

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held by telephone and internet audio conference on the 16th day of December, 2020.

In the Matter of a Motion for an)
Emergency Order Establishing a)
Temporary Moratorium on Utility)
Discontinuances to Protect Public Health)
and Safety by Mitigating the Spread of the)
COVID-19 Pandemic.)

File No. AO-2021-0164

ORDER DENYING MOTION

Issue Date: December 16, 2020

Effective Date: December 26, 2020

On December 7, 2020, Consumers Council of Missouri filed a *Request for Emergency Order and Motion for Expedited Treatment* requesting that the Commission issue an emergency order placing a moratorium on involuntary residential disconnections by water, electric, and gas corporations and a waiver of any late fees through at least March 31, 2021.¹ Consumers Council asked for a Commission decision by December 16, 2020. The Commission directed notice of the motion and directed that responses be filed by December 14, 2020.

Consumers Council's reason for its request was to help "flatten the curve" of the increasing number of COVID-19 cases within the state by preventing regulated water, gas, and electric utilities from disconnecting residential customers. Consumers Council's theory is that if residential customers are disconnected or are under the threat of

¹ March 31, 2021, is the expiration date of the most recent declaration of a state of emergency in Governor's Executive Order 20-19.

disconnection, they will be more likely to move or seek shelter in other than their current residences. This mobility would then lead to increased spread of COVID-19.

As support for its motion, Consumers Council cited to several academic and research articles, the White House COVID-19 Task Force State Report for Missouri,² and specifically to a Duke University study³ showing that moratoriums on disconnections help reduce the spread of COVID-19 by allowing people to continue to shelter at home, even when suffering economic distress because of layoffs, illness, quarantines, and other causes of lost income due to the pandemic. Attached to its request and motion were letters of support from the Missouri Hospitals Association, Empower Missouri, National Housing Trust (NHT), and Missouri Energy Efficiency for All (MO-EEFA).⁴ Consumers Council later submitted letters in support from the Missouri Public Health Association, and AARP. Additionally, Renew Missouri, AARP, NHT, and ArchCity Defenders, Inc., have filed applications to intervene in the case, and Legal Services of Eastern Missouri and Sierra Club submitted statements in support of the motion.⁵

² Issue 24, November 29, 2020.

³<https://nicholasinstitute.duke.edu/articles/policy-pandemic-housing-security-policiesreduce-us-covid-19-infection-rates>

⁴ MO-EEFA is a coalition of other groups: NHT, Renew Missouri, Elevate Energy, National Resource Defense Council (NRDC), Missouri Housing Development Commission, Tower Groves Neighborhood Community Development Corporation, and Midwest Energy Efficiency Alliance (MEEA).

⁵ On December 15, 2020, ArchCity Defenders filed additional letters in support of Consumers Council's motion from the following: Christ Church UCC, Economic Security Corporation of Southwest Area, Jewish Community Relations Council of St. Louis, KC Tenants, Kids Win Missouri, Metropolitan St. Louis Equal Housing and Opportunity Council, Missouri Community Action Network, Operation Food Search, Saint Louis University Center for Service and Community Engagement, and Sts. Joachim and Ann Care Services.

The large Commission-regulated utilities in the state,⁶ the CSWR-Affiliated Utilities,⁷ and two municipalities⁸ all filed responses opposing Consumers Council's motion. The utilities stated that at the beginning of the pandemic they each voluntarily placed a moratorium on residential disconnections. This action allowed the utilities time to take the necessary legal and organizational steps to revise their payment plans, collections processes, customer financial assistance programs, and other operations to better serve their customers during the pandemic. Each of the utilities explained the actions it had taken and indicated that most of the repayment and financial assistance programs were still available and funded. The utilities stated concern that a blanket moratorium would have unintended consequences and could harm customers by making them ineligible to receive financial assistance from LIHEAP because no disconnection was imminent. Additionally, the utilities stated that customers often did not engage with the utilities to seek help with payment plans and financial assistance until prompted to do so by disconnection notices. The utilities argued that granting the motion may leave customers with insurmountable arrearages when the moratorium expires.

The utilities argued that the programs they have put in place should be allowed to work and have been working. The CSWR-Affiliated Utilities gave the example that it had very few customers requesting extended payment plans at the end of its voluntarily moratorium and had not involuntarily disconnected any customers during the pandemic.

⁶ Union Electric Company, d/b/a Ameren Missouri; Spire Missouri, Inc.; Evergy Metro, Inc. d/b/a Evergy Missouri Metro and Evergy Missouri West, Inc. d/b/a Evergy Missouri West (collectively referred to as "Evergy"); Summit Natural Gas of Missouri; The Empire District Electric Company, The Empire District Gas Company, Liberty Utilities (Missouri Water) LLC, and Liberty Utilities (Midstates Natural Gas) Corp. (collectively referred to as "Liberty"); Missouri-American Water Company (MAWC).

⁷ Confluence Rivers Utility Operating Company, Inc.; Elm Hills Utility Operating Company, Inc.; Hillcrest Utility Operating Company, Inc.; Indian Hills Utility Operating Company, Inc.; Raccoon Creek Utility Operating Company, Inc.; and Osage Utility Operating Company, Inc. (collectively referred to as the "CSWR-Affiliated Utilities").

⁸ The City of St. Joseph, Missouri, and the City of Jefferson, Missouri.

