

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

OFFICE OF THE ATTORNEY GENERAL )  
COMMONWEALTH OF KENTUCKY )  
 ) Case No. 2005-00057  
V. )  
 )  
ATMOS ENERGY CORPORATION )

**Brief of Atmos Energy Corporation**

Atmos Energy Corporation (“Atmos”), by counsel, files this Brief in compliance with the Commission’s order of February 16, 2007, which was entered in response to the Attorney General’s Motion of February 13, 2007 to hold the procedural schedule in abeyance until the conclusion of the pending rate case filed by Atmos, Case No. 2006-00464 (the “rate case”). The issue to be briefed is whether delaying a decision in this case, as requested by the Attorney General, until after the conclusion of the rate case, renders this complaint proceeding “moot”. Stated differently, whether entry of a final order in the rate case would nullify any subsequent rate adjustment decision in this complaint proceeding. Atmos submits the answer under Commission precedent and long standing ratemaking principals is clearly in the affirmative.

By way of background and to put this issue in perspective, a brief review of the history of this case may be helpful to understanding the significance of this motion by the Attorney General. It is the Attorney General for the second time who is seeking a delay

in the procedural schedule. These delays in the resolution of this matter do nothing to allay customers' concerns about Atmos' rates, which have been fueled by the Attorney General's assertions. His efforts to thwart the orderly process established by the Commission fly in the face of the aspersion in his Renewed Motion for a Procedural Schedule, page 2, filed on February 1, 2006, that the delay in processing the case and "...the failure to address the Attorney General's Complaint and lower citizens' bills amounts to governmental blessing of corporate irresponsibility and greed."

The filing of the Complaint in this case by the Attorney General was discretionary on his part. The Attorney General's decision to assume the obligation of pursuing what he apparently believed was an important issue has caused both Atmos and the Commission to spend a great deal of time, effort and money to respond to his allegations. Now, after starting the process, he wants everyone to agree to delay the conclusion of this matter solely for his convenience. He seeks to avoid all activity in this case until it suits his schedule and his discretionary allocation of resources. By that time, Atmos will have new rates in effect and the impact of a 2005 earnings review will be so remote from the company's operations that further action would not only be pointless, it would be as the Commission states in its order of February 16<sup>th</sup> - moot.

A moot case is one that seeks a decision in a matter that cannot have any practical effect on an existing controversy. Louisville Transit Co. v. Dept. of Motor Transportation et al., Ky., 286 S.W.2d 536 (1956). The "existing controversy" here is the claim of the Attorney General that Atmos is over earning under the Commission's final rate order in Case No. 99-070. For the reasons set forth below, a decision on that issue, entered after the entry of a final order by the Commission in the rate case, would have no practical

effect since it would relate to a period of time that is not only too remote for ratemaking purposes, but also to a period governed by the Commission's prior rate order in Case No. 99-070 – an order that would no longer be in effect.

In a case involving similar facts, the Kansas State Corporation Commission, 2001 WL 291910, Docket No. 00-KEPE – 1132 – COM, decided January 11, 2001, copy attached, declared an investigation of the Kansas Electric Power Cooperative (KEPCo) moot. A Complaint about KEPCo's rates was filed by a customer. KEPCo responded that the Complaint was based on a time period too remote to be used for ratemaking, and would not accurately reflect KEPCo's current operations.

KEPCo stated in response to the complaint that it intended to file a rate application using more current financial data, which would make any further action on the complaint administratively inefficient and a waste of time and effort for all parties. The Kansas Commission agreed that investigation of a prior period rate issue would be rendered moot by the filing of a current rate application.

