

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-484G

IN THE MATTER OF THE JOINT APPLICATION OF ATMOS ENERGY CORPORATION AND COMFURT GAS, INC., FOR THE APPROVAL OF THE TRANSFER OF CERTAIN FACILITIES AND PROPERTIES FROM COMFURT GAS, INC., TO ATMOS ENERGY CORPORATION AND AUTHORIZING THE TRANSFER OF ALL CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY ISSUED TO COMFURT GAS, INC., FOR SAID NATURAL GAS FACILITIES AND PROPERTIES ON AN EXPEDITED BASIS PURSUANT TO THE COMMISSION'S MODIFIED PROCEDURES.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING UNOPPOSED MOTION,
ESTABLISHING PROCEDURAL SCHEDULE,
SCHEDULING PREHEARING CONFERENCE,
AND SCHEDULING HEARING DATES**

Mailed Date: January 6, 2004

I. STATEMENT

1. On November 4, 2003, Atmos Energy Corporation and ComFurT Gas, Inc. (Applicants), filed their Verified Joint Application (Application). Confidential Exhibit 3 appended to the Application was filed with the Commission under seal. The Application commenced this proceeding.

2. On November 5, 2003, the Commission gave public notice of the Application. *See* Notice of Application Filed, dated November 3, 2003. On November 24, 2003, Staff of the Commission (Staff) intervened of right and requested a hearing in this matter. Staff is the only intervenor in this matter.

3. Applicants requested, and the Commission granted, expedited treatment of the Application. *See* Decision No. C03-1353 at ¶ 5. In addition, when it referred this matter to an Administrative Law Judge for hearing, the Commission provided specific guidance with respect to the scope of this proceeding. *Id.* at ¶¶ 3 and 4. Finally, the Commission deemed the Application complete as of December 2, 2003. *Id.* at ¶ II.A.1. This matter is assigned to the undersigned Administrative Law Judge (ALJ).

4. On December 17, 2003, Applicants filed a Motion for Leave to File Supplemental Direct Testimony and Request for Waiver of Response Time. At the December 18, 2003, prehearing conference, Staff stated that it does not oppose this motion. The ALJ granted the unopposed motion, and this Order memorializes that oral ruling. As Staff had the opportunity to provide an oral response to the motion, the Request for Waiver of Response Time will be denied as moot.

5. On December 18, 2003, pursuant to Decision No. R03-1384-I, the ALJ held a prehearing conference in this matter. The Applicants presented a procedural schedule, proposed dates, and proposed procedures concerning discovery and service of filings which were satisfactory to the parties.

6. Before addressing the procedural schedule, the ALJ must address the issue of the scope of this proceeding and whether or not two issues identified by Staff in its Notice of Intervention fall within the scope of the proceeding. The ALJ finds that the Staff-identified issues of “whether the price paid by Atmos for ComFurT’s assets is justified and prudent” and “whether [savings, if any, from the transaction] should be captured in rates for the benefit of ComFurT’s customers” (Notice of Intervention at 1-2) are beyond the scope of this proceeding.

7. First, Rule 4 *Code of Colorado Regulations* (CCR) 723-1-55(c), particularly (c)(12) and (c)(13), sets out the content of an application for authority to transfer assets. That Rule, then, establishes what the Applicants here must prove in order to obtain the requested Commission authority and certificate of public convenience and necessity. That Rule contains no specific requirement that Applicants prove facts with respect to either of the two cited Staff-identified issues.

8. Second, the Commission directed that the scope of this proceeding is to be determined by applying the principles in Decisions No. C99-1052 and No. C99-1147.¹ The Staff-identified issues are not contained among the principles announced in those two decisions.

9. Third, the ALJ reviewed Commission decisions in past asset transfer proceedings. The Commission has approved assets transfers without making a finding that the price paid for the assets was justified or prudent.² In addition, the Commission has deferred issues related to regulatory treatment of the purchase price to other dockets. *See, e.g.*, Decision No. C97-0564 (decision approving U S WEST Communications, Inc.'s disposition of Bellcore ownership interest; treatment of gains from sale deferred on the Commission's own motion to later proceeding; no presumption as to treatment made). Questions pertaining to the reasonableness

¹ Rules 4 CCR 723-1-55(c)(12) and (c)(13)(D) require Applicants to establish "[f]acts showing that the transfer is not contrary to the public interest[.]" Rule 4 CCR 723-1-55-(c)(13)(D) also requires "an evaluation of the benefits and detriments, if any, to the customers of each party and as to all other persons who will be affected by the transfer[.]" It is in the context of these Rules that the principles of Decisions No. C99-1052 and No. C99-1147 will be applied.

