(Decision No. C93-1608)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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IN THE MATTER OF THE JOINT APPLICATION OF ATMOS ENERGY CORPORATION AND GREELEY GAS COMPANY AND GREELEY GAS ACQUISITION CORPORATION FOR APPROVAL OF THE MERGER OF UTILITY ASSETS AND OPERATIONS.	)	DOCKET NO. 93A-352G COMMISSION DECISION GRANTING RECONSIDERATION, REARGUMENT, AND REHEARING OF DECISION NO. R93-1497 AND APPROVING THE MERGER WITH CERTAIN TERMS AND CONDITIONS

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Mailed Date: December 27, 1993
Adopted Date: December 22, 1993

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Appearances: Steven H. Denman, Esq., Denver, Colorado, on behalf of Greeley Gas Company;

Thomas F. Dixon, Esq., Denver, Colorado, and Lee A. Everett, Dallas, Texas, on behalf of Atmos Energy Corporation and Greeley Gas Acquisition Corporation;

Jeffery A. Froeschle, Assistant Attorney General on behalf of the Staff of the Commission;

Lawrence P. Terrell, Esq., Denver, Colorado, on behalf of the City of Lamar and the Lamar Utilities Board; and

James R. Lewis, Assistant Attorney General, on behalf of the Office of Consumer Counsel.

STATEMENT OF THE CASE

BY THE COMMISSION:

By application filed July 9, 1993, Greeley Gas Company ("Greeley Gas" or "Company"), Greeley Gas Acquisition Corporation, and Atmos Energy Corporation (collectively "Atmos") jointly applied to this Commission for authority to merge the assets and utility operations of Greeley Gas into the acquisition corporation, and then merge the acquisition corporation with Atmos. On July 16, 1993, the Commission sent notice to all who might desire to protest, object, or intervene.

On August 4, 1993, Public Service Company of Colorado ("PSCo") moved to intervene, as did K N Energy, Inc., ("K N"). On August 13, 1993, the City of Lamar, Colorado, and the separate City of Lamar Utilities Board intervened (collectively "Lamar"). On August 16, 1993, the Trial Staff of the Commission ("Staff") intervened.

By Decision No. C93-1121, September 9, 1993, the Commission ordered that the matter be heard on November 4, 1993. Subsequent to the order setting the matter for hearing, the Office of Consumer Counsel ("OCC") untimely petitioned to intervene on September 17, 1993, which intervention was granted by an interim order dated October 5, 1993.

On November 4, 1993, the matter came on for hearing before Administrative Law Judge Arthur G. Staliwe. At the conclusion of the hearing, final briefs were authorized, which briefs were filed on November 15, 1993. Pursuant to the provisions of § 40-6-109, C.R.S., Administrative Law Judge Staliwe issued Recommended Decision No. R93-1497. That decision became effective by operation of law. However, on December 21, 1993, Greeley Gas, Atmos, and Staff filed a Stipulation Requesting Reconsideration, Reargument, and Rehearing of Decision No. R93-1497 and Waiving Response Time. This matter comes before the Commission pursuant to that stipulation.

FINDINGS OF FACT

Based upon all the evidence of record, the following is found as fact:

1. Greeley Gas Company is a Delaware corporation (*See* Exhibit No. 3) authorized to do business in the State of Colorado (*See* Exhibit No. 4), engaged in the business of distributing natural gas at retail to both residential and commercial customers in various locations throughout the State of Colorado (*See* Exhibit No. 7). As of the end of March 1993, Greeley Gas served 69,634 customers in the 60 communities located in 16 counties in its various service territories in

Colorado. Additionally, Greeley Gas also provides the retail sale of natural gas in portions of Kansas and Missouri. (*See* Exhibit No. 1).

2. The stock of Greeley Gas is not publicly traded; the company is a closely held corporation with all stock issued to, and owned by, members of the Schlessman family and related trusts created for minor children. As pertinent here, this Commission is being asked to approve the stock swap by the members of the Schlessman family and related trusts between themselves as private individuals and Atmos Energy Corporation, Dallas, Texas. There is no sale of utility property itself. Rather, by acquiring all of the stock of Greeley Gas from the private shareholders, Atmos will become the sole stockholder, and merge the company whose stock it has acquired into its existing corporate structure as a division, rather than operating Greeley Gas as a wholly-owned subsidiary.

