



Ernie Fletcher  
Governor

Teresa J. Hill, Secretary  
Environmental and Public  
Protection Cabinet

Timothy J. LeDonne  
Commissioner  
Department of Public Protection

Commonwealth of Kentucky  
**Public Service Commission**  
211 Sower Blvd.  
P.O. Box 615  
Frankfort, Kentucky 40602-0615  
Telephone: (502) 564-3940  
Fax: (502) 564-3460  
psc.ky.gov

Mark David Goss  
Chairman

John W. Clay  
Commissioner

Honorable Dennis G. Howard II  
Assistant Attorney General  
Office of the Attorney General Utility & Rate Intervention Division  
1024 Capital Center Drive  
Suite 200  
Frankfort, KY 40601-8204

February 9, 2007

RE: Case No. 2005-00057

We enclose one attested copy of the Commission's Order in the above case.

Sincerely,

A handwritten signature in black ink, appearing to read "Beth O'Donnell".

Beth O'Donnell  
Executive Director

BOD/sh  
Enclosure



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Honorable John N. Hughes  
Attorney at Law  
124 West Todd Street  
Frankfort, KY 40601

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Honorable Mark R. Hutchinson  
Attorney at Law  
Wilson, Hutchinson & Poteat  
611 Frederica Street  
Owensboro, KY 42301

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William J. Senter  
V.P. Rates & Regulatory Affairs  
Atmos Energy Corporation  
2401 New Hartford Road  
Owensboro, KY 42303-1312

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Gary L. Smith  
Vice President, KY Marketing & Reg.  
Atmos Energy Corporation  
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Commissioner  
Department of Public Protection

Honorable Douglas Walther  
Associate General Counsel  
Atmos Energy Corporation  
2401 New Hartford Road  
Owensboro, KY 42303-1312



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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

OFFICE OF THE ATTORNEY GENERAL	)	
COMMONWEALTH OF KENTUCKY	)	
	)	
COMPLAINANT	)	
	)	
V.	)	CASE NO. 2005-00057
	)	
ATMOS ENERGY CORPORATION	)	
	)	
DEFENDANT	)	

O R D E R

On November 17, 2006, Atmos Energy Corporation ("Atmos") moved the Commission to dismiss this proceeding and to suspend immediately the procedural schedule. On November 28, 2006, the Commission entered an Order suspending the procedural schedule to allow the Attorney General, by and through his Office of Rate Intervention ("AG"), the opportunity to respond to Atmos's motion. The AG responded on November 29, 2006 and the movant replied on December 7, 2006. The motion to dismiss has been properly briefed and stands submitted for decision.

In support of its motion to dismiss, Atmos stated that the period designated by the Commission for review of Atmos's earnings is too remote from current operating conditions to be an appropriate gauge of Atmos's financial condition.<sup>1</sup> It stated that it

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<sup>1</sup> The Commission established a 12-month test period ending September 30, 2005 as the test period to be used for review of Atmos's rates in this proceeding.

has given notice of its intent to file a forecasted test-year rate case on or shortly after December 1, 2006<sup>2</sup> and that the period proposed for review in the new rate case would be a more accurate depiction of its financial condition. Atmos further argued that reviewing its financial condition using the more recent test period through its rate application would address the AG's arguments that he is unable to make *pro forma* adjustments due to the lack of available information. Atmos also argues that "[e]ven if the Commission were to determine a rate that might be appropriate based on the historical information developed in the Complaint case, that rate could not be imposed on Atmos, because it would result in a retroactive reduction of its earnings and violate the rule against retroactive ratemaking."

The AG countered these arguments stating: (1) that it is inappropriate for Atmos to complain, 1-1/2 years into the proceeding, that the test period is too remote; (2) that rates established based on the test period ending September 30, 2005 would not constitute retroactive rate-making as they would be set prospectively; and (3) that the issue before the Commission in this proceeding is not relevant to the issue before the Commission in Atmos's recently filed rate proceeding. He further argued that his inability to make *pro forma* adjustments due to lack of information does not constitute grounds for dismissal as he does not bear the burden of proof in this proceeding. He stated that once the Commission determined that he had established a *prima facie* case, the Commission was required by KRS 278.260 to conduct the investigation into Atmos's earnings.

