

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In The Matter of:

THE APPLICATION OF ATMOS ENERGY     )  
CORPORATION FOR AN ADJUSTMENT     )     Case No. 2013-00148  
OF RATES AND TARIFF MODIFICATIONS     )

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**BRIEF OF STAND ENERGY CORPORATION**

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Comes now Intervenor Stand Energy Corporation, by and through its undersigned General Counsel and for its Post-Hearing Brief in the above-styled matter states as follows:

**ARGUMENT**

1.     **Stand Energy was Denied Substantive and Procedural Due Process By the Commission’s Arbitrary and Capricious Order on Stand Energy’s Motion To Intervene in Violation of 807 KAR 5:001 and Section 2 of the Kentucky Constitution Guaranteeing Equal Protection of the Laws.**
  
- A.     **The Commission Changed the Kentucky Administrative Regulations Governing the Rules of Procedure for Commission Proceedings Effective January 4, 2013.**

In the year before the filing of this General Rate Case, the Kentucky Public Service Commission (hereinafter “Commission”) reviewed the Administrative Regulations covering Commission proceedings and made significant changes effective January 4, 2013. In fact, **the Commission removed all references to the former procedure for “limited intervention”** by adopting the new “Rules of Procedure” (See, 807 KAR 5:001) effective January 4, 2013. As a result of the rule change, the **only** type of intervention authorized by rule in May of 2013 was “full” intervention.

**B. May 24, 2013 - Stand Energy's Motion To Intervene & Supporting Memorandum.**

The Atmos Application proposed to adjust the rates of all classes of service within the Atmos system: residential, small non-residential, large non-residential and interruptible service customers. As such, it is appropriate for the Commission to also consider proposals to modify and improve the existing Atmos Tariff to expand gas transportation services to commercial, industrial, governmental and other public entities including the appropriate thresholds and rates. Such issues were the topic of Case No. 2010-00146, *An Investigation of Natural Gas Retail Competition Programs* and the Commission's Resulting Order:

As for expanded transportation services to commercial and industrial consumers, and governmental and other public entities that do not currently qualify for existing transportation services, the Commission finds it appropriate to encourage Atmos, Delta, Duke Kentucky and LG&E to evaluate their existing transportation tariffs with the context of the operation of their distribution systems and the maintenance of system integrity. The EIA data on marketer and LDC prices for commercial customers reflects that the average marketer price was lower than the average LDC price in the majority (sic<sup>1</sup>) of states. (See, Appendix C). Therefore, the Commission will review the reasonableness of the existing transportation tariffs of each of the above-named LDC's and any proposed changes in rate design and product and service availability in their next general rate proceeding. (p. 16, Emphasis Added).

It was the authority of the Commission's Order, quoted above, upon which Stand Energy based its May 24, 2013 Motion To Intervene and Supporting Memorandum in this "next general rate proceeding" of Atmos Energy Corporation.

**C. Stand Energy Suggested Lowering Volumetric Thresholds and Other Ideas.**

In its' Motion To Intervene, Stand Energy suggested lowering volumetric thresholds required to transport gas on the Atmos system. Stand Energy also suggested establishing a Pilot Gas Program to benefit schools in the Atmos territory and that the Commission formulate

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<sup>1</sup> Exhibit C, *Consumer Prices Table 24* from a 2008 EIA Report lists 9 "selected states" Florida, Georgia, Maryland, Michigan, New York, Ohio, Pennsylvania, Virginia and the District of Columbia. Of these 9 states only in Georgia was the marketer price higher for commercial customers than the LDC price. In the other 8 states (8 out of 9) the marketer price was lowest for commercial customers.

Standards of Conduct to apply to Atmos to better promote competition and lower rates to customers. Standards of conduct are important considering the fact that Atmos Energy Corporation's (AEC's) unregulated subsidiary – Atmos Energy Marketing (AEM) - serves the majority of the largest customers transporting gas on the Atmos system.

Unfortunately, the Commission summarily decided this issue without a hearing and decided not to consider the issues suggested by Stand Energy - a Pilot Program for Schools and Standards of Conduct for Atmos. The Commission's refusal to discuss *bona fide* issues in this General Rate Case is further evidence of the substantive and procedural due process violations suffered by Stand Energy in this case resulting in the denial of equal protection of the laws.

