

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

IN THE MATTER OF MIDWEST ENERGY SEEKING COMMISSION) Docket No.
APPROVAL TO IMPLEMENT A PAY-AS-YOU-SAVE PROGRAM)
FOR ITS ELECTRIC SERVICE) 07-MDWG-788-TAR
)

STATE CORPORATION COMMISSION

JUN 18 2007

BRIEF OF MIDWEST ENERGY

A. Introduction

Susan K. Driff Docket Room

The How\$martsm program is designed primarily to facilitate the purchase and installation of energy efficiency products for the low income and rental markets – although other residential and commercial customers are eligible to participate. The program is modeled on the Pay As You Save[®] (PAY^S[®]) program – a type of program that the Kansas Energy Plan 2007 encouraged utilities to implement on a pilot basis.¹ A copy of the relevant portion of the Kansas Energy Plan is attached as Exhibit 1.

Midwest Energy Inc.'s (Midwest Energy) initial How\$martsm tariff filings and related documents have been the subject of extensive discussions between Commission Staff and the Citizens' Utility Ratepayer Board (CURB). As a result, the initial filings have been modified to reflect numerous recommendations from those parties – particularly CURB. The product of these negotiations is reflected in the Stipulation and Agreement (S & A) executed and submitted by all three parties. The S & A incorporates both proposed tariff provisions and form documents to be utilized in implementing the program.

The parties have submitted the S & A urging Commission consideration and approval of the revised How\$martsm program. Notwithstanding agreement on the merits and desirability of

¹ The Kansas Energy Council, Kansas Energy Plan 2007, Chapter 9, "Energy Conservation and Efficiency," p. 34.

the program, there remain certain fundamental differences between Midwest Energy and CURB. Specifically, Midwest Energy and CURB disagree as to whether the program should be offered as a tariffed utility service that would allow disconnection for failure to pay How\$martsm charges and whether Midwest Energy should have the opportunity to recover bad debts from non-payment of such charges in future rate filings.

CURB contends that the disconnection and bad debt recovery options should not be permitted. For Midwest Energy, treatment as a tariffed utility service is a crucial element of the How\$martsm program without which the program may not go forward. Midwest Energy's position on these issues is consistent with the terms of the prototype PAYS® Program, with legislation enacted in the 2007 session by the Kansas legislature, with actions in other states that have addressed PAYS® type programs, with the Commission's broad regulatory authority, and with applicable provisions of the Commission's Standards on Billing Practices. Midwest Energy is eager to implement the program as submitted in the S & A. The Commission's resolution of the disputed issues, however, will determine whether the How\$martsm program will be implemented or withdrawn.

B. Mandatory Elements for PAYS® Programs

The program was originally filed as a PAYS® rider. Although Midwest Energy subsequently chose to change the designation to How\$martsm, the requirements for use of the PAYS® trademark are instructive. PAYS® America, owner of the trademark, has established these primary requirements:

1. Assignment of PAYS® charges to specific meter locations, rather than to individual customers. The How\$martsm program makes the payment assignments on a meter location basis. The parties are in agreement on this point.

2. Independent certification that products are appropriate and savings estimates exceed payments. Midwest Energy's energy audit and calculations underlying the How\$martsm conservation plan are designed to meet this requirement.
3. Billing and payment of the energy efficiency program costs on the utility bill with disconnection for nonpayment. The How\$martsm plan contemplates, and the parties agree, that billing and payment should be accomplished via the utility bill. As already noted, however, CURB disagrees regarding authority to disconnect service for nonpayment.

C. Disconnection for Nonpayment: An Essential Program Design Element

The ability to disconnect for nonpayment of the How\$martsm charge is an essential component of the plan. Consider the primary market barrier PAYS®-type programs are designed to overcome. Landlords are reluctant to invest in energy efficiency improvements when they are not responsible for payment of utility bills and when they will not realize any direct economic benefit from the additional investment necessary to achieve energy savings. Tenants are not willing to invest significant sums for energy efficiency improvements they will not own and from which they likely will benefit for only a short period of time. Neither are they willing to commit to financial obligations that would extend beyond the length of their occupancy.

The transferability of the repayment obligation in the How\$martsm plan overcomes this obstacle. The landlord is more likely to agree to energy efficiency improvements if someone else provides all or at least a portion of the capital. (The proposed tariffs allow a property owner to "buy down" the initial project cost if the projected savings do not exceed the monthly project surcharge. In this case the customer would only pay for the cost-justified portion of the project.)

