

IN THIS ISSUE

Late Payment Charges for Delinquent Residential Utility Accounts

NOTE TO READERS

ON-LINE DELIVERY

This document presents the bi-monthly electronic newsletter of Fisher, Sheehan & Colton: *FSC's Law and Economics Insights*. Previous issues of the newsletter can be obtained at FSC's World Wide Web site:

<http://www.fsconline.com> (click on "News")

Fisher, Sheehan & Colton
Public Finance and General Economics
34 Warwick Road, Belmont, MA 02478
(voice) 617-484-0597 *** (fax) 617-484-0594
(e-mail) roger@fsconline.com

When Not Cost-Based, Utility Late Payment Charges Merit Strict Controls

Fisher, Sheehan and Colton (FSC) was asked to prepare an annotated model state utility commission regulation governing the imposition of late payment charges on delinquent residential accounts.

Its model regulation governing residential late payment charges is presented below:

UTILITY LATE PAYMENT CHARGES FOR DELINQUENT RESIDENTIAL ACCOUNTS: A MODEL STATE COMMISSION REGULATION

April 2014

SECTION 1. DEFINITIONS

"Financial hardship customers" means customers who meet any one or more of the following qualifications: they have a gross monthly household income not exceeding 150% of the Federal poverty level;¹ or they participate in a means-tested state or federal energy assistance program; or they participate in a utility-sponsored low-income assistance program.

"Late payment charge"² means an additional charge, over the net total cost of utility service

¹ 52 Pa. Code § 56.22(d) (Penn. 2014).

² Different states use different references. Whether the term is late payment charge, late payment fee, late payment penalty, delinquent penalty, interest, or some related verbiage, they should be considered sui generis.

provided, which is applied to any past-due bill under this regulation.³ In any case where net and gross amounts are billed, the difference between net and gross is a late payment charge and shall be so specified.⁴ In its billing, the utility shall not use the term “prompt payment discount” or other words of similar import which suggest that the consumer will receive a discount or reduction of charges for electric service for payment prior to a certain date.⁵

SECTION 2. LATE CHARGE AUTHORIZATION

Subject to the following requirements, as well as the limitations of Section 4, a utility may charge and collect a late payment charge for overdue bills of all non-financial hardship customers:

1. The late payment charge on any overdue bill shall not exceed the amount set forth in the utility's tariff approved by the commission;
2. The commission shall approve a proposed late payment charge as follows:
 - a. The commission shall grant approval of a utility's proposed late payment charge tariff, whether new or amended, only if the utility demonstrates that the proposed charge does not exceed the actual costs incurred by the utility due to lateness;⁶

³ COMAR 20.30.03.01(Maryland 2014); see also, 170 IAC 4-1-1 (Indiana 2014) (“Late payment charge means the one (1) time penalty assessed by a utility upon all current bills at such time as they become delinquent”).

⁴ Iowa Admin. Code 199-19.2(4) (476) (Iowa 2014).

⁵ Okla. Admin. Code 165:35-19-32(b) (Okla. 2014).

⁶ This regulation makes a late payment charge explicitly

- b. To demonstrate that a proposed charge does not exceed costs, the utility shall provide the commission with:
 - i. Aggregate carrying cost information;
 - ii. Aggregate administrative information on costs not incurred in the absence of the late payment;⁷ and
 - iii. Other relevant information in the aggregate.⁸

SECTION 3. BILL STATEMENT DISCLOSURE OF LATE CHARGE.

A utility shall clearly state upon the face of its bills the amount of any late payment charge, and the date on or before which payment must be received in order to avoid paying the late payment charge.⁹

SECTION 4. LATE CHARGE LIMITATIONS

cost-based. It rejects the notion that a late payment charge should serve as an “incentive” to make payments or that the “comparability” of the late payment charge to other consumer credit interest rates is in any sense relevant to a determination of the reasonableness of the charge.

⁷ Administrative cost causation is measured by a “but for” test. Only those costs that would not be incurred but for the late payment are subject to inclusion through a late payment charge.

⁸ N.H. Code Admin. R. Puc 1203.08(a) (NH 2014).

