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), Southeastern Area (Old Neelyville), Kirksville Area, and in the Northeastern Area	))))))	**Case No. GR-2008-0364**

REPLY BRIEF OF
ATMOS ENERGY CORPORATION

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REPLY BRIEF OF
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I. INTRODUCTION

In accordance with the Commission's *Order Modifying Briefing Schedule* issued in this matter on April 27, 2011, Atmos Energy Corporation ("Atmos") respectfully submits its Reply Brief in response to the Staff's Initial Brief filed on April 29, 2011 ("Staff Brief"), and to the Office of the Public Counsel's Initial Brief[1] filed on May 13, 2011 ("OPC Brief").

II. STAFF'S THEORY OF THIS CASE HAS AGAIN MORPHED INTO NEW ALLEGATIONS TO SUPPORT ITS AFFILIATED TRANSACTION DISALLOWANCE THAT WERE NOT PRESENTED PREVIOUSLY IN ITS STAFF RECOMMENDATION, STAFF DIRECT, STAFF REBUTTAL OR STAFF SURREBUTTAL TESTIMONY, LIST OF ISSUES OR POSITION STATEMENT.

"Well, there you go again."
Ronald Reagan

[1] Public Counsel's Initial Brief filed two weeks after Staff filed its latest "theory of the case" does little more than "me too" the Staff's new allegations. Therefore, Atmos will address the position of Staff and Public Counsel together in this Reply Brief.

A. The evolution of Staff's proposed affiliated transaction disallowance continues.

As fully discussed in Atmos' Post-Hearing Brief, the Staff (and Public Counsel) position(s) in this case have continued to morph over an extended course of time, and now – based on the latest revelations contained in the Staff's Brief -- the Commission and Atmos are presented with Staff's LATEST theory in support of its proposed affiliated transaction disallowance: "$308,000 Proposed Disallowance Flows From Atmos' Failure to Keep Adequate Records Required by the Affiliate Rules." (Staff Brief, p. 17)[2]. Such theory was not presented previously in the Staff Recommendation, Staff Direct, Staff Rebuttal, the Joint List of Issues[3], or the Position Statements filed by Staff and Public Counsel. Indeed, as discussed, *infra*, these parties have now totally abandoned the

[2] While the above-referenced section of Staff's brief is laced with platitudes designed to raise unwarranted Commission concerns in this matter ("hold harmless Hannibal customers;" "the Commission will be powerless to scrutinize and police affiliate transactions;" and "the public interest demands transparency" -- p. 20), Atmos would characterize it as a primer in doublespeak.

[3] In its Initial Brief, Public Counsel indicates that "the parties" identified two very broad issues for this case. (Public Counsel Brief at 8). In reality, Atmos filed its own List of Issues which more specifically identified the following issues that need to be resolved by the Commission:

1. Were the Company's gas supply costs reasonable and prudent during the 2007-2008 ACA period?

2. Was it prudent for Atmos to utilize a competitive bidding process to obtain its gas supplies?

3. Has Atmos provided a "financial advantage" to its affiliated gas marketing company (AEM) under the Affiliated Transactions Rule (4 CSR 240-40.015) by awarding a portion of its gas supply contracts to AEM after utilizing a competitive bidding process?

4. Does the Commission's Affiliated Transaction Rule (4 CSR 240-40.015) require Atmos to lower its gas costs in the PGA/ACA process by the same amount as the profits of the affiliated gas marketer that provided a portion of the gas supplies to Atmos after the formal competitive bidding process?

5. Should Staff's proposed affiliated transaction adjustments be adopted?

Unfortunately, even Atmos' more specific list of issues could not have anticipated the morphing of the issues raised by Staff and Public Counsel related to allegations that AEM failed to keep adequate records under the Affiliated Transactions Rules since they were not raised until the evidentiary hearings.

allegation that the Affiliated Transaction Rule itself requires that the profits of an affiliate be used to lower gas costs in the PGA/ACA process, and Staff has abandoned its recommendation that the Commission prohibit Atmos from engaging in affiliated transactions with AEM in this PGA/ACA proceeding (although it now invites Atmos and AEM to voluntarily stop engaging in affiliate transactions).

Incredibly, and in the face of the record of this proceeding clearly documenting the morphing of Staff's theories for its proposed $308,733.39 (latest figure) disallowance, Staff concludes its Initial Brief with the statement that ". . .the Staff proposed a $308K disallowance on the failure of Atmos and AEM to document its costs and to provide the cost methodology and cost allocations to and away form the deal required by the Affiliate Rules." (Staff Brief, p. 32) However, as detailed in Atmos' Post-Hearing Brief, the Staff Recommendation (filed on December 28, 2009 recommending its original $363,000 affiliated transaction disallowance) was filed before there had been a single discovery dispute in this case – not one – and, obviously, no motion to compel had been filed, and there is no mention of Staff's concern about AEM's recordkeeping anywhere in the Staff Recommendation or Staff's Direct Testimony, Staff's Rebuttal Testimony, the Joint List of Issues filed by Staff and Public Counsel, or the Position Statements filed by Staff and Public Counsel. Yet, this is now the basis for their proposed disallowance of Atmos' gas costs—AEM's recordkeeping!

Initially, Atmos must take issue with a number of phrases and references strategically placed in Staff's Brief, obviously designed to "poison the well" in support of Staff's goal of portraying Atmos as the bad actor in this matter. From the initial line of

the brief – "This case and its discovery disputes . ." – to the "boilerplate RFP process"[4] – to the oblique reference to a common incentive compensation program – to a quotation of a statement in a Commission Order (at the top of page 5 of the brief) that Staff and Public Counsel know Atmos took exception to, and was later clarified by the Commission in a subsequent Order to ensure that "the challenged statement does not indicate that the Commission has prematurely decided the issue of the effect of the bidding process. . . . The statement in the order granting Staff's motion to compel is not binding on the Commission in the ultimate resolution of this case . . ."[5]

While not an exhaustive list, the above references, regrettably, are indicative of the tone of the Staff's Brief.[6] In addition, Staff has shamelessly attempted to taint the record with innuendo about the state of affairs in other jurisdictions where Atmos operates without any credible evidence or showing of relevance.

