BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In re: Petition to Open an Investigation to Determine Whether Atmos Energy Corp. Should be Required by the TRA to Appear and Show Cause That Atmos Energy Corp. Is Not Overearning in Violation of Tennessee Law and That It Is Charging Rates That Are Just and Reasonable	)	**Docket No. 05-00258**

REPLY OF CONSUMER ADVOCATE AND PROTECTION DIVISION TO RESPONSE OF CHATTANOOGA GAS COMPANY TO THE ISSUES PROPOSED FOR PHASE TWO

The Office of the Tennessee Attorney General, by and through the Consumer Advocate and Protection Division, pursuant to the Hearing Officer's instruction at the Status Conference held on September 26, 2006, hereby submits its Reply to the Response of Chattanooga Gas to the proposed Phase Two issues.

INTRODUCTION

In the Response, Chattanooga Gas requests the Authority to dismiss Phase Two of this docket in favor of a rulemaking proceeding to consider industry-wide policy regarding the Phase Two issues. Response at 3. The Consumer Advocate opposes dismissal of Phase Two of this docket because: (1) the Phase Two issues must be addressed within the context of a contested case rather than a rulemaking; and (2) the Consumer Advocate will be prejudiced and the interests of consumers harmed if Phase Two is dismissed.

ARGUMENT

I. THE PHASE II ISSUES MUST BE DECIDED IN A CONTESTED CASE FORMAT.

Citing to *Tennessee Cable TV Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 162-63 (Tenn. Ct. App. 1992), Chattanooga Gas argues that these proceedings should be dismissed in favor of a rulemaking because the issues being litigated here have the potential to impact all natural gas utilities regulated by the Authority. Response at 1. Chattanooga Gas's reliance on *Tennessee Cable* is misplaced, however. Indeed, under the authority of *Tennessee Cable*, as well as other statutory and case law, a contested case is required to address the specific issues raised in Phase Two.

In particular, a rulemaking is appropriate to formulate new policies, rules, or standards that are intended to have wide coverage encompassing a large segment of the regulated or general public, as opposed to an individual or narrow select group. *Tennessee Cable*, 844 S.W.2d at 162. On the other hand, a contested case is a proceeding "in which the legal rights, duties, or privileges of specific parties are determined." Tenn. Code Ann. § 65-2-101(2) (2004); *see also* Tenn. Code Ann. § 4-5-102(3) (2005). Additionally, "the fixing of rates shall be deemed a contested case rather than a rule-making proceeding." *Id.* Finally, a contested case is required to resolve disputed factual, legal, or policy questions that have not been previously addressed by the Authority. *Office of the Attorney General v. Tennessee Regulatory Auth.*, 2005 WL 3193684 at *10 (Tenn. Ct. App. Nov. 29, 2005).

Accordingly, a rulemaking is characterized by a proceeding that promulgates an agency statement of general applicability, whereas contested cases are characterized by proceedings that: (1) hinge on a particular set of facts; (2) involve the rights, duties, or privileges of specific parties; or (3) establish rates for regulated services. Resolution of the Phase Two issues will require a proceeding that encompasses all of these contested case characteristics.

A. The Facts Matter.

Resolution of the Phase Two issues, and the relief that consumers are seeking in this docket, will depend on the Authority's findings of fact relative to issues that it has never previously addressed. Although many pertinent facts are not known at this time -- as discovery has not yet begun -- the following facts are known:

1. Of Atmos Energy Corporation's (Atmos's) gas transportation and supply system, Atmos's gas utility ratepayers use only about 60% of the capacity to meet their needs, whereas about 40% of the system capacity is available for transportation only. *See* Hearing Transcript, Docket No. 05-00258, Volume VII at 40, Volume IX at 42, (August 31, 2006).

2. In exchange for the sale, lease, or release of Atmos's system, Atmos's gas utility ratepayers received only about $30,000, which was accomplished through an asset management arrangement between Atmos and its affiliate, Atmos Energy Marketing (AEM). *See* Order Resolving Discovery and Protective Order Disputes and Requiring Filings, Docket No. 05-00258, p. 7 (June 14, 2006).

