

1 BEFORE THE PUBLIC SERVICE COMMISSION

2 STATE OF MISSOURI

3
4
5 TRANSCRIPT OF PROCEEDINGS

6 Oral Argument

7 October 20, 2010

8 Jefferson City, Missouri

9 Volume 3

10
11
12
13 In The Matter Of The PGA/ACA Filing)
14 Of Atmos Energy Corporation For)
15 The West Area (Old Butler), West)
16 Area (Old Greeley), Southeastern) File No. GR-2008-0364
Area (Old SEMO), Southeastern Area)
(Old Neelyville), Kirksville Area)
And The Northeastern Area)

17
18
19 MORRIS L. WOODRUFF, presiding
20 CHIEF REGULATORY LAW JUDGE
21 JEFF DAVIS,
TERRY JARRETT,
22 KEVIN GUNN,
COMMISSIONERS

23 REPORTED BY:
24 Lisa M. Banks, CCR No. 1081
25 TIGER COURT REPORTING, LLC

A P P E A R A N C E S

JAMES FISCHER, Attorney at Law
LARRY DORITY, Attorney at Law
Fischer & DORITY, PC
101 Madison Street, Suite 400
Jefferson City, Missouri 65101
573.636.6758

FOR: Atmos Energy Corporation

MARK POSTON, Public Counsel
PO Box 2230
Jefferson City, Missouri 65102
573.751.5558

FOR: Office of Public Counsel

ROBERT BERLIN, Legal Counsel
PO Box 360
Jefferson City, Missouri 65101
573.751.4140

FOR: Staff of the Missouri Public Service Commission

1 JUDGE WOODRUFF: We're here this afternoon
2 for an oral argument on Staff's Motion to Compel in Case
3 No. GR-2008-0364. We'll start today by taking entries of
4 appearances beginning with Staff.

5 MR. BERLIN: Thank you, Judge. Appearing on
6 behalf of the Staff of the Missouri Public Service
7 Commission, Robert S. Berlin, Post Office Box 360,
8 Jefferson City, Missouri, 65102.

9 JUDGE WOODRUFF: On behalf of Atmos?

10 MR. FISCHER: Yes, Judge. Thank you. On
11 behalf of Atmos Energy Corporation let the record reflect
12 the appearance of Larry W. Dority and James M. Fischer.
13 Our address is on the written entry of appearance.

14 JUDGE WOODRUFF: Thank you. Public counsel?

15 MR. POSTON: Thank you. Mark Poston
16 appearing for the Office of the Public Counsel and the
17 public.

18 JUDGE WOODRUFF: Thank you. The main point
19 of this proceeding today is to allow the commissioners to
20 ask questions of the parties. And I'll give the parties an
21 opportunity to make brief opening statements if they like.
22 It's Staff's motion, so Staff can go first.

23 MR. BERLIN: Thank you, Judge. Would you
24 like me to go to the podium or --

25 JUDGE WOODRUFF: Yes, please.

1 MR. BERLIN: May it please the Commission.
2 The Staff is here today to seek from the Commission an
3 order granting Staff's second Motion to Compel from the
4 0708ACA case. An order from the Commission would direct
5 Atmos to produce to Staff certain documents regarding the
6 gas supplies that the regulated utility purchased from its
7 affiliated company, Atmos Energy Marketing Company --
8 Marketing.

9 These gas supplies serve Missouri ratepayers
10 in Hannibal, Canton and Bowling Green in the northeast
11 service area of Atmos and in Butler in the western service
12 area. And about 12,000 customers in the northeastern area
13 are affected by these purchases.

14 In this 0708ACA case the Staff is trying to
15 determine the prudence and reasonableness of Atmos gas
16 purchasing transactions with its unregulated affiliate AEM.
17 And to determine whether these purchases are prudent and
18 reasonable, the Staff must determine the fair market value
19 of gas supplies of the unregulated affiliate to determine
20 whether that would be the same fair market value of gas
21 supplies to the regulated LDC.

22 Now this case is a complex case because
23 Atmos is engaged in self-dealing with its unregulated
24 affiliate company. Because Atmos is dealing with itself
25 there are endless possibilities for manipulation.

1 These transactions by definition are not
2 done at armslength; one management group controls both
3 sides of the transaction. An armslength transaction on the
4 other hand, is one that is done with an independent third
5 party supplier. Because the regulated utility is engaged
6 in self-dealing with its affiliate company, as I said, a
7 company that has ultimate control over the documents and
8 the transaction, the public interest demands that the
9 Commission scrutinize Atmos self-dealing.

