

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

August 11, 2006

IN RE:)	
)	
PETITION OF THE CONSUMER)	DOCKET NO.
ADVOCATE TO OPEN AN)	05-00258
INVESTIGATION TO DETERMINE)	
WHETHER ATMOS ENERGY CORP.)	
SHOULD BE REQUIRED BY THE)	
TENNESSEE REGULATORY)	
AUTHORITY 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)	

ORDER RESOLVING SECOND ROUND DISCOVERY DISPUTES

This docket came before the Hearing Officer at a Status Conference held on July 27, 2006 to hear arguments on disputes concerning the second round of discovery requests issued by Atmos Energy Corporation (“Atmos”) to the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”), the Atmos Intervention Group (“AIG”), and the Tennessee Regulatory Authority (“Authority”) Investigative Staff (“Investigative Staff”) and by AIG to Atmos.

I. RELEVANT PROCEDURAL HISTORY

On July 21, 2006, Atmos issued its second round of discovery requests to the Consumer Advocate, AIG and the Investigative Staff and AIG issued its second round of discovery requests to Atmos. All parties filed objections on July 25, 2006. On July 26, 2006, AIG filed a letter in response to Atmos’s objections explaining AIG’s reasons for issuing the requests.

On July 25, 2006, a *Notice of Status Conference* was issued. The notice provided that a status conference would be held at 9:00 a.m. on July 27, 2006, absent the parties notifying the Hearing Officer by 2:00 p.m., July 26, 2007, that a conference was not necessary. No such notification was filed, and the Hearing Officer convened the Status Conference as noticed at 9:00 a.m. on July 27, 2006. The following party representatives were in attendance:

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

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

Atmos – Misty Smith Kelley, Esq. and Clinton P. Sanko, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, 1800 Republic Centre, 633 Chestnut Street, Chattanooga, Tennessee, 37450 and Patricia D. Childers, Division Vice President, Atmos Energy Corporation, 810 Crescent Centre Drive, Suite 600, Franklin, Tennessee 37067-6226;

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

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

Chattanooga Gas – Jennifer Brundige, Esq., Farmer & Luna, 333 Union Street, Suite 300, Nashville, Tennessee 37201.

During the Status Conference, each of the disputed discovery requests was addressed. The parties had reached resolutions in advance of the conference as to some disputes. As to other disputes, resolutions were forged during the Status Conference.¹ After discussing the final disputes, the Status Conference was recessed until 3:00 p.m. The Status Conference was reconvened telephonically at 3:00 p.m. at which time the Hearing Officer issued oral rulings as to each of the disputes. This order serves to memorialize those rulings and provide a detailed analysis of each ruling.

¹ In the end, the following disputes remained: Atmos Request No. 1 to the Consumer Advocate, AIG, and Investigative Staff; Atmos Request Nos. 3 and 32 to AIG; Atmos Request Nos. 2, 16, 19, 44, and 46 to the Consumer Advocate; and AIG Request Nos. 3 through 12 to Atmos.

II. DISCOVERY REQUESTS OF ATMOS DISPUTED JOINTLY BY THE CONSUMER ADVOCATE, AIG AND INVESTIGATIVE STAFF

A. Positions of the Parties

Atmos served the following question on the Consumer Advocate, AIG and Investigative Staff:

Request No. 1. PRODUCE all DOCUMENTS related to the ATMOS Show Cause Petition, the Staff investigative report, or to these proceedings which were exchanged by and between any member of one or more of the following: (i) CAPD, (ii) the STAFF, and/or the INTERVENTION GROUP. This request includes all DOCUMENTS, as defined above, including e-mails, correspondence, notes, memoranda, drafts, edits, and other COMMUNICATIONS between or among the foregoing PERSONS.²

In their written objections, the Consumer Advocate, AIG and Investigative Staff (together the “Objectors”) assert two grounds: common interest privilege and work product doctrine. As to the common interest privilege, the Objectors assert that the “Common Interest Privilege extends the Attorney-Client Privilege to a litigation group by permitting participants of the group ‘to communicate among themselves and with their attorneys on matters of common legal interest for purposes of coordinating their legal strategy.’”³ The Objectors next assert that the documents requested were exchanged between the Consumer Advocate, Staff and AIG “in connection with anticipated litigation and in furtherance of a common interest or legal strategy in actual or anticipated litigation.”⁴ As to the work product doctrine, Objectors maintain that the materials sought reflect “the mental impressions, conclusions, opinions or legal theories of [] counsel and consultants.”⁵

² See, e.g., *Atmos Energy Corporations First Requests for Information from the Staff*, 5 (July 21, 2006) (the same request is contained in the requests sent to the Consumer Advocate and AIG).

³ See, e.g., *Objections of Atmos Intervention Group to Atmos Energy Corporation’s First Requests for Information*, 2 (July 25, 2006) (quoting *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203,212-13 (Tenn. Ct. App. 2002)) (exact or similar statements are included in the objections of the Consumer Advocate and Investigative Staff).

⁴ See, e.g., *id.* (exact or similar statements are included in the objections of the Consumer Advocate and Investigative Staff).

⁵ See, e.g., *id.* (exact or similar statements are included in the objections of the Investigative Staff).

