

**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

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| IN RE: PETITION TO OPEN AN |) | Filed Electronically in Docket Office on 06/23/06 |
| INVESTIGATION TO DETERMINE |) | |
| WHETHER ATMOS ENERGY CORP. |) | @ 2:02pm |
| SHOULD BE REQUIRED BY THE TRA |) | Docket No. 05-00258 |
| 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 |) | |

**Atmos Energy Corporation's Response to June 16, 2006 Letter Filed on Behalf of Atmos
Intervention Group and Accompanying Affidavit of Earl Burton**

On June 14, 2006, the Authority issued an order¹ in this docket requiring all parties to file a response to the following request from Director Miller:

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.²

By letter dated June 16, 2006, counsel for a group identified as "the Atmos Intervention Group" declined to comply with the Authority's June 14 Order. The factual allegations contained in counsel's letter and the accompanying Affidavit of Earl Burton are inaccurate and unfounded, and the legal authorities cited therein do not support counsel's refusal to comply with the Authority's order. As such, Atmos Energy Corporation ("Atmos" or "Company") requests that the group identified as "the Atmos Intervention Group" be prohibited from participating further in this

¹ See June 14, 2006 *Order Resolving Discovery Disputes and Requiring Filings*, pp. 3-4.

² *Id.* at pp. 3-4, quoting June 8, 2006 *Letter from Director Miller to Director Ron Jones as Hearing Officer*, p. 1.

docket until such time as counsel for that group complies with the Authority's June 14 Order and identifies all clients he represents.

I. **THE JUNE 16, 2006 LETTER FROM COUNSEL FOR THE ATMOS INTERVENTION GROUP DOES NOT CORRECTLY DESCRIBE THE LEGAL STANDARD FOR PERMITTING PARTIES TO REMAIN ANONYMOUS.**

Counsel's June 16, 2006 letter claims that the group he identifies as "the Atmos Intervention Group" has a right to participate in this docket without revealing the identity of its members, unless that right is outweighed by the prejudice to the other parties in the case. Counsel has turned the standard upside down. Contrary to counsel's arguments, there is a presumption under the law that parties *must* be identified by name. *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004). This presumption is embedded in the constitutional notion of open governmental and judicial proceedings and the constitutional guarantees of due process. *Id.*; *see also Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981). As such, parties are permitted to proceed anonymously *only* under circumstances in which a party's privacy interests *substantially outweigh* the presumption for fully open proceedings, *and* where the other parties will not suffer prejudice as a result of litigating against unidentified persons. *Porter*, 370 F.3d at 560-61. Moreover, even where protective anonymity is granted, it is granted only for preliminary proceedings, or is limited to protecting the party from publicly revealing its identity. Protective anonymity cannot be used to force parties to litigate against unknown persons. *See Porter*, 370 F.3d at 561; *Gomez v. Buckeye Sugars*, 60 F.R.D. 106, 106-07 (N.D. Ohio 1973); *Does v. Advanced Textile Corporation*, 214 F.3d 1058, 1069 (9th Cir. 2000), *see generally* 97 A.L.R. Fed. 369 (collecting cases).

The cases cited by counsel do not in any way alter the presumption that parties are entitled to know the identity of other parties to a particular proceeding. Counsel cites two cases from Tennessee. In one, the court merely mentions in a footnote that the plaintiff in the case was

permitted to proceed anonymously, and notes that decision that was not challenged on appeal. *See Doe v. HCA Health Svcs.*, 46 S.W.3d 191, 194 n.1 (Tenn. 2001). In the second, the issue before the court was not whether parties could litigate anonymously, but rather whether an attorney who publicly revealed the contents of proceedings before the Board of Professional Responsibility could be punished for violating Tenn. Sup. Ct. Rule 9, which required that attorney disciplinary proceedings be kept confidential. *See Doe v. Doe*, 127 S.W.3d 728, 735 (Tenn. 2004). The court struck down the confidentiality requirement as unconstitutional. *Id.* Significantly, the court found that the state's interest in encouraging reluctant witnesses, one of the arguments advanced in counsel's June 16 letter, was not sufficient to overcome the constitutional infirmities of the confidentiality rule at issue. *Id.* Neither of these cases provide any support for the proposition that parties to a regulatory proceeding are entitled to refuse to reveal their identity.

There are four factors courts consider to determine whether a party's privacy interests ***substantially outweigh*** the presumption for fully open proceedings. Those factors include:

- (1) whether the party seeking anonymity is suing to challenge governmental activity;
- (2) whether prosecution of the suit will compel the party to disclose information "of the utmost intimacy";
- (3) whether the litigation compels the party to disclose an intention to violate the law, thereby risking criminal prosecution; and
- (4) whether the parties are children.

Porter, 370 F.3d at 560. None of these factors are present in this case.

