

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

JUN 15 2007

 Docket Room

In The Matter Of Midwest Energy Seeking Commission
Approval To Implement A Pay-As-You-Save Program For
Its Natural Gas Service

)
)
) Docket No.
) 07-MDWG-784-TAR
)

BRIEF OF THE CITIZENS' UTILITY RATEPAYER BOARD

COMES NOW the Citizens' Utility Ratepayer Board (CURB), and submits the following brief on the issues designated in the Order Scheduling Briefs filed April 29, 2007. In support of its brief, CURB states as follows:

I. STATEMENT OF FACTS

1. On January 29, 2007, Midwest Energy, Inc. (Midwest) filed tariffs to implement a proposed pilot energy efficiency program in limited portions of its electric and natural gas service areas.

2. On February 1, 2007, CURB filed a Petition to Intervene. The Commission granted CURB's Petition to Intervene on March 2, 2007.

3. On February 2, 2007, a Suspension Order and an Order Assessing Costs were issued by the Commission.

4. Commission Staff, CURB, and Midwest (collectively, "the Parties") engaged in extensive discussions after the proposed tariff rider was filed. These discussions resulted in numerous revisions to the proposed pilot program and amendments to the implementing documents.

5. On May 17, 2007, the Parties filed a Stipulation and Agreement, which recognized the numerous negotiated revisions to the proposed pilot program and amendments to

the implementing documents, but also recognized that the Parties had unresolved disagreements about the proposed pilot program.

6. The proposed pilot program was originally identified as the Pay-As-You-Save Rider, but the designation has been changed to the How\$martsm Rider in the amended tariff rider and implementing documents. Under the amended proposed pilot program, Midwest will develop a conservation plan for participating customers and pay the upfront costs for approved efficiency measures. The payment obligation for recovering the costs is assigned to the premises to be recovered through a monthly line item charge on the customer's utility bill. Provided the required notice is given and consent is obtained, the payment obligation transfers to subsequent customers at the same premises until the obligation is repaid in full. The monthly charge will be less than the *estimated* monthly average savings attributable to the efficiency investment.

7. Under Midwest's proposal, the monthly How\$martsm charge is to be treated the same as Midwest's charges for electric and natural gas services under the Commission's Billing Standards. As proposed, failure to make full payment (current electric and gas charges plus the How\$martsm charge) by a Midwest customer could result in disconnection in accordance with Midwest's approved Terms and Conditions. As proposed, bad debts incurred as a result of the program would be recoverable from other Midwest ratepayers (including those not participating in the How\$martsm program) in subsequent rate filings.

8. As noted in the Stipulation and Agreement, CURB does not agree that the How\$martsm pilot program need be approved as a tariffed service. However, if the Commission approves the How\$martsm pilot program as a tariffed service, CURB urges the Commission to follow its longstanding policy by designating and treating How\$martsm charges as a special service (and not as a regular utility service) under the Commission's Billing Standards, and

prohibiting Midwest from disconnecting utility customers for failure to pay for special services (such as the How\$martsm program charges). Further, CURB urges the Commission to deny Midwest's request to approve tariff language indicating that bad debts incurred under the How\$martsm program are recoverable in future rate filings.

II. ARGUMENTS AND AUTHORITIES

A. The How\$martsm Pilot Program Should Not Be Offered As A Tariffed Service.

9. CURB urges the Commission not to approve Midwest's How\$martsm Pilot Program as a tariffed program.

10. Legislation passed by the 2007 Kansas legislature, Substitute for House Bill No. 2278 (2007), arguably authorizes the Commission to approve Midwest's How\$martsm pilot program as a tariffed service. However, this bill was not effective when the tariff was filed and will not become effective until its publication in the statute book.¹ The Commission retains its discretion – it is not required to tariff this proposed program.

