

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

October 6, 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)	

**RECOMMENDATION OF THE HEARING OFFICER REGARDING THE DISMISSAL
OF PHASE TWO AND THE NEED FOR A RULEMAKING TO RESOLVE ASSET
MANAGEMENT ISSUES**

To avoid any unnecessary delay in the continuation of the Phase Two procedural schedule, the Hearing Officer presents this recommendation to the Panel for consideration at the October 16, 2006 Authority Conference or at such other time as deemed appropriate. The issues discussed herein came before the Hearing Officer as a result of the *Response of Chattanooga Gas Company to the Issues Proposed for Phase II* (“*Response*”) filed by Chattanooga Gas Company (“CGC”) and the related comments filed by Tennessee Regulatory Authority (“Authority”) Investigative Staff (“Investigative Staff”), Atmos Energy Corporation (“Atmos”), Atmos Energy Marketing, LLC (“AEM”), the Atmos Intervention Group (“AIG”), and the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”).

I. RELEVANT PROCEDURAL HISTORY

On June 16, 2006, Atmos filed a motion requesting expedited, interlocutory review by the Panel of the *Order Resolving Discovery and Protective Order Disputes and Requiring Filings* issued by the Hearing Officer on June 14, 2006. On June 22, 2006, the Hearing Officer entered an order granting Atmos permission to proceed with the requested interlocutory review and extending the time for filing responses to the discovery requests.

During the Authority Conference on June 26, 2006, the Panel addressed the interlocutory appeal. As part of its ruling, the Panel voted to bifurcate this docket into two phases. It was explained that Phase One will set base rates without consideration of topics involving the asset management agreement, AEM revenue imputation, other income reported on Atmos's SEC 10K report and the performance based ratemaking mechanism. These specific topics were left for Phase Two. It was also explained that the Phase Two topics would be addressed in this docket by the same Panel, but that the decision of whether the phases would proceed concurrently or consecutively would be left to the Hearing Officer.¹

On July 13, 2006, the Hearing Officer issued an *Order Addressing Intervention of AEM and the Procedural Schedules for Phases One and Two*. In the order, the Hearing Officer established a procedural schedule that required the filing of proposed issues for Phase Two on September 12, 2006.² Pursuant to the procedural schedule, Atmos, the Consumer Advocate, and AIG filed proposed issues for Phase Two.

In order to discuss with the parties the proposed issues for Phase Two, a *Notice of Status Conference* was issued scheduling a Status Conference for 10:00 a.m. on September 26, 2006.

¹ Transcript of Authority Conference, pp. 26-30 (Jun. 26, 2006).

² *Order Addressing Intervention of AEM and the Procedural Schedules for Phases One and Two*, Attachment A (July 13, 2006).

Attached to the notice, was the *Docket No. 05-00258 – Phase Two Issues List*, which included all of the issues proposed by the parties. On September 25, 2006, CGC filed its *Response* to the proposed issues for Phase Two in which CGC stated that “it would be more appropriate for the TRA to consider these issues in a rulemaking proceeding than to establish an industry-wide policy regarding asset management through individual company’s rate cases.”³

The Status Conference was convened on September 26, 2006, at 10:00 a.m. as noticed and 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;

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

CGC – J.W. Luna, Esq. and Jennifer Brundige, Esq., Farmer & Luna, 333 Union Street, Suite 300, Nashville, Tennessee 37201.

During the Status Conference, there was general agreement that the *Docket No. 05-00258 – Phase Two Issues List* accurately described the issues for Phase Two. The parties also agreed, however, that additional issues may need to be listed as the procedural schedule progresses.⁴ At the conclusion of the issues list discussion, the parties were given until September 29, 2006 to file comments on CGC’s *Response*.

³ *Response of Chattanooga Gas Company to the Issues Proposed for Phase II*, 1 (Sept. 25, 2006).

⁴ Transcript of Status Conference, pp. 4-5, 7-12 (Sept. 26, 2006).

