

**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

**ATMOS ENERGY CORPORATION'S RESPONSE IN OPPOSITION TO
STAFF'S MOTION AND WAIVER REQUEST CONCERNING DISCOVERY**

COMES NOW Atmos Energy Corporation ("Atmos" or "Company"), and pursuant to the Commission's *Order Establishing Time To Respond* ("Order") issued in this matter on June 18, 2010, files its Response In Opposition to Staff's Motion and Waiver Request Concerning Discovery filed on June 14, 2010 ("June 14th Motion"). As its response in opposition to the Staff's June 14th Motion, Atmos respectfully states:

1. Staff's June 14th Motion actually represents Staff's second bite of the apple in furtherance of its real agenda at this stage of the proceeding -- to extend the discovery period herein in a belated effort to support Staff's proposed affiliated transactions adjustments for which Staff has no support in the record. A brief review of recent filings in this case may be helpful in understanding the current status and the reasons why Staff's requested relief should be rejected outright.

2. Late Friday afternoon, June 11, 2010, the Staff filed its Motion to Suspend Proposed Procedural Schedule ("June 11th Motion") which stated that "Staff is unable to comply with the established deadline [for filing rebuttal testimony due the next Monday, June 14, 2010] due to the failure of Atmos to provide requested documents in response to Staff Data Request

No. 117.”¹ (June 11th Motion, p. 1). Atmos filed its Response In Opposition To Staff’s Motion To Suspend Proposed Procedural Schedule on June 14, 2010, fully setting forth the reasons why Staff’s June 11th Motion should be denied. Atmos’ Response is incorporated herein by reference.

3. As reflected in the Commission’s Order, “On June 14, 2010, the Staff of the Commission filed a motion asking the Commission to compel Atmos Energy Corporation to produce certain marketing contracts that Atmos contends are under the control of an affiliated gas marketing company. Staff, among other things, also asks that the procedural schedule for this case be suspended until the discovery dispute can be resolved.” While acknowledging that it had not complied with the requisite actions for elevating discovery disputes set forth in Commission Rule 4 CSR 240-2.090, among the sweeping requests for expeditious relief presented by Staff were:

1) Compel Atmos to respond fully to DR 117; 2) Waive the requirement for additional discovery conference; 3) Suspend the procedural schedule until the discovery dispute is resolved; 4) Permit Staff to file supplemental rebuttal or surrebuttal testimony unlimited to issues raised in Atmos’ rebuttal testimony; 5) Join Atmos Energy Holdings, Inc. and Atmos Energy Marketing, LLC as parties to this case; 6) Suspend indefinitely the procedural schedule in this case or order other sanctions against Atmos for its failure to object and failure to respond to DR 117; and 7) Expedite the response to this pleading so that the Parties may proceed accordingly. (Staff June 14th Motion, pp. 3-4).

4. In accordance with its Order Scheduling A Prehearing Conference issued on June 15, 2010, the Commission conducted a prehearing conference regarding Staff’s motion on June 18. At that conference, the presiding officer directed the parties to discuss the matter further and

¹ In response to one of the subparts of DR No. 117 which requested documents from an affiliated gas marketer, AEM [Atmos Energy Marketing], Atmos responded on June 11, 2010 that “the requested documents are not in the possession of AEC [Atmos Energy Corporation].

to file a status report on June 23. The presiding officer also allowed Atmos until June 23 to file a written response to Staff's motion.

