

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ATMOS ENERGY ) CASE NO.  
CORPORATION FOR AN ADJUSTMENT OF RATES ) 2018-00281

NOTICE OF FILING

Notice is given to all parties that the following materials have been filed into the record of this proceeding:

- The digital video recording of the evidentiary hearing conducted on January, 2019 in this proceeding;
- Certification of the accuracy and correctness of the digital video recording;
- All exhibits introduced at the evidentiary hearing conducted on January 10, 2019 in this proceeding;
- A written log listing, *inter alia*, the date and time of where each witness' testimony begins and ends on the digital video recording of the evidentiary hearing conducted on January 10, 2019.

A copy of this Notice, the certification of the digital video record, hearing log, and exhibits have been electronically served upon all persons listed at the end of this Notice.

Parties desiring to view the digital video recording of the hearing may do so at

[http://psc.ky.gov/av\\_broadcast/2018-00281/2018-00281\\_10Jan19\\_Inter.aspx](http://psc.ky.gov/av_broadcast/2018-00281/2018-00281_10Jan19_Inter.aspx).

Parties wishing an annotated digital video recording may submit a written request by electronic mail to [pscfilings@ky.gov](mailto:pscfilings@ky.gov). A minimal fee will be assessed for a copy of this recording.

Done at Frankfort, Kentucky, this 4<sup>TH</sup> day of February 2019.



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Public Service Commission of Kentucky

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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ATMOS ) CASE NO.  
ENERGY CORPORATION FOR AN ) 2018-00281  
ADJUSTMENT OF RATES )


CERTIFICATION

I, KaBrenda L. Warfield, hereby certify that:

1. The attached DVD contains a digital recording of the Hearing conducted in the above-styled proceeding on January 10, 2019. Hearing Log, Exhibit List and Witness List are included with the recording on January 10, 2019.
2. I am responsible for the preparation of the digital recording;
3. The digital recording accurately and correctly depicts the Hearing of January 10, 2019
4. The Hearing Log attached to this Certificate accurately and correctly states the events that occurred at the Hearing of January 10, 2019 and the time at which each occurred.

Signed this 1<sup>st</sup> day of February, 2019.

  
KaBrenda L. Warfield, CKP  
Paralegal Consultant

  
Stephanie Schweighardt, Notary Public  
State at Large  
Commission Expires: January 14, 2023  
ID#: 614400



Judge: Bob Cicero; Talina Mathews; Michael Schmitt

Witness: David Garrett; Lane Kollen

Clerk: KaBrenda Warfield

Date:	Type:	Location:	Department:
1/10/2019	Other	Hearing Room 1	Hearing Room 1 (HR 1)

Event Time	Log Event	
12:43:04 PM	Session Started	
12:43:07 PM	Session Paused	
12:59:48 PM	Session Resumed	
12:59:50 PM	Chairman Schitt Note: Fields, Angela	Chairman stating Preliminary remarks and introduction of Vice Chairman Cicero and Commissioner Mathews.
1:02:24 PM	Chairman Schmitt Note: Fields, Angela	Also before the hearing started Mr. Cook you advised that you had two experts who are present by telephone conference call here today is that correct?
1:02:57 PM	Chairman Schmitt Note: Fields, Angela	Mr. Hughes I know that it was kind of an unusual request, but Mr. Cook invited your expert to participate by telephone as well. Do you have anyone here or your expert by phone? Not required to do so.
1:03:27 PM	Chairman Schmitt Note: Fields, Angela	Mr. Cook on behalf of the Attorney General's Office if you would like to go ahead and argue your motion please proceed.
1:03:33 PM	Asst Atty Gen Cook Note: Fields, Angela	Thank you very much Mr. Chairman. May I please the Commission?
1:03:38 PM	Asst Atty Gen Cook Note: Fields, Angela Note: Fields, Angela	Tab 3, first document. The reason that we are here today was Atmos' response to a discovery request from the Attorney General number 1-3. And that is attached in the handout Mr. Cook gave out.
1:04:20 PM	Asst Atty Gen Cook Note: Fields, Angela	At this point the Attorney General is only seeking discovery. It's not asking the Commission to make any kind of ruling about the methodology that it will rely on in setting the appropriate depreciation rates in this case. It's only asking for it in discovery.
1:08:43 PM	Chairman Schmitt - Asst Atty Gen Cook Note: Fields, Angela	I understand why you want this information. You have answered the question before it was asked as to why you don't think you can produce it.
1:09:40 PM	Chairman Schmitt - Atty Hughes Atmos Note: Fields, Angela	Mr. Hughes what do you say?
1:11:38 PM	Chairman Schmitt - Atty Hughes Note: Fields, Angela	At this time have you spoken to your expert about how long it would take or how much it would cost to provide this? What did he say?
1:11:58 PM	Chairman Schmitt Note: Fields, Angela	One of the things that strikes me as being interesting.
1:14:52 PM	Atty Hughes Atmos Note: Fields, Angela	We have no objection to filing anything that the Commission orders us too.

