

THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Application of Atmos )  
Energy to Amend Its Purchase Gas Adjustment )  
(PGA) Schedule to Add a Demand Charge ) Docket No. 14-ATMG-230-TAR  
Savings and Pipeline Bypass Savings )  
Component to the PGA. )

**RESPONSE OF THE CITIZENS' UTILITY RATEPAYER BOARD TO ATMOS  
ENERGY'S PETITION FOR RECONSIDERATION AND CLARIFICATION**

The Citizens' Utility Ratepayer Board (CURB) herein files its Response to Atmos Energy's (Atmos or Company) Petition for Reconsideration and Clarification (Petition) in the above captioned matter. The Kansas Corporation Commission (KCC or Commission) must deny Atmos's Petition. In support, CURB submits the following:

**I. BACKGROUND**

1. On November 15, 2013, Atmos filed its original application in this docket. The original application proposed adding a Demand Charge Savings and Pipeline Bypass Savings Component to Atmos' Purchased Gas Adjustment (PGA). In short, Atmos proposed a "shared savings"-type incentive mechanism by which Atmos would charge customers full FERC tariffed prices under its PGA, and if Atmos could purchase upstream pipeline capacity and natural gas at a lower price, Atmos would "share" the "savings" with customers by crediting 50% of the price difference back to customers. Atmos suggested that without the possibility of capture and retention of some of the price difference under its proposed mechanism, Atmos would have no incentive to attempt to lower gas supply costs for its customers. Atmos based the 50% savings

level on a nineteen year-old Commission order that allowed companies to share 50% in capacity release revenues.

2. On February 21, 2014, representatives from Atmos met with the KCC staff. Other intervening parties were not invited to this meeting. At this meeting, an agreement was struck under which Atmos would amend its application. Under the Amended Application, Atmos would construct certain infrastructure projects. Once constructed, Atmos would include the cost of the infrastructure projects in consumer rates for recovery. Atmos would also run a program similar to the shared savings program proposed in the original application—except, under the Amended Application, Atmos would retain 100% of the difference between what it charged customers under the PGA and Atmos's actual cost of upstream pipeline capacity and natural gas supply. Allowing Atmos to keep 100% of this savings pool of money was intended to provide "financing" for the infrastructure projects. But none of this pool of money would be used to offset the actual cost of the infrastructure projects in a way that served to reduce customer rates. Once the infrastructure projects were built and the costs embedded in customer's rates, Atmos would take money out of the savings pool and move it to shareholder accounts.

3. On April 24, 2014, Atmos filed its Amended Application seeking approval for an infrastructure program consistent with the agreement reached at the February 21, 2014, meeting with KCC Staff. To finance the infrastructure program in the Amended Application, Atmos sought the same Demand Charge Savings and Pipeline Bypass Savings Component as proposed in its Original Application, except that Atmos now proposed keeping 100% of any savings generated under the program.

4. On October 14, 2014, after testimony (in which KCC staff and Atmos agreed to change Atmos's proposed 100% savings retention to 75% savings to Atmos and 25% to

customers), an evidentiary hearing and post-hearing briefs, the Commission issued its Order Denying Application.

5. On October 29, 2014, Atmos filed its Petition for Reconsideration and Clarification of the Commission October 14, 2014 Order denying Atmos's Amended Application.

## II. ARGUMENT

### a. Atmos fails to allege or support a finding that the Commission order is unlawful or otherwise invalid.

6. Atmos fails to state a legal basis for invalidating the Commission's Order Denying Application in its Petition for Reconsideration and Clarification. Atmos filed its Petition "pursuant to K.S.A. 66-529 and K.A.R 82-1-235". These are general statutes and regulations providing the authority for, and the necessity of, filing a petition for reconsideration as a prerequisite to appellate review. However, Kansas courts examine the validity of Commission orders pursuant to the Kansas Judicial Review Act (KJRA), K.S.A 77-621 et seq. To be successful on appeal, Atmos bears the burden of proving the Commission's denial of the Amended Application in this case was invalid or illegal. To meet this burden, Atmos must prove the Commission, in reaching its decision and issuing its order, violated one of the eight grounds for appeal under K.S.A. 77-621(c).

