

Commission's December 2005 Emergency Rule Amendment that is currently before the Western District Court of Appeals. In both of those appeals, the utilities took the position that the Commission's use of an accounting authority order to defer and permit potential recovery of the costs associated with its rule changes did not provide a legally sufficient or otherwise adequate recovery mechanism. In both cases, separate judges of the Cole County Circuit Court agreed with the utilities' assessment.

The Proposed Amendment provides yet another opportunity to revisit and, more importantly, resolve these issues. As they have in the past, the Missouri Utilities are interested in working with the Commission and other parties to develop Cold Weather Rule provisions that appropriately balance the interests of customers who face significant challenges in maintaining their utility service with those of the utility and other customers who must ultimately bear the cost of any bad debts left behind when customers can't or won't pay their bills for service.

To that end, these comments recommend two clarifications to the terms governing who is eligible for the more lenient credit and payment provisions set forth in the Proposed Amendment. The first simply clarifies that utilities retain the option they already have under the current Cold Weather Rule to file tariffs establishing the income levels at which customers are eligible to take advantage of the credit and payment terms set forth in the Rule and the Proposed Amendment. The second is designed to clarify that the Proposed Amendment's provision requiring that the utility offer reconnection or retention of service only once under the more lenient payment provisions of the Amendment is truly a one-time obligation that also counts offers that were made as a result of the 2005 Emergency Amendment to the Rule.

These comments also recommend a solution to the cost recovery issues that have arisen in connection with the Commission's previous rulemaking efforts and that are likewise implicated by the current rulemaking. It comes in the form of an uncollectible expense accounting tracker. In addition to providing what the Missouri Utilities believe is an indispensable component to any lawful rulemaking action by the Commission, the tracker proposed herein is also designed to provide a longer-term solution to the treatment of uncollectible expenses – a treatment that is based squarely on similar accounting and recovery approaches that the Commission and other stakeholders in the regulatory process have previously deemed acceptable for addressing other expense items.

The Missouri Utilities want to emphasize that in developing this proposed tracker, they have made a sincere effort to formulate an approach to this issue that reasonably accommodates the various objections that have been raised by Staff and Public Counsel to numerous other proposals that utilities have submitted in the past to address this issue. While there are a number of considerations which support the approval and use of an uncollectible expense accounting tracker, the main reasons for implementing the concept can be summarized as follows:

- The tracker does not contemplate *any* surcharges or rate adjustments being made outside the context of a general rate case proceeding. Instead, any increases or decreases in uncollectible expense are deferred and later reconciled only when a general rate case proceeding is filed. This is entirely consistent with the Proposed Amendment's preference for using accounting authorizations to address the recovery issue.
- Implementation of a tracker would likely end further litigation in the courts over cost recovery issues. From the utilities' perspective, it would also eliminate the recovery issue in future rulemaking proceedings involving the Cold Weather Rule as well as foreclose the need to consider

alternative recovery proposals for addressing uncollectible expense in general rate case proceedings.

- There is strong legal precedent for an uncollectible expense accounting tracker. Indeed, similar mechanisms have been repeatedly employed by the Commission (without legal objection and with the concurrence of Staff, Public Counsel and other parties) to address other cost items, including pensions expenses, post-retirement medical benefits and even uncollectible expenses itself. Moreover, implementation of such a mechanism would be consistent -- indeed would effectuate -- the Cold Weather Rule's existing requirement that the ... "commission shall recognize and permit recovery of reasonable operating expenses incurred by a utility because of the rule." 4 CSR 240-13.055(12). At the same time, the tracker would also constitute a reasonable response to the circuit court's repeated findings that a reasonable recovery mechanism must be implemented by the Commission to address the financial effects of its revisions to the Cold Weather Rule. In view of all of these considerations, there should be no real argument regarding the Commission's authority to approve such a mechanism. To the contrary, applicable legal considerations suggest that it would be far more dubious from a legal perspective for the Commission *not* to approve such a mechanism than it would be for it to move forward with such an approach.
- There is strong policy precedent for an uncollectible expense accounting tracker. As previously noted similar mechanisms have been repeatedly employed by the Commission to address other cost items that fluctuate significantly due to market factors beyond the utility's control, including pension costs and post-retirement medical benefits. This factor is certainly applicable to uncollectible expenses, which are not only affected by extremely volatile changes in the wholesale price of natural gas but also by rather frequent regulatory changes to the Cold Weather Rule. Because experience has shown that accounting trackers have worked effectively in the past to reduce the financial impact that changes in these significant cost areas have had on customers and utilities alike, there is every reason to believe that a tracker would prove equally effective in addressing uncollectible expenses.
- By providing for eventual recovery of any under-recoveries and return of any over-recoveries, an uncollectible expense accounting tracker would also have the effect of reducing the disputes which can and often do occur when establishing expense and revenue levels in a general rate case proceeding and eliminate the need to litigate alternative approaches for recovering such costs. At the same time, a tracker would also eliminate the need to establish uncollectible expense levels based on guesses of what is likely to occur -- guesses that almost always turn out to be wrong and

that, for one reason or another, have led to a chronic under-recovery of such expenses.