Atmos agrees that as to the common interest privilege the controlling case in Tennessee is *Boyd v. Comdata Networks, Inc.*⁶ and asserts arguments that fall within two categories - lack of sufficient information and lack of a common interest. First, Atmos contends that the Objectors' bare assertions that the information was shared in furtherance of a common interest are insufficient. Atmos also contends it is unable to directly address the privilege and work product doctrine claims given that the Objectors failed to comply with Tennessee Rule of Civil Procedure 26.02(5) by not providing Atmos with a privilege log at the time they filed their objections.⁷ Atmos asserts that there must be justification for each communication for which the privilege or doctrine is requested.⁸

Second, as to whether there is a common interest, Atmos contends that there could not have been a common interest at the time Investigative Staff was conducting its investigation and that as late as May 15, 2006, Attorney General Paul Summers stated during an Authority Conference that there was no relationship between the Consumer Advocate and AIG.⁹ Atmos also asserts that the facts that the Objectors filed discovery on one another and held differing opinions in the pre-filed testimony is evidence of the lack of a common interest.¹⁰

⁶ 88 S.W.3d 203, 212-13 (Tenn. Ct. App. 2002).

⁷ Transcript of Proceedings, July 27, 2006, 11-12, 17-18 (Status Conference).

⁸ *Id.* at 31.

⁹ General Summers' statement at the Authority Conference was as follows:

[F]rom a procedural standpoint I would like to make it clear to the Authority that an issue arose by letter dated May 12th, 2006 from Ms. Kelley representing Atmos, and there was -- it was a two-and-a-half-page letter that was sent to Chairman Ron Jones. It concerned whether or not any type of a relationship -- attorney-client relationship or some kind of connection existed between the Consumer Advocate and the Atmos Intervention Group or a man who is named Mr. Burton I believe and also Mr. Walker.

I would like to state affirmatively, after canvassing my staff, I'm convinced that no attorney-client relationship exists between them. We do have a relationship so far as merely being participating parties, all of which is a matter of record in this Authority, but there's no relationship or any connection that might have been alleged in the second paragraph of Ms. Kelley's letter, and I just wanted to state for the record that that was the case, and I determined that after talking with my -- with my Consumer Advocate.

Transcript of Proceedings, May 15, 2006, 15-16 (Authority Conference).

¹⁰ Transcript of Proceedings, July 27, 2006, 15-16 (Status Conference).

The Consumer Advocate addressed both of Atmos's arguments. First, the Consumer Advocate forcefully opposes any requirement of strict compliance with the Tennessee Rules of Civil Procedure asserting that requiring the compilation of a privilege log would delay the proceeding such that the hearing could not take place as scheduled.¹¹ Second, addressing the existence of a common interest, the Consumer Advocate explains that the interest is obvious, that is, Objectors are seeking a ruling that Atmos is overearning and are also seeking a rate reduction to ratepayers.¹² The Consumer Advocate relies on the Objectors' communications in formulating discovery requests and in coordinating testimony to support the existence of a common interest.¹³ The Consumer Advocate also responds to Atmos's reliance on the statement of General Summers by arguing that his statements were restricted to Atmos's unfounded assertions that "somehow the attorney general was working with Earl Burton to get a town meeting or some such thing."¹⁴ Additionally, the Consumer Advocate asserts that the requested documents relate

¹¹ Transcript of Proceedings, July 27, 2006, 18-19 (Status Conference).

¹² *Id.* at 20.

¹³ *Id.* at 37.

¹⁴ *Id.* at 44. The letter that initiated the Attorney General's appearance at the May 15th Authority Conference states:

Atmos Energy Corporation ("Atmos") has recently become aware of certain solicitation efforts by individuals who identify themselves as the "Atmos Intervention Group." This is the same name used by a group of unidentified Atmos customers Attorney Henry Walker has indicated he represents. The "Atmos Intervention Group" has issued press releases concerning the Staff's investigation, and Mr. Walker has made several filings in this docket on behalf of the "Atmos Intervention Group," including one joint filing together with the Consumer Advocate. The solicitation letter Atmos received a copy of, however, does not reference Mr. Walker.

In light of concerns the Directors have expressed regarding the accuracy of information being shared with the public and media about this docket, and due to the lack of clarity as to what the "Atmos Intervention Group" is, who represents them, and what connection the group may have with the Consumer Advocate, Atmos is writing to notify the Authority of the facts it has been made aware of and the actions the Company has taken in response.

....

... The fact that the Consumer Advocate has made a joint filing in this docket together with the Atmos Intervention Group raises questions as to a possible connection between the Consumer Advocate, Mr. Walker, Mr. Burton and the Atmos Intervention Group.

