

**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: PETITION TO OPEN AN) Filed Electronically in Docket Office on 06/16/06 @
INVESTIGATION TO DETERMINE) 3:45pm
WHETHER ATMOS ENERGY CORP.)
SHOULD BE REQUIRED BY THE TRA) Docket No. 05-00258
TO APPEAR AND SHOW CAUSE THAT)
ATMOS ENERGY CORP. IS NOT)
OVEREARNING IN VIOLATION OF)
TENNESSEE LAW AND THAT IT IS)
CHARGING RATES THAT ARE JUST)
AND REASONABLE)

Atmos Energy Corporation’s Motion for Expedited TRA Review of Hearing Officer Order

Pursuant to Tenn. Code Ann. § 4-5-315 and Tenn. Rules & Regs. 1220-1-2-.18,¹ Atmos Energy Corporation (“Atmos” or “Company”) files this Motion for Expedited TRA Review of the Hearing Officer’s June 14, 2006 Order Resolving Discovery and Protective Order Disputes and Requiring Filings (“June 14 Order”) in this docket.

Atmos requests that the Authority reconsider that portion of the June 14 Order which effectively expands the scope of this proceeding to include a re-examination of the gas costs and gas purchasing revenues governed by the Company’s Performance-Based Ratemaking (“PBR”) mechanism and the Authority’s Purchased Gas Adjustment (“PGA”) rule. As described by the Authority, this docket was convened “for the purpose of establishing a fair and reasonable return for Atmos.”² The Company requests that the Authority recognize the scope of this docket as limited to those issues which impact the Company’s base rates, i.e., rate base, operation and

¹ Tenn. Code Ann. § 4-5-315 requires the TRA to grant motions for review of initial hearing officer orders upon the appeal of any party. Tenn. Code Ann. § 4-5-315(a). Tenn. Rules & Regs. 1220-1-2-.18 provides that initial hearing officer orders shall be reviewed upon appeal by any party. To the extent Tenn. Rules & Regs. 1220-1-2-.06(6) may require permission of the Hearing Officer, Atmos requests such permission by this Motion.

² Transcript of May 15, 2006 TRA Agenda Conference, p. 24.

maintenance expenses, net operating income, rate of return, etc. The discovery requests that are the subject of the June 14 Order seek information related solely to the Company's gas purchasing activities. This information has no bearing on the Company's base rates, and the Company requests that the Authority therefore exclude such information from the scope of discovery in this proceeding.³

Due to the fact that Atmos has been ordered to produce the requested information on June 23, 2006, the Company also requests that, to the extent the Authority is unable to rule before the June 23 response date, the time for responding to the discovery requests at issue be extended pursuant to Tenn. Rules & Regs. 1220-1-1-.11 until such time as the Authority issues its ruling on this Motion, presumably at the June 26, 2006 agenda conference.

I. **THE JUNE 14 ORDER CORRECTLY DESCRIBES THE SCOPE OF THIS DOCKET AS LIMITED TO BASE RATES.**

The June 14 Order recognizes that the Authority's regulation of Atmos' base rates is, consistent with the regulation of all other gas distribution companies in the state, separate and distinct from the Authority's regulation of the Company's gas purchasing. As stated in the June 14 Order, neither the *costs* the Company incurs to purchase gas on behalf of its customers, nor the *revenues* derived from the management of the natural gas assets necessary to procure that gas supply, are taken into consideration in setting the Company's base rates. (June 14 Order, p. 6.) Rather, as the June 14 Order explains, such costs and revenues are regulated independently of base rates, through the PGA rule and the ACA audits (which govern the pass-through of gas supply costs to the consumers), and the Company's PBR (which governs the sharing of revenues and losses from the Company's gas supply asset management). (Id.)

³ The Company is requesting an extension only for those requests that are the subject of the June 14 Order. The Company will respond to all other discovery requests by the original June 23 response date, and has already begun providing some of those responses.

