

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the Matter of the Complaint of Atmos Energy)	Docket No. 17-CONS-3509-CMSC
Against Endeavor Energy Resources, L.P. Relating)	
to the Stegmeir #23-1 Well Located in the SW/4)	CONSERVATION DIVISION
SW/4 SW/4 of Section 23, Township 33 South,)	
Range 17 East, Labette County, Kansas.)	License No: 31769
_____)	

ORDER ON ATMOS ENERGY'S COMPLAINT

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having reviewed its files and records, and being fully advised in the premises, the Commission makes the following findings and conclusions:

I. Background

1. On March 2, 2017, Atmos Energy Corporation (Atmos) filed a Complaint against Endeavor Energy Resources, L.P. (Endeavor).¹ The Complaint noted Atmos' ownership of the Liberty North Underground Gas Storage Facility (Underground Gas Storage Facility), wherein Atmos "stores gas in the Squirrel Sand underground formation."² The Complaint stated that Atmos' Underground Gas Storage Facility encompasses the West Half of Section 23, Township 33 South, Range 17 East, in Labette County, Kansas.³

2. Atmos' Complaint stated that Endeavor owns and operates the Stegmeir #23-1 well (Well) and that Commission records indicate "the Well is producing gas from the Squirrel Sand Formation at a depth below surface of 454-467 feet."⁴ Based on the above, Atmos argued that "the Well is located within the boundaries of Atmos Energy's Underground Gas Storage

¹ Docket No. 17-CONS-3509-CMSC, Complaint, p. 1 (Mar. 2, 2017) (Complaint).

² *Id.*, ¶ 3.

³ *Id.*

⁴ *Id.*, ¶ 6.

Facility and is producing gas from the same underground formation being used by Atmos Energy to inject and store gas.”⁵ Thus, the Complaint asked the Commission to find, pursuant to K.S.A. 55-1210, that Endeavor has no right to produce gas from its Well because “the gas produced from the Well is the *property of Atmos Energy*.”⁶

3. Atmos asserted that K.S.A. 55-1210(c)(2) gives it the right to test the gas produced from Endeavor’s Well “as may be reasonable to determine *ownership of gas*.”⁷ Atmos claimed it has sought Endeavor’s permission to sample gas from Endeavor’s Well to see if the gas belongs to Atmos.⁸ The Complaint requested a Commission order allowing Atmos to sample the gas produced from Endeavor’s Well so that Atmos may “conduct tests *to determine ownership of the gas*.”⁹

4. On March 2, 2017, Atmos also filed a Motion for [an] Order to Test [the] Well Pursuant to K.S.A. 55-1210(c)(2) (Motion to Test), specifically asking the Commission to allow Atmos to conduct tests on the Well to determine whether gas being produced from the Well is Atmos’ gas.¹⁰ Atmos stated its belief “that Endeavor is producing injected gas *owned by Atmos Energy* from the Well.”¹¹ Atmos further stated: “In order to confirm whether the Well is producing injected gas *owned by Atmos Energy* from the Well, Atmos Energy has requested on several occasions that Endeavor permit Atmos Energy to take gas samples of the gas at the wellhead of the Well.”¹² Atmos reiterated its request for a Commission order allowing it to sample the gas from the Well “*to determine ownership of the gas produced from the Well*.”¹³

⁵ *Id.*

⁶ *Id.*, ¶ 10. (Italics added).

⁷ *Id.*, ¶ 12. (Italics added).

⁸ *Id.*, ¶ 13.

⁹ *Id.*, ¶ 14.

¹⁰ Motion to Test, p. 1 (Mar. 2, 2017).

¹¹ *Id.*, ¶ 6. (Italics added).

¹² *Id.*, ¶ 7. (Italics added).

¹³ *Id.*, ¶ 12. (Italics added).

5. Both Atmos' Complaint and Motion to Test are devoid of any mention of pollution or gas leaks with respect to the Well.