7. Nowhere in its Petition does Atmos cite to the KJRA. Nor does Atmos provide any indication which element of K.S.A 77-621(c) Atmos believes the Commission has violated.<sup>1</sup>

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<sup>1</sup> The closest Atmos comes to alleging the Commission's order violates an element of K.S.A. 77-621(c) is at paragraph 11 of Atmos's Petition, where Atmos states "In conclusion, Atmos Energy asks the Commission to reconsider its decision and grant the step-by-step detailed proposal submitted by Atmos Energy and Staff in this case outlined in paragraph 5 of this Petition with specific citations to the record made in this case to what is clearly substantial competitive [sic] evidence". The obvious typographical error aside, even with this language Atmos does not allege the Order itself is invalid or otherwise not supported by substantial competent evidence. Atmos never mentions the legal standard for what is or is not considered substantial competent evidence. With this language, Atmos only asserts that the evidence it prefers the Commission review is substantial competent evidence. The Commission found Atmos's evidence insufficient.

Nor does Atmos at any point in its Petition allege that the Commission's October 29, 2014 Order Denying Application is in any way illegal or improper. In this case, Atmos may desire a different outcome than it received, but Atmos has failed to allege any fact or violation of law that would invalidate the Commission October 29, 2014 Order Denying Application. As such, the Order is legal and proper and the Commission can deny Atmos's Petition for failing to allege or support any claim that would otherwise call into question the validity of the Commission's order.

**b. The Commission has no obligation to issue an advisory opinion.**

8. Having failed to allege or support a legal finding that the Commission's Order Denying Application is otherwise invalid, Atmos's Petition can more accurately be described as a polite request for the Commission to reverse itself in its entirety. Barring a complete reversal by the Commission, Atmos then notes that in its Order, the Commission directed the parties to "engage in dialog to pursue policy options that might incentivize Atmos to capture potential demand charge reductions and pursue capital improvement projects with the resulting savings, and to develop standards for Commission approval of such projects." (Order, Page 4, Paragraph 11). In doing so, Atmos asks the Commission to issue what amounts to an advisory opinion explaining what it liked or disliked about Atmos's proposal. Since the issues in this docket revolve around general policy and the Commission's Order is otherwise legal, the Commission is under no obligation to reverse itself, provide additional explanation or issue an advisory opinion. The Commission may do any of the above, but these options are discretionary in nature.

9. Without rehashing the entire case or restating all the arguments in CURB's testimony and Post-Hearing Briefs, CURB does offer the following comments in response to Atmos's polite request for the Commission to reverse itself.

10. Atmos focuses its attention on the Commission's denial of the Demand Charge Savings and Pipeline Bypass Savings Component portion of the Amended Application. In fact, when read in context, the vast majority of Atmos's Petition is focused on convincing the Commission to approve only this section of the Amended Application. Discussing the fact that the Commission found the infrastructure program premature, given the open general investigation dealing with rural infrastructure development, Atmos complains that the "clear and main focus of its application – and incentive mechanism to reduce demand charges – was unfortunately blurred by the lesser significant portion of its application, which had to do with the utility's commitment to invest an amount equal to its portion of the savings from reducing demand charges."<sup>2</sup> If the Commission does not reverse itself, Atmos asks that in the alternative the Commission "approve Atmos Energy's proposal with the exception of removing that portion of the application having to do with the use of savings for future approved projects and replacing that proposal with a simple 50/50 sharing of savings between the customers and Atmos Energy, similar to what the Commission does with capacity release."<sup>3</sup>

11. This case started as a 50/50 shared savings PGA proposal. Then Atmos amended its application to create an infrastructure development program, using the 100% of the funding from the PGA proposal to fund the infrastructure development. Now that the Commission has denied the infrastructure development program, Atmos claims that the infrastructure development program wasn't the focus of its Amended Application and Atmos suggests that the Commission ignore the Amended Application and approve the 50/50 shared savings proposal Atmos had filed in the original application. Unfortunately for Atmos, the Amended Application and the infrastructure development proposal are the sole questions before the Commission. Since

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<sup>2</sup> Petition at paragraph 4, page 5

<sup>3</sup> Petition at paragraph 11, page 18-19.

the Commission has—at least for the time being—rejected the infrastructure development proposal, there is no need for the Commission to discuss or approve the PGA proposal that is intended to finance the infrastructure development proposal.

12. It would also be highly objectionable and prejudicial for the Commission to summarily abandon the request Atmos makes in its Amended Application and approve what Atmos proposed in its original application. The original application is no longer in effect, having been replaced by the Amended Application, and there is no evidence to support the proposal in the original application. While Atmos bases its 50/50 shared savings proposal in its original application on the Commission's nineteen year-old capacity release order, the parties have not argued and the Commission has not considered the more recent orders requiring Kansas electric utilities to return 100% of off-system electric sales to customers. Since off-system electric sales for electric utilities is functionally analogous to capacity release for natural gas utilities, Atmos cannot claim that a nineteen year-old capacity release order has any precedential value in light of more recent decisions that return such benefits to customers. It is certainly arguable that the more recent electric utilities rulings are more representative of current Commission thinking. Further, KCC Staff would have rejected the 50/50 sharing proposal in Atmos's original application. According to Mr. Haynos, Staff "had meetings internally" and "we were not inclined to agree to the, to this type of approach where 50 percent of the profits were kept by Atmos."<sup>4</sup> A Commission Order at this point in the process approving something akin to Atmos's original proposal would likely run afoul of the KJRA.

13. Rather than speaking to the narrow points framed by Atmos's Amended Application, and recognizing that any Commission ruling in this case, whether advisory or not, will impact the other natural gas utilities (and likely electric utilities) subject to the

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<sup>4</sup> Haynos, Tr. at p. 146.

Commission's jurisdiction, CURB suggests the Commission open a generic investigation. CURB agrees with Atmos that if the Commission wants to pursue an incentive purchase-type mechanism, it might help to have some guidance from the Commission on what is acceptable. But CURB does not agree that the Commission should make such a sweeping ruling based only on what Atmos proposed in this case. The Commission has not heard from other utilities that may be impacted. Nor has the Commission heard from the customers who ultimately pay the bills.

14. Given the above, CURB urges the Commission not to reverse itself and approve any portion of Atmos's Amended Application. CURB also urges the Commission to decline to issue an advisory opinion based only on the facts as presented in the current case.

- c. The Commission must continue to reject the idea that Atmos has no obligation to constantly adjust to changing market conditions and to pursue supply options that will reduce costs to customers.**

15. Atmos continues to frame the PGA proposal as an attempt "to provide an incentive at no additional cost or risk to the customers for Atmos Energy to attempt to reduce demand charges paid to interstate pipelines."<sup>5</sup> Atmos argues that there is "no way customers would be worse off under the program."<sup>6</sup> This can only be true if (1) the Commission accepts the idea that Atmos, in fulfilling its statutory obligation to provide just and reasonable rates, has no obligation to try to reduce customer supply cost or act to do so when opportunities arise, and (2) the Commission accepts the idea that its authority and enforcement capability are insufficient to force Atmos to meet this obligation. If Atmos is meeting its obligation, and the KCC is insuring that it does, then customers get the benefit of lower upstream supply costs through lower PGA rates. If customers have to pay Atmos extra to meet this basic obligation, then there is in

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<sup>5</sup> Petition at paragraph 3, page 3; paragraph 6, page 13.