1:15:48 PM Chairman Schmitt - Atty Hughes Atmos  
Note: Fields, Angela In our deliberations we actually spoke to our staff and somebody said well we might like to see it. They didn't ask for it, and that might be through oversight or whatever. In view of the fact that it might be of some value, we think that it ought to be produced and order it to be produced.

1:17:13 PM Atty Hughes Atmos  
Note: Fields, Angela There is potentially future issues if the Commission grants the Attorney General's Motion to Compel.

1:17:44 PM Chairmain Schmitt - Atty Hughes Atmos  
Note: Fields, Angela This is a specific case and a specific issue and we don't intend for any ruling on this motion to be a definitive explanation or position that has any value beyond the instant case.

1:18:07 PM Chairman Schmitt  
Note: Fields, Angela Anything further Mr. Cook?

1:18:25 PM Asst Atty Gen Cook  
Note: Fields, Angela If I understand correctly, correct me if I am wrong. That it should be a rate payer cost?

1:18:51 PM Asst Atty Gen Cook  
Note: Fields, Angela So it would be just another part of the rate case expense?

1:19:07 PM Atty Hughes Atmos  
Note: Fields, Angela We file periodic updates on the rate case expenses.

1:19:18 PM Chairman Schmitt - Asst Atty Gen Cook  
Note: Fields, Angela Now you have Mr. Garret on the phone. He has not been listed as an expert.

1:19:33 PM Chairman Schmitt - Asst Atty Gen Cook  
Note: Fields, Angela Is it your intent to use Mr. Garret in this case?

1:19:38 PM Chairman Schmitt - Asst Atty Gen Cook  
Note: Fields, Angela Because he has not been identified.

1:19:39 PM Chairman Schmitt - Asst Atty Gen Cook  
Note: Fields, Angela And it's a little late.

1:20:18 PM Chairman Schmitt - Atty Hughes Atmos  
Note: Fields, Angela Mr. Hughes is there anything else?

1:20:36 PM Chairman Schmitt  
Note: Fields, Angela You could probably do it in two and a half weeks or so?

1:20:43 PM Asst Atty Gen Cook  
Note: Fields, Angela The only thing about that is when I looked at the procedure schedule tomorrow the responses to the second data request are going to be filed.

1:20:59 PM Chairman Schmitt - Asst Atty Gen Cook  
Note: Fields, Angela It's your motion and you asked and Mr. Hughes I am sure objected in good faith. So if you need a couple weeks we'll do whatever we have to do on the schedule to give Mr. Hughes' witness enough time.

1:21:19 PM Atty Hughes Atmos  
Note: Fields, Angela As soon as I can today or tomorrow I'll find out when we anticipate to be able to file it.

1:21:39 PM Chairman Schmitt  
Note: Fields, Angela Commissioner Cicero do you have a question?

1:21:40 PM Vice Chairman Cicero - Atty Hughes  
Note: Fields, Angela Just a clarification.

1:22:23 PM Vice Chairman Cicero - Atty Hughes  
Note: Fields, Angela I'm just curious wheter the cost is really an issue or whether it was more to do with the precedent of requiring you to produce a report requested by the Attorney General.

1:22:36 PM Atty Hughes Atmos  
Note: Fields, Angela Response.

1:23:26 PM Vice Chairman Cicero - Atty Hughes  
Note: Fields, Angela Was that the number about three thousand dollars.

1:23:33 PM Vice Chairman Cicero - Atty Hughes  
Note: Fields, Angela Okay. I do not have any other questions.

1:23:35 PM Chairman Schmitt  
Note: Fields, Angela Commissioner Mathews?

1:23:36 PM Chairman Schmitt  
Note: Fields, Angela Anything further Mr. Hughes? Mr. Cook? Thank you we'll have an order out by Monday. If nothing further then this hearing is adjourned.

1:23:58 PM Session Ended



**Name:**

**Description:**

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AG - Handout 1 - Tab 3, first document.

Handout not entered into the record.





COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In The Matter of:

ELECTRONIC APPLICATION OF ATMOS )  
ENERGY CORPORATION FOR AN ) Case No.  
ADJUSTMENT OF RATES ) 2018-00281

**ATTORNEY GENERAL'S MOTION TO COMPEL DISCOVERY**

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and hereby moves the Commission to order petitioner Atmos Energy Corporation ("Atmos") to produce certain data requested in the Attorney General's Initial Data Requests. In further support of this motion, the Attorney General states as follows.

On November 21, 2018, the Attorney General filed his Initial Data Requests in this matter. In particular, AG 1-30 requested that Atmos recalculate its proposed depreciation rates based on the Average Life Group ("ALG") methodology. On December 7, 2018 Atmos refused to comply with this request, stating in its objection that doing so would be "unduly burdensome," ostensibly because the Company calculated its proposed depreciation rates based on the Equal Life Group ("ELG") methodology and seeks to preclude the Commission from adopting depreciation rates based on the ALG methodology.

