

BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI

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TRANSCRIPT OF PROCEEDINGS

Prehearing Conference

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Jefferson City, Missouri

Volume 2

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In the Matter of the PGA/ACA	)	
Filing Of Atmos Energy	)	
Corporation For The West Area	)	
(Old Butler), West Area (Old	)	File No. GR-2008-0364
Greeley), Southeastern Area	)	
(Old SEMO), Southeastern Area	)	
(Old Neelyville), Kirksville	)	
Area And The Northwestern Area	)	

MORRIS L. WOODRUFF, Presiding  
CHIEF REGULATORY LAW JUDGE

REPORTED BY:  
Tracy Taylor, CCR No. 939  
TIGER COURT REPORTING, LLC

A P P E A R A N C E S

JAMES M. FISCHER, Attorney at Law

LARRY W. DORITY, Attorney at Law

Fischer & DORITY, P.C.

101 Madison Street, Suite 400

Jefferson City, Missouri 65101

573.636.6758

FOR: Atmos Energy Corporation

MARC D. POSTON, Deputy Public Counsel

PO Box 2230

Jefferson City, Missouri 65102

573.751.5558

FOR: Office of Public Counsel

ROBERT S. BERLIN, Senior Counsel

PO Box 360

Jefferson City, Missouri 65101

573.526.7779

FOR: Staff of the Missouri Public Service Commission

JUDGE WOODRUFF: This is a prehearing conference in GR-2008-0364 concerning the PGA/ACA filing of Atmos Energy. Begin by taking entries of appearance for Staff.

MR. BERLIN: Appearing on behalf of the State of the Missouri Public Service Commission, Robert S. Berlin, Post Office Box 360, Jefferson City, Missouri 65102.

JUDGE WOODRUFF: Thank you. For Atmos?

MR. FISCHER: Appearing on behalf of Atmos Energy Corporation, James M. Fischer and Larry W. Dority, law firm of Fischer and Dority, PC. Our mailing address is 101 Madison Street, suite 400, Jefferson City, Missouri 65101.

And on the telephone is Erica Hise, who happens to be in-house counsel for the company, but I won't enter her appearance.

JUDGE WOODRUFF: Ms. Hise, if you want to enter your appearance.

MS. HISE: This is Erica Hise for Atmos Energy. I'm sorry. I'm having a bit of trouble hearing on the line.

MR. FISCHER: Judge, unless you need her to enter, I think we're okay with just going ahead.

JUDGE WOODRUFF: Okay. I just wanted to

verify --

MR. FISCHER: I just wanted to identify she's on the phone.

JUDGE WOODRUFF: That's correct. Okay. For Public Counsel?

MR. POSTON: Marc Poston appearing for Office of Public Counsel and the public, PO Box 2230, Jefferson City, 65102.

THE COURT: Thank you.

Well, thank you all for coming this morning. And I asked you here to deal with a motion that was filed by Staff. Just trying to get some idea of what's actually going on in this case and if there is any possibility for reaching sort of -- some sort of amicable agreement on all this.

Staff's motion had asked for a waiver of the requirement that we have a discovery conference. This will take the place of that so that won't be an issue anymore. The commissioners, of course, are gone next week so there's not going to be any orders coming through agenda next week so we've got a little bit of time to try and work this out, to try to figure out what's going on.

First of all, we'll deal with the motion to compel aspect of this. Staff, do you want to

explain what this is all about?

MR. BERLIN: Sure, Judge. I think what I'd like to do is just start with a time line of actions here. On May 3rd the Staff issued its Data Request No. 117. It was a multipart data request, paragraphs A through M. And there was no objection made by Atmos to any of the parts of Data Request 117, particularly paragraphs J and K, which I'll explain in a minute. So May 13th came no objection was made.

The response to the data request was due May 23rd per commission rule. Now, Atmos had submitted a partial response of some information on May 24th and they submitted another partial response of some information on June 3rd.

Now, on June 3rd, Staff and Atmos counsel, Mr. Fischer, we met and held a discovery conference of our own to see if we could resolve certain objections to other DRs, not the DR that's in question here.

JUDGE WOODRUFF: Okay.

MR. BERLIN: And we were able to reach an agreement at that time on our ability to respond to certain DRs. And based upon that conversation at that time, I then later called you and canceled the meeting that we -- that I had originally scheduled for you on

the 3rd. One of the topics of discussion on June 3rd though was the lateness of DR 117. And Mr. Fischer assured me that the response was forthcoming.

Now, Judge, I would like to just say that so far, you know, this is -- I don't think there's anything unusual at this point. We were looking for the responses.

Now, that final response though to DR 117 was -- wasn't submitted until June 9th and it came to the attention of Staff on June 10th. And we are looking at filing rebuttal -- we needed the documents requested in DR 117 in order to prepare and submit our rebuttal testimony due just a few days later on June 14th.

Let me describe -- I would -- I would have to go into camera if you would like me to discuss the specifics of what we were looking for, but we were looking for certain contracts.

JUDGE WOODRUFF: We can discuss it in general terms at this point.

MR. BERLIN: All right. I'll do my best to keep it in general terms. We are looking for certain supply contracts in paragraph J from Atmos Energy Marketing. And we were -- and certain

agreements, addendums, exhibits, schedules, appendices, letter agreements and other contractual documents.