Staff would lead you to believe that Atmos is engaged in "a number of controversial and difficult ACA cases" in Illinois. (Staff Brief, p. 28) It is simply untrue. Staff's assertion is only supported by brief testimony from its own witness at the evidentiary hearing in which the witness reports reviewing a single case in Illinois. (Tr Vol 7, p 739 ln 21-23). Although the docket to which Staff refers does involve AEM, the matters at issue in that docket are different than Staff's evolving allegations in this

[4] Staff has reviewed Atmos' RFP process in detail in this and previous ACA cases, and Atmos has agreed to incorporate their suggestions into the "boilerplate" RFP process its utilizes. See e.g., Order Approving Stipulation and Agreement, and the Stipulation And Agreement in Case No. GR-2007-0407, p. 3-4 where the Company agreed to incorporate nine (9) Staff recommendations into its RFP process.

[5] *Order Regarding Motion for Reconsideration, Motion for Rehearing, and Request for Stay of Order*, Case No. GR-2008-0364, August 4, 2010, p. 3.

[6] Cleverly, Staff appears to take delight in suggesting that Atmos "led the charge" in contesting the Commission's affiliate transaction rules back in 2003 (Staff Brief, pp. 15-16) and, therefore, should be suspect in terms of compliance. Of course, as the Staff well knows (buried in its Footnote 44, p. 16), Atmos Energy Corporation was simply the first named appellant among Missouri Gas Energy, Laclede Gas Co. and Trigen-Kansas City Energy Corp., along with separate appellants Ameren Corporation and Union Electric Company, d/b/a AmerenUE.

docket. Staff then cites the fact that a number of dockets are pending to leap to the conclusion that "these cases are controversial and difficult." (Tr Vol 7, p 740, ln 1-3) As is the usual practice, cases are taken up in chronological order and a delay in the resolution of a single docket can delay the resolution of subsequent dockets, but does not demonstrate the nature of the matters at issue in those subsequent dockets. There are currently no "controversial" or "difficult" issues pending in any Illinois dockets.

The portion of Staff's Brief addressing the Texas jurisdiction is even more baseless and egregious. Staff attempts to characterize the final order in Railroad Commission of Texas (RCT) Gas Utility Docket (GUD) 9696 from 2009. Citing to the Findings of Fact in GUD 9696, Staff emphasizes that the RCT "established a triennial review procedure and imposed seven standards on the gas purchases of the utility." (Staff Brief, p. 28) What Staff either failed to recognize or intentionally withheld from this Commission is that the referenced triennial review was established in the Final Order in GUD 8664, a 1997 docket involving Lone Star Gas Company, one of Atmos' predecessors in interest in Texas. Not only was the triennial gas cost review not aimed at Atmos, the final order in GUD 9696, the order cited by Staff, *abolished this very review process*. (Final Order, RCT GUD 9696, p.6).

B. The latest Staff theory also is erroneous and misplaced.

Based on self-serving seeds planted during its opening statement and live testimony at the evidentiary hearing, the Staff now concludes that "[t]he lack of AEM records was foundational to Staff's proposed $308K disallowance." (Staff Brief, p. 19) However, the cross-examination of Staff Witness Sommerer revealed the following:

Q. Now Mr. Berlin yesterday indicated that Staff is alleging, I think, that there are inadequate recordkeeping now by AEM. Is that your understanding?
A. Yes.
Q. Is Staff referencing the documents that -- that you were requesting that would identify the profit and loss of AEM on a transaction-by-transaction basis?
A. He's referring to a specific data request where Staff had asked for the deal documentation and supporting documentation around AEM's economic evaluation of the deal.
Q. And that would be -- the document that you received had the gross profits but not any net profits. Correct? They didn't have that document. Right?
A. That's correct.
Q. Now, does the Commission's affiliated transaction rule anywhere say that you need to keep a transaction-by-transaction accounting of the net profits of the affiliate?
MR. BERLIN: Objection, calls for legal conclusion.
BY MR. FISCHER:
Q. As a non-lawyer reading the affiliated transaction documents or rules, do you know of anywhere that there's a statement you need to keep the net profits on a transaction-by-transaction basis?
A. I'm not aware of that provision, no. (Tr. Vol. 7, pp. 634-635)(emphasis added)

* * * *

Q. I'm just about done, Mr. Sommerer, but are you familiar with the commission's affiliated transaction rules, both the gas marketer rule and the affiliated transaction rule?
A. Yes.
Q. I think those rules have been in effect for quite awhile, going back to the '99 and then it was taken to the Supreme Court, but it's been in effect for quite awhile. Correct?
A. Correct.
Q. Do you happen to have a copy of the affiliated transaction rule? If you don't, I've got one here. Okay. I'd like to refer you to the 40.016 rule, the Marketing Affiliate Rule on Page 5. There the purpose clause at the very beginning states, This rule sets forth standards of conduct, financial standards, evidentiary standards and recordkeeping requirements applicable to all Missouri Public Service Commission, parentheses Commission, regulated gas corporations engaging in marketing affiliate transactions. Do you see that?
A. Yes.
Q.. Wouldn't you agree that the marketing affiliate transaction rule specifically authorizes and contemplates that LDCs may engage in affiliated transactions with their affiliated gas marketing affiliates?
A. Yes.

Q. From your perspective as a non-lawyer, wouldn't you agree that on its face, it would be inconsistent with this marketing affiliate transactions rule for the Commission to adopt the recommendation of the Staff to prohibit LDCs from engaging in gas supply transactions with affiliates?
A. From my layperson standpoint, I would think that that policy approach without some rulemaking effort would be inconsistent with this current rule.
Q. Now, let's go down to -- go to the – the other rule, the 015 rule, particularly Subsection (3)(a) There it states, When a regulated gas corporation purchases information, assets, goods or services from an affiliated entity, the regulated gas corporation shall either obtain competitive bids for such information, assets, goods, or services, or demonstrate why competitive bids were neither necessary or appropriate; is that right?
A. That's correct.
Q. As you understand this rule, is it correct that when an LDC purchases goods or services from an affiliate, then the rule requires the LDC to utilize competitive bidding for goods or services unless it demonstrates why competitive bids aren't necessary or appropriate?
A. That's my understanding.
Q. And you've agreed that Atmos followed the preferred method of competitive bidding in this case. Right?
A. Correct. (Tr. Vol. 7, pp. 695-697)

Nevertheless, the Staff chooses to focus its attention on the following portion of the Affiliate Transaction Rule, 4 CSR 240-40.015 section (5)[7]:

(5) Records of Affiliated Entities.
(A) Each regulated gas corporation shall ensure that its parent and any other affiliated entities maintain books and records that include, at a minimum, the following information regarding affiliate transactions:
1. Documentation of the costs associated with affiliate transactions that are incurred by the parent or affiliated entity and charged to the regulated gas corporation;
2. Documentation of the methods used to allocate and/or share costs between affiliated entities, including other jurisdictions and/or corporate divisions;
3. Description of costs that are not subject to allocation to affiliate transactions and

[7] As noted in Staff's Brief, the companion rule, 4 CSR 240-40.016 Section 6, mirrors the same requirements.

> documentation supporting the nonassignment of these costs to affiliate transactions;

(Staff Brief, pp. 14-15 and 19)

However, such documentation requirements apply to costs incurred by the affiliate and charged to the utility – *e.g.*, if the affiliate has accountants, and those accountants also provide service to the utility, the affiliate is going to allocate the cost of the accounting services to the utility -- this does not apply to situations where the affiliate is SELLING a good to the utility at a fair market price, particularly pursuant to a robust RFP process. An examination of the referenced subsections reveal that the subject matter is cost allocation – not fair market pricing. But in this case, AEM did not allocate any costs to Atmos at all. Instead, it participated in a robust, competitive bidding process to obtain the right to sell natural gas to Atmos—it did not allocate any costs of gas to Atmos! Therefore, Staff's LATEST theory to support its affiliated transaction disallowance is also inapplicable to the facts of this case.

In reality, Atmos and AEM have strictly followed the "Record Keeping Requirements" contained in the Affiliated Transactions Rule, 4 CSR 240-40.015(4), and the identical Marketing Affiliate Transactions rule, 4 CSR 240-40.016(5):

A. Atmos "maintains, books, accounts and records separate from those of its affiliate" (Tr. 443), as required by 4 CSR 240-40.015(4)(A) and 4 CSR 240-40.016(5)(A);

B. Atmos maintains the information required by 4 CSR 240-40.015(4)(B) and 4 CSR 240-40.016(5)(B)(i.e. list of affiliated entities, list of goods and services to or from affiliates, contracts, and list of affiliate transactions, amount of transactions, and basis

used to record each transaction—fair market price or fully distributed cost);

C. Atmos maintains the information required by 4 CSR 240-40.015(4)(C) and 4 CSR 240-40.016(5)(C)(i.e. records identifying basis used for each transaction—fair market price or fully distributed cost), and books and accounts and supporting records in sufficient detail to permit verification of compliance with the rule.

This required information is submitted to the Staff and Public Counsel each year.[8] Both Staff's counsel and Staff's witness have indicated to the Commission that Staff has not raised any concerns about the Company's Cost Allocation Manual in this proceeding. (Tr. 698) In fact, Staff has never raised substantive issues regarding after Atmos' annual affiliated transaction submission to the Commission. (Tr. 171-72, 698)

And so, at the end of the day, is Staff's ill-placed argument regarding the adequacy of AEM's records truly the basis, or foundation, for its proposed $308,000 adjustment? By the time of redirect examination during the evidentiary hearing, the "basis of Staff's adjustment" was starting to move again. Mr. Berlin's redirect examination of Mr. Sommerer includes the following exchange:

[8] For a list of the Affiliate Transactions Filings from 2005 through 2011 made by Atmos Energy Corporation, see the following:

		Date Submitted
BAFT-2005-0196	Affiliate Transactions	3/15/2005
BAFT-2006-1179	Affiliate Transactions	3/15/2006
BAFT-2007-0338	Affiliate Transactions	3/15/2007
BAFT-2008-0078	Affiliate Transactions	9/2/2008
BAFT-2009-0763	Affiliate Transactions	3/13/2009
BAFT-2010-0592	Affiliate Transactions	3/12/2010
BAFT-2011-0477	Affiliate Transactions	3/11/2011

> Q. And you were asked some questions about the proposed disallowance. And what is the basis of Staff's adjustment for the amounts that you list in your surrebuttal testimony, the $308,000?
> A. The basis behind that disallowance is to bring the best estimate that Staff believes of the fair market value of AEM's cost of supplies associated with the actual sale of gas to its affiliate, AEC. **That's the primary reason behind the adjustment** along with the fact that the Staff believed additional records should have been kept by AEM to provide support for its fair market value. (Emphasis added; Tr. Vol. 7, p. 731)

Stay tuned.

