

In the Matter of:

APPLICATION OF WKG STORAGE, INC. FOR)
RATE ADJUSTMENT FOR SMALL UTILITIES)
PURSUANT TO 807 KAR 5:076)

CASE NO.
2016-00053

ATTORNEY GENERAL’S COMMENTS

The Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, hereby submits his comments to the Public Service Commission (“Commission” or “PSC”) in the above-styled case. Due to the fact that the petitioner in this case, WKG Storage Inc. (“WKG” or “Company”), has never acted as if they were a regulated utility; WKG provides a wholesale service to only one single utility customer, which WKG is a subsidiary of; and WKG does not provide any service to or for the public the Commission should not consider WKG as a utility. Therefore, the Company’s rates do not fall under the jurisdiction of the Commission.

BACKGROUND

WKG has filed an Alternative Rate Filing (“ARF”) with the Commission, requesting an increase in the rates it currently charges.¹ WKG is a natural gas storage company which is a wholly-owned subsidiary of Atmos Pipeline and Storage, LLC (“Atmos Pipeline”), and Atmos

¹ Revised Application. In the Matter of: *WKG STORAGE, INC. REVISED APPLICATION FOR ADJUSTMENT OF RATES PURSUANT TO 807 KAR 5:076*, Case No. 2016-00053. Page 5 (hereinafter “Revised Application”)

Pipeline is a wholly-owned subsidiary of Atmos Energy Holdings, Inc. (“Atmos Holdings”).² Furthermore, Atmos Holdings is a subsidiary of Atmos Energy Corporation (“Atmos Energy”).³ WKG stores natural gas in its underground storage facility located in Hopkins County, Kentucky for its only customer, Atmos Energy.⁴ The Commission is granted the statutory authority under KRS 278.040 to regulate utilities in this state, with the exception of cities or political subdivisions, and accordingly has exclusive jurisdiction over the rates and services of these utilities.⁵ Although the Commission’s power afforded by statute is expansive, courts have previously held that the Commission “has only such powers as granted by the General Assembly.”⁶ Thus, the Commission’s authority to set rates is therefore limited to those entities that are defined as “utilities” under KRS 278.010.

DISCUSSION

I. WKG’S FAILURE TO ACT AS A REGULATED UTILITY

The Attorney General contends that due to the Company’s failure to file annual reports that are required of regulated utilities, it has not acted in accordance with the law and regulations a regulated utility is expected. For instance, in the memorandum filed by the Commission, dated February 26, 2016, the Commission Staff asserted that WKG had not filed annual reports with

² Tucker, Bruce. “Atmos Energy, Atmos Pipeline and Storage Inc. Safety Publication.” Web PDF. 28 March 2016. <http://sitemanager.pdigm.com/user/file/Kentucky/Atmos_Pipeline_and_Storage_LLC.pdf> (hereinafter “Safety Publication”); Order. In The Matter of: *THE APPLICATION OF WKG STORAGE, INC. FOR APPROVAL OF A CHANGE IN CONTROL THROUGH ACQUISITION OF ASSETS OF KENTUCKY PIPELINE AND STORAGE COMPANY, INC. AND FOR APPROVAL OF TARIFF*, Case No. 2001-00235, Dated September 24, 2001.

³ WKG Storage Inc. Response to Commission Staff’s Second Data Request, Attachment 1 to Staff DR No. 2-05, Case No. 2016-00053

⁴ Safety Publication, Page 1; Revised Application, Page 8; WKG Storage Rate Tariff. Filed with the Commission, effective date 15 Oct. 2001. Page 1

⁵ KRS 278.040

⁶ *Cincinnati Bell Telephone Co. v. Kentucky Public Service Com’n*, 223 S.W.3d 829, 836 (Ky. Ct. App. 2007) (quoting *PSC v. Jackson County Rural Elec. Coop., Inc.*, 50 S.W.3d 764, 767 (Ky. App. 2000).

