THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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 Gas System Reliability Surcharge per K.S.A. 66-2201 through 66-2204.	))))	Docket No. 10-ATMG-133-TAR

CURB's Petition for Reconsideration

The Citizens' Utility Ratepayer Board (CURB) petitions the Kansas Corporation Commission (Commission or KCC) for reconsideration of its order issued in the above-captioned docket on December 11, 2009, which denied CURB's three motions to stay these proceedings, approved a non-unanimous stipulation and settlement agreement, and authorized Atmos Energy to impose a gas system reliability surcharge. CURB sets forth its grounds for reconsideration below.

1. CURB requests reconsideration of the denial of its motion that requested that the "Commission find it has no jurisdiction at this time to determine the return on equity[1] 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 [in Docket No. 08-ATMG-280-RTS]."[2]

2. CURB requests reconsideration pursuant to K.S.A. 77-529 and 66-118b, on the grounds that the Commission acted beyond the jurisdiction conferred by any provision of law.

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1 Notwithstanding the legislature's choice of the term "cost of equity," as used in the GSRS statute, CURB believes it is more appropriate to adhere to widespread industry practice by using the term "return on equity", or ROE, which is also consistent with the vast majority of documents that were filed in this docket and in the 280 Docket. A "cost" generally represents a fixed amount of dollars actually expended by the utility; a "return" is expressed as a percentage, and the "return on equity" set in a rate case is an aspirational percentage (what the utility hopes to earn on its investment) rather than historical (what the utility actually earned). Our legislature may prefer calling the return the "cost of equity," but it is singular in its preference—and wrong.

2 CURB is not requesting reconsideration of the denial of its other two motions.

K.S.A. 77-621(c)(2). Specifically, the KCC has no jurisdiction to act upon subject matter that is pending review before the Kansas Supreme Court in Case No. 101452.

Factual background

3. The subject matter in question is the decision of the KCC in the most recent rate case of Atmos Energy, Docket No. 08-ATMG-280-RTS (280 Docket), to approve a settlement provision that provided a method for determining Atmos' return on equity, for purposes of calculating the return on a Gas System Reliability Surcharge (GSRS) tariff. The method approved by the Commission, which was to be used when Atmos applied for a GSRS tariff, was to assume an ROE that is the equivalent of the average of the ROEs of the other Kansas natural gas utilities. CURB objected to the decision of the KCC not to make its own determination of the ROE, and objected to the method of calculating the GSRS return because it did not comport with the requirements of K.S.A. 66-2204(d), and because basing the rates of Atmos on the returns of other utilities was arbitrary and capricious and would not ensure that only just and reasonable rates would be charged through the surcharge.

4. While the Kansas Court of Appeals dismissed CURB's appeal on procedural grounds, the Kansas Supreme Court granted CURB's petition for review. Review is pending, and the case has not been docketed for hearing.

5. In this docket (133 Docket), Atmos applied for a GSRS tariff on August 14, 2009. Thereafter, the Kansas Supreme Court granted CURB's petition for review on October 1, 2009. Following informal discussions with KCC Staff, Atmos and advisory counsel for the KCC concerning whether the Commission has jurisdiction to act on subject matter currently pending review in the Supreme Court, CURB filed three motions with the KCC. Each challenged the

jurisdiction of the KCC to act on Atmos' GSRS tariff while the question of how the return on the tariff is to be calculated is being reviewed by the Kansas Supreme Court. CURB requested that the Commission stay or suspend action in this docket for lack of jurisdiction until the Supreme Court issues its ruling on how the return should be calculated. The Commission denied all three motions on December 11, 2009.

6. In the 133 Docket Order, instead of enforcing its order in the 280 Docket prescribing the method for determining the ROE in calculating the return on Atmos' GSRS tariff, the KCC chose instead to approve a different method of determining the ROE for Atmos' GSRS tariff. In doing so, the KCC has effectively revised its previous order on this subject matter while this subject matter is pending review. The KCC has no jurisdiction to act on subject matter pending review before the Supreme Court.

