

has given notice of its intent to file a forecasted test-year rate case on or shortly after December 1, 2006² 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.

² 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. 1995-00011:³

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

³ 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*,⁴ 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....”⁵ 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 9th day of February, 2007.

By the Commission

ATTEST:


Executive Director

⁴ Ky. App., 605 S.W. 2d 46, 50 (1980).

⁵ Black’s Law Dictionary, 96 (7th 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