

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

Before Commissioners: Thomas E. Wright, Chairman  
Michael Moffett, Commissioner  
Joseph F. Harkins, Commissioner

AUG 31 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  
)

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

)  
) Docket No.  
) 07-MDWE-788-TAR ✓  
)

**CURB's PETITION FOR RECONSIDERATION**

COMES NOW the Citizens' Utility Ratepayer Board ("CURB"), pursuant to K.S.A. 66-118b, K.S.A. 77-529, and K.A.R. 82-1-235, and respectfully petitions the Kansas Corporation Commission (KCC or Commission) for reconsideration of its August 17, 2007, *Order Adopting Stipulation* (hereinafter referred to as the "Order") in the above captioned matter. As set forth more fully below, CURB requests reconsideration of the Commission's Order on the following grounds: (1) the Commission's Order allowing disconnection for nonpayment of How\$mart<sup>sm</sup> services is erroneous, is not supported by substantial evidence, is unreasonable, arbitrary and capricious, and is unjustly discriminatory and unduly preferential; and (2) the Commission's Order allowing Midwest the opportunity to seek recovery of How\$mart<sup>sm</sup> associated bad debt expenses in subsequent rate proceedings is erroneous, unjustly discriminatory and unduly preferential.

**I. The Commission's Order allowing disconnection for nonpayment of HowSmart<sup>sm</sup> services is erroneous, is not supported by substantial evidence, is unreasonable, arbitrary and capricious, and is unjustly discriminatory and unduly preferential.**

1. The Commission erroneously relies upon the *contention* of Midwest energy that disconnection is necessary because “there must be some means to encourage repayment of the project costs. ... If utility service cannot be disconnected for nonpayment of the HowSmart<sup>sm</sup> 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.”<sup>1</sup>

2 Usual and customary business collection methods contradict Midwest's contention that there is no immediate or efficient method to motivate payment other than disconnection. Midwest has the same informal collection options available to collect unpaid HowSmart<sup>sm</sup> obligations as are available to any other business that finances the sale and/or installation of furnaces, air conditioners, and insulation. Commonly-known informal collection methods include sending past-due reminder notices and making telephone calls to the customer. Another informal collection method available to Midwest, routinely utilized by businesses prior to resorting to litigation, is to send unpaid HowSmart<sup>sm</sup> bills to a collection agency for collection assistance. All of these usual and customary informal business collection methods to motivate payment are available to Midwest, just as they are available to all businesses that currently finance the sale and/or installation of furnaces, air conditioners, and insulation.

3. The Commission ignores or fails to acknowledge these usual and customary business collection efforts available to Midwest when it concludes, “If utility service cannot be disconnected for nonpayment of the HowSmart<sup>sm</sup> charges, *there is no immediate or efficient*

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<sup>1</sup> *Order Adopting Stipulation*, ¶¶ 11.

*method to motivate payment other than through a formal collection process which defeats the purpose of the program.”<sup>2</sup>*

4. The Commission’s conclusion that “there is no immediate or efficient method to motivate payment other than through a formal collection process” is therefore erroneous as it is contrary to usual and customary business collection practices, is not supported by substantial competent evidence, and is unreasonable, arbitrary and capricious.

5. As fully briefed by CURB, Midwest’s proposal to allow termination for nonpayment of How\$mart<sup>sm</sup> obligations would reverse the Commission’s longstanding policy, formalized in its Billing Standards in effect since 1979, which prohibit termination of service for non-payment of special services “such as the sale of merchandise, insulation, or services performed in connection therewith.”<sup>3</sup>

6. The Commission should not reverse its longstanding policy, absent substantial competent evidence compelling such a change. Midwest and Staff have failed to provide substantial competent evidence to support a reversal of the Commission’s longstanding policy of prohibiting termination of utility service for nonpayment of special services such as the How\$mart<sup>sm</sup> program.

7. As CURB pointed out in its brief, 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. Like Midwest, Kansas banks financing these projects have both informal and formal collection methods available to motivate payment by their customers. Like customers of a Kansas banking institution, Midwest customers should not have essential utility services terminated for failing to

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<sup>2</sup> *Order Adopting Stipulation*, ¶¶ 25 (emphasis added).

<sup>3</sup> Brief of the Citizens’ Utility Ratepayer Board, ¶¶ 13-19.

pay for energy efficient products and services like How\$mart<sup>sm</sup> products and services. Midwest should resort to the usual and customary business collection methods that are utilized by Kansas banking institutions to motivate payment by How\$mart<sup>sm</sup> customers.

8. Moreover, the Commission's Order is arbitrary, capricious, unduly discriminatory and unduly preferential by failing to treat the How\$mart<sup>sm</sup> program as a special service under existing Billing Standards. Under Section IV. B. (1) I. A. (3) and Section I. A. (3) of the existing Billing Standards, utilities (including Midwest) are prohibited from terminating essential utility services for the nonpayment of special services that are indistinguishable from the How\$mart<sup>sm</sup> products and services. Even though the How\$mart<sup>sm</sup> program services are no different than special services currently provided by Midwest and other utilities, the How\$mart<sup>sm</sup> program services will be treated differently under the Commission's Order along termination of service for nonpayment.

