

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of Atmos Energy Corporation's)
Tariff Revision Designed to Consolidate Rates)
and Implement a General Rate Increase for)
Natural Gas Service in the Missouri Service)
Area of the Company.)

Case No. GR-2006-0387

**STAFF'S MEMORANDUM CONCERNING THE
VALIDITY OF ATMOS' COMPLIANCE TARIFF**

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its Memorandum Concerning the Validity of Atmos' Compliance Tariff, states as follows:

Introduction:

At the on-the-record presentation held herein on December 15, 2009, Staff advised the Commission that Atmos' compliance tariffs, approved on July 26, 2007, remain valid and effective despite the later reversal of the Commission's report and order by the Missouri Court of Appeals. This memorandum will set out the basis of Staff's opinion.

Ratemaking in Missouri:

Ratemaking in Missouri involves two successive processes. First, the Commission determines a rate that is "just and reasonable," which determination is embodied in a report and order.¹ Second, the company files, and the

¹ A "just and reasonable" rate is one that is fair to company and customers alike in that it is designed to produce revenues sufficient to cover the company's cost of providing the service and to yield a reasonable profit on the private monies invested in the company's assets, collected from customers without discrimination or preference, and with due regard to the cost of serving each customer.

Commission approves, tariffs designed to implement the Commission's determination and to collect that just and reasonable rate.² This second phase results in both a set of tariffs and the order that approves them. Because the purpose of these tariffs is to implement the Commission's report and order, they are referred to as "compliance tariffs"; the general practice is that they are approved by a Regulatory Law Judge acting under a delegation of authority pursuant to § 386.240, RSMo. Thus, the Commission's original proceedings in this matter resulted in a report and order, issued on February 22, 2007, compliance tariffs filed on March 1, 2007,³ and an order approving those compliance tariffs, issued on March 27, 2007.⁴

Judicial Review of Commission Actions:

Actions of the Commission may only be challenged pursuant to the exclusive procedures set out at §§ 386.500 through 386.540, RSMo.⁵ The first and essential step is an application for rehearing which must be presented to the Commission prior to the effective date of the order being challenged.⁶ Assuming the Commission denies the application, the next step is a writ of review at the

² The schedules of charges, rates, terms and conditions governing utility service are generally referred to as "tariffs."

³ Substitute sheets were filed on March 9, 16, 26, and 27, 2007.

⁴ Except for the Energy Conservation and Efficiency Program called for in the Stipulation and Agreement. On July 26, 2007, the Commission approved tariff sheets implementing Atmos' Energy Conservation and Efficiency Program, filed on June 28, 2007.

⁵ The Missouri Supreme Court has held that the judicial review procedures at §§ 386.500 through 386.540, RSMo, are both "exclusive and jurisdictional" as "a special separate statutory procedure for the review of an 'original order or decision' of the Commission[.]" ***Union Electric Co. v. Clark***, 511 S.W.2d 822, 825 (Mo. 1974).

⁶ "A threshold requirement for filing a petition for writ of review is to seek rehearing before the PSC" ***St. ex rel. Riverside Pipeline Co., L.P., v. Public Service Commission of the State of Missouri***, 215 S.W.3d 76, 80 (Mo. banc 2007); see §§ 386.500.2, 386.515, RSMo.

Circuit Court followed by an appeal to the Court of Appeals.⁷ In the present case, Public Counsel filed a timely application for rehearing with respect to the Commission's report and order and, when that was denied, pursued a successful writ of review in the Circuit Court of Cole County and a successful appeal in the Court of Appeals, Western District.

The Present Case:

Although the Public Counsel successfully pursued review of the Commission's report and order, he did not challenge the order that approved the compliance tariffs. That order is therefore now final and beyond challenge.⁸ The compliance tariffs themselves may be challenged, but only by a complaint, which would result in a new rate case requiring close to a year to resolve.⁹ The opinion and mandate of the Court of Appeals instruct the Commission to redo its report and order – that, after all, was the Commission action that Public Counsel challenged. There is no mention in the mandate and opinion of the Court of Appeals of either the compliance tariffs or the order that approved those tariffs. Those things were not within the scope of the appeal brought by the Public Counsel.

In summary, the Commission must redo its report and order in the light of the opinion of the Court of Appeals. Meanwhile, the tariffs approved on remain in

⁷ § 386.510, RSMo.

⁸ § 386.550, RSMo: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."

⁹ § 386.270, RSMo: "All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter."

effect until changed by authority of the Commission. In redoing its report and order, the Commission must consider all relevant factors.¹⁰ Given the interval that has passed since the original test year in this case, that requirement mandates a new rate case. Finally, at the end of that case, in its new report and order, the Commission will direct Atmos to file new compliance tariffs.

Atmos' New Rate Case:

There is an additional wrinkle in this case: Atmos has already initiated a new rate case by filing proposed tariffs on December 28, 2009.¹¹ That new rate case will result in a new report and order and new compliance tariffs that will, in about ten months, replace the tariffs presently in effect. Because the proceedings on the remanded case will also amount to a new rate case, both Staff and Atmos have suggested that the proceedings on remand be combined with the proceedings on the new rate case. Public Counsel has strenuously opposed this suggestion, even going so far as to assert that it would somehow amount to a denial of “due process.”

Given the amount of time and effort involved in preparing and litigating a rate case, it is simply not feasible for either Atmos or Staff to undertake two, simultaneously. Nor could two rate cases reasonably be completed in quick succession – each takes nearly a year. The only reasonable course for the Commission to take is to combine the two proceedings.

¹⁰ *State ex rel. Utility Consumers' Council of Missouri v. Public Service Commission'* 585 S.W.2d 41, 56 (Mo. banc 1979); § 393.270.4, RSMo.

¹¹ Case No. GR-2010-0192.

Conclusion:

Staff's purpose in this memorandum is to explain its position with respect to Atmos' currently effective tariffs: they are in force and effect and are unaffected by the reversal of the Commission's supporting report and order. Perhaps that result seems strange, but it is nonetheless true. The reversal of the report and order was not a finding that those tariffs were not lawful; the opinion and mandate issued by the Western District do not mention Atmos' tariffs.

Respectfully submitted,

s/ Kevin A. Thompson

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **20th day of December, 2010**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson