BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

August 23, 2006

IN RE:	)	
	)	
PETITION OF THE CONSUMER ADVOCATE TO OPEN AN 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	)	**DOCKET NO. 05-00258**

ORDER ON MOTIONS *IN LIMINE*, MOTION FOR PERMISSION TO SEEK INTERLOCUTORY APPEAL AND OTHER MATTERS

This docket came before the Hearing Officer for consideration of (1) *Atmos Energy Corporation's Motion in Limine to Exclude the Testimony of Hal Novak* and *Atmos Energy Corporation's Motion in Limine to Request a Ruling on the Order of Proof at the Hearing* filed electronically on August 11, 2006; (2) *TRA Investigative Staff Motion for Permission to Seek Interlocutory Review of Order Resolving Second Round Discovery Disputes* filed electronically on August 21, 2006; and (3) other matters raised during the August 22, 2006 Status Conference.

I. RELEVANT PROCEDURAL HISTORY

On August 11, 2006, Atmos Energy Corporation ("Atmos") filed two motions: (1) *Atmos Energy Corporation's Motion in Limine to Exclude the Testimony of Hal Novak* and (2) *Atmos Energy Corporation's Motion in Limine to Request a Ruling on the Order of Proof at the*

Hearing. As a result of these filings, a *Notice of Status Conference* was issued scheduling a Status Conference for 10:00 a.m. on August 22, 2006. The purposes given for scheduling the Status Conference are to hear arguments on the motions in *limine* filed by Atmos and to resolve any other outstanding disputes. On August 18, 2006, the Atmos Intervention Group ("AIG") electronically filed a response to the motion in *limine* to exclude the testimony of Mr. Novak. No other responses to the motions in *limine* were filed prior to the Status Conference.

On August 21, 2006, the TRA Investigative Staff electronically filed the *TRA Investigative Staff Motion for Permission to Seek Interlocutory Review of Order Resolving Second Round Discovery Disputes*. No responses to this motion were filed prior to the Status Conference.

The Hearing Officer convened the Status Conference as noticed at 10:00 a.m. on August 22, 2006. The following party representatives were in attendance:

> **TRA Investigative Staff** – Gary Hotvedt, Esq. and David Foster, Team Leader, Tennessee Regulatory Authority, 460 James Robertson Parkway, Nashville, Tennessee 37243;
> **Atmos Energy Marketing** – 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 and Protection Division of the Office of the Attorney General** – Vance Broemel, Esq. and Joe Shirley, Esq., Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202;
> **AIG** – Henry Walker, Esq. and April Ingram, Esq., Boult, Cummings, Conners & Berry, PLC, 1600 Division Street, Suite 700, Nashville, Tennessee 37203; and
> **Chattanooga Gas Company** – Jennifer Brundige, Esq., Farmer & Luna, 333 Union Street, Suite 300, Nashville, Tennessee 37201.

During the Status Conference, each of the motion was argued and certain additional matters were raised and argued. This order serves to provide a ruling on each item of contention and to provide a detailed analysis of each ruling.

II. *ATMOS ENERGY CORPORATION'S MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF HAL NOVAK*[1]

A. Positions of the Parties

In its motion to exclude the testimony of AIG witness, William H. Novak, Atmos asserts three arguments. First, Atmos contends that the testimony should be excluded because contingency fees for experts are barred and void as a matter of law.[2] For its second argument in support of exclusion, Atmos asserts that Mr. Novak's testimony is not reliable. As grounds for this assertion, Atmos notes that Mr. Novak did not conduct a cost of service study and did not discuss his proposals with Berkline LLC and Koch Foods, Inc., the two named AIG participants.[3] Atmos's third argument centers on the make-up of AIG. Atmos contends that it was recently disclosed that Earl Burton is a member of AIG. Atmos states: "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 least in part, at the suggestion of a competitor of Atmos Energy Marketing."[4] Based on these arguments, Atmos requests that the Hearing Officer exclude the testimony of Mr. Novak.

