Missouri Public Service Commission

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August 10, 2001

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. GA-98-464

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of **STAFF'S SUPPLEMENTAL SUGGESTIONS.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Dennis L. Frey

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DLF:ccl
Enclosure
cc: Counsel of Record

FILE COPY

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of United Cities Gas Company, a division of Atmos Energy Corporation, for an Accounting Authority Order Related to Investigation and Response Actions Associated with its Former Manufactured Gas Plant Site in Hannibal, Miss	))))))	Case No. GA-98-464

STAFF'S SUPPLEMENTAL SUGGESTIONS

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), and respectfully states as follows:

1. On April 15, 1998, United Cities Gas Company, a division of Atmos Energy Corporation ("United Cities" or "Company"), filed with the Missouri Public Service Commission ("Commission") an Application For Accounting Authority Order to defer costs associated with the investigation, assessment, and environmental response actions at the Company's former Manufactured Gas Plant ("MGP") site in Hannibal, Missouri.

2. On February 25, 1999, the Commission issued an Accounting Authority Order ("AAO") with respect to "costs incurred or payments received between March 31, 1998 and the effective date of the rates established in United Cities' next general rate case or the beginning of the deferral period of any subsequent accounting authority order for the same costs, whichever is earlier." Ordered paragraph No. 3 states: "That this accounting authority order shall become null and void in the event United Cities does not file tariff sheets proposing a general increase in rates

within twenty-four (24) months from the effective date of this order." Ordered paragraph No. 6 states: "This order shall become effective on March 9, 1999."

3. On February 5, 2001, United Cities filed with the Commission a Motion For Modification of Accounting Authority Order, requesting that the Commission modify the subject AAO by extending the date on which the AAO would become null and void (unless a general rate case is filed) from March 9, 2001 to March 9, 2002. The Company explained that it does not believe it would be desirable to file a rate case before March 9, 2001, and that accordingly, if the time frame of the AAO is not extended, the Company will be required to write off some $377,000 in costs already incurred, as well as an additional $123,000, which it expects to incur over the next twelve (12) months.

4. Both the Staff and the Office of the Public Counsel ("OPC") filed pleadings opposing United Cities' request. In particular, Staff's Suggestions, filed March 2, 2001, urged that the Commission deny the Company's request for a one-year extension in the duration of the subject AAO. Staff suggested that the time frame established for deferral of costs is appropriate in this case and in addition to being clear and definite, helps to minimize the required amount of regulatory oversight.

5. At a March 15, 2001 prehearing conference, both the Staff and OPC suggested that because the Commission-ordered time period for the subject AAO had expired, the question whether the Company's request for an extension of the AAO had become moot. The presiding RLJ directed the parties to file pleadings concerning whether the Commission may, at this point, grant the relief United Cities requests, a directive reiterated in the Commission's March 21, 2001 Notice Regarding Procedural Schedule And Regarding Memorandum.

6. On March 22, 2001, the Staff filed a Motion To Dismiss, arguing that while the statutes and case law do not appear to contemplate a situation such as that now before the Commission, the courts nevertheless recognize the need, at some point, for finality in decisions, whether they be judicial or administrative. The Staff's Motion cited a Florida case, *People's Gas System v. Mason*, 187 So.2d 335, 339 (1966), where the Supreme Court of that state stated: "orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts."

7. Pursuant to a July 3, 2001 Commission order, a second prehearing conference was held on July 11, 2001. At the conclusion of the conference, the presiding Regulatory Law Judge encouraged the parties to file an additional pleading, summarizing their positions in this case. Accordingly, the Staff states and asserts the following:

8. The Staff continues to believe that the subject AAO cannot, at this time, be extended, as requested by United Cities; that by its terms, the AAO is null and void due to the failure of United Cities to file a rate case by March 9, 2001. Under the circumstances, it does not make sense for the Commission now to order its extension. As suggested in Staff's March 22, 2001 Motion, this situation is not at all analogous to one in which a statute of limitations is tolled by the timely filing of a pleading. In contrast to statutes of limitations, there is no provision in the statutes or in the Commission rules for the filing of requests for extension of accounting authority orders, nor does the instant AAO so provide. Instead, the AAO specifically and

unambiguously requires that if the Company does not file a rate case within twenty-four months from the effective date of the AAO (March 9, 1999), the AAO "shall become null and void". Thus, as of March 10, 2001, the AAO was self-extinguishing. Accordingly, the Commission may not order the extension of something that no longer exists.

