

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

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

**APPLICATION FOR REHEARING**

COMES NOW the Office of the Public Counsel (“OPC”) and for its Application for Rehearing states as follows:

1. On February 3, 2010, the Commission issued its Order Consolidating Cases (Order), consolidating Atmos Energy Corporation’s 2006 rate case (GR-2006-0387) with Atmos’ 2010 rate case (GR-2010-0192). OPC requests a rehearing of the Order authorizing the continuation of a tariff that was not approved by a just and reasonable order, and urges the Commission to revert back to the status quo tariff that was lawfully determined to be just and reasonable.

2. OPC asks the Commission to rehear its decision that allows the current tariff to remain “operational until the Commission makes its decision on remand and new compliance tariffs become effective in conformity with that subsequent order.” This decision simply ignores the Court of Appeals opinion and allows the continuation of a rate design, and a district consolidation decision, that were reversed by the Court of Appeals. Consumers deserve better. The opinion of the Court of Appeals is now the “law of the case” in all subsequent proceedings and Commission orders, and there continues to be insufficient evidence to support any order that authorizes the continuation

of the current rates. *State ex rel. Anderson Motor Co. v. Public Service Commission*, 134 S.W.2d 1069 (Mo. App. 1939). The only outcome that is fair to consumers is to order Atmos to revert back to the status quo tariff, which stands as the only tariff that has been found to be just and reasonable. Under the Commission's Order, consumers will be forced to continue paying rates under a rate design and district consolidation that is not supported by a just and reasonable decision. If the Commission eventually determines that the SFV rate design and district consolidation are not just and reasonable, consumers will have been subject to this unjust and unreasonable tariff for *three and a half years*. The Commission can quickly and easily remedy this egregious error by rehearing and reversing its decision to allow the current tariff to continue.

3. In reversing the Commission's Report and Order, the Court of Appeals stated "Atmos and Staff have failed to provide competent and substantial evidence to support the bases upon which they justify the SFV rate design's impact on customer bills. There are no cost studies to substantiate Staff's testimony that the cost of service is the same or that there is subsidization between low and high volume residential users, which was the primary rationale cited by the Commission to justify adoption of the SFV structure."<sup>1</sup> Allowing a decision that was reversed by the Circuit Court and Court of Appeals to continue without evidence to support the rate design or district consolidation suggests an unlawful predetermination that the SFV rate design is just and reasonable, and that it is preferable over the status quo rate design. This predetermination creates an absence of due process, which requires a fair and impartial Commission. *Union Electric Co. v. Public Service Commission*, 591 S.W.2d 134 (Mo. App. 1979).

---

<sup>1</sup> *State ex rel. Public Counsel v. Missouri Public Service Commission*, 289 S.W.3d 240, 256 (Mo. App. W.D. 2009).

4. The Order justifies the continuation of the unjust and unreasonable rate design and district consolidation decisions by concluding:

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

This conclusion fails to recognize that the Commission's order approving Atmos' tariff is ancillary to the Report and Order decided on the merits of the case, and therefore, OPC was not required to appeal the tariff order separately. *Fischer v. Public Service Commission*, 670 S.W.2d 24 (App. 1984). Accordingly, the order approving the tariff is meaningful only in relation to the Report and Order. The two tariff orders are subordinate to and in aid of the Report and Order. *Id.* When the Report and Order was deemed unlawful and unreasonable, the tariff orders were deemed unlawful and unreasonable as well. *Id.* If OPC were to have sought appeal of the orders approving the tariffs, Atmos and the Staff likely would have challenged OPC's actions as a collateral attack on the Report and Order under Section 386.550 RSMo, which states that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."

5. The Commission's interpretation of Section 386.270 RSMo 2000 is in error. That section states:

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

The Commission cannot separate the rates in the tariff from the order approving those rates, as it appears to be doing in its Order. On appeal, the rates and district consolidation were found to be unjust and unreasonable, and according to Section 386.270 RSMo 2000, the rates fixed by the Commission are only lawful “until found otherwise in a suit brought for that purpose pursuant to the provisions of” Chapter 386. Accordingly, the tariff that implements the reversed decision is no longer lawful and should be immediately declared void and unenforceable.