3. Atmos sold, leased, or released its system to AEM, a wholly-owned subsidiary of Atmos, through a process where AEM was the only bidder. *See* Status Conference Transcript at 54 (June 8, 2006).

It is therefore not surprising that the following Phase Two issues, among others, have been raised:

1. How is Atmos compensated for the sale, lease, or release of capacity and is that compensation fair to Atmos's customers?

2. Are Atmos's customers receiving fair compensation for the assets related to the sale, lease, or release of capacity for which they have paid?

3. Does the Authority have the authority to impute to Atmos all or part of the profits that AEM generates through its asset management arrangement with Atmos?

4. Has Atmos oversubscribed to capacity?

5. Did Atmos comply with the Guidelines for Affiliate Transactions when entering into the existing asset management contract with AEM?

See Notice of Status Conference, Docket No. 05-00258 (September 19, 2006) (Phase Two Issues List attached). The parties have agreed that the Phase Two Issues List fairly presents the issues under consideration in Phase Two of this docket. Status Conference Transcript at 4 (September 26, 2006).

Clearly, resolution of these issues cannot be appropriately addressed through the promulgation of a rule that will be generally applied to all natural gas utilities regulated by the Authority. Rather, these issues deal with the specific asset management transactions of a particular natural gas utility, as well as that utility's dealings with its marketing affiliate. Indeed, Chattanooga Gas itself recognizes that the facts and circumstances surrounding each utility's asset management arrangement and affiliate transactions are so distinct that a decision in one case cannot be properly applied to another:

> CGC and Atmos are two very different companies, and they have different asset management agreements and arrangements . . . <u>Because the facts surrounding asset management and affiliate transactions are different for each company</u>, it would be improper for the TRA to make decisions using the facts of the Atmos case that will bind CGC or other natural gas companies."

Response at 2 (emphasis added). In other words, the particular facts of each case will determine the merits-based decision of the Authority on these types of issues. A rulemaking, therefore, is not appropriate.

B. The Parties Matter.

In both Phase One and Phase Two of this docket, the Consumer Advocate is representing the interests of <u>Atmos's gas utility customers</u> rather than utility ratepayers in general. The Consumer Advocate is advancing the interests of these specific ratepayers through its claims that, under the attendant circumstances, Atmos is overcharging them for the utility services that they are receiving.

The Consumer Advocate, therefore, is requesting that the utility bills of these particular ratepayers be reduced to a just and reasonable level. This case is about one utility -- Atmos -- and its gas utility customers. Accordingly, the relief that the Consumer Advocate is seeking in this docket cannot be granted through a rulemaking decision that would be generally applied to all natural gas utilities.

C. The Rates Matter.

Both Phase One and Phase Two of this docket involve utility rates. Indeed, it could not be any clearer from the issues included on the Phase Two Issues List that Phase Two is primarily about utility rates -- virtually every issue on the list involves the amount of money that Atmos's customers pay to Atmos for natural gas utility services. In particular, issues concerning fair compensation to Atmos's customers for Atmos's sale, lease, or release of its capacity to AEM have a direct effect on the customers' utility bills; issues concerning imputation of AEM's asset management profits to Atmos have a direct effect on the customers' utility bills; issues concerning Atmos's potential oversubscription to capacity have a direct effect on the customers' utility bills; and issues concerning Atmos's self-dealing with its affiliate, AEM, have a direct effect on the customers' utility bills. Moreover, the overarching question raised by the Phase Two issues is whether the charges to Atmos's gas utility customers for system capacity and transportation are just and reasonable.

Phase Two of this case is about <u>money</u>. Specifically, Phase Two is about the amount of money that Atmos's customers have to pay to Atmos for regulated services. The law deems such proceedings contested cases, not rulemakings. Tenn. Code Ann. §§ 65-2-101(2), 4-5-102(3) (2004 & 2005). A rulemaking is simply not the appropriate forum for deciding how much money particular customers must pay a particular utility for public utility services.