In paragraph K we were also looking for certain other contracts, more related to the financial side of the agreements that were made between Atmos Energy Marketing, the -- the affiliate of Atmos, and its suppliers for the provision of certain natural gas that was bought during the ACA period. And those documents were necessary for us to do and prepare adequately in -- our rebuttal testimony.

Now, I filed --

JUDGE WOODRUFF: Mr. Berlin, if I can interrupt you, I was curious about this information. What aspect of your case is it -- are you trying to prove with this information?

MR. BERLIN: All right. This is a -- an ACA case. It is a rate case. And we're trying to determine the prudence and the reasonableness of the transactions that Atmos Energy Corporation and its unregulated affiliate -- through its unregulated affiliate Atmos Energy Marketing, the gas supplies that were purchased for that ACA period.

Now, let me just say that this is a case that involves self-dealing. Atmos Energy Corporation

chose to deal with itself through its unregulated affiliate, Atmos Energy Marketing. And so the inquiry that Staff has is to determine whether the prices paid for the gas supplies by the unregulated affiliate were reasonable. We are trying to determine the fair market value of the gas supplies purchased by AEM on the behalf of the regulated LDC parent of AEM, Atmos Energy Corporation.

Our -- our audit is to determine and our inquiry is to determine the fair market value: Is the fair market value of the unregulated affiliate the same as the fair market value to Atmos Energy, the LDC.

JUDGE WOODRUFF: Okay. Now, in your initial audit results that started this whole process, it was my understanding that Staff had asked that the disallowance be based on the entire amount of profit that the affiliate had made on the transaction; is that correct?

MR. BERLIN: The Staff, based upon available information at the time that it was -- it was required to submit and file its Staff recommendation in this case was the end of December. And I can't recall if it was the 29th or the 30th of December, but Staff filed its Staff recommendation



proposing a disallowance based on the available information provided by Atmos at that time.

JUDGE WOODRUFF: Is this additional information then to refine the amount of disallowance?

MR. BERLIN: This information is to determine -- so that Staff auditors can determine what the true fair market value is.

JUDGE WOODRUFF: Will that have an impact on the amount of the disallowance then?

MR. BERLIN: It can. Once we look at the documents, it certainly can impact that recommendation.

JUDGE WOODRUFF: So it's possible that after you saw this information, then there would no longer be a disallowance? Is that a possibility?

MR. BERLIN: That is one of the possible outcomes, but we don't --

JUDGE WOODRUFF: Or it could be a larger disallowance?

MR. BERLIN: I don't know that it would be larger. I would have to, you know, go to my expert witness here on that, but it is possible -- there's a whole range of possible outcomes if Staff is permitted to complete its audit and inquiry into the fair market value of the gas supplies that the unregulated

affiliate, AEM, purchased on behalf of the regulated entity, its parent, Atmos Energy Corporation.

And so certainly there are -- that is one of the outcomes. But we don't -- we don't know the nature of the contracts that the unregulated affiliate entered into with its gas suppliers. We can't determine the value of something, that is the gas supplies, unless we see the contracts and the terms and conditions and the features of those contracts to determine if the seller -- well, because of the fact that the seller and the buyer are -- all report to one common management, they are -- Atmos Energy Corporation has control over both sides of the transaction.

They control the negotiation. The seller and the buyer both report to a common management. There's a unity of purpose in the corporation and that transaction is not done at arm's length.

This is not an ACA case that involves the dealings with an independent third-party gas supplier such as ExxonMobil, BP or Conoco Phillips. This is an ACA that involves an additional inquiry into the reasonableness and fair market value of the purchase of the gas suppliers done by Atmos Energy Marketing, the unregulated affiliate company on the behalf of

its -- its parent, the LDC, the company that we regulate. And so we are looking for contractual documents, and I'll use that in a general term. And that is what paragraph J and K are asking the company for.

Now, on June 9th, the company submitted its final response. And we looked at it -- we were able to look at it on June 10th. And Atmos's final response was that the documents were not in the possession of AEC, Atmos Energy Corporation.

Now, this came to us on the 10th and we had been working, Judge, on our rebuttal testimony. I'd like to emphasize, by the way, that Staff had not been dilatory and has been working on the case and we were working with Mr. Fischer in these responses.

Now, I would say that the responses weren't provided to us by Mr. Fischer from what we can tell. They were provided to us by the Atmos legal department. But we don't know who -- who truly provided all of them, but they seem to have originated at the Atmos legal department.

Now, they came to our attention and we were -- we had worked on our rebuttal testimony. At that point we determined that we were unable to properly complete the testimony because we had relied

on Atmos providing us the documents that we had requested. Atmos did not object to the provision of those documents, but Atmos then came and said, 17 days after the response due date, that the documents were no lon-- were not in the possession of Atmos Energy Corporation.

Now, Judge, that surprised us. That surprised us. And -- and there's a reason why it surprised us. Why didn't Atmos Energy Corporation have possession of the contractual documents of AEM, its unregulated marketing affiliate? We couldn't understand that response. We had every reason to believe that those documents would be provided to Staff.

The reason we had every reason to believe that, Judge, is because I'm holding in my hand this thick stack of data responses, request responses from Atmos Energy Corporation that are AEM documents. I have here provided to us in response to data requests to Atmos the AEM P and L sheet and I have the AEM gas purchase invoices.

