

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

<p>IN RE:</p> <p>APPLICATION OF STATE AND FEDERAL ASSISTANCE PAYMENTS TO MEET REQUIREMENTS OF SECOND PAYMENT AGREEMENT IN 199 IAC 19.4(10)"c"(2) AND 20.4(11)"c"(2)</p>	<p>DOCKET NO. DRU-05-1</p>
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**DECLARATORY ORDER**

(Issued May 17, 2005)

**PROCEDURAL BACKGROUND**

On March 21, 2005, the Utilities Board (Board) received a letter from Jerry McKim, Director, Bureau of Energy Assistance of the Iowa Department of Human Rights (IDHR/BEA), requesting the Board issue a declaratory order concerning the application of low-income home energy assistance program (LIHEAP) payments in meeting the requirements for a second payment agreement under 199 IAC 19.4(10)"c"(2) and 20.4(11)"c"(2). Specifically, IDHR/BEA requested the Board modify the interpretation of these subparagraphs made in the "Order Adopting Amendments" in Revisions to Consumer Services Rules [199 IAC 19.4(10), 19.4(13), 19.4(15), 19.4(16), 20.4(11), 20.4(14), 20.4(15), and 20.4(16)], Docket No. RMU-04-2, issued July 30, 2004. In that order, the Board stated that state and federal assistance payments should not be considered as satisfying the criteria for being offered a second payment agreement.

On March 24, 2005, the Board issued an order giving notice of the request for declaratory order and establishing dates for intervention and replies. On April 6, 2005, the Board issued an order granting intervention in this docket to Interstate Power and Light Company (IPL), the Consumer Advocate Division of the Department of Justice (Consumer Advocate), MidAmerican Energy Company (MEC), and the Iowa Association of Electric Cooperatives (IAEC). The Board also scheduled a meeting for interested parties for April 18, 2005.

Comments were filed by IPL, Consumer Advocate, MEC, and IAEC. On April 11, 2005, IDHR/BEA filed responsive comments. On the same date, Aquila, Inc., d/b/a Aquila Networks (Aquila), filed an application to intervene and participate in the meeting. The meeting was held as scheduled on April 18, 2005. As a result of the meeting, IDHR/BEA made a proposal that modified its request for a declaratory order. On April 22, 2005, the Board issued an order allowing additional comments addressing the modified IDHR/BEA proposal or other matters and granting Aquila intervention.

### **PARTIES' POSITIONS**

The facts to be considered in this declaratory order are described at length in the Board's March 24, 2005, order giving notice of the request. The basic issue before the Board involves the interpretation of the language in 199 IAC 19.4(10)"c"(2) and 20.4(11)"c"(2) that establish criteria for when a utility must offer a second payment agreement to a customer.

The language in question states: "The utility shall offer a second payment agreement to a customer who is in default of a first payment agreement if the customer has made at least two consecutive full payments under the first payment agreement." In the order adopting this language in Docket No. RMU-04-2, the Board stated "[a]ssistance payments from a state or federal agency should not be considered as satisfying this requirement." However, this statement was not made a part of the actual rule.

IDHR/BEA initially requested the Board issue a declaratory order with:

1. A declaration that the quoted language from the Board's order was not intended to exclude all (or any) assistance payments from a state or federal agency as "counting" as a payment toward fulfilling an initial payment plan in the month in which the state or federal assistance is made;
2. A declaration that the quoted language was not intended to indicate that the source of any individual payment is a factor to be used in determining whether that payment is to be considered in determining whether two full payments have been made on the payment plan; and
3. A declaration that the quoted language was intended simply to prevent a customer who receives a lump sum payment in an amount greater than the total of one or more monthly bills from claiming application of that payment as a "full payment" in the month the credit is applied.

IDHR/BEA modified its request after the meeting held in this docket on April 18, 2005. The modified request is as follows:

Instead of the current interpretation that "Assistance payments from a state or federal agency should not be considered as satisfying this requirement," provide that "Assistance payments from a state or federal agency or their sub-grantees made directly to the utility shall be used to satisfy the requirement for one payment of the required two full consecutive payments when the assistance partially covers a monthly bill and the customer pays the remainder of that bill in full."

Consumer Advocate, Aquila, IPL, and MEC filed additional comments concerning the modified request. In its additional comments, Consumer Advocate stated that it supported the proposal described above made by IDHR/BEA. Consumer Advocate suggested that the proposed interpretation addresses all of the issues raised in this declaratory order and should be adopted by the Board.

Aquila filed additional comments stating that it had no objection to the solution proposed by IDHR/BEA.

IPL filed additional comments stating that it does not object to the modified proposed interpretation made by IDHR/BEA. IPL requested that the Board set a compliance date that will allow the utilities sufficient time to develop materials and train customer service staff personnel of the new interpretation. IPL suggested that local community action agencies will also need to understand the new interpretation and train their staff personnel for the effect of the new interpretation.

MEC filed additional comments stating that it did not support the proposed interpretation. MEC questioned whether a declaratory order proceeding is the best way to actually change the language from the Board's July 30, 2004, order. MEC suggested that a change in the Board's interpretation in the order may be beyond the

scope of this docket. MEC suggested that the interpretation proposed by IDHR/BEA may not resolve the problem of the Board's interpretation being considered discriminatory. Finally, MEC stated that it could find the new interpretation difficult to implement.

MEC proposed that this docket be closed by the Board pursuant to 199 IAC 4.9(1), (5), and (6). Under these provisions, the Board may refuse to issue a declaratory order because the questions presented would more properly be resolved in a different type of proceeding or the facts or questions presented are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

MEC then suggested that the issues raised in the request for declaratory order can be addressed by ignoring the source of the two full consecutive payments and adding a condition that the customer apply for the second payment agreement within 60 days of default under the first agreement. MEC stated that because first agreements are tailored to an individual's ability to pay, amount of debt, and other factors specific to the individual, it is likely that the payment terms from the first agreement would continue to be reasonable for that individual, especially since any additional debt would be capped by the 60-day requirement.

MEC suggested that the second agreement time frame should assist low-income customers who do not become LIHEAP-certified through the winter heating season. Requesting the second agreement within 60 days would also indicate the customer's good faith to work with the utility to pay the past due amounts. This

proposal would also eliminate the necessity that utilities attempt to determine the source of any assistance payments and it could not be argued that LIHEAP customers are being discriminated against. MEC offered the following amendment to subparagraphs 19.4(10)"c"(2) and 20.4(11)"c"(2).

The utility shall offer a second payment agreement to a customer who is in default of a first payment agreement if the customer has made at least two consecutive full payments under the first payment agreement and has requested the second payment agreement within sixty days of the default under the first payment agreement. The customer shall be required to pay for current service in addition to the monthly payments under the second payment agreement and may be required to make the first payment up-front as a condition of entering into the second payment agreement. The utility may also require the customer to enter into a level payment plan to pay the current bill. The utility may offer additional payment agreements to the customer.

### **BOARD DISCUSSION**

The Board in adopting the amendments to its rule on second payment agreements in Docket No. RMU-04-2 was attempting to address issues raised in previous rule making dockets that demonstrated that many low-income customers did not apply for and were not certified for LIHEAP and, therefore, were not protected from disconnection during the winter months. The Board adopted the provisions in 199 IAC 19.4(10)"c"(2) and 20.4(11)"c"(2) to provide some additional protection to these non-LIHEAP-certified low-income customers. In addition, the Board determined that a customer seeking a second payment agreement should have demonstrated a good faith effort to make the payments under the first payment

agreement. The Board adopted the two full consecutive payment requirement to meet this latter objective. The subparagraphs provide that "[t]he utility shall offer a second payment agreement to a customer who is in default of a first payment agreement if the customer has made at least two consecutive full payments under the first payment agreement."

This request for a declaratory order presents the Board with the question of whether state and federal assistance made to the utility on behalf of a LIHEAP-certified customer can be used to meet the requirements of two full consecutive payments for the customer to be offered a second payment agreement. The Board considered this question in adopting the current requirements in subparagraphs 19.4(10)"c"(2) and 20.4(11)"c"(2) and stated "[a]ssistance payments from a state or federal agency should not be considered in satisfying this requirement." This statement is not, itself, a rule, but it does represent the Board's interpretation of the rule at the time it was adopted.

The Board did not intend in making this statement to require the utility to determine the source of every payment made by a customer. The Board was only addressing whether direct payments made from a community action agency to a utility for a LIHEAP-certified customer should be considered to satisfy the two consecutive full payments requirement. The Board adopted the rule to insure that second payment agreements were offered to those customers who used their own resources to make payments on the first payment agreement.