Letter from Misty Smith Kelley to Chairman Ron Jones, 1-2 (May 12, 2006).

to the common interest and were exchanged between the Objectors with the expectation that they would remain confidential.¹⁵

AIG also asserts that a common interest exists between itself and the Consumer Advocate and Investigative Staff. AIG contends that the Objectors worked together on discovery, they exchanged drafts of testimony, they joined in settlement discussions and they shared the same clients. AIG further posits that there could not have been cooperation on the front-end had the Objectors known the information would be subject to discovery.¹⁶ As to the sufficiency of the justification for the application of the work product doctrine and common interest privilege, AIG contends that a decisionmaker can rely on an attorney affidavit to uphold a claim of privilege and the statements of counsel on the record are equally subject to such reliance. AIG adds that the common interest privilege extends to communications of non-attorneys.¹⁷

Investigative Staff fully supports the arguments of the Consumer Advocate and AIG and asserts that the filings demonstrate the existence of a joint legal strategy. Investigative Staff also agrees with the Consumer Advocate that a strict application of Tennessee Rule of Civil Procedure 26.02(5) would result in delay.¹⁸ As to the extent that information was shared, the Investigative Staff insists that there was no information shared with the Consumer Advocate or AIG during the investigation.¹⁹ The Investigative Staff contends that despite differences on some issues as reflected in the pre-filed testimony, the Objectors have been working together since there was actual or anticipated litigation.²⁰

¹⁵ Transcript of Proceedings, July 27, 2006, 21-22 (Status Conference).

¹⁶ *Id.* at 23-25.

¹⁷ *Id.* at 30.

¹⁸ *Id.* at 25.

¹⁹ *Id.* at 26. Investigative Staff later agreed that there were no communications between it, AIG and the Consumer Advocate after the issuance of the *Report and Recommendation of Investigative Staff* with regard to the investigation. *Id.* at 112.

²⁰ *Id.* at 27.

B. Decision of the Hearing Officer

i. Common Interest Privilege

The parties have agreed that the *Boyd* decision of the Middle Section of the Tennessee Court of Appeals is the controlling authority in Tennessee for common interest privilege.²¹ *Boyd* stands for the proposition that four factors must exist in order for the common interest privilege to apply. According to *Boyd*, to succeed with the privilege a party must demonstrate:

(1) that the otherwise privileged information was disclosed due to actual or anticipated litigation, (2) that the disclosure was made for the purpose of furthering a common interest in the actual or anticipated litigation, (3) that the disclosure was made in a manner not inconsistent with maintaining its confidentiality against adverse parties, and (4) that the person disclosing the information has not otherwise waived the attorney-client privilege for the disclosed information.²²

The primary dispute here is whether there is a common interest as is required by the second factor. As to this requirement, *Boyd* states: “The cooperation required to invoke the common interest privilege must be more than cooperation for business purposes or to address a common problem. The cooperation must be in the furtherance of a joint strategy for actual or anticipated litigation.”²³ The Objectors have failed to demonstrate a common interest in furtherance of a joint strategy. This determination is supported by four justifications: (1) the interests and objectives of the parties are divergent; (2) the pre-filed testimony of the Objectors contain numerous points of disagreement; (3) cooperation during discovery was requested to promote administrative efficiency; and (4) Attorney General Summers recognized that no relationship exists between the Consumer Advocate and AIG.

²¹ See Transcript of Proceedings, July 27, 2006, 8, 28, 30 & 70 (Status Conference); *Objections of Atmos Intervention Group to Atmos Energy Corporation’s First Requests for Information*, 2 (July 25, 2006); *Consumer Advocate and Protection Division’s Objections to Atmos Energy Corporation’s First Request for Information*, 2 (July 25, 2006); *TRA Investigative Staff Objections to Atmos Energy Corporation’s First Requests for Information from the Staff*, 2, (July 25, 2006).

²² *Boyd v. Comdata Networks, Inc.*, 88 S.W.3d 203,214-15 (Tenn. Ct. App. 2002) (footnotes omitted).

²³ *Id.* at 215 n.16.

Of particular importance is the first justification, that is, Objectors represent distinct clients with divergent interests and objectives. The Investigative Staff has an interesting role as a litigant in this proceeding. The objective of the Investigative Staff is to propose just and reasonable rates.²⁴ In proposing such just and reasonable rates, Investigative Staff must consider the safety, adequacy and efficiency of the service,²⁵ issues of particular importance to consumers. The rates must also provide Atmos with a reasonable return on the value of property used to render service.²⁶ Therefore, the Investigative Staff cannot be committed solely to the best interests of the consumer, but must also consider the interests of Atmos.²⁷

To the contrary, the Consumer Advocate represents only the interests of Tennessee consumers.²⁸ Ensuring that Atmos has the opportunity to earn a fair rate of return is not a statutory charge of the Consumer Advocate. Additionally, the Consumer Advocate has no mandate to favor one type of consumer over another. The duties of the Consumer Advocate extend equally to all Tennessee consumers of public utility service.

AIG is comprised of two specific entities, Berkline LLC and Koch Foods, Inc. As such, AIG's only objectives are those of Berkline LLC and Koch Foods, Inc. It is likely that these objectives are not the same as other consumers such as residential or an industrial consumer of differing size and stature.

²⁴ Tenn. Code Ann. §65-5-101(a) (Supp. 2005).

²⁵ *Id.*; see *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (1992) (opinion on rehearing).

²⁶ See *Bluefield Waterworks & Improvement Co. v. Public Serv. Comm'n of West Virginia*, 262 U.S. 679, 690, 43 S.Ct. 675, 678 (1923) (holding that "[r]ates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment").

²⁷ See *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (1992) (opinion on rehearing) (holding that a "rate need only fall within the 'zone of reasonableness' . . . that takes into consideration the interests of both the consumer and the utility").

²⁸ Tenn. Code Ann. §65-4-118(b) (2004).

