

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

In the Matter of the PGA/ACA Filing of Atmos)	
Energy Corporation for the West Area (Old Butler),)	<u>File No. GR-2008-0364</u>
West Area (Old Greeley), Southeastern Area (Old)	
SEMO), Southeastern Area (Old Neelyville),)	
Kirksville Area and the Northeastern Area)	

**DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT
IN THE ORDER GRANTING STAFF’S MOTION TO COMPEL
ATMOS TO RESPOND TO DATA REQUESTS**

To prevail on its Motion to Compel, the Staff must show that the discovery it seeks is relevant. I do not believe the Staff has met its burden of establishing relevance; therefore, I dissent.

The Rules of Discovery and Evidence

“[D]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. [...]” 4 CSR 240-2.090(1). That includes the use of motions to compel along with subpoena power. The Affiliate Transactions and Marketing Affiliate Transactions rules, 4 CSR 240-40.015(3) and 4 CSR 240-40.016(4), provide evidentiary guidelines for Affiliate Transactions and Marketing Affiliate Transactions (the “affiliate rules”). These two rules purport to grant the Commission the “authority” to investigate the operations of an affiliated entity as well as review, inspect and audit books, accounts and other records kept by an affiliated entity – solely for the purpose of ensuring compliance with the rule as well as make findings available to the commission. See 4 CSR 240-40.015(6)(B)1, 2 4 and 4 CSR 240-40.016(7)(B)1, 2. The affiliate rules must be read against the limitations provided by Section 393.140(12), RSMo, which authorizes regulated utilities to engage in other businesses, provided that the businesses are not otherwise subject to the jurisdiction of the Commission, are not in the same business as the regulated utility, and is conducted in a way that is

separate and apart from the regulated utility itself. The affiliate rules recognize the statutory limitations of Section 393.140(12) by limiting the scope and reach of the rule only to “ensuring compliance with the rule,” and notably restricting obligations associated with the rule to the regulated gas corporation alone.¹ The affiliate rules cannot be boot-strapped to allow the Staff to obtain records of an affiliate for any other purpose.

The Commission’s discovery roadmap is also set out by the Supreme Court of Missouri in the Rules of Civil Procedure. Rule 56(b)(1) limits that which is discoverable by providing that “[I]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The party seeking discovery shall bear the burden of establishing relevance.” Mo. Rules of Civ. Pro. The burden is with the Staff because they filed the motion to compel.

The Data Requests

The Staff in Data Request 117.1 indicated that the Companies response to Staff Data Request 117 revealed unexplained anomalies in the quantities of gas supplies provided by Atmos unregulated marketing affiliate Atmos Energy Marketing (AEM) to the Hannibal/Bowling Green service area. In Data Request 117.1, the request at issue here, the Staff sought documents related to the baseload supply acquired by AEM in three specific trades intended by AEM to provide flexible baseload service to Atmos’ LDC customers. Staff sought these documents it claims to explain the anomalies concluded by Staff in the quantities of gas supplies in these three trades.

In Staff Data Request 131.1, Staff requested AEM’s economic analysis of its sales obligation with Atmos LDC. Staff asserted that they need these documents to support their assessment of the fair

¹ “Each regulated gas corporation shall ensure that its parent and any other affiliated entities ...” (emphasis added) (obligating regulated gas corporations to compliance with the affiliate rules 4 CSR 240-40.016(6)).

market value of the gas supplies that AEM provided to Atmos LDC customers and for Staff to evaluate the integrity of Atmos' bid process for those supplies.

Burden of Proof and Evidentiary Standards

For the Staff's Motion to Compel to be granted, the Staff must establish relevance. Mo. Rules of Civ. Proc. 56(b)(1). Relevance has specific legal meaning, and it also must be considered in the appropriate legal context. In my opinion in Case No. EM-2007-0374, I provided a detailed primer on "relevance" which bears repeating here. "The law requires evidence to be both logically and **legally** relevant in order to be admissible. Evidence is logically relevant when it tends to prove or disprove a fact in issue or corroborates other relevant evidence which bears on the principle issue.² Even if logically relevant, the finder of fact has discretion to limit such evidence, or exclude it all together, if the fact-finder believes the evidence is not legally relevant.³ Legal relevance refers to the probative value of the purported evidence outweighing its risks of unfair prejudice, confusion of issues, delay, waste of time or cumulativeness. Consequently, even logically relevant evidence may be excluded unless its benefits outweigh its costs."⁴ (emphasis in original) As to each DR at issue, in my opinion, the Staff failed to meet either relevance test.

It is undisputed that the transactions at issue occurred between a regulated gas corporation and an affiliate as set forth in the affiliate rules.⁵ It is also undisputed that there are limits to the scope and reach of discovery. *See Mo. Rule Civ. Pro. 56.01*. The affiliate rules specifically dictate the evidentiary standards for affiliate transactions and limit what evidence may be sought under the authority of these rules. Therefore the determination of relevance, both legal and logical, is set forth by the affiliate rules.

² Footnotes omitted.

³ Footnote omitted.

⁴ Statement Responding to the "Statement in Dissent to Regulatory Law Judges' Evidentiary Ruling and Objections to Procedural Irregularity." *Case No. EM-2007-0374*, pgs. 2-3, May 16, 2008.

