

**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)
Natural Gas Service in the Missouri Service)
Area of the Company.)

Case No. GR-2006-0387

**PUBLIC COUNSEL'S RESPONSE
TO STAFF'S TARIFF ARGUMENT**

COMES NOW the Office of the Public Counsel ("OPC") and provides the following response to the Staff's claim that the Court of Appeal's reversal has no impact on the Report & Order compliance tariffs because OPC did not appeal the separate orders approving the compliance tariffs:

1. During the December 15, 2009 on-the-record presentation, Staff counsel argued that the Commission may continue with the straight fixed-variable (SFV) rate design reversed by the Court of Appeals because OPC did not appeal the orders approving the compliance tariffs. (Tr. 792). The Commission directed parties to file any responses to Staff's arguments by January 4, 2010. (Tr. 835).

2. On January 4, 2010 the Staff requested an extension to file the Staff's response, despite having already advocated for the Staff's legal theory during an on-the-record proceeding several weeks prior. On January 12, 2010 the Staff requested a second extension and was granted an extension to January 19, 2010.

3. Staff counsel admitted during the on-the-record proceeding that Staff had no support for the Staff's theory that parties must file separate appeals of the Report and Order and the orders approving the compliance tariffs to challenge a final judgment in a

general rate case. (Tr. 795). Research reveals that the Report and Order is the appealable final judgment, and therefore, OPC did not need to appeal the separate orders approving the compliance tariffs. The Staff's unstudied theory should be rejected just as the compliance tariffs should be rejected and replaced.

4. The Commission's February 22, 2007 Report and Order was the final judgment of the Commission. The two Commission orders approving the compliance tariffs only ensured that the tariffs complied with the Report and Order. The Commission's March 23, 2007 *Order Denying Motion to Reject Tariff and Order Approving Tariff* approved the rate and rate design tariff and concluded that the compliance tariff complies with the Report and Order. Four months later the Commission issued its July 26, 2007 *Order Approving Tariff Sheets in Compliance with Report and Order* which approved the energy efficiency and conservation provisions and also determined that the tariffs were in compliance with the Report and Order. Under the Staff's theory, OPC would have had to file three separate appeals to challenge the Commission's rate case decision: an appeal of the Report and Order, and appeals of the two compliance tariff orders.

5. "The statutes regarding Missouri appellate procedure make a final judgment a prerequisite to appellate review." *State ex rel. Missouri Gas Energy, et al. v. P.S.C.*, 50 S.W.3d 801 (Mo. App. W.D. 2001). "A judgment that resolves fewer than all legal issues as to any claim for relief is not final." *Id.* The only order that resolved all issues is the Report and Order. The compliance tariff orders simply resolved the issue of whether the tariffs complied with the Report and Order.

6. In *Barker v. St. Louis*, 88 S.W. 74 (Mo. 1905), the Missouri Supreme Court determined that “there can be but one final judgment in a civil action.” *See also Russell v. St. Louis & S.R. Co.*, 55 S.W. 454 (Mo. 1900). This is consistent with the statutes that all reference appeals of “the” final order or decision of the Commission. § 386.510, § 386.520, and § 386.540 RSMo.

7. In *Boden v. Johnson*, 23 S.W.2d 186 (Mo. App. 1930), the Missouri Court of Appeals stated that a final judgment must “determine the merits of the controversy,” which the compliance tariff orders do not do. The only final judgment that determined the merits of the contested issues is the Report and Order. Likewise, the only issues raised by OPC on appeal are the issues that were addressed in the findings and conclusions of the Report and Order. The Staff’s theory would have parties appeal orders that determine uncontested matters and that do not resolve the merits of the controversy. In the present case, Staff would have OPC appeal the compliance tariff orders despite the fact that those orders do not contain sufficient findings of fact and conclusions of law to resolve the contested rate design issue. Judicial review is inappropriate unless a full, written opinion, including findings of fact and conclusions of law, explain the basis for the order. *Complete Auto Body & Repair, Inc. v. St. Louis County*, 232 S.W.3d 722 (Mo. E.D. 2007). If the Commission were to follow the Staff’s theory, all future compliance tariff orders would need to provide findings of fact and conclusions of law on each tariff change.

