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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

PRE-HEARING

February 8, 2002
Jefferson City, Missouri
Volume VI

In the Matter of Associated Natural)
Gas Company's Tariff Revision)
Designed to Increase Rates for Gas) Case No.
Service to Customers in the Missouri) GR-97-272
Service Area of the Company.)

BEFORE: KEVIN THOMPSON,
Regulatory Law Judge.

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1 JUDGE THOMPSON: Good morning. My name is
2 Kevin Thompson. I'm the Regulatory Law Judge
3 presiding over this matter, which is in the matter
4 of Associated Natural Gas Company's tariff revision
5 designed to increase rates for gas service provided
6 to customers in the Missouri service area of the
7 company, Case No. GR-97-272.

8 Could we have oral entries of appearance
9 at this time, beginning with Associated Natural
10 Gas?

11 MR. COOPER: Dean L. Cooper from the law
12 firm of Brydon, Swearngen and England, P.C.,
13 P.O. Box 456, Jefferson City, Missouri 65102,
14 appearing on behalf of Arkansas Western Gas
15 Company, doing business as Associated Natural Gas
16 Company.

17 JUDGE THOMPSON: Thank you.
18 How about Staff?

19 MR. SCHWARZ: Thomas R. Schwarz, Jr.,
20 P.O. Box 360, Jefferson City, Missouri 65102,
21 appearing for the Staff of Missouri Public Service
22 Commission.

23 JUDGE THOMPSON: Public Counsel?

24 MR. MICHEEL: Douglas E. Micheel,
25 appearing on behalf of the Office of Public Counsel

1 and the Public, P.O. Box 7800, Jefferson City
2 Missouri 65102-7800.

3 JUDGE THOMPSON: Thank you.

4 I believe we have a guest here today
5 representing Atmos.

6 MR. FISCHER: Thank you, your Honor.
7 James M. Fischer, Fischer and Dority, P.C.,
8 101 Madison Street, Suite 400, Jefferson City,
9 Missouri, appearing today for Atmos Energy
10 Corporation.

11 JUDGE THOMPSON: Thank you.

12 And I had a telephone discussion with
13 Mr. Rob Fulton earlier in the week. I believe he
14 represents Miranda Aluminum, and he is unable to be
15 here today because of a prior commitment.

16 Perhaps you are all surprised that we
17 would set this case for a status hearing, given
18 that it was remanded to the Commission in the fall
19 of 2000 after appeal to the Western District Court
20 of Appeals, but the reason I've done that is
21 because it appears to me that the case perhaps has
22 become moot, in which case there would be little
23 point in the Commission and I going to the effort
24 necessary in creating a second report and Order in
25 this matter.

1 Do I have any -- any of the parties have
2 any comments on that?

3 MR. FISCHER: Your Honor, it's my
4 understanding that Atmos Energy and Miranda, which
5 is one of the main appellants in the case, are
6 finalizing discussions about a contract that would
7 change the rate or extend a contract rate that has
8 been out there that may very well make some of the
9 Miranda issues, I think, moot if we can finalize
10 that contract.

11 But it's my understanding that at this
12 point that has not happened. They are still
13 talking about it. So I don't think at this point
14 it's probably something we can say is completely
15 moot.

16 There were some other, I think, issues on
17 appeal which I would like to visit with Staff and
18 Public Counsel about to determine whether -- what
19 the status of those might be as far as Atmos'
20 continuing ongoing operations might be concerned.

21 JUDGE THOMPSON: Okay. And that is
22 essentially what Mr. Fulton told me on the phone as
23 well, that discussions were -- contract
24 negotiations were ongoing and had not yet been
25 finalized.

1 Mr. Cooper?

2 MR. COOPER: Your Honor, from Associated
3 Natural Gas', I guess, position, they believe that
4 because they have sold their properties, that they
5 no longer have any interest in this case and, thus,
6 turn to Atmos and Mr. Fischer as to the status and
7 how they would like to pursue the case at this
8 point.

9 JUDGE THOMPSON: Well, before we go any
10 further, I'd like to make sure I understand some
11 things. There was a Commission Order issued in
12 Case GM 2003-12 on the 20th day of April 2000
13 effective May 1st, 2000, approving a Stipulation
14 and Agreement which provided for the sale of assets
15 from ANG or AWG, doing business as ANG, to Atmos.
16 Are all of you more or less familiar with that
17 transaction?

