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

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel ("Public Counsel") and for its Application for Rehearing, pursuant to Section 386.500 (RSMo. 2000) and 4 CSR 240-2.160, respectfully states the following:

1. On February 22, 2007, the Missouri Public Service Commission ("Commission") issued, in a 3-2 vote, its Report and Order ("*Order*") bearing an effective date of March 4, 2007. Public Counsel, pursuant to Section 386.500, RSMo. 2000 and 4 CSR 240-2.160 specifically sets forth the reasons warranting a rehearing and moves the Commission for rehearing of its *Order* that rejected the general rate increase originally requested by Atmos Energy Corporation but conditionally approved a new fixed monthly charge rate design, if Atmos files an efficiency and conservation program. Otherwise, the Commission finds that Atmos shall maintain its current rate structure with no additional revenue required.

2. Public Counsel requests rehearing because the decision is erroneous and is unlawful, unjust, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is in violation of constitutional provisions of due process under Mo.

Const. (1945) Art. I sec. 10 and the Fourteenth Amendment of the United States Constitution, is in violation of constitutional provisions of equal protection of the law as guaranteed by the Missouri Constitution and the 14th Amendment, U.S. Constitution, is unauthorized by law, made upon an unlawful procedure and without a fair trial, and constitutes an abuse of discretion, and fails to contain adequate findings of fact and conclusions of law setting forth the basic factual findings that support the conclusions set forth in the Order in a sufficient unequivocal affirmative manner so that a reviewing court could properly review the decision to determine if it was reasonable, all as more specifically and particularly described in this rehearing motion.

Residential Rate Design

3. The Commission overlooked relevant and material issues of fact and law and issued an unlawful and unreasonable decision when it relied upon Atmos' abandonment of its rate request and $3.4 million revenue increase as the basis to adopt the proposed straight fixed-variable rate design. The *Order* finds "the decision by Atmos to abandon its request for a $3.4 million revenue increase in its entirety is sufficient reason to overcome any doubts about the proposed [straight fixed-variable] rate design." A subjective decision by a gas utility to abandon a requested rate increase does not have any bearing on the reasonableness of a specific rate design or whether such rate design is in the public interest. The Order fails to identify how the abandonment supports the specific rate design conditionally adopted. The Commission supports this finding that the abandonment justifies the SFV rate design by concluding that even a portion of a $3.4 million rate increase could have a traumatic effect on Atmos' customers. However, since Atmos rescinded its request for a rate increase and conceded to no rate increase in

rebuttal testimony, the effect of the rate increase is irrelevant and immaterial and the proposed revenue increase derived from the now abandoned rate increase is a moot issue. The hypothetical effect of a rate increase that is no longer an issue in the case and is not a proposal of any party is irrelevant to the decision of whether this change in a decades old rate design is just and reasonable. The decision to approve an untested straight fixed-variable ("SFV") rate design based on facts (the rate and revenue increase) that are no longer a live issue of Atmos or any party and have no bearing on the rate design's reasonableness is unlawful, unjust, unreasonable, arbitrary and capricious and constitutes an abuse of discretion.

4. The Commission overlooked relevant and material issues of fact and law and issued an unlawful and unreasonable decision when it adopted the SFV rate design based on its holding that low-volume customers are subsidized because there was no competent and substantial evidence, such as a cost study, to support this holding. The *Order* states "the evidence shows that currently the low-use customer is being subsidized." The Commission cites as its factual basis for that conclusion the unsubstantiated assertion by Staff witness Ms. Ross that low-volume users are "not paying enough to cover their cost of service." The record contains no evidence of any cost study or other study or the results of any factual inquiry to support her bald speculation and generalization. The *Order* also finds "that the cost of serving residential customer is the same regardless of usage" and "customers using less than the average will underpay their cost of service." The example cited by the Commission simply indicates that low-volume and high-volume customers have the same equipment placed "outside the house" according to Ms. Ross. (Tr. 356). However, the Commission failed to make a