Neither Atmos, nor any other jurisdictional utility should be able to dictate the terms of its ratemaking by withholding critical information, or not performing calculations, especially when doing so would result in ratemaking that is inconsistent with prior Commission orders. In the instant case, Atmos seeks authorization to change its depreciation rates based on a new depreciation study based on the ELG methodology. Atmos bears the

burden of proving that the proposed depreciation rates are fair, just and reasonable, but it should not be allowed to satisfy that burden by failing to provide essential data.

Atmos must be compelled to provide the comparison of its proposed depreciation rates based on the ALG methodology because the Commission recently found in Case No. 2017-00321 that the ALG methodology is superior to the ELG methodology.<sup>1</sup> In that case, the Commission noted:

“. . . [T]his Commission has found that the ELG procedure does not accurately match revenues and expenses, is front-loaded, and Duke Kentucky is the only Kentucky based utility that utilizes the ELG procedure for computing depreciation rates.”<sup>2</sup>

Moreover, in Case No. 2017-00321, Duke Energy as a result of a discovery request from the Attorney General did not object to providing the depreciation study it submitted in that case based upon the ALG methodology.<sup>3</sup> In the instant case, only Atmos itself is in a position to provide the depreciation rates based upon the ALG methodology, given that it has retained a depreciation expert and given that this expert has the requisite proprietary software to calculate depreciation rates using *either* the ELG or the ALG methodology. The Commission should not allow a utility to unilaterally refuse to provide critically relevant information essential to the setting of fair, just and reasonable rates. Allowing such a result would set a horrendous precedent, not only as to depreciation rates, but also with respect to any other issue in which a utility disagrees with another party. The Commission should not relinquish its ratemaking authority to the very entity that it is charged with regulating.

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<sup>1</sup> *In Re: Electronic Application of Duke Energy Kentucky, Inc. for an Adjustment of Electric Rates, etc.*, Final Order dated April 13, 2018, pp. 26-27. *See also* Rebuttal Testimony of Duke Energy’s depreciation expert John J. Spanos in that case, at 30-34 in which he acknowledged that “ELG, will every time result in higher depreciation rates in early years than the ALG methodology.”

<sup>2</sup> Case No. 2017-00321, Final Order dated April 13, 2018, at 26. The Commission’s adoption of the ALG methodology in that case resulted in a reduction in depreciation expense of \$6.920 million. *Id.* at 26-27.

<sup>3</sup> Case No. 2017-00321, Duke’s response to AG 1-35.

Additionally, in the instant case, Commission Staff in PSC 2-39 also asked Atmos whether the Company was aware of the Commission's finding and holding in Case No. 2017-00321 disallowing Duke's attempt to utilize the ELG methodology in its depreciation study. Atmos responded that it was aware of the holding in that case.<sup>4</sup>

The ALG methodology is the predominant depreciation methodology for the utility industry, is just as accurate as ELG, and provides full compensation to the Company for gross plant costs.<sup>5</sup> Moreover, ALG smooths the data so that group depreciation rates tend to remain constant, all else equal, over the service life compared to ELG procedure. By contrast, the ELG methodology accelerates recovery in early years, and decelerates recovery in the later years, all else equal. Perhaps most important, the ELG methodology requires a more refined stratification of the data which is the result of the subjective judgment and assumptions of the depreciation analyst, and can be easily biased, regardless of whether intentionally or unintentionally.<sup>6</sup>

The Attorney General's request that Atmos recalculate its proposed depreciation rates based upon the ALG methodology is clearly reasonable. The Commission itself has expressed its preference for the ALG methodology, and the provision of this data will obviously assist the Commission in its determination of fair, just and reasonable rates. Therefore, Atmos should be compelled to produce the requested data.

Finally, counsel for the Attorney General notes that he has been in communication with counsel for Atmos in an attempt to resolve this discovery dispute, but the parties have not been able to reach a resolution.

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<sup>4</sup> Atmos' response to PSC 2-39.

<sup>5</sup> See Direct Testimony of Lane Kollen, Case No. 2017-00321, pp. 31-36.

<sup>6</sup> *Id.* at 34-35.

Respectfully submitted,

ANDY BESHEAR  
ATTORNEY GENERAL



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***Certificate of Service and Filing***

Counsel certifies that the foregoing is a true and accurate copy of the same document being filed in paper medium with the Commission within two business days; that the electronic filing has been transmitted to the Commission on December 21, 2018; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

This 21<sup>st</sup> day of December, 2018.



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Assistant Attorney General

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In The Matter of:

ELECTRONIC APPLICATION OF ATMOS )  
ENERGY CORPORATION FOR AN ) Case No.  
ADJUSTMENT OF RATES ) 2018-00281

**ATTORNEY GENERAL'S REPLY TO ATMOS' RESPONSE TO THE  
ATTORNEY GENERAL'S MOTION TO COMPEL**

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and for his Reply to Atmos' Response to the Attorney General's Motion to Compel, states as follows.