² Rule 4 CCR 723-1-55(c)(13)(E) states that Applicants must provide a "comparison of the kinds and costs of service rendered before and after the proposed transfer." Applicants have stated that they do not seek a rate change in this proceeding; thus, there will be no change in rates flowing from a decision in this docket. In addition, a requirement that these comparative data be provided does not equate to a requirement that the Commission determine the reasonableness and prudence of the purchase price. In this case at least, Rule 4 CCR 723-1-55(c)(13)(E) does not support a finding that the Commission must determine the reasonableness and prudence of the asset purchase price.

and prudence of the asset purchase price are to be considered in subsequent proceedings, as are issues related to treatment of the purchase price.³

10. In this case, therefore, the ALJ concludes that the two Staff-identified issues are beyond the scope of the proceeding. There will be no presumptions created, and none will be intended to be created, from a decision in this docket with respect to the following: (a) “whether the price paid by Atmos for ComFurT’s assets is justified and prudent”; and (b) “whether [savings, if any, from the transaction] should be captured in rates for the benefit of ComFurT’s customers” (Notice of Intervention at 1-2). These matters are deferred to another and subsequent proceeding.

11. Having determined this issue concerning the scope of this proceeding, the ALJ will address the procedural schedule and hearing dates for this proceeding. Both Applicants made it clear that they wish this case to be heard and decided on an expedited basis. To that end, at the prehearing conference the parties proposed the following procedural schedule: (a) on or before **January 9, 2004**, Applicants will file corrections to their direct and supplemental direct testimony and exhibits; (b) on or before **January 14, 2004**, Staff will file its answer testimony and exhibits; (c) on or before **January 21, 2004**, Staff will file corrections to its answer testimony and exhibits; (d) on or before **January 28, 2004**, Applicants will file their rebuttal testimony and exhibits; (e) on or before **January 30, 2004, at noon**, each party will file its

³ Staff may present testimony or other evidence related to the two identified issues provided the proffered testimony or other evidence is relevant to an issue in Decisions No. C99-1052 and No. C99-1147 or is relevant under Rule 4 CCR 723-1-55(c). Whether, in fact, proffered testimony or other evidence is relevant will be decided on motion and on a case-by-case basis.

prehearing motions;⁴ (f) a final prehearing conference will be held on **February 2, 2004**;⁵ (g) not later than the **commencement of the hearing on February 3, 2004**, Applicants will file corrections to their rebuttal testimony and exhibits; (h) the hearing will be held on **February 3 and 4, 2004**; and (i) on or before **February 19, 2004**, parties will file their post-hearing statements of position. Absent further Order, no response to a statement of position will be permitted.

12. The proposed procedural schedule and hearing dates are acceptable and, according to the Applicants, satisfy their request for an expedited proceeding. The contract for purchase of the assets at issue here has a “drop-dead” date of June 30, 2004. The procedural schedule, as adopted, should permit the Commission to issue a decision in this proceeding sufficiently in advance of that date to allow Applicants to complete the transaction by the June 30, 2004 date, assuming the Commission grants the Application. In addition, the Commission has deemed the Application complete as of December 2, 2003. Absent Applicants’ waiver of the statutory time frame or a finding of extraordinary circumstances, a Commission decision in this proceeding should issue not later than June 29, 2004. *See* §§ 40-6-109.5(1) and 40-6-109.5(4), C.R.S. The procedural schedule, as adopted, allows sufficient time for preparation of a Commission decision on exceptions, if necessary, within the statutory time frames.

⁴ This date does not apply to motions to compel response to discovery or to motions to compel response to audit. Parties should file those motions as the need arises. The ALJ will consider a motion to compel on an expedited basis. No written response to a prehearing motion is required. Argument on prehearing motions will be heard at the prehearing conference scheduled for February 2, 2004.

⁵ In the event that no prehearing motion is filed and no party requests a final prehearing conference, this prehearing conference will be vacated.