factual finding on key factual matters that underlie the reasonableness and justness of the rate design: whether the other non-gas costs are volume based or whether the costs are identical for all residential customers. 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. W.D. 2004). The record in this case lacks any evidence, let alone any competent and substantial evidence, demonstrating that high-volume customers are subsidizing low-volume customers. This claim must be supported by a properly conducted cost study of residential costs. Such a study would need to indicate that the cost of serving a low-volume customer is identical to the cost to serve a high-volume customer, and that high-volume customers are shouldering the costs of low-volume customers. Staff did not conduct such a study. Staff's claim is a mere guess, generalization and speculation, and as such, the *Order* relying upon mere speculation to make its findings is unlawful and unreasonable.

5. Staff's assertions in attempt to support a rate design that charges each residential customer the same regardless of volumes assumes the cost to serve each customer has no relation to volumes. The Commission's finding not only has no support in the record, but directly contradicts the record evidence that demonstrates costs are based on volumes – the higher the volumes the higher the costs to serve those customers. In State ex rel. Utility Consumers Council of Missouri, et al. v. P.S.C., 585 S.W.2d 41, 56 (Mo. banc 1979), the Supreme Court ruled that the Commission is required to consider all relevant factors in setting rates. But here, the Commission's *Order* fails to consider the relevant cost evidence.

6. **Storage Costs are Based Upon Volumes**. A cost study by Staff witness Mr. Tom Imhoff functionalized class costs into several categories, and based many of the costs upon volumes. For example, Mr. Imhoff testified that storage costs were allocated to customer classes based upon volumes. (Ex. 118, p. 5). Likewise, high-volume residential customers use more gas and require greater storage capacity than low-volume residential customers, and thus require greater costs which should be reflected in a rate design based upon volumes.

7. **Cash Working Capital Costs are Based Upon Volumes.** Mr. Imhoff also testified that a portion of purchased gas costs related to cash working capital are based upon volumes, which is not recognized in a rate design that eliminates the volumetric element. (Ex. 118, p. 5).

8. **Distribution Measuring and Distribution Regulating Costs are Based Upon Volumes.** Mr. Imhoff further testified that the cost for Distribution Measuring and Distribution Regulating is based on volumes because "[t]his type of cost is associated with equipment used to measure and regulate natural gas before it reaches individual customers' service lines." (Ex. 118, p. 6). In other words, Staff's own testimony indicates that the costs associated with the system before reaching an individual customer's service lines is based on volumes. The traditional rate design recognizes this by including the customer related costs – service line, meter, and regulator – in the fixed charge and by including the volume-related costs into a volume based charge. (Tr. 520). In conditionally approving the SFV rate design, the *Order* ignores the undisputed evidence adduced by its own Staff that the costs on residential service are impacted by volumes and, therefore, the SFV rate design lacks evidentiary support.

9. Staff witness Mr. Dan Beck testified that the diameters of pipes are "sized to carry sufficient volumes to meet peak day demand" and that:

> The allocation of the cost of mains should reflect the total value that customers derive from the service throughout the year. Utilization of the capacity of mains is a reasonable way of measuring how the various classes of customers benefit from that portion of the local distribution system. (Ex. 128, pp. 1-2).[1]

Mr. Beck further testified that the "relative amount of capacity is allocated to the classes based on their contribution to the monthly peak demand." *Id*. The same concept applies within the residential class. A high-volume residential customer contributes more to the monthly peak demand, and peak demand is utilized to size the diameters of pipes used in that system.

10. The Commission recently found that the cost of mains has a demand component. In Missouri Gas Energy's 2004 rate case, Case No. GR-2004-0209, the Commission said that "the vast majority of cost of service elements" for local distribution companies "will be either customer or demand related." The Commission adopted MGE's zero-intercept method of allocating the cost of mains, which allocated 34.7% of mains as customer-related and 65.3% as demand related.[2] The Commission concluded "[t]he extra cost of installing larger mains, mains that are large enough to meet peak demand, would be the demand-related portion of the cost of the main."