10 Missouri statute Section 393.130 charges the
11 Commission with assuring that Missouri consumers pay only
12 just and reasonable rates. And the Staff is committed to
13 helping the Commission fully scrutinize Atmos' self-dealing
14 with its affiliate, AEM, by taking a comprehensive review
15 of the affiliate transactions that are at issue here.

16 The Commission's Affiliate Transaction Rules
17 provide for the Commission, through its Staff, to undertake
18 a thorough evaluation of Atmos affiliate transactions. And
19 I would add that the Missouri Supreme Court in 2003
20 affirmed the Commission's Affiliate Transaction Rules. In
21 its decision, the Court recognized when a traditional
22 regulated monopoly expands into non-regulated areas that
23 expansion gives utilities the opportunity and the incentive
24 to shift their non-regulated cost to the regulated
25 operations with the affect of unnecessarily increasing the

1 rates charged to the utilities customers.

2 And furthermore, the Court recognized that
3 the utility -- and in the Court's words -- has the
4 incentive and the ability to milk the rate of return rate
5 regulated monopoly affiliate to subsidize its competitive
6 ventures. The Commission's Affiliate Transaction Rules
7 provide Staff full access to the records and documents of
8 the utilities affiliate.

9 The purpose for access is obvious; the
10 dealings with an unregulated affiliate must be done with
11 complete transparency to the regulator. And as I mentioned
12 earlier, the Staff is attempting to determine through its
13 investigation of these transactions the fair market value
14 of the gas supplies bought by AEM and to determine whether
15 AEM's fair market value of gas supplies would be the same
16 fair market value to the Atmos regulated LDC.

17 COMMISSION JARRETT: Let me interrupt you
18 there for a second. Did I hear you correctly that you say
19 that the reason we're here is to determine the fair market
20 value of the price AEM paid for the gas?

21 MR. BERLIN: Let me back up a minute. That
22 is what's Staff's charge in its investigation of these
23 transactions. We're here today on Staff's Motion to Compel
24 Atmos to produce to Staff certain documents regarding these
25 transaction.

1 COMMISSIONER JARRETT: But isn't the
2 Affiliate Transaction Rule -- the purpose of it is for the
3 Commission to determine whether the price paid by the LDC
4 is the fair market price for the gas? We're not concerned
5 with whether -- the price that the affiliate paid. We're
6 concerned with the price that Atmos paid and whether it's
7 fair or not. Isn't that the purpose of the Affiliate
8 Transaction Rule?

9 MR. BERLIN: I think that both -- I think
10 that the purpose of the Affiliate Transaction Rule is to
11 make available all of the records of the affiliate that
12 engages in these gas purchasing decisions on behalf of the
13 regulated utility and that the fair market value -- we
14 are -- Staff is trying to determine that fair market value
15 based upon the fair market value of the supplies to the
16 affiliate.

17 In other words, is the fair market value
18 that the affiliate got for those gas supplies, would that
19 be the same as the fair market value that the LDC would get
20 if the LDC had actually gone out and purchased the gas from
21 an independent third party.

22 COMMISSIONER JARRETT: But that's not what
23 the Affiliate Transaction Rule says, is it? It says that
24 the LDC should purchase either the fair market value -- the
25 fair market price. Are you using fair market value and

1 fair market price synonymously? Because the rule doesn't
2 say fair market value. It says fair market price.

3 MR. BERLIN: Okay. Yeah. I believe the
4 asymmetrical pricing provisions of the Affiliate
5 Transaction Rule require that the LDC purchase supplies
6 from its affiliate at the lower of --

7 COMMISSIONER JARRETT: Right.

8 MR. BERLIN: -- the fair market -- I call
9 value -- fair market price or fully distributed costs.

10 COMMISSIONER JARRETT: Right. The lesser
11 of.

12 MR. BERLIN: The lesser of. And so overall,
13 what we are here for is to determine the prudence and the
14 reasonableness of the regulated LDC buying gas supplies
15 from its unregulated affiliate company. And as part of
16 Staff's investigation it must do a complete analysis of the
17 fair market value of those supplies out in the market to
18 make sure that there are -- there is no manipulation of
19 that price or that no -- nothing has been done to
20 manipulate that price.

