

1 affiliated entity, the regulated gas corporation shall  
2 document both the fair market price of such information,  
3 assets, goods and services and the fully distributed cost  
4 to the regulated gas corporations to produce the  
5 information, assets, goods or services for itself.

6 Did the Company do those things?

7 MR. BERLIN: I believe that it did.

8 COMMISSIONER JARRETT: Okay. And then (C):  
9 In transactions that involve the provision of information,  
10 assets, goods or services to affiliated entities, the  
11 regulated gas corporation must demonstrate that it 1;  
12 considered all costs incurred to complete the transaction;  
13 2, calculated the costs at times relevant to the  
14 transaction; 3, allocated all joint and common costs  
15 appropriately; and 4, adequately determined the fair market  
16 price of the information, assets, goods or services.

17 Did Atmos do that?

18 MR. BERLIN: I would want to defer to  
19 Mr. Sommerer as I didn't do the audit.

20 COMMISSIONER JARRETT: Sure.

21 MR. BERLIN: If that's all right.

22 COMMISSIONER JARRETT: Sure.

23 MR. FISCHER: Commissioner, Your Honor, I  
24 don't mean to interrupt but I would note that (C)  
25 particularly relates to the provision of assets or goods or

1 services to the affiliate.

2 COMMISSIONER JARRETT: I'm sorry. You're  
3 right. You're right. (C) wouldn't apply in this case.  
4 Thank you. I appreciate that. I was on a roll down that  
5 problem. And I apologize.

6 And then we get to the CAM. (D) talks about  
7 the CAM. And they're supposed to use a Commission approved  
8 CAM, which sets forth the cost allocation, market valuation  
9 and internal cost methods.

10 And I can't remember in the exchange you had  
11 with Commissioner Davis, I -- they do have a CAM. Has it  
12 been Commission approved?

13 MR. BERLIN: Not to my knowledge.

14 COMMISSIONER JARRETT: Okay. Mr. Fischer,  
15 Mr. Dority, do you have a response to that?

16 MR. FISCHER: Judge [sic], it has been filed  
17 each year since the Affiliate Transaction Rule went into  
18 effect. It's submitted to Staff routinely on March 15th or  
19 thereabouts. It's never, to my knowledge, been submitted  
20 to the commissioners for their -- for their approval, but  
21 it's never been challenged by anyone either.

22 COMMISSIONER JARRET: I'm just wondering  
23 when it says Commission approved does that mean we have to  
24 vote on it?

25 MR. FISCHER: I frankly don't think any CAM

1 in this state has been approved that I'm aware of.

2 COMMISSIONER JARRETT: All right.

3 MR. FISCHER: In that sense.

4 COMMISSIONER JARRETT: Okay. But it's been  
5 on file?

6 MR. FISCHER: It's been on file and  
7 available for questioning by staff and there's never been  
8 any -- except for the time that Mr. Sommerer mentioned  
9 where we had a change in personnel that were filing it and  
10 it got filed late, I don't think there's ever been a  
11 question about that CAM for Atmos.

12 COMMISSIONER JARRETT: Okay. Then moving on  
13 to (4). I'm not going to go through these, but it talks  
14 about the recordkeeping requirements of the regulated gas  
15 utility and the types of records that they have to keep  
16 when they do business with an affiliate.

17 Is there anything in there that Atmos has  
18 failed to do? Have they kept all of their proper records?

19 MR. BERLIN: There were some records that  
20 they did not provide. Mr. Sommerer can tell you more --

21 COMMISSIONER JARRETT: Okay.

22 MR. BERLIN: -- specifically --

23 COMMISSIONER JARRETT: It doesn't say  
24 anything in the rule about that they have to provide them.  
25 It just says that they have to keep them.

1 MR. BERLIN: well, that they didn't keep  
2 them.

3 QUESTIONS BY COMMISSIONER JARRETT:

4 Q. Okay. which ones didn't they keep?

5 A. I had requested a complete explanation of  
6 all nominations that were made between the affiliate.

7 Q. Okay. what number is that in here?

8 A. It's not part of the Motion to Compel. It's  
9 another data request.

10 Q. I'm talking about under the rule. Because  
11 it lists the types of records. which type of record are  
12 you referring to when you say they didn't provide the  
13 nominations? I'm sorry, it does say they have to provide  
14 the information every March 15th, so I was wrong there.

15 A. In the context of the specific requirements,  
16 they have complied with those six requirements that are  
17 listed.