From this understanding of the Objectors' interests and objectives, it is clear that while their interests and objectives may overlap in certain respects, there is great potential for conflict such that the Objectors' overarching joint strategy claim cannot be sustained. For example, although all three Objectors have a consumer interest to protect, the Investigative Staff's protection must be balanced against the interests of Atmos, AIG's protection is limited to the interests of its two clients, and the Consumer Advocate must consider the interests of all consumers. Thus, it is not readily apparent from the objectives and interests of the parties alone that a common interest as demonstrated through cooperation towards a joint strategy exists.

A second justification for overruling the common interest privilege objections is that the numerous points of disagreement contained in the pre-filed direct testimony are not supportive of the contention that a joint strategy exists of such sufficiency as to satisfy the second prong of the *Boyd* test. Objectors cite the fact that they shared their testimony prior to filing and agreed on some aspects of the testimony as support for a determination that Objectors shared a joint strategy. For example, AIG cites the fact that its expert witness adopted the testimony of certain Consumer Advocate witnesses as evidence of a joint strategy. However, other aspects of the pre-filed direct testimony weigh in favor of the opposite determination.

Rate cases are very complex in that they involve numerous issues of significant financial, theoretical, and philosophical difficulty. Disputes often involve the cost of capital, cost of equity, cost of debt, capital structure, revenue requirement/surplus, appropriate test and attrition years, tariff structure and rate design. In this docket, there is disagreement among the Objectors as to many of these issues.

The Investigative Staff disagrees with the Consumer Advocate and AIG on the capital structure, cost of equity, cost of debt, cost of capital and in relation thereto the revenue surplus.

The chart below illustrates these disagreements.

	Consumer Advocate	Investigative Staff
Cost of Equity	8% ²⁹	10.75% ³⁰
Cost of Long-Term Debt	5.52% ³¹	5.77% ³²
Cost of Short-Term Debt	5.09% ³³	Asserts that this element be excluded from the capital and capital structure
Cost of Capital	6.6% ³⁵	7.916% ³⁶
Capital Structure	44.3% Equity 43.1% Long-Term Debt 12.6% Short-Term Debt ³⁷	43.09% Equity 56.91% Long-Term Debt ³⁸
Rate Adjustment	\$12,407,308 decrease ³⁹	\$9,177,524 decrease ⁴⁰

Based on these differing positions, a common interest as demonstrated through cooperation in furtherance of a joint strategy is not apparent.

With the exception of agreeing to the rate surplus calculation of the Consumer Advocate, AIG's testimony addresses only its proposal to restructure the industrial rate schedule tariffs. For example, AIG proposes to combine rate schedules 220 and 230 and to implement a two-tiered rate structure with a seasonal adjustment.⁴¹ AIG also proposes that certain rate schedule tariffs be inactivated entirely.⁴² The Consumer Advocate and Investigative Staff neither

²⁹ Pre-Filed Direct Testimony of Stephen Brown, 2 (July 17, 2006).

³⁰ Pre-Filed Direct Testimony of Jerry Kettles, Exhibit 1 Schedule JLK-9 (July 17, 2006).

³¹ Pre-Filed Direct Testimony of Stephen Brown, 2 (July 17, 2006).

³² Pre-Filed Direct Testimony of Jerry Kettles, Exhibit 1 Schedule JLK-9 (July 17, 2006).

³³ Pre-Filed Direct Testimony of Stephen Brown, 2 (July 17, 2006).

³⁴ Pre-Filed Direct Testimony of Jerry Kettles, 4 (July 17, 2006).

³⁵ Pre-Filed Direct Testimony of Stephen Brown, 2 (July 17, 2006).

³⁶ Pre-Filed Direct Testimony of Jerry Kettles, Exhibit 1 Schedule JLK-9 (July 17, 2006).

³⁷ Pre-Filed Direct Testimony of Stephen Brown, 2 (July 17, 2006).

³⁸ Pre-Filed Direct Testimony of Jerry Kettles, Exhibit 1 Schedule JLK-9 (July 17, 2006).

³⁹ Pre-Filed Direct Testimony of Terry Buckner, 3 (July 17, 2006). AIG expressly agrees with the calculation of this number. Pre-Filed Direct Testimony of William H. Novak, 11 (July 17, 2006).

⁴⁰ Pre-Filed Direct Testimony of David Foster, 2 (July 17, 2006).

⁴¹ Pre-Filed Direct Testimony of William H. Novak, 2-3 (July 17, 2006).

⁴² *Id.* at 10-11 (July 17, 2006). The proposal covers Rate Schedule 221 (experimental school service); Rate Schedule 280 (economic development gas service); Rate Schedule 291 (negotiated gas service); Rate Schedule 292 (cogeneration service); and Rate Schedule 293 (large tonnage air conditioning gas service).

proposed rate schedule structural changes or inactivation nor adopted the pre-filed direct testimony of AIG. Thus, a joint strategy is not discernable from this portion of the pre-filed testimony.

It is also unclear whether AIG, the Consumer Advocate and Investigative Staff share the same position on rate design. As to this topic, the Consumer Advocate merely states that it is in favor of “across-the-board rate changes” without any explanation as to how this approach would be implemented.⁴³ However, AIG provides a more detailed proposal arguing that the Authority should “apportion any rate change that it deems appropriate evenly across-the-board to all customer classes based on the existing gross margin in each rate class.”⁴⁴ The Investigative Staff is silent on this topic – neither providing a general statement as did the Consumer Advocate nor addressing the more detailed proposal of AIG. Once again, it cannot be determined from this portion of the pre-filed testimony that a joint strategy exists.