Argument:

KCC has no jurisdiction to issue further orders on subject matter in the 280 Docket that is pending review by the Kansas Supreme Court.

7. The Commission states in its 133 Docket Order that CURB offered "nothing by way of case law, statute, or Commission regulation" (133 Order, ¶12) to establish that the Commission had no jurisdiction to issue an order on the subject matter that is pending review before the Kansas Supreme Court. However, the Commission offers nothing by way of case law, statute, or Commission regulation to support its finding that it may revise a previous ruling while that ruling is pending review by the Kansas Supreme Court. Further, the Commission offers no explanation as to why Supreme Court Rule 8.03, which deprives the Kansas Court of Appeals of jurisdiction to issue a mandate to the tribunal below when the Kansas Supreme Court grants a petition for review, does not

support the contention of CURB that jurisdiction over the subject matter continues to reside in the appellate court, not the KCC.

8. This may be a separate docket from the 280 Docket, but the subject matter of the appeal specifically relates to this docket. The 280 Docket order approved a specific method of determining the ROE for Atmos, for purposes of calculating the return on the GSRS tariff. The order in this docket approves a specific method of determining the ROE for Atmos, for purposes of calculating the return on the GSRS tariff—but the method approved is a different method. CURB does not deny that the KCC has the power to determine that evidence presented in subsequent dockets merits a different decision than was issued in a previous docket, but CURB does not believe that the law allows the KCC to revise a decision while it is pending review by the Supreme Court. These circumstances (approving a specific method of determining the ROE for Atmos for purposes of calculating the return on the GSRS tariff) are the exact, specific circumstances that are addressed by the provisions of the 280 Order which are pending review by the Supreme Court. The fact that this is a separate docket does not eliminate the fact that the KCC is addressing the same specific subject matter that is pending review before the Supreme Court.

9. Again, CURB must point out the difference between these circumstances, and the circumstances in which the KCC is permitted to issue orders in a second rate case while the first rate case is on appeal. Primarily, the reason is that the second rate case order has no net effect on the amount approved in the first case. Rates are always subject to adjustment if the appellant succeeds on appeal. There is no harm done to the utility or its ratepayers when rates deemed too high or too low are subject to adjustment to the appropriate amount. In the circumstances of 280 and 133 Dockets, however, the decision the KCC made in the second case is revising the decision made in the

first case, while the first decision is pending review. A decision in a second rate case does not affect the decision in the first rate case in any way. Here, however, the second decision materially alters the outcome contemplated by the first decision.

10. Furthermore, the exercise of concurrent jurisdiction is not unlimited. The fact that KCC orders routinely state that it continues to "retain jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary" (133 Order, ¶15) does not deprive the Kansas Supreme Court of exclusive jurisdiction over the specific matters pending before it. While concurrent jurisdiction may exist in certain circumstances, such as when the KCC approves a rate design scheme for a utility while the utility appeals the amount of the rate increase, concurrent jurisdiction is intended to ensure that the business of the KCC and the utilities it regulates does not grind to a halt whenever a party files an appeal. Concurrent jurisdiction is not to be exercised for the purpose of circumventing appellate review, or for the purpose of attempting to fix mistakes before the appellate court has identified what mistakes were made. If the KCC were permitted to revise its orders on appeal before the appeal is concluded, the appellate process would be unwieldy, because the practice would lead to more appeals than necessary. When the appellate court has exclusive jurisdiction over the subject matter being reviewed, when the appellant prevails, only one order, not several, must be revised to conform to the court's opinion.

