RES-R-3

Missouri Supreme Court Orders

First

Order

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As of: November 6, 2018 4:20 PM Z

State ex rel. Atmos Energy Corp. v. PSC

Supreme Court of Missouri

April 22, 2003, Filed

No. SC84344

Reporter
103 S.W.3d 753 *; 2003 Mo. LEXIS 70 **

STATE ex rel. ATMOS ENERGY CORPORATION, et al., Appellants, v. PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al., Respondents. and AMEREN CORPORATION and UNION ELECTRIC COMPANY, d/b/a AmerenUE, Appellants, PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al., Respondents.

Subsequent History: [1]**

Rehearing overruled by *State ex rel. Atmos Energy Corp. v. PSC, 2003 Mo. LEXIS 96 (Mo., May 27, 2003)*

Prior History: APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY. Honorable Thomas J. Brown, III, Judge.

State ex rel. Atmos Energy Corp. v. PSC of Mo., 2001 Mo. App. LEXIS 2272 (Mo. Ct. App., Dec. 26, 2001)

Disposition: Affirmed.

Core Terms

rulemaking, affiliates, procedures, proposed rule, promulgate, contested case, heating, circuit court, regulated, corporations, electric, notice, requirements, sections, public utility, provisions, services, asymmetrical, companies, pricing, entity, fair market price, final order, comments, parties, issues, cases, rates, steam, vague

Case Summary

Procedural Posture

Appellants, gas corporations, public utilities, steam distribution company, heating company, and electric and gas utility (utilities), sought review of the decision of the Circuit Court of Cole County (Missouri), which affirmed the orders of respondent Public Service Commission of the State of Missouri (PSC) involving rules that regulated transactions between public utilities and their affiliates.

Overview

The PSC filed proposed rules establishing asymmetrical pricing standards that prohibited certain transactions between public utilities and their affiliates. The PSC enacted the rules and denied the request for rehearing. The circuit court granted judgment in favor of the PSC, and the court affirmed. The utilities contended that the PSC's promulgation of the rules failed to comply with the procedures set forth in *Mo. Rev. Stat. § 386.250(6)* (2000), but the court held that, in view of the evidentiary procedures provided

at the three-day hearing, the PSC fully complied with the requirements. The utilities also contended that the PSC failed to comply with the publication requirements of Mo. Rev. Stat. ch. 536, but the court stated that *Mo. Rev. Stat. § 536.021.2(1)* (2000) imposed no such obligation on an agency. The PSC was not engaged in an adjudication, but in rulemaking. Thus, *Mo. Rev. Stat. § 393.140(5)* (2000) was therefore irrelevant to the court's review of the rules. The court concluded that the PSC had authority to promulgate the rules and that the promulgation satisfied all relevant rulemaking procedures.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

HN1[] **Energy & Utilities Law, Utility Companies**

The Public Service Commission is a state agency established by the Missouri General Assembly to regulate public utilities operating within the state.

HN2[] **Trials, Entry of Judgments**

See *Mo. Rev. Stat. § 386.540.1* (2000). The commission and any party, including the public counsel, who has participated in the commission proceeding which produced the order or decision may, after the entry of judgment in the circuit court in any action in review, prosecute an appeal to a court having appellate jurisdiction in this state. Such appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases.

HN3[] **Preliminary Considerations, Jurisdiction**

Mo. Rev. Stat. § 386.540.1 (2000) is applicable only if it is first determined that jurisdiction was proper in the circuit court. A judgment entered in excess of or beyond the jurisdiction of the trial court is void and an appellate court has no jurisdiction to review on the merits.

HN4[] **Hearings & Orders, Judicial Review**

The circuit court's jurisdiction derives from *Mo. Rev. Stat. §§ 386.500* and *386.510* (2000), which provide that an applicant may seek review in the circuit court of a Public Service Commission of the State of Missouri (PSC) order or decision if the applicant has timely filed an application for rehearing and that application has been denied. In that regard, the legislature has provided a special statutory procedure for review of an original order or decision of the PSC and that procedure is provided for in *Mo. Rev. Stat. § 386.510* (2000) and is exclusive and jurisdictional. When confronted with a challenge to a rule promulgated by the PSC, a circuit court is vested with jurisdiction to review the rule if the challenging parties have complied with the rehearing procedures set forth in *§ 386.510*.

HN5[] **Standards of Review, Substantial Evidence**

Pursuant to *Mo. Rev. Stat. § 386.510* (2000), the standard of review of a Public Service Commission of the State of Missouri (PSC) order of rulemaking is two-pronged: first, the reviewing court must determine whether the PSC's order is lawful; and second, the court must determine whether the order is reasonable. However, that standard for review is essentially the same as our review of cases decided by other administrative tribunals. There is no presumption in favor of the PSC's resolution of legal issues. Nor is there any presumption in favor of the circuit court's determination of these issues, over and above an appellant's normal

burden of demonstrating error. So we decide the legal points anew. The decision of the PSC on factual issues, however, is presumed to be correct until the contrary is shown and the Supreme Court of Missouri is obliged to sustain the PSC's order if it is supported by substantial evidence on the record as a whole.

HN6[] Regulators, Public Utility Commissions

See Mo. Rev. Stat. § 386.250(6) (2000).

HN7[] Agency Rulemaking, State Proceedings

Rules must be promulgated in accordance with the appropriate rulemaking procedures to be valid.

HN8[] Agency Rulemaking, Formal Rulemaking

Mo. Rev. Stat. § 386.250(6) does not obligate the Public Service Commission of the State of Missouri to provide evidentiary procedures at the hearing other than that which the statute plainly requires, the opportunity to present evidence. Moreover, the specific evidentiary procedures sought by utilities, cross-examination of witnesses and the presentation of rebuttal evidence, are procedures normally employed under the Missouri Administrative Procedure Act in contested cases but not rulemaking hearings. That rulemaking statutes require a "hearing" does not mean that the hearing must take the form of an adjudicatory, trial-type hearing in the nature of that in a contested case. In the absence of a clear indication of legislative intent that more is required, the presence of the mandate for hearing in a rulemaking context means only that the agency cannot promulgate the rule on the basis of an invitation for written comments on its proposal. The agency must meet interested members of the public face to face with an opportunity for oral presentation and comment, but the legislative quality of rulemaking assures that nothing more is expected than a legislative-style hearing.

HN9[] Agency Rulemaking, State Proceedings

Mo. Rev. Stat. § 536.021.2(1) (2000) states that a notice of proposed rulemaking shall contain an explanation of any proposed rule or any change in an existing rule, and the reasons therefor. The purpose of the notice procedure is to briefly explain the general subject matters covered by the proposed rules, and allow opportunity for comment by supporters or opponents of the measure.

Rulemaking > State Proceedings

HN10[] Agency Rulemaking, Formal Rulemaking

See Mo. Rev. Stat. § 536.021.6(4) (2000).

HN11[] Regulators, Public Utility Commissions

See Mo. Rev. Stat. § 393.290 (2000).

HN12[] Agency Rulemaking, State Proceedings

Under the express language of Mo. Rev. Stat. § 393.290 (2000), when the Public Service Commission of the State of Missouri (PSC) properly invokes its jurisdiction under Mo. Rev. Stat. ch. 386 and 393, it also is authorized to act with respect to heating companies. Despite the fact that Mo. Rev. Stat. §§ 386.250 and 393.140 (2000) do not reference heating companies, the PSC's citation to those sections as its authority for promulgation of rules do not violate Mo. Rev.

Stat. § 536.021.2(2) (2000).

HN13[↓] Agency Rulemaking, State Proceedings

See Mo. Rev. Stat. § 536.016 (2000).

HN14[↓] Agency Rulemaking, State Proceedings

Mo. Rev. Stat. § 536.016 (2000) does not govern the entire rulemaking process but only the proposal of rules.

HN15[↓] Agency Rulemaking, State Proceedings

Mo. Rev. Stat. § 536.016 (2000) applies solely to an agency's proposal of rules and does not have retrospective application. An intent to apply § 536.016 retrospectively cannot be gleaned from the statute.

HN16[↓] Agency Rulemaking, State Proceedings

Mo. Rev. Stat. § 393.140(11) (2000) prohibits a utility from charging or extending to any person or corporation any form of contract or agreement except such as are regularly and uniformly extended to all persons and corporations. The Public Service Commission of the State of Missouri is empowered to establish such rules and regulations to this effect.

HN17[↓] Agency Rulemaking, State Proceedings

Mo. Rev. Stat. § 393.140(5) (2000) is primarily intended to authorize determination of improper conduct such as charging unjust, unreasonable or unlawful rates or engaging in discriminatory conduct, while Mo. Rev. Stat. § 393.140(11) is primarily concerned with rule making, and prohibiting any form of contract or agreement except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The Public Service Commission of the State of Missouri has authority to make rules for that purpose.

HN18[↓] Agency Rulemaking, State Proceedings

The Public Service Commission of the State of Missouri has the rulemaking authority, pursuant to Mo. Rev. Stat. § 393.140(11) (2000), to prohibit a utility from extending contracts or agreements that are not of the type regularly and uniformly extended to all other entities. The enactment of the asymmetrical pricing standards, in essence, a simple prohibition to all utilities against providing a financial advantage to their affiliates, is a proper manifestation of this authority.