5. As Atmos stated in its previous Response, this case involves one major issue which is primarily a legal question. In this case (like in Case No. GR-2007-0403), Atmos used a formal competitive bidding process to solicit bids from unregulated gas marketers for the Company's gas supplies. After a careful evaluation of the various bids received, Atmos awarded certain of its gas supply contracts to Atmos Energy Marketing, LLC ("AEM"), an affiliated gas marketer, which submitted the lowest and best bid for those gas supplies. Although several contracts were awarded pursuant to the same formal competitive bidding process, only those that went to AEM have been put into issue by Staff. In this case, Staff is proposing to impute the profits of AEM on these transactions to lower the gas costs of Atmos by the same amount as the AEM profits on these transactions. In other words, Staff proposes to disallow from Atmos' gas costs an amount equal to the profits earned by AEM, based upon Staff's incorrect interpretation of the Commission's Affiliated Transactions Rule, 4 CSR 240-40.015 and 4 CSR 240-40.016. As a result, Atmos believes that the legal issues to be resolved in this case will be whether Atmos' gas costs are prudent, and whether the Affiliated Transaction Rule requires a regulated LDC to lower its gas supply costs in the PGA/ACA process by the same amount as the profits of an affiliated gas marketer that provided gas supplies, pursuant to a formal competitive bidding process. Indeed, Staff's June 14th Motion characterizes the issue at dispute as a proposed affiliate transaction disallowance. (Staff's June 14th Motion, page 3).

6. During the prehearing conference, Staff continued its misplaced attention on purported waivers of objection deadlines and alleged failures to respond, attempting to bolster its suggested requests for extraordinary relief "as sanctions against Atmos for its failure to object

and failure to respond to DR 117.” However, as the presiding officer noted during the prehearing conference, Atmos did not object to Staff’s DR No. 117; instead, it answered DR No. 117 by indicating that it does not have in its possession the contracts that its affiliated gas marketer has made with upstream suppliers. As Atmos stated, there is a “Chinese wall” required by the Commission’s Affiliated Transactions Rules and Atmos’ own Manuals for dealing with its affiliated gas marketer that ensures that its affiliated gas marketer is treated the same way as any unaffiliated gas marketer. While Atmos and Staff have been able to amicably resolve any discovery issues up to this point,² Staff is requesting all contracts between AEM and its upstream gas marketers, which Atmos simply does not have in its possession. AEM can not provide those contracts to Atmos without violating those Chinese wall provisions.

7. Accordingly, while the presiding officer stated that the prehearing conference would fulfill the Commission’s discovery rule requirement of arranging “an immediate telephone conference with the presiding officer and opposing counsel” (4 CSR 240-2.090(8), it is Atmos’ understanding that the Staff would need to pursue an additional discovery motion, *e.g.*, motion to compel, or other procedural avenue, should it wish to do so.

8. In Staff’s Rebuttal Testimony filed on June 14, 2010, Staff Witness David Sommerer discusses DR No. 117:

After the gas was delivered to Atmos, it would have been transported using Atmos’ firm transportation agreement, but as discussed previously, the gas that AEM obtain at Haven and resold to Atmos may not have been firm supply. This information was part of Staff discovery in DR # 117 that has been hampered by Atmos’ refusal to provide the data. The Staff is taking action to obtain this information, which will assist in understanding the fair market value of the gas sold to AEC. (Sommerer Rebuttal Testimony, page 10).

² Ironically, the fact that Atmos had facilitated the provision of some AEM information to Staff in attempting to accommodate Staff’s inquiries, was used against Atmos in the course of argument during the prehearing conference.

From this testimony, it is Atmos' understanding that Staff wants to determine if the gas that AEM obtained at Haven and resold to Atmos was or was not firm supplies. When Atmos inquired of AEM regarding Staff's request, AEM did offer a compromise alternative to providing each and every contract that Staff is requesting. This compromise, offered during the prehearing conference, would have AEM provide an affidavit to Atmos that affirms that during the ACA period in question in this case, all gas supplies provided to Atmos were firm, or if some percentage of the services were not firm, what percentage of the gas supplies were not firm. This information, we believe, would be a reasonable compromise that would give Staff the information it apparently wants, without allowing Staff to go on a fishing expedition through the business relationships of an unregulated gas marketer with its own upstream suppliers. Such reasonable compromise could be accomplished without violating the Chinese wall created by the Commission's Affiliated Transactions Rule or Atmos' own policies related to its affiliated gas marketer.