11. The *Order* in the present case abandons its prior holding that the demand related component of mains should be recognized without a finding of why that finding

[1] Atmos also recognizes that the value to the customer is a relevant consideration in designing rates, as well as the concept of gradualism to minimize the impact of a rate increase on consumers. (Tr. 72). Neither of these relevant factors is considered by the SFV rate design.

generally applicable in the industry should no longer be followed. There also is no finding to support a zero demand costs in this case and there is no record evidence why the Commission's reasoning has changed from 65% demand costs to 0% demand costs. The Commission's findings in the 2004 MGE case are consistent with an earlier conclusion by the Commission recognizing the demand-related component of distribution mains. In an earlier MGE rate case, Case No. GR-98-140, the Commission identified the demand-related component of distribution mains as the costs related to the sizing of the mains to meet customer demands:

> MGE used a two inch diameter minimum system study to allocate distribution system costs to its various classes of ratepayers. The basic purpose of the minimum system study was to segregate the actual cost of mains in the existing distribution system by recognizing that this cost depends on the number of customers to be served, the locations (which determines main length), and the maximum amount of gas that has to flow through the mains to meet customer demands (which determines main diameter). In other words, it separates the embedded cost of mains in the existing system between customer-related and demand-related components. Customers must be connected to the system of distribution mains with at least a minimum size pipe if they are to receive any service. This portion of the mains costs is the customer-related component. The remainder of the costs of mains relates to the sizing of the mains to meet the demands customers place on the system. This portion of the mains costs is the demand-related component.[3]

The present *Order* contradicts previous findings of a demand-related component in the cost of distribution mains without evidence to support that deviation and rejection of demand based components. The Order does not explain and fails to recognize the overwhelming evidence in the present case that the demand-related component continues

---

[2] In the Matter of Missouri Gas Energy's Tariffs to Implement a General Rate Increase for Natural Gas Service, Case No. GR-2004-0209, *Report and Order,* September 21, 2004, pp. 49-50.

[3] In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Missouri Service Area, Case No. GR-98-140, *Report and Order,* August 21, 1998.

today. The record does not support abandoning the demand-related component, and is therefore unjust, unreasonable and unlawful.

12. The Commission unlawfully and unreasonably relies upon the testimony of Ms. Ross to support its finding that high-volume customers are subsidizing low-volume customers under the existing rates. Upon cross-examination, Ms. Ross admitted that the Staff did not conduct a cost study and she does not know the cost to serve low-volume or high-volume residential customers. (Tr. 310-311). Without knowing these costs, Ms. Ross' testimony that high-volume customers are subsidizing low-volume customers lacks an evidentiary foundation, is based upon conjecture, speculation and unsubstantiated generalizations and, therefore, is not based on competent and substantial evidence. The *Order* does not rely upon competent or substantial evidence as required by law. State ex rel. U.S. Water/Lexington v. P.S.C, 795 S.W.2d 593, 595 (Mo. App. W.D. 1990).

13. The evidence submitted by Atmos also lacks any cost data or the results of any other factual investigation into the relevant costs upon which the Commission could base a finding that high-volume residential customers are subsidizing low-volume residential customers. (Tr. 69). In response to a data request from Public Counsel, Atmos acknowledged that when the Atmos engineering department designs each main extension or system modification, it uses expected load information, system capacity, and system modeling software. (Tr. 70-71). In other words, main extensions and other system modifications are affected by demand-related components, and the costs associated with those extensions and modifications are also demand-related. Without evidentiary support

for ignoring the demand-related costs, the *Order* findings are not supported by competent and substantial evidence.