6. The Order violates Section 386.490(3) RSMo 2000 which prohibits the Commission from allowing the unlawful tariff to continue. It provides:

Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States. [emphasis added].

Orders of the Commission remain in effect until changed or abrogated by the commission “unless such order is unauthorized by this law or any other law.” The Commission’s authority to allow the tariff to continue does not supersede the Court’s lawful reversal.

7. The Order violates Section 393.130 RSMo, which mandates that “all charges made or demanded” by a gas corporation “shall be just and reasonable and not more than allowed by law or by order or decision of the commission.” A court of law determined that the rates are not lawful because they were not authorized by a just and reasonable order. “Every unjust or unreasonable charge made or demanded for gas...or in connection therewith, or in excess of that authorized by law or by order or decision of the

commission is prohibited.” The Commission’s Order authorizes an unjust and unreasonable charge, which is clearly *prohibited*.

8. The Order violates Section 393.270(4) RSMo because it determines the rates to be charged to Atmos’ customers without consideration of all relevant facts which have a bearing upon a proper determination of rate design and district consolidation, and without a determination of a reasonable average return. *Utility Consumers Council, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. 1979).

9. The Order violates Section 536.090 RSMo requiring all orders or decisions in contested cases to contain sufficient findings of fact and conclusions of law. The Order does not contain sufficient findings of fact and conclusions of law that support the continuation of the SFV rate design or of district consolidation. In fact, the Order contains *no* findings of fact or conclusions of law related to either the SFV rate design or district consolidation. Accordingly, the Order is unsupported by competent and substantial evidence, is arbitrary, capricious, unreasonable, and involves an abuse of discretion. The effect of the Order is that it establishes rates and authorizes the consolidation of districts, which also impacts rates. Ratemaking orders must be based upon competent and substantial evidence on the record. *Union Elec. Co. v. P.S.C.*, 136 S.W.3d 146, 151 (Mo. App. 2004). The record in this case lacks any competent and substantial evidence, as already determined by the Court of Appeals. As such, the Commission’s order is unlawful and unreasonable.

10. The Order violates OPC’s right to appeal pursuant to Section 386.540 RSMo 2000 by effectively ignoring the Court of Appeals decision reversing the

Commission's Report and Order. Likewise, the Order violates OPC's right to due process of law pursuant to Article I, Section 10, of the Missouri Constitution.

11. The Commission should also be aware of the fact that in Atmos' subsequent rate case, Case No. GR-2010-0192, Atmos failed to correct the errors identified by the Court of Appeals, and therefore, the record will not include the evidence the Court of Appeals held was necessary. The Court of Appeals reversed the Commission's decision on district consolidation and concluded:

The Commission based its decision to consolidate Atmos's districts on the alleged "fact" that the cost to serve Atmos's residential customers through the state is the same. However, Staff failed to conduct cost studies on each of the original districts to determine whether the cost to serve each area was indeed the same. Without such evidence, Ms. Ross's claim that the cost of service is roughly the same among each district is purely speculative. Therefore, we find that the Commission's decision to consolidate Atmos's districts was not based on competent and substantial evidence.

The Court further concluded that "we agree with OPC that it was unreasonable for the Commission to approve consolidation of the districts without the benefit of studies determining the costs for each district, and we reverse the Commission's decision on this issue." The cost studies in Atmos' prefiled evidence in Case No. GR-2010-0192 are broken down by the consolidated districts, not the original districts. This means the Commission will once again have no evidence to support district consolidation, and the Commission will have allowed an unreasonable district consolidation decision to continue even when it is obvious that that decision will not be supported by the subsequent record.

