

**ADDRESSING LOW-INCOME INABILITY-TO-PAY  
UTILITY BILLS DURING THE WINTER MONTHS  
ON TRIBAL LANDS SERVED BY ELECTRIC CO-OPS:  
A Model Tribal Winter Utility Shutoff Regulation**

**PREPARED BY:**

Roger D. Colton  
Fisher, Sheehan and Colton  
Public Finance and General Economics  
34 Warwick Road  
Belmont, MA 02478  
617-484-0597 (voice) \*\*\* 617-484-0594 (fax)  
rcolton101@aol.com (e-mail)

This publication cannot substitute for the independent judgment and skills of a competent attorney or other professional. Non-attorneys are cautioned against using these materials to conduct a law suit or to take other action without advice or assistance from an attorney. Always use other sources to determine if there are special rules for individual jurisdictions.

# Fisher Sheehan & Colton

**Public Finance and General Economics**  
34 Warwick Rd\*\*Belmont, MA 02478  
617-484-0597\*\*\*617-484-0594 (FAX)

33126 S.W. Callahan Road  
Scappoose, OR 97056  
503-543-7172

Box 27, R.R. 5  
Iowa City, IA 52240  
319-338-1494

The following material presents a recommended Regulation to implement winter utility shutoff restrictions for a local Rural Electric Cooperative (REC) serving Tribal customers. The assumption behind the Regulation is that, without the Tribal Regulation, the REC will be unregulated by any State Public Utility Commission rule regarding winter restrictions.

The Regulation and the accompanying attachments offer no opinion as to the need for, or legitimacy of, a Tribal Regulation under circumstances where the State has exercised jurisdiction regarding winter utility service terminations. Presumably, however, if the State restricts winter shutoffs, the need for a Tribal Regulation is rendered less important.

The material that follows is contained in four parts. The parts should be read as a unified whole.

- o *Part 1* presents a "preamble" setting forth a policy and factual basis for adopting winter utility service restrictions.
- o *Part 2* presents the actual model regulation.
- o *Part 3* presents a "commentary and explanation" of the model regulation, which describes in detail the intention underlying each section of the model regulation.
- o *Part 4* presents a "jurisdictional statement" explaining why the Tribal Council has the authority to adopt a regulation regarding the activities of a non-tribal entity (*i.e.*, the REC) when those activities affect Tribal members.

**JURISDICTIONAL STATEMENT:  
MODEL TRIBAL REGULATION  
TERMINATION OF RESIDENTIAL UTILITY SERVICE  
DURING WINTER MONTHS  
BY RURAL ELECTRIC COOPERATIVE**

This *Jurisdictional Statement* relates to the jurisdiction of the Tribal Council to promulgate restrictions on the involuntary termination of utility service due to nonpayment during the winter months. The Tribal Council has the jurisdiction to promulgate such regulations. The issue is whether the Tribal Council has the jurisdiction to exercise regulatory authority over a non-Indian entity (*i.e.*, the Rural Electric Cooperative) who has entered into a contract to provide electric service to Indian members within the exterior boundaries of the Tribal reservation.

**OVERVIEW**

Under U.S. Supreme Court decisions, "the source of Native Americans' self-governing authority flows from treaties between Indian tribes and the United States, from federal laws, and from the tribes' inherent authority as sovereign."<sup>1\</sup>

The issue is *not* whether the Tribe may regulate the treatment of nonmembers of the Tribe.<sup>2\</sup> Moreover, according to the accompanying *Commentary and Explanation*, the limitation is for jurisdictional purposes.<sup>3\</sup> The limitation, in other words, recognizes that "the Supreme Court has consistently held that tribal sovereignty does not preclude a state from regulating a tribal activity where nonmembers are concerned."<sup>4\</sup>

**STATE VS. TRIBAL REGULATION**

---

<sup>1\</sup> Martin Kirkwood, "Federal and State Regulation of Tribal Utilities," 7 *SPG Natural Resources and Environmental* 27 (1993). (*hereafter*, *Kirkwood*).

<sup>2\</sup> *Regulation*, Section 1(c).

<sup>3\</sup> *Commentary and Explanation*, Part One, Comment 9, "Finally, the regulation makes clear that it applies only to a customer if the customer is a Native American who receives utility service within the exterior boundaries of the Tribal Lands from the company proposing the termination. The purpose of this part of the regulation is jurisdictional. Tribes may exert exclusive jurisdiction over Tribal members regarding transactions occurring on Tribal lands."

<sup>4\</sup> *Kirkwood*, *supra*.

Some question may exist as to whether the Tribal Council has the authority to exercise Tribal regulation in the event that either (a) the State has exercised regulatory jurisdiction over the REC statewide; or (b) the State has chosen to leave RECs unregulated by state administrative agencies.

In general, one commentator has explained Tribal and State jurisdiction as follows:

The state regulates activities off the reservation no matter who is the party. The tribe has exclusive regulatory jurisdiction, limited only by Congress, over its members and over Indian land. This regulatory power, consistent with the tribe's semi-sovereign status, has been held to include the power to regulate non-Indians. A tribe may regulate through taxation, licensing, or other means the activities of non-members who enter consensual relations with the tribe or its members.\* \* \*In a recent landmark decision, the Ninth Circuit held that tribal power to regulate carries with it the power to enforce the regulation.<sup>151</sup>

Carter went on to discuss "tribal regulatory jurisdiction over non-Indians." Carter stated:

The general areas of tribal regulatory jurisdiction over non-Indians have been delineated by the Supreme Court. Absent any of the three situations discussed above,<sup>161</sup> the tribe will have jurisdiction in these areas. The areas are lumped into two categories: the regulation of non-Indians doing business on the reservation; and the regulation of non-Indians whose activities impact tribal self-government.

