

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 11th day of February, 2009.

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

**NOTICE AND ORDER FINDING ATMOS ENERGY CORPORATION'S
ANNUAL REPORT TO BE IN COMPLIANCE, AND DENYING
PUBLIC COUNSEL'S REQUESTS FOR CLARIFICATION
AND TO OPEN AN INVESTIGATION**

Issue Date: February 11, 2009

Effective Date: February 21, 2009

Syllabus: The Missouri Public Service Commission accepts Atmos Energy Corporation's Annual Report and denies the Office of the Public Counsel's challenges to the report's compliance and its request to open an investigation.

Background and Procedural History

The Commission issued its Report and Order ("Order") in this matter on February 22, 2007; bearing an effective date of March 4, 2007. Atmos Energy Corporation ("Atmos") filed compliance tariffs for rates and rate design, Tariff Tracking No. YG-2007-0602, which were approved to become effective April 1, 2007. These tariffs replaced Atmos' prior tariff (JG-2003-0046) in its entirety. In addition to compliance tariffs for rates and rate design, Atmos filed compliance tariffs to effectuate its Energy Conservation and Efficiency Program, Tariff Tracking No. YG-2007-0957, which were approved to become effective on August 31, 2007.

The Office of the Public Counsel (“Public Counsel”) sought a Writ of Review in the Cole County Circuit Court, and on August 27, 2008, the Court entered a judgment reversing the Commission’s decision and remanding for further proceedings. Atmos filed its notice of appeal with the Missouri Court of Appeals, Western District, on October 3, 2008, and the Western District currently has jurisdiction over the Commission’s final Order.¹ The Commission notes that the circuit court’s judgment does not invalidate the Order while an appeal is pending at the Missouri Court of Appeals or the Missouri Supreme Court.² Consequently, the Order remains in full force and effect and unchanged by the circuit’s court’s decision.

Pursuant to the Commission’s Order, Atmos filed reports on its Energy Conservation and Efficiency Program on May 15, 2008 and on August 29, 2008. Atmos also filed its Annual Report (“Report”) regarding the impact of its fixed delivery charge rate design (also known as the single fixed variable rate design) on energy efficiency and conservation on November 24, 2008. Public Counsel objected to Atmos’ Report on December 4, 2008. Public Counsel claimed the Report did not comply with the Commission’s Order and requested an investigation. Staff filed a reply to Public Counsel’s objection on January 5, 2009. Public Counsel filed a surreply to Staff’s reply on January 15, 2009, and Atmos filed a response on January 15, 2009.

¹ Western District Case No. WD70219 is not yet disposed.

² *State ex rel. GTE North, Inc. v. Missouri Public Service Com'n*, 835 S.W.2d 356, 363-368 (Mo. App. 1992) (This case interprets the construction and interaction of Sections 386.270 and 386.540).

Atmos' Report – Impact of its Rate Design on Energy Efficiency and Conservation

Atmos' Annual Report:

- (1) summarizes the program;
- (2) describes how the new rate design has aligned the interests of the customers and the company to encourage conservation;
- (3) identifies its contributions to the program, i.e. \$165,000 for the first year and \$173,000 for the second year;
- (4) recites expenditures of several thousand dollars more for public education about the program and delineates all steps taken to promote public education regarding the program;
- (5) lists the current number of customers participating in the program, i.e. 12 homes weatherized and 6 more in progress;
- (6) observes that only a few months of consumption data is available post-weatherization;
- (7) relates that after two years it will have available a full year's data, at which point it can perform a more complete evaluation;
- (8) elucidates that 46 customers have received High Efficiency Space Heating rebates related to replacement of less efficient heating equipment;
- (9) recounts that the average equipment removed by customers during the first program year had an Annual Fuel Utilization Efficiency ("AFUE") of 68%, while the average AFUE of the new equipment was 93%. As a direct result of the installed higher efficiency heating equipment, it is estimated that the average customer who has taken advantage of this rebate will now consume approximately 270 Ccf less per year. This translates to over \$240 in savings over a twelve month period (assuming an average monthly PGA of .90/Ccf);
- (10) outlines additional benefits from the fixed delivery charge rate design beyond the Energy Efficiency and Conservation Program including increased stability in rates, better customer management of energy cost, and lower winter bills; and,
- (11) establishes that the two primary concerns identified with implementing a fixed delivery charge rate design have not materialized. The first concern centered around the possibility that there would be a large number of customer complaints during the months following the implementation of the new rate design, as customers experienced increased gas bills during the

summer. The other concern was that the Company might experience an increased level of customers leaving the system to avoid paying the fixed delivery charge during months where they consume little or no natural gas thereby placing a greater financial burden on the remaining ratepayers.³