18 Q. Okay. And then it talks about -- then  
19 there's (C). There's two other requirements that they have  
20 to maintain on a calendar year basis.

21 Has Atmos complied with those two under (C)?

22 A. In my opinion, they have complied with item  
23 no. 1 in that they have a representation of what they  
24 believe would be the fair market price. That's subject to  
25 differing opinions, but they have records. Fully

1 distributed cost, we've discussed their view of that. And  
2 although you don't have any mathematical calculations,  
3 there was just basically discussion of their belief that it  
4 was higher and therefore not relevant.

5 Item no. 2: Sufficient detail to permit  
6 verification of compliance of the rule gets into my again,  
7 non-legal view, just based upon my experience. I believe  
8 it's appropriate in order to seek compliance with the rule  
9 to better understand what fair market value is. And that  
10 goes to the records dispute we have in this case.

11 COMMISSIONER JARRETT: Okay. But number (4)  
12 appears to me -- and this will go to Mr. Berlin, I guess.  
13 This is a legal question. If you look at (5) it talks  
14 about in (A) -- (5)(A) it talks about records of affiliated  
15 entities. It talks at a minimum they have to keep these  
16 records. There's no language like that in (4).

17 So aren't you requesting records from the  
18 Company that they're not required to keep under the rule?

19 MR. BERLIN: Are you talking about  
20 specifically number (4)?

21 COMMISSIONER JARRETT: Any of them? Yeah.  
22 Number (4) Record keeping requirements. It doesn't say  
23 that that's a non-exclusive list. It doesn't say like "at  
24 a minimum" like it does down in (5).

25 Isn't that the full universe of information

1 that you can request from the Company under this rule?

2 MR. BERLIN: Well, I -- like what  
3 Mr. Sommerer talked to -- I go back to -- well, moving off  
4 of (4), I guess, I'm going to 6(C)(2) under (4); the books  
5 of accounts and supporting records in sufficient detail to  
6 permit verification of compliance with this rule. And I  
7 believe as Mr. Sommerer stated, that's where these --

8 COMMISSIONER JARRETT: Okay. That's the  
9 records the Company has to keep.

10 Mr. Fischer, do you believe you supplied  
11 account -- books of accounts and supporting records in  
12 sufficient detail to permit verification of compliance with  
13 this rule?

14 MR. FISCHER: Yes, sir. And --

15 COMMISSIONER JARRETT: What have you  
16 provided?

17 MR. FISCHER: Every March 15 we provide the  
18 CAM reporting and those are the records related to all  
19 affiliate transactions. And we've demonstrated here that  
20 we're complying with the Commission's rule that mandates  
21 competitive bidding. We've done that. And I don't think  
22 there's anything beyond that that we've missed.

23 But the CAM reporting happens every March 15  
24 and it lists all affiliated transactions and it lists the  
25 requirements that are contained in this rule.

1                   COMMISSIONER JARRETT: All right. I guess  
2 the dispute then is over the records of the affiliate; is  
3 that correct? In both of the DRs they're requesting  
4 information from the affiliates records.

5                   MR. BERLIN: I think it --

6                   MR. FISCHER: Yes. That's correct. It goes  
7 to the question of whether the records that they're  
8 requesting have anything to do with either the fair market  
9 value, which is the issue in this case or whether the  
10 Company, Atmos, has complied with the Affiliated  
11 Transaction Rules.

12                  COMMISSIONER JARRETT: All right.

13                  MR. FISCHER: For the sole purpose of  
14 ensuring compliance with this rule and make findings  
15 available to the Commission. And I think that's that  
16 standard that we're looking at.

17                  COMMISSIONER JARRETT: And when do you  
18 determine fair market value -- fair market price? Is that  
19 determined at the time of the bid? Is it determined in  
20 every transaction that occurs after for the entire contract  
21 period?

22                  MR. FISCHER: I think the fair market price,  
23 from my perspective, would be determined at the time the  
24 bids are looked at, reviewed and the low bid is accepted.  
25 Now, the Commission -- the filing, I believe, on the

1 Affiliate Transaction Rule list what is included, what has  
2 been accepted. I can verify that.

3 COMMISSIONER JARRETT: All right.

4 Mr. Berlin, Mr. Sommerer do you agree? Disagree? You  
5 disagree? Why?

6 THE WITNESS: I think it's relevant in terms  
7 of determining the fair market value to take a look at the  
8 entire period. We really don't know what the fair market  
9 value of that service is until you see the total cost as  
10 Commissioner Davis and I were discussing the totality of  
11 the actual cost, which involves the summation of all the  
12 invoices that were received from AEM.

