



BOULT ■ CUMMINGS®
CONNERS ■ BERRY PLC

Henry Walker
(615) 252-2363
Fax: (615) 252-6363
Email: hwalker@boultcummings.com

June 16, 2006

Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Re: *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 Number: 05-00258

Dear Chairman Jones:

You have asked the parties to respond to the letter you received from Director Pat Miller, dated June 8, 2006. The letter stated:

In order to properly evaluate the various positions of the parties and give the appropriate weight to such positions, it is essential that all attorneys disclose their clients. Therefore, I am requesting that you, as Hearing Officer, require this disclosure at your earliest convenience.

The Atmos Intervention Group ("AIG") is represented in this proceeding by the undersigned, Henry Walker of the firm Boulton, Cummings, Conners & Berry, PLC. AIG consists entirely of customers of Atmos Energy Corporation ("Atmos"). Berkline and Koch Foods are representative members of AIG. Other members of the group have indicated that they wish to remain anonymous for fear of economic retaliation by Atmos or its affiliate, Atmos Energy Marketing ("AEM"). As explained in the attached affidavit of Mr. Earl Burton,¹ these members, as well as potential members who may join AIG, are dependant upon AEM and/or Atmos for gas supplies. They have serious concerns that, if a customer's membership in AIG is publicly announced, AEM and/or AEG could (a) require the customer to put up collateral in order to continue purchasing gas, (b) curtail gas deliveries on peak days, or (c) discontinue marketing gas supplies to that captive customer.

To each of these customers, natural gas is a critical ingredient in the industrial process. They cannot take any risks that their supply will be diminished or that their gas costs will increase as the result of discretionary decisions by Atmos or AEM. Each customer has a strong interest in the outcome of this rate case but the customer's position on most issues is adverse to AEM and Atmos. Those two utilities have monopoly or near-monopoly control over the customer's gas supply and a

¹ The attached affidavit is a facsimile copy. The original will be filed on Monday, June 19.

June 16, 2006

Page 2

financial incentive to deter these industrial customers from participating in the case and raising issues about the relationship between Atmos and AEM. Despite the potential benefits of future rate reductions and tariff improvements, these customers cannot afford to participate in the case at the risk of possible economic retaliation. For that reason, most AIG members have chosen to remain anonymous and rely on counsel and expert consultants to represent their interests in this proceeding.

Under the law in Tennessee, these industrial customers have the right to participate in this case without being exposed to possible retaliation. In such situations, federal and state courts, including Tennessee courts, have applied a balancing test, weighing a party's need for anonymity against the general presumption that parties' identities are public information and the risk of unfairness to the opposing party. Where the risk of harm outweighs any prejudice to other parties, a litigant may remain anonymous. See Does I through XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir. 2000); Gomez v. Buckeye Sugars, 60 F.R.D. 106, 107 (N.D. Ohio, 1973) (permitting employers to use pseudonyms to protect them from potential retaliation by employer,); see Doe v. HCA Health Services, 46 S.W.3d 191, 193 (Tenn. 2001) (plaintiff allowed to remain anonymous because of fear of retaliation against her employer.)

In the Advanced Textile case, a case involving a suit by employees against an employer, the Ninth Circuit reviewed similar cases from around the country and concluded (at 1068):

We join in our sister circuits and hold that a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity. We further hold that in cases where, as here, pseudonyms are used to shield the anonymous party from retaliation, the district court should determine the need for anonymity by evaluating the following factors: (1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, and (3) the anonymous party's vulnerability to such retaliation.

The Tennessee Supreme Court has similarly adopted a balancing test and ruled that litigants may remain anonymous where warranted by the state's interest in protecting a party from possible recrimination and in encouraging individuals to participate in proceedings before a state regulatory board.