6. On March 13, 2017, Endeavor filed a Motion to Dismiss, asking the Commission to dismiss Atmos' Complaint, deny Atmos' Motion to test the Well and order Atmos to pay Endeavor's costs, expenses and reasonable attorney fees in this matter.¹⁴ Endeavor argued that dismissal is warranted because: (1) the Commission lacks jurisdiction to determine property rights pertaining to minerals produced from subsurface formations;¹⁵ and (2) Atmos' Complaint relies on factual misstatements.¹⁶

7. Endeavor's Motion to Dismiss asserted that K.S.A. 55-1210(c)(3) entitles Endeavor to its costs, expenses and attorney fees in defending against Atmos' Complaint.¹⁷

8. On March 22, 2017, Staff responded to Endeavor's Motion to Dismiss, affirming Endeavor's contention that the Commission lacks jurisdiction or authority to determine a party's property rights regarding minerals produced from subsurface formations and to order testing of the Well.¹⁸ Staff's response took no position on Atmos' alleged factual misstatements or Endeavor's request for attorney fees.¹⁹

9. On March 24, 2017, Atmos also responded to Endeavor's Motion to Dismiss, claiming that Endeavor's two grounds for dismissal were mistaken.²⁰ Atmos' Response to Endeavor first attempted to refute Endeavor's arguments regarding the factual statements in Atmos' Complaint.²¹ Atmos then contended that the jurisdictional question is a "red herring"

¹⁴ Motion to Dismiss, p. 6 (Mar. 13, 2017).

¹⁵ *Id.*, ¶¶ 8-10.

¹⁶ *Id.*, ¶¶ 11-12.

¹⁷ *Id.*, ¶ 13.

¹⁸ Staff's Response to Endeavor's Motion to Dismiss, ¶ 7 (Mar. 22, 2017).

¹⁹ *Id.*, ¶ 8.

²⁰ Atmos Energy's Response to Endeavor's Motion to Dismiss, ¶¶ 1-2 (Mar. 24, 2017) (Atmos' Response to Endeavor).

²¹ *See Id.*, ¶¶ 3-22.

because “Atmos Energy is not requesting the determination of property rights.”²² Atmos stated that its initial complaint was “[p]erhaps . . . worded awkwardly in that it could be read to be asking the Commission for a determination of property rights.”²³ However, discarding that reading, Atmos claimed that its Complaint was only asking the Commission to:

“(1) make a determination that the Squirrel sand formation underlying the subject property is part of the Liberty Facility, (2) order that Endeavor plug back the Squirrel formation using a permanent cement plug, (3) order that the Stegmeir 23-1 well be tested to determine if it is or has been producing gas from the Liberty Facility, and (4) enjoin Endeavor from further production until the risk of pollution and/or dangerous gas leaks can be ascertained and dealt with.”²⁴

10. Atmos agreed that K.S.A. 55-1210 does not authorize “the Commission to enjoin production or test wells *to determine or establish property rights to the gas therein*.”²⁵ Yet Atmos reiterated that it “is not requesting that the Commission determine who owns the gas being produced from the Stegmeir well, but only that the Commission determine whether gas from the Squirrel formation is leaking at the Stegmeir 23-1 well.”²⁶ Atmos pressed the Commission’s obligation to address pollution in Kansas, and thus, its obligation to prevent well production where necessary.²⁷

11. Atmos also argued that Endeavor misread K.S.A. 55-1210, and therefore, is not entitled to attorney fees.²⁸ Atmos specifically asserted that “this administrative action is not ‘litigation’ as that term is used in K.S.A. 55-1210. The ‘litigation’ contemplated would be an action commenced in the district court to determine property rights to gas that migrates to land that has not been condemned or purchased for gas storage purposes.”²⁹

²² *Id.*, ¶ 24.

²³ *Id.*, ¶ 25.

²⁴ *Id.*

²⁵ *Id.*, ¶ 28. (Italics in original).

²⁶ *Id.*, ¶ 29.

²⁷ *Id.*, ¶ 32.

²⁸ *Id.*, ¶¶ 34-41.

²⁹ *Id.*, ¶ 40.