II. COMMENTS OF THE PARTIES

A. CGC

CGC urges the Authority to consider the proposed Phase Two issues in a rulemaking rather than a contested case. CGC relies on *Tennessee Cable Association v. Tennessee Public Service Commission* for its position and argues that the proposed issues have the “potential to impact all natural gas utilities regulated by the Tennessee Regulatory Authority.”⁵ As an alternative to a rulemaking, CGC suggested the Hearing Officer enter a limiting order stating that the decisions in this docket are limited to Atmos and have no precedential effect on other utilities.⁶ In support of a limiting order, CGC explained in its *Response* that “CGC and Atmos are two very different companies, and they have different asset management agreements and arrangements.”⁷ Lastly, CGC contends that company-specific determinations with regard to the subject matter of the proposed issues should be addressed in the 2005 actual cost adjustment audit docket, Docket No. 05-00253, if it is still open, or the docket to be opened for the actual cost adjustment audit for the year ending June 30, 2006. In support of this relief, CGC asserts that issues concerning asset management and capacity assets are reviewed through the annual actual cost adjustment audits.⁸

B. Atmos

Citing *Tennessee Cable*, Atmos argues that the asset management issues should be resolved in a rulemaking as they “require the formulation of new policies, rules, and standards

⁵ *Response of Chattanooga Gas Company to the Issues Proposed for Phase II*, 1 (Sept. 25, 2006) (citing *Tennessee Cable Assoc. v. Tennessee Pub. Serv. Comm’n*, 844 S.W.2d 151, 161-62 (Tenn. Ct. App. 1992)); see Transcript of Status Conference, pp. 6 (Sept. 26, 2006).

⁶ *Response of Chattanooga Gas Company to the Issues Proposed for Phase II*, 1-2 (Sept. 25, 2006); Transcript of Status Conference, pp. 6-7 (Sept. 26, 2006).

⁷ *Response of Chattanooga Gas Company to the Issues Proposed for Phase II*, 2 (Sept. 25, 2006)

⁸ *Id.* at 3; see Transcript of Status Conference, pp. 6 (Sept. 26, 2006).

that will govern the future conduct of all regulated gas companies.”⁹ Atmos contends that it has made this argument in this docket as well as in Docket No. 05-00253, which, Atmos contends, includes the same asset management issues.¹⁰ However, Atmos also argues that the Hearing Officer is without the necessary authority to either modify or reverse the Panel’s ruling in Docket No. 05-00253 or reconsider or modify the Panel’s decision to proceed with Phase Two as a contested case. Atmos also concludes that even if the Hearing Officer determines he has

⁹ *Comments of Atmos Energy Corporation Concerning Issues Raised in Response of Chattanooga Gas Company to the Issues Proposed for Phase II*, 7 (Sept. 29, 2006) (citing *Tennessee Cable Assoc. v. Tennessee Pub. Serv. Comm’n*, 844 S.W.2d 151, 161-62 (Tenn. Ct. App. 1992)).

¹⁰ In Docket No. 05-00253, Audit Staff made four recommendations that are relevant to this docket. Briefly, the relevant recommendations in the Audit Report are:

1. a. The Company should allow at least thirty (30) days for a prospective bidder to respond to its request for proposal.
- b. The Company should advertise the request for proposal in appropriate trade publications.
2. a. The Company should provide Audit Staff documentation of the total profits realized by AEM from the sale of customer assets. This documentation should be provided in its annual Actual Cost Audit filing.
- b. The Company should credit 100% of this profit to ratepayers in its actual cost adjustment Account.
- c. The Authority should open a separate docket to address the inclusion of asset management fees in the Company’s performance based ratemaking rider and the appropriate sharing mechanism and percentage applicable to these fees.
- d. The Authority should direct the TRA Staff and Company to submit a proposed revision of the affiliate rules currently included in the performance based ratemaking rider to provide additional guidance to the Company in the selection of the asset manager.
3. The Company should file all future proposed asset management and gas procurement agreements or renewal of the current contract with the Authority for prior approval.
4. The Company should provide a summary report listing all billing adjustments made to the actual cost adjustment recoveries in each annual actual cost adjustment filing.

