

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ATMOS	)	CASE NO.
ENERGY CORPORATION FOR AN ADJUSTMENT	)	2021-00214
OF RATES	)	

ORDER

On June 7, 2022, Atmos Energy Corporation (Atmos) filed a motion, pursuant to KRS 278.400, requesting rehearing of the Commission’s May 19, 2022 final Order in this proceeding. On June 14, 2022, The Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention (Attorney General), the only intervenor in this case, filed a response to Atmos’s motion for rehearing. This matter now stands submitted for a decision.

LEGAL STANDARD

KRS 278.400, which establishes the standard of review for motions for rehearing, limits rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful.<sup>1</sup> A Commission Order is deemed unreasonable only when “the evidence presented leaves no room for difference of opinion among reasonable minds.”<sup>2</sup>

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<sup>1</sup> Case No. 2021-00365, *Electronic Application of Kenergy Corp. for a Certificate of Public Convenience and Necessity for the Construction of a High-Speed Fiber Network and for Approval of the Leasing of the Network’s Excess Capacity to an Affiliate to be Engaged in the Provision of Broadband Service to unserved and Underserved Households and Businesses of the Commonwealth* (Ky. PSC May 19, 2022), Order 1–2.

<sup>2</sup> *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46, 50 (Ky. App. 1980).

An Order can only be unlawful if it violates a state or federal statute or constitutional provision.<sup>3</sup>

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.

#### ATMOS'S MOTION FOR REHEARING

Atmos requested rehearing of six issues from the May 19, 2022 Order in this matter: (1) clarification of the manner to adjust rates at the conclusion of the three-year amortization for the Excess Deferred Income Taxes (EDIT) Regulatory Liability; (2) clarification of the manner to adjust rates at the conclusion of the six-year amortization for the regulatory liabilities established following Case No. 2018-00281;<sup>4</sup> (3) clarification of the method to “true-up” and collect annual Pipeline Replacement Program (PRP) rider revenue for the time period of October 1, 2021 through May 19, 2022 pertinent to Case No. 2021-00304;<sup>5</sup> (4) clarification of whether the Commission’s order to combine all commercial service under Rate G-2 into Priority Level 2 was intended to apply to all commercial service under Rate G-1 instead; (5) reconsideration of whether the Commission’s order to track the net operating loss (NOL) accumulated deferred income

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<sup>3</sup> *Public Service Comm'n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm'n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

<sup>4</sup> Case No. 2018-00281, *Electronic Application of Atmos Energy Corporation for an Adjustment in Rates* (Ky. PSC May 7, 2019), Order at 59.

<sup>5</sup> Case No. 2021-00304, *Electronic Application of Atmos Energy Corporation to Establish PRP Rider Rates for the Twelve Month Period Beginning October 1, 2021* (Ky. PSC May 20, 2022), Order at 2.

taxes (ADIT) for Kentucky in each fiscal year on a standalone basis presents a conflict with the normalization standards and procedures for accelerated depreciation of the Internal Revenue Service (IRS); and (6) reconsideration of the imputation of a hypothetical capital structure for a standalone corporation with no holding company.<sup>6</sup>

## DISCUSSION AND FINDINGS

### Methodology for Reflecting in Rates the Termination of the Amortization of the EDIT Regulatory Liability

Atmos proposed a five-year amortization period to amortize its EDIT regulatory liability. The May 19, 2022 Order required Atmos to use a three-year period and included this amortization in base rates.<sup>7</sup> Atmos asserted that the end of the three-year amortization period may not align with the dates for a subsequent general rate case and requested clarification for a methodology to align rates, if necessary. Atmos proposed a rider similar to the ratemaking approved by the Commission in Case No. 2018-00039<sup>8</sup> which incorporated the tax rate change that came about from the Tax Cuts and Jobs Act of 2017 (TCJA). Specifically, Atmos requested that at the end of the three-year period, rates be adjusted up to reflect the fact that the EDIT has been fully amortized through the rider.<sup>9</sup>

The Attorney General stated that Atmos did not propose any particular ratemaking method in its application or final brief, after the Attorney General's expert, Lane Kollen,

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<sup>6</sup> See Atmos's Petition for Rehearing (filed June 7, 2022).