the Commission.⁷ These reports are not only required under 807 KAR 5:006(4), but also under 807 KAR 5:076 which is the ARF procedure for small utilities.⁸ Furthermore, it is against the spirit of the regulation to allow entities that have not previously filed reports, or otherwise acted in accordance with the applicable law, to file information from the past two years at the time of filing an ARF. Neither the Commission Staff in the February 26 memorandum, nor the Company in any filing since, has cited or explained why “transmission companies” are relieved by the Commission in its annual filing requirement, or why WKG is considered a “transmission company.” These annual reports aren’t just required should the instance arise that a utility may file a rate adjustment, but they are a part of the systematic regulation of utilities in this Commonwealth envisioned by the legislature. To allow WKG to defy their legal requirements for years, until the time arises that they wish to benefit from a rate case, is not in accordance with the intention or spirit of the law.

Additionally, public service companies that are not explicitly exempted are required by law to file certain annual reports to the Department of Revenue.⁹ These reports include information such as the name and principal place of business, financial data like undivided profits and the cost and year acquired of property that is used by the entity, as well as the reports previously filed with the Commission by way of 807 KAR 5:003.¹⁰ When asked if WKG has filed these, the Company responded that these reports are only required from “state assessed” companies and that WKG Storage is not considered a state assessed company because the state agency “does not consider WKG Storage, Inc.’s business activities to meet the definition of

⁷ Memorandum. In the Matter of: *WKG STORAGE, INC. APPLICATION FOR ADJUSTMENT OF RATES PURSUANT TO 807 KAR 5:076*, Case No. 2016-00053. Dated March 1, 2016. Page 1.

⁸ 807 KAR 5:006 (4); 807 KAR 5:076

⁹ KRS 136.120; KRS 136.120; KRS 136.140

¹⁰ KRS 136.120, 136.120 & 136.140

“public service.””¹¹ As the Company has not filed the aforementioned reports, they necessarily have not paid the assessments that fund the ongoing operations of the PSC.¹² These are just two instances where the Company has not acted as if they were rate-regulated by the Commission, and WKG seemed to only change their behavior when it was in their interest to receive the benefit of earning a return.

II. WKG IS NOT A UTILITY UNDER KENTUCKY LAW

KRS 278.010 sets forth the definitions to be used in the chapter regulating public utilities, generally. This sections defines utilities, as it relates to natural gas as, “...any person....who owns, controls operates, or manages any facility used or to be used for or in connection with... the production, manufacture, storage, distribution, sale, or furnishing of natural or manufactured gas, or a mixture of same *to or for the public*, for compensation.”¹³ WKG is in the business of storage and transmission of natural gas and performs these services only for a single company - Atmos Energy.¹⁴ More importantly, WKG is a subsidiary of Atmos Energy.¹⁵ Relatively soon after WKG purchased their storage assets the Company entered into an agreement with Atmos Energy to contract 1.75 BCF of storage, or 97.22% of WKG’s capacity, for 90% of the tariffed rate.¹⁶ Additionally, WKG notes that it has not sought any additional intrastate customers since Atmos Energy contracted for nearly the entire storage field.¹⁷

¹¹ WKG Storage Inc. Response to Attorney General’s First Data Request, Response to AG DR No. 1-09, Case No. 2016-00053; WKG Storage Inc. Response to Attorney General’s Third Data Request, Response to AG DR No. 3-01, Case No. 2016-00053

¹² KRS 278.150

¹³ KRS 278.010 (3)(b) [emphasis added]

¹⁴ Revised Application, Page 8; 2001-00235 Order; “Underground Natural Gas Storage Agreement”, filed with Commission, effective 3 Sept. 2004, Page 1 (Hereinafter Agreement).

¹⁵ See Footnote 2 and 3, above.