The June 14 Order very clearly and accurately sets forth this distinction between these gas cost/revenue issues governed by the PGA and PBR, and issues considered when setting base rates. The June 14 Order also finds that information related solely to the costs and revenues from the Company's gas supply management has no bearing on the setting of base rates, and is therefore totally irrelevant to this proceeding:

As a general proposition, information related to the cost of gas, which includes the commodity and transportation costs *offset by any revenues derived from the use of the natural gas assets*, is not relevant to this docket because such costs are not a factor used in calculating a company's rate base, operation and maintenance expenses, net operating income, rate of return, or base rates, all issues in this docket. Instead, gas costs are regulated independent of these items. Such costs are passed directly through to consumers via the PGA. Upon filing, the Authority audits gas cost recovery via the PGA using the ACA audit and assesses a surcharge or credit as necessary to ensure that only actually incurred natural gas costs are recovered from consumers. A second audit, the PBR audit, reviews the allocation of revenues or losses derived from the sale or purchase of natural gas between consumers and stockholders. ***Thus, information related solely to gas costs is not relevant to the determinations to be made in this docket.***

(June 14 Order, p. 6) (emphasis added). The "revenues derived from the use of natural gas assets" mentioned in the June 14 Order refers to revenues from the management of Atmos' gas supply assets. In 2003, Atmos issued a Request for Proposals seeking a company to manage those gas supply assets. Atmos Energy Marketing, LLC ("AEM"), the Company's non-regulated marketing affiliate, was the successful bidder, and now manages the Company's gas supply assets. The June 14 Order recognizes that the income derived from AEM's asset management activities is income from gas supply assets which is regulated through the PGA and the Company's PBR, and is therefore irrelevant to base rates and thus beyond the scope of this docket:

During the course of the status conference it became clear that the “other income”⁴ referenced to by the Consumer Advocate included an amount equal to approximately \$30,000. Although the exact amount is not of consequence, what is of importance is the fact that the \$30,000 is a portion of the income received by Atmos in exchange for allowing Atmos Energy Marketing, Inc. (“AEM”) to manage Atmos’s natural gas assets. The Consumer Advocate has failed to demonstrate that the \$30,000 that it references as a basis for obtaining the requested capacity release information is anything other than *income derived from the use of natural gas assets*. As noted above, *such revenues should be included in the cost of gas and recovered by the ratepayers through the PGA, but are not relevant to the determinations to be made in this docket.*

(June 14 Order, pp. 6-7) (emphasis added).

Despite the Order’s clear finding that the gas supply costs the Company incurs and the revenues from AEM’s management of those gas supply assets are regulated separately from base rates through the PGA and PBR, and are therefore beyond the scope of this proceeding, the Order nevertheless compels Atmos to produce information related solely to the pass-through of gas supply costs and the sharing of asset management revenues. As discussed more thoroughly below, these rulings, which may have been based on a distinction that does not exist under the facts and circumstances of this case, are in error and should be reversed.

⁴ The “other income” referenced by the Consumer Advocate referred to income the Company received under its PBR mechanism. See June 8, 2006 Transcr. p. 12; Consumer Advocate’s Response to Atmos’ Objections pp. 2-3 (citing a statement in Atmos’ 2002 10-K Report that “[w]e recognized *other income* of \$.4 million, \$1.0 million and \$.2 million in fiscal years 2002, 2001 and 2000 *attributable to the Georgia and Tennessee Performance-based Ratemaking mechanisms.*”) (emphasis added).

II. **THE CONSUMER ADVOCATE'S DISCOVERY REQUESTS AT ISSUE SEEK INFORMATION RELATED TO COSTS AND REVENUES GOVERNED BY THE PGA AND PBR, AND ARE THEREFORE OUTSIDE THE SCOPE OF THIS PROCEEDING.**

The June 14 Order compels Atmos to produce information in response to requests from the Consumer Advocate and the Atmos Intervention Group.⁵ Both sets of requests are similar in that they seek information related solely to Atmos' gas purchasing management.

The Consumer Advocate's requests seek information related to the pass-through of gas costs and revenues related to AEM's capacity release activities. As recognized by the June 14 Order, the capacity release income that is the subject of the requests is income Atmos shares in through its PBR from AEM's management of gas supply assets, and is therefore beyond the scope of this proceeding. (June 14 Order, p. 7.) However, the Order compelled Atmos to respond to the extent Atmos also receives income through the PBR that, unlike the capacity release revenues, is *not* derived from the management of gas supply assets. (*Id.*) Although counsel for Atmos explained at the June 8 status conference that the only income Atmos receives from the management of its gas supply assets flows through the PBR, and that *all* of the income from the PBR is derived solely from the management of assets used for gas supply, the Order nonetheless found insufficient record evidence to support Atmos' assertions. (*Id.*)

Atmos did not receive the Consumer Advocate's response to its objections until June 7, the day before the status conference, and was therefore unable to offer sworn testimony at the status conference on this issue. From the June 14 Order, it appears the Hearing Officer found such sworn testimony necessary. (June 14 Order p. 7.) Atmos is submitting with this Motion an

⁵ TRA Staff, the Consumer Advocate, and the Atmos Intervention Group submitted a joint set of discovery requests to Atmos consisting of 128 separate requests for information. Atmos did not object to any of the requests contained in the joint submission. The Consumer Advocate submitted a separate set of 22 additional discovery requests. Although Atmos submitted objections to certain of the Consumer Advocate's additional discovery requests, all of the objections were resolved by agreement of the parties with the exception of the requests that are the subject of the June 14 Order. The requests that are the subject of the June 14 Order are Consumer Advocate Requests 1.A through 1.H, 3.A, and 3.H through 3.K. (June 14 Order p. 5.)

