

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**Nashville, Tennessee**

**July 13, 2006**

|  |   |                   |
|--|---|-------------------|
| <b>IN RE:</b>                          | ) |                   |
|  | ) |                   |
| <b>PETITION OF THE CONSUMER</b>        | ) | <b>DOCKET NO.</b> |
| <b>ADVOCATE TO OPEN AN</b>             | ) | <b>05-00258</b>   |
| <b>INVESTIGATION TO DETERMINE</b>      | ) |                   |
| <b>WHETHER ATMOS ENERGY CORP.</b>      | ) |                   |
| <b>SHOULD BE REQUIRED BY THE</b>       | ) |                   |
| <b>TENNESSEE REGULATORY</b>            | ) |                   |
| <b>AUTHORITY TO APPEAR AND SHOW</b>    | ) |                   |
| <b>CAUSE THAT ATMOS ENERGY CORP.</b>   | ) |                   |
| <b>IS NOT OVEREARNING IN VIOLATION</b> | ) |                   |
| <b>OF TENNESSEE LAW AND THAT IT IS</b> | ) |                   |
| <b>CHARGING RATES THAT ARE JUST</b>    | ) |                   |
| <b>AND REASONABLE</b>                  | ) |                   |

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**ORDER ADDRESSING INTERVENTION OF AEM AND THE PROCEDURAL  
SCHEDULES FOR PHASES ONE AND TWO**

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This docket came before the Hearing Officer at a Status Conference held on June 30, 2006 to hear from the parties on a number of issues arising from the panel's June 26, 2006 deliberations and to address the request of the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") to extend the time for filing pre-filed direct testimony and the *Petition of Atmos Energy Marketing, LLC Requesting Full Intervention* filed by Atmos Energy Marketing, Inc. ("AEM") on June 30, 2006.

**I. RELEVANT PROCEDURAL HISTORY**

On June 16, 2006, Atmos Energy Corporation ("Atmos") filed a motion requesting expedited review by the panel of the *Order Resolving Discovery and Protective Order Disputes and Requiring Filings* ("Discovery Order") issued by the Hearing Officer on June 14, 2006. On

June 22, 2006, the Hearing Officer entered an order granting Atmos permission to proceed with the requested interlocutory review and extending the time for filing responses to the discovery requests. On June 23, 2006, the Consumer Advocate filed the *Consumer Advocate's Response to Hearing Officer's Order of June 22, 2006, Granting Extension of Time for Atmos to File Responses to Discovery Requests*. In this filing, the Consumer Advocate requests "an extension of time in which to file its pre-filed testimony corresponding to the amount of time it takes to resolve the discovery disputes."<sup>1</sup>

Also on June 23, 2006, AEM filed a petition to intervene. In its petition, AEM requested limited intervention for the "purpose of addressing the intervention of [the Atmos Intervention Group], Director Miller's June 8, 2006, letter, and the allegations set forth in Mr. Burton's afore-referenced affidavit."<sup>2</sup>

During the Authority Conference on Monday, June 26, 2006, the panel made three decisions in this docket. First, a majority of the panel voted to reverse in part the order granting intervention without limitation to the Atmos Intervention Group ("AIG"). Specifically, the majority voted to allow intervention of AIG for the named parties only. Second, it was decided that Atmos Energy Corporation ("Atmos") should respond to the discovery requests of the Consumer Advocate and AIG as required by the *Discovery Order*. Third, a decision was made to bifurcate this docket into two phases. Phase One will set base rates without consideration of issues involving the asset management agreement, AEM revenue imputation, other income reported on Atmos's SEC 10K report and the performance based ratemaking mechanism. These

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<sup>1</sup> *Consumer Advocate's Response to Hearing Officer's Order of June 22, 2006 Granting Extension of Time for Atmos to File Responses to Discovery Requests*, 1 (Jun. 23, 2006).

<sup>2</sup> *Petition to Intervene of Atmos Energy Marketing, LLC*, 3 (Jun. 23, 2006).

specific issues will be addressed in Phase Two. Also during the June 26, 2006 Authority Conference, the Hearing Officer granted AEM's petition for limited intervention.<sup>3</sup>

As a result of the panel's decisions, the Hearing Officer issued a *Notice of Status Conference* on June 27, 2006, scheduling a Status Conference for June 30, 2006. The purpose of the conference, according to the notice, is to address any matters arising as a result of the June 26, 2006 Authority Conference, including identifying parties for the two phases of the docket, reviewing and modifying as necessary the procedural schedule for Phase One and establishing a procedural schedule for Phase Two.

