

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

OFFICE OF THE ATTORNEY GENERAL)
COMMONWEALTH OF KENTUCKY)
V.)
ATMOS ENERGY CORPORATION)

Case No. 2005-00057

Motion to Dismiss of Atmos Energy Corporation

Atmos Energy Corporation, by counsel, moves to dismiss the Complaint of the Attorney General filed on February 10, 2005. The alleged purpose of that Complaint was to force the Commission to review the rates of Atmos for the purpose of determining if Atmos was over-earning on the previously authorized return on equity. On November 1, 2006, Atmos filed a notice of intent to file a rate application on or shortly after December 1. Atmos believes that the filing of the rate case will make all issues in the Complaint moot.

At a conference among the Attorney General, Atmos and the Commission staff held on February 14, 2006, the possible impact of a rate filing by Atmos was discussed:

After inquiry from Commission Staff, Atmos stated that it had contemplated filing an application for a rate adjustment in the near future. In light of Atmos' statement, Commission staff suggested that the parties may wish to consider entering into an agreement wherein the parties would agree that Atmos would file a rate

adjustment case by a date certain and that the AG would move to dismiss his Complaint. Mr. Randy Hutchinson, attorney for Atmos, stated that he would like to have the opportunity to meet briefly with his client in private. The participants all agreed and Atmos briefly left the room.

Upon returning to the room, Mr. Hutchinson thanked the participants for the opportunity to meet with his client and stated that he was not prepared to agree to his client filing a rate case at this time. He stated that he would continue to discuss the matter with Mr. Howard. (Staff Conference Memorandum, February 20, 2006)

Consistent with this commitment from Atmos, it has now submitted a notice of intent to file a rate application and has had discussions with the Attorney General's office about resolving the outstanding issues presented in the Complaint. Unfortunately, no agreement could be reached as to the dismissal of this case.

Atmos believes that the Complaint should be dismissed. The issue of over-earning for the period defined by the Commission - the year ending September 30, 2005 - in its Order of February 2, 2006 is too remote from current operating conditions to be an accurate gauge of Atmos' financial condition.

The establishment of rates on current economic conditions is the primary standard used by the Commission. It was referenced in Atmos' last rate case:

In determining the overall reasonableness of the proposed increase in annual revenues, the Commission has evaluated all revenue and expense adjustments proposed by Western in light of its traditional rate-making treatment. In addition, it has considered the **current economic conditions and the rates of return on common equity that have been authorized in recent cases.** "Application of Western Kentucky Gas for an Adjustment of Rates,

Case No. 99-070, Order of December 21, 1999, page 3”.
(Emphasis added)

More recently, the Commission has repeated that standard in the Application of Kenergy Corp. for a Reduction in Revenue and in Existing Rates, Case No. 2004-00446, page 3, June 14, 2005. For purposes of the hearing in this case, the Commission established a test period ending September 30, 2005. Obviously, that period cannot be considered a window of currently prevailing economic conditions.

Even the Attorney General in his Complaint asserts the need for a review of current conditions. As stated in paragraph 7 of that Complaint:

Pursuant to KRS 278.060, KRS 278.030 and Kentucky law, Atmos is authorized to receive only fair, just and reasonable rates for service rendered to the public. The determination of whether gas rates are fair, just, and reasonable has historically been made by the Commission through an examination of the rate-of-return on common equity currently being earned by the public utility, compared against the fair, just and reasonable rate-or-return on common equity which should be earned based **upon currently prevailing economic conditions**. (Emphasis added).

KRS 278.270 requires the Commission to set rates that are just and reasonable to be followed in the future. The Attorney General recognizes this. In his Motion for Ruling and Procedural Schedule filed on September 13, 2005, the Attorney General stated on page 2: “To provide **reasonable rates prospectively**, the Attorney General respectfully demands that a procedural schedule and hearing immediately be established in this docket.”