⁹ Okla. Admin. Code 165:35-19-32(b) (Okla. 2014); see also, 3 AAC 52.430 (Alaska 2014).

1. A utility shall not consider a customer's bill, when paid in person, past due unless the payment is made after the due date printed on the bill. When a customer mails any payment in the net amount of a bill for service, and such payment is received at the utility's office not more than two full business days after the due date printed on the bill, the customer shall be deemed to have made timely payment. In determining whether a bill is past due, a utility may rely on the postmark of the payment, in which case, the payment shall be considered past due if the payment is postmarked after the due date printed on the bill.
2. Each utility shall choose one of the above methods for determining when a bill is past due¹⁰ and shall apply this method to all customers. For utilities which choose the postmark method, in instances where the postmark is illegible or absent, the customer's payment shall be deemed timely made if the payment is received at the utility's office not more than two full business days after the due date printed on the bill.¹¹
3. The charge will be based on a monthly late-payment rate applied to overdue account balances at the time of preparing the subsequent month's bill¹² for residential accounts.¹³

¹⁰ The test for when a payment is deemed to be "late" must be one or the other of the two stated alternatives. Once elected, the test must be applied to all customers.

¹¹ 83 Ill. Adm. Code 280.90 (Ill. 2014).

¹² While the trigger if *whether* to apply a late payment charge is governed by Section 4(1) – 4(2), the balance against which the late payment charge is to be applied is governed by Section 4(3).

¹³ OAR 860-021-0126 (Oregon 2014).

SECTION 5. LATE CHARGE LIMITATIONS

1. A utility shall not impose late-payment charges on residential customers unless the utility's rate schedule provides that the late charge is not applied on residential balances less than \$200.¹⁴
2. No late payment fee may be imposed for any time period in which a bill is in dispute pursuant to applicable Commission rules. A customer will have a minimum of 25 days from the date of the resolution of the dispute to remit payment to a utility in order to avoid a late payment charge.¹⁵
3. No utility may charge a late payment fee for failure to pay an estimated bill by the due date unless the customer is subsequently delinquent on a bill using an actual read. This rule shall not apply if the bill is estimated because the utility was unable to gain access to the meter, the utility's lack of access is documented, and the customer refused to provide an actual meter reading.¹⁶
4. No late payment charge may be imposed for an amount overdue that is the sole result of a budget payment plan.¹⁷

¹⁴ OAR 860-021-0126 (Oregon 2014).

¹⁵ 65-407 CMR Ch. 870, § 1 (Maine 2014).

¹⁶ Mich. Admin. Code R. 460.122(3) (Mich. 2014).

¹⁷ 65-407 CMR Ch. 870, § 1 (Maine 2014); see also, 83 Ill. Adm. Code 280.90 (Ill. 2014); see also, OAR 860-021-0126 (Oregon 2014).

5. No utility may assess a late payment charge on any final bill which has been outstanding for more than 12 months.¹⁸
6. No additional late payment charge may be applied to a delinquent account for utility service after the date on which the delinquent account was written off¹⁹ by the utility as uncollectible.²⁰
7. No utility may assess a late payment charge bill for any amount billed which is not for utility service.²¹
8. No late payment charge shall not be applied to any amount billed as taxes which utilities are required to collect.²²

SECTION 6. NO COMPOUNDING OF LATE CHARGES.

An additional late fee may not be applied to a subsequent bill for failure to pay the prior late fee. The late payment charge on delinquent bills may not be applied to any balance to which the late payment charge was applied in a previous billing.²³

SECTION 7. LATE CHARGES AND DEFERRED PAYMENT PLANS.

A delinquent amount covered by a deferred payment agreement shall not be subject to additional late payment charges if the customer meets the payment schedule including the current bill as required by the agreement.²⁴ However, if a customer defaults on a deferred payment agreement, the amount remaining shall be subject to any applicable monthly late payment charge.²⁵

SECTION 8. ANNUAL FORGIVENESS

Each account shall be granted not fewer than one complete forgiveness of a late payment charge each calendar year. The utility's rules shall be definitive that on one monthly bill in each period of eligibility, the utility will accept the net amount of such bill as full payment for such month after expiration of the net payment period.²⁶ At its discretion, a utility may waive more than one late payment charge for residential customers.²⁷

SECTION 9. BILL PAYMENT DATE ADJUSTMENT

Every utility shall offer a financial hardship residential customer the opportunity to pay his or her bill on a reasonable schedule that is adjusted for such customer's periodic receipt of income without such customer incurring late payment charges; provided, however, that any such offer

¹⁸ 83 Ill. Adm. Code 280.90 (Ill. 2014).

