BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Atmos Energy Corporation's Tariff Revision Designed to Consolidate Rates and Implement a General Rate Increase for Natural Gas Service in the Missouri Service Area of the Company	))))))	**GR-2006-0387**

APPLICATION BY HANNIBAL REGIONAL HOSPITAL
FOR LIMITED REHEARING, RECONSIDERATION OR MODIFICATION

COMES NOW Hannibal Regional Hospital (Applicant) and through its attorneys seeks reconsideration or rehearing of the Commission's Order Concerning Test Year and True-Up and Adopting Procedural Schedule ("Order") dated June 2, 2006 and in particular Paragraph F (p. 5) and the related ruling in Paragraph ORDERED 5 (p. 7) thereof:

A. Timeliness of This Application.

The subject Order was issued on June 2, 2006 and stated to be effective that same date. Missouri law requires that any such order[1/] be issued with a reasonable time within which to seek rehearing or reconsideration. Failure to provide such a reasonable period, which Missouri courts have construed as not less than 10 days, results in such a period being imposed by law. Else parties are denied the opportunity to seek rehearing of an order before they even see it. This Application, filed within 10

[1/] It cannot seriously be argued that an order that seeks to limit rights that are granted by state statute does not have substantive effect.

days of the June 2, 2006 date, is, accordingly, timely. Indeed, Judge Brown of the Cole County Circuit Court has previously chastened the Commission for attempting to make its orders impervious to review by declaring them effective simultaneously with their issuance.

B. The Commission's Advance Limitation on the Length of Post-Hearing Briefs is Arbitrary, Capricious, Unreasonable, Violates Governing Missouri Law and Public Policy.

In Paragraph F of its June 2, 2006 Order (p. 5), the Commission rules in advance on page lengths for post-hearing briefs. Later, at page 7, the Commission includes a referencing limitation in Paragraph ORDERED 5. Paragraph F states:

> Since the prehearing briefs will cover most of the record, posthearing briefs will not need to be very lengthy, and will be limited to ten pages in length. Posthearing briefs will generally just need to update the prehearing briefs for new evidence adduced at the hearing.

It is arbitrary to seek to limit the length of any post-hearing brief before the record is complete and, indeed, months before the hearing has even been held and any intelligent guess can be made regarding its actual length, the issues that will be tried and the issues that may be resolved without trial. Moreover, there is no competent and substantial evidence to support such a decision. Such decisions are best left to the end of the hearing. At that time the number and complexity of the issues that the Commission must resolve will be known. The

extent of the record necessary to be analyzed as well as the exhibits to be addressed with also be known.

The quoted paragraph makes the assumption that the prehearing briefs will "cover much of the record" but fails to recognize that in many instances the length of the hearing is less controlled by the parties and what they file as by the questions that are posed by various commissioners, the need for additional questions and activity following those questions, the additional rounds of cross-examination that may be necessitated by those questions, and the need to consider exhibits that may be produced or requested during those exchanges.

The Commission's apparent shift in reliance to a pre-hearing brief and a statement that the only purpose served by post-hearing briefs is to "update the prehearing briefs for new evidence adduced at the hearing" is troubling. Certainly a pre-hearing brief is a useful addition to the procedure.[2/] Appropriately used, a pre-hearing brief can succinctly state the issues and articulate the party's position on those issues. A prehearing brief can also identify specific legal issues that may arise in the case and provide the submitting parties an opportunity to make initial arguments regarding those issues.

[2/] Actually, this practice is neither new nor inventive. For a number of years the practice of a "hearing memorandum" was followed. However, that document grew so lengthy and its preparation became so cumbersome that it was abandoned in favor of "statements of position" which include all the material necessary to orient the Commissioners to the issues in the case and do not require concurrence by the other parties in the wording of a party's position.

But a prehearing brief is not a substitute for an effective and well-drafted post-hearing brief for several reasons. *First*, no litigator worth the title of attorney should be expected to reveal -- in advance of hearing -- their trial strategy, including the witnesses that they expect to cross-examine, the content of that cross-examination and the forensic exhibits that they may choose to introduce to limit the witness' testimony or otherwise impeach their credibility. The hearing process is, among other things, an opportunity for the foundations of an opposing witnesses' opinions to be undercut or the witness impeached. Expecting parties to reveal through a prehearing brief their trial strategy compromises the most basic responsibilities, could require the disclosure of attorney work-product, and may be subject to challenge as an attempt by the Commission to regulate how law is practiced which is clearly beyond the Commission's jurisdiction.

