

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

OCT 23 2009

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



In the Matter of the Application of Atmos )  
Energy for Approval of the Commission for ) Docket No. 10-ATMG-133-TAR  
Gas System Reliability Surcharge per K.S.A. )  
66-2201 through 66-2204. )

**COMMENTS OF CURB**

**and**

**MOTIONS OF CURB**

The Citizens' Utility Ratepayer Board (CURB) submits the following comments and motions concerning Atmos Energy's request for approval of a Gas System Reliability Surcharge (GSRS) tariff in the above-captioned docket and the memorandum of the Staff of the Kansas Corporation Commission (KCC or Commission) recommending approval of Atmos' request.

**I. COMMENTS**

1. CURB agrees with Staff's opinion that Atmos is ineligible for recovery of approximately \$2.7 million in projects because they do not meet the criteria outlined in the Gas Safety and Reliability Policy Act (Act), K.S.A. 66-2201 – 2204. CURB also agrees with Staff that Atmos would be eligible for recovery of the approximately \$7.1 million in projects that do meet the criteria set forth in the Act—if its application was properly before the KCC at this time. CURB objects to Staff's recommendation that the Commission approve Atmos' application for a GSRS tariff and approve recovery of \$765,529 annually through the GSRS surcharge, including a return calculated on an assumed 10.2% return on equity (ROE), precisely because the application is not properly before the Commission at this time.

2. Simply put, the KCC has no jurisdiction in this matter at this time. Since November 21, 2008, when CURB timely appealed the KCC's approval of the method for calculating a GSRS tariff for Atmos in Docket No. 08-ATMG-280-RTS (280 Docket), the jurisdiction over this matter has resided in the appellate courts of Kansas. (See Opin. No. 08-101452-A, *Citizens' Utility Ratepayer Board v. State Corporation Commission*, --- Kan.App.--- 2009). The Kansas Court of Appeals assumed jurisdiction on that date, taking it away from the KCC. Subsequently, the Kansas Supreme Court assumed jurisdiction and took it away from the Court of Appeals on October 1, 2009, when it granted CURB's petition for review of the Court of Appeals decision. (See Kansas Supreme Court Docket, Case No. 08-101452-AS, *Citizens' Utility Ratepayer Board v. State Corporation Commission*). Therefore, the KCC has no jurisdiction over matters concerning Atmos GSRS and it must find that Atmos' GSRS application is improperly before the Commission at this time. Until the Kansas Supreme Court remands the matters concerning Atmos' GSRS tariff back to the KCC, the Commission has no jurisdiction to consider Atmos' application for a GSRS tariff, approve recovery of revenues through a GSRS tariff or approve a rate of return for a GSRS tariff.

3. It should be noted that the KCC is under no obligation to meet the 120-day statutory deadline (K.S.A. 66-2204(b)(4)) to issue an order on this GSRS application. Since Atmos' new GSRS application was filed with a decision-making body without jurisdiction to accept it, the application is essentially moot. One cannot trigger a statutory deadline by filing an application with a tribunal that has no jurisdiction.

4. However, in the event that the KCC disagrees with this assertion, and finds that it has jurisdiction generally to consider Atmos' new GSRS application in this docket, the fact remains that

the specific issue of whether the KCC's approval of the settlement between Staff and Atmos in Docket 08-ATMG-280-RTS established an appropriate method of calculating the return on the GSRS under the Act is pending before the Supreme Court. The KCC cannot reasonably assert that it has jurisdiction over this specific issue at this time. Therefore, Atmos' request in the current application to assume a 10.2% return on equity to calculate the return on the GSRS, as approved by the KCC in the 280 Docket, must be deferred until the Supreme Court has issued its opinion on the matter and remanded jurisdiction back to the KCC.

5. While CURB does not concede that the KCC has any jurisdiction at all in this matter, if the Commission finds that it has general jurisdiction to consider Atmos' new GSRS application in this docket, the KCC should nevertheless limit its decision to approving the tariff only to the extent of allowing Atmos to recover the actual eligible costs—with no additional rate of return. The decision on how to calculate the appropriate return on the GSRS costs must be deferred until after the Supreme Court has issued its opinion on this issue and remanded the case back to the KCC for final disposition.