AIG electronically filed on August 18, 2006, a response to Atmos's motion to exclude testimony. In its response to Atmos's contingency fee arguments, AIG explains Tennessee Energy Consultants, a consultant to the members of AIG, is compensating Mr. Novak for his

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[1] During the Status Conference, Atmos stated that a preferable title for its motion would be a motion "to limit the rights of the Intervention Group to present the testimony of Hal Novak," but Atmos did not alter its request for relief, which is to exclude the testimony. *Atmos Energy Corporation's Motion in Limine to Exclude the Testimony of Hal Novak*, 11 (elec. filed Aug. 11, 2006).

[2] *Id.* at 4.

[3] *Id.* at 5-7.

[4] *Id.* at 8-10.

services. AIG further explains that although Mr. Novak originally agreed to a percentage of monies collected by Tennessee Energy Consultants, the consultant and expert have now agreed to a flat fee.[5] Thus, AIG contends the issue raised by Atmos is moot. As a footnote to this explanation, AIG argues that even if a contingency arrangement remained, such an arrangement goes "to the weight of his testimony, not its admissibility." Finally, AIG contends that Mr. Novak has testified at the Authority in the past as an expert and is clearly qualified to testify in this docket.[6] As to Mr. Novak's expert qualifications, AIG asserts that neither a cost of service study nor direct communications with AIG members is necessary. According to AIG, Mr. Novak's testimony is based on his experience, knowledge and communications with Mr. Earl Burton of Tennessee Energy Consultants, who has had direct communications with the members of AIG.[7] As to Atmos's argument regarding Mr. Burton's membership in AIG, AIG contends that Mr. Burton is a member of the "group only in the non-legal sense that [he is] part of the AIG team working on this case."[8]

During the Status Conference, all parties were offered an opportunity to argue their position with respect to this motion. Atmos elaborated on its three core arguments and clarified that it is not attacking Mr. Novak's qualifications as a witness or his conclusions. According to Atmos, allowing Mr. Novak's testimony would impede the orderly and prompt conduct of this proceeding. Atmos references a shroud of secrecy over the nature and make-up of AIG and contends that it is appropriate to exclude the testimony now that Atmos has learned that there was a contingency arrangement, that Mr. Novak has not communicated directly with the AIG industrial customers and that Earle Burton, a consultant to the customers within AIG and a

[5] *Response of Atmos Intervention Group to Motion of Atmos to Strike Testimony*, 1 (elec. filed Aug. 18, 2006).
[6] *Id.* at n.1.
[7] *Id.* at 2.
[8] *Id.* at 2-3.

competitor of Atmos Energy Marketing, will benefit from the tariff changes in Mr. Novak's testimony. Atmos also explains that the fact that AIG converted the contingency fee arrangement to a flat fee does not mitigate the ill-effects of allowing the testimony on the record because the testimony was filed when the contingency fee arrangement was in place. In response to AIG's contention that the contingency fee arrangement does not affect the admissibility of the testimony, Atmos asserts that the case law relied upon is not from Tennessee. Further, Atmos contends that the Authority as an arm of state government should refuse to admit testimony that is the product of an arrangement that goes against the public policy of the State of Tennessee.[9] In response to AIG's reliance on the United States Court of Appeals for the Fifth Circuit case of *United States v. Cervantes-Pacheco*,[10] Atmos contends that the admissibility standard in the federal courts is lower than that of Tennessee and Tennessee's more stringent standard should be applied.

AIG responds initially by noting that there is no longer a contingency fee arrangement in place between Mr. Novak and AIG and that there is no case law that supports striking testimony as a result of the existence of a contingency fee arrangement. AIG argues that the conversion of the compensation arrangement cures any ill-effect because the testimony is not in the record until Mr. Novak presents it during the hearing, which has yet to occur. AIG next asserts that Atmos's criticisms of Mr. Novak's testimony should be brought out during cross-examination and not result in the exclusion of the testimony. AIG reiterates the comments in its written response regarding the function of Mr. Burton and apologizes for the inartful drafting of the discovery

[9] Atmos cites *Swafford, M.D. v. Harris*, 967 S.W.2d 319 (Tenn. 1998) for the proposition that contingency fee arrangements for expert witnesses are against the public policy of the State of Tennessee.
[10] 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied, Nelson v. U.S.*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988).

request response. In conclusion, AIG comments that many of Atmos's oral arguments are not directly related to the motion and seem to be intended to paint a negative picture of AIG.

