ORDER NO. 6 INITIAL COMMENTS OF CENTERPOINT ENERGY

CenterPoint Energy Resources Corp., d/b/a CenterPoint Energy Arkansas Gas, ("CenterPoint Energy" or the "Company") submits these Initial Comments to the Arkansas Public Service Commission (the "Commission") in response to the questions set forth in "Attachment A" to Order No. 6 issued in this docket on August 8, 2006.

LEGAL AND PROCEDURAL ISSUES

1. In developing conservation and energy efficiency policies and program guidelines for electric and gas utilities in Arkansas under the Energy Conservation Endorsement Act of 1977 (ECEA), is the Commission required to conduct both rulemaking and adjudicatory proceedings? Please provide legal authority and citations and [sic] for your position.

The process set out in the ECEA for approving an energy efficiency program is an adjudicatory process. The ECEA gives the Commission the authority to approve energy conservation programs and measures only "[a]fter proper notice and hearings." Ark. Code § 23-3-405(a)(2). This "notice and hearing" language envisions individual adjudicatory proceedings for the approval of each utility's proposed energy efficiency program. See, e.g., Grayden v. Rhodes, 345 F.3d 1225, 1253 (11th Cir. 2003) ("The words 'after notice and . . . hearing' . . . connote a hearing appropriate to adjudicatory action, not to legislation or rule making").

Moreover, before ordering or approving an energy conservation program, the Commission must specifically find that the program will benefit both the utility's customers and the utility. Ark. Code § 23-3-405(a)(2) (stating that the Commission can approve an energy
efficiency program only "if it determines [it] will be beneficial to the ratepayers ... and to the utilities themselves"). The making of such a finding should be based on substantial evidence, which requires an adjudicatory proceeding where the parties can present evidence.

The ECEA does not require a rulemaking proceeding, but as the Company has stated in its Initial Comments filed in this docket on March 24, 2006:

[T]he utilities and all interested parties need well-defined rules before they can start with aggressive programs. Regulatory uncertainty will hamper the Commission’s goal of achieving meaningful energy efficiency savings. . . . Utilities, or any other party for that matter, would be reluctant to expend significant resources on developing comprehensive energy efficiency programs before new rules are in place, because those rules would to a large extent dictate the form and substance of such programs. Thus, serious development of energy efficiency program proposals will not even commence until after new rules are in place.  

After rules are adopted, any Commission proceeding for approval of a utility’s energy efficiency program or any component or measure contained in that program should be an adjudicatory style proceeding, including in the context of a quasi-judicial proceeding such as are proceedings for general rate changes.

2. Is there a need for new legislation to clarify or grant new authority to the Commission to address and resolve issues presented in this docket? Please identify and discuss in detail the issues and areas in which there are questions about the Commission’s authority to act, promulgate policies and rules, or implement programs on a statewide or utility-specific basis (e.g., rate discrimination, inter- and intra-class subsidization, low-income programs, etc.).

CenterPoint Energy believes the ECEA provides the Commission with the authority necessary to address and resolve the major issues in this docket. The ECEA authorizes the Commission to require and approve utility-administered energy conservation programs. Ark.

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1 Initial Comments of CenterPoint Energy in Docket No. 06-004-R at pp. 34-35 and 39 (filed Mar. 24, 2006).
2 It is also the Commission’s “goal for this proceeding to culmination in the adoption of rules or guidelines for the implementation of utility-sponsored conservation and energy efficiency programs.” Order No. 3 at p. 1 (emphasis added).
Code § 23-3-405(a)(1) (stating that the Commission is authorized to approve or require only programs "by utility companies" (emphasis added)). It further mandates the contemporaneous recovery of all costs of every kind incurred by the utility as a result of its engaging in such programs. Id. § 23-3-405(a)(3) (“At the time any such programs or measures are approved and ordered into effect, the commission shall also order that the affected public utility company be allowed to increase its rates or charges as necessary to recover any costs incurred by [it] as a result of its engaging in any such program or measure” (emphasis added)). “The adjective ‘any’ means ‘all’ or ‘every’ or ‘of every kind.’” State v. Gray, 322 Ark. 301, 306, 908 S.W.2d 642, 645 (1995).

