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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:

ATMOS ENERGY CORPORATION	**)**	
GENERAL RATE CASE AND PETITION	**)**	
TO ADOPT ANNUAL REVIEW	**)**	**Docket No. 14-00146**
MECHANISM AND ARM TARIFF	**)**	
	)	

RESPONSE IN OPPOSITION TO
THE CONSUMER ADVOCATE'S MOTION FOR LEAVE
TO FILE SUPPLEMENTAL TESTIMONY

Atmos Energy respectfully opposes the Consumer Advocate's Motion for Leave to File Supplemental Testimony, and respectfully moves to strike the proffered supplemental testimony of Hal Novak. How and why the parties resolved the 12-00064 docket is entirely irrelevant to this proceeding. What the parties discussed in their settlement negotiations, or what positions may have been maintained, compromised, or left unresolved are protected matters under Rule 408 of the Tennessee Rules of Evidence. Mr. Novak's testimony improperly implies inside knowledge of the parties' negotiations, as a participant in some of the discussions. Public disclosure of such discussions would be utterly improper and should not be allowed under Rule 408. And Mr. Novak's proposed testimony would violate the express terms of the Agreement itself.

Separately, Mr. Novak's testimony is untimely under the amended Procedural Schedule in this matter. This is not a simple matter of whether to allow Mr. Novak's testimony as a belated addition to the record in this matter. Mr. Novak's testimony not only is improper, and

inadmissible, and untimely, it is factually incorrect in important respects. If it were allowed, Atmos Energy would have to request – and for the record does hereby request in the alternative – leave to respond to Mr. Novak's belated supplemental testimony. Instead, the Advocate's untimely request should be denied and the testimony stricken.

A. The proposed supplemental testimony is untimely.

As an initial matter, the motion should be denied because it is not timely. On March 11, 2015, the TRA issued an Order Amending Procedural Schedule mandating that the Advocate's Pre-filed testimony be filed by April 7, 2015.[1] This itself was an extension of time for the Advocate's testimony. The Advocate now attempts to submit supplemental testimony two weeks *beyond* the extended deadline. Their request comes in a case with an already-abbreviated procedural schedule and a fast approaching hearing date. If Mr. Novak's testimony were allowed, Atmos Energy would be forced to respond to it, as in addition to being inadmissible and late, it is wrong in material respects. And this would further complicate an already-tight schedule. Accordingly, for this reason alone, the Advocate's Motion for Leave to File Supplemental Testimony should be denied.

B. Mr. Novak's proposed testimony is improper and inadmissible.

The Advocate seeks to submit proof regarding the parties' settlement negotiations in a prior docket. Such matters have no relevance here. Their settlement negotiations and the terms of the prior settlement are entirely inadmissible under Rules 401, 403 and 408, Tenn. R. Evid., and the terms of the Settlement Agreement in that prior case, TRA Docket No. 12-00064.

Evidence of settlement discussions is improper and inadmissible under Rule 408 of the Tennessee Rules of Evidence. Rule 408 provides,

[1] TRA Docket No. 14-00146, *Order Amending Procedural Schedule*, filed March 11, 2015.

> Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . .[2]

The purpose of Rule 408 is "to encourage settlement of suits by forbidding a party from pointing to an opponent's settlement offer as proof that the opponent thought that he would lose. The rule promotes settlement through a free exchange of offers and the recognition that an offer of settlement may not necessarily reflect the belief that the adversary's claim has merit."[3] Rule 408 prohibits the admission of evidence obtained during settlement negotiations when such evidence is offered to "prove liability for or invalidity of a civil claim or its amount."[4] Rule 408 expressly states: "Evidence of conduct or statements made in compromise negotiations is . . . *not admissible*." (Emphasis supplied).

The Advocate's proposed testimony directly contravenes both the letter and purpose of Rule 408. Mr. Novak seeks to testify concerning the parties' give and take during settlement discussions in a prior matter. He seeks to prove that, contrary to the express terms of the Settlement Agreement itself, Atmos Energy in fact agreed to a compromise that included what Mr. Novak believes is a concession on an issue that has arisen again in this case. This is *exactly* the kind of testimony that Rule 408 is designed to preclude. The Rule protects the privacy of settlement discussions precisely so that parties will be *encouraged* to compromise – to engage in give and take – knowing that their discussions and compromises will not be used against them in later proceedings. It is important to emphasize here that Mr. Novak's proposed testimony seeks

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[2] Tenn. R. Evid. 408.
[3] *Vafaie v. Owens*, No. 01A01-9510-CV-00472, 1996 WL 502133, at *8 (Tenn. Ct. App. Sept. 6, 1996) (citing *Evans v. Troutman*, 817 F.2d 104 (6th Cir.1987)) (internal quotations omitted).
[4] *Vafaie*, 1996 WL 502133, at *9.

to go *behind* the terms of the Settlement Agreement itself and to discuss the give and take that led up to it. That is exactly what Rule 408 forbids, and his testimony should be disallowed on these grounds alone.

Beyond Rule 408, Mr. Novak's testimony is simply irrelevant to any issue in this case. How the parties reached their resolution of the Company's last rate case does not tend to prove any fact that "is of consequence to the determination" of the present action, the standard of relevance under Rule 401, Tenn. R. Evid. The parties' settlement discussions in the last case simply have no bearing on any issue that must be decided in this one. And even if, for the sake of argument, one could conceive of some slender theory of relevance, the proposed supplemental testimony should be excluded under Rule 403, as any possible probative value is far outweighed by the danger of unfair prejudice and confusion of the issues. At a public hearing, the Authority simply should not entertain testimony and counter-testimony about what the parties traded, one thing for another, in the course of their settlement negotiations in a prior matter. Such a result would put a serious chill on future settlement discussions in all Authority cases – a chill that is precisely contrary to the purpose and intent of Rule 408.

