

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the matter of PGA / ACA filing of Atmos)
Energy Corporation for the West Area (Old)
Butler), West Area (Old Greeley),)
Southeastern Area (Old SEMO), Southeastern)
Area (Old Neelyville), Kirksville Area, and in)
the Northeastern Area)

Case No. GR-2008-0364

**STAFF'S REPLY TO
ATMOS ENERGY CORPORATION'S RESPONSE TO STAFF'S
PROPOSED PROCEDURAL SCHEDULE AND MOTION FOR
EXPEDITED TREATMENT**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its Reply to Atmos Energy Corporation's Response To Staff's Proposed Procedural Schedule and Motion For Expedited Treatment (Response and Motion), states as follows:

1. In its Response and Motion, Atmos asks the Commission to order a procedural schedule that directs simultaneous filing of testimony. Staff disagrees with Atmos' application of the law regarding the presumption of prudence. Atmos correctly cites the law governing the presumption of prudence in an ACA case without affiliate transactions, but that law does not apply here because this case involves a disputed affiliate transaction. As discussed below, there is no presumption of reasonableness when a regulated utility engages in transactions with its unregulated affiliate.

2. Atmos states in para. 8 of its Response and Motion:

Only when the Staff or some other party creates a "serious doubt" about the prudence of the expenditures of the public utility does the burden to dispel those doubts shift to the public utility [to] prove that the expenditures were prudently incurred. See State ex rel. Associated Natural Gas v. Public Service Commission,

954 S.W.2d 520, 529 (Mo.App.1999). See also Report & Order, pp. 16-17, Re Missouri Gas Energy, Case No. GR-2003-0330 (Commission recognized the legal presumption of prudence for natural gas companies in PGA/ACA cases).

The presumption of prudence discussed in the above cases, and upon which Atmos relies, does not apply when a regulated utility engages in affiliate transactions. In this case, Atmos has used its non-regulated affiliate, Atmos Energy Marketing, LLC, to supply gas to its Northeast Missouri service territories. Affiliate transactions are not “arms length transactions” and do not carry a presumption of reasonableness.

3. The presumption that is to be applied to companies that engage in affiliate transactions is succinctly stated on p. 311 of The Process of Ratemaking, Vol. I¹:

Services provided by the affiliate. Unlike ordinary expenses of a regulated company, expenses paid to an affiliate do not carry a presumption of reasonableness. [FN 7] The burden is on the company to prove their reasonableness. [FN 7: See U.S. West Communications, Inc. v. Utah PSC, 901 P.2d 270, 1995 Utah LEXIS 46 (Utah, 1995)] (emphasis added)

4. The Missouri Supreme Court, in upholding the Commissions’ affiliate transaction rules, recognized that an affiliate transaction is not an “arms length” transaction of the type cited by Atmos in the Associated Natural Gas and MGE cases. (See Atmos Energy Corporation v Public Service Commission, 103 SW.3d 753, (Mo. Sup. Ct. enbanc 2003)). Missouri’s Supreme Court recognized that when a traditional regulated monopoly expands into non-regulated areas, that expansion “...gives utilities the opportunity and incentive to shift their non-regulated costs to their regulated operations with the effect of unnecessarily increasing the rates charged to the utilities’ customers....As long as a [public utility] is engaged in both monopoly and competitive activities, it will have the incentive as well as the ability to ‘milk’ the rate-of-return regulated monopoly affiliate to subsidize its competitive ventures.” (Id. at 764).

5. Hence, there can be no presumption of reasonableness when a regulated utility engages in affiliate transactions. Here, the burden of demonstrating reasonableness has shifted to Atmos because it has engaged in affiliate transactions to supply its LDC. In support thereof, Staff points to the following organizational structure of Atmos:

* Atmos Energy Corporation (AEC) is a Missouri regulated local gas distribution company (LDC).

*Atmos Energy Corporation used its affiliate company, Atmos Energy Marketing, LLC (AEM), to supply gas to Missouri's Northeastern service area during the winter heating season of 2007 - 2008.

*Atmos Energy Corporation is the parent of, and exerts ultimate control over Atmos Energy Marketing, LLC, its non-Missouri regulated affiliate company.

6. Because management of Atmos Energy Corporation, the regulated LDC, has ultimate control over Atmos Energy Marketing, LLC, Atmos Energy Corporation, the LDC, has ultimate control over the production of all documents related to this dispute. In preparation of the Commission-ordered Staff recommendation, filed December 29, 2009, the Staff used all information provided by Atmos in the data requests that it chose to respond to in order to prepare its ACA audit recommendation and still meet the Commission's deadline. The proposed affiliate transaction disallowance made by Staff in its verified Recommendation is the product of the information provided by Atmos – information that Atmos has sole control over. The burden is now on Atmos to come forward with its direct testimony in response to Staff's verified Recommendation.

7. Atmos correctly notes that on February 3, 2010, the Commission just issued its Order Approving Unanimous Stipulation And Agreement in its 2006 – 2007 ACA, Case No. GR-2007-0403. That case also involved a similar affiliate transaction issue which the parties

¹ The Process Of Ratemaking, Vol. I. by Leonard Saul Goodman, Public Utilities Reports, Inc.

eventually settled, avoiding lengthy discovery. However, the Commission should not confuse the 2006-2007 ACA settlement with the discovery process in the affiliate transaction issue that is at the heart of this dispute and covers a different (2007 – 2008) ACA period. These issues are not the same. The discovery process is not the same. ACA cases covering different periods do not have identical issues involving identical discovery. Also, the amount of discovery and the sheer complexity of the discovery process differs hugely from whether the issue settles out or goes to full litigation. The Staff, and this Commission and those who practice before it, are well aware of how complex and how long the discovery process can take when an affiliate transaction issue goes to litigation in ACA cases. (See pending Laclede Gas Company ACA Case No.s GR-2005-0203 and GR-2006-0288. These ACA cases involve affiliate transactions and do not have procedural schedules).

8. Atmos has not stated sufficient cause for expedited treatment. There is no operation of law date in this case. At dispute is a proposed affiliate transaction disallowance, therefore there is no harm to Atmos by not expediting the procedural schedule. Staff can point to no ACA case that involves an affiliate transaction dispute where the Commission has ever ordered a procedural schedule. Moreover, Commission practice shows that affiliate transaction disputes in ACA cases require long discovery periods before a procedural schedule can be set. Staff endeavors to do its best to move discovery along, but that is a two way street and Staff can not predict what information Atmos may object to providing Staff.

9. With regard to Atmos' insistence on the filing of simultaneous testimony, there is no Commission rule requiring the filing of simultaneous testimony. While it is probably true that 75% of the ACA cases have simultaneous testimony filings, not all do. In Missouri Gas Utility, Inc.'s 2006-2007 ACA case GR-2008-0136 and in Missouri Gas Energy's 2000-2001

ACA case GR-2001-382, the Commission did not order simultaneous filing of Direct testimony. Rather, the Commission ordered procedural schedules similar to what Staff has proposed in this case.

WHEREFORE, for the above stated reasons, the Staff respectfully requests the Commission deny Atmos' request for expedited treatment and renews its request that the Commission approve its proposed procedural schedule.

Respectfully submitted,

/s/ Robert S. Berlin

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 23rd day of February 2010.

/s/ Robert S. Berlin