Second, there is legitimate concern that the Commission's apparent desire to limit post-hearing briefs to absurdly low page limits months in advance of the hearing runs afoul of the Commission's basic responsibility to base its decision on competent and substantial evidence on the whole record.[3/] *A priori*, a prehearing brief cannot be based on the ***record*** of the proceeding, since that record does not exist until the time of the hearing. Indeed, prepared testimony -- the only

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[3/] An administrative decision in a contested case must be supported by competent and substantial evidence on the whole record. Mo. Const., Art. V, Section 18.

thing on which a prehearing brief could be based -- is ***not part of the record*** -- and cannot be "competent" evidence within the meaning of the Missouri Constitution -- until it has been subjected to cross-examination and successfully survived any motions to strike or objections directed to the evidence that would be premature if made before the material is offered.[4/] "Competent evidence is defined by Missouri courts as relevant and ***admissible*** evidence that can establish the fact at issue."[5/] The Commission has been reversed in the past because of a failure to

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[4/] Fixing of rates imposes a

> "duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such."

Morgan v. United States, 298 U.S. 468, 479-80, 56 S.Ct. 906, 80 L.Ed. 1288 (1936).

[5/] *City of Kan. City v. New York - Kan. Bldg. Assocs.*, L.P., 96 S.W.3d 846, 861 (Mo. Ct. App. 2002); *Loven v. Greene County*, 63 S.W.3d 278, 292 (Mo. Ct. App. 2001); *Consolidated Sch. Dist. No. 2 v. King*, 786 S.W.2d 217, 219 (Mo.App. W.D. 1990) (emphasis added).

Evidence is not competent if there is no opportunity for cross-examination.

> "These reasons were not competent as evidence prior to the cross-examination of the witness, nor were they made either necessary or competent by that cross-examination.

State v. McDonough, 232 Mo. 219, 234 (Mo. 1911)

properly interpret objections to evidence and the proper value to be placed on evidence.[6/]

Third, Section 536.080 imposes the requirement upon the Commission and requires that the individual commissioners certify compliance with its alternative provisions. The Section provides:

> 1. In contested cases each party shall be entitled to present oral arguments or written briefs ***at or after*** the hearing which shall be heard or read by each official of the agency who renders or joins in rendering the final decision.
>
> 2. In contested cases, each official of an agency who renders or joins in rendering a final decision shall, prior to such final decision, either ***hear all the evidence, read***

[6/] *State ex rel. GS Techs. Operating Co. v. PSC of Mo.*, 116 S.W.3d 680, 691 (Mo. Ct. App. 2003) where the reviewing court said:

> In this case, the Commission's decision to accord Mr. Ward's opinion testimony "little weight" was not based on a proper exercise of its discretion. [**21] Instead, it was based on an erroneous interpretation of the law. In particular, it was based on the Commission's incorrectly finding that KCPL objected to all of the statements and documents attached to Mr. Ward's testimony and that the regulatory law judge had limited the purpose for which they were received. Aside from Mr. Lewonski's affidavit, the other statements and documents attached to Mr. Ward's testimony, which he relied upon in reaching his opinion, were received without objection by the regulatory law judge. Although hearsay, [footnote omitted] the attachments had probative value, as they included plant records and statements from KCPL employees describing the events at the plant that led up to the Hawthorn 5 explosion. The facts contained in these attachments were substantive evidence in the record supporting Mr. Ward's opinion testimony. The Commission erred in concluding otherwise.

Id. at 691.

> ***the full record including all the evidence, or personally consider the portions of the record cited or referred to in the arguments or briefs. . . .***[7]

A prehearing brief cannot be prepared "at or after" the hearing and therefore cannot be used as a substitute for briefing that follows the hearing. In *T. J. Moss Tie*, the court, stated:

> Under the provisions of section 536.080, each agency official who joined" in rendering a final decision" was required prior thereto either to have heard all the evidence, to have read the full record including all the evidence, or personally to have considered the portions of the record cited or referred to in arguments or briefs. Inasmuch as only one commissioner heard the evidence ***and no transcript was available until eleven days after the decision and thus another commissioner could not have read the full record or considered citations to such transcript prior to the decision, and inasmuch as the record does not disclose any written or oral stipulation of the parties waiving compliance with the provisions of section 536.080, it is apparent that the requirements of that section were ignored.***[8]

Section 536.080.2 provides three explicit alternatives for decisionmakers: (1) hear all the evidence; (2) read the full record including all the evidence; or (3) personally hear or read and consider the portions of the ***record cited in the arguments or briefs***.[9]

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[7] Section 536.080 RSMo 2000 (emphasis added).

