

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Application of Atmos Energy Corporation)
for an Adjustment of Rates) Case No.
and Tariff Modifications) 2017-00349

ATMOS ENERGY CORPORATION'S MOTION TO ENFORCE PROCEDURAL ORDER

Atmos Energy Corporation (Atmos Energy), by counsel, objects to the Attorney General's Motion for Leave to File Late Post Hearing Brief and moves to enforce the Order issued on March 26, 2018. The basis for the Attorney General's Motion is that the Commission Staff requested a clarification of three Atmos Energy Post Hearing Responses. The Commission Staff on Thursday, April 12, 2018 issued a supplemental data request to Atmos for clarification of three issues related to the Pipeline Replacement Program (PRP). The responses were due no later than, April, 17, 2018 – the same day simultaneous briefs were scheduled to be filed.

On April, 17 at 3:35 p.m., the Commission Staff notified Atmos that the responses filed by Atmos earlier that day needed additional clarification. Almost immediately, the Attorney General indicated in a series of email messages among the Commission Staff and Atmos, that he would seek to delay the filing of his brief due to the Staff's latest questions to Atmos. The basis of the motion was that the Attorney General's due process right to file his brief had been denied.

Atmos initially objected to this delay by email to Commission Staff and the Attorney General. Subsequently, Atmos filed an Objection into the case file. The AG has

known since last Thursday of the timing of the responses to the Staff's additional questions. He made no objection and waived any opportunity to prevent the issuance of the questions or the response by Atmos. Had the responses filed on April 17th by Atmos been satisfactory, the AG would have had little if any opportunity to modify his brief to address the supplemental information. He now wants to delay the filing of his brief in its entirety based on a very minor clarification of one issue.

It is obvious the Attorney General is using this issue as an excuse to gain additional time to complete his brief. His motion is essentially one of delay to give him the opportunity to file a rebuttal brief. There is no reason to grant his request. He has not been harmed and has not been deprived of his ability to respond to the issues in the case. His brief should have been complete and ready to file yesterday given the timing of this series of events. What he seeks is an unfair advantage based on a very minor correction to the information already in the record.

To grant his motion gives the Attorney General the unfair advantage of responding to the Atmos' brief, without the same opportunity for Atmos to respond to his brief. Atmos proposed allowing the Attorney General to file a supplemental brief on the additional responses related to the Staff's clarifications. That offer was rejected. Given the pending end of the suspension period, there is not time to revise the briefing schedule.

The procedural order issued on March 26th requires simultaneous brief to be filed no later than April 17th and that the case will stand submitted for decision as of 12:01 on April 18th. Atmos filed its brief on April 17th at 1:47PM ET. The Attorney General has not filed his brief.

Subsequent to the filing of the pleadings related to the Attorney General's Motion, the parties received the attached email from Commission counsel. That message states

in part:

“Before the additional Motions/Objections were filed, the Commission Legal Staff provided the option to the Attorney General to file his post-hearing brief tomorrow, and either (1) address the pipeline replacement program in the brief, and then have the opportunity to supplement the brief based on Atmos’ responses, or (2) address the entire pipeline replacement program issue in a supplemental brief...”

This message raises several significant legal and due process issues. First, KRS 278.390 states:

Every order entered by the Commission shall continue in force until the expiration of time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or part, by order or decree of a court of competent jurisdiction

The agreement among the Staff and the Attorney General, which was not made known to Atmos until after it had been accepted by them, violates the procedural order of March 26th and KRS 278.390. Pursuant to the statute, only the Commission not the Staff can modify an order. The agreement among the Staff and the Attorney General not only modifies the order by extending the filing date of the Attorney General’s brief, it provides an option for the Attorney General to dictate the terms of the procedural schedule and it negates the Commission’s directive that the case be submitted for decision after 12:01 a.m. on April 18th.

As the Commission acts and speaks only through its Orders, the Commission may modify an order only through the issuance of an order. In Union Light Heat & Power Co. v. Pub. Serv. Com’n, Ky., 271 S.W.2d 361, 365 (1954), the Court said: “the commission, like a court, acts and speaks only through its written orders”. In Commonwealth ex rel. Stephens v. South Central Bell Telephone Company, Ky., 545 S.W.2d 927, 931 (1976), Kentucky’s highest court stated:

It is as obvious as the acropolis of Athens that an order of the commission continues in force until revoked or modified by the commission or unless suspended or vacated in whole or in part by the Franklin Circuit Court...

Given the explicit statutory and judicial requirements of an order to modify an order, the unilateral agreement expressed in the Staff's email is void and has no lawful effect. The requirement for the filing of the briefs on April 17th has not been changed. The Attorney General is well aware of the statutory authority of the Commission. His role as Attorney General is to enforce the law, not ignore it. He cannot claim that he has been harmed, prejudiced or that his due process rights have been violated. He has knowingly participated in a violation of the statute and accepted the risk associated with that violation. His actions should not be rewarded by allowing him to file his brief.

The second issue involved in this matter of the agreement among the Staff and the Attorney General is the violation of the prohibition of *ex parte* contacts. As the attached email states, the Commission Staff and the Attorney General agreed to the extension of the time for the Attorney General to file his brief, before the pleadings were filed. Atmos was not a party to these discussions and was not aware of this prior agreement when it filed its objection to the Motion.

The standard for determining *ex parte* violations is set forth in *Louisville Gas and Electric Co. v. Cowan*, 862 S.W.2d 897 (Ky. App. 1993). In *Cowan* the Kentucky Court of Appeals declared that:

"*ex parte* contacts make administrative agencies' decisions voidable, not void per se." The *ex parte* contact, however, must be an improper *ex parte* contact. An improper contact relates to the merits of the proceeding! "Legitimate procedural and status inquiries" are not improper. An improper *ex parte* contact is one that so taints an administrative decision so as to make it unfair either to the innocent party or to the public interest the agency is supposed to protect."

The Court in *Cowan* further described the analysis of any *ex parte* contact that must

be performed:

The question of whether a decision has been tainted requires analysis of whether the improper contacts may have influenced the agency's ultimate decision; whether the contacting party benefited from the decision; whether the contents of the contact were disclosed; and whether vacation and remand would serve a useful purpose. In analyzing the issue we must be concerned with protecting the integrity of the administrative process, which includes the question of the appearance of impropriety from *ex parte* contacts, and the fairness of the result."

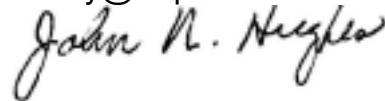
In this case, the *ex parte* contact actually affected a Commission decision – it led to the Staff modifying an order allowing the Attorney General additional time to file his brief; the contact among the Staff and the Attorney General was not disclosed to Atmos until after their agreement had been finalized; the integrity of the administrative process has been tainted by the extra-legal actions of the Attorney General; and the conduct of the Attorney General certainly gives the appearance of impropriety. The result of this conduct is to taint the fairness of the hearing process.

The only fair remedy is to enforce the terms of the March 26th order and reject any brief tendered subsequent to that date. Any other outcome will be a violation of KRS 278.390 and the Court's ruling in *Cowan, supra*. If there is additional information filed into the record subsequent to that date, the Attorney General could be allowed to file a brief on that limited additional information.

For these reasons, Atmos asserts that the agreement among the Staff and the Attorney General be rejected and that the briefing schedule contained in the Order of March 26, 2018 be enforced.

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Certification:

I certify that this is a true and accurate copy of the documents to be filed in paper medium; that the electronic filing was transmitted to the Commission on April 18, 2018; that six copies of the filing will be delivered to the Commission within two days; and that no party has been excused from participation by electronic means.