Atmos' refusal to provide in discovery depreciation rates using the most-widely accepted methodology in the industry is not, as Atmos would have the Commission believe, merely a discovery dispute. Rather, Atmos' attempt to unilaterally restrict a comprehensive review of its depreciation rates is tantamount to instilling a *de facto* alternative ratemaking mechanism (ARM) in which the Company itself -- rather than the Commission -- dictates what evidence is considered in setting the rates. The Commission must not allow Atmos to dictate the terms of discovery.

In Case No. 2013-00148,<sup>1</sup> the Commission recognized that having more data, rather than too little, is "appropriate and beneficial" in the context of considering evidence, particularly utility-supported methodologies. Accordingly, the Commission put Atmos on notice that with regard to cost of service studies, it should file multiple-methodology COSSes in the future:

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<sup>1</sup> *In Re*: Application of Atmos Energy Corporation for an Adjustment of Rates and Tariff Modifications.

Atmos-Ky. acknowledged that there is support for the approach used by the AG in previously filed COSSes in other jurisdictions.<sup>97</sup> In addition, Atmos-Ky. stated that "[b]oth approaches utilize traditional and accepted classification and allocation methods and yet produce widely divergent results of the 'cost of service.'" It was for this reason that, in Case No. 10201,<sup>98</sup> the Commission encouraged Columbia to submit multiple methodology COSSes in its future rate proceedings. The Commission reaffirmed this position in Case No. 90-013<sup>99</sup> when it encouraged Atmos-Ky.'s predecessor, Western, as well as other utility companies and intervenors, to file well-documented alternative and multiple-methodology COSSes to provide additional information for rate design. We continue to believe that such an approach to COSSes is appropriate and beneficial. Hence, the Commission strongly encourages Atmos-Ky. to file multiple-methodology COSSes in future rate cases **in order to give the Commission a range of reasonable results** for use in determining revenue allocation and rate design.<sup>2</sup>

The Commission has expressed a strong concern against allowing parties to unduly tilt the evidentiary scale to one side or the other by controlling and shaping the record in an outcome-determinative manner. In Case No. 2003-00266,<sup>3</sup> the Commission allowed MISO to file a second set of cost/benefit studies, finding:

Having cost/benefit studies in this case that are based upon comparable inputs will produce **a more complete evidentiary record, enabling the Commission to be in a better position to render a decision on the merits.**<sup>4</sup>

Here, Atmos is proposing new depreciation rates,<sup>5</sup> and bears the evidentiary burden on this issue.<sup>6</sup> The utility provided a single methodology, whereas the Attorney General merely wants to compare the outcomes of that methodology with the most commonly used methodology, in order to determine the reasonableness of Atmos' proposal. When asked for this information, Atmos objected stating it was unduly burdensome. Yet Atmos' Response

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<sup>2</sup> *Id.* at p. 34 [footnote citation deleted; emphasis added].

<sup>3</sup> *In Re: Investigation into the Membership of Louisville Gas & Elec. Co. and Kentucky Utilities Co. in the Midwest Independent Transmission System Operator, Inc.*

<sup>4</sup> *Id.*, Final Order dated Feb. 4, 2005, p. 34 [emphasis added].

<sup>5</sup> *See, e.g.*, Direct Testimony of Dane Watson, Case No. 2018-00281.

<sup>6</sup> KRS 278.190 (3).

instead focused on shot-gun style legal gymnastics designed to be anything other than transparent. Atmos' response raises two questions: (a) was Atmos' response to the Attorney General's discovery request honest (that performing the ALG methodology was unduly burdensome), in light of the fact that its Response to the Attorney General's Motion seemingly abandoned this attempted defense; and (b) would the Company's response have been the same had Commission Staff requested the ALG methodology for Atmos' proposed depreciation rates? The Commission, the Attorney General and the customers he represents should have this information available to them. The alternative would set an unacceptable precedent, in allowing a regulated entity in tunnel-vision like manner to control the evidentiary record.

Wherefore, the Attorney General respectfully requests that the Commission grant his previously-filed Motion to Compel.

Respectfully submitted,

ANDY BESHEAR  
ATTORNEY GENERAL



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*Certificate of Service and Filing*

Counsel certifies that the foregoing is a true and accurate copy of the same document being filed in paper medium with the Commission within two business days; that the electronic filing has been transmitted to the Commission on January 2, 2019; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

This 2<sup>nd</sup> day of January, 2019.



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Assistant Attorney General

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In The Matter of:

ELECTRONIC APPLICATION OF ATMOS )  
ENERGY CORPORATION FOR AN ) Case No.  
ADJUSTMENT OF RATES ) 2018-00281

**ATTORNEY GENERAL'S MOTION TO STRIKE ATMOS' RESPONSE  
DATED JANUARY 3, 2019; ALTERNATIVE MOTION FOR LEAVE TO FILE A  
RESPONSE THERETO; MOTION TO SET A FORMAL HEARING ON ATTORNEY  
GENERAL'S MOTION TO COMPEL**

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and hereby moves the Commission: (a) to strike Atmos' Second Response dated January 3, 2019 to the Attorney General's initial Motion to Compel; (b) alternatively, for leave to file a Reply to Atmos' January 3, 2019 response; and (c) alternatively, to set a formal hearing on the record regarding his Motion to Compel. In support thereof, the Attorney General states as follows.