While the Objectors’ differing interests and objectives and their disagreements contained in the pre-filed testimony are sufficient justification for the determination that there is no common interest, that is, no cooperation in furtherance of a joint strategy, the third and fourth justifications require comment. The third justification is the fact that the parties’ cooperation with regard to issuing discovery requests was done to promote administrative efficiency.⁴⁵ Thus, reliance on this action to support the privilege is of little persuasive value. The goal of the cooperation was to avoid serving duplicitous requests on Atmos. Such cooperation can be achieved absent a joint strategy.

The fourth justification involves the comments of Attorney General Summers. Atmos relies on the comments to support its claim that there is no common interest, whereas the

⁴³ Pre-Filed Direct Testimony of Stephen Brown, 24 (July 17, 2006).

⁴⁴ Pre-Filed Direct Testimony of William H. Novak, 11 (July 17, 2006).

⁴⁵ Transcript of Proceedings, May 22, 2006, 8 (Status Conference).

Consumer Advocate contends the comments do not support that proposition. It is reasonable to construe the comments of Attorney General Summers as a proclamation of the lack of a relationship between the Consumer Advocate and AIG. The only circumstance shared by the two entities, according to General Summers, is their status as parties.

Based on the foregoing discussion, it is apparent that there is no common interest such that the parties cooperated in furtherance of a joint strategy. Therefore, the common interest privilege objection is overruled.

ii. Work Product Doctrine

As to the remaining work product doctrine objection, that claim too must be rejected. The reason for rejection is simple. The request is for documents “which were exchanged by and between any member of one or more of the following: (i) CAPD, (ii) the STAFF, and/or the INTERVENTION GROUP.”⁴⁶ Absent a common interest, such information is not protected because it has been disclosed in a manner that is inconsistent with the protection afforded by the work product doctrine. Specifically, it is without question that disclosure was intended to be used as a sword against Atmos and the work product doctrine used as a shield against disclosure to Atmos.⁴⁷

⁴⁶ See, e.g., *Atmos Energy Corporations First Requests for Information from the Staff*, 5 (July 21, 2006) (the same request is contained in the requests to the Consumer Advocate and AIG).

⁴⁷ See *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 786-88 (Tenn. Ct. App. 1999) (noting that “[c]ourts have universally held that a party is prevented from invoking the work product doctrine immunity as both ‘sword and shield’”); *Cambell County Bd. of Educ. v. Brownlee-Kesterson, Inc.*, 677 S.W.2d 457, 463 (Tenn. Ct. App. 1984).

III. DISCOVERY REQUESTS OF ATMOS DISPUTED BY AIG

A. Request No. 3⁴⁸

i. Positions of the Parties

In its written objections, AIG relies on the common interest privilege as well as the work product doctrine. Specifically, AIG asserts the materials sought were exchanged in “furtherance of a common interest or legal strategy” and were “prepared with and under the supervision of AIG’s counsel and consultants.” According to AIG, “the information reflects the mental impressions, conclusions, opinions or legal theories of AIG’s counsel and consultants.”⁴⁹

During the Status Conference, Atmos responded to AIG’s objections. Atmos contends that there is no common interest. Atmos also asserts that work product shared with a testifying expert is discoverable and that anything given to a testifying expert by a non-testifying expert is discoverable.

In its reply to Atmos, AIG agrees that the common interest privilege does not apply, but adds that there is no Tennessee case law on whether work product provided to a testifying expert is discoverable. As to bias, AIG contends it is almost frivolous to say that its expert, Mr. William H. Novak, is biased because he talked to Mr. Earl Burton, a non-testifying expert. Nevertheless, AIG states that Mr. Burton did review Mr. Novak’s testimony. AIG contends that Atmos is not entitled to neither rough drafts of testimony nor information from a non-testifying expert.⁵⁰

⁴⁸ Request No. 3 asks:

Produce all DOCUMENTS relating to any communications between the INTERVENTION GROUP and Earl Burton. In addition, please state whether Earl Burton reviewed Hal Novak’s testimony? If so, please include in your production all DOCUMENTS RELATING OR REFERRING TO any edits, additions, changes or other communications with Earl Burton regarding Hal Novak’s testimony.

Atmos Energy Corporations First Requests for Information from the Intervention Group, 5 (July 21, 2006).

⁴⁹ See *Objections of Atmos Intervention Group to Atmos Energy Corporation’s First Requests for Information*, 1-3 (July 25, 2006).

⁵⁰ Transcript of Proceedings, July 27, 2006, 61 (Status Conference).

ii. Decision of the Hearing Officer

This request is best addressed by focusing on each of the three sentences independently. The first sentence asks AIG to “[p]roduce all DOCUMENTS relating to any communications between the INTERVENTION GROUP and Earl Burton.”⁵¹ The objection to this request is sustained. Rule 26.02(4)(B) of the Tennessee Rules of Civil Procedure provides:

A party may not discover the identity of, facts known by, or opinions held by an expert who has been consulted by another party in anticipation of litigation or preparation for trial and who is not to be called as a witness at trial except as provided in Rule 35.02 or upon a showing that the party seeking discovery cannot obtain facts or opinions on the same subject by other means.⁵²

This request unequivocally calls for information from a non-testifying expert. Such a request contravenes the exemption from providing such information contained in the above rule.