HN19[↓] Agency Rulemaking, State Proceedings

Mo. Rev. Stat. § 536.010(2) (2000) defines "contested case" as a proceeding before an agency in which legal rights, duties or privileges of specific parties" are determined. Mo. Rev. Stat. § 536.010(4) defines "rule" each agency statement of general applicability that implements or prescribes law or policy.

HN20[↓] Agency Rulemaking, State Proceedings

Mo. Rev. Stat. § 393.130.2 (2000) precludes a utility from directly or indirectly by any special rate or other device or method from collecting or receiving from any person or corporation greater or lesser compensation for that utility's services than it charges every other person or corporation. Mo. Rev. Stat. § 393.140(1) (2000) states that the Public Service Commission of the State of Missouri (PSC) shall have general

supervision over all gas utilities, electric utilities, and heating utilities. Reading Mo. Rev. Stat. § 393.130.2 in conjunction with the broad supervisory power granted under Mo. Rev. Stat. § 393.140(1), the PSC's authority to require utilities to maintain records so that it may determine whether utilities are following their obligations under Mo. Rev. Stat. § 393.130.2 is firmly established.

HN21[⬇] **Public Utility Commissions, Authorities & Powers**

The Public Service Commission of the State of Missouri (PSC) has authority to extend the reach of the rules to a utility's affiliates. Mo. Rev. Stat. § 393.140(12) (2000) precludes regulation of a utility's affiliate where the affiliate is substantially kept separate and apart from the business of the utility. However, that section also states that the PSC shall have the right to inquire as to, and prescribe the apportionment of, capitalization, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant, electric plant, or heating plant. Thus, where the affiliate is not one substantially kept separate from the utility, the PSC is authorized to inquire into certain aspects of the affiliate's operations as they relate to the capitalization, debts, expenses, etc., of the utility.

HN22[⬇] **Agency Rulemaking, State Proceedings**

To determine whether a particular enactment is void for vagueness, courts ask whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. In so doing, however, courts expect neither absolute certainty nor impossible standards of specificity. And when construing civil enactments, as opposed to criminal enactments, courts have a greater tolerance because the consequences of imprecision are qualitatively less severe.

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FOR RESPONDENT: Ms. Lera L. Shemwell, Ms. Dana K. Joyce, Jefferson City, Missouri, Mr. Douglas E. Michael, Office of Public Counsel, Jefferson City, Missouri.

Judges: Stephen N. Limbaugh, Jr., Chief Justice. All concur.

Opinion by: Stephen N. Limbaugh, Jr.

Opinion

[*756] en banc

Atmos Energy Corporation (Atmos); Missouri Gas Energy (MGE); Laclede Gas Company (Laclede); Trigen-Kansas City Energy Corporation (Trigen); Ameren Corporation (Ameren); and Union Electric Company (UE), d/b/a AmerenUE, appeal the judgment of the Circuit Court of Cole County affirming the final orders of rulemaking of the Missouri Public Service Commission (PSC), promulgating several rules that regulate transactions between certain public utilities and their affiliates. Appellants contest the validity of the rules by challenging the authority of the PSC to promulgate them and the procedure by which they were promulgated, claiming generally that

as affected entities they were unlawfully denied contested case procedures before the PSC in voicing their objections to the promulgation of the rules. After appeal to the Court of Appeals, Western District, this Court granted transfer. *Mo. Const. art. V, sec. 10*. The judgment is affirmed.

I.

[2]** *HN1*[↑] The PSC is a state agency established by the Missouri General Assembly to regulate public utilities operating within the state. Appellants Atmos, MGE, and Laclede are gas corporations and public utilities, as defined in *sections 386.020(18) and 386.020(42)*, [1] subject to regulation by the PSC. Trigen is a steam distribution company operating as a retail distributor of steam in Jackson County, Missouri, and subject to PSC regulation as a "heating company," pursuant to *section 386.020(20)*. UE is an electric and gas utility, which **[*757]** qualifies as an electrical corporation under *section 386.020(15)* and a gas corporation under *section 386.020(18)*, and is subject to regulation by the PSC as a regulated investor-owned utility company. Ameren, the unregulated parent corporation of UE, is not an electrical or gas corporation and, therefore, is not directly subject to the jurisdiction of the PSC.

[3]** On April 26, 1999, the PSC, citing *sections 386.250 and 393.140* as authority, filed proposed rules *4 CSR 240-20.015*, *4 CSR 240-80.015*, *4 CSR 240-40.015*, and *4 CSR 240-40.016* with the Missouri Secretary of State. The proposed rules, applicable to electric utilities, steam heating utilities, and gas utilities, establish "asymmetrical pricing standards" that prohibit certain transactions between public utilities and their affiliates.

As required under *sections 386.250(6) and 536.021*, the proposed rules were then published in the Missouri Register, 24 Mo. Reg. 1346-64, and thereafter the PSC commenced separate cases for each of the proposed rules. The notice of proposed rulemaking for each of the proposed rules invited interested persons to submit written comments to the PSC and declared that a public hearing would be held at which interested persons could appear. Prior to the hearing, several utilities filed complaints with the PSC objecting to the manner **[**4]** in which the proceedings were being conducted. Specifically, the utilities contended that because of the "complexity and importance of the issues," the PSC should provide contested case procedures and allow the utilities to cross-examine and rebut opposing witnesses. The PSC denied the requests to provide contested case procedures, but reiterated that comments could be submitted.

After consolidating all four cases, the PSC held a three-day public hearing on September 13-15, 1999. At the hearing, the PSC considered appellants' extensive written comments opposing certain provisions of the proposed rules and allowed several representatives of the appellant utilities to orally present their arguments in opposition. In addition, witnesses were called, including representatives of the appellant utilities, who testified under oath, but only members of the PSC and the administrative law judge were permitted to examine the witnesses. Although each of the utilities participated at the hearing in varying degrees, they again objected to the proceedings on the ground that full contested case procedures should have been employed.

Following the hearing, the PSC issued "Orders of Rulemaking" in **[**5]** each of the cases,

[1] All Missouri statutory references are to RSMo 2000 unless otherwise indicated.

enacting the rules that are the subject of this appeal. Thereafter, the PSC denied timely-filed requests for rehearing in all four cases, and the appellant utilities, pursuant to section 386.510, then filed a petition for writ of review in the Circuit Court of Cole County. In the petition, appellants challenged the PSC's authority to promulgate the rules and the procedure by which they were promulgated. After hearing and argument, the Circuit Court granted judgment in favor of the PSC.

II.

There is some question about this Court's jurisdiction to hear the rulemaking challenge. Appellants correctly assert that appellate jurisdiction can be based on section 386.540.1, which provides, in pertinent part:

HN2[↑] The commission and any party, including the public counsel, who has participated in the commission proceeding which produced the order or decision may, after the entry of judgment in the circuit court in any action in review, prosecute an appeal to a court having appellate jurisdiction in this state. Such **[*758]** appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases. . . .

However, **[**6]** HN3[↑] that section is applicable only if it is first determined that jurisdiction was proper in the circuit court. *See Sumnicht v. Sackman, 968 S.W.2d 171, 174 (Mo. App. 1998)* ("A judgment entered in excess of or beyond the jurisdiction of the trial court is void and an appellate court has no jurisdiction to review on the merits.") (citation omitted); Two Pershing Square, L.P. v. Boley, 981 S.W.2d 635, 639 (Mo. App. 1998); *Peters v. United Consumers Club, 786 S.W.2d 192, 193 (Mo. App. 1990)*.

HN4[↑] The circuit court's jurisdiction derives from sections 386.500 and 386.510, which provide that an applicant may seek review in the circuit court of a PSC "order or decision" if the applicant has timely filed an application for rehearing and that application has been denied. In that regard, this Court has held "that the Legislature has provided a special statutory procedure for review of an 'original order or decision' of the Commission…and that procedure [is] provided for in [section] 386.510 [and] is exclusive and jurisdictional." Union Electric Company v. Clark, 511 S.W.2d 822, 825 (Mo. 1974). **[**7]** Moreover, this Court determined that the agency action at issue in the case "*whether it be called a rule or an order*, is clearly within the term 'original order or decision' as used in [section] 386.510." Id. at 824. (Emphasis added.) The clear import of our decision in Clark is that, when confronted with a challenge to a rule promulgated by the PSC, a circuit court is vested with jurisdiction to review the rule if the challenging parties have complied with the rehearing procedures set forth in section 386.510. *See also* State ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n, 592 S.W.2d 184 (Mo. App. 1979); Jefferson Lines Inc. v. Pub. Serv. Comm'n, 581 S.W.2d 124 (Mo. App. 1979).

Arguably, contrary to the holding of *Clark*, review of PSC orders of rulemaking should be conducted via declaratory judgment actions under the Missouri Administrative Procedure Act, section 536.050, and not chapter 386. Superficially, two statutory amendments enacted since *Clark* appear to support such a conclusion. In 1976, the term "rule" under the MAPA **[**8]** was amended to exclude a "determination, decision or *order* in a contested case." Section 536.010(4)(d). (Emphasis added.) And one year later, section 386.250(6) was amended to mandate that PSC rules be promulgated pursuant to the procedures set forth

in *chapter 536*. However, with respect to the first amendment, because the term "order" explicitly refers to orders that an agency issues in a contested case, the term does not include "orders" that an agency may promulgate through rulemaking, such as are permitted in *chapter 386*. Further, the latter amendment to *section 386.250(6)* merely imposes the procedural requirements of the MAPA for the enactment of PSC rules, but does not effect a change in how the rules are to be judicially reviewed. Therefore, neither amendment, either in purpose or effect, alters the holding in *Clark* that the procedures set forth in *chapter 386* govern judicial review of PSC rulemaking.