The TRA Investigative Staff and Consumer Advocate also weighed in on this issue during the Status Conference. The TRA Investigative Staff asserts that an expert witness does not have to communicate with the underlying client. The Consumer Advocate states that it welcomes the participation of all parties and does not wish for any party to be silenced.

B. Decision of the Hearing Officer

Despite the protracted arguments during the Status Conference, the arguments to be considered remain substantially as stated in the motion. Specifically, the issue is should the testimony of Mr. Novak be excluded because (1) Mr. Novak was retained pursuant to a contingency fee arrangement, (2) Mr. Novak's testimony is unreliable as a result of his failure to use a cost of service study and to communicate directly with the AIG customers and (3) Mr. Burton, a competitor of Atmos Energy Marketing, is listed as a member of AIG and is a beneficiary of AIG's testimony. The answer to this issue is no.

There is no dispute that the prevailing public policy in Tennessee is in opposition to compensating an expert witness on a contingency fee basis.[11] Moreover, there is no dispute that prior to August 16, 2006, Mr. Novak and AIG's clients had a contingency fee arrangement and Mr. Novak's pre-filed direct testimony was filed on July 17, 2006. What is in dispute is whether the existence of a contingency fee arrangement with an expert witness necessarily results in the exclusion of that witness's testimony and, if so, whether exclusion can be avoided by a modification to that arrangement.

AIG asserts that the existing case law generally favors not excluding contingency fee driven expert testimony, but instead supports allowing the decisionmaker to consider the

[11] *Swafford, M.D. v. Harris*, 967 S.W.2d 319, 323-24 (Tenn. 1998).

existence of the arrangement when determining the weight or credibility to be given the evidence. Although Atmos does not specifically argue against this assertion, it contends that the Hearing Officer should nonetheless exclude the testimony in light of Tennessee's stringent admissibility standard and the strong denouncement of contingency arrangements in *Swafford* and the Tennessee Rules of Professional Conduct.

AIG is correct in asserting that the case law supports admission of the testimony. Tennessee law is not wholly silent as to the affect on expert testimony of having retained the expert witness pursuant to a contingency fee arrangement and tends to support admission of the testimony. In a Tennessee Court of Appeals decision, the court stated: "Medical experts cannot be paid on a contingency basis. *Swafford v. Harris*, 967 S.W. 2d 319, 323 (Tenn. 1998). In addition, a finder of fact may consider an expert's bias or **financial interest** in the litigation when determining the weight to be given to his or her opinions."[12] Non-Tennessee case law lends further support to this approach, particularly when the decisionmaker is not a jury.[13] In fact of the only two cases found favoring exclusion of testimony, one held that the testimony is admissible if the compensation

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[12] *Street v. Levy (Wildhorse) Ltd. P'ship*, 2003 WL 21805302, n.5 (Tenn. Ct. App. Aug. 7, 2003) (emphasis added); *see also GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 547 (Tenn. Ct. App. 2005) (quoting *Street*).

[13] *See United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied, Nelson v. U.S.*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988) (stating: "We therefore hold that an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial. As in the case of the witness who has been promised a reduced sentence, it is up to the jury to evaluate the credibility of the compensated witness."); *Tagatz v. Marquette University*, 861 F.2d 1040, 1042 (7th Cir. 1988) (stating: "There is a rule against employing expert witnesses on a contingent-fee basis . . . and this rule might be thought to imply that a party-whose 'reward' for testifying depends, of course, on the outcome of the suit-is not eligible to be an expert witness. **But it is a rule of professional conduct rather than of admissibility of evidence.** It is unethical for a lawyer to employ an expert witness on a contingent-fee basis, . . . but it does not follow that evidence obtained in violation of the rule is inadmissible.") (emphasis added); *Webb v. Hyman*, 861 F. Supp. 1094, n.4 (D.D.C. 1994); *New England Tel & Tel. Co. v. Board of Assessors of Boston*, 468 N.E.2d 263, 872-73 (Mass. 1984); *Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874, 876-77 (Ind. Tax Ct. 1993) (finding that "[d]espite the disapproval expert witness contingent fee agreements have received, there is no absolute prohibition on the admission of contingently paid expert's testimony, and in this court, which operated exclusively without a jury, . . . the potential for abuse is less than would be the case in a trial to a jury").

arrangement is altered[14] and the second decision explicitly provides that it is to be considered as having no precedential value and includes an additional fact basis for the decision.[15] In light of the existing case law, Atmos's plea to exclude the testimony of Mr. Novak because he was retained pursuant to a contingency fee arrangement should be denied.