18 MR. SCHWARZ: Yes.

19 MR. FISCHER: Yes.

20 JUDGE THOMPSON: Now, in that transaction,
21 based on my review of the documents this morning,
22 there was no merger of ANG as a corporate entity
23 into Atmos, rather, there was a sale of assets in
24 Missouri by ANG to Atmos; is that correct?

25 MR. FISCHER: Yes, your Honor. It was an

1 asset purchase arrangement.

2 JUDGE THOMPSON: ANG, to the extent that
3 it had existence as a legal entity prior to the
4 sale, continues to exist today; is that correct?

5 MR. COOPER: Correct.

6 JUDGE THOMPSON: And then there was an
7 Order issued by the Commission on May 16th of 2000,
8 effective June 1, 2000, in which a tariff filed by
9 Atmos was approved. Now, I understand the tariff
10 in question was the existing ANG tariff, which
11 Atmos adopted; isn't that correct?

12 MR. FISCHER: Yes.

13 JUDGE THOMPSON: Okay. So that tariff is
14 now the law of the land as though enacted by the
15 legislature according to the jurisprudence on
16 tariffs. So my question is, how can the outcome of
17 Case 97-272 have any effect on a tariff approved by
18 the Commission without limitation in June of 2000?

19 MR. SCHWARZ: Well, the Commission's Order
20 approving that tariff is not yet final, because it
21 has been remanded for reconsideration.

22 JUDGE THOMPSON: This would be the Order
23 in GM-2003-12?

24 MR. SCHWARZ: No. No. No. No. The
25 Order in the present case is not yet filed.

1 JUDGE THOMPSON: I realize that, and I
2 realize that this is a tariff essentially identical
3 to the tariff approved by the Commission in June of
4 2000, yet, although identical, it's not the same
5 exact tariff.

6 In other words, if we think about what a
7 rate case Order says, they usually say that the
8 tariffs filed by the company are rejected but the
9 company may file a tariff in compliance with this
10 Order, which the Commission will then approve.
11 Now, in this case, ANG, I assume, has no interest
12 in filing a new tariff covering Missouri
13 operations. Is that true?

14 MR. COOPER: That is true.

15 JUDGE THOMPSON: And Atmos was not and is
16 not now a party to Case 97-272. Is that true?

17 MR. FISCHER: Your Honor, I think we
18 effectively stepped into the shoes of the -- of ANG
19 whenever we adopted their tariffs. We're not -- we
20 never filed to intervene in that case. It was
21 never in front of the Missouri Commission to
22 intervene in while we were interested in that
23 property.

24 JUDGE THOMPSON: Well, as far as I can
25 see, there has been no entry of appearance. There

1 has been no grant of intervention. There's been no
2 Order substituting parties. Atmos is simply not a
3 party to this case. Isn't that correct?

4 In other words, if there is any party here
5 or out there in the wide world who has a belief
6 that some portion of Atmos' current tariff is not
7 just and reasonable, would it not take a complaint
8 case in order to bring that before the Commission?

9 MR. SCHWARZ: Certainly the Atmos tariffs
10 are subject to complaint on those grounds at the
11 present time, but that's, I think, a separate
12 question from whether the tariff adopted by Atmos
13 was subject to further action or review, not only
14 by the Commission but -- but by the Courts
15 ultimately. That is the review process for the --
16 for the tariff that Atmos adopted is still in
17 metios res (ph. sp.). I mean, it's just not --
18 it's not a final product as it were.

19 JUDGE THOMPSON: Well --

20 MR. SCHWARZ: It's an interesting point.

21 JUDGE THOMPSON: Here in Missouri a case
22 is moot where the decision can have no practical,
23 enforceable consequences between the parties.
24 Where a case has been submitted, argued and
25 submitted at an appellate court, dismissal for

1 mootness is discretionary.