- Like other trackers, an uncollectible expense accounting tracker would work both ways, in that it would cover both increases and decreases in uncollectible expenses, thereby protecting both the utility and the ratepayer.

For all of these reasons, as well as those discussed in greater detail below, the Missouri Utilities strongly urge the Commission to incorporate these recommendations in any final rule issued as a result of this proceeding.

CLARIFICATIONS TO ELIGIBILITY REQUIREMENTS

As previously noted, the Missouri Utilities recommend only two clarifications to those provisions of the Proposed Amendment which govern the terms for retaining or restoring service. Both of them relate to who is eligible to take advantage of the more lenient payment provisions of the Proposed Amendment.

The first clarification simply seeks to preserve an option that utilities already have under the current Cold Weather Rule to establish income levels at which customers are eligible to receive the more lenient payment provisions set forth in the Rule. This provision, which was adopted as recently as 2004, provides that a utility may file tariffs establishing procedures for limiting the availability of the Rule's payment terms to households with net income levels below (150%) of the federal poverty level. 4 CSR 240-13.055(13).

The obvious intent of this provision is to make explicit what has always been implicit in the Rule, namely that the Rule's overriding purpose is to help those customers who, because of their limited incomes, would otherwise have difficulty maintaining utility service during the winter heating season. Stated another way, the Cold Weather

Rule was never intended to provide all customers a carte blanche relaxation of their customary payment obligations, regardless of need, simply because the weather has turned colder. The very same considerations should also apply to the relaxed payment provisions set forth in the Proposed Amendment. Accordingly, the Proposed Amendment should be revised to make it clear that the utility's current option to propose and, with the Commission's approval, implement income eligibility requirements also applies to the payment provisions set forth in the Amendment. Clarifying language to that effect is set forth in Attachment A, hereto, as a revision to subsection (14)(F) of the Proposed Amendment.

The second clarification is designed to ensure that the provision of the Proposed Amendment which requires the utility to offer the Amendment's more lenient payment terms only once to each customer is truly a one-time requirement. Although the Missouri Utilities do not believe it is unreasonable to provide eligible customers who truly need it a one-time opportunity to retain or restore utility service under more lenient payment terms, other customers would face a significant risk of increased uncollectible expenses if the same customer were given multiple opportunities to participate in such arrangements. Indeed, if a customer never had to pay more than 50% of his or her arrearages in order to have service restored, it is almost certain that the customer's arrearage level would continue to grow year after year if payments other than the initial one were never made. Accordingly, the Missouri Utilities propose that a sentence be added at the end of subsection (14)(A) clarifying that the one-time offer requirement includes offers that were made by the utility as a result of the Commission's last Emergency Amendment to the Cold Weather Rule in December 2005, as well as offers that are made by the Utility

subsequent to the effective date of the Proposed Amendment under consideration in this proceeding. (*See Attachment A*).

UNCOLLECTIBLE EXPENSE ACCOUNTING TRACKER

In addition to clarifying when customers are eligible to take advantage of the more lenient payment terms set forth in the Proposed Amendment, the Missouri Utilities also believe it is imperative that the Commission adopt as part of the Amendment language authorizing an uncollectible expense accounting tracker as set forth in Attachment A. Specifically, the Missouri Utilities recommend that the Commission substitute the following language for the cost recovery language that is currently set forth in subsections 14(G) and (H) of the Proposed Amendment:

“Each gas utility shall be authorized to defer for recovery from, or return to, customers in any existing or subsequent general rate case proceeding, the difference between the cumulative monthly net write-off amounts reflected in its base, non-gas rates as of January 1, 2006 and the cumulative monthly net write-off amounts actually experienced by the utility subsequent to that date. Such deferred amounts, either negative or positive, shall be amortized over a three year period as a component of the rates established in each applicable general rate case proceeding. Initially, the amount of net write-offs reflected in the gas corporation's rates shall be that amount actually experienced by the gas corporation for the calendar year ending December 31, 2005, or, if the gas utility concluded a general rate case proceeding in calendar year 2005, the average of the amounts recommended by the gas corporation and the Commission Staff or the amount ordered by the Commission. In each general rate case proceeding concluded subsequent to 2005, the level of net write-offs reflected in rates shall be the average of the amounts recommended by the gas corporation and the Commission Staff, unless a different amount has been agreed upon by the parties or determined by the Commission, plus or minus any unamortized or over-amortized amounts from any previous deferral period. In each subsequent rate case proceeding, the new deferral period shall commence immediately following the end of the latest update period used to derive the level of net write-offs reflected in the rates established in that case.”

