

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Atmos Energy Corporation and	:	
Liberty Energy (Midstates) Corp.	:	
	:	Docket No. 11-0559
Application for Approval of Proposed	:	
Reorganization and Other Relief	:	

REPLY IN SUPPORT OF MOTION TO STRIKE

Atmos Energy Corporation (“*Atmos*”) and Liberty Energy (Midstates) Corp. (“*Liberty Energy Midstates*”) (collectively “*Joint Applicants*”) hereby submit their reply to Staff’s response (“*Staff’s Response*”) to the Joint Applicants’ Motion to Strike Staff’s Initial Brief (“*Staff’s Brief*”). Staff’s Response does not rebut the Joint Applicants’ showing that the Commission should strike portions of Staff’s Brief’s because it contains false statements and statements that are not supported by citations to the record or to applicable authority, as described further below.

- I. Staff has not Rebutted the Joint Applicants’ Demonstration that Staff’s Arguments Relying on False Statements Should Be Stricken**
 - a. The Statements Identified In The Motion to Strike Are False and Misleading**

Staff’s Response contains a number of arguments against the Motion to Strike. None of these arguments go to the heart of the matter. Staff’s Brief did not say that the blacklines provided by Joint Applicants should have had more annotations, or that the Joint Applicants provided blacklines that it did not introduce into evidence. Staff’s Brief stated without qualification that the Joint Applicants “failed to provide blackline versions

of its latest proposed ASAs and CAM . . .”¹ Staff’s Response argues that the blacklines provided by the Joint Applicants were not in the record or did not contain enough annotations² at the same time as it stands by the claim that no blacklines were provided.³ Clearly, blacklines were provided and the statements by Staff to the contrary are false.

In the remainder of this section, the Joint Applicants address certain of Staff’s arguments. However, Staff’s arguments are beside the point and do not go to whether the statements in Staff’s Brief were true. They were not.⁴ On that basis alone, the Commission should strike Section III of Staff’s Brief, or at least Section III.A.1 (which is based almost entirely on the false statements), and the parts of Staff’s Brief that refer to Section III.A.1 by reference (III.B.1, III.C.1 and III.D.1). In addition, the Joint Applicants request that the portions of Staff’s Reply Brief that rely on similar statements be stricken.⁵

¹ Staff Initial Brief, Docket No. 11-0559 (Filed Feb. 23, 2012) (“*Staff’s Brief*”).

² See Staff’s Response at 3 (“[t]he documents that [the Joint Applicants] provided to Staff did not include all annotations . . . were not presented as evidence in the proceeding.”).

³ See Staff of the Illinois Commerce Commission Response to Atmos Energy Corporation and Liberty Energy (Midstates) Corp.’s Motion to Strike, Docket No 11-0559 (Filed January 16, 2012) (“*Staff’s Response*”) at 3 (“Attachment C [sic] actually supports Staff’s representations in its Initial Brief, which Staff stands by that: ‘. . . Midstates failed to provide blackline versions of its latest proposed ASAs and CAM . . .’”). See also Staff’s Response at 8 (“Staff’s [Brief] is literally, substantively, and in every other respect correct in asserting that: ‘Midstates failed to provide blackline versions of its latest proposed ASAs and CAM . . .’”).

⁴ See, e.g., Motion to Strike, March 8, 2012, at Attachment A.

⁵ See, e.g. Section III of Reply Brief of the Staff of the Illinois Commerce Commission (“*Staff’s Reply Brief*”), Docket No. 11-0559 (Filed March 8, 2012), p. 4 (“JA did not provide blackline versions that started with Staff’s draft versions. Therefore, Staff was forced to spend even more time deciphering what changes the JA had accepted/not accepted and how their new version of the ASAs and CAM compared with Staff’s proposed documents.”) as well as all assertions without citation. This request is included in this reply because the arguments are the same with respect to Staff’s Reply Brief. However, if the Commission so desires the Joint Applicants can file a separate motion to strike pending the outcome of this motion.