2 Now, I don't know -- I know that this sale
3 and this tariff approval were completed before the
4 case was remanded by the Western District, and
5 given the pace at which things move there, it seems
6 to me likely, although I don't know it for a fact,
7 that the case had, in fact, been argued and
8 submitted prior to -- prior to --

9 MR. SCHWARZ: Although the reason for the
10 remand was never mentioned in the argument, as I
11 recall.

12 JUDGE THOMPSON: Well, being that as it
13 may, the point is the case -- the case was
14 submitted. It was properly subjugated at the time
15 and it was discretionary in the Court of Appeals
16 whether or not to dismiss it because of changed
17 circumstances. I don't know if the Court ever
18 became aware of those circumstances.

19 At any rate, the Court decided the case
20 and remanded it to the Commission. Now that it's
21 back here in front of Commission, I think the
22 Commission is required to ask whether or not the
23 case is moot.

24 I don't think -- in the event that it is
25 moot, I don't think it's a contested case any

1 longer, and the Commission may well not have
2 jurisdiction. If Atmos is not a party, then any
3 decision by this Commission as to the tariffs
4 submitted and proposed by ANG five years ago is not
5 binding on Atmos. It's not enforceable between the
6 parties.

7 MR. FISCHER: Your Honor, I don't have
8 that stipulation in the GM-2003-12 case in front of
9 me. I --

10 JUDGE THOMPSON: I happen to have it right
11 here (indicating).

12 MR. FISCHER: Okay. It's my recollection
13 there might have been a provision in there related
14 to a number of ongoing ANG matters, including some
15 ACA cases.

16 JUDGE THOMPSON: There was, indeed, and
17 what it provides is that ANG is going to cooperate
18 with ongoing litigation and that ANG is not going
19 to move to quash subpoenas, for example, or quash
20 record requests or data requests on the grounds
21 that it's no longer engaged and operating that
22 system. However, ANG also retains any other
23 objections that it might have.

24 I don't see anything in this agreement
25 that says that Atmos steps into the shoes of ANG as

1 a litigant with respect to this case. Would the
2 parties like to take a look at this?

3 MR. SCHWARZ: No.

4 The -- and, of course, Miranda is a party
5 as well, and to the extent that Miranda took
6 positions that were adverse to those of Public
7 Counsel, Staff and ANG, I think that there may
8 still be a contested case posture available.

9 I would also point out that the
10 Commission's -- the Commission can award -- issues
11 an Order to Atmos --

12 JUDGE THOMPSON: Not to Atmos. Atmos
13 isn't a party.

14 MR. SCHWARZ: The Commission issues
15 Orders --

16 JUDGE THOMPSON: That's true.

17 MR. SCHWARZ: -- to regulated utilities --

18 JUDGE THOMPSON: Yes.

19 MR. SCHWARZ: -- and to the extent that
20 Atmos adopted tariffs, which Atmos well new at the
21 time were still the subject of -- of open
22 litigation, I think Atmos would be hard pressed to
23 say that they have some lawful grounds on which to
24 resist an Order resolving a contested case that
25 they knew was ongoing. And this is -- I'm

1 speaking --

2 JUDGE THOMPSON: I understand. I

3 understand, and --

4 MR. SCHWARZ: And I think it would bear

5 some serious thought for the Commission to find

6 that its jurisdiction can be avoided by the

7 transfer of property. And -- I mean, that -- that

8 just --

9 MR. COOPER: Your Honor, can I make one

10 suggestion?

11 JUDGE THOMPSON: You may.

12 MR. COOPER: You have caught us a little

13 bit cold here.

14 JUDGE THOMPSON: I understand that, and I

15 apologize.

16 MR. COOPER: Would your Honor consider, I

17 guess, providing us ten days or so to probably talk

18 amongst ourselves and file something with the

19 Commission indicating a position as to the

20 decision?

21 JUDGE THOMPSON: That's exactly where this

22 was going to go.

23 Mr. Micheel, do you have anything to add

24 at this point?

25 MR. MICHEEL: We support what the

1 Commission did, your Honor, so if you want to moot
2 it out, we're happy as clams.

3 JUDGE THOMPSON: Okay.

4 MR. MICHEEL: So that's why I'm being
5 quiet.

6 JUDGE THOMPSON: Okay. Very good.

7 Because I see this as being subject matter
8 jurisdictional, I don't -- the Commission can't
9 waive it. We can't say, Gosh, you know, it's been
10 here a long time and we've let it sit an even
11 longer time, so why don't we just write a decision
12 and get it behind us. If it's subject matter
13 jurisdictional, we have to answer that question,
14 whether we want to or not, though, I'm sure you can
15 guess which way I lean.