In any event, in this case, appellants complied with each step of the review procedures mandated by *chapter 386*. They contested the content of the proposed rules and timely filed applications **[**9]** for rehearing after the PSC's final orders of rulemaking, and when the applications for rehearing were denied, they timely filed petitions for writ of review in the circuit court. At that point, the circuit court had jurisdiction to hear the claims. Under *section 386.540.1*, this Court, in turn, is vested **[*759]** with jurisdiction to hear this appeal. This Court now turns to the merits of those claims.

III.

HN5[↑] Pursuant to *section 386.510*, the standard of review of a PSC order of rulemaking is two-pronged: first, the reviewing court must determine whether the PSC's order is lawful; and second, the court must determine whether the order is reasonable. However, "that standard for review is essentially the same as [our review of] cases decided by other administrative tribunals." *Love 1979 Partners, et al. v. Public Service Comm'n of Missouri, 715 S.W.2d 482, 490 n.8* (Mo. banc 1986). As this Court held in *Love*:

> There is no presumption in favor of the Commission's resolution of legal issues. Nor is there any presumption in favor of the circuit court's determination of these issues, over and above an appellant's normal **[**10]** burden of demonstrating error. So we decide the legal points anew. The decision of the Commission on factual issues, however, is presumed to be correct until the contrary is shown and we are obliged to sustain the Commission's order if it is supported by substantial evidence on the record as a whole.

Id. at 486.

IV.

Appellants Atmos, MGE, Laclede, and Trigen raised seven points of error in their joint brief, with appellants Ameren and UE concurring in two of these points (points I and V below). We address each point in turn.

Point I

Appellants contend that the PSC's promulgation of the rules failed to comply with the rulemaking procedures set out in *section 386.250(6)*, which states, that as *HN6*[↑] "to the adoption of rules…which prescribe the conditions of rendering public utility service…*a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule*[.]" (Emphasis added.) Appellants interpret *section 386.250(6)* to require a "hearing" at which affected parties are entitled to certain evidentiary procedures, particularly, the opportunity to **[**11]** cross-examine adverse witnesses and present rebuttal evidence. Because those procedures were disallowed in this case, appellants contend that the rules are void. *See NME Hospitals, Inc. v. Dept. of Social*

Services, 850 S.W.2d 71, 74 (Mo. banc 1993) (holding that HN7[↑] rules must be promulgated in accordance with the appropriate rulemaking procedures to be valid).

Section 386.250(6) does indeed govern the rules at issue in this case, because they undoubtedly "prescribe the conditions of rendering public utility service." However, section 386.250(6) HN8[↑] does not obligate the PSC to provide evidentiary procedures at the hearing other than that which the statute plainly requires - the opportunity to "present evidence." Moreover, the specific evidentiary procedures sought by utilities - cross-examination of witnesses and the presentation of rebuttal evidence - are procedures normally employed under the MAPA in contested cases but not rulemaking hearings. Hagely v. Board of Educ. of Webster Groves School Dist., 841 S.W.2d 663, 668 (Mo. banc 1992). This is a crucial point, as Professor Alfred Neely explained:

That **[**12]** [rulemaking] statutes require a "hearing" does not mean that the hearing must take the form of an adjudicatory, trial-type hearing in the nature of that in a contested case. In the absence of a clear indication of legislative intent that more is required, the presence of the mandate for hearing in a rulemaking context means only that the agency cannot **[*760]** promulgate the rule on the basis of an invitation for written comments on its proposal. *[The agency] must meet interested members of the public face to face with an opportunity for oral presentation and comment, but the legislative quality of rulemaking assures that nothing more is expected than a legislative-style hearing....*

ALFRED S. NEELY, MISSOURI PRACTICE: ADMINISTRATIVE PRACTICE AND PROCEDURE section 6.39, at 192 (3d ed. 2001). (Emphasis added.)

Though appellants concede that in this case the PSC engaged in rulemaking, not adjudication, they still contend that the section 386.250(6) requirement that they be allowed to "present evidence" at the hearing necessarily encompasses the corollary procedures of cross-examination and presentation of rebuttal evidence. This Court disagrees. Section [**13] 386.250(6) requires exactly what it says: "[A] hearing . . . at which affected parties may present evidence as to the reasonableness of any proposed rule." Nothing more and nothing less is required. Thus, in view of the evidentiary procedures provided at the three-day hearing, the PSC fully complied with the requirements of section 386.250(6).

Point II

Appellants next contend that the PSC failed to comply with the publication requirements of chapter 536 because the published notices of proposed rulemaking (1) did not provide sufficient explanations of the proposed rules and (2) did not include concise summaries of the PSC's findings with respect to the merits of the testimony or comments received in opposition to the rules.

On the first point, section 536.021.2(1) HN9[↑] states that a notice of proposed rulemaking shall contain "an explanation of any proposed rule or any change in an existing rule, and the reasons therefor[.]" The purpose of the notice procedure is to briefly explain the "general subject matters covered by the [proposed] rules," City of Springfield v. Public Service Comm'n, 812 S.W.2d 827, 832 (Mo. App. 1991) **[**14]** (*overruled on other grounds by* Missouri Mun. League v. State, 932 S.W.2d 400, 403 (Mo. banc 1996)), and "'allow opportunity

for comment by supporters or opponents of the measure. . .,'" *NME, 850 S.W.2d at 74*. Here, it is undisputed that the notices of proposed rulemaking both explained the general subject matter of the proposed rules and gave notice of the means and manner by which the public could comment on the proposed rules. Nonetheless, appellants argue that the notices were insufficient because they failed to explain why the PSC chose to act through rulemaking rather than some alternative agency method. However, this argument is wholly without merit, as *section 536.021.2(1)* imposes no such obligation on an agency.

With respect to appellants' second argument, *section 536.021.6(4)* requires a final order of rulemaking to contain:

HN10[↑] A brief summary of the general nature and extent of comments submitted in support of or in opposition to the proposed rule and a concise summary of the testimony presented at the hearing, if any, held in connection with said rulemaking, together with a concise **[**15]** summary of the state agency's findings with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule[.]

In its final orders of rulemaking, the PSC carefully summarized every favorable and unfavorable statement it received during the written comment process and the three-day public hearings. For each statement received, the PSC gave an extensive **[*761]** response explaining why it had chosen to reject the suggestion or to incorporate only some part of the suggestion. Under these circumstances, there is no merit in appellants' assertion that the PSC failed to comply with *section 536.021.6(4)* in issuing the final orders of rulemaking.

Point III

Appellant Trigen argues that the new PSC rule affecting steam heating utilities, *4 CSR 240-80.015*, is void because neither the published notice of proposed rulemaking nor the published final order of rulemaking cited the appropriate "legal authority upon which the proposed rule [was] based," as required under *section 536.021.2(2)*. Though in both publications the PSC cited *sections 386.250 **[**16]** and 393.140* as the statutes that vested it with authority to promulgate the steam heating rule, Trigen correctly points out that neither statute cited mentions "steam heating companies," but instead refers only to the PSC's jurisdiction over companies providing gas, water, electricity, and sewer services. However, appellant fails to take into account *section 393.290*, aptly titled "Powers of [the Public Service] Commission relating to other utilities made applicable to heating companies," which states:

HN11[↑] All provisions of chapters 386, 387, 390, 392 and 393, RSMo, in reference to . . . gas corporations, electrical corporations, water corporations . . . and sewer corporations, in reference to . . . the fixing of just and reasonable rates and adequacy of service, . . . excessive charges for product, service or facilities, proceedings before the [PSC], . . . and in all other sections, paragraphs, provisions and parts of chapters 386, 387, 390, 392 and 393, RSMo, in reference to any other corporations subject to any of the provisions of chapters 386, 387, 390, 392 and 393, RSMo, so far as the same shall be practically, legally or necessarily **[**17]** applicable to heating companies in this state, are hereby made applicable to such heating companies as designated in said chapters, and shall have full application thereto.

Thus, *HN12*[↑] under the express language of *section 393.290*, when the PSC properly invokes its jurisdiction under *chapters 386 and 393*, it also is authorized to act with respect to heating companies. Despite the fact that *sections 386.250 and 393.140* do not reference heating companies, the PSC's citation to those sections as its authority for promulgation of the rules did not violate *section 536.021.2(2)*.

Point IV

Appellants also contend that the PSC acted unlawfully in adopting the rules by failing to comply with the provisions of *section 536.016*, which, the parties agree, became effective on August 28, 1999, more than two months after the notices of the proposed rules were published in the Missouri Register. *Section 536.016* provides:

HN13[↑] 1. Any state agency *shall propose rules* based upon substantial evidence on the record and a finding by the agency that **[**18]** the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority. (Emphasis added.)

2. Each state agency shall adopt procedures by which it will determine whether a rule is necessary to carry out the purposes of the statute authorizing the rule. Such criteria and rulemaking shall be based upon reasonably available empirical data and shall include an assessment of the effectiveness and the cost of rules both to the state and to any private or public person or entity affected by such rules.