II. **THE ALLEGATIONS IN COUNSEL'S JUNE 16 LETTER, EVEN IF TRUE, WOULD BE INSUFFICIENT TO JUSTIFY THE REFUSAL TO IDENTIFY THE MEMBERS OF THE ATMOS INTERVENTION GROUP.**

Consistent with the constitutional underpinnings of the presumption that parties must be identified by name, courts have found that presumption overcome only in extreme and unusual

circumstances which are certainly not present in this case. The two cases cited in counsel's June 16 letter reveal the types of circumstances which warrant permission to proceed anonymously: In *Does v. Advanced Textile Corporation*, 214 F.3d 1058 (9th Cir. 2000), the party seeking the protection of anonymity was a group of Chinese garment workers on the island of Saipan who, if identified, would face possible deportation, arrest, and imprisonment by the Chinese government. *Id.* at 1070-72. Similar, in the second case cited in counsel's letter, *Gomez v. Buckeye Sugars*, 60 F.R.D. 106 (N.D. Ohio 1973), the party seeking to proceed anonymously was a group of migrant farm workers alleging their employers were violating the Fair Labor Standards Act. *Id.* at 107.

An examination of the cases nationwide in which parties have been permitted to proceed anonymously reveals that the extreme factual circumstances in the two cases cited in counsel's letter are typical of the type of facts which must be present to overcome the presumption of open proceedings. *See, e.g., Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004) (parents and students seeking to enjoin the practice of teaching bible class in public schools in Rhea County, Tennessee could proceed anonymously)³; *see generally* 97 A.L.R. Fed. 369 (noting that cases permitting parties to proceed anonymously involve matters of the most sensitive and highly personal nature, such as birth control, abortion, homosexuality, mental illness, and the rights of children). Allegations of economic harm is **not** a sufficient basis for permitting parties to proceed anonymously. *Free Market Compensation v. Commodity Exchange, Inc.*, 98 F.R.D. 311 (S.D. N.Y. 1983) (holding that plaintiff's desire to avoid professional embarrassment and economic loss was insufficient to permit him to appear in securities fraud action without disclosing his identity). As discussed more thoroughly below, the allegations of potential economic harm contained in counsel's letter are

³ In describing the peculiarly acute threat of public ridicule for the plaintiffs in this case, the court noted that the litigation was taking place at the site of the famous Scopes monkey trial, and one of the schools involved, Bryan College, was named for the lawyer that argued against the teaching of evolution in the Scopes case, William Jennings Bryan. *Porter*, 370 F.3d at 561 n.1.

unfounded. However, even if they were correct, counsel's allegations do not rise to the level required to substantially outweigh the presumption of open proceedings and justify a request to proceed anonymously.

III. **THE ALLEGATIONS OF POTENTIAL RETALIATION IN COUNSEL'S JUNE 16 LETTER ARE UNFOUNDED.**

As noted above, even if the allegations of potential economic harm contained in counsel's June 16 letter were true, such allegations fail to rise to the level required to overcome the constitutionally embedded presumption that parties must be identified by name. However, the allegations contained in counsel's June 16 letter and the accompanying Affidavit of Earl Burton are not true. Counsel and Mr. Burton allege that the industrial customers they seek to represent⁴ would be subject to retaliation by Atmos and its non-regulated affiliate, Atmos Energy Marketing, LLC ("AEM") if their identities are revealed. The majority of the allegations lodged by Mr. Burton concern retaliation by AEM, with whom Mr. Burton directly competes.⁵ The only allegation of retaliation by Atmos is the claim that Atmos could retaliate against its interruptible customers that join the Atmos Intervention Group by subjecting those customers to increased curtailments.⁶ The suggestion that Atmos would retaliate in such a way is ridiculous. Atmos has an obligation to serve those customers, and has every incentive to sell as much gas as possible to its interruptible customers. To do otherwise would subject the Company to lost revenues. Atmos could not retaliate in the way suggested, and furthermore, has no incentive to do so.

⁴ As noted in Atmos' May 12, 2006 letter filed in this docket, as far as the Company is aware, Mr. Earl Burton is not an attorney and his firm, Tennessee Energy Consultants is not a law firm. However, it appears from the filings of the Atmos Intervention Group that the group is the creation of Mr. Burton, an admitted direct competitor of AEM. Mr. Burton's affidavit states that he is soliciting Atmos industrial customers to join his group. As reflected in the solicitation attached to Atmos' May 12 letter, it is also clear that Mr. Burton is offering to appear in this docket as the representative of those customers in exchange for a fee. These filings also raise the question as to who Mr. Walker's client is, and who is compensating him for his work in this docket.

⁵ As demonstrated in the Affidavit of Rob Ellis submitted with Atmos' Motion for Protective Order, Mr. Burton's business consists mainly of contacting AEM customers and trying to convince them to contract with marketers other than AEM. *Atmos Energy Corporation's Motion for Protective Order*, at *Exhibit A, Affidavit of Rob Ellis*.

⁶ *Affidavit of Earl Burton* at ¶ 4(b).

