

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

MAY 27 2008

Before Commissioners: Thomas E. Wright, Chairman
Michael C. Moffet
Joseph F. Harkins

 Docket Room

In the Matter of the Application of Atmos)
Energy for Adjustment of its Natural Gas) Docket No. 08-ATMG-280-RTS
Rates in the State of Kansas.)

CURB's Petition for Reconsideration

The Citizens' Utility Ratepayer Board (CURB) submits this petition for reconsideration of two determinations of the Kansas Corporation Commission in its *Order Approving Contested Settlement Agreement*, issued in the above-captioned docket on May 12, 2008:

Issues

- I. Given the Commission's determination in a recent docket that a regulatory liability for terminal net salvage is necessary to protect ratepayers, its failure to so protect ratepayers in this docket is arbitrary and capricious.**
- II. The Commission's decision to approve Atmos' Gas Safety and Reliability surcharge (GSRS) tariff without making the determinations required by K.S.A. 66-2204(d) to implement the tariff is arbitrary and capricious. Further, the method of determining the rate of return for the GSRS provided in the settlement and approved by the Commission does not comply with K.S.A. 66-2204(d).**

Arguments

- I. Given the Commission's determination in a recent docket that a regulatory liability for terminal net salvage is necessary to protect ratepayers, its failure to so protect ratepayers in this docket is arbitrary and capricious.**

1. In this docket, the Commission declined to amend the settlement agreement between Staff and Atmos to order the company to record a regulatory liability to account for terminal net salvage costs that are collected from ratepayers. Given that the Commission has

already determined in a previous docket that ratepayers should be protected from losing their interest in their contributions to future removal costs, the Commission should have done so in this docket, as well. The terms of the settlement agreement would not have been disturbed or altered in any way by doing so. It is arbitrary and capricious to deny ratepayers protection from the loss of their interest in their contributions, when the protection is so easy to provide, and at no cost to the company or ratepayers.

2. The Commission has already recognized the value of providing such protection to ratepayers. In Docket No. 05-WSEE-981-RTS, the Commission determined that a regulatory liability should be recorded to account for terminal net salvage collected in depreciation rates by Westar Energy and Kansas Gas and Electric Company (Westar). The Commission favorably cited the comments of the Commission Staff, the Kansas Industrial Consumers, and the Unified School District No. 259 in support of recording a regulatory liability, and noted that Westar Energy itself agreed with their proposals. *Order on Rate Applications*, at ¶¶103 – 104. Staff pointed out that where a utility does not have a legal obligation to remove facilities, there is no certainty that the money collected from ratepayers for removal will ever be used for that purpose. To protect ratepayers from being charged for removals that never occur, a regulatory liability is recorded, which ensures that ratepayers are credited for the amounts contributed. Recording a regulatory liability has no impact whatsoever on the utility's revenues or earnings: it merely labels those funds as owed to ratepayers if not used for their intended purpose.

3. The potential loss to ratepayers of their interest in future removal costs is not merely theoretical. In this docket, consistent with his testimony in the Westar case, CURB witness Michael Majoros testified that when the telephone industry's regulatory regime changed,

\$11 billion in ratepayer contributions for future removals were taken into earnings. (Tr. Vol. 2, at 245). Eleven billion dollars was paid by ratepayers for a future cost, and then taken away with the stroke of a pen. Recording a regulatory liability would have prevented that.

4. Thus, history demonstrates the need for recording a regulatory liability to protect ratepayers. The Commission has already recognized the necessity of protecting ratepayers in a recent major rate case. The need is identical in this case, and there has been no argument from the company or Staff against the advisability of recording a regulatory liability—other than the fact that they omitted such a provision in their settlement. But recording a regulatory liability would alter none of the terms of the settlement, would have no impact on revenues, and would protect ratepayers. In fact, Staff witness Dunkel agreed with Majoros that the provision would have no impact on the settlement’s terms. (Tr. Vol. 2, at 245). Without any evidence in the record on which to base an argument disputing the value of recording a regulatory liability, the litigation risk created by doing so would be *de minimis*. It is simply arbitrary and capricious not to order Atmos to record a regulatory liability in this docket to ensure that ratepayers are credited with their contributions to future costs of removal if the contributions are not utilized for that purpose.

