

Summary of SC92964, *State ex rel. Office of the Public Counsel v. Missouri Public Service Commission*

Appeal from the Missouri Public Service Commission

Argued and submitted May 22, 2013; opinion issued July 30, 2013, and modified on the Court's own motion Sept. 10, 2013

Attorneys: The office of public counsel was represented by its deputy counsel, Marc Poston, of Jefferson City, (573) 751-5558. The public service commission was represented by Jennifer Leigh Heintz of the commission in Jefferson City, (573) 751-8701. Atmos Energy Corporation was represented by James M. Fischer and Larry W. Dority of Fischer & Dority PC in Jefferson City, (573) 636-6758, and Douglas C. Walther, deputy general counsel of Atmos Energy Corporation in Dallas, (972) 855-3102.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The office of public counsel appeals from an order entered by the public service commission rejecting the commission staff's proposed disallowance of the actual cost adjustment requested by a utility concerning its purchase of natural gas from its affiliate. In a unanimous decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri reverses the order and remands (sends back) the case. The commission's application of a presumption of prudence in rejecting the staff's proposed disallowance resulted in an order that is unlawful and unreasonable.

Facts: The commission has jurisdiction over the rates and charges that Atmos Energy – as a regulated gas utility – imposes on its Missouri customers. When purchasing natural gas from an affiliate and later recovering that cost from its ratepayers, a regulated utility can compensate its affiliate only at the lesser of the fair market price of the gas or the fully distributed cost to the regulated gas company were the utility to acquire the gas for itself. In reviewing certain Atmos gas purchases, commission staff indicated that Atmos failed to comply with rules applicable to transactions with affiliates because Atmos failed to document properly the fair market value and fully distributed cost of its transactions with its affiliate. Staff recommended that the commission disallow the amount of profit the affiliate earned from the transaction. In considering whether Atmos complied with the affiliate transaction rules, the commission applied a presumption that Atmos' gas purchases were prudent and put the burden on commission staff to prove that Atmos' purchases from its affiliate were not prudent. The commission determined that staff had failed to rebut this presumption in finding compliance with the affiliate transaction rules and in rejecting staff's proposed disallowances regarding Atmos' transactions with its affiliate. The office of public counsel appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The commission's application of the presumption of prudence in rejecting staff's proposed disallowance resulted in an order that is unlawful and unreasonable. The commission adopted rules pertaining to affiliate transactions in response to the concern that

regulated utilities would abandon their traditional monopoly structure and shift their non-regulated costs to their regulated operations with the effect of increasing the rates charged to the utilities' customers. While this Court does not suggest that there was such conduct between Atmos and its affiliate, the risk of this conduct and the incentive to undertake it inherently exists in affiliate transactions. A presumption that the costs of transactions between affiliates were incurred prudently is inconsistent with the affiliate transaction rules and had the effect of shifting the burden to staff to show Atmos did not comply with the rules.

(2) Due to its application of the presumption of prudence, the commission did not consider particular matters mandated by the affiliate transaction rules. Accordingly, on remand, Atmos must provide sufficient pricing documentation and the commission must consider whether Atmos compensated its affiliate above the lesser of the fair market price or the fully distributed cost to Atmos to provide the gas for itself.