---

<sup>151</sup> Mickale Carter, "Regulatory Jurisdiction on Indian Reservations in Montana," 5 *Public Land Law Review* 147 (1984). (*hereafter*, Carter). (citations omitted).

<sup>161</sup> A Tribe may not exercise jurisdiction if: (1) if the powers of self-government were voluntarily relinquished by treaty; (2) if Congress in the exercise of its plenary authority over tribes divested the tribe of the power; or (3) if the exercise of power would be inconsistent with the superior interests of the United States as a sovereign nation. With regard to the second condition, the action of Congress must be explicit on the face of the statute or in the legislative history. With regard to the third condition, only three areas have been identified: (a) a tribe may not convey trust land without the consent of the federal government; (b) a tribe may not deal directly with a foreign nation; and (c) a tribe may not exercise criminal jurisdiction over non-Indians. *Carter, supra*.

The *Montana v. United States*,<sup>17</sup> court described tribal power as follows: 'A tribe may regulate, through taxation, licensing, or other means the activities of non-members who enter consensual relationship with the tribe or its members through commercial dealings, contracts, leases, or other arrangements\* \* \*.' A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on non-Indian lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.<sup>18</sup>

Importantly, the REC need not "agree" to be regulated for the Tribal Council to exercise its authority.

The power of the tribe to regulate is based on sovereignty, drawn from both the power to tax and the power to exclude non-Indians, and is not derived from the consent of those being regulated. Being so derived, a tribal regulation can not be overturned because the person being regulated has not consented to the regulation. This is especially important when a non-Indian is being regulated by a tribal government because typically, even if the non-Indian is a resident of the reservation, he has no say in tribal government. Participation in tribal government is usually limited to tribal members.<sup>19</sup>

The remainder of this *Jurisdictional Statement* seeks to briefly identify the Tribal interests in the Regulation restricting the involuntary termination of utility service for nonpayment during the winter period.

## **THE TRIBAL INTERESTS IN WINTER UTILITY SERVICE RESTRICTIONS**

The Tribal interests in regulating the termination of utility service during the winter period are substantial. The interests include:

---

<sup>17</sup> 450 U.S. 544, 565 - 566 (1980).

<sup>18</sup> *Carter, supra.*

<sup>19</sup> *Id.*

## *The Health and Safety of Tribal Members*

The termination of utility service during the winter months poses a substantial health and safety threat to Tribal members which the Tribe has an interest in regulating. These payment problems can threaten the health, safety and perhaps even life of low-income individuals. The availability of public utility services has been judicially recognized as essential not only to modern convenience, but to modern health and welfare as well. The U.S. Supreme Court noted in *Craft v. Memphis Gas, Light and Water Division*,<sup>\10\</sup> that "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>\11\</sup> Similarly, an Ohio federal district court has stated that "the lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal."<sup>\12\</sup>

These policy statements have a basis in fact. There are substantial health implications associated with the loss of home heating in cold weather, which energy efficiency improvements can help avoid. A 1991 study of shutoffs in North Carolina found that seven percent (7%) of all households lost their primary heating service in that state for a variety of reasons in the last winter.<sup>\13\</sup> Many of these households lacked any alternative heating source when their primary heating source was out of operation. Nearly four of ten of those households (38%) having lost primary heat said that they had *no* alternative and, as a result, that they went *without* heat for some period of time during the winter because of the loss.<sup>\14\</sup>

A 1993 study in Washington state found similar results.<sup>\15\</sup> That study reported that sixty-two percent (62%) of all respondents losing their service at some time during the

---

<sup>\10\</sup> 436 U.S. 1 (1978).

<sup>\11\</sup> *Id.*, at 18.

<sup>\12\</sup> *Palmer v. Columbia Gas Co. of Ohio*, 342 F.Supp. 241, 244 (N.D. Ohio 1972) (citations omitted); *see also, Stanford v. Gas Service Company*, 346 F.Supp. 717, 721 (D.Kan. 1972). An excellent canvass of cases is found in *Montalvo v. Consolidated Edison Company of New York*, 110 Misc. 2d 24, 441 N.Y.S.2d 768, 776 (N.Y. 1981).

<sup>\13\</sup> Colton and Levinson, *Energy and Poverty in North Carolina: Combining Public and Private Resources to Solve a Public and Private Problem* (1991).

<sup>\14\</sup> *Id.*, at 62.

<sup>\15\</sup> Sheehan, *et. al, An Assessment of Low-Income Energy Needs in Washington State*, at 108 (Nov. 1993).

preceding twelve months reported using nothing while their heat was off. Of those who lost their heat during the *winter*, 51% reported using nothing while their heat was off. The next most frequent response for all shutoffs (and specifically winter shutoffs) was "other," having been selected by 15% of the respondents. In most cases "extra blankets" and "stayed at a friend's or family's house" were the responses written in. Therefore, not just a majority, but a substantial majority (62% + 15% = 77%), of those who lost their heat had absolutely no heat in their homes for the duration of time that their heat was off.<sup>\16\</sup>

Loss of a household's primary heat source presents serious risks both in terms of the cold as well as the dangerous side effects such as fire and carbon monoxide poisoning resulting from using unsafe heating sources. According to the National Center for Health Statistics, approximately 60,000 lives are lost annually by problems associated with cold weather including fires, carbon monoxide poisoning, pneumonia, influenza and other infectious diseases and of course hypothermia.<sup>\17\</sup>