Tenants should be more willing to pay for an improvement if overall utility bills -- including the project surcharge -- are reduced and no tenant obligations remain when the premises are vacated.

Even with transferability to future customers, however, there must be some means to encourage repayment of the project costs. Utility service is normally in the name of the tenant, not the property owner. If utility service cannot be disconnected for nonpayment of the How\$martsm charges, there is no immediate or efficient method to motivate payment. A utility is left with only the expensive and time-consuming option of initiating formal collection efforts via the court system. Once the conservation measure is installed, a customer receives the economic benefits, irrespective of payment practices, unless disconnection is an available tool.

Midwest Energy could retain a security interest in How\$martsm property and perfect by filing a financing statement. Retaining a security interest (sometimes herein referred to as a "lien") would be a significant obstacle to acceptance of the program. A UCC filing on the How\$martsm property creates potential liability for the property owner -- an individual or entity who, in the case of a landlord, already may be reluctant to make the investment. Moreover, a lien would not place any obligation on the tenant who is the primary beneficiary of the energy-saving improvement because the tenant has no ownership interest in the How\$martsm property. Equally problematic, the remedy for failure to make payments on the secured property is foreclosure. Apart from being very expensive, foreclosing on How\$martsm improvements would have the perverse effect of potentially removing items from service that have been determined to enhance energy efficiency. Finally, the basic act of filing UCC financing statements adds costs and creates an administrative burden. UCC financing statements must be filed and then renewed

every five years for a fee of \$15 per transaction. Special rules apply to proper fixture filings.² Terminations and amendments also incur a \$15 fee. By contrast, disconnection for non-payment of How\$martsm charges is both a more efficient and economical way to obtain payment than the UCC filing and foreclosure approach.

It should also be noted that the proposed How\$martsm tariffs require the project surcharge to be less than 90 percent of the estimated savings. As a result, net customer bills will be lower than they otherwise would be and the incidence of unpaid bills – and the need for disconnection – should actually decrease from the current circumstance.

D. Actions in Other Jurisdictions Support Midwest Energy’s Disconnection Request

Other legislative and regulatory bodies have considered the disconnection issue and explicitly allowed disconnection for nonpayment of PAYS®-type surcharges. In the 2006 session, the Hawaii State Legislature adopted Act 240 which addressed a number of energy-related topics.³ Governor Linda Lingle signed the “Energy for Tomorrow” legislation on June 26, 2006. Section 13 of Act 240 instructed the Hawaii Public Utilities Commission to implement a pilot program applying the PAYS® concept to solar water heating systems. Section 13.(b)(3) directed that the program should “[p]rovide for disconnection of utility service for non-payment of solar water heating system pay as you save payments....” Act 240 also set forth other important features underlying PAYS®-type programs including billing and payment via the utility bill and assignment of repayment obligations to the meter location.

² It should also be noted that certain items, such as insulation or windows, may lose their character as fixtures and become a part of the real estate. In that instance, a UCC filing would not be effective and a real estate mortgage would be required in order to perfect Midwest Energy’s interest in the items.

³ Hawaii State Legislature, 2006 Legislative Session, SB2957 SD2 HD2 CD1

Similarly, in a case involving approval of a pilot PAYS® program for New Hampshire Electric Cooperative and Public Service Company of New Hampshire, the New Hampshire Public Utilities Commission (NH Commission) found that it should approve:

utility authority to impose disconnection for non-payment of PAYS charges, and utility authority to require customers to assume PAYS payment obligations when beginning service at premises where permanent PAYS measures have been installed and unaccrued PAYS payments remain.⁴

In an earlier order, the NH Commission found that it had the authority to permit disconnection for nonpayment with one caveat: "...as long as this is clearly indicated in the utility's tariff."⁵

There, the NH Commission explained:

We agree with the parties that it is well within our statutory authority to permit a utility to impose disconnection on a customer for failure to make payment on PAYS charges, assuming the other requirements for disconnection are met. We begin with the premise that the statutory scheme under which the Commission operates gives it "plenary" ratemaking authority over the state's utilities, except in circumstances specifically enumerated in the statute.⁶

The NH Commission also explained that a PAYS®-type program is not a "collateral matter," so removed from the provision of the subject utility service as to prevent disconnection for non-payment.⁷ It reasoned:

PAYS measures and conventional electric service are complementary and interlocked in this sense. A PAYS measure generates no savings and is thus ineffective without the associated electric service and, in turn, an important policy objective associated with electric service [encouraging energy efficiency], is at least arguably less effective without PAYS. As noted by ECS and OCA, the key is clear tariff language – and, by extension, appropriate affirmative disclosures to PAYS customers about the consequences of non-payment.⁸

⁴ New Hampshire Public Service Commission, Order 23,851, at 15. November 29, 2001.