6. Further, Staff's suggestion that the Commission could award Atmos a return that is calculated on a return on equity of 10.3% by utilizing the alternative method of determining the return on equity to be used in calculating the GSRS described in K.S.A. 66-2204(d)(9) is without merit, given that the Commission has no jurisdiction in this matter at this time. Additionally, that method relies on reference to evidence in the record of the most recent rate case. Since the official record of Atmos' recent rate case is currently in the possession of the Supreme Court, the evidence is currently unavailable in the present case.

7. Further, if the Commission had determined the ROE in the 280 Docket rate case, as the statute contemplates, deciding which alternative method of determining the ROE is appropriate in this docket would not be necessary. The statute clearly contemplates that the Commission would establish an ROE in the course of a company's rate case to ensure that the return on the GSRS accurately mirrors the overall return that the company is allowed to earn. Declining to determine the ROE in a rate case, as the KCC did in the 280 Docket, which creates the necessity of using an alternative method in a later case, is entirely inconsistent with the statute's clear intent of ensuring that the return on GSRS revenues accurately mirrors the return on base rates.

8. CURB also questions Staff's statement in its memorandum that "In this case, because Staff is recommending Atmos's filing be approved in full, the choice of a 10.3% ROE instead of a 10.2% ROE would be of no consequence." This statement is puzzling, because Staff recommends that the Commission disallow recovery of approximately \$2.7 million in costs contained in Atmos' application, which is hardly a recommendation to approve the application "in full." If Staff meant to indicate that the company should not be awarded a return based on a higher ROE than it requested, then CURB would agree. However, the statement seems to imply that the KCC may assume either a 10.2% or a 10.3% ROE to calculate the return on the GSRS, because the result is "of no consequence." CURB disagrees. First of all, the consequences of this determination fall squarely on ratepayers, who prefer the consequences of providing profits to their utilities based on statutory guidelines and sound reasoning rather than random determinations. Furthermore, if in determining the return on the GSRS, the KCC utilizes a method of calculating it that does not comport with requirements of the Act, the consequences will be illegal rates. No rate calculated in a manner that violates a statute that was expressly created to determine how the rate is to be calculated could

possibly be deemed just and reasonable under Kansas law. That is a significant consequence, regardless of the actual monetary impact on customers.

9. Finally, whether or not the KCC finds that it has jurisdiction to consider Atmos' GSRS application at this time, the pending opinion of the Supreme Court may affect any of the KCC's decisions in this docket—including the rates set by the Commission. It just makes sense to stay or suspend these proceedings until the opinion is issued. The practice of judicial economy and the desirability of rate stability should lead the Commission to the conclusion that it should suspend the proceedings in this docket until the Supreme Court has issued its opinion on the previous docket in this matter.

## II. MOTIONS

10. **Therefore, for all of the reasons stated above, CURB respectfully moves that the Commission find it has no jurisdiction at present to consider Atmos' application in this docket, and issue an order instructing Atmos that it may resubmit its application once the Kansas Supreme Court has issued its opinion and jurisdiction is once again returned to the KCC; or**

11. **In the alternative, CURB respectfully moves that the Commission find it has no jurisdiction at this time to determine the return on equity that will be used to calculate the return on Atmos' GSRS revenues in this docket, and suspend or stay its decision on awarding a return on GSRS revenues until the Supreme Court has issued its opinion in the pending appeal; or**

12. **In the alternative, if the Commission finds it has jurisdiction to consider Atmos' GSRS application in this case, for the sake of judicial economy and rate stability CURB respectfully moves the Commission to stay or suspend all or any of its decisions in this case that may be affected by the pending Supreme Court decision on these matters until the opinion is issued and the case is remanded back to the KCC for final disposition.**

Respectfully submitted,



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CERTIFICATE OF SERVICE

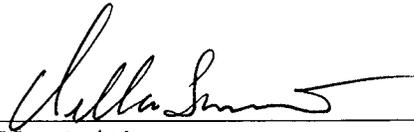
10-ATMG-133-TAR

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, e-mailed or hand-delivered this 23rd day of October, 2009, to the following:

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