In re: Atmos Energy Corporation’s Actual Cost Adjustment (ACA) Audit for the Twelve Months Ended June 30, 2005, Docket No. 05-00253, *Notice of Filing by the Utilities Division of the Tennessee Regulatory Authority, Compliance Audit Report of Atmos Energy Corporation Actual Cost Adjustment*, 20-21 (Apr. 21, 2006). The Panel unanimously voted to adopt recommendations numbered 2d, 3 and 4 and to reject recommendations numbered 1 and 2a through c. In the course of developing revisions in accordance with 2d and with regard to recommendations 2a through c, the Panel directed Audit Staff and Atmos to meet to discuss the effects of incorporating the asset management arrangement into the performance-based ratemaking rider. The Panel also voted that in the event agreement on any issue cannot be reached or Audit Staff believes that issues remain unresolved, then the Panel may consider whether to convene a contested case on those issues or to take some other actions. Transcript of Authority Conference, pp. 7-8 (May 15, 2006). During the September 26, 2006, Status Conference, Audit Staff attorney, Monica Smith-Ashford, noted for the record that the Audit Staff did not intend to meet with Atmos with regard to Docket No. 05-00253 until the completion of both phases of Docket No. 05-00258. Transcript of Status Conference, pp. 39-40 (Sept. 26, 2006).

authority, “comity and the orderly and effective administration of Authority dockets demand” that the Panel determines whether to convene a rulemaking.¹¹

As to Docket No. 05-00253, Atmos relies on the May 15, 2006, action of the Panel to withhold a decision on how to proceed with the outstanding asset management issues until after a meeting between Atmos and Audit Staff. Based on this action, Atmos argues that the “presiding panel in Docket No. 05-00253 has ruled on how the asset management issues should be taken up by the Authority, and any request to change or alter the panel’s ruling must be brought before that panel and ruled on by that panel.”¹²

Atmos next turns to the procedural history of Docket No. 05-00258 and notes that the Panel convened this proceeding as a contested case proceeding, not a rulemaking. Atmos also notes that during the June 26, 2006, Authority Conference, the Panel bifurcated the docket with the asset management issues to be heard later in the same docket by the same Panel. Atmos contends that the Hearing Officer may not disturb this ruling of the Panel.¹³

C. AEM

AEM echoes the call for resolution of the present dispute by the Panel.¹⁴ AEM argues that because the Panel determined how to proceed after the filing of the *Report and Recommendation of Investigative Staff* on April 24, 2006, and made later decisions on the manner in which the docket should continue to proceed, any request relative to those decisions should be determined by the Panel.¹⁵ In a footnote, AEM comments that “it is not customary for

¹¹ *Comments of Atmos Energy Corporation Concerning Issues Raised in Response of Chattanooga Gas Company to the Issues Proposed for Phase II*, 8 (Sept. 29, 2006).

¹² *Id.* at 6.

¹³ *Id.* at 6-7.

¹⁴ *Comments of Atmos Energy Marketing, LLC to the Response of Chattanooga Gas Company to the Issues Proposed for Phase II*, 1 (Sept. 29, 2006).

¹⁵ *Id.* at 3.

the Pre-Hearing Officer to consider matters seeking to materially and substantively alter a course previously established by a presiding panel.”¹⁶

D. AIG

AIG contends that both the suggestion that the Phase Two issues be moved to a rulemaking and the suggestion that an order limiting the application of the order to Atmos are “ill advised.”¹⁷ AIG argues that this is a rate case that may result in a reduction of base rates and/or gas costs, and, by definition, rate cases are contested cases.¹⁸ AIG asserts that although a rulemaking may be opened later to address general policy issues, a rulemaking is not the appropriate forum to address the issues raised in this docket. According to AIG, a limiting order is not appropriate as CGC should not be immunized now from any decision in this case. AIG recognizes that rate cases are fact specific, but may also involve legal and policy decisions that are likely to be followed later. AIG argues that CGC is free to point out factual difference between it and Atmos to the Panel.¹⁹

E. Consumer Advocate

The Consumer Advocate opposes dismissal and summarizes the bases for its position with the two succinct claims that: “(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.”²⁰ As to its first basis, the Consumer Advocate cites *Tennessee Cable*, Tenn. Code Ann. § 65-2-101(2) and 4-5-

¹⁶ *Id.* at 4, n.8.

¹⁷ *Response of Atmos Intervention Group to Chattanooga Gas Company's Motion*, 1 (Sept. 29, 2006).

¹⁸ *Id.* (citing Tenn. Code Ann. § 4-5-102(3)).

¹⁹ *Id.* at 2.

