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DANA AVANT LEWIS, *DIRECTOR*

RAILROAD COMMISSION OF TEXAS

HEARINGS DIVISION

August 21, 2020

TO: All Parties of Record

RE: **GUD No. 10918**, *Formal Complaint of DCP Guadalupe Pipeline, LLC against Atmos Energy Corporation*

HEARINGS LETTER NO. 08

Order on DCP's Motion to Dismiss

Attached is the Order on DCP's Motion to Dismiss, filed on February 14, 2020.

Sincerely,

A handwritten signature in blue ink that reads "Dee Marlo Chico".

Dee Marlo Chico
Administrative Law Judge

cc: Service List

Service List

GUD No. 10918

Formal Complaint of DCP Guadalupe Pipeline, LLC against Atmos Energy Corporation

Administrative Law Judge: Dee Marlo Chico
Technical Examiners: James Currier and Rose Ruiz

Atmos Energy Corporation

(Respondent)

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cc: Kari French, RRC Austin – Director, Oversight & Safety Division

Mark Evarts, RRC Austin – Director, Marketing Oversight Section

16 TEX. ADMIN. CODE § 1.7 (Ex Parte Communications):

- (a) *Ex parte communications are prohibited in contested cases as provided in the APA and other applicable rules including the Texas Disciplinary Rules of Professional Conduct.*
- (b) *Each party shall provide all other parties with a copy of all documents submitted to an examiner.*
 - (1) *The attachment of a certificate of service stating that a document was served on a party creates a rebuttable presumption that the named party was provided a copy.*
 - (2) *Failure to provide a copy to all other parties may result in rejection and return of the document without consideration.*

**BEFORE THE RAILROAD COMMISSION OF TEXAS
HEARINGS DIVISION**

FORMAL COMPLAINT OF DCP	§	GAS UTILITIES DOCKET
GUADALUPE PIPELINE, LLC (“DCP”)	§	
AGAINST ATMOS ENERGY	§	NO. 10918
CORPORATION		

ORDER GRANTING DCP’S MOTION TO DISMISS

On November 12, 2019, Complainant, DCP Guadalupe Pipeline (“DCP”), filed with the Railroad Commission of Texas (“Commission”) a complaint against Respondent, Atmos Pipeline – Texas (“APT”), a division of Atmos Energy Corporation (collectively, “Atmos”) for breach of contract.

Jurisdiction is the only issue addressed herein, not the merits of the breach of contract claims. As treated below, DCP’s Motion is **GRANTED**.¹

I. Background

Relevant Background

The Waha Header System is a set of natural gas pipeline facilities located in West Texas that perform a “hub” function by interconnecting multiple interstate and intrastate pipeline systems. It is undisputed that on December 21, 2018, DCP sued Atmos in Dallas County District Court for breach of contract of the Agreement for Construction, Ownership, and Operation of the Waha Header (“COO Agreement”). Atmos moved to abate the case claiming DCP must first exhaust its administrative remedies since DCP’s breach of contract claims were subject to the Commission’s jurisdiction. DCP opposed Atmos’s motion, but the district court granted it and abated the breach of contract case on July 27, 2019.

DCP filed its complaint with the Commission on November 12, 2019.² Atmos filed its answer and a general denial on December 9, 2020.³ At the February 14, 2020 pre-hearing conference, the date for the hearing on the merits to address the jurisdictional issue was set for July 6, 2020.⁴ DCP also mentioned filing a document, which the Administrative Law Judge (“ALJ”) and Technical Examiners (collectively, “Examiners”) and Atmos did not receive.⁵ DCP’s Motion to Dismiss was thereafter received.⁶ On June 19, 2020, Atmos filed with the Commission a Motion to Cancel the Hearing or Alternatively, Change the Hearing Date, and Agreed Motion to Extend Deadlines.⁷ On July 2, 2020, the ALJ granted Atmos’s Motion to Cancel the July 6, 2020 hearing.⁸ The parties were informed the ALJ will issue a ruling on the jurisdictional issue based on the parties’ pleadings, motions, and the respective responses and replies.