There are a number of compelling reasons why the Commission should adopt this accounting mechanism as part of the Proposed Amendment. First and foremost, the law requires a recovery mechanism that is far more certain and reliable than that provided by the vague accounting authorization language set forth in the Proposed Amendment. As previously noted, two separate judges of the Circuit Court of Cole County have independently determined that mere authorization to file for an accounting authority order does not provide a sufficient mechanism to make utilities whole for the financial losses they incur when the Commission changes the rules governing how they collect the revenues to which they are lawfully entitled. The rationale and judicial precedent underlying these determinations is discussed in *State ex rel. Alma Telephone Company, et al. v. Public Service Commission*, 40 S.W.3d 381 (Mo. App. 2001).

In *Alma Telephone*, the subject telephone companies suffered reduced revenues as the result of the Commission's elimination of the Primary Toll Carrier ("PTC") Plan. The law of the case was based upon the court's finding:

. . . that the Commission did not calculate the financial impact of eliminating the PTC Plan on the Telephone Companies. The court noted that the Commission did not find any of the Telephone Companies' tariffed rates or revenues to be unreasonable, unlawful, or excessive although it recognized that the change from the PTC Plan to an ORP could cause the Telephone Companies to lose revenues and incur new expenses. Finally, the court found that the Commission provided in its order that any of the Telephone Companies that subsequently experienced revenue losses could file a rate case under the Commission's existing rate base/rate of return regulation procedures to attempt to recover the loss or, in other words, that the Commission determined that the Telephone Companies were "not entitled to be kept whole for the revenue losses that [would] be experienced as part of the process of replacing the PTC Plan with an ORP."

In its conclusions of law, *the trial court determined that the Commission's denial of revenue neutrality to those companies that would experience revenue losses as a result of the transition to an ORP arrangement was an unconstitutional taking of revenues without due process and was a revenue reduction imposed by the Commission without*

considering all relevant factors. It held that the Telephone Companies' tariffed access and billing and collection rates and revenues were *prima facie* lawful and reasonable until found otherwise; that the Commission's Report and Order did not find any of the Telephone Companies' rates or revenues to be unlawful or unreasonable; and that the Commission's invitation to the companies to file rate proceedings if they were adversely affected by its decision was an unlawful shifting of the burden of proof to the companies. The court concluded that the Commission could not lawfully eliminate the PTC Plan and require the Telephone Companies to provide intraLATA toll service in their respective exchanges without either engaging in a financial analysis of the companies or providing a *revenue neutrality* mechanism assuring that the companies' earnings would not be financially impacted. Thus, the court reversed the Commission's Report and Order and remanded the case to the Commission for the purpose of conducting a new hearing in a manner consistent with its judgment.

Id. at 385 (emphasis added). The Cole County Circuit Court found similar principles required revenue neutrality in striking down the Commission's Community Optional Service orders, *See State ex re. Contel of Missouri, et al. v. Public Service Commission*, Cases Nos. CV190-190CC, CV190-191CC and CV190-193CC and *State ex rel. Choctaw Telephone Company v. Public Service Commission*, Case No. CV193-66CC and in striking down previous emergency amendments to the Cold Weather Rule. (*State ex rel. Missouri Gas Energy, et al., v. Public Service Commission*, Case No. 01CV325865 (Cole Cty Cir. Ct., decided November 27, 2001); *State ex rel. Mo. Gas Energy, et al., v. Public Service Commission*, Case No. 05AC-CC01138 (Cole Cty Cir. Ct., decided February 8, 2006)).

The Proposed Amendment in the present case has similar problems. The Missouri Utilities present rates are based, in part, upon the collection policies currently found within the existing Commission rules and the Missouri Utilities' tariffs. The Proposed Amendment serves to reduce those revenues by requiring lesser payments of past due amounts in order to reconnect, or maintain, utility service for those customers who have previously failed to follow through on payment plans under existing rules. Also, by requiring the reconnection, or preventing the disconnection, of customers that

would otherwise not be on the system, the Proposed Amendment requires the Missouri Utilities to incur greater bad debts than otherwise would exist and thereby incur new expenses. As a result, the Proposed Amendment creates an “unconstitutional taking of revenues without due process and is a revenue reduction imposed by the Commission without considering all relevant factors,” as the Commission has not found, nor does it have any basis to find, that the Missouri Utilities’ rates are unreasonable or unjust.