21 COMMISSSIONER JARRETT: I understand your
22 argument. I'll let you continue.

23 MR. BERLIN: Let me -- let me just discuss
24 right now what we are asking the Commission to do with my
25 Motion to Compel. We're asking for an order of the

1 Commission to require Atmos to respond fully to Staff's
 2 follow-up DRs, numbers 117.1 and 131.1. 171.1, Staff is
 3 seeking some rationale and some support behind some
 4 unexplained anomalies in the quantities of gas supplies
 5 provided by AEM to the Hannibal/Bowling Green service area.
 6 Specifically, Staff seeks documents that are related to the
 7 baseload supply acquired by AEM in two specific trades.

8 Now, one trade involves gas that AEM bought
 9 from its supplier for its baseload supply. The second
 10 trade also involves gas that AEM bought from its supplier
 11 for baseload supply. But in that trade there was another
 12 transaction. AEM sold gas back to its supplier. And both
 13 of these trades were intended by AEM to provide flexible
 14 baseload service to Atmos LDC customers.

15 And these documents are to explain, as I
 16 said, offering rationale and support for inconsistencies in
 17 the quantities of gas that AEM nominated, but that the
 18 quantities are reflected differently in the P&L statements
 19 in both of those trades.

20 Now, Atmos responded to Staff and said that
 21 that was not relevant. Of course, Staff -- Staff's
 22 position is that in deed it is relevant to the gas supplies
 23 that the regulated utilities sold to customers in its
 24 service area.

25 And now with DR 131.1, in order to explain

1 that DR -- and I have copies of both DRs if that would be
2 of help to the commissioners.

3 COMMISSIONER DAVIS: Yes. I'd like to have
4 them.

5 JUDGE WOODRUFF: And Mr. Berlin, I note that
6 these are both marked Highly Confidential.

7 MR. BERLIN: Yes.

8 JUDGE WOODRUFF: Keep that in mind as we
9 discuss them.

10 MR. BERLIN: And Judge, I'm going to get
11 into a more detailed discussion on 131.1, I'd like to go in
12 camera for.

13 JUDGE WOODRUFF: Now?

14 MR. BERLIN: Yes.

15 JUDGE WOODRUFF: Okay. We're in camera.

16 (REPORTER'S NOTE: At this point, an
17 in-camera session was held, which is contained in Volume 4,
18 pages 64 to 66 of the transcript.)
19
20
21
22
23
24
25

1 MR. BERLIN: In summary --

2 JUDGE WOODRUFF: We're back in regular.

3 MR. BERLIN: Okay. In summary, Staff's
4 request for discovery here is about transparency. The
5 company controls all the documents. The public interest
6 demands the Commission fully scrutinize the self-dealing of
7 its regulated utility. Staff needs these documents so that
8 it can fully evaluate these transactions and a fair market
9 value of those transactions; this is Staff's job. And it's
10 a very narrow request. These are the deals that supply gas
11 to Hannibal, Canton, Bowling Green.

12 And by doing our job, we believe we're
13 helping to keep the Commission's regulatory compact with
14 consumers. And that's a compact that is one that we all
15 know. It says -- and we as a commission say this over and
16 over -- that consumers only pay the market cost of gas.
17 The utility does not earn on gas supplies. The utility
18 earns a profit on the plant and equipment it employs to
19 deliver that gas to consumers.

20 So Staff needs these documents to make sure
21 that we honor that compact. We need these documents to
22 make sure that ratepayers are not subsidizing shareholder
23 profits on gas sales.

24 And that concludes my opening remarks. Of
25 course I'm available for any questions from the bench.

1 Thank you.

2 JUDGE WOODRUFF: Thank you, Mr. Berlin.
3 Public counsel wish to make an opening?

4 MR. POSTON: May it please the Commission.
5 Public counsel supports Staff's Motion to Compel as we
6 filed a pleading in support of it. We still stand by that.
7 And I'd just like to point to the Commission's July 2010
8 order that must comply with Staff's DR 117. The order
9 states on page 4 that due to Staff's obligations and
10 unscrutiny review that -- quote -- it must be able to
11 review the supply contracts that entered into Atmos -- or
12 entered into by Atmos's affiliate -- end quote.

13 We believe DRs 117.1 and 131.1 are a
14 continuation of that Staff obligation. Since Staff must
15 review those contracts as the Commission concluded,
16 certainly Staff must also follow up on questionable
17 transactions that are revealed when they do review those
18 contracts.

