

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

This matter is before the Commission on the motion to dismiss filed by Atmos Energy Corporation ("Atmos"). Because the Attorney General ("AG") has failed to sustain his burden of proof, the motion will be granted.

On February 1, 2005, the AG filed a complaint alleging that the rates of Atmos were producing revenues in excess of reasonable levels. In support of his complaint, the AG submitted the verified written testimony of Robert Henkes. Mr. Henkes testified that, based upon his limited earnings review of Atmos's Kentucky jurisdictional operations, Atmos allegedly achieved an average return on equity ("ROE") of 19.4 percent from the 12-month period ending September 30, 2001 through the 12-month period ending March 31, 2004. Comparing these findings to the ROE that the Commission awarded Delta Natural Gas Company in 2004, Mr. Henkes concluded that

Atmos was earning an ROE well in excess of an average ROE the Commission has found.

On February 14, 2005, Atmos answered the complaint and moved for dismissal. In support of its motion to dismiss, Atmos argued that the AG failed to state facts sufficient to meet the standard for regulatory certainty of a violation or to present any evidence that any Commission Order, statute, or regulation had been violated. Atmos further argued that Mr. Henkes' analysis is based on inaccurate information regarding Atmos' earnings. In support of its motion, Atmos provided its own schedules showing calculations and earnings.

In an Order dated February 2, 2006, the Commission determined that the AG had established a prima facie case, despite certain deficiencies in its financial information and calculations. It also noted that, in order to proceed, the AG would have to produce substantial evidence on the appropriate ROE level for Atmos under present economic conditions.

An informal conference was held shortly thereafter to set up a procedural schedule for the case. Commission Staff presented a proposed schedule, but the AG, acknowledging that he had the burden of proof, maintained that it would not allow for enough time to process the case.¹ The AG thought that the case would be similar to that of the Commission's investigation into the earnings of Brandenburg Telephone Company, Case No. 9859, which was processed in approximately 20 months. The AG stated that this case could be processed in less than 20 months, but he suggested that Atmos would need 60 days to compile the necessary information. By the end of the

¹ See Informal Conference Memo at 1, dated February 20, 2006.

informal conference, the parties agreed to a lengthened schedule that allowed the AG to make three data requests of Atmos over a 5-month period between March and August 2006. Testimony and requests for information were to be filed between September 2006 and January 2007, and a public hearing would be held sometime after January 19, 2007.

After the AG propounded his first data requests, Atmos sought to quash several of the requests. It argued that information pertaining to years prior to and beyond the test year were irrelevant and speculative. Although the Commission permitted the AG to look at Atmos's financial information outside the test year to determine the reasonableness of the finances within the test year, the Commission limited the request to a 12-month period prior to the test year and 6 months after it.

Atmos filed the bulk of its responses on May 15, 2006, and the remainder was filed on the following day. The AG followed up with his second set of data requests on June 14, 2006, and Atmos timely filed its responses on July 12, 2006. According to the schedule, the AG was to file his third data request by August 2, 2006, but due to a "scheduling mistake," the data request was not filed until August 8, 2006 and was accompanied by a motion to amend the procedural schedule accordingly. Atmos did not oppose the AG's motion to amend the procedural schedule and responded to the last round of data requests on August 16, 2006.

On November 1, 2006, and prior to filing verified testimony in this proceeding, Atmos filed a notice of intent to file a general rate case. Atmos also filed a motion to dismiss the AG's complaint on November 17, 2006. Atmos argued that its own rate case would moot the AG's complaint. Further, it maintained that the test period ending

on September 30, 2005 was too remote to meet the “current economic conditions” standard. Atmos also moved for holding the existing procedural schedule in this proceeding in abeyance. The AG argued that the issue presented in this case is not relevant to Atmos’s rate proceeding and that referring to the established test period would not result in retroactive rate-making.

The Commission agreed 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 prospectively adjust Atmos’s rates at the conclusion of its recently filed rate proceeding. The Commission also agreed that the imposition of a rate adjustment at the conclusion of this proceeding, which was scheduled to be concluded before the proposed rate adjustment would be effective, would not violate the prohibition against retroactive rate-making. Thus, the Commission denied Atmos’s motion to dismiss and reiterated that the AG had the burden of proof in this case.

The Commission amended the procedural schedule to accommodate the time spent briefing and disposing of the motion to dismiss. Atmos was required to file its testimony on February 23, 2007. All requests for information to Atmos based on its filed testimony were to be served by March 9, 2007, and Atmos’s responses to these requests were due on March 19, 2007. Finally, the AG was to file rebuttal testimony by March 29, 2007.

On February 13, 2007, the AG filed a motion to hold the new procedural schedule in abeyance. The AG argued that the temporal proximity of the deadlines made it impossible for his experts to analyze the data, in addition to their responsibilities in other matters. He indicated that his primary expert would be out of the country for a

period of time, which would limit his ability to review the testimony and information filed by Atmos to five days. The AG also asserted he had a number of other time-consuming rate cases that prevented him from completing his responsibilities in this case under the revised procedural schedule. Curiously, he stated that the filed rate doctrine would prevent the Commission from ordering a reduction of rates in this proceeding at the conclusion of the new rate proceeding, but he continued to request that his complaint be held in abeyance until that time. Recognizing that by granting the AG's motion, the AG's complaint would become moot, the Commission ordered the parties to brief whether this proceeding should be held in abeyance pending the outcome of Atmos's general rate case.

On March 30, 2007, the Commission denied the AG's motion after reviewing the briefs, finding that if it were to grant the motion, it would be prohibited by the rule against retroactive rate-making from ruling on the alleged issue of over-earning during the period of review established for this proceeding. It noted that Staff's originally proposed procedural schedule was extended for a significant amount of time, based on the suggestion of the AG. Because the AG did not propound a data request during the pendency of the motion to hold in abeyance, the Commission amended the procedural schedule to allow additional data requests to be propounded on Atmos.

On April 9, 2007, the AG provided a written objection to the Commission's updated procedural schedule, stating:

The Attorney General has demonstrated that compliance with the schedule (imposed over the OAG's objection) is not feasible. Because the Attorney General is being denied any meaningful opportunity to perform his statutory charge to advance the interests of the citizens of the Commonwealth by the unilateral actions of the PSC, he reluctantly is forced to withdraw from these proceedings.

In response to the AG's withdrawal, Atmos filed a motion to dismiss.

In both its February 2, 2006 and February 9, 2007 Orders, the Commission plainly set forth the statutory responsibility of the AG, as the complainant, to carry the burden of proof.² The Commission accommodated the AG's requests for more time to develop his case. The AG's most recent motion, if granted, would have rendered his own complaint moot. In the end, he has withdrawn from the case and presented insufficient evidence to carry his burden of proof. Atmos's motion to dismiss will be granted.

IT IS HEREBY ORDERED that:

1. The motion to dismiss filed by Atmos is granted.
2. This proceeding shall be closed and removed from the Commission's docket.
3. This is a final and appealable Order.

Done at Frankfort, Kentucky, this 1st day of June, 2007.

By the Commission

ATTEST:



Executive Director

² Energy Regulatory Comm'n v. Kentucky Power Co., 605 S.W.2d 46 (Ky. App. 1980).

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

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

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

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

Gary L. Smith
Vice President, KY Marketing & Reg.
Atmos Energy Corporation
2401 New Hartford Road
Owensboro, KY 42303-1312

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