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 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	)	Docket No. 05-00258

ATMOS ENERGY CORPORATION'S MOTION *IN LIMINE* TO EXCLUDE THE TESTIMONY OF HAL NOVAK

Atmos Energy Corporation ("Atmos") submits its First Motion *In Limine* to Exclude the Testimony of Hal Novak ("Motion to Exclude"). Mr. Novak's testimony should be excluded under the Hearing Officer's explicit power to place conditions on an intervenor's participation in the hearing, *see* TENN. CODE ANN. § 4-5-310, as well as the Hearing Officer's implicit powers to prepare the "matter for hearing by the panel as expeditiously as possible."

Mr. Novak's testimony is ostensibly on behalf of two industrial customers of Atmos. The testimony proposes significant and wide-ranging rate design changes to Atmos' industrial and commercial tariffs and should be excluded because: (1) Mr. Novak is operating under a contingency fee, which is an improper and void arrangement under Tennessee law; (2) Mr. Novak's "expert" testimony is unreliable because it is not based on a cost of service study and Mr. Novak had no prior communications with the two industrial customers whose interests he has been retained to represent; and (3) the Intervention Group includes a "member" who were not previously identified to the Hearing Officer (Mr. Earl Burton) and has already been found to be in competition with Atmos Energy Marketing.

For the above-stated reasons, Mr. Novak's testimony should be excluded.

I. THE HEARING OFFICER'S POWER TO EXCLUDE THE TESTIMONY

A. THE EXPLICIT POWER UNDER THE INTERVENTION STATUTE.

The Hearing Officer has the power to impose conditions on the Intervention Group, as an intervening party in this docket. When an intervenor qualifies for intervention, the Hearing Officer:

> ***may impose conditions*** upon the intervenor's participation in the proceedings, either at the time that the intervention is granted or ***at any subsequent time***. Conditions may include:
>
> (1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
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> (2) Limiting the intervenor's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
>
> (3) Requiring two (2) or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery and other participation in the proceedings.

TENN. CODE ANN. § 4-5-310(c).

The Intervention Group's[1] Petition to Intervene, filed on May 17, 2006, stated as its grounds stated that the Intervention Group's members were customers of Atmos:

> **[The Intervention Group] is a group of customers who purchase natural gas from Atmos.**[FN] [Footnote stated the Intervention Group "members include, among others, Berkline, LLC and Koch Foods, Inc."]
>
> This is a proceeding to examine the rates, terms and conditions of service of Atmos Energy Corporation. **As customers of Atmos, the members of [the Intervention Group] have legal rights, duties, privileges, immunities or other legal interest which may be determined in the proceeding.**
>
> Since this docket has just been opened, the granting of this petition to intervene will not impair the interests of justice or the orderly and prompt conduct of these proceedings.
>
> Based on these facts, [the Intervention Group] asks that this petition to intervene be granted.[2]

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[1] To avoid confusion, this Motion to Exclude will consistently refer to the intervening party as the "Intervention Group." Any use of the trademark "Atmos" in the Intervention Group's name is misleading and without the permission of the Company.

After a Status Conference, the Hearing Officer, granted the Intervention Group's Petition to Intervene. The Hearing Officer found that "the petitions were timely filed and substantiate that ***Petitioners' legal interests may be affected by this docket.*** Further Petitioners' intervention will not impair the interests of justice or the orderly and prompt conduct of this docket."[3] While the initial grant of authority did not place any conditions on the intervention, "[t]he [Hearing Officer] may modify the order [granting intervention] at any time, stating the reasons for the modification." TENN. CODE ANN. § 4-5-310(d)).