²⁰ *Reply of Consumer Advocate and Protection Division to Response of Chattanooga Gas Company to the Issues Proposed for Phase Two*, 1 (Sept. 29, 2006).

102(3), and *Office of the Attorney General v. Tennessee Regulatory Authority*²¹ for the proposition that contested cases are appropriate for 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.”²² According to the Consumer Advocate, Phase Two meets these three criteria.²³ The Consumer Advocate emphasizes that the Phase Two issues are fact specific determinations, involving the customers of Atmos, and the rates paid by those customers.²⁴ The Consumer Advocate also argues that it will be prejudiced if Phase Two is dismissed because it relied on the Panel’s decision to bifurcate the docket and consider asset management issues in a contested case when preparing its Phase One case. In a rulemaking, the Consumer Advocate contends, it will not be able to discover pertinent information as it would be able to do in a contested case.²⁵

The Consumer Advocate also rejects CGC’s other suggestions. Specifically, the Consumer Advocate rejects the suggestion that a limiting order is necessary. It agrees that the ruling in the contested case may apply to CGC. The Consumer Advocate notes, however, that such application would occur only under the doctrine of *stare decisis* and is no different than any ruling in any rate case. Similarly, the Consumer Advocate rejects the suggestion that the issues should be addressed in the actual cost adjustment audit. The Consumer Advocate proclaims the proposed Phase Two issues are ratemaking issues, not audit issues.²⁶

²¹ 2005 WL 3193684 at *10 (Tenn. Ct. App. Nov. 29, 2005).

²² *Reply of Consumer Advocate and Protection Division to Response of Chattanooga Gas Company to the Issues Proposed for Phase Two*, 2 (Sept. 29, 2006).

²³ *Id.*

²⁴ *Id.* at 3-5.

²⁵ *Id.* at 7-8.

²⁶ *Id.* at 6.

F. Investigative Staff

In its written comments filed on September 29, 2006, the Investigative Staff notes that AIG and the Consumer Advocate make compelling arguments. The Investigative Staff then suggests that the Panel address company-specific issues in the Phase Two contested case and thereafter address generic issues, such as “(1) the request for proposal process (“RFP”); (2) the appropriate fee structure (fixed fee or percentage of gain, and sharing percentage); (3) periodic review by outside/independent consultant; and (4) third-party vs. affiliate manager considerations,” in a rulemaking.²⁷ Investigative Staff in its final comment requests that the Panel hear arguments on the issues presented by CGC’s *Response* at the earliest opportunity.²⁸

III. RECOMMENDATIONS

I do not fully adopt all of the arguments asserted in favor of consideration of the issues generated by CGC’s *Response* by the Panel rather than the Hearing Officer. It is my opinion, however, that the most efficient manner in which to proceed is to prepare recommendations for the Panel’s consideration at the October 16, 2006 Authority Conference. My hope is that a decision by the Panel on October 16th will bring any procedural disputes to an end and allow whatever procedure the Panel adopts to move forward without delay.

Based on the filings of the parties, this recommendation shall address three issues: (A) Whether Phase Two of Docket No. 05-00258 should be dismissed and the Phase Two issues addressed through a new rulemaking docket; (B) Whether Phase Two of Docket No. 05-00258 should be dismissed and the Phase Two issues addressed through either Docket No. 05-00253 or Atmos’s next actual cost adjustment audit; and (C) Whether the Panel should issue an order limiting the decisions in Phase Two to the facts surrounding Atmos and its asset management

²⁷ *Reply of TRA Investigative Staff to Chattanooga Gas Company’s Proposal for Rulemaking*, 1-2 (Sept. 29, 2006).

²⁸ *Id.* at 2.

agreement and stating that the decision will have no precedential or binding effect on CGC or other natural gas utilities.

A. Whether Phase Two of Docket No. 05-00258 should be dismissed and the Phase Two issues addressed through a new rulemaking docket?