19 Likewise, Staff must also determine the
20 context under which those AEM supply contracts were made,
21 which Staff seeks in DR 131.1. We're not talking about
22 documents that are unaffiliated supplier. We're talking
23 about documents of a company controlled by Atmos and
24 documents that will help the Commission address the
25 Missouri Supreme Court's concerns that dealings with an

1 unregulated affiliate trace the potential and incentive to
2 milk regulated customers.

3 That's our biggest concern that dealing with
4 an affiliate, it's all too easy for and LDC to follow that
5 incentive. And I'd like to again quote from the July order
6 on page 5 the Commission says -- quote -- only by having
7 full access to the relevant records of the affiliate can
8 Staff evaluate Atmos's compliance with the Affiliate
9 Transaction Rules and report its findings to the
10 Commission -- end quote.

11 We believe that same finding applies here as
12 well and we'd urge the Commission to grant Staff's Motion
13 to Compel. Thank you.

14 JUDGE WOODRUFF: Thank you, Mr. Poston. For
15 Atmos?

16 MR. FISCHER: Thank you Judge and
17 commissioners. Thank you very much for convening this
18 opportunity to have an oral argument about this motion. We
19 appreciate very much an opportunity to come before you. I
20 understand a happy birthday is in order as well.

21 COMMISSIONER GUNN: Thank you.

22 MR. FISCHER: Like Mr. Berlin, before I get
23 into the specifics of the Motion to Compel itself, I'd like
24 to provide the Commission with a little more background on
25 the legal issue in this case and the competitive bidding

1 process that was used by Atmos to secure the gas supplies
2 for the 2007 and 2008 ACA period.

3 I think before the Commission can really
4 decide this Motion to Compel, we need to understand the
5 full scope of the legal issues that are involved in the
6 case to determine whether this information is really
7 relevant and needed or likely to lead to any admissible
8 evidence.

9 Atmos uses a formal competitive bidding
10 process to solicit bids from numerous unregulated gas
11 suppliers for the company's gas supplies throughout the
12 state of Missouri. This formal, competitive bidding
13 process is fully described in the direct testimony of Becky
14 Buchanan (ph.) in this case.

15 After a careful evaluation of the various
16 bids received throughout the service area, Atmos awarded
17 eight separate gas supply contracts to six different gas
18 marketers. Two of those eight were awarded to an
19 affiliate, Atmos Energy Marketing. In that case, they
20 submitted -- AEM submitted the lowest and the best bid for
21 the gas supplies for the Hannibal and the Butler areas of
22 the company during this ACA period.

23 AEM did not win the bid for the other areas
24 of the state, which make up about 66 percent of Atmos's
25 load in Missouri. In those areas the winning bids went to

1 other unregulated gas marketers who submitted lower bids
2 than AEM. AEM has not been the dominant supplier for Atmos
3 in Missouri. For the period April 2004 through November
4 2009 Atmos issued 48 separate Missouri RFPs. Of those 48
5 RFPs AEM participated in 24 of the RFP processes and it was
6 the winning bidder in only six of those.

7 The other suppliers who won multiple times
8 in Missouri include BP, which is a very large gas marketer,
9 has won eight times; Tenaska, seven; Anadarko, seven times;
10 Centerpoint, five; ConocoPhillips, five; and Shell and OGE
11 have both won twice.

12 There we go. Sorry.

13 In this case, the Staff is not proposing any
14 disallowances related to the gas marketers that submitted
15 the lowest and best bid in the Kirksville, Piedmont,
16 Arcadia, Jackson and other southeast Missouri service
17 areas. In other words, Staff is not proposing to disallow
18 any costs associated with AEM's competitors;
19 ConocoPhillips, Centerpoint, BP Energy Company, Anadarko or
20 Tenaska Marketing.

21 Staff apparently recognizes correctly that
22 Atmos's competitive bidding process produced contracts in
23 these regions that were both prudent and reasonable. In
24 these areas these contracts represented the lowest and the
25 best bid that was available to Atmos and its customers.

1 Now, even though Atmos used the exact same
2 competitive bidding process for the Hannibal and the Butler
3 areas Staff is nevertheless proposing disallowances in
4 these areas because the contracts were awarded to AEM, an
5 affiliate of Atmos. Of course Atmos is contractually
6 obligated to pay the full amount of the amount that they
7 agree to pay AEM under that competitive bid process. And
8 the AEM bids were the lowest and best bids that were
9 available in those two service areas.