B. THE IMPLICIT POWER OF THE HEARING OFFICER TO PREPARE THE CASE FOR HEARING.

On August 2, 2006, the voting panel assigned to this docket issued its Order Accepting Recommendation of Intervention Staff and Appointing a Hearing Officer. The Panel ordered that "Chairman Ron Jones is appointed as Hearing Officer to determine the type of proceeding to be established and ***to take all actions necessary to prepare this matter for hearing by the panel as expeditiously as possible.***"[4]

Under the August 2, 2006 Order, the Hearing Officer has the power to address preliminary evidentiary questions in this docket. "[M]otions *in limine* . . . that seek to exclude or to obtain a ruling on the admissibility of evidence may be brought ***at any time*** before the introduction of the evidence to which they pertain." *Pullum v. Robinette*, 174 S.W.3d 124, 135 (Tenn. Ct. App. 2004); 1 TENN. JURIS., *Appeal and Error* § 37 (noting that motions *in limine* are a proper way for a litigant to object to irrelevant evidence). "A motion *in limine* is a request for guidance by the court regarding an evidentiary question. The trial court may, within its discretion, provide such guidance by making a preliminary ruling with respect to admissibility. The parties may then consider the court's ruling when formulating their trial strategy." *United*

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[2] 5/17/2006 Petition to Intervene of the Intervention Group at p. 1 (emphasis added).

States v. Luce, 713 F.2d 1236, 1239 (6th Cir. 1983); *see also United States v. Leon*, No. 90-6571, 1992 U.S. App. LEXIS 14323, *21-*22 (6th Cir. 1992).

II. MR. NOVAK'S TESTIMONY SHOULD BE EXCLUDED

A. MR. NOVAK IS BEING PAID ON AN ILLEGAL AND VOID EXPERT CONTINGENCY FEE AND, AS SUCH, THE TESTIMONY SHOULD BE EXCLUDED.

In response to discovery, Mr. Novak provided information relating to how he is being compensated in this case. While stating that "[h]e has no specific records relating to the nature of his work assignments or compensation during this time"[5] and that "[t]here are no engagement agreements or similar documentation between the [] Intervention Group and either William H. Novak or WHN Consulting."[6] Mr. Novak stated that he was working on a contingency fee:

> Mr. Novak will receive one-third (1/3) of the net proceeds from the clients of [the] Intervention Group when this case is completed. There is no hourly rate charged, and there are no records kept of Mr. Novak's time in preparing his testimony on behalf of the clients of [the] Intervention Group.[7]

It is hornbook law that contingency fees for experts are barred and void as a matter of public policy. *See Swafford v. Harris*, 967 S.W.2d 319, 323 (Tenn. 1998); *Street v. Levy (Wildhorse) Ltd. P'ship*, 2003 WL 21805302, *4, n. 5 (Tenn. Ct. App. Aug. 7, 2003); TENN.R.SUP.CT. 8, Rule of Professional Conduct ("RPC") 3.4, Cmt. 4 ("The common law rule in most jurisdictions is . . . that it is improper to pay an expert witness a contingent fee."); Restatement of Contracts § 553(2) ("a bargain to pay an expert witness for testifying to his opinion . . . is illegal . . . if the agreed compensation is contingent on the outcome of the controversy."). As Mr. Novak's contingency fee arrangement is improper and void as a matter of public policy, the expert testimony of Mr. Novak should be excluded from Phase One.

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3 5/25/2006 Order Granting Interventions and setting Procedural Schedule at p. 2.This language and the order also addressed the Petition to Intervene of Chattanooga Gas Company.

4 8/2/2006 Order at p. 5.

5 Resp, to Discovery Request No. 7, attached as Exhibit _ to this Motion to Exclude.

6 Resp, to Discovery Request No. 16, attached as Exhibit _ to this Motion to Exclude.

B. MR. NOVAK'S TESTIMONY IS UNRELIABLE BECAUSE IT IS NOT BASED NEITHER ON A COST OF SERVICE STUDY, NOR ANY COMMUNICATION WITH THE NAMED INTERVENORS.

Even setting the issue of Mr. Novak's fee, his "expert" testimony must be reliable to be admissible under Tennessee law. The Tennessee Supreme Court has stated that in considering the testimony of an expert, such as Mr. Novak, the Court "must determine that the expert testimony is ***reliable*** in that the evidence will substantially assist the trier of fact to determine a fact in issue and that ***the underlying facts and data appear to be trustworthy***." *Brown v. Crown Eqip. Corp.*, 181 S.W.3d 268, 274 (Tenn. 2005) (emphasis added).[8] Mr. Novak's testimony is not reliable because he neither conducted a class cost of service study, nor did he discuss any of his proposals with Berkline or Koch Foods—the two named intervenors.

