

1 what they bid and whether they got the low price or not in
2 the competitive bidding process. And it has nothing to do
3 with whether they're doing the competitive bidding that's
4 required by the -- by the Affiliated Transaction Rule or
5 anything else related to the Affiliated Transaction Rule.
6 It's totally irrelevant. It's not designed to lead to
7 admissible evidence. And that's the reason we'd ask that
8 you deny 117.1.

9 Looking at 131.1: There it seeks to
10 determine if AEM, as an unregulated gas marketer, is
11 following the specific risk management manual. They look
12 at their manuals and they're wondering, well there's
13 something that's not quite right. They're not following
14 their own manual. That has nothing to do with the fair
15 market price of gas. It has nothing to do with whether
16 Atmos is following the Affiliated Transaction Rule in
17 Missouri.

18 They're also requesting all procedures
19 maintained by AEM trade management department. Once again,
20 it has nothing to do with the fair market price and it has
21 nothing to do with whether we're following the Affiliated
22 Transaction Rule. They're asking for trader validation
23 reports; whatever those are. They're asking for trading
24 books. They're asking for definition of terms included in
25 AEM's Risk Management Policy and other internal reports

1 related to AEM's unregulated business.

2 I just don't see how any of this information
3 has anything to do with fair market price of gas paid by
4 Atmos or how it has anything to do with whether we're
5 following the Affiliated Transaction Rule that requires the
6 competitive bidding process that we've been engaged in. We
7 therefore would respectfully request the Commission deny
8 that Motion to Compel.

9 Now, on September 22nd, Atmos also filed not
10 only a response to the Motion to Compel, but we -- we asked
11 that the Commission reestablish the procedural schedule of
12 this proceeding. We believe it's time for the Commission
13 to resolve the legal issues that are at the heart of this
14 case. Staff does not need endless discovery to file
15 surrebuttal testimony, which is the very next step in the
16 procedural schedule.

17 Apparently -- they've already had four
18 months to look at our rebuttal. Apparently, the Staff
19 believes there is no rush in this case since there is not
20 operation of law date. However, that is just not a
21 satisfactory answer.

22 Recently the Staff filed a pleading in the
23 Laclede PGA case, GR-200-0387. I've got a copy of that if
24 you'd like to see it. But in that case the Staff stated,
25 Staff proposes to reserve its recommendation on the ACA

1 balances in this case because the ACA balances in Case Nos.
2 GR-2006-0288, GR-2005-0203 and GR-2008-014 are still in
3 dispute.

4 Now, the reason I'm bringing this up is this
5 is just an example of how the Commission's failure to
6 resolve this Affiliated Transaction issue can linger from
7 year to year to year. And pretty soon you get them all
8 pancaked back. Apparently Laclede has four or five of
9 these because they still are waiting to resolve some
10 affiliated transaction issue.

11 Apparently Staff was unable to make its
12 recommendation on this recent Laclede case because it still
13 had outstanding disputes over the Affiliated Transaction
14 Rule dating back to 2005. Now, Atmos believes that its
15 customers deserve more certainty of their bills that
16 allowing Staff to needlessly postpone the Commission's
17 determination of this legal issue in this case for years
18 into the future like apparently what's happening in
19 Laclede.

20 Thank you so very much for giving me the
21 opportunity to finally get in front of the Commission with
22 these issues. And I will be happy to answer whatever
23 questions you have.

24 JUDGE WOODRUFF: Thank you, Mr. Fischer.
25 Well, we'll move on with questions of the commissioners.

1 Commissioner Davis?

2 COMMISSIONER DAVIS: Commissioner Gunn wants
3 to go first.

4 COMMISSIONER GUNN: And Commissioner Jarrett,
5 I have a meeting that I have to leave in a little bit for,
6 so -- and I don't have very many. I know -- I think -- I
7 know Commissioner Davis has a fair amount.

8 And I'm going to concentrate mostly on you,
9 Mr. Fischer, just to talk about some of the arguments.

10 So you brought up 393.140 Subsection 12.

11 MR. FISCHER: Yes, sir.

12 COMMISSIONER GUNN: Does that -- so the
13 Affiliate Transaction Rule allows us to get to certain
14 documents of the affiliated companies. Do you think that
15 393.140 (12) is in conflict with that Affiliated
16 Transaction Rule that allows us to get to the documents
17 under certain cases?