Chattanooga Gas makes the point that a decision in Phase Two could have the potential to impact other natural gas utilities. Response at 1. This is true, but only under the doctrine of *stare decisis*, where the particular circumstances of each case must be examined to determine if the prior decision has any precedential value. This is also no different than any other rate case proceeding. Within the context of a rate case, the Authority makes many decisions that may be carried forward and applied to other cases under this doctrine. The Authority's ratemaking rationale -- concerning, for example, the amount of revenues, pension costs, incentive pay, depreciation, uncollectible accounts, other operations and maintenance expenses, working capital, other taxes, etc., allowed into utility rates -- may be applied to the circumstances of each case. But, multiple rulemakings are not needed to establish the Authority's treatment of revenues, pension costs, incentive pay, depreciation, uncollectible accounts, other operations and maintenance expense, working capital, other taxes, etc. And, neither is a rulemaking needed in this instance.

Chattanooga Gas also suggests that the Phase Two issues should be addressed within the context of the ACA audits. Response at 3. The Consumer Advocate disagrees. The Phase Two issues are not the type of issues normally addressed through an ACA audit. Indeed, the Phase Two issues are ratemaking issues, not audit issues, and ratemaking issues should be addressed within the context of a contested case. Even if the Authority decided to consider the Phase Two issues in Atmos's ACA audit, it would have to turn the audit docket into a contested case in order to properly address these issues. *See In Re: Review of Nashville Gas Company's IPA Relating To Asset Management Fees,* Order Granting Petition to Intervene, Docket No. 05-00165 (July 19, 2005) (a contested case arising from Nashville's ACA audit). There is no reason to dismiss the contested case that is already underway here simply to convene another contested case to hear the exact same issues.

A contested case is the appropriate forum in this case because Phase Two is about the amount of money flowing back to Atmos's utility customers from the sale, lease, or release of Atmos's system capacity to its affiliate, AEM, under their asset management arrangement, as well as the amount of money that Atmos's utility customers are billed for Atmos's subscription to system capacity. The Authority should stay on the course that it has already established to resolve these issues.

II. THE CONSUMER ADVOCATE WILL BE PREJUDICED IF PHASE II IS DISMISSED.

If Phase Two of this docket is dismissed, the Consumer Advocate and Atmos's customers will be prejudiced. During the Authority Conference held on June 26, 2006, the Authority bifurcated this docket -- deciding to consider issues involving base rates in Phase One and, deciding further, to consider issues involving the asset management agreement, AEM revenue imputation, other income, and performance based ratemaking in Phase Two. *See* Order Addressing Intervention of AEM and the Procedural Schedules for Phases One and Two, Docket No. 05-00258, pp. 2-3 (July 13, 2006). Accordingly, the Consumer Advocate adjusted its discovery requests and re-shaped its testimony to address issues involving only base rates in Phase One of this docket, which has now been completed. The Consumer Advocate believed that it would have the opportunity to address the Phase Two issues in Phase Two of this docket -- as this is exactly what this Authority has ordered. *Id.* Accordingly, if Phase Two of this docket is dismissed without addressing the Phase Two issues, the Consumer Advocate would be prejudiced and the interests of consumers -- specifically, Atmos's customers -- would be harmed.

The Consumer Advocate has every right to get to the bottom of these Phase Two issues, and it fully intends to do so. The amount that Atmos charges ratepayers for regulated utility services, either through base rates, the PGA mechanism, or otherwise, is not a matter of small concern to the Consumer Advocate. And a rulemaking proceeding -- which will not even give the Consumer Advocate the opportunity to discover the proper amount that Atmos's customers should be charged for services in light of Atmos's subscriptions to capacity, asset management arrangements, and affiliate transactions -- is clearly not adequate to address the Phase Two concerns of the Consumer Advocate.

CONCLUSION

For the foregoing reasons, the Authority would err if it dismissed Phase Two of this contested case and, instead, addressed the Phase Two issues through a rulemaking proceeding. The Phase Two issues should be addressed in a contested case format, where each party's rights to discovery of the facts, as well as presentation of evidence and argument in support of its position, are fully protected by the Uniform Administrative Procedures Act and Authority rules.

Respectfully submitted,

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