On the morning of June 30, 2006, AEM filed a petition for full intervention. The Hearing Officer convened the Status Conference later that morning as noticed at 10:00 a.m. The following parties were in attendance:

**Investigative Staff** – Gary Hotvedt, Esq., Tennessee Regulatory Authority, 460 James Robertson Parkway, Nashville, Tennessee 37243;

**Atmos** – Misty Smith Kelley, Esq. and Clinton P. Sanko, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, 1800 Republic Centre, 633 Chestnut Street, Chattanooga, Tennessee, 37450;

**AIG** – Henry Walker, Esq. and April A. Ingram, Esq., Boulton, Cummings, Connors & Berry, PLC, 1600 Division Street, Suite 700, Nashville, Tennessee 37203;

**Consumer Advocate** – Timothy Phillips, Esq. and Joe Shirley, Esq., Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202;

**Chattanooga Gas** – J.W. Luna, Esq., Farmer & Luna, 333 Union Street, Suite 300, Nashville, Tennessee 37201; and

**AEM** – Melvin J. Malone, Esq., Miller & Martin LLP, 1200 One Nashville Place, 150 4th Avenue North, Nashville, Tennessee, 37219.

During the Status Conference, the parties discussed their intended roles in Phase Two of the proceeding, the Phase One procedural schedule and the Phase Two procedural schedule. At the conclusion of the Status Conference, a procedural schedule form was distributed to the parties and the parties were directed to file proposed schedules by Friday, July 7, 2006. The

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<sup>3</sup> Transcript of Proceedings, Authority Conference, pp. 31-32 (Jun. 26, 2006).

procedural schedule form followed closely the procedures adopted for Phase One and included time periods for completion of the activities.

## **II. PETITION OF ATMOS ENERGY MARKETING, LLC REQUESTING FULL INTERVENTION**

AEM filed a petition for full intervention the morning of the June 30, 2006 Status Conference. In its petition, AEM asserts that as a result of the panel's June 26, 2006 decisions and the *Discovery Order* issued by the Hearing Officer on June 14, 2006, AEM's "legal rights, duties, privileges, immunities or other legal interests may be determined in this proceeding."<sup>4</sup> Tennessee Code Annotated Section 4-5-310(a) sets forth the following criteria for granting petitions to intervene:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of the law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.<sup>5</sup>

During the Status Conference, the Hearing Officer granted the petition for full intervention. The petition was timely filed and substantiates that AEM's legal interests may be affected by this docket. Further, AEM's intervention will not impair the interests of justice or the orderly and prompt conduct of this docket. Therefore, pursuant to Tennessee Code Annotated Section 4-5-310(a), the petition is granted.

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<sup>4</sup> See *Petition of Atmos Energy Marketing, LLC Requesting Full Intervention*, 2 (Jun. 30, 2006).

<sup>5</sup> Tenn. Code Ann. § 4-5-310(a) (2005).

### **III. PHASE ONE PROCEDURAL SCHEDULE**

During the Status Conference, two items related to the Phase One procedural schedule were discussed. The first involves the date for filing pre-filed direct testimony. The second involves the scope of that testimony.

As to the date for filing pre-filed direct testimony, the Consumer Advocate had requested that the date be extended by the same amount of time provided to Atmos for the filing of responses to disputed discovery requests. At the Status Conference, the Consumer Advocate requested that no determination be made on its request to extend the time to file pre-filed direct testimony until after the Consumer Advocate and Atmos resolve all outstanding discovery issues. The Consumer Advocate agreed to notify the Hearing Officer as soon as possible of any need to resolve the request. As part of this discussion, AIG noted that it had not yet had the opportunity to review all of the discovery responses, but requested that if an extension of time is granted to the Consumer Advocate, the same extension should be granted to all parties.