13 QUESTIONS BY COMMISSIONER JARRETT:

14 Q. Isn't that a little problematic though?  
15 That's kind of a hindsight thing, isn't it? I mean, you  
16 know, you bid out something. The bid -- the RFP is an  
17 appropriate document. The bids come in. The lowest bid's  
18 accepted. And we're asking the Company to --

19 A. It's the administration of the contract. If  
20 the gas truly was interruptible and it didn't show up, if  
21 the Company bought all daily supply, if they forgot to  
22 nominate.

23 Q. Now which Company are you talking about?

24 A. Well, good question. If the LDC, from their  
25 perspective forgot to order gas, if they bought spot supply

1 at \$100 in MCF. All of these things are taking place  
2 retrospectively. Our review isn't realtime; it's six  
3 months after -- after the fact.

4 Sometimes it can kind of look like it's  
5 hindsight because you are, you know, post the actual  
6 execution. But the prudent standard requires that we look  
7 at what the utility was faced with at that time. And  
8 clearly the dichotomy here is it is very compelling when  
9 you have an RFP and you've got a low bid there, to say well  
10 it should be over with.

11 But there's a lot of dynamic that occurs  
12 after the RFP has been instituted and implemented that can  
13 really have a big, large impact on whether the supply shows  
14 up, whether it was reliable, whether it was cost effective,  
15 whether it was reasonable in any way.

16 Maybe this is a poor analogy, but if you're  
17 buying a car you're doing and RFP, you're going from dealer  
18 to dealer. But you know, maybe there's a maintenance  
19 contract that's just awful. And the engine falls out and  
20 it costs you 10 grand to get the thing done and you didn't  
21 have a warranty on it. Those things can impact the value  
22 of the deal.

23 And so I understand the concern that RFPs, a  
24 certain amount of weight needs to be given to them. And  
25 you really have to do a close look at -- not only when the

1 RFP is set, but what happens after the fact.

2 Q. And I understand -- I understand you're  
3 point, but I'm looking at the scope of the rule. I mean,  
4 that's kind of what I'm trying to determine. But, you  
5 know, notwithstanding the statute that Mr. Fischer put  
6 up; let's say that didn't exist. We could write a rule  
7 that says the Commission can go in and look at every piece  
8 of paper ever generated by an affiliate.

9 But we didn't write a rule like that. We  
10 wrote a rule, you know -- or we can say we have to put an  
11 auditor in the affiliates office every day and he's going  
12 to watch every transaction. It would be cost prohibitive.  
13 We can't do that.

14 So we set a rule to try to balance between  
15 trying to make sure that we keep everybody on an even  
16 playing field but it's not so intrusive and cost  
17 prohibitive and take years and years and years to try to  
18 figure out -- you know, in order to make this thing work.

19 And it seems to me number (3) sets out the  
20 evidentiary standards for the affiliated transactions and  
21 that's really what we have to look at. And it says  
22 competitive bids.

23 COMMISSIONER DAVIS: No you don't,  
24 Commissioner Jarrett; Staff can just make it up.

25 COMMISSIONER JARRETT: Well, that's what I'm

1 asking. I'm asking does Staff feel like this rule is  
2 inadequate and they need more information than what is  
3 provided for in the rules?

4 MR. BERLIN: Well, Commissioner Jarrett, the  
5 RFP process seeking of competitive bids would seem to  
6 answer all of the questions if we were dealing with an  
7 independent third party, but we're not. We're dealing with  
8 an affiliate that is controlled by the same senior  
9 management that controls the LDC.

10 And so Staff's investigation has to be --  
11 has to scrutinize the affiliate transaction to ensure that  
12 there's no preference or advantages conferred upon the  
13 unregulated affiliate that would not be otherwise available  
14 to an independent third party supplier dealing in an  
15 armslength transaction.

16 COMMISSIONER JARRETT: Right. But  
17 there's nothing in this rule -- let's say the affiliate  
18 wasn't bidding -- wasn't going to provide any gas to Atmos,  
19 they just weren't. There's nothing in this rule that  
20 requires them to do competitive bidding with other third  
21 party, non-related entities.