12. On March 28, 2017, Atmos replied to Staff's response to Endeavor's Motion to Dismiss (Atmos' Reply to Staff), requesting that the Commission grant Atmos leave to file an amended complaint³⁰ because, "[a]s elaborated on in Atmos Energy's Response to Endeavor's motion, Atmos is not asking for a determination of property rights in this administrative action."³¹

13. Atmos' Reply to Staff argued that, with respect to gas storage fields, the Commission has jurisdiction to address pollution of soils or waters in Kansas.³² Atmos further averred that "the testing of gas wells in an effort to *prevent* pollution of the soils and water of the state are well within the Commission's power."³³

14. Atmos conceded again that its Complaint "may have been worded inadequately in that it seemed, on its face, to call for the litigation and determination of property rights before the Commission."³⁴ However, "[t]hat is not what Atmos Energy requests."³⁵ Atmos therefore appealed to K.A.R. 82-1-220(c) as a basis for giving it the opportunity to amend its Complaint.³⁶

15. On March 31, 2017, Endeavor replied to Atmos' response to its Motion to Dismiss, arguing again for dismissal because "[t]he Commission lacks jurisdiction to address the issues raised in this Complaint,"³⁷ and "[i]t would not be appropriate to allow Atmos to file a completely new Complaint that bears no resemblance whatsoever to the original Complaint under the guise of an 'amendment' of its pleadings."³⁸

16. On April 18, 2017, Atmos filed a Reply to Endeavor's Reply, arguing that the Commission has jurisdiction "to determine whether SW/4 SW/4 SW/4 of Section 23, Township

³⁰ Atmos Energy's Reply to Staff's Response to Endeavor's Motion to Dismiss, ¶ 13 (Mar. 28, 2017).

³¹ *Id.*, ¶ 8.

³² *Id.*, ¶ 5.

³³ *Id.*, ¶ 7. (Italics in original).

³⁴ *Id.*, ¶ 11.

³⁵ *Id.*

³⁶ *Id.*, ¶ 12.

³⁷ Reply to Atmos Energy's Response to Endeavor's Motion to Dismiss, ¶ 10 (Mar. 31, 2017) (Endeavor's Reply)

³⁸ *Id.*

33 South, Range 17 East (“Land”) is included within the Liberty Gas Storage Facility (“Liberty Facility”) permit that was approved by the KCC.”³⁹ Atmos claimed that its original Complaint “cannot feasibly be construed to not include a request to determine that the Land is within the KCC permitted boundaries of the Liberty Facility.”⁴⁰ Atmos further argued that the Commission has the legal duty to determine Kansas Underground Gas Storage Facility boundaries owned by companies like Atmos, and therefore, the determination of the Liberty Facility boundaries “is squarely within the KCC’s jurisdictional powers and is clearly in dispute between Atmos Energy and Endeavor and should be resolved as part of this complaint proceeding.”⁴¹ Atmos argued that Endeavor’s claims regarding its lease at issue were mistaken,⁴² and that “[t]he Commission should accept Atmos Energy’s Response as an amendment or grant Atmos Energy leave to file a formal amended complaint in the interests of efficiency and justice.”⁴³

II. Discussion

17. Based on the above factual background, Atmos’ Complaint and Motion to Test solely addressed ownership of the gas being produced by Endeavor’s Well⁴⁴ and have nothing to do with determining whether the Squirrel Sand formation is part of Atmos’ Underground Gas Storage Facility, with cement plugs being used for a plug back, or with pollution and/or gas leaks.⁴⁵ Any determination Atmos has sought on the question of whether the Well is or has been producing gas from the Underground Gas Storage Facility has been exclusively for the purpose of ascertaining the ownership of that gas.⁴⁶ As Endeavor pointed out, “[t]here is no mention of

³⁹ Atmos Energy’s Reply to Endeavor’s Reply, ¶ 1 (Apr. 18, 2017).

⁴⁰ *Id.*, ¶ 2.

⁴¹ *Id.*, ¶ 3.

⁴² *Id.*, ¶¶ 4-5.

⁴³ *Id.*, ¶ 6.