3. As a result of both age and health concerns, three of the top four executives in Greeley Gas have plans to retire by the end of 1993, or some time in 1994. Further, recent enactments at the federal level such as the Americans With Disabilities Act and the Energy Policy Act of 1992, have increased the cost of doing business for Greeley Gas, with consequent need to increase the Company's capital. However, given the closely held nature of the corporation, it found itself at a disadvantage in accessing capital markets as compared to larger, publicly traded corporations such as Atmos. Accordingly, in early 1993 the board of directors of Greeley Gas solicited bids from various companies they determined might be interested in the acquisition of Greeley Gas; 11 responses were received by March 15, 1993. On March 22, 1993, Greeley Gas notified Atmos that it had been selected as the potential merger party. (*See* Exhibit No. 1).

Under the agreement and plan of reorganization (Exhibit No. 2), the stockholders of Greeley Gas will receive common shares of stock of Atmos, with all of the assets, properties, as well as the obligations and liabilities, becoming the obligation of Atmos. In practice this will be a two-step procedure with all of the shares of Greeley Gas being first acquired by a shell acquisition corporation, with the acquisition corporation then immediately merging all of its assets, property, and business with Atmos. Under this proposal, the existing rates and charges of Greeley Gas will carry forward and become the rates and charges for Atmos. There is no automatic rate increase as a result of this merger.

4. Atmos is a gas distribution company serving customers in Texas, Louisiana, and Kentucky. Currently, the various combined operations of Atmos provides natural gas service to over 500,000 customers. Because of its size and publicly

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traded nature, Atmos enjoys short-term borrowing interest rates between 2 and 2 1/2 percent less than those charged to Greeley Gas, and has in place experienced employees in the natural gas distribution business capable of replacing the Greeley Gas executives desiring to retire in 1993 and 1994.

As an aside, as a result of the merger between Atmos and Trans Louisiana Gas, Atmos inherited an anti-trust suit arising from activity which took place before the merger, which activity certain parties in this proceeding now seek to lay at the feet of Atmos. The litigation is ongoing, and no final judgment has been rendered yet.

5. The competent evidence of record in this matter, especially the testimony and exhibits of Tim Griffy, partner, Ernst & Young (Dallas office), establishes that in the opinion of his accounting firm the merger in this matter warrants accounting treatment as a pooling of interests, and the management of both Greeley Gas and Atmos are proceeding on that basis. (*See* Exhibit Nos. 49 and 50).

6. The competent evidence in this matter, to the extent that it can be used since it expresses future intentions, establishes that Atmos intends to follow NARUC guidelines for the accounting of expenses, income, etc., to avoid cross-subsidization between its various operating divisions in other states. Further, Atmos intends to honor all franchises, agreements, and other obligations currently held by Greeley Gas in Colorado, as Atmos understands them. It should be noted that this item is in contention between the City of Lamar and Atmos as relates to the Lamar franchise rather than leave the old one in place for its duration.

The Stipulation

7. In the Stipulation Requesting Reconsideration, Reargument, and Rehearing of Decision No. R93-1497 and Waiving Response Time (the "Stipulation"), Greeley Gas, Atmos, the OCC and Staff agreed that no party in this proceeding challenged the Commission's jurisdiction to approve the exchange of stock which is contemplated under this merger transaction in the joint application. Greeley Gas and Atmos only sought approval of the merger by the Commission as required by Rule 55. Atmos submitted itself to the jurisdiction of the Commission for this purpose.

8. The parties to the Stipulation further agreed that no party in this proceeding desires to litigate the jurisdictional issue raised by Administrative Law Judge Staliwe concerning the Commission's jurisdiction over the exchange of Greeley Gas' stock for Atmos' stock. However, the Stipulation places no limitations upon the parties in future proceedings to assert whatever position they believe is appropriate with respect to the jurisdiction of the Commission in those proceedings.

9. Under these circumstances, the parties to the Stipulation believe that the Commission need not rule upon its jurisdiction over the exchange of stock in determining whether the merger should be approved. We agree.