Atmos's remaining arguments should likewise be dismissed. The fact that Mr. Novak did not perform a cost of service study does not diminish the reliability of his expert testimony to such a degree that necessitates its exclusion. Atmos itself admitted that its testimony regarding rate design is not based on a cost of service study. Moreover, Atmos did not challenge the Consumer Advocate's rate design expert testimony for lack of a cost of service study. It is for the decisionmaker to decide how the lack of a cost study affects the credibility or reliability of the testimony. Similarly, the lack of direct communications with the AIG customers is insufficient to serve as a basis for excluding the testimony. This fact too should be considered when evaluating the credibility to be afforded the testimony. AIG is correct in this regard.

Last, Atmos argues that the testimony should be excluded because Mr. Burton is referred to in a discovery response as a member of AIG and Mr. Novak's testimony benefits Mr. Burton, a competitor of Atmos Energy Marketing. At this point it is worth mentioning that Mr. Burton, an acknowledged competitor of Atmos Energy Marketing, has not been excluded from participating through AIG in this proceeding. The sole limitation placed on Mr. Burton is that the protective order prevents disclosure of any information related to Atmos Energy Marketing

[14] *See Mushroom Transportation Co. v. Continental Bank*, 70 B.R. 416, 418 (Bankr. E.D. Penn 1987) (stating "the contingent fee agreement renders Deric incompetent to testify at trial at this time" and "[i]f the method of compensation were altered, there would be no apparent bar to the testimony, the witness' stake in the litigation would be eliminated").

[15] *See Sakar v. Qureshi*, 541 N.W.2d 837, *3-*4 (Wis. Ct. App. 1995) (determining that expert opinion testimony could be excluded where the expert had minimal experience in divorce litigation and "her testimonial capacity was called into question by her contingency fee agreement").

to Mr. Burton.[16] Moreover, to the best of the Hearing Officer's knowledge, there is nothing that prevents a competitor of an entity from participating in a proceeding involving that entity or that prevents a party from asserting a position that may benefit a competitor. Thus, the fact that the testimony will or may benefit Mr. Burton's interests should not result in the exclusion of Mr. Novak's testimony. The same is true for the reference in the discovery response to Mr. Burton as a member of AIG. Sloppy draftsmanship, which was admitted to by AIG, should not serve in this instance to exclude expert testimony.

Based on the foregoing, *Atmos Energy Corporation's Motion in Limine to Exclude the Testimony of Hal Novak* is denied. The panel may consider the facts brought forth through the arguments on the motion in the course of evaluating the weight and credibility to be afforded Mr. Novak's testimony.

III. *ATMOS ENERGY CORPORATION'S MOTION IN LIMINE TO REQUEST A RULING ON THE ORDER OF PROOF AT THE HEARING*

A. Order of Testimony

i. Positions of the Parties

In its motion requesting a ruling on the order of proof, Atmos requests simply that the Hearing Officer set forth the order of proof and does not offer a proposal as to the order. No written responses to this motion were filed.

The oral arguments on this motion were not as simple as the prayer for relief and basis asserted therefore provided in the motion, even from Atmos. The TRA Investigative Staff began the discussion citing TRA Rule 1220-1-2-.16 for the proposition that the TRA Investigative Staff, Consumer Advocate and AIG are asserting the affirmative; therefore, by rule, these three parties should have the burden of proof and present their cases first.

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[16] *Order Resolving Discovery and Protective Order Disputes and Requiring Filings*, 19 (June 14, 2006).