18 MR. FISCHER: Judge [sic], I'm not really
19 sure there's a conflict if you narrowly apply the
20 Affiliated Transaction Rule in getting into documents that
21 are related solely to -- for the purpose of determining
22 whether you've complied with the Affiliated Transaction
23 Rule.

24 Now, that -- that statutory provision does
25 suggest that the Commission shouldn't be required -- or

1 cannot require unregulated gas marketers that have -- whose
2 business is being kept totally separate from the natural
3 gas utility to report and to provide things. I mean,
4 that -- that -- the rule is still in effect as far as I
5 know. But I think if it's very narrowly construed, that
6 wouldn't be a conflict.

7 To the extent that you allow Staff to get
8 into all the gas -- unregulated gas marketers operations
9 for all its upstream people, I think then the statute would
10 be invoked and it would be a prohibition. I'm not sure
11 there's a red line there or a clear bright line, but's it's
12 one I think that clearly you have to make a judgment about.

13 Now, I guess if I had to err, I'd err in
14 favor of not having the authority to go into all that
15 stuff, especially if you're doing a competitive bidding
16 process where it's so clear you've got the lowest and best
17 bid out there.

18 COMMISSIONER GUNN: But it's -- I mean, if
19 we're talking about a prohibition then we may have to take
20 a look at it because it's either a -- it's either
21 prohibited or it's allowed.

22 MR. FISCHER: Yeah.

23 COMMISSIONER GUNN: And that's -- I mean, I
24 know -- I understand what you're saying in that if you kind
25 of do it quietly, you know, very narrowly tied to the rule.

1 But if there's a prohibition, there's a prohibition and we
2 can't --

3 MR. FISCHER: Well, certainly the statute
4 would trump any regulation.

5 COMMISSIONER GUNN: Right. Right. And
6 that's what I'm saying. So if there's a prohibition, we
7 may have an issue.

8 So you spent a lot of time talking about the
9 disallowance and the substance of what Staff is going to
10 recommend to us, or may recommend or may be preparing
11 testimony in as to this right now or to the action. But in
12 terms of the procedure here, we can -- we could agree at
13 this point with Staff on the procedure and you on the
14 substance; that they may -- let's say we give them all the
15 documents that they request or allow them to do that. But
16 then they would still have the burden of showing that the
17 disallowance was appropriate.

18 And if the documents, as you said, didn't
19 show that or -- and I understand -- I'm taking out your
20 relevancy argument here for a second. I understand that's
21 still going on. But they would still have to meet the
22 burden. So all the substance that you're talking about we
23 could agree with you wholeheartedly even with giving the
24 Staff these documents.

25 MR. FISCHER: Judge I -- Commissioner, I

1 think I would agree accept that the procedural schedule's
2 been suspended in this case. The Staff did an audit of
3 this company for over a year, made its recommendation, made
4 its recommended disallowance.

5 And now they want to have unended discovery
6 into the affiliated gas Company's operations before they
7 will let us have a procedural schedule to get back -- so we
8 can get a determination on the merits.

9 COMMISSIONER GUNN: But we could -- we could
10 allow them to get the documents under a fairly strict
11 proce-- and in the same order give you a procedural
12 schedule as well.

13 MR. FISCHER: Well, except -- yeah, except
14 the Staff has suggested they'd like to do depositions.
15 They'd like to have more information. Because from their
16 perspective, they will know the fair market value when they
17 see it.

18 COMMISSIONER GUNN: I understand. But you
19 made a statement earlier that Mr. Sommerer is the reg--
20 Mr. Sommerer is the regulator here. And I --

21 MR. FISCHER: I understand --

22 COMMISSIONER GUNN: And he's -- let me
23 finish.

24 MR. FISCHER: I'm sorry.

25 COMMISSIONER GUNN: Because he's not. And

1 you can talk about the Staff's suggesting all that they
2 want, that doesn't necessarily mean that we're going to
3 give it to them. So theoretically we could say, okay. Yes
4 you have the documents, but you have a limited time in
5 which to review them and we're going to require you to file
6 a -- to institute a procedural schedule from that point on.
7 We can do that. Is that correct?

