

Decision No. R14-0551-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0153G

IN THE MATTER OF THE APPLICATION OF ATMOS ENERGY CORPORATION FOR AN ORDER GRANTING IT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO IMPLEMENT THE GREELEY BUILDING PROJECT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
DENYING MOTION *IN LIMINE***

Mailed Date: May 22, 2014

I. STATEMENT, FINDINGS, AND CONCLUSIONS

1. Only those portions of the procedural history necessary to understand this Decision are included.

2. On February 19, 2014, Atmos Energy Corporation (Atmos) filed an Application for an Order Granting It a Certificate of Public Convenience and Necessity to Implement the Greeley Building Project.

3. The Colorado Office of Consumer Counsel (the OCC) timely intervened in this proceeding.

4. On March 12, 2014, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ) for disposition.

5. The ALJ established a procedural schedule on March 24, 2014 after the prehearing conference. Decision No. R14-0322-I. Consistent with the procedural schedule, the OCC filed its Answer Testimony on April 22, 2014, and Atmos filed Rebuttal Testimony on May 8, 2014.

6. On May 13, 2014, the OCC filed a “Motion *in Limine* to Exclude New Evidence on Rebuttal and Request for Shortened Response Time” (Motion). The Motion sought a shortened response time to May 16, 2014. Also on May 13, 2014, Atmos filed a “Response to Request for Shortened Response Time to the Motion *in Limine*.”

7. On May 15, 2014, the ALJ shortened the response time to the Motion to May 20, 2014. Decision No. R14-0525-I.

8. Atmos filed a “Response to Motion *in Limine* to Exclude New Evidence on Rebuttal” on May 20, 2014.

9. The Motion requests that large portions of David D. Hergenreder’s Rebuttal Testimony, and exhibits thereto be stricken and excluded from evidence. As grounds therefore, the OCC argues that the referenced evidence bolsters Mr. Hergenreder’s Direct Testimony, is not responsive to the OCC’s Answer Testimony, amounts to a new direct case, or raises new issues, concepts or refinements. The OCC argues that if the testimony is not stricken, it will be unduly prejudiced because the evidence has been offered too late after the OCC filed its Answer Testimony.

A. Applicable Legal Standards and Conclusions

10. Rule 1501(a) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations*, 723-1, requires the Commission, to the extent practical to conform to the Colorado Rules of Evidence. However, Rule 1501(a) is explicit that the Commission is not bound to the technical rules of evidence and that the Commission may receive and consider evidence not admissible under the rules of evidence. Thus, the Commission has discretion to admit or refuse to admit evidence.

11. Rebuttal evidence is used to contradict an adverse party's evidence. *People v. Trujillo*, 49 P.3d 316, 320 (Colo. 2002). This type of evidence is generally substantive, may support the party's case-in-chief, and is presented after the opposing party has presented its evidence. *Id.* Rebuttal evidence “explains, refutes, counteracts, or disproves the evidence put on by the other party.” *Id.*, quoting *People v. Rowerdink*, 756 P.2d 986, 994 (Colo. 1988). The Commission has the discretion to admit rebuttal evidence. *Id.*

12. The OCC argues that admission of the rebuttal evidence at issue would be prejudicial to it, and the evidence should be stricken as permitted by Rule 403 of the Colorado Rules of Evidence. The OCC further argues that the disputed evidence should be stricken because it is either: not responsive to the OCC's Answer Testimony, bolsters Mr. Hergenreder's Direct Testimony, amounts to a new direct case, or raises new issues, concepts or refinements. Under the circumstances here, the ALJ disagrees and will deny the Motion.

13. The ALJ finds that the disputed rebuttal evidence is relevant and material. The disputed rebuttal evidence is responsive to the OCC's Answer Testimony; it attempts to disprove, refute, or contradict the OCC's Answer testimony. While it is true that the disputed rebuttal evidence provides more specific information not included in the Direct Testimony and Exhibits, in large part, the evidence elaborates upon topics discussed in the Direct Testimony.¹

14. The disputed rebuttal evidence was filed on May 8, 2014. The hearing is scheduled for May 28, 2014. Thus, by the time of the hearing, the OCC will have notice of the rebuttal evidence for 20 days by the time of the hearing. Nevertheless, to eliminate prejudice to the OCC in receiving that information after it submitted its Answer Testimony, the ALJ will

¹ This is not to say that the ALJ approves of a litigant's strategy to withhold presenting crucial evidence until its rebuttal case.

permit the OCC an opportunity to respond to that evidence during the evidentiary hearing. The OCC may do so through the presentation of evidence and legal argument.² That presentation should be narrowly limited to responding to the disputed rebuttal evidence identified in the Motion.

II. ORDER

A. It Is Ordered That:

1. The Office of Consumer Counsel's (the OCC) "Motion in Limine to Exclude New Evidence on Rebuttal and Request for Shortened Response Time" (Motion) is denied.

2. The OCC may present evidence and legal argument during the evidentiary hearing in this matter responding to the disputed rebuttal evidence identified in the Motion. That presentation is narrowly limited to responding to the disputed rebuttal evidence identified in the Motion.

² To further minimize any prejudice, the ALJ informally notified the parties of this ruling via email on the evening of May 21, 2014, the day after Atmos filed its Response.

3. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads 'Doug Dean'.

Doug Dean,
Director