10 For the Hannibal and the Butler areas Staff,
11 in this case, is proposing to lower the gas costs that are
12 passed through to consumers by the same amount as the gross
13 profits of AEM on these contracts. In other words, Staff
14 is proposing to disallow from Atmos's gas costs an amount
15 that is equal to the gross profits earned by AEM on these
16 contracts.

17 And I'm emphasizing the word "gross" here
18 because the amount of the staff's disallowance does not
19 take into account that AEM has overheads too. AEM has
20 salaries and office costs and other numerous overheads that
21 are not being reflected at all in the Staff's adjustment.
22 They need to take a look at that before they get to the net
23 profit that AEM actually may have earned on those
24 transactions. Staff totally ignores those overheads in
25 their adjustment, but that's not really the primary issue

1 that's at issue in this case.

2 If Atmos had rejected the AEM bids and
3 accepted a higher bid from another bidder, then I suspect
4 Atmos would be facing a different Staff disallowance for
5 its failure to accept the lowest and best bid available.

6 In the Hannibal area if the supply contract
7 had been awarded to the lowest cost bidder -- or excuse
8 me -- had not been awarded to the lowest cost bidder, which
9 happened to be the affiliate, but instead had been awarded
10 to the second place bidder, the annual cost for the
11 Hannibal area consumers would go up by \$38,000.

12 Similarly in the Butler area, if the
13 contract that had been awarded to the second place bidder,
14 then the annual cost to consumers would have gone up by
15 \$1,050. So if Atmos had accepted the second best bids in
16 these two areas, I suspect Atmos would be -- or the Staff
17 would be suggesting disallowances of nearly \$40,000 because
18 Atmos didn't accept the lowest and the best bid available.

19 Because Atmos tried to save its customers an
20 additional \$40,000 by doing the right thing and accepting
21 the lowest and the best bid available, it's now facing a
22 disallowance proposal by Staff of \$362,979. That's more
23 than nine times the savings it achieved for the customers
24 in Hannibal and Butler by accepting the lowest cost bid.

25 I just ask the Commission: Is this really

1 the type of perverse incentive that the Commission wants to
2 introduce in the PGA process? The only difference between
3 the circumstances in the Hannibal and Butler service areas
4 and in the rest of the company service areas, as far as we
5 can tell, is that AEM happens to be an affiliate of Atmos
6 Energy Corporation and AEM won the competitive bid process
7 in Hannibal and Butler and lost everywhere else.

8 It's important, I think, to recognize Judge,
9 that Atmos -- or excuse me -- AEM is not a purchasing agent
10 for Atmos in Hannibal and Butler. And Staff seems in some
11 of its arguments seem to suggest that that's what's
12 happening. AEM is not going out to secure gas supplies as
13 an agent of Atmos.

14 Instead, it's an unregulated gas supplier in
15 competition with numerous other unregulated gas suppliers
16 seeking to win the business of Atmos Energy Corporation.
17 When Atmos sends out RFPs in these processes, usually they
18 send out RFP to more than 50 separate gas marketers. Now,
19 not all of those bid, but that's how many folks they're
20 dealing with and that's how many entities are out there in
21 competition with AEM.

22 Staff apparently thinks that Atmos should be
23 able to secure the gas supplies directing from upstream gas
24 producers at the same cost as AEM. However, this
25 assumption is not based upon fact and ignores the evidence

1 that AEM operates in a national market with great economies
2 of scale and scope.

3 The evidence also shows that Atmos does not
4 have the gas supply personnel and expertise to provide the
5 same type of services that are available from AEM or other
6 unregulated gas marketers. There are different skills
7 needed for personnel for national gas marketers that are
8 needed for the personnel of local distribution companies.

9 There are also different financial risks
10 associated with securing gas supplies and interstate
11 transportation services for unregulated gas marketers that
12 exist for local distribution companies.

13 The Staff's proposed disallowance is based
14 upon the Staff's incorrect and we believe unlawful
15 interpretation of the Commission's Affiliated Transaction
16 Rule, which is found at 4 CSR 240-40.015 and the companion
17 rule that -- the Marketing Affiliated Rule, which is found
18 at 40.016.

19 Now, as the Commission knows the Affiliate
20 Transaction regulations have the separate rule, this
21 companion rule that's entitled Marketing Affiliate
22 Transaction Rule, that specifically contemplates that
23 regulated gas companies may lawfully do business with an
24 affiliated gas marketer.