IDHR/BEA has now raised the issue of whether the Board's interpretation of the rule treats the LIHEAP-certified customer adversely as compared to other similarly-situated customers. IDHR/BEA sought a review of the Board's interpretation from the Federal Division of Energy Assistance, Office of Community Services, Department of Health and Human Services (DEA/OCS). In a letter from DEA/OCS, the federal agency states that it believes the Board's interpretation appears to violate Assurance 7, 42 USCA § 2605(b)(7)(C). Assurance 7 states in relevant part that "no household receiving assistance under this title will be treated adversely because of such assistance . . ."

IDHR/BEA offers the compromise of not considering LIHEAP payments when they amount to a full payment on the customer's account, but to consider any partial payment of a utility bill covered by LIHEAP funds when the customer makes the remaining payment from the customer's own resources. Even though IDHR/BEA agreed that a customer who did not make any payments on a first payment agreement during the moratorium was not making a good faith attempt to pay for utility service, this compromise offered by IDHR/BEA still could be interpreted by DEA/OCS as treating LIHEAP-certified customers adversely. MEC also pointed this out in its additional comments.

Based upon the information provided by IDHR/BEA, the Board now understands that excluding LIHEAP funds sent to the utility by the state community action agency for LIHEAP-certified customers could jeopardize the funding arrangement whereby grant money is sent directly to the utility in the customer's

name and could require IDHR/BEA to make payments directly to customers.

Payment of the grant money directly to the customer, who would then have some discretion of whether to pay the utility, could be problematic. It could create an additional administrative burden on IDHR/BEA and would create a situation where the utility might receive less money than under current procedures.

The Board appreciates IDHR/BEA's proposal and the positions of the other parties and has considered this issue very carefully. Based upon a review of all of the information presented, the Board finds that it should withdraw its statement made in the "Order Adopting Amendments" in Docket No. RMU-04-2 that "[a]ssistance payments from a state or federal agency should not be considered as satisfying this requirement." Even though the Board believes that a customer should make some payments on the first payment agreement from the customer's own resources in order to be eligible for a second payment agreement, the Board does not want to jeopardize the current procedures whereby the LIHEAP payments are made directly to the utility.

Subparagraphs 19.4(10)"c"(2) and 20.4(11)"c"(2) do not require a utility to determine the source of the two consecutive full payments. Withdrawal of the statement in the Board's order will leave the rule unchanged and will allow all payments, regardless of the source of the payment, to be considered in satisfying the two consecutive full payments requirement. For some utilities this will not be a change. For others this will require a change in procedures.

The Board does not consider adoption of the request for declaratory order modified interpretation to be beyond the scope of its authority. Iowa Code § 17A.9 provides that a person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency. Here, IDHR/BEA has requested a declaratory order addressing specific circumstances under the Board's order adopting amendments in Docket No. RMU-04-2 and the interpretation of the provisions of 19.4(10)"c"(2) and 20.4(11)"c"(2). The Board has primary jurisdiction over the issue of disconnection of utility service pursuant to Iowa Code § 476.20 and, therefore, can issue a declaratory order interpreting its disconnection rules.

MEC is correct that the Board could open another rule making docket to address protections for non-LIHEAP-certified low-income customers from disconnection. However, several proposals to address this issue were considered in Docket No. RMU-04-2, including MEC's proposed 60-day requirement. The Board considered all of these proposals when it adopted the second payment agreement requirements to increase protection for non-LIHEAP-certified low-income customers. There is no need to reopen the rules at this time.

### **DECLARATORY ORDER**

The Board withdraws the statement at page 14 of its "Order Adopting Amendments" issued July 30, 2004, in Docket No. RMU-04-2 that "[a]ssistance payments from a state or federal agency should not be considered as satisfying this requirement." There should be no consideration of the source of a customer's

payment when considering the two consecutive full payments requirement in 199 IAC 19.4(10)"c"(2) and 20.4(11)"c"(2).

The Board recognizes that it may take some time for utilities to adjust procedures based upon the withdrawal of the statement concerning state and federal assistance payments. The Board will allow utilities until November 1, 2005, to implement procedures consistent with this declaratory order. A utility may also adopt procedures that are more favorable to customers.

### **ORDERING CLAUSES**

#### **IT IS THEREFORE ORDERED:**

1. A declaratory order as described in the paragraph above is issued in response to the petition filed by Jerry McKim, Director, Bureau of Energy Assistance of the Iowa Department of Human Rights, on March 21, 2005.
2. Utilities have until November 1, 2005, to implement the decision made in this declaratory order.

#### **UTILITIES BOARD**

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 17<sup>th</sup> day of May, 2005.