Respondents counter that *section 536.016* cannot be applied to the promulgation of the rules because *HN14*[↑] the statute **[*762]** does not govern the entire rulemaking process but only the proposal of rules, which, in this case, the PSC had completed prior to the statute's effective date. A plain reading of the statute supports that interpretation. *Subsection 1* of the statute clearly imposes an obligation on an agency to "*propose*" rules that are based on "substantial evidence" and are "necessary to carry out the purposes of the statute granting such rulemaking authority." *Subsection 2*, then, elaborates upon the requirements set out in *subsection 1* **[**19]** and states that the agency's determination - that the rule proposed is necessary to carry out the purposes of the enabling statute - must be supported by empirical data and include a cost-benefit analysis.

Because *section 536.016* *HN15*[↑] applies solely to an agency's proposal of rules, and because the PSC proposed the rules prior to the statute's effective date, the statute is relevant only if it has retrospective application. We hold that it does not. As far back as 1909 this Court held that, "If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case…and all things done under the late law will stand unless an intention to the contrary is plainly manifested[.]" *Clark v. Kansas City, St. L. & C. R. Co., 219 Mo. 524, 118 S.W. 40, 43 (Mo. 1909)*. *See also Jones by Williams v. Missouri Dept. of Social Serv., 966 S.W.2d 324, 329 (Mo. App. 1998)*; *Pierce v. Missouri Dept. of Social Serv., 969 S.W.2d 814, 823 (Mo. App. 1998)*; *State v. Thomaston, 726 S.W.2d 448, 462 (Mo. App. 1987)*. **[**20]** An intent to apply *section 536.016* retrospectively cannot be gleaned from the statute.

Point V

Appellants argue that the rules' "asymmetrical pricing standards," which prohibit a utility from

providing a financial advantage to its affiliates and establish a "fair market price" that a utility may charge, are void because they were not promulgated in accordance with *section 393.140(5)*.

[2] This section, appellants argue, requires the PSC to conduct an adjudicatory hearing, which, implicitly, is a contested case under the MAPA, to determine whether a utility's current rates are "unjust, unreasonable, unjustly discriminatory or unduly preferential. . . ." *Sec. 393.140(5)*.

[21]** The underlying premise of appellants' argument is faulty. The PSC did not establish the "asymmetrical pricing standards" pursuant to its adjudicatory authority under *section 393.140(5)*. Instead, the standards were enacted in accordance with the PSC's rulemaking authority under *section 393.140(11)*, ***HN16***[↑] which prohibits a utility from charging or "extending to any person or corporation any form of **[*763]** contract or agreement . . . except such as [are] regularly and uniformly extended to all persons and corporations . . .," and further empowers the PSC to establish "such rules and regulations" to this effect.

This Court explained the important differences between *sections 393.140(5) and 393.140(11)* in *McBride & Son Builders, Inc. v. Union Elec. Co., 526 S.W.2d 310, 313 (Mo. 1975)*:

It would seem to be a reasonable interpretation of *subsection (5)* that ***HN17***[↑] it is primarily intended to authorize determination of improper conduct such as charging unjust, unreasonable or unlawful rates or engaging in discriminatory conduct, while *subsection (11)* is primarily concerned with rule making, **[**22]** and prohibiting any form of contract or agreement except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The Commission has authority to make rules for that purpose.

As made clear in *McBride*, ***HN18***[↑] the PSC has the rulemaking authority, pursuant to *section 393.140(11)*, to prohibit a utility from extending contracts or agreements that are not of the type regularly and uniformly extended to all other entities. The enactment of the "asymmetrical pricing standards" - in essence, a simple prohibition to all utilities against providing a financial advantage to their affiliates - is a proper manifestation of this authority.

Appellants argue, however, that by establishing a "fair market price," the standards do much more than merely mandate the uniformity of rates. In setting a "fair market price" - a maximum price a utility may compensate its affiliate for goods or services, and a minimum price a utility may charge its affiliate for goods or services - appellants claim that the PSC is

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[2] The "asymmetrical pricing standards" are set forth in *subsection (2)* of the rules, which provides:

A regulated [utility] shall not provide a financial advantage to an affiliated entity. For purposes of this rule, a regulated [utility] shall be deemed to provide a financial advantage to an affiliated entity if-

It compensates an affiliated entity for goods or services above the lesser of-

The fair market price; or

The fully distributed cost to regulated [utility] to provide goods or services for itself; or

It transfers information, assets, goods or services of any kind to an affiliated entity below the greater of-

The fair market price; or

The fully distributed cost to regulated [utility].

* * *

The regulated utilityshall not participate in any affiliated transactions which are not in compliance with this rule, except as otherwise provided in *section (10)* of this rule [which provides a procedure by which utility corporations may obtain a variance from these standards].

necessarily making a determination that their current rates are "unjust, unreasonable, unjustly discriminatory or unduly preferential. **[**23]** " *Section 393.140(5)*. It follows, appellants explain, that proper enactment of the "asymmetrical pricing standards" could only be accomplished via the PSC's adjudicatory or contested case authority under *section 393.140(5)*, and not through the PSC's rulemaking authority under *section 393.140(11)*.

Again, appellants' arguments are unavailing. In setting the "fair market price," the PSC did not determine that a specific utility's rates were "unjust, unreasonable, unjustly discriminatory or unduly preferential," but established a rate standard for the *entire* public utility industry. *Compare section 536.010(2)* (***HN19***[↑] defining "Contested case" as "a proceeding before an agency in which legal rights, duties or privileges of *specific parties*" are determined) *with section 536.010(4)* (defining "Rule" as "each agency statement of *general applicability* that implements…or prescribes law or policy….") Thus, the PSC was not engaged in an adjudication (contested case) but rulemaking. *Section 393.140(5)* is therefore irrelevant **[**24]** to our review of the rules.

Point VI

Appellants argue that the PSC acted outside its authority because the rules impose record keeping requirements on both the utilities and their affiliates. As we understand the argument, record keeping is not directly related to the ratemaking function of the PSC and, in any event utilities' affiliates are not subject to PSC regulations whatsoever.

Respondents concede that the rules regulate certain aspects of the relationship between utilities and their affiliates. In its brief, the PSC explained that the rules are a reaction to the emergence of a profit-producing scheme among public utilities termed "cross-subsidization," in **[*764]** which utilities abandon their traditional monopoly structure and expand into non-regulated areas. This 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. *See United States v. Western Elec. Co., 592 F. Supp. 846, 853 (D.D.C. 1984)* ("As long as a [public utility] is engaged in both monopoly and competitive activities, it will have the incentive **[**25]** as well as the ability to 'milk' the rate-of-return regulated monopoly affiliate to subsidize its competitive ventures….") To counter this trend, the new rules - and in particular, the asymmetrical pricing standards - prohibit utilities from providing an advantage to their affiliates to the detriment of rate-paying customers. In addition, to police compliance, the rules require the utilities to ensure that they and their affiliates maintain records of certain transactions.

The PSC's authority to enact these regulations is set out in *chapter 393*. *Section 393.130.2* ***HN20***[↑] precludes a utility from "directly or indirectly by any special rate…or other device or method…[from] collecting or receiving from any person or corporation…greater or lesser compensation" for that utility's services than it charges every other person or corporation. *Section 393.140(1)* states that the PSC shall have "general supervision" over all gas utilities, electric utilities, and heating utilities. Reading *section 393.130.2* in conjunction with the broad supervisory power granted under *section 393.140(1)* **[**26]** , the PSC's authority to require utilities to maintain records so that it may determine whether utilities are following their obligations under *section 393.130.2* is firmly

established.

Likewise, *HN21*[↑] the PSC has authority to extend the reach of the rules to a utility's affiliates. *Section 393.140(12)* precludes regulation of a utility's affiliate where the affiliate is "substantially kept separate and apart" from the business of the utility. However, that section also states that the PSC shall have the "right to inquire as to, and prescribe the apportionment of, capitalization, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant, electric plant, [or heating plant]. . . . " *Sec. 393.140(12)*; see *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n, 706 S.W.2d 870, 880-81 (Mo. App. 1985)*. Thus, where the affiliate is not one "substantially kept separate" from the utility, the PSC is authorized to "inquire" into certain aspects of the affiliate's operations as they relate to the capitalization, debts, expenses, **[**27]** etc., of the utility. By requiring affiliates to maintain records of certain transactions with regulated utilities, the rules at issue do no more than is prescribed in *section 393.140(12)*. With respect to allegations by appellants that the PSC will enforce these rules against affiliates that are, in fact, "substantially kept separate" from the utilities, any perceived violation is best litigated on a case-by-case basis when and if those circumstances arise.

Point VII

Finally, appellants argue that the rules contain impermissibly vague provisions in violation of the *Due Process Clauses of the state* and *federal constitutions*. In response respondents argue that this Court should refrain from deciding this issue because appellants lack standing and the challenge is not yet ripe. Alternatively, respondents argue that the rules are not vague.

Assuming arguendo that appellants have standing and the case is ripe, **[*765]** they nevertheless fail to establish that the rules' provisions are unconstitutionally vague. *HN22*[↑] To determine whether a particular enactment is void for vagueness, courts ask "whether the language conveys to a person of ordinary intelligence a sufficiently **[**28]** definite warning as to the proscribed conduct when measured by common understanding and practices." *Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955, 957* (Mo. banc 1999). In so doing, however, courts expect "neither absolute certainty nor impossible standards of specificity." *Id.* And when construing civil enactments, as opposed to criminal enactments, courts have a "greater tolerance . . . because the consequences of imprecision are qualitatively less severe." *Id. at 957-58*. In this case, the terms and provisions cited by appellants, when read in context, are clear and sufficiently place appellants and others within the public utility industry on notice of the proscribed conduct. *See id. at 957*. For example, the first allegedly vague term, "unfair activity," is not at all vague because it is specifically and expressly defined in another section of the rules, *4 CSR 240-40.016(1)(P)*, *4 CSR 240-40.015(1)(J)*, *4 CSR 240-80.015(1)(J)*. The other terms complained of are simply read out of context and merit no further **[**29]** discussion.