Atmos filed a timely objection to Stand Energy's intervention - but ignored the new Kentucky Administrative Regulations and argued that if Stand Energy was allowed to intervene, that such intervention should be "**limited**" in a number of ways. (Atmos Objection p.4). Thereafter the Commission entered the procedural schedule for the case on June 28, 2013. According to the procedural schedule for this case, "All requests for information to Atmos shall be filed no later than August 14, 2013."

**D. The Commission Did Not Rule on Stand Energy's Motion to Intervene For more than 3 Months and Then only AFTER the closure of Discovery.**

After the procedural schedule was entered, numerous other matters were filed in the case and ruled upon by the Commission. But, for unknown reasons, the Commission did not rule on Stand Energy's Motion To Intervene until an Order was issued on September 3, 2013. This date was almost 3 weeks after the discovery cutoff (August 14<sup>th</sup>) set in the Procedural Order. By holding Stand Energy's motion for over three months without decision and then not issuing the Order granting intervention until after the discovery cutoff had passed, the Commission

effectively denied Stand Energy its substantive and procedural rights to fully participate in this case resulting in the denial of equal protection of the laws.

Stand Energy should have been granted full intervention and allowed meaningful participation in the case. Stand Energy had intended to contribute to the issues in discovery, including the issues surrounding the Atmos “special contracts” - some of the largest customers on the Atmos system that will be discussed in more detail herein.

Stand Energy was the only party to the case with competitive head-to-head experience working against Atmos’ unregulated marketing Affiliate, Atmos Energy Marketing (AEM), who could address competitive issues in the natural gas marketplace. Stand Energy was unable to participate and assist the Attorney General’s Office of Rate Intervention which was required to invest a great deal of valuable time and effort to fight discovery battles with Atmos alone. Stand Energy could have provided enumerable help to the Attorney General and Commission Staff in this case. Atmos resisted discovery from the Attorney General in this case just as Atmos resisted discovery in Case No. 2010-00146. In the Order addressing Stand Energy’s intervention, the Commission granted Stand Energy “*Full Intervention Limited to . . .*”:

In Case No. 2010-00146 (footnote omitted), an investigation to which both Atmos Energy and Stand Energy were parties, the Commission expressly stated that there was a need to review the transportation tariffs of natural gas local distribution companies in their next base rate proceeding. The Commission finds that this case represents its first such opportunity to review Atmos Energy’s gas transportation tariffs since the Order in that proceeding, and that Stand Energy may present issues or develop facts that assist the Commission in its investigation of these issues. For these reasons, the Commission will grant Stand Energy full intervention limited to participation on the issues of Atmos Energy’s transportation threshold levels and any other matters related thereto, but not to whether a Pilot Program for Schools or enhanced Standards of Conduct should be added. (Order at p. 6).

The definition of “Limited Full Intervention” does not exist in the regulations. Full Intervention, by definition can not be limited. There is no authority for limiting Stand Energy’s participation as a party to this case in the Commission regulations. In this case, “Limited Full Intervention” means Stand Energy was precluded from meaningful participation in the case by being denied the opportunity to propound discovery to Atmos Energy Corporation in an important general gas rate case that is not likely to be repeated for a number of years. The delay in issuing the Order and the Order itself were both arbitrary and capricious actions that violated Stand Energy’s rights. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission* 379 S.W.2d 450, 456 (Ky. 1964) provides for a three part test for arbitrariness in this Commonwealth with respect to administrative actions: (1) was the agency's action within the scope of its granted powers; (2) did the agency provide procedural due process; and (3) was the agency's decision supported by substantial evidence. If the administrative action fails to meet any of these standards, the action taken or the decision made must be considered to be arbitrary.

