BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 9, 2007

IN RE:	)	
	)	**DOCKET NO.**
ATMOS ENERGY'S TENNESSEE AND	)	**06-00222**
UNION CITY TENNESSEE 2005-2006	)	
ACA FILING	)	

OPINION OF DIRECTOR RON JONES CONCURRING IN RESULTS ONLY

The above-styled docket came before a panel of the Tennessee Regulatory Authority ("Authority") during an Authority Conference on February 26, 2007. At that conference, a motion was made to convene a contested case and appoint a hearing officer for the purpose of entering a protective order. Because I disagree with the reasoning supporting the motion, I voted to concur only with the results of the motion, and I now file this Concurring Opinion to memorialize the reasons for my disagreement.

During the Authority Conference, Chairman Sara Kyle made a motion that was seconded without comment by Director Roberson. The motion stated:

> Again, according to Authority rules a protective order cannot be entered outside of a contested case proceeding. Specifically our Authority Rule 1220-1-1-.03(8); therefore, I would move to convene a contested case proceeding in this docket and appoint general counsel or his designee to serve as hearing officer for the purpose of entering a protective order.[1]

Despite the Chairman's contention that the Authority's rules provide that a protective order cannot be entered outside of a contested case, the fact is that the Authority's rules nowhere state

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[1] Transcript of Authority Conference, p.35 (Feb. 26, 2007).

or even imply that a protective order cannot be entered outside of a contested case. The rule cited by the Chairman provides:

> Parties in a contested case in which a protective order has been entered who seek to file information which they deem proprietary shall file with the Authority requisite copies of said information in a sealed envelope clearly marked "proprietary information," and otherwise in accordance with the terms of the protective order. The provisions of this rule shall not abridge the right of any other party to contest the proprietary status of such information. Further, the Authority and its staff shall have the right to review said proprietary information for the purpose for which it was submitted.[2]

So, if, as I have asserted, this rule does not stand for the proposition asserted by the Chairman, that is, a "protective order cannot be entered outside of a contested case proceeding," then what does it stand for? The answer is simple. The rule provides that <u>if</u> you are a party in a contested case and <u>if</u> you want to file information you consider proprietary and <u>if</u> a protective order has been entered in the contested case, then you shall file the information by: (1) providing the requisite number of copies; (2) enclosing the copies in a sealed envelope; (3) clearly marking the envelope as containing "proprietary information"; and (4) complying with all other terms of the protective order. In summary, the rule cited in the motion and quoted above is nothing more than a general filing procedure - not a restraint on the Authority's ability to enter a protective order. For this reason, I cannot adopt the reasoning of the majority, and I am of the opinion that the justification for the motion is so contrary to the plain language of the rule that I cannot allow it to go unanswered in the administrative record.

Despite my disagreement with the justification supporting the motion, I agreed with the conclusion of the motion to convene a contested case and appoint a hearing officer for the purpose of entering a protective order. It has become readily apparent that audits of this type often require the Authority's Staff to review information that audited entities consider to be

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[2] Tenn. Comp. R. Regs. 1220-1-1-.03(8) (July 2006, Revised).

proprietary. While it is my opinion that the law does in certain limited circumstances allow the Authority to protect information outside of a contested case, the application and operation of that law remains untested by the Authority.[3] However, pursuant to Section 4-5-311(a) of Tennessee Code Annotated, an administrative judge or hearing officer may enter a protective order in a contested case. Therefore, in order to permit the agency to consider the entry of a protective order in this docket, I am of the opinion that the most prudent path at this time is to convene a contested case and appoint General Counsel or his designee to serve as hearing officer for the purpose of entering a protective order.

III. CONCLUSION

Based on the foregoing comments and analysis, I respectfully disagree with the analysis of the majority, but concur in the conclusion to convene a contested case and appoint a hearing officer for the purpose of entering a protective order.

Ron Jones, Director

[3] Section 65-3-109 of Tennessee Code Annotated prohibits the Department of Transportation from giving "publicity to any contracts, leases, or engagements obtained by it in its official capacity, if the interests of any company would thereby be injuriously affected, unless, in the judgment of the department of transportation, the public interest requires it." Tenn. Code Ann. § 65-3-109 (2004 Repl.). This statute prohibits the department from releasing certain information to the public but also gives it the power to release the information upon a determination that the "public interest requires it." Pursuant to section 65-4-105(a), the Authority has this same prohibition/power with regard to the public utilities it regulates. *See* Tenn. Code Ann. § 65-4-105(a) (2004 Repl.).