This told us that Atmos Energy Corporation has control and possession of its doc-- of its unregulated affiliate documents. The unregulated affiliate reports up to Atmos Energy Corporation, the

LDC. As I said, it's well established and -- that there is a common management. The LDC manages and controls its unregulated affiliate. There is a direct line down to the unregulated affiliate. Again, the LDC and the unregulated affiliate share a common management unity of purpose.

Now, Staff has suspicion here and -- and it's a professional scepticism, if you will. It's what we do as auditors to determine the reasonableness and fairness of the gas supply prices. The buyer and the seller, Atmos employees on both sides of the transaction, report to a common management and they both have the same executive compensation and incentive program that is tied directly to the earnings per share performance of Atmos Energy Corporation.

They both have that same common purpose and vision to advance the interests of Atmos Energy Corporation through their incentive compensation programs. And so we have a reasonable suspicion, Judge. We -- we need to examine the fair market value of the documents -- the contracts that we had asked for from AEM, which they didn't provide us because they said they were not in the possession. But the gas purchase invoices of AEM and the AEM profit/loss

statement were in their possession earlier so -- we have that right here, Judge.

So that caught us by surprise and we were unable to properly complete our rebuttal testimony. As I said, we had been working on it, we filed -- we -- I filed immediately -- my first filing, as you know, was a motion to suspend the procedural schedule. I felt we were put up -- the actions that were taken in their responses and their violations and abuses of our discovery rules put us in a box.

We could not properly complete our rebuttal testimony, but I was not -- we were going to comply with the procedural schedule as it stood at that time and we filed our rebuttal testimony. It's incomplete. And if you read it, you can see there's three specific areas where it is incomplete because we had relied on Atmos's provision of the documents, the contractual documents that we requested in Data Request 117.

So Monday came and Mr. Fischer filed a response in opposition to our motion and then filed their rebuttal testimony. We then pulled together what rebuttal testimony we had and filed it along with another motion and request for waiver that seeks certain relief, Judge.

And to summarize it, we -- we were -- we were asking Atmos to -- that the Commission compel Atmos to respond fully to DR 117, the waiver of the additional discovery requirement, but that's not an issue because that, as you indicated earlier, right now this will serve as that.

And we're seeking that the Commission suspend the procedural schedule until discovery dispute -- this discovery dispute is resolved. And we are permitted that by Commission Rule 242.09(1) as it ties to Missouri Court Rule 61.01 that provides for sanctions against the disobedient party.

Now, Judge, I would like -- I would like to add this: There is no operation of law date here that the Commission must follow or that the company is tied to. There is no prejudice to Atmos because they already have the money collected from this ACA period. But there is a -- there is a prejudice to the ratepayer because we can't conduct a thorough and complete audit of these gas supply contracts and the purchase prices paid by the -- by the company unless we have these documents.

And so we had asked in our motion -- our second motion filed June 14th, that the Commission either permit Staff to file a supplemental rebuttal or

surrebuttal testimony unlimited as to the issues because of our inability to address issues in the rebuttal testimony that we did file per -- per Commission rule. We also asked, Judge, that we join Atmos Energy Holdings, Inc. and Atmos Energy Marketing, LLC as parties to this case.

But, Judge, I don't believe that's necessary and I don't know the answer to that, because Atmos is very clear in its organizational charts that it controls and manages its subsidiary company and its affiliate. And so the past record of discovery in this case, that Atmos has provided AEM documents, would indicate that they indeed have control and possession over the documents that are sought related to the '07/08 ACA period.

And so, Judge, we're asking that so that we can go off on this track of resolving discovery disputes, that we not be prejudiced and now be diverted to discovery matters and our efforts taken away from completing a thorough audit of the purchase prices and determining the fair market value of the gas supplies that the unregulated affiliate bought for its regulated LDC on the other side of the self-dealing transaction, if you will.

So I would -- I would point out that,



again, there is no rush to hearing here because of no operation of law date. Atmos waived any right it had to objection on DR 117 by not timely making one, as I stated.

And again, as a matter of law, Atmos controls its subsidiary and its affiliate and they have, you know, a common management with a unity of corporate purpose, they control both sides of the transaction, the seller and the buyer report to the same management.

And based upon Atmos's past provision of AEM documents in response to -- and I have held up the responses to DRs 106 and 107. These are the AEM profit and loss statement and the AEM gas purchase invoices that Atmos provided to us earlier.

And Staff is just concerned that it is unable to properly do its statutorily mandated -- that this Commission can do and perform its statutory mandated complete and thorough audit of the -- of the value of the gas supplies -- the fair market value of the gas supplies and to determine whether the prices that were paid by Missouri ratepayers in the Hannibal, Missouri area were indeed reasonable.

And as I say, these documents that we are seeking would help Staff make that determination and

help it complete its audit. And it would certainly affect the outcome of this case, depending upon the discovery that is -- responses that are provided to us. We have to have time to review those and to -- and to thoroughly investigate them. And it may lead to additional discovery, Judge. And we need to have that time.

And we don't want Atmos controlling the scope and the pace of discovery. We want to engage in the discovery that we are entitled -- the reasonable discovery that we're entitled to and -- and proceed with -- with the case.

JUDGE WOODRUFF: Thank you. Would Atmos like to respond?