11. Further, waiting until the appellate court has provided guidance on the subject matter ensures that subsequent orders issued are consistent with the court's opinion. When only one tribunal at a time is acting on a particular subject matter, appellants don't have to guess which tribunal's opinion it must obey. Thus, the tribunal being reviewed should abstain from exercising its jurisdiction over the subject matter that is pending review by a higher tribunal. By vesting exclusive

jurisdiction in appellate courts, judicial economy is served, because a single appeal may suffice to resolve the conflict, rather than several appeals. Moreover, when an appellant is not subject to further orders on the subject until the appellate court has concluded its review, the appellant knows which orders must be obeyed, because there is a clear hierarchy of authority. Thus, the finality of orders is served. The appellant knows that the most recent final order is the order that must be obeyed, and when the Supreme Court issues its opinion, that's it: win or lose, the decision is final. If the appellate court decides that the KCC's view of the law was erroneous, then the appellant isn't forced to appeal two or three more orders that were also founded on that erroneous view. If the court decides that the KCC was right, then the appellant won't waste the court's time filing two or three appeals. Vesting exclusive jurisdiction in the appellate court therefore promotes judicial economy and the finality of judgments. Thus, the KCC should not exercise concurrent jurisdiction over matters pending before the Kansas Supreme Court, to serve the principles of judicial economy and finality of judgments.

12. If the Commission has had a difficult time understanding the logic of CURB's position in this case, the roots of the difficulty may reside in the illogical position the Commission has taken in regard to the authority and effect of its 280 Docket order and its arguments that CURB's appeal was premature because Atmos withdrew its application for the GSRS tariff in that docket. The Commission once again fails to appreciate the contradiction inherent in its actions in the 280 Docket order when it (1) explicitly approved the method to be used for determining the ROE when Atmos implements a future GSRS tariff while (2) simultaneously ordering that CURB would be free to argue for another method of determining the ROE when Atmos petitioned for a GSRS tariff. This contradictory pair of mandates implied that the KCC's approval of the rule to be applied in the next

case was simply a statement of its preferences, and had no force or authority—which is contrary to all common sense. A KCC order must be obeyed, whether the order determines a rate increase or determines the method to be used to determine a utility's ROE in a future case. But the Commission's arguments that CURB had no reason to object to the rule set in the 280 Docket until a GSRS tariff was filed with the Commission implies that its approval of the rule was simply precatory.

13. The only other conclusion one could reach in facing this pair of mandates was that the KCC meant to imply that a party's only recourse when it disagrees with the Commission's approval of a rule to be applied in the future is not to appeal the rule, but to wait and argue against it when the occasion arises in the future to apply the rule. But this is contrary to common sense, as well. Normally, a party is deemed to have acquiesced in the approval of the rule if the party fails to petition for reconsideration or appeal. In the absence of revisions to the Kansas Administrative Procedures Act and an explicit declaration of a change in Commission policy, CURB decided it should not wait until the rule was applied to appeal, for fear of losing its right to do so.

14. Thus, CURB's position in this case assumes (1) that the KCC does not issue orders it does not intend to enforce; (2) does not approve rules it does not intend the parties to obey; (3) if CURB's petition for reconsideration was denied, the only way CURB could obtain redress was to file an appeal; and (4) if CURB had failed to do so, the KCC would have deemed that CURB had acquiesced in its approval of the rule.

15. CURB's position in this case also assumes (1) the KCC approved a rule (i.e., the method to be used to calculate the return on the GSRS tariff) in the 280 Docket that would be applied in a future docket; (2) the 133 Docket was the future docket in which that rule would be

applied; but (3) in the 133 Docket, the KCC applied a different rule, which (4) effectively revised the rule approved in the 280 Docket; while (5) CURB's appeal of that rule is pending review; which (6) is an inappropriate exercise of concurrent jurisdiction by the KCC, if it indeed has any jurisdiction at all.

16. While CURB acknowledges that there are instances in which the KCC may exercise jurisdiction concurrently with an appellate court, CURB does not believe that the KCC may exercise its jurisdiction to revise the precise rule that the Kansas Supreme Court has agreed to review. The fact that this is a separate docket does not support the Commission's contention that the subject matter is unrelated. Indeed, the subject matter in this docket—how the return on Atmos' GSRS tariff is to be calculated—is exactly the same subject matter that is pending review.