V.

For the foregoing reasons, this Court holds that the PSC had authority to promulgate the rules and that promulgation of the rules satisfied all relevant rulemaking procedures. Thus, the order of rulemaking was lawful and reasonable. The judgment of the circuit court is affirmed.

Stephen N. Limbaugh, Jr., Chief Justice

All concur.

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Second Order

Caution
As of: May 17, 2017 1:47 PM Z

Office of the Pub. Counsel v. Mo. PSC

Supreme Court of Missouri

July 30, 2013, Opinion Issued

No. SC92964

Reporter

409 S.W.3d 371 *; 2013 Mo. LEXIS 45 **; 2013 WL 3894953

OFFICE OF THE PUBLIC COUNSEL, Appellant, vs. MISSOURI PUBLIC SERVICE COMMISSION and ATMOS ENERGY CORPORATION, Respondents.

Prior History: [**1] Appeal from the Missouri Public Service Commission.

Office of Pub. Counsel v. Mo. PSC, 2012 Mo. App. LEXIS 1170 (Mo. Ct. App., Sept. 18, 2012)

Core Terms

affiliate, bid, transactions, staff, regulated, costs, distributed cost, gas corporation, services, fair market price, burden of proof, customers, non-affiliated, delivery, prudent, records, Energy, affiliated entity, interruptible, lesser, fair market value, disallowance, non-regulated, expenditures, requirements, companies, conformed, purchases, expenses, presumed

Case Summary

Overview

HOLDINGS: [1]-Since the Office of Public Counsel reviewed the transaction between the gas corporation and its affiliate through the lens of the presumption of prudence, its order was unlawful and unreasonable; [2]-To presume that a regulated utility's costs in a transaction with an affiliate were incurred prudently was inconsistent with the affiliate transaction rules; [3]-To satisfy the affiliate transaction rules' requirements, the gas corporation must provide sufficient asymmetrical pricing documentation as to fair market value, including the bidding process, and the calculation of the fully disturbed cost.

Outcome

Order reversed and case remanded.

LexisNexis® Headnotes

HN1[] When a regulated gas corporation engages in a business transaction with an affiliated entity, it is required to abide by the affiliate transaction rules set forth in the Missouri Code of State Regulations. *Mo. Code Regs. Ann. tit. 4, §§ 240-40.015*-40.016. Due to the inherent risk of self-dealing, the presumption of prudence utilized by the Missouri Public Service Commission when reviewing regulated utility transactions should not be employed if a transaction is between a utility and the utility's affiliate.

HN2[] When acquiring natural gas from an affiliate, a regulated local distribution company can compensate its affiliate only at the lesser of the gas' fair market price or the fully distributed cost to the regulated gas company were it to acquire the gas for itself. Mo. Code Regs. Ann. tit. 4, § 240-40.016(3)(A). This provision is known as the asymmetrical pricing standard.

HN3[] Mo. Code Regs. Ann. tit. 4, § 240-40.015 is the general affiliate transaction rule, while Mo. Code Regs. Ann. tit. 4, § 240-40.016 specifically regulates transactions between regulated gas corporations and affiliated gas marketing companies. Both § 240-40.015 and § 240-40.016 provides a regulated gas corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated gas corporation shall be deemed to provide a financial advantage to an affiliated entity if it compensates an affiliated entity for goods or services above the lesser of (A) the fair market price or (B) the fully distributed cost to the regulated gas corporation to provide the goods or services for itself.

HN4[] Pursuant to Mo. Rev. Stat. § 386.510 (2000), the appellate standard of review of a Missouri Public Service Commission order is two-pronged: first, the reviewing court must determine whether the Commission's order is lawful; and second, the court must determine whether the order is reasonable. The Commission's order has a presumption of validity, and the burden of proof is on the appellant to prove that the order is unlawful or unreasonable. The lawfulness of an order is determined by whether statutory authority for its issuance exists, and all legal issues are reviewed de novo. The decision of the Commission is reasonable where the order is supported by substantial, competent evidence on the whole record; the decision is not arbitrary or capricious or where the Commission has not abused its discretion.

HN5[] The burden is on the gas corporation to prove that the gas costs it proposes to pass along to customers are just and reasonable. Mo. Rev. Stat. § 393.150.2 (2000). Under the presumption of prudence, a utility's costs are presumed to be prudently incurred. However, the presumption does not survive a showing of inefficiency or improvidence that creates serious doubt as to the prudence of an expenditure. If such a showing is made, the presumption drops out and the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.

HN6[] Agreements between a public utility and its affiliates are not made at arm's length or on an open market. They are between corporations, one of which is controlled by the other. As such they are subject to suspicion and therefore present dangerous potentialities.

HN7[] The Missouri Public Service Commission enacted the affiliate transaction rules in 2000 with the precise purpose of thwarting unnecessary rate hikes due to cross-subsidization. Those rules require that a utility must show that it paid the lesser of the fair market rate or the fully distributed cost to the regulated gas corporation and require that records be kept supporting these calculations. Mo. Code Regs. Ann. tit. 4, § 240-40.016(4)(B). The affiliate rules' stated purpose is to prevent regulated utilities from subsidizing their non-regulated operations and provide the public the

assurance that their rates are not adversely impacted by the utilities' nonregulated activities. Mo. Code Regs. Ann. tit. 4, § 240-40.015. A presumption that costs of transactions between affiliates were prudent is inconsistent with these rules.

HN8[] A presumption of prudence should not be applied to affiliate transactions.

HN9[] A presumption of prudence is inconsistent with the rationale for the affiliate transaction rules and with the Missouri Public Service Commission's obligation to prevent regulated utilities from subsidizing their non-regulated operations.

HN10[] Missouri law sets out the burden of proof in Missouri Public Service Commission proceedings. Those statutes provide that a gas corporation has the burden to prove that the gas costs it proposes to pass along to customers are just and reasonable. Mo. Rev. Stat. § 393.150.2 (2000). The Commission has no authority to adopt rules changing the burden of proof set out in the statutes, and it is proper for the affiliate transaction rules to note that they do not attempt to do so. A regulation that is beyond the scope of the statute is a nullity.

HN11[] A change in the presumption of prudence does not change the burden of proof set out in the Missouri Public Service Commission governing statutes. The presumption of prudence does not address the burden of proof at all. It sets out an evidentiary presumption created by the Missouri Public Service Commission. That standard provides that the utility's expenditures are presumed to be prudent until adequate contrary evidence is produced, at which point the presumption disappears from the case. This presumption affects who has the burden of proceeding, but it does not change the burden of proof, which by statute must remain on the utility. Mo. Rev. Stat. § 393.150.2 (2000).

HN12[] The presumption of prudence is not even a creature of statute or of Missouri Public Service Commission regulations or rules. It was created by Missouri Public Service Commission case law. It cannot be applied inconsistently with the Missouri Public Service Commission's governing statutes and rules. The application of a presumption of prudence to a transaction with an affiliated company is inconsistent with the Missouri Public Service Commission's statutory and regulatory obligations to review affiliate transactions. Accordingly, the presumption of prudence is inapplicable to affiliate transactions.

HN13[] The affiliate transaction rules mandates that a utility shall not provide a financial advantage to an affiliated entity. The utility provides a financial advantage if it compensates an affiliated entity for goods or services above the lesser of the fair market price or the fully distributed cost to the utility to provide the goods or services for itself. Mo. Code Regs. Ann. tit. 4, § 240-40.016(3)(A).

HN14[] In all transactions that involve the purchase or receipt of goods or services from an affiliated entity, the utility must document the fair market value and the fully distributed cost, Mo. Code Regs. Ann. tit. 4, § 240-40.016(4)(B), and this documentation must be kept in books and records with sufficient detail to permit verification with this rule. Mo. Code Regs. Ann. tit. 4, § 240-40.016(5)(C)1. The rules specifically define what figures must be included in the calculation of the fully distributed cost.

HN15[] See Mo. Code Regs. Ann. tit. 4, § 240-40.016(1)(F).

HN16[] See Mo. Code Regs. Ann. tit. 4, § 240-40.016(4)(B).

Risk

HN17[] The evidentiary requirement requires a regulated gas company maintain the following records: (1) Records identifying the basis used (e.g., fair market price, fully distributed cost, etc.) to record affiliate transactions; and (2) Books of accounts and supporting records in sufficient detail to permit verification of compliance with this rule. Mo. Code Regs. Ann. tit. 4, § 240-40.016(5)(C).

Judges: LAURA DENVIR STITH, JUDGE. All concur.

Opinion by: LAURA DENVIR STITH

Opinion

[*372] en banc

The Office of Public Counsel (OPC) appeals from an order entered by the Missouri Public Service Commission (PSC) rejecting the PSC staff's proposed actual cost adjustment disallowances regarding Atmos Energy Corporation's transactions with its affiliate. This Court reverses.