Courts have long recognized a public policy rationale behind the rule that "negotiated compromises should be encouraged, and litigants will be discouraged from attempting compromises if their proposals can be used against them in the event negotiation fails."[5] Indeed, when the federal version of Rule 408 was enacted, the Advisory Committee commented that "[a] more consistently impressive ground [supporting the exclusion of compromises] is promotion of

[5] Lynne H. Rambo, Impeaching Lying Parties with Their Statements During Negotiation: Demysticizing the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes, 75 Wash. L. Rev. 1037, 1046-47 (2000) (citing *Moffitt-West Drug Co. v. Byrd*, 92 F. 290, 292 (8th Cir. 1899) ("If every offer to buy peace could be used as evidence against him who presents it, many settlements would be prevented, and unnecessary litigation would be produced and prolonged."); *Graff v. Fox*, 204 Ill. App. 598, 604 (1917) ("Admissions ... when made for the purpose of effecting a compromise of the matter in dispute, should be excluded as evidence on the ground of public policy."); *Eckhardt v. Harder*, 160 Wash. 207, 211, 294 P. 981, 983 (1931) (holding offer inadmissible because "[t]he law favors the settlement of controversies out of court")).

the public policy favoring the compromise and settlement of dispute."[6] Dean Wigmore aptly observed that settlement negotiations should be excluded because "as a matter of interpretation or inference, [a settlement offer] does not signify an admission at all," but rather merely a "desire for peace." [7]

Mr. Novak's testimony also contravenes the terms of the 12-00064 Settlement Agreement itself, as the Authority's decision in Docket No. 14-00081 makes clear. The settlement agreement reached in Docket No. 12-00064 provides that neither party will be bound by a position asserted in that proceeding or any cost allocation methodology agreed upon. As the Authority noted in TRA Docket No. 14-00081, paragraph 14 of the settlement agreement provides:

> The Parties agree to support this Stipulation and Settlement Agreement before the Authority in any hearing, proposed order, or brief conducted or filed in this proceeding; provided, however, that the settlement of any issue provided for herein shall not be cited as precedent by any of the Parties hereto in any unrelated or separate proceeding or docket before the Authority. The provisions of this Settlement Agreement are agreements reached in compromise and solely for the purpose of settlement of this matter. They do not necessarily reflect the positions asserted by any party, and no party to this Settlement Agreement waives the right to assert any position in any future proceeding, in this or any other jurisdiction. **None of the signatories to this Settlement Agreement shall be deemed to have acquiesced in any ratemaking or accounting methodology or procedural principle, including without limitation, any cost of service determination or cost allocation or revenue-related methodology**.[8]

The Authority further noted in approving the Advocate's Motion to Dismiss in Docket No. 14-00081 that the *Order Approving Settlement Agreement* in Docket No. 12-00064 "does not constitute a binding consent decree that controls the parties' or the Authority's actions in [other

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[6] *Id*. at 1047.
[7] *Id*. at 1102 (citing 4 John Henry Wigmore, Evidence §1061, at 36 (James H. Chadbourne rev. ed. 1972)).
[8] TRA Docket No. 14-00081, *Order Granting CAD's Motion To Dismiss*, filed December 8, 2014, page 15-16, ¶ 6 (emphasis added).

dockets]."[9] The Authority found that the Settlement Agreement provides by its terms that it "shall not have any precedential effect in any future proceeding or be binding on any of the Parties in this or any other jurisdiction except to the limited extent necessary to implement the provisions hereof."[10]

The Order states that "the settlement of any issue pursuant to the Stipulation and Settlement Agreement shall not be cited by the Parties or any other entity as binding precedent in any other proceeding before the Authority or any court, state or federal."[11] The Authority concluded that "in accepting the Stipulation and Settlement Agreement, the Authority was not adopting any specific means, models or methodologies used to calculate the resulting agreed-upon terms."[12] The Authority further concluded that "Atmos Energy's tariff rates established in its most recent general rate case are not based on an adopted ratemaking methodology but instead are based on the Authority's approval of negotiated rates which the Authority found were within the 'zone of reasonableness' and which promoted the public interest by balancing the interests of the consumer and the Company."[13]

This proceeding is not an outgrowth of the 12-00064 settlement. Indeed, it was filed because the Authority's Order in 14-00081 held that prior settlement is *not* binding on future cases. How the parties resolved the 12-00064 docket, and more specifically what compromises were made in the course of those settlement negotiations, should have absolutely no bearing on the resolution of this docket. In that case, the Parties had opposing views on many issues, but decided to reach a global settlement by setting some of those differences aside, agreeing *not to*

[9] *Id*. at 14, ¶ 5.
[10] *Id*. at 14-15, ¶ 5.
[11] *Id*. at 15, ¶ 5.
[12] *Id*. at 16, ¶ 6
[13] *Id*. at 17, ¶ 6

agree on certain issues, and reaching a resolution that expressly reserved all rights for *both* parties as to future cases. Their settlement negotiations are irrelevant and utterly inadmissible.

CONCLUSION

For the foregoing reasons, the Advocate's Motion should be denied and the proffered supplemental testimony should be stricken from the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel of record, this the 23rd day of April, 2015.

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