8 MR. FISCHER: Yes, sir. And you are clearly
9 the regulator. I didn't mean to imply anything else.

10 COMMISSIONER GUNN: I understand.

11 MR. FISCHER: There is a substantial public
12 policy question though, you need to ask yourself; is if
13 every time a gas marketer or an affiliated gas marketer
14 wins a bid, are you going to spend a year or more trying to
15 resolve these questions, or is it really the market that
16 decides what the fair market price is.

17 COMMISSIONER GUNN: Yeah. That is a fair
18 point and I think one that is the crux of your argument
19 here. And I think that's an extremely fair point. So --
20 but let me move on a little bit to the bidding process.

21 The competitive bidding process in order for
22 it to take away any concerns that it's an affiliate that
23 won the bid, would you exclude documents that showed as a
24 general -- as a general -- I don't want to get into the
25 tall weeds about these, but -- documents that may or may

1 not demonstrate that the bids truly were competitive?
2 would you think that those would be relevant to this
3 process?

4 MR. FISCHER: I think the Staff has clearly
5 looked at the RFP process as a part of this and if the RFP
6 process is legitimate -- which apparently it is for all the
7 others except the affiliate in the two cases -- they
8 haven't had any problem with that.

9 COMMISSIONER GUNN: But you would agree that
10 part of the reason why you take a look at affiliate
11 transactions closer than other transactions is because of
12 the very nature of the intertwining interests.

13 MR. FISCHER: Well, I would agree if -- if
14 the company went out and said, hey, we need our affiliate
15 to provide us a bid and we're not going to look at anybody
16 else and we're going to cut a deal with our affiliate, then
17 sure. You need to look at that kind of thing.

18 But to the extent you have a robust,
19 competitive bidding process, which is fair and you've kept
20 your affiliate on the other side of that Chinese wall --

21 COMMISSIONER GUNN: Right.

22 MR. FISCHER: -- you just need to look at
23 what the results are. Or otherwise, like I say on this
24 particular slide, in this case we saved customers \$40,000;
25 not a lot of money. But because we went out and did that,

1 the Staff is now proposing to disallow us a \$363,979.

2 COMMISSIONER GUNN: Again, you're getting
3 into -- you're getting into the substance.

4 MR. FISCHER: I --

5 COMMISSIONER GUNN: I'm interested in -- I'm
6 interested in -- because we go back to the fact that you
7 talk about how if there is a competitive bidding process
8 then we don't need to worry about it. But documents
9 relevant to whether that affiliate was kept on the one side
10 of the -- of the wall, would be appropriate to delve into
11 in order -- with the idea that these affiliate transactions
12 do get slightly higher scrutiny.

13 MR. FISCHER: I would agree with that, Judge
14 [sic], except that none of the -- none of the documents the
15 Staff are asking for do that.

16 COMMISSIONER GUNN: I understand. So then
17 we're talking -- I mean, I want to try to lay some ground
18 work here.

19 MR. FISCHER: I think it's appropriate from
20 my perspective that the Staff investigate whether the RFP
21 process is legitimate, whether there is any manipulation as
22 they have said. But to the extent that there is a robust,
23 competitive fair bidding process, which they haven't
24 challenged here, then you just look at the results of that
25 bidding process.

1 You don't go back upstream and say, well
2 gee, let me know why you hedge up with your AEM, and let me
3 know why you reduced your volumes on these national
4 contracts, and let me know what those manuals really say
5 because I'm interested in it and I'd like to know more
6 about it. That doesn't have anything to do with fair
7 market value of the -- or the fair price that was paid by
8 Atmos, a regulated company.

9 COMMISSIONER GUNN: Does it have anything to
10 do with the potential financial advantage that the
11 affiliate could receive?

12 MR. FISCHER: It does not.

13 COMMISSIONER GUNN: Under no possible
14 conceptual argument?

15 MR. FISCHER: It does not. Now, the Staff
16 would suggest -- I think what the heart of their argument
17 is that if you accept an affiliate bid, then you can't
18 include any of those profits, if there are any, in the gas
19 costs. Now, you can include all the profits of anybody
20 else, but we want to take away those profits by imputation
21 of reviews or imputation adjustment because it's an
22 affiliate.

23 Now, if that's the ruling of the Commission
24 the implication is that affiliate gas marketers are not
25 going to bid and so in Hannibal and Butler you wouldn't get

1 the cheapest cost of gas.

2 COMMISSIONER GUNN: If we take away -- if we
3 take away that, we might as well do -- we might as well
4 prohibit affiliate transaction.

