

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

RATE ADJUSTMENT OF WESTERN)	CASE NO.
KENTUCKY GAS COMPANY)	90-013

O R D E R

This matter arises upon the January 23, 1991 filing of a motion by Western Kentucky Gas Company ("Western") moving the Commission to enter an Order disclosing the identity of the staff person or persons responsible for developing the theory of imputing deferred income taxes to Western's rate base; disclosing the identity of the staff person or persons performing the calculations set forth in the Commission's rate order of September 13, 1990; and granting it the right to call the staff person or persons for cross-examination at the hearing scheduled for January 29, 1991. Western argues that the theory supporting the adjustment to Western's rate base reflecting the imputation of deferred income taxes was not disclosed by the Commission until entry of the rate Order and that Western was unfairly precluded from addressing the impropriety of the adjustment during the original hearing. And, finally, Western argues that the mere opportunity to present oral arguments or evidence on rehearing does not fully satisfy constitutional due process requirements under the facts of this particular proceeding.

The Commission, having considered the motion and being otherwise sufficiently advised, finds that Western's request should be denied for the following reasons:

Western claims it had no notice that the adjustment to the deferred income tax was under consideration by the Commission and that they were, therefore, unfairly precluded from presenting relevant evidence and expert opinion demonstrating the impropriety of the adjustment during the original hearing. The Commission is unpersuaded that this is a legitimate claim by Western. Had Western's request for rehearing been denied, Western may have had some basis upon which to claim they had no opportunity to present relevant evidence and expert opinion on this adjustment. However, since we granted rehearing to Western specifically on this issue, they now have an opportunity to fully develop this issue for the Commission's consideration.

A Kentucky Court of Appeals case, Utility Regulatory Commission v. Kentucky Water Service Company, Inc., 642 S.W.2d 591 (1982) has been relied upon by Western in support of its motion herein to buttress its argument of "surprise" at the Commission's treatment of the deferred income tax issue. The Commission notes that the issue in Kentucky Water was whether the Commission's denial of rehearing was lawful and reasonable. The Court of Appeals, in affirming the lower court, found that rehearing should have been granted because the Commission had long acquiesced in the utility's consistent treatment of job development investment tax credits as a component of retained earnings. Kentucky Water is inapplicable in the instant case for two reasons. First, the

Commission has not denied rehearing on this issue. Second, the Commission fails to see how it could have acquiesced in a particular treatment of the deferred income taxes at issue in this proceeding since this is the first rate-making proceeding that Western has undergone since the purchase of Western Kentucky Gas by Atmos Energy Company, Inc.

Granting the request of Western regarding disclosure of the identity of staff members advising the Commission on the deferred income tax issue and subsequently allowing cross-examination of Staff would be an unjustified intrusion into the Commission's decision-making process. The United States Supreme Court has unequivocally ruled that internal conversations between an administrative body and its staff are not discoverable. In United States v. Morgan, 313 U.S. 409 (1941), a litigant challenged rates established by the Secretary of Agriculture for stockyard marketing agencies and sought discovery of the Secretary's deliberative process, including his consultation with subordinates. The lower court permitted the discovery and the Supreme Court reversed, ruling that:

[T]he short of the business is that the Secretary should never have been subject to this examination. The proceeding before the Secretary 'has a quality resembling that of a judicial proceeding.' (Citation omitted). Such an examination of a judge would be destructive of judicial responsibility. . . . [J]ust as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected.

Morgan at 422. This rule prohibiting discovery of an administrative agency's decision-making process was reaffirmed in T.S.C. Motor Freight Line, Inc. v. United States, 186 F.Supp. 777

(S.D. Tx. 1960), Aff'd sub nom. Herrin Transportation Co. v. U.S., 366 U.S. 419 (1961).

The Commission Staff is an arm of the Commission charged with the responsibility of advising and assisting the Commission in technical and legal matters. The mental processes of administrative decision-makers and the Staff who advise and assist them in technical matters, are not a proper subject of inquiry by Western or any other party to a Commission proceeding.

Western relies on a Kentucky Supreme Court case, Kaelin v. City of Louisville, 643 S.W.2d 590 (Ky. 1982) for the proposition that a party has the constitutional due process right to cross-examine the opponents' witnesses in a proceeding before an administrative body. Western's reliance upon Kaelin is misplaced. In proceedings before the Public Service Commission, the Commission itself is represented by its Staff. Staff is not a true party or an "opponent" to a proceeding before the Commission in the adversarial sense. Staff participates in cross-examination of the company's witness in order to get all the facts necessary to an informed decision before the Commission in a given proceeding. In this proceeding, the Commission Staff has acted only in an advisory capacity to the Commission and has not acted as a party in this proceeding.

Further, the Commission does not dispute that Kentucky Water, 642 S.W.2d 591, cited by Western, entitles a party to know the factual basis relied upon to support the decision. However, Western has been fully apprised of the factual material relied


upon to render the decision to impute deferred income taxes. The Commission's Order at pages 6-12 is replete with factual references that are fully supported by the record in this proceeding. The numbers necessary to perform the calculations that fully reflect the Commission's decision to impute certain deferred income tax levels are clearly reflected in the Order.

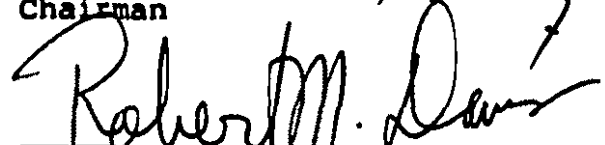
Based upon the foregoing the Commission finds that due process does not require that Western be permitted to cross-examine any Staff member responsible for providing advice and assistance to the Commission on this technical issue.

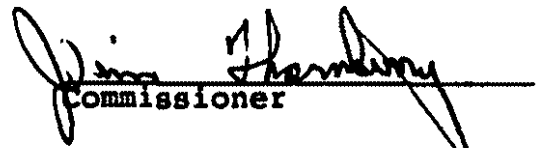
IT IS THEREFORE ORDERED that Western's motion be and it hereby is denied.

Done at Frankfort, Kentucky, this 25th day of January, 1991.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director