Atmos contends that by filing the motion it is seeking direction from the Hearing Officer as to the order of the proof, but that it is also preserving its objection to the fact that the manner in which this docket has proceeded has resulted in the burden of proof being placed on Atmos. Atmos asserts that it has faced unique difficulties in this case as a result of the procedural schedule, the simultaneous filings, and the fact that the TRA Investigative Staff and Consumer Advocate failed to include forward-looking attrition year adjustments in their direct testimony, but rather the Consumer Advocate included the 2007 attrition year adjustments for the first time in its rebuttal testimony. Atmos also posits that the hearing will go beyond the currently scheduled time period and asserts that the party that goes first is disadvantaged. Based on these arguments, Atmos concludes that equity demands giving Atmos the last word. Atmos later agrees that rebuttal witnesses can be permitted to address unanticipated live testimony other than Atmos's testimony with regard to the 2007 attrition year adjustments offered by the Consumer Advocate in its rebuttal testimony.

The Consumer Advocate agrees with the TRA Investigative Staff's proposal, but adds that it should not be prevented from calling rebuttal witnesses as provided for in Tennessee Code Annotated section 4-5-312(b). AIG contends that Atmos should not be permitted to have it both ways. That is, Atmos cannot argue that they have a de facto burden of proof in some instances and that they do not have the burden of proof in other instances. Also, AIG notes that the Authority has allowed a party to recall witnesses in the past for rebuttal purposes.

ii. Decision of the Hearing Officer

It appears from the arguments that the parties agree that the testimony should be presented in the following order: Consumer Advocate, TRA Investigative Staff, AIG, and Atmos. In dispute is to what extent the first three presenters may call rebuttal witnesses after the

presentation of Amos's witnesses. Atmos agrees that the Consumer Advocate, TRA Investigative Staff, and AIG may call rebuttal witnesses, but contends that the ability should be limited to rebut unanticipated testimony and should not include rebuttal of Atmos's witnesses responding to the 2007 attrition year adjustments contained in the Consumer Advocate's rebuttal testimony.

Tennessee Code Annotated section 4-5-312 provides:

> To the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the pre-hearing order.[17]

This section permits the Authority to restrict the rebuttal testimony in a pre-hearing order. In addition, procedural equity as well as past Authority policy, albeit unwritten, advises that due to the pre-filing of testimony rebuttal witnesses should only be permitted when statements are asserted that fall outside the scope of the pre-filed or rebuttal testimony.

None of the parties have asserted any reason for not following the traditional policy of the agency regarding rebuttal testimony. Accordingly, rebuttal witnesses shall only be permitted to rebut assertions made during the hearing that fall outside the scope of the direct or rebuttal pre-filed testimony. As to rebuttal of Atmos's response to the Consumer Advocate's 2007 attrition year adjustments, Atmos's argument is not compelling. All parties should be permitted an opportunity to fully respond to the direct and rebuttal testimony of all parties. The TRA Investigative Staff, AIG, and Atmos will have the ability at the hearing to fully comment on the direct and rebuttal testimony of the other witnesses. The Consumer Advocate should also have this ability, that is, it should also be permitted to comment on Atmos's live rebuttal of the 2007 attrition year adjustments. While it is true that disparate treatment of the Consumer Advocate

[17] Tenn. Code Ann. § 4-5-312(b) (2005).

could be justified by the fact that the Consumer Advocate filed the 2007 attrition year adjustments for the first time in its rebuttal testimony, this result is too harsh in light of the fact that the Consumer Advocate will be disadvantaged if it is permitted to present rebuttal testimony because it will have to comment on live testimony.

As an aside, I note that the arguments as to the burden of proof fail to consider the novel nature of this proceeding or the fact that the ultimate responsibility for setting just and reasonable rates rests with the Authority. At the end of the day it is the Authority's decision that will be judged. The burden of proof is an anomaly in this proceeding. Each party has the burden of proving its case. Unlike a civil or criminal trial, this agency will not dismiss the case because a party failed to carry its burden of proof, although the agency may determine that a position cannot be adopted because there was insufficient proof. All in all whether a particular party has the burden of proof or carried its burden of proof is of little importance. What is of primary importance, however, is that the Authority have as much information as is available within the constraints of the procedural schedule to rely upon when setting just and reasonable rates.

Based on the foregoing, the order of testimony shall be the Consumer Advocate, TRA Investigative Staff, AIG, and Atmos. Further, rebuttal witnesses shall only be permitted to rebut assertions made during the hearing that fall outside the scope of the pre-filed direct or rebuttal testimony.