5 MR. FISCHER: Yeah. And that's apparently,
6 based on the Staff's position statement, what they really
7 want to have happen.

8 COMMISSIONER GUNN: And I -- I'll tell you,
9 I don't necessarily disagree with what you're saying. And
10 I'll tell you, I mean, I come from -- I think there's -- I
11 have a very clear line in my head between the procedural
12 posture of this as the substantive. I think that the
13 arguments that are being made substantively are, if they're
14 proposing disallowances here, then we have to make sure
15 that those -- that we have to exam those disallowances very
16 carefully.

17 MR. FISCHER: But Judge [sic] --

18 COMMISSIONER GUNN: The discovery issue, you
19 know, there's not only the Subsection 1 that you mentioned,
20 there's also Subsection 2, which allows basically -- and
21 I'll read it just to be precise is that -- investigating
22 the operations of a regulated gas corporation or an
23 affiliated entity and a relationship to each other for the
24 sole purpose of assured compliance of the rule.

25 That is actually, in my opinion, broader

1 than (B)(1). (B)(2) allows to take a look at any sort of
2 these relationships that you would have. Now, I agree 100
3 percent that again, the crux comes back on the sole purpose
4 of enforcing the rule. But in my opinion, (2) is -- is
5 broader than (1) because (1) says there are specific
6 documents here that you -- you could take a look at.

7 But (2) allows you to talk about the
8 operations of both entities as they relate to -- as they
9 relate to each other. And that to me has slightly broader
10 implications than what we're talking about here. But I get
11 the argument very clearly. I don't really have any other
12 questions.

13 But I understand exactly what you're saying
14 and I think that this Commission has to very carefully take
15 a look at what are the public policy implications of what
16 we're doing both in terms of making sure that the ACA
17 adjustments are done in a timely manner; making sure that
18 we are not increasing costs of these, delaying them; and
19 whether we accept as legitimate affiliate transactions.

20 MR. FISCHER: And I would urge you,
21 Commissioner, not to have a view, well, this is just
22 discovery. I mean, we'll determine if it's relevant later.
23 The only way you have any jurisdiction to look at an
24 unregulated gas marketer if it is relevant to either
25 determining the fair market price or if it complies with

1 the rule.

2 Just the attitude, well, we'll figure that
3 out later, it doesn't work here. And I would urge you not
4 to do that.

5 COMMISSIONER GUNN: why doesn't it work?

6 MR. FISCHER: Because you're getting into
7 areas that are beyond the Commissioner's jurisdiction. If
8 it's not -- if you're not looking at questions -- even
9 under your own rule -- to determine whether the companies
10 are complying with the Affiliated Transaction Rule, there's
11 no authority to get into their business dealings of an
12 affiliated gas marketer.

13 COMMISSIONER GUNN: You're assuming, though,
14 that they are irrelevant. When you say they don't -- your
15 premise is that they're irrelevant so it doesn't work.
16 Someone else's premise -- and I'm not saying I'm saying
17 this, but someone else's premise is maybe is the -- whether
18 or not that factors into the disallowance can be made by
19 this commission --

20 MR. FISCHER: Well, perhaps --

21 COMMISSIONER GUNN: -- afterwards.

22 MR. FISCHER: -- the Staff should be asked
23 to justify then exactly what it is about the procedures of
24 an unregulated gas company what their -- you know, what
25 their -- you know, what those procedures have -- why are

1 they relevant to --

2 COMMISSIONER GUNN: And I think that's a
3 fair -- I think that's an extremely fair point. The list
4 that you gave up there, there may be perfectly good
5 explanations as to why some of those might be relevant or
6 what those arguments are. And that might be done in a
7 post-hearing brief.

8 Because we're not -- it's not an all or
9 nothing type of -- I mean, you would obviously prefer it to
10 be nothing. But if there may be -- this is not something
11 where I think the Commission is forced to say, yes we
12 think -- yes, you have to provide it all or no, you don't
13 have to provide it all. There may be documents that we
14 make independent determination that we think are relevant
15 and others that we determine are not.

16 MR. FISCHER: But the regulated companies
17 have to have the opportunity to present their arguments on
18 their merits and not just allow these investigations to go
19 on and on an on because -- I mean, from the -- as I view
20 it, if it's not -- the bidding process determines the fair
21 market value. If it really is subjective determination of
22 what the value is, I mean, that can go on forever.