It mandates that, beyond recovery of program costs, both the utility and its customers must be benefited by the implementation of the utility-administered programs. Id. § 23-3-405(a)(2) (stating that such programs may be approved by the Commission only “if it determines they will be beneficial” to the utility and its ratepayers). Finally, as explained in below in the Company’s response to Question 8, it authorizes the implementation of energy efficiency measures aimed directly at low income consumers.

3. How, if at all, would Commission decisions regarding the implementation, funding and cost recovery of energy efficiency programs affect the recovery of embedded fixed costs in future rate cases of electric and gas utilities?

Commission decisions regarding the implementation, funding and cost recovery of energy efficiency programs should have no effect on a gas utility’s recovery of embedded fixed costs in future rate cases. As far as the program costs are concerned, only the utility’s actual costs to provide energy efficiency services would be recovered by the utility as a result of the Commission’s approval of the utility’s energy efficiency program.
PROGRAMMATIC ISSUES

4. Should the Commission require the preparation of an energy efficiency potentials study prior to adopting rules and/or specific utility orders regarding conservation and energy efficiency programs that will take significant time to implement? If not, why do you believe a study is not necessary?

The Commission should not require the preparation of any energy efficiency potential study for the following reasons:

- These studies are costly.
- A study will delay implementation of programs.
- In a state where there is very little, if any, history of energy efficiency measures being implemented, potential should not be much of an issue.
- Potential studies were not conducted at the beginning of the Texas efficiency programs in 2000, and their energy efficiency programs have been successful nevertheless.
- Potential studies are of greater usefulness as energy efficiency programs mature and new sources of energy efficiency need to be identified, rather than at the beginning when energy savings are easier to accomplish.
- There is plenty of existing data available from other states that can provide some of the information that would be obtained by an expensive potential study.

5. Should the Commission establish statewide and utility-specific energy (kWh or therms) and demand (kW) savings goals and targets? If so, should they be based on energy throughput, energy sales (revenues), or some other metric?

Goals should be set for each utility as opposed to an across-the-board, statewide goal. Gas utility goals may be very different than electric utility goals. The Commission should base each utility’s goal on input received from that utility, and the utility should have a key role in setting goals. Goals should be tied to the state’s overall energy efficiency objectives. If the utility is capacity constrained, then a demand reduction goal may be appropriate. While the Commission should give general direction and guidance on goal setting, a one-size-fits-all metric
is not recommended; rather, each utility’s situation, customer base, and operating environment should determine how goals are set.

6. Should the achievement of energy and demand savings goals and targets be judged in the aggregate for each utility or on a program-by-program basis?

While a cost/benefit analysis and Commission approval should be applied on a program-by-program basis, achievement of energy efficiency goals and targets should be judged in the aggregate for each utility. Each utility should be given the latitude of selecting a program portfolio to achieve goals and budgets. Individual programs will succeed and fail. This approach has worked well in Texas.

7. What is end-use demand forecasting (See comments of the Attorney General.) and what are its purposes? What benefits does it offer to the process of developing conservation and energy efficiency programs, and how does it relate to the issue of conducting a potentials study (See Question 4.) If the respondent is a utility, is your company prepared to conduct and/or cooperate in the preparation of such a forecast?

End-use demand forecasting is a method used to forecast a utility’s demand growth based on analysis of the end-uses that make up the utility’s load. Sophisticated computer models along with extensive data on end-uses are used to generate these forecast. Expensive end-use surveys along with expertise in running computer models are required. The cost of end-use modeling exceeds the benefits it brings to the development of energy efficiency programs. However, end-use demand forecasting for electric utilities could be useful in setting energy efficiency baselines and in evaluating free rider effects, but has much less usefulness for gas utilities. CenterPoint Energy is prepared and has the capability to perform end-use demand forecasting, but it strongly recommends against doing it based on its costs exceeding its benefits, especially for its gas utility operations in Arkansas where there is negative demand growth.
8. Should there be a single statewide low-income energy efficiency program, developed, promoted, funded and implemented in coordinated fashion by the utilities and other interested parties? Please explain whether the ECEA provides the Commission with sufficient authority to adopt such a program and identify any infirmities in the law that would need to be cured by legislation to enable the adoption of such a program.