<sup>7</sup> May 19, 2022 Order at 21.

<sup>8</sup> Case No. 2018-00039, *Electronic Investigation of the Impact of the Tax Cuts and Job Act on the Rates of Atmos Energy Corporation* (Ky. PSC April 22, 2020), Order at 4.

<sup>9</sup> Atmos's Petition for Rehearing at 2-3.

recommended a three-year amortization period of the EDIT regulatory liability to approximate the period between rate cases, consistent with the treatment for rate case expense.<sup>10</sup> The Attorney General argued that rehearing is not the appropriate venue for Atmos to introduce an issue for the first time, but that if rehearing is granted, the requested ratemaking is inconsistent with prior precedent and should be rejected.<sup>11</sup>

Atmos's proposed method is inconsistent with the Commission's typical treatment of the amortization of regulatory assets and liabilities, including rate case expenses in this case. The Commission's May 19, 2022 Order noted that Kollen recommended a three-year amortization of EDIT such that it was on the same period as rate case expenses,<sup>12</sup> and Atmos did not object, but noted that a longer amortization period benefits customers.<sup>13</sup> Atmos did not raise this issue when Kollen proposed the three-year amortization period and has offered no new evidence for the Commission to consider on this issue. Further, Atmos has the opportunity to file a new application for base rates within three years such that the amortization could be adjusted at that point if necessary. For the above reasons, and based upon the motion, response, and case record, the Commission finds that Atmos failed to meet its burden of proof and rehearing on this issue is denied.

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<sup>10</sup> Attorney General's Response to Atmos's Petition for Rehearing (Attorney General's Response) (filed June 14, 2022) at 1.

<sup>11</sup> Attorney General's Response at 2.

<sup>12</sup> May 19, 2022 Order at 20.

<sup>13</sup> May 19, 2022 Order at 21.

Methodology for Reflecting in Rates the Termination of the Amortization of the Regulatory Liabilities Established Following Case No. 2018-00281

Atmos proposed to amortize regulatory liabilities established in Case No. 2018-00281 over a 12-month period and to establish a separate credit rider in its revenue requirement model filed with its application. The May 19, 2022 Order required Atmos to utilize a six-year amortization period for these liabilities, and stated that the amortization will continue until the liabilities are exhausted or the effective date of Atmos's next rate case, whichever occurs first.<sup>14</sup> Atmos requested rehearing to clarify that a similar ratemaking methodology to that requested for the EDIT regulatory liability above shall be used upon termination of the six-year amortization period of these regulatory liabilities.<sup>15</sup>

The Attorney General stated that Atmos did not discuss this matter in its application or final brief, after Kollen proposed a different amortization period.<sup>16</sup> The Attorney General recommended that rehearing should be denied, but that if rehearing is granted, the proposed ratemaking is inconsistent with prior precedent and should be rejected.<sup>17</sup>

The language cited by Atmos in its request for rehearing did not and was not intended to create a rider to allow the rate effects of the amortization of the regulatory liabilities to fall off at the end of the amortization period. The May 19, 2022 Order extended the amortization period and included the amortization of the regulatory liabilities in base rates, in part, to ensure that a portion of the regulatory liabilities is available to

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<sup>14</sup> May 19, 2022 Order at 27.

<sup>15</sup> Atmos's Petition for Rehearing at 3–4.

<sup>16</sup> Attorney General's Response at 2.

<sup>17</sup> Attorney General's Response at 2–3.

offset likely future rate increases.<sup>18</sup> By including the effect of the amortization in base rates, the Order indicated that the rate effect of the amortization would remain in base rates until those rates are amended. Thus, the Commission finds that it is unnecessary to clarify the May 19, 2022 Order with respect to the amortization of the regulatory liabilities.

