BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

June 14, 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 RESOLVING DISCOVERY AND PROTECTIVE ORDER DISPUTES AND REQUIRING FILINGS

This docket came before the Hearing Officer at a status conference held on June 8, 2006 to hear arguments on disputes concerning the proposed protective order and discovery requests issued to Atmos Energy Corporation ("Atmos") by the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") and the Atmos Intervention Group ("AIG"). The *Notice of Filing and Status Conference* issued on June 5, 2006.

I. RELEVANT PROCEDURAL HISTORY

On May 26, 2006, the Consumer Advocate and AIG each filed discovery requests directed to Atmos, and the Investigative Staff of the Tennessee Regulatory Authority ("Investigative Staff"), Consumer Advocate and AIG filed joint discovery requests directed to

Atmos. Attached to the joint requests was a copy of the *Filing Guidelines for Rate Cases*, also referred to as Minimum Filing Requirements.[1] Atmos filed objections to the individual discovery requests of the Consumer Advocate and AIG on June 2, 2006.

On the afternoon of June 2, 2006 counsel for Atmos contacted the Hearing Officer to discuss the proposed protective order that was due to be filed that day. Counsel explained that generally there was agreement over the terms of the protective order; however, counsel further stated that there is a dispute over access to information by Mr. Earl Burton, a consultant to and possible expert witness on behalf of AIG. Thereafter, counsel for Atmos was notified that it was the Hearing Officer's opinion that the parties should continue to work to file a proposed protective order. In the event that agreement could not be reached, counsel was told that the Hearing Officer would hear arguments on the dispute at the status conference previously scheduled for June 8, 2006, at 9:00 a.m. and that each party would be required to file on June 7, 2006, a statement describing the dispute and the party's position thereon. Counsel responded that she would notify the other parties of the outcome of the discussion.

On June 5, 2006, an e-mail was sent to all parties recounting the discussion. In addition, the Hearing Officer issued a *Notice of Filing and Status Conference* confirming with the parties the June 8, 2006 status conference and instructing each party to file by noon on Wednesday, June 7, 2006, a statement detailing any dispute concerning the proposed protective order and the party's position with regard to the dispute. In accordance with the notice, the Consumer Advocate, AIG and Atmos all made filings setting forth their respective positions on the protective order dispute as well as their positions on the discovery disputes. A review of these filings revealed that the Consumer Advocate discovery requests in dispute were items 1.A, 1.B,

[1] *See First Joint Discovery Requests of TRA Investigative Staff, Consumer Advocate and Protection Division, and AIG*, 1 (May 26, 2006).

1.C, 1.D, 1.E, 1.F, 1.G, 1.H(a) and (b), 3.A, 3.B, 3.C, 3.D, 3.E, 3.F, 3.G, 3.H, 3.I, 3.J, 3.K, 5 through 14, and 16 through 18, and the AIG discovery requests in dispute were items 1 through 9.

The Hearing Officer convened the status conference as noticed at 9:00 a.m. on June 8, 2006. The following parties were in attendance:

> **Investigative Staff** – Gary Hotvedt, Esq., Tennessee Regulatory Authority, 460 James Robertson Parkway, Nashville, Tennessee 37243;
> **Atmos** – Misty Smith Kelley, Esq., Baker, Donnelson, Bearman & Caldwell, 1800 Republic Centre, 633 Chestnut Street, Chattanooga, Tennessee, 37450;
> **AIG** – Henry Walker, Esq., Boult, Cummings, Conners & Berry, PLC, 1600 Division Street, Suite 700, Nashville, Tennessee 37203;
> **Consumer Advocate** – Vance Broemel, Esq., Joe Shirley, Esq., and Timothy Phillips, Esq., Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202; and
> **Chattanooga Gas** – Jennifer Brundige, Esq., Farmer & Luna, 333 Union Street, Suite 300, Nashville, Tennessee 37201.

At the beginning of the conference, the Consumer Advocate and Atmos reported that they had reached an agreement as to Consumer Advocate discovery request items 3.B, 3.C, 3.D, 3.E, 3.F and 3.G. After having discussed certain other topics, the Hearing Officer took a brief recess. Upon reconvening, AIG and Atmos notified the Hearing Officer that they had reached agreement on Consumer Advocate discovery request items 5 through 14 and 16 through 18. Thereafter, the Hearing Officer proceeded with further discovery and protective order discussions.

At the conclusion of all noticed matters, the Hearing Officer notified the parties that during the status conference Director Miller filed in the docket a letter directed to the Hearing Officer. The Hearing Officer read into the record the letter, which states:

> 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 fully disclose their clients. Therefore, I am requesting that you, as Hearing Officer, require this disclosure at your earliest convenience.[2]

[2] Letter from Director Pat Miller to Chairman Ron Jones (June 8, 2006).

In response to this request, the Hearing Officer directed the parties to file responses by 2:00 p.m. on Friday, June 16, 2006. All parties agreed to this date.

II. GENERAL DISCOVERY PRINCIPLES

Pursuant to Authority Rule 1220-1-2-.11, when informal discovery is not practicable, discovery shall be effectuated in accordance with the Tennessee Rules of Civil Procedure. The Rules of Civil Procedure permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.[3] Through these instruments, a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."[4] The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.[5] The Tennessee Court of Appeals has commented on relevancy as follows:

> Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase "relevant to the subject matter involved in the pending action" has been construed "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[6]

Further, parties may learn of information related to books, documents or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.[7] Tennessee's rules do provide some limitations, however. Rule 26.02 permits a court to limit discovery under certain circumstances, such as undue burden, and Rule 26.03 permits a court to issue protective orders as justice requires.[8]

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[3] Tenn. R. Civ. P. 26.01.
[4] *Id.* at 26.02(1).
[5] *Id.*
[6] *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).
[7] Tenn. R. Civ. P. 