

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 3rd day of
February, 2010.

In the Matter of Atmos Energy Corporation's Tariff)
Revision Designed to Consolidate Rates and) **File No. GR-2006-0387**
Implement a General Rate Increase for Natural Gas)
Service in the Missouri Service Area of Atmos)

In the Matter of Atmos Energy Corporation's Tariff)
Revision Designed to Implement a General Rate) **File No. GR-2010-0192**
Increase for Natural Gas Service in the Missouri) **Tariff No. YG-2010-0426**
Service Area of the Company)

ORDER CONSOLIDATING CASES

Issue Date: February 3, 2010

Effective Date: February 13, 2010

Procedural History

The Commission issued its Report and Order ("Order") in GR-2006-0387 on February 22, 2007, with an effective date of March 4, 2007. When addressing the issue of rate design the Commission concluded:

The Commission has thoroughly considered the facts of this case and the arguments of all the parties. The Commission has found that the status quo rate design is just and reasonable and that the volumetric rates encourage conservation. The Commission agrees with its Staff that the facts of this case present an opportunity to implement just and reasonable rates under a rate design that is quite novel in the state of Missouri. However, the Commission has determined that it is not just and reasonable to relinquish the conservation measures currently in place in the form of volumetric rates without also implementing a significant efficiency and conservation program to offset the loss of conservation encouraged by the volumetric portion of the rate. Therefore, the Commission has determined that Atmos shall maintain the status quo rate design unless it proceeds with a significant energy efficiency and conservation program as set out in the body of this order. If Atmos chooses to go forward with such a program, it may file new tariffs designed to implement not only that program, but also a fixed delivery charge rate design.

Atmos Energy Corporation subsequently filed compliance tariffs to implement a straight fixed variable rate design and tariffs complying with the condition of developing and implementing a significant energy efficiency and conservation program. The Commission approved the tariffs implementing the new rate design on March 27, 2007 to become effective April 1, 2007. These tariffs replaced Atmos' prior tariff (JG-2003-0046) in its entirety. Compliance tariffs to effectuate the Energy Conservation and Efficiency Program (YG-2007-0957) were approved to become effective on August 31, 2007.

The Office of the Public Counsel pursued a Writ of Review with the Cole County Circuit Court, which ultimately reversed and remanded the Order on August 27, 2008, finding six points of error. The case was appealed to the Missouri Court of Appeals for the Western District. On June 23, 2009, the Western District reversed the Commission's Order and remanded the case to the circuit court with instructions to remand to Commission. The Western District's opinion, which totally subsumes the circuit court's judgment, found two points of error. The Western District's mandate issued July 15, 2009; however, jurisdiction was not restored to the Commission by the circuit court until September 17, 2009.

Since jurisdiction has been restored, the Commission has not sat idly, rather it has: (1) reviewed the voluminous evidentiary record in its entirety, (2) entertained multiple pleadings and cross-pleadings propounding legal arguments from the parties, (3) held an on-the-record proceeding to allow for oral argument on the legal positions of the parties; and (4) reviewed and analyzed the statutory, regulatory and case law controlling the issues upon which the remand was based. Complicating this review of File No. GR-2006-0387

was Atmos' filing of a new rate case on December 28, 2009 (File No. GR-2010-0192); a case that brings many of the same issues back to the Commission for an identical review.

Western District Opinion in GR-2006-0387

The Western District held:

Due to the absence of competent and substantial evidence to support the Commission's findings regarding subsidization and Atmos's cost of service, we reverse the Commission's decisions adopting the SFV rate design and approving consolidation of Atmos's districts and remand those matters to the Commission for further proceedings. In light of our reversal of the Commission's adoption of the SFV rate design, we do not address OPC's arguments regarding Atmos's ROE, revenue requirement, the creation of new SGS and MGS classes, or the amount or structure of any seasonal reconnection proposals. Finally, we affirm the Commission's order adopting Staff's negative amortization proposal.¹

The Western District reversed and remanded on two issues: (1) adopting the Straight Fixed Variable ("SFV") rate design and (2) approving consolidation of Atmos' districts. Consequently, the Commission must reconsider its decision on those two matters.

With regard to the inter-related issues of rate design and revenue requirement, the Western District elucidated:

The Commission relied, in part, on Atmos's abandonment of its request for a \$3.4 million rate increase as a basis to find Atmos's existing revenues to be just and reasonable. But Atmos's abandonment of the rate increase request seems to have been dependent on the Commission's acceptance of the SFV rate design. If, on remand, the parties decide to abandon their advocacy of the SFV rate structure, Atmos could well revert to seeking the rate increase.