1. *Tennessee Cable Analysis*

This agency is very familiar with the teachings of *Tennessee Cable*, a case relied on by most of the parties. In this case, the Tennessee Court of Appeals reviewed the manner in which the Tennessee Public Service Commission (“Commission”) used rulemaking and adjudication when considering a regulatory reform plan and technology master plan. In the course of its decision, the Court adopted a test set forth by the Supreme Court of New Jersey. Specifically, the test provides:

an agency’s determination should take the form of rulemaking if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.²⁹

Relying on the test and the actions of the Commission, the Court concluded that the adoption of the regulatory reform plan and technology master plan should have proceeded in a rulemaking.³⁰

²⁹ *Tennessee Cable Assoc. v. Tennessee Pub. Serv. Comm’n*, 844 S.W.2d 151, 162 (Tenn. Ct. App. 1992) (quoting *Metromedia, Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 478 A.2d 742, 751 (1984)).

³⁰ *Id.* at 163.

The issues presented by Phase Two of this docket do not meet most of the qualifications of the test for choosing a rulemaking and the qualifications that are not met weigh in favor of proceeding with a contested case. The first three qualifications for a rulemaking do not exist here. The issues as drafted and attached hereto as Attachment A³¹ apply to the existing circumstances surrounding Atmos's provision of gas to consumers and its relationship with AEM. The issues specifically concern Atmos, not other natural gas utilities. In fact, as to asset management, CGC noted in its *Response* that other natural gas utility companies "have completely different asset management agreements and arrangements than Atmos" and "CGC and Atmos are two very different companies."³² Moreover, the issues are focused on Atmos's present asset management arrangement and use of storage and capacity assets. The resolution of these issues will not operate only in future cases as mentioned in qualification three. Thus, it is my unqualified conclusion that with regard to the issues for Phase Two the first three reasons for choosing a rulemaking do not exist.

The fourth qualification is met. The determination of the Phase Two issues is likely to prescribe a "legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization."³³ It is often true, however, that contested case and rulemaking issues meet this qualification. In most instances, issues that involve legal standards that are expressly provided for or clearly and obviously inferable from statutes do not make their way to a Panel through either a rulemaking or contested case. Thus, while I find this qualification is met, I give to it little weight.

³¹ The Hearing Officer added issue 5(g) to the list during the Status Conference. Transcript of Status Conference, p. 13 (Sept. 26, 2006). All other issues came from the parties' filings of September 12, 2006.

³² *Response of Chattanooga Gas Company to the Issues Proposed for Phase II*, 2 (Sept. 25, 2006).

³³ *Tennessee Cable Assoc. v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 162 (Tenn. Ct. App. 1992) (quoting *Metromedia, Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 478 A.2d 742, 751 (1984)).

Taking a very conservative approach to qualifications five and six, I conclude that these qualifications should be found to exist. It is possible that once the legal and factual determinations are made in Phase Two that decisions that could be characterized as establishing administrative policy decisions will follow. As with qualification four, however, I give my conclusion with respect to qualifications five and six little weight in the overall analysis. To explain, the specific focus of the Phase Two issues to Atmos and its asset management practices limits the application of any administrative policy determinations to instances involving the same or substantially similar circumstances. Any policy decision will not likely constitute an interpretation of general policy as referred to in qualification six. Further, there is nothing that compels policy decisions to be rendered only in rulemakings. In *Office of the Attorney General v. Tennessee Regulatory Authority*, cited by the Consumer Advocate, the Court of Appeals of Tennessee recognized that policy issues may be resolved in a contested case when it concluded that the Authority should not have resolved certain factual and policy issues without a contested case proceeding.³⁴ Thus, as with the fourth qualification, while I find that qualifications five and six are met, I give them little weight.

Based on the above analysis of each of the qualifications for choosing a rulemaking, I conclude that a rulemaking is not appropriate in this instance. The factors weigh heavily in favor of proceeding with a contested case. In my opinion the fact that the first three qualifications have not been met is critical to the overall analysis. As described in *Tennessee Cable*, adjudication “involves individual rights or duties and the determination of disputed factual issues in particular cases.”³⁵ The issues as framed for Phase Two include numerous

³⁴ *Office of the Attorney Gen. v. Tennessee Reg. Auth.*, 2005 WL 3193684, *6 (Tenn. Ct. App. Nov. 29, 2004).

³⁵ *Tennessee Cable Assoc. v. Tennessee Pub. Serv. Comm’n*, 844 S.W.2d 151, 161 (Tenn. Ct. App. 1992)

issues of law and fact the resolutions of which are dependant on the specific circumstances of Atmos's asset management practices.