⁴⁴ See ¶¶ 1-5 of this Order, *supra*.

⁴⁵ See ¶ 9 of this Order, *supra*.

⁴⁶ See ¶¶ 2-5 of this Order, *supra*.

the threat of pollution or dangerous gas leaks of any kind whatsoever, nor is there any mention of any public health and safety interests in the entire body of the Complaint.”⁴⁷

18. Atmos did not “inadequately” or “awkwardly” word its Complaint such that it could be confused with a request for a property rights determination instead of a request pertaining to pollution, leaks, casing materials and formations underlying the storage facility.⁴⁸ Rather, Atmos explicitly asked the Commission to order injunctive relief stopping Endeavor from producing gas from the Well because the gas is Atmos’ property.⁴⁹ The Commission finds Atmos attempted a wholesale mid-course change in the nature and purpose of its Complaint. Therefore, the Commission rejects Atmos’ claim that it “is not asking for a determination of property rights in this administrative action.”⁵⁰

19. Atmos’ invocation of K.A.R. 82-1-220(c) as a proper basis for leave to amend its Complaint is also unavailing. K.A.R. 82-1-220(c) requires the Commission to examine a formal complaint “to ascertain whether or not the allegations, if true, would establish a prima facie case for action by the commission and whether or not the formal complaint conforms to these regulations.” It is one thing for the Commission to determine a prima facie case based on the Complaint’s stated allegations, and an entirely different thing to determine whether a prima facie case can be made on an entirely different complaint based on a set of factual allegations not asserted in the original Complaint and not supported in any of Atmos’ pleadings.⁵¹

20. The Commission notes that its procedural standards under K.A.R. 82-1-220 require more than the notice standards under the Kansas rules of civil procedure.⁵² This is why

⁴⁷ Endeavor’s Reply, ¶ 3.

⁴⁸ See Atmos’ Reply to Staff, ¶ 9.

⁴⁹ See Complaint, ¶ 10.

⁵⁰ Atmos’ Reply to Staff, ¶ 8; see Complaint, ¶ 10.

⁵¹ See Endeavor’s Reply, ¶¶ 1, 3, 5 and 10.

⁵² See *Boydston v. Bd. of Regents for State of Kan.*, 242 Kan. 94, 98, 744 P.2d 806 (1987) (stating that “[t]he short and plain statement of a claim is sufficient if it gives the defendant ‘fair notice of what the plaintiff’s claim is and the ground upon which it rests’”).

the Commission has from time-to-time waived K.A.R. 82-1-220's procedural requirements or permitted a complainant to amend its complaint to either change its legal argument or include additional facts. However, Atmos' Complaint here is distinguishable from that amendment scenario because Atmos is not changing its legal theory or providing new information to support its Complaint. Instead, Atmos has twice alleged a completely new cause of action mid-proceeding.⁵³ Hence, the Commission finds no basis to waive the requirements of K.A.R. 82-1-220, and thus, no basis to grant Atmos an opportunity to amend its Complaint.

21. In addition, Atmos' Complaint does not contain any of K.A.R. 82-1-220(c)'s enumerated "defects" that would prevent the Commission from determining whether Atmos has established a *prima facie* case regarding ownership of the gas coming from Endeavor's Well.⁵⁴ Instead, Atmos' Complaint made a clear and coherent case that Atmos owns the gas being produced from Endeavor's Well, and thus, Endeavor should be enjoined from producing that gas, and Atmos should be granted permission to test the gas to confirm its ownership.

22. Atmos' Reply to Endeavor's Reply is also unavailing because it does not advance a claim for which relief may be granted. Even were the Commission to grant Atmos' assertion that the boundaries of the Liberty Storage Facility are "clearly in dispute" in this docket⁵⁵ and make a finding as to "whether [Endeavor's] Land is located within the KCC permitted boundaries of the Liberty Facility,"⁵⁶ it would not follow from such a determination that the Commission can provide Atmos any jurisdictionally-permissible relief. In other words, asking the Commission to determine the boundaries of an Underground Storage Facility is not a complaint at all. It does not allege a violation of law, regulation or Commission order.⁵⁷

⁵³ See ¶¶ 9, 13 and 16 of this Order, *supra*.