11. Special services, such as the sale of merchandise, insulation or services performed in connection therewith provided in Midwest's How\$martsm pilot program, have traditionally not been authorized by tariff or otherwise specifically regulated by the Commission. The Commission's Billing Standards, promulgated in 1979 (with the provisions related to special services unchanged in subsequent dockets), recognize this. CURB will discuss the Commission's longstanding policy more in depth in Argument I. B below.

12. The How\$martsm pilot program can be offered without being approved as a tariffed service, and to approve it as a tariffed service would be inconsistent with longstanding

¹ Substitute for House Bill No. 2278 (2007). ("This act shall take effect and be in force from and after its publication in the statute book."). See, <http://www.kslegislature.org/legsrv-bills/showBill.do?id=164764>.

policy with the Commission to treat such products and services as special services under the Commission's Billing Standards. CURB therefore respectfully requests that the Commission deny Midwest's application to approve its How\$martsm pilot program as a tariffed service, but instead urge Midwest to offer it as a non-tariffed service. Midwest is merely offering a banking service – making loans to customers. This is not a utility service.

B. If The Pilot Program Is Approved As A Tariffed Service, It Should Be Designated A Special Service Under The Commission's Billing Standards And Not A Regular Utility Service That Could Result In Disconnection For Failure To Pay.

13. Since 1979, the Commission's Billing Standards have prohibited termination of service for non-payment of special services “such as the sale of merchandise, insulation, or services performed in connection therewith.”² The products and services included in Midwest's How\$martsm pilot program involve the sale of merchandise, insulation, and services performed in connection therewith. To allow termination for nonpayment of the How\$martsm obligation would be a reversal of longstanding Commission policy, and would not be in the public interest.

14. Section IV. B. (1) I. A. (3) and Section I. A. (3) of the Billing Standards³ read as follows:

² See, Standards on Billing Practices, pp. 3, 11, Sections I. A. (3) and IV. B. (1), attached to Order dated August 21, 1979, ¶ 7, *In the Matter of a General Investigation to Establish a Policy Concerning Billing Practices, Security Deposits, Late Payment Charges and Discontinuance of Services*, Docket No. 114,337-U. See also, Standards on Billing Practices, pp. 2-3, 16, Sections I. A. (3) and IV. B. (1), Appendix “A” to March 21, 1989, Order, *In the Matter of a General Investigation into the Policies Concerning Billing Practices, Security Deposits, Late Payment Charges and Discontinuance of Service*, Docket No. 158,796-U; Standards on Billing Practices, pp. 3, 11, Sections I. A. (3) and IV. B. (1), Attachment A to Order Amending Standards on Billing Practices dated October 22, 2001, *In the Matter of a General Investigation into Local Distribution Companies' Tariffs Regarding Billing Practices and Procedures*, Docket No. 97-GIMG-514-GIG. While other sections of the Standards on Billing Practices have been amended since the October 22, 2001 Order in Docket Nos. 97-GIMG-514-GIG, no subsequent order has, to CURB's knowledge and belief, attached a complete copy of the Standards on Billing Practices. See, orders in Docket Nos. 02-GIMX-211-GIV and 04-GIMX-651-GIV.

³ Standards on Billing Practices, p. 11, Section IV. B. (1), Attachment A to Order Amending Standards on Billing Practices dated October 22, 2001, *In the Matter of a General Investigation into Local Distribution Companies' Tariffs Regarding Billing Practices and Procedures*, Docket No. 97-GIMG-514-GIG. The language for Sections I. A. (3) and IV. B. (1) of the Standards on Billing Practices is virtually unchanged since it was adopted by the

Section IV STANDARDS ON DISCONTINUANCE OF SERVICE PRACTICES

...

B. None of the following shall constitute sufficient cause for a utility to discontinue service:

- (1) The failure of a customer to pay for special charges as defined in I.A. (3).⁴

Section I STANDARDS ON BILLING PRACTICES

A. Contents of a Bill:

...