Further, as above, reflecting the rate effects of the amortization of the regulatory liabilities in base rates until Atmos next amends such rates is consistent with the Commission's treatment of regulatory assets and liabilities in most cases, including rate case expenses in this case. Atmos will also have ample opportunity to adjust rates before the six-year amortization period has concluded based on past filings, so the amortization period or the rate treatment at the end of the period can be adjusted in later rates cases, if appropriate. In fact, as noted in the May 19, 2022 Order, the Commission chose the six-year amortization period precisely because it expected Atmos to request another rate increase during that period. For the above reasons and based upon the motion, response, and case record, the Commission finds that Atmos failed to meet its burden of proof and rehearing on this issue is denied.

#### Methodology for True-Up of PRP

On July 30, 2021, in Case No. 2021-00304, Atmos filed its PRP rates effective October 1, 2021, through September 30, 2022, which the Commission subsequently suspended on August 20, 2021, noting that the application included requests that were

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<sup>18</sup> May 19, 2022 Order at 27.

included in the rate case filing.<sup>19</sup> The May 19, 2022 Order, among other PRP related requests, allowed Atmos to roll its PRP into base rates through September 30, 2022.<sup>20</sup>

Atmos has requested clarification of the proper method to true-up and collect PRP revenue associated with the period between October 1, 2021, and May 19, 2022. Atmos suggested two alternatives: (1) calculate a volumetric rate through September 30, 2022, the end of its PRP and fiscal year, or (2) include these amounts in its August 1, 2023 PRP filing to be implemented October 1, 2024, to recover the revenue difference through the true-up provision. Atmos requested the second option, noting a concern for the rate impact of calculating a volumetric rate in a compressed timeframe, during a period of low usage.<sup>21</sup>

The Attorney General noted that there is no relevant testimony on this issue but that it supports Atmos's proposal to delay recovery of these amounts until October 1, 2024, contingent upon the Commission's review of Atmos's calculations and finding that additional revenue is warranted.<sup>22</sup>

In the past, when a rider was rolled into base rates, the Commission has not allowed a true-up for the periods before the roll-in.<sup>23</sup> However, the timing of the two filings at issue, the overlapping periods, and the suspension of the rider rates present novel

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<sup>19</sup> Case No. 2021-00304, *Electronic Application of Atmos Energy Corporation to Establish PRP Rider Rates for the Twelve Month Period Beginning October 1, 2021* (Ky. PSC Aug. 20, 2021), Order at 1.

<sup>20</sup> May 19, 2022 Order at 20.

<sup>21</sup> Atmos's Petition for Rehearing at 4–5.

<sup>22</sup> Attorney General's Response at 3–4.

<sup>23</sup> See Case No. 2021-00185, *Electronic Application of Delta Natural Gas Company, Inc. for an Adjustment of Its Rates and a Certificate of Public Convenience and Necessity* (Ky. PSC Jan. 3, 2022) Order at 21.

circumstances that justify rehearing regarding whether and how PRP revenue associated with the period before base rates were placed into effect should be trued-up, including whether the true-up should be limited to PRP revenue from October 1, 2021, through December 31, 2021, given that the PRP was included in a forecasted test year for base rates starting January 1, 2022, even if the rates were not in effect until May 19, 2022. Therefore, rehearing is granted regarding the PRP true-up in order to take additional evidence on the issues discussed above. Further, the Commission, on its own motion, finds that a procedural schedule should be established for the orderly processing of this rehearing as set forth in the Appendix to this Order.

#### Correction to Tariff regarding Priorities of Curtailment

In the May 19, 2022 Order, the Commission approved Atmos's proposed revisions to its priorities of curtailment. On page 67, the Order stated that the revisions included, inter alia, "(1) combine all commercial service under Rate G-2 into Priority Level 2."<sup>24</sup> Atmos requested clarification regarding whether this noted revision should instead state that Priority Level 2 is for commercial services under Rate G-1.<sup>25</sup> The Attorney General took no position on this request for rehearing.<sup>26</sup>

The Commission finds that the language questioned by Atmos and quoted above does contain a typographical error. Specifically, the language quoted above should have referred to "Rate G-1" as opposed to "Rate G-2." Thus, the Commission finds that rehearing shall be granted to correct the error and that the portion of the sentence quoted

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<sup>24</sup> May 19, 2022 Order at 67.