22 They can purchase the gas -- there may be  
23 other rules that require them to do certain practices, but  
24 for purposes of this rule, it doesn't require them to get  
25 competitive bids if they're going to, you know, buy gas

1 from BP, Conoco, Shell. They can just go do it.

2 We put in place -- the Commission put in  
3 place as the check, the competitive bidding process when  
4 there's an affiliate involved. And I guess I'm asking do  
5 you believe the rule authorizes more than that or do we  
6 need to change the rule?

7 MR. BERLIN: I may not be answering your  
8 question, but I'm -- I don't believe anywhere in the rule  
9 that the rule can be construed as to saying that a request  
10 for bid, an RFP -- request for proposal, and RFP process  
11 can be used as a proxy for establishing fair market price  
12 when you're dealing with an affiliate. I just  
13 don't --

14 COMMISSIONER JARRETT: Well, that's exactly  
15 what it does, doesn't it?

16 MR. BERLIN: Well, I don't -- I don't see it  
17 as saying that's where the inquiry just stops because I  
18 don't -- I read this with you and I just don't -- I don't  
19 see that. The RFP process could certainly do that, I  
20 think, if you're dealing with a -- pretty much -- and I  
21 defer to the situations that the auditors can find, but  
22 when you're dealing with independent third party suppliers  
23 like a ConocoPhillips, Sensomobile, Anadarko, you have  
24 armslength transactions and that part is taking on risk.

25 And when you're dealing with an affiliate

1 transaction, you have a single management that is -- has  
2 the same incentive. And there's also an incentive to  
3 settle any kind of failure to perform in such a way as to  
4 hold the affiliate harmless because of the fiduciary  
5 responsibilities involved in the management of that LDC and  
6 the affiliate have.

7 So I think -- I go back to the affiliate  
8 transaction itself and I cannot agree that an RFP by itself  
9 would establish fair market price.

10 COMMISSIONER JARRETT: And it may not, but  
11 that's what the rule provides for. I mean, you may want to  
12 completely want to rewrite this rule to do all kinds of  
13 things, but I'm just looking at what's printed on the page.  
14 And the evidentiary standard -- number (3), that's what it  
15 says: Evidentiary standards for affiliated transactions.  
16 The standard is they got to get competitive bids.

17 And should the Company be able to rely on  
18 that plain language in the rule.

19 MR. BERLIN: So the question then becomes is  
20 when you're dealing with an affiliate, is that bid  
21 competitive. Because you're dealing not at an armslength  
22 transaction. It can't be presumed that that reasonable.

23 COMMISSIONER JARRETT: Well, the assumption  
24 is that it is a competitive bid. Every-- you bid it out to  
25 your affiliate. They have the same chance of bidding on it

1 as Conoco and BP and Shell and any other company that wants  
2 to bid on it. They're all equally bidding on the same  
3 terms and conditions. And the one that wins, wins.

4 And if they've got the -- if the affiliate  
5 has the lowest bid, it's been a fair process. That's the  
6 whole purpose of competitive bids. I mean, that's why the  
7 State has competitive bidding. Everybody bids on the same  
8 terms and conditions and the State picks the lowest and  
9 best bid.

10 I mean, isn't that -- isn't that what number  
11 (3) says; that that's the standard? And if there's another  
12 standard, where is it in the rule?

13 MR. BERLIN: I can't deny what (3) says on  
14 the literal side of it, but again I go back --

15 COMMISSIONER JARRETT: Well, don't we have  
16 to read the rules literally, the plain language of the  
17 rules?

18 MR. BERLIN: Plain language of the rule, but  
19 the question becomes again, competitive bidding when the  
20 manage-- the same senior management controls both sides of  
21 the transaction. At that point in time, when that  
22 management controls both sides of the transaction, and  
23 wears the same hat, you know, is it -- is it truly  
24 competitive?

25 Are there advantages and preferences built

1 into that that would not be available to an independent  
2 third party. And this requires a great deal of scrutiny.  
3 These are complex transactions that require an  
4 extraordinary amount of analysis to make sure that it is  
5 truly a competitive bid and that no benefits or advantages  
6 have been conferred.

7 COMMISSIONER JARRETT: Right. Well, I guess  
8 what I'm saying is the rule provides the tools for the  
9 Commission to look into these things. And are you  
10 asking -- are you using a tool that the rule doesn't give  
11 you --

12 MR. BERLIN: I don't believe so.

13 COMMISSIONER JARRETT: -- in asking for  
14 affiliate records of the transactions with other parties  
15 other than Atmos?