Moreover, these dangerous tradeoffs between health and energy affect not only the vulnerable elderly, but young children as well. A study by Boston City Hospital of 7,367 children found that "the number of malnourished, low-weight children jumped dramatically following the coldest winter months."<sup>\18\</sup>

In fact, the elderly are one of the most vulnerable populations to these health impacts. Hypothermia is a more serious danger than people are commonly aware, particularly for the elderly. Over 2.5 million older Americans are at risk of developing hypothermia during the winter season each year according to the National Institute on Aging.<sup>\19\</sup> The proceedings of the Federal Council on the Aging, *Accidental Hypothermia: Facts and Myths*, states:

Hypothermia, literally a drop in the body's internal temperature, is a

---

<sup>\16\</sup> The North Carolina study did not consider the "other" category in its analysis.

<sup>\17\</sup> Select Committee on Aging, House of Representatives, *Deadly Cold: Health Hazards Due to Cold Weather*, at 2 (1984).

<sup>\18\</sup> Diego Ribadeneira, "BCH Study Illustrates Poor's Painful Choice," *The Boston Globe*, at 1 (September 8, 1992).

<sup>\19\</sup> *Id.*

potentially fatal cold weather hazard for older Americans. While usually associated with outdoor recreation or the homeless, most victims of hypothermia are the elderly who die in their own homes in seemingly normal temperatures.<sup>120\</sup>

In discussing which elderly people are most vulnerable to death resulting from hypothermia, a Congressional Committee, the Select Committee on Aging, wrote in their report to Congress:

Low fixed incomes, poverty and the increased cost of fuel heating and cooling the home create conditions in which many of the most vulnerable members of our communities are forced to make dangerous tradeoffs between energy and health. Energy conservation programs which encourage elderly people to reduce room temperature below 70 degrees F, directly endangers the health and safety of those who are vulnerable to hypothermia.\* \* \* These individuals may try and minimize their fuel costs by keeping the temperature in the home or apartment as low as possible rather than a minimum of 65 degrees. In the worst case inability to pay for fuel energy could result in a termination of service and severe risk during a cold spell.<sup>121\</sup>

The Select Committee found that these deaths related to cold weather are preventable. In the "Suggestions for Reform" section, the Select Committee for Aging, as one of its recommendations, advised the following: "health organizations should work closely with gas and electric companies to prevent gas and electric shutoffs to residential customers. Shutoffs during the winter time should not be allowed without adequate warning and notification of a responsible health department."

Finally, in contrast to the households who had absolutely nothing to rely upon when their heat was shutoff as discussed above, the remaining 23 percent in Washington state generated heat by using another fuel source, whether it was a portable heater, the kitchen stove, or a fireplace.<sup>122\</sup> Households which experienced loss of home heat

---

<sup>120\</sup> Federal Council on the Aging, *Accidental Hypothermia: Facts and Myths*, at iv (Washington D.C.).

<sup>121\</sup> Select Committee on Aging, House of Representatives, *Deadly Cold: Health Hazards Due to Cold Weather*, at 2 (1984).

<sup>122\</sup> *Sheehan et al.*, at 108.

between April and November were more likely to use a fireplace or portable electric heater. Similarly, in North Carolina, even those households who didn't lack heat altogether faced major disruptions in their ability to keep warm. Of those households losing their primary fuel last winter, nearly one in four (24%) used either portable kerosene heaters or portable electric heaters as their (expensive and very dangerous) replacement source of heat. A nearly equal proportion of the households losing their primary source of heat relied upon either their cooking stove or their fireplace (20%) as their primary heating source.<sup>123\</sup>

### ***Control of Potential for REC Abuse of Payment Plan Negotiations***

The Tribal Council takes note of the character of the REC being subjected to the terms of this Regulation. The Council believes the Tribe has an interest in preventing the REC from abusing its power to dispense necessary utility service. The Council has an interest in ensuring the principle that the company may not discontinue essential electric service when its convenience or caprice may dictate, even after notice.

In *Wood v. City of Auburn*,<sup>124\</sup> one court crafted one of the most eloquent, firm and judicious statements regarding the imbalance of power between a consumer and utility. In *Wood*, the consumer had disputed a bill, which bill and dispute lapsed into apparent inertia on both sides. When the utility was sold to the city, however, the city resurrected the old debt and threatened to terminate service unless the old debt was paid. The consumer successfully enjoined the threat of termination in the court below.

In holding that the injunction against termination of service would become permanent, the Maine Supreme Court was compelled to observe:

The parties are not on equal ground. The city, as a water company, cannot do as it will with its water. It owes a duty to each consumer. The consumer, once taken on to the system, becomes dependent on that system for a prime necessity of business, comfort, health, and even life. He must have the pure water daily and hourly. To suddenly deprive him of this water in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He

---

<sup>123\</sup> *Colton and Levinson*, at 63.

<sup>124\</sup> 87 Me. 287, 32 A. 906 (1895).

must surrender, and swallow his choking sense of injustice.