B. Opening and Closing Arguments

i. Positions of the Parties

The parties proposed widely divergent views for the timing of opening arguments. AIG offered the first proposal suggesting ten minutes for each party. Atmos then requested that it be afforded one hour for its opening comments. The Consumer Advocate conditioned its agreement

with Atmos's proposal on the Hearing Officer giving the Consumer Advocate one hour as well. The TRA Investigative Staff suggested thirty minutes per side, presumably grouping it, the Consumer Advocate and AIG on one side and Atmos, Atmos Energy Marketing and Chattanooga Gas Company on the other side. Atmos Energy Marketing initially offered no comment, but later agreed that if afforded time, it would yield that time to Atmos.

As to closing arguments, the TRA Investigative Staff and AIG agree that the timing of closing arguments should be determined closer to the end of the hearing. The Consumer Advocate suggests that the timing should mirror that of the opening arguments. Atmos states that it is flexible noting that the length of closing arguments, if any, may be dependant on the filing, if any, of post-hearing briefs.

ii. Decision of the Hearing Officer

Having considered the arguments of the parties, it is determined that the Consumer Advocate and Atmos shall have thirty (30) minutes each for opening arguments. The TRA Investigative Staff and AIG shall have ten (10) minutes each for opening arguments. Atmos Energy Marketing and Chattanooga Gas Company shall have five (5) minutes each for opening arguments. Parties may not yield their time to another party. These times are based on the breadth and complexity of the pre-filed testimony presented by each of the parties.

As for closing arguments, absent a contrary decision by the panel, closing arguments will be presented through the filing of post-hearing briefs. Such briefs shall be filed two weeks following the conclusion of the hearing.

IV. *TRA INVESTIGATIVE STAFF MOTION FOR PERMISSION TO SEEK INTERLOCUTORY REVIEW OF ORDER RESOLVING SECOND ROUND DISCOVERY DISPUTES*

A. Positions of the Parties

The TRA Investigative Staff electronically filed on August 21, 2006 a motion requesting permission to proceed with an interlocutory appeal of the *Order Resolving Second Round Discovery Disputes* issued on August 11, 2006. The reasons for the appeal are to "prevent the use at hearing of the following supplied documents and so that such directive does not become precedent for the Authority."[18] According to the TRA Investigative Staff, the joint legal strategy and common interest is demonstrated by the voluminous documentation produced as a result of the *Order Resolving Second Round Discovery Requests*.[19] TRA Investigative Staff suggests that, in the event that Atmos does not intend to use the disputed documentation at the hearing, Staff can enter an objection at the start of the hearing and the panel can then hear the appeal at a more opportune time. However, in the event that Atmos chooses to use the documents, TRA Investigative Staff suggests that it can enter a simple objection at the time the document is used, the parties can present full arguments at the conclusion of the hearing and the panel can then enter a ruling.[20]

During the Status Conference, the TRA Investigative Staff argued that it should be permitted to seek a review by the panel, if it chooses to do so. The Staff emphasizes that it has not yet made the decision as to whether to seek review, but simply wishes to obtain the permission to do so. The TRA Investigative Staff further notes that given its relationship with the Authority, it may be precluded from appealing the issue to the Court of Appeals upon the

[18] *TRA Investigative Staff Motion for Permission to Seek Interlocutory Review of Order Resolving Second Round Discovery Disputes*, 1 (elec. filed Aug. 21, 2006).
[19] *Id.* at 2.
[20] *Id.* at 2-3.

entry of a final order. The Consumer Advocate and AIG express support for the motion, but do not offer opinions on the appropriate procedure.

Atmos made four points at the Status Conference with regard to the request for permission to seek an interlocutory appeal. First, Atmos comments that it will not be goaded by the TRA Investigative Staff into revealing what, if any, documentation it will use during the hearing. Second, the documents produced by the TRA Investigative Staff as a result of the *Order Resolving Second Round Discovery Disputes* do not contain any attorney-client communications. Third, Atmos states it position that the *Order Resolving Second Round Discovery Disputes* cannot serve as a precedent outside of this docket. Fourth, Atmos asserts that because this matter would not be heard and resolved in advance of the hearing it is not an interlocutory matter; therefore, the motion may be denied.