807 KAR 5:001 § 5 (2)-(3) provide that in motion practice before the Commission, there shall be a motion, a response, and a reply. The Commission's regulations make no provision for a second response, such as Atmos filed on January 3, 2019, to a motion. Moreover, Atmos even failed to seek leave to file any such second response. Therefore, the Attorney General moves to strike Atmos' Second Response dated January 3, 2019 on the basis that it is clearly unlawful.

In the alternative, the Attorney General seeks leave of the Commission to file the following reply to Atmos' Second Response. Atmos asserts that it would be "unduly burdensome" for it to provide its proposed new depreciation rates in the instant case based

upon the ALG methodology.<sup>1</sup> However, upon best information and belief, the Attorney General believes that doing so would require virtually no work at all on behalf of Atmos' depreciation expert who filed testimony in this matter, Mr. Watson. The genesis of this issue is Atmos' objection to the Attorney General's discovery, and it is the utility's burden to support the sustaining of its objection.

Moreover, it is the Commission and consumers who would be unduly burdened if the Commission sustains the objection. Upon best information and belief, it is the Attorney General's understanding that Mr. Watson utilizes a proprietary software program known as "PowerPlan" to develop depreciation rates. This software program relies on prodigious volumes of historic fixed asset data that are maintained within the utility's PowerPlan software program and extracted and utilized to develop depreciation rates. There are other proprietary software programs developed by other consulting firms that are used by those firms to develop depreciation rates. Once the data is loaded into these software programs, they can calculate depreciation rates under either the ELG or the ALG procedures. The data does not change. Only the statistical calculations change.

The Attorney General's sole expert witness in this matter, Mr. Lane Kollen, who has appeared numerous times before this Commission, is a revenue requirements expert. Mr. Kollen does not perform independent depreciation studies because such studies typically are performed either by the utility, or a consultant for the utility using proprietary software programs. However, Mr. Kollen does address various depreciation issues, such as the use of ELG or ALG, the service lives of assets, and salvage percentages, among other issues. Mr. Kollen does not have access to PowerPlan or other proprietary software program. Nor would

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<sup>1</sup> Atmos' Response to Attorney General's DR 1-30.

it be cost-effective for him to replicate the utility's depreciation study. After making reasonable inquiry, Mr. Kollen believes the cost of obtaining a proprietary software program would be \$30,000 or more. However, even if Mr. Kollen *could* obtain such software (which he cannot due to contractual cost constraints), the Company's data would have to be loaded into the software program and then benchmarked against the results developed by Mr. Watson. Mr. Kollen could not replicate Mr. Watson's work even as to the ELG methodology because the software program that Mr. Kollen would license may not provide consistent results with the PowerPlan software Mr. Watson utilized in preparing Atmos' actual proposed new depreciation rates based upon the ELG methodology. To make matters even more complicated – and unduly burdensome – Mr. Watson's depreciation study consists of over **1,100 data files**.<sup>2</sup> While that data is already loaded into Mr. Watson's proprietary software, Mr. Kollen would have to license proprietary software and input this data into that software simply to attempt to replicate Mr. Watson's results. This would be a significant, time consuming, and costly task that would unnecessarily duplicate the cost Atmos incurred to perform the depreciation study, and for which it seeks reimbursement in this rate proceeding.

Atmos bears the burden of proof that its depreciation rates are fair, just and reasonable. Atmos has retained a depreciation expert capable of recalculating the depreciation rates based on the ALG methodology using the data already loaded into the PowerPlan proprietary software program at virtually no cost and simply using the algorithms already resident in the software program. Atmos' costs in bringing its rate cases are reimbursed by its ratepayers, not its shareholders. Atmos is required to provide complete responses to data requests, such as the one at issue here. Atmos itself must therefore provide the requested data in order for the

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<sup>2</sup> See Atmos' Motion for Deviation, dated Oct. 12, 2018.

intervenors and the Commission to review the data and determine the reasonableness of Atmos' *proposed* rates. The Attorney General believes that depreciation rates based on the ELG methodology are unreasonable on their face as well as being inconsistent with Commission precedent on this issue. Without additional evidence to support, compare and contrast Atmos' proposed rates, the Attorney General may be forced to recommend \$0 in annual depreciation expense in this matter.

Accordingly, the Attorney General respectfully requests that the Commission grant his previously-tendered Motion to Compel. Alternatively, if the Commission believes it would be helpful, the Attorney General respectfully moves the Commission to set a formal hearing on the record regarding his Motion to Compel. Mr. Kollen can be available telephonically to answer any of the Commission's questions any day next week (January 7-11, 2019), except that on Wednesday January 9<sup>th</sup> he could only be available in the late afternoon, due to testifying at another hearing out-of-state. In addition, a depreciation consultant that Mr. Kollen has previously worked with, Mr. David Garrett, is also prepared to appear telephonically for up to two hours in order to address questions the Commission may have.<sup>3</sup> The Attorney General also respectfully suggests that it would be helpful for Mr. Watson to likewise be made available telephonically to address any questions the Commission may have, and to respond to cross-examination from the Attorney General.