¹⁶ WKG Storage Inc. Response to Attorney General’s First Data Request, Response to AG DR No. 1-16, Case No. 2016-00053; WKG Storage Inc. Response to Attorney General’s First Data Request, Response to AG DR No. 1-14,

As WKG has made it clear it has no intention to contract with or ascertain additional customers, they are merely a subsidiary providing services to a parent company.¹⁸ This can only lead to the logical conclusion that it is actually Atmos Energy who is receiving any and all services provided by the company, rather than WKG providing services, *to or for the public*.¹⁹ This distinction, along with the fact that a separate state agency, “does not consider WKG Storage, Inc.’s business activities to meet the definition of ‘public service’” leads the Attorney General to the conclusion that WKG does not fall under the statutory definition of a utility.²⁰ If the company is not a utility under the statutory definition, then its *rates* are not subject to PSC approval. Consequently, the Commission does not have the authority to grant rates to WKG because it is not a utility, except for the PSC’s authority to enforce the provisions of law dictating the relationship between utilities and their non-regulated affiliates, as it relates to Atmos Energy.²¹

III. WKG’S STATUS IS AN ATTEMPT TO BYPASS THE LAW’S INTENT

Not only does the relationship between WKG and Atmos Energy bring up possible issues regarding affiliate pricing, such as the mandate that services provided to an utility by an affiliate shall be priced at the affiliate’s full distributed cost, but in no event greater than market, but it

Case No. 2016-00053: Underground Natural Gas Storage Agreement, signed May 28, 2004, on file with the Public Service Commission

¹⁷ WKG Storage Inc. Response to Attorney General’s First Data Request, Response to AG DR No. 1-15, Case No. 2016-00053

¹⁸ WKG Storage Inc. Response to Attorney General’s First Data Request, Response to AG DR No. 1-16, Case No. 2016-00053; WKG Storage Inc. Response to Attorney General’s First Data Request, Response to AG DR No. 1-14, Case No. 2016-00053

¹⁹ KRS 278.010 (3)(b) [emphasis added]

²⁰ WKG Storage Inc. Response to Attorney General’s First Data Request, Response to AG DR No. 1-16, Case No. 2016-00053; WKG Storage Inc. Response to Attorney General’s First Data Request, Response to AG DR No. 1-14, Case No. 2016-00053; KRS 278.010 (3)(b)

²¹ KRS 278.2213 [emphasis added]; WKG Storage Inc. Response to Attorney General’s Third Data Request, Response to AG DR No. 3-01, Case No. 2016-00053

also blurs the lines of transparency and accuracy of the purchased gas adjustment (PGA).²² When pressed about why the majority of WKG's assets are recorded on the books as non-utility property and have been characterized as such since inception, the Company mentions that the storage demand fees charged by WKG "are recorded within our (assumingly referring to Atmos Energy) purchased gas cost accounts."²³ The PGA mechanism was implemented in order for gas LDC's to be alleviated from the market risk associated with the purchase and transportation of natural gas.²⁴ The PSC has stated that, "the PGA enables utilities to adjust on a regular basis the amount they charge to their customers to reflect the actual cost of the gas used by those customers."²⁵ When asked if the utilities earn a profit on the PGA, the PSC answers unequivocally, "No. The PGA serves strictly as a mechanism for reflecting the costs of natural gas and pipeline transportation costs on a *dollar-for-dollar basis*."²⁶ If WKG earns a profit, Atmos Energy earns a profit, which by its definition is not a cost of Atmos Energy associated with either the purchase or transportation of gas. If WKG is allowed to be treated as a rate-regulated utility, the abovementioned precedent will be overturned and Atmos Energy will be earning a profit, recoverable through the PGA.

Affording WKG this treatment will open the floodgates for utilities to separate every part of the purchase, transportation, and storage of their supply in an effort to identify each entity as a utility. If the Commission allows this to occur then each of the subsidiaries will be eligible to earn a return (profit) which will then be passed on to the unsuspecting customers via the PGA. The Attorney General would argue that this is absolutely against the spirit and purpose of the

²² KRS 278.2207 (1)(b)

²³ WKG Storage Inc. Response to Commission Staff's First Data Request, Response to Staff DR No. 1-14, Case No. 2016-00053

²⁴ The Purchased Gas Adjustment: Frequently Asked Questions
<http://psc.ky.gov/agencies/psc/consumer/pga%20qanda.pdf> Page 1.

²⁵ *Id.* at 1.