16 MR. BERLIN: By asking for the affiliate's  
17 records we are entitled to do that under the rule.

18 COMMISSIONER JARRETT: Mr. Fischer, I take  
19 it you would disagree with that?

20 MR. FISCHER: Most definitely, Your Honor.  
21 That's our whole basis for the case today.

22 COMMISSIONER JARRETT: All right.  
23 Mr. Poston, I haven't given you a chance to weigh in on  
24 this. Would you like to --

25 MR. POSTON: If I could just jump in real

1 quick on the section (3) that you were pointing to. And I  
2 think you said that there was, you know -- kind of creating  
3 an assumption of a competitive bid. And it seems to be  
4 what I'm hearing from Staff is that we can't really assume  
5 that that these bids were competitive unless we look to see  
6 all the underlying data included in the affiliate data to  
7 determine whether that was truly competitive.

8 COMMISSIONER JARRETT: Well, I guess --  
9 yeah. Like I said, I understand the point, but I'm saying  
10 that this is the rule we have. And I understand that Staff  
11 thinks it needs to look at this, this, and this to make  
12 these determinations. But the rule obviously has to set  
13 boundaries.

14 And so what I'm saying is what Staff is  
15 asking for, is it beyond the scope of the rule when it  
16 talks about the competitive bidding. And where in the rule  
17 does it say Staff can ask for what they're asking for?

18 MR. POSTON: I would look at just the  
19 general standards that -- under like (2)(A), a regular gas  
20 corporation shall not provide financial advantage to an  
21 affiliated entity. You know, just generally Staff trying  
22 to determine whether there was a financial advantage. That  
23 seems --

24 COMMISSIONER JARRETT: Okay. Well --

25 JUDGE WOODRUFF: Anything else from anybody

1 before I wrap up?

2 MR. FISCHER: Well, Judge, if this is my  
3 last opportunity, maybe I should just make a couple of  
4 quick observations, not to extend it very long.

5 COMMISSIONER DAVIS: Hold on. Can I extend  
6 it very long because I've just got a couple more questions  
7 here. Thank you, Mr. Fischer.

8 QUESTIONS BY COMMISSIONER DAVIS:

9 Q. Mr. Sommerer, would you agree with me that  
10 if there is a disallowance to be made in this case, that in  
11 all likelihood \$360,000 isn't the right amount?

12 A. It's based upon the best information I have  
13 based upon the today's information, it's the amount that  
14 staff is proposing, but there is a chance that it could be  
15 adjusted based upon the scheduling.

16 Q. Well, and that's all their estimated profit  
17 for the entire period. Correct?

18 A. As adjusted by staff.

19 Q. As adjusted by staff for those two  
20 districts?

21 A. Correct.

22 Q. So assuming you get the data you want for  
23 AEC's nominations, assuming they did use first of the  
24 month, you know, pricing and got their baseload, an amount  
25 that would be reasonable for those months, then if they did

1 that for a month in question, then the profits they made in  
2 that month should be okay. Correct? If they did those  
3 things?

4 A. Well, assuming that there weren't any  
5 special opportunities for AEM by virtue of it being an  
6 affiliate and that there weren't any gaming opportunities  
7 that were exploited by AEM, and we can verify that those  
8 nominations weren't impacted by AEM's desire to make  
9 profits, then I -- that's where we're going. That's what  
10 would satisfy me.

11 Q. Okay. So it's certainly possible then that  
12 for several of those months that AEC made the right  
13 nominations, that you know, they got their baseload and  
14 whatever profit that they made in those months or on those  
15 days, they're entitled to keep?

16 A. That's a possibility.

17 COMMISSIONER DAVIS: Okay. Thank you.

18 COMMISSIONER JARRETT: I do have a couple  
19 more questions.

20 Mr. Fischer, I wanted to ask you a question.  
21 You talked about the non-discrimination standards?

22 MR. FISCHER: Yes, sir.

23 COMMISSIONER JARRETT: I guess in .016.

24 MR. FISCHER: Yes, sir.

25 COMMISSIONER JARRETT: And Atmos has to

1 comply with those. And there -- it looks like there's  
2 regular filings and reports that you provide to the  
3 Commission on those, or at least parts of them?

4 MR. FISCHER: I don't see a specific one,  
5 but yes. I believe so. The -- there are about 15 of  
6 those, basically all designed to make sure that there are  
7 no preferences to the affiliate. And giving them marketing  
8 information that would be helpful dealing with interpreting  
9 our tariff in a way that would be helpful to their  
10 particular transporters.