In *Kentucky Milk Marketing and Antimonopoly Com'n v. Kroger Co.*, our Supreme Court discussed Section 2 of the Kentucky Constitution:

Section 2 of our Constitution is simple, short and expresses a view of governmental and political philosophy that, in a very real sense, distinguishes this republic from all other forms of government which place little or no emphasis on the rights of individuals in a society. It is as follows: ‘§ 2. Absolute and arbitrary power denied. Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority.’ (Emphasis added). While there are numerous cases which have been decided on the basis of this bulwark of individual liberty, the number is relatively few, in view of its potential importance to our jurisprudence. Section 2 is a curb on the legislature as well as on any other public body or public officer in the assertion or attempted exercise of political power. *Sanitation Dist. No. 1 v. City of Louisville*, 308 Ky. 368, 213 S.W.2d 995 (1948). Whatever is contrary to democratic ideals, customs and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is

arbitrary, *Id.* No board or officer vested with governmental authority may exercise it arbitrarily. If the action taken rests upon reasons so unsubstantial or the consequences are so unjust as to work a hardship, judicial power may be interposed to protect the rights of persons adversely affected. *Wells v. Board of Education of Mercer County*, Ky., 289 S.W.2d 492, 494 (1956). Our function is to decide a test of regularity and legality of a board's action by statutory law and by the constitutional protection against the exercise of arbitrary official power. *Kentucky Milk Marketing and Antimonopoly Com'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985).

Several more years of the *status quo* will harm competition in the Atmos territory and harm large customers currently taking natural gas commodity service on the Atmos system. Those large customers will continue to be required by Atmos to pay more than is necessary for their natural gas commodity while keeping all but a few competitive suppliers, other than Atmos Energy Marketing, at bay for years to come. This certainly, by any criteria, is arbitrary and is inimical to the public interest. It is an invasion of the right of gas suppliers like Stand Energy to sell competitively, and of the public to buy competitively in the open market.

**2. The Volumetric Threshold To Transport Gas on the Atmos System Should be Lowered to Allow More Customers To Buy Their Own Natural Gas in the Market.**

**A. The Current Threshold of 9,000 Mcf/year Should be Lowered to 3,000 Mcf/year.**

The current volumetric threshold required by the Atmos Tariff to transport customer owned natural gas to the customer's facility, with the assistance of a supplier such as Stand Energy, is 9,000 Mcf/Year. Stand Energy submits that either Atmos should voluntarily lower the threshold or the Commission should Order Atmos to lower that threshold to 3,000 Mcf/Year. This suggestion is based upon general industry knowledge, the thresholds of other LDC's and the evidence and testimony of Atmos Witness Mark Martin in this case as well as his Responses and Supplemental Responses to Data Requests, in Case No. 2010-00146, *An Investigation of Natural*

*Gas Retail Competition Programs.* Those responses are attached hereto as Appendix A (Original Responses) and Appendix B (Supplemental Responses).

Mark Martin testified for Atmos Energy Corporation in this General Rate case as the “Primary Sponsor for the Applicant”.<sup>2</sup> During Mr. Martin’s testimony, Commissioner Breathitt asked Mr. Martin a question requesting an explanation of the difference between sales and transport customers? Mr. Martin responded that sales customers are residential and small commercial customers, while transport customers tend to be larger type facilities and plants. He continued by stating, “They choose transportation in an effort, based on the size of their consumption, maybe they can get a better price in the marketplace compared to our (Atmos) GCA.”<sup>3</sup> (Emphasis added). Mr. Martin admits that only those customers meeting the current volumetric threshold qualify to even attempt to save money in the marketplace over the Atmos GCA by transporting their own natural gas via a third party supplier. As he clearly states, the “better price in the marketplace compared to Atmos” is a possibility, but only for those customers who qualify by meeting the volumetric threshold.

As proven by other utilities in Kentucky and other states - the alleged risks and dangers of gas transportation are resolved and the utility is protected financially by properly drafted tariffs that control supplier behavior without being unduly punitive or unduly benefiting or enriching the utility. Some utilities actually have no minimum transportation threshold to qualify for a transportation program in exchange for the customer purchasing a type of backup service. These utilities manage transportation programs much more open and liberal than the Atmos Energy program with relative ease. Would the current tariff provisions remain intact or would Atmos change the cash out and other punitive provisions to become more restrictive in the event

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<sup>2</sup> January 23, 2014 Video Transcript, Mark Martin Testimony 10:34:49 – 10:34:59

<sup>3</sup> January 23, 2014 Video Transcript, Mark Martin Testimony 13:40:32 – 13:41:25

Atmos Energy Marketing had to face actual competition on a level playing field? The Commission must also guard against risks to competition in the event the threshold is lowered – that other provisions of the Atmos tariff would be made more punitive and restrictive.