Public Counsel's Objection

Public Counsel argues that the Report does not analyze whether the Order, by implementing the single fixed variable ("SFV") rate design, removed price signals and increased usage. Public Counsel requests the Commission issue an order requiring Atmos to amend its Report to fully comply with the Order, and further requests the Commission open an investigation into Atmos' rate design.

Staff's Reply

Staff correctly notes that the only guidance provided by the Commission regarding the filing of Atmos' Report was one sentence appearing in the body of the Order that was repeated as Ordered Paragraph No. 9, which states:

Finally, if the fixed delivery charge rate design is implemented, Atmos shall file on an annual basis a report with the Commission for the purpose of evaluating the effect of a fixed delivery charge rate design on energy efficiency and conservation. (Report and Order, pp. 22-23).

Staff argues out that Public Counsel's allegations of Atmos' non-compliance are merely another challenge to the SFV rate design. Staff believes Atmos' report is in compliance with the Commission's Order.

³ The Company reports that: (1) the transition to the new rate design has been virtually seamless; (2) it has experienced only a handful of customer inquiries/complaints related to the new rate design at the call center, local office, and Commission levels combined; (3) it has not experienced the level of customer complaints or interest that was initially anticipated; and (4) it has not experienced greater residential customer attrition since the implementation of the fixed delivery charge design. Atmos' average change in the number of residential customers for the five annual periods from April 2001 through March 2002, to April 2006 through March 2007 was a loss of 633 customers per year; and for the same period following the new rate implementation (April 2007 through March 2008), the Company's residential customers decreased by 733. The four month period of April 2008 through July 2008, shows a residential decrease of 204 customers. The projected annual loss based on the 204 customers leaving the system in 4 months time would be approximately 612 customers. This suggests that the Company has not experienced a significant change in the number residential customers as it relates to the new rate design.

Staff also states there is no basis for OPC's requested "investigation." Pursuant to the collaborative process prescribed in the Order, the Collaborative Members (Atmos, Commission Staff, the Missouri Department of Natural Resources – Energy Center, and Public Counsel) helped design the Program Description, General Terms and Conditions, and the specific components of the Conservation Efforts constituting Atmos' Energy Conservation and Efficiency Program. In accordance with the parameters agreed upon by the Collaborative Members (including Public Counsel), Atmos has been providing the Collaborative Members quarterly reports and has filed Biannual Reports with the Commission. In addition, both the *FILING MEMORANDUM Regarding Energy Conservation and Efficiency Program* and the tariff sheets filed by Atmos on June 28, 2007,⁴ inform the Commission that Atmos will conduct a comprehensive evaluation of the program in the following manner:

"At the end of the second program year, the Company will perform an evaluation of [the program] to evaluate the success of the program in accordance with parameters developed by the Collaborative Members. Based on discussions of the Collaborative Members to date, it is anticipated that such evaluation will address the success of the program in terms of participation, increased affordability, reduced arrears, reduced late payments, disconnects/reconnects and reduced uncollectibles. Information on customer usage and payments will be included in the evaluation." Moreover, Collaborative Members will continue to actively participate in the program evaluation process.

Staff observes that an evaluation done at the end of the second program year, as already planned, will benefit from Atmos having collected more meaningful and ripe data. At present there is only data for a single 12-month period after the rollout of the SFV delivery charge (April 2007 – March 2008). According to Staff, not only is data from a single period inadequate, that data reflects the initial program start-up. Atmos must collect

⁴ See EFIS Docket No. 226. EFIS is the Commission's Electronic Information and Filing System.

data from a second period, especially after the program has been fully implemented, before it can provide a more meaningful evaluation.

