

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ATMOS	)	CASE NO.
ENERGY CORPORATION FOR PRP RIDER	)	2023-00231
RATES BEGINNING OCTOBER 1, 2023	)	

ORDER

On October 18, 2023, Atmos Energy Corporation (Atmos) filed a motion for rehearing pursuant to KRS 278.400, requesting reconsideration and clarification of the Order entered September 29, 2023, regarding Atmos’s annual Pipeline Replacement Program (PRP) filing.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. A Commission Order is deemed unreasonable only when “the evidence presented leaves no room for difference of opinion among reasonable minds.”<sup>1</sup> An order can only be unlawful if it violates a state or federal statute or constitutional provision.<sup>2</sup>

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<sup>1</sup> *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

<sup>2</sup> *Public Service Comm’n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm’n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.

### MOTION

Atmos seeks rehearing on the following four issues.

#### Reconsideration of the denial of proposed Aldyl-A projects

Atmos argued in its petition that the Commission imposed a different standard of review for the inclusion of Aldyl-A projects in its PRP than was applied in Case Nos. 2021-00214<sup>3</sup> and 2022-00222,<sup>4</sup> which approved the inclusion of Aldyl-A pipe replacements projects in rates.<sup>5</sup> Specifically, Atmos argued that the strict risk-ranking standard imposed in the order in this case is inconsistent with the previous requirement that PRP applications with Aldyl-A projects “at a minimum include safety justifications.” Atmos argued that “minimum safety justifications” is broader than the “highest risk” standard imposed in this case.<sup>6</sup>

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<sup>3</sup> Case No. 2021-00214, *Electronic Application of Atmos Energy Corporation for an Adjustment of Rates* (Ky. PSC May 19, 2022).

<sup>4</sup> Case No. 2022-00222, *Electronic Application of Atmos Energy Corporation to Establish PRP Rider Rates for the Twelve Month Period Beginning October 1, 2022* (Ky. PSC May 25, 2023).

<sup>5</sup> Petition at 4–5.

<sup>6</sup> Petition at 5.

Atmos claimed the application of a different standard to include Aldyl-A projects in its PRP is contrary to Kentucky law and violates its due process rights.<sup>7</sup> Atmos noted that the Commission approved in Case Nos. 2022-00222 and 2021-00214 Aldyl-A projects with identical risk factors as the projects proposed in this case. Atmos argued that it presented the same level and type of evidence in this matter as in the prior cases approving inclusion of Aldyl-A projects.<sup>8</sup>

Atmos argued that its request was arbitrarily denied. Atmos also claimed that it has provided the safety justifications for the Aldyl-A projects proposed in this case and has met the standard of evidence set by the Commission in Case No. 2021-00214 and affirmed through the Commission's approval of inclusion of the Aldyl-A projects proposed in Case No. 2022-00222. Atmos argued that in addition to risk-ranking and prioritizing projects based on consequence of failure and likelihood of failure, it considers "the contractors available, geographically equitable distribution of planned investment to benefit customers and communities, and limiting potential disruption in the right-of-ways to manageable levels in the communities it serves."<sup>9</sup>

#### Reconsideration of the exclusion of NOL ADIT

With regard to the determination of the appropriate level of Net Operating Loss Accumulated Deferred Income Taxes (NOL ADIT) include in the PRP rate base, Atmos argued that the Commission made errors in its application of three Internal Revenue Code normalization rules:

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<sup>7</sup> Petition at 5 (citing *Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*, 642 S.W.2d 591, 592 (Ky. Ct. App. 1982).

<sup>8</sup> Petition at 5–7.

<sup>9</sup> Petition at 7–8.

- The appropriate level for assessing Atmos’s taxable income or loss position (i.e., an allocation of Atmos’s overall regulated operations or the income/loss derived solely from Atmos’s Kentucky operations).
- The relevant period for determining Atmos’s taxable income or loss.
- The determination of taxable losses attributable to accelerated tax depreciation.

#### Clarification on the Implementation of the \$30 Million PRP Capital Spending Cap

The September 29, 2023 Order in this case increased the annual cap on PRP spending from \$28 million to \$30 million. Atmos argued that the Order is unclear whether the raised cap on PRP spending is now applicable or applies only to future PRP filings.<sup>10</sup> Atmos stated that with the removal of the proposed Aldyl-A projects, the total PRP investment is slightly less than \$28 million.<sup>11</sup> Atmos requested to include additional bare steel pipe replacement projects in the fiscal year 2024 PRP rider.<sup>12</sup>

#### Reconsideration of the denial true-up calculations for the period October 1, 2021, through May 19, 2022

Atmos stated that the period for which it seeks true-up is when it had invested in projects approved in its PRP filing in Case No. 2021-00304<sup>13</sup> but recovered no related revenue because the PRP rates were suspended to investigate issues also raised in Atmos’s rate case filed in Case No. 2021-00214. Atmos argued that similar facts occurred in allowing true-up in prior Atmos cases, and that Atmos has followed the same methodology in calculating the true-up in this filing. Atmos stated that it does not seek

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<sup>10</sup> Petition at 15.