⁵⁴ See K.A.R. 82-1-220(c).

⁵⁵ Atmos' Reply to Endeavor's Reply, ¶ 3.

⁵⁶ *Id.*, ¶ 7.

⁵⁷ See K.A.R. 82-1-220(b).

23. The fact is, Atmos originally complained that Endeavor was unlawfully taking Atmos' gas.⁵⁸ Asking the Commission to make a determination that Endeavor's Land is within the Commission-permitted boundaries of the Liberty Underground Storage Facility does not change the nature of Atmos' Complaint and instead appears to be an oblique attempt by Atmos to get to the question of gas ownership, over which the Commission has no jurisdiction.⁵⁹

24. K.S.A. 55-1210(d) gives an injector of gas "the right to compel compliance with this section by injunction or other appropriate relief by application to a court of competent jurisdiction." Atmos itself admits "the Commission is not the proper venue to litigate and determine property rights."⁶⁰ Indeed, Atmos affirmed: "Endeavor is correct that K.S.A. 55-1210 does not give the authority to the Commission to enjoin production or test the wells *to determine or establish property rights to the gas therein*."⁶¹

25. Because Atmos' Complaint seeks a property rights determination regarding the gas being produced from Endeavor's Well, and because the Commission lacks jurisdiction to make such a determination under K.S.A. 55-1210(d), the Commission dismisses Atmos' Complaint.

26. Concerning Endeavor's request for costs, expenses and attorney fees,⁶² the Commission disagrees with Endeavor's interpretation of K.S.A. 55-1210(c)(3) and finds that Endeavor is not entitled to an award of such costs, expenses and fees. Endeavor cannot properly argue that issues arising pursuant to K.S.A. 55-1210 must be litigated in a court of law, rather than before the Commission,⁶³ and also argue that the Commission, rather than the court of law, may award costs, expenses and attorney fees under the auspices of that same statute. When

⁵⁸ See ¶¶ 2-4 of this Order, *supra*.

⁵⁹ See ¶¶ 24-25 of this Order, *infra*.

⁶⁰ See Atmos' Reply to Staff, ¶ 2.

⁶¹ Atmos' Response to Endeavor, ¶ 28. (Italics in original).

⁶² See ¶ 7 of this Order, *supra*.

⁶³ See Motion to Dismiss, ¶ 9.

K.S.A. 55-1210 is read together as a whole, the Commission agrees that “[t]he ‘litigation’ contemplated would be an action commenced in the district court to determine property rights to gas.”⁶⁴ Hence, the Commission lacks jurisdiction both to make a property rights determination and to award costs, expenses and attorney fees.

THEREFORE, THE COMMISSION ORDERS:

A. Atmos’ Complaint is dismissed and its Motion for Order to Test Well Pursuant to K.S.A. 55-1210(c)(2) is denied.

B. Endeavor’s request for an award of costs, expenses and reasonable attorney fees incurred in defending this action is denied.

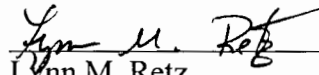
C. The parties have fifteen days from the date this Order was electronically served to petition for reconsideration.⁶⁵

D. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders, as necessary.

BY THE COMMISSION IT IS SO ORDERED.

Apple, Chairman; Albrecht, Commissioner; Emler, Commissioner

Dated: MAY 18 2017


Lynn M. Retz
Secretary to the Commission

MJD

⁶⁴ See Atmos’ Response to Endeavor, ¶ 40; see also Endeavor’s Reply, ¶ 2, which itself seems to “inadvertently” support Atmos’ argument and the Commission’s finding pertaining to attorney fees.

⁶⁵ K.S.A. 66-118b; K.S.A. 77-529(a)(1).

CERTIFICATE OF SERVICE

I certify that on May 18, 2017, I caused a complete and accurate copy of this Order to be served via United States mail, with the postage prepaid and properly addressed to the following:

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