23 COMMISSIONER GUNN: I don't disagree with
24 you. So I appreciate my colleagues indulgence. I
25 appreciate --

1 MR. BERLIN: Commissioner Gunn?

2 COMMISSIONER GUNN: Yeah. Sure. Please.

3 MR. BERLIN: Would you allow me one minute
4 before --

5 COMMISSIONER GUNN: Sure. Absolutely.

6 MR. BERLIN: -- you leave?

7 COMMISSIONER GUNN: Absolutely. And I'll
8 let Mr. Poston do it as well.

9 MR. BERLIN: I understand you're on a short
10 time schedule.

11 COMMISSIONER GUNN: You're fine. You're
12 fine.

13 MR. BERLIN: But --

14 COMMISSIONER GUNN: Go ahead.

15 MR. BERLIN: -- you brought up an issue of
16 burden. And I'd like to be pretty clear that the case law
17 out there says that it is generally held that utility bears
18 the burden of proving that expenses incurred in
19 transactions with affiliates are reasonable. Let me tell
20 you what the Commission said in a Kansas City Power and
21 Light company Case No. GR-89-48. And the Commission
22 said --

23 COMMISSIONER DAVIS: Did you say GR-89-48?

24 MR. BERLIN: Correct.

25 COMMISSIONER DAVIS: So that's 20 years ago?

1 MR. BERLIN: Right.

2 COMMISSIONER DAVIS: Okay. This is before
3 the Affiliate Transaction Rule?

4 MR. BERLIN: And I'd like to -- let me tell
5 you what this commission's -- the commission at that time
6 said. And the commission said that the standard is that
7 when some participant in a proceeding creates a serious
8 doubt as to the prudence of an expenditure, then the
9 company has the burden of dispelling those doubts and
10 proving that the question expenditure was prudent. And
11 that's quote from that particular case.

12 And the case law that I cited earlier is
13 from Boise Water Corporation versus the Idaho Public
14 Utility Commission in both Boise Water Case 1 and Boise
15 Water Case 2 and Southwestern Bell versus the State
16 Corporation Commission of Kansas.

17 And additionally, the law is that throughout
18 the United States it is recognized that a public utility's
19 dealings with its affiliates require thorough investigation
20 and close scrutiny by a public utility commission. And
21 that comes from Turpin v. Oklahoma Corporation Commission
22 and a whole series of cases in New York, Massachusetts,
23 Idaho, Oregon and Rhode Island.

24 So I'd like to, you know, put that issue of
25 burden up there and say that we believe we have raised a

1 serious doubt as to the prudence of these gas supply
2 transactions.

3 MR. FISCHER: And we'd like the opportunity
4 to rebut that.

5 COMMISSIONER GUNN: I understand. Do you
6 have anything? Again, I thank everybody for --

7 MR. POSTON: Thank you. I just wanted to
8 make the point that this really is an issue of first
9 impression here as far as a PGA and the transactions
10 between an affiliate and the regulated company. And so if,
11 you know, there's a commissioner or the commission is on
12 the fence of whether they think this is relevant or not,
13 I'd urge the Commission to err on the side of let's look at
14 the information, let's look at it in this case. Down the
15 road, future PGAs maybe the Commission and the parties will
16 learn something different and treat those differently.

17 But at this point, since this is really new
18 ground for all of us, I'd say let's see what's Staff wants
19 to see and the Commission can then determine when it's
20 entered into evidence or they try to enter it into
21 evidence, whether it's relevant or not or admissible.
22 Thank you.

23 COMMISSIONER GUNN: All right. Well, again
24 thank you very much. I appreciate it. And I'll be reading
25 the transcript afterwards, so --

1 MR. FISCHER: Thanks for spending your
2 birthday with us.

3 COMMISSIONER GUNN: Thank you. Have a --
4 have a, what I'm sure will be a spirited discussion for us.
5 So thanks everybody. I appreciate it.

6 JUDGE WOODRUFF: Moving on to Commissioner
7 Davis.

8 COMMISSIONER DAVIS: All right. All right.
9 Mr. Fischer, you're standing up there, so let me just --
10 let me just start with you Mr. Fischer.