III. STAFF'S ALLEGATIONS THAT ATMOS AND AEM PROVIDED INACCURATE AND MISLEADING RESPONSES TO DATA REQUESTS ARE WITHOUT MERIT

While the Staff rhetoric would accuse Atmos of a "long history of inaccurate and incomplete DR responses to Staff,"[9] the record clearly shows just the opposite. Company Witness Buchanan candidly testified on cross-examination that to her knowledge one DR may have been answered inaccurately (Tr. 346-348); however, there is no record support for Staff's outrageous allegations of Atmos "misleading" or "sandbagging" the Staff, as suggested in the Staff Brief. (*See*, Tr. 342-352; 480-489)

As noted in its review of the procedural history of this matter in its initial brief, Atmos does not believe that the record reflects that it has in any way abused the discovery process, or otherwise been uncooperative in providing Staff necessary and relevant information during its "forensic audit." Atmos objected to two or three data requests which it believed were inappropriate and irrelevant (Tr. 693) and, when a majority of the Commissioners ruled in favor of Staff, Atmos and AEM timely complied and provided the requested information. Public Counsel's similar statements[10] in its brief

[9] Staff Brief, p. 32.
[10] Public Counsel Brief at 2-4.

indicate that it must be confusing this case with some other contentious matter since the record certainly does not support such allegations.

Staff apparently believes that DR 100 is its "smoking gun" in this case, supporting its misguided allegation that Atmos misled the Staff and somehow "hid" the Haven outage force majeure event. Of course, the record clearly shows otherwise.

By Mr. Berlin:

Q. Well, Ms. Buchanan, this DR asks, Regarding reliability for the ACA period for the pipelines and suppliers that the LDC utilized for this ACA period – Paragraph A: Were there any pipeline or supplier actions including maintenance or pressure problems during this ACA period that caused the LDC to question its reliance on the transport, storage or supplies to be delivered to the LDC?

Paragraph B: If yes, fully explain the actions that caused concern, and explain what actions the LDC has taken to alleviate those concerns for this ACA and subsequent ACA periods. Is that a fair reading of this?

A. That's what the data request says. Yes.

Q. And can you tell me who responded to this DR?

A. Mike Walker.

Q. And if you would, please, let's look at the response related to Hannibal, Bowling Green area. And would you please read to me the response.

A. There were not any pipeline supplier liability reliability issues during this ACA period.

Q. Okay.

A. **I stand behind that, too. I fully support his answer in that.** (Emphasis added) (Tr. 351-352)

By Mr. Berlin:

Q. And my question, Mr. Walker, is: Is this a DR that you had responded to?

A. Yes. It was.

Q. Okay. Because your name is at the bottom. Right?

A. Yes.

Q. Okay. Is there any information contained in this response regarding constraints at the Haven receipt point?

A. Are you talking about during the outage – the pipeline rupture?

Q. Just in the DR response, is there any information in this response regarding constraints at the Haven receipt point?

A. Outside of the pipeline rupture, no.

Q. Is there any mention of the cuts to supply and storage made in the November/December 2007 for Hannibal, Bowling Green area?
A. Again, outside of the pipeline rupture, no.
Q. And, in fact, the response is, There were not any pipeline/supplier reliability issues during this ACA period. Isn't that correct?
A. That's correct. (Tr. 482-483)

As Ms. Buchanan was allowed to explain on redirect examination:

A. What I'd really like to express is that we believe our supplier is reliable. They served us reliable [sic] for many years, and also during the course of this ACA period served us reliability [sic] throughout this event.

The force majeure holds a different level of service accountability, where there's a realization because of this act of God, you may not be able to get the supply in the same way you're used to.

Like I said, there was some scrambling going around through the pipeline and the various shippers to try to deal with this, and it was a rather extensive outage. And to say that that one event, and our supplier asking us to work with them during those weeks to reduce nominations and to say that that made them unreliable just does not sit well with me. . .
Q. Well, that raises a question. You were asked about some DRs where you said you didn't have any reliability problems.
A. Yes. That's what I meant. That's what I was alluding to.
Q. Do you consider a force majeure event to be a reliability problem?
A. No. That is a – an act of God. Again, it's beyond the pipeline's control, and beyond the supplier's control. So it's a whole new animal when you have a force majeure. (Tr. 456-458)

As Ms. Buchanan explained, a Force Majeure Event does not constitute a "reliability" issue—the subject of the data request. An "Act of God" is not something that Atmos would consider to be a problem of reliability for either Panhandle Eastern Pipeline or AEM. Of equal import, of course, is the fact that Staff's protestations of "nondisclosure" of Panhandle's line rupture at Haven ring hollow, considering the fact that Staff knew about this information prior to filing direct testimony in this matter. In addressing Atmos' motion to strike testimony, Commissioner Jarrett correctly notes:

The Staff, by failing to seek a waiver, evaded Commission rules. Now, after the fact, Staff points the finger at Atmos to defend its motion to strike. Staff Counsel during oral argument did not argue "good cause."

> Instead, Staff Counsel argued that reliability was the issue that led to the inclusion of a new theory in surrebuttal. **The reliability concerns underlying Staff's new theory was based on information which Staff knew prior to the filing of direct testimony in this case. Tr. 711, lns. 22-25 and Tr. 712, lns. 1-3.** (Emphasis Added)[11]

Even more troubling when "peeling layers off the onion" to examine Staff's baseless claims regarding incomplete records or responses, is Staff's disingenuous discussion of "gross profits" and suggesting that AEM was not forthcoming in providing net profit information (See discussion, *infra*, pages 14-15), when the DR at issue clearly requests records that show the gross profit involved.

At the end of the hearings, it appears that Staff is trying to create the illusion that Atmos failed to accurately answer the multitude of data requests propounded by Staff to create an excuse or flimsy justification for the fact that Staff has blatantly violated the Commission's rules that require parties to include in their direct testimony "all testimony and exhibits asserting and explaining that party's entire case-in-chief." 4 CSR 240-2.130(7)(A)(emphasis added). Of course, the Staff's direct testimony was filed after Staff had completed a year-long ACA audit.