IV. **ATMOS WOULD BE PREJUDICED IN THIS DOCKET IF THE MEMBERS OF THE ATMOS INTERVENTION GROUP ARE NOT IDENTIFIED.**

Even where a party requesting anonymity demonstrates that they will be forced to disclose matters of the utmost intimacy, or will be subject to criminal prosecution if identified, courts will deny a request to proceed anonymously where granting such a request will prejudice the opposing parties *in any way* in the presentation of their defense. *Porter*, 370 F.3d at 561. Counsel for the Atmos Intervention Group has cited no case in which parties were forced to litigate against unknown persons, as is requested here. Rather, it appears from a review of relevant caselaw that in virtually all of the cases in which parties have been permitted to proceed anonymously, the anonymity was either limited to preliminary proceedings, or only protected the party from *publicly* revealing their identity. *See Porter*, 370 F.3d at 561 (noting that although the court's order preserving anonymity prevented non-parties from knowing the plaintiffs' identity, no limitation was placed on defense counsel's scope of discovery); *Gomez*, 60 F.R.D at 106 (noting that anonymity was requested only until the Court determined whether the defendants were joint employers); *Advanced Technologies*, 214 F.3d at 1069 (anonymity granted only while discovery was stayed pending court's ruling on preliminary motion). Contrary to the representations in counsel's June 16 letter, there is no established precedent for forcing parties to litigate against unknown entities.

It is not surprising that the relevant cases do not sanction the practice of permitting parties to conceal their identity from other parties and the adjudicator of the proceeding. Such a practice violates due process guarantees, as well as the basic tenets of fairness. For example, if the members of the Atmos Intervention Group are not identified, there will no way for the Authority to ensure that all members of the group meet the statutory requirements for intervention, and are not, for example, competitors of the various parties or other entities who have joined in an effort to

obtain information otherwise unavailable to them. In addition, concealing the identity of the group members will prevent Atmos, as well as the other parties, from being able to exercise its right to obtain discovery or to effectively challenge, respond, or rebut the specific allegations and positions taken by the group. The prejudice extends beyond the parties, to the Authority itself. As Director Miller noted in his June 8 letter, the Authority cannot evaluate the positions of the parties and the appropriate weight to give those positions, unless the Authority knows who the members of the Atmos Intervention Group are. The ability to judge the credibility of the parties' positions is a particularly acute concern in this case with respect to the Atmos Intervention Group. Counsel for the Atmos Intervention Group claims to speak on behalf of all Atmos industrial customers. However, from the filings and information available to date, it appears that counsel may only speak for the two named industrial customers, or perhaps only for Mr. Earl Burton. Contrary to counsel's arguments in the June 16 letter, concealing the identity of the members of the Atmos Intervention Group will not only prevent Atmos and the other parties from effectively challenging and responding to the group's positions, it also eliminates the Authority's ability to properly evaluate the parties' positions and the credibility of the witnesses in reaching its decision in this matter.

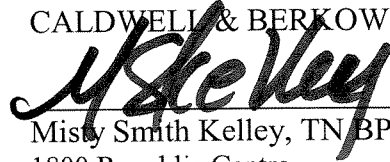
V. **CONCLUSION.**

A party to a proceeding may be accorded some level of anonymity only if (1) the party can show that its privacy interests substantially outweigh the constitutionally embedded presumption that parties be identified by name; and (2) the party can demonstrate that no prejudice will result from the protection it requests. Previous cases have found these requirements satisfied only where the litigation involved matters of the most sensitive and highly personal nature, such as birth control, abortion, homosexuality, mental illness, and the rights of children, or where the party

would be subject to arrest, deportation, or criminal prosecution if their identity was revealed. In addition, even where parties have been granted some protective anonymity, the courts have stressed that under no circumstances may a party conceal its identity from the other parties to the proceeding during the substantive adjudication of the merits. Even if the allegations contained in counsel's June 16 letter were correct, which they are not, those allegations do not come close to meeting the standard for the granting of any type of protective anonymity. The novel request made in counsel's June 16 letter to conceal the identity of the members of the Atmos Intervention Group from the parties to this docket is totally without precedent or justification, and violates fundamental guarantees of due process and basic tenets of fairness. Therefore, Atmos requests that that the group identified as "the Atmos Intervention Group" be prohibited from participating further in this docket until such time as counsel for that group complies with the Authority's June 14 Order and identifies all clients he represents.

Respectfully Submitted,

BAKER, DONELSON, BEARMAN
CALDWELL & BERKOWITZ

A handwritten signature in black ink, appearing to read "Misty Smith Kelley", is written over a horizontal line.

Misty Smith Kelley, TN BPR # 19450
1800 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450-1800
(423) 209-4148
(423) 752-9549
mkelley@bakerdonelson.com
Attorneys for Atmos Energy Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been e-mailed or faxed and mailed to the following parties of interest this ^{13th} day of June, 2006.

Timothy Phillips
Vance L. Broemel
Joe Shirley
Cynthia Kinser
Office of Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202

Gary Hotvedt
General Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Henry Walker
Boult, Cummings, Conners & Berry
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, TN 37203

J.W. Luna
Jennifer Brundige
Farmer & Luna
333 Union Street, Suite 300
Nashville, TN 37201

A handwritten signature in dark ink, appearing to read "J.W. Luna", is written over a horizontal line.