11 We've got -- I'm going to go back and look
12 at the -- looking at these two data requests, particularly
13 at 131.1; I mean, would you agree that the Company's
14 refusal to produce the documents gives the appearance that
15 something shady may be going on?

16 MR. FISCHER: I think they responded that
17 there weren't any documents that were responsive to this
18 request.

19 COMMISSIONER DAVIS: So you're saying
20 there's no documents and that's it? Okay.

21 MR. FISCHER: You know, sometimes there are
22 DRs that are not very specific about things and there
23 aren't documents that are responsive to those requests.

24 COMMISSIONER DAVIS: Correct. Which could
25 be why they want to go down to sunny Houston for a couple

1 of days and take some people's depositions because I mean,
2 obviously when you're saying that, you know, you have the
3 manual, you have to file trader validation reports, you
4 know, that there's some sort of procedure to be followed.
5 There ought to be documents that reflect that those
6 procedures would be followed, I would think. Wouldn't
7 there?

8 MR. FISCHER: Well, it's an unregulated
9 business and I don't know what all goes on in those
10 unregulated businesses. But I would suggest to you that
11 they are moving quickly in national markets and lots of
12 evaluations of deals -- they're putting in a bid like you
13 put in a bid on stock.

14 COMMISSIONER DAVIS: Yeah.

15 MR. FISCHER: And they're trying to get the
16 business, but they may not. If they don't get it, what's
17 to evaluate. If they get it, what's to evaluate?

18 COMMISSIONER DAVIS: Okay. And that's fair
19 because I mean -- going -- I think the point that you were
20 trying to make with Commissioner Gunn earlier was that
21 staff's discovery ability with AEM is -- I mean, they may
22 have extensive discovery capabilities under 7(B)(1) and
23 (2), but that really only complies to -- or pertains to
24 ascertain compliance with the Affiliate Transaction Rule.

25 MR. FISCHER: That's correct.

1 COMMISSIONER DAVIS: And that anything
2 outside the Affiliate Transaction Rule they -- that
3 information is --

4 MR. FISCHER: It's beyond the scope of their
5 authority.

6 COMMISSIONER DAVIS: It's beyond the scope
7 of their authority. Okay. Okay.

8 Mr. Fischer, I mean, if you want to go back
9 and have a seat.

10 MR. FISCHER: I appreciate it. Unless Judge
11 or Jarrett -- did you have any --

12 COMMISSIONER JARRETT: Well, I'll wait until
13 Commissioner Davis finishes.

14 COMMISSIONER DAVIS: Mr. Berlin, in your
15 opening statement you seem to indicate that -- I mean, and
16 I wrote this down, that you were -- quote -- still trying
17 to determine whether Atmos had violated the Affiliate
18 Transaction Rule and yet, you know, Staff's already saying
19 that \$362,000 roughly, should be disallowed. So I guess
20 I'm a little confused. So which is it?

21 MR. BERLIN: Commissioner Davis, the
22 \$300-and -- I believe, \$362,000 number came as a result of
23 a proposed disallowance in the Staff recommendation that
24 was filed in this case in the 2009 -- that disallowance,
25 based upon all of the information the Staff had at that

1 time when it did its Staff recommendation was based upon a
2 P&L statement that was provided by AEM that showed a profit
3 in that amount. And then Staff made some adjustments to it
4 based upon the information that it had. And that was what
5 we had at the time; the claim that they had made and
6 profited on the sale of gas to Missouri ratepayers.

7 The discovery that Staff is engaged in right
8 now is to determine fair market value. You know, what is
9 it that --

10 COMMISSIONER DAVIS: All right. Mr. Berlin,
11 I'm going to stop you right there. Do you own a house?

12 MR. BERLIN: I do.

13 COMMISSIONER DAVIS: How long have you owned
14 that house?

15 MR. BERLIN: A few years.

16 COMMISSIONER DAVIS: Okay.

17 MR. BERLIN: With my wife, yeah.

18 COMMISSIONER DAVIS: Do you know what the
19 fair market value of that house was when you bought it?

20 MR. BERLIN: No. Because I wasn't around
21 when -- she actually bought the house.

22 COMMISSIONER DAVIS: Okay. You don't.

23 Well, let's go to Mr. Sommerer. Let's swear
24 Mr. Sommerer in. Let's see if he owns a house.

25 (Witness sworn.)

