

JOHN N. HUGHES
ATTORNEY AT LAW
PROFESSIONAL SERVICE CORPORATION
124 WEST TODD STREET
FRANKFORT, KENTUCKY 40601

Telephone: (502) 227-7270

jnhughes@johnnhughespsc.com

February 9, 2016

Jeff Derouen
Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

Re: Atmos Energy Corporation
Case No. 2015-00343

Dear Mr. Derouen:

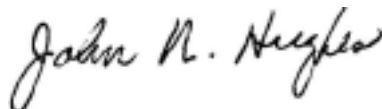
Atmos Energy submits for filing a Reply to the Attorney General's Response. In light of the issuance a short time ago of Chairman Gardner's letter recusing himself from consideration of the R&D issue, Atmos Energy believes it important to have in the record its position on the issue, which it was preparing to submit today. I certify that the electronic documents are true and correct copies of the original documents.

If you have any questions about this filing, please contact me.

Submitted By:

Mark R. Hutchinson
Wilson, Hutchinson and Littlepage
611 Frederica St.
Owensboro, KY 42301
270 926 5011
randy@whplawfirm.com

And



John N. Hughes

Attorneys for Atmos Energy Corporation

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Application of Atmos Energy Corporation)
for an Adjustment of Rates) Case No. 2015-0343
and Tariff Modifications)

REPLY

INTRODUCTION

The Attorney General, in his Response to Chairman Gardner’s letter of January 25, 2016, demands that if Atmos Energy does not withdraw its existing R & D Rider, then Chairman Gardner must recuse himself from this entire proceeding, because of a “potential for the appearance of impropriety” (emphasis added). Attorney General’s Response, page 1, Line 5. It is not clear from its Response whether the Attorney General is insisting that Atmos Energy withdraw its previously approved R & D Rider in its entirety or its proposed adjustment to the Rider. Either way, the Attorney General’s position is untenable and Atmos Energy disagrees with the Attorney General. For purposes of this Reply, Atmos Energy will give the Attorney General the benefit of the doubt and assume he is referring to the adjustment only.

The Attorney General has historically objected to R & D Riders such as the one here and the Kentucky Public Service Commission (“Commission”) has consistently approved them – recognizing the value and benefit of research and development in the natural gas industry. The Attorney General has now employed a different tactic: Pressure Atmos Energy to withdraw what the Attorney General characterizes as the “offending” Rider or face the disruption to these proceedings that would follow if Chairman Gardner is forced to recuse himself from the entire proceeding. It is noteworthy that the Attorney General does not simply seek the recusal of Chairman

Gardner from discussion or decision making concerning the R & D Rider adjustment, he seeks the recusal of the Chairman from the entire proceeding.

Given that the funds generated by the R & D Rider do not benefit it, one might wonder why Atmos Energy does not simply give in to the Attorney General and withdraw the R & D adjustment? To do so, however, would be wrong for several reasons. As set forth in more detail below, those reasons include: (1) The R & D Rider serves a beneficial purpose in furthering the research and development efforts in the gas industry, as this Commission has previously recognized, and should be supported; (2) There is no statutory, regulatory, judicial or ethical reason for Chairman Gardner to recuse himself in this rate case because he serves on a 23 person advisory committee to a national 501(c)(3) not-for-profit organization dedicated to research and development in the natural gas industry that may receive a relatively small amount of funding from the R & D Rider. Participation by our regulators on committees and boards of national organizations dedicated to the betterment of the natural gas industry should be encouraged, rather than discouraged, which will occur if the Attorney General is successful; (3) The Commission should not accept the Attorney General's premise that even a "potential for the appearance of impropriety" is sufficient reason to compel recusal from a proceeding.

ARGUMENT

In direct response to the Attorney General's belief that the issue of Atmos Energy's proposed adjustment of its calculation of a contribution to GTI or similar organization will create an ethical conflict for Chairman Gardner, Atmos Energy certainly disagrees. First, to clarify the nature of the proposed adjustment, Mark Martin's testimony should be reflected in its entirety, rather than the misleading excerpt included in the Attorney General's Response:

Q. DOES THE PROPOSED R&D UNIT CHARGE INCREASE CREATE ADDITIONAL REVENUES FOR THE COMPANY?

A. No. While the Company does not directly benefit financially from the R&D Rider, the Company does benefit by new technology and more efficient appliances that result from research funded by

the R&D Rider. All funds collected under the R&D Rider would be remitted to the Gas Technology Institute (GTI), **or similar research or commercialization organization** (emphasis added). While the Company has flexibility on where it remits funds, all funds collected through the R&D unit charge have been remitted to GTI. (Pre Filed testimony of Mark Martin, Case No. 2015-0343).

This contribution is a separate, non-revenue item for Atmos Energy to The Gas Technology Institute (GTI). It is a fee collected for the funding of research beneficial to all natural gas users. There is no direct benefit from the fee to Atmos Energy. Indeed, the Attorney General's response states that "the Commission has historically prevented utilities from incorporating donations to not-for-profit entities into rate base...." This is a curious statement as the R & D Rider is neither a rate base item, nor is it even a cost of service item for the Company. The contribution, as stated above, is a non-revenue item in which the Company derives no financial benefit through either rate base or cost of service.