A single statewide low-income program makes sense and would minimize the development and administrative work, but only if it truly is limited and targeted to low-income consumers. Program proposals that try to reach low-income consumers under the guise of “substandard homes” would end up losing all the potential benefits of a statewide program, because it would not be limited to low-income consumers and would have higher administrative costs due to the necessity of having to set the criteria for qualification as a substandard home and then having to determine if that criteria are met on a home-by-home basis.

Most participants in this docket seem to believe that the ECEA does not authorize the Commission to order or approve energy efficiency measures aimed directly and explicitly at low income consumers. To that extent, perhaps there is a need for new legislation to provide that authority. However, we believe the ECEA already provides adequate authority.

It is legal, and it would be administratively more efficient and effective, to explicitly design and target an energy efficiency program for “low income consumers” whose definition can be tied to some objective and known standard. Everyone refers to *Arkansas Gas Consumers v. Arkansas Pub. Serv. Comm’n*, 118 S.W.3d 109 (Ark. 2003), for the notion that the Commission does not have authority to use ratepayer dollars to fund a “social program” benefiting low income consumers.

In *Arkansas Gas Consumers*, the Commission had issued an order requiring gas utilities, before the start of the 2001-2002 winter season, to reconnect “eligible” customers who had been disconnected for nonpayment during the previous 2000-2001 winter season and remained
disconnected. The Commission’s order defined “eligible” customers as those with incomes below 200% of the federal poverty guidelines.

The court struck down the Commission order on the pertinent ground that the Commission had no authority to implement the program. As has been said many times in other court opinions, the Commission is a creature of the legislature and has only the authority that the legislature has delegated to it. Authority has been delegated to the Commission in only two types of statutes: (1) specific delegations of power to accomplish a specific purpose and (2) general delegations of power to generally regulate and supervise the rates and practices of utilities. In *Arkansas Gas Consumers*, no party claimed the program was implemented under any specific delegation of statutory authority. The only pertinent issue in that case was whether the Commission’s general statutory grants of authority were broad enough to encompass the program. The court held that these general grants of authority were not broad enough.

The court in *Arkansas Gas Consumers* did not strike down the program because it discriminated against “non-eligible customers,” *i.e.*, higher income customers. The court struck down the program because the Commission did not have the authority to implement any social program in the absence of specific legislation authorizing the Commission to do it. The Commission’s general statutory authority simply does not encompass the institution of social programs.

Thus, even if the program challenged in *Arkansas Gas Consumers* had not defined “eligible” customers in terms of income levels, but instead had defined eligibility as *all* customers, *regardless of income level*, who had been disconnected during the previous winter and remained disconnected, the court would have *still* struck down the program, because such a program would also have been a social program and it also would have fallen outside the
Commission's general statutory authority. In other words, it would have still been deemed a social program even if eligibility was not income based.

A social program, in fact, does not mean an income-based program. A social program is defined as a program "relating to . . . the welfare of human beings as members of society."\(^3\) The public education system, for example, is a non-income-based social program. A state mandated, non-income-based energy conservation program would be as much of a social program as would be a state mandated, income-based energy conservation program. Regardless of the type of social program (income-based or non-income-based), *Arkansas Gas Consumers* simply held that the Commission cannot implement one under its general authority.

The holding in *Arkansas Gas Consumers*, therefore, is not applicable to this docket. This docket was initiated under the ECEA. The ECEA is a specific grant of authority to the Commission to institute social programs dealing with energy efficiency. The Commission does not need to rely on its general statutory powers to implement energy efficiency social programs.

