

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

OFFICE OF THE ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

Complainant

v.

ATMOS ENERGY CORPORATION

Respondent

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: Case No. 2005-00057
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ATTORNEY GENERAL'S BRIEF REGARDING MOTION TO HOLD
PROCEDURAL SCHEDULE IN ABEYANCE

Comes now the Attorney General, by and through his Office of Rate Intervention, and states as follows for his brief regarding the Commission's order dated February 16, 2007, requiring the parties to brief the issue of whether the Attorney General's motion to hold the procedural schedule for the instant case in abeyance pending final resolution of case no. 2006-00464 renders the instant case moot:

The Attorney General on February 1, 2005 filed the instant complaint alleging over-earning by Respondent. Atmos responded on February 11, 2006, denying any over-earning and moved to dismiss the complaint. On February 25, 2005 the Attorney General filed his response, arguing that he had indeed established a prima facie case. In that response, the Attorney General noted that

Atmos simply refused to provide responses to some of his requests for information.¹

Despite the fact that the Attorney General established a prima facie case, and despite the obvious unwillingness of Atmos to cooperate, the Commission still did not issue a procedural schedule or any other order compelling Atmos' full responses. Moreover, the Commission failed to initiate an investigation as it is required to under KRS 278.260, and as precedence required.²

Months passed.

Since the Commission had still not issued any ruling on this matter, the Attorney General on September 13, 2005 moved for an immediate ruling that Atmos was over-earning, to establish a procedural schedule, to determine the amount of the excessive over-earning, and to reduce the rates charged prospectively to reasonable amounts. The Attorney General *urged* the Commission to rule on this matter:

"Given the delay that has already occurred since the filing of the Complaint, it is impossible to afford the Attorney General and other interested parties sufficient time to conduct meaningful discovery, hold a hearing and issue a decision prior to the beginning or end of this heating season. Under a system governed by the [filed] rate doctrine, justice delayed becomes justice denied. To provide reasonable rates prospectively, the Attorney General respectfully demands that a procedural schedule and hearing immediately be established in this docket."³

¹ Response brief of February 25, 2005, pp. 2-3; *citing* In the Matter of Kanawha Hall v. Equitable Production Co. (2004-00307), order of Oct. 2, 2004, pp. 2-3.

² *Id.* at p. 6, *see in particular* n. 4.

³ Attorney General's Response Brief of September 13, 2005, at p. 2.

The Attorney General made this motion in the fall of 2005, shortly after Hurricane Katrina hit the U.S. Gulf coast, which set in motion some of the most significant gas price increases in U.S. history. The Attorney General brought to the Commission's attention the impending adverse impact that lay ahead for ratepayers:

"Given . . . that the approaching winter will present ratepayers with significant increases for the natural gas cost portion of their bills, it is imperative that the Commission rule that the company is overearning and immediately set in course a procedural schedule and hearing to reduce the non-gas rates so that customers are not burdened with the support of inflated earnings for Atmos on top of increases in gas prices." ⁴

More months passed.

From the time of the filing of the instant complaint (February 1, 2005) until the time the Commission finally ruled on the Attorney General's request for a procedural schedule (February 2, 2006), average natural gas prices in Kentucky rose from \$10.61/mcf to \$14.48/mcf, an increase of 36.48%.⁵ But the Commission did not rule on the Attorney General's motion until the height of the gas crisis, in February 2006, one full year after the Attorney General filed the instant complaint.

It was not until February 2, 2006, however, that the Commission agreed that the Attorney General had established a prima facie case, and issued a procedural schedule. Nonetheless, the Commission's staff, in an informal

⁴ Id.

⁵ Source: U.S. Energy Information Administration;
http://tonto.eia.doe.gov/dnav/ng/ng_pri_sum_dcu_nus_m.htm

conference held on February 14, 2006, resulting with the issuance of the procedural schedule, began that conference by asking the Atmos representatives whether they planned on filing a rate case. Although that informal conference was held in a case alleging over-earning, it immediately became evident that the writing was on the wall -- the Commission had already made up its mind that it would never make any finding of over-earning (despite the fact that the Commission never initiated an investigation [as is required under KRS 278.260] nor any other measures designed to objectively determine the facts).