- (3) The utility may include on the bill for utility services other charges for special services. Special services are those not authorized by tariff or otherwise specifically regulated by the Commission, such as the sale of merchandise, insulation or services performed in connection therewith. Charges for special services shall be designated clearly and separately from charges for utility services.⁵

15. It is clear that Midwest seeks to have its proposed HowSmartsm tariff authorized to specifically avoid and abrogate Section IV. B. (1) I. A. (3) and Section I. A. (3) of the Billing Standards. This would reverse Commission policy protecting Kansas ratepayers for over 27 years.

16. Legislation was passed this year by the 2007 Legislature relating to the financing of the purchase price and installation cost of energy efficiency conservation measures by utilities.

While not yet effective, Substitute for House Bill No. 2278 (2007) provides as follows:

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 (sic) from the installation of the energy conservation measures.

Commission in 1979, demonstrating the longstanding policy of prohibiting termination for special services such as merchandise, insulation or services performed therewith.

⁴ Standards on Billing Practices, p. 11, Section IV. B. (1), Attachment A to Order Amending Standards on Billing Practices dated October 22, 2001, *In the Matter of a General Investigation into Local Distribution Companies' Tariffs Regarding Billing Practices and Procedures*, Docket No. 97-GIMG-514-GIG.

⁵ *Id.*, p. 3, Section I. A. (3) (emphasis added).

(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.⁶

17. When it becomes effective, Substitute for House Bill No. 2278 (2007) will authorize utilities to recover the costs of energy efficiency programs, such as the How\$martsm program costs, through tariffs approved by the Commission. However, the bill provides no indication the legislature intended to reverse over 27 years of Commission policy prohibiting the termination of service for nonpayment of special services, “such as the sale of merchandise, insulation or services performed in connection therewith.” The Commission can still condition any tariff it approves. If it chooses to approve this tariff, the Commission should therefore recognize and designate it as what it is - a special service - to preserve the longstanding Commission policy prohibiting the termination of service for nonpayment of special services.

18. There is no compelling reason to cause the Commission to reverse its longstanding policy of prohibiting termination of utility service for nonpayment of special services with respect to the How\$martsm program. Most ratepayers finance these products and services using traditional banking services, and their gas and electric service is not terminated in the unfortunate event they are unable to make the payment on the new furnace or air conditioner. Midwest is merely offering those banking services. Likewise, the failure of a consumer to pay

⁶ Substitute for House Bill No. 2278 (2007). See, <http://www.kslegislature.org/legsrv-bills/showBill.do?id=164764>.

the How\$martsm obligation should not result in the termination of essential utility services to those who find themselves without the resources to pay for these energy efficient products.

19. As the United States Supreme Court has noted, “utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health or safety.”⁷ Similar findings have been made by Kansas courts.⁸ As a result, CURB urges the Commission to continue its longstanding policy of prohibiting termination of utility service for the nonpayment of special services like the How\$martsm pilot program.

C. If The Pilot Program Is Approved As A Tariffed Service, Bad Debts Incurred Under The How\$Martsm Program Should Not Be Recoverable From Other Ratepayers In Future Rate Filings.

20. If the Commission approves the How\$martsm pilot program as a tariffed service, it should not approve Midwest’s request to pre-determine that the bad debts resulting from the program are recoverable from other ratepayers in future rate filings.

21. Midwest’s pre-determination request would result in bad public policy. The Commission is authorized by law to pre-determine ratemaking principles and treatment of certain generating and transmission facility investments under K.S.A. 66-1239. However, no such authorization exists for Midwest’s request for pre-determination that bad debts resulting from its How\$martsm pilot program will be recoverable from other ratepayers in future rate filings, and the Commission should not make such a pre-determination in the absence of specific statutory authority.

22. Aside from the absence of authority to do so, such a pre-determination is not in the public interest. Financing the purchase and installation of energy efficient products such as

⁷ Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978). Stanford v. Gas Service Co., 346 F. Supp, 717, 721 (D. Kan. 1972).