1 DAVID SOMMERER testifies as follows:

2 QUESTIONS BY COMMISSIONER DAVIS:

3 Q. Mr. Sommerer, do you own a house?

4 A. Yes, with my wife.

5 Q. With your wife. Did you participate in the
6 purchasing of that house?

7 A. Yes, I did.

8 Q. Okay. And when did you buy that house?

9 A. Approximately 10 years ago.

10 Q. Approximately 10 years ago. And would you
11 agree that the fair market value of that house at that time
12 would have been the price you paid for it?

13 A. Based upon the information that I had
14 available and the negotiations that I did with the seller and
15 the market research that I did, comparable houses in the
16 neighborhood, I believe that was the fair market value.

17 Q. Okay. So you didn't get a deal or get it
18 less than fair market value?

19 A. Actually, I thought I got a pretty good deal
20 on it.

21 Q. All right. All right. well, anyway, now
22 that was 10 years ago. Do you think the fair market value
23 of your house has changed in the last 10 years?

24 A. Yes.

25 Q. Do you think it's changed from 2008 until

1 now?

2 A. Yes.

3 Q. Okay. Now Mr. Sommerer, going back and
4 looking at your direct testimony pages 1 through 3 in your
5 scheduled DMS 1-1, you've been performing or supervising
6 PGA and ACA reviews for more than 20 years. Correct?

7 A. That's correct.

8 Q. So you're intimately familiar with the
9 process?

10 A. Yes.

11 Q. And your duties as manager of the
12 procurement analysis department require you to be familiar
13 with the -- what's commonly referred to as the Affiliate
14 Transaction Rule as well as the Market Affiliate Rule?

15 A. Yes.

16 Q. So you are familiar with those rules?

17 A. Yes.

18 Q. Do you have a copy of them?

19 A. No. I do not. It could be my attorney
20 has -- I now have a copy.

21 COMMISSIONER DAVIS: Okay. Let me go back to
22 Mr. Berlin for just a second.

23 Earlier Commissioner Jarrett asked you if
24 fair market value was fair market price. And you gave an
25 answer but I just want to make sure. Is fair market value

1 fair market price?

2 MR. BERLIN: Fair market value includes fair
3 market price. Staff is looking at some additional things
4 that go into the value equation that drives the price of
5 the product.

6 COMMISSIONER DAVIS: Okay. And what are
7 those additional things?

8 MR. BERLIN: Well, for example, we're trying
9 to determine the value of the product. The product is the
10 gas supply. And in order to determine that, we look at the
11 features of the contract that include the terms and the
12 conditions of the contracts of supply. We look at things
13 such as pricing provisions. We look at receipt points,
14 delivery points, quantity. We look at flexibility on
15 nomination rights. We look at firm obligations. And we
16 look at interruptible obligations; a combination of those
17 factors.

18 COMMISSIONER DAVIS: And you don't think a
19 buyer and seller would also look at those same things?

20 MR. BERLIN: I believe that a buyer and
21 seller do when they're done at armslength.

22 COMMISSIONER DAVIS: All right. Mr. Berlin,
23 are you familiar with Black's Law Dictionary?

24 MR. BERLIN: I am.

25 COMMISSIONER DAVIS: Okay. That's an

1 authoritative reference?

2 MR. BERLIN: I believe so.

3 COMMISSIONER DAVIS: Okay. So I have the
4 7th edition here. Have you looked at Black's Law
5 Dictionary to -- for any guidance of what fair market price
6 or fair market value is?

7 MR. BERLIN: I don't believe I've looked at
8 it.

9 COMMISSIONER DAVIS: Okay. So if I was
10 looking at page 616 under the definition of fair market
11 price and there was a statement that said, see fair market
12 value under value, you'd have no reason to dispute that,
13 would you?

14 MR. BERLIN: No. I would not.

15 COMMISSIONER DAVIS: And if I was looking at
16 one line below that at the definition of fair market value
17 and it said, see value, you'd have no reason to dispute
18 that?

19 MR. BERLIN: I would not.

20 COMMISSIONER DAVIS: Okay. And so let's go
21 back to page 1549, the definition of value. And underneath
22 it is the definition of fair market value. It provides,
23 the price that a seller is willing to accept and a buyer is
24 willing to pay on the open market and at an armslength
25 transaction; the point at which supply and demand

1 intersect.

2 would you agree with that definition?