12. OPC also strongly disagrees with the Commission's characterization of OPC's recommendation that the Commission revert back to the status quo tariff in April 2010. The Order states that the purpose of OPC's recommendation was "so that the

ratepayers can take advantage of the benefits of the SFV rate design, the rate design it opposes.” The Order takes liberties with OPC’s stated reasons for the recommended timing of reverting back. In fact, the reason for choosing April is because it would be the most *neutral* timing for both consumers and Atmos due to the fact that the SFV rates became effective in April 2007 and the different rate designs recovers rates differently throughout the year. This incorrect characterization of OPC’s recommendation wrongly portrays OPC as being opportunistic when the true intent of OPC’s recommendation was equity and balance.

13. OPC also disagrees with the Commission’s suggestion in Footnote 3 that OPC is urging the Commission to make a revenue requirement decision based on stale data. First, the Commission would not need to reconsider revenue requirement to revert back to the status quo rate design because the status quo rate design is based on prior Commission orders that considered the revenue requirement issue. The Commission would simply be reverting back to the tariffs that existed when the case was pending before the Commission before Report and Order, because that is where the case now stands. Atmos and the Staff have a burden of proof to overcome before the Commission can issue an order approving the SFV rate design or district consolidation. Second, the Commission’s suggestion that it is improper to revert to rates based on data from prior years carries with it the incorrect assumption that existing rates for other utilities set more than a few years ago are also improper because the underlying data is obsolete. If the Commission followed this rationale for all regulated utilities, every utility would need to file rate cases every few years to prevent rates that were set on data from prior years,

which would be a drastic break from the existing rate of return regulation structure that has been in place as long as utilities have been regulated by the Commission.

14. It is not too late for the Commission to do what is fair to consumers and order Atmos to revert back to the status quo tariff. The status quo rate design was determined to be just and reasonable in the original orders adopting it, and it was found to be just and reasonable in the Commission's February 22, 2007 Report and Order, where the Commission stated "[t]he Commission has found that the status quo rate design is just and reasonable and that the volumetric rates encourage conservation." (*Report and Order*, p. 47).

WHEREFORE, Public Counsel respectfully urges the Commission to rehear its Order Consolidating Cases for the reasons stated herein and revert to the status quo rate design and the status quo districts.

**Respectfully submitted,**

OFFICE OF THE PUBLIC COUNSEL

By: /s/ Marc D. Poston

Marc D. Poston (#45722)

Deputy Public Counsel

P. O. Box 2230

Jefferson City MO 65102

(573) 751-5558

(573) 751-5562 FAX

[marc.poston@ded.mo.gov](mailto:marc.poston@ded.mo.gov)

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been sent via email on this 12<sup>th</sup> day of February 2010.

**Missouri Public Service Commission**  
Service List for Case No. **GR-2006-0387** Last Updated: **8/11/2006**

Office General Counsel  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
GenCounsel@psc.mo.gov

Bob Berlin  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
Bob.Berlin@psc.mo.gov

Douglas Walther  
Atmos Energy Corporation  
P.O. Box 650205  
Dallas, TX 75265-0205  
douglas.walther@atmosenergy.com

Larry Dority  
Atmos Energy Corporation  
101 Madison--Suite 400  
Jefferson City, MO 65101  
lwdority@sprintmail.com

James Fischer  
Atmos Energy Corporation  
101 Madison--Suite 400  
Jefferson City, MO 65101  
jfischerpc@aol.com

Stuart Conrad  
Hannibal Regional Hospital  
3100 Broadway, Suite 1209  
Kansas City, MO 64111  
stucon@fcplaw.com

David Woodsmall  
Hannibal Regional Hospital  
428 E. Capitol Ave., Suite 300  
Jefferson City, MO 65102  
dwoodsmall@fcplaw.com

Robin Fulton  
Noranda Aluminum, Inc.  
135 E Main St  
P.O. Box 151  
Fredericktown, MO 63645  
rfulton@charterinternet.com

**/s/ Marc D. Poston**

Marc D. Poston