This Commission has determined in prior cases, whether in the context of excessive earnings, one time expense savings or unexpected tax refunds, that the development of a mechanism to recompense ratepayers for those rate distortions is through a general rate proceeding. In Re: Big Rivers Electric Corporation, Case 94-453, Order of February 21, 1997, the Commission discussed the review of rates in light of a complaint that Big Rivers was unjustly enriched by certain litigation proceeds. The Attorney General's Complaint in this case essentially claims unjust enrichment through the collection of an alleged excessive return on equity by Atmos. The Commission's

order noted that the means to a proper remedy to any unjust enrichment claim is through a general ratemaking proceeding.

These orders are consistent with the Commission's statutory authority of KRS 278.270, which provides that any change in rates shall be "followed in the future" and they reinforce the notion that rates are best determined in a general rate case using the most recent and accurate financial data available. When the Commission concludes Atmos' pending rate case, it will establish rates using such current data, including the appropriate level of return.

The Attorney General identified the period and information that is the focus of his Complaint in his Response to Atmos, dated November 29, 2006 at page 5: "...the Complaint seeks *prospective* rate relief **based on information described when the complaint was filed.**" (Emphasis added) The information described in the Complaint as the support for the investigation, namely the rates, allowed return and test year adjustments, will be of no relevance once the new rates are established. Atmos cannot be found to be charging excessive rates, if those rates are no longer in effect.

Under KRS 278.390: "Every order entered by the Commission shall continue in force until...revoked or modified by the Commission..." The Order entered in Case 99-070 remains in force until revoked or modified by the Commission. Once the Commission enters a final decision in the pending rate case, however, the order in Case No. 99-070 will no longer be in effect and therefore not capable of modification.

Although the Commission has previously indicated in this case that an adjustment in rates at the conclusion of this proceeding would not violate the prohibitions against retroactive ratemaking as any adjustment that might be ordered would be prospective

only (Commission Order of February 9, 2007, p. 3), an entirely different conclusion results when a final order in Atmos' rate case has already been entered. In other words, the Order in Case No. 1999-070 which the Commission would be adjusting, would no longer be in effect – having been superseded by the Commission's order in Atmos' rate case.

In summary, any attempt to adjust Atmos' rates resulting from Case No. 99-070 cannot have any practical effect on the existing controversy, because any alleged unreasonable rates set in Case No. 99-070 will have been revoked and replaced with the rates found to be reasonable in Case No. 2006-00464. As the Commission states on page 3 of its February 9, 2007 order, it is authorized "...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." Once the Case No. 99-070 order is superseded by the current rate order, the Commission will have determined whether the existing rates are unjust or unreasonable, so any further investigation of their reasonableness is not only moot, it is contrary to the statutory authority of the Commission.

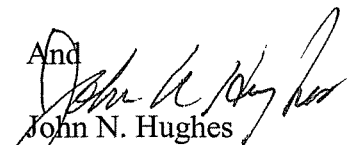
For these reasons, Atmos submits that the Attorney General's complaint should be dismissed, because a decision entered in this case, following the conclusion of Atmos' general rate proceeding would be meaningless and therefore moot.

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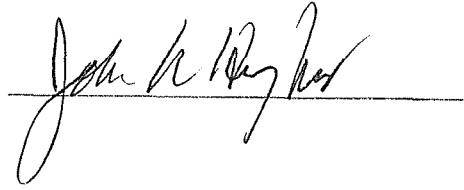
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Certification:

I certify that a copy of this Brief was served on the Attorney General, 1204  
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day of February, 2007.



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2001 WL 291910 (Kan.S.C.C.)

(Cite as: 2001 WL 291910 (Kan.S.C.C.))