¹ This order is being provided contemporaneously to the Hearings Director. Any order of dismissal issued by the Hearings Director is appealable under Commission Rule § 1.128 (Motions for Rehearing).

² Letter from Jay B. Stewart, counsel for DCP, filed November 12, 2019.

³ Atmos’s Answer and General Denial to DCP’s Complaint from Ann M. Coffin, counsel for Atmos, filed December 9, 2019.

⁴ Hearing Letter No. 05 (Notice of Hearing) issued May 29, 2020 (attaching the Notice of Hearing).

⁵ Transcript (Prehearing Conference) at 6 (February 14, 2020) (“the Complainant did file a reiteration of the complaint in early February”).

⁶ DCP’s Motion to Dismiss for Lack of Jurisdiction from Jay B. Stewart, counsel for DCP, filed on February 14, 2020.

⁷ Atmos’ Motion to Cancel the Hearing or Alternatively, Change the Hearing Date, and Agreed Motion to Extend Deadlines from Ann M. Coffin, counsel for Atmos, filed on June 19, 2020.

⁸ Hearings Letter No. 07 (Order on Atmos’s Motion to Cancel Hearing) (attaching order).

The COO Agreement

DCP and APT are the current parties to the COO Agreement. On July 20, 1989, DCP and APT, through their predecessors in interest, entered into the COO Agreement. DCP and its predecessors owned 100 percent of the Waha Header until November 2017, when APT acquired a 25 percent interest. DCP is the majority owner (75%) of the Waha Header System. APT is the minority owner (25%) of the Waha Header System and acts as operator of the Waha Header System under the terms of the COO Agreement and its associated Pipeline Facilities Lease Agreement.

II. DCP's Position

In its complaint, DCP requested the Commission make a jurisdictional determination arguing the Commission has no jurisdiction over the claims in this case, and, in the alternative, issue an order removing Atmos as the operator of the Waha Header because of Atmos' breach of the terms of the COO Agreement if the Commission determines it has jurisdiction over the claims in this case. DCP outlined the specific actions and omission Atmos breached in its obligations:

- Atmos operated the Waha Header System solely for its own benefit and to the detriment of DCP in violation of its obligation to act on behalf of DCP;⁹
- Atmos violated obligations to operate the Waha Header System as a separate cost center, to keep accurate and completely separate accounts and records for the Waha Header System, and to submit monthly reports by improperly combining service across the Waha Header System with other services APT provides to its shippers on the APT intrastate pipeline system;¹⁰
- Atmos entered into contracts with customers without prior Administrative Committee approval and with terms not approved by the Administrative Committee;¹¹ and
- Atmos undertook "Major Decisions" without prior approval of the Administrative Committee.¹²

DCP claims Atmos is reframing DCP's claims, seeks an audit of itself, and did not allege any violations of the Gas Utilities Regulatory Act, Commission rules, or requirements under the Federal Energy Regulatory Commission ("FERC"). DCP asserts the breach of contract claims are solely a product of APT's breaches of its private contract obligations to DCP. DCP also insisted it did not allege APT engaged in unreasonable discrimination as among shippers on the Waha Header and nor is DCP seeking any changes in APT's rates through this complaint.

III. Atmos's Position

Atmos declared that as a gas utility, as defined under Sections 101.003(7) and 121.001 of the Texas Utilities Code, the Commission has exclusive jurisdiction to address DCP's allegations of discrimination and improper recordkeeping.¹³

Atmos explained DCP alleged discrimination when it asserted (1) APT established rates and allocated priorities designed to primarily benefit APT and threaten the viability of the Waha

⁹ in violation of the General Agreement of the Parties at page 5 and Part B, Section 2.1.1 of the COO Agreement

¹⁰ In violation of Part B, Sections 1.1, 2.1, 2.1.12, 2.2, 2.5.1 of the COO Agreement

¹¹ in violation of Part B, Sections 2.1, 3.5, 8.5 of the COO Agreement

¹² In violation of Part B, Section 3.5 of the COO Agreement

¹³ Atmos Energy Corporation's Answer and General Denial to DCP Guadalupe Pipeline, LLC's Complaint Against Atmos Energy Corporation from Ann M. Coffin, counsel for Atmos, filed on December 9, 2019 at 4; see also Tex. Util. Code §§ 101.003(7), 121.001.