On Friday, July 7, 2006, the Hearing Officer received via electronic mail a request from the Consumer Advocate.<sup>6</sup> The request reads:

The Consumer Advocate requests that the filing date for all pre-filed testimony in this matter be moved from Friday, July 14 to Monday, July 17. All other dates in the procedural schedule will remain the same. The CAD has contacted counsel for Atmos, AEM, AIG, Chattanooga Gas, and TRA Staff and none oppose this request. Please let us know if this causes any inconvenience for the Hearing Officer.

Based on the assertions that the remainder of the schedule will not be delayed as a result of the requested modification and that there is no opposition to the request, the request is granted.

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<sup>6</sup> A printed version of the e-mail has been filed in the docket file.

The second procedural schedule subject raised during the Status Conference is Atmos's request that any procedural order reflect that the testimony to be filed pursuant to the Phase One procedural schedule be limited to the Phase One issues. Although this should go without saying, to the extent it is necessary, the parties are cautioned to limit the subject matter of the Phase One testimony to the scope of Phase One as defined by the panel during the June 26, 2006 Authority Conference.

#### **IV. PHASE TWO PROCEDURAL SCHEDULE**

During the Status Conference, the parties were directed to file comments on the Phase Two procedural schedule by July 7, 2007. Atmos, AEM, AIG and the Consumer Advocate filed comments.

In its comments, Atmos affirms its support of the Hearing Officer's suggestion of taking the Phase Two issues in two separate parts – the first part covering imputation of AEM revenues and other income and the second part covering asset management issues and the performance based ratemaking mechanism. Atmos next argues that Phase Two should not begin until the Authority issues a final order in Phase One and proposes dates running from an assumed Phase One final order issuance date of October 20, 2006. Atmos's schedule for the first part of Phase Two includes the filing of a threshold issues list, the pre-filing of direct and rebuttal testimony, a hearing, the filing of post-hearing briefs, panel deliberation and the issuance of a final order. The proposed schedule begins October 27, 2006 and concludes on December 6, 2006.<sup>7</sup> Atmos's schedule does not include any additional discovery for these issues. As to the second part of Phase Two, issues involving asset management and the performance based ratemaking mechanism, Atmos sets forth a schedule running from an assumed Phase Two - part one final order issuance date of December 6, 2006. Atmos's schedule for part two contains two rounds of

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<sup>7</sup> *Atmos Energy Corporation's Proposed Procedural Schedule for Phase Two*, 5 (Jul. 7, 2006).

discovery, the pre-filing of direct and rebuttal testimony, a hearing, and the filing of post-hearing briefs. The schedule begins on December 13, 2006 and concludes on May 14, 2007.<sup>8</sup> AEM concurs with the schedules proposed by Atmos.<sup>9</sup>

Intervenors other than AEM also filed comments. The Consumer Advocate notes in its comments that it is generally in agreement with the procedural schedule time periods distributed to the parties by the Hearing Officer during the Status Conference.<sup>10</sup> The Consumer Advocate requests, however, that hearing dates be scheduled on dates following the hearing dates set in the Chattanooga Gas Company rate case.<sup>11</sup> The Consumer Advocate also requests two rounds of discovery, asserts that a final order in Phase One is not required before proceeding with Phase Two, and that Phase Two should not be broken into parts.<sup>12</sup> AIG asserts that Phase Two should conclude prior to the winter heating season because the decisions in Phase Two could result in a reduction of Atmos's base rates.<sup>13</sup> Finally, Chattanooga Gas Company states that it has no objection to the procedural schedule time periods distributed to the parties.<sup>14</sup>

Upon consideration of the proposals, the Hearing Officer concludes that Phase Two issues should be addressed together through one procedural schedule. While I am largely persuaded that the speediest avenue to establishing final base rates in advance of the heating season is to address all potential rate base adjustment issues prior to addressing non rate base issues, apparently not all parties agree. In fact, the Consumer Advocate, who has been incredibly consistent and justifiably steadfast in its desire to expedite this proceeding, has evidently

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<sup>8</sup> *Id.* at 6.

<sup>9</sup> Letter from Counsel for AEM, Melvin J. Malone, dated July 7, 2006 (Jul. 7, 2006).

<sup>10</sup> Letter from Counsel for the Consumer Advocate, Vance Broemel, dated July 7, 2006, 1 (Jul. 7, 2006).