With the ECEA, the Legislature expressly found that "enormous amounts of energy are wasted by *consumers of all classes and economic levels* due to inadequate insulation of buildings and other inefficiencies in the use of energy." Ark. Code § 23-3-402 (emphasis added). To address this finding, the statute expressly authorizes the Commission to order or approve "energy conservation programs and measures." § 23-3-405. The phrase "energy conservation programs and measures" is defined to include "Programs of residential, commercial, or industrial insulation, *including measures to facilitate the financing of such insulation.*" § 23-3-403(1) (emphasis added). Such programs are social programs because they relate to "the welfare of human beings as members of society." See n.3.

\(^3\) *Webster's New Collegiate Dictionary* 1094 (1979) (defining the word "social").
Importantly, the ECEA specifically authorizes the Commission to implement energy efficiency programs designed to reduce wasteful energy consumption by consumers at "all economic levels." § 23-3-402. Such programs would constitute "social programs," but, unlike the case in *Arkansas Gas Consumers*, the Commission has specific statutory power to implement energy efficiency social programs. In other words, energy conservation programs are social programs that the Legislature has specifically authorized the Commission to implement. The Commission would not be relying on its general authority to implement them as it was for the program struck down in *Arkansas Gas Consumers*.

Not only does the ECEA specifically authorize the Commission to implement this social program, it clearly authorizes the Commission to implement it in a way to help consumers at "all economic levels" to consume energy more efficiently. It would make no sense if, despite the ECEA’s intent to address the problem of wasteful energy consumption by consumers at all income levels, the Commission could order or approve a program that practically helps only certain consumers (*i.e.*, those at income levels high enough to pay the program costs) to reduce wasteful consumption. That would utterly defeat the purpose of the ECEA to provide energy efficiency measures to *consumers at all economic levels*. Thus, the Commission not only has the authority under the ECEA to institute weatherization programs aimed specifically at low income consumers, it also has the authority under the ECEA to "facilitate the financing" of weatherization programs for low income consumers so that they, along with all other consumers, can get help to reduce wasteful consumption, as intended by the Legislature.

The issue *not* addressed by *Arkansas Gas Consumers* is whether providing preferential treatment to low income consumers violates the Arkansas statutory prohibitions against discrimination between customers or preferences in rates or services. Ark. Code §§ 23-3-114
and 23-4-107. These statutes, however, prohibit only unjust discriminations or preferences; they do not preclude reasonable differences in the rates, terms, or even in the availability of service between customers. See, e.g., *Rossi v. Garton*, 211 A.2d 806 (N.J. Super. Ct. App. Div. 1965) (holding that only “unjust discriminations” are forbidden and that “[i]t is only arbitrary discriminations that are unjust. If the [discrimination] is based upon a reasonable and fair difference in conditions which equitably and logically justify [the discrimination], it is not an unjust discrimination”). *See also Wilson v. Arkansas Pub. Serv. Comm’n*, 648 S.W.2d 63, 64 (Ark. 1983) (holding that § 23-3-114 “does not prohibit differences in rates; it merely prohibits unreasonable rate differences”). If a discrimination or preference has a reasonable basis or purpose, therefore, it is not unjust, and it does not violate the statutory prohibition against unreasonable discriminations or preferences.

It can certainly be argued that the ECEA makes low income preferences for energy efficiency and weatherization measures just and reasonable as a matter of law. But even if the ECEA did not do this, then the question of whether a discrimination is reasonable or unreasonable (indeed, questions of what is reasonable or unreasonable in general) is a question of fact. *See, e.g., Roy v. Atkins*, 276 Ark. 586, 637 S.W.2d 598 (1982) (holding that questions of “reasonableness and necessity of medical expenses are questions of fact to be decided by a jury”); *L.A. Green Seed Co. of Ark. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969) (addressing reasonableness of notice in a lease termination as a question of fact). On questions of fact, the Commission’s findings must only be based on substantial evidence. Ark. Code § 23-2-423. If the Commission’s findings on questions of fact are supported by substantial evidence, then no court can overturn that finding. *Id.* (stating: “The finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive.” (emphasis added)). Therefore,
if the Commission has “substantial evidence” (which is a fairly low standard to meet; it has been
defined by courts only as more than a scintilla of evidence) for a finding that energy efficiency
measures specifically targeted at low income consumers are a reasonable way to fulfill the
ECEA’s purpose of reducing wasteful energy consumption by consumers at all classes and
income levels, its decision will not be overturned.