The court reasoned further:

Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost,<sup>125\</sup> the collector may have embezzled the money, yet the consumer must pay it again, and perhaps still again. He cannot resist, lest he lose the water.<sup>126\</sup>

We note in particular the vulnerable position of the consumer in the relationship with the utility, and agree with the reasoning of one court which said:

It is a public service corporation, monopolistic in its nature, and the patrons have no choice but to accept its service, and they have not the privilege of selecting to do business with a competitor, because there is no competitor, and for this reason the rights of the public should be carefully guarded against oppressive methods used for the purpose of collecting unjust demands. The necessities of the law must meet modern conditions.<sup>127\</sup>

We believe that the potential loss of essential utility service, provided by a monopoly supplier, falls within these statements of the need for protection against abuse. Given the potential for life-threatening loss by the customer who cannot pay, the interest in regulation by this Council is clear.

While the Council recognizes the need for fair and effective collection practices by the REC to protect its financial wellbeing, the Council further finds the demand by an REC for the right to terminate service during the winter period is wholly out of proportion to the necessities of fair protection. Moreover, the Council believes whether or not one agrees with the wisdom of the Regulation does not detract from the *jurisdiction* of the Council to address the interests in controlling potential abuses.

---

<sup>125\</sup> A lost receipt was the basis of a dispute in which the consumer was vindicated in *Birmingham Water Works Co. v. Wilson*, 2 Ala. App. 581, 56 So. 760 (1911).

<sup>126\</sup> *Wood*, *supra*, 32 A. at 908.

<sup>127\</sup> *Id.*, at 928, quoting, *Telegraph Co. v. Hobart*, 89 Miss. 252, 42 So. 349 (1906).

## ***Control of Unfair Debt Collection Practices***

The Tribal Council also has an interest in controlling what we believe to be unfair debt collection practices by a Rural Electric Cooperative. We find that the use of service terminations during the winter period to be such an unfair debt collection practice.

We base our finding on the observation that any definition of "unfairness" should blend three elements: (1) substantial consumer injury, (2) not outweighed by benefits to competition, (3) which consumers can not reasonably avoid.

We note that in 1985, the State of Vermont promulgated regulations dealing with the unregulated sale of propane.<sup>128\</sup> The Vermont regulation sets out certain standards based on the authority to prohibit unfair and deceptive acts and practices.<sup>129\</sup> We note these Vermont regulations simply as an illustration of the fact that others have sought to control the collection practices of commercial entities providing home heating service on the basis of authority over restricting collection activities deemed to be "unfair."

## **CONCLUSION AND SUMMARY**

The Tribal Council has jurisdiction to promulgate a Regulation that limits the authority of the local Rural Electric Cooperative to terminate utility service during the winter period. There is no question but that the Regulation explicitly limits its coverage to Tribal members living with the exterior boundaries of the Tribal lands.

As such, the Tribal Council has identified certain interests which the Council has in the control of a commercial relationship with Tribal members on Tribal property. These interests include, but are not necessarily limited to:

1. Protecting the health and safety of Tribal members during the winter period;
2. Controlling potentially abusive utility collection practices during the winter period; and
3. Controlling inherently unfair debt collection practices by the local REC.

---

<sup>128\</sup> Vermont Attorney General Rule CF 111, Liquefied Petroleum "Propane" Gas.

<sup>129\</sup> *See*, 9 *Vermont Stat. Ann.* §2461(b) (1991 supp.).

**PREAMBLE:**  
**MODEL TRIBAL REGULATION**  
**TERMINATION OF RESIDENTIAL UTILITY SERVICE**  
**DURING WINTER MONTHS**  
**BY RURAL ELECTRIC COOPERATIVE**

1. This Tribal Council finds that the local Rural Electric Cooperative (REC) today has gained all the power, and consequently all the potential for abuse, of the investor-owned utilities in response to which RECs were born. The local REC has become a monopoly provider of an essential public resource. As one Colorado court put it: "A consumer located in an area exclusively served by an REC must take *its* service if service is to be received at all\* \* \*. The form of organization delivering the service makes no difference to the consumer." *Western Colorado Power Co. v. Public Utilities Commission*, 411 P.2d 785, 795 (Colo. 1966)
2. The Council finds that the original rationale for leaving RECs unregulated is no longer a sufficiently compelling justification for leaving the electric service recipients on our Tribal Lands unprotected against the threat of unreasonable action by an REC. The local REC serving our Tribe is no longer a small group of individuals who have voluntarily banded together to serve themselves. Instead, the REC is a large, complex, hierarchical organization that is far removed --physically as well as in spirit-- from the needs of its less fortunate members. There is thus a great need to gain formalized customer service regulations against unreasonable actions for those customers served by the local REC.
3. Within the relationship between Tribal members and the local REC, because of unequal bargaining relationships, Tribal consumers have a specific vulnerability to the REC. The vulnerability of Tribal electric utility consumers who are dependent on the REC as the single supplier of the electric service necessary to life, itself, is recognized by this Council.
4. In particular, the potential for conflict between the payment-troubled customer and the REC is now substantial. There can be no question but that the local Rural Electric Cooperative has come face-to-face with the plight of the rural poor. And that plight is substantial, particularly on Tribal Lands. Native

Americans on our Tribal lands represent some of America's lowest income households.

5. These payment problems can threaten the health, safety and perhaps even life of low-income individuals. The availability of public utility services has been judicially recognized as essential not only to modern convenience, but to modern health and welfare as well. The U.S. Supreme Court noted in *Craft v. Memphis Gas, Light and Water Division*,<sup>30\</sup> that "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>31\</sup> Similarly, an Ohio federal district court has stated that "the lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal."<sup>32\</sup>
6. This Council believes that special winter protections may be appropriate whenever: (1) the REC is an entity that has power over a vulnerable party; and (2) as the stronger party, the REC has the opportunity to exploit that power. Courts have long recognized the danger of a utility exploiting a customer's dependency on the receipt of service to obtain concessions from the consumer. This is, for example, the basis for the prohibition against utilities terminating service because of a customer's refusal to pay a disputed bill.<sup>33\</sup> The particular

---

<sup>30\</sup> 436 U.S. 1 (1978).