B. Decision of the Hearing Officer

Authority Rule 1220-1-2-.06(6) provides that "[p]ermission for interlocutory review shall not be unreasonably withheld."[21] The only argument in opposition to granting permission is that this is not a true interlocutory matter. The TRA Investigative Staff acknowledged that it is in an odd situation in that if the panel did not review the Hearing Officer's decision, it may be that the decision stands unchallenged because the TRA Investigative Staff may be precluded from seeking review by the Tennessee Court of Appeals.

Both arguments have merit. The request is not truly one for permission to proceed with an interlocutory review. Instead, given that the TRA Investigative Staff's position is now supported by the actual documentation, it is more akin to a request to seek permission to file for rehearing by the panel. Nevertheless, it is an attempt to have the panel review a decision of the

[21] Tenn. Comp. R. & Regs. 1220-1-2-.06(6) (July 2003, Rev.).

Hearing Officer, a request that should not be unreasonably denied. Atmos's argument, therefore, should be rejected.

Based on the foregoing, the *TRA Investigative Staff Motion for Permission to Seek Interlocutory Review of Order Resolving Second Round Discovery Disputes* is granted. The TRA Investigative Staff shall note its objection during its opening arguments and at such time that specific documentation, if any, is produced. At the conclusion of the presentation of proof, the panel shall decide if and when it will hear oral arguments and render a decision.

V. OTHER MATTERS

A. Wellmont Health Systems

During its discussion of the motion to exclude the testimony of Mr. Novak, Atmos raised the fact that AIG has added Wellmont Health Systems as a member of the group. In response Atmos acknowledges that it recently recruited Wellmont Health Services as a member of the group and will continue to recruit participants throughout the two phases of this docket. When asked whether it was making a motion as to the exclusion of Wellmont Health Services, Atmos responded that it was simply raising an objection on the record to the inclusion of a new party at this late date in the proceeding. Along this same line of reasoning, Atmos Energy Marketing asserts that each member of the intervention group must meet the qualifications of the statute. Thereafter, AIG notes that Atmos has not asserted that Wellmont Health Services is not an Atmos customer.

In the *Order Granting Interventions and Setting Procedural Schedule*, the Hearing Officer granted intervention to AIG, which "includes customers who purchase natural gas from Atmos such as Berkline, LLC and Koch Foods, Inc."[22] Individual intervention of the clients of AIG was neither sought nor granted. The intervenor in this proceeding is the Atmos Intervention

[22] *Order Granting Interventions and Setting Procedural Schedule*, 1 n.1, 2 & 4 (May 25, 2006).

Group. A later decision to require AIG to provide updates on the status of its membership did not alter this fact. Despite AEM's assertion that the members of the group must meet the qualifications for intervention, there has been no assertion that Wellmont Health Services does not do so. All that has been asserted is that Wellmont Health Services inclusion has come at a late date in the proceeding. Atmos has not asserted how it is prejudiced by such circumstances.

Based on the foregoing, the objection as to the inclusion of Wellmont Health Services as a participant in AIG is overruled. To avoid future problems, AIG shall notify the Authority by letter when it recruits a new participant and affirm that the new recruit falls within the definition of AIG contained in footnote 1 of the *Order Granting Intervention and Setting Procedural Schedule.* Any objections to the inclusion of the new recruit shall be filed in writing and establish the existence of prejudice.

B. Rescheduling the Hearing

At the conclusion of its discussion on the closing arguments, Atmos suggests that the preferred approach with regard to the hearing details is to delay the hearing until such time as the Authority can hear the case from beginning to end in one sitting. Atmos Energy Marketing supports this suggestion arguing that it is difficult to keep up with the flow of a multi-party proceeding when it is split into multiple sessions. AIG agrees with this argument, but asserts that moving forward to the extent possible is preferable to not doing anything until a later date. The Consumer Advocate and TRA Investigative Staff agree that moving forward and completing what can be done in the currently scheduled time period is the better approach.

The Hearing Officer declines to grant the request to move the hearing to a time when the panel can hear the entirety of the proof in one sitting. While it is preferable to hear a case in one sitting, it is often impractical because of the many variables inherent in progressing through a

procedural schedule and the numerous schedules that must be accommodated. At the beginning of this docket the Hearing Officer was charged "to take all actions necessary to prepare this matter for hearing by the panel as expeditiously as possible."[23] Based on this charge and the difficulty at this time of securing enough days to hearing the case in one sitting within any reasonable time period, the request to move the hearing dates is rejected. Possible continuation dates will be submitted to the parties for their consideration as soon as such dates can be determined.