14. The *Order* has a reverse effect in terms of subsidization. By requiring all residential customers to pay an equal "delivery charge" and removing the volumetric element from rates, while the evidence shows that cost of service is volume based, will force low-volume users to subsidize high-volume users. This would have a devastating affect on low-income, low-volume users. The evidence shows low-volume residential customers would pay 52% to 173% more depending on the district in which those customers reside. (Ex. 201, p. 11). The evidence shows that the rate design is unjust, unfair and unreasonable. The burden of proof to show the rate increase is just and reasonable is upon Atmos. Section 393.150.2 RSMo 2000. Atmos has not met its burden because it did not submit evidence showing how the new rate design and resulting rates are just and reasonable. The record does not contain competent and substantial evidence from Atmos or Staff or any party that the increase in rates is just and reasonable. The *Order's* unreasonable effect discriminates against low-volume users contrary to the longstanding Missouri Supreme Court's decision in State ex rel. St. Louis v. P.S.C., 329 Mo. 918, 47 S.W.2d 102 (Mo. 1932). This effectively subjects low-volume consumers to "undue or unreasonable prejudice or disadvantage" in violation of Section 393.130 RSMo 2000.

15. The *Order* is unreasonable because the *Order* cannot determine if the rates are just and reasonable when the record does not have evidence and there is no finding of the full impact to ratepayers; that key finding is unknown. Ms. Ross testified that the Staff did not conduct any studies to determine how many customers would be negatively

impacted by a SFV rate design. (Tr. 308). Staff also did not investigate to determine the impact a SFV rate design would have on low-income customers, who make up a substantial portion of Atmos' customers, particularly customers in the Southeast Missouri (SEMO) area served by Atmos. (Tr. 310; Ex. 206; Tr. 573). It is unjust and unreasonable for the Commission to adopt an untested rate design without conducting a study or other investigation to determine the facts to show how this will impact customers and whether such impact can be mitigated in some way through concepts such as gradualism. In Case No. GR-98-140, the Commission made the appropriate finding when it concluded "[i]t is not just the methodology or theory behind any proposed rates but the rate impact which counts in determining whether rates are just, reasonable, lawful, and nondiscriminating."[4] *Citing* State ex rel. Associated Natural Gas Co. v. P.S.C., 706 S.W.2d 870, 879 (Mo. App. 1985). In the present case, the Commission considered the methodology without considering the rate impact. The test for just and reasonable rates is its effect and impact not only on the company, but also on the customer. The question of a just and reasonable rate can not be determined in a factual vacuum, but must be shown to be just and reasonable by the facts showing its effect on the company and the customer. A just and reasonable rate must be just and reasonable to both the utility and its customers. State ex rel. Val Sewage Co. v. P.S.C., 515 S.W.2d 845 (Mo. App. 1974). The evidence before the Commission indicates the current rate design is just and reasonable to both Atmos and ratepayers, and that the SFV rate design is unjust, unreasonable, and unlawful, and discriminates against low-volume residential consumers.

16. The *Order* states that Public Counsel "did not come forward in this proceeding with any weatherization or efficiency proposals that could assist in

[4] *Id.*

encouraging energy conservation of efficiency." The *Order* unlawfully and unreasonably shifts the burden to Public Counsel to come forward with a proposal that would justify a rate design it opposes. The Commission overlooks Public Counsel's proposal to keep the current rate design tied to volumes as a highly effective conservation and efficiency mechanism, thus providing a monetary incentive to ratepayers to reduce consumption. Public Counsel was conscious of the Commission's decision in Case No. GR-2004-0209 rejecting Public Counsel's proposal to adopt the Pay As You Save (PAYS) program and the Commission's finding that consideration of such a program "needs to take place in a broader setting than is afforded by" a rate case.[5] Atmos and Staff did not propose sufficient programs and failed to meet the burden of proof to support a SFV rate design. Public Counsel's role is not to support a flawed SFV rate design by proposing conservation and efficiency programs to help Atmos meet that burden.

