

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

August 17, 2006

Filed electronically 8/18/06 @ 1:45pm

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

**RESPONSE OF ATMOS INTERVENTION GROUP TO
MOTION OF ATMOS TO STRIKE TESTIMONY**

The Atmos Intervention Group ("AIG") submits the following response to the motion of Atmos Energy Corporation ("Atmos") asking that the expert testimony of Mr. Hal Novak be excluded from this proceeding.

Atmos argues that there are three reasons why Mr. Novak should not be allowed to testify.

1. Atmos first argues that Mr. Novak should not be allowed to testify because he is being paid through a contingency fee arrangement.

Mr. Novak is being paid by Tennessee Energy Consultants ("TEC") which is providing consulting services to members of AIG in connection with this proceeding. See the "Atmos Customer Agreement" which was filed by Atmos with the Authority on May 12, 2006. (Under the Agreement, the customer may pay TEC either a flat fee or, at the customer's option, a portion of the customer's future savings.) Although Mr. Novak originally agreed to be paid one-third of the money collected by TEC, he and TEC now have an arrangement under which TEC will pay Mr. Novak a flat fee for his services. A copy of the

new agreement is attached. Since Mr. Novak's fee is not contingent upon the outcome of this proceeding, the issue raised by Atmos is moot.¹

2. Atmos argues that Mr. Novak does not qualify as an expert witness because he has not done a class cost of service study nor has he directly talked to AIG members Koch Foods and Berkline.

Mr. Novak's testimony recommending changes in the outdated tariffs of Atmos is based on his substantial experience with and knowledge of the natural gas industry. It is not necessary that he conduct a class cost-of-service study nor that he talk directly to AIG members in order to qualify as an expert in this case. In preparing his testimony, Mr. Novak has consulted with Mr. Earl Burton of Tennessee Energy Consultants, who also has substantial experience in this area. Mr. Burton has consulted directly with AIG members about their gas purchasing practices. Based on his own experience and his discussions with Mr. Burton, Mr. Novak explains in his pre-filed testimony and in the response of AIG to the second round of discovery requests from Atmos (See Responses to Questions 13 and 29) how Mr. Novak's proposed tariff changes will benefit industrial and commercial customers in general and AIN members in particular.

Mr. Novak, who has testified as an expert many times before this agency, is clearly qualified to testify as an expert witness in this case.

3. Finally, Atmos argues that Mr. Novak's testimony should be excluded because Atmos contends that Mr. Earl Burton is a "member" of AIG and therefore a party to this proceeding. It is not clear what

¹ Even if Mr. Novak were being paid on a contingency basis, the existence of a contingency arrangement would go to the weight of his testimony, not its admissibility. "No court, so far as I have been able to find, now excludes contingent fee testimony." United States v. Cervantes-Pacheco, 826 F.2d 310, 316 (5th Circuit, 1987 (*en banc*) Rubin, J. concurring. There is a disciplinary rule regarding the hiring of expert witnesses by attorneys (See Tenn. Rules of Professional Conduct 3.4), "But it is a rule of professional conduct rather than of admissibility of evidence . . . [I]t does not follow that evidence obtained in violation of the rule is inadmissible." Tagatz v. Marquette University, 861 F.2d 1040, 1042 (7th Circuit, 1988). This distinction is especially true in an administrative proceeding, such as this one, in which the triers of fact are "accustomed to dealing daily with expert witnesses." New England Telephone and Telegraph Company v. Board of Assessors of Boston, 468 N.E.2d 263, 268 (Mass. 1984) (holding that even if the expert had a contingency fee arrangement, his "testimony was presented to an experienced administrative agency accustomed to dealing daily with expert witnesses and their testimony concerning rates of return, rents imputed to premises, allowances for expenses and vacancies and similar issues. We conclude the board should not have disregarded [the expert's] testimony.")

this has to do with Mr. Novak's testimony. In any event, as AIG has previously explained, Mr. Earl Burton is a consultant to the members of the intervention group. He is not a member of AIG nor a party to this case. Any implication to the contrary in AIG's Response No. 3 to Atmos' discovery is incorrect. Mr. Burton, Mr. Novak, and counsel for AIG are "members" of the group only in the non-legal sense that they are part of the AIG team working on this case.

Since there is no factual or legal basis for any of the arguments raised by Atmos, the motion to exclude the testimony of Mr. Novak must be denied.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via email and U.S. mail, postage prepaid, to:

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on this the 14th

day of August 2006.



Henry M. Walker

WHN CONSULTING

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August 16, 2006

PROPOSAL FOR SERVICES CONFIDENTIAL

Earl Burton
Tennessee Energy Consultants
100 E. 10th Street Suite 401
Chattanooga TN 37402

Dear Mr. Burton,

This is a proposal for natural gas advisory services to Tennessee Energy Consultants ("TEC") and William H. Novak doing business as WHN Consulting. ("WHN"). The scope of this proposal covers services related to providing expert testimony on gas related issues in TRA Docket No. 05-00258

Scope of Services:

WHN will research and analyze natural gas rate and tariff issues that impact large industrial gas users represented by the Atmos Intervention Group in Docket No. 05-00258.

WHN will research and analyze similar natural gas rate and tariff from other gas distribution companies regulated by the Tennessee Regulatory Authority.

WHN will draft new tariff language that modernizes Atmos Energy's rates and tariffs, and more accurately reflects the costs of service, and facilitates a more competitive market for gas supply for the Atmos Intervention Group.

WHN will confer with TEC on various tariff and rate proposals. TEC will in turn meet with the individual members of the Atmos Intervention Group to convey issues and objectives of the Atmos Intervention Group intervention.

WHN will provide expert testimony on the TRA Docket No. 05-00258, addressing tariff and rate issues of the Atmos Intervention Group.

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Services will be provided under the following contract terms:

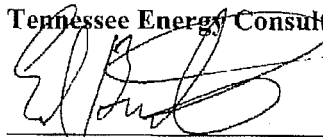
Fee on Recoveries	Compensation
Phase I of Docket 05-00258	\$10,000
Phase II of Docket 05-00258	To be determined

Payment:

Payment for services will be billed and remitted within 90 days of completed work. WHN and TEC may agree to an alternate payment schedule to be billed and paid over a predetermined time period.

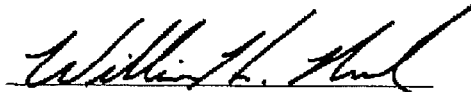
Either party has the right to terminate consulting services covered by this agreement with notice in writing.

Tennessee Energy Consultants:



Earl Burton

WHN Consulting:



William H. Novak