

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of a General Investigation            )  
Regarding the Acceleration of Replacement of    )  
Natural Gas Pipelines Constructed of Obsolete     )  
Materials Considered to be a Safety Risk.         )                   Docket No. 15-GIMG-343-GIG

**BRIEF ON JURISDICTIONAL QUESTION**

Pursuant to the Kansas Corporation Commission's ("Commission") Order Setting Procedural Schedule issued March 19, 2015, Atmos Energy submits the following brief on the question of whether the Commission has jurisdiction and authority to establish alternative ratemaking methodologies for pipe replacement that go beyond the parameters established under the Gas Safety Reliability Policy Act ("GSRS Act").<sup>1</sup> Atmos Energy submits that the Commission has such authority for the reasons set forth in this brief.

I. **THE COMMISSION HAS LEGAL AUTHORITY TO CONSIDER AND APPROVE ALTERNATIVE RATEMAKING METHODOLOGIES FOR PIPE REPLACEMENT THAT GO BEYOND THE GSRS ACT**

1. The answer to whether the Commission has authority to approve alternative ratemaking methodologies for pipe replacement that go beyond the GSRS Act is found in the 2006 Kansas Court of Appeals case *Kansas Industrial Consumers Group, Inc. v. The State Corporation Commission of the State of Kansas*, 36 Kan.App.2d 83, 138 P.3d 338 (2006), review denied November 8, 2006 ("*KIC case*").

2. In the *KIC* case, a group of industrial customers challenged the Commission's authority to approve two alternative rate-recovery mechanisms for Westar Energy, an energy cost adjustment ("ECA") and an environmental cost recovery rider ("ECRR").<sup>2</sup> Both surcharges are similar in nature

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<sup>1</sup>K.S.A. 66-2201, *et seq.*

<sup>2</sup>*Kansas Industrial Consumers Group, Inc. v. The State Corporation Commission of the State of Kansas*, 36 Kan. App. 2d 83, 87, 94-95, 138 P.3d 338 (2006), review denied November 8, 2006.

to the alternative ratemaking methodologies for pipe replacement that are proposed by the Commission Staff and the gas utilities in that they will allow the utility to recover its actual cost outside the context of a rate case in order to address the regulatory lag built into the traditional ratemaking process involving litigated rate cases.<sup>3</sup> The industrial customers argued (1) changes in rates were required by law to be done in a full blown rate case and not through alternative rate mechanisms,<sup>4</sup> or in other words, the Commission had no authority to approve alternative rate mechanisms; and (2) since the Legislature had allowed for certain surcharges through legislation, but had not included an ECA or ECRR surcharge in those allowed surcharges, the Commission lacked authority to approve an ECA or ECRR.<sup>5</sup> The Court rejected both arguments.<sup>6</sup>

3. In finding the Commission had authority to approve alternative rate-recovery mechanisms and was not limited to making all rate changes in the context of a rate hearing, the Court focused its attention on the language contained in K.S.A. 66-117, which sets forth the procedures to implement a public utility rate change.<sup>7</sup> The Court stated that "K.S.A. 66-117, does not require on its face, every change in rates to be approved in a full-blown rate hearing."<sup>8</sup> The Court found that because the statute begins with the language "Unless the state corporation commission otherwise orders..." the Legislature had provided the Commission the authority to approve alternative rate-recovery mechanisms outside the traditional ratemaking process.<sup>9</sup> The Court also indicated the

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<sup>3</sup>*Id.*

<sup>4</sup>*Id.* 36 Kan. App. 2d at 91.

<sup>5</sup>*Id.* 36 Kan. App. 2d at 94-95.

<sup>6</sup>*Id.* at 36 Kan. App. 2d at Syl. 2.

<sup>7</sup>*Id.* at 36 Kan. App. 2d at 92.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* at 36 Kan. App. 2d at 93.

Commission's interpretation that it was granted full power and authority to supervise and control utilities and that those powers were to be liberally construed and the Commission was given all incidental powers necessary to carry into effect the provisions of the public utility act, as expressly granted by the Legislature under the public utility act, was correct.<sup>10</sup>

4. With respect to the industrial customers' argument that under the doctrine of *expressio unius est exclusio alterius*, i.e., the inclusion of one thing implies the exclusion of another, the Legislature's actions in permitting surcharges for specific types of expenses infers an intent not to permit surcharges for expenses not specifically authorized by statute, which is parallel to the argument that the GSRS Act excludes all other alternative rate recovery mechanisms relating to pipe replacement, the Court in rejecting that argument found that courts are especially reluctant to apply the doctrine when defining the authority of a regulatory agency.<sup>11</sup> The Court concluded as long as the Commission is acting under its broad powers and does so in a reasonable and lawful manner, it has the statutory authority to approve alternative rate mechanisms and surcharges even if such are not included in the list of surcharges that have been approved by the Legislature.<sup>12</sup>

5. A close look at the GSRS Act shows that it was adopted by the Legislature to require the Commission to allow natural gas utilities to recover costs relating to two specific items: (1) costs incurred by the utility to comply with pipeline safety requirements (as costs related to fixing leaking pipes, cathodic protection, and other items specifically mentioned in the pipeline safety act and not those projects relating to the acceleration of replacement of obsolete piping); and (2) costs incurred by the utility when it is requested by government entities to relocate its pipeline. (K.S.A. 66-2202(f))

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<sup>10</sup>*Id.* at 36 Kan. App. 2d at 94.

<sup>11</sup>*Id.* at 36 Kan. App. 2d at 96.