Mr. Novak's stated "purpose" in this case "is to present the [] ***Intervention Group's*** . . . recommended structural changes (other than rates) to the industrial tariffs of Atmos . . . for the TRA's consideration."[9] Mr. Novak proposes several design changes to Atmos's rate schedules which neither the CAPD or Staff requested, endorsed, or otherwise suggested. Mr. Novak admits that in preparing his testimony he has not prepared a class cost of service study and that, without it, "it is impossible to know if the rates for one class of customers is too high, thereby resulting in a subsidy to the other customer classes."[10] In response to various testimony, moreover, Mr. Novak admitted that he has never even spoken to any representative of Berkline or Koch Foods:

> **Identify all persons with whom you spoke or consulted about your testimony before you filed it. Specifically, and without limitation of the foregoing, please identify:**

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7 Resp, to Discovery Request No. 17, attached as Exhibit _ to this Motion to Exclude.

8 *Brown* cited to several other noteworthy cases including: *McDaniel v. CSX Trans., Inc.*, 955 S.W.2d 257 (Tenn. 1997); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

9 Direct Test. of Hal Novak at p. 1, lines 21-25.

10 *Id.* at p. 12, lines 12-20.

(i) All persons at Berkline who you spoke to;

(ii.) All persons at Koch Foods who you spoke to;

(iii.) All persons on the Staff that you spoke to;

(iv.) All persons at the CAPD that you spoke to; and

(vi.) Whether you spoke to Earl Burton.

RESPONSE:

Mr. Novak has not had any conversations with the employees or management of Berkline or Koch Foods. Mr. Novak had no conversations with the Staff about his testimony. Mr. Novak did speak with Dan McCormac at the CAPD about his testimony. As mentioned already in our response to Item 3, Mr. Novak collaborated with Earl Burton on his testimony.[11]

1. Mr. Novak's Testimony is Not Reliable Because His Rate Design Changes Are Not Based on a Cost of Service Study.

Under the *Tennessee Rules of Evidence*, for Mr. Novak's expert testimony to be admissible, it must meet the following threshold conditions:

> If scientific, technical or other specialized knowledge will ***substantially assist the trier of fact to understand the evidence or to determine a fact in issue***, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.

TENN.R.EVID. 702 (emphasis added).[12] The Hearing Officer should act as a "gatekeeper" to determine if the proffered expert's testimony is relevant and reliable. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-92 (1993). This is not to test the conclusions of Mr. Novak—rather, it is focused "solely on principles and methodology." *Id.* at 595.

"Experts are permitted a wide latitude in their opinions, including those not based on firsthand knowledge, so long as 'the expert's opinion [has] a reliable basis in the knowledge and experience of the discipline." *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir. 2000) (citing *Daubert*, 509 U.S. at 592). The Tennessee Supreme Court set forth a list nonexclusive factors in *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997) regarding the

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[11] Resp, to Discovery Request No. 19, attached as Exhibit _ to this Motion to Exclude.

[12] The Federal Rule of Evidence 702 was amended in 2000 to reflect the Supreme Court's ruling in *Daubert v. Merrell Dow Pharms., Inc.*, 526 U.S. 137 (1999). In addition to these specific rules, evidence generally must

reliability of expert testimony. It is not necessary to here examine each *McDaniel* element. *Brown*, 181 S.W.3d at 274. Mr. Novak's own testimony makes clear that he has not prepared a class cost of service study and that, without it, "it is impossible to know if the rates for one class of customers is too high, thereby resulting in a subsidy to the other customer classes."[13] In other words, for rate design changes, it is necessary and common to rely on a cost of service study. That has not been done. As such, Mr. Novak's testimony is not probative and should be excluded.

2. Mr. Novak's Testimony is Not Reliable, Nor Based On Trustworthy Underlying Facts, Because He Never Spoke to the Intervention Group's Industrial Customers.