⁵ New Hampshire Public Service Commission, Order 23,758 at 9. August 7, 2001.

⁶ *Id.*, at 6-7.

⁷ *Id.*, at 7-9.

⁸ *Id.*, 9-10.

Interestingly, all parties submitting briefs in the New Hampshire proceedings, including the Governor's Office of Energy and Community Services and the Office of Consumer Advocate, agreed the NH Commission had authority to permit disconnection for failure to honor PAYS® obligations.⁹

E. This Commission is Empowered to Offer the How\$martsm Program as a Tariffed Service

1. 2007 Legislation Specifically Authorizes Commission Approval of PAYS®-Type Programs as a Tariffed Utility Service

This Commission has explicit statutory authority to approve the How\$martsm proposal. The Kansas Legislature adopted Substitute for House Bill 2278 (HB 2278) in the 2007 Session by an overwhelming margin.¹⁰ A copy of the bill is attached as Exhibit 2.

Section 1 (a) of HB2278 authorizes public utilities to enter into financing arrangements with customers and landlords of customers for the purchase and installation of energy conservation measures. Section 1 (b) gives the Commission authority to approve tariffs that will recover the utility's financing and program costs. It provides:

(b) Such utilities [offering energy conservation measure financing programs] may recover the cost of such financing and related program costs through tariffs approved by the state corporation commission pursuant to K.S.A. 66-117.

By attaching the repayment obligation to the premises (or meter), the How\$martsm plan assigns the repayment obligation to customers who are receiving utility service at those premises at any point in time. As a result, there is a direct link between the energy efficiency benefit and the repayment obligation. The traditional ratemaking nexus of cost causer/cost payer is maintained, albeit with How\$martsm that concept applies to costs on the customer's side of the

⁹ *Id.*, 4.

¹⁰ The Kansas House passed Substitute for House Bill 2278 on a unanimous vote, and the Kansas Senate passed the measure with only one dissenting vote. Gov. Kathleen Sebelius signed the measure on March 28, 2007.

meter. Additionally, the original tenant or property owner need not worry about an obligation that outlasts the occupation and receipt of utility services at the premises where How\$martsm efficiency and conservation improvements have been installed.

2. Commission’s General Authority Permits Approval of How\$martsm Program as a Tariffed Service

The Commission is granted broad authority to “supervise and control the electric and natural gas public utilities” under its jurisdiction.¹¹ It is also empowered “to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.”¹² K.S.A. 66-101g and K.S.A. 66-1,207 provide that “grants of power, authority, and jurisdiction” made to the Commission are to be “liberally construed” and confer on the Commission all incidental powers necessary to effectuate provisions of Kansas public utility law. The Commission’s substantive mandate is to ensure that utility services and practices are not “unjust, unreasonable, unreasonably inefficient or insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation” of Kansas public utility law.¹³ The advancement of energy efficiency measures through the approval of tariffed services falls within the scope of this broad authority.

This authority has been exercised frequently. For example, prior to the passage of HB2278, the Commission approved tariffs to establish voluntary energy conservation programs such as Kansas City Power & Light’s (KCPL) Low-Income Weatherization tariff and Energy Audit and Energy Saving Measures Rider.¹⁴ Features of the KCPL tariffs that are similar to Midwest Energy’s How\$martsm proposal include: (1) participation is voluntary, (2) funds may be used for program administrative costs, and (3) program costs may be recovered from ratepayers.

¹¹ K.S.A. 66-101 and K.S.A. 66-1,201.

¹² *Id.*

¹³ K.S.A. 66-101d, K.S.A. 66-1, 205.

¹⁴ Docket No. 06-KCPE-497-TAR and Docket No. 06-KCPE-1232-TAR.