The second sentence of the request states: “In addition, please state whether Earl Burton reviewed Hal Novak’s testimony?”⁵³ This objection is moot and, therefore, requires no ruling. During the Status Conference, counsel for AIG stated that Mr. Burton had reviewed Mr. Novak’s pre-filed direct testimony,⁵⁴ thereby answering the request and rendering the dispute moot.

The third sentence of the request states: “If so, please include in your production all DOCUMENTS RELATING OR REFERRING TO any edits, additions, changes or other communications with Earl Burton regarding Hal Novak’s testimony.”⁵⁵ The objection to this request is sustained in part and overruled in part such that any documents relating to or referring to any edits, additions, changes or other communications with Mr. Burton regarding Mr. Novak’s testimony that actually resulted in changes to Mr. Novak’s testimony must be produced. This

⁵¹ *Atmos Energy Corporations First Requests for Information from the Intervention Group*, 5 (July 21, 2006).

⁵² Tenn. R. Civ. Pro. 26.02(4)(B) (2006). Atmos does not argue that it is entitled to the information based on one of the exceptions.

⁵³ *Atmos Energy Corporations First Requests for Information from the Intervention Group*, 5 (July 21, 2006).

⁵⁴ Transcript of Proceedings, July 27, 2006, 55 (Status Conference).

⁵⁵ *Atmos Energy Corporations First Requests for Information from the Intervention Group*, 5 (July 21, 2006).

conclusion is one of simple logic. As discussed above, Rule 26.02(4)(B) exempts from discovery information related to the identity of, facts known by and opinions held by a consulted, but non-testifying expert. However, a party should not be permitted to rely on this rule while at the same time allowing the non-testifying expert to alter the testimony of the testifying expert. In other words, once the non-testifying expert witness becomes a testifying expert witness, albeit vicariously, discovery should be permitted. Absent such a conclusion, a party could shield a non-testifying expert from discovery while at the same time entering the facts known by and opinions held by the non-testifying expert into the record via the testimony of a testifying expert. Based on this reasoning, the objection to this request is sustained in part and overruled in part and AIG shall produce any documents relating to or referring to any edits, additions, changes or other communications with Mr. Burton regarding Mr. Novak's testimony that actually resulted in changes to Mr. Novak's testimony.

B. Request No. 32⁵⁶

i. Positions of the Parties

In its written objections, AIG relies on the common interest privilege as well as the work product doctrine. Specifically, AIG asserts that the materials sought were exchanged in

⁵⁶ Request 32 asks:

On page 12 of your testimony, you state "I have reviewed [the prefiled testimony and exhibits of the CAPD] for this case. AIG agrees with the CAPD's calculation of revenue surplus for this case and recommends [sic] that it be adopted by the TRA." Please IDENTIFY:

- (i) Exactly when you received the CAPD's testimony;
- (ii) How long you took to review it;
- (iii) What independent analysis you did of their conclusions and approach;
- (iv) Anything that you do not agree with;
- (v) Whether you reviewed the Staff's prefiled testimony and exhibits;
- (vi) What independent analysis you did of STAFF's conclusions and approach;
- (vii) Anything in the STAFF's analysis that you do not agree with;
- (viii) All DOCUMENTS which were provided by you by the CAPD or the STAFF related to this proceeding.

Specifically, please produce all DOCUMENTS comprising, RELATING OR REFERRING TO the exact copy of the prefiled testimony and exhibits that you were given to review, and all communications with any PERSON at the CAPD or STAFF with whom you discussed your testimony prior to filing.

Atmos Energy Corporations First Requests for Information from the Intervention Group, 15 (July 21, 2006).

“furtherance of a common interest or legal strategy” and were “prepared with and under the supervision of AIG’s counsel and consultants.” According to AIG, “the information reflects the mental impressions, conclusions, opinions or legal theories of AIG’s counsel and consultants.”⁵⁷

During the status conference, both parties asserted their positions. Atmos began the discussion and claims that this request goes to the basis of Mr. Novak’s opinion, which is clearly discoverable.⁵⁸ AIG reaffirmed its assertion that the common interest privilege protects the information. Thereafter, a dispute arose over whether the common interest extends the circle of communicants that are covered by the common interest privilege. According to Atmos, *Boyd* supports the argument that the common interest privilege does not extend the protection.⁵⁹ To the contrary, AIG contends that pursuant to *Boyd* the “common interest privilege widens the circle of persons to whom clients may disclose privileged communications”⁶⁰ Thus, AIG posits that the common interest privilege includes discussion between the parties’ experts.⁶¹

ii. Decision of the Hearing Officer

As previously determined, the common interest privilege and work product doctrine do not apply to the information shared between parties.⁶² Additionally, the requested information is discoverable under Tennessee Rule of Civil Procedure 26.02(1) and (4).⁶³ Given that the work product doctrine as memorialized in Tennessee Rule of Civil Procedure 26.02(3) is subject to the provisions of 26.02(4), the work product doctrine does not operate to protect the requested

⁵⁷ See *Objections of Atmos Intervention Group to Atmos Energy Corporation’s First Requests for Information*, 1-2, 4 (July 25, 2006).