<sup>11</sup> See *In re: Petition of Chattanooga Gas Company for Approval of Adjustment of its Rates and Charges, Comprehensive Rate Design Proposal, and Revised Tariff*, Docket No. 06-00175, *Proposed Procedural Schedule* (Jun. 30, 2006) (containing proposed hearing dates of October 30 through November 3, 2006).

<sup>12</sup> Letter from Counsel for the Consumer Advocate, Vance Broemel, dated July 7, 2006, 1-2 (Jul. 7, 2006).

<sup>13</sup> *Response of Atmos Intervention Group*, 2 (Jul. 7, 2006).

<sup>14</sup> Letter from Counsel for Chattanooga Gas Company, J.W. Luna, dated July 7, 2006 (Jul. 7, 2006).

concluded that any further division of issues in the proceeding, at this juncture, should not be pursued.<sup>15</sup> AIG stated that it supports the position of the Consumer Advocate Division.<sup>16</sup> Given the Consumer Advocate's well documented unwavering commitment to complete this cause as soon as practicable and given the realization that no person is endowed with a singular capacity for correctness on this issue, the Hearing Officer finds it reasonable and without prejudice to the other parties to adopt the Consumer Advocate's position at this time. Moreover, after further deliberation, it is my determination that the issues, particularly those related to revenue imputation, the asset management agreement and the performance based ratemaking mechanism, have a sufficient nexus to afford the parties a meaningful analysis even when kept together.

The timing concerns present particularly challenging issues. I summarily reject the argument that a final order in Phase One must be issued before the Phase Two schedule can commence. There simply is no reasonable justification for this argument and such a requirement was not mandated by the panel.<sup>17</sup> The Authority decided to procedurally sever the two phases and any administrative efficiency gained by having done so would likely be forfeited if the Authority were to require the issuance of an order in Phase One as a prerequisite to commencing Phase Two proceedings. Simply stated, Phase One issues are distinct from the Phase Two issues.<sup>18</sup>

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<sup>15</sup> "With regard to the issue of whether review of the PBR mechanism itself (as distinct from the financial impact of the current PBR on rates) should be included in Phase II or broken out into a Phase III, we prefer to keep the issues in Phase II." Letter from Counsel for the Consumer Advocate, Vance Broemel, dated July 7, 2006, 2 (Jul. 7, 2006).

<sup>16</sup> "As to the scheduling of the phase two proceeding, Atmos [sic] supports the comments of the Consumer Advocate Division . . . ." Letter from Counsel for AIG, Henry Walker, dated July 7, 2006, 2 (Jul. 7, 2006).

<sup>17</sup> Director Miller, who made the prevailing motion, offered the following in response to the question of whether the phases would run consecutively or concurrently: "Consecutively. Otherwise, we don't gain anything by breaking them out, I don't think. Let me take that back. I mean I want to allow you the ability to manage the docket as hearing officer, but that's how I envisioned it." This comment in no way requires the issuance of a final order on Phase One, and, further, in my opinion, that the comment allows the Hearing Officer flexibility when setting the starting point of Phase Two. Transcript of Proceedings, Authority Conference, p. 28 (Jun. 26, 2006).

<sup>18</sup> The Hearing Officer is cognizant that an adjustment to Phase One base rates may be warranted after the completion of Phase Two. This *potential* action, however, is independent of the setting of base rates in Phase One.

Also, I am sympathetic to the claim that the hearing should follow in time the hearing in the Chattanooga Gas Company rate case. Given that a procedural schedule has not yet been set for that proceeding, I will presume for the purposes of this order that a hearing will be set for October 30 through November 3, 2006, the dates contained in the proposed procedural schedule.<sup>19</sup> Further, the argument that Phase Two should be concluded prior to the start of the heating season is a laudable target, but may impose a goal too difficult to attain in light of other factors, such as the statutory time period for completion of the Chattanooga Gas Company rate case and the holidays in November and December.