b. The Joint Applicants Have Made Their Case In Support of the Application Separately From The Motion To Strike

Staff's Response asserts that the Joint Applicants "believe the documents they attached to the January 26 e-mail should have been sufficient for Staff to recommend the [*sic*] that the Commission make the necessary findings to approve the transaction."⁶ This is a misunderstanding of the Joint Applicants' position. The Joint Applicants have met their burden for Commission approval of the proposed reorganization. This burden was met through the evidence presented at the hearing as further described in detail in the Joint Applicants' Initial Brief and Reply Brief⁷ and the sufficiency of the evidence presented does not depend on the evidence in the Motion to Strike or its outcome.

The ASAs and CAM proposed by the Joint Applicants are unquestionably part of the record in this proceeding.⁸ The Joint Applicants did not introduce blacklines as evidence in this case nor do the Joint Applicants believe that any blacklines are necessary for the Commission to approve the ASAs and CAM or the proposed reorganization. Because the documents proposed by Ms. Pearce are also in the record⁹ any party is free to point out differences between the two sets of documents and the Commission has all the necessary evidence to understand those differences to the extent the parties identify them. The Joint Applicants, where relevant, pointed out those

⁶ Staff Response to Motion to Strike, March 16, 2012 at 5.

⁷ See Joint Applicant Ex. 1.0-1.2; Joint Applicant Ex. 2.0-2.1; Joint Applicant Ex. 3.0-3.2; Joint Applicant Ex. 4.0; Joint Applicant Ex. 5.0-5.6; Joint Applicant Ex. 6.0-6.5; Joint Applicant Ex. 7.0-7.4; Joint Applicant Ex. 8.0; Joint Applicant Ex. 9.0-9.11; Joint Applicant Ex. 10.0-10.1; Joint Applicant Ex. 12.0; Joint Applicant Initial Brief; Joint Applicant Reply Brief.

⁸ Joint Applicant Ex. 9.6-9.10.

⁹ Staff Ex. 10.0, Att. A-E.

differences in testimony and in its briefs¹⁰ and Staff could also have done so as well. All one has to do is look at Attachment A to see that Staff is only pretending that it could not have identified the differences between the sets of documents.¹¹

c. The Joint Applicants Are Not Seeking To Shift the Burden of Proof

Staff points out that the Joint Applicants have the burden of proof in this proceeding.¹² The Joint Applicants have made no contrary argument. In fact, the burden of proof would remain on the Joint Applicants even if Staff had contested no issues or not presented evidence.¹³ Staff's statement again misses the point because as set forth in Section II.b of this reply, the Joint Applicants filed Attachment A not as evidence that Staff could or did rely on the blacklines provided to it but to illustrate that Staff's statements that the blacklines were not provided is false.

d. Staff's Criticisms of the Blacklines Are Unwarranted And Irrelevant

Staff points out what it sees as defects in the blacklines.¹⁴ Staff is incorrect about a number of these points. For example, as set forth in Attachment A, the blacklines

¹⁰ See, e.g., Joint Applicant Ex. 9.0 at 12:291-23:537; Joint Applicant Initial Brief at 32-70; Joint Applicant Reply Brief at 7-32.

¹¹ In fact, Staff counsel did cross examine Mr. Eichler about certain of these differences, in one case using language nearly identical to that set forth in the annotation to the blacklines provided by the Joint Applicants. See Motion to Strike at 2 (comparing Tr. at 37:22-38:6 ("Would you agree that this change was made to address confusion caused by the term 'Service Company,' using the term 'Service Company' differently in the [CAM] in the ASA.") with Attachment A to Motion to Strike ("Changed to address confusion caused by using the term service company differently in the CAM and ASA."). There is nothing wrong with preparing cross examination questions about a document that is in the record based on information obtained from non-record sources; parties use data requests for this purpose all the time.

¹² Staff's Response at 7.