⁵⁸ Transcript of Proceedings, July 27, 2006, 67 (Status Conference).

⁵⁹ *Id.* at 71-72.

⁶⁰ *Id.* at 71.

⁶¹ *Id.*

⁶² See *supra* discussion at pp. 6-12.

⁶³ During the issuance of the oral rulings, the Hearing Officer erroneously referenced 26.02(1) and (3) rather than 26.02(1) and (4). See Transcript of Proceedings, July 27, 2006, 6 (Status Conference – Oral Rulings).

information.⁶⁴ Therefore, the work product doctrine objection is overruled and AIG shall provide the requested information.

IV. DISCOVERY REQUESTS OF ATMOS DISPUTED BY THE CONSUMER ADVOCATE - REQUEST NOS. 2, 16, 19, 44 AND 46⁶⁵

A. Positions of the Parties

In its written objections, the Consumer Advocate asserts that the requests are “overly broad, unduly burdensome, and unlikely to lead to the discovery of admissible evidence.” In support of these contentions, the Consumer Advocate notes that it does not track all the requested documents. The Consumer Advocate also asserts as a basis for its objection the work product doctrine contending that the requested information may include information created on behalf of counsel in anticipation of litigation.

In response, Atmos notes that the Consumer Advocate asked the same question of it and that Atmos believes all such requests to be reasonable.⁶⁶ Atmos also explains that it is simply requesting that the Consumer Advocate provide what it has retained and note in its response that it has not retained everything.⁶⁷ The Consumer Advocate agrees that both parties should reply based on the information each has maintained in its records.⁶⁸ Disagreement between the parties remains as to the breadth of the request. Atmos argues that the Consumer Advocate should

⁶⁴ See *Hammock v. Sumner County*, 1997 WL 749461, *2 (Dec. 5, 1997) (holding that “reports prepared by experts in anticipation of trial are not covered by the work product doctrine”).

⁶⁵ All the requests are worded similarly to Request No. 2, which states: “Please produce all DOCUMENTS that you (Michael D. Chrysler) relied upon, referenced, created, or otherwise reviewed in preparation of your testimony. This request includes all work papers, reference sources, financial information, discovery responses, e-mails and other materials. Please produce working Microsoft Excel files for all work papers and exhibits.” *Atmos Energy Corporations First Requests for Information from the CAPD*, 5 (July 21, 2006).

⁶⁶ Transcript of Proceedings, July 27, 2006, 81-82 (Status Conference).

⁶⁷ *Id.* at 82-84.

⁶⁸ *Id.* at 82.

respond to the request as written, and the Consumer Advocate seems to assert that the parties should provide only what they intend to rely on at the hearing.⁶⁹

B. Decision of the Hearing Officer

The requested information is discoverable under Tennessee Rule of Civil Procedure 26.02(1) and (4).⁷⁰ As discussed above, given that the work product doctrine is applicable only subject to the provisions of Tennessee Rule of Civil Procedure 26.02(4), it can not be used to deny a party access to discoverable expert information.⁷¹ Moreover, the explanation of Atmos that all they are requesting is information the Consumer Advocate has maintained negates the argument that the request is overly broad or unduly burdensome. Based on the foregoing, the objections are overruled and the Consumer Advocate shall respond to the requests.

V. DISCOVERY REQUESTS OF AIG DISPUTED BY ATMOS - REQUEST NOS. 3 THROUGH 12⁷²

A. Positions of the Parties

In its written objections, Atmos contends the request is beyond the scope of legitimate discovery, overly broad and unduly burdensome, and not reasonably calculated to lead to the discovery of relevant information. In support of this position, Atmos asserts that the requests require it to write software, query its billing system, verify the data, and manually compile the information for customers outside the billing system. In further support, Atmos notes that the

⁶⁹ Transcript of Proceedings, July 27, 2006, 83-87 (Status Conference).

⁷⁰ During the issuance of the oral rulings, the Hearing Officer erroneously referenced 26.02(1) and (3) rather than 26.02(1) and (4). See Transcript of Proceedings, July 27, 2006, 7 (Status Conference – Oral Rulings).

⁷¹ See *supra* discussion at pp. 16-17.

⁷² These requests all ask for information about Atmos's various rate schedules applicable to industrial customers. For example, Request No. 3 asks:

AIG has concerns regarding the proper rate tiers or steps for Rate Schedule 220. Currently this particular rate schedule has no rate steps. In order to properly evaluate the need for rate tiers or steps for this rate schedule, please provide an average monthly cumulative distribution analysis for Rate Schedule 220 for the 12 months ended September 30, 2005 in 10 Mcf increments. This analysis should show the average amount of monthly sales volumes and cumulative percentage of volumes for each increment, beginning with 10 Mcf, then 20 Mcf, then 30 Mcf, etc. If you have any questions regarding this item, please contact us before proceeding.