<sup>25</sup> Atmos's Petition for Rehearing at 5.

<sup>26</sup> Attorney General's Response at 4.

above from page 67 of the May 19, 2022 Order shall be amended and replaced with the following language: “(1) combine all commercial service under Rate G-1 into Priority Level 2.”

#### Reconsideration of Consolidated Tracking on NOL ADIT

Atmos requested that the Commission reconsider its determination that Atmos begin to track the generation and utilization of NOL ADIT for Kentucky in each fiscal year on a standalone basis. Atmos indicated that it calculates its NOL ADIT for ratemaking purposes in a manner consistent with a Private Letter Ruling (PLR) it obtained from the Internal Revenue Service (IRS) pursuant to the final order in Case No. 2013-00148.<sup>27</sup> Atmos stated that PLR found “that the use of any method other than the ‘last dollars deducted’ method would be inconsistent with the Normalization Rules” and argued that changing the methodology it uses to track the generation and utilization of NOL ADIT for its Kentucky operations on a standalone basis may be inconsistent with the “last dollar deducted” method, and therefore could result in a normalization violation.<sup>28</sup>

The Attorney General argued that there is no potential normalization violation if Atmos tracks the NOL ADIT on a standalone basis for Kentucky. The Attorney General asserted that Atmos already calculated the NOL ADIT on a standalone basis, at least in part, through the allocation of NOL ADIT during the rate case, including its removal of NOL ADIT attributable to Winter Storm URI and its removal of amounts associated with

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<sup>27</sup> Atmos’s Petition for Rehearing at 6.

<sup>28</sup> Atmos’s Petition for Rehearing at 5–7.

“unregulated” divisions’ use of NOL ADIT to defer tax expense. Thus, the Attorney General argued that there is no basis for rehearing on this issue.<sup>29</sup>

The PLR Atmos obtained, pursuant to the final order in Case No. 2013-00148, did not address how NOLs and associated NOL ADIT should be allocated between Atmos’s divisions.<sup>30</sup> Further, since Atmos obtained its PLR regarding the treatment of NOL ADIT, the IRS released Revenue Procedure 2020-39 that, among other things, addressed the treatment of net operating loss carryforwards (NOLC) and associated NOL ADIT in ratemaking.<sup>31</sup>

Revenue Procedure 2020-39 notes that “there is not one single methodology provided for determination of the portion of an NOLC that is attributable to depreciation,” and states that:

Regulating commissions have expertise in this area, and any reasonable method for determining the portion of the NOLC attributable to depreciation should generally be respected provided such method does not clearly violate normalization requirements.<sup>32</sup>

It further notes that the purpose of identifying the NOLC that is attributable to accelerated depreciation is to ensure “that rate base is not understated in jurisdictions in which net

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<sup>29</sup> Attorney General’s Response at 5.

<sup>30</sup> See Private Letter Ruling 2015-34001, 2015 WL 4978111 (issued Aug. 21, 2015) (identifying the issues the IRS was asked about, which do not mention the allocation among operating divisions, and describing how the utility tracks ADIT and corresponding NOL ADIT without mentioning that ADIT is tracked at the division level and NOL ADIT is tracked at the corporate level); see also Case No. 2017-00349, *Electronic Application of Atmos Energy Corporation for an Adjustment of Rates and Tariff Modifications* (Ky. PSC May 3, 2018), final Order (identifying the private letter ruling that Atmos obtained pursuant to the final order in Case No. 2013-00148).

<sup>31</sup> Rev. Proc. 2020-39, 2020-36 I.R.B. 546, Section 4.02 (issued August 21, 2020).