¹³ See 7-204(b)(providing that the Commission should not approve a proposed reorganization unless it finds the reorganization will not adversely affect the ability of the utility to perform its duties under the Act); *People v. Orth*, 124 Ill. 2d 326 (1988)(placing the burden of proof on the party seeking relief until a prima facie showing is made).

¹⁴ Staff Response at 3.

indicated all of the differences between the two sets of documents, but also included annotations to help Staff understand where language was simply moved.¹⁵ The fact that not all marked changes included explanatory annotations does not impair Staff's ability to see these changes.¹⁶ Staff also regards the provision of blacklines as being provided at the eleventh hour—but this is simply the result of their being a comparison of the changes in the very last two rounds of testimony. They were provided one day after that testimony was filed.¹⁷

But bear in mind that Staff's Response is discussing alleged defects in blacklines that Staff's Brief states were never provided. Whether Staff could have relied on those blacklines or not is irrelevant for purposes of this motion. The entire basis of Section III.A.1 of Staff's Brief is not that Staff received blacklines that did not have enough annotations, or that the blacklines provided did not alleviate Staff's concerns, but that Staff did not receive blacklines at all.

e. Summary

In summary, the Joint Applicants are not trying to be inflammatory or to engage in motions practice in order to waste anyone's time. The substantive issue here is that by simply reading Staff's Brief, the Commission would have no idea that:

- The Joint Applicants provided blacklines to Staff;

¹⁵ Motion to Strike, Attachment A.

¹⁶ The annotations are explanations for the reasoning behind certain changes or in some cases pointing out where strikeouts were moved to other parts of the documents. See Motion to Strike, Attachment A.

¹⁷ Motion to Strike, Attachment A. At best, they could have been provided with the testimony itself, one day earlier. As stated, however, the Joint Applicants had to manually input the changes because Staff had not provided clean copies to run a blackline against. See Motion to Strike at n.16.

- The Joint Applicants offered to provide any other blacklines that might have been useful to Staff in understanding the Joint Applicants' proposals;
- The Joint Applicants provided word documents that would allow Staff to generate its own blacklines which it could have entered into the record if it deemed them necessary.

Staff's Brief alleged that blacklines were not provided—there were no disclosures that blacklines were provided, but were not part of the record, or that the blacklines provided were insufficient in some way. Section III, or at least Section III.A.1 and the other portions of Section III that refers to Section III.A.1, should be stricken.

II. Striking Staff's Unsupported Assertions is Legally and Factually Supported

Contrary to Staff's assertions, the Joint Applicants' concerns are not "stylistic objections."¹⁸ Staff's Brief contained a number of unsupported assertions that the Joint Applicants do not believe are in the record. The Commission has previously granted motions to strike portions of an initial brief that contain extra-record assertions.¹⁹ The Joint Applicants specifically highlighted those assertions that contained no citation to the record as well as assertions where the citations to the record were inaccurate. Staff's Response has not even attempted to rebut the Joint Applicants' argument that these assertions are in the record.²⁰

¹⁸ See Staff's Response at 9-10.

¹⁹ See *CUB v. Ill. Energy Savings Corp.* Docket No. 08-0175(III. Comm. Comm'n, ALJ Ruling, January 8, 2010)(striking extra-record material from reply brief and sua sponte striking extra-record material from an initial brief); *Consumers III. Water Co.* Docket No. 95-0641 (III. Comm. Comm'n, October 23, 1996) (granting a motion to strike portions of an Initial Brief).

²⁰ See Joint Applicant Motion To Strike, March 8, 2012 at 6; Staff's Response at 9-11.