17. It is not clear from the Commission's order in this case why it does not find Supreme Court Rule 8.03 applies to this case. (133 Order, ¶12). According to the rule, the Court of Appeals loses its power to issue a mandate to the KCC once the Supreme Court grants a petition for review. Thus, it is apparent that the Court of Appeals has power to act—i.e., jurisdiction—over the subject matter of the appeal until it issues a mandate to the KCC or the Supreme Court assumes jurisdiction. Since no mandate issued to the KCC, and the Kansas Supreme Court granted CURB's petition for review, CURB believes that the Kansas Supreme Court has assumed jurisdiction over the subject matter of CURB's appeal, and that the KCC has no jurisdiction to act upon the subject matter until the Kansas Supreme Court issues its opinion, and either returns jurisdiction over the subject matter to the Court of Appeals or to the KCC. While the Commission may believe that the subject matter of this docket has nothing to do with the subject matter on appeal, or may believe that it may exercise concurrent jurisdiction with the Supreme Court, the "rule on its face" (¶12) clearly establishes that

jurisdiction resides in the appellate courts until a mandate is issued. It is a fact that the Court of Appeals did not issue a mandate to the KCC dismissing CURB's appeal. While the KCC may honestly believe that CURB has wrongly interpreted the meaning of Rule 8.03 as defining the limits of the KCC's jurisdiction, it does prescribe the limits of the Court of Appeals' jurisdiction, and by implication draws the line where appellate jurisdiction begins and ends.

18. Whether or not it is appropriate to consider that Rule 8.03 defines the limits of appellate jurisdiction, there is a clear policy reason for the rule: it promotes judicial economy and finality of judgments. After all, the Supreme Court may overrule the Court of Appeals. If the Court of Appeals issued a mandate to the KCC, and then the Supreme Court later on overruled the Court of Appeals, the KCC might then have to revise several orders it issued in the interim, in reliance on the Court of Appeals mandate. Rule 8.03 prevents this result, thus promoting judicial economy. The KCC will receive only one mandate from the appellate courts, and will only need to revise one ruling. The parties who are subject to that ruling will not be forced to obey one opinion, then another. The opinion of the Supreme Court will settle the dispute, once and for all. Just as Rule 8.03 prevents the appellate courts from issuing conflicting mandates to the KCC, investing exclusive jurisdiction over the subject matter on appeal with the reviewing court prevents the KCC and the appellate courts from issuing conflicting mandates. Thus, Rule 8.03 promotes finality of judgments, and establishes a hierarchy of decisions: the parties will not be left to guess which tribunal to obey. The order of the Kansas Supreme Court will be final—not a "final" order the KCC issued in the interim.

19. CURB notes that the 133 Docket order explicitly acknowledges that the choice of methodology in this docket was "an effort to resolve CURB's legal concern [about the legality of

averaging other utilities ROEs to determine the ROE of Atmos]." (133 Docket, p.18). Having all but acknowledged that it was trying to fix the errors of the 280 Docket in the 133 Docket, it is simply disingenuous of the KCC to argue that the subject matter of this docket is unrelated to the subject matter of the 280 Docket in order to defeat CURB's allegations that the KCC has no jurisdiction over the subject matter at this time. Having acknowledged that the 133 Order attempts to address CURB's legal concerns about the 280 Docket order, the KCC admits that the 133 Order revises its decision in the 280 Docket. However, CURB's legal concerns with the 280 Docket order are currently pending review by the Supreme Court. Only the Supreme Court can resolve CURB's legal concerns about the 280 Docket order at this point in time. By addressing CURB's legal concerns in the 133 Order, the KCC impermissibly exercised its jurisdiction over matters under the jurisdiction of the Supreme Court.

