

Where in this case has Atmos met this evidentiary standard and provided documentation of the FDC? When Staff asked for this data from Atmos, Atmos simply responded by saying “not applicable” and that Atmos did not do an FDC calculation.³

Contrary to Atmos’ assertion, the recordkeeping requirements of the rule are very applicable, and specifically require Atmos to maintain “books of accounts and supporting records in sufficient detail to permit verification of compliance with” the Rule.⁴ These records must be kept separately for FMV and FDC calculations.⁵ To determine the FDC and FMV, local distribution companies such as Atmos are required to support the gas rates paid by customers with *detailed cost documentation* showing that Atmos determined whether Atmos could acquire the gas for itself at a price that is less than the value of the same gas requirement on the open market.⁶ The Post-Hearing Brief of Atmos Energy Corporation did not identify any evidence of these calculations for either FMV or FDC. Atmos has not overcome its burden of demonstrating that the price Atmos charged its customers for the gas in question was not less or greater than the FDC.

Atmos argues in its Brief that because “Staff is not proposing to disallow any costs associated with AEM’s competitors”, that “Staff apparently recognizes that Atmos’ competitive bidding process produced contracts in these regions that are just and reasonable.”⁷ This argument highlights the significant challenges faced by Staff as it conducts its prudence review. It is much more difficult to show that Atmos had access to the same gas resources as a non-affiliated gas marketer than it is to show that Atmos had

³ Tr. 99-100.

⁴ 4 CSR 240-40.016(5)(C).

⁵ 4 CSR 240-40.016(5)(C)1.

⁶ *Id.*

⁷ Atmos Post-Hearing Brief, pp. 8-9.

access to the same gas resources as it provided for itself through AEM.⁸ If Atmos were able to produce savings for its customers by providing the services in-house rather than through AEM, it is possible that Atmos could have also produced savings elsewhere due to the mark up that exists where the cost of gas includes the marketing middle-man's profit margin. The Staff's decision not to challenge other contracts is no indication that those contracts are just and reasonable.

Atmos argues that if Atmos had offered the contracts in question to the second highest bidder, instead of AEM, that annual costs for the Hannibal and Butler areas would have increased.⁹ This faulty argument misses the point. If Atmos has acquired the gas on its own using the same sources as AEM, Atmos would have acquired the gas at a lower price than the second highest bidder, and contracting with the second highest bidder would be unnecessary.

Atmos argues in regard to the extremely low number of bids received in response to its RFPs, that "Atmos certainly cannot be held responsible for the lack of interest by unregulated gas marketers in a specific RFP."¹⁰ OPC strongly disagrees with the assertion that Atmos is helpless when it comes to soliciting bids. Atmos chooses how robust of a process it uses, and Staff's witness testified that Atmos' process is not very robust.¹¹ This was highlighted by Atmos' actions after receiving an AEM bid that was significantly less (\$235,000) than the next highest bid. Mr. David Sommerer testified:

To me, three bidders is not a particularly robust process. We talked about the \$235,000 perhaps being a signal that you don't have the same service here. The way I viewed that \$235,000 was it was material, and I believe there were ways they could have seen that was significant. And sometimes

⁸ Tr. 47.

⁹ *Id.* p. 10.

¹⁰ Atmos Post-Hearing Brief, pp. 23-24.

¹¹ Tr. 165.

there isn't a free lunch and sometimes things are too good to be true. And I think that may have been an instance where they have followed up more thoroughly and tried to increase the bidders that were buying in for the RFP.¹²

OPC urges the Commission to bear in mind that transactions between Atmos and AEM are by definition not arms length transactions. Black's Law Dictionary defines "Arm's length transaction" as:

...a transaction negotiated by unrelated parties, each acting in his or her own self interest; the basis for a fair market value determination. A transaction in good faith in the ordinary course of business by parties with independent interests.¹³

Both Atmos and AEM share the same common goal – increasing profits for Atmos, and therefore do not negotiate contracts with the same disinterest towards the success of the other entity as would a contract between Atmos and an unaffiliated entity.¹⁴ The above definition recognizes that an arm's length transaction can be used as the basis for an FMV determination. A transaction that is not arms length, on the other hand, cannot possibly establish the FMV of the gas because such agreements are tainted by a common goal of increasing profits for their common shareholders.

Furthermore, the FMV is the price a willing buyer and willing seller *agree to* on an open market. The FMV cannot be established by bids, as suggested by Atmos in its Post-Hearing Brief. Bids are not an accepted and agreed upon price. Bids are offers to provide a service, which is different than a price that a willing buyer accepts and that a willing seller actually accepts for that service.

The only evidence in the case that would provide the Commission with the FMV of the gas transactions in question is that evidence showing what AEM paid to acquire

¹² *Id.*

¹³ OPC Exhibit No. 14.

¹⁴ Tr. 115.

the gas, offset for overhead.¹⁵ This value was agreed upon between an unrelated seller and buyer on the open market, as required by the asymmetrical pricing standards requirement that Atmos not pay AEM more than the lesser of FMV or FDC. For these reasons, OPC urges the Commission not to disallow \$308,733 and protect ratepayers from paying more than the fair market value of gas, as prohibited by the Commission's asymmetrical pricing standard.

Respectfully submitted,

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¹⁵ Tr. 177-178.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 14th day of November 2011.

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