**B. Judicial Admissions by Atmos Justify Lowering the Threshold To Transport.**

Atmos, through its Corporate Representative Executive Mark Martin, admitted there is no difference in the cost to Atmos to deliver third party or supplier gas compared to the natural gas Atmos would deliver to the same sales customer. (July 28, 2010, Original Response to Data Request 1.1a, Appendix A). Considering the fact that Atmos is not allowed to profit from providing natural gas that flows through the GCA process, it should make no difference to Atmos whether Stand Energy, or any other supplier, is supplying the gas. Yet it clearly does matter to Atmos.

b. Atmos balances its system daily utilizing no-notice storage service purchased from an interstate pipeline. Atmos charges fees to transportation customers to cover the expenses related to this system balancing. (July 28, 2010, Original Response to Data Request 1.1c, Appendix A). “Gaming of the system” (the most common criticism of gas transportation) is controlled by balancing restrictions in the Atmos tariff and transportation fees designed by Atmos to offset actual costs related to supplier balancing issues. As such, it is unclear why the volumetric threshold to transport as has not been lowered, either by Atmos or by Order of the Commission, to allow more customers to take advantage of transportation.

**C. Stand Proved Savings For All Customers Audited by Staff in Case No. 2010-00146.**

It is important for the Commission to know that Stand Energy was required by Commission Staff to produce monthly invoices for the entire period of service for both the



largest and the smallest customers on each Kentucky Gas distribution LDC in Case No. 2010-00146. These monthly invoices for these 10 customers (most had been served by Stand Energy for many years) were analyzed by Staff to determine whether Stand Energy was in fact saving customer's money over what they would have been charged by the host LDC during the same period of time. Every single Stand Energy customer audited by Commission Staff saved money vs. the utility. Every single one. Was this information shared with the Commissioners? Stand Energy knows it wasn't discussed in the hearing. Then, this overwhelming fact of transportation program savings was omitted from the Staff Report issued after the hearing. Stand Energy could not object to the absence of information in the Staff Report because **all post-hearing procedures were eliminated in the procedural schedule when it was originally issued.** It would appear that someone with the ability to control what was contained in the Staff Report - didn't want that investigation case to change the status quo. Every action by a public agency such as the Kentucky Public Service Commission should be subject to at least one review or appeal. Case No. 2010-00146 had no procedure for any review or appeal whatsoever.

The fact is, Stand Energy saved money for all customers audited by Commission Staff in Case No. 2010-00146, the Commission Staff just didn't think that fact was relevant for the record. For whatever reason, those overwhelming facts were omitted from the record. Stand Energy's documented savings for those Commission Staff-audited customers also supports the Energy Information Agency (EIA) Exhibit (Exhibit C, Consumer Price Table 24 from 2008 EIA Report introduced into evidence by PSC Staff in Case 2010-00146) which showed that in 8 of 9 states audited by the U.S. Government, large transportation customers saved money buying gas from suppliers vs. sales customers getting their gas from the utility! For all of these reasons, the

Commission should lower the volumetric threshold to qualify to transport customer owned gas on the Atmos system from 9,000 Mcf/year to 3,000 Mcf/year.

**3. Serious and Substantial Anti-Competitive Issues Exist With Atmos Energy Which Should Be Addressed by The Commission.**

**A. Asset Manager Atmos Energy Marketing is Excercising Immense Market Power.**

Atmos Energy Marketing is a marketer in competition with other gas marketers such as Stand Energy, in addition to being the “Asset Manager” of Atmos Energy Corporation of Kentucky and numerous other utilities (including Atmos Energy Corporation in Tennessee) and municipal gas systems in multiple states. This means Atmos Energy Marketing has daily functional control over the extensive interstate pipeline capacity owned by Atmos Energy Marketing’s combined peak customer load in addition to the capacity controlled by Atmos Energy Corporation from numerous municipal gas systems. Stand intended to address specifically in discovery with Atmos, the almost complete lack of competition for the supply of natural gas on the Atmos system. Stand Energy didn’t get that opportunity, as previously stated.