WHEREFORE, the Attorney General respectfully renews his request that the Commission grant his previously-tendered Motion to Compel; or alternatively, (a) that it grant his motion for leave to tender the included Reply to Atmos' Second Response dated

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<sup>3</sup> Mr. Garrett, a recognized depreciation expert and past-president of the Society of Depreciation Professionals, will not be providing pre-filed written direct testimony in this matter, has not participated in this case up to and including the present date, and his appearance would be limited solely as a consultant to Mr. Kollen, and to assist the Commission in this matter.

January 2, 2019; or (b) to hold a formal evidentiary hearing on the record regarding his Motion to Compel.

Respectfully submitted,

ANDY BESHEAR  
ATTORNEY GENERAL



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*Certificate of Service and Filing*

Counsel certifies that the foregoing is a true and accurate copy of the same document being filed in paper medium with the Commission within two business days; that the electronic filing has been transmitted to the Commission on January 4, 2019; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

This 4<sup>th</sup> day of January, 2019.



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Assistant Attorney General

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ATMOS )  
ENERGY CORPORATION FOR AN )  
ADJUSTMENT OF RATES ) Case No. 2018-00281

**Atmos Energy's Response to Attorney General's  
Motion To Compel Discovery**

Atmos Energy Corporation (Atmos Energy or Company), by counsel, responds to the motion to compel filed by the Attorney General on December 21, 2018. Pursuant to the Commission's Order of October 26, 2018, the parties have engaged in the initial round of discovery. The Attorney General's motion to compel seeks additional data in response to his question AG 1-30 – data that does not exist. The Attorney General believes that Atmos Energy must provide information that is unrelated to the response provided and which it does not have. The primary basis for his motion is stated on page 1:

Neither Atmos, nor any other jurisdictional utility should be able to dictate the terms of its ratemaking by withholding critical information, or not performing calculations, especially when doing so would result in ratemaking that is inconsistent with prior Commission orders.

The Attorney General cites no authority supporting his demand for additional discovery. The Commission generally follows the guidelines of the Kentucky Rules of Civil Procedure (CR) in deciding issues related to discovery.

KRS 278.310 provides that the Commission is not bound by the technical rules of legal evidence, and the applicability of the Kentucky Rules of Civil Procedure is limited to civil actions in the Court of Justice. However, in adjudicating discovery disputes of this nature, we find it appropriate to



consider CR 26.02(1), which delineates the scope of discovery in judicial proceedings. Order dated September 1, 2011, in *In the Matter of Application of Louisville Gas and Electric Company for Certificates of Public Convenience and Necessity and Approval of its 2011 Compliance Plan for Recovery by Environmental Surcharge*, Case No. 2011-00162.

Civil Rule 26.02 states:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including **the existence, description, nature, custody, condition and location of any books, documents, or other tangible things** and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added)

The scope of this rule is further explained in CR 34.01:

Any party may serve on any other party a request (a) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample **any tangible things which constitute or contain matters within the scope of Rule 26.02 and which are in the possession, custody or control of the party** upon whom the request is served; or (b) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26.02.

Based on these rules, a party may discover documents or tangible things in existence that are in the possession of another party. In this case, the study sought by

the Attorney General does not exist. A party cannot be required to provide something it does not have. The Commission has recognized this principle:

The Commission does agree with Columbia that CR 26.02 and the cited cases support the argument that a "study" not in existence should not be the subject of discovery. However, "study" implies not only compilation and computation, but also the application of analytical thought to the information provided. The Commission, therefore, finds that items Set A, number 74, and Set B, number 21, as requiring "studies" to be performed, should be exempted from operation of the April 20, 1989 Order. *Application for an Adjustment of Rates of Columbia Gas*, Case No. 10498, Order dated April 26, 1989.

Further, a party cannot be compelled to prepare evidence that is solely for the purpose of assisting an opposing party prove its case. With respect to requests for documents and other tangible things, CR 34.02 permits a party to serve requests upon another party to produce or make available documents or other "tangible things which constitute or contain matters within the scope of Rule 26.02 and which are in the possession, custody or control of the party upon whom the request is served . . . . (emphasis added). Creating new documents for the benefit of the opposing party is not allowable under this rule. See *Schulte v. Potter*, 218 Fed Appx. 703, 706 (10<sup>th</sup> Cir. 2007):

A magistrate judge held a hearing and, on July 2, 2004, issued a written order denying the motion [to compel] because there were "no responsive documents in existence," and stating that he would not require the USPS to create reports based on "statistics concerning the age of Defendant's work force.