C. Panel Witnesses

AIG, the Consumer Advocate and the TRA Investigative Staff object to Atmos's use of panel witnesses to present rebuttal testimony. The parties assert that cross-examination of panel witnesses is difficult because it is impossible to know what testimony to attribute to which witness. AIG even posits that Atmos's strategy is to make the intervenors' opportunity to cross-examine Atmos's witnesses more difficult. Atmos counters that it filed its rebuttal testimony using panels to better present testimony of witnesses with complementary institutional knowledge. Atmos contends that its approach is more efficient, and it agrees that each panel member will be bound by the testimony of the other.

The TRA Investigative Staff, Consumer Advocate and AIG have failed to demonstrate that the use of panel witnesses will prejudice them such that they are deprived of their due process. To the contrary, Atmos has sufficiently explained its reason for submitting panel testimony and it is likely that questioning the panel members simultaneously will help to avoid references to a witness who is not on the stand. Based on the foregoing, the objection to the use of panel witnesses is overruled.

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[23] *Order Accepting Recommendation of Investigative Staff and Appointing a Hearing Officer*, 5 (Aug. 2, 2006).

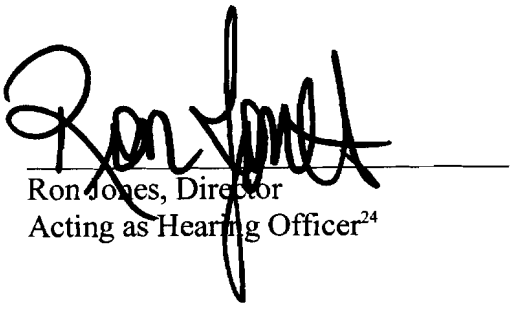
D. Demonstrative Exhibits

Near the conclusion of the Status Conference, the parties agreed to exchange on the morning of Monday, August 28, 2006 all demonstrative exhibits each party intends to use during the hearing.

IT IS THEREFORE ORDERED THAT:

1. *Atmos Energy Corporation's Motion in Limine to Exclude the Testimony of Hal Novak* is denied.
2. *Atmos Energy Corporation's Motion in Limine to Request a Ruling on the Order of Proof at the Hearing* is granted as follows:
    a. The order of testimony shall be the Consumer Advocate, TRA Investigative Staff, AIG, and Atmos.
    b. Rebuttal witnesses shall only be permitted to rebut assertions made during the hearing that fall outside the scope of the pre-filed direct or rebuttal testimony.
    c. The Consumer Advocate and Atmos shall have thirty (30) minutes each for opening arguments.
    d. The TRA Investigative Staff and AIG shall have ten (10) minutes each for opening arguments.
    e. Atmos Energy Marketing and Chattanooga Gas Company shall have five (5) minutes each for opening arguments.
    f. Parties may not yield their time for opening arguments to another party.
    g. Absent a contrary decision by the panel, closing arguments will be presented through the filing of post-hearing briefs. Such briefs shall be filed two weeks following the conclusion of the hearing.

3. *TRA Investigative Staff Motion for Permission to Seek Interlocutory Review of Order Resolving Second Round Discovery Disputes* is granted. The TRA Investigative Staff shall note its objection during its opening arguments and at such time that specific documentation, if any, is produced. At the conclusion of the presentation of proof, the panel shall decide if and when it will hear oral arguments and render a decision.
4. The objection as to the inclusion of Wellmont Health Services as a participant in AIG is overruled. In the future, AIG shall notify the Authority by letter when it recruits a new participant and affirm that the new recruit falls within the definition of AIG contained in footnote 1 of the *Order Granting Intervention and Setting Procedural Schedule.* Any objections to the inclusion of the new recruit shall be filed in writing and establish the existence of prejudice.
5. The objection to the use of panel witnesses is overruled.
6. Unless otherwise agreed to by the parties, all demonstrative exhibits shall be exchanged on the morning of Monday, August 28, 2006.



Ron Jones, Director
Acting as Hearing Officer[24]

[24] 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).