<sup>6</sup> Petition at paragraph 6, page 13; paragraph 7, page 14-15.

fact a cost to customers, and customers are made worse off by this proposal. Stated another way, if Atmos is working hard to meet its statutory obligations and is looking for and finding new and innovative ways to supply customers and reduce costs, and if the regulatory process has any teeth at all, then under Atmos' proposal, customers would be giving Atmos 75 cents on the dollar for savings that are 100% rightfully theirs. What Atmos euphemistically calls "savings" is in fact a "cost" to customers. And, as was made clear in CURB's testimony and in cross-examination, none of the 75 cents on the dollar Atmos proposes to take from customers will actually be used to pay down (net) the cost of the infrastructure projects. Customer rates will increase to pay for the infrastructure projects and customers will have to forego lower PGA rates that they otherwise would have enjoyed. Couched in terms as a "benefit" to customers, this proposal simply would require customers to surrender money to Atmos for doing something that the company is already obligated to do, and pay the full cost of the projects, as well.

16. CURB does not mean to suggest that regulation is perfect, or that some of the criticisms that form the basis of Atmos's proposal aren't true. However, for purposes of this case, Atmos's claim that it can "save" customers money can only be true if you start from the premise that Atmos has no obligation to adjust to changing market conditions, no obligation to seek out opportunities to lower customer rates and that regulation is an abject failure. The Commission firmly rejected this premise in its order, stating "Atmos has an obligation to provide sufficient and efficient service at just and reasonable rates", and that "this obligation carries with it the requirement to constantly adjust to changing market conditions and to pursue supply options that will reduce costs to customers". More importantly, the Commission made clear that "For this reason, the Commission finds the need for the proposed incentive program is mitigated, and more evidence is necessary to justify its benefits".

17. In this case, there is clear evidence that Atmos has the workforce, expertise and ability to search out new upstream supply options. Atmos testifies that it has done so in other states, and that it has already identified available upstream capacity to serve Kansas customers.<sup>7</sup> The Commission was correct in its order. If Atmos is doing its job, it should be identifying and pursuing opportunities to reduce customers supply costs, and the need for the type of incentive program Atmos is proposing is mitigated. The real problem in this case is that Atmos says that it will not pursue these options.<sup>8</sup> The Commission should consider opening an investigation docket to require Atmos to seek alternative upstream supply opportunities, issue requests for proposals for supply alternatives and otherwise prove to the Commission that Atmos is meeting its obligations as a public utility.

**d. If the Commission reconsiders its Order Denying Application, the Commission must also address the changes and modifications recommended by CURB as set forth in the Testimony Of Stacey Harden and as outlined in CURB's Post-Hearing Brief.**

18. CURB recommended numerous changes to Atmos's proposal in this case. CURB's proposed changes are listed in the testimony of Stacy Harden and are also listed in Section IV of CURB's Post-Hearing Brief. The most important changes proposed by CURB related to the preapproval process for infrastructure projects and the idea that before Atmos takes consumer dollars through the sharing percentage, all possible cost increases necessary to achieve upstream supply savings and any increases in rate to pay for infrastructure projects be netted against any savings. While CURB does not recommend the Commission reconsider any part of its Order in this case, if the Commission does choose to reconsiders its Order and does choose to implement any part of Atmos's proposal, the Commission must also assure CURB and its clients

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<sup>7</sup> Malter, Tr. at p. 109

<sup>8</sup> Malter, Tr. at p. 109

that it will have fair and open access to the preapproval process for projects and that customers will see true net savings from this proposal.