Atmos Intervention Group's Second Round of Discovery to Atmos Energy Corporation, 7 (July 21, 2006).

second round of discovery was applicable only to the direct testimony filed by all parties on July 17, 2006. Atmos asserts that the information sought goes beyond the scope of direct. Atmos also contends that the request is overreaching in that AIG seeks information that would have no impact on either customer in AIG.⁷³

In the Status Conference, AIG refers to a letter it filed on July 26, 2006 and explained that it needs the information if it is to design rates. AIG further asserts that if receipt of the information is withheld until after the revenue requirement is determined then the time required to implement the rate reductions will be prolonged.⁷⁴ AIG also contends that there is nothing in the procedural schedule that limits the second round of discovery requests to the content of the pre-filed direct testimony, but notes that the information requested is needed simply to fill in the blanks in the proposed tariffs submitted as part of Mr. Novak's testimony.⁷⁵

Atmos claims that the requests are not related to any proposal of any party and that AIG could have issued these requests as part of the first round of discovery. Atmos opposes allowing parties to make new proposals in their rebuttal testimony. Atmos asserts that the "only way the information is discoverable is if it's the ruling of the hearing officer that rebuttal testimony can include things that are not addressed on direct, new proposals."⁷⁶

B. Decision of the Hearing Officer

The *Order Granting Interventions and Setting Procedural Schedule* did not contain an explicit statement limiting the scope of the second round of discovery to the content of the pre-filed direct testimony. Despite the absence of such a statement though, it is not unreasonable to assume that a limitation was intended. This is so merely because the second round followed the

⁷³ *Atmos Energy Corporation's Objections to Atmos Intervention Group's Second Round of Discovery passim* (July 25, 2006).

⁷⁴ Transcript of Proceedings, July 27, 2006, 91 (Status Conference).

⁷⁵ *Id.* at 94-95.

⁷⁶ *Id.* at 91.

filing of pre-filed direct testimony and preceded the filing of pre-filed rebuttal testimony, which is necessarily limited to the subject of the pre-filed direct testimony. Thus, the pivotal question is whether the requests sufficiently relate to the subject of the pre-filed direct testimony. The answer is yes.

Contrary to Atmos's assertions, there is a sufficient nexus between the testimony of Mr. Novak and the subject of the requests to require responses thereto. The requests seek information related to the gas volumes purchased for rate schedules that are the subject of Mr. Novak's testimony. In his testimony, Mr. Novak proposes structural changes, such as adding rate tiers and adjusting charges for current rate tiers, to Rate Schedules 220, 230, 240, 250, and 260.⁷⁷ In addition, Mr. Novak contends that Atmos should discontinue tariffs for Rate Schedules 221, 280, 291, 292, and 293 because these tariffs have seen little or no usage.⁷⁸ Information related to gas volumes purchased is related to the proposals of Mr. Novak and should be provided. Therefore, Atmos's objections are overruled, and as agreed to by the parties, Atmos shall provide the information by Thursday, August 17, 2006.

IT IS THEREFORE ORDERED THAT:

1. The objections of the Consumer Advocate and Protection Division of the Office of the Attorney General, the Atmos Intervention Group, and the Tennessee Regulatory Authority Investigative Staff to Atmos Energy Corporation Request No. 1 are overruled. The Consumer Advocate and Protection Division of the Office of the Attorney General, the Atmos Intervention Group, and the Tennessee Regulatory Authority Investigative Staff shall provide the information by Friday, August 4, 2006, as required by the procedural schedule.

⁷⁷ For example, Mr. Novak proposes that Rate Schedules 220 and 230 be consolidated and include a two-tiered, seasonal rate design. Pre-Filed Direct Testimony of William H. Novak, 3 (July 17, 2006). Additionally, Mr. Novak indicates in his proposed tariffs that the rates for existing rate tiers are yet to be determined. *See e.g., id.* at Exh. AIG-2 Sch. 1 of 3 (proposed tariff for Rate Schedule 240).

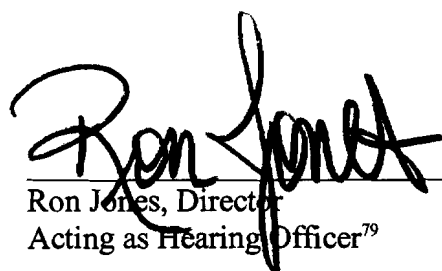
⁷⁸ *Id.* at 10-11.

2. The objections of the Atmos Intervention Group to Atmos Energy Corporation Request No. 3 are sustained in part and overruled in part. AIG shall produce any documents relating to or referring to any edits, additions, changes or other communications with Mr. Earl Burton regarding Mr. William H. Novak's testimony that actually resulted in changes to Mr. William H. Novak's testimony by Friday, August 4, 2006, as required by the procedural schedule.

3. The objections of the Atmos Intervention Group to Atmos Energy Corporation Request No. 32 are overruled. The Atmos Intervention Group shall provide the information by Friday, August 4, 2006, as required by the procedural schedule.

4. The objections of the Consumer Advocate and Protection Division of the Office of the Attorney General to Atmos Energy Corporation Request Nos. 2, 16, 19, 44 and 46 are overruled. The Consumer Advocate and Protection Division of the Office of the Attorney General shall provide the information by Friday, August 4, 2006, as required by the procedural schedule.

5. The objections of Atmos Energy Corporation to Atmos Intervention Group Request Nos. 3 through 12 are overruled. Atmos Energy Corporation shall provide the requested information by Thursday, August 17, 2006, as agreed to by the parties.


Ron Jones, Director
Acting as Hearing Officer⁷⁹

⁷⁹ 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, pp. 29-39 (May 15, 2006) (Authority Conference).