The Proposed Amendment attempts to address the increased expenses, reduced revenues, reduced income and reduced achieved returns resulting from this rule change in an accounting authority order. This mechanism would permit the deferral of expenses caused by the Proposed Amendment for recovery in a subsequent general rate case. Unfortunately, it suffers the same deficiency as that found in the *Alma Telephone* case in that it would effectuate an “unlawful shifting of the burden of proof” to the Missouri Utilities to prove that they are due revenues to which they are already entitled. In addition to these considerations, there is also the issue as to whether the Commission has complied with its own rule provision. As previously noted, the Cold Weather Rule itself has a provision which states that the “...commission shall recognize and permit recovery of reasonable operating expenses incurred by a utility because of the rule.” 4 CSR 240-13.055(12). Years of experience have shown, however, that this straightforward requirement has not been satisfied by the Commission's existing practices. To the contrary, the state's two largest gas utilities, Laclede and MGE, have under-recovered their uncollectible expenses by a combined total of nearly \$30 million over the past 10 years, as shown in Attachments 1 and 2. And, as shown on Attachment 3, over the past 4 years, more than 90% of these uncollectible expenses have been caused by the residential customers who benefit from the lenient reconnection, deposit and payment terms of the Cold Weather Rule.

In view of these considerations, the Missouri Utilities could fairly argue that the only constitutionally-permissible solution to this problem is the one that was adopted by

the Commission in response to the *Alma Telephone* decision, wherein the companies were allowed to file tariffs containing interim rates, subject to refund, designed to achieve “revenue neutrality.” As previously discussed, however, in an effort to break the impasse which has developed over the cost recovery issue, the Missouri Utilities have fashioned an alternative solution that seeks to accommodate the various objections that Staff and Public Counsel have previously raised to other proposals submitted in the past to address this issue. And the Missouri Utilities have done so by basing that approach on accounting and cost recovery measures that the Commission and other parties have long deemed acceptable for addressing other expense items.

To that end, the uncollectible expense accounting tracker does *not* contemplate recovering the gas cost portion of uncollectible expense as part of the Purchased Gas Adjustment clause -- as Laclede and other utilities have previously proposed to do. Although the Missouri Utilities believe that such PGA treatment is eminently reasonable, as evidenced by its recent adoption in Kansas and a variety of other jurisdictions, it recognizes that Staff and perhaps other parties continue to have concerns regarding such an approach. Nor does the uncollectible expense accounting tracker contemplate *any* separate surcharge or rate adjustment being implemented outside the context of a general rate case proceeding. Once again, the Missouri Utilities believe that such an approach is not only reasonable but fully warranted under Missouri law as an appropriate response to the legal principles that both Judge Brown and Judge Callahan of the Cole County Circuit Court have previously determined should govern cost recovery in this area. Nevertheless, no surcharge or rate adjustment is being proposed in light of the objections that have also been raised by Staff and others to these mechanisms.

Instead, the uncollectible expense accounting tracker simply defers for future recovery in a general rate case proceeding the difference between the amount of uncollectible expense included in rates, or existing at the time the last Emergency Rule went into effect on January 1, 2006, and the amount, whether higher or lower, actually

incurred by the utility. In taking this approach, the tracker is fully consistent with the Proposed Amendment's preference for utilizing accounting authorizations to address this issue. Moreover, by not providing for any carrying costs on the difference between the level of uncollectible expense included in rates and the level actually incurred, the tracker also ensures that utilities will retain a strong incentive to control their uncollectible expenses through appropriate collection efforts.