[8] *T. J. Moss Tie Co. v. State Tax Com.*, 345 S.W.2d 191, 193 (Mo. 1961).

[9] It should immediately be observed that the statute provides ***only*** these three alternatives. It does ***not*** on its face permit a commissioner to hear "some" of the evidence, read the "balance" of the record, and then rely upon the parties briefs to (continued...)

Setting aside the issue of a dishonest certification, a commissioner cannot read a prehearing brief and fulfill this statutory requirement. The "record" does not yet exist and cannot be cited in a prehearing brief. Although a reviewing court may be willing to presume compliance with the statutory requirement,[10] that presumption is rebuttable and could be easily rebutted by a showing that compliance was impossible.[11]

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[9] (...continued)
bridge that which the commissioner did not "hear." The statute does ***not*** say ". . . or any combination of the foregoing."

[10] *State ex rel. Jackson County v. Public Service Com.*, 532 S.W.2d 20, 30 (Mo., 1975):

> . . . . it is presumed that administrative decisions are made in compliance with applicable statutes. *Dittmeier v. Missouri Real Estate Commission*, 316 S.W.2d 1 (Mo. *en banc* 1958), *cert. denied* 358 U.S. 941, 3 L. Ed. 2d 348, 79 S. Ct. 347.

[11] Consider the court's words from *State ex rel. Jackson County v. Public Service Com.*, 532 S.W.2d 20 (Mo. 1975):

> However, the facts as to Commissioner Sprague create a possible denial of due process and the actual truth of the matter should be brought forward. To accomplish the same, and hopefully to avoid further delay in this matter, the trial court is directed to modify its "order of remand" to allow Commissioner Sprague ten days to certify to it that he had complied with § 536.080 at the time of denial of the motions for re-hearing. Absent such certification, the remand for reconsideration should follow.

To this point, the Missouri courts have also ruled:

> Our Administrative Procedure Act provides that upon judicial review of a decision or order of an administrative officer or body: "The court may in any case hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record." § 536.140, P4.

(continued...)

These three alternatives provided by the General Assembly recognize the power post-hearing briefing brings to the decisional process. This is the opportunity that the attorneys can "connect the dots" in their respective cases after the evidence and exhibits are "in the can" and after the witnesses have been subjected to the crucible of cross-examination. Not only does the Commission risk violation of the statute by a procedure that arbitrarily cripples post-hearing briefs, it deprives itself of the benefit of the analysis of the parties who should best know their respective cases to marshall their arguments, testimony, evidence and exhibits to the proof of their respective cases. Competent practitioners should reject an attempt to "dumb down" the process and to make their skills in trial advocacy and persuasive writing superfluous or irrelevant.

If it is to be the position of the Commission that the hearing does not matter and that what happens at the hearing does not matter, then the Commission should openly state so rather than implicitly try to limit the significance of the hearing, and the cross-examination of witnesses, by suggesting that briefs in advance of the hearing will "cover most of the record."

The Commissions' arbitrary and capricious advance determination of the length and content of post-hearing briefs raises other questions that go to the heart of the essential

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[11/](...continued)

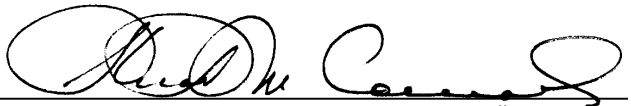
Dittmeier v. Missouri Real Estate Com., 316 S.W.2d 1, 5 (Mo. 1958).

fairness of the hearing. What if the cross-examination by the parties and the Commissioners' questions and their responses require much more than 10 pages to address? How can that be addressed if the Commission has predetermined the length of that pleading? What if prefiled testimony is the subject of an objection or motion to strike and the objection or motion is sustained? Or is such testimony's simple filing sufficient to include it in the record? Is the Commission seeking recognition of a new definition of what constitutes "the record?" And what in such a case should be made of a particular party's reliance on the rejected testimony in their prehearing brief. How can such a rejection be "updated?" These and possibly many other questions many of which may rise to the level of due process issues can be avoided by simply withdrawing Paragraph F and the related parenthetical provision in Paragraph ORDERED 5.

WHEREFORE, reconsideration of the June 2, 2006 Order should be granted and the Order corrected to delete Paragraph F and the related provision in Paragraph ORDERED 5.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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ATTORNEYS FOR HANNIBAL REGIONAL HOSPITAL

June 2, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

Stuart W. Conrad

Dated: June 2, 2006