It is worth noting that the Commission approved a Stipulation and Agreement between KCPL and intervening parties in Docket No. 04-KCPE-1025-GIE that specifically allowed KCPL to “accumulate costs for these programs in regulatory asset accounts as the costs are incurred through the next rate case”. The Commission also recently approved KCPL’s Building Operator Certification Program in Docket No. 07-KCPE-683-MIS to provide energy efficiency training to large commercial customers of the utility.

That the Commission may properly approve such measures and permit recovery of related costs is underscored by the provisions of K.S.A. 66-117(e). There the legislature has provided that, upon proper showing by a public utility, the Commission may allow a premium return on investments in projects or systems that can be reasonably expected “ . . . (2) to cause the conservation of energy used by its customers, or (3) to bring about the more efficient use of energy by its customers.” Although Midwest Energy has not requested the premium return envisioned by the incentive legislation, the How\$martsm program advances both conservation and efficiency objectives and thus comports with clear statements of legislative policy as to how the Commission may exercise its plenary regulatory authority.

F. Commission Billing Standards Permit Disconnection for Non-Payment of How\$martsm Charges

The Commission’s existing Electric, Natural Gas and Water Billing Standards (Billing Standards) do not prohibit implementation of the How\$martsm program as proposed, including the disconnection option. Under the Billing Standards, a regulated utility may discontinue service when a utility bill becomes delinquent, after proper notice has been given to a customer.¹⁵ Discontinuance of service is not allowed for, “...failure of a customer to pay for

¹⁵ KCC Electric, Natural Gas and Water Billing Standards, July 9, 2002, Section IV.A.(3)

special charges as defined in I.A.(3).”¹⁶ However, the Billing Standards define special services as “...those not authorized by tariff or otherwise specifically regulated by the Commission...”¹⁷ Midwest Energy’s How\$martsm proposal is clearly in the form of a tariff subject to Commission regulation. The propriety of according tariffed status to the proposal is confirmed by HB 2278.

G. Recovery of Bad Debt Expenses Should be Permitted

The proposed tariffs allow Midwest Energy to seek recovery of bad debts associated with the How\$martsm program in a subsequent rate case. CURB has indicated that it opposed this feature of the How\$martsm program, “...those who do not benefit from the equipment should not be required to guarantee the loan.”¹⁸ Contrary to CURB’s reasoning, this provision will not place an undue burden on program non-participants. Rather, because How\$martsm project payments must be less than the anticipated savings, one would expect the utility bills of How\$martsm participants to be lower than if no efficiency measures had been installed. In other words, if a How\$martsm customer leaves a bad debt with Midwest Energy, the amount of the debt will likely be smaller than it otherwise would have been. This is particularly true if Midwest Energy has the disconnection option available to enforce payment of How\$martsm charges. As a consequence, even non-participants should realize some benefit from the program.

Moreover, because the program is available to all commercial and residential customers, it would not be unjustly discriminatory or unduly preferential to permit the recovery of How\$martsm bad debt expenses from those customer classes. In this regard, it should be noted that Midwest Energy is not seeking prior Commission approval of How\$martsm associated bad debt expenses in this proceeding. Rather, the proposed tariff only allows Midwest Energy the

¹⁶ *Id.*, at Section IV.B.(1)

¹⁷ *Id.* at Section I.A.(3)

¹⁸ CURBside News, April, 2007, at 9.

opportunity to seek recovery in a subsequent rate case. At that time, the Commission would determine the reasonableness of the proposed bad debt expense amounts.

The propriety of allowing recovery of bad debt expenses in rates is a well-establishing rate-making principle. In *Midwest Gas Users Association v. Kansas Corporation Commission*, 5 Kan. App. 2d 653, 659, the Court characterized the Commission's rate-setting action as a legislative function in which the Commission may consider matters of policy. It explained: "The Commission could properly consider for example the 'value of service' to the different customer classes, the diminution of gas reserves, and the 'cost' in terms of future availability to firm customers of continuing to provide service to interruptibles."¹⁹ The *Midwest* court also quoted extensively from *Permian Area Rate Cases*, 390 U.S. 747,776-776, 20 L.Ed.2d 312 (1968), where the United States Supreme Court stated:

[T]he "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." . . . It follows that rate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, "to make the pragmatic adjustment which may be called for by particular circumstances."