<sup>31\</sup> *Id.*, at 18.

<sup>32\</sup> *Palmer v. Columbia Gas Co. of Ohio*, 342 F.Supp. 241, 244 (N.D. Ohio 1972) (citations omitted); *see also, Stanford v. Gas Service Company*, 346 F.Supp. 717, 721 (D.Kan. 1972). An excellent canvass of cases is found in *Montalvo v. Consolidated Edison Company of New York*, 110 Misc. 2d 24, 441 N.Y.S.2d 768, 776 (N.Y. 1981).

<sup>33\</sup> *See e.g., Wood v. Auburn*, 87 Me. 287, 32 A. 906, 907 - 908 (1895). In this case, the court crafted one of the most eloquent, firm and judicious statements regarding the imbalance of power between a consumer and utility. In *Wood*, the consumer had disputed a bill, which bill and dispute lapsed into apparent inertia on both sides. When the utility was sold to the city, however, the city resurrected the old debt and threatened to terminate service unless the old debt was paid. The consumer successfully enjoined the threat of termination in the court below.

In holding that the injunction against termination of service would become permanent, the Maine Supreme Court was compelled to observe:

"The parties are not on equal ground. The city, as a water company, cannot do as it will with its water. It owes a duty to each consumer. The consumer, once taken on to the system, becomes dependent on that system for a prime necessity of business, comfort, health, and even life. He must have the pure water daily

ability of our local REC to exploit its power during the winter months is recognized by this Council.

7. The Council also recognizes that there is an inextricable tie between monopoly power and winter service obligations. In *Trigg v. Middle Tennessee Electric Membership Corporation*,<sup>134)</sup> the Tennessee Appeals Court stated:

electric co-ops in the state of Tennessee enjoy a monopolistic position that spawns certain rights and benefits.

A concomitant of these rights and benefits is a duty to use a corresponding degree of care to protect the public. It must act reasonably when terminating service to a customer when the discontinuance of service might present an obvious danger of damage to the property of the customer.

The Tribal Council finds that the attached Regulation regarding winter terminations of service reasonably defines the local REC's "degree of care" to be exercised during the winter period.

8. Finally, the essential nature of electric service provided by RECs implies that the risks associated with a wrongful denial of service during the winter period can be, quite literally, deadly. Accordingly, in considering winter protections for customers of RECs facing the denial or disconnection of service, the Council must consider how to allocate the "risk of being wrong."

The termination of service represents a decision that no other credit and collection mechanism will be effective. In contrast, to *not* terminate service means that a decision is made that arrears can be collected eventually without resorting to service termination. During the winter, the Council has determined, there should be a reduced risk to the consumer of an erroneous decision. In reaching this conclusion, the Council has weighed the consequences to each party --the REC and the consumer-- of an erroneous decision. The Council

(..continued)

and hourly. To suddenly deprive him of this water in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He must surrender, and swallow his choking sense of injustice."

<sup>134)</sup> 535 S.W.2d 730 (Tenn.App. 1976).

reflects not only the weight of the private and public interests affected, but also a judgment about how the risk of error should be distributed between the REC and its consumers. The Council believes that the higher standard imposed by our winter restrictions is preferable because, given the weight of the private interests at stake, the social cost of even occasional error is sizable.

9. Historically, there has been a high degree of concern expressed about the erroneous deprivation of a household's utility service. In addition to this expressed concern is the higher protection judicially offered to protect against the erroneous deprivation of utility service in other circumstances.<sup>135\</sup> Many courts have held public utilities not to a simple duty of care in negligence actions, for example, but rather to the "highest" duty of care.<sup>136\</sup> This duty flows from the special dependence that customers have on their local REC, their inability to mitigate the damages from an erroneous deprivation of service from a monopoly supplier, and the risk of serious loss should service be denied or interrupted.<sup>137\</sup>
10. In addition to this risk allocation inquiry, the Council has determined that the higher winter standard is appropriate where conditions exist that will likely lead to an erroneous decision. In particular, the Council believes that three factors create a significant prospect of erroneous REC decisions regarding credit and collection. These three factors include:
  - o First, because Tribal members are often poor, uneducated, and, by definition, members of a minority group, the decisions are often vulnerable to judgments based on cultural or class bias.
  - o Second, the REC's ability to assemble its case almost inevitably dwarfs the Tribal customer's ability to mount a defense. and
  - o Third, the disparity between the REC's and the Tribal members' resources

---

<sup>135\</sup> *Josephson v. Mountain Bell Telephone Company*, 576 P.2d 850, 852 (Utah 1978) (the company, as a public utility, has a higher obligation to render service to the public than does the ordinary business.)

<sup>136\</sup> See e.g., *Kohler v. Kansas Power and Light Co.*, 192 Kan. 226, 387 P.2d 149, 151 (1963); accord, *Washington Gas Light Co. v. Aetna Casualty & Sur. Co.*, 250 Md. 325, 242 A.2d 802, 804 (Md.App. 1968).

<sup>137\</sup> See e.g., *Consolidated Edison Co. v. Jones*, 111 Misc.2d 1, 444 N.Y.S.2d 1018 (1981).

to collect is matched by a striking asymmetry in their options for remedies when the collection is unreasonable.

