1986).

[18] http://liheap.ncat.org/dereg/states/ohio.htm.

assist the director. This section orders the director to adopt rules to carry out the low-income programs.

Pennsylvania

As in many other states, Pennsylvania mandated low-income assistance programs when it revised its utility statutes during a period of "restructuring" in the mid-1990s.

Pennsylvania statute 66 Pa.C.S.A. § 2802(10) states the Commonwealth "must, at a minimum, continue the protections, policies and services that now assist customers who are low-income to afford electric service." Subsection (17) states "[t]here are certain public purpose costs, including programs for low-income assistance, energy conservation and others, which have been implemented and supported by public utilities' bundled rates. The public purpose is to be promoted by continuing universal service and energy conservation policies, protections and services, and full recovery of such costs is to be permitted through a nonbypassable rate mechanism." Statute 66 Pa. C.S.A. § 2804 instructs that the commission "shall ensure that universal service and energy conservation policies, activities and services are appropriately funded and available in each electric distribution territory," and provides detail on how plans for universal service are to be funded.

New Jersey

New Jersey's "Electric Discount and Energy Competition Act" authorizes a Universal Service Fund (USF) program, called a "fixed credit percentage of income payment plan," under which participants are required to pay no more than six percent of their annual income toward electric and gas bills.

The Act states:

> There is established in the Board of Public Utilities a nonlapsing fund to be known as the **"Universal Service Fund."** The board shall determine: the level of funding and the appropriate administration of the fund; the purposes and programs to be funded with the monies from the fund; which social programs shall be provided by an electric public utility as part of the provision of its regulated services which provide public benefit; whether the funds appropriated to fund the "Lifeline Credit Program" established pursuant to P.L. 1979 c 197, the "Tenants' Lifeline Assistance Program" established pursuant to P.L. 1981 c. 210, the funds received pursuant to the Low Income Home Energy Assistance Program established pursuant to 42 U.S.C. s.8621 et seq., and funds collected by electric and natural gas utilities, as authorized by the board, to offset uncollectible electricity and natural gas bills should be deposited in the fund; and whether new charges should be imposed to fund new or expanded social programs. [Emphasis added.]

New Hampshire

New Hampshire's Legislature passed a restructuring law in 1996 that authorizes a system benefits charge. N.H. Rev. Stat § 374-F:3 states:

> VI. BENEFITS FOR ALL CONSUMERS. Restructuring of the electric utility industry should be implemented in a manner that benefits all consumers equitably and does not benefit one customer class to the detriment of another. Costs should not be shifted unfairly among customers. A nonbypassable and competitively neutral system benefits charge applied to the use of the distribution system may be used to fund public benefits related to the provision of electricity. Such benefits, as approved by regulators, may include, but not necessarily be limited to, **programs for low-income customers**, energy efficiency programs, funding for the electric industry's share of commission expenses pursuant to RSA 363-A, support for research and development, and investments in commercialization strategies for new and beneficial technologies. [Emphasis added.]

Colorado

The Colorado legislature authorized low-income energy assistance with the "Low-Income Energy Assistance Act."

C.R.S.A. § 40-8.7-102 provides:

> (1) The general assembly hereby finds, determines, and declares that, in order to serve the best interest of the citizens of Colorado and, in particular, to **aid low-income** citizens of Colorado, there is a need for an energy assistance program to collect an **option low-income energy assistance contribution** from utility customers in Colorado.
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> (2) The general assembly further finds that the most efficient way to support such a program is for gas and electric utilities to provide the **opportunity for each utility customer to contribute an optional amount** on the customer's billing statement for low-income energy assistance that will be displayed monthly on the utility bill until the customer indicates otherwise and that the moneys collected shall be most economically and equitably disbursed through a system in which the contributions collected by electric utilities and gas utilities are transmitted to energy outreach Colorado. [Emphasis added.]

Colorado's legislation provides that "every utility doing business in Colorado shall participate in the energy assistance program,[19] and allows utilities to recover "any reasonable costs that a utility incurs in connection with the program."[20]

Texas

The Texas legislature authorized a system benefits charge, a nonbypassable fee of up to 65 cents per megawatt hour, to fund low-income rate assistance and energy efficiency in V.T.C.A. § 39.903. The system benefit fund fee is allocated to customers based on the amount of kilowatt hours used. The statute indicates how the fund is to be used:

> (e) Money in the system benefit fund may be appropriated to provide funding solely for the following regulatory purposes, in the following order of priority:

[19] C.R.S.A. § 40-8.7-104(2).

[20] *Id.* at (3).

(1) programs to: (A) **assist low-income electric customers by providing the 10 percent reduced rate** prescribed by Subsection (h); and (B) provide on-time bill payment assistance to electric customers who are or who have in their households one or more seriously ill or disabled low-income persons and who have been threatened with disconnection for nonpayment;

(2) customer education programs, administrative expenses incurred by the commission in implementing and administering this chapter, and expenses incurred by the office under this chapter;

(3) programs to assist low-income electric customers by providing the targeted energy efficiency programs described by Subsection (f)(2);

(4) programs to **assist low-income electric customers by providing the 20 percent reduced rate** prescribed by Subsection (h); [Emphasis added.]

The statute also provides for reimbursement to the commission and the state Health and Human Services Commission for the cost of implementing the program, determining eligibility and "outreach expenses the commission determines are reasonable and necessary."

Update on Public Comments

At the time of Staff's Initial Comments, 20 public comments had been received. Seven of those comments supported the Commission establishing a low-income rate class and 12 were against the concept. Since that time, two additional public comments were received. One supports the establishment of the special class. The other is from a non-for-profit retirement community suggesting that if a special rate is developed for businesses that house lower-to-moderate income customers, qualifying data should be requested on an annual basis – data such as that reflecting the number of tenants that passed away, moved to/from the community, etc. The comment suggests providing such information on a monthly basis would be cumbersome administrative work.