11 (E): A regulated gas company shall not give  
12 any customer using its marketing affiliate preference. So  
13 we can't help a customer to use the gas marketer in some  
14 way that would be beneficial to that gas marketer.

15 They can't -- the regulated company can't  
16 disclose its -- to its marketing affiliate information that  
17 it receives through processing of requests for or provision  
18 of transportation services. So it can't give them any  
19 information that would be helpful to the affiliate to --  
20 based on information it gets as a regulated company.  
21 That's basically the kind of thing that's throughout here.

22 And then, I think (H) -- well, you can't  
23 condition or tie an offer or agreement to the provision of  
24 a transportation account to a shipper in which the  
25 marketing affiliate is involved. So you can't -- you can't

1 do anything basically that would help the affiliate to do  
2 business in a way that a non-affiliate could based on your  
3 information or your interpretations of tariffs and that  
4 kind of thing.

5 Those are the kinds of things that are  
6 generally in that non-discrimination standard.

7 COMMISSIONER JARRETT: Right. And you  
8 believe Atmos complies with all of these?

9 MR. FISCHER: Yes. And there are -- there  
10 have been no allegations to the contrary that I am aware  
11 of.

12 COMMISSIONER JARRETT: Mr. Berlin said  
13 something -- because I know, you know, we have the Laclede  
14 case as well, which is a different case. And there may be  
15 a different corporate structure for Laclede. Can you tell  
16 me what the structure of Atmos is?

17 MR. FISCHER: Yeah. I'm not certain what  
18 the structure of Laclede and LER may be. But the -- for  
19 Atmos, Atmos does have a subsidiary. It is a subsidiary  
20 of -- which is the gas marketing affiliate AEM. So that's  
21 the structure here. We don't have a holding company in  
22 Atmos. Atmos is the company and then there's a subsidiary.

23 COMMISSIONER JARRETT: All right.

24 MR. FISCHER: Which is the unregulated gas  
25 marketer, which is -- complies with the rules here.

1 COMMISSIONER JARRETT: All right. So --

2 MR. FISCHER: And regarding the books and  
3 records, the Chinese wall is there. We -- I would dispute  
4 that the Company has -- the Atmos has unfettered access to  
5 the books and records of the subsidiary even though it is a  
6 subsidiary because the Commission rule prohibits that.

7 COMMISSIONER JARRETT: And does Atmos have  
8 records establishing that such a wall exists?

9 MR. FISCHER: Yeah. Well --

10 COMMISSIONER JARRETT: Is that discoverable  
11 to the Company -- or to the Staff?

12 MR. FISCHER: Certainly. And the testimony  
13 of Rebecca Buchanon in this case I think establishes that.

14 COMMISSIONER JARRETT: Why wouldn't that  
15 information that there is a proper wall established be good  
16 enough to satisfy staff?

17 MR. FISCHER: Well, speculation on my  
18 part -- you can ask Staff, I guess -- it seems, based on  
19 what I've heard today, that there is great scepticism that  
20 there might be some kind of a conspiracy or something  
21 between the regulated gas company and its affiliate in  
22 their dealings that causes all these things to go out the  
23 window; that therefore, you can't rely on the fact that  
24 they bid the lowest price.

25 And I would suggest to the Commission maybe

1 that's what the Staff's position statement is said. They  
2 don't want to have affiliated transactions anymore. If the  
3 Commission wants that -- wants that position to be adopted,  
4 you should tell the Company that and we should try to  
5 comply with that.

6 But certainly there's no basis for the kind  
7 of adjustment that the Staff is proposing in this case.  
8 And I would suggest that that is totally contrary to the  
9 Affiliate Transaction Rule that specifically permit  
10 marketing companies to participate with their regulated  
11 company.

12 COMMISSIONER JARRETT: All right.  
13 Mr. Berlin, you're itching. I can see that.

14 MR. BERLIN: Thank you.

15 COMMISSIONER JARRETT: Go ahead.

16 MR. BERLIN: Thank you, Commissioner  
17 Jarrett. First of all about the Chinese wall; the Chinese  
18 wall has absolutely no meaning in the business world or in  
19 a business context. Chinese wall has great meaning to  
20 lawyers, and we all know that because we're all lawyers.