2. Other Arguments

Two additional arguments deserve comment before leaving the question of whether Phase Two of Docket No. 05-00258 should be dismissed and the Phase Two issues addressed through a new rulemaking docket. The first argument is that the current proceeding is correct because the Phase Two issues may result in an alteration of base rates.³⁶ I agree with this argument. To the extent that any rates are fixed, such action must be done in a contested case. Section 65-2-101(2) of Tennessee Code Annotated defines the term contested case and deems the fixing of rates to be a contested case rather than a rulemaking.³⁷

The second argument is that prejudice would result to those parties that relied upon the Panel's June 26, 2006, decision to address asset management practices in Phase Two when managing their Phase One cases. Based on my familiarity with this docket, it is reasonable to conclude that some of the parties would have acted differently had they known that Phase Two would later be dismissed and converted to a rulemaking proceeding, in which discovery and other adjudicatory rights do not exist. It is likewise reasonable to conclude that the parties relied on the decision of the Panel to bifurcate this docket and the subsequent decision of the Hearing Officer establishing a procedural schedule when crafting their Phase One strategy. Modifying the type of proceeding at this time would likely convert that reasonable reliance into detrimental reliance. Therefore, any modification to the type of proceeding should only occur upon a showing of an unequivocal legal mandate.

³⁶ For example, see Issue 5(a), which addresses whether imputation would reduce Atmos's revenue requirement.

³⁷ See Tenn. Code Ann. § 65-2-101(2) (2004).

3. Conclusion

Based on my analysis of *Tennessee Cable*, the definition of contested case contained in section 65-2-101(2) of Tennessee Code Annotated, and the likely prejudice that could result from a change in the type of proceeding, it is my opinion and recommendation that Phase Two of Docket No. 05-00258 should not be dismissed and the Phase Two issues should not be addressed through a new rulemaking docket. This conclusion should not be construed to infer that I am opposed to a rulemaking. Such is not the case. A rulemaking could be convened at any time to address policy issues affecting natural gas companies generally. For example, as suggested by the Investigative Staff, a determination of general request for proposal guidelines is well-suited to a rulemaking.

B. Whether Phase Two of Docket No. 05-00258 should be dismissed and the Phase Two issues addressed through either Docket No. 05-00253 or Atmos's next actual cost adjustment audit?

I must reject CGC urgings to resolve the Phase Two issues through either Docket No. 05-00253 or Atmos's next actual cost adjustment audit for two reasons. First, CGC's argument that the Phase Two issues should be resolved in an actual cost adjustment docket assumes that the resolutions to those issues will not affect common ratemaking factors. CGC states in its *Response*, "factual issues concerning asset management and the handling of capacity assets are more appropriately handled in the ACA audits and do not impact base rates, the revenue requirement, or any rate design issues included in a rate case."³⁸ At first blush this argument resonates well; however, as previously noted a specific issue in Phase Two involves a determination as to whether the Authority may impute AEM's profits to lower Atmos's revenue

³⁸ *Response of Chattanooga Gas Company to the Issues Proposed for Phase II*, 3 (Sept. 25, 2006).

requirement.³⁹ Therefore, if the Authority were to act as CGC has suggested it would pre-judge or even foreclose this issue. Moreover, during the June 26, 2006 deliberations, the Panel recognized that there could be an adjustment to rates following the conclusion of Phase Two and chose to move forward with a bifurcated contested case.⁴⁰

A second point relevant to this determination is the fact that the related asset management issues were raised in Atmos's most recent actual cost adjustment audit, Docket No. 05-00253, prior to the asset management topics being bifurcated in this docket. The Panel deliberated Docket No. 05-00253 on May 15, 2006. On that date, the Panel adopted certain asset management recommendations, but voted to provide Atmos and Audit Staff time to work together before deciding how to proceed further.⁴¹ Also on May 15, 2006, the Panel voted to move forward with a ratemaking proceeding in Docket No. 05-00258.⁴² Later, on June 26, 2006, as a result of an interlocutory review of a discovery order, the Panel voted to bifurcate Docket No. 05-00258 such that issues involving the asset management agreement, AEM revenue imputation, other income reported on Atmos's SEC 10K report and the performance based ratemaking mechanism would be handled separately.⁴³ These listed topics certainly concern the same subject matter as the audit recommendation in Docket No. 05-00253. I must conclude that when the Panel voted in Docket No. 05-00258 to move forward with the topics in Phase Two of this docket, it did so with full knowledge of its earlier decision in Docket No. 05-00253 and with the intention of keeping the dockets separate.