HN1[] When a regulated gas corporation such as Atmos Energy engages in a business transaction with an affiliated entity, it is required to abide by the affiliate transaction rules set forth in the Missouri Code of State Regulations. 4 CSR 240-40.015-40.016. Due to the inherent risk of self-dealing, the presumption of prudence utilized by the PSC when reviewing regulated utility transactions should not be employed if a transaction is between a utility and the utility's affiliate.

Because the PSC reviewed the transaction between Atmos and its affiliate through the lens of the presumption of prudence, its order is unlawful and unreasonable. Accordingly, the order is reversed and the case remanded to the PSC for further review consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2007 and 2008, Atmos **[**2]** Energy Corporation operated as the largest natural-gas-only distributor in the United States. As a local distributing company, Atmos does not produce its own gas and does not purchase gas directly from producers. Instead, Atmos contracts with independent gas marketing companies to purchase natural gas. Atmos then delivers the purchased gas to customers through its local pipelines.

[*373] Atmos is subject to regulation as a gas corporation and public utility by the Missouri Public Service Commission (PSC). *See* § 386.020; § 386.250; *chapter 393*.[1]

The PSC is a state agency established to regulate public utilities operating within the state. Pursuant to the statutory provisions in chapter 393, the PSC has jurisdiction over the

[1] All Missouri statutory references are to RSMo 2000 unless otherwise indicated.

rates and charges that Atmos imposes on its Missouri customers.[2]

In addition to the basic amount Atmos charges its customers under its published rate, Atmos also is permitted to charge its customers for additional costs it has incurred when the price it pays its suppliers for gas increases. These additional charges are recovered through **[**3]** a two-part mechanism known as a purchased gas adjustment/actual cost adjustment process (PGA/ACA). In the PGA portion of this process, a utility such as Atmos files annual tariffs in which it estimates its costs of obtaining gas over the coming year. The PGA amounts are then included in the customers' bills over the ensuing 12 months. Because it is difficult to estimate the projected changes in cost precisely, the utility then files for an adjustment, or ACA, if its actual cost is different than projected in its PGA filing. This ACA allows the PSC to correct any discrepancies between the costs billed and the costs actually incurred. When an ACA is received, the PSC staff audits the utility's gas purchases made during the ACA period in question. As part of the review, the staff evaluates whether the rates paid by consumers for natural gas sold during the period were "just and reasonable." *§ 393.130.1*. The PSC then takes the staff's audit into consideration and ultimately determines the proper ACA amount.[3]

Atmos submitted its 2007-2008 ACA filings to the PSC on October 16, 2008. PSC staff audited the ACA filing by reviewing and analyzing the billed revenues and actual gas costs for the period of September 1, 2007, to August 31, 2008, for each of Atmos' eight Missouri service areas. The staff's review raised concerns regarding Atmos' transactions with Atmos Energy Marketing LLC ("AEM").

AEM is a separate, unregulated but affiliated gas marketing company that is wholly owned by Atmos. Between April 2004 and November 2009, Atmos issued 48 requests for proposals (RFPs) in six other service areas. Of these 48 RFPs, AEM **[*374]** submitted bids in response to 24 and was the winning bidder in six.

Two of these six winning bids were for supplying gas to the Hannibal area operating system during the 2007-2008 ACA period. As required when taking bids, Atmos issued a RFP and interested suppliers submitted confidential bids proposing pricing for supplying gas services to Atmos for the Hannibal area. For the 2007-2008 ACA period at issue here, Atmos had two overlapping RFP processes; the first covered **[**6]** the period April 1, 2007, to March 31, 2008, and the second covered the period

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[2] In 2012, Atmos sold its Missouri assets to Liberty Utilities.

[3] The PSC adopted the PGA/ACA rate mechanism pursuant to its broad power to regulate gas utilities, rather than pursuant to a specific statutory directive. *See chapter 393*; *4 CSR 240-13.015(1)(S)* **[**4]** (defining "purchased gas adjustment clause"); *4 CSR 240-40.018(1)(B)* (explaining use of purchased gas adjustment clauses to control financial gains or losses associated with gas price volatility). This Court has not addressed the authority of the PSC to utilize the PGA/ACA mechanism as part of its regulation of gas utilities, although one court of appeals decision has done so. *See State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n or State, 976 S.W.2d 470 (Mo. App. 1998)* (discussing implied authorization for use of PGA/ACA mechanism when certain procedural protections are in place). Here, as neither party challenges the use of the PGA/ACA mechanism, this Court still does not reach that issue. *Cf. State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n, 585 S.W.2d 41, 46 (Mo. banc 1979)* (disapproving *electric* utility's use of a fuel adjustment clause, which is similar to a PGA mechanism, because automatic adjustment clauses were unlawful under statutory scheme then in place); *State ex rel. AG Processing v. Pub. Serv. Comm'n, 340 S.W.3d 146, 151 (Mo. App. 2011)* (approving *electric* utility's use of fuel adjustment clause, which permitted automatic adjustment **[**5]** for actual fuel costs without a full rate hearing, pursuant to legislature's 2005 enactment of *section 386.266*).

April 1, 2008, to March 31, 2009. For each period, Atmos sent RFP letters to 56 gas marketing companies.

During the first period, Atmos received only five bids that Atmos said conformed to the RFP requirements. Its affiliate, AEM, submitted the lowest bid at $14,723,472. The lowest conforming bid submitted by a non-affiliated gas marketer was for $15,069,726, approximately $346,000 higher than AEM's bid. During the second period, only three suppliers submitted bids that Atmos said conformed to its RFP. Its affiliate, AEM, submitted a bid of $13,947,511. This bid was approximately $100,000 lower than the next lowest bid of $14,049,424. Atmos awarded AEM both contracts.

Staff raised an issue about how the RFP set out certain supply requirements and whether AEM's bid actually conformed to the RFP requirements. It is uncontested that the RFP mandated that all gas supply be "firm and warranted." But the RFP process also allowed bidders to use either a primary natural gas receipt point or a secondary receipt point. Primary firm delivery is the highest priority gas supply and costs more because timely delivery is [**7] assured. Secondary in-path delivery is just below primary firm delivery. The secondary delivery method, though, is still "firm" though less convenient. Both forms of delivery are preferred over "interruptible" supply, because the timing of supplying interruptible gas may be interrupted if the supplier has an inadequate quantity of gas to meet all commitments at a specific time. Staff contended it was not clear that AEM's bid was for firm rather than interruptible gas because the transaction confirmation document that normally specifies "firm" delivery was left blank. Staff also contended the distinction between primary and secondary receipt points was not made clear in the RFP bidding, which could have allowed AEM an advantage if it had insider knowledge that Atmos was willing to accept a secondary receipt point bid. Staff contends this gave AEM a benefit in the transactions because of its affiliation with Atmos.

The transactions between a utility such as Atmos and its affiliate are governed by the PSC's affiliate transaction rules. The rules establish standards for a regulated gas utility's dealings with its affiliated companies. *HN2*[↑] When acquiring natural gas from an affiliate, a regulated [**8] local distribution company can compensate its affiliate only at the lesser of the gas' fair market price or the fully distributed cost to the regulated gas company were it to acquire the gas for itself. 4 CSR 240-40.016(3)(A).[4]

This provision is known as [*375] the asymmetrical pricing standard. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n of*

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[4] *HN3*[↑] 4 CSR 240-40.015 is the general affiliate transaction rule, while 4 CSR 240-40.016 specifically regulates transactions between regulated gas corporations and affiliated gas marketing companies. Both 240-40.015 and 240-40.016 provide:

(A) A regulated gas corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated gas corporation shall be deemed to provide a financial advantage to an affiliated entity if —

1. It compensates an affiliated entity for goods or services above the lesser of —

A. The fair market price; or

B. The fully distributed cost to the regulated gas corporation to provide the goods or services for itself ...

State, 103 S.W.3d 753, 762 (Mo. banc 2003).

Following its audit of the 2007-2008 ACA period, the PSC staff report indicated that Atmos had failed to comply with the affiliate **[**9]** transaction rules because it failed to properly document the fair market value and fully distributed cost of its transactions with AEM. Staff proposed a disallowance of $308,733 for the Hannibal area, an amount equal to the profit AEM earned on that transaction.

In its filed response to the staff's recommendation, Atmos disagreed with the proposed disallowance and requested a hearing. The PSC conducted an evidentiary hearing on March 23 and 24, 2011, and issued a report and order on November 9, 2011.

In considering whether Atmos complied with the affiliate transaction rules, the PSC applied a presumption that Atmos' gas purchases were prudent and put the burden on staff to prove that the purchases from AEM were not prudent. The PSC determined that staff had failed to rebut this presumption, that the fair market price was established by Atmos' bidding process, and that this fair market price was less than the fully distributed cost for Atmos to acquire the gas itself. Based on this presumption, the PSC found compliance with the affiliate transaction rules and rejected staff's proposed disallowances regarding Atmos' transactions with AEM.

OPC filed an application for rehearing, which the **[**10]** PSC denied.[5]

OPC appealed and the court of appeals affirmed. This Court granted transfer pursuant to *art. V, sec. 10 of the Missouri Constitution* after opinion by the court of appeals.