5. This is one of those “specific issues that for one reason or another must be identified,” that CURB witness Andrea Crane spoke of when she discussed her general preference for black box settlements. (*Id.*, at 228). Despite the appeal of simple settlement terms, some things shouldn’t be left to chance, or to a later docket. Michael Majoros, the CURB witness on the subject of depreciation rates, insisted on the inclusion of this provision, and with good reason. Without it, the settlement does nothing to protect ratepayers’ interest in their

contributions to future costs of removal. This provision can be implemented without disturbing any of the operative terms of the settlement reached by Staff and Atmos.

6. Therefore, CURB respectfully requests that the Commission reconsider its decision not to order Atmos to record a regulatory liability for future costs of removal that are included in the company's depreciation rates

II. The Commission's decision to approve Atmos' Gas Safety and Reliability surcharge (GSRS) tariff without making the determinations required by K.S.A. 66-2204(d) to implement the tariff is arbitrary and capricious. Further, the method of determining the rate of return for the GSRS provided in the settlement and approved by the Commission does not comply with K.S.A. 66-2204(d).

7. The Commission approved Atmos' request for a GSRS without making any of the determinations required by K.S.A. 66-2204(d) before the tariff may be implemented. The statute provides that the GSRS shall be calculated using specific data determined during the most recent general rate proceeding of the utility, including the utility's actual regulatory capital structure, the actual cost rates for the utility's debt and preferred stock, and the utility's cost of common equity. K.S.A. 66-2204(d)(5), (6) and (7). It should be noted that, to calculate the GSRS, the statute requires the use of the **actual** cost rates for the utility's debt and preferred stock and the cost of equity: it does not permit the use of "implied" costs. Instead, the Commission approved the following language in the settlement:

Staff and Atmos agree that for applications filed under the GSRS tariff and K.S.A. 2006 Supp. 66-2201 *et seq.*, or in other instances where a Commission-approved carrying charge is needed, the debt/equity ratio shall be 51.90%/48.10%, the cost of debt shall be 6.11% and the cost of equity shall be equal to the average of the cost of equity used or agreed to be used by the Commission in calculating the GSRS for the other Kansas gas utility companies."

Joint Stipulated Settlement Agreement, at ¶10. However, nothing in the Commission order identifies evidence supporting this agreed-upon language. Further, the agreement to use the cost of equity of other Kansas gas utility companies to calculate the GSRS for Atmos is in clear violation of the terms of the statute that require the calculation to be based on Atmos' actual costs. Additionally, the agreement to use these calculations "in other instances where a Commission-approved carrying charge is needed" is vague and not supported by any evidence or findings at all.

8. Importantly, the statute provides that a utility may not apply for a GSRS if it has not had a general rate proceeding determined or dismissed within the last 60 months, unless the filing is made part of a new general rate proceeding, as is the case here. K.S.A. 66-2203(b). The clear purpose of these requirements are to ensure that the GSRS, which allows the company to collect a return on the costs placed in the surcharge, accurately provides the return that has been established for the company's base rates. Only a general rate case is conducted with the close scrutiny that insures accurate determinations of the company's requirements for a return on its costs of debt and equity. Even a dismissal of a rate application must be based on the Commission's conclusion that the company is not under-earning, which conclusion could only be made on the basis of substantial evidence that the company's current revenues are sufficient to supply its previously-approved rate of return. Thus, in crafting the GSRS statute, the legislature sought assurance that the rate would be calculated on recent, accurate information. The settlement agreement is not sufficient to establish that the rates are accurate, and the Commission's order approving the settlement is not sufficient, either.

9. The statute provides a two-part test for determining whether an alternative method of making the cost determinations is available to the Commission. K.S.A. 66-2204(d)(9) provides:

in the event that the information pursuant to paragraphs (5), (6) and (7) are unavailable **and** the commission is not provided with such information on an agreed-upon basis, the commission shall utilize the average of the recommendations contained in the testimony submitted by the natural gas public utility and commission staff during the most recent general rate proceeding of the natural gas public utility to determine the capital structure, recommended cost rates for debt and preferred stock and recommended cost of common equity to determine the average weighted cost of capital. (emphasis added).

