

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

September 29, 2006

IN RE:)	
)	
PETITION OF THE CONSUMER)	DOCKET NO.
ADVOCATE TO OPEN AN)	05-00258
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)	

**ORDER ON *ATMOS ENERGY CORPORATION'S COMMENTS IN RESPONSE TO
MOTION TO TAKE OFFICIAL NOTICE***

This docket came before the Hearing Officer for consideration of *Atmos Energy Corporation's Comments in Response to Motion to Take Official Notice* ("Comments") filed by Atmos Energy Corporation ("Atmos") on September 11, 2006.

I. RELEVANT PROCEDURAL HISTORY

At the start of the evidentiary hearing on Phase One of this docket, the Hearing Officer offered a motion for the Panel's consideration. The motion sought to have the panel take official notice pursuant to section 4-5-313(6) of Tennessee Code Annotated of (1) Atmos's 3.03 Reports for the period of September 1999 through May 2006; (2) Monthly Gas Summaries as provided by Atmos for the period of January 2001 through March 2006; and (3) Atmos's June 2006 10Q

SEC Report and to afford the parties ten (10) days to file *Comments* on the noticed materials.¹ For informational purposes, the Hearing Officer explained that the documents that were the subject of the motion were filed in the docket file on August 24 and 28, 2006.² No objection to the motion was offered, and the panel unanimously voted in favor of the motion.³

Near the conclusion of the hearing, the Tennessee Regulatory Authority Investigative Staff (“Investigative Staff”) moved to take official notice of the Monthly Gas Summaries for April and May 2006. No objection to the motion was offered, and the panel unanimously voted in favor of the motion. The parties were also provided ten (10) days within which to file *Comments* on the noticed materials.⁴

The only party to file comments on the noticed material was Atmos, which filed its *Comments* on September 11, 2006. In its *Comments*, Atmos requested:

(1) that the parties be notified which party or entity is requesting the noticed information be made a part of the record; (2) that the parties be provided copies of the source or sources for that request or request [sic]; 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.⁵

Atmos noted in its *Comments* “that the most recent monthly gas summaries have yet to be placed in the docket file as of the date of this filing.”⁶ In response to this contention the record was reviewed to determine whether any of the officially noticed documents were not in the

¹ Transcript of Hearing, v.1, pp. 4-5 (Aug. 29, 2006).

² When introducing the official notice motion, the Hearing Officer stated:

For the parties’ information, all the noted -- all of the notice materials, with the exception of the monthly gas summaries for October 2003 through March 2006, were placed in the docket file on August 28th, 2006. The monthly gas summaries for October 2003 through March 2006 were placed in the docket file on August 24th, 2006 as part of a public records response to Mr. Walker.

Id. at 5.

³ *Id.*

⁴ Transcript of Hearing, v.7, p.57 & v.8, pp. 3-4 (Aug. 31, 2006). Although the terms “3.03 reports” and “monthly gas summaries,” were used indiscriminately during the discussion of this motion, it is the Hearing Officer’s understanding that the subject of the motion to take official notice was the Monthly Gas Summaries, which are a separate filing from the 3.03 Reports.

⁵ *Atmos Energy Corporation’s Comments in Response to Motion to Take Official Notice*, 4-5 (Sept. 11, 2006).

⁶ *Id.* at 2.

docket file. It was discovered that in fact certain documents were missing. As a result, Monthly Gas Summaries for October 2003, November 2003, January through April 2004, February 2005 and March 2005 were filed in the docket file on September 14, 2006. Additionally, the Monthly Gas Summaries for April and May 2006, the documents that are the subject of Investigative Staff's motion to take official notice, were filed in the docket file on September 26, 2006.

As a result of Atmos's *Comments* and the need to discuss the issues for Phase Two of this docket, a *Notice of Status Conference* was issued scheduling a Status Conference for 10:00 a.m. on September 26, 2006. The Status Conference was convened as noticed and the following party representatives were in attendance at the Status Conference:

Investigative Staff – Gary Hotvedt, Esq., Tennessee Regulatory Authority, 460 James Robertson Parkway, Nashville, Tennessee 37243;

Atmos Energy Marketing – Melvin J. Malone, Esq., Miller & Martin LLP, 1200 One Nashville Place, 150 4th Avenue North, Nashville, Tennessee, 37219;

Atmos – Misty Smith Kelley, Esq. and Clinton P. Sanko, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, 1800 Republic Centre, 633 Chestnut Street, Chattanooga, Tennessee, 37450;

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

Atmos Intervention Group – Henry Walker, Esq., Boulton, Cummings, Connors & Berry, PLC, 1600 Division Street, Suite 700, Nashville, Tennessee 37203; and

Chattanooga Gas Company – J.W. Luna, Esq. and Jennifer Brundige, Esq., Farmer & Luna, 333 Union Street, Suite 300, Nashville, Tennessee 37201.