Because of the dated information cited in the Complaint and the less than current data supporting the 2005 historical test period, there is

no justifiable basis to review financial information that will produce rates that are not predicated on current information and which will not produce rates that are reasonable to charge on a going forward basis.

Additionally, the Attorney General has admitted that he cannot produce adequate evidence to support his allegations.

From the AG's point of view, there are several problems associated with this approach. First, the AG doesn't have complete knowledge of all of the pro forma adjustments that would need to be made to the unadjusted test year operating results in order to annualize and normalize the potential myriad of known and measurable revenue and expense changes during the test year. Only the Company, which has full control of the necessary information, knows the full extent of such known and measurable changes. However, the Commission has ruled that the Company does not have to provide this information to the AG even if the AG asks for it in discovery. Second, even if the Company were to list the pro forma adjustments required to properly annualize and normalize the test year results for known and measurable changes, in many instances the AG would not have the necessary data to make its own quantifications of these pro forma adjustments. For example, the pro forma adjustment to weather-normalize the unadjusted test year operating margins could not be performed by the AG without relying on complex modeling information that is only available to and controlled by the Company. Henkes' Supplemental Testimony, pages 4-5.

As Mr. Henkes readily admits in this testimony, the most accurate, current financial information that will allow the Commission and the Attorney General to determine the earnings of Atmos is information that is in Atmos' control. The filing of the rate application by Atmos will resolve the dilemma he faces – Atmos will supply the missing information in this case that he cannot supply in the Complaint case. It serves no useful purpose to have this Complaint case continue when a more current, more

accurate case is being prepared and will be filed. Any conclusion that might be reached as to the earnings of Atmos for the test period in the Complaint case will be superceded by the findings in the rate case. It is simply pointless and an inefficient use of the Commission's, Attorney General's and Atmos' time and resources to pursue this Complaint.

Even if the Commission were to determine a rate that might be appropriate based on the historical information developed in this Complaint case, that rate could not be imposed on Atmos, because it would result in a retroactive reduction of its earnings and violate the rule against retroactive ratemaking. The Commission engaged in an extensive review of this principle in *Kentucky Industrial Utility Customers, Inc. v. Big Rivers Electric Corporation*, Case No. 95-011, (April 1, 1997). In that case the Commission said:

The rule against retroactive ratemaking is a 'generally accepted principle of public utility law which recognizes the prospective nature of utility ratemaking and prohibits regulatory commissions from rolling back rates which have already been approved and become final.' **It further prohibits regulatory commissions, when setting utility rates, from adjusting for past losses or gains to either the utility, consumers, or particular classes of consumers.** The rule 'rewards the utility's efficiency and protects the consumer from surprise surcharges allocable to the utility's losses in prior years...[and] ensures fairness, stability and certainty by preventing a regulatory agency from reversing prior approved rates.' (Emphasis added)

Thus, the only opportunity the Commission has to set reasonable rates on a prospective basis using current financial data is the pending rate case.

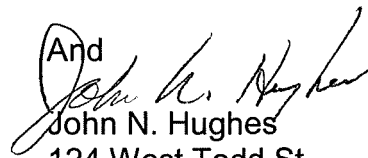
During the Commission's review of this Motion and the filing of the rate application, Atmos requests that the procedural schedule in this case be held in abeyance. If the Complaint is dismissed, any additional time and effort expended by the parties in the case will have been wasted. If the case is not dismissed, the procedural schedule can be revised accordingly.

For these reasons, Atmos moves for the immediate abeyance of the procedural schedule and for dismissal of the Complaint.

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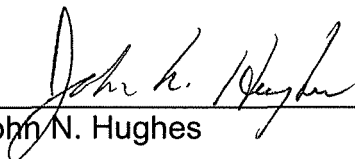
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Certification:

I certify that a copy of this Motion was served on the Attorney General, 1204 Capital Center Dr., Frankfort, KY 40601 by first class mail the 17th day of November, 2006.



John N. Hughes