Regarding the topic of competition, the Atmos Energy Corporation Code of Conduct on the topic of “Competition” states:

**Competition** – “All of the Company’s activities are governed by federal and state antitrust and trade regulation statutes. There are many types of activities that in some cases may be violations of federal and state antitrust laws. For example, certain types of discussions, meetings or arrangements . . . and any agreement whether formal or informal, or any joint activity involving the Company and any other party, the intent or effect of which is to fix prices, allocate markets or otherwise reduce competition, may violate antitrust laws.”

**Exactly!**

**B. Atmos Transportation Customers, Including Special Contract Customers.**

In July 2010 when Mark Martin answered Data Requests from Stand Energy, Atmos Energy had 217 transportation customers on their system. (October 6, 2010, Supp. Response to

Data Request 1.9b, Appendix B). 170 of those transportation customers (78%) were served by AEM, the unregulated marketing affiliate and asset manager of Atmos Energy Corporation. (*Id.*) The majority of the remaining customers are served by Constellation, Proliance (now out of business) and BP according to Mr. Martin. (*Id.*) In addition, Atmos admitted (after initially denying) the fact that Stand Energy serves one of the larger gas users on the Atmos system. For Atmos Energy to claim they are unaware of the identities of competitors supplying natural gas on their system is ludicrous. Furthermore, Atmos admits to having approximately 30 customers that qualify for transportation service who choose to stay on sales service. (July 28, 2010 Response to Date Request 1.9d, Appendix A). This fact alone would suggest a lack of information available to Atmos customers on transportation options available under existing tariffs and lack of information on the relative costs and benefits of sales service vs. transportation service.

**C. “Exclusive Dealing” Is Prohibited by Federal and State Anti-Trust Laws.**

Atmos Energy Corporation admitted it buys 98.5% of its natural gas commodity from its unregulated affiliate and contracted “Asset Manager” - Atmos Energy Marketing and the remaining 1.5% from local producers. (October 6, 2010, Supp. Responses to Data Requests 1.4a and 1.9c, Appendix B).

Atmos Energy Corporation has awarded the RFP for its system supply of natural gas to Atmos Energy Marketing consistently year-after-year notwithstanding the bids of other qualified asset managers. This fact alone looks and smells like “exclusive dealing” which is strictly prohibited by federal and state anti-trust laws.

It appears to Stand Energy, both from our experience in the market with and against Atmos and the above statistics, that Atmos Energy Marketing and its activities as “asset manager” are the main impediment to competition on the Atmos Energy Corporation system and

the likely source of anti-competitive activities and pricing relative to competitors such as Stand Energy.

KRS 367.175, which prohibits the " restraint of trade and formation of monopolies[,]" *Brandon v. Combs*, 666 S.W.2d 755, 757 (Ky.App.1983), is based upon Sections 1 and 2 of the Sherman Anti-Trust Act. *Mendell v. Golden-Farley of Hopkinsville, Inc.*, 573 S.W.2d 346, 348 (Ky.App.1978). Because " every agreement concerning trade and every regulation of trade restrains trade," the Supreme Court has held that Section 1 of the Sherman Act makes " illegal only those contracts and combinations that constitute unreasonable restraints of trade." **54A Am.Jur.2d, Monopolies, Restraints of Trade, and Unfair Trade Practices** § 47 (1996). A restraint of trade may be adjudged unreasonable if it is per se unreasonable or violates the rule of reason. *Id.* Examples of per se unreasonable conduct include price-fixing arrangements, tying arrangements, agreements among competitors to divide markets or to allocate customers, group boycotts, and agreements to limit production. *Id. at § 51.* The Atmos Energy Corporation – Atmos Energy Marketing RFP arrangement is certainly “cozy” at best and at worst it may be an example of prohibited “exclusive dealing”. Mr. Gary Smith testified at the hearing under cross examination that Atmos Energy Corporation had been putting the Asset Manager duties out for competitive RFP for almost 15 years. Only once, the first year, could the witness recall any other bidder, other than Atmos Energy Marketing, winning the bid. Only one year. Although Mr. Smith did indicate the bid had been bifurcated last year and AEM did not serve both halves of the Kentucky system.<sup>4</sup> For this reason, efforts to increase competition in the Atmos territory are necessary and appropriate.