25 Subsection 2 of that rule is entitled

1 Non-Discrimination Standards. And those non-discrimination
2 standards include about 15 separate, specific provisions
3 that are intended to prevent the regulated gas company from
4 favoring its affiliate.

5 These provisions effectively create what I
6 consider a Chinese wall between the regulated company on
7 the one side and the unregulated marketing affiliate on the
8 other to ensure that customer information, marketing
9 information and the books and records are not shared in any
10 way between the regulated company and the unregulated
11 marketing affiliate. That's -- that's what those rules are
12 designed to do.

13 These rules strictly prescribe how the
14 regulated company can deal with an unregulated affiliated
15 marketing company. That's what the rule is designed to do
16 and that's what it has been effectively doing for years.
17 These rules strictly prescribe how the company can do it
18 and without giving any preference whatsoever to the
19 unregulated affiliate.

20 Now, in this case Staff has not alleged that
21 Atmos or AEM have violated in any way these Chinese wall
22 provisions. However, Staff is making an adjustment based
23 upon their incorrect and unlawful assertion that the
24 Affiliate Transaction Rule -- and I think more specifically
25 the asymmetric pricing standards contained in subsection 2,

1 requires that the Commission disallow from Atmos's gas
2 costs an amount that is equal to the affiliate gas
3 marketer's profits.

4 Atmos believes that the legal issue to be
5 resolved in this case as in any ACA case is basically
6 whether Atmos's gas costs are prudent or not. But more
7 specially, whether the Affiliated Transaction Rule requires
8 that a regulated local distribution company must lower its
9 gas costs in the PGA process by the same amount as the
10 gross profits of an affiliated gas marketer that provided
11 gas supplies after a formal, competitive bidding process.

12 Atmos believes the Staff's interpretation's
13 incorrect and we think it would be unlawful for it to adopt
14 it. We believe that the Affiliated Transaction Rule does
15 not require the result that the Staff is urging. And if
16 it's interpreted in the manner advocated by Staff then the
17 effect is going to be that affiliated gas marketers will
18 not be bidding on gas contracts with affiliated gas
19 companies in Missouri and consumers may not receive the
20 lowest and bid cost for their gas in Missouri.

21 We don't believe that the purpose of the
22 Affiliated Transaction Rule was to effectively prohibit
23 affiliated gas marketers from participating in a formal,
24 competitive bidding process sponsored by a regulated gas
25 company or to prohibit an affiliated gas marketer from

1 earning a profit on gas supply contracts.

2 Apparently though, this is another area of
3 disagreement between the Company and the Staff. In Staff's
4 position statement filed on June 30, 2010, Staff finally
5 laid out its real position and agenda in this case when it
6 clearly and unequivocally stated -- and I'm going to
7 quote -- Staff now urges the Commission to prohibit LDCs
8 from engaging in gas supply transactions with unregulated
9 affiliates and subsidiaries, unquote.

10 Apparently Staff in this proceeding is now
11 urging the Commission to revoke the provisions of the
12 Marketing Affiliate Rule that clearly allow regulated gas
13 companies to deal with and to do business with their
14 affiliated gas marketers.

15 The Commission's Affiliated Transaction Rule
16 is clearly at the heart of the dispute in this case. Both
17 the Affiliated Transaction Rule and the Marketing Affiliate
18 Rule have the following provisions that mandate competitive
19 bidding unless good cause is shown why competitive bidding
20 is not appropriate. Now, I've got it on the screen.

21 But when a regulated gas corporation
22 purchases information, goods or services from and
23 affiliate, the regulated gas company shall either obtain
24 competitive bids for such information, assets, goods or
25 services, or demonstrate why competitive bids were neither

1 necessary or appropriate.

2 There's an identical provision to this in
3 the Marketer Affiliate Transaction Rule as well. From both
4 of these provisions it's clear that a formal, competitive
5 bidding process like the one that Atmos engages in and is
6 utilized in this case, is clearly the -- the preferred
7 method of dealing under the Affiliated Transaction Rule,
8 unless you demonstrate why competitive bids were neither
9 necessary nor appropriate.

10 Well, Atmos thinks that the competitive
11 bidding process is the appropriate thing to do, so there's
12 no need to suggest why it's not appropriate. It's what
13 they've done and it's what is required by the rule. Atmos
14 has followed this preferred method of dealing with its gas
15 affiliate by using a robust, competitive bidding process.