This alternative method of calculating the GSRS cannot be utilized where, as here, the circumstances do not pass the first part of the test. The information that could have been used to make these determinations **is** available in this docket, having been provided to the Commission by the company, the Commission Staff and CURB in substantial testimony and evidence. As for the second part of the test, the company and Staff have provided figures for these costs in the settlement without providing any supporting evidence, and those cost figures were contested by CURB with evidence and in testimony. There can be no “agreed-upon” costs when they are contested in this case.

10. Even if the Commission were to argue that K.S.A. 66-2204(d)(9) allows only two of the parties to agree upon the costs, which CURB believes is an erroneous interpretation given the clear preference of the statute for specific determinations based on the utility’s actual costs, the information on the actual costs **is** available, so the first prong of the test fails and the Commission cannot resort to the alternative method of calculating the GSRS return. Furthermore, even if the circumstances allowed resort to this alternative method, the Commission

would have no clear answer, because Staff's expert's recommendation was simply a mid-point of what he believed was an acceptable range of appropriate returns on equity. The Commission cannot average the positions of the company and Staff, as required by this provision of the statute, and come up with a specific return by using a range of figures.

11. Regardless of whether the circumstances permitted the rate to be calculated with the actual costs described in K.S.A. 66-2204(d)(5), (6) and (7), or by the alternative method described in section (9), the Commission is simply not permitted under the statute to base the rate on the average return of other natural gas utilities, as it has done in this docket. The approval of the terms of the settlement violates either provision of the statute.

12. When Atmos files its first petition to include costs in the GSRS, determinations of its costs that were never made in the rate case cannot provide the basis for calculating the rate under the first method of K.S.A. 66-2204(d). The alternative method will not be available, either, because the information to make the determinations was available, but not utilized to make the determinations. Finally, the method provided by the settlement does not comply with the statute at all. Therefore, there will be no basis upon which the Commission may set the rate.

13. It is simply arbitrary and capricious for the Commission to refuse to make these determinations now: the statute will not permit the Commission to make them later under the particular circumstances of this case. Further, the Commission's decision to approve the settlement agreement provision and base the GSRS rate on the average rate of return of other utilities clearly violates the language and the intent of K.S.A. 66-2204(d).

14. The legislature surely did not intend for the Commission to intentionally deprive itself of an option for calculating the rate: the logical thing to do is make the determinations

now, as a part of the general rate case. To do otherwise is arbitrary and capricious. These determinations will not disturb the terms of the settlement, but will serve to provide the accurate data required by the terms of the GSRS statute to calculate the GSRS when Atmos brings forth its first petition to place costs in the surcharge.

15. Therefore, CURB respectfully requests that the Commission withdraw its approval of the settlement provisions that provide for an illegal calculation of the GSRS return, withdraw its approval of the provision that would allow this method to be used to calculate rates in other unidentified instances, and instead identify substantial evidence supporting the Commission's specific determinations that are identified by K.S.A. 66-2204(d)(5), (6) and (7) as necessary for calculating the GSRS rate of return for Atmos.

Respectfully submitted,



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VERIFICATION

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COUNTY OF SHAWNEE)

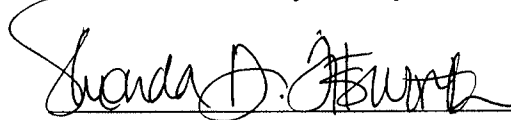
I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is an attorney for the above named petitioner; that she has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.



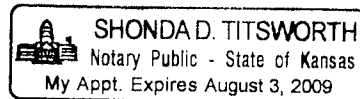
Niki Christopher

SUBSCRIBED AND SWORN to before me this 27th day of May, 2008.



Notary of Public

My Commission expires: 8-03-2009.



CERTIFICATE OF SERVICE

08-ATMG-280-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, or hand-delivered this 27th day of May, 2008, to the following:

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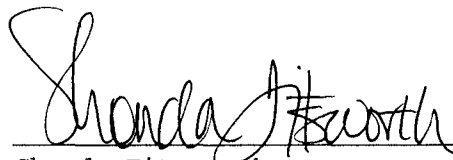
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