Re Hartland Electric Rural Cooperative, Inc.  
Docket No. 00-KEPE-1132-COM

Kansas State Corporation Commission  
January 11, 2001

\*1 Before Commissioners: John Wine, Chair, Cynthia L. Claus, Brian J. Moline

## ORDER

The above matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration. Having reviewed its files and being fully advised of all matters of record, the Commission finds:

1. A pre-hearing conference was held on December 13, 2000 and December 21, 2000. Appearances of counsel were as follows: Timothy L. Fielder on behalf of Heartland Rural Electric Cooperative, Inc. (Heartland); Frank A. Caro, Jr. and Harold L. Haun on behalf of Kansas Electric Power Cooperative, Inc. (KEPCo); and Paula Lentz on behalf of Commission Staff and the public generally. The hearing officer was Caroline Ong, Advisory Counsel.
2. The pre-hearing conference was scheduled by the hearing officer by telephone after review of the pending motions in the docket. All parties agreed that it would promote resolution of the issues in this docket for the parties to meet as soon as possible to discuss the case. All parties waived formal notice of the pre-hearing conference and appeared at the conference.
3. The following pleadings are pending: a November 3, 2000 motion for discovery conference filed by KEPCo, with a November 7, 2000 response by Heartland; a November 7, 2000 motion to compel discovery and request for sanctions by Heartland, with a November 20, 2000 response by KEPCo; a November 20, 2000 motion to dismiss by KEPCo, with responses filed on November 30, 2000 by Heartland and by Staff. Several letters should also be noted: an October 13, 2000 letter from KEPCo regarding the confidentiality of certain filed information; a November 16, 2000 letter from KEPCo stating that it agrees to file a rate case on or before July 1, 2001; November 17, 2000 letter from Heartland stating that Heartland had received KEPCo's November 16, 2000 letter, but still wanted to proceed with its complaint and with the discovery it had requested.
4. At the December 13, 2000 pre-hearing conference, KEPCo noted that July 1, 2001 is a Sunday and stated that its rate case would therefore be filed by June 29, 2001. The rate case would be based on a Year 2000 test year. The parties agreed that the question of what relief could be granted by the Commission and the lawful

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dates for any changes in rates to occur should first be resolved before review of the various motions. After discussion, Heartland requested that the pre-hearing conference be continued for approximately one week so that it could further consider the relief it was requesting. The pre-hearing conference was continued to December 21, 2000.

5. On December 21, 2000, just prior to the resumption of the pre-hearing conference, Heartland filed a letter on its position. The December 21, 2000 letter acknowledged that any relief as to rates would have to be prospective only. The letter requested that Heartland be able to continue with the complaint case, and that the complaint not be stayed pending the filing of a rate case by KEPCo. Heartland stated that it would file testimony on or before January 31, 2001.

6. Heartland's December 21, 2000 letter was discussed at the pre-hearing conference. Heartland verified that it would plan to file rate design testimony in January 2001, and that this testimony would be based on the rate design study prepared for KEPCo in 2000. KEPCo stated that the study was based on data that was now stale and contained approximately 15 different rate design scenarios. Heartland indicated that it would base its filing on the scenarios that it felt were appropriate and that KEPCo could suggest its own rate design when responding to Heartland's filing. Both KEPCo and Staff objected to Heartland's proposal, and asked that they be given an opportunity to respond in writing to Heartland's letter.

7. KEPCo and Staff filed separate responses to Heartland's letter on January 4, 2001. KEPCo argues that Heartland's proposal would cause a disjointed proceeding which would be contrary to the public interest and would place a significant time and cost burden on KEPCo, the Commission and Staff. KEPCo states that the February 2000 rate design that Heartland wants to use for its filing utilizes 1998 test year revenues and that this data would not accurately reflect KEPCo's current operations. KEPCo notes that the 1998 data will be superceded by Year 2000 data when KEPCo makes its rate case filing. KEPCo repeats its commitment to file a rate case on June 29, 2001. KEPCo states that to continue the complaint investigation based on old data is administratively inefficient and a waste of time and effort for all parties. KEPCo requests that the Commission dismiss Heartland's complaint.

