

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of a Proposed Emergency     )  
Amendment to Commission Rule 4 CSR     )  
240-13.055.     )

Case No. GX-2006-0181

**STAFF'S COMMENTS ON THE LDC'S DECEMBER 5, 2005 PROPOSAL,  
AND ON REVENUE NEUTRALITY**

At the December 6, 2005, hearing in this case, the Commission invited the parties to respond to two items: the LDC's alternate cost recovery proposal (Hearing Exhibit 8); and comments of Laclede Gas Company about the weight to be accorded to decisions of the Cole County Circuit Court that AAOs are not sufficient guarantees of required "revenue neutrality" in Commission rulemakings.

The LDC's December 5, 2005 Proposal (Hearing Exhibit 8) Comments

1. Initially, Staff notes that the proposal permits the imposition of a new rate to recover the cost of a single rate outside of a general rate proceeding. The proposal provides no authority for such a rate-setting, nor was such support provided by LDC counsel at the hearing. Further, the proposal is not clear whether the proposed AAO is to be used in conjunction with setting the proposed new rate, or whether it is authorization of a separate recovery mechanism at the option of the LDC.

2. The Staff has no problem with subdivisions (a) and (b) of Exhibit 8.

3. The Staff disagrees with the provisions of subdivision (c) to the extent that it incorporates costs described in subdivision (d), to which Staff objects.

4. Although subdivision (d) purports to track “the costs of complying with the rule,” Staff submits that it does not do so. Rather, the recovery will almost surely recover costs unrelated to implementation of the emergency provisions.

- a. There has been some confusion over the time needed to measure the fiscal effects of the emergency amendment. The Commission’s 2001 emergency amendment required LDCs to allow customers up to eighteen months to pay off arrearages. Thus, given that the rule expired on March 31, 2002, whether or not customers fully complied with payment agreements would not be determined until eighteen months after March 31, 2002. The rule, therefore, permitted AAOs to accumulate costs for eighteen months. In the present amendment, no party is proposing to extend payments for more than the current twelve months provided by the Cold Weather Rule. Thus, for this rule, all effects of the rule will be known twelve months after termination of the ECWR provisions, which must occur not later than June 29, 2006 (assuming a full 180-day emergency rule period). There is no need to track costs, for recovery through an AAO or otherwise, for more than twelve months after the termination of the ECWR.
- b. The LDCs propose to recover “90% of any bad debt amounts that are associated with charges to customers in (i) above who take advantage of this emergency rule shall be identified and accumulated as of September 30, 2007, as costs of complying with this rule,” less two reductions described later.

- i. The LDCs provide no explanation for the 90% figure. If it is meant as an estimate of the total bad debt that represents the natural gas portions of the customers' entire arrearages, it is unjustified and appears to over-recover the costs of the ECWR by overstating the gas cost portion of total bills. If it is intended as a negotiating ploy, to trade recovery of legitimate costs in return for authorization of a single-issue rate, it is simply inappropriate. Staff's position is that the LDCs should recover all costs caused by the amendment; not recover costs not caused by the amendment; and recover all eligible costs caused by the rule. The Staff believes that a matrix like the one used by Laclede Gas Company to comply with the 2001 ECWR will appropriately measure the costs of this proposed amendment.
- ii. Staff expects that customer compliance with the payment terms under the rule can be determined not later than twelve months after expiration of the ECWR. That is, by that date all customers will have successfully completed the payment plans extended under the rule, or will have defaulted. At that time, the actual costs of the rule can be computed by use of the matrix used by Laclede Gas Company to comply with the 2001 ECWR, which Staff attached to its initial filing in this case.
- c. Staff believes that use of a matrix like the one used by Laclede for the 2001 ECWR eliminates the need to specify the reductions proposed by the LDCs in subparts iii and iv.
- d. The provisions of subpart v. are unnecessary in light of Staff's earlier comments. However, should the Commission approve direct charges, Staff suggests that 90

days to audit two years of records of all LDCs, coupled with anticipated rate cases, may not be sufficient. Staff recommends that the Commission not commit now to a timetable so far in the future and so dependent on unknown variables.

- e. Staff does not believe that there is any need for the provisions of subpart vi. One year after the expiration of the ECWR the LDCs will know if the customers taking advantage of the rule have met payment obligations. For those that have not, and who later make partial or total repayment, those payments will be reflected in the normal course of business through either reductions to accounts receivable (if not written off) or through write-off reversals (if the accounts are written off).

#### Separate Rate Recovery

5. At the hearing the LDCs emphasized the holding of the Cole County Circuit Court in a challenge to the 2001 ECWR, reversing the Commission's finding that an AAO was a sufficient recovery mechanism. Staff does not agree that the Circuit Court's decision was well-taken, and suggests that the Court of Appeals might reach a different conclusion.

6. By way of briefly identifying support for its position, Staff directs the Commission to *City of Kansas City, Missouri v. Jimmy Jordan*, No. WD64388, October 25, 2005. The slip opinion, pages 5 through 8, discusses the exercise of police power, and the due process rights limiting the exercise.

. . . . The police power may be exercised to protect public health and safety. [Citation omitted] In fact, "the preservation of the public health is a paramount end of the police power of the state." [Citation omitted] "Every citizen holds his property subject to the valid exercise of the police power." [Citation omitted] Where public safety and welfare, as well as peace and health are involved, the sovereign may abridge, abrogate, impair, or even *destroy* property. [Citation omitted]

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. . . In order for the requirements of due process to be met, parties whose rights are to be affected must be given notice and the opportunity to be heard. [Citation omitted] The notice and opportunity to be heard must be at a meaningful time and in a meaningful manner. [Citation omitted] “Due process is flexible and calls for such procedural protections as the particular situation demands.” [Citations omitted] “Due process analysis requires the balancing of three competing interests: (1) the private interest that will be affected by official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional safeguards; and (3) the government interest.” [Citations omitted.]

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“[T]he necessity of quick action by the State and the impracticability of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State’s action at some time after the initial taking, can satisfy the requirement of procedural due process.” [Citations omitted.]

7. Staff suggests that an AAO meets the Western District’s statement of the law. An AAO permits the LDCs to record any costs of the ECWR for possible recovery at a time when such costs, if any, are actually known. Particularly in the present circumstances, where costs are unknown, pre-deprivation relief is impracticable.

8. Further, a due process analysis will not be ripe for review until after the ECWR has run its course. Prior to that time, no LDC will be able to specify whether the ECWR has worked a takings, nor state the amount of any such takings. Thus, relief, if any is owed, must in any event await the outcome rather than the inception of the ECWR.

Respectfully submitted,

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 7th day of December, 2005.

/s/ Thomas R. Schwarz, Jr.