16 Now, obviously since they've used the
17 competitive bidding process they've not attempted to
18 explain why it shouldn't be used.

19 Now, Section (3)(B) of both the Affiliate
20 Transaction Rule and the Marketing Affiliate Rule have a
21 provision that I have marked -- or I have on the board.
22 And that's really the key here, as Mr. Berlin has pointed
23 out, is what is the fair market price required to be used
24 under the Affiliate Transaction Rule.

25 In a recent pleading filed by the Staff in a

1 Laclede gas complaint case, Case No. GC-2011-0098 just two
2 weeks ago, Staff defined the fair market price as follows:
3 Fair market price value -- or excuse me -- fair market
4 value is traditionally considered to be the amount
5 something would sell for in an open market between a
6 willing buyer and a willing seller who are both
7 knowledgeable and informed and prudent and who are acting
8 independently of each other.

9 In the case of Atmos, the fair market price
10 is determined by the formal, competitive bidding process.
11 It's an objective price that's determined by the
12 competitive bidding process that puts willing, unregulated
13 gas marketers against one another to establish the lowest
14 and the best price that Atmos can accept.

15 And here's -- this is where the rub in this
16 case comes: Staff is unwilling to accept that the
17 competitive bidding process used by Atmos determines the
18 fair market price required to be used by the Affiliate
19 Transaction Rule.

20 Staff believes it needs to spend months or
21 even years investigating unregulated gas marketers
22 contracts with other upstream suppliers in order to
23 determine whether gas -- whether Atmos is really receiving
24 the fair market price when its affiliate gas marketer
25 happens to win the bid.

1 Apparently, the Staff believes that the fair
2 market price is in the eye of the beholder and it's the
3 regulator, in this case, Mr. Sommerer, rather than the
4 market itself that determines the fair market price or the
5 fair market value.

6 Mr. Sommerer and the Staff believe he needs
7 to know about all the contractual arrangements of AEM with
8 its upstream gas providers before he can determine what the
9 fair market price is.

10 He believes he needs to understand the
11 hedging practices of the unregulated gas marketer, its risk
12 management manuals, and all the reasons why the unregulated
13 gas marketer might reduce the volumes that it needs under a
14 given contract. That's what we're talking about. That's
15 what they're asking for in this motion.

16 Like obscenity, Staff apparently believes it
17 will know the fair market price only after they see it or
18 at least investigate it for months and months. As a result
19 Staff has issued DRs demanding that AEM produce all of its
20 contracts with its upstream gas suppliers so that Staff can
21 determine in its own eyes the fair market price or the fair
22 market value of the gas supplies provided after a
23 competitive bidding process.

24 Now, Atmos believes that it's the market
25 made up of willing, competing suppliers and a willing,

1 knowledgeable buyer that determines the fair market price.
2 It's not the regulator who wants to know all the details of
3 the contractual arrangements with the lowest bidder with
4 the upstream producers that determines that market price.

5 And I think that's the fundamental -- very
6 fundamental difference between the company and the Staff in
7 this case. What determines the fair market price; an open
8 and competitive bidding process or a staffer sitting in the
9 Governor office building, or does the Commission want to
10 delve into these questions everytime a regulated gas
11 company accepts the lowest and best bid from and affiliated
12 gas marketer.

13 Now, the Commission had established the
14 procedural schedule that was being followed by Atmos, the
15 Staff and Public Counsel. Staff and Public Counsel --
16 Atmos and Staff have actually filed direct testimony, they
17 filed the rebuttal testimony. And Atmos, Staff and Public
18 Counsel had filed their list of issues and their position
19 statements before the procedural schedule was abruptly
20 suspended.

21 Notwithstanding the fact that we were within
22 a month of filing surrebuttal testimony and having the
23 evidentiary hearing quickly thereafter, the procedural
24 schedule was suspended when Atmos objected to a single DR.
25 And that DR was the -- when Staff requested all of AEM's

1 contracts with upstream providers. Even though
 2 4 CSR 240-40.0167 Subsection (2)(K) unequivocally requires
 3 that the regulated gas company -- and I'm going to quote it
 4 here -- maintain its books and accounts and records,
 5 completely separate and apart from those of the marketing
 6 affiliate. That's a requirement of this Commission.