<sup>12</sup>*Id.* at 36 Kan. App. 2d at 97.

(definition of projects covered by GSRS)).<sup>13</sup> The Legislature under the GSRS Act stated that the Commission shall allow recovery of these two types of cost under the GSRS surcharge when requested by the gas utility. There is no language contained in the GSRS Act that suggested the Legislature intended for the Commission to be precluded from looking at other alternative rate mechanisms to cover cost recovery for pipeline projects. Nor is there any language suggesting that natural gas utilities are precluded from requesting some other type of recovery mechanism, or that the GSRS surcharge was the only mechanism that could be approved by the Commission with respect to pipeline replacement. Instead, the GSRS Act simply required the Commission to allow a utility to implement a GSRS surcharge when requested by the utility. As in the *KIC* case, it is fair to assume the intent to permit the GSRS surcharge by the Legislature did not preclude natural gas utilities from asking for other types of mechanisms, or the Commission from approving other alternative rate mechanisms dealing with cost recovery of pipeline projects, and according to the Court, as long as the Commission's decision to implement other mechanisms is reasonable and lawful, such will be upheld as being within their powers to do so. Accordingly, the Commission has the legal authority under its broad incidental powers to approve alternative ratemaking methodologies for pipe replacement that go beyond the GSRS Act.

II. FROM A POLICY STANDPOINT THE COMMISSION SHOULD NOT SIMPLY REJECT THE ALTERNATIVE RATEMAKING METHODOLOGIES FOR PIPE REPLACEMENT BECAUSE THE LEGISLATURE ADOPTED THE GSRS ACT

6. In the recent Atmos Energy rate case, CURB took the position that the Commission should reject the alternative ratemaking proposal submitted by Atmos Energy to replace obsolete pipe outright because the Legislature had adopted the GSRS Act, and the Commission should not even

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<sup>13</sup>K.S.A. 66-2202(f).

consider the merits of the mechanism for that reason.<sup>14</sup> The CURB attorney was not bashful about and played up the fact that two of the commissioners were involved in passing the GSRS Act and they owed it to their former colleagues in the Legislature to stand up for the Legislative act and stomp down any inappropriate intrusion by this Commission on the rights of the Legislature.<sup>15</sup> That argument not only missed the point of the GSRS Act, but totally usurps the authority this Commission has been given by that very Legislature.

There is a reason why the Legislature provided the Commission with broad authority and specifically indicated in the statutes establishing the Commission's authority that the Commission's powers shall be liberally construed and the Commission shall be conferred all incidental powers necessary to carry out the provisions of the Public Utility Act.<sup>16</sup> The Legislature has entrusted the Commission, with its Staff of experts, to supervise and control the utilities that operate in Kansas. Absent the rhetoric provided by CURB in Atmos Energy's recent rate case, a review of the actual authority the Legislature has conferred upon the Commission, clearly demonstrated why from a policy standpoint the Commission should not simply reject the alternative ratemaking proposals because the Legislature has adopted the GSRS Act. Instead, the Commission should use the powers that were conferred upon it by the Legislature, take advantage of the experts that it has working for it, as well as the expertise of the utility, and make its decision on whether to approve the alternative ratemaking proposals to replace obsolete pipe, based upon the merits of such proposals.<sup>17</sup>

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<sup>14</sup>Docket No. 14-ATMG-320-RTS (2014) ("320 Docket"); Crane Direct Testimony, page 51, lines 11-12.

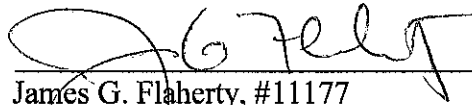
<sup>15</sup>*Id.*, Springe, Vol. I, Tr. 33, line 12 through Tr. 34, line 21; Tr. 35, lines 16-19.

<sup>16</sup>K.S.A. 66-1,201. "The Commission is given full power, authority and jurisdiction to supervise and control the natural gas public utilities... doing business in Kansas and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."

<sup>17</sup>See testimony provided by Staff Witness Haynos in the 320 Docket.

III. CONCLUSION

7. The Commission has the authority to consider and approve alternative ratemaking proposals for pipe replacement that go beyond the parameters established under the GSRS Act for the reasons set forth herein.

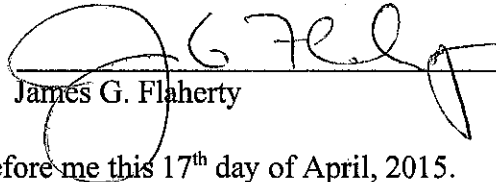


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VERIFICATION

STATE OF KANSAS, COUNTY OF FRANKLIN, 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 Brief on Jurisdictional Question, knows the contents thereof; and that the statements contained therein are true.

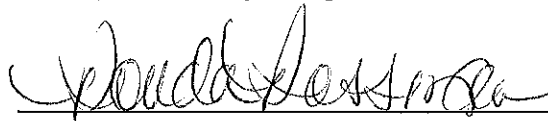


James G. Flaherty

SUBSCRIBED AND SWORN to before me this 17<sup>th</sup> day of April, 2015.



Appointment/Commission Expires:



Notary Public

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was sent by electronic mail this 17<sup>th</sup> day of April, 2015, addressed to:

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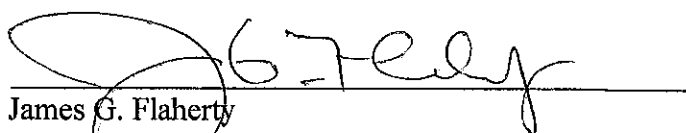
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