Pursuant to the procedural schedule, the Attorney General issued discovery requests that sought, *inter alia*, pro forma adjustments to the historic test period ending Sept. 30, 2005. On March 30, 2006 Atmos filed a motion to quash production of these pro forma adjustments, claiming they were "irrelevant," and "speculative." The Attorney General responded to this motion on April 7, 2006,⁶ noting:

"Regardless of who claims the rate is unreasonable and, consequently, who bears the burden of proof, **only the utility** is in possession of the necessary facts to make the analyses of revenues and expenses that will allow the determination of whether the rate is reasonable. Because the utility is the only party in possession of the facts pertaining to its expenses and revenues, it is the challenging party that bears the burden of producing the information upon which the analyses are to be conducted, including the production of information not already in existence. Were it otherwise, KRS 278.260 would be just empty words incapable of providing relief. Requiring the utility to produce this information, since it is the only party in possession of the data necessary to perform the requisite analyses, does not change the

⁶ The Attorney General notes for the record that this pleading is not contained on the PSC website.

burden of proof; rather, it simply provides the evidentiary basis for making the determination.”⁷ [emphasis added]

The Attorney General further noted that failure to allow him to pursue the pro forma adjustments would hobble his attempts to discover the necessary information to develop his case, participate in a meaningful hearing, and exercise his statutorily mandated right and duty to represent Atmos’ Kentucky ratepayers.⁸

Quite remarkably, however, the Commission ultimately granted Atmos’ request to avoid having to respond to the pro forma adjustments, by limiting the temporal scope of the data sought to only the test year and the immediate preceding year.⁹ Both Atmos and the Commission knew well that the Attorney General would not be able to fully establish Atmos’ over-earning without the data from those pro forma adjustments.¹⁰ The Commission’s ruling granting Atmos’ motion to quash was made all the more remarkable by the fact that in a prior utility complaint case, the Commission reserved to itself the right to obtain the same sort of data originating outside the test year.

In particular, in Case No. 9859 (In the Matter of: An Investigation Into the Reasonableness of the Earnings of Brandenburg Telephone Company Inc.),¹¹ the Commission initiated an investigation pursuant to KRS 278.260 into the utility’s

⁷ Id. at pp. 3-4.

⁸ Id. at pp. 6-7.

⁹ See Order of May 9, 2006, pp. 3-5.

¹⁰ See Supplemental Testimony of Robert Henkes, pp. 4-11; see also Attorney General’s Responses to PSC Staff’s Discovery Requests, nos. 1-3.

¹¹ The Commission stated expressly that its investigation of Brandenburg’s earnings was being conducted pursuant to KRS 278.260 in its order dated 20 July 1988, page 1.

earnings. The utility was required to respond to four sets of information requests in addition to filing its response showing the reasons why its rates should not be reduced to achieve a more reasonable return on its investment.¹² Like the information requests posed by the Attorney General in the instant case, the information requests posed by the Commission itself in Brandenburg demanded the utility to produce information not already in existence, produce information and conduct analyses based on assumptions it might not otherwise choose to use, and to produce information that both pre- and post-dated the test year.¹³

The Commission saw fit to require such information under Brandenburg, but not in the instant case. Instead, the Commission in the instant case

¹² See Order of 4 May 1988, page 1.

¹³ Included among the Commission's information requests were requests for:

- (a) An amended Pro Forma income statement having as its starting point the end of the test period which pro formed the items for the 12 month period following the test period where the required computation of expenses and revenues were to be done in accord with the parameters established by the Commission in its information request (*See* Order of 19 June, 1987, pp. 1-2.);
- (b) Detailed workpapers showing all amounts used to arrive at end of period and pro forma adjustments, including an explanation as to how the base amounts were developed and brought forward and what data constituted the basis for the adjustment (*Id.*, pp. 2-3);
- (c) Information predating and postdating the test year period (*See* Order of 22 July 1987, p. 1, 2);
- (d) Information not already in existence in response to the request to normalize revenues within the test period (*Id.*, p. 2);
- (e) Information not already in existence and subsequent to the test year in response to a request to estimate hearing expenses (*Id.*, p. 4);
- (f) Information supporting projections of income and investment levels during and subsequent to the test year, account balances subsequent to the test year as available, and the treatment of uncollectible accounts for years prior to the test year (*See* Order of 19 June 1987, p. 2);
- (g) Information supporting projected wage increases subsequent to the test year, projected rates of growth in certain expenses, and an analysis of the change in costs and expenses when certain changes in billing were anticipated to begin after the test year (*Id.*, p. 3);
- (h) Analysis of changes seen when comparing Annual Reports and the test year income and pro forma statements, information not in existence (*Id.*, p. 4); and
- (i) Analysis of the dollar impact of a theoretical depreciation study on test period depreciation expense, information not in existence that assumes facts other than those the utility would voluntarily assume (*Id.*, p. 5).

responded to the Attorney General's argument regarding the Brandenburg precedent by stating that the complainant bears the burden of proof, and that " . . . requiring it [Atmos] to provide pro forma adjustments at this time would inappropriately shift the burden of proof from the Complainant."¹⁴ The Commission thereby confused and intermingled the burden of proof with the burden of production. The effect of this confusion was to eviscerate KRS 278.260 to render it meaningless – anyone can make a complaint allegation, **but by definition** the complaint will fail because the precedential effect of this ruling precludes complainants from obtaining meaningful discovery. The Commission has thereby created a dual system of justice in which it can obtain all the information it chooses, but precludes a complainant from doing likewise. Perhaps worse yet, this ruling provides shelter to utility companies from any outside scrutiny. Such results are wholly contrary to the statute's plain meaning, and more importantly, run afoul of even basic notions of simple justice, due process and equal protection.

Moreover, the Commission has quite simply failed to adhere to its own statutory duty to initiate an investigation as mandated in KRS 278.260. The record shows the Commission never tendered any discovery requests to Atmos – none at all. Prudent regulatory oversight would dictate that when a complainant has established a prima facie case that the regulated entity earned well in excess of the level of return set by the regulatory agency, then that agency would want

¹⁴ Order of May 9, 2006, p. 3.

to determine why the agency failed to reach this same conclusion. After all, the Attorney General's establishment of a prima facie case of Atmos' over-earning was based in large part upon the same financial data Atmos submitted to the Commission. ¹⁵ Yet instead of inquiring further to determine why the Commission itself did not reach the same conclusion, the Commission not only failed to investigate, but worse yet nailed the door shut so that no one else could shed the light of day on the issue. ¹⁶

Despite the fact the Attorney General had established a prima facie case for over-earning, the Commission's orders essentially precluded him from being able to establish the over-earning. And now Atmos, perhaps via invitation of the Commission's comments at the February 14, 2006 informal conference, has filed a rate case. Atmos' ratepayers, however, will not be able to receive any refunds for the period of over-earning, due to the dictates of the filed rate doctrine.

On November 17, 2006, Atmos moved the Commission to dismiss the instant case as being moot, since it just recently filed a rate case. The Commission denied Atmos' motion. ¹⁷ The Attorney General had argued that he does not bear

¹⁵ The Attorney General also notes that Atmos settled a case in Colorado involving charging consumers excessive rates. Additionally, the Texas Railroad Commission staff recently recommended a ruling requiring Atmos to reduce its rates by \$23,000,000, and issue a refund of \$2.6 million. Furthermore, the Tennessee Regulatory Authority is also investigating allegations of over-earning (docket no. 05-00258): <http://www2.state.tn.us/tra/dockets/0500258.htm>.

¹⁶ The Attorney General also points out for the record that during the pendency of the instant complaint case against Atmos Energy Corporation – and after the Commission's ruling severely limiting the Attorney's General's scope of discovery -- in the last week of July, 2006 then-Kentucky Public Service Commissioner Greg Coker resigned from the PSC to accept a position with Atmos Energy Corporation. See article from Lexington Herald Leader, Sept. 21, 2006: <http://www.topix.net/content/kri/4221816453219141866526103877812443334670>.

