

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the matter of PGA/ACA Filing of	)	
Atmos Energy Corporation for the West	)	
Area (Old Butler), West Area (Old	)	
Greeley), Southeastern Area (Old SEMO),	)	Case No. GR-2008-0364
Southeastern Area (Old Neelyville),	)	
Kirksville Area, and in the Northeastern	)	
Area.	)	

**PUBLIC COUNSEL’S RESPONSE IN SUPPORT  
OF THE STAFF’S MOTION TO COMPEL AND IN  
SUPPORT OF SUSPENDING THE PROCEDURAL SCHEDULE**

**COMES NOW** the Missouri Office of the Public Counsel and for its response in support of the Staff’s motion to compel and in support of the Commission Staff’s motion to suspend the procedural schedule, states:

1. Public Counsel strongly supports the Staff’s discovery efforts, including the Staff’s motion to compel discovery filed on June 14, 2010.
2. Public Counsel also supports suspending the procedural schedule in this case until the discovery dispute is resolved. There is no operation of law in PGA/ACA cases, and there is no reason to needlessly rush this matter, which would only prejudice Staff’s discovery attempts, and ultimately harm the customers of Atmos that want nothing short of a full audit of all relevant data.
3. The relationship between a regulated utility and its unregulated marketing affiliate creates a potential for overcharging consumers, which can only be monitored by full disclosure by the utility of its transactions with its affiliate. To do anything short of requiring full disclosure is not in the public interest. The Missouri Supreme Court

recognized the potential for abuse caused by the relationship between a regulated utility and its marketing affiliate when the Court reviewed the Commission's affiliate transaction rules. The Court explained that utilities have an incentive to "milk" the regulated monopoly to subsidize the unregulated affiliate:

Respondents concede that the rules regulate certain aspects of the relationship between utilities and their affiliates. In its brief, the PSC explained that the rules are a reaction to the emergence of a profit-producing scheme among public utilities termed "cross-subsidization," in which utilities abandon their traditional monopoly structure and expand into non-regulated areas. This expansion **gives utilities the opportunity and incentive to shift their non-regulated costs to their regulated operations with the effect of unnecessarily increasing the rates charged to the utilities' customers.** See *United States v. Western Elec. Co.*, 593 F. Supp. 846, 853 (D.D.C. 1984) ("**As long as a [public utility] is engaged in both monopoly and competitive activities, it will have the incentive as well as the ability to 'milk' the rate-of-return regulated monopoly affiliate to subsidize the competitive ventures...**") To counter this trend, the new rules – and in particular, the asymmetrical pricing standards – prohibit utilities from providing an advantage to their affiliates to the detriment of rate-paying customers. In addition, to police compliance, the rules require the utilities to ensure that they and their affiliates maintain records of certain transactions. [emphasis added].<sup>1</sup>

Accordingly, the requested records must be reviewed by the auditors tasked with performing the prudency review, and ultimately the Commission, if the Commission is to prevent Atmos from engaging in affiliate transactions that enhance the earnings of its non-regulated marketing affiliate and harm customers of the regulated utility. Atmos not only has ability to milk the regulated customers to subsidize its unregulated operations, it also has an incentive to do so. *Id.* This certainly increases the scrutiny the Commission must place on reviews of such transactions, especially in a rate proceeding such as this where all relevant factors must be reviewed. § 393.270.

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<sup>1</sup> *State ex rel. Atmos Energy Corp. et al. v. P.S.C.*, 103 S.W.3d 753 (Mo. 2003).

4. PGA cases are a function of the Commission's ratemaking authority, and therefore the Commission must adhere to the ratemaking requirement that all rates charged by a utility be just and reasonable. §§ 393.140 and 393.150 RSMo 2000; *Associated Natural Gas Company v. P.S.C.*, 954 S.W.2d 520 (Mo.App. 1997). Missouri courts have held that § 393.270.4 RSMo requires that the Commission's determination of the proper rate for gas is to be based on all relevant factors. *State ex rel. Midwest Gas Users Association v. P.S.C.*, 976 S.W.2d 470 (Mo.App. 1998). The relevant factors related to these prudence reviews include the prudence of the transactions between Atmos and its affiliate. The Commission cannot properly perform its ratemaking function without considering the information that will determine whether these transactions with the marketing affiliate caused ratepayers to overpay for gas.

5. The Commission's authority to compel Atmos to produce records is in § 393.140(8), which gives the Commission the authority to "examine the accounts, books, contracts, records, documents and papers of any" gas corporation. *See also* § 386.450. Section 393.140(9) gives the Commission the authority to compel the production of "any accounts, books, contracts, records, documents, memoranda and papers." This authority is furthered by the Commission's § 393.140(5) power to "examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business."

6. In *Midwest Gas Users' Association v. Office of Public Counsel*, 976 S.W.2d 470, 483 (Mo. App. 1998), the Missouri Court of Appeals explained that the Commission has the authority to review the prudence of a company's "decision to enter into a particular contract when a less costly alternative is available." *Id.* The Commission

does not conduct a prudence review of the PGA before it goes into effect, and the Commission may disallow some or all of the adjustment sought when fuel costs are “unreasonable or the result of imprudent purchases.” *Id.* The information sought by the Staff will help the Commission determine whether the costs incurred by Atmos and passed along to consumers were reasonable or unreasonable, prudent or imprudent.

7. Continuing with the current procedural schedule before the Staff can properly and fully perform its audit and review would be an injustice to the 56,000 customers of Atmos that are only required to pay the prudent gas purchasing decisions by Atmos. If the Atmos purchasing decisions were prudent, Atmos should have no concerns with the Commission’s Order directing Atmos to open its books and records regarding its affiliate transactions. The Commission should allow the Staff to review the records and submit as evidence those records they deem relevant. The proper time for Atmos to object is when an attempt is made to enter such evidence into the record, not when Atmos is being requested to produce the records it is required by law to provide and keep.

8. Public Counsel asks the Commission to maintain consistency in its pending PGA/ACA cases by holding Atmos to the same standard the Commission is holding Laclede Gas Company in Case Nos. GR-2005-0203 and GR-2006-0288. The Commission will only maintain consistency between PGA/ACA cases by compelling Atmos to release its records before allowing this matter to proceed forward.

9. Public Counsel also supports the Staff’s additional request to file supplemental testimony, and the Staff’s request to make Atmos Energy Holdings, Inc. and Atmos Energy Marketing, LLC parties to this case.

WHEREFORE, the Office of the Public Counsel respectfully offers this response in support of the Staff's Motions.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 23<sup>rd</sup> day of June 2010:

/s/ Marc Poston