Header; (2) APT bundled the service across the Waha Header with other services APT provided to shippers; and (3) APT combined and operated the Waha Header indistinctly from APT's wholly owned intrastate pipeline system. Atmos also argued that DCP's claim that APT is comingling other services with the Waha Header and therefore attributing revenues to APT's own interests as opposed to the joint interest in the Waha Header also falls under a discrimination analysis as Sections 104.004 and 121.104 of the Texas Utilities Code prohibits APT from granting an unreasonable preference or advantage concerning rates or services to similarly situated entities.

Atmos purports the Commission has exclusive jurisdiction over how it is required to maintain its books and records since Sections 102.201-.203 of the Texas Utilities Code establishes the Commission's authority over a gas utility's books and records and vest the Commission with exclusive authority to audit the accounts of a gas utility. Atmos asserts gas utilities are required to maintain their books and records according the FERC Uniform System of Accounts for all operating and reporting systems so any books and records and accounting of revenue from the Waha Header are issues that fall under the Commission's exclusive original jurisdiction. Atmos explains that APT's Other Revenue, which serves as the baseline for Atmos' annual Rider REV filing, includes revenue received by APT from the Waha Header, which was credited to Atmos' cost of service rates in the Final Order issued in GUD No. 10580.

Thus, Atmos requests the Commission audit APT's books and records to determine whether APT properly recorded Atmos's Other Revenue, including the Waha Header revenues, in compliance with the Rider REV – Revenue Adjustment Tariff and whether Atmos properly maintained its books and records with regard to amounts collected for the Waha Header transportation service. As Atmos explained, the Cox Act permits the Commission to review, revise, and regulate a contract that establishes a price, rate, or condition of service and the COO Agreement includes terms establishing a price or rate for transportation of gas.

IV. Discussion

Unlike courts, an administrative agency is “a legislative creation with only those powers expressly conferred and necessary to accomplish its duties.”¹⁴ Although the undersigned Administrative Law Judge (“ALJ”) agrees with Atmos's assertion that the Texas Legislature has designated the Commission as the agency responsible for the rates and services of a gas utility,¹⁵ the ALJ disagrees with Atmos's conclusion that this designation gives the Commission jurisdiction over the matters involved in this case.

The pleadings are inherently judicial, because the complaint did not pertain to the gas utility's “services” or “rate”¹⁶ (i.e., the gas utility rate structure) but rather the private obligations between pipeline co-owners.¹⁷ It has not been shown, based on the pleadings, that this private contract – the COO Agreement – has taken on an administrative character. The COO Agreement is not governed by the express terms of a rate despite Atmos's reference to the Rider REV-Revenue Adjustment Tariff. The allegations of discrimination, as propounded by Atmos, do not involve Atmos's gas utility obligations to its customers but rather the obligations are specific to Atmos's duties as a co-owner. Finally, DCP's relief sought – monetary damages and removal of APT as operator of the Waha Header – are types of relief granted by a district court, not by the Commission.

¹⁴ *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 216 (Tex. 2002).

¹⁵ Tex. Util. Code § 102.001 (Railroad Commission Jurisdiction)

¹⁶ Tex. Util. Code § 101.003(12), (14) (defining “rate” and “service,” respectively).

¹⁷ Tex. Util. Code § 101.003(12), (14) (defining “rate” and “service,” respectively).

After considering the pleadings, motions, and the respective responses and replies, the ALJ finds that Commission lacks jurisdiction over this complaint. Therefore, DCP's motion to dismiss is **GRANTED**.

V. Order

IT IS THEREFORE ORDERED that DCP's Motion to Dismiss is **GRANTED**.

Signed on August 21, 2020.



**DEE MARLO CHICO
ADMINISTRATIVE LAW JUDGE**