The Joint Applicants filed a representative list of unsupported assertions contained in Staff's Brief as Attachment C to the Motion to Strike.²¹ Staff's Response did not specifically address how *any* of the items listed in Attachment C are supported by citations (or the record).²² Instead, Staff's Response simply states "Staff's Initial Brief is replete with citations to testimony, hearing transcripts, and Commission Orders." If that were the case, the Joint Applicants would not have filed a motion to strike.²³

Despite Staff's claims, the Joint Applicants are not requesting that Staff comply with some arbitrary "cookie-cutter" standard created by the Joint Applicants. These are the Commission's rules that require citation to the record.²⁴ The Joint Applicants simply request that Staff follow the Commission's rules to cite record evidence. Staff seems to be arguing that it can't be bothered to comply with the rules or to make accurate citations.²⁵

Again, the Joint Applicants did not file a motion to strike to be picky about form. The Joint Applicants understand that there is a difference between nonsubstantive and substantive failures. For instance, Staff's Response repeatedly cites to the January 26 email as Attachment C, but this email was filed as Attachment A.²⁶ Because the Joint Applicants' motion was relatively short, it was not difficult for the Joint Applicants to

²¹ Joint Applicant Motion To Strike, March 8, 2012, Attachment C.

²² See Staff's Response at 9-11.

²³ Or perhaps more directly, the Joint Applicants would not have been able to include as Exhibit C an extensive list of examples of statements that were unsupported by citation to the record or to which the citation indicated did not correspond to the record.

²⁴ See 83 Ill. Adm. Code 200.800(a) ("Statements of fact in briefs and reply briefs should be supported by citation to the record.").

²⁵ See Staff's Response at 9-10 ("If Staff's briefs were subject to the stylistic objections of every utility counsel that came before the Commission, Staff's positions would be entirely suppressed.").

²⁶ See Staff's Response at 2-4.

determine what Staff was referring to and there would be no point to objecting to this misreference.

The same is not true, however, with respect to Staff's Brief. The breadth of the record and the overwhelming number of unsupported assertions makes it very difficult to determine which assertions, if any, are supported by the record. As indicated in the Joint Applicants' Motion to Strike and its attachments, there weren't just one or two instances in Staff's Brief of failing to cite to the record or incorrectly citing to the record.²⁷ Rather, Staff made unsupported assertions throughout its brief.²⁸ In response to the Joint Applicants' identification of unsupported statements, Staff did not provide a single reference to indicate that this support existed.

As another example, Staff's Response inaccurately cites to Illinois Supreme Court Rule 341(e)(6) to support its view that the Joint Applicants' request for relief is extraordinary.²⁹ Rule 341(e) does not contain the quotation cited by Staff.³⁰ In fact, Supreme Court Rule 341(e) does not even have a subsection (6); this rule simply provides the number of copies of an appellate brief to be filed and served.³¹

The Joint Applicants believe that Staff may be referring to Supreme Court Rule 341(h)(6), because in 2006 this rule was renumbered and subsection (e), which does

²⁷ See Joint Applicant Motion to Strike, March 8, 2012 at 5-8; Joint Applicant Motion to Strike, Attachment C.

²⁸ *Id.*

²⁹ See Staff's Response at 12 ("In addition, Illinois Supreme Court Rule 341 is instructive, providing that: '[t]he striking of an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the alleged violations of procedural rules interfere with or preclude review.' (S. Ct. Rule 341(e)(6).)"); Il. S. Ct. R. 341(e)(no language quoted by Staff).

³⁰ See Il. S. Ct. R. 341(e) (no language quoted by Staff).

³¹ See Ill. S. Ct. R. 341(e)(no subsection 6 or language quoted by Staff). A copy of Supreme Court Rule 341 is attached as Appendix A.

have a subsection (6), was renumbered to subsection (h).³² If that was the only point this would also be a nonsubstantive mis-citation. However, the issue becomes substantive because the rule *does not contain* anything like the language quoted by Staff.³³ Staff again makes an unsupported assertion, this time regarding Illinois law, and leaves it to the Joint Applicants, the ALJ, and the Commission to guess at what Staff is referring to.