³⁹ See *supra* note 36.

⁴⁰ Transcript of Authority Conference, p. 29 (June 26, 2006).

⁴¹ See *supra* note 10 (explaining in detail the Audit Staff recommendations and decision of the Panel).

⁴² Transcript of Authority Conference, p. 30 (May 15, 2006).

⁴³ *Id.* at 26-30 (June 26, 2006).

Based on the foregoing, it is my opinion and recommendation that Phase Two of Docket No. 05-00258 should not be dismissed and the Phase Two issues should not be addressed through either Docket No. 05-00253 or Atmos's next actual cost adjustment audit.

C. Whether the Panel should issue an order limiting the decisions in Phase Two to the facts surrounding Atmos and its asset management agreement and stating that the decision will have no precedential or binding effect on CGC or other natural gas utilities?

There is no reason to issue an order limiting the decisions in Phase Two to the facts surrounding Atmos and its asset management practices. As I have discussed, the Phase Two issues are specific to Atmos and will depend on findings of fact specific to Atmos. Thus, by the very nature of the Phase Two issues the decisions will directly apply to only Atmos and its asset management practices.


As to the entry of an order stating that the decision will have no precedential or binding effect on CGC or other natural gas utilities, it is my opinion that such an order would be wholly contrary to the practice of this agency. As suggested by AIG and the Consumer Advocate, this case should not be treated any differently than other proceedings at this agency, and I agree. Any decision made by the Authority may be relied upon in the future to support a decision in a case involving the same or similar facts. CGC has exercised its right to intervene in this docket and will be afforded the same opportunities as the other parties to present its case.

Based on the foregoing it is my opinion and recommendation that the Panel not issue an order (1) limiting the decisions in Phase Two to the facts surrounding Atmos and its asset management agreement or (2) stating that the decision will have no precedential or binding effect on CGC or other natural gas utilities.

IT IS THEREFORE RECOMMENDED:

1) Phase Two of Docket No. 05-00258 should not be dismissed and the Phase Two issues should not be addressed through a new rulemaking docket or any actual cost adjustment audit docket. The Panel should stay the course established during the June 26, 2006, deliberations and support bringing this docket to conclusion in accordance with the procedural schedule adopted on July 13, 2006 and modified on October 6, 2006.

2) The Panel should not issue an order (1) limiting the decisions in Phase Two to the facts surrounding Atmos and its asset management agreement or (2) stating that the decision will have no precedential or binding effect on CGC or other natural gas utilities.



Ron Jones, Director
Acting as Hearing Officer⁴⁴

⁴⁴ 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 Authority Conference, pp. 29-39 (May 15, 2006).

