

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 9th day of
December, 2009.

In the Matter of Atmos Energy Corporation's Tariff)	
Revision Designed to Consolidate Rates and)	<u>Case No. GR-2006-0387</u>
Implement a General Rate Increase for Natural Gas)	
Service in the Missouri Service Area of Atmos)	

**ORDER CLARIFYING PROCEDURE FOR
ON-THE-RECORD PROCEEDING**

Issue Date: December 9, 2009

Effective Date: December 9, 2009

An on-the-record proceeding is scheduled for Tuesday, December 15, 2009. The order setting the proceeding delineated the scope of the proceeding. It directed the parties to be prepared to answer questions regarding: (1) procedural timelines; (2) whether the record should be re-opened and additional evidence adduced; and, (3) hypothetical scenarios regarding reversion to status quo rate design and effects on revenue requirement and rate classes, and the effects of consolidating the remanded matter with Atmos Energy Corporation's next general rate case.

On December 2, Public Counsel filed a motion for clarification because the Commission had also directed the parties to disclose any witnesses they intend to proffer at the proceeding, if in fact they intended to proffer any witnesses. There was no requirement in that order that witnesses be proffered; it was left to counsel's decision on how they feel they may best represent their respective clients. Public Counsel is of the impression that if witnesses are proffered, the Commission will be adducing competent evidence and the record in this matter will have effectively been reopened.

On-the-record proceedings are typically designed for one-way exchanges between the Commissioners and the parties and their representatives. When the proceedings involve one-way communications, they are legislative in nature, not adjudicatory.

It is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party.¹ The only exception to this fundamental evidentiary rule is if an attorney's statements make "a clear, unequivocal admission of fact, in which case they are binding on the party in whose interest they are made."²

Moreover, one-way exchanges where witnesses (even if sworn) are not cross-examined by opposing counsel do not generate competent evidence upon which the Commission may base a decision on the merits of any action.³ Fundamental aspects of due process include the ability to cross-examine witnesses and to present evidence, and cross examination is required in administrative cases once they involve the agency's quasi-adjudicatory authority for deciding contested issues.⁴

¹ *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. Banc 2005) (Judge White Dissenting), *citing to*, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. Banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. Banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955).

² *Mills v. Redington*, 736 S.W.2d 522, 525 (Mo. App. E.D. 1987); *Harper v. Calvert*, 687 S.W.2d 227, 230 (Mo. App. W.D. 1984); *Rawlings v. Young*, 591 S.W.2d 34, 38 (Mo. App. E.D. 1979).

³ *Colyer v. State Bd. of Registration For Healing Arts*, 257 S.W.3d 139, 146 (Mo. App. 2008). See also *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). *Jamison v. State, Department of Social Services*, 218 S.W.3d 399, 405-415 (Mo. banc 2007).

⁴ *Id.*; *Mikel v. Pott Industries/Saint Louis Ship*, 910 S.W.2d 323, 327 (Mo. App. E.D. 1995); *State ex rel. Utility Consumers Council v. Public Service Commission*, 562 S.W.2d 688, 694 (Mo. App. 1978). Due process "includes knowing the opponent's claims, hearing the evidence submitted, confronting and cross examining witness, and submitting one's own witnesses." *Id.*; *Graves v. City of Joplin*, 48 S.W.3d 121, 124 (Mo. App.

Simply put, the scheduling of an on-the-record proceeding does not re-open the evidentiary record in this matter. An on-the-record proceeding should not be confused with an evidentiary hearing. Because of the apparent confusion surrounding this procedure the Commission will clarify to the parties that even if they proffer a witness, this is not an evidentiary hearing, this will not constitute the taking of competent evidence, and the Commission is not re-opening the record by having this proceeding.

THE COMMISSION ORDERS THAT:

1. The Office of the Public Counsel's motion for clarification is granted.
2. The procedure for the on-the-record presentation scheduled for December 15, 2009, is clarified as directed in the body of this order.
3. This order shall be effective immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Davis, Jarrett, Gunn,
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

S.D. 2001). *Lewis v. City of University City*, 145 S.W.3d 25, 31 (Mo. App. E.D. 2004).