

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

IN RE: PETITION TO OPEN AN)
INVESTIGATION TO DETERMINE)
WHETHER ATMOS ENERGY CORP.)
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 COMMENTS IN RESPONSE TO
MOTION TO TAKE OFFICIAL NOTICE**

At the August 29, 2006 hearing in this docket, the presiding panel voted to take official notice, pursuant to Tenn. Code Ann. § 4-5-313(6), of the following items:

(1) Atmos Energy Corporation ("Atmos") 3.03 reports for the period of September 1999 through May 2006 (the "3.03 Reports");

(2) Atmos monthly gas summaries for the period of January 2001 through May 2006 (the "Monthly Gas Summaries"); and

(3) Atmos' June 2006 10Q SEC report.

(8/29/06 Trans. (Vol. I) at pp. 4-5; 8/31/06 Trans. (Vol. VIII) at pp. 3-4.) The panel also ruled that the parties would be given ten days to comment on the notice materials. (*Id.*) This filing constitutes Atmos' comments, per the panel's ruling.

The TRA's authority to take official notice is defined by the Tennessee Uniform Administrative Procedures Act. Specifically, Tenn. Code Ann. § 4-5-313(6) permits the agency to take official notice of *inter alia* any fact that could be judicially noticed in the courts of this state or the record of other proceedings before the agency. However, § 4-5-313(6) requires that

parties be notified “of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed.” The statute codifies the well-settled rule that it is a denial of due process for an administrative agency to make its decisions on facts which the parties have no opportunity to examine and rebut through additional evidence or further explanation. *See* Tenn. Op. Atty. Gen. No. 85-013 (January 15, 1985). Any item officially noticed must be disclosed in a manner which permits the noticed facts to be “supplemented, explained, or refuted by contrary evidence.” *Id.* at * 3 (citations omitted). As discussed more thoroughly below, because the parties have not been provided any information as to which entity is requesting the official notice in this case, or the purpose or relevance of the noticed information, the parties have no meaningful opportunity to contest, rebut, or explain the noticed information.

Atmos has reviewed the portions of the notice materials which have been placed in the docket file to date. From this review, it appears that the materials that have been placed in the file to date are correct copies of the noticed items. However, the documents are voluminous, and Atmos has not been able to verify the authenticity of each individual document with 100% certainty. In addition, from this review, it appears that the most recent monthly gas summaries have yet to be placed in the docket file as of the date of this filing.

Furthermore, it is unclear from the filings and motion which party or entity is requesting that the items be made part of the record in this docket pursuant to official notice. In addition, the parties have not been provided any information as to the purpose for the request or the intended use of the documents.

The relevancy of the listed items to the disputed issues in this docket is not readily apparent. The 3.03 Reports contain historic per book data calculated in the form specified by TRA rule. Both the TRA Investigative Staff and the Consumer Advocate have acknowledged in

this docket that the amounts contained in the 3.03 Reports are not the appropriate amounts to use for ratemaking purposes.¹ As acknowledged by the parties in this docket, numerous adjustments must be made to the historic per books information contained in the 3.03 Reports to arrive at appropriate amounts for ratemaking purposes. Those necessary adjustments would include, among other things, adjustments to account for such things as out of period expenses, expense credits or revenues, estimates of unbilled amounts, unusually high or low levels of expenses or revenues which are not representative of the future, patterns of changes in the number of customers and in usage per customer, inflationary trends, future plant additions and other changes. These adjustments are not insignificant. For example, in the last United Cities rate filing in Tennessee (Docket 95-02258) the rate of return on rate base in the unadjusted historic test year was 11.48% percent while the rate of return on rate base in the adjusted attrition year was significantly lower at 8.96%. In that case, the company requested a rate of return of 11.16%, less than the rate of return in the historic test year. That case resulted in an approved revenue increase of more than \$2.2 million.²

Through the course of this docket, the parties have referenced amounts contained on specific 3.03 Reports in testimony and other filings for various purposes, and those 3.03 Reports are already part of the record in this case. However, in each instance, the other parties were informed of precisely how the party was relying on the 3.03 Report information, and had full opportunity to rebut the relevancy or use of the information in the manner employed. The motion for official notice expands the record to include 3.03 Reports which have not been used by the parties to the case, without any explanation as to how the information may be used, or by whom. Without knowing how the information is relevant, or how it may be used, Atmos has no

¹ See, e.g., 4/24/06 Report and Recommendation of Investigative Staff at pp. 15-17; August 30, 2006 Transcr. (Vol. IV) (Test. of D. McCormac) at pp. 33-34; August 30, 2006 Trans. (Vol. VI) (Test. of D. Foster) at pp. 43-45, 50-51.

² See 10/18/05 Atmos Resp. to Consumer Advocate Pet., at pp. 7-8

way to contest or rebut the information, or provide supplementary or contrary evidence. The information contained in the approximately 5 years worth of monthly 3.03 Reports is relevant to this proceeding only if the significant adjustments discussed above are made. If the Authority intends to rely on these 3.03 Reports for its decision in this case, the law requires that Atmos be afforded a full opportunity to examine the adjustments the Authority intends to make, and offer evidence to contest, rebut, or supplement those adjustments.

Like the 3.03 Reports, the relevancy of the Monthly Gas Summaries and Atmos June 2006 10Q SEC Report to the disputed issues in this docket is difficult to ascertain. The Monthly Gas Summaries are provided as supplemental information to the monthly 3.03 Reports, and like the 3.03 Reports, report information pursuant to formats prescribed by TRA rule. Specifically, the Monthly Gas Summaries provide information on the number of customers, volumes, and revenues by town and certain customer codes. The information is not grouped by tariff, and therefore would not be relevant to a determination of gross margin or rate design issues without substantial adjustments and additional information. The June 2006 10Q SEC Report, like the TRA reports discussed above, contains information in the format prescribed by the reporting guidelines promulgated by the SEC for the Company as a whole, and would not be relevant to the Tennessee-specific ratemaking issues in this docket without additional adjustments, information, and explanation. Under Tennessee law, Atmos must be given the opportunity to contest, rebut, and explain this information before it is relied upon as a basis for any determination in this docket. Atmos cannot do this without knowing how the information is relevant, and how it may be used, including the necessary additional adjustments or information that will be taken into account. Therefore, consistent with the requirements of Tenn. Code Ann. § 4-5-313(6), Atmos requests: (1) that the parties be notified which party or entity is requesting the noticed information be made part of the record; (2) that the parties be provided copies of the

source or sources for that request or request; and (3) that the parties be informed of the purpose for the requests, and the manner in which the information is intended to be used; and (4) upon receiving this additional information, the parties be given the opportunity to notify the Authority if they wish to contest or rebut the information.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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