Staff has abandoned its other "theories of the case" in support of its affiliated transaction adjustment in this case in the face of the overwhelming evidence that: (1) Atmos followed the Commission's requirement to conduct a competitive bidding process for its gas supplies; (2) Atmos paid its affiliate less than the fair market price for its gas supplies; (3) Atmos did not provide any "financial advantage" or other preference to its affiliate; and (4) Atmos was prudent and reasonable in its gas purchasing activities during this ACA period.

[11] *Dissenting Opinion of Commissioner Terry M. Jarrett Regarding Order Denying Atmos' Motion to Strike Testimony*, Case No. GR-2008-0364, May 5, 2011, p. 2. See also, Post-Hearing Brief of Atmos Energy Corporation, pp. 44-45.

The Commission should find that Staff's allegations that Atmos provided inaccurate and misleading responses to data requests are nothing more than Staff's last ditch attempt to come up with something (or anything) to justify its proposed disallowance that caused this case to go to hearing in the first place. As Atmos has explained throughout this proceeding, Atmos attempted to save its customers an additional $140,000 by accepting the lowest and best bid from its affiliate, and now this action has resulted in Staff proposing a $308,000 affiliate transaction disallowance, and Atmos having to participate in an expensive and time-consuming forensic investigation by Staff. The Commission should not encourage this approach in PGA/ACA cases.

IV. FORCE MAJEURE ADJUSTMENTS

At pages 21-26 of its Initial Brief, Staff addresses its Scenario 1 and 2 alternative adjustments as purported "measures of harm to ratepayers from imprudent decisions in making December 2007 baseload and swing gas nominations." Atmos fully addressed and refuted these adjustments at pages 43-53 of its initial brief; however, there are a handful of statements that need to be addressed in this reply brief.

First, Staff highlights the Prudence Standard that unequivocally states that "The **test of prudence should not be based upon hindsight, but upon the reasonableness standard**." (Staff Brief at 26)(Staff's original emphasis). However, Staff's analysis of the facts surrounding its proposed Scenario 1 and 2 ignore the quoted standard. As explained in Atmos' Post Hearing Brief, Staff attempts to Monday Morning quarterback Mr. Walker by suggesting (with 20/20 hindsight) what Mr. Sommerer believed Mr. Walker should have done. (Staff Brief at 25-26)(Tr. 621) According to Staff, what Mr. Walker should have done on that first Monday morning after Thanksgiving was to

"adjust Atmos' December baseload FOM NOM to eliminate the 5% storage deficiency and to include additional gas to raise the Company's storage level to 5% above its plan." (Staff Brief at 25-26) However, Staff ignores the fact that at the time Mr. Walker returned to his office after Thanksgiving, the pipeline notice did not indicate that there would be any adverse impact upon shippers. (Tr. 570) Not only that, but the 5% deficiency in the end of month storage levels were, oddly enough, not known to Mr. Walker until *after the end of the month*. Only with 20/20 hindsight does Staff or anyone else know that there would be a Force Majeure Event declared later in the month that might result in cuts later in December. Given the information that Mr. Walker had at the time he returned to his office following the Thanksgiving Break, it was completely reasonable that he would "stay the course" and continue to maintain his nominations as he had previously judged them to be appropriate under the circumstances that existed at the end of November.

Staff also criticizes Mr. Walker for nominating levels that were at 25% of the warmer than expected winter levels, and not strictly following the Atmos Gas Supply Plan's guideline to review the nomination levels at 20% of warmer than winter gas supplies. (Staff Brief at 21-22) As explained in Atmos' Post-Hearing Brief, Mr. Walker used his best judgment to make his First-of-the Month nomination after carefully reviewing the trends of the year, and where his storage levels would end up based upon those trends. (Tr. 570-71) The exercise of his best judgment is certainly not the basis for a prudence disallowance in this case.

Finally, Staff attempts to illustrate in its Initial Brief (at p. 21) how Staff witness Sommerer calculated the alleged "damages" associated with its proposed prudence

disallowance by citing to Ex No. 20 which is Atmos' DR response to DR 79. However, this DR response does not support Staff's proposed calculation. As previously explained in Atmos' Post-Hearing Brief at page 46, Staff failed to previously include in the record anything to show the Commission how it came up with its numbers for its proposed prudence disallowance.

As explained in Atmos' Post-Hearing Brief, the Staff has also failed to show the "nexus" between Mr. Walker's actions and any harm to consumers. *See Associated Natural Gas*, 945 S.W.2d at 529. As Ms. Buchanan testified, there were other reasons besides the Force Majeure Event that would require that in January, February and March, there might be larger purchases of gas. (Tr. 455) The reasons included: a propane peaking plant in Hannibal experienced an outage in mid-December requiring additional purchases, storage contract ratchets require additional purchases to ensure deliverability on a peak day, and the need to purchase gas supplies for unusually cold days. (Tr. 456) As a result, Staff has not demonstrated that any specific actions by Mr. Walker caused any harm to consumers. As previously noted, no consumer was affected or probably even aware of the pipeline rupture during this rare Force Majeure Event. (Tr. 540)

In summary, the Commission should reject the Staff's proposed disallowances which were first raised in Staff's surrebuttal testimony. Even giving Staff the benefit of the doubt on the untimely nature of this prudence adjustment, the Staff has not demonstrated that Atmos' gas specialist Mike Walker did anything that would objectively be considered imprudent in his gas purchasing activities in November or December 2007. Certainly, Staff has not demonstrated that any of his actions "caused" consumers to be

adversely affected. As a result, Staff's eleventh hour prudence disallowance should be rejected.