II. *ATMOS'S COMMENTS*

In its *Comments*, Atmos argued that the parties have not received a “meaningful opportunity to contest, rebut, or explain the noticed information” because they have not been notified of which entity requested official notice or “the purpose or relevance of the noticed

information.”⁷ Atmos contended that the relevancy of the noticed information is not “readily apparent.”⁸

As to the specific information noticed, Atmos comments that the 3.03 Reports contain historic per book data and that numerous adjustments must be made to this data in order to calculate amounts for ratemaking purposes.⁹ Atmos acknowledges that specific 3.03 Reports information was referenced by the parties throughout this proceeding and notes that because it knew how the parties were relying on the information, it could rebut it.¹⁰ Atmos contends that the same is not true of the 3.03 Report amounts that are included in the official notice motion, but that were not referenced by the parties.¹¹ Similarly, Atmos argues that the relevancy of the Monthly Gas Summaries and Atmos’s June 2006 10Q SEC Report is difficult to ascertain. Atmos asserts that the information contained in the Monthly Gas Summaries is not relevant to the gross margin or rate design issues without substantial adjustments and additional information. Likewise, according to Atmos, the SEC 10Q Report is not applicable to Tennessee-specific ratemaking issues absent additional adjustments, information and explanation.¹²

Atmos also notes in its *Comments* that “it appears that the materials that have been placed in the file to date are correct copies of the noticed items.”¹³ Atmos qualified this statement by asserting that it has not been able to verify the authenticity of each document noticed with complete certainty.¹⁴

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2-3.

¹⁰ *Atmos Energy Corporation’s Comments in Response to Motion to Take Official Notice*, 3 (Sept. 11, 2006).

¹¹ A review of the record reveals that all of the 3.03 Reports included within the Authority’s official notice were referenced in some fashion by the parties. For example, Atmos itself in its demonstrative exhibit titled “Atmos Gross Margin (Per Books)” uses information from 3.03 Reports for October 1998 through the June 2006. *See also*, Transcript of Hearing, v. 4, pp. 10-13 (Aug. 30, 2006).

¹² *Id.* at 4.

¹³ *Id.* at 2.

¹⁴ *Id.*

III. STATUS CONFERENCE

During the Status Conference, Atmos presented arguments similar, if not identical, to those in its *Comments*. Atmos represents that it could comment to the Hearing Officer on the authenticity of the officially noticed documents recently added to the docket file within a matter of days.¹⁵ Atmos additionally agrees that it now understands that the motion to take official notice made at the start of the Hearing was made by the Hearing Officer and voted on by the panel and that the subsequent motion to take official notice was made by the Investigative Staff and voted on by the panel.¹⁶ Thus, by the end of the Status Conference, the sole outstanding issue was whether Atmos is entitled to additional information regarding the purpose or relevance of the noticed information.

IV. FINDINGS AND CONCLUSIONS

Atmos's pleas do not fall on deaf ears. The arguments are understood, but simply not adopted. The Tennessee Regulatory Authority ("Authority") fully complied with the requirements of section 4-5-313(6) and contrary to Atmos's contention the relevancy and purpose of the noticed material to the disputes in this docket are readily apparent, assuming that such a standard exists in Tennessee law.

A. Construction of Section 4-5-313(6)

Section 4-5-313(6) of *Tennessee Code Annotated* provides:

(6) Official notice may be taken of:

- (A) Any fact that could be judicially noticed in the courts of this state;
- (B) The record of other proceedings before the agency;
- (C) Technical or scientific matters within the agency's specialized knowledge; and
- (D) Codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association.

¹⁵ Transcript of Status Conference, p. 16 (Sept. 26, 2006).

¹⁶ *Id.* at 20-21.

Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, 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.¹⁷

There is no dispute that the noticed material falls within the categories of information of which the Authority may take official notice. Instead, the dispute centers on the requirements of the final paragraph of section 4-5-313(6). This paragraph requires the agency to perform three actions: (1) provide notice at a particular point in the proceeding; (2) include in the notice “the specific facts or material noticed and the source thereof”; and (3) afford the parties an opportunity to contest and rebut the noticed material.

Atmos argues that the Authority has not met the third requirement of affording it an opportunity to contest and rebut the noticed material. Atmos’s argument, however, rests on its construction of the language of the second requirement. To explain, Atmos contends that by not providing it with the purpose or relevance of the noticed material when the relevance or purpose is not readily apparent from the material alone, the Authority effectively denied Atmos of its opportunity to contest or rebut the noticed material. In essence, Atmos has defined the phrase “specific facts or material noticed” in section 4-5-313(6) to include an explanation of the relevance or purpose of the material when such explanation is not readily apparent from the material alone.