The courts recognize that, at some point, there needs to be finality in decisions, so that interested parties eventually may be assured of their rights and obligations. Surely, at a minimum, an order is final upon its expiration.

9. At the July 11 prehearing conference, the Regulatory Law Judge raised the question whether the Commission might simply grant a new AAO incorporating the subject environmental clean-up costs for the time period at issue, along with any similar costs incurred on a going-forward basis. This form of relief was requested in the alternative in United Cities' Motion For Modification. Counsel for United Cities argued that the Commission indeed has the authority to order the capturing of costs on a retrospective basis. (Tr. 37). As support for its position, United Cities pointed out that, in its February 25, 1999 Accounting Authority Order in this case, the Commission did, in fact, reach back to include costs incurred (and payments received) by the Company beginning March 31, 1998, "almost a full year retroactive". (Tr. 43). However, the fundamental question here is not whether the Commission may reach into the past and identify costs that have already been incurred for deferral under an AAO. Indeed, no one argues that the Commission does not have such authority. Rather, the question is whether the Commission may do so with respect to costs that were already identified with a prior AAO that has now expired. Can such costs nevertheless simply be reassigned to a subsequent AAO?

The Staff submits that the answer is "no." Clearly, such an approach is, in substance, no different from an extension of the existing AAO. As such, it suffers from the same fatal flaw as

the Company's proposed extension in that it resuscitates dollars whose regulatory treatment has already been specified and executed in a prior order, now expired. As suggested earlier, to now revive such costs would be inconsistent with the court-sanctioned objective of finality at some point in adjudicated matters.

Furthermore, the establishment of a replacement AAO to cover the very same costs as the previous order would be bad policy. By doing so, the Commission would be signaling that, in the event a utility determines that its costs deferred under an existing accounting authority order are not sufficient to trigger the filing of a rate increase case (i.e., the utility's earnings picture is satisfactory), the utility might nevertheless anticipate favorable Commission treatment of a request for a transfer of said costs to a new accounting authority order. Presumably, if such a request is granted and the utility continues to experience satisfactory earnings, the utility could seek continued preservation of these costs through the establishment of yet another accounting authority order. The Staff would suggest that an administrative nightmare will result, as the accounting authority order process degenerates from one of identifying dollars possibly to be considered in a utility's next rate case, to one of identifying dollars to be considered in the utility's next accounting authority order request.

10. A commission grant of the Company's request would raise other serious policy concerns. In fact, it would serve to undermine previously articulated Commission policy regarding accounting authority orders. The issue of the proper timing of deferral requests in relation to rate increase cases has been raised in past accounting authority order proceedings, and policy decisions by the Commission have resulted. In its Report & Order in consolidated Case Nos. EO-91-358 and EO-91-360, involving UtiliCorp United, Inc., the Commission stated the following:

> The Commission finds that a time limitation on deferrals is reasonable since deferrals cannot be allowed to continue indefinitely. The Commission finds that a rate case must be filed within a reasonable time after the deferral period for recovery of the deferral to be considered. For purposes of this case the Commission finds that twelve months is a reasonable period. This limitation accomplishes two goals. First, it prevents the continued accumulation of deferred costs so that total disallowance would not affect the financial integrity of the company or the Commission's ability to make the disallowance; and secondly, it ensures the Commission of a review of those costs within a reasonable time. If the costs are truly extraordinary, recovery in rates should not be delayed indefinitely. A utility should not be allowed to save deferrals to offset against excess earnings in some future period. (Emphasis added.) (Report and Order, pp.8-9).

The above-quoted language is equally applicable to United Cities' request to extend its recently expired AAO, which already allowed the Company to defer MGP costs for about three years (from March 1998 to March 2001). Granting the requested one-year extension of the time to file a rate case, then, could lengthen the deferral period to a maximum of four years. If allowed, the length of this deferral period would be unprecedented. No utility has sought, nor has the Commission granted, a deferral period of four years or more since the Report and Order in Case Nos. EO-91-358 and EO-91-360 was issued.