<sup>32</sup> Rev. Proc. 2020-39, 2020-36 I.R.B. 546, Section 4.02 (issued August 21, 2020).

deferred tax liabilities reduce rate base,”<sup>33</sup> which is similar to the basis the IRS gave in Atmos’s PLR.<sup>34</sup>

The inclusion of NOL ADIT arising from losses in other jurisdictions in rate base would not serve the purpose given by the IRS for accounting for NOLC, because losses that are not attributable to this jurisdiction could not have arisen from the accelerated depreciation of utility property in this jurisdiction and any ADIT associated with losses in other jurisdictions is not offsetting rate base in Kentucky. In fact, the IRS recently issued a PLR for another utility, citing Revenue Procedure 2020-39, which found that it did not violate normalization rules to allocate the NOLs of a consolidated group to a subsidiary using a separate return methodology and that it similarly did not violate normalization rules to allocate NOLs assigned to the subsidiary between divisions of the subsidiary based on the taxable income of each division, with the “with or without” or “last dollar deducted” method apparently being used once the NOLs were assigned to a division.<sup>35</sup> Thus, consistent with the Attorney General’s arguments, the Commission does not believe that requiring Atmos to calculate the utilization and generation of NOL ADIT going forward on standalone basis based solely on Kentucky operations would violate normalization rules.

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<sup>33</sup> Rev. Proc. 2020-39, 2020-36 I.R.B. 546, Section 4.02 (issued August 21, 2020).

<sup>34</sup> See Private Letter Ruling 2015-34001, 2015 WL 4978111 (issued Aug. 21, 2015).

<sup>35</sup> Private Letter Ruling 2022-06010, 2022 WL 420844 (issued Feb. 11, 2022); see also Case No. 2021-00183, *Electronic Application of Columbia Gas of Kentucky, Inc. for an Adjustment of Rates; Approval of Depreciation Study; Approval of Tariff Revisions; Issuance of a Certificate of Public Convenience and Necessity, and Other Relief* (Ky. PSC Dec. 28, 2021), Order at 15 (explaining that there is an argument that including NOL ADIT attributable to losses in other jurisdictions would violate normalization rules in the same manner that using ADIT from other jurisdictions to offset Kentucky rate base would violate the normalization rules).

However, even if calculating the utilization and generation of NOL ADIT on standalone basis violated normalization rules, Atmos would not be entitled to rehearing of this issue in this case. The May 19, 2022 Order did not actually change the method used to calculate the NOL ADIT in the forecasted test year in this case.<sup>36</sup> Further, while the Commission expects to consider whether the standalone NOL ADIT calculation should be used to reflect the NOL ADIT balance when setting rates in future cases, the final order did not require Atmos to use that method in such cases and indicated that Atmos will have the opportunity to raise objections, if any, to using it in such cases.<sup>37</sup> Thus, the May 19, 2022 Order could not possibly be read as imposing a rate adjustment that violated normalization rules in the manner feared by Atmos.

Rather, the May 19, 2022 Order simply requires Atmos to track the generation and utilization of NOL ADIT for Kentucky in each fiscal year on a standalone basis as described in the final order; requires Atmos to file a report in future applications to increase base rates showing the standalone generation and utilization of NOL ADIT in each year for Kentucky based on Kentucky operations only; and requires Atmos to explain in detail why using an alternative method is reasonable if it proposes to do so in such cases.<sup>38</sup> Those requirements should ensure that Atmos maintains and reports the information necessary to calculate the generation and utilization NOL ADIT on a standalone basis between cases in its next rate case, so the Commission has the

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<sup>36</sup> May 19, 2022 Order at 11 (rejecting the Attorney General’s proposed adjustment to the method in this case).

<sup>37</sup> See May 19, 2022 Order at 14 (“If Atmos Kentucky proposes to use a different method to reflect the generation and utilization of NOL ADIT for Kentucky in its revenue model in such cases, Atmos Kentucky must explain in detail why using that method would be reasonable.”)

<sup>38</sup> See May 19, 2022 Order at 14.

information necessary to compare the standalone calculation to any method proposed by Atmos in order to review the reasonableness of rates proposed by Atmos. Such requirements are well within the Commission's authority to require Atmos to provide information and are reasonable for the reasons discussed in the May 19, 2022 Order, including the significant losses incurred by other divisions that Atmos initially included as part of rate base for Kentucky operations. Thus, the Commission finds that Atmos failed to establish that the May 19, 2022 Order with respect to the treatment of NOL ADIT is unlawful or unreasonable as alleged, and therefore, that Atmos's request for rehearing of that section of the order is denied.