V. STAFF MISUNDERSTANDS THE PRESUMPTION OF PRUDENCE IN PGA/ACA CASES INVOLVING AFFILIATED TRANSACTIONS.

In its Initial Brief, Staff correctly cited the seminal case, *State ex rel. Associated Natural Gas Company v. Public Service Commission of Missouri*, 954 S.W.2d 520, 528-29 (Mo. App. 1997), as the legal basis of the Commission's Prudence Standard for PGA/ACA cases. It noted that this case holds that "[a] utility's costs are presumed to be prudently incurred." (Staff Brief at 12)

However, after laying out the legal presumption of prudence and the correct legal standard for judging prudence in Missouri by quoting the *Associated* decision, Staff tries to create an exception for cases involving affiliated transactions[12], and then inexplicably concludes: "Case law is clear there is no presumption of reasonableness when a utility deals with its affiliate." (*Id.*) Staff is simply incorrect in its assertion on this point.

Unfortunately, Staff fails to inform the Commission that the *Associated* case itself dealt with an affiliated transaction under a gas purchase contract between an LDC and its affiliated company, and the *Associated* court found that the legal presumption of prudence applied to affiliated transactions. *See* 945 S.W.2d at 523. Clearly, Missouri law makes no distinction between cases involving affiliated transactions and other cases with regard to the legal presumption of prudence. In fact, the Missouri courts have already held that the legal presumption of prudence specifically applies to affiliated transactions. (*See* Atmos' Post-Hearing Brief, p. 8-9) Rejecting assertions by the State of Missouri

[12] Staff does not cite any Missouri case law for its assertion, but instead relies on cases from other jurisdictions that are not applicable or binding in Missouri. (Staff Br. at 13, fn. 41 &42).

and Public Counsel that there was no legal presumption of prudence for affiliated transactions, the court in *State ex rel. Public Counsel v. Public Service Commission,* 274 S.W.3d 569, 577 (Mo.App. 2009) clearly and unequivocally held:

> Their assertion is incorrect. Regulation 240–20.015(6)(c) says, "This rule does not modify existing legal standards regarding which party has the burden of proof in the commission proceeding." This means that the regulation does not modify the existing burden of proof. Although UE purchased the CTGs from its affiliates, the commission properly presumed that UE was prudent in its purchase of the CTGs, until the State or Public Counsel presented evidence that raised a "serious doubt" concerning the prudence of its expenditure. *State ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri,* 954 S.W.2d 520, 528 (Mo.App.1997).

Notwithstanding the existence of the legal presumption of prudence, Atmos has provided competent and substantial evidence in the record that demonstrates that its gas purchasing practices were prudent and otherwise consistent with the requirements of the Affiliated Transaction Rules. (Atmos Br. at 4-53)

The Staff also makes much of the fact that Atmos participated with gas industry in the initial challenge to the lawfulness and appropriateness of the Affiliated Transaction Rules when they were first adopted. (Staff Brief at 15-16) Contrary to the assertions of Staff, Atmos has followed the requirements of the Affiliated Transaction Rule since its inception. Atmos is not seeking in this case to eliminate any record keeping requirements contained in the rules. As explained herein, Atmos has strictly followed those record keeping requirements since the rules were adopted. Instead, Atmos seeks the right to engage in the affiliated transactions that are specifically contemplated by the rules without the need to defend itself in costly forensic investigations when it accepts the lowest and best bid from its affiliated gas marketer. If this is not to be the public policy of the Missouri Public Service Commission, then Atmos would request that the

Commission clearly explain the expectations of the Commission for evaluating such transactions so that regulated gas companies like Atmos and its unregulated affiliate can determine whether it is worth the price to participate in such affiliated transactions that may save its ratepayers some additional dollars.

As Atmos has already pointed out, Atmos in this case tried to save its customers an additional $140,000 by accepting the lowest and best bid from its affiliate rather than pay the fair market price established by the competitive bidding process with unaffiliated gas marketers. As result, Atmos is now facing a disallowance proposed by Staff of $308,000. (Atmos Post-Hearing Brief at 40-41)

VI. AFFILIATED TRANSACTIONS RULES

Staff has largely abandoned its original positions and staked out a new position in its Initial Brief to justify its $308,000 affiliated transaction adjustment. While Atmos has fully addressed the Staff's new position above, it is also important to identify areas that are no longer in dispute related to the Staff's proposed affiliated transaction disallowance.

A. Staff has not disputed that Atmos used the competitive bidding process required by the Affiliated Transaction Rule.

Staff has not contested the fact that Atmos uses a robust, competitive bidding process to obtain its gas supplies in Missouri. However, Staff announced in its Initial Brief that "the Staff cannot solely rely on the 'robustness' of the RFP / Bid Evaluation process when evaluating the transaction between the LDC and its affiliate." (Staff Brief at 2) In other words, just because the Company uses the Commission-mandated competitive bidding process, it is not acceptable to Staff, unless Staff also conducts a "forensic audit" of the affiliate's business practices. The necessity of such a forensic

investigation under such circumstances is still a very fundamental issue to be addressed by the Commission. As explained in Atmos' Post-Hearing Brief, Staff's position on this issue should be rejected.

B. Staff has now totally abandoned the allegation that the Affiliated Transaction Rule itself requires that the profits of an affiliate be used to lower gas costs in the PGA/ACA process.

While this position was the fundamental justification for the affiliated transaction adjustment contained in the original Staff Recommendation, Direct Testimony of David M. Sommerer, and Staff's Position Statement in this case, Staff has now abandoned it:

> The $308K adjustment is not proposed because AEM made a profit, it was proposed because the basis of the $308K adjustment was not fully supported by AEM.