Permitting the recovery of How\$martsm bad debt expenses in rates applicable to the classes of customers who benefit from the program and who are eligible to participate in it constitutes a "pragmatic" rate and cost recovery determination that falls within the scope of the legislative, policy-making authority delegated to the Commission. That the How\$martsm program effectuates a state energy efficiency policy explicitly sanctioned and encouraged by the legislature buttresses the notion that Midwest Energy should be permitted to recover these expenses in its general rates.

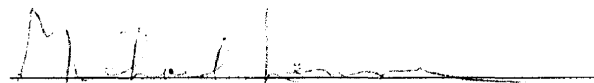
¹⁹ 5 Kan. App. 2d at 661.

H. Conclusion

Midwest Energy, in collaboration with Staff and CURB, has invested significant effort and resources to develop the proposed How\$martsm program. It urges the Commission to approve the program on terms that will permit Midwest Energy to move forward with its implementation. Permitting disconnection for non-payment of How\$martsm charges and authorizing Midwest Energy to seek recovery of bad debt expenses in subsequent rate proceedings are essential components of a workable and reasonable How\$martsm program.

A significant number of customers have expressed interest in participating in the How\$mart program as proposed and have requested that Midwest Energy contact them as soon as possible if the program is approved. Customers often make improvements during the more extreme summer conditions. Accordingly, to the extent possible, Midwest Energy requests expeditious consideration of this matter such that Midwest Energy can respond to the customers' requests at the earliest possible time.

Respectfully submitted,



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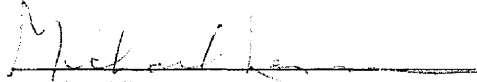
Attorneys for Midwest Energy, Inc.

VERIFICATION

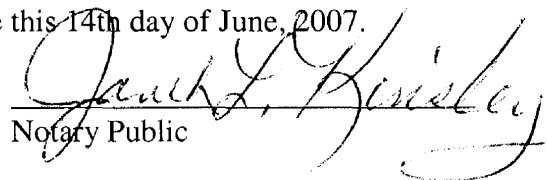
STATE OF KANSAS)
)
) ss:
SEDGWICK COUNTY)

Michael Lennen, of lawful age, being first duly sworn on oath, states:

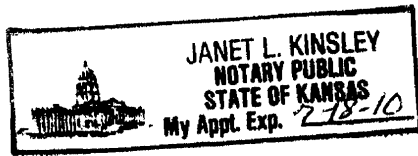
That he is attorney for Midwest Energy, Inc., in the above captioned matter; that he prepared the above and foregoing Brief of Midwest Energy, Inc., and knows the contents thereof, and that the statements contained therein are true.


Michael Lennen

SUBSCRIBED AND SWORN to before me this 14th day of June, 2007.


Notary Public

My appointment expires: 7-18-10



CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2007, the original and seven copies of the foregoing Brief of Midwest Energy, Inc., were sent via U. S. Mail, postage prepaid, to:

SUSAN K. DUFFY
Executive Director
KANSAS CORPORATION COMMISSION
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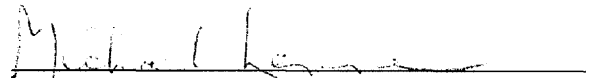
and that one copy was mailed to each of the following counsel or parties of record:

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Kansas Energy Plan 2007

Kansas Energy Chart Book

Kansas Energy Council
January 2007

www.kec.kansas.gov

Exhibit 1

2. Encourage Utility Implementation of PAYS® (Pay As You Save) and PAYS-type Pilot Programs

Kansas utilities are encouraged to implement pilot programs to demonstrate the effectiveness of financing energy conservation improvements through a PAYS® and PAYS-type financing system.

The Pay-As-You-Save, or PAYS®, system is designed to give building owners and tenants a way to finance the purchase and installation of energy conservation measures with no upfront expense or direct debt obligation.¹⁴ PAYS® was first piloted by two New Hampshire utilities in 2003.¹⁵ In its essence, PAYS® allows the participant to pay for the energy conservation improvements through an additional, tariffed charge on the participant's utility bill. The PAYS® charge is based on the useful life of and savings attributable to specific energy efficiency measures (not to exceed 75% of the expected savings), and appears on monthly utility bills for a prescribed period of time (not to exceed 75% of the life of the measure). The PAYS® charge is specifically designed to stay with the meter for the duration of the repayment period. If the participant moves, the PAYS® charge is passed on to the next owner/tenant, provided transfer of ownership/tenancy occurs prior to the end of the repayment period. To qualify for PAYS®, a qualified utility-sponsored energy audit must be performed and all proposed conservation projects are subject to inspection prior to initiation of PAYS® financing. Only permanently affixed conservation measures (e.g., insulation, HVAC, windows and doors) qualify for PAYS® funding. PAYS®-based tariffs would require regulatory approval.