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<sup>2</sup> The Commission accepted Atmos's application for a rate adjustment on January 16, 2007.

The Commission has reviewed the briefs filed by the parties and finds that Atmos's motion to dismiss should be denied and that the remainder of the procedural schedule suspended by our Order of November 28, 2006 should be reinstated with amended due dates.

The Commission agrees with the AG that the issue in this proceeding - whether Atmos was over-earning at the end of the 12-month period ending September 30, 2005 - is different from the issue of whether it would be appropriate to adjust Atmos's rates at the conclusion of its recently filed rate proceeding. We also agree with the AG that the imposition of a rate adjustment at the conclusion of this proceeding will not violate the prohibition against retroactive rate-making as any rate adjustment that might be ordered will be prospective only. As the Commission explained in Case No. 1995-00011:<sup>3</sup>

The rule against retroactive ratemaking is a 'generally accepted principle of public utility law which recognizes the prospective nature of utility ratemaking and prohibits regulatory commissions from rolling back rates which have already been approved and become final.' . . . It further prohibits regulatory commissions when setting utility rates, from adjusting for past losses or gains to either the utility consumers, or particular classes of consumers.

Moreover, the Commission finds that it is specifically authorized by KRS 278.270 to make prospective adjustments to rates if it finds that the rates are unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any provisions of KRS Chapter 278.

The Commission disagrees with the AG's contention that he does not bear the burden of proof in this proceeding. The AG argues that, pursuant to KRS 278.260, once

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<sup>3</sup> Case No. 1995-00011, Kentucky Industrial Utility Customers, Inc. v. Big Rivers Electric Corporation (Ky. PSC April 1, 1997).

the Commission determined that his complaint established a *prima facie* case, the complaint became an investigation by the Commission and he was relieved of his burden of proof. The Court of Appeals of Kentucky clearly stated in *Energy Regulatory Commission v. Kentucky Power Company*,<sup>4</sup> that “[a]pplicants before an administrative agency have the burden of proof.” While the term “applicant” is not defined in KRS Chapter 278, it is generally held to mean “[o]ne who requests something; a petitioner....”<sup>5</sup> The Commission finds that the AG is the applicant in this proceeding and that, contrary to his arguments, nothing in the language of KRS 278.260 relieves him from his burden of proof.

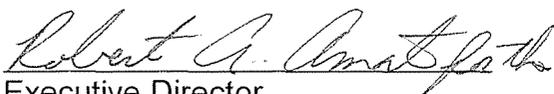
IT IS THEREFORE ORDERED that:

1. Atmos’s motion to dismiss is denied.
2. The procedural schedule set forth in Appendix A to this Order shall be followed.

Done at Frankfort, Kentucky, this 9<sup>th</sup> day of February, 2007.

By the Commission

ATTEST:

  
Executive Director

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<sup>4</sup> Ky. App., 605 S.W. 2d 46, 50 (1980).

<sup>5</sup> Black’s Law Dictionary, 96 (7<sup>th</sup> ed. 1999).

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2005-00057 DATED February 9, 2007.

Atmos shall file testimony, in verified form, no later than ..... 02/23/07

All requests for information to Atmos shall be filed no later than ..... 03/09/07

Atmos shall file responses to requests for information no later than ..... 03/19/07

AG shall file rebuttal testimony, in verified form, no later than ..... 03/29/07

Last day for Atmos to publish notice of hearing ..... To be scheduled

Public Hearing shall begin at 9:00 a.m., Eastern  
Time, in Hearing Room 1 of the Commission's  
offices at 211 Sower Boulevard, Frankfort, Kentucky,  
for the purpose of cross-examination of witnesses of  
the AG and Atmos ..... To be scheduled