At this point in the Staff Brief, Staff seems quite confused about whose burden it is to "fully support" Staff's own "$308K adjustment". It is certainly not AEM's burden to support Staff's adjustment. In fact, AEM is not even a party to this case.

But what is more perplexing about this case is that Staff has now totally abandoned its original justification for forcing this case to hearing in the first place. In fact, although the Staff subtracted the "gross profits" of AEM off the gas costs as the basis for its affiliated transaction adjustments in the Staff Recommendation and direct testimony, Staff makes only one reference to the term "gross profits" in its Initial Brief at 18:

> Staff could not have known AEM's costs associated with the affiliate transaction because the single AEM document did not answer Staff's questions. AEM had compared the generic Panhandle cost of supply to the revenues AEM earned from Atmos. AEM listed gross profits. AEM did not report net profit. If AEM had reported its overhead costs associated with the transaction, Staff may have reduced the profits by the amount of

> AEM's reasonable costs and considered it in its proposed adjustment. But AEM did not report costs of its transactions

Staff fails to inform the Commission that it specifically asked in DR No. 106 for the "gross profits" of AEM on the affiliated transactions.[13] (See Attachment No. 1). The "gross profits" information, as requested by Staff, was supplied by AEM through Atmos. Based upon this "gross profit" information, Staff proposed its affiliated transactions adjustment. (Ex No. 26, pp. 9-10, Sommerer Direct). Of course, if the Staff had utilized the "net profits" of AEM for its adjustment, there would have been a much smaller adjustment, or no adjustment at all.

As explained by Staff witness Sommerer during the evidentiary hearings, Staff never requested additional information regarding the other AEM overheads, including personnel costs, office costs, and other administrative overheads necessary to determine the "net profits" of AEM. (Tr. 643) It is therefore rather disingenuous for Staff to suggest that "Staff may have reduced the profits by the amount of AEM's reasonable costs and considered it in its proposed adjustment. But AEM did not report costs of its transactions." In reality, Staff never even asked for that information necessary to calculate net profits!

C. Staff has not disputed the fact that Atmos paid its affiliate less than the fair market price for its gas supplies as established by a competitive bidding process among unaffiliated gas marketers.

During cross-examination, Mr. Sommerer testified that he would consider recommending to Staff that they withdraw the affiliated transaction adjustment if the evidence showed that Atmos paid AEM less than the fair market price for the gas supplies. (Tr. 630) Atmos believes that the competent and substantial evidence clearly

[13] The Commission should take administrative notice of DR No. 106 to confirm that Staff requested the "gross profits" information from AEM. (See Attachment No. 1)

demonstrates that Atmos did pay AEM less than the fair market value for its gas supplies. (Atmos Brief at 25-32) However, Staff's Initial Brief does not even address this fundamental issue. Instead, Staff creates a new assertion that the Atmos should not pay AEM more than AEM paid for its gas supplies—not because of the Affiliated Transaction Rule, but rather because AEM did not keep appropriate records, or because AEM brought "no discernible value" to the transaction:

> The $308K adjustment, discussed below in detail, captures the difference between the fair market price of the gas supplies that AEM bought from its suppliers and the price paid by Atmos to AEM for those supplies during the ACA period. The $308K adjustment makes AEM's fair market price of gas the same as Atmos' fair market price—as if the LDC, using its RFP process and gas buying expertise, had bought the gas supplies for itself, without AEM participation. Staff's analysis of limited available records and the evidence of record show that AEM brought no discernible value to Atmos' captive ratepayers. (*footnotes omitted*)

(Staff's Initial Brief at 4.)

Atmos has addressed the Staff's new assertion regarding the recordkeeping requirements under the Affiliated Transaction Rule above. In addition, it has already addressed the "value" that AEM brought to the transaction in its Post-Hearing Brief at 26-27. Clearly, AEM brought "value" to the transaction by making lower bids (that reduced the cost of gas for ratepayers) than any unaffiliated gas marketer bids.

Staff's theory, as Commissioner Jarrett[14] has already pointed out, is based upon an attempt by Staff to pierce the "regulatory veil" between the two entities. Yet, Staff understands that AEM's overhead costs are not in Atmos' rates (Tr. 639), but it still attempts to treat AEM as if it is really Atmos, under the erroneous assumption that Atmos could have obtained the gas supplies at the same "cost" as AEM—totally ignoring the

[14] *Dissenting Opinion of Commissioner Terry M. Jarrett In The Order Granting Staff's Motion To Compel Atmos To Respond To Data Request* (filed December 22, 2010)

fact that there is a "cost" to obtaining those gas supplies that are not included in Atmos' rates today. Staff's logic and theory is simply incorrect.

D. Staff has abandoned its recommendation that the Commission prohibit Atmos from engaging in affiliated transactions with AEM in this PGA/ACA Proceeding.

Although Staff's Position Statement[15] in this case made clear its real agenda—the complete prohibition of affiliated transactions between LDCs and affiliated marketing companies—Staff has now recognized the legal problems with its position:

> The Greenbrier case held that agencies cannot promulgate, or repeal, a rule by an adjudicated order. . . Accordingly, Staff does not suggest, nor does Staff recommend, that the Commission promulgate any change or repeal of any section of the Affiliate Rules by adjudication.

(Staff Brief at 30)

While the Staff now seems to acknowledge that its agenda cannot be lawfully accomplished in this proceeding, Staff nevertheless points the finger of blame for Staff's unlawful recommendation squarely at Atmos: "This problem is of Atmos' own making." (Staff Br. at 29)

With all due respect to Staff, this is utter nonsense. Staff's allegation that "Atmos sandbagged Staff with incorrect information"[16] and other inappropriate innuendoes of collusion between Atmos and AEM (Ex No. 26, pp. 11-14 Sommerer Direct; Ex No. 27, pp. 6-12, Sommerer Rebuttal) simply represent the latest twist on the "conspiracy theory" underpinnings of Staff's misguided efforts in this matter.