13. Testimony, exhibits, motions, and responses to motions shall be served on all parties by electronic means (*e.g.*, by electronic mail, by facsimile) with paper copy to follow or by in-hand delivery on counsel on the dates stated in ¶ 11, *supra*.

14. All dates for filing and service referenced in this Order mean in-hand to those on the service list who are located in the Denver, Colorado metropolitan area.

15. For prehearing motions, motions to compel, and responses to motions to compel, each party shall deliver a copy of a filing directly to the ALJ. This will not reduce the number of copies required to be filed with the Commission under the Rules of Practice and Procedure.

16. This Order, and not Rule 4 CCR 723-1-77, shall govern discovery in this proceeding.

17. The cut-off dates for discovery will be: (a) January 14, 2004, for discovery addressed to Applicants' direct testimony; (b) January 28, 2004, for discovery addressed to Staff's answer testimony; and (c) February 2, 2004, for discovery addressed to Applicants' rebuttal testimony.

18. Time for response to discovery will be: (a) for discovery addressed to Applicants' direct case and served from December 18, 2003, to and including January 1, 2004, response time is seven calendar days from the date of receipt; (b) for discovery addressed to Applicants' direct case and served from January 2, 2004 to and including January 14, 2004, response time is five calendar days from the date of receipt; (c) for discovery addressed to Staff's answer testimony and served from January 14, 2004 to and including January 28, 2004, response time is five calendar days from the date of receipt; and (d) for discovery addressed to Applicants' rebuttal

testimony and served from January 28, 2004 to and including February 2, 2004, response time is three calendar days and Applicants will make good faith efforts to respond more quickly.

19. Objection to discovery is due, in writing, not later than two business days following receipt of the discovery request to which objection is made. Parties are to file motions to compel response to discovery within two business days of receipt of the written objection, and parties are to attempt to resolve the dispute before a motion to compel is filed. Response to a motion to compel is due not later than one business day following receipt of the motion to compel. As soon as possible after receipt of the motion and the response, the ALJ will conduct a hearing, which may include hearing by telephone, on a motion to compel.

20. For service of discovery and for service of response to discovery, the following procedures govern: (a) discovery shall be served electronically (with paper copy to follow) or in-hand delivery to counsel for the responding party; (b) responses shall be due and served electronically (with paper copy to follow) or in-hand delivery to counsel for the requesting party; and (c) copies of all discovery requests and of all responses must be served on all counsel. For discovery requests and responses served by electronic means (*e.g.*, by electronic mail, by facsimile), a paper copy of any document must follow the electronic service for service to be effected and effective. The paper copy may be mailed or hand-delivered, provided the mailing or hand-delivery occurs on the same day as the electronic service.

21. Except in testimony or as necessary to support a motion, parties shall not file discovery requests and responses with the Commission and shall not serve discovery requests and responses on the Commission advisors (including Commission counsel) identified by Staff in the Rule 9(d) Notice filed in this docket.

22. Reference to testimony and exhibits in direct examination, in cross-examination, and in filings (*e.g.*, motions, statements of position) shall be to the paper copy.

23. Rule 4 CCR 723-1-22(d)(3) states: “If a pleading refers to new court cases or other authorities not readily available to the Commission, six copies of each case or other authority shall be filed with the pleading.” If a party wishes the ALJ to consider a cited authority, *other than* an opinion of the United States Supreme Court, a reported Colorado state court opinion, or a Commission decision, the party must provide copies of that cited authority.

24. The parties are requested to provide the decision number when referring to a Commission decision.

II. ORDER

A. It Is Ordered That:

1. The Motion for Leave to File Supplemental Direct Testimony is granted.
2. The procedural schedule set out above in this Order is adopted.
3. A prehearing conference in this docket is scheduled as follows:

DATE: February 2, 2004

TIME: 9:00 a.m.

PLACE: Commission Hearing Room
1580 Logan Street, OL2
Denver, Colorado

4. Hearing in this matter shall be conducted at the following dates, time, and place:

DATES: February 3 and 4, 2004

TIME: 9:00 a.m.

PLACE: Commission Hearing Room
1580 Logan Street, OL-2
Denver, Colorado

5. The parties shall follow the procedures and shall make the filings set forth above.

6. The Request for Waiver of Response Time to Motion for Leave to File Supplemental Direct Testimony is denied as moot.

7. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge