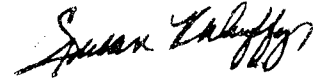


STATE CORPORATION COMMISSION

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

OCT 27 2009



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

**RESPONSE OF ATMOS ENERGY TO
COMMENTS OF CURB AND MOTIONS OF CURB**

COMES NOW, Atmos Energy ("Atmos") and in response to the Comments of CURB and Motions of CURB, states as follows:

1. CURB objects to Staff's recommendation that the Kansas Corporation Commission ("Commission") approve Atmos' application for a Gas Safety and Reliability Surcharge ("GSRS") tariff and approve recovery of \$765,529 annually through its GSRS surcharge, because Atmos' application is "not properly before the Commission at this time." Specifically, CURB argues since CURB's appeal relating to Atmos' 2008 rate case (Docket No. 08-ATMG-280-RTS ("280 Docket")) is still on appeal with the Kansas Supreme Court, the Commission has no jurisdiction to consider Atmos' application for a GSRS tariff in this pending docket. CURB's objection should be rejected for several reasons.

2. The first reason CURB's objection should be rejected is because the pending appeal referred to by CURB relates to Atmos' 2008 rate case filing and does not relate to the pending matter before the Commission. Atmos' 2008 rate case filing and its 2009 application for the implementation of a GSRS tariff are separate matters and the Commission simply does not lose jurisdiction to consider Atmos' GSRS tariff application as a result of the appeal relating to the 2008 rate case.

3. The second reason CURB's objection should be rejected is because Atmos' request to

adopt a GSRS tariff in its 2008 rate case filing was withdrawn from that rate case. The Commission specifically found in its Order on Limited Reconsideration issued on October 22, 2008, in the 280 Docket that "procedurally, the Commission considers the GSRS tariff submitted by Atmos effectively withdrawn." **Order on Limited Reconsideration, page 11, paragraph 20.** The Commission's Order on Limited Reconsideration went on to specifically find that CURB had no objection to the withdrawal of the GSRS tariff from Atmos' rate case filing in the 280 Docket. **Order on Limited Reconsideration, page 11, paragraph 19.** Even if CURB could show some relationship to Atmos' current GSRS application and the proposed GSRS tariff filed in the 2008 rate case, it is clear from the Commission's Order on Limited Reconsideration said tariff was withdrawn from the rate case, with the approval of the Commission, and without objection by CURB. Therefore, whatever issues currently on appeal relating to Atmos' 2008 rate case filing are not related to Atmos' current GSRS application. Moreover, the Commission commented in its Order on Limited Reconsideration that CURB stated it was willing to defer the GSRS issue for "another day," meaning when Atmos filed its application for approval of its first GSRS tariff (which is this pending case). That day is now, and if CURB has any objection to Atmos' current application for a GSRS tariff, it has the right and ability to raise those objections in this case. In fact, CURB has filed its comments with respect to Atmos' GSRS tariff and is getting its day before the Commission to raise any issues it has regarding the pending GSRS tariff application.

4. The third reason CURB's objection should be rejected is because CURB never requested a stay of the Commission's orders in the 280 Docket or put up the required bond and therefore, those orders remain in full force and effect pursuant to K.S.A. 66-118g and K.S.A. 66-118h. Even though as indicated above, the Commission's orders relating to Atmos' 2008 rate case filing do not relate to the pending docket with respect to Atmos' application for a GSRS tariff, and the

Commission's orders specifically approved the withdrawal of Atmos' GSRS tariff from the 2008 rate case filing, the fact CURB did not request a stay of the Commission's orders in the 280 Docket and did not put up a bond as required by statute, means that under K.S.A. 66-118g, the appeal of those Commission orders did not stay or suspend the operation of those orders or decision of the orders in the case. Those orders remain in full force and effect.

5. The fourth reason CURB's objection should be rejected is because CURB provides no case law or statutes to support its position and therefore, provides no legal basis to support its motion in this case. The Commission, in fact, does not lose jurisdiction in setting rates and approving tariffs for a utility, simply on the grounds there is an appeal of that utility's previous rate case filing. See *Gas Service Co. v. Kansas Corporation Commission*, 6 Kan. App. 2d 592, 631 P.2d 263, (1981) (utility filed for new rate increase with Commission while previous rate case order was still on appeal).

6. The fifth reason CURB's objection should be rejected is because Atmos and Staff have agreed in this docket not to rely upon or use the provision in the Settlement Agreement in the 280 Docket relating to Atmos' future GSRS applications and therefore, CURB's objection that said provision was unlawful and should not be adopted by the Commission, is addressed by it not being used by Staff and Atmos in this case. As the Commission will recall, and as the Commission pointed out in its orders in the 280 Docket, CURB did not raise any objection to the provision in the Settlement Agreement in the 280 Docket relating to approval of Atmos' GSRS tariff at the hearing, nor in its pre-filed testimony, nor in its closing argument, nor in its post-hearing brief. In fact, the first time CURB raised its objection to the provision in the Settlement Agreement in the 280 Docket was in its Petition for Reconsideration. In that Petition for Reconsideration, CURB argued that Atmos GSRS tariff was unlawful and the method to determine the return on equity included in the settlement provision did not comply with the GSRS statutes. In order to address CURB's concern, and because