The Public Interest Advisory Committee (PIAC) for GTI, which is the entity Chairman Gardner is a member, is made up of 23 appointees from various state utility commissions, municipals, environmental groups and consumer advocates. The Attorney General's assertion that Chairman Gardner's advisory position among this group of disparate interests creates the appearance of a conflict of interest is unjustified on its face. The assertion becomes even more unsupportable when viewed in light of the legal standards for recusal.

The starting point of the consideration of a possible conflict is the Executive Branch Ethics Code in the Kentucky Revised Statutes (KRS).

11A.005 Statement of public policy.

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

(a) A public servant be independent and impartial;

- (b) Government policy and decisions be made through the established processes of government;
 - (c) A public servant not use public office to obtain private benefits; and
 - (d) The public has confidence in the integrity of its government and public servants.
- (2) The principles of ethical behavior for public servants shall recognize that:
- (a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;
 - (b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and
 - (c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

Nothing in the Attorney General's Response provides any support for a possible violation of the ethics policy. The allegation by the Attorney General that there is a perception of impartiality is not substantiated and is not a factor for disqualification included in the code.

Specific standards of conduct by government agents are included in KRS 11A.030.

11A.030 Considerations in determination to abstain from action on official decision -- Advisory opinion.

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

- (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
- (2) The effect of his participation on public confidence in the integrity of the executive branch;
- (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
- (4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch; or
- (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business,

profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

Nothing in the Attorney General's Response supports a finding of any applicability of the factors in this statute. Neither Chairman Gardner's independence nor any "benefit" from a decision on the R & D adjustment has been alleged and none can be implied from his role on the PIAC.

Even applying the strict standards of judicial conduct to the quasi-judicial nature of the Commission, Chairman Gardner's position on PIAC does not create a basis for recusal.

§ SCR 4.300. Kentucky Code of Judicial Conduct:

PREAMBLE

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution.

Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding. . .

(Atmos Energy notes that the Attorney General's alternative to recusal is the withdrawal by Atmos Energy of its proposed R & D rate adjustment. It certainly appears he is be attempting to use this tactical ploy to leverage a concession from Atmos Energy in exchange for Commissioner Gardner's participation in the case).

"De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality. . .

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

SCR 4.300 (3)(E)

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: .

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or minor child residing in the judge's household, has any interest, more than a de minimis interest, in the subject matter in controversy or in a party to the proceeding that could be substantially affected by the proceeding;

Several federal cases define the bounds of impropriety. For example, a federal district judge must recuse himself “in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Whether recusal is warranted “turns on ‘whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.’ ” United States v. Scrushy, 721 F.3d 1288, 1303 (11th Cir. 2013)). “[A] judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation.” United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986). The Attorney General has alleged only the most tenuous, speculative basis for his call for recusal.

It should also be noted that R & D riders are not an issue of first impression or of new policy for the Commission. The GTI contributions have been approved in prior cases. The initial approval for Atmos Energy was in Case No. 99-070 in 1999. Similar approval was given to Columbia Gas in Case No. 2002-00145 in December, 2002. In Case No. 2004-00067, November, 2004, p. 59, involving Delta Gas, the Commission said over the Attorney General's opposition:

The Commission agrees with Delta's proposal to recover monies to voluntarily fund GTI research through a tariff rider. The Commission has provided a clear signal to jurisdictional gas utilities in the past that it supports research and development efforts in the gas industry. Allowing recovery via a rider is

consistent with Commission decisions for two other gas utilities, Atmos Energy and Columbia Gas of Kentucky.

Given the Commission's prior approval of the policy to fund natural gas research, Chairman Gardner, even if he approves Atmos Energy's proposed increase in funding of the existing rider, will not be acting in a manner inconsistent with previous decisions or creating a new policy benefiting GTI, any other organization or himself. Nothing the Attorney General has alleged suggests that the Chairman will or even can derive any personal benefit from a decision on this issue or that he can unethically benefit GTI.

Based on the explicit standards for administrative and judicial conduct, a public official such as Chairman Gardner must weigh the possibility of a conflict based on the factors contained in the various statutory and judicial sources. Nothing involved in the decision on the proposed GTI contribution is sufficient to warrant recusal. As the Commission recognized in "Callahan v. Grayson RECC", Case No. 2005-00280, March 15, 2006, p.3:

A motion to recuse is an extreme sanction which must be supported by real and substantial evidence to overcome the presumption that public officers act in good faith in the performance of their duties, See Summit v. Mudd, 679 S.W. 2d 225 (Ky.1984); see also Kroger v. Louisville & Jefferson County Air Bd., 308 S.W.2d 435, 439 (Ky.1957); Rawlings v. City of Newport, 121 S.W.2d 10, 15 (Ky.App. 1938).

There is simply no basis for Atmos Energy to concede an issue or for the Commission to disrupt the case because of the unjustified perception of the Attorney General. Atmos Energy believes the request by the Attorney General should be rejected and that the case proceed unencumbered.

Submitted by:

Mark R. Hutchinson
Wilson, Hutchinson & Littlepage
611 Frederica St.
Owensboro, KY 42303
270 926 5011
Randy@whplawfirm.com

John N. Hughes

John N. Hughes
124 West Todd Street
Frankfort, KY 40601
502 227 7270
jnhughes@johnnhughespsc.com
Attorneys for Atmos Energy
Corporation