MR. FISCHER: Well, thank you, Judge. There was a lot there and I'll try to address those points as I go along. First of all though, I think I need to give you a little bit more background on the case and the issue that's here.

This case involves one single legal issue, which really doesn't involve a lot of facts, and that is in the event that a public utility like Atmos enters into competitive bidding processes, as Atmos has done throughout its territory, and in the event that an affiliated gas marketer happens to win

the bid of the -- for the gas supply, is that good enough? Or if it happens to be an affiliate, do you then also have to impute the profits back from the affiliated gas marketer to lower the gas price that is paid by the customer to the regulated company?

Unlike a situation where if an unregulated gas marketer won the bid, you wouldn't be doing that, but because it happens to be an affiliate, do you impute the profits of that affiliate back to the gas company?

That's the sole legal issue that needs to be resolved by the Commission. That's the issue the company wants to get in front of the Commission as soon as possible. And that's the issue that I think the Staff has been proposing in their Staff recommendation, which was filed at the end of the year, which occurred after the -- after the Staff had done a complete audit for -- that lasted for more than a year.

And now they've been doing additional discovery since that time, they filed their Staff recommendation disallowing \$369,000 in that Staff recommendation. They've also reiterated that again in their direct testimony. Now they are doing discovery on the company's direct testimony, which -- which

didn't address any of these contracts that they're talking about.

So I guess my first point is, it's a legal -- legal issue that we would like to have addressed by the Commission sooner rather than later.

JUDGE WOODRUFF: Now, if I can interrupt.

MR. FISCHER: Yes, sir.

JUDGE WOODRUFF: You really described two issues. One would be the idea of -- if I can -- repeat it for me.

MR. FISCHER: Okay. Well, I'll try to simplify it. Really it's -- there are two issues, I agree. The first is whether the gas costs that Atmos is trying to pass along to the customer is prudent.

JUDGE WOODRUFF: Yeah, that's the overall issue.

MR. FISCHER: That's the overall issue. The second issue is whether, under the Affiliate Transaction Rule, the profits of an affiliate gas marketer should be imputed back to the -- the gas company because it happens to be an affiliate even though they've gone through the competitive bidding requirements of the Affiliate Transaction Rule.

That's the legal issue that I think is really in question here, that second one. And they --

go ahead.

JUDGE WOODRUFF: What I was looking at is divide that second one, I guess, as to whether competitive bidding is enough.

MR. FISCHER: Yes.

JUDGE WOODRUFF: If the Commission were to decide that competitive bidding is enough, then is it fair to say then we wouldn't even need to look at the second part of the issue?

MR. FISCHER: That would be our impression of the issue, Judge. Because, again --

JUDGE WOODRUFF: Let me ask Mr. Berlin. Do you see agree with that characterization?

MR. BERLIN: I'm sorry. Would you please restate your characterization?

JUDGE WOODRUFF: Well, the idea was that -- Atmos is saying that these contracts were awarded by competitive bidding and they're saying that that's enough. And I believe Staff disagrees with that. Is that right?

MR. BERLIN: Well, Judge, the Staff disagrees with that as being a single and sole determinative factor. Staff would agree it is one factor that we look at. One of the other factors is one I already mentioned, that both the seller and the

buyer share the same executive compensation, but --

JUDGE WOODRUFF: You don't need to --

MR. BERLIN: -- there's a lot of factors that we look at.

JUDGE WOODRUFF: Now, your discovery that you're disagreeing about, is that going to the second part of that issue about the amount of the profits that would be imputed back or -- what I'm trying to get at is can we answer the first question without answering the second question?

MR. BERLIN: Well, Judge, I -- I would disagree with Mr. Fischer's characterization that this is about imputation of profit. This case is not about imputation about profit solely or specifically.

What it is about the determination of fair market value of the gas supplies and were the prices paid reasonable. We can't determine the value of the gas supplies unless we see the contract -- contracts and the features and provisions and terms and conditions of those contracts, because that can affect the value.

We don't know what it is that is being bid out, being purchased by the affiliate. Remember, the company controls the seller and the buyer. This is not an independent third-party arm's length

transaction.

MR. FISCHER: Judge, I really didn't have a chance to get beyond that first point.

JUDGE WOODRUFF: I'll come back to you.

MR. FISCHER: Okay.

JUDGE WOODRUFF: I just wanted to explore this a little bit more.

MR. FISCHER: Going back to that last point though, the nature of the adjustment the Staff has proposed is that you look at the price that came out of the competitive bidding process and you subtract from that what they believe to be the profits of the gas marketer.

So whenever I use the terms "imputing the profits," he uses the term "determining the fair value." That subtraction results in the same thing. That's what the Staff is suggesting is the fair value of that -- that gas supply. So I mean, I think we're in the same -- same issue. It's just whether I call it imputing profits, he calls it determining fair value. That's how you get there. Okay?

So now they did an audit for over a year that ended at the end of this last calendar year. They didn't get around to filing -- asking for these contracts until right before the rebuttal testimony

was due. We indicated that we didn't have those contracts and that's -- that's the truth. We don't have those in the possession of Atmos, the public utility.

The Commission's Affiliate Transaction Rule itself creates a Chinese wall in the relationship between Atmos Energy Corporation, the public utility, which does not control the gas marketer, and the gas marketing company, which is an affiliate of it because it's owned by a single holding company.

JUDGE WOODRUFF: Clarify for me what the structure is.