[15] Ex No. 29, Staff Position Statement, p. 2.
[16] Staff Brief at 10.

Clearly, Atmos and AEM did not make Staff recommend that all affiliated transactions should be prohibited in Missouri. This recommendation is of Staff's own making—no one made them take this unsustainable legal position. But even Staff now recognizes that their initial recommendation to prohibit affiliate transactions is unlawful—and it is also against the public interest.[17]

Staff needs to take responsibility for its own wildly vacillating recommendations in this case, and not attempt to blame them on the Company. Staff should also be held accountable for the costs that Staff is imposing on Missouri ratepayers and the regulated companies by launching expensive and time-consuming "forensic audits" when a regulated company merely follows the Commission's mandate in the Affiliated Transaction Rules to use competitive bidding to obtain its gas supplies. Staff acknowledges "the enormous amount of time and resources consumed by affiliate cases under their current posture" (Staff Brief at 29), but it fails to recognize that the "current posture" is created by Staff's unrelenting desire to delve into the books and records of unregulated affiliate gas marketers. This "current posture" is totally unnecessary when LDCs like Atmos follow the Commission's mandate to utilize competitive bidding processes when purchasing gas supplies. It is unfortunate that Staff has decided that Atmos and its affiliate are the "primary suspects" that require a forensic investigation to uncover the "improper relationship between the non-regulated affiliate and the regulated entity"[18] that Staff merely assumes must exist between them.

[17] It is also doubtful whether the Commission itself has the statutory authority to prohibit outright all affiliated transactions in a rulemaking proceeding since Section 393.140(12) RSMo clearly authorizes gas corporations to conduct unregulated businesses separate and apart from the operations of the regulated public utility operations..

[18] *Dissenting Opinion of Commissioner Terry M. Jarrett In The Order Granting Staff's Motion To Compel Atmos To Respond To Data Request* (filed December 22, 2010).

Both Company witnesses, Becky Buchanan and Mike Walker, expressed their feelings of outrage and disgust that Staff would make such allegations without a shred of evidence to support their personal attacks on the integrity of Ms. Buchanan and Mr. Walker. (Tr. 466, 588-89)

E. Staff now invites Atmos and AEM to voluntarily stop engaging in affiliated transactions.

Having recognized that it would be illegal for the Commission to prohibit affiliate transactions in this adjudicatory proceeding, now Staff invites Atmos to consider the option of voluntarily stopping its practice of engaging in affiliate transactions with AEM when AEM is the lowest bidder. (Staff Brief at 16 and 29) As the Company explained in its Initial Brief, this may very well be the option that is chosen if the Commission decides that the Staff's unprecedented approach in this case should be the regulatory policy in Missouri. (Atmos Brief at 40-43) Under the Staff's suggested regulatory policy in this case, there is no incentive for either Atmos or AEM to engage in such transactions in the future if they are going to face substantial affiliate transaction disallowances and be compelled to participate in expensive "forensic audits" when AEM happens to be the lowest and best bidder. (Atmos Brief at 40-43)

VII. CONCLUSION

In conclusion, the Commission should reject the Staff's proposed $308,000 Affiliated Transaction Adjustment, and the prudence adjustment associated with the Force Majeure Event in December 2007. Staff simply failed to raise a serious doubt regarding the prudence of Atmos' gas purchasing practices during the ACA period. Even if a "serious doubt" had been raised (which it has not), the competent and substantial

evidence in the record presented by the Atmos witnesses demonstrates that Atmos was prudent in its gas purchasing activities during the 2007-2008 ACA period.

For the reasons stated herein, the Commission should find and conclude:

1. Atmos Energy Corporation's purchasing practices were prudent during this ACA period.
2. The Affiliated Transaction Rule does not require that a regulated LDC like Atmos lower its gas supply costs in the PGA/ACA process by the same amount as the gross profits of an affiliated gas marketer that provided gas supplies after a formal competitive bidding process.
3. Atmos did not provide a "financial advantage" to its affiliate since it paid AEM less than the fair market price, as established by a competitive bidding process, for its gas supplies.
4. The Commission should not prohibit affiliated transactions between Atmos and its affiliated gas marketer in this adjudicatory proceeding.
5. The Commission should not adopt the Staff's proposed $308,000 disallowance of gas costs because Atmos asserted its legal right to object to discovery related to its unregulated affiliate or because AEM "failed" to maintain records that Staff alleges are required by the Affiliated Transaction Rules.
6. Atmos was not imprudent by failing to nominate the maximum amount possible under its contract with AEM during a December 2007 Force Majeure period during the rupture of the natural gas pipeline owned and operated by Panhandle Eastern Pipeline Company.

Respectfully submitted,

/s/ James M. Fischer

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed or mailed, First Class mail, postage prepaid, this 20th day of May, 2011, to all counsel of record in this matter.

/s/ James M. Fischer

_____

James M. Fischer

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*** Company Name**	Atmos Energy Corporation-Investor(Gas)		
*** Data Request No.**	0106		
Date Requested	5/26/2009		
Issue	Expense Operations Purchased Gas		
Requested From	Judy Dunlap	**Email**	rate.administration@atmosenergy.com
Requested By	Lock Phil	**Email**	Phil.Lock@psc.mo.gov
Brief Description	AEM's supply and management transaction and contract records		
Description	Please provide a copy of AEM's supply and management transaction and contract records that show the gross profit related to each deal between the Missouri LDC and AEM in effect during the 2007-2008 ACA for the Rich Hill and Hume service area (SSCG), Butler and Hannibal/Canton service areas (PEPL) and Piedmont (MRT) service area.		

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