Affidavit confirming the assertions made at the June 8 status conference that the only “other income” Atmos receives is that which flows through the PBR mechanism, 100% of which is derived from the management of the Company’s gas supply assets. Therefore, all of the information sought by the Consumer Advocate’s requests falls within the category of revenues derived from the use of the Company’s gas supply assets, which the Order finds is governed by the PGA and PBR and is thus beyond the scope of this proceeding. (June 14 Order, p. 7.) As such, that portion of the June 14 Order compelling Atmos to respond further to the Consumer Advocate’s requests should be reversed.

III. **THE REQUESTS OF THE ATMOS INTERVENTION GROUP SEEK INFORMATION RELATED TO COSTS AND REVENUES GOVERNED BY THE PGA AND PBR, AND ARE THEREFORE OUTSIDE THE SCOPE OF THIS PROCEEDING.**

Like the Consumer Advocate requests discussed above, the requests at issue from the Atmos Intervention Group also seek information concerning gas supply items which are governed by the PGA and PBR and are therefore unrelated to base rates and beyond the scope of this proceeding. Specifically, the Atmos Intervention Group requests seek information concerning the Company’s asset management contract with AEM and the profits generated by AEM from its management of the Company’s gas supply assets.

The Atmos Intervention Group does not dispute that its requests seek information related to gas supply costs and revenues governed by the PGA and PBR. Instead, the Atmos Intervention Group argues that it needs the information to support its argument that the consumers are entitled to a greater share of the revenues from the management of gas supply assets, and that the Authority should grant the consumers this additional share by using the profits AEM generates

from its management of the gas supply assets to reduce Atmos' revenue requirement in this case.⁶ The June 14 Order clearly found that because revenues derived from the management of gas supply assets are not included in base rates, but are instead governed by the PGA and PBR, that such revenues are beyond the scope of this proceeding. However, the Order failed to apply that finding to the Atmos Intervention Group discovery.

There can be no doubt that what the Atmos Intervention Group is seeking is a revision to the PBR. The orders in the PBR proceedings determined how asset management revenues should be split between the Company and the consumers. Under the current asset management contract, consumers receive 100% of the up front fee AEM pays for the right to manage Atmos' assets and 90% of the capacity release revenues under the PBR. The Atmos Intervention Group wants the TRA to reconsider this split. This necessarily requires a reconsideration of the TRA's orders in the Company's PBR proceedings which determined the appropriate sharing between the Company and the consumers. The PBR tariff was implemented after over two years of proceedings which included several rounds of pre-filed testimony, numerous hearings, a one-year experimental period, an audit of the experimental period performed by a consultant hired by the Commission, followed by additional rounds of testimony and hearings. To suggest, as the Atmos Intervention Group has, that the Authority should take up these issues within the 3 months remaining in the procedural schedule in this case is unreasonable and violative of the most basic tenets of fairness.

Expanding the scope of this docket to include a re-examination of the PBR orders, as the June 14 Order does, also requires that the Authority rescind its order in the Company's latest ACA audit, Docket No. 05-00253, which ordered the Company to work with Staff to submit a joint proposal to revise the PBR to incorporate the asset management agreement.

⁶ The June 14 Order did not directly address the assertions in the Affidavit of AEM Senior Vice President Rob Ellis that the discovery submitted by the Atmos Intervention Group appeared to have been drafted for the specific purpose of aiding Mr. Earl Burton's current efforts to compete with AEM.

The Company does not dispute the Authority's power to revise the PBR or to alter the manner in which it regulates asset management activities or affiliate transactions. Atmos is eager to meet with Staff to develop the joint proposal to revise the PBR contemplated by the Authority's order in the ACA docket. It is clear, however, that such issues are beyond the scope of this docket. As such, that portion of the June 14 Order compelling Atmos to respond to the requests of the Atmos Intervention Group should be reversed.