Two other issues raised in the comments involve the need for further discovery on the imputation and other income issues and the need for an issues list. As to the former, I find that this issue is moot given the decision to place the Phase Two issues within one schedule. Although the intervenors have had one opportunity to issue discovery on the issues of imputation of revenues and other income, there has been no such opportunity with regard to the asset management and performance based ratemaking mechanism issues. Thus, the Phase Two procedural schedule should include two rounds of discovery. As to the latter issue, it is my opinion that an issues list for Phase Two should be created. The creation of an issues list will provide the parties and the Authority with a guide to the efficient resolution of this phase of the docket.

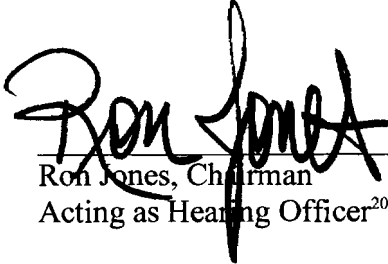
With these findings and conclusions in mind, I adopt the *Phase Two Procedural Schedule* attached hereto as Attachment A. Any party objecting to this schedule for reasons other than those asserted in the July 7, 2006 comments should file such objections by no later than Friday, July 21, 2006.

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<sup>19</sup> See *In re: Petition of Chattanooga Gas Company for Approval of Adjustment of its Rates and Charges, Comprehensive Rate Design Proposal, and Revised Tariff*, Docket No. 06-00175, *Proposed Procedural Schedule* (Jun. 30, 2006) (containing proposed hearing dates of October 30 through November 3, 2006).

**IT IS THEREFORE ORDERED THAT:**

1. The *Petition of Atmos Energy Marketing, LLC Requesting Full Intervention* filed on June 30, 2006 is granted.
2. The time for filing pre-filed direct testimony for Phase One is extended until Monday, July 17, 2006. No other dates are modified.
3. The subject of the pre-filed direct testimony for Phase One shall be limited to the subject of Phase One as described by the panel during the July 26, 2006 Authority Conference.
4. Phase Two of this docket shall proceed in accordance with the schedule attached hereto as Attachment A. Any party objecting to this schedule for reasons other than those asserted in the July 7, 2006 comments should file such objections by no later than Friday, July 21, 2006.

  
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Ron Jones, Chairman  
Acting as Hearing Officer<sup>20</sup>

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<sup>20</sup> During the May 15, 2006 Authority Conference, a panel of the Tennessee Regulatory Authority consisting of Chairman Sara Kyle and Directors Ron Jones and Pat Miller unanimously voted to appoint Director Jones as the Hearing Officer to prepare this docket for a hearing by the panel. Transcript of Proceedings, Authority Conference pp. 29-39 (May 15, 2006).

## **Phase Two Procedural Schedule**

|   |   |
|---|---|
| Proposed Issues List Filed                                      | September 12, 2006 – Tuesday                                |
| Status Conference on Proposed Issues List (if necessary)        | September 26, 2006 at 10:00 a.m. – Tuesday                  |
| Discovery Requests Filed  | October 13, 2006 – Friday                                   |
| Discovery Objections Filed                                      | October 20, 2006 – Friday                                   |
| List of Disputed Discovery Requests with Party's Position Filed | October 25, 2006 – Wednesday                                |
| Status Conference on Disputed Discovery Requests (if necessary) | October 27, 2006 at 10:00 a.m. – Friday                     |
| Discovery Responses Filed                                       | November 13, 2006 – Monday                                  |
| Pre-Filed Direct Testimony Filed                                | December 4, 2006 – Monday                                   |
| Discovery Requests Filed  | December 11, 2006 – Monday                                  |
| Discovery Objections Filed                                      | December 18, 2006 – Monday                                  |
| List of Disputed Discovery Requests with Party's Position Filed | December 22, 2006 – Friday                                  |
| Status Conference on Disputed Discovery Requests (if necessary) | January 4, 2007 at 10:00 a.m. – Thursday                    |
| Discovery Responses Filed                                       | January 12, 2007 – Friday                                   |
| Pre-Filed Rebuttal Testimony Filed                              | February 2, 2007 – Friday                                   |
| Hearing   | February 20-23, 2007 - Tuesday through Friday <sup>21</sup> |

All filings shall be filed with the Authority's docket clerk by 2:00 p.m. on the date due.

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<sup>21</sup> These dates are subject to approval by Chairman Kyle and Director Miller, the other members of the panel assigned to this docket.