⁵ References hereafter are to the "affiliate rule", with any material differences between 4 CSR 240-40.015 Affiliate Transaction Rule and 4 CSR 240-40.016 Marketing Affiliates Transaction Rule noted as appropriate.

Staff's motion was made under the auspices of the affiliate rules. The affiliate rules' specified purpose provides the bounds for relevancy and also serves as the standard for considering logical and legal relevance.

The basis for the affiliate rules is that when there are dealings between a regulated entity and its unregulated affiliate, an unfair advantage could be given to the unregulated affiliate by the regulated entity. The stated purpose of the affiliate rules are "to prevent regulated utilities from subsidizing their non-regulated operations." In effect, the affiliate rules serve as a substitute for competition. The affiliate rules attempt to approximate an arm's length transaction between a regulated entity (which the Commission regulates) and a non-regulated affiliate (which the Commission does not regulate). Compliance with the affiliate rules by the regulated entity thus make affiliate transactions capable of being viewed as occurring at arm's length.

The proposition that a transaction occurring between a regulated entity and an affiliate, even in compliance with the affiliate rules, is incapable of occurring at arm's length, sets up a construct where affiliate transactions can never be justified. This would make the rule a nullity. The Commission, by promulgating the affiliate rules, did not intend that transactions with affiliates be de facto prohibited, when the affiliate rules set out in great detail the manner in which such transactions are permitted.

No law prevents affiliate transactions; rather, Commission rules set out a process by which affiliate transactions may take place. To demonstrate compliance with the rules the regulated entity must meet the "Evidentiary Standards for Affiliate Transactions" set out at 40 CSR 240-40.016(4). The rules provide for a beginning and an end to these transactions, which allows regulated entities to move forward with new transactions. These standards, by which compliance is measured, are assumed to produce results which do not provide a financial advantage to an affiliate. 40 CSR 240-40.016(3). It would be absurd to interpret the affiliate rules to prohibit affiliate transactions.

Legal Analysis

Staff's purpose in seeking the disputed discovery was made clear in the October 20, 2010, oral argument:

[T]he staff is attempting to determine through its investigation of these transactions the fair market value of the gas supplies bought by AEM and to determine whether AEM's fair market value of gas supplies would be the same fair market value to the Atmos regulated LDC.

Tr. at p. 59, lines 12 – 16 (emphasis added). And,

In this 0708ACA (sic) case the Staff is trying to determine the prudence and reasonableness of Atmos gas purchasing transactions with its unregulated affiliate AEM. And to determine whether these purchases are prudent and reasonable, the Staff must determine the fair market value of gas supplies of the unregulated affiliate to determine whether that would be the same as fair market value of gas supplies to the LDC.

Tr. p. 57, lines 14 – 21 (emphasis added).

The relevant question is not whether the non-regulated AEM paid fair market value for the gas it bought. The relevant question is whether the Atmos regulated LDC paid fair market value for the gas it bought from AEM. Staff already has the information to make that determination, as indicated in the position statement it filed in this case on June 30, 2010:

It is staff's position that the rates charged by Atmos in its Butler and Hannibal service areas were NOT just and reasonable because the rates did not merely pass on the cost of the gas but included profits for Atmos' shareholders.

Position Statement at 1 (emphasis in the original). Further, Staff calculated the profit to be \$362,979 in total and asked that that amount be disallowed. *Id.* at 2. By subtracting the profit from the total amount paid to AEM by Atmos's regulated LDC, Staff knows exactly to the dollar the actual price of the gas paid for by the LDC. Staff can easily compare this amount to other information to which it has access in order to determine whether the regulated LDC paid fair market price for the gas. The position of Staff completely ignores the affiliate rules by advocating that Atmos should purchase gas from AEM not at a

fair market price, nor at Atmos' fully distributed cost, but at AEM's cost. The fact that AEM may have made a profit on the sale is irrelevant to this inquiry under the affiliate rules. Non-affiliate providers of gas to Atmos' regulated LDC make a profit on their sales, and Staff does not object to that. It is unrealistic for Staff to assert that an affiliate should not make a profit as well.

Staff's real purpose, in my opinion, is to investigate whether there is an improper relationship between the non-regulated affiliate and the regulated entity, and they want the affiliate's records to prove this. To do so, Staff must pierce the "regulatory veil" between the two entities, because they are not authorized to investigate a non-regulated entity.⁶ Staff wants the discovery under the auspices of the affiliate rules, but under the limited scope of the affiliate rules, Staff cannot use them to pierce that veil. Since Staff's investigation is not authorized by any law or rule of this Commission, the discovery it seeks is irrelevant.

If Staff wants to conduct a prudence evaluation, it can do so, but such an evaluation is different from a review under the affiliate rules, and has a different set of discovery parameters and evidentiary standards. Staff already has the information they need to determine fair market value for purposes of the affiliate rules. The discovery is irrelevant to the inquiry at issue, and I would have denied the Motion to Compel.

Sincerely,



Terry M. Jarrett, Commissioner

Issued this 22st day of December, 2010.

⁶ *Id.*