9. To illustrate, Midwest and other utilities that have installed insulation for customers are prohibited from terminating utility service for nonpayment of the insulation charge under existing Billing Standards regarding special services. However, under the Commission's Order, a customer who has insulation installed under Midwest's How\$mart<sup>sm</sup> program can be disconnected for nonpayment of the same installation services. The Commission's Order treats the nonpayment of the cost and installation of insulation (or other special services) differently under the Midwest How\$mart<sup>sm</sup> program than under existing Billing Standards, and is therefore arbitrary, capricious, unjustly discriminatory and unduly preferential.

10. CURB would again remind the Commission of the admonition of the United States Supreme Court: "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.”<sup>4</sup> Similar findings have been made by Kansas courts.<sup>5</sup>

11. CURB respectfully urges the Commission to reconsider its decision to reverse its longstanding policy by allowing disconnection of utility service for nonpayment of How\$mart<sup>sm</sup> services.

**II. The Commission’s Order allowing Midwest the opportunity to seek recovery of How\$mart<sup>sm</sup> associated bad debt expenses in subsequent rate proceedings is erroneous, unjustly discriminatory and unduly preferential.**

12. The Commission’s Order dismisses CURB’s arguments by summarily characterizing it as a “cost causer/cost payer argument” and erroneously concludes that because Midwest contends 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\$mart<sup>sm</sup> bad debt expenses from those customer classes.”<sup>6</sup>

13. The Commission’s Order completely ignores CURB’s argument that Midwest is precluded from the opportunity to seek recovery in a subsequent rate case because of the explicit language of House Bill No. 2278 (2007), which is consistent with the reasoning of the Kansas Supreme Court in *Jones v. Kansas Gas & Electric Co.*, 222 Kan. 390, 565 P. 2d 597 (1977).

14. 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.*”<sup>7</sup>

15. House Bill No. 2278 (2007) expressly states that the costs of energy efficient programs like the How\$mart<sup>sm</sup> pilot program shall be paid for by the customers receiving the

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<sup>4</sup> *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).

<sup>5</sup> *Stanford v. Gas Service Co.*, 346 F. Supp, 717, 721 (D. Kan. 1972).

<sup>6</sup> *Order Adopting Stipulation*, ¶ 27.

<sup>7</sup> Substitute for House Bill No. 2278 (2007), Section 1, ¶ (b) (emphasis added).

benefit from the installation of the energy conservation products. This express language makes it clear that the legislature intended the costs of these energy efficient programs to be paid for by Midwest's How\$mart<sup>sm</sup> customers (those "benefiting from the installation of the energy conservation measures), not by other ratepayers who do not own or receive any benefit from those products and may well have financed their own energy efficient products and services through Kansas banking institutions.

16. Consistent with this legislatively expressed intent is the rationale of the Kansas Supreme Court in *Jones*, where 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."<sup>8</sup>

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).<sup>9</sup>

17. As a result, the Commission's conclusion that simply because Midwest contends 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\$mart<sup>sm</sup> bad debt expenses from those customer classes" is erroneous. This conclusion could have been made by the Supreme Court in *Jones*: because all customers have the opportunity to pay their bills on time, it would not be unjustly discriminatory or unduly preferential to permit the recovery of the same penalty from all delinquent customers. However, this is not what the Supreme Court decided in

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<sup>8</sup> *Jones v. Kansas Gas & Electric Co.*, 222 Kan. at 401 (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]).

<sup>9</sup> *Id.*, at p. 402 (emphasis added).

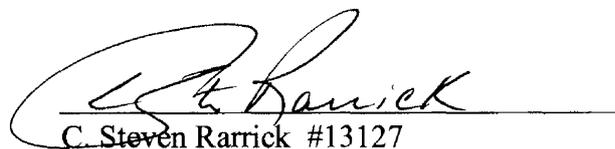
*Jones*. Likewise, the Commission's Order allowing Midwest the opportunity to seek recovery of How\$mart<sup>sm</sup> associated bad debt expenses in subsequent rate proceedings is similarly unjustly discriminatory and unduly preferential.

18. As a result, CURB respectfully requests that the Commission reconsider its decision to allow Midwest the opportunity to seek recovery of How\$mart<sup>sm</sup> associated bad debt expenses in subsequent rate proceedings, but to limit any recovery of How\$mart<sup>sm</sup> associated bad debt from "*customers benefitting (sic) from the installation of the energy conservation measures.*"<sup>10</sup>.

### **III. Conclusion.**

19. WHEREFORE, CURB respectfully requests that the Commission reconsider its *Order Adopting Stipulation* to (1) allow disconnection for nonpayment of How\$mart<sup>sm</sup> services and (2) allow Midwest the opportunity to seek recovery of How\$mart<sup>sm</sup> associated bad debt expenses in subsequent rate proceedings. While CURB supports the concept of the How\$mart<sup>sm</sup> program, customers should not lose essential utility services for nonpayment, and customers who do not benefit from the program should not pay for bad debts associated with the program.

Respectfully submitted,



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<sup>10</sup> Substitute for House Bill No. 2278 (2007), Section 1, ¶ (b) (emphasis added).



**CERTIFICATE OF SERVICE**

07-MDWG-784-TAR & 07-MDWE-788-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 31st day of August, 2007, to the following:

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