21 There's nothing in the case law. There's  
22 nothing in the rules or anything that sets up what's called  
23 a Chinese wall. Now, what we do know -- and Mr. Fischer  
24 was correct -- is that Atmos, the LDC, has ultimate  
25 management control over its subsidiary, its unregulated

1 subsidiary, Atmos Energy Marketing, LLC.

2 And as Mr. Sommerer pointed out in some of  
3 the questions to -- from Commissioner Davis, is yes there's  
4 some cause for concern because both sides of the fence  
5 share the same earnings per share goals regarding their  
6 incentive compensation, lend directly to how well Atmos  
7 Energy Corporation does.

8 A gain on the AEM side, translates to a gain  
9 on the LEC side because Atmos Energy Corporation, the LDC,  
10 has ultimate control over all of the documents and that is  
11 how Atmos has been able to provide AEM documents, more  
12 so -- perhaps more forthcoming than in the Laclede case  
13 because there is a significant organizational difference.

14 And that organizational difference is also  
15 pointed out in one of the cover letters regarding the CAM  
16 that Atmos sent to -- I think it was to Bob Chalenburg  
17 (ph.) earlier this year. So the organization is very  
18 different than Laclede's.

19 COMMISSIONER JARRETT: Now, so are you  
20 saying that Staff does has some concerns that Atmos is not  
21 complying with some of the non-discrimination standards in  
22 (2)(A) through (O)?

23 MR. BERLIN: (2)(A) through (O). We've made  
24 no allegations specific to those rules. The concern is --  
25 is really where Staff is coming from and we've talked about

1 this afternoon -- is that there is a potential for  
2 manipulation. There exists many permutations of  
3 manipulations that could take place on affiliate  
4 transactions.

5 Again, that's why we're going through such  
6 exhaustive discovery to scrutinize the affiliate  
7 transactions to ensure that that has not taken place.

8 COMMISSIONER JARRETT: All right. And this  
9 is Staff's policy in every case, every company?

10 MR. BERLIN: Staff is consistent in  
11 investigating these kind of affiliate transactions as I  
12 understand them. And I think there's -- to my knowledge,  
13 there's only one other case out there and that's the  
14 Laclede case. But those are the only two that I'm aware  
15 of; Atmos and Laclede.

16 COMMISSIONER JARRETT: Right. And I did --  
17 just to switch gears for a minute.

18 QUESTIONS BY COMMISSIONER JARRETT:

19 Q. I did want to ask about the \$363,000  
20 approximately. As I recall in your -- Mr. Sommerer, in  
21 your discussion with Commissioner Davis about the different  
22 bids. I think it was BP -- was it BP, Conoco and Shell,  
23 were the three bidders in the Hannibal area other than AEM?

24 A. Are we in camera?

25 JUDGE WOODRUFF: No. We're not in camera.

1 Do we need to be?

2 COMMISSIONER JARRETT: I'm sorry.

3 (REPORTER'S NOTE: At this point, an  
4 in-camera session was held, which is contained in Volume 4,  
5 page 225 of the transcript.)  
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1 JUDGE WOODRUFF: Okay. We're out of in  
2 camera.

3 COMMISSIONER DAVIS: I mean, Mr. Berlin -- I  
4 mean, you're still -- and I guess I'm concerned because,  
5 yes, we have established that when you have affiliate  
6 transactions there is a potential for abuse, but it appears  
7 to me that you haven't found the smoking gun yet.

8 We haven't found an e-mail. We haven't  
9 found a record of a phone call. We haven't found that  
10 anomaly yet. Is that a fair statement?

11 MR. BERLIN: I think it's a fair statement  
12 that --

13 COMMISSIONER DAVIS: Okay.

14 MR. BERLIN: We've identified concerns.

15 COMMISSIONER DAVIS: Right. So once again,  
16 why is staff moving to disallow \$360,000 when you don't  
17 know that there is a violation yet?

18 MR. BERLIN: We're moving based upon the  
19 recommendation we -- at the end of December of '09 on the  
20 ACA. The purpose of our discovery is to determine that  
21 fair market price, the value of that contract and all the  
22 dealings we've discussed today related to that contract to  
23 make sure that the fair market price, the value of that  
24 contract to AEM would be the same to the LDC.

25 COMMISSIONER DAVIS: Right. But --

1 MR. BERLIN: And we had identified concerns  
2 that lead us to believe through professional skepticism  
3 that our auditing group has that raise serious questions as  
4 to that affiliate transaction, those specific trades. And  
5 so as Mr. Sommerer pointed out, there is, based upon the  
6 discovery, there's a possibility -- a good possibility that  
7 that could be adjusted possibly downward.