MR. FISCHER: There's -- well, there's a -- I can have Erica jump in here, but there's an Atmos Holding and there's an energy corporation I think under -- there's the public utility and then there is the gas energy marketing company, which is an affiliate of the company.

JUDGE WOODRUFF: So Atmos, the utility, is a sister corporation to the --

MR. FISCHER: Yes.

JUDGE WOODRUFF: -- affiliate, or to the marketing affiliate?

MR. BERLIN: Judge, that's incorrect. That's incorrect. Atmos Energy Corporation owns its



subsidiary, Atmos Energy Holdings, Incorporated, which has under it and owns Atmos Energy Marketing, LLC. And that -- that information --

JUDGE WOODRUFF: So you're saying the utility aspect of the company is at the top of the pyramid?

MR. BERLIN: Yes. The utility --

MR. FISCHER: And I may be incorrect.

MR. BERLIN: They share a common management.

MR. FISCHER: I may have misspoken on that. That may be the structure, Judge. But regardless, the Affiliate Transaction Rules themselves create a Chinese wall and determine the relationship between the public utility and its -- and its marketing company.

It sets out all the provisions in the rule and what we can provide to the -- the gas marketing company. We can't provide any information that's not -- that we don't provide to unaffiliated gas marketing companies.

And, likewise, the company's manuals also define that relationship and the gas marketing company can't give information back to Atmos that it -- that is inappropriate that other gas company -- gas

marketers would not -- they can't benefit by that relationship at all. They hold them at arm's length, they keep this Chinese wall that and part of that is due to the Affiliate Transaction Rule itself.

Now, these gas contracts are not contracts with the public utility. What we're talking about are gas supply contracts between the marketing company and its upstream suppliers. So there's no privity of contracts, so to speak, with the public utility itself.

What the Staff is asking to do is to look at the business relationships between an unregulated gas marketer and its own suppliers upstream. And as I understand it from the testimony of Mr. Sommerer, which was filed on June 14th, he discusses that DR 117 and let me just read to you a portion of it.

He says: After the gas was delivered to Atmos, it would have been transported using Atmos's firm transportation agreement, but as discussed previously, the gas that AEM, which is the gas marketer, obtained at Haven and would re-- and resold to Atmos may not have been firm supply. This information was part of Staff discovery in DR 117 that has been hampered by Atmos's refusal to provide the data. Staff is asking -- or is taking action to

obtain this information which will assist in understanding the fair market value of the gas sold to AEM.

As I understand that section, what they are suggesting is that perhaps the supplies that AEM got upstream may not have been all firm supplies. And that if they're not all firm supplies, that that would affect the -- their view of whether Atmos was getting the gas at a fair market value.

Now, that's the sole purpose, as I understand it, for wanting to delve into the relationship of an unregulated company not under the jurisdiction of this Commission with its own unregulated suppliers upstream. Now, that's -- that's the nature of this issue.

We think the Staff has been very, very late in asking for this information. They could have asked for it at the time of the audit, they didn't. They could have asked for it after -- in any of the 20 months that have occurred before they got around for asking for it.

Now at the last minute they're suggesting that because we don't have that information in our possession, that's grounds to suspend the entire procedural schedule so that they can go on a fishing

expedition into this kind of thing. Now, we don't think that's necessary for the determination of the legal issue that the Commission is being asked to resolve.

We believe that we should get it in front of the Commission as soon as possible and not -- not allow the Staff to go off on delving into unregulated activities in a way that is not necessary to resolve the case.

But as I said in our response, Staff didn't come to us with this dispute. They filed for a suspension of the procedural schedule before I ever received a phone call or anything to talk about it. We think there is a compromise. We think it's a reasonable compromise. It doesn't violate the Chinese wall and the Affiliate Transaction Rule and it doesn't violate Atmos's manuals that keep that Chinese wall in place.

We went to AEM and suggested is there something that we can provide to Staff that would deal with their fundamental issue and resolve the matter that wouldn't violate the Chinese walls that we're talking about. And what they've suggested -- and this is something that I would put on the table as a compromise position that would keep us from having to

litigate all this discovery and we can get on to filing our surrebuttal and we can get the Commission to resolve the legal issue about whether you need to do more than just competitively bid your gas supplies.

And that is, AEM has indicated that it could provide to Atmos an affidavit that would affirm that during the ACA period in question in this case, the gas supplies provided to Atmos were indeed firm; or if some percentage of those services were not firm, they would identify that.

That should resolve the question without having to deal with all of the -- getting into all the nuances of the contracts between unregulated upstream suppliers and an unregulated company that is not in front of this Commission. But that should give the Staff the -- the level of information that they need to answer that question, which, according to their testimony, is what they're trying to find out.

So I would suggest that as a compromise and I think we need to get on with filing our surrebuttal testimony. We've got our position statements due in the next couple of weeks, our -- our list of issues. And we can get this issue in front of the Commission and resolve the legal issue, which is

fundamentally just a question of how do you interpret that Affiliate Transaction Rule.

JUDGE WOODRUFF: Okay. Response?

MR. BERLIN: Well, Judge, part of the response to Data Request 117, one of the interim responses, was the company is still missing some portions of the response and will provide as soon as available. And it was never made available to us, which is important to determine the costs of the supplies.

