

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**November 8, 2007**

<b>IN RE:</b>	)	
	)	
<b>DOCKET TO EVALUATE ATMOS</b>	)	<b>DOCKET NO.</b>
<b>ENERGY CORPORATION'S GAS</b>	)	<b>07-00225</b>
<b>PURCHASES AND RELATED SHARING</b>	)	
<b>INCENTIVES</b>	)	

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**ORDER ON NOVEMBER 5, 2007 PRE-HEARING CONFERENCE**

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This docket came before the Hearing Officer at a Pre-Hearing Conference to establish a procedural schedule and to address any issues raised by the parties either through filings made prior to November 5, 2007, or orally at the start of the Pre-Hearing Conference.

**I. RELEVANT PROCEDURAL HISTORY**

On November 6, 2006, a majority of the panel assigned to Docket Nos. 05-00253<sup>1</sup> and 05-00258<sup>2</sup> voted to allow the parties to file briefs regarding whether Docket No. 05-00253 or Docket No. 05-00258 is the appropriate forum to address asset management issues and the manner in which resolution of the issues should proceed.<sup>3</sup> On November 20, 2006, the Consumer Advocate filed its brief in which it asserted its preference for proceeding in Docket No. 05-00258.<sup>4</sup> However, the Consumer Advocate also stated that it would not object to the

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<sup>1</sup> *In re: Atmos Energy Corporation's Annual Cost Adjustment (ACA) for the Twelve Months Ended June 30, 2005.*

<sup>2</sup> *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.*

<sup>3</sup> Transcript of Authority Conference, pp. 8-9 (Nov. 6, 2006).

<sup>4</sup> *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, *Brief of the Consumer Advocate and Protection Division on the Appropriate Forum to Address Asset Management Issues*, 3 (Nov. 20, 2007).

consideration of the issues in Docket No. 05-00258 as part of Docket No. 05-00253, as long as the following conditions were adopted:

(1) the Authority allows all of the parties in Docket No. 05-00258 to intervene without limitation in Docket No. 05-00253; (2) Docket No. 05-00253 is conducted as a full-scale contested case proceeding, with all attendant rights and privileges; (3) all of the asset management issues adopted in Docket No. 05-00258 in the Order Adopting Phase Two Issues and Modifying the Phase Two Procedural Schedule are heard without limitation and decided in Docket No. 05-00253; and (4) the remedies available in Docket No. 05-00258 are in no way limited under Docket No. 05-00253.<sup>5</sup>

Briefs were also filed by Atmos Energy Corporation (“Atmos”), the Atmos Intervention Group, the Investigative Staff of the Tennessee Regulatory Authority, and Chattanooga Gas Company.

At the August 20, 2007 Authority Conference, the panel assigned to Docket Nos. 05-00253 and 05-00258 voted to create a new docket as a result of the panel’s decisions to close Docket Nos. 05-00253 and 05-00258.<sup>6</sup> The new docket was later assigned Docket No. 07-00225. As part of the decision to open Docket No. 07-00225, the panel voted to impose the conditions proposed by the Consumer Advocate, but modified the result of the conditions to take into consideration the panel’s decision to create Docket No. 07-00225 rather than transferring all Docket No. 05-00258 issues into Docket No. 05-00253. Thus, for example, all of the asset management issues adopted in Docket No. 05-00258 in the *Order Adopting Phase Two Issues and Modifying the Phase Two Procedural Schedule* are to be heard without limitation in this docket as are any issues outstanding in Docket No. 05-00253.<sup>7</sup> The panel also agreed that any party that had participated in either of the two closed dockets would be permitted to intervene automatically in Docket No. 07-00225, if the party chooses to do so.<sup>8</sup> Given the decision with regard to interventions, the panel voted to grant the petitions to intervene filed by Stand Energy

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<sup>5</sup> *Id.* at 4.

<sup>6</sup> Transcript of Authority Conference, pp. 29-50 (Aug. 20, 2007).

<sup>7</sup> *See id.* at 41-42.