8. Staff maintains that while it is possible for rate design to be addressed separately from revenue requirement, Heartland's proposal takes these matters out of the proper order. Staff notes that the rate design study Heartland wants to use is based on 1998 data, and that a rate design study should be based on fresh data and on current 2000 test year revenue requirements. Staff states that it is not logical to complete a rate design study that may be rendered moot immediately by a rate case application. Given the Commission's calendar and other obligations, Staff questions whether any filing made by Heartland in January could be reviewed by the Commission prior to filing of the rate case on June 29, 2001. Staff recommends that the Commission stay this proceeding pending the filing by KEPCo of a rate case. If KEPCo files a rate case and rate design on or before June 29, 2001, Staff would support dismissal of this proceeding. If those filings are not

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made, then the stay in this case would be lifted.

9. The Commission has jurisdiction over the parties and the subject matter of this docket. See K.S.A. 66-101, et seq. The Commission has considered the positions of the parties and the various motions that are pending. Rates should be based on the most accurate and current information possible. KEPCo has stated its intention to file a comprehensive rate case on or before June 29, 2001. This case would use data from a Year 2000 test year. The Commission agrees with Staff and KEPCo that this filing with the 2000 test year is the best manner in which to review KEPCo's rates. The Commission sees no justification for attempting to design rates based on 1998 data when Year 2000 data will be available in several months.

10. The review of KEPCo's rate design for its customers will be a complicated process. If Heartland were permitted to make the rate design filing it requests, it is certain that KEPCo would have substantial modifications or objections and that the proceeding would not be concluded until some time after July 2001. The Commission finds merit in the argument that any decision based on 1998 data would have to be immediately reconsidered when the revenue requirement using a Year 2000 test year was determined. To require that time and effort be expended to litigate issues relating to outdated data is not reasonable. Having two proceedings would be a wasteful, inefficient and burdensome use of Commission Staff and resources, and would be of no benefit to Heartland or KEPCo. The Commission will not accept Heartland's proposal.

11. When Heartland filed its Petition, it sought an investigation of KEPCo's rates. At the time of the filing, Heartland also indicated that it believed it was entitled to refunds or **retroactive rate** relief. That element of the Petition is no longer being pursued, as Heartland has agreed that rate relief must be prospective. An investigation to determine what rates are just and reasonable would be accomplished through the rate filing KEPCo has agreed to make.

12. Under K.S.A. 1999 Supp 66-101e, the Commission has discretion in how it investigates and handles written complaints. The Commission finds that the rate filing by KEPCo will result in Heartland obtaining the relief it seeks. The Commission further finds that the June 29, 2001 KEPCo rate filing is the most fair and reasonable way of considering the issues that have been raised in this proceeding. The Commission directs KEPCo to file a comprehensive rate case on or before June 29, 2001. The Commission will keep this docket open until the June 29, 2001 deadline has passed in order to verify that a sufficient rate filing has been made by KEPCo. However, the Commission orders that no further discovery or activity take place in this docket. Further proceedings in this docket are stayed until after June 29, 2001.

13. Based on the above rulings, the Commission finds that the following pending matters are moot: KEPCo's October 13, 2000 letter concerning the confidentiality of certain information; KEPCo's motion for a discovery conference; and Heartland's motion to compel discovery and request for sanctions. KEPCo's motions to dismiss are not ruled on at this time, but will be considered after June 29, 2001.

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\*2 IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

(A) Heartland's proposal to file rate design testimony based on 1998 data is denied.

(B) KEPCo is to file a comprehensive rate case on or before June 29, 2001.

(C) Further proceedings in this docket are stayed until after June 29, 2001.

(D) KEPCo's October 13, 2000 letter concerning the confidentiality of certain information, KEPCo's motion for a discovery conference, and Heartland's motion to compel discovery and request for sanctions are found to be moot.

(E) KEPCo's motions to dismiss are not ruled on at this time, but will be considered after June 29, 2001.

(F) A party may file a petition for reconsideration of this Order within fifteen (15) days of the date of this Order. If service is by mail, three (3) additional days may be added to the fifteen (15) day time limit to petition for reconsideration.

(G) The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

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