17. The Commission unlawfully and unreasonably issued an order purporting to finally decide the rate case but in fact leaving the record open for additional evidence that could change the rate design and the effect of the case. Allowing Atmos until June 30, 2007 to provide further information on conservation and efficiency programs that have yet to be developed is effectively allowing undetermined evidence outside the record to satisfy the burden of proving the SFV rate design is just and reasonable. This unorthodox and unlawful procedure prevents Public Counsel from challenging evidence as required by Section 536.070 RSMo 2000 in any contested case. In addition, the evidence does not support a conditional approval of the SFV rate design based upon conditions and amounts not appearing anywhere in the record. The conditions, and

[5] In the Matter of Missouri Gas Energy's Tariffs to Implement a General Rate Increase for Natural Gas Service, Case No. GR-2004-0209, *Report and Order*, September 21, 2004, p. 66.

whatever program is developed after this case is closed, are not based upon competent and substantial evidence in the record of this proceeding. Accordingly, the *Order* is not just and reasonable as required by Section 393.130.1 RSMo 2000.

18. The Commission's *Order* at page 19 appropriately recognizes the resulting decrease in risk that results from a rate design that completely eliminates weather volatility. However, the Commission's finding that Atmos has given consideration for this decreased risk "by foregoing its request for an additional $3.4 million" is baseless. This finding assumes Atmos was entitled to a $3.4 million rate increase absent a SFV rate design; however, the Commission has made no findings that a rate increase is otherwise warranted. In fact, the Commission's *Order* at Page 22 and again at Page 44 finds that no party justified a change in the revenue requirement. The Commission's finding of "consideration" for the decreased risk is unjust, unreasonable and unlawful, and in violation of Section 393.130.1 RSMo 2000.

19. In the 2004 MGE rate case, the Commission found that the public interest is best served by setting customer charges as low as reasonably possible. The present *Order* justifies a change from these previous findings by finding that "the natural gas distribution business has changed drastically in less than a decade." The Commission's prior finding was issued less than two and a half years before the present *Order.* There is no evidence in this case, nor any evidence identified by the Commission, showing what "drastic" business changes have occurred or how changes justify this drastic change in policy. These findings are not supported by the record. The *Order* is unjust, unreasonable and unlawful, and in violation of Section 393.130.1 RSMo 2000.

20. The SFV rate design conclusions provide unnecessary financial protections for the utility company and fail to recognize the protections the Commission must afford the public. The *Order* finds that a revenue increase is unnecessary; however, the impact of the SFV rate design proposal will be a rate increase by eliminating weather and other business risk without an offset to revenue. And it will require substantial rate increases for the large number of low-volume consumers. The Commission's purpose is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity. May Dep't Stores Co. v. Union Electric Light & Power Co., 107 S.W.2d 41, 48 (Mo. 1937). The "dominant thought and purpose" of the Commission "is the protection of the public . . . the protection given the utility is merely incidental," State ex rel. Crown Coach Co. v. P.S.C., 179 S.W.2d 123, 126 (Mo. 1944). By requiring low-volume residential consumers to pay more than the cost to serve them, the SFV rate design is unjust and unreasonable in violation of Section 393.130.1(RSMo. 2000). Furthermore, the *Order*s findings are not based on competent and substantial evidence because the evidence lacks cost study support. An order's reasonableness depends on whether it was supported by substantial and competent evidence on the whole record. State ex rel. Midwest Gas Users' Association v. P.S.C, 976 S.W.2d 470 (Mo. App. 1998).

