

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

OFFICE OF THE ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

Complainant

v.

ATMOS ENERGY CORPORATION

Respondent

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: Case No. 2005-00057
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ATTORNEY GENERAL'S RESPONSE TO ATMOS' MOTION TO DISMISS

Comes now the Attorney General, by and through his Office of Rate Intervention, and states as follows for his Response to Atmos' Motion to Dismiss:

For the first time in the one-and-one-half years that the instant case has been pending before the Commission¹, Atmos argues that the established test year ending September 30, 2005, is "too remote" to reflect its current financial condition. Atmos thereby attempts to confuse the issues surrounding the Attorney General's complaint with issues Atmos apparently hopes to present in its general rate case (2006-00464).

Having had ample opportunity to assert a claim of staleness of the established test year, Atmos' should not now be heard to say that mere passage of time renders the instant case moot. The issue of whether Atmos over earned in

¹ The Attorney General filed his complaint on 1 February 2005. The Commission entered an order on 2 February 2006 stating that the Attorney General had established a prima facie case and then opened a docket regarding the matter.

the year ending September 30, 2005, is entirely different from any issues associated with whether Atmos needs a future rate increase.

Moreover, the Attorney General notes that the filing of Atmos' motion at a mere two weeks prior to the date that its testimony (if any) is due to be filed is even more curious. Indeed, the only evidence in the record to date is that of the Attorney General. Atmos has not filed any proof to contradict any of the Attorney General's evidence. Instead, and somewhat amazingly, Atmos relies solely on the notice of intent to file a general rate case utilizing a future test year as the grounds to dismiss the instant complaint case regarding the year ending September 30, 2005. The mere procedure of filing a notice of intent to file a new general rate case cannot by any stretch of the imagination constitute sufficient proof to render the instant case moot.

Atmos further argues that the Attorney General's expert testimony points out that as a result of the Commission's ruling limiting the scope of discovery, it does not have access to all the information that it would like to have. This does not constitute grounds to dismiss – rather, it constitutes grounds for the Commission to investigate, as it is required to under KRS 278.260, and pursuant to precedent set forth in *In the Matter of: An Investigation Into the Reasonableness of the Earnings of Brandenburg Telephone Company Inc.*, (Case No. 9859).

In both its May 9, 2006, and February 2, 2006 orders, the Commission has stated (at p. 3 of each order) that the Attorney General, as the complainant, bears the burden of proof in this KRS 278.260 action. Atmos now moves for dismissal

of the action asserting a failure of the Attorney General to meet that burden of proof with his supplemental testimony. Even if one assumes that the Attorney General's testimony fails to prove that Atmos was over earning, this would not constitute adequate grounds to dismiss the complaint because under the specific provisions and governance of KRS 278.260 and 805 KAR 5:001 §12, the Attorney General does not bear the burden of proof.

In its February 2nd order, the Commission points to *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980) to support its finding that the Attorney General, as the complaining party, bears the burden of proof. However, that case does not speak to a complaint brought under KRS 278.260. The issue addressed in *Kentucky Power Co.*, supra, is whether an administrative agency acting in a quasi-judicial role to decide whether a claimant is entitled to relief must affirmatively show that the claimant is not entitled to the requested relief, when the only evidence on the record before the agency is that which was presented by the claimant in support of its requested relief. The case in no way speaks to the process specifically established by KRS 278.260. Under this statute's express terms, the complainant does not have the burden of proof. Instead, the Commission has the obligation to investigate if it chooses to do so.

Unlike KRS 278.190(3) and 278.430 -- both of which specifically impose the burden of proof on the party seeking relief -- KRS 278.260 places *no burden of proof* on the Attorney General as complainant. Instead, KRS 278.260 gives the Commission, upon the filing of a complaint, the discretion to "make such

investigation as it deems necessary or convenient” regardless of what proof is presented by the complainant. The next sentence of KRS 278.260 provides that the Commission’s power to investigate is the same, regardless of whether the investigation is commenced via a complaint or via the Commission’s own motion: “The Commission may also make such an investigation on its own motion.” The complainant, in this case the Attorney General, is not proving the case against Atmos; rather, the Commission is conducting an investigation of Atmos’ earnings. Consequently, the issue of whether the Attorney General has satisfied any burden of proof is entirely irrelevant to this proceeding under KRS 278.260 and cannot warrant dismissal of the complaint.²

By like token, 805 KAR 5:001 §12 requires only that the Attorney General, as complainant, establish a prima facie case. In fact, the Commission in its February 2nd order expressly found that the Attorney General has done so. What remains then, is that the Commission is to conduct the investigation that it has, in its discretion, undertaken under KRS 278.260. The Commission’s ultimate decision in this case will be the product of that investigation, not of what the Attorney General has been able to prove.