### **III. CONCLUSION**

19. CURB did not attempt to refute every issue raised by Atmos in its Petition. CURB has no interest in rearguing this case. Ultimately, Atmos is just restating the facts it has already presented to the Commission. CURB has provided testimony and a Post-Hearing Brief refuting this evidence. This is a policy docket. To the extent the Commission remains unconvinced the policy and programs proposed by Atmos make sense, and the Commission is unsatisfied with the level and veracity of the evidence before it, the Commission has no obligation to approve the Amended Application. Atmos does not allege the Commission's Order Denying Application is unlawful. Atmos merely seeks a different result or advice for future filings. The Commission is not obligated to provide either. Nor should the Commission issue broad policy pronouncements based on the limited evidence offered in this case. While Atmos continually references the Commission's 1995 Order on Capacity Release, it fails to recognize that before the Commission issued that order in 1995, it spent a full year soliciting comments from all interested parties. And that was for a single revenue line in the existing PGA. Here, Atmos suggests changing the entire PGA process and the rates customers pay to create a savings pool to reward shareholders for building infrastructure that may be unnecessary and that customers will ultimately pay for in rates. These are not insignificant policy questions. The Commission should act only with deliberation and intention. In this instance, the Commission must reject Atmos's Petition.

Respectfully submitted,

*David Springe* (nkc)

David Springe, Consumer Counsel #15619

Niki Christopher #19311

Citizens' Utility Ratepayer Board

1500 SW Arrowhead Road

Topeka, KS 66604

(785) 271-3200

(785) 271-3116 Fax



**CERTIFICATE OF SERVICE**

14-ATMG-230-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 10<sup>th</sup> day of November, 2014, to the following:

MICHAEL NEELEY, LITIGATION COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD RD  
TOPEKA, KS 66604-4027  
[m.neeley@kcc.ks.gov](mailto:m.neeley@kcc.ks.gov)

SAMUEL FEATHER, LITIGATION COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD RD  
TOPEKA, KS 66604-4027  
[s.feather@kcc.ks.gov](mailto:s.feather@kcc.ks.gov)

JAY VAN BLARICUM, ADVISORY COUNSEL  
KANSAS CORPORATION COMMISSION  
1500 SW ARROWHEAD RD  
TOPEKA, KS 66604-4027  
[j.vanblaricum@kcc.ks.gov](mailto:j.vanblaricum@kcc.ks.gov)

JAMES G. FLAHERTY, ATTORNEY  
ANDERSON & BYRD, L.L.P.  
216 S HICKORY  
PO BOX 17  
OTTAWA, KS 66067  
[jflaherty@andersonbyrd.com](mailto:jflaherty@andersonbyrd.com)

MARY TURNER, DIRECTOR, REGULATORY AFFAIR  
KANSAS CITY POWER & LIGHT COMPANY  
ONE KANSAS CITY PL, 1200 MAIN ST (64105)  
PO BOX 418679  
KANSAS CITY, MO 64141-9679  
[mary.turner@kcpl.com](mailto:mary.turner@kcpl.com)

ROB HACK, LEAD REGULATORY COUNSEL  
KANSAS CITY POWER & LIGHT COMPANY  
ONE KANSAS CITY PL, 1200 MAIN ST (64105)  
PO BOX 418679  
KANSAS CITY, MO 64141-9679  
[rob.hack@kcpl.com](mailto:rob.hack@kcpl.com)

GLENDA CAFER, ATTORNEY  
CAFER PEMBERTON LLC  
3321 SW 6TH ST  
TOPEKA, KS 66606  
[glenda@caferlaw.com](mailto:glenda@caferlaw.com)

TERRI PEMBERTON, ATTORNEY  
CAFER PEMBERTON LLC  
3321 SW 6TH ST  
TOPEKA, KS 66606  
[terri@caferlaw.com](mailto:terri@caferlaw.com)

ROGER W. STEINER, CORPORATE COUNSEL  
KANSAS CITY POWER & LIGHT COMPANY  
ONE KANSAS CITY PL, 1200 MAIN ST (64105)  
PO BOX 418679  
KANSAS CITY, MO 64141-9679  
[roger.steiner@kcpl.com](mailto:roger.steiner@kcpl.com)

A handwritten signature in black ink that reads "Shonda Smith". The signature is written in a cursive style with a large, looping initial "S".

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Shonda Smith  
Office Manager