And let me just -- if I could, I want to address just one point before I respond specifically to that. The talk of profit imputation. What we're looking at is the fair market value of the cost of the gas supplies. I said the cost. Not the sales price, but the cost. Because sales minus cost equals profit. So we need to know the cost of the gas supplies.

Now, the value -- let me -- and let me just kind of amplify why understanding that is so important. Mr. Fischer seized on one point as to whether Atmos Energy Marketing Company was buying -- indeed bidding out for firm supplies. That's one of the questions. But the val -- that would help determine the value of the gas package.

The value of the gas contracts depends on

features such as pricing provisions, receipt points, delivery points, quantity, flexibility on nomination rights -- and I emphasize flexibility on nomination rights -- firm obligation or interruptible obligation, the quantity of gas AEM pooled or -- or even aggregated on a particular pipeline.

That all might help enlighten the inquiry as to the cost of the gas supplies and the value. Because how does the -- because we need to see that and understand it.

Now, I -- I would be glad to enter into discussions with Mr. Fischer and Atmos counsel on resolving this. The problem is we were caught by surprise. We couldn't complete our rebuttal testimony, we can't complete our audit. And the actions -- despite all the words that are said here today, the actions and the dates show that we were placed at a clear disadvantage and we couldn't per-- do our rebuttal testimony.

MR. FISCHER: Judge --

MR. BERLIN: And --

MR. FISCHER: Excuse me. I'm sorry. I didn't mean to interrupt.

MR. BERLIN: Well, let me just say, I'd be willing to talk with him only if we get out from

under the yoke of a procedural schedule. Because whether that -- these discovery issues can be resolved short of going to a full motion to compel hearing in front of the commissioners, well, I don't know.

You know, I'm certainly willing to entertain that with -- that with Atmos counsel, but we don't want to be fighting discovery matters as to whether or not -- you know, the scope and the pace of discovery, which they would control and backs us up against a locked-in procedural schedule.

In order to --

JUDGE WOODRUFF: Well, let me interrupt you there. I certainly think the Commission will be amenable to allowing the parties sufficient time to prepare their cases and that can certainly be something that you all discuss.

The hearing in this case isn't set until September. And I realize that's -- the Atmos rate case is in August so -- **as I recall**, that's why we set this in September so we've got a little bit of time before the hearing certainly.

MR. FISCHER: Well, Judge, I also would suggest that what this case is about is the Staff's proposed disallowance, which was filed in December following a full audit. Now, I think what they're



saying is they don't have a basis for that disallowance that they proposed, without having this information.

So I would suggest that they would withdraw that disallowance and we won't have to deal with it. We can deal with it at some future time, but they're saying they don't have a basis for what they've already suggested.

They've suggested that in their Staff rec, they're suggested that in their rebuttal and now we're supposed to be doing discovery on our various direct and their direct, which we've done, we filed our rebuttal. We should now be doing discovery on our rebuttal testimony.

It's not to develop -- not to find the end date of the audit. The audit has already ended. We're now dealing with the testimony that flows from that. And if the Staff doesn't have a basis for what they proposed, then that's the problem. We'll talk about that at the hearing.

But it's not -- it shouldn't be an open-ended discovery matter where you do your audit, you make a disallowance, but then you start your discovery and you go forward and you get into all the unregulated activities of the companies, which are

beyond the Commission's jurisdiction.

Now, the Staff doesn't want to get it in front of the Commission apparently. We would like to get it there as soon as possible. And I'm just frustrated because this should not be an unending audit scenario again where you continue to audit, you don't have to rely on what you did in your audit of a previous year, you get to go start over and go into the path of getting into unregulated activities, which were never audited apparently and they never asked for that information in a timely way. That's frustrating for the companies.

But anyway, I think we're talking here about, you know, the telephone conference to deal with the motion to compel. If we need to go in front of the Commission, I guess we can, but I'd like to resolve this. And if the Staff would agree to this compromise, then we can go forward and get our testimony done and we can all prepare for our hearing and we can get the issue in front of the Commission.

JUDGE WOODRUFF: Well, I'll let you discuss the compromise off the record later if you want to go in that direction.

MR. BERLIN: Judge, this company chose to deal with itself. And when the buyer and a seller are

controlled by the same management ultimately and they're all in the same house, it invites additional scrutiny. These cases are a lot harder to determine the fair market value, to determine the reasonable -- whether the prices paid by the people in Hannibal, the ratepayers in Hannibal were indeed the -- reasonable and fair.

And we have to complete a thorough audit. Our inquiry does not -- and our discovery rights do not end with a filing of a Staff rec or a filing of specific testimony. The discovery -- reasonable discovery is ongoing. And we have to have that opportunity. If we're going to fight discovery issues, then we need to suspend the procedural schedule.

And the only case that I can cite to you right now is the case pending -- ACA cases pending with Laclede on affiliate transactions where there is no procedural schedule and they are working, you know, the -- in addressing discovery issues right now and that have gone on for a long time.

JUDGE WOODRUFF: For years.

MR. BERLIN: These are complex cases, Judge, when you have self-dealing. And the -- there's an Illinois docket out there where the -- Atmos is

involved in the very same kind of affiliate type of issue and that has been -- discovery has been going on for two years. And this is not unusual for the complex nature of the type and thorough audit that we have to conduct when the company decides that it's going to deal with itself.