<sup>8</sup> *See id.*

Corporation (“Stand”) on June 21, 2007, in Docket No. 05-00253 and on December 15, 2006, in Docket No. 05-00258 so that Stand would be permitted to intervene automatically in Docket No. 07-00225.<sup>9</sup>

On October 12, 2007, Atmos and the Consumer Advocate filed a *Joint Motion Calling for a Prehearing Conference to Set Procedural Schedule*. The motion specifically requested that the Hearing Officer schedule a conference for November 5, 2007, to establish a procedural schedule and address any other appropriate matters. An order granting the motion was issued on October 30, 2007. The order set the conference for 12:30 p.m. on Monday, November 5, 2007. Also on October 30, 2007, a *Notice of Pre-Hearing Conference* was issued notifying recipients that the purposes of the Pre-Hearing Conference are to establish a procedural schedule and to address any issues raised by the parties either through filings made prior to November 5, 2007, or orally at the start of the Pre-Hearing Conference.<sup>10</sup>

On November 2, 2007, Atmos Energy Marketing (“AEM”) and SouthStar Energy Services LLC d/b/a Georgia Natural Gas (“SouthStar”) filed petitions to intervene. No other filings were made in advance of the Pre-Hearing Conference.

The Hearing Officer convened the Pre-Hearing Conference as noticed at 12:30 p.m. on November 5, 2007, in the Hearing Room of the Tennessee Regulatory Authority. Entities in attendance were as follows:

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

**Atmos** – A. Scott Ross, Esq., Neal & Harwell, 150 4th Avenue North, Suite 2000, Nashville, Tennessee, 37219;

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

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<sup>9</sup> See *id.* at 44-45.

<sup>10</sup> *Notice of Pre-Hearing Conference* (Oct. 30, 2007).

**SouthStar** – David R. Esquivel, Esq., Bass, Berry & Sims PLC, 315 Deaderick Street, Suite 2700, Nashville, Tennessee 37238; and

**Stand** – D. Billye Sanders, Esq., Waller, Lansden, Dortch & Davis, LLP, 511 Union Street, Suite 2700, Nashville, Tennessee 37219.

## **II. PETITIONS TO INTERVENE**

### **A. SouthStar's Petition to Intervene**

SouthStar filed a petition to intervene on November 2, 2007. In its petition, SouthStar asserts that the resolution of issues regarding the management and use of the assets of Atmos and its affiliates may affect SouthStar's "rights, duties, privileges, immunities, or other legal interests."<sup>11</sup> SouthStar further asserts that granting its petition will not "impair the interests of justice or the orderly and prompt conduct of the proceedings."<sup>12</sup> Tennessee Code Annotated Section 4-5-310(a) sets forth the following criteria for granting petitions to intervene:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of the law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.<sup>13</sup>

SouthStar was not a party to either Docket No. 05-00253 or Docket No. 05-00258; therefore, it must satisfy the requirements of Tennessee Code Annotated Section 4-5-310 before being permitted to intervene. No party objected to the petition to intervene during the Pre-Hearing Conference, and the petition was granted. Granting the petition is justified because it

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<sup>11</sup> *Petition to Intervene of SouthStar Energy Services LLC d/b/a Georgia Natural Gas*, 1 (Nov. 2, 2007).

<sup>12</sup> *Id.*

<sup>13</sup> Tenn. Code Ann. § 4-5-310(a) (2006 Repl.).

was timely filed and substantiates that SouthStar's legal interests may be affected by this docket. Further, SouthStar's intervention will not impair the interests of justice or the orderly and prompt conduct of this docket.

**B. AEM's Petition to Intervene**

AEM filed a petition to intervene in this docket on November 2, 2007. AEM was granted permission to intervene in Docket No. 05-00258 at the status conference held on June 30, 2006.<sup>14</sup> During the Pre-Hearing Conference, the Hearing Officer granted the petition for intervention in Docket No. 07-00225. Granting the intervention is simply an administrative action given the determination of the panel in Docket Nos. 05-00253 and 05-00258 that parties to those dockets would have the option to automatically become parties to Docket No. 07-00225.