Staff also correctly points out that Atmos' currently approved Tariff Sheet No. 115 (Energy Conservation and Efficiency Program) provides that the program will remain in effect unless the program is modified or terminated by the Commission, or a court invalidates or otherwise overturns the Commission's Order. Given that the circuit court's judgment to reverse and remand is on appeal, the Commission does not yet know whether its Order will remain intact or whether an ultimate remand will involve any issue connected with the rate design and its interrelation to the conservation and efficiency program.

Public Counsel's Surreply

Public Counsel filed a surreply to Staff's reply reiterating its previous requests; however, Public Counsel changed its position on its request for an investigation agreeing with Staff that a new docket to investigate might not be necessary at this time. Public Counsel also substituted a completely different request for the Commission to newly interpret its Order to provide the parties with guidance as to what the Commission's expectations were regarding Atmos' Report.

Atmos' Response

Atmos also responded and fully concurred with Staff's analysis.

Conclusions and Decision

After reviewing the parties' filings and the Commission's Order, the Commission concludes that Atmos filed a detailed Annual Report that complies with the Commission's general directive with regard to providing information on the impact of its fixed delivery charge rate design on energy efficiency and conservation. Atmos' approved tariff for its

Energy Conservation and Efficiency Program provides that the program will remain in effect unless the program is modified or terminated by the Commission, or a court invalidates or otherwise overturns the Commission's Order. The Commission's Order is still in full force and effect while the case remains on appeal, and it is unknown what, if any, part of the Commission's decision will be affected by the appellate court's or circuit court's rulings.

The courts have jurisdiction to review the Commission's Order on the merits of the case.⁵ The Commission lost jurisdiction to amend, clarify or take any other action with regard to the Order when the appeal started.⁶ Even if the Commission still had jurisdiction, it would also be unwise for the Commission to take such action without knowing what the courts will ultimately do – premature action may merely result in addressing issues that do not require revision and result in a subsequent appeal.

However, the courts have no jurisdiction to review the Commission's interlocutory orders concerning ancillary issues.⁷ So while the Commission will take no action that would bear on its final Order, it will rule on Public Counsel's current requests so long as that ruling has no effect on the Order. Public Counsel, as Staff so thoroughly outlined, is incorrect about Atmos' report. The report is in compliance with the Order, and Public Counsel gives no valid reason to launch an investigation when another report is already scheduled to be completed once additional data has been collected. Moreover, the

⁵ Their limited jurisdiction to review final administrative orders on the merits of a case is outlined clearly in the Mo. Constitution, Art. V, Sec. 18 and in Sections 536.100, 536.150, and 386.510. This limited jurisdiction is also thoroughly delineated in *State ex rel. Riverside Pipeline Co., L.P. v. Public Service Com'n of State of Mo.*, 26 S.W.3d 396, 399-401 (Mo. App. 2000).

⁶ *Woodman v. Director of Revenue*, 8 S.W.3d 154, 156-157 (Mo. App. 1999); *Sheets v. Labor and Industrial Relations Commission*, 622 S.W.2d 391, 394 (Mo. App. 1981); *Eleven Star, Inc. v. Director of Revenue*, 764 S.W.2d 521, 522 (Mo. App. 1989); *Dillon, d/b/a Home Satellite Systems v. Director of Revenue*, 777 S.W.2d 326 (Mo. App. 1989).

⁷ *Id.*

Commission may be performing another review of Atmos' SFV rate design depending upon the courts' directives once the appellate process is complete.

THE COMMISSION ORDERS THAT:

(1) The "Annual Report of Atmos Energy Corporation Regarding the Company's Fixed Delivery Charge Rate Design and Its Impact on Energy Efficiency and Conservation," filed on November 24, 2008 by Atmos Energy Corporation was timely filed and complies with the Missouri Public Service Commission's February 22, 2007 Report and Order.

(2) The Office of the Public Counsel's request for an investigation into Atmos Energy Corporation's rate design is denied.

(3) The Office of the Public Counsel's request for the Commission to further interpret and clarify the Missouri Public Service Commission's February 22, 2007 Report and Order is denied.

(4) This order shall become effective on February 21, 2009.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Murray, Davis, Jarrett, and Gunn, CC., concur.
Clayton, Chm., concurs, with separate concurring
opinion to follow.

Stearley, Senior Regulatory Law Judge