BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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	)))))	**Case No. GR-2008-0364**

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT REGARDING ORDER DENYING ATMOS' MOTION TO STRIKE TESTIMONY

I write in Dissent to the Order Denying Atmos' motion to strike testimony because I believe that this Commission should follow its rules. The Commission did not follow its rules with regard to the motion, so I dissent from the majority's Order Denying Atmos' Motion to Stike Testimony.

The Rule

Commission Rule 4 CSR 240-2.130(7), 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." There is no dispute that the matters included in Mr. Sommerer's surrebuttal testimony are outside the scope of the Commission's rule regarding pre-filed testimony. The Commission's rule can be waived for good cause; however, **Staff did not seek leave from this Commission to file the surrebuttal testimony outside the scope of the rule.** The surrebuttal testimony filed by Staff should have been rejected for failure to comply with the rules.

As I have stated in prior concurrences and dissents, the rules of this Commission are law. In this case, the Staff – being in the position to know and understand that the testimony it was prepared to file as surrebuttal would present a new theory, was also in a position to seek a waiver of the Commission's rules prior to filing the surrebuttal testimony, but it did not.

The standard for waiver of a Commission rule is set forth in 4 CSR 240-2.015(1), which declares that "[A] rule in this chapter may be waived by the Commission for good cause." In this case, the reasons cited by Staff and other parties do not rise to the level of "good cause" and as such, the motion by Atmos should have been granted. Although the term "good cause" is frequently used in the law,[1] the rule does not define it. Therefore, it is appropriate to resort to the dictionary to determine its ordinary meaning.[2] Good cause "generally means a substantial reason amounting in law to a **legal excuse** for failing to perform an act required by law."[3] (Emphasis added). Similarly, "good cause" has also been judicially defined as a "**substantial reason or cause** which would cause or justify the ordinary person **to neglect one of his [legal] duties**."[4] (Emphasis added). Of course, not just any cause or excuse will do. To constitute good cause, the reason or legal excuse given "must be real not imaginary, substantial not trifling, and reasonable not whimsical."[5] And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.[6]

The Staff, by failing to seek a waiver, evaded Commission rules. Now, after the fact, Staff points the finger at Atmos to defend its motion to strike. Staff Counsel during oral argument did not argue "good cause." Instead, Staff Counsel argued that reliability was the issue that led to the inclusion of a new theory in surrebuttal. The reliability concerns underlying Staff's new theory was based on information which Staff knew prior to the filing of direct testimony in this case. Tr. 711, lns. 22 – 25 and Tr. 712, lns. 1 – 3.

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1 *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).
2 *See State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term "good cause" as used in a Missouri statute); *Davis*, 469 S.W.2d at 4 – 5 (same).
3 *Black's Law Dictionary*, p. 692 (6th ed. 1990).
4 *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. *See, e.g., Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.")
5 *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). *See also Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

The burden to show good cause is not on Atmos here, it is on Staff. Staff offered nothing that would constitute good cause justifying a waiver of Commission rules. The majority, in my opinion, ignored the well-settled good cause standard and instead has substituted its own, lesser standard. I would have granted the motion because the Staff knowingly proceeded in a manner which disregarded the Commission's rules, and because Staff failed to show good cause for denying Atmos' motion.

Due Process

Not until after an Order ruling on Atmos' motion to strike is effective is Atmos' right to seek an opportunity to rebut that surrebuttal testimony ripe. Any suggestion that Atmos could have tried the issues in Mr. Sommerer's testimony during the March 23, and 24, 2011 hearing, would call into question the very motion which Atmos had placed before the Commission for determination. The majority's Order states:

> 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.

This language suggests that Atmos should have taken action **before** their motion to strike was ruled on with regard to examination of the witness or the filing of additional testimony.[7] This language also suggests that Atmos "sat on its rights" and therefore has waived them with respect to an opportunity to respond to the surrebuttal testimony.

The Order gets it wrong. Filing something in EFIS does not constitute offering evidence. Atmos followed proper practice and procedure by timely objecting to the surrebuttal testimony at the time it was offered into evidence. To imply that it was Atmos' responsibility to request leave to file additional testimony before its motion to strike was ruled on turns proper hearing practice and procedure on its

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[6] *See generally Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975).

[7] Commission rules do not provide for the filing of pre-filed testimony after surrebuttal testimony is filed.

head.[8] Just being able to cross-examine a witness on his new theory is not adequate – Atmos deserves the right to file rebuttal testimony and to call its own witnesses to address the new theory injected into the case in Staff's surrebuttal testimony. If the record is not reopened to allow Atmos the opportunity to provide its own testimony and evidence in response to the admission of the surrebuttal testimony, then I believe that Atmos' due process rights will be violated.

Conclusion

I believe that Commission Staff, as well as all parties appearing before this Commission, should adhere to this Commission's rules. The rules do not allow a new issue to be interjected into a case in surrebuttal testimony. If a party wants to do so, that party must request a waiver and show good cause. In this case, Staff did not do so. Further, Atmos was not allowed to file rebuttal testimony or present its own evidence on the new issue. I would have granted Atmos' motion to strike portions of Mr. Sommerer's surrebuttal testimony.

For all of these reasons, I respectfully dissent.

Terry M. Jarrett, Commissioner

Issued this 5th day of May, 2011.

[8] Atmos' motion to strike was not ruled on until after the hearing was concluded, so Atmos had no meaningful opportunity to offer its own testimony or evidence.