**C. Future Interventions**

During the Pre-Hearing Conference, the Hearing Officer clarified that any entity that was a party to Docket No. 05-00253 or Docket No. 05-00258 and that wishes to participate in this docket should file a notice of intent stating such. Requiring a notice of intent to be filed in this docket will ensure that the record in this docket is complete and stands on its own - separate and apart from the records of Docket Nos. 05-00253 and 05-00258. As Atmos is the subject of this docket there is no need for it to file a notice of intent; however, the Consumer Advocate and Stand should each file a notice of intent indicating their desire to participate in this docket as a party.

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<sup>14</sup> See *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 Addressing Intervention of AEM and the Procedural Schedules for Phases One and Two*, 4 (July 13, 2006).

### III. PROCEDURAL SCHEDULE

The discussion of the procedural schedule dominated the Pre-Hearing Conference. The parties raised the following issues: (1) whether the Consumer Advocate, Stand, AEM, and SouthStar should file petitions that include a short and plain statement of claims; (2) the need for two discovery rounds prior to the filing of pre-filed direct testimony by the Consumer Advocate, Stand, and SouthStar; (3) the number of discovery requests that the Consumer Advocate, Stand, and SouthStar would be permitted to submit to Atmos; (4) whether discovery requests that mirror a factual issue on the issues list should be counted against a party's allowed number of discovery requests; and (5) the scope of the subject of the questions to be asked as part of the second round of discovery propounded in advance of the pre-filed direct testimony.

As to the first issue, the Consumer Advocate, Stand, AEM, and SouthStar are required to identify their claims with regard to the issues to be decided in this docket, starting with the issues list adopted in Docket No. 05-00258 (attached hereto as Attachment A).<sup>15</sup> This requirement is qualified, however, by recognition that the parties may not be able to fully describe their claims as to each issue without engaging in discovery. The argument expressed by the Consumer Advocate and Stand that a statement of claims is not needed because the issues list adopted in Docket No. 05-00258 is complete and is the appropriate starting point is insufficient. While the issues list may in fact be complete and is being used as a starting point, requiring a statement of claims to the best of the parties' abilities at this time is appropriate as it may facilitate a better understanding of each issue and, thereby, narrow the issues to be litigated.

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<sup>15</sup> See *Id. Order Adopting Phase Two Issues and Modifying the Phase Two Procedural Schedule*, Attachment A (Oct. 6, 2006).

Given this resolution of the first issue, a procedural schedule was developed during the Pre-Hearing Conference for the preliminary phases – the finalization of the issues and the entry of a protective order. The schedule is as follows:

<b>November 19, 2007</b>	The Consumer Advocate, Stand, SouthStar, and AEM shall file a short and plain statement of their claims with regard to each issue to be decided in this docket, starting with the issues listed in Attachment A to this order. Additionally, the parties may argue in favor of adding additional issues to the list or deleting issues from the list. Finally, the parties shall identify any issues the parties determine to be legal issues or issues that should be decided as threshold issues.
<b>December 3, 2007</b>	Atmos shall file its response to the filings of November 19, 2007.
<b>December 13, 2007</b>	The Hearing Officer shall convene a status conference at 9:00 a.m. in the Tennessee Regulatory Authority Hearing Room to resolve any disputes with regard to the issues list and to set further dates in the procedural schedule.
<b>December 20, 2007</b>	The parties should file an agreed protective order or, if no agreement can be reached, a statement of the disputed issues along with the parties' positions.
<b>January 11, 2008</b>	The Hearing Officer shall convene a status conference following the status conference in Docket No. 07-00020 in the Tennessee Regulatory Authority Hearing Room to resolve any disputes with regard to the protective order.

There is no need at this time to resolve the remaining four issues raised by the parties, because the adopted procedural schedule does not address the timing or other details of discovery. The remaining issues will be addressed at the appropriate time absent an agreement by the parties. The parties are encouraged to discuss these issues over the next month in an effort to reach a compromise.