21. The *Order* conditionally approving a SFV rate design essentially guarantees Atmos will recover its costs. Case law specifically states that the utility should be provided no more than an *opportunity* to earn its authorized return. In State ex rel., Missouri Public Service Co. v. Fraas, 627 S.W.2d 882 (App. W.D. 1981), the Western District held that a tariffed rate is intended to only permit an opportunity to

make the percentage return approved by the PSC, and guarantees no specific return. The SFV rate design proposed by Staff, however, guarantees a specific return by recovering *all* non-gas costs in a fixed charge. Providing the utility with only an opportunity to earn a return, rather than a guaranteed return, protects ratepayers by encouraging the utility to operate efficiently. The SFV rate design will not only guarantee revenues for a monopoly regulated utility, but it will essentially shift risk from the shareholders to the ratepayers. This is another example of the *Order* placing far more emphasis on protecting the shareholders while providing no protections for the rate paying public the Commission is to protect. Accordingly, the *Order* is unjust, unreasonable and unlawful, and in violation of Section 393.130.1 RSMo 2000.

Small General Service Rate Design

22. The *Order* adopting the Staff's proposed split in the Small General Service (SGS) rate class at the 2,000 Ccf mark is unsupported by the record. The rationale in dismissing Public Counsel's evidence that customers using 2,001 Ccfs will pay two to three times as much in non-gas rates as a customer using 2,000 Ccfs is based upon the Commission's finding that customers using less than 2,000 Ccf per year are served by the same size and type of equipment as residential customers. However, this is not true for all SGS customers and will result in SGS customers paying the costs of equipment not utilized by that SGS customer. The evidence before the Commission shows that there are large volume users that are served by two-inch distribution mains, the same size used to serve residential customers. (Tr. 71-72). Despite the need to find a dividing line to distinguish between classes, it is unreasonable to fashion that dividing line in a manner that a difference of one Ccf creates a huge discrepancy in rates and

which charges customers for more expensive equipment not utilized by that customer. The difference in rates must be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate. State ex rel. City of St. Louis v. P.S.C., 327 Mo. 318, 36 S.W.2d 947, 950 (Mo. 1931). The record does not contain competent and substantial evidence of a "reasonable and fair difference in conditions which equitably and logically justify a different rate." The PSC's Order does not make these required finding of facts mandated in City of St. Louis. Persons receiving similar service under similar circumstances cannot be charged for that service in an arbitrary, designed, dissimilar manner. State ex rel. DePaul Hospital School of Nursing v. P.S.C., 464 SW2d 737 (Mo App 1970); State ex rel. McKittrick v. P.S.C., 352 Mo. 29, 175 S.W.2d 857 (1943). The Order findings regarding seasonal disconnects fail to consider all relevant factors in violation of State ex rel. Missouri Water Co. v. P.S.C., 308 S.W.2d 704 (Mo. 1957). The Order findings on SGS rate design are unjust and unreasonable in violation of Section 393.130.1 RSMo 2000 for the reasons stated above, and for the additional reasons Public Counsel has requested rehearing on the issue of residential rate design.

Seasonal Disconnects

23. The *Order* at Page 28 identifies the purpose of Staff's seasonal disconnect proposal is "to dissuade seasonal customers that disconnect during the non-winter months and do not pay the costs associated with providing utility service." The *Order* findings on this issue are unjust and unreasonable for several reasons: 1) It forces customers to pay for a utility service they did not receive; 2) It assumes all customers disconnecting for less than seven months are "seasonal disconnects" and not consumers disconnecting

for reasons unrelated to the seasons; 3) It hinders competition by discouraging consumers from attempting other forms of heat energy such as wood or propane; and 4) It is not supported by a cost study showing what costs a disconnected household incurs. The *Order* findings also assume a SFV rate design, and does not explain how this issue is resolved should Atmos not agree to the conditions and instead maintain the current rate design. The *Order* findings on seasonal disconnects are unjust and unreasonable in violation of Section 393.130.1 RSMo 2000.