8 COMMISSIONER DAVIS: Okay. No further  
9 questions.

10 COMMISSIONER JARRETT: Hold on a second.  
11 I'll ask the question: Is Staff using this as a  
12 negotiating tool saying, we're going to recommend  
13 disallowance of \$363,00 if you don't play ball with us and  
14 give us the information?

15 MR. BERLIN: No. We are -- we pulled that  
16 number, as Mr. Sommerer said, that number came from Atmos  
17 itself as to the profit that they made on the deal in  
18 the -- in the supplying gas to Missouri -- the northeast  
19 customers and the Butler customers.

20 And that is the basis of the disallowance  
21 that there was -- that there was profit made on that gas.  
22 That's the original basis back in December before we'd been  
23 able to enter into the kind of discovery we need to vet  
24 that.

25 COMMISSIONER JARRETT: So just because they

1 made a profit, that calls the whole thing into question?

2 MR. BERLIN: It raised a serious question to  
3 Staff auditors.

4 COMMISSIONER JARRETT: Yeah. But the other  
5 bidders built profit into their goods. Isn't AEM allowed  
6 to make a profit?

7 MR. BERLIN: We're really not so focused on  
8 that as we are the fair market price of the deal and the  
9 way the deal was implemented and the potential for  
10 manipulation or abuse. So the --

11 COMMISSIONER JARRETT: And you're saying --

12 MR. BERLIN: The discovery is intended to  
13 establish that and quite possibly that discovery could lead  
14 us to an adjustment of that number.

15 COMMISSIONER JARRETT: All right. Thank  
16 you.

17 JUDGE WOODRUFF: All right. Final thoughts  
18 from Staff in about 30 seconds.

19 MR. BERLIN: In about 30 seconds.

20 COMMISSIONER DAVIS: The lightning round.

21 MR. BERLIN: Thank you. Ultimately this is  
22 about an affiliate transaction and self-dealing of a  
23 regulated utility. And we are trying to use the Affiliate  
24 Transaction Rules that grant us the access to the records  
25 of the affiliate to establish the fair market value price

1 of the gas, contract, gas supply service that was rendered  
2 to the northeast service area.

3 We -- because of the nature of this  
4 transaction, it involves a great deal of discovery that are  
5 complex in nature. There's many factors that have to be  
6 looked at to make that -- to satisfy the auditing group;  
7 that there have been no undue or abusive-type preferences  
8 given to its affiliate.

9 And so we're trying to do our job to fully  
10 scrutinize these transactions and to do so with complete  
11 transparency to the ratepayer so that this commission can  
12 meet its regulatory compact that it tells the consumer that  
13 they're not paying profits on the supply of gas that's part  
14 of their -- a large part of their bill.

15 So that's what Staff's investigation and  
16 analysis and discovery is all about in a nutshell.

17 JUDGE WOODRUFF: Okay. Briefly from Public  
18 Counsel.

19 MR. POSTON: Thank you. We just ask that  
20 the Commission to allow the Staff to complete its  
21 investigation. And without allowing them to complete it,  
22 consumers will question whether the rates that they paid  
23 for gas are truly just and reasonable.

24 If we don't look at all this data and all  
25 these records, we'll really never know whether the

1 Commission -- or whether consumers have overpaid for gas.  
2 So we urge the Commission to grant the Motion to Compel and  
3 let Staff complete its investigation.

4 JUDGE WOODRUFF: Any final thoughts from the  
5 Company?

6 MR. FISCHER: Just briefly, Judge. Thank  
7 you.

8 Just a couple observations. We've been  
9 sitting here a long time and a lot of information has come  
10 out. I would just like to observe, I guess, that Atmos  
11 believes the Staff is making the issues in this case much  
12 more complex than they need to be.

13 As I understood the testimony and the  
14 comments from the bench, there doesn't seem to be a  
15 question that on the prudence issue Atmos was prudent in  
16 accepting the lowest cost bid. I don't think there was any  
17 suggestion that they should have accepted a higher than the  
18 lowest cost bid.

19 Now, if you turn to the next question on the  
20 Affiliated Transaction Rule, the question then is what's  
21 the fair market price and whether, under the rule, did the  
22 Company compensate its affiliate at a price that was higher  
23 than the fair market price.

24 Now, I think we've heard that there were  
25 other -- what they call -- armslength bidders, that bid