11. Accordingly, the Tribal Council finds that the special winter protections incorporated in the attached Regulation are appropriate. The "higher standard" referenced throughout this Preamble includes a demonstration by the REC seeking to involuntarily terminate service for non-payment during the winter period that of the following five items:
  - a. The customer has failed to make a good faith effort to make some payment during the period of November 1 to April 1; and
  - b. The customer has either refused to negotiate a reasonable deferred payment arrangement for past due bills, or refused to enter into a reasonable deferred payment arrangement offered by the REC; and
  - c. The REC has informed the customer of available sources of utility assistance dollars, as well as informing the customer of the availability of levelized budget billing; and
  - d. The REC has informed the customer of available means to make reductions in energy usage; and
  - e. The REC has informed the customer of the agencies providing legal assistance to low-income individuals.

**MODEL TRIBAL REGULATION:  
TERMINATION OF RESIDENTIAL UTILITY SERVICE  
DURING WINTER MONTHS  
BY RURAL ELECTRIC COOPERATIVE**

1. During the period of November 1 to April 1, no involuntary termination of residential service for nonpayment may occur if:
  - a. The customer has made a good faith effort to make some payment during the period of November 1 to April 1; or
  - b. The customer has entered into a reasonable deferred payment arrangement for past due bills; and
  - c. The customer is a Native American who receives utility service within the exterior boundaries of the Tribal Lands from the company proposing the termination.

*provided that:*

Residential service may, during the period November 1 to April 1, be involuntarily terminated for nonpayment if, upon request, specific written permission for the termination of that customer's service has been granted by the Tribal Council.

2. In any instance where a utility requests permission to effect the involuntary termination of service for nonpayment during the period of November 1 to April 1, the utility providing service shall prior to making the request:
  - a. Inform the customer in a manner deemed reasonable by the Tribal Council:
    - i. of the availability of fuel assistance dollars; and
    - ii. of the availability of crisis assistance dollars; and
    - iii. of the availability of levelized monthly budget billing.

- b. Allow the customer reasonable time, as determined by the Tribal Council, to make application for fuel assistance, crisis assistance, or levelized monthly budget billing.
  - c. Maintain documentation in a manner deemed reasonable by the Tribal Council of compliance with these notice requirements.
- 3. In any instance where a utility requests permission to effect the involuntary termination of service for nonpayment during the period of November 1 to April 1, the utility providing service shall prior to making the request:
  - a. Inform the customer in a manner deemed reasonable by the Tribal Council of the means available to make reductions in energy usage, including:
    - i. The availability of utility programs to reduce energy usage; and
    - ii. The availability of government programs to reduce energy usage; and
    - iii. The availability of consumer education regarding ways for the customer to reduce energy usage.
  - b. Inform the customer in a manner deemed reasonable by the Tribal Council of the agencies providing legal assistance to low-income individuals.
  - c. Maintain documentation in a manner deemed reasonable by the Tribal Council of compliance with these notice requirements.
- 4. No utility subject to this regulation may threaten to involuntarily terminate service of a residential customer for nonpayment during the period November 1 to April 1 in any situation where that utility lacks actual legal authority to effect such termination under the terms of the Regulation above.
- 5. No part of this Regulation shall excuse the utility from providing other notices or complying with other consumer protections required by law.

**COMMENTARY AND EXPLANATION:  
MODEL TRIBAL REGULATION  
TERMINATION OF RESIDENTIAL UTILITY SERVICE  
DURING WINTER MONTHS  
BY RURAL ELECTRIC COOPERATIVE**

**PART ONE:**

**REGULATION:**

1. *During the period of November 1 to April 1, no involuntary termination of residential service for nonpayment may occur if:
  - a. *The customer has made a good faith effort to make some payment during the period of November 1 to April 1; or*
  - b. *The customer has entered into a reasonable deferred payment arrangement for past due bills; and*
  - c. *The customer is a Native American who receives utility service within the exterior boundaries of the Tribal Lands from the company proposing the termination.**

**COMMENTARY AND EXPLANATION:**

1. This regulation provides protections from "winter" utility shutoffs. For purposes of this regulation, "winter" is defined as the period November 1 to April 1.
2. This regulation provides protections from utility shutoffs whether or not the utility service is the service used as the primary heating source. It recognizes that electricity is generally essential for the operation of winter heating service (*e.g.*, for operation of furnace fans), whether or not electricity is the primary heating fuel.
3. This regulation provides protections against the termination of utility service for nonpayment. It does not restrict the termination of service for other causes (*e.g.*, fraud, safety hazards).

4. This regulation provides protections against the termination of service for "nonpayment." The regulation does not distinguish between the items for which "nonpayment" is made. Accordingly, service may not be disconnected, for example, for nonpayment of current usage; of demands for cash deposits; of payments on deferred payment arrangements negotiated before the start of the winter period; and the like. This list is intended to be illustrative and not comprehensive.
5. This regulation limits the winter period protections to persons who have made a "good faith effort to make some payment during the period of November 1 to April 1." The regulation intentionally does not place a minimum amount on what that payment must be. The sole purpose of this part of the Regulation is to deny the protections of the Regulation to customers who have made zero payments toward their utility bill.
6. The regulation, however, does not make a blanket exception to the winter shutoff restrictions for customers who have made zero payments. If a customer has made no payments, but for whatever reason, can show that he or she has nonetheless been acting in "good faith," the shutoff restrictions still apply. The burden is on the customer who has made no payments to demonstrate that he or she has been acting in good faith notwithstanding the complete absence of payment.
7. In the alternative to making "some payment" toward his or her utility bill, the shutoff restrictions apply to the customer who may have made no payment, but who has instead entered into a reasonable deferred payment arrangement for past due bills. The term "or" before this sentence makes clear that the "made some payment" and "entered into a deferred payment arrangement" language represents disjunctive propositions. The shutoff restrictions apply to all customers who meet one or the other test.
8. The language relating to reasonable deferred payment arrangements contemplates that the utility has offered a reasonable deferred payment arrangement in the first instance. To show that a customer does not fall within this language, the utility must show either that the customer has refused to negotiate a reasonable payment arrangement, or that the utility has, in fact, offered a reasonable deferred payment arrangement and the customer has refused to enter into such an arrangement.