Under CR 34.02, a party responding to discovery is under a duty to search for and ascertain whether the requested **documents exist**. *Wal-Mart Stores v. Dickinson*, 29 S.W.3d 796, 804 (Ky. 2000). The Attorney General has cited no authority for the proposition that a responding party must generate new forms of data or new documents

solely for purposes of responding to a discovery request. Indeed, the responding party is only required to produce existing information and documents within its possession, custody and control that have been identified with sufficient particularity to permit that party to effectively respond. See CR 34.01, 34.02 and 26.02; See also, *Sithon Maritime Co. v. Holiday Mansion*, 1998 U.S. Dist. LEXIS 5432 at \*27 (D. Kan. 1998) (electronic publication only): A "court cannot compel a defendant to produce documents that it does not have." *Sithon Maritime Co.*, 1998 U.S. Dist. LEXIS at \*27. This same limitation was referenced in *Fadem v. Am. States Preferred Ins. Co.* 2014 U.S. Dist. LEXIS 6312 \*; 2014 WL 202176 (citations omitted): "a party, however, is not required to create a document where none exists."; "...a document request that would require the defendant to create a roster of all employees who supervised the prison cage yard is not a proper request under *Federal Rule of Civil Procedure 34(a)*"; "[A] defendant is not required to create a document in response to a request for production."

Not only is there no legal support for the motion to compel, the Attorney General's motion is unjustified and unnecessary. He has the capability of preparing any type of study he believes is relevant to this proceeding. The Attorney General has retained in this case the same depreciation expert he retained in Atmos Energy's prior two rate cases, Case Nos. 2015-00343 and 2017-00349. In the 2015 case, the totality of the data underlying the company's depreciation study was provided. The Commission asked for and was provided the same information in this proceeding. See PSC DR 1-64. The Attorney General's witness expressly identifies himself as an expert in depreciation. He has testified extensively in regulatory matters pertaining to depreciation. Given his experience and the availability of the necessary information to

complete a study, the Attorney General should have his witness prepare any study it believes is appropriate.

The Attorney General refers to a "proprietary" program and describes it as "necessary" to conduct his preferred study. However, the program used by Atmos Energy's witness is available to the Attorney General's witness and is not the exclusive program available for preparing a depreciation study. The Attorney General's witness has the same access to the various programs capable of completing his study as any other expert witness has. His failure to avail himself of a computer program necessary to attempt to substantiate his theory of the case is solely in his control and is not a valid basis to compel Atmos Energy to conduct and provide an additional study.

The Attorney General's assertion that the Company is somehow trying to "dictate" the terms of its ratemaking by refusing to produce something the Attorney General can produce itself is simply wrong. The Company is not trying to "dictate" anything. The Attorney General's motion to compel is unfounded and should be denied for both legal and equitable reasons.

The Attorney General has not provided any legal support, including any precedent of this Commission, for his effort to compel the Company to perform and produce a study that does not exist. The legal authority cited above, in fact, supports the Company's position that the motion to compel should be denied. It would also be inequitable for the Commission to order a party to undertake a study that the requesting party can perform itself. Here, all of the information needed to perform the study desired by the Attorney General is in the record and can be performed by the Attorney General's experts. The Commission should not compel one party to perform a study an

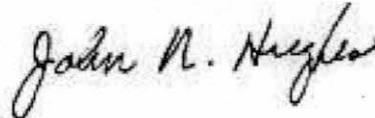
opposing party is capable of performing itself simply to accommodate the requesting party.

The Attorney General's motion presumes that the Commission has already ruled on the issue of the appropriate depreciation methodology for all rate cases in Kentucky. It has not and it would be premature to rule on that issue in this case before the record is complete and briefs filed. The only issue at this point is appropriateness of the Attorney General's request.

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Certification:

I certify that this is a true and accurate copy of the documents to be filed in paper medium; that the electronic filing was transmitted to the Commission on December 28,

2018; that one copy of the filing will be delivered to the Commission within two days; and that no party has been excused from participation by electronic means.

*John R. Hughes*

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ATMOS )  
ENERGY CORPORATION FOR AN )  
ADJUSTMENT OF RATES ) Case No. 2018-00281

**Atmos Energy's Response To Attorney General's Reply To  
Atmos Energy's Response To  
The Attorney General's Motion To Compel Discovery**

Atmos Energy Corporation (Atmos Energy), by counsel, responds to the reply to the response to the motion to compel filed by the Attorney General on January 2, 2019 (Reply to Response).<sup>1</sup>

In the instant filing, Atmos Energy would like to point out four things:

1. The Reply to Response did not indicate that the Attorney's General's witness cannot perform the requested study. If the requested study is "the most commonly used methodology,"<sup>2</sup> it would seem that the Attorney General's witness should be able to perform it or the Attorney General should be able to locate some other party capable of performing it.
2. The Reply to Response claims that failing to grant the Attorney General's Motion to Compel would, "set an unacceptable precedent, in allowing a regulated entity in tunnel-vision like manner to control the evidentiary record."<sup>3</sup>

Atmos Energy has never objected to the requested information being placed

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<sup>1</sup> Atmos Energy respectfully requests leave to submit this answer to correct the record and aid the Commission's decision-making process. The Commission is permitted to accept answers for such purposes.