And so we're always open to discussion, but we can't be backed into the corner on a procedural schedule. And part of what I put in my first motion was that Staff would agree to file status reports informing the Commission of the progress. Staff does not want to keep an open-ended case.

Staff has not been dilatory. Our record is one of moving this case along. We filed what rebuttal testimony we could and we need to be able to work discovery issues separate from having to proceed on the merits of this very complex case.

So that's where we're at, Judge. We -- we need -- we need to have the ability to address the discovery issues without the procedural schedule. And I would add, Judge, that they have violated and abused the Commission's discovery rules. They failed to object within the limit and they --

JUDGE WOODRUFF: They, in fact, have not objected. Correct?

MR. DORITY: They have not.

JUDGE WOODRUFF: You keep talking about how they abused the process, but -- they apparently responded late, but they didn't -- their response was, We don't have the documents. So that's the response. And you filed your motion to compel. So I don't see that there's been any abuse of process by either party here.

MR. BERLIN: Well, they led us to believe -- number one, they have provided us AEM documents, as I indicated, and I can show you with these DRs. So we have every reason to believe that.

They didn't object to the provision of the documents that they have demonstrated are in their -- their possession, the types of documents; The -- the gas invoices, the AEM -- the AEM gas invoices, the AEM P and L statement.

They had those -- Atmos provided that to Staff. And so if this was going to be an issue, we should have -- it should have been identified but they waited until the eleventh hour before Staff was getting -- before Staff could prepare its rebuttal testimony. And so we are at a disadvantage here, Judge.

And certainly I don't -- I would -- if I

was Mr. Fischer, I'd want to move this thing along too because they controlled all the documents and that puts Staff at a clear disadvantage and Public Counsel at a clear disadvantage.

JUDGE WOODRUFF: Does Staff have any other alternatives to obtain these documents from Atmos, the utility? Could they subpoena these documents from the other entity, from the marketing company?

MR. BERLIN: Judge, we could do that if it's necessary. And that's part of what we -- you know, they're not -- if they aren't going to provide us these contracts, then we'll need to do either a motion to compel or a subpoena. But that's -- and we would proceed along those lines.

MR. FISCHER: Judge, we would like to very much find an amicable compromise here because, you know, to bring in AEM as separate parties or to go fight in circuit court, add additional cost to the process, we're -- what we're talking about, something that we have not really brought out yet is that the bidding process that they used, only 5 out of 16 contracts ended up being awarded to the affiliate.

Now, if they had not awarded those to the five, apparently Staff wouldn't have a problem with

allowing the unaffiliated companies' gas costs to be passed through because it came out of an affiliate -- it came out of a competitive bidding process.

But because I guess it's -- let's see -- approximately gas supplies to 19,000 customers, which is less than one-third of the Missouri customers, happened to have supplies that were provided by the affiliate, that's the reason Staff made its disallowance in December, reiterated that disallowance in its direct testimony and that's what we're fighting about is the Staff's position that they should disallow it.

Now Staff is apparently saying they really don't know and they need additional discovery. Well, that discovery should have happened. It should have happened before they filed their Staff rec and certainly before they did their direct testimony. And now just to say, well, let's continue to have a long-ended discovery process is just not reasonable.

MR. BERLIN: Judge, if we get the documents that we have requested, it is possible that we could get to where Mr. Fischer is discussing in terms of resolving the case. You know, it is certainly a possible outcome. We're -- it's -- we don't have the information.

MR. FISCHER: And it's just as possible that we'll end up doing like Laclede where we go through the courts and up to the Supreme Courts so that Mr. Sommerer and his folks can take a look at unregulated contracts for unregulated suppliers that are beyond the jurisdiction of this Commission.

MR. BERLIN: Well, Judge, and I submit to you that maybe is what we need to litigate, because we have discovery rights here and we need to be able to perform -- fully perform the audit on the documents that we have requested and were led to believe would be provided to us by Atmos's own actions in provision of other AEM documents. And it -- you know, that may -- may very well be a track we need to go into to resolve the discovery in this case.

But that said, we are unable to proceed with the procedural schedule without the documents. We don't have control over the documents, Judge. We just don't. And -- and -- and so --

JUDGE WOODRUFF: All right. Well, these motions are pending before the Commission and I'm not going to try to make any rulings on them today. As you're all aware, there's not likely to be an agenda meeting next week, so the earliest agenda the Commission could deal with this would be the June 30th



agenda, which is already after the joint list of issues and the statement of positions are due in this case.

What I'm going to ask you to do is to discuss this amongst yourselves after we go off the record, see if there is any amicable agreement that you can reach. File a joint report with me on Wednesday of next week. I'm not sure what day of the -- what day that would be. That would be the 23rd, I guess.

MR. DORITY: 23rd.

JUDGE WOODRUFF: Let me know where you're at. And at that point if either party wants to file any additional written documents, you can file those at the same time and I'll put something on agenda for the 30th for the Commission to try and make a decision on it.

MR. POSTON: What are the motions that are pending?

JUDGE WOODRUFF: Well, right now we have two motions; one from Staff that was filed on Friday asking to suspend the procedural schedule and then there was another motion filed on Monday that asked -- is a motion to compel and a motion to add parties, file supplemental testimony or suspend the procedural

schedule, sanctions and expedited responses. So they're -- I would anticipate taking up both of those.