16 So why don't I give you -- why don't I
17 give you 30 days to talk among yourselves and to
18 file something then if you want?

19 MR. SCHWARZ: How many days?

20 JUDGE THOMPSON: 30.

21 MR. MICHEEL: And what you are looking for
22 is something regarding whether or not this case is
23 moot?

24 JUDGE THOMPSON: Exactly so. Exactly so.
25 In other words, given the standard that mootness is

1 where the decision has no practical effect on the
2 parties before the Commission and does not result
3 in any enforceable result among the parties, is
4 that the situation we find ourselves in?

5 In other words, it seems to me if we were
6 to issue an Order making Atmos a party today, okay,
7 then Atmos has never had a bite of the apple, and I
8 think that from due-process considerations, that
9 that would require a rehearing. In other words,
10 before Atmos can be stuck with an overturned
11 tariff, they would have to have an opportunity to
12 come in and be heard on the point.

13 MR. COOPER: Another possibility, though,
14 that I suppose we could consider and, once again,
15 I'm kind of working off the top of my head, but in
16 a litigation where a party perhaps passes away,
17 there is a substitution of parties, and I wonder if
18 that wouldn't be a --

19 MR. SCHWARZ: ANG is not dead. They're
20 just acquiescing.

21 JUDGE THOMPSON: Usually that's done where
22 the parties are in privity, for example, a medical
23 malpractice action and the patient dies and so a
24 spouse or an executor is substituted as the party.

25 Here you have an arm's length transaction

1 between two business entities. I don't know that
2 it can be said that Atmos is in privity with ANG.
3 I mean, perhaps Atmos -- if we made them a party,
4 perhaps Atmos would say, We adopt the positions and
5 the arguments previously raised by ANG and we'll
6 abide by the result whenever it might be, but on
7 the other hand, maybe they won't. Maybe Atmos
8 might see an argument that ANG never raised and
9 Atmos would want a chance to raise that argument.
10 It seems to me that fundamental fairness would
11 require that they have an opportunity to raise it.

12 In other words, I know if I buy property
13 where there's an ongoing lawsuit about, you know,
14 the boundaries or an easement or something, then
15 I've bought myself a lawsuit, but that doesn't mean
16 I don't get to be heard. And I don't know if this
17 is the kind of sale where they bought a lawsuit
18 along with those assets. I just don't know if it
19 is.

20 So --

21 MR. SCHWARZ: How about 45 days?

22 JUDGE THOMPSON: 45 days is fine with me.

23 MR. SCHWARZ: I think 45 days.

24 JUDGE THOMPSON: 45 days is great. I'll
25 go back and tell the Commission that --

1 MR. SCHWARZ: That may give Miranda and
2 Atmos time to --
3 JUDGE THOMPSON: Absolutely.
4 And we will -- we will be happy to receive
5 anything that Atmos chooses to file, but I think at
6 this point it's important to preserve the position
7 that Atmos is not a party.
8 Anything else?
9 Thank you very much. I appreciate you all
10 appearing here today, especially on such short
11 notice.
12 JUDGE THOMPSON: Mr. Schwarz?
13 MR. SCHWARZ: Let me pull back my
14 recommendation on the 45 days. If somebody has a
15 calendar, let's pick a date certain, 45 days. It's
16 division I believe by seven, so it should be a
17 Friday. Never mind.
18 JUDGE THOMPSON: You are good.
19 MR. DAN BECK: It's not division by seven.
20 JUDGE THOMPSON: Nine and five.
21 MR. SCHWARZ: All right. Somebody get a
22 calendar.
23 Well, actually if it's 45 days, that's
24 seven weeks and three days, which is a Monday,
25 which is just as good. So 45 days is okay.

1 JUDGE THOMPSON: Okay. We'll say the
2 business day closest to the 45th day.

3 And thank you very much. We're
4 adjourned.

5 (THE HEARING WAS ADJOURNED.)

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