There is a clear linkage between the adoption of a particular rate design and the considerations regarding Atmos's revenue requirement. Because we have reversed the Commission's decision to adopt the SFV rate design, the Commission's findings and conclusions regarding Atmos's overall revenue requirements are not ripe for review.²

¹ *State ex rel. Public Counsel v. Missouri Public Service Com'n*, 289 S.W.3d 240, 256 (Mo. App. W.D. 2009).

² *Id.* at 253.

Because of the clear linkage between revenue requirement and rate design, the Commission must reconsider revenue requirement as it re-examines the rate design issue. The parties are all in agreement with the Western District on this issue.³ And as earlier noted, the Commission will have to examine these identical issues in the new rate case docket, GR-2010-0192. Additionally, Atmos' continued shareholder funding of its Energy Efficiency and Conservation Program on an annual basis, a specific condition precedent to the Commission's adoption of the SFV rate design, will also require re-examination.

Tariff Status

Once the Commission approves a tariff, it becomes Missouri law,⁴ and it has "the same force and effect as a statute directly prescribed from the legislature."⁵ Section 386.270 provides:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Consequently, once a tariff is approved and has become effective, it is valid until found otherwise invalid in a lawsuit litigating that issue; either by an appeal of the Commission's

³ See Transcript Volume 10, On-the-Record Presentation, December 15, 2009, pp. 762-763, 765, 772, 819, 832-834. Public Counsel distinguishes its position; however, by arguing the Commission would not have to look at updated information on revenue requirement. In essence, Public Counsel argues it would just and reasonable to set current rates based upon data from 2005.

⁴ Sections 393.130, 393.140(11), and 393.150, RSMo 2000; *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 156 S.W.3d 513, 521 (Mo. App. 2005); *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 583 (Mo. App. 2000); *Southwestern Bell Yellow Pages, Inc. v. Wilkins*, 920 S.W.2d 544, 548 (Mo. App. 1996). *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm'n*, 286 S.W. 84, 86, (Mo. 1926); *Wheelock v. Walsh Fire Clay Products Co.*, 60 F.2d 415 (8th Circuit 1932); *Updike Grain Co. v. Chicago & N.W. Ry. Co.*, 35 F.2d 486 (8th Circuit 1929); *Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. . . .*, 267 F.Supp. 175 (D.C. Mo. 1967).

⁵ *Id.*; *Laclede Gas Co.*, 156 S.W.3d at 521; *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo. App. 1996); *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988); *State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell*, 736 S.W.2d 383, 387 (Mo. banc 1987).

decision in a court of competent jurisdiction pursuant to Section 386.510, or in a complaint action before the Commission pursuant to Section 386.390.⁶ In both of these litigation choices, the burden of proof lies with the petitioner challenging the lawfulness of the order approving the tariff.⁷

It is important to note that the Western District did not expressly find the current tariff implementing the straight fixed variable rate design to be unlawful. That determination is essentially on hold while the Commission reconsiders the issues pursuant to the Western District's instructions. The tariff remains operational until the Commission makes its decision on remand and new compliance tariffs become effective in conformity with that subsequent order.

Timing Considerations

Because the Commission must re-examine revenue requirement along with its re-examination of rate design it must re-open the evidentiary record in GR-2006-0387. And because the Commission will be hearing identical evidence on many of the identical issues in the pending rate case, the Commission must decide whether it will have two concurrently running cases to address many of the same issues or whether the two cases should be consolidated. This issue has weighed heavily on the Commission and the general public

⁶ Sections 386.510 and 386.390, RSMo 2000; *State ex rel. Public Counsel v. Public Service Com'n*, 210 S.W.3d 344, 360 (Mo. App. 2006); *Union Elec. Co.*, 17 S.W.3d at 583; *State ex rel. GTE North, Inc. v. Public Service Commission*, 835 S.W.2d 356, 367 (Mo. App. 1992); *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.*, 765 S.W.2d 618, 621 (Mo. App. 1988). See also *In the Matter of the Filing of Proposed Tariffs by The Empire District Electric Company to Comply with the Commission's Report and Order in Case No. ER-2001-299 and to Correct a Recently Discovered Error in the Calculation of the Revenue Requirement*, Case No. ET-2002-210, Tariff No. 200200321, *Order Rejecting Tariff*, issued November 19, 2001, effective date November 24, 2001.

