

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

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

OCT 29 2009



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. )

**CURB'S REPLY TO ATMOS**

The Citizens' Utility Ratepayer Board (CURB) replies as follows to the *Response of Atmos Energy to Comments of CURB and Motions of CURB*:

1. Contrary to the various assertions of Atmos that this proceeding is irrelevant to the matters currently pending before the Kansas Supreme Court, the matters currently before the Commission are directly relevant to the matter before the Supreme Court. In its petition for review, CURB specifically challenges the failure of the KCC in the 280 Docket rate case to make the determinations required by K.S.A. 66-2204(d) in approving the settlement agreement between Staff and Atmos that prescribes the method to be used to calculate Atmos' GSRS tariff—when and if Atmos applied for the tariff. Further, as the Court of Appeals noted in its opinion, the Commission in the 280 Docket “specifically ordered that KCC staff and Atmos **remain bound** by the terms of their SSA [the settlement in the 280 Docket]—including ¶10 of the settlement agreement.” (Opin., at 11, *emphasis added*). Paragraph 10 describes the method for calculating Atmos' GSRS tariff when the tariff is implemented. Atmos and Staff thus remain bound by Commission order to the terms of Paragraph 10, until the KCC “unbinds” them by a subsequent order, or the Kansas Supreme Court rules that the KCC has no authority to bind them to the terms of Paragraph 10. This docket is

the proceeding in which the GSRS tariff is to be implemented. The outcome of the Supreme Court's review is thus directly relevant to this docket.

2. Atmos' assertion that the ruling in *Gas Service Co. v. Kansas Corporation Commission*, 6 Kan.App.2d 592, 631 P.2d 263 (1981) supports the proposition that the KCC has jurisdiction to approve Atmos' GSRS tariff under these circumstances is simply wrong. In *Gas Service*, the company appealed the reduction of the rate of return granted by the KCC in what is generally called an "abbreviated rate case" under K.A.R. 82-1-231(b), which was filed three months after the KCC issued a final order in the company's base rate case. The company argued that the evidence presented in the 231(b) proceeding did not support a change in the rate of return that the KCC approved in the base rate case. The KCC argued that the company's appeal was moot because the company had subsequently received approval in a third rate application for an interim rate increase (subject to refund pending final order) that exceeded the amount at issue in the appeal. The KCC lost that argument. The Court found that, so long as the rates granted in company's most recent case were interim rates, and thus there was a chance that the KCC's final order could result in reinstating the rates ordered in the abbreviated rate case, the company's complaint was not moot. The Court of Appeals held that the company's complaint about the reduced rate of return in the abbreviated case had merit, because 231(b) clearly contemplates that the KCC should calculate rates to be awarded in an abbreviated rate case by assuming the rate of return that was established in the previous base rate case, absent compelling evidence to revise it. The KCC was ordered to rehear the abbreviated rate case and set the company's rates under the terms set forth under 231(b), or to hear a new base rate case filed by the company.

3. Thus, *Gas Service* had nothing to do with determining the jurisdiction of the KCC. In fact, the word “jurisdiction” does not appear in the opinion. The only relation that the *Gas Service* case has to this one is the holding that the KCC must adhere to the applicable rules and regulations in setting rates of return, and if it doesn’t, an interim order does not render moot a complaint about the original erroneous order, so long as a possibility exists that the rates determined by the original order that are based on an erroneously-determined rate of return may be reinstated. If anything, *Gas Service* supports the proposition that the KCC’s errors in determining an appropriate rate of return upon which to base rates are not remedied by a subsequent order if it does not provide a permanent remedy for the errors that were made.

4. Admittedly, CURB has had no success in finding appellate opinions that address the specific questions raised by CURB concerning the jurisdiction of the KCC to decide issues on the GSRS while CURB is appealing GSRS issues. However, if *Gas Service* is the only case that Atmos can find to support its proposition that the KCC has jurisdiction to approve its GSRS tariff while CURB’s appeal of GSRS tariff issues are pending before the Supreme Court, then CURB is confident that there is no specific case law that is counter to CURB’s position in this case. This may, indeed, be a matter of first impression for the courts.