The only legal support provided by Atmos in support of its argument is an Attorney General Opinion from 1985.¹⁸ The issue addressed in the opinion is whether the Technical Secretary of the Tennessee Solid Waste Disposal Control Board may participate in Board deliberations of contested cases by, for example, giving technical opinions on division operations

¹⁷ Tenn. Code Ann. §4-5-313(6) (1998 Repl.).

¹⁸ Tenn. Op. Atty. Gen. No. 85-013, 1985 WL 193559 (Tenn. A.G. January 15, 1995).

and departmental policy and procedures. As quoted and cited by Atmos in its *Comments*,¹⁹ the Attorney General opined:

It is a well-settled rule that it is a denial [of] due of process and protections afforded the accused by the rules of evidence for an administrative tribunal to make its decisions on facts not in the record and as to which the parties have no opportunity to examine and rebut.

....
... It is generally recognized, however, that while an administrative agency may take notice of facts known to it such facts must be made to appear in the record in order to support a decision. That is, administrative agencies should make no use of their personal knowledge or of data accumulated by them unless the matter is disclosed and put upon the record so that the supposed fact may be supplemented, explained, or refuted by contrary evidence, and so that a court, on judicial review, may be informed of what facts the agency has utilized, so as to determine the existence of evidence in support of the decision.²⁰

I fully support the opinion of the Attorney General expressed in the above quote. The opinion, however, does not support Atmos's contention that something more than the "specific facts or material noticed" must be provided when official notice is taken. Instead, the quoted language supports the plain language of section 4-5-313(6). The opinion stands for the proposition that material must be placed in the record and the parties to the contested case provided an opportunity to examine and rebut the material. This is exactly what the Authority did. Atmos cites no other legal authority in support of its construction of section 4-5-313(6).

In my opinion, the language of the statute is unambiguous. Atmos would have this agency construe the language to require something more than the plain language contemplates. In drafting this statute, the General Assembly could have easily included a requirement to disclose the purpose for or relevancy of the information to be noticed when such is not readily apparent in addition to the "specific facts or material noticed and the source thereof." The law prohibits forced constructions of statutes. As the Tennessee Supreme Court recently affirmed:

¹⁹ *Atmos Energy Corporation's Comments in Response to Motion to Take Official Notice*, 2 (Sept. 11, 2006).

²⁰ Tenn. Op. Atty. Gen. No. 85-013, 1985 WL 193559, *2-*3 (Tenn. A.G. January 15, 1995).

Intent is determined “from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute’s meaning.” . . . If the statute’s language is clear, we must apply its plain meaning without a forced interpretation.²¹

The requirement proposed by Atmos is not contained within the language of section 4-5-313(6) and the proposed construction strains the natural and ordinary meaning of the language. Therefore, it is my opinion that Atmos’s argument must be rejected.

There can be no dispute that the Authority complied with the plain language of the paragraph. First, the Authority provided notice through the motions to take official notice made during the hearing. Second, the notice/motions included a list of the specific facts or material that was being noticed and the sources thereof. Specifically, the facts and material noticed is the information contained in the 3.03 Reports, Monthly Gas Summaries and the June 2006 SEC 10Q Report. The sources for the facts and material are the reports and summaries themselves. Third, the Authority provided all parties ten days to comment on the facts and materials noticed.²² Thus, the Authority fully complied with the plain language of section 4-5-313(6) and no further explanation is required.

B. Readily Apparent Relevancy or Purpose

Despite my conclusion that the Authority fully complied with section 4-5-313(6), for the sake of addressing the *Comments* from all sides, I will assume that Atmos is correct in its contention that the phrase “specific facts or material noticed” includes or requires an explanation of the relevancy or purpose of the noticed material when the relevancy or purpose is not readily

²¹ *Clark v. Lowe’s Home Centers*, ___ S.W.3d ___, 2006 WL 2439736, *2 (Tenn. Aug. 24, 2006) (citations omitted).

²² The Hearing Officer recognizes that despite the attempt to provide ten days at the time of the hearing, arguably this attempt failed given that all of the noticed information was not at that time filed in the docket file. To cure any defect that arises from this failure, all parties will be afforded ten (10) days from the date of this order to comment on the noticed material filed in the docket file on September 14 and 26, 2006.

apparent from the material alone. Even given this assumption, my conclusion remains that the Authority need not take any further action.