A PAYS-type system could require the same standards for evaluating and financing as PAYS®, but the payments would be tied to the participating customer, not to the meter. Furthermore, rather than being a "banker," the utility's role could be that of a conservation loan facilitator. To facilitate loans through a PAYS-type pilot program, the utility would probably engage in two basic steps. In the first step, the utility would perform (or facilitate the performance of) an energy audit. The audit would include, in addition to the performance of standard audit tests and inspections, the development of a customer-specific "Energy Action Plan," which estimates dollar savings and the costs to achieve those savings; thus, identifying conservation measures that are likely to be cost-effective for that customer to install. The Plan would also contain "bid sheets" detailing installation costs, along with a list of utility-approved installation

¹⁴ PAYS web site: <http://www.paysamerica.org/index.html>.

¹⁵ GDS Associates, Inc., 2003, *Process Evaluation of the Pilot "Pay As You Save" (PAYS) Energy Efficiency Program: As delivered by the New Hampshire Electric Cooperative and Public Service Company of New Hampshire*, December 2003 (<http://www.gdsassociates.com>).

contractors. In the second step, the utility would offer its customers a prearranged credit program through the utility's bank (or a participating bank) and represent to the bank loan officer the net savings that are likely to result from installing the proposed energy conservation improvements. Qualified customers can choose to repay the loan either by (1) making payments directly to the bank, or (2) making loan payments through the monthly utility bill (possibly using the PAYS® method for setting the size and term of the loan repayment). In the PAYS-type pilot, all customers (with the exception of low-income customers) would pay the full cost of the energy audit through the audit fee. Options for paying the audit fee include (1) direct payment by the customer at the conclusion of the audit (or possibly at a later date), (2) payment through a levelized monthly charge appearing on the customer's monthly bill, perhaps over a 36-month period, and (3) payment through the inclusion of the audit fee as part of the energy conservation loan principle.

Both the PAYS® and the PAYS-type pilot programs should be linked to the State's new low-income energy efficiency loan fund and the Weatherization Assistance Program, both operated by the Kansas Housing Resources Corporation. Depending on their income levels, utility customers who don't qualify for financing under the bank's underwriting rules may be eligible for a low-interest loan or for free weatherization assistance.

Small pilot programs would test the effectiveness of these promising financing systems and allow policy makers and utilities to evaluate for future, possibly broader applications. Utilities would be encouraged to initiate pilot programs by June 2007.

Substitute for HOUSE BILL No. 2278

AN ACT concerning electric and natural gas public utilities; relating to financing of energy conservation equipment.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Electric and natural gas public utilities, as defined in K.S.A. 66-101a and 66-1,200, and amendments thereto, may enter into agreements with customers and landlords of customers for the financing of the purchase price and installation cost of energy conservation measures by such utilities.

(b) Such utilities may recover the cost of such financing and related program costs through tariffs approved by the state corporation commission pursuant to K.S.A. 66-117, and amendments thereto, and paid for by the customers benefitting from the installation of the energy conservation measures.

(c) Except as otherwise required by the state corporation commission, through the approved tariff or otherwise, such utilities shall assume no liability for the installation, operation or maintenance of such measures, and shall not provide any warranty as to the merchantability of the measures, or its fitness for a particular purpose, and no action shall be maintained against any such utility the basis of which is such liability or warranty.

(d) Nothing in this section shall be construed to limit any rights or remedies of utility customers and landlords of utility customers against other parties to a transaction involving the purchase and installation of energy conservation measures.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the HOUSE, and passed that body

HOUSE concurred in _____
SENATE amendments _____

Speaker of the House.

Chief Clerk of the House.

Passed the SENATE _____
as amended _____

President of the Senate.

Secretary of the Senate.

APPROVED _____

Governor.