II. STANDARD OF REVIEW

HN4[↑] "Pursuant to *section 386.510*, the appellate standard of review of a [PSC] order is two-pronged: 'first, the reviewing court must determine whether the [PSC]'s order is lawful; and second, the court must determine whether the order is reasonable.'" *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State, 120 S.W.3d 732, 734 (Mo. banc 2003)*. The PSC's order has a presumption of validity, and the burden of proof is on the appellant to prove that the order is unlawful or unreasonable. *State ex rel. Sprint Missouri, Inc. v. Pub. Serv. Comm'n of State, 165 S.W.3d 160, 164 (Mo. banc 2005)*. The lawfulness of an order is determined "by whether statutory authority for its issuance exists, and all legal issues are reviewed de novo." *AG Processing, 120 S.W.3d at 734*. "The decision of the [PSC] is reasonable where the order is supported by **[**11]** substantial, competent evidence on the whole record; the decision is not arbitrary or capricious or where the [PSC] has not abused its discretion." *State ex rel. Praxair, Inc. v. Missouri Pub. Serv. Comm'n, 344 S.W.3d 178, 184 (Mo. banc 2011)*.

III. ANALYSIS

The OPC argues that the PSC's order is unlawful and unreasonable in that it violates *4 CSR 240-40.016* and is not based on competent and substantial evidence. The order is unlawful, the OPC contends, because **[*376]** the PSC did not adhere to the asymmetrical pricing standard

[5] OPC acts as consumers' advocate and represents the public in utility cases before the PSC. The powers of the OPC are set forth in *section 386.710*.

rules, which require documentation showing that Atmos charged customers the lesser of the fair market price or the fully distributed cost for the gas supply acquired from Atmos' affiliate, AEM. The OPC claims the order is unreasonable because it believes the PSC's conclusion that Atmos acquired gas supply from AEM at the lesser of the fully distributed cost or fair market price is not supported by competent and substantial evidence. This error was contributed to by the PSC's misreliance on the presumption of prudence in reviewing the bid of an affiliate, which OPC says is improper.

A. Presumption of Prudence

HN5[↑] The burden is on the gas corporation to prove that the gas costs **[**12]** it proposes to pass along to customers are just and reasonable. *§ 393.150.2; see also Matter of Kansas Power and Light Co., 30 Mo. P.S.C. (N.S.) 76 (1989)* (The gas corporation "has the burden of showing its proposed rates are just and reasonable ... [and] of showing the reasonableness of costs associated with its rates for gas.)

While the burden of proof rests on the gas corporation, the PSC's practice has been to apply a "presumption of prudence" in determining whether a utility properly incurred its expenditures. The presumption of prudence is not a creature of statute or regulation. It first was recognized by the PSC in *Matter of Union Electric, 27 Mo. P.S.C. (N.S.) 183 (1985)* and has been applied by it since that point.

Under the presumption of prudence, a utility's costs "are presumed to be prudently incurred. ... However, the presumption does not survive a showing of inefficiency or improvidence" that creates "serious doubt as to the prudence of an expenditure." *Id. at 193*, quoting *Anaheim, Riverside, Etc. v. Fed. Energy Reg. Com'n, 669 F.2d 799, 809, 216 U.S. App. D.C. 1 (D.C. Cir. 1981)*. If such a showing is made, the presumption drops out and the applicant has the burden of dispelling these doubts **[**13]** and proving the questioned expenditure to have been prudent. *Id.*

The Missouri court of appeals has applied the presumption of prudence in numerous cases involving non-affiliated companies. *See, e.g., State ex rel. Assoc. Natural Gas Co. v. Public Serv. Comm'n, 954 S.W.2d 520 (Mo. App. 1997)*. It also has applied it in one case involving affiliated companies, simply stating without any analysis that, "Although UE purchased the CTGs from its affiliates, the commission properly presumed that UE was prudent in its purchase of the CTGs." *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n, 274 S.W.3d 569, 582 (Mo. App. 2009)*.

This Court has not addressed directly whether the presumption of prudence is valid in either affiliate or non-affiliate cases, although it did note its existence, without addressing its legitimacy, in *dicta* in a non-affiliate case, *State ex rel. Riverside Pipeline Co., L.P. v. Pub. Serv. Comm'n of State, 215 S.W.3d 76, 85 (Mo. banc 2007)*. Riverside upheld a stipulation between the PSC and certain energy companies that precluded prudence review by the PSC.

The OPC agrees that a presumption of prudence is appropriately applied in arms-length transactions, and this Court concurs. **[**14]** When dealing at arms-length, there is a diminished probability of collusion and the pressures of a competitive market create an assumption of legitimacy.

OPC argues, however, that a presumption that a transaction was agreed to [*377] prudently should not apply to *affiliate* transactions because of the greater risk of self-dealing when contracting with an affiliate. This Court again agrees. As noted in the report of a Congressional staff investigation of the particularly egregious affiliate dealings between Enron and its pipeline subsidies in the wake of Enron's collapse:

> [W]henever a company conducts transactions among its own affiliates there are inherent issues about the fairness and motivations of such transactions. ... One concern is that where one affiliate in a transaction has captive customers, a one-sided deal between affiliates can saddle those customers with additional financial burdens. Another concern is that one affiliate will treat another with favoritism at the expense of other companies or in ways detrimental to the market as a whole.

Staff of Senate Comm. on Gov't Affairs, 107th Cong., *Committee Staff Investigation of the Federal Energy Regulatory Commission's Oversight of Enron* [**15] *26*, n.75 (Nov. 12, 2002); *see also* Judy Sheldrew, *Shutting the Barn Door Before the Horse Is Stolen: How and Why State Public Utility Commissions Should Regulate Transactions Between A Public Utility and Its Affiliates*, 4 NEV. L.J. 164, 195 (2003).

This greater risk inherent in affiliate transactions arises because *HN6*[↑] agreements between a public utility and its affiliates are not "made at arm's length or on an open market. They are between corporations, one of which is controlled by the other. As such they are subject to suspicion and therefore present dangerous potentialities." *Pac. Tel. & Tel. Co. v. Pub. Utils. Comm'n, 34 Cal. 2d 822, 215 P.2d 441, 449 (Cal. 1950) (Carter, J., dissenting)*.

Indeed, as the PSC acknowledged in *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n of State, 103 S.W.3d 753, 763-64 (Mo. banc 2003)*, the affiliate transaction rules were adopted in response to the very kinds of concerns now raised by OPC. In that case, the concern was with a profit-producing scheme among certain public utilities termed "cross-subsidization," through which some utilities would abandon their traditional monopoly structure and expand into non-regulated areas. "This expansion [gave] utilities the [**16] 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." *Id. at 764*. *See also United States v. Western Elec. Co., 592 F. Supp. 846, 853 (D.D.C.1984)* ("As long as a [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").

Here, the concern is with an ability to offer a lower bid than one's competitors because of access to inside information about costs and terms and because of an ability to shift fixed costs to the regulated utility, thereby allowing the affiliate to bid lower due to lower overhead costs. While this Court does not suggest that there was such conduct here, the risk of this conduct and the incentive to undertake it inherently exists in affiliate transactions.

For these reasons, the rationale for permitting a presumption of prudence in arms-length transactions simply has no application to affiliate transactions. *HN7*[↑] The PSC enacted

the affiliate transaction rules in 2000 with the precise purpose [**17] of thwarting unnecessary rate hikes due to cross-subsidization. State ex rel. Atmos, 103 S.W.3d at 764. Those rules require that a utility must show that it paid the lesser of the fair market rate or the fully distributed cost to the regulated gas corporation [*378] and require that records be kept supporting these calculations. 4 CSR 240-40.016(4)(B) ("[T]he regulated gas corporation shall document both the fair market price of such ... goods and services and the fully distributed cost to the regulated gas corporation to produce the ... goods or services for itself.")

The affiliate rules' stated purpose is to "prevent regulated utilities from subsidizing their non-regulated operations ... and provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities." 240-40.015. A presumption that costs of transactions between affiliates were prudent is inconsistent with these rules.

For these reasons, the majority of other courts to address the issue have concluded that ***HN8***[↑] a presumption of prudence should not be applied to affiliate transactions. In US W. Commc'ns, Inc. v. Pub. Serv. Comm'n of Utah, 901 P.2d 270 (Utah 1995), the Supreme Court of Utah [**18] held that the Utah Public Service Commission correctly placed the burden on a telephone provider of proving that the services rendered by its affiliate were not duplicative. In support of its decision, the court remarked; "While the pressures of a competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction." Id. at 274.

The Supreme Court of Idaho reached a similar conclusion in Boise Water Corp. v. Idaho Pub. Utilities Comm'n, 97 Idaho 832, 555 P.2d 163 (1976). The court refused to make an exception to the rule placing upon the utility the burden of proving reasonableness of its operating expenses paid to an affiliate, stating; "The reason for this distinction between affiliate and non-affiliate expenditures appears to be that the probability of unwarranted expenditures corresponds to the probability of collusion." Id. at 169. See also, Turpen v. Oklahoma Corp. Comm'n, 1988 OK 126, 769 P.2d 1309, 1320-21 (Okla. 1988) ("It is generally held that, while the regulatory agency bears the burden of proving that expenses incurred in transactions with nonaffiliates [**19] are unreasonable, the utility bears the burden of proving that expenses incurred in transactions with affiliates are reasonable); Michigan Gas Utilities v. Michigan Pub. Serv. Comm'n, 206234, 1999 Mich. App. LEXIS 1954, 1999 WL 33454925 (Mich. App. Feb. 9, 1999) ("the utility has the burden of demonstrating that its transactions with its affiliate are reasonable"). This Court concurs. ***HN9***[↑] A presumption of prudence is inconsistent with the rationale for the affiliate transaction rules and with the PSC's obligation to prevent regulated utilities from subsidizing their non-regulated operations.