<sup>2</sup> Reply to Response at 2.

<sup>3</sup> *Id.* at 3.

in the evidentiary record.<sup>4</sup> Rather Atmos Energy has objected to being required to incur the expense to prepare and create evidence that is solely for the purpose of assisting the Attorney General in proving its case.

3. In Atmos Energy's last rate proceeding, the Attorney General argued that Atmos Energy should be denied recovery of its rate case expenses.<sup>5</sup> It seems improper for the Attorney General to simultaneously compel Atmos Energy to perform studies that Atmos Energy had not conducted and incur thousands of additional dollars of rate case expenses while also arguing that Atmos Energy should not be allowed to recover its rate case expenses.
4. Finally, the Attorney General complains of Atmos' reliance on "legal gymnastics" to support his objection to discovery. Yet, when those same arguments support the Attorney General's position, he relies on them as the Commission observed in "Application of Kentucky American Water Company for An Adjustment of Rates, Case No. 2015-0418. Order of July 17, 2016, p. 2:

The Attorney General, while noting that "the Commission is not bound by the technical rules of legal evidence," asserted that the Commission should consider the Kentucky Rules of Civil Procedure in adjudicating this discovery dispute."

If the Attorney General wants to perform the analysis it has requested of Atmos Energy and place it in the record in this proceeding, he is free to do so. However, as Atmos Energy has previously stated, because the Attorney General has not and cannot

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<sup>4</sup> Atmos Energy did not object on the grounds of relevance. Rather, Atmos Energy objected to the relevant subpart of AG Question No. 1-30 on the grounds that it was "unduly burdensome and calls for the Company to undertake an analysis and calculation that it has not performed in relation to a depreciation methodology that the Company has not proposed and does not support."

<sup>5</sup> See, e.g., *In Re: Application of Atmos Energy Corporation for an Adjustment of Rates and Tariff Modification*, Case No. 2017-00349, *Direct Testimony and Exhibits of Lane Kollen* (Ky. PSC Jan. 17, 2018) at 38.

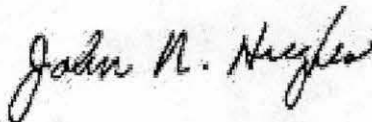


provide any legal support for his effort to compel Atmos Energy to produce a study it does not have, whereas the Company has cited several supporting cases, the Commission should deny the motion.

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Certification:

I certify that this is a true and accurate copy of the documents to be filed in paper medium; that the electronic filing was transmitted to the Commission on January 3, 2019; that one copy of the filing will be delivered to the Commission within two days; and that no party has been excused from participation by electronic means.

**Case No. 2018-00281**  
**Atmos Energy Corporation, Kentucky Division**  
**AG DR Set No. 1**  
**Question No. 1-30**  
**Page 1 of 1**

**REQUEST:**

Refer to the April 13, 2018 Order in Case Nos. 2017-00321 at pages 26-27 wherein the Commission required the use of the Average Life Group ("ALG") procedure and rejected the Equal Life Group ("ELG") procedure for computing depreciation rates for Duke Energy Kentucky, Inc. (Electric).

- a. Confirm that the Company's proposed depreciation rates were developed using the ELG procedure.
- b. Recalculate the depreciation rates using the ALG procedure. Provide the calculations in Excel format, with all formulas intact and cells unprotected and with all columns and rows accessible.

**OBJECTION:**

The Company objects to subpart (b) of this request as it unduly burdensome and calls for the Company to undertake an analysis and calculation that it has not performed in relation to a depreciation methodology that the Company has not proposed and does not support.

**RESPONSE:**

- a. Confirm.
- b. See objection above.

Respondent: Dane Watson



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structures. Fixed Assets maintains a full audit trail for all property, plant and equipment transactions. The CPR links directly into the book depreciation ledger, creates all necessary tax and ledger entries, and maintains multiple books for each asset.

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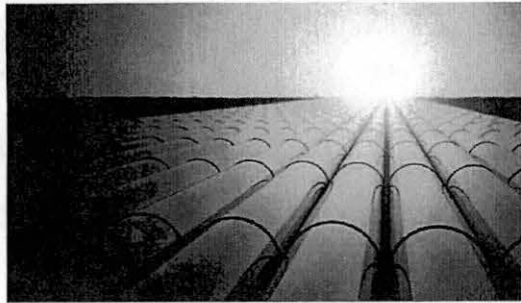
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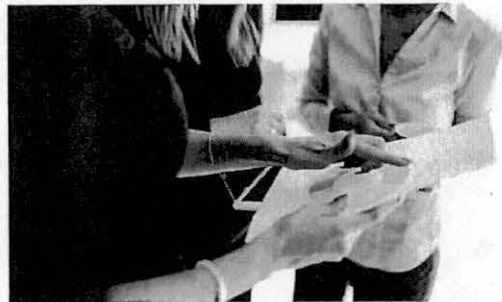
- **Automatic workflow documentation** improves process clarity and simplifies analysis of current depreciation rates and their associated curves and lives.
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