9. Finally, the regulation makes clear that it applies only to a customer if the customer is a Native American who receives utility service within the exterior boundaries of the Tribal Lands from the company proposing the termination. The purpose of this part of the regulation is jurisdictional. Tribes may unquestionably exert exclusive jurisdiction over Tribal members regarding transactions occurring on Tribal lands.

## **PART TWO:**

### **REGULATION:**

*provided that:*

*Residential service may, during the period November 1 to April 1, be involuntarily terminated for nonpayment if, upon request, specific written permission for the termination of that customer's service has been granted by the Tribal Council.*

### **COMMENTARY AND EXPLANATION:**

1. This part of the Regulation provides the means for a utility to effect a termination of residential service during the period of November 1 to April 1. The Regulation states that before an involuntary termination of service may be made during the winter period, the utility must first be granted permission for the termination of service.
2. This section does not provide an exception to the general shutoff restrictions. It is not a mechanism for a utility to gain permission to terminate service to a customer who otherwise falls within the protections of the winter restrictions.
3. The requirement for obtaining specific permission to terminate service to a particular customer during the winter period is intended to forestall any possibility that a utility might argue that a customer has "consented" to the termination of service for nonpayment, thus making the termination "voluntary," and rendering the winter restriction, which applies to involuntary terminations for nonpayment, inapplicable. No such "consent" is anticipated and any such "consent" to service terminations that may be sought by a utility will be presumed to be void as a matter of public policy.
4. This section provides that only "specific permission" may be granted for a particular customer's service. This language is intended to preclude any argument that some action by the Tribe or its members constitutes a blanket permission granted to make terminations of service during the winter period.
5. This section provides that permission to effect a termination of service during the winter period may only be granted upon request by the utility. That request must

relate to a specific individual customer. The request must document compliance with both requirements of the first section: (1) that the customer has made no payments during the winter; and (2) that the customer has refused to negotiate a reasonable payment arrangement, or has refused to enter into a reasonable payment arrangement. In contrast, the burden to demonstrate that a customer has acted "in good faith" notwithstanding the total lack of payments during the winter period is on the customer.

6. Permission for a winter termination of residential utility service must be granted by the Tribal Council. It is anticipated that the Tribal Council may delegate the authority to grant permission to a person or subsidiary body. If the power to grant permission is delegated, the person or body invested with the authority to grant permission may only act within the limits of the authority delegated. The Tribal Council may, in other words, reserve unto itself, sitting as a Council, the authority to make determinations in cases involving special circumstances defined by the Council notwithstanding its otherwise general delegation of powers to grant permission in all other circumstances.
7. The "specific permission" language in this section anticipates that permission to disconnect service, as granted by the Tribal Council, will be valid for a prescribed reasonable period of time. If the termination of service for which permission is granted is not, in fact, effected during the period for which the permission is valid, a new request for new permission must be initiated.
8. Under the "specific permission" language, blanket permissions to disconnect service, even if limited to a specific customer, are not valid. The "specific permission" language contemplates nonpayment of a specific bill resulting in the termination of service within a prescribed period of time set forth in the written permission.
9. The permission granted under this Regulation must be "written." The requirement for "written" permission may be important in determining whether a utility has actual legal authority to effect a termination of service at the time it threatens to terminate service.
10. The violation of this Regulation may be remedied by injunction or mandamus in the Tribal Courts, and may give rise to an action for damages. Whether damages may include punitive damages, or whether they are limited to actual damages, is

to be determined by local Tribal law.

**PART THREE:**

**REGULATION:**

2. *In any instance where a utility requests permission to effect the involuntary disconnection of service for nonpayment during the period of November 1 to April 1, the utility providing service shall prior to making the request:*
  - a. *Inform the customer in a manner deemed reasonable by the Tribal Council:*
    - i. *of the availability of fuel assistance dollars; and*
    - ii. *of the availability of crisis assistance dollars; and*
    - iii. *of the availability of levelized monthly budget billing.*
  - b. *Allow the customer reasonable time, as determined by the Tribal Council, to make application for fuel assistance, crisis assistance, or levelized monthly budget billing.*
  - c. *Maintain documentation in a manner deemed reasonable by the Tribal Council of compliance with these notice requirements.*

**COMMENTARY AND EXPLANATION:**

1. This regulation describes certain information that must be provided to a customer prior to a utility making a request to be granted permission to effect an involuntary disconnection of service during the winter period. Each piece of information is designed to help the customer, and the utility, avoid the need for the disconnection of service.
2. No specific form of notice is dictated by this regulation. However, the notice must be provided in a manner deemed reasonable by the Tribal Council. This Regulation anticipates pre-approval of the notice. The Regulation anticipates Tribal Council review of the time, place, manner, and content of the notice.
3. In addition to informing the customer of the availability of the listed assistance, the utility must, prior to making a request for permission to effect a termination of service during the winter period, allow a reasonable time for the customer to

apply for such assistance. The determination of what time is "reasonable" is committed to the discretion of the Tribal Council.