7 We originally were told that Staff needed to
 8 have the contracts between AEM and its affiliated providers
 9 so that the Staff could assess the value of those contracts
 10 from Staff's unique perspective, and in particular whether
 11 there were any interruptible gas supplies involved. Well,
 12 the Commission ruled and now Staff does have those
 13 contracts between AEM and its upstream proprietors.

14 However, now Staff says it needs more
 15 information to assess the value of those contracts from
 16 their unique perspective. We continue to believe that the
 17 fair market price is determined by the competitive bidding
 18 process and the information that Staff is now requesting is
 19 totally irrelevant to that determination and it's not
 20 designed to lead to admissible evidence.

21 Now, if the Commission grants the Staff's
 22 Motion to Compel in this case at this point, the Staff has
 23 indicated that it will have more discovery for AEM and
 24 possibly even want to depose the employees in Houston of
 25 AEM, the unregulated gas marketer.

1 Now, on September 14, 2010, Staff did file
2 its Motion to Compel related to these two DRS, 117.1 and
3 131.1, which Mr. Berlin has talked about. Since those DRS
4 are totally irrelevant to determining what the fair market
5 price is from our perspective and not designed to lead to
6 any admissable evidence, we would ask the Commission to
7 deny that request at this point.

8 Staff is seeking the details of business of
9 an unregulated gas marketer that is not a gas corporation
10 under Chapter 386 and frankly, it's not under the
11 jurisdiction of the Commission.

12 Now, I put on the board here 393.140
13 Subsection 12. We think that that Subsection 12 prohibits
14 the Commission from getting into these kinds of records
15 from AEM because as you'll see it's a corporation whose
16 business is being kept separate. It's not subject to any
17 of the provisions of this chapter or under this particular
18 subsection. And it's not required to procure the consent
19 or authorization of the Commission to any act and such
20 other business or to make any report in respect thereof.

21 Now, it's kept separate from the gas
22 corporation. It's not a natural gas utility. And we
23 believe that subsection 12 is an indication that the
24 legislature says the Commission doesn't have jurisdiction
25 over that.

1 Now, there is another provision in the
2 Affiliated Transaction Rule that is 4 CSR 240-40.0156
3 (B)(1). Under that particular rule the Commission does
4 have authority to review, inspect, audit books, accounts
5 and other records kept by an affiliated entity.

6 But this is the important language: For the
7 sole purpose of ensuring compliance with the Affiliated
8 Transaction Rule; not to get into things that aren't
9 important to determining the fair market price; not to
10 determine -- getting into things that are not important in
11 determining whether the company did competitive bidding as
12 it's required to do in the Affiliated Transaction Rule; not
13 trying to find out what kind of policies, manuals it has
14 out there.

15 Because the company has utilized the
16 preferred method of competitive bidding required by the
17 rule, none of the information regarding the minutia of the
18 business of AEM with its upstream providers is necessary to
19 ensure compliance with the Affiliated Transaction Rule.

20 This is what DR 117.1 seeks. It seeks
21 volumes that actually flowed under the AEM agreement with
22 one of its upstream suppliers. It seeks AEM documents
23 related to the reasons why AEM reduced the volumes of gas
24 taken under two specific contracts. It wants to know did
25 AEM have any hedges in place.

1 According to Staff's Motion to Compel, their
2 seeking to explore unexplained anomalies in the quantities
3 of gas supplied by Atmos -- or excuse me -- by AEM for
4 services provided in unregulated gas markets throughout the
5 country. They want to know the volumes that actually
6 flowed under the AEM agreement. They want copies of the
7 AEM documents related to reasons why they reduced the
8 volumes. And those are trade -- based on Trade
9 No. 2366672239534.

10 But these -- these documents have nothing to
11 do with the fair market price that's determined in the
12 competitive bidding process or compliance with the Missouri
13 Affiliated Transaction Rule.

14 With regard to Trade 239534, Staff was
15 asking --

16 JUDGE WOODRUFF: Mr. Fischer, I want to make
17 you aware that we are still in open session.

18 MR. FISCHER: I'm all right with this.

19 JUDGE WOODRUFF: Thank you.

20 MR. FISCHER: Did AEM have any hedges in
21 place to protect against price exposure created by selling
22 baseload gas at FOM, which is first of the month while
23 buying gas at GDA? I'm not sure what GDA is.

24 It's difficult to understand for me how
25 AEM's hedging practices upstream have anything to do with