IV. **CONCLUSION.**

The June 14 Order accurately sets forth the traditional distinction between the two types of regulation for gas companies, which is similar to the two sides of a ledger: on the left-hand side is the regulation of base rates; on the right, the regulation of gas cost issues, which include the costs and revenues derived from the Company's gas purchasing activities. The June 14 Order also clearly found that this docket concerns only the left-hand side of the ledger – issues concerning base rates. As such, the June 14 Order concluded that information related to the right-hand side of the ledger, including the sharing of revenues from the Company's management of its gas supply assets, are irrelevant to the setting of base rates, and therefore beyond the scope of this proceeding. All of the discovery requests discussed in the June 14 Order relate solely to the gas cost side of the ledger. Therefore, such discovery is outside the scope of this docket.

Respectfully Submitted,

BAKER, DONELSON, BEARMAN
CALDWELL & BERKOWITZ

A handwritten signature in black ink, appearing to read "Misty Smith Kelley", is written over a horizontal line. The signature is fluid and cursive.

Misty Smith Kelley, TN BPR # 19450
1800 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450-1800
(423) 209-4148
(423) 752-9549
mkelley@bakerdonelson.com
Attorneys for Atmos Energy Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been e-mailed or faxed and mailed to the following parties of interest this ~~11th~~ 14th day of June, 2006.

Timothy Phillips
Vance L. Broemel
Joe Shirley
Cynthia Kinser
Office of Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202

Gary Hotvedt
General Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Henry Walker
Boult, Cummings, Conners & Berry
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, TN 37203

J.W. Luna
Jennifer Brundige
Farmer & Luna
333 Union Street, Suite 300
Nashville, TN 37201



**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: PETITION TO OPEN AN)
INVESTIGATION TO DETERMINE)
WHETHER ATMOS ENERGY CORP.)
SHOULD BE REQUIRED BY THE TRA) Docket No. 05-00258
TO APPEAR AND SHOW CAUSE THAT)
ATMOS ENERGY CORP. IS NOT)
OVEREARNING IN VIOLATION OF)
TENNESSEE LAW AND THAT IT IS)
CHARGING RATES THAT ARE JUST)
AND REASONABLE)

Affidavit of Greg Waller

I, Greg Waller, after first being duly sworn according to law, hereby depose and say that:

1. I am beyond the age of majority, am competent to make this Affidavit, and have personal knowledge of the matters stated within this Affidavit.

2. I am employed by Atmos Energy Corporation (“Atmos” or “Company”) as Vice President of Planning. I am based out of Atmos’ Franklin, Tennessee office.

3. I have reviewed the following statement from Atmos’ Form 10-K for the year ending September 30, 2002, which is referenced in the June 14, 2006 Order in this docket:

The gas purchase and capacity release mechanisms of the Performance-Based Ratemaking mechanism are designed to provide us incentives to find innovative methods to lower gas costs to our customers. We recognized other income of \$.4 million, \$1.0 million and \$.2 million in fiscal years 2002, 2001 and 2000 attributable to the Georgia and Tennessee Performance-based Ratemaking mechanisms.

(June 14 Order, p. 5, citing the June 7, 2006 Consumer Advocate's Response to Atmos Energy Corporation's Objections to First Discovery Request of the Consumer Advocate and Motion to Compel, p. 2.)

4. All of the "other income" amounts referred to in the statement quoted above are amounts the Company has received through its Performance-based Ratemaking mechanisms ("PBR") in Tennessee and Georgia. In Tennessee, 100% of the income the Company receives through its PBR is derived through one of the two separate sharing mechanisms within the PBR: (1) the Gas Procurement Incentive Mechanism (also referred to as Gas Commodity Cost Mechanism); and (2) the Capacity Management Incentive Mechanism (also referred to as the Capacity Release Sales Mechanism. All of the income the Company receives under both sharing mechanisms is derived from the Company's gas procurement activities and the management of the gas supply assets necessary to procure a gas supply. Atmos receives no income through the PBR that is not derived from its gas purchasing activities.

FURTHER AFFIANT SAITH NOT.

Greg Waller
Greg Waller

STATE OF Tennessee

COUNTY OF Williamson

Personally appeared before me, Pamela Todd, a Notary Public in and for said State and County, Greg Waller, the within named affiant, with whom I am personally acquainted (or who proved to me on the basis of satisfactory evidence), and who acknowledged that he executed the foregoing instrument for the purposes therein contained.

WITNESS my hand and seal at office, on this 16th day of June, 2006.

Pamela Todd
Notary Public
STATE
OF
TENNESSEE
NOTARY
PUBLIC
DAVIDSON COUNTY, TENN.
My Commission Expires 05-24-08

My Commission Expires:
May 24, 2008