Discussion of the fallback provision [K.S.A. 66-2204(d)(9)]

20. If the Supreme Court rules in CURB's favor in the 280 Docket, the KCC will have to review the evidence presented in the rate case to determine an ROE for Atmos. There will be no occasion to utilize the fallback method of determining the ROE [K.S.A. 66-2204(d)(9)] for Atmos' GSRS tariff that the Commission approved in this docket. On the other hand, if the Supreme Court rules in the KCC's favor, then use of the fallback provision would perhaps be necessary, but it's not good ratemaking, as will be discussed below.

21. Because the KCC refused to determine the ROE for Atmos in the 280 Docket, it now declares that the ROE is "unavailable." By its own action—or rather, inaction—the KCC forced resort to the fallback provision [K.S.A. 66-2204(d)(9)]. CURB apparently is alone in perceiving the grim irony of this result. The KCC, which is the sole entity in the state of Kansas in charge of

ensuring that rates are just and reasonable, hasn't determined an ROE for a natural gas utility in well over a decade. We don't know what a fair ROE for Atmos should be, or for any other gas utility in Kansas, because the KCC has repeatedly chosen not to decide. Now the KCC says we have to use the fallback provision to determine the ROE for the GSRS tariff, a provision that was clearly intended to be used only if the utility hasn't had a rate case recently.

22. So it was not CURB's "unwillingness to settle" that created the necessity of using the fallback provision in this case. It was the KCC's refusal to utilize the evidence before it in the 280 Docket to determine a fair and equitable ROE. CURB's refusal to settle in this case is grounded in the principle that the KCC should wait until the Supreme Court mandate is issued before deciding if it is necessary to utilize the fallback provision in this case. If the KCC had granted CURB's motions to stay these proceedings until the Supreme Court issued its opinion on the KCC's ruling in the 280 Docket, resort to the fallback provision in this docket might not be necessary at all. Whether or not the KCC's ruling in this case complies with the letter of the law—in this case, the GSRS statute's fallback provision—there can be no pretense that it is the result of good ratemaking practices.

23. Changes in the regulatory regime sometimes make it necessary for regulatory commissions to change their traditional practices. Approving a black-box settlement that does not establish the ROE was once a perfectly acceptable practice during the era when utilities recovered all of their revenues through base rates, so long as the total amount collected from customers was within the zone of reasonableness. But now, with utilities collecting revenues through surcharges that are intended to provide more rapid recovery, but not excess recovery, of shareholders' investments, ensuring that the surcharge provides a rate of return that mirrors the return on base rates requires that the Commission reject the historic practice of approving black-box settlements that do not establish

a reasonable ROE for the utility. "We've always done it this way" is insufficient reason to continue doing something that no longer works to ensure reasonable rates. If regulators are to continue carrying out their duties to ensure just and reasonable rates, they must establish new practices that enable them to exercise the same sort of regulatory oversight over surcharges that they exercise over base rates. Regulators cannot ensure that surcharges that provide a return to the utilities are just and reasonable without establishing that the return provided is just and reasonable. That simply can't be done without deciding what level of return is just and reasonable.

24. Unfortunately, the fallback provision at K.S.A. 66-2204(d)(9), which provides that the KCC should use the average of the ROE recommendations of the utility and Staff to determine the return on GSRS revenues, almost ensures that the resulting rates will be unreasonable. The fallback provision encourages utilities to overstate their ROE recommendations, because the fallback provision doesn't require their ROE recommendations to be supported by the evidence. Now, a utility can present a witness who recommends an outlandishly high ROE in its rate application, and even if the witness fails to support his or her recommendation, that recommendation will be averaged with the Staff's recommendation to determine the ROE for calculating the return on the GSRS tariff if the rate case is settled by a black box settlement. Thus, under the fallback provision, *the ROE will be determined without requiring that the recommendations of the utility and Staff are supported by substantial competent evidence!* This may be the result that the legislature intended, but it is a wholly arbitrary method of setting rates that are, by statute, required to be based on substantial and competent evidence that they are just and reasonable. (See K.S.A. 66-101d, -101e, -101f). In other words, it may be presumptively legal to use the fallback provision, but it's not necessarily a good

idea if the Commission wants its order to survive an appellate challenge that it is arbitrary and capricious.[3]