The PSC counters that it always has recognized a presumption of prudence and that this Court cannot read the affiliate transaction rules to negate that presumption in the case of affiliated transactions because the affiliate transaction rules themselves state that they did not "modify existing legal standards regarding which party

has the burden of proof in commission proceedings." 4 CSR 240-40.015(6)(C) & 240-40.016(7)(C). This argument is based on a misunderstanding of the concept of burden of proof.

HN10[↑] Missouri law sets out the burden of proof in PSC proceedings. As noted earlier, those statutes provide that a gas corporation has **[**20]** the burden to prove that the gas costs it proposes to pass along to customers are just and reasonable. § 393.150.2. The PSC has no authority to adopt rules changing the burden of proof set out in the relevant statutes, and it was proper for the affiliate transaction rules to note that they did not attempt to do so. *See* Kanakuk-Kanakomo *[*379]* Kamps, Inc. v. Dir. of Revenue, 8 S.W.3d 94, 98 (Mo. banc 1999) (A regulation that is beyond the scope of the statute is a nullity).

HN11[↑] A change in the presumption of prudence does not change the burden of proof set out in the PSC governing statutes. The presumption of prudence does not address the burden of proof at all. It sets out *an evidentiary presumption* created by the PSC. That standard provides that the utility's expenditures are presumed to be prudent until adequate contrary evidence is produced, at which point the presumption disappears from the case. *See* Deck v. Teasley, 322 S.W.3d 536, 539 (Mo. banc 2010) (discussing general law of presumptions). This presumption affects who has the burden of proceeding, but it does not change the burden of proof, which by statute must remain on the utility.[6]

Further, HN12[↑] the presumption of prudence is not even a creature of statute or of PSC regulations or rules. It was created by PSC case law. It cannot be applied inconsistently with the PSC's governing statutes and rules. As discussed above, the application of a presumption of prudence to a transaction with an affiliated company is inconsistent with the PSC's statutory and regulatory obligations to review affiliate transactions. Accordingly, the presumption of prudence is inapplicable to affiliate transactions.

B. PSC Order Inappropriately Relied on Presumption of Prudence

The PSC used the presumption of prudence to shift the burden from Atmos, which should have been required to show that it complied with the affiliate transaction rules, and instead placed the burden on staff to show that Atmos did not do so.

The effect of the PSC's reliance on the presumption of prudence is particularly obvious **[**22]** in regard to the PSC's discussion of what would have been the fully distributed cost had Atmos obtained the gas itself rather than going through third parties. As noted earlier, HN13[↑] the affiliate transaction rules mandate that a utility shall not provide a financial advantage to an affiliated entity. The utility provides a financial advantage if it "compensates an affiliated entity for ... goods or services above the lesser of ... [t]he fair market price ... or [t]he fully distributed cost to the [utility] to provide the ... goods or services for

[6] Although the above analysis is dispositive, **[**21]** it bears noting that the PSC has not identified any rule, regulation or decision in which it affirmatively determined prior to the adoption of the affiliate transaction rules that the presumption of prudence was applicable to affiliate transactions. For this reason also, AEM's argument is not well taken.

itself." 4 CSR 240-40.016(3)(A).

HN14[↑] In all transactions that involve the purchase or receipt of goods or services from an affiliated entity, the utility must document the fair market value and the fully distributed cost, 4 CSR 240-40.016(4)(B),[7]

and this documentation must be kept in books and records with "sufficient detail to permit verification with this rule." 4 CSR 240-40.016(5)(C)1.[8]

The rules specifically **[*380]** define what figures must be included in the calculation of the fully distributed cost:

> HN15[↑] Fully distributed cost (FDC) means a methodology that examines all costs of an enterprise in relation to all the goods and services that are produced. FDC **[**23]** requires recognition of all costs incurred directly or indirectly used to produce a good or service. Costs are assigned either through a direct or allocated approach. Costs that cannot be directly assigned or indirectly allocated (e.g., general or administrative) must also be included in the FDC calculation through a general allocation.

4 CSR 240-40.016(1)(F).

Due to **[**24]** its reliance on the presumption of prudence, the PSC did not consider whether Atmos kept the required books and records and whether Atmos showed that its fully distributed costs were higher than the fair market value of the services received from its' affiliate. Neither did it require Atmos or AEM to produce most of these records to staff or OPC.[9]

Staff did not have evidence as to how AEM prepared its bid or as to the sharing of costs between Atmos and AEM because it had not been able to obtain this information. This led the PSC to reject staff's proposed disallowance of $308,733 in profits because, it found, staff did not offer "any serious argument to suggest that Atmos could provide gas-marketing service for itself cheaper if it did not usa the services of gas marketing companies."

Of course, it was not up to staff to prove a negative. Whether staff thought the cost would have been cheaper if Atmos had not used the

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[7] The regulation states in relevant part:

> HN16[↑] In transactions that involve either the purchase or receipt of information, assets, goods or services by a regulated gas corporation from an affiliated entity, the regulated gas corporation shall document both the fair market price of such information, assets, goods and services and the fully distributed cost to the regulated gas corporation to produce the information assets, goods or services for itself.

4 CSR 240-40.016(4)(B)

[8] HN17[↑] The evidentiary requirement requires a regulated gas company maintain the following records:

> 1. Records identifying the basis used (e.g., fair market price, fully distributed cost, etc.) to record affiliate transactions; and
>
> 2. Books of accounts and supporting records in sufficient detail to permit verification of compliance with this rule.

4 CSR 240-40.016(5)(C).

[9] This also led the PSC to not resolve the issue whether Atmos adequately complied with the PSC's order compelling production of certain information in its books and records and whether the order went beyond what was required by the affiliate transaction rules. In light of the presumption of prudence, the PSC found that this discovery was not necessary. Because it is appropriate for the PSC to determine **[**25]** the parties' disagreement on the meaning, effect and compliance with the motion to compel in the first instance in light of this Court's ruling on the inappropriateness of using the presumption of prudence in affiliate transactions, this Court does not resolve this issue here but leaves it for the PSC to resolve on remand.

affiliate was the not the relevant question; the affiliate transaction rules put the burden on Atmos to keep records that would allow it to show it would not have been cheaper.

The PSC notes that staff did not specifically contest what Atmos' costs of providing its own gas marketing services would have been. OPC, however, did contest this issue. In its initial brief before the PSC, OPC specifically challenged the prudence of purchasing gas at a marked-up price from an affiliate rather than by Atmos acquiring the gas itself at a similar or lesser cost, stating, "Atmos' decision to purchase gas through its marketing affiliate AEM, rather than by making the gas purchases itself (and avoiding the AEM profit mark-up) is reason alone to **[**26]** render Atmos' purchasing decisions imprudent."

OPC argues that the PSC erred in simply presuming that, because there was a bid process, the lowest price bid must have been the lowest fair market value of the gas. It argues that the number of bidders was so low that the bid process was inadequate to identify the fair market value of the gas. OPC also specifically questions whether Atmos required AEM to bid for the same service as the other companies to whom Atmos sent an RFP in light of staff's evidence that the agreement between Atmos and AEM left blank whether **[*381]** the gas was to be "firm" or "interruptible gas," whereas other gas-supply agreements between Atmos and non-affiliates specifically identified that firm gas was required. This was an important distinction because, as noted earlier, firm gas transportation, for which delivery is guaranteed, is generally more expensive than interruptible transportation, for which delivery can be delayed if the pipeline's capacity is completely in use.

OPC suggests that if Atmos requested proposals for firm gas transportation with the understanding that it would be sufficient if AEM bid the cost of interruptible gas transportation, it would have allowed **[**27]** AEM to undercut the other gas marketers' bids. If this were what happened, the bid by AEM most certainly would not have reflected the "fair market price" of firm gas.

Similarly, OPC questioned whether the bidding process adequately established the fair market price due to the low number of conforming bids submitted by non-affiliated gas marketers. In the first RFP, only four non-affiliated gas marketers submitted conforming bids; in the second RFP, only two did so (and only if one presumes that they all bid on firm rather than interruptible gas). The record does not show whether the PSC would have considered this a sufficient response to enable it to determine the fair market value of the gas had it not relied on the presumption of prudence.

As with the question of fully distributed costs, due to its reliance on the presumption of prudence, the PSC did not develop a sufficient record on these or related issues to permit this Court to determine whether Atmos complied with the affiliate transaction rules and whether the PSC order is reasonable and lawful. This Court remands so that the PSC ca resolve these issues in the first instance based on the proper standard

IV. CONCLUSION

The PSC erred **[**28]** in relying upon the presumption of prudence in rejecting staff and OPC's proposed disallowance for Atmos' Hannibal service area gas costs. The affiliate

transaction rules were enacted in an effort to prevent regulated utilities from subsidizing their non-regulated activities. To presume that a regulated utility's costs in a transaction with an affiliate were incurred prudently is inconsistent with these rules.

The PSC relied heavily on the presumption of prudence in rejecting staff's proposed disallowance. This error resulted in an order that is unlawful and unreasonable. On remand, the PSC again must consider whether Atmos compensated AEM above the lesser of the fair market price or the fully distributed cost to Atmos to provide the gas for itself. To satisfy the affiliate transaction rules' requirements, Atmos must provide sufficient asymmetrical pricing documentation as to fair market value, including the bidding process, and the calculation of the fully disturbed cost. The PSC's order is reversed, and the case remanded.

LAURA DENVIR STITH, JUDGE

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