

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 27<sup>th</sup> day of  
April, 2011.

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

**File No. GR-2008-0364**

**ORDER DENYING ATMOS' MOTION TO STRIKE TESTIMONY**

Issue Date: April 27, 2011

Effective Date: April 27, 2011

This case concerns Staff's Actual Cost Adjustment audit of Atmos Energy Corporation for the 2007-2008 period. Staff filed its audit report in December 2009, and recommended a \$363,000 adjustment to reduce Atmos' recoverable gas costs by the amount of profit that an unregulated affiliated gas marketing company, Atmos Energy Marketing, earned by supplying natural gas to Atmos. Atmos opposed Staff's proposed adjustment and three rounds of testimony were filed by Staff and Atmos.

In David Sommerer's surrebuttal testimony filed on December 22, 2010, Staff presented a new theory to justify either a \$52,000 or \$86,000 disallowance of a portion of Atmos' gas costs. That new disallowance alleges Atmos imprudently failed to nominate sufficient baseload gas supplies for the month of December 2007. At the hearing, held on March 23 and 24, 2011, Atmos moved to strike those portions of Sommerer's surrebuttal testimony that relate to the newly proposed disallowance.

At the hearing, the presiding officer deferred making a ruling on the motion to strike to allow the Commission an opportunity to decide the motion. Subject to a later ruling, Staff was allowed to present testimony about its new disallowance and Atmos was allowed to cross-examine Staff's witness on that disallowance.

Atmos contends the newly proposed disallowance set forth in Sommerer's surrebuttal testimony is improper because it was not raised by Staff until surrebuttal testimony, thus depriving Atmos of an opportunity to respond to that testimony. To support its motion to strike, Atmos relies on Commission Rule 4 CSR 240-2.130(7), which requires that direct testimony include "all testimony and exhibits asserting and explaining that party's entire case-in-chief." The same rule limits surrebuttal testimony to "material which is responsive to matters raised in another party's rebuttal testimony.

In response, Staff argued Atmos had concealed the circumstances surrounding the December 2007 baseload nominations from Staff until after Staff had filed its rebuttal testimony and for that reason, Staff could not present the new disallowance until it filed its surrebuttal testimony.

The Commission's rule regarding the prefiling of testimony is designed to move through the rounds of testimony in an orderly fashion to focus the various issues for a decision by the Commission. For that reason, all parties should present their entire case in their direct testimony so that subsequent rounds of testimony can be used to respond to that case in chief. When a party introduces a new theory about its case for the first time in its surrebuttal testimony it causes problems for the other parties because they have a more limited opportunity to present testimony to rebut that new theory.

However, the Commission's rules should not be interpreted to place blinders on the Commission that would preclude it from considering a new theory that arises for the first time in surrebuttal testimony. That is particularly true where, as here, the party presenting the new theory or evidence explains that it was unable to offer that theory or evidence earlier in the proceeding.

In this case, Staff's witness presented a new theory to justify a disallowance in his surrebuttal testimony that was filed in December 2010. The evidentiary hearing did not take place until March 2011. Obviously, Atmos was not surprised at the hearing by Staff's new theory. While it did not have an opportunity to prefile rebuttal testimony, it certainly had ample opportunity to prepare its cross-examination to attack Staff's theory and did effectively cross-examine Staff's witness. In addition, Atmos could have asked for an opportunity to supplement its testimony either by filing additional prefiled testimony, or by seeking leave to offer live direct or rebuttal testimony at the hearing. Instead, Atmos chose to wait until the hearing to make a motion to strike Staff's testimony.

The Commission concludes that Atmos was not prejudiced by Staff's presentation of a new disallowance in its surrebuttal testimony and on that basis will deny Atmos' motion to strike. This order does not make any findings regarding the merits of the disallowance proposed by Staff.

#### **THE COMMISSION ORDERS THAT:**

1. Atmos Energy Corporation's Motion to Strike a Portion of Staff's Testimony is denied.

2. This order shall become effective immediately upon issuance.

( S E A L )

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'S. C. Reed', written over a faint, illegible background.

**Steven C. Reed**  
**Secretary**

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

Woodruff, Chief Regulatory Law Judge,