9. Having heard the Company's offer, and understanding that Staff might need more time to consider same, the presiding officer directed the parties to discuss the matter further and to "file a joint status report on June 23, 2010, regarding any agreement that they are able to reach relating to the discovery dispute between Staff and Atmos Energy Corporation." Order, page 1. In conformance with said Order, the Joint Status Report is being filed this date. Regrettably, the parties have not been able to reach an agreement regarding this issue at this time.

10. As noted above, the record clearly does not support any claim for sanctions resulting in the extraordinary requests for relief as set forth in Staff's June 14th Motion. In its previous Response, Atmos fully rebutted Staff's suggested needs regarding (1) suspension of the existing procedural schedule, and (2) waiver of the subject-matter limitations of testimony in 4

CSR 240-2.130(7). As discussed therein, no additional discovery should be needed to support Staff's proposed adjustment since Staff has already proposed, quantified, and recommended the affiliate transaction adjustment in its Staff Recommendation filed on December 28, 2009, and in the Direct Testimony of David M. Sommerer filed on March 12, 2010. Atmos' direct testimony did not rely upon and did not include any references to the documents being requested in DR No. 117; thus, there was no prejudice to Mr. Sommerer's preparation and filing of rebuttal testimony, Staff's protestations notwithstanding.

11. Finally, premised on the ridiculous claim that "Atmos Energy Corporation seeks to thwart the Staff's discovery by claiming the requested documents are in the hands of a third party," Staff would have the Commission unlawfully order the joinder of Atmos Energy Holdings, Inc. and Atmos Energy Marketing, LLC as parties to this action -- entities that have never been parties to Commission proceedings and that are beyond its regulatory jurisdiction. As a creature of the legislature, the Commission has only the powers expressly granted by statute.³ While the Staff can point to no explicit authority for the kind of joinder powers presumed in its June 14th Motion, it does suggest that the "Staff believes that §393.140(12) RSMo 2000, as well as 4 CSR 240-40.015(6)(A) and 40.016(7) give the Commission *broad authority* to make those entities parties and permits the Staff to inquire into the relationship among the Atmos Companies." (Staff June 14th Motion, page 2, emphasis added). Atmos would respectfully suggest that such statutory section and Commission Rules support the very opposite conclusion to that proposed by Staff. Regarding the general powers of the Commission with respect to gas, water, electricity and sewer services, Section 393.140(12) describes the carrying on of other business that is not otherwise subject to the jurisdiction of the Commission and is so

³ *State ex rel. Beaufort Transfer Co. v. Public Service Comm'n*, 593 S.W.2d 241, 246 (Mo App. W.D. 1979).

conducted that its operations are to be substantially kept separate and apart (describing, in essence, the very type of business at issue herein subject to the affiliated transactions rules), resulting in the express pronouncement that such corporation in respect to such other business shall not be subject to any of the provisions of this chapter. And while said statutory section does not limit the Commission's powers to inquire as to, and prescribe the apportionment of, certain areas, such authority is set forth in the Commission's affiliated transactions rules. Likewise, if affiliated entities could be involuntarily joined as a party to a Commission proceeding, there would be no need for the provisions of the affiliate transactions rules that Staff specifically cites, explicitly authorizing access to affiliate records under certain conditions – conditions which do not exist herein.⁴

WHEREFORE, for the reasons stated herein and in Atmos' previous response in opposition dated June 14, 2010, Atmos Energy Corporation respectfully requests that the Commission deny the Staff's Motion And Waiver Request Concerning Discovery.

Respectfully submitted,

/s/ James M. Fischer

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⁴ Staff's request that the Commission summarily order that the two Atmos affiliated entities be made parties to this case, is essentially the same issue pending in Case No. GR-2010-0171, the Laclede Gas rate case, for which an Oral Argument has been rescheduled for July 9, 2010.

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 23rd day of June, 2010.

/s/ James M. Fischer

James M. Fischer