Ameren Missouri reported that its current programs are working as the number of disconnections in August 2020 are lower than in August 2019. Evergy also reported that its programs are working as evidenced by the fact that the number of customers on pay arrangements at the end of November 2020 is greatly increased compared to the same period in 2019 but the average amount of arrears remains similar to pre-pandemic numbers. MAWC reported that since it resumed disconnections in September 2020, monthly disconnections have decreased compared to the pre-pandemic number.

The utilities also argued that from November 1 to March 31, the Commission's Cold Weather Rule⁹ is in place and will decrease the amount of disconnections and increase the length of payment plans, alleviating some of the disconnection fears. Finally, several of the large utilities noted that they had additional voluntary moratoriums on disconnections for nonpayment and the waiver of late fees through the end of December 2020 and some into March 2021.

Additionally, the City of St. Joseph and the City of Jefferson stated that Consumers Council's moratorium will have the unintended consequence of causing financial distress on some municipalities and other unregulated public systems that rely on established contracts with regulated water utilities to disconnect water customers for non-payment of sewer services provided by the non-regulated utility. The municipalities stated that the voluntary moratoriums of the utilities at the beginning of the pandemic put an unintended financial strain on their public works systems and their ability to service municipal bonds.

The Staff of the Commission stated in its response that Consumer Council's motion requested a moratorium that was too broad and should not be applied to small utilities.

⁹ 20 CSR 4240-13.055(6).

Staff also responded that such a moratorium should be closely scrutinized so as to not create unintended consequences. Staff noted that a broad application of a moratorium should be promulgated as a rule.

As legal authority for the Commission to take its requested action, Consumers Council cites the Commission's general statutory authority found in Section 386.310.1, RSMo. That provision gives the Commission the authority, after hearing, to issue orders or rules requiring utilities to:

maintain and operate its line, plant, system, equipment, apparatus, and premises in such manner as to promote and safeguard the health and safety of its employees, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety and other devices or appliances, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, customers or the public may demand, including the power to minimize retail distribution electric line duplication for the sole purpose of providing for the safety of employees and the general public in those cases when, upon complaint, the commission finds that a proposed retail distribution electric line cannot be constructed in compliance with commission safety rules. The commission may waive the requirements for notice and hearing and provide for expeditious issuance of an order in any case in which the commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property, provided that the commission shall include in such an order an opportunity for hearing as soon as practicable after the issuance of such order.

Even though the statute appears to grant the Commission broad powers to act to protect the health and safety of the public, the Commission cannot issue an order of general applicability. Such an order would be a "rule" as defined by Section 536.021(6), RSMo. That statute defines a 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 any agency." The legislature has given the Commission the power to make rules and regulations, but it must follow the notice and

comment rulemaking process in Chapter 536, RSMo. The Missouri Supreme Court has also said that “[a]gencies cannot promulgate, or repeal, a rule by an adjudicated order.”¹⁰ An administrative rule that is adopted in violation of the notice and comment procedures of the state Administrative Procedures Act is “void.”¹¹ Thus, in order to take the action requested by Consumers Council, the Commission would need to promulgate an emergency rule under Section 536.025, RSMo.¹²

An emergency rule may be made only if the Commission:

- (1) Finds that an immediate danger to the public health, safety or welfare requires emergency action or the rule is necessary to preserve a compelling governmental interest that requires an early effective date as permitted pursuant to this section;
- (2) Follows procedures best calculated to assure fairness to all interested persons and parties under the circumstances;
- (3) Follows procedures which comply with the protections extended by the Missouri and United States Constitutions; and
- (4) Limits the scope of such rule to the circumstances creating an emergency and requiring emergency action.¹³

The Commission has carefully reviewed Consumers Council’s motion and shares its concern for the well-being of utility customers and all Missouri citizens during the pandemic. However, the Commission can only take the actions it is has been authorized by the state legislature to take. Consumers Council provides no legal authority for the requested Commission action, other than its interpretation of Section 386.310, RSMo. The Commission disagrees with Consumers Council’s interpretation and determines that it does not have authority to grant the motion. Any emergency action the Commission takes that has general applicability to an industry, such as the motion made by Consumers

¹⁰ *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 357 (Mo. 2001).

¹¹ See, *NE Hosps., Inc. v. Development of Soc. Servs.*, 850 S.W.2d 71 (Mo. banc 1993).

¹² On December 15, 2020, Consumers Council filed a reply to the utility responses continuing to argue that the Commission has authority under Section 386.310, RSMo, to take the requested action.

¹³ Section 536.025.1, RSMo.

Council, must be promulgated as an emergency rule under the provisions of Section 536.025, RSMo.

Furthermore, based on the motion and the responses of Staff and parties in support of and in opposition to the motion, the Consumers Council has not provided sufficient evidence that its proposed moratorium is necessary to protect the public from an immediate danger, that such emergency action would be best calculated to assure fairness to all interested parties, or that the scope of the requested action is appropriately limited so that it does not cause additional harm. The Commission denies Consumer Council's motion.

THE COMMISSION ORDERS THAT:

1. The *Request for Emergency Order and Motion for Expedited Treatment* filed on December 7, 2020, by Consumers Council of Missouri is denied.
2. This order is effective December 26, 2020.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Rupp, Coleman, and
Holsman CC., concur.

Dippell, Senior Regulatory Law Judge