¹⁹ Working capital is not charge on uncollectible accounts. Nor are collection activities directed toward uncollectible accounts. Accordingly, no basis exists to charge a cost-based late payment charge on an account already written off as uncollectible.

²⁰ Wis. Adm. Code s PSC 113.0406(7) (Wis. 2014).

²¹ 83 Ill. Adm. Code 280.90 (Ill. 2014).

²² 20 VAC 5-10-10(C) (Virg. 2014).

²³ 30 TAC § 291.87(c) (Texas 2014); see also, Mich. Admin. Code R. 460.122(2) (Mich. 2014); see also, 3 AAC 52.430 (Alaska 2014).

²⁴ Once a customer agrees to a deferred payment arrangement, so long as the customer maintains that payment arrangement, the payments are deemed to be "current" for purposes of a late payment charge.

²⁵ Wis. Adm. Code s PSC 185.33 (Wis. 2014); see also, OAC 4901:1-18-05(H) (Ohio 2014); see also, 15 DCMR § 305 (Washington D.C. 2014) ("No late payment charge shall be levied on any amounts, including deferred payment installments, paid by the due date. . .")

²⁶ Iowa Admin. Code 199-21.4(4) (476) (Iowa 2014).

²⁷ 83 Ill. Adm. Code 280.90 (Ill. 2014).

may prescribe a late payment charge, consistent with the standards set forth in Section 2 of this regulation, where payment is not made within 20 days²⁸ of the scheduled due date.²⁹

SECTION 10. DISCLOSURE

At least 30 days, or one billing cycle, before a late payment charge program is begun or an existing late payment charge is increased, a utility must disclose to the affected customers the late payment charge rate and the methods that will be used to calculate late payment charges. Every bill issued after an approved late payment charge program begins must state the due date of the bill and the effective monthly late payment charge rate that will be imposed if the bill is not paid by the due date.³⁰

SECTION 11. NO TAXATION OF LATE PAYMENT CHARGE

The amount of any late payment charge imposed by a public utility on its customers shall not be subject to tax if the charge is in addition to any charge for the utility's sale of its commodity or service and is imposed solely for the privilege of deferring payment of the purchase price of the commodity or service and furthermore is separately stated³¹ and reasonable in amount.³²

²⁸ A financial hardship customer may adjust the due date of his or her bill to match the receipt of income, but a late payment charge is appropriate if payments are not made within the adjusted due date period.

²⁹ 16 NYCRR 11.15 (NY 2014).

³⁰ 65-407 CMR Ch. 870, § 1 (Maine 2014).

³¹ See also, 20 VAC 5-10-10(C) (Virginia 2014) (“the amount of any such charge included as a separately identified item upon the current bill”).

³² Iowa Admin. Code 701-16.50(422,423 (Iowa 2014)); see also, Okla. Admin. Code 710:65-19-341(e) (Okla. 2014). (“Charges which are separately stated and are unrelated to the amount of gas or electricity used such as fees for meter reading, installation, initiation, disconnection, or restora-

SECTION 12. REQUIRED TO FILE TARIFF.

Any utility which chooses to impose a late payment charge must file terms and conditions conforming to this rule. Any utility that has existing terms and conditions that conflict with this rule must file revised terms and conditions at the time of its next general rate case or when it next revises its rate schedules whichever is earlier. This rule preempts any inconsistent terms and conditions from the time of its effective date.

Fisher, Sheehan and Colton, Public Finance and General Economics (FSC) provides economic, financial and regulatory consulting. The areas in which FSC has worked include energy law and economics, fair housing, affordable housing development, local planning and zoning, energy efficiency planning, community economic development, poverty and telecommunications policy, regulatory economics, and public welfare policy.

tion of service, as well as charges for returned checks or for late payment, are not subject to sales tax.”)