COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ATMOS ENERGY CORPORATION FOR AN ADJUSTMENT OF RATES	)))	Case No. 2018-00281

Atmos Energy's Response to Attorney General's Motion To Compel Discovery

Atmos Energy Corporation (Atmos Energy or Company), by counsel, responds to the motion to compel filed by the Attorney General on December 21, 2018. Pursuant to the Commission's Order of October 26, 2018, the parties have engaged in the initial round of discovery. The Attorney General's motion to compel seeks additional data in response to his question AG 1-30 – data that does not exist. The Attorney General believes that Atmos Energy must provide information that is unrelated to the response provided and which it does not have. The primary basis for his motion is stated on page 1:

> Neither Atmos, nor any other jurisdictional utility should be able to dictate the terms of its ratemaking by withholding critical information, or not performing calculations, especially when doing so would result in ratemaking that is inconsistent with prior Commission orders.

The Attorney General cites no authority supporting his demand for additional discovery. The Commission generally follows the guidelines of the Kentucky Rules of Civil Procedure (CR) in deciding issues related to discovery.

> KRS 278.310 provides that the Commission is not bound by the technical rules of legal evidence, and the applicability of the Kentucky Rules of Civil Procedure is limited to civil actions in the Court of Justice. However, in adjudicating discovery disputes of this nature, we find it appropriate to

consider CR 26.02(1), which delineates the scope of discovery in judicial proceedings. Order dated September 1, 2011, in *In the Matter of Application of Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge,* Case No. 2011-00162.

Civil Rule 26.02 states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including **the existence, description, nature, custody, condition and location of any books, documents, or other tangible things** and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added)

The scope of this rule is further explained in CR 34.01:

> Any party may serve on any other party a request (a) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample **any tangible things which constitute or contain matters within the scope of Rule 26.02 and which are in the possession, custody or control of the party** upon whom the request is served; or (b) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26.02.

Based on these rules, a party may discover documents or tangible things in existence that are in the possession of another party. In this case, the study sought by

the Attorney General does not exist. A party cannot be required to provide something it does not have. The Commission has recognized this principle:

> The Commission does agree with Columbia that CR 26.02 and the cited cases support the argument that a "study" not in existence should not be the subject of discovery. However, "study" implies not only compilation and computation, but also the application of analytical thought to the information provided. The Commission, therefore, finds that items Set A, number 74, and Set B, number 21, as requiring "studies" to be performed, should be exempted from operation of the April 20, 1989 Order. *Application for an Adjustment of Rates of Columbia Gas*, Case No. 10498, *Order* dated April 26, 1989.

Further, a party cannot be compelled to prepare evidence that is solely for the purpose of assisting an opposing party prove its case. With respect to requests for documents and other tangible things, CR 34.02 permits a party to serve requests upon another party to produce or make available documents or other "tangible things which constitute or contain matters within the scope of Rule 26.02 and which are in the possession, custody or control of the party upon whom the request is served . . . . (emphasis added). Creating new documents for the benefit of the opposing party is not allowable under this rule. See *Schulte v. Potter*, 218 Fed Appx. 703, 706 (10th Cir. 2007):

> A magistrate judge held a hearing and, on July 2, 2004, issued a written order denying the motion [to compel] because there were "no responsive documents in existence," and stating that he would not require the USPS to create reports based on "statistics concerning the age of Defendant's work force.

Under CR 34.02, a party responding to discovery is under a duty to search for and ascertain whether the requested **documents exist**. *Wal-Mart Stores v. Dickinson,* 29 S.W.3d 796, 804 (Ky. 2000). The Attorney General has cited no authority for the proposition that a responding party must generate new forms of data or new documents

solely for purposes of responding to a discovery request. Indeed, the responding party is only required to produce existing information and documents within its possession, custody and control that have been identified with sufficient particularity to permit that party to effectively respond. *See* CR 34.01, 34.02 and 26.02; *See also, Sithon Maritime Co. v. Holiday Mansion,* 1998 U.S. Dist. LEXIS 5432 at *27 (D. Kan. 1998) (electronic publication only): A "court cannot compel a defendant to produce documents that it does not have." *Sithon Maritime Co.,* 1998 U.S. Dist. LEXIS at *27. This same limitation was referenced in *Fadem v. Am. States Preferred Ins. Co.* 2014 U.S. Dist. LEXIS 6312 *; 2014 WL 202176 (citations omitted): "a party, however, is not required to create a document where none exists."*;…"*a document request that would require the defendant to create a roster of all employees who supervised the prison cage yard is not a proper request under *Federal Rule of Civil Procedure 34(a)*)"; "[A] defendant is not required to create a document in response to a request for production."

Not only is there no legal support for the motion to compel, the Attorney General's motion is unjustified and unnecessary. He has the capability of preparing any type of study he believes is relevant to this proceeding. The Attorney General has retained in this case the same depreciation expert he retained in Atmos Energy's prior two rate cases, Case Nos. 2015-00343 and 2017-00349. In the 2015 case, the totality of the data underlying the company's depreciation study was provided. The Commission asked for and was provided the same information in this proceeding. See PSC DR 1-64. The Attorney General's witness expressly identifies himself as an expert in depreciation. He has testified extensively in regulatory matters pertaining to depreciation. Given his experience and the availability of the necessary information to

complete a study, the Attorney General should have his witness prepare any study it believes is appropriate.

The Attorney General refers to a “proprietary” program and describes it as “necessary” to conduct his preferred study. However, the program used by Atmos Energy’s witness is available to the Attorney General’s witness and is not the exclusive program available for preparing a depreciation study. The Attorney General’s witness has the same access to the various programs capable of completing his study as any other expert witness has. His failure to avail himself of a computer program necessary to attempt to substantiate his theory of the case is solely in his control and is not a valid basis to compel Atmos Energy to conduct and provide an additional study.

The Attorney General’s assertion that the Company is somehow trying to “dictate” the terms of its ratemaking by refusing to produce something the Attorney General can produce itself is simply wrong. The Company is not trying to “dictate” anything. The Attorney General’s motion to compel is unfounded and should be denied for both legal and equitable reasons.

The Attorney General has not provided any legal support, including any precedent of this Commission, for his effort to compel the Company to perform and produce a study that does not exist. The legal authority cited above, in fact, supports the Company’s position that the motion to compel should be denied. It would also be inequitable for the Commission to order a party to undertake a study that the requesting party can perform itself. Here, all of the information needed to perform the study desired by the Attorney General is in the record and can be performed by the Attorney General’s experts. The Commission should not compel one party to perform a study an

opposing party is capable of performing itself simply to accommodate the requesting party.

The Attorney General's motion presumes that the Commission has already ruled on the issue of the appropriate depreciation methodology for all rate cases in Kentucky. It has not and it would be premature to rule on that issue in this case before the record is complete and briefs filed. The only issue at this point is appropriateness of the Attorney General's request.

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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 December 28,

2018; that one copy of the filing will be delivered to the Commission within two days; and that no party has been excused from participation by electronic means.