Under *Tennessee Rules of Evidence* 702, Novak's testimony must be reliable and intended to "substantially assist the trier of fact to understand the evidence or to determine a fact in issue." By nature of its status as an intervenor, the Intervention Group has limitations on what evidence it can present and on what issues it can "substantially assist the trier of fact." In this case, as set forth above, the Intervention Group's expert testimony must be geared toward "substantially assist[ing] [the TRA] to understand the evidence or to determine a fact in issue" relating to Berkline and Koch Foods—the only two members of the Intervention Group that have a rights or legal interests in this docket. However, Mr. Novak admits that he never met with, spoke to, or even corresponded with either Berkline or Koch Foods. For an intervenor to participate in a docket and submit expert testimony to protect its legal interests, there should be some indicia of reliability--the expert should at least talk to the clients whose interests he is protecting. As he did not, Mr. Novak's testimony is unreliable and should be excluded from this docket.

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be relevant to be admissible. See Tenn. R. Evid. 401, 402.

[13] *Id.* at p. 12, lines 12-20.

C. MR. BURTON, A COMPETITOR OF ATMOS ENERGY MARKETING, IS A MEMBER OF THE GROUP.

The Intervention Group was granted intervention in this proceeding ***as customers of Atmos***. In its recent discovery responses, the Intervention Group admitted that Mr. Burton participated in drafting the expert testimony in this case and affirmatively admitted that Mr. Burton is a "Member of the Intervention Group":

> ***As a Member of the [] Intervention Group, Mr. Burton*** both collaborated on and reviewed Mr. Novak's direct testimony in this docket.[14]

This admission is contradicted by the prior pleadings in this docket that have characterized the Intervention Group as an organization comprised of "customers of Atmos":

- "The [] Intervention Group is represented in this proceeding by the undersigned, Henry Walker of the firm Boult, Cummings, Conners & Berry, PLC. [The Intervention Group] ***consists entirely of customers*** of Atmos . . ."[15]
- At a status conference, Mr. Walker stated that he appeared on behalf of the Intervention Group "which is a ***group of industrial customers*** of Atmos Energy."[16]
- The Intervention Group is "a ***group of large customers*** who obviously have a strong interest in making sure that their gas rates are just and reasonable."[17]
- "The [] Intervention Group [is] a ***group of customers*** who purchase natural gas from Atmos;"[18]
- Describing the Intervention Group as "a group of ***gas customers*** served by Atmos;"[19]
- "The [] Intervention Group [is] a group of ***large customers*** who purchase natural gas from Atmos;"[20]

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14 Resp, to Discovery Request No. 3, attached as Exhibit _ to this Motion to Exclude.
15 6/16/2006 Letter from the Intervention Group at p. 1 (emphasis added).
16 5/15/2006 TRA Proceeding Tr. at p. 16 (emphasis added).
17 *Id.* at p. 19.
18 11/2/2005 Letter from the Intervention Group at p. 1 (emphasis added).
19 11/8/2005 Letter from the Intervention Group at p. 1 (emphasis added).
20 5/12/2006 Comments of the Intervention Group at p. 1 (emphasis added).

It has been consistently represented that the only members of the Intervention Group are ***Berkline*** and ***Koch Foods***. For instance, at the most recent Status Conference of July 27, 2006, Mr. Walker stated:

> DIRECTOR JONES: Before we go to each of the specific objections and address them individually . . . Mr. Walker, has there been any other members of [the Intervention Group] – do you have **any additional members** of [the Intervention Group] that signed on?
>
> MR. WALKER: I wish. **Not yet**.
>
> DIRECTOR JONES: Not at this time. And could you restate for the record who the current members of –
>
> MR. WALKER: **Berkline and Koch Foods**. The same two that we notified you of earlier.[21]

The Intervention Group's discovery responses admission that Mr. Burton is "***a Member of the [] Intervention Group***"[22] are particularly troubling because the Hearing Officer has already found that Mr. Burton is a competitor of Atmos Energy Marketing. The Hearing Officer found that Mr. Burton is the Intervention Group's "consultant and expert witness ***and a competitor of [Atmos Energy Marketing]***."[23]