#### **IV. DEFERRAL ORDER**

At the outset of the Pre-Hearing Conference, Atmos made an oral motion requesting that the Authority enter an order allowing it to defer the costs associated with litigating this docket. Atmos explained that obtaining an order allowing the deferral is a Generally Accepted Accounting Principles ("GAAP") requirement. Atmos also stated that issuing a deferral order is

not a pronouncement as to whether the costs will be recoverable in the future. Atmos agreed that determination would be an issue for the hearing.

During the Pre-Hearing Conference, Atmos was ordered to file the Financial Accounting Standards Board standard justifying Atmos' position. On November 6, 2007, Atmos filed Financial Accounting Standard ("FAS") No. 71 and referenced paragraph 9. The paragraph states:

9. Rate actions of a regulator can provide reasonable assurance of the existence of an asset. An enterprise shall capitalize all or part of an incurred cost<sup>5</sup> that would otherwise be charged to expense if both of the following criteria are met:
- a. It is probable<sup>6</sup> that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes.
  - b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate-adjustment clause, this criterion requires that the regulator's intent clearly be to permit recovery of the previously incurred cost.

FAS71, Footnote 5 – An *incurred cost* is “a cost arising from cash paid out or obligation to pay for an acquired asset or service, a loss from any cause that has been sustained and has been or must be paid for” (Eric L. Kohler, *A Dictionary for Accountants*, 5th ed. [Englewood Cliffs, N.J.: Prentice-Hall, Inc. 1975], p. 253).

FAS71, Footnote 6 – The term *probable* is used in this Statement with its usual general meaning, rather than in a specific technical sense, and refers to that which can reasonably be expected or believed on the basis of available evidence or logic but is neither certain nor proved (*Webster's New World Dictionary of the American Language*, 2d college ed. [New York and Cleveland: World Publishing Company 1972], p. 1132). That is the meaning referred to by FASB Concepts Statement No. 3, *Elements of Financial Statements of Business Enterprises*.<sup>16</sup>

No party objected to Atmos' motion during the Pre-Hearing Conference; however, at that time no party knew the specific support upon which Atmos based its request. Having now

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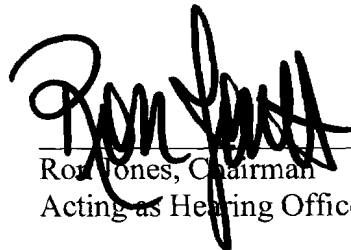
<sup>16</sup> *Statement of Financial Accounting Standards No. 71*, Financial Accounting Standards Board of the Financial Accounting Foundation, para. 9 (December 1982) (filed on Nov. 6, 2007).



received the specific reference and recognizing that it is multi-faceted, I have determined that it is appropriate to afford all parties an opportunity to speak to the request. Therefore, any party who wishes to object to the request of Atmos for an order allowing it to defer costs associated with this litigation shall file a detailed explanation of its objection by Monday, November 19, 2007.

**IT IS THEREFORE ORDERED THAT:**

1. The petitions to intervene filed by Atmos Energy Marketing and SouthStar Energy Services LLC d/b/a Georgia Natural Gas are granted.
2. Any party to Docket No. 05-00253 or Docket No. 05-00258 that wishes to participate in this proceeding as a party shall file a notice of intent in Docket No. 07-00225.
3. The procedural schedule set forth herein is adopted. Any request to alter this schedule shall be in writing and shall state whether any party objects to the proposed alteration.
4. Detailed objections to the oral motion of Atmos requesting an order to defer costs associated with the litigation of this docket shall be filed by **Monday, November 19, 2007**.

  
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Ron Jones, Chairman  
Acting as Hearing Officer<sup>17</sup>

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<sup>17</sup> During the deliberations in Docket Nos. 05-00253 and 05-00258 on August 20, 2007, the panel voted to open a new docket and appointed Director Jones to serve as the Hearing Officer for the purposes of preparing Docket No. 07-00225 for hearing by the panel. Transcript of Authority Conference, pp. 42-43 (Aug. 20, 2007).

## **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?