²⁶ *Id.* at 1. [emphasis added]

PGA which is to “reflect the price of natural gas at cost,” and is not intended to be a mechanism for utilities to maximize profits.²⁷ Instead, WKG’s service contract with Atmos Energy, as a non-regulated subsidiary, should be truly negotiated at arms-length, taking into account the true cost of service, dollar-for-dollar, so the cost to Atmos Energy can be accurately determined for PGA purposes.²⁸ The current service contract cannot be said to accurately reflect the cost of service, as it is an arbitrary 90% percent of a rate charged by its predecessor more than a decade and a half ago.²⁹

IV. ADDITIONAL CONSIDERATIONS

During discovery, when pressed as to why WKG believes they are regulated, the Company only points to the 2001 Commission order transferring Kentucky Pipeline and Storage Company, Inc.’s (KYPSCO) facilities to WKG.³⁰ WKG misstates what this order actually reflects, which is that KYPSCO was a utility regulated by the PSC prior to its sale to WKG, and pursuant to statute, PSC approval was necessary for the transfer.³¹ Nothing in that order suggests or infers, never mind confirms, that WKG is or was a utility subject to PSC regulation for rates. There are different scenarios in which approval of a transfer under this statute is necessary, yet the acquiring party does not come out the other side regulated by the PSC, like a city who acquires a utility, or here, where the acquiring utility no longer provides service to or for the

²⁷ Order. In the Matter of: *AN INVESTIGATION OF NATURAL GAS RETAIL COMEPETITION PROGRAMS*, Case No. 2010-00146, December 28, 2010.

²⁸ KRS 278.2213

²⁹ Underground Natural Gas Storage Agreement, signed May 28, 2004, on file with the Public Service Commission; WKG Storage Inc. Response to Attorney General’s Third Data Request, Response to AG DR No. 3-07, Case No. 2016-00053; WKG Storage Inc. Response to Attorney General’s First Data Request, Response to AG DR No. 1-04, Case No. 2016-00053

³⁰ Order. In the Matter of: *THE APPLICATION OF WKG STORAGE, INC. FOR APPROVAL OF A CHANGE IN CONTROL THROUGH ACQUISITION OF ASSETS OF KENTUCKY PIPELINE AND STORAGE COMPANY, INC. AND FOR APPROVAL OF TARIFF*, Case No. 2001-00235, September 24, 2001.

³¹ KRS 278.020 (6)

public.³² Regardless of this point, it is apparent that neither the Company's books, nor their actions over the past fifteen (15) years, indicate that WKG is, or should be, rate-regulated by the PSC. The Attorney General would contend that WKG has never been a regulated utility by the PSC which is evidenced by its own actions - from not filing annual reports with either the PSC or the Department of Revenue, not paying assessments used to fund the ongoing operation of the PSC, having the majority of their assets booked as "non-utility" since inception, and not providing service to or for the public as required by the Kentucky statutory definition of a "utility".³³

CONCLUSION

Whereby, the Attorney General respectfully requests the Commission deny WKG's request for a rate based on the aforementioned reasons. WKG is not a rate-regulated utility under the PSC's own statutes and regulations, and therefore should not be allowed to pass through profits under the guise of a cost associated with the PGA. In the alternative, should the PSC find that WKG is, or has been, rate-regulated, then the company should have to file annual reports with both the Department of Revenue and the PSC, and pay all associated fees and assessments, for the both the current year and any year that it has operated as a rate-regulated utility in the Commonwealth of Kentucky. It is against the intent and desire of the Legislature to allow companies to dodge the responsibilities of being regulated while also benefitting from the ability to earn a rate of return on investment.

³² See Kentucky OAG 2-01 stating, "Kentucky statutes are clear that the Public Service Commission must approve a purchase, control or acquisition of a utility by a municipality. However, the statute also states that city owned utilities do not fall under the traditional regulatory jurisdiction of the PSC. As a result, most municipal utility operations fall outside the regulatory powers of the PSC, unless the city contracts with a PSC-regulated entity." Page 5; KRS 278.010 (3)(b)

³³ KRS 278.010 (3)(b)

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Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to the Acting Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were mailed via First Class U.S. Mail, postage pre-paid, to:

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This 8th day of July, 2016



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