To explain, despite Atmos's contentions, the relevancy of the material or purposes for which the material could be used *is* readily apparent. Thus, no further action is necessary. In making this assessment, the noticed material cannot be considered in a vacuum. Instead, the nature of the noticed material must be viewed in the context of the proceeding, the record, and the disputed issues. After all, this agency may not enter a decision that does not have an "adequate evidentiary predicate."²³

The noticed material is relevant to a ratemaking proceeding. The 3.03 Reports contain accounting information such as operating revenues, operating expenses, income and balance sheet information, customer numbers and rate of return calculations. The SEC 10Q Report includes consolidated financial sheets and the related notes and management discussion. The Monthly Gas Summaries contain the number of customers, volumes and revenues broken down by town served and service class. Ratemaking proceedings require a detailed review of the utility's financial records as well as customer usage information. Given the nature of the noticed information and the innate areas of review in ratemaking proceedings, the fact that the noticed material, as a whole, is relevant and has a purpose cannot be reasonably disputed.

The particular manner in which the information will be used may not be known as a certainty, but can with rational assurance be gleaned by the parties with reasonable specificity from the issues in the docket. At the time of the Authority taking official notice, issues in this

²³ The Tennessee Supreme Court has stated: "Thus, the Public Service Commission in rate making and design cases is not solely governed by the proof although, of course, there must be an adequate evidentiary predicate." *CF Indus. v. Tennessee Pub. Serv. Comm'n*, 599 S.W.2d 536, 543 (Tenn. 1980). *See also* Tenn. Code Ann. §4-5-314(d) (1998 Repl.) (stating: "Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. The agency member's experience, technical competence and specialized knowledge may be utilized in the evaluation of evidence.")

docket had been vetted out through pre-filed testimony. The issues were further distilled and the parties' positions clarified through live testimony.²⁴ In light of this, Atmos's contention that it is unable to readily determine the relevance or purpose of the noticed material is found to be without merit. I recognize that the task of responding to the official notice was not a trivial one, but it was one that Atmos, which was responsible for preparing the officially noticed material, was capable of doing with the information it had at the time the comments were due.

C. Confidentiality of Authority Staff Advice

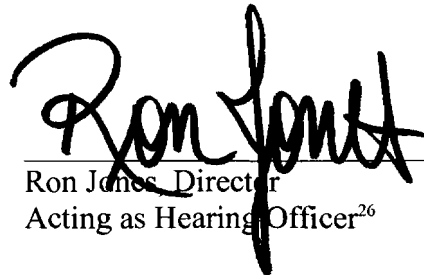
Given Atmos's insistence on detailed information regarding the manner in which the Authority intends to use the material noticed, it appears that Atmos is attempting to uncover the analysis contemplated by the Authority's Advisory Staff and to rebut that analysis prior to the Directors engaging in deliberations. It is without dispute that the advice of the Authority's Advisory Staff to its Directors is confidential²⁵ and any conduct that jeopardizes that relationship, unintended or otherwise, will not be sanctioned.

²⁴ For example, references to the 3.03 Reports were made throughout the hearing by Atmos and other parties. These references relate to the calculation of the gross margins from the 3.03 Report information, comparison and analysis of gross margins from various points in time from October 1998 through June 2006, the analysis of declining gross margins and reported rates of return and the validity of comparing the 3.03 Report rate of return with a proposed rate of return for ratemaking purposes. Transcript of Hearing, v.10, p.14, 47-50 & 55 (Aug. 31, 2006); Transcript of Hearing, v.4, pp, 10-13, 30-31 & 37-40 (Aug. 30, 2006).

²⁵ *Consumer Advocate Div. v. Tennessee Reg. Auth.*, 1998 WL 684536, *2 (Tenn. Ct. App. July 1, 1998); see Transcript of Status Conference, p. 29 (Sept. 26, 2006).

IT IS THEREFORE ORDERED THAT:

1. For the reasons given herein, Atmos's request for additional information regarding the purpose or relevance of the noticed information is denied.
2. All parties shall have until October 9, 2006, to file comments on Monthly Gas Summaries for October 2003, November 2003, January through April 2004, February 2005 and March 2005, which were filed in the docket file on September 14, 2006, and the Monthly Gas Summaries for April and May 2006, which were filed in the docket file on September 26, 2006.



Ron Jones, Director
Acting as Hearing Officer²⁶

²⁶ During the May 15, 2006 Authority Conference, a panel of the Tennessee Regulatory Authority consisting of Chairman Sara Kyle and Directors Ron Jones and Pat Miller unanimously voted to appoint Director Jones as the Hearing Officer to prepare this docket for a hearing by the panel. Transcript of Authority Conference, pp. 29-39 (May 15, 2006).