Supreme Court Rule 341(h)(6) actually states that the Statement of Facts in an appellate brief requires “appropriate reference to the pages of the record on appeal, e.g., R, C7, or R.7.”³⁴ In general, courts do not simply ignore noncompliance with this requirement of record citation, as Staff’s misquote suggests. In fact, the consequence for failure to comply with Rule 341(h)(6) is exactly what Staff seeks to avoid here—that the issues are deemed to be forfeited.³⁵ Courts have stated that “[s]trict adherence to the requirement of citing relevant pages of the record is necessary to expedite and facilitate the administration of justice.”³⁶

It is true that courts have found exceptions to forfeiting an issue, but this is typically in situations involving simple records, where the ability of the court to review

³² See Ill. S. Ct. R. 341, amended May 24, 2006 (Section (e) moved to Section (h) without changes to language).

³³ See Ill. S. Ct. R. 341(h)(6)(no language quoted by Staff). The Joint Applicants do not believe this language is contained in *any* Illinois Supreme Court Rule, but as is the case with Staff’s failure to cite or cite correctly in its Initial Brief, it is

³⁴ Ill. S. Ct. R. 341(h)(6).

³⁵ See *People v. Lantz*, 186 Ill. 2d 243, 261-62 (1999) (finding arguments not made without citations to the record to be waived); *Mikrut v. First Bank of Oak Park*, 359 Ill. App. 3d 37 (1st Dist 2005) (waiving a claim not supported by a specific citation).

³⁶ *Crull v. Sriratana*, 388 Ill. App. 3d 1036, 1045 (4th Dist 2009); *Maun v. Dept. of Prof. Reg.*, 299 Ill. App. 3d 388, 399 (4th Dist 1998).

the issue was not precluded or interfered with.³⁷ However, such an exception would not be applicable in this docket because the record consists of hundreds pages of testimony and exhibits. Staff's argument that striking its brief deprives Staff of the opportunity to file a brief ignores the reality that Staff had the chance to file a brief (and in fact did so), but simply failed to follow the Commission's rules. It compounded that failure in Staff's Response by not even attempting to indicate support for its assertions in the record.

The Joint Applicants have demonstrated that their motion should be granted. However, even where motions to strike have been denied, courts have found that it is appropriate to disregard any fact or claim not supported by the record.³⁸ Such an approach is consistent with Section 10-103 of the Act,³⁹ and Staff's unsupported assertions should be disregarded in all cases.

III. Conclusion

WHEREFORE, for all of the reasons set forth above and in the Motion to Strike, the Joint Applicants respectfully request the Commission to grant the Joint Applicants' motion for entry of an expedited order striking: (A) Section III of Staff's Brief, or if striking all of Section III of Staff's Brief is not deemed appropriate by the Commission, in the alternative striking (A1) Sections III.A.1 for relying on false or misleading statements and Sections III.B.1, III.C.1, and III.D.1 for incorporating false and misleading

³⁷ See *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (2d Dist. 1999)(granting an exception to the requirement for citations where the record was not long); See *People v. Derosssett.*, 237 Ill. App. 3d 315, (4th Dist 1992) (finding that striking appellate briefs is only appropriate when review is precluded or interfered with).

³⁸ See *Hurlbert v. Brewer*, 386 Ill. App. 3d 1096, 1101 (4th Dist. 2008) (denying a motion to strike but disregarding any fact or claim not supported by the record); *North Shore Sanitary Dist. v. Ill. Labor Relations Bd.*, 262 Ill. App. 3d 279, 286 (2d Dist 1994)(disregarding noncomplying statements).

³⁹ See 220 ILCS 5/10-103 ("any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case").

statements by reference, and (A2) each of the statements in Staff's brief that is not supported by any citation or that is supported by citations that are inaccurate as discussed above and/or set forth in the Motion to Strike or its attachments, and (B) the analogous portions of Staff's Reply, if deemed warranted by the Commission.

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Dated: March 21, 2012

Respectfully submitted,

ATMOS ENERGY CORPORATION AND
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