

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE OFFICE OF ATTORNEY GENERAL	)	
THE COMMONWEALTH OF KENTUCKY	)	
	)	
COMPLAINANT	)	
	)	
v.	)	CASE NO. 2005-00057
	)	
ATMOS ENERGY CORPORATION	)	
	)	
DEFENDANT	)	

ORDER

The Attorney General (“AG”) has filed a complaint against Atmos Energy Corporation (“Atmos”) in which he alleges that Atmos’s current rates are producing an unreasonable level of revenues and should be reduced. Atmos has moved to dismiss the complaint for failure to state a *prima facie* case. By this Order, we deny the motion to dismiss and establish the initial process for addressing the AG’s complaint.

On February 1, 2005, the Attorney General filed a complaint alleging that Atmos’s present rates for service were producing revenues in excess of reasonable levels. In support of his complaint, he submitted the verified written testimony of Robert Henkes. Mr. Henkes testified that, based upon his limited earnings review of Atmos’s Kentucky jurisdictional operations,<sup>1</sup> Atmos had achieved an average return on equity (“ROE”) of 19.40 percent from the 12-month period ending September 30, 2001 through

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<sup>1</sup> Testimony of Robert J. Henkes at 2.

the 12-month period ending March 31, 2004.<sup>2</sup> Comparing these findings to the ROE that the Commission had awarded Delta Natural Gas Company in 2004,<sup>3</sup> he concluded that Atmos is currently earning an ROE well in excess of that the Commission has found reasonable. In preparing his testimony and conducting his review, Mr. Henkes relied upon information included in proceedings in Colorado and Tennessee relating to Atmos's earnings.<sup>4</sup>

On February 14, 2005, Atmos answered the complaint and moved for its dismissal. In support of its motion to dismiss, Atmos argues that the AG failed to comply with Administrative Regulation 807 KAR 5:001, Section 12 as his complaint fails to state facts sufficient to meet the standard for regulatory certainty of a violation or present evidence that any Commission Order, statute or regulation had been violated.

Atmos further argues that Mr. Henkes' analysis is based upon factually incorrect schedules that "provide inaccurate information about Atmos' earnings."<sup>5</sup> In its answer, Atmos attempts to refute the Attorney General's allegations by providing "schedules showing corrected calculations and earnings."<sup>6</sup> Finally, Atmos argues that the AG

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<sup>2</sup> Id. at 6.

<sup>3</sup> Case No. 2004-00067, Application of Delta Natural Gas Company, Inc. for an Adjustment of Rates (Ky.PSC Nov. 10, 2004) at 54.

<sup>4</sup> AG's Complaint at 3.

<sup>5</sup> Answer at 4.

<sup>6</sup> Id.

seeks to have the Commission engage in single issue rate-making by setting rates based solely on ROE without regard to other aspects of Atmos's financial operations.<sup>7</sup>

The AG responds that Mr. Henkes' testimony, which shows Atmos has consistently achieved an ROE above that granted in its last fully litigated rate case and above an ROE appropriate under current financial conditions, sufficiently establishes a *prima facie* case that Atmos's rates are unreasonable and excessive.<sup>8</sup> He argues that complainants, who lack access to a utility's internal financial information, must rely on information available as a matter of public record. He further argues that the fact that his financial calculations have not been adjusted for rate-making purposes does not lessen their reliability for the purpose of determining the existence of a *prima facie* case for unreasonable rates.<sup>9</sup> He further argues that Atmos refused to provide the financial information necessary for a more accurate review of Atmos's ROE and that this lack of cooperation should not be rewarded by establishing an unrealistically high standard to prevent the AG from bringing his complaint.<sup>10</sup>

In any complaint proceeding before the Commission, the complainant bears the burden of proof.<sup>11</sup> Both parties in this case agree that the AG's analysis is lacking in certain respects and that the calculations of his witness have not been adjusted for rate-

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<sup>7</sup> Id. at 8.

<sup>8</sup> AG's Response to Atmos's Answer and Motion to Dismiss Complaint at 2.

<sup>9</sup> Id. at 3.

<sup>10</sup> Id. at 4.

<sup>11</sup> Energy Regulatory Comm'n v. Kentucky Power Co., Ky.App., 605 S.W.2d 46 (1980).

making purposes. The Commission finds that, notwithstanding these deficiencies, the AG has set forth sufficient allegations and provided sufficient supporting testimony to establish a *prima facie* case.

We note that the establishment of a *prima facie* case is not the same as meeting one's burden of proof. For this case to continue, the AG must clearly establish that Atmos's current rates are producing an ROE that is excessive under present economic conditions. The Commission intends to establish a procedural schedule that will afford the AG a meaningful opportunity to conduct discovery and to develop testimony and evidence to meet his burden of proof.

We place the AG on notice, however, that to proceed further with his complaint he must produce substantial evidence on the appropriate ROE level for Atmos under present economic conditions. Any supplemental testimony that the AG presents after completion of discovery should, at a minimum, contain a detailed ROE analysis that specifically identifies the currently appropriate ROE for Atmos's Kentucky Operations; a detailed analysis of the changed economic conditions affecting Atmos's Kentucky Operations; a Rate Base, Capitalization, Capital Structure, and Statement of Operations for Atmos's Kentucky Operations as of September 30, 2005; and a determination of the appropriate Revenue Requirement for Atmos's Kentucky Operations.

IT IS THEREFORE ORDERED that:

1. Atmos's Motion to Dismiss is denied.
2. An informal conference shall be held at the Commission's offices in Frankfort, Kentucky on February 14, 2006, at 3:00 p.m., Eastern Time, for the purpose

of developing a procedural schedule, the simplification of issues, and any other matters that may aid in the handling and disposition of this proceeding.

Done at Frankfort, Kentucky, this 2<sup>nd</sup> day of February, 2006.

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Executive Director