Return on Equity

24. The *Order* does not take into account the reduction in risk that results from a rate design that completely eliminates weather risk and other business risk factors for Atmos. The United States Supreme Court, in Bluefield Water Works and Improvement Company v. Public Service Commission of West Virginia, 262 U.S. 679, 67 L.Ed. 1176, 43 S.Ct. 675 (1923), and in Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 88 L.Ed. 333, 64 S.Ct. 281 (1944), mandated that the rate of return for a utility must be comparable to the return on investments in other enterprises having a corresponding risk. In State ex rel. Missouri Water Company v. P.S.C., 308 S.W.2d 704 (Mo. 1957), the Supreme Court of Missouri held that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." The risk associated with the comparable companies used in the Staff analysis is less than the risk that would result from the SFV rate design. Staff's ROE witness Mr. Barnes admitted that Staff's analysis failed to consider corresponding weather risks when selecting the comparable group of companies. (Tr. 113, 117). Mr. Barnes also admitted that he did not study the rate designs of the comparable companies

to determine whether those rate designs completely mitigated weather risk as would the SFV rate design. (Tr. 118). The only consideration Staff made in determining whether it selected companies with corresponding risks and uncertainties is whether the companies selected were local distribution companies. (Ex. 101, p. 14). The *Order* at Pages 19-20 recognizes that Staff's analysis of comparable companies includes "some elements of risk" and that this is "not enough." Despite this finding, the Commission does not account for this reduction in risk in Atmos' level of revenue. The evidence before the Commission suggests that a SFV rate design coupled with no change in revenue requirement will result in a return on equity (ROE) of 12.6%. (Tr. 614). The *Order* made no finding that a 12.6% ROE is reasonable, nor did it make any offsetting reductions to ROE to reflect the reduction in risk from the SFV rate design. In State ex rel. Missouri Office of Pub. Counsel v. P.S.C., 858 S.W.2d 806 (Mo. App. 1993), the Court of Appeals concluded that the Missouri Public Service Commission must consider all relevant factors, including all operating expenses and the utility's rate of return, when determining a rate authorization. The Commission made no consideration of Atmos' rate of return as required. A ratemaking order of the Commission should set rates no higher than necessary to cover operating expenses and debt services, plus a return to assure confidence in the business and attract equity investors. State ex rel. Associated Natural Gas Co. v. P.S.C., 706 S.W.2d 870 (Mo. App. W.D. 1985). Contrary to this requirement, the *Order* requires ratepayers to pay excessive prices because the SFV allows rates that are higher than necessary to achieve these goals. *Id.* Moreover, the *Order* does not contain, as required by law, findings that are "sufficiently definite and certain under the circumstances of the case to enable the court to review the decision

intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence." State ex rel. U.S. Water/Lexington v. Missouri Public Service Commission, 795 S.W.2d 593, 594 (Mo. App. 1990). The Commissions failure to adjust ROE according to the reduction in risk is unlawful, unjust and unreasonable, violates the United States Constitution, Amendments 5 and 14, and the Missouri Constitution, Article I, Section 10, as well as the United States Supreme Court's ruling in Bluefield and should be reheard. Atmos is no longer requesting an increase in revenue, yet the impact of the *Order* will increase revenue, which the Commission concluded is not justified. This result is not just and reasonable as required by Section 393.130.1 and 393.140 RSMo 2000.

Depreciation

25. The Commission unlawfully and unreasonably relied upon testimony of accounting issues from a Staff witness who was not qualified by education or, by his own admission, knowledge and experience. The Staff accepted the company's records even though it stated that such records were unreliable and not maintained in accordance with PSC rules. The *Order* adopted the Staff's proposal to enter a negative amortization of $591,000 into the depreciation reserve Account 108. Atmos' depreciation data is riddled with errors, as acknowledged by the Staff's witness Mr. Gilbert, and should not be relied upon. (Tr. 186-187). Atmos unlawfully failed to maintain plant data as required by 4 CSR 240-40.040. As a result, the Staff was unable to determine a theoretical reserve for each account and based its proposal for a negative amortization of $591,000 on assumptions that are not known and measurable. (Tr. 188, 210-211). Mr. Gilbert testified that he was unable to verify the accuracy of Atmos' data and records and simply

"accepted management's recognition and acknowledgment of an over-accrual of depreciation." (Tr. 188-189). Accordingly, the Commission's findings are unjust and unreasonable in violation of Section 393.130.1 RSMo 2000, and are not based upon competent and substantial evidence.