More fundamentally, granting a deferral period of this length would violate the underlying premise of accounting authority orders. Specifically, accounting authority orders are to be granted only when a utility incurs unusual and extraordinary expenses that are not contemplated in the normal ratemaking process, and that have the effect of not allowing the utility a reasonable opportunity to earn its authorized rate of return. The Staff submits that allowing deferral of costs that the utility expects to incur over a four-year period, in and of itself, strongly suggests that the subject costs are not extraordinary at all; that on the contrary, they are in the nature of an ongoing expense. To allow recovery in rates of deferred non-extraordinary

expenses would run afoul of the well-settled legal prohibitions against single-issue and retroactive ratemaking.

11. The Company has complained about having to write off the total amount deferred over approximately three years if the AAO is not extended. Of course, United Cities could have mitigated that effect by forgoing the AAO option and simply expensing the subject costs each year as they were incurred. United Cities chose not to do so and instead availed itself of the AAO with full knowledge that the Company might ultimately have to write off the deferred amount as a lump sum. Further, the Staff would note that United Cities has not presented any evidence that the amount it has deferred to date under the AAO at issue is material either to its overall financial situation or to the financial situation of its parent company, Atmos Energy Corporation. Nor has it presented any evidence that the amount of MGP costs it expects to incur in the twelve months ending March 2002 is material. Without some information regarding materiality, United Cities has not even shown that it will suffer any significant harm from the write-off. In addition, as the Commission itself noted in the Report and Order quoted above, the fact that deferred amounts stockpile over time, and thus increase the amount of any required write-off in the event of a subsequent denial of rate recovery, is a reason to limit the deferral period in the first place. Clearly, this rationale does not support a one-year extension of the subject AAO to four years.

12. Accounting authority orders are an attempt to address the problem of regulatory lag for utilities, and are not intended to allow a utility to stockpile costs indefinitely, until it should happen to file a rate case. To grant an accounting authority order is to accord special treatment to the utility so that its authorized earnings do not suffer as a result of an unusual and extraordinary occurrence. If the circumstances are such that the utility's earnings are not

suffering, it will elect not to file a rate case within the specified time frame, and, by definition, there is no longer a need to be concerned about the adverse impact on earnings of costs subject to the accounting authority order. At that point, the very terms of the accounting authority order, as well as concerns about single-issue and retroactive ratemaking, should govern the final disposition of the matter; namely, the absorption of the subject costs by the utility. In the instant case, United Cities had every right to file a rate case to recover the subject costs at any time during the twenty-four month life of the AAO; however, it made a business decision not to do so based on its assessment that its earnings picture is satisfactory. The consequences of that decision are clearly set forth in the subject AAO, and the Company must now accept them.

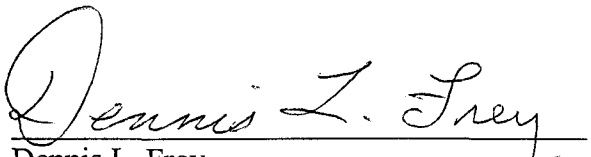
13. In the Staff's opinion, granting United Cities' unprecedented request either for an extension of its now-defunct AAO or, in the alternative, for a replacement AAO, is not permissible inasmuch as the AAO, by its very terms, has now expired and therefore cannot be extended. In addition, to grant the requested extension would, for no good reason, change the Commission's past policy decisions regarding the accounting authority order process and, in fact, would serve to undermine the very purpose of accounting authority orders. This case should therefore be dismissed.

In the event, however, that the Commission decides to consider either the extension of the AAO or the transfer of the associated costs to a replacement AAO, the matter should be set for hearing, with provision for the filing of testimony by the parties.

WHEREFORE, for the above-stated reasons, the Staff suggests that the Commission dismiss this case. In the alternative, the Staff suggests that the Commission establish a procedural schedule to permit a full evidentiary hearing regarding this matter.

Respectfully submitted,

DANA K. JOYCE
General Counsel



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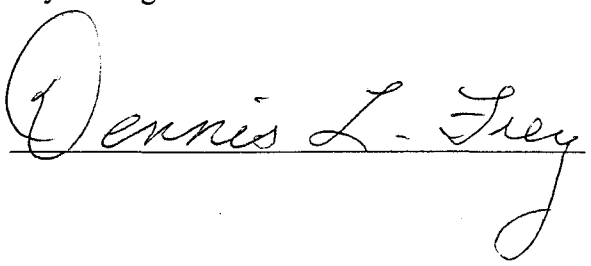
Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 10th day of August 2001.



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