9. Should there be statewide or utility industry-specific (e.g., electric and
gas) standards and mechanisms for conservation and energy efficiency
program funding and cost recovery? In other words, should the
Commission adopt generally consistent approaches and principles for
addressing the following issues: (a) Use of a rider, surcharge, public
benefit or other non-bypassable wires or pipes charge to fund programs;
(b) Expensing or amortizing program costs; (c) Permitting concurrent or
defered cost recovery; (d) Allocation of costs within or across customer
classes. Should there be a uniform standard for removing energy sales-
reduction disincentives associated with the promotion and implementation
of conservation and energy efficiency programs (e.g., a lost-revenue
adjustment or, alternatively, a decoupling mechanism).

There should be statewide standards, established in this rulemaking docket, for cost
recovery, which allow utilities to recover all costs contemporaneously with there incurrence, and
which provide utility/shareholder incentives for meeting and for exceeding goals. Furthermore,
cost recovery should include recovery of lost revenues. Such standards are required under the
ECEA. First, section 23-3-405(a)(3) mandates contemporaneous recovery by the utility of “any
costs incurred . . . as a result of its engaging in [an energy efficiency] program or measure.”
Second, section 23-3-405(a)(2) mandates an additional requirement – that the utility’s
engagement in an energy efficiency program or measure must be “beneficial” to the utility.

Commission mandated energy efficiency programs without contemporaneous cost
recovery would be in violation of section 23-3-405(a)(3) of the ECEA. Similarly, Commission
mandated energy efficiency programs without a lost revenue recovery mechanism would be in
violation of both sections 23-3-405(a)(2) and 23-3-405(a)(3) of the ECEA. Section 23-3-
405(a)(3) mandates contemporaneous recovery of “any cost” incurred by a utility “as a result” of engaging in such programs, and lost revenues incurred by a utility as a result of engaging in those programs represent opportunity costs to the utility—it will be foregoing the opportunity to receive those revenues that it would otherwise receive by not engaging in those programs.

In addition, section 23-3-405(a)(2) mandates that the Commission find that the utility will be benefited by engaging in energy efficiency or conservation programs. However, it is practically impossible for a utility, whose revenues are substantially tied to the level of use of its services by its customers, to benefit from engaging in energy efficiency or energy conservation measures, the purpose of which is to reduce consumption, unless a lost revenue recovery mechanism exists for the utility.

Lost revenue recovery, or a decoupling mechanism, is essential to negating the “throughput disincentive.” In other words, a utility has a definite disincentive to engage in energy efficiency programs to the extent that its revenues are derived from the volume of its sales. Indeed, lost revenue recovery and decoupling mechanisms are endorsed by both by the National Association of Regulatory Utility Commissioners and the National Action Plan for Energy Efficiency (July 2006):

Traditional ratemaking approaches have strongly linked a utility’s financial health to the volume of electricity or gas sold via the ratemaking structure, creating a disincentive to investment in cost-effective demand-side resources that reduce sales. . . . Aligning utility and public interest aims by [1] disconnecting profits and fixed cost recovery from sales volumes, [2] ensuring program cost recovery, and [3] rewarding shareholders can “level the playing field” . . . and can yield a lower, cost, cleaner, and reliable energy system.5

4 As explained above in response to Question 2, the word “any” means “all” or “every” or “of every kind.” (citing to State v. Gray, 322 Ark. 301, 306, 908 S.W.2d 642, 645 (1995)).
Lost revenue recovery should therefore be permitted by the Commission for two reasons: it is required by the ECEA and it is necessary for the success of the energy efficiency programs implemented under the ECEA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on all parties of record by forwarding the same by first class mail, postage prepaid, this 27th day of October, 2006.

Mickey S. Moon