⁸ Stanford v. Gas Service Co., 346 F. Supp, 717, 721 (D. Kan. 1972).

air conditioners, furnaces, and insulation has traditionally been handled by local banks and financial institutions. If ratepayers default on these traditional private loans, their banks and financial institutions do not have the option of collecting the bad debt from other ratepayers – nor should Midwest. Consumers who have already paid the cost of purchasing and installing energy efficient products for their own homes should not be required to pay for the energy efficient products installed in other ratepayers homes who participate in the How\$martsm program but subsequently fail to pay the obligation. The financing of the purchase and installation by Midwest does not change the nature of the transaction – the products being financed are not owned by Midwest (such as generation or transmission assets); they are the exclusive property of private individuals who own the premises. The obligation to pay for those privately-owned products should not be transferred to other ratepayers (ratepayers who have no ownership interest in the furnaces, air conditioners, and insulation installed on those private premises and receive no benefits from those products).

23. While not yet effective, the provisions of Substitute for House Bill No. 2278 (2007) provide specific guidance to the Commission regarding how the costs of Midwest’s How\$martsm pilot program are to be paid. Specifically, Substitute for House Bill No. 2278 (2007) states, “Such utilities may recover the cost of such financing and related program costs through tariffs ... and paid for by the customers benefitting (sic) from the installation of the energy conservation measures.”⁹

24. The language of this bill expressly states that the costs of the How\$martsm pilot program shall be paid for by the customers receiving the benefit from the installation of the energy conservation products, not from other ratepayers who receive no benefit from the measures, many who have already personally paid the cost of their own energy conservation

⁹ Substitute for House Bill No. 2278 (2007), Section 1, ¶ (b) (emphasis added).

products. It is clear from this language that the legislature intended those costs to be “paid for by the customers benefitting (sic) from the installation of the energy conservation measures,” not by other ratepayers who do not own or receive any benefit from those products.

25. The language in Substitute for House Bill No. 2278 (2007) is also consistent with the Supreme Court’s holding in *Jones v. Kansas Gas & Electric Co.*, 222 Kan. 390, 565 P. 2d 597 (1977). In *Jones*, the Supreme Court noted that the “touchstone of public utility law is the rule that one class of consumers shall not be burdened with costs created by another class.”¹⁰ The *Jones* Court applied this “touchstone of public utility law” to the issue of whether a late payment penalty or charge should be assessed uniformly to all delinquent customers, including those who pay after a penalty was imposed but before collection efforts were initiated, or only to delinquent customers who did not pay their bill until after the company was required to initiate collection efforts and incur collection costs. Noting the evidence demonstrated that many delinquent customers pay their bills before any collection costs accrued, but under the present system those customers were required to pay the same late payment penalty as those who actually caused the collection costs, the *Jones* Court concluded:

The argument advanced by the utility companies, the theory of which we approve, is that a prompt paying customer should not be burdened with the expense caused by someone else; but when fairness to the first class of late payers is considered we find they are required to do the very thing the penalty is intended to prevent, and are required to contribute toward the cost of collecting the bills owed by the more delinquent customers. To this extent we think the practice of assessing the same penalty against all delinquent customers, regardless of the nature or character of their delinquency, is discriminatory and unfair. (citations omitted).¹¹

26. The rationale used by the Kansas Supreme Court in *Jones* is equally applicable and compelling here. Customers who have already personally incurred the expense of financing,

¹⁰ *Jones v. Kansas Gas & Electric Co.*, 222 Kan. 390, 401, 565 P. 2d 597 (1977) (citing *Coffelt v. Ark. Power & Light Co.*, 248 Ark. 313, 451 S.W. 2d 881 [1970]; *Utilities Comm. v. Consumers Counsel*, 18 N.C. App. 717, 198 S.E. 2d 98 [1973])

¹¹ *Id.*, at p. 402 (emphasis added).

the purchase and installation of energy efficient products in their homes should not be burdened with the expense caused by someone else (i.e., the bad debts of those who choose to participate in the How\$martsm pilot program, rather than financing their energy efficient measures through private banks and financial institutions). As a result, CURB submits Midwest's proposed practice of assessing the bad debts of its How\$martsm customers against all of its other customers, regardless of the fact many of these customers have personally financed the cost of purchasing and installing their own energy efficient products, is discriminatory and unfair.