the GSRS tariff filed in the rate case was more of a placeholder for when Atmos filed its first GSRS application, Atmos agreed to withdraw the GSRS tariff, the Commission approved said withdrawal, and CURB stated it had no objection to said withdrawal of the tariff from the rate case. CURB then filed an appeal to the Court of Appeals challenging the lawfulness of the method to determine the return on equity included in the settlement provision between Staff and Atmos, arguing that Staff and Atmos could not agree to use the average return on equity of the other gas utilities in the state to set the return on equity in Atmos' future GSRS filings. Staff and Atmos have agreed not to use that provision of the Settlement Agreement in the 280 Docket that CURB says is unlawful to set the return on equity in the pending docket. Instead, Staff and Atmos have agreed to set the return on equity in the pending docket for Atmos' GSRS tariff based upon the provisions of the GSRS statute. Once again, in order to satisfy the concerns raised by CURB, Atmos and Staff have taken steps to address those concerns – in the rate case, by seeking Commission withdrawal of the GSRS tariff – and in this case, by agreeing not to rely upon or use the provision in the rate case settlement, but to rely solely upon the specific provisions of the statute.

7. CURB also argues the evidence from the 280 Docket relating to capital structure, return on debt and return on equity is "currently unavailable" because the "official record" is currently in the possession of the Kansas Supreme Court and not the Commission. Atmos is not sure what CURB means by this statement. The Kansas Supreme Court has a copy of the rate case record and the Commission maintains the original record. Atmos is not sure what CURB means when it refers to the "official record," but clearly the Commission, and the public for that matter, have access to the public record located on the Commission's web site, which includes all of the information and testimony necessary to comply with the provisions of the GSRS statute.

8. CURB's position in this matter is perplexing. The fact of the matter is Atmos agreed

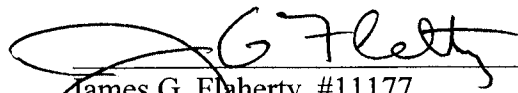
with Staff to the provision in the 280 Docket relating to the return on equity relating to setting future GSRS rates because such provided at the time a lower return on equity to Atmos than what would have been calculated using the terms of the GSRS statute where as in this case, the return on equity was unavailable due to the Commission's approval of a black-box settlement (10.2% vs. 10.3%). If CURB wants to argue that the settlement provision is unlawful, and as a result, require Staff and Atmos and the Commission to simply rely upon the provisions of the GSRS statute, and as a further result, have the return on equity set at 10.3% instead of 10.2% based upon the average of the return on equity recommendations made by the witnesses for Staff and Atmos, in order to prove its point, then Atmos and Staff have agreed not to stand in CURB's way no matter how perplexing its position.

9. Finally, CURB argues the Commission should stay Atmos' pending GSRS application until the Kansas Supreme Court has issued a decision regarding Atmos' 2008 rate case appeal on the grounds that said opinion might impact the pending case. Atmos' disagrees with CURB's argument for all of the reasons previously stated. If the Commission approves the settlement agreement between Staff and Atmos in this pending case, which specifically provides that Staff and Atmos are not using the provision in the Settlement Agreement in the 280 Docket to establish Atmos' GSRS rate in this case, but instead are simply relying upon the GSRS statute to set said rates, then even if the Kansas Supreme Court would agree with CURB that said provision in the Settlement Agreement between Staff and Atmos in the 280 Docket was unlawful, said decision would not have any impact on the pending filing, because Staff and Atmos, (and the Commission if it approves the settlement in this docket) will not have used or relied upon that settlement provision in the pending docket to set Atmos' GSRS rates. Furthermore, the GSRS rates, by their statutory nature, are subject to adjustment and true up each year so in the unlikely event the Kansas Supreme Court would issue a decision that might impact the Commission's approval of Atmos' GSRS rates in the pending case, the rates could be

adjusted to account for any such decision.

10. Atmos is currently the only utility without a GSRS surcharge in place and it would be unfair and unlawful for the Commission to stay the pending matter based upon CURB's unsupported position in this case.

WHEREFORE, for the reasons set forth herein, Atmos requests that CURB's Motion be denied and that the Commission approve the Settlement Agreement between Staff and Atmos in this matter.



James G. Flaherty, #11177

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VERIFICATION

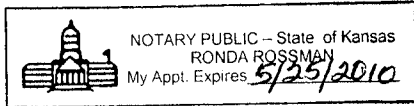
STATE OF KANSAS, FRANKLIN COUNTY, ss:

James G. Flaherty, of lawful age, being first duly sworn on oath, states: That he is an attorney for Atmos Energy; that he has read the above and foregoing Response of Atmos Energy to Comments of CURB and Motions of CURB, knows the contents thereof; and that the statements contained therein are true.



James G. Flaherty

SUBSCRIBED AND SWORN to before me this 27th day of October, 2009.





Notary Public

Appointment/Commission Expires:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 27th day of October, 2009, addressed to:

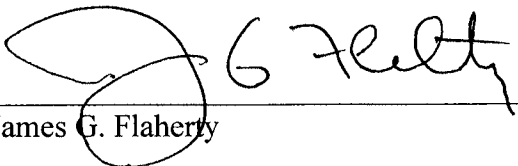
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