5. Atmos notes that “CURB’s position in this matter is perplexing,” because it may result in the KCC approving a higher ROE for Atmos than the settlement called for, if the alternative method of determining the ROE is now used. However, if CURB is correct that the KCC has no jurisdiction in this matter, then Atmos’ assertion that customers will have to pay rates based on a higher ROE is baseless. Furthermore, CURB’s position is not that 10.2% or 10.3% is a “correct” ROE; CURB’s position is that it was the KCC’s obligation, in choosing to make the determination in

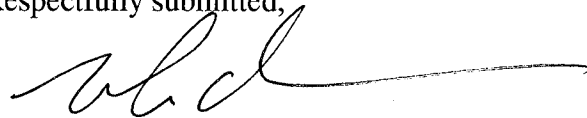
the rate case of how the GSRS was to be calculated in the future, to decide what the evidence indicated that a fair and reasonable ROE for Atmos should be. It did not do so. Avoiding the obligation, which later triggers the necessity to use the less accurate fall-back provisions contained in the statute, just compounds the problem of whether the ROE accurately reflects Atmos' needs and just puts more distance between the evidence and the decision. This is no way to assure customers will pay just and reasonable rates.

6. CURB maintains that the KCC has no jurisdiction to hear this matter until the Kansas Supreme Court returns jurisdiction over the issue of how Atmos' GSRS is to be calculated to the KCC, and that even if the KCC believes it has jurisdiction to continue these proceedings, that it is not in the interest of judicial economy and rate stability to do so until the Kansas Supreme Court issues its opinion in the matters pending before it. The fact that the GSRS can change annually is no reason to accept further instability of rates and to ignore the principle of judicial economy.

7. Lastly, Atmos complains that it is the "only utility without a GSRS surcharge in place" but the reason why is that Atmos voluntarily withdrew its application for a GSRS tariff in the 280 Docket, apparently based on its own (unfounded) hopes that CURB would have no grounds on which to appeal or would not prevail if it did appeal. Its current effort to change the terms of the settlement agreement to prevent another challenge is, in a way, an implicit acknowledgement that CURB may prevail in the end. The notion that staying these proceedings would be "unfair and unlawful" because Atmos is the "only utility without a GSRS surcharge" is absurd. If, rather than withdrawing the tariff and insisting on the KCC's approval of Paragraph 10, Atmos had simply requested the KCC to approve a GSRS tariff in the 280 Docket based on an ROE determined by the Commission on the basis of the evidence presented in the rate case, Atmos would have its tariff and

CURB would have no grounds for appeal. Although an Atmos executive testified that it “wouldn’t hurt” to do it that way, that’s not the way Atmos asked the KCC to do it. The fact that Atmos has no GSRS is a direct result of its own actions, not CURB’s. Awaiting the opinion of the Kansas Supreme Court before proceeding further in this case does not deny Atmos its right to seek a GSRS surcharge, but simply assures that the GSRS tariff to be approved is consistent with Kansas law and approved by a tribunal with the jurisdiction to approve it.

Respectfully submitted,



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VERIFICATION

STATE OF KANSAS )  
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COUNTY OF SHAWNEE )

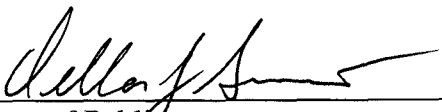
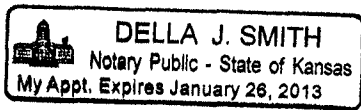
I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is an attorney for the 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 29<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
Notary of Public

My Commission expires: 01-26-2013.

CERTIFICATE OF SERVICE

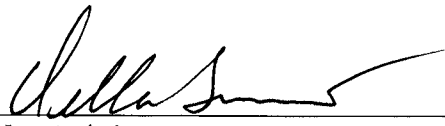
10-ATMG-133-TAR

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, e-mailed or hand-delivered this 29th day of October, 2009, to the following:

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Della Smith