Reconsideration of Setting Rates Based on Actual, Prudently Incurred Capital Costs Associated with the Actual Common Equity Ratio

First, Atmos noted that its Kentucky operation is not an "operating subsidiary" as indicated in the Commission's May 19, 2022 Order.<sup>39</sup> Atmos then requested that the Commission reconsider its application of the modified capital structure used for ratemaking. Atmos noted that it is not part of a holding company structure, and the proposed capital structure represents an actual cost, not a hypothetical or subsidiary cost that is part of a larger holding company and can be leveraged at a higher level than the actual corporate structure. Atmos argued that a weaker capital structure limits Atmos's sound business decisions that have allowed Atmos to meet the Commission's policy goals expressed in its recent order in Case No. 2021-00481<sup>40</sup> to make capital investments

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<sup>39</sup> May 19, 2022 Order at 32.

<sup>40</sup> Case No. 2021-00481, *Electronic Joint Application of American Electric Power Company, Inc., Kentucky Power Company and Liberty Utilities Co. for Approval of the Transfer of Ownership and Control of Kentucky Power Company.*

in the integrity of its system. Thus, Atmos argued that the Commission should reconsider its decision to impute a “weaker, higher debt hypothetical capital structure.”<sup>41</sup>

The Attorney General argued that the May 19, 2022 Order thoroughly discussed Atmos’s proposed capital structure, Atmos presented no new evidence on rehearing, and rehearing should be denied.<sup>42</sup>

The Commission recognizes that Atmos’s operations in Kentucky are not part of a holding company structure and notes that Atmos’s structure was made clear in the May 19, 2022 Order despite the potentially inarticulate use of the term “operating subsidiary” in a single instance.<sup>43</sup> The Commission further finds that Atmos has not provided any new evidence regarding its proposed capital structure, which was thoroughly discussed in the Commission’s May 19, 2022 Order. The Commission was very clear as to why the adjustment was made and presented support that a higher equity component is not necessary for capital investment. For the above reasons, and based upon the motion, response, and case record, the Commission finds that Atmos failed to meet its burden of proof and rehearing on this issue is denied.

IT IS THEREFORE ORDERED that:

1. Atmos’s motion for rehearing is granted in part and denied in part.
2. Atmos’s motion for rehearing is granted to investigate and to allow Atmos to provide the Commission additional support for its assertion that a PRP true-up should be allowed for the collection of PRP revenue for October 1, 2021, through May 19, 2022.

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<sup>41</sup> Atmos’s Petition for Rehearing at 8.

<sup>42</sup> Attorney General’s Response at 5.

<sup>43</sup> See, e.g., May 19, 2022 Order at 1–2 (describing Atmos’s corporate structure and operations and indicating that Atmos Energy operates the regulated gas distribution operation in Kentucky).

3. Atmos's motion for rehearing is granted to correct the error on page 67 of the May 19, 2022 Order, and the language on page 67 of the May 19, 2022 Order stating "(1) combine all commercial service under Rate G-2 into Priority Level 2" is amended and replaced with language stating "(1) combine all commercial service under Rate G-1 into Priority Level 2."

4. Atmos's motion for rehearing is denied for the remaining four issues Atmos presented for rehearing.

5. The procedural schedule set forth in the Appendix to this Order shall be followed with respect to the rehearing on the PRP true-up.

6. Nothing contained herein shall prevent the Commission from entering further Orders in this matter.

PUBLIC SERVICE COMMISSION



Chairman

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Vice Chairman

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Commissioner



ATTEST:

  
Executive Director

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2021-00214 DATED JUN 24 2022

All rehearing requests for information to Atmos  
shall be filed no later than ..... 07/11/2022

Atmos shall file responses to rehearing requests for  
information no later than..... 07/25/2022

Simultaneous briefs by parties shall be filed no later than..... 08/08/2022

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