27. The Kansas Commission acknowledged the decision by the *Jones* Court in Docket No. 114,337-U, where the Commission stated:

In recognizing the general rule that one class of utility consumers should not be burdened with costs created by another class, the Court stated that the late paying customers who cause the utility to incur collections costs should pay a charge greater than that imposed on late payers who do not cause collection costs and that the higher penalty should reflect those collection costs.¹²

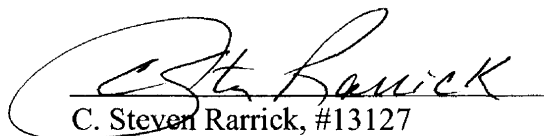
28. Utilities are frequently concerned with the cost-causer principle of rate making and public utility law. Here, many customers have already incurred the cost of energy efficient products in their homes, either through the initial purchase price of an energy efficient home, or by personally paying or financing the cost of purchasing and installing more energy efficient products, products that they own and maintain. Midwest's proposal is to require those customers to bear the costs of bad debts of those who finance their energy efficient products through Midwest's How\$martsm program. Midwest's proposal is discriminatory and unfair, and should not be approved by the Commission.

¹² Order dated August 21, 1979, ¶ 7, *In the matter of a General Investigation to Establish a Policy Concerning Billing Practices, Security Deposits, Late Payment Charges and Discontinuance of Services*, Docket No. 114,337-U.

III. CONCLUSION.

29. CURB supports the concept of Midwest's How\$martsm pilot program, but requests that the Commission approve the program as a non-tariffed service. However, if the Commission chooses to approve the program as a tariffed service, CURB urges the Commission to follow its longstanding policy of prohibiting the termination of gas and electric service as a result of a customer's failure to pay for special services like the How\$martsm program services. The How\$martsm program services constitute the very "sale of merchandise, insulation, or services performed in connection therewith" the Commission's Standards on Billing Practices have specifically addressed since 1979, and there is no compelling reason for the Commission to depart from this longstanding policy. Finally, if the Commission approves the How\$martsm program as a tariffed service, the bad debts resulting from the program should not become the burden of other ratepayers who do not own and receive no benefit from the energy efficient products financed by Midwest. CURB appreciates the opportunity to brief the issues regarding Midwest's proposed pilot program, and respectfully requests that the Commission issue an expedited decision on the issues briefed herein.

Respectfully submitted,



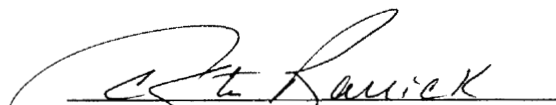
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VERIFICATION

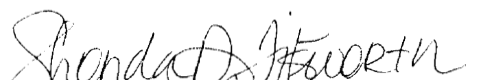
STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

C. Steven Rarrick, of lawful age, being first duly sworn upon his oath states:

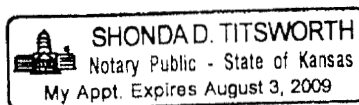
That he is an attorney for the Citizens' Utility Ratepayer Board; that he has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.


C. Steven Rarrick

SUBSCRIBED AND SWORN to before me this 15th day of June, 2007.


Notary of Public

My Commission expires: 8-03-09



CERTIFICATE OF SERVICE

07-MDWG-784-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, or hand-delivered this 15th day of June, 2007, to the following:

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