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<sup>4</sup> January 23, 2014 Video Transcript, Gary Smith Testimony 18:07:35 – 18:08:12

**D. Continuation of “Special Contracts” Ad Infinitum Is Devastating To Competition.**

Stand Energy did not sign a confidentiality agreement in this case. Therefore, Stand was not allowed to view confidential materials. Nevertheless, Stand Energy can comment on the public fact that Atmos Energy has seventeen large industrial customers who have received discounted distribution rates (i.e., “Special Contracts”) in exchange for agreeing not to bypass the Atmos Energy distribution system<sup>5</sup>. Most of these agreements are almost 20 years old. That’s a huge amount of revenue that has never been included in the Atmos GCA to the detriment of those Atmos customers paying the GCA. These Atmos “Special Contracts” are anti-competitive. Because the justification for approving these “Special Contracts” is almost 20 years old (and not necessarily permanent), the Commission should revisit these Special Contracts with each affected customer. One example is Federal and Kentucky underground pipeline safety regulations have been adopted and old rules have been changed since these Atmos Special Contracts were approved by the PSC. Chairman Armstrong indicated that Atmos participated in a case recently with the Commission involving pipeline safety legislation.<sup>6</sup> The economics of bypasses have simply changed. The costs to obtain easements, lay pipe, document pipeline construction, document odorant injection, etc. have all increased dramatically, meaning some of those Special Contracts are likely no longer appropriate from a regulatory perspective.

The amount of discount or lost revenue or other details of each individual industrial customer receiving a “Special Contact” from Atmos is arguably confidential and trade secret information that should not be disclosed. However, the combined or aggregate amount of lost

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<sup>5</sup> Stand Energy is also the only party in the case that has installed multiple bypass pipelines around natural gas distribution systems on behalf of customers. Again, Stand Energy was denied the opportunity to ask relevant questions or provide the benefit of our experience that would have advanced this issue of utility bypass pipelines and raised questions for the Attorney General and Staff to ask Atmos. Stand Energy’s exclusion from Discovery in this case caused economic harm to Stand Energy as well as economic damage to competition in the Atmos territory.

<sup>6</sup> January 23, 2014 Video Transcript, Mark Martin Testimony 13:44:52 – 13:45:44.

revenue from these 17 “Special Contract” customers should be made available to the public and to competitors - and without signing a confidentiality agreement! Only in this way can ratepayers and competitors fully grasp the magnitude of the discount being granted year after year in order to have a meaningful discussion about competition, while protecting the privacy and trade secret rights of the individual Atmos industrial customers.

Atmos Energy Corp has a state-granted monopoly to distribute gas in its territory. However, that monopoly must not be allowed by the Commission to extend to the natural gas commodity bought and sold in its service territory. To allow the Atmos monopoly to extend to the supply of natural gas on the Atmos Energy Corporation systems will harm large Atmos customers by denying them the opportunity to pay lower rates, and harm competition generally between and among gas suppliers in the Atmos territory. By allowing Atmos to engage in combinations in restraint of trade with its subsidiary Atmos Energy Marketing, that are not transparent to regulators or the public (or to competitors), the Commission is in effect legitimizing conduct that would not otherwise survive close regulatory or legal scrutiny.

Respectfully Submitted,

STAND ENERGY CORPORATION

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**CERTIFICATE OF SERVICE VIA ELECTRONIC FILING**

In accordance with the requirements for electronic filing as required in this case, I hereby certify that the foregoing electronic filing is a true and accurate copy of the documents to be filed in paper medium; that the electronic filing has been transmitted to the Commission on March 14, 2014; that an original of this filing will be delivered to the Commission within two days of March 14, 2014; and that no party has been excused from participation by electronic means.

/s/ JOHN M. DOSKER

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