Weighing the complainant's desire for confidentiality against the possible prejudice to other parties, the Tennessee Supreme Court agreed with the Attorney General that those who make complaints to the Board of Professional Responsibility, a state regulatory board, may remain anonymous. Doe v. Doe, 127 S.W.3d 728, 735 (Tenn. 2004). The Court explained:

We consider next the interest of protecting anonymity. The Attorney General contends that the State has a compelling interest in protecting the anonymity of complainants or participants who might not otherwise file valid complaints or provide information to the Board in the absence of the confidentiality provision. We recognize in Doe v. Bd. of Prof'l

Responsibility that the rule serves to protect complainants from possible recrimination while a thorough investigation is conducted and that “removing or unnecessarily qualifying the confidentiality requirement would eliminate many sources of information and reduce complaints received by the Board from lay citizens, litigants, lawyers, and judges.” 104 S.W.3d at 472. As the United States Supreme Court assumed in Landmark Communications, and as we stated in Doe, confidentiality serves a legitimate state interest in encouraging the filing of complaints and the willing participation of relevant witnesses. 435 U.S. at 835, 841.

The same logic applies to the members of AIG who desire to be represented before the Tennessee Regulatory Authority but fear possible retaliation if publicly identified. If the TRA were to require all such parties to identify themselves, these customers would be reluctant to participate in rate proceedings. The TRA would be deprived of relevant information about the needs of those customers and their concerns about Atmos and AEM.

As discussed in the Doe case, Tennessee, like other state and federal jurisdictions, has recognized that a balancing test should be applied to consider the benefits of confidentiality against the possibility of prejudice to other parties.

In this case, once AIG identified two representative members of the customer group, Atmos raised no further objection to the group’s request to intervene. Atmos, after all, already knows who its customers are and understands that customers in one class, such as industrial customers, have different interests from residential and commercial customers. Atmos has not asked the identity of AIG’s members nor could Atmos reasonably argue that knowing which of its industrial customers are also members of AIG should have any bearing on how Atmos treats the industrial class as a whole or any influence on any other issue in this rate case.

As the cases cited above illustrate, the litigation in this area typically arises when one party seeks to learn the identity of another party or parties and objects to allowing the other side to remain anonymous. No such objection has been raised here. Therefore, in weighing the relative harm to the parties, the fear of retaliation expressed by AIG members clearly outweighs the “harm” (or lack of harm) to any other party.

The case law does not appear to address a situation where one of the presiding judges seeks to know the names of a party in order to “properly evaluate the various positions of the parties and give the appropriate weight to such positions.” While AIG might benefit by presenting testimony from each of its member companies, the fear of retaliation prevents most of the group from coming forward. Instead, they have chosen to participate through counsel and the use of expert consultants who can represent the group’s interests. That is a choice AIG members should be allowed to make. They must not be forced to risk retaliation, now or in the future, as the price of participating in a TRA rate case.


Given AIG’s identification of two, representative members, the concerns of other members that public exposure could lead to retaliation, and the lack of any prejudice to any other party, the

June 16, 2006
Page 4

Hearing Officer should apply Tennessee case law on this issue, balance the relative harm to the parties and respectfully decline to grant Director Miller's request.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/djc
Enclosure
cc: Parties of record

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

June 16, 2006

<i>In re: Petition to Open an Investigation to</i>)	
<i>Determine Whether Atmos Energy Corp. Should be</i>)	
<i>Required by the TRA to Appear and Show Cause</i>)	Docket No. 05-00258
<i>That Atmos Energy Corp. is Not Overearning in</i>)	
<i>Violation of Tennessee Law and That it is Charging</i>)	
<i>Rates That are Just and Reasonable</i>)	

AFFIDAVIT OF EARL BURTON

I, Earl Burton, after being duly sworn, submit the following statement:

1. I am owner of Tennessee Energy Consultants, a natural gas and energy consulting firm managing natural gas and energy costs for clients in the State of Tennessee including numerous clients served by Atmos Energy Corporation.
2. I currently have clients that are members of the Atmos Intervention Group (AIG) I, and have solicited the support of numerous Atmos Energy customers to convey the benefits of joining the Atmos Intervention Group.
3. The AIG consists of a group of natural gas users that have an interest in lower natural gas distribution rates and other service offerings that will assist them in managing natural gas costs.
4. Based on my conversations with members of AIG, I have learned that most of our AIG customers have serious concerns regarding the disclosure of their names in this rate proceeding for the following reasons:
 - a. **Credit.** Many large gas users need a considerable amount of credit through their natural gas supplier and Atmos Energy Marketing (AEM), an affiliate of Atmos Energy, serves most of AIG members. Gas marketers often require customers to put up collateral in order to continue natural gas deliveries. If AEM were to impose such a requirement, it would place a financial hardship on many customers with marginal credit ratings. AIG members are concerned that if Atmos Energy learned that they were members of AIG, AEM would require that customer to put up collateral to continue receiving service. I would quote the gas consultant from one of Atmos Energy industrial gas users, "Atmos

Energy Marketing is the only gas marketer that will serve us without collateral, and we declined participation [in AIG] for this reason.”

b. **Curtailments:** Natural gas supply and delivery is very critical to the large gas users of AIG, and many customers are served by Atmos Rate 250 schedule that gives the company the right to curtail natural gas deliveries on peak days. Given the critical importance of the reliability of natural gas to AIG members, and concerns that Atmos Energy has the ability to increase the frequency of curtailments, AIG members are very concerned with confidentiality of disclosing their identity in this rate proceeding. As one potential AIG member said, “We have problems with our propane system, and if we participate, we do not want to risk any chance of more curtailments. Confidentiality is very important to us participating in this intervention.”

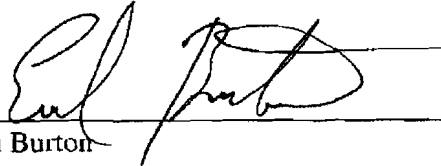
c. **Atmos Energy Marketing controls regulated capacity:** I have observed that under the current asset management arrangement between Atmos Energy and their marketing affiliate, AEM, AIG members and Atmos customers considering participating in the intervention are captive to Atmos Energy or the marketing affiliate on gas supply and delivery. In many service areas of Atmos, AEM controls all of the primary capacity on the interstate pipeline, and in some cases, the capacity is fully subscribed by Atmos. Therefore, transportation customers have no other options than to transport gas through Atmos Energy Marketing. I have observed that this gives the Atmos Energy Marketing a virtual monopoly on transporting natural gas to many of Atmos Energy’s customers and contributes to higher costs for Atmos transportation customers. Atmos Energy Marketing uses this asset management control to achieve a very high market share of buying gas for Atmos customers, and also discourages competition since they claim in many cases that customers will incur additional penalties and costs with a competitive shipper. This further validates our observation that Atmos Energy customers are led to be captive to Atmos Energy and Atmos Energy Marketing, and do not want to compromise their confidentiality fearing retaliation since they may not have a competitive option for procuring their natural gas.

In consideration of the above critical factors that impact the business operations of AIG members that are materially impacted by this rate proceeding, confidentiality is of utmost

importance for AIG. Based on my discussions with AIG members and potential members, many of them fear retaliation from Atmos Energy and/or AEM if the customer's name is revealed in this proceeding.

5. Further the Affiant saith naught.

Dated this 16 day of June, 2006.

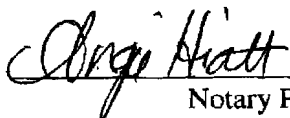


Earl Burton

State of Tennessee)
County of Hamilton)

Personally appeared before me, Angie Hiatt, a Notary Public in and for said State and County, Earl Burton, and within named affiant, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who acknowledged that he executed the foregoing instrument for the purposes therein contained.

Witness my hand and seal at office, on this 16 day of June 2006.



Notary Public

My Commission Expires: My Commission Expires February 4, 2009