10. Accordingly, the parties to the Stipulation request the Commission enter its own decision addressing the approval of the merger transaction only.

11. Greeley Gas and Atmos have further agreed that neither will seek an acquisition adjustment for the merger in the future under any circumstances. Greeley Gas and Atmos agree that this may be made a condition of any approval of the merger. If this condition is made a part of the Commission's decision, Staff will withdraw its objection to the Commission approving the merger of Greeley Gas into Atmos as requested in the Joint Application.

12. If the Stipulation is approved and if the Commission imposes the condition discussed in Paragraph 11 above and enters a decision which is materially similar to that attached as Appendix A to the Stipulation, then Greeley Gas, Atmos, OCC, and Staff agree they will not further appeal, either Decision No. R93-1497 or a decision entered by the Commission materially similar to that attached as Appendix A to the Stipulation, including but not limited to seeking reconsideration, reargument, or rehearing of the Commission decision or by seeking judicial review of the Commission decision.

13. The parties to the Stipulation state that intervenors PSCo, K N, and Lamar have no objection to the approval of the Stipulation by the Commission and, entry of the proposed Commission decision attached as Appendix A to the Stipulation. The parties to the Stipulation are also authorized to state that the OCC will take no position with respect to the Stipulation and will not file a response to the Stipulation. The parties to the Stipulation are further authorized to state that if the Stipulation is approved and a decision is issued by the Commission which is materially similar to that attached as Appendix A to the Stipulation, that K N and Lamar will not appeal such a decision, including but not limited to seeking reconsideration, reargument, or rehearing of the Commission decision or by seeking judicial review of the Commission decision. PSCo has not

actively participated in this proceeding and advises it is unlikely it would appeal a decision materially similar to that attached as Appendix A to the Stipulation. Finally, the parties request the Commission waive response time asserting no party will file response to the Stipulation.

14. Under the terms and conditions established in the Stipulation, approval of the joint application is in the public interest. Since no party will file a response to the Stipulation, response time to the Stipulation will be waived.

15. The joint application should be approved as modified by the Stipulation. Moreover, as requested in the Stipulation, the Commission should enter its own decision granting reconsideration, reargument, and rehearing of Decision No. R93-1497 so that Decision No. R93-1497 shall not become a decision of the Commission. The Commission's decision shall impose certain terms and conditions as authorized by § 40-5-105, C.R.S., which were not imposed in Decision No. R93-1497.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the following conclusions of law are drawn:

1. At the outset of the hearing, Administrative Law Judge Staliwe ruled that the City of Lamar's request to condition any grant upon Atmos' negotiating a new franchise agreement to be outside this agency's jurisdiction. Specifically, Lamar requests that this agency read and interpret the existing franchise agreement (a contract), old and new Lamar municipal ordinances, provisions of the Colorado corporation code, and pertinent provisions of the Colorado constitution relating to home rule cities, in order to arrive at Lamar's desired result.

2. Pursuant to § 13-15-101, C.R.S. *et seq.*, any person (including municipalities) interested under a contract, municipal ordinance, franchise, and statute can obtain a declaration of their rights under the above in the proper court of record. *See* §§ 13-51-103, 105, and 106, C.R.S. Pursuant to Rule 57, C.R.C.P., the proper court is the District Court.

3. The fact that the Legislature has expressly empowered the courts to adjudicate rights under contracts, ordinances, franchises, etc., clearly indicates there was no intent to grant such authority to this agency, even if one of the parties is a public utility. Haney v. PUC, 194 Colo. 481, 574 P.2d 863 (1973). Accordingly, Lamar may take their concerns in this regard to the district court for Prowers County, and seek redress in a forum authorized to grant the relief sought.

4. The condition which the parties to the Stipulation requested the Commission impose upon Atmos as a condition of granting the joint application is a proper condition and not contrary to rule or law.

5. Greeley Gas and Atmos have demonstrated that granting the joint application as modified by the Stipulation with certain conditions attached is in the public interest, appropriate under Rule 55 of the Commission's Rules of Practice and Procedure, and consistent with the requirements of § 40-5-105, C.R.S.