4. This regulation specifically does not limit the required notification of fuel assistance and crisis assistance to fuel assistance or crisis assistance provided pursuant to the federal Low-Income Home Energy Assistance Program (LIHEAP), 42 *U.S.C.* §8621, *et seq.*. It instead includes all available local, state and private fuel assistance as well. This Regulation places a duty upon the utility to inform itself of local assistance that is available in addition to LIHEAP funds.
5. This regulation requires the utility to maintain documentation, in a form deemed reasonable by the Tribal Council, of its compliance with this section. That documentation must be provided as a part of the request for permission to effect an involuntary termination of service during the winter period.

## **PART FOUR:**

### **REGULATION:**

3. *In any instance where a utility requests permission to effect the involuntary disconnection of service for nonpayment during the period of November 1 to April 1, the utility providing service shall prior to making the request:*
  - a. *Inform the customer in a manner deemed reasonable by the Tribal Council of the means available to make reductions in energy usage, including:*
    - i. *The availability of utility programs to reduce energy usage; and*
    - ii. *The availability of government programs to reduce energy usage; and*
    - iii. *The availability of consumer education regarding ways for the customer to reduce energy usage.*

### **COMMENTARY AND EXPLANATION:**

1. This Regulation requires a utility to inform customers of the means available to reduce inefficient energy use. It recognizes that the reduction or elimination of inefficient energy use will make energy more affordable and thus help a customer pay both current bills and arrears.
2. No specific form of notice is dictated by this regulation. However, the notice must be provided in a manner deemed reasonable by the Tribal Council. This Regulation anticipates pre-approval of the notice. The Regulation anticipates Tribal Council review of the time, place, manner, and content of the notice.
3. The Regulation is set forth as a conjunctive requirement. Accordingly, the utility must notify the customer of *each* means to reduce energy usage set forth in the Regulation.
4. This Regulation is based on the conclusion that a utility has an obligation to mitigate the damages of nonpayment through the offer and pursuit of energy efficiency programs directed toward nonpaying customers. *See generally, Colton and Smith. (1993). "The Duty of a Public Utility to Mitigate `Damages'*

from Nonpayment through the Offer of Conservation Programs." 3 *Boston University Public Interest Law Journal* 239.

5. This regulation requires the utility to maintain documentation, in a form deemed reasonable by the Tribal Council, of its compliance with this section. That documentation must be provided as a part of the request for permission to effect an involuntary termination of service during the winter period.

**PART FIVE:**

**REGULATION:**

3. *In any instance where a utility requests permission to effect the involuntary disconnection of service for nonpayment during the period of November 1 to April 1, the utility providing service shall prior to making the request:
  - a. \* \* \*
  - b. *Inform the customer in a manner deemed reasonable by the Tribal Council of the agencies providing legal assistance to low-income individuals.**

**COMMENTARY AND EXPLANATION:**

1. This regulation describes certain information that must be provided to a customer prior to a utility making a request to be granted permission to effect an involuntary disconnection of service during the winter period. This section allows a customer to seek legal assistance if the customer believes he or she has cause for legal remedies to be sought against the utility (e.g., if the utility is seeking to impose financial liability for the debt of a third party).
2. No specific form of notice is dictated by this regulation. However, the notice must be provided in a manner deemed reasonable by the Tribal Council. This Regulation anticipates pre-approval of the notice. The Regulation anticipates Tribal Council review of the time, place, manner, and content of the notice.
3. This regulation requires the utility to maintain documentation, in a form deemed reasonable by the Tribal Council, of its compliance with this section. That documentation must be provided as a part of the request for permission to effect an involuntary termination of service during the winter period.

## **PART SIX:**

### **REGULATION:**

4. *No utility subject to this regulation may threaten to involuntarily terminate service of a residential customer for nonpayment during the period November 1 to April 1 in any situation where that utility lacks actual legal authority to effect such termination under the terms of the Regulation above.*

### **COMMENTARY AND EXPLANATION:**

1. This Regulation states that a utility may not threaten to disconnect service if lacks the "actual legal authority" to effect that disconnection. The Regulation sets up an objective test. It matters not what the utility believes its legal authority to be. The test is whether the utility has "actual legal authority" to effect the disconnection. This objective test is reasonable since no legal authority exists to effect a disconnection of service without having first obtained prior written permission to effect the disconnection from the Tribal Council.
2. The Regulation stands on the proposition that the threat to terminate service during the winter months is inherently coercive. A threatened termination of service during the winter period may be as damaging as the actual termination of service.
3. The Regulation stands on the further proposition that to use the threat of a termination of service during the winter period as a collection device, when no legal authority exists to effect that termination, is an inherently unfair and deceptive debt collection practice.

**PART SEVEN:**

**REGULATION:**

5. *No part of this Regulation shall excuse the utility from providing other notices or complying with other consumer protections required by law.*

**COMMENTARY AND EXPLANATION:**

1. This Regulation does not excuse the utility from providing constitutionally required pre-termination notices and complaint proceedings.
2. This Regulation does not excuse the utility from providing consumer protections required by any other applicable local, state, or federal statute.
3. This Regulation does not excuse the utility from providing consumer protections required by any applicable common law requirement.
4. The remedies available under this Regulation, including the award of damages, are cumulative to any remedies available pursuant to law other than this Regulation.