8. In *Blechle v. Goodyear Tire & Rubber Co.*, 28 S.W.3d 484 (Mo. App. 2000), the Missouri Court of Appeals concluded that the final judgment rule is based on

the belief that piecemeal appeals are oppressive and costly. Staff's illogical theory would be oppressive and costly, and would promote judicial inefficiency.

9. Under the Staff's theory, OPC could challenge the SFV rate design through a challenge to the Report and Order and separately through a challenge to the compliance tariff order. If this were possible, OPC could have the same SFV rate design decision reviewed separately by the Missouri Court of Appeals for the Western District and the Southern District. This absurd outcome could violate the prohibition against collateral attacks on final orders of the Commission. § 386.550 RSMo.

10. While the Staff's theory may be somewhat creative in its attempt to keep in place a rate design that has not been lawfully found to be just and reasonable, it is simply illogical and not supported by any legal authority.

11. OPC urges the Commission to issue a new Report and Order based on the evidence already before it, a process that has been deemed lawful by the Supreme Court of Missouri:

Finally, it is argued by respondents, the Second Order of the Commission is void because it did not comply with the judgment of the Court entered in the original case, but that it was a new order issued without notice or a hearing. The Court remanded the case to the Commission "for further proceedings consistent herewith." The Court did not attempt to give the Commission specific directions. The Second Order is substantially similar to the First Order, except that it avoids the procedural defects which impaired the validity of the First Order. The proceeding involving the proposed rate increase of the Telephone Company had been before the Commission since September 30, 1947. Protracted hearings were held and all parties were given an opportunity to present evidence and to file briefs. All of the respondents filed motions for rehearing before the Commission on the Second Order entered on February 25, 1949. Under these circumstances, the Commission was justified in promulgating a Report and Order upon the evidence already before it, and it was not necessary for the Commission to give any further notice or to hold any further hearings. [In re Milwaukee Electric Ry. & Light Co.](#), 189 Wis. 96, 206 N.W. 201, 203; [People ex rel. New York Cent. & H.R.R. Co. v. Public Service Commission](#), 228 N.Y. 553, 126 N.E. 728, 729.

State ex rel. City of Kansas City v. P.S.C., 228 S.W.2d 738 (Mo. 1950). In the present case, the Commission held evidentiary hearings and all parties were given an opportunity to present evidence and file briefs. Under these circumstances, the Commission is justified in issuing a new Report and Order upon the evidence already before it without holding further hearings. Likewise, the Commission has the authority to order Atmos to file new tariffs that revert back to the status quo rate design based on the evidence before it and without holding further hearings.

12. “All charges made or demanded by any such gas corporation...shall be just and reasonable and not more than allowed by law or by order or decision of the commission.” § 393.130 RSMo. “Every unjust or unreasonable charge made or demanded for gas...in excess of that allowed by law or by order or decision of the commission is prohibited.” *Id.* The Missouri Court of Appeals’ decision is the law that declared the order approving the current rates to be unlawful and unreasonable. Accordingly, a rate that has not been found to be lawful and reasonable is prohibited and the Commission may order Atmos to change its tariff under § 393.140 (11) RSMo.

13. In addition, § 386.490.3 states that “[e]very 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]. The Circuit Court of Cole County and the Missouri Court of Appeals both

determined that the Report & Order approving the existing rates is not authorized by Missouri law, and therefore, the currently ordered rates cannot lawfully continue.

WHEREFORE, Public Counsel respectfully offers this response regarding the Staff's theory on appeals of Commission decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been sent via email on this 19th
day of January 2010.

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