3 MR. BERLIN: I would. So -- but you're
4 saying that fair market is not fair market price?

5 MR. BERLIN: I think that -- and I'm trying
6 to explain in terms of the gas supply contract product that
7 is supplied into northeast Missouri --

8 COMMISSIONER DAVIS: Uh-huh.

9 MR. BERLIN: -- price is certainly a feature
10 of the contract, the price -- the actual commodity of that
11 gas.

12 COMMISSIONER DAVIS: Uh-huh.

13 MR. BERLIN: In the supply contract that's
14 awarded there's also other pricing provisions that involve
15 such things as reservation capacity, transportation.
16 There's other things such as receipt points and delivery
17 points, secondary delivery points.

18 There's quantity flexibility on nomination
19 rights, the ability to arbitrage the difference between
20 first of the month baseload nominations and gas daily
21 pricing.

22 COMMISSIONER DAVIS: Right.

23 MR. BERLIN: There's the ability to provide
24 firm obligations, firm gas and then interruptible supplies
25 as well. And how firm is the firm gas; that may depend

1 upon whether or not there's a secondary delivery and
2 receipt point involved.

3 COMMISSIONER DAVIS: Okay. Mr. Berlin, can
4 we agree that the Affiliate Transaction Rule, 4 CSR
5 240-40.015 and the Marketing Affiliate Rule,
6 4 CSR 240-40.016 that nowhere in either one of those rules
7 is the term fair market value? Can we agree on that?

8 MR. BERLIN: I mean, that'd be my
9 recollection.

10 COMMISSIONER DAVIS: That is -- is that your
11 recollection, Mr. Sommerer?

12 THE WITNESS: Yes, sir.

13 COMMISSIONER DAVIS: Mr. Poston, do you have
14 any different recollection?

15 MR. POSTON: I don't think so. It seems to
16 refer to fair market price.

17 COMMISSIONER DAVIS: Now Mr. Berlin, do you
18 agree with Mr. Fischer's analysis that your broad
19 investigatory powers only extend to the enforcement of
20 4 CSR 240-40.015 and .016, the Affiliate and Marketing
21 Affiliate Transaction Rules?

22 MR. BERLIN: As it pertains to affiliate
23 transactions, yes.

24 COMMISSIONER DAVIS: Okay. But value isn't
25 listed in the rule, only price is listed in the rule. So

1 you still think you have the -- you still think you have
2 the authority there?

3 MR. BERLIN: I do based upon what we are
4 looking at here. We are looking at a gas supply contract
5 that includes many factors that I just mentioned that can
6 affect pricing. And it affects the conferring of
7 advantages. And so --

8 COMMISSIONER DAVIS: Okay. Okay. Let's go
9 back to Mr. Sommerer here.

10 BY COMMISSIONER DAVIS:

11 Q. Mr. Sommerer, how many different contracts
12 were in place for Atmos's various Missouri properties
13 during this time?

14 A. During the ACA period that's --

15 Q. In question.

16 A. -- in question?

17 I don't have the exact number. But usually
18 the way Atmos conducts its business, it will do an RFP for
19 particular segments of their service area.

20 Q. Uh-huh.

21 A. And so they probably have something like
22 eight to ten contracts in place during that time period.

23 Q. Okay. And these were all pursuant to an
24 RFP, were they not?

25 A. Yes.

1 Q. Okay. Did you review all of the contracts
2 for this period?

3 A. I reviewed it or members of my staff
4 reviewed those contracts.

5 Q. Okay. Are there -- I mean, if we need to go
6 in camera, we can go in camera. But what are the material
7 differences between those contracts? Price?

8 A. Correct. Location.

9 Q. What else?

10 A. Location.

11 Q. Location. Okay.

12 A. Flexibility of the contract, whether the
13 contract is an asset management agreement where you're
14 handing over your transportation and storage agreements to
15 the asset manager, the winner of the bid, or whether it's a
16 more straightforward supply only bid where you maintain
17 control over your storage and you, in essence, are just
18 obtaining the basic supply from the vendor.

19 Q. Okay. Now, is it fair to say that there are
20 some pipelines running through Missouri where storage is
21 not available?

22 A. That is fair to say, yes.

23 Q. And can you identify those pipelines?

24 A. Well, I think it's better said that the LDCs
25 may not have access to storage because it's fully described