25. Fortunately, the Commission has the authority to ensure that the fallback provision isn't used very often. Furthermore, it should do so, because it's a lousy way to ensure reasonable returns, even if the legislature approves of it, and even if the decision could survive an appeal. The Commission can, and should, ensure that this misguided fallback provision is used only in rare circumstances by declaring that it will be Commission policy to determine a reasonable ROE for each utility in every rate case, whether or not the recommended revenue requirement is established by settlement among the parties. The Commission has wide discretion to revise its policies in response to changes in the regulatory regime, and has the responsibility to revise its practices if they no longer help the Commission meet its obligations and carry out its duties. So long as the practice continues of allowing utilities to recover costs through surcharges with returns, the Commission must adopt regulatory practices that enable it to perform its duty to the ratepayers to ensure that the surcharges and the returns on surcharges are just and reasonable. The Commission must discontinue the historic practice of approving black-box settlements without determining a reasonable ROE for the utility, because this practice is no longer consistent with the Commission's duty to ensure just and reasonable rates. By adopting the policy of setting the ROE in every rate case, regardless of whether the case is settled or litigated, the Commission will ensure that GSRS returns are based on substantial competent evidence, not the inflated and unsupported recommendations that the fallback provision is destined to produce.

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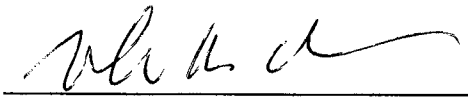
3 CURB is not attempting to preserve this argument for appeal in this case, but raises these concerns as food for thought as the Commission considers whether it should exercise its discretion to avoid the use of the fallback provision now or in the future.

26. It is CURB's position that the Commission has the responsibility to avoid resorting to bad ratemaking practices when it has the discretion to instead adopt better ratemaking practices. By simply waiting until the Supreme Court issues its opinion on the KCC's order in the 280 Docket before making a decision regarding the ROE in this docket, the KCC may be able to avoid the necessity of utilizing the fallback provision in this docket. Even if the KCC believes it has concurrent jurisdiction with the Supreme Court and therefore may issue further orders determining the method for setting Atmos' ROE for purposes of calculating the return on the GSRS tariff, the KCC also has the discretion to decline to do so until the Supreme Court issues its opinion. By declining to do so, the KCC may be able to avoid resort to the fallback provision. It simply makes good sense for the Commission to choose the path that is more likely to lead to rational ratemaking and less likely to lead to reversal.

27. Therefore, CURB respectfully requests reconsideration of the denial of its motion that requested that the "Commission find it has no jurisdiction at this time to determine the return on equity[4] 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 [in Docket No. 08-ATMG-280-RTS].

4 Notwithstanding the legislature's choice of the term "cost of equity," as used in the GSRS statute, CURB believes it is more appropriate to adhere to widespread industry practice by using the term "return on equity", or ROE, which is also consistent with the vast majority of documents that were filed in this docket and in the 280 Docket. A "cost" generally represents a fixed amount of dollars actually expended by the utility; a "return" is expressed as a percentage, and the "return on equity" set in a rate case is an aspirational percentage (what the utility hopes to earn on its investment) rather than historical (what the utility actually earned). Our legislature may prefer calling the return the "cost of equity," but it is singular in its preference—and wrong.

Respectfully submitted,



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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

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

That she is an attorney for the Citizens' Utility Ratepayer Board; 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 28th day of December, 2009.

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 26, 2013

Notary of Public

My Commission expires: 01-26-2013.

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, emailed or hand-delivered this 28th day of December, 2009, to the following:

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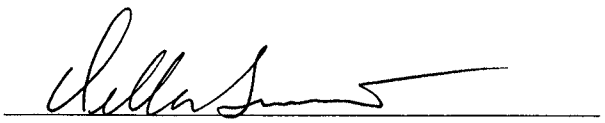

Della Smith