6. The parties to the Stipulation have also demonstrated the granting of reconsideration, reargument, and rehearing is appropriate under Rule 92 of the Commission's Rules of Practice and Procedure and § 40-6-114, C.R.S. Although Decision No. R93-1494 became a decision of the Commission on December 21, 1993, under § 40-6-114, C.R.S., any party may within 20 days thereafter make application for reconsideration, reargument, and rehearing of the decision. Under Rule 92 of the Commission's Rules of Practice and Procedure, failure to file exceptions prevents parties from challenging basic findings of fact. However, conclusions of law can be challenged. This decision does not modify any basic findings of fact made by Administrative Law Judge Staliwe. However, additional comments based upon the Stipulation have been included.

7. Accordingly, the Stipulation Requesting Reconsideration, Reargument, and Rehearing of Decision No. R93-1497 and Waiving Response Time should be approved.

8. Finally, the joint application should be approved as modified by the Stipulation.

THEREFORE THE COMMISSION ORDERS THAT:

1. The Stipulation Requesting Reconsideration, Reargument, and Rehearing of Decision No. R93-1497 and Waiving Response Time should be approved and Reconsideration, Reargument, and Rehearing of Decision No. R93-1497 is hereby granted. Response time is waived.

2. The joint application of Greeley Gas Company, Greeley Gas Acquisition Corporation, and Atmos Energy Corporation to merge as modified by the Stipulation Requesting Reconsideration, Reargument, and Rehearing of Decision No. R93-1497 and Waiving Response Time is granted.

3. The merger of Greeley Gas Company into the Greeley Gas Acquisition Corporation and the subsequent merger of the Greeley Gas Acquisition Corporation into Atmos Energy Corporation as provided by the Agreement and Plan of Reorganization is approved subject to the following terms and conditions:

A. Greeley Gas Company and Atmos Energy Corporation shall not be permitted to seek an acquisition adjustment for the merger which is the subject of this docket in the future under any circumstances.

B. Within ten days after the merger is completed, Atmos Energy Corporation shall file a Notice of Consummation with the Commission.

4. Greeley Gas Company is authorized to transfer to Atmos Energy Corporation all of its assets, liabilities, utility operations, and business in the State of Colorado.

5. Atmos Energy Corporation is hereby authorized to succeed through the merger to all of Greeley Gas Company's utility rights, title, and interest in its utility plant and facilities.

6. Atmos Energy Corporation is authorized to exercise all rights granted to it under all franchises, certificates, consents, and permits relating to the ownership and operation of plant and facilities and to assume the obligations and liabilities of Greeley Gas Company as set forth more fully in the Agreement and Plan of Reorganization.

7. Atmos Energy Corporation is authorized to commence providing natural gas utility service to the public in Greeley Gas Company's former service areas. All existing certificates of public convenience and necessity held by Greeley Gas Company are hereby transferred to Atmos Energy Corporation.

8. Atmos Energy Corporation is authorized to adopt as its initial rates, rules, regulations, and conditions of service for natural gas utility service in the areas now served by Greeley Gas Company the applicable rates, rules, regulations, and conditions of service of Greeley Gas Company presently in effect.

9. Greeley Gas Company shall file a closing annual report for the portion of 1993 in which it actually provided natural gas utility service within 120 days after the closing of the merger transaction.

10. Greeley Gas Company and Atmos Energy Corporation are hereby authorized to perform any and all other actions which may

be necessary, contemplated, or desirable to carry out the merger transaction or transactions described herein.

11. The time for filing petitions for reconsideration, reargument, and rehearing of this Decision begins on the mailing date.

This Decision is effective on its Mailed Date.

ADOPTED IN SPECIAL OPEN MEETING December 22, 1993.

THE PUBLIC UTILITIES COMMISSION
FOR THE STATE OF COLORADO

Robert E. Temmer

Christine E.M. Alvarez

Commissioners

COMMISSIONER VINCENT MAJKOWSKI
DISSENTING.

COMMISSIONER VINCENT MAJKOWSKI DISSENTING:

I respectfully dissent from the majority opinion.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Vincent Majkowski

Commissioner

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