26. Past ratepayers paid through rates the balance that is reflected in the accumulated depreciation reserve account. The treatment adopted by the *Order* requires the company to reinvest this reserve back into the company simply to lower current rates. As a result, future ratepayers will have to pay back the accumulated depreciation reserve amount *and* will be required to pay a return on the $591,000. This will occur because under basic accounting principles a reduction in accumulated depreciation reserve requires an increase in net plant in service (plant in service less accumulated depreciation). The Staff evidence relied upon by the *Order* is based on accounting principles testified to by a non-accountant. Mr. Gilbert testified that he lacked the accounting expertise to know the proper accounting treatment for depreciation expense. (Tr. 189, 192). Without a proper understanding of the accounting implications of Staff's depreciation proposal, Mr. Gilbert's testimony is unreliable and insufficient to support Staff's proposal for a negative amortization of $591,000. Facts or data relied upon by experts must be reasonably relied upon by experts in the field, and Mr. Gilbert is neither an accounting expert nor did he rely upon data reasonably relied upon by expert accountants performing depreciation accounting. Section 490.065 RSMo 2000.

27. Although such treatment of accumulated depreciation reserve may have a short-term gain in terms of lower rates, the theory behind this treatment is flawed and creates a generational inequity because it will require future ratepayers to repay these

"savings" and will require ratepayers to pay a return on these "savings" until such time as they are repaid. The example cited in the *Order*, given by Mr. Gilbert, highlights Mr. Gilbert's lack of accounting knowledge because it fails to mention the $591,000 that will have to be repaid by ratepayers. The *Order* provides no support for the finding that this method has been "often used," just as there is no support for the finding that future rates to customers will be less. By requiring ratepayers to repay the $591,000 plus a return on top of the $591,000 placed in net plant in service, the result will be more revenue collected from ratepayers, not less. There is no competent and substantial evidence in the record to support the *Order*. The *Order* findings regarding depreciation are unlawful, unjust and unreasonable, in violation of Section 393.130.1 RSMo 2000, and violate the United States Constitution, Amendments 5 and 14, and the Missouri Constitution, Article I, Section 10.

District Consolidation

28. The *Order* consolidates Atmos' seven different rate districts into three rate districts with one rate per class for each district. The Commission determined that customers in neighboring districts would pay different costs for the same gas usage. This finding is unjust and unreasonable in that it is not supported by competent and substantial evidence on the record. There is no evidence to suggest the embedded district costs are the same. Staff ignores the fact that the embedded cost of mains varies significantly by district. (Ex. 202, p. 7). In addition, the evidence shows that density, depreciation rates and other factors of each legacy district will influence the mains costs. (Ex. 202, p. 7). The Staff's Accounting Schedules indicate that there are indeed significant differences in the embedded costs of each district. (Ex. 202, p. 11). Neither the Staff nor Atmos have

prepared cost studies which show cost justification for district consolidation. However, the evidence does indicate that consolidation will cause customer bills to change from a 29% decrease to a 67% increase depending on the district. (Ex. 202, p. 4). Until such time that a cost study is performed to determine whether district consolidation will be harmful or otherwise discriminatory to customers, the Commission's findings are unjust and unreasonable, and are not supported by competent and substantial evidence.

WHEREFORE, Public Counsel respectfully requests that the Commission grant this application for rehearing.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: **/s/ Marc D. Poston**

Marc D. Poston (#45722)
Senior Public Counsel
P. O. Box 2230
Jefferson City MO 65102
(573) 751-5558
(573) 751-5562 FAX
marc.poston@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been sent via email on this 2nd day of March 2007:

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