<sup>11</sup> Petition at 5.

<sup>12</sup> Petition at 15 and Exhibit A.

<sup>13</sup> Case No. 2021-00304, *Electronic Application of Atmos Energy Corporation to Establish PRP Rider Rates for the Twelve Month Period Beginning October 1, 2021* (Ky. PSC May 20, 2022).

true-up for the period after the May 19, 2022 Order in Case No. 2021-00214 that approved Atmos's request to roll its PRP rider into base rates.

## DISCUSSION AND FINDINGS

### Reconsideration of the denial of proposed Aldyl-A projects

The Commission in this case has applied a more specific standard for the required showing of safety justifications to include Aldyl-A projects than in Case No. 2021-00214. Although the Order in Case No. 2021-00214 set forth a minimum showing required to include Aldyl-A projects, the Order provided that the proposed projects would be considered on a case-by-case basis and does not preclude the Commission from requiring a more specific showing of consistency with Atmos's Distribution Integrity Management Plan. As discussed in the September 29, 2023 Order, the annual PRP spending cap was imposed to allow accelerated recovery of investments to replace the segments of pipe on Atmos's system at the highest risk of failure (bare steel), and Atmos failed to justify inclusion of the proposed Aldyl-A projects in its PRP ahead of the replacement of the remaining bare steel segments of pipe on its system. The Commission therefore finds that Atmos's request for reconsideration of the exclusion of Aldyl-A projects from its fiscal year 2024 PRP rider rates should be denied.

### Reconsideration of the exclusion of NOL ADIT

Atmos argued that the "with or without" rule, which has been required by normalization rules, should be applied to determine the level of NOL ADIT. That rule, however, is used to determine the extent to which any taxable loss and resulting NOL ADIT should be attributed to accelerated depreciation, and therefore subject to normalization rules, not to determine that a taxable loss occurred. The primary basis for

the decision in the September 29, 2023 Order is that Atmos failed to establish that it was in a taxable loss position, so the “with or without” rule would not come into play. On rehearing, Atmos has not demonstrated that it is in a taxable loss position during the relevant periods based on its Kentucky operations despite being told that it would need to do so in the last two cases that dealt with this issue.<sup>14</sup>

Atmos also did not address the fact that the only NOL ADIT excluded in the final Order arose from timing differences associated with the accelerated expensing of repairs for tax purposes that are unprotected i.e., not subject to the normalization rules. The September 29, 2023 Order cites to a private letter ruling issued by the Internal Revenue Service that indicates that NOL ADIT associated with the accelerated expensing of repairs is not subject to normalization rules, and Atmos acknowledged the same in response to request for information served in a prior PRP case.<sup>15</sup> Thus, the normalization rules do not support granting rehearing because they do not apply to the NOL ADIT excluded from rate base. For these reasons, the Commission finds that Atmos’s petition for rehearing of the exclusion of NOL ADIT should be denied.

#### Clarification on the Implementation of the \$30 Million PRP Capital Spending Cap

The Commission agrees with Atmos that the September 29, 2023 Order is not clear whether the increased spending cap of \$30 million applies only prospectively or is in effect for fiscal year 2024 spending. Atmos requested in its petition for rehearing that the increased spending cap be authorized for fiscal year 2024 and to include additional

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<sup>14</sup> See Case No. 2021-00214, May 19, 2022 Order at 14 and 62, and Case No. 2022-00222, May 25, 2023 Order at 12.

<sup>15</sup> See Case No. 2022-00222, Atmos’s Response to Commission Staff’s First Request for Information, Item 13(b).

bare steel pipe replacement projects described in Exhibit A to its petition. These additional projects were not included in Atmos's filing to establish rider rates, and increasing rider rates to cover these projects raise issues of notice. The Commission finds that Atmos's petition for rehearing on the increased PRP spending cap should be granted, and that the September 29, 2023 Order should be clarified that the increased PRP spending cap applies prospectively and not to fiscal year 2024 spending.

Reconsideration of the denial true-up calculations for the period October 1, 2021, through May 19, 2022

The true-up of this period was previously addressed on rehearing in Case No. 2021-00214, and the Commission specifically ordered that no true-up would be permitted.<sup>16</sup> As noted in the June 15, 2023 Order in Case No. 2021-00214, when the issue has been specifically addressed, the Commission has not allowed a true-up for the periods before a rider was rolled into base rates. For this reason, the Commission finds that Atmos's request to reconsider the denial of true-up calculations for the period October 1, 2021, through May 19, 2022, should be denied.

IT IS THEREFORE ORDERED that:

1. Atmos's petition for rehearing is denied in part and granted in part in accordance with the above findings.
2. The September 29, 2023 Order is clarified that the revised PRP spending cap of \$30 million applies prospectively.
3. The remainder of the September 29, 2023 Order not in conflict with this Order remains in effect.

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<sup>16</sup> Case No. 2021-00214, June 15, 2023 Order at 11.

4. This matter is closed and removed from the Commission's docket.

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PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ENTERED  
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