By the terms of the Commission’s own order, it is now up to Atmos to refute the Attorney General’s actions – it has not done so, and cannot now stand upon the unsubstantiated notice of intent to file a general rate case as the sole

² See also *In the Matter of: An Investigation Into the Reasonableness of the Earnings of Brandenburg Telephone Company Inc.*, (Case No. 9859).

grounds for dismissing the instant action. Dismissing this complaint based on the procedural filing of a “notice of intent” imbues that procedural step with the credibility of evidence, a characteristic the notice quite obviously lacks. If the Commission was to adopt Atmos’ reasoning, it would be superfluous for any complainant to put on any evidence, and would mock the most fundamental concepts of due process and equal protection, because *the Commission would be approving Atmos’ request for a rate increase without weighing and evaluating evidence which the law requires Atmos to provide*. In other words, the Commission would be requiring complainants to establish a prima facie case before granting relief, but would grant utilities rate increases based on mere notice. Such would not comport with even basic notions of due process and substantial justice.

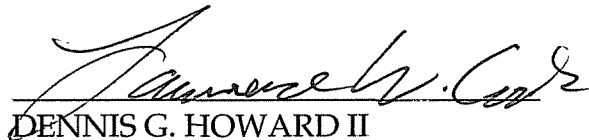
Finally, Atmos throws up another smokescreen by alleging that the complaint asks the Commission to engage in retroactive ratemaking. To the contrary, the complaint seeks *prospective* rate relief based on information described when the complaint was filed. Once again, Atmos seeks to ignore the mandate of KRS 278.260 which authorizes and requires Commission action upon the filing of a complaint. The complaint process set forth in KRS 278.260 requires the Commission to redress past wrongs and grant relief on a prospective going-forward basis when warranted. In the instant complaint, the Commission has chosen to use an historic test year, the same tool authorized for general rate making under KRS 278.192 and 278.190. Examining that historic test year in the context of a KRS 278.260 proceeding is no more retroactive ratemaking than it is

when utilized in a KRS 278.190 proceeding. Clearly, this is not retroactive ratemaking.

WHEREFORE, the Attorney General respectfully requests that the Commission deny Atmos' motion to dismiss.

Respectfully submitted,


GREGORY D. STUMBO
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "Lawrence W. Cook", is written over a horizontal line.

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Notice of Serving and Filing in Paper and Electronic Medium

Per Instruction 2 (d) of the Commission's 3 March 2006 Order, Counsel submits for filing, by hand delivery to Beth O'Donnell, Executive Director, Public Service Commission, 211 Sower Blvd., Frankfort, KY 40601, the original and five copies of the document in paper medium. Counsel also submits a copy of the document in electronic medium by e-mailing the document to pscfilings@ky.gov and Beth.O'Donnell@ky.gov. 29 November 2006 is the date for the filing and service in paper and electronic medium.

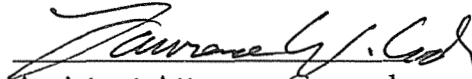

Assistant Attorney General

Certificate of Service

Per Instructions 2 (d) and 8 the 3 March 2006 Order, Counsel certifies service of a true and correct photocopy of the document by mailing the photocopy, first class postage prepaid, to the following:

John N. Hughes
124 West Todd St.
Frankfort, KY 40601

Counsel further certifies, per Instructions 2 (e) and 9, service of an electronic version of the document by electronic mail to the following: johnhughes@fewpb.net; randy@whplawfirm.com; gary.smith@atmosenergy.com; and douglas.walther@atmosenergy.com. Service was made this 29~~th~~ day of November, 2006.


Assistant Attorney General