Just as significantly, the adoption of the uncollectible expense accounting tracker will resolve recovery issues relating to uncollectible expense not only for this and future rulemaking proceedings, but also for purposes of future rate cases. Moreover, it will do so in a way that has previously been deemed acceptable by the Commission, Staff, Public Counsel and other parties. As previously discussed, the Commission has used accounting trackers to address other cost items that fluctuate significantly due to market factors beyond the utility's control. Among others, these have included trackers for pension costs and post-retirement medical benefits, as well as trackers for costs caused by changes in the Commission's Cold Weather Rule requirements. *Re Empire District Electric Company*, Case No. ER-2004-0570, Report and Order issued March 10, 2005; *Re Missouri Gas Energy* Case No. GR-2004-0209, Report and Order Issued September 21, 2004; *Re Aquila, Inc.*, Case No. ER-2005-0436, Order Approving Stipulation and Agreement, Issued February 23, 2006; *Re Laclede Gas Company*, Case No. GR-94-220, Report and Order Issued August 22, 1994; *Re Laclede Gas Company*, Case No GR-2001-629, Order Approving Unanimous Stipulation and Agreement, Issued November 29, 2001. The same considerations which justified the establishment of these trackers are equally applicable to uncollectible expenses, which are not only affected by extremely volatile changes in the wholesale price of natural gas, but also by rather frequent regulatory changes to the Cold Weather Rule. Because experience has consistently shown that accounting trackers have worked effectively in the past to reduce the financial impact that changes in these significant cost areas have had on customers and utilities

alike, there is every reason to conclude that a tracker would work equally well in addressing uncollectible expenses.

In addition, an uncollectible expense accounting tracker would also have the effect of reducing the disputes which can and often do occur when establishing expense and revenue levels in a general rate case proceeding by ensuring the eventual recovery of or return to customers of any differences between what was estimated and what was actually incurred. In short, a tracker would mitigate the uncertainty associated with establishing the amount of uncollectible expenses and, in the process, ensure that both the utility and its customers are protected.

For all of these reasons, the Missouri Utilities believe that such a tracker should be adopted by the Commission as a thoroughly reasonable and legally indispensable part of its Proposed Amendment.

WHEREFORE, for the forgoing reasons, the Missouri Utilities respectfully request that the Commission incorporate these recommendations in any final Proposed Amendment issued in this proceeding.

Respectfully Submitted,

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ATTACHMENT 1

MISSOURI GAS ENERGY COMPARISON OF ACTUAL UNCOLLECTIBLES AND UNCOLLECTIBLES INCLUDED IN RATES

	Actual Uncollectibles	Rate Case Allowance	Difference
FYE 1996	\$ 3,906,455	\$ 3,409,662	\$ (496,793)
FYE 1997	9,442,692	3,409,662	(6,033,030)
FYE 1998	4,469,856	3,409,662	(1,060,194)
FYE 1999	2,584,998	4,325,000	1,740,002
FYE 2000	1,696,606	4,325,000	2,628,394
FYE 2001	12,653,781	4,325,000	(8,328,781)
FYE 2002	3,211,390	4,323,292	1,111,902
FYE 2003	6,602,056	4,323,292	(2,278,764)
FYE 2004	8,537,318	4,323,292	(4,214,026)
CYE 2005	<u>7,108,777</u>	<u>7,042,000</u>	<u>(66,777)</u>
Total	<u>\$ 60,213,929</u>	<u>\$ 43,215,862</u>	<u>\$ (16,998,067)</u>

ATTACHMENT 2

LACLEDE GAS COMPANY COMPARISON OF ACTUAL UNCOLLECTIBLES AND UNCOLLECTIBLES INCLUDED IN RATES

<u>Fiscal Year</u>	<u>Actual Uncollectibles</u>	<u>Rate Case Allowance</u>	<u>Difference</u>
1996	4,246,546	5,174,753	928,207
1997	8,236,705	4,703,000	(3,533,705)
1998	7,584,521	4,703,000	(2,881,521)
1999	5,377,844	5,733,097	355,253
2000	4,583,253	6,238,936	1,655,683
2001	5,379,383	6,351,500	972,117
2002	11,294,193	7,516,279	(3,777,914)
2003	7,481,477	7,973,287	491,810
2004	9,139,788	8,000,000	(1,139,788)
2005	10,547,022	8,000,000	(2,547,022)
Plus: 9 mos June 2006	7,978,247	6,796,578	(1,181,669)
Less: 9 mos June 1996	2,665,918	3,902,030	1,236,112
Ten Years ended June 2006 Total	79,183,061	67,288,400	(11,894,661)

ATTACHMENT 3

MGE Residential Customers' Write-Offs As a Percentage of Total Write-Offs

Year	Residential Percentage
2002	87.52%
2003	94.46%
2004	91.74%
2005	92.95%
2002-2005 Average	91.67%

Laclede Residential Customers' 90+ Days Arrears on Finaled Accounts As a Percentage of Total 90+ Days Arrears on Finaled Accounts

<u>Year Ended May 31</u>	<u>Residential Percentage</u>
2002	91.5%
2003	97.0%
2004	93.4%
2005	88.7%
2002-2005 Average	92.0%