⁷ *David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), *citing to*, *Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968). See also Section 386.430, RSMo 2000; *Union Elec. Co.*, 765 S.W.2d at 621.

interest must be balanced with the interests of multiple rate classes' and with the company's and shareholders' interests.

Public Counsel asserts that the Commission must resolve the remand case expeditiously, and that failure to do so would violate its due process rights and its right to appeal pursuant to Section 386.540, RSMo 2000.⁸ Public Counsel has also argued that any decision regarding reversion to the status quo rate design should be held up until April of this year so that the ratepayers can take advantage of the benefits of the SFV rate design, the rate design it opposes.⁹

The Commission's Staff and Atmos point out that it would better serve all of the parties, the ratepayers and company alike, to consolidate GR-2006-0387 with GR-2010-0192. Further, the court of appeals has made abundantly clear:

Upon remand, an administrative tribunal is bound to enter judgment in conformity with the appellate court's mandate. A mandate is not to be read and applied in a vacuum. The opinion is part of the mandate and must be used in interpreting the mandate. Accordingly, proceedings on remand should be in accordance with the mandate and the result contemplated in the appellate court's opinion. (Internal citations omitted).¹⁰

At the on-the-record proceeding held on December 15, 2009, Atmos outlined the probable timeline that GR-2006-0387 would follow once the record was re-opened. Given the time it will take for the parties to prepare and present their evidence, any final order following a separate evidentiary hearing for GR-2006-0387 will end up being issued at approximately the same time as when the evidentiary hearings in the pending rate case,

⁸ See EFIS Docket Entries Numbers 248 and 249. EFIS is the Commission's Electronic Information and Filing System. The case law Public Counsel referenced for support of its due process argument holds that due process requires an opportunity to be heard in a timely and meaningful manner, and that due process is flexible and calls for procedures that fit the situational demands. Transcript, Volume 10, On-the Record Presentation, December 15, 2009, pp. 742-743.

⁹ Transcript, Volume 10, On-the Record Presentation, December 15, 2009, pp. 741, 745-747.

¹⁰ *Roberts v. City of St. Louis*, 292 S.W.3d 566, 570 (Mo. App. 2009).

GR-2010-0192, are concluding and briefs are being filed. Unfortunately, to proceed in this fashion, to obtain the most expeditious decision in GR-2006-0387, places the Commission in the position of having concurrent evidentiary hearings encompassing identical issues. There is potential that one decision will moot out the other, or parts of the other. Issuing a decision in GR-2006-0387 earlier than the final decision in GR-2010-0192 could also force premature decisions in GR-2010-0192. There is also the possibility that inconsistent decisions could occur creating flip-flopping of rate designs and producing radical changes in charges between rate classes within a couple of months. This problem is exponentially magnified if using 2005 data for one case and 2009-2010 data for the other.¹¹ There is also potential for unnecessarily forcing further litigation as the parties' and various rate classes' interests may collide within mere weeks between the two Commission rulings in the separate actions.

The great potential for confusion and disruption for the ratepayers, coupled with the unnecessary exhaustion of legal and administrative resources weighs in favor of consolidation. When considering the Western District's opinion in conjunction with its mandate, as is required, consolidation satisfies the Commission's obligations to follow the Western District's instructions on the remand of GR-2006-0387. Consolidation satisfies the requirements of due process to allow for a timely and meaningful opportunity to be heard in a flexible manner consistent with what the situation demands.¹² Consolidation also promotes the interests of judicial and administrative economy. Consolidation of GR-2006-0387 with GR-2010-0192 is lawful, prudent, and reasonable.

¹¹ Moreover, relying on 2005 data to set rates this year would challenge the just and reasonable standard.

¹² *Nixon v. Peterson*, 253 S.W.3d 77, 82 (Mo. banc 2008).

THE COMMISSION ORDERS THAT:

1. The evidentiary record in File Number GR-2006-0387 is re-opened.
2. File numbers GR-2006-0387 and GR-2010-0192 are consolidated. File No. GR-2010-0192 is designated as the lead case.
3. File number GR-2006-0387 shall be closed.
4. This order shall be effective February 13, 2010.

BY THE COMMISSION



**Steven C. Reed
Secretary**

(S E A L)

Davis, Jarrett, Gunn, and Kenney, CC., concur;
Clayton, Chm., dissents with dissenting opinion to follow.

Stearley, Senior Regulatory Law Judge