¹⁷ See Order of February 9, 2007.

the burden of proof in this proceeding, and that instead KRS 278.260 mandates that the Commission initiate an investigation. However, the Commission overruled this argument, instead arbitrarily finding that the Attorney General was an “applicant” (a provision not found in KRS 278.260), and therefore bore the burden of proof (despite the fact that the statute says nothing about the complainant bearing the burden of proof).¹⁸

The Commission also in its Order dated February 9, 2007 established a revised procedural schedule. The revised order in the instant case has strict deadlines that butt up against the deadlines set forth in the Atmos rate case procedural schedule, which the Commission issued on the same day the procedural schedule in the instant case was filed. On February 13, 2007 the Attorney General filed a motion to hold the procedural schedule in the instant case in abeyance, given the fact that its principal expert in both the instant case, and the Atmos rate case (2006-00464) was due to be out of the country, and given the Attorney General’s extraordinarily heavy work load and the small staff of his Office of Rate Intervention.

The Commission responded to this motion by ordering the parties to file briefs on what *it* deemed the issue of whether such motion makes the instant case moot. The Attorney General respectfully suggests that the Commission is moving with circuitous logic. If the instant case is to any degree made moot by the filing of Atmos’ new rate case, it is due to the one-year delay by the

¹⁸ *Id.*

Commission in failing to take any measures to investigate the allegation of over-earning, and to issue a procedural schedule. This Commission has already done everything it can to shape the parameters of this case so that the Attorney General simply has no way of discovering sufficient evidence of Atmos' over-earning during the relevant periods. The deck was stacked long ago, and this Commission in its order of February 13, 2007 placed the final nail in the coffin.

The Attorney General simply cannot complete the task which the Commission demands of him under the current procedural schedule regarding Atmos as so ordered on February 12, 2007. The Attorney General believes that the one-year delay by the Commission to take any action at all in the instant case means it is highly unlikely that Atmos' ratepayers will receive any monetary relief from Atmos' over-earning in the period complained of. Even if the Commission should issue a finding of over-earning, any potential rate adjustment is likely to be illusory given the concurrent pendency of Atmos' rate case.

WHEREFORE, the Attorney General respectfully: (a) renews his request for the Commission to require Atmos to submit the pro forma adjustments as originally requested; (b) requests that the Commission reconsider its previous finding that the Attorney General as complainant bears the burden of proof in the instant proceeding, as such finding is contrary to the plain meaning of KRS 278.260; and (c) hold the procedural schedule in abeyance pending resolution of Atmos' rate case (2006-00464).

Respectfully submitted,

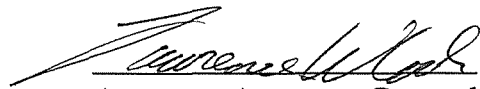
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Notice of Serving and Filing in Paper and Electronic Medium

Per Instruction 2 (d) of the Commission's 3 March 2006 Order, Counsel submits for filing, by hand delivery to Beth O'Donnell, Executive Director, Public Service Commission, 211 Sower Blvd., Frankfort, KY 40601, the original and five copies of the document in paper medium. Counsel also submits a copy of the document in electronic medium by e-mailing the document to pscfilings@ky.gov and Beth.O'Donnell@ky.gov. 26 February 2007 is the date for the filing and service in paper and electronic medium.



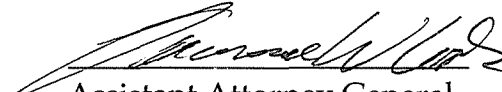
Assistant Attorney General

Certificate of Service

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

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

Counsel further certifies, per Instructions 2 (e) and 9, service of an electronic version of the document by electronic mail to the following: inhughes@fewpb.net; randy@whplawfirm.com; gary.smith@atmosenergy.com; and douglas.walther@atmosenergy.com. Service was made this 26th day of February 2007.


Assistant Attorney General

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