Docket No. 05-00258 – Phase Two Issues List

1. How is Atmos Energy Corporation compensated for the sale, lease, or release of capacity and is that compensation fair to consumers?
 - a. What is the bidding process for the sale, lease, or release of capacity?
 - b. What asset management arrangements or contracts are or have been in place with regard to capacity?
 - c. How are FERC-mandated payments handled?
2. What exactly is the amount of total capacity and what amount of capacity is available for the sale, lease, or release to third parties or affiliates or divisions of Atmos Energy Corporation?
 - a. What is the appropriate level of capacity?
 - b. What has been the record of capacity planning in the past?
 - c. What are the future plans?
3. What is the relation between Atmos Energy Corporation and Atmos Energy Marketing and any other affiliate or division of Atmos Energy Corporation?
 - a. the appropriate relation between parent and affiliate or division
 - b. communications between parent and affiliate or division
 - c. the number of overlapping employees
 - d. the record keeping of the parent and affiliate or division
4. Are consumers receiving fair compensation for the assets related to the sale, lease, or release of capacity for which they have paid?
5. Does the Tennessee Regulatory Authority have the authority to impute to Atmos Energy Corporation all or a portion of the profits Atmos Energy Corporation's separate, non-regulated affiliate corporation, Atmos Energy Marketing, generates through its management of Atmos Energy Corporation's idle gas supply assets?
 - a. If yes, may the Tennessee Regulatory Authority impute those profits to lower Atmos Energy Corporation's revenue requirement for base rates even though the assets are part of Atmos Energy Corporation's gas supply procurement activities, which under established Tennessee Regulatory Authority policy are separately regulated through the Purchased Gas Adjustment mechanism, and not through base rates?
 - b. If the Tennessee Regulatory Authority imputes Atmos Energy Marketing asset management profits to lower Atmos Energy Corporation's revenue requirement for base rates, must the Tennessee Regulatory Authority treat other similarly situated gas companies in a like manner? Can such imputation be accomplished in a contested case, or is a rulemaking required?
 - c. Does the Tennessee Regulatory Authority have the authority to impute Atmos Energy Marketing's asset management profits to Atmos Energy Corporation even though there is no requirement for gas companies to engage in asset management?
 - d. If the Tennessee Regulatory Authority's decision in Phase Two of this docket results in a decision by Atmos Energy Marketing to exercise its right to terminate its asset management contract with Atmos Energy Corporation, can the Tennessee Regulatory Authority order Atmos Energy Corporation to engage in asset management itself? If so, how will the Tennessee Regulatory Authority provide for Atmos Energy Corporation to recover the costs of engaging in those activities,

- and how will the Tennessee Regulatory Authority monitor Atmos Energy Corporation's compliance? Would prudency audits be required?
- e. If the Tennessee Regulatory Authority orders that a portion of the Atmos Energy Marketing asset management profits be imputed to Atmos Energy Corporation, how will the agency determine what percentage of Atmos Energy Marketing revenues are derived from the Atmos Energy Corporation regulated Tennessee assets, versus what percentage are derived from Atmos Energy Corporation regulated assets in other states, or from Atmos Energy Marketing's own separately owned assets?
 - f. If the Tennessee Regulatory Authority orders that a portion of the Atmos Energy Marketing asset management profits be imputed to Atmos Energy Corporation, how will the agency determine the portion of Atmos Energy Marketing revenues that constitute profit and what portion Atmos Energy Marketing must use to meet the costs it incurs?
 - g. What constitutes retroactive ratemaking?
 - h. If the Tennessee Regulatory Authority orders that a portion of the Atmos Energy Marketing asset management profits be imputed to Atmos Energy Corporation, how will the Tennessee Regulatory Authority determine this amount consistent with the prohibition against retroactive ratemaking? Would the Tennessee Regulatory Authority have to reach a determination as to the amount of profit Atmos Energy Marketing will make in a particular future time period? If the Tennessee Regulatory Authority orders that a percentage of the Atmos Energy Marketing profits be imputed to Atmos Energy Corporation, how will the Tennessee Regulatory Authority monitor compliance? Would it require regular audits from Tennessee Regulatory Authority Staff? Does the Tennessee Regulatory Authority have the authority to audit non-regulated affiliates such as Atmos Energy Marketing?
6. Did Atmos Energy Corporation comply with the Guidelines for Affiliate Transactions entering into the existing asset management contract with Atmos Energy Marketing? If so, does the Tennessee Regulatory Authority have the Authority to invalidate the existing contract or change the terms of the existing contract? If the contract is invalidated, is Atmos Energy Marketing entitled to a refund of all or a portion of the annual lump sum fee it pays under the contract for the right to manage Atmos Energy Corporation's assets that is currently flowed through 100% to consumers?
 7. Should Atmos Energy Corporation share in the lump sum fee it receives from Atmos Energy Marketing under the terms under the asset management contract through its existing Performance Based Ratemaking ("PBR") plan? If so, how would such a change affect the balance of incentives in the current PBR plan? If the Tennessee Regulatory Authority orders that all or a portion of Atmos Energy Marketing asset management profits be imputed to Atmos Energy Corporation, how would the balance of the incentives in the current PBR be affected? Would such action render the PBR plan ineffective or invalid? Would such action require reversal of the Authority's orders in the PBR dockets?
 8. Whether Atmos Energy Corporation has oversubscribed to storage and capacity assets to handle the Company's jurisdictional requirements?
 9. Whether Atmos Energy Corporation is currently utilizing its gas storage assets to maximize benefits to ratepayers?