The Hearing Officer's determination that Mr. Burton was a "consultant," rather than a member, was based on the representations of the Intervention Group. In prior filings in this action the Intervention Group stated:

> ***Mr. Burton is an expert in the natural gas industry***. A former employee of Chattanooga Gas, he now advises large gas customers throughout Tennessee concerning their gas purchases. ***Because of this experience, he can now advise [the Intervention Group]*** and the TRA concerning the reasonableness of the Asset Marketing Agreement and help the agency determine whether 'Tennessee ratepayers are being treated fairly' under the Agreement.[24]

In the Affidavit of Earl Burton filed before this Hearing Officer, Mr. Burton himself stated:

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21 7/27/2006 TRA Proceeding Tr. at pp. 6-7.

22 Resp, to Discovery Request No. 3, attached as Exhibit _ to this Motion to Exclude.

23 6/14/2006 Order Resolving Discovery and Protective Order Disputes and Requiring Filings at p. 15 (emphasis added).

24 6/7/2006 Resp. of the Intervention Group to the Objections of Atmos at pp. 11-12 (emphasis added).

1. I am the owner of Tennessee Energy Consultants, a natural gas and energy consulting firm managing natural gas and energy costs for clients in the State of Tennessee including numerous clients served by Atmos Energy Corporation.

2. ***I currently have clients that are members of the [] Intervention Group*** [] I, and have solicited the support of numerous Atmos Energy customers to convey the benefits of joining the [the] Intervention Group.

3. ***The [Intervention Group] consists of a group of natural gas users that have an interest in lower natural gas distribution rates and other service offerings that will assist them in managing natural gas costs.***[25]

The newly discovered membership of Earl Burton in the Intervention Group raises a question of what other interests are represented by the Intervention Group. This admission also calls into question whether the Intervention Group properly demonstrated its right to be an intervenor in this proceeding. Under this procedural schedule, it is unfair and prejudicial to force Atmos to respond to the myriad of rate design changes that the Intervention Group has singularly requested, and which have been promulgated, at lease in part, at the suggestion of a competitor of Atmos Energy Marketing. As such, the testimony of Hal Novak impedes "the orderly and prompt conduct of the proceedings" and, in order to meet the purposes of bringing this matter to hearing as expeditiously as possible, and to fulfill the purposes of the intervention statute, the testimony of Hal Novak should be excluded from Phase One as direct proof of any rate design changes.

III. CONCLUSION

Atmos welcomes participation by any of its customers in this docket. However, the right of any intervenor to participate in this docket should not be unfettered. Even under the permissive language of the Intervention Statute, under which the Hearing Officer granted the initial application to intervene, the right to intervene to protect one's legal rights does not mean that the intervenor represents all similarly situated parties or represents a class of customers. It

[25] 6/16/2006 Letter from the Intervention Group at attached Affidavit of Earl Burton (at ¶¶ 1-3).

means intervention is given to protect and represent ***the rights of the intervening parties***. The Hearing Officer granted the intervention of the Intervention Group so that it could represents the rights of two industrial customers of Atmos: Berkline and Koch Foods. These customers represent two (2) industrial customers out of 16,000.

In this "rocket docket," with only three days of Hearing allotted,[26] Atmos requests that the Hearing Officer exclude the testimony of the Intervention Group because (1) Mr. Novak, an expert witness, is being paid an illegal contingency fee; (2) Mr. Novak's methodology is unreliable; and (3) Mr. Burton's undisclosed membership in the Intervention Group raises questions about the interests the Intervention Group actually represents and the propose scope of the intervention.

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[26] 7/27/2006 TRA Proceeding Tr. at pp. 2-3 (noting that Director Miller had a conflict on September 1, 2006, and that oral argument was scheduled in another matter on August 30, 2006, leaving only three days for hearing: "we will make every effort and I will make every effort and I certainly hope that we will have cooperation to conclude this hearing by August 31, 2006").

CERTIFICATE OF SERVICE

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

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