MR. FISCHER: Yeah, we'd like to have the opportunity to respond to that in writing.

JUDGE WOODRUFF: Yeah. If you can do that by next Wednesday also. But I will emphasize, of course, that if you can reach an amicable settlement, that is certainly agreeable -- or preferable to the Commission.

Mr. Poston, you've been sitting quietly back there. Does Public Counsel have a position on all this?

MR. POSTON: Yeah. We do support what Staff's trying to do here. There is no time issue as far as we're concerned, just like in the Laclede case. You know, I see Atmos trying to rush this along. And that -- the only reason I would see for that is to hamper the Staff's ability to actually get these documents. So there's no operation of law date, there's no reason this can't be delayed to give -- you know, to flesh out these issues.

And as far as the data, what Staff is trying to seek, it seems pretty clear that it is within Atmos's control and that this audit and -- consumers won't feel as if there is a complete audit

of what -- of Atmos's gas purchasing unless this information is looked at.

I mean, you know, like Staff counsel said, it could turn out that this is not influential in the case, but we don't know until we see it. And at that time the Commission can -- if the Staff even decides to try to enter it as evidence, the Commission can decide at that point if it's -- if it's relevant.

But, you know, right now it's just at discovery. They're just trying to get these documents to then determine whether it's, you know, something they want to use in the case. And so I think it's clear that this -- what they're trying to seek, you know, is -- could potentially lead to -- to evidence that could be entered in the case.

So I don't see any reason why the Commission would not compel Atmos to provide this data and I don't see any reason why the Commission would not allow this case to be extended to give time to flesh these issues out.

JUDGE WOODRUFF: Let me give Atmos a chance to respond to that as far as the -- who loses if this is delayed. Is Atmos going to lose money or is there a pool of money that they're not going to be able to access at this point?

MR. FISCHER: Well, Judge there's -- I think there's a need by all involved, the company and its ratepayers, to know with some certainty what the gas costs are that are going to be flowed back through the ACA process. It's always the company's preference to try to get these things resolved.

There are cases I know -- MGE being one -- where these drug on for years and years and years and without any certainty. That's not in anybody's best interest. And it's the interest of I think our company to try to do an ACA period, get it resolved and then move onto the next one.

And certainly in this case when it's really just a legal issue, we believe that we ought to get it resolved. And we had this same issue in the last ACA, we settled it, we were able to reach a dollar settlement, but the issue was there and the Staff did discovery on that issue at that time. Now it's come back up in another ACA period. We need to get it resolved by the Commission.

JUDGE WOODRUFF: Or it's going to come up in the next ACA.

MR. FISCHER: Yeah, it's going to keep coming up. And, frankly, what's going to happen is if it becomes such a pain to deal with these issues, the

affiliate may just choose never to bid again and the ratepayers are going to be the worse off for it. Because if they could have bid at a lower price than unregulated affiliates or unaffiliated companies, then the gas costs are going to be higher because they -- they could have had a lower bid but because this regulatory process has been so onerous, they chose not to bid, which is certainly their right.

JUDGE WOODRUFF: Let me ask you this for all the parties: Would it be possible to bifurcate this proceeding so that we can answer the first part of the question about is competitive bidding enough?

MR. FISCHER: We would support that wholeheartedly.

JUDGE WOODRUFF: Would that be acceptable to Staff and Public Counsel? Do you understand what I'm saying?

MR. POSTON: No. Could you explain?

JUDGE WOODRUFF: Well, as I understand, the company's argument is that this -- there has been competitive bidding to award these contracts and their argument is that that's enough, the Commission doesn't have to look beyond that into the details of these transactions.

If the Commission agreed with that, then

there would be no need to look at fair market value.  
Is that true?

MR. BERLIN: No, Judge, I disagree with that. Looking at the contracts that we have requested will -- will determine whether the bidding process was -- was faulty or not. We -- as I mentioned, there's a lot of provisions in a contract. We don't know the value of something, you know, until we see what the many provisions of the contract are.

JUDGE WOODRUFF: And that's the contracts you want to see that are the subject of this data request?

MR. BERLIN: Yes.

MR. FISCHER: And, Judge, from my perspective, that goes to the question of, you know, what is the level of the disallowance or the imputation or the determination of fair market value, not to whether the competitive bidding is the -- what you have to do under the Affiliate Transaction Rule.

JUDGE WOODRUFF: Okay. Well, I think we've reached an impasse at this point from anything else that we can do on the record. Is there anything else anyone wants to add while we're on the record?

MR. FISCHER: Thank you very much for your time.

JUDGE WOODRUFF: All right.

MR. BERLIN: No, Judge. Thank you.

JUDGE WOODRUFF: Well, then I'll leave you to your discussions.

MR. DORITY: You might advise Ms. Hise to stay on the line.

JUDGE WOODRUFF: Ms. Hise, are you still there?

Ms. HISE: Yes, sir.

JUDGE WOODRUFF: All right. You can stay on the line. And with that then, we're off the record and I'll be leaving the room.

(Prehearing conference concluded.)

## CERTIFICATE OF REPORTER

I, Tracy Thorpe Taylor, CCR No. 939, within the State of Missouri, do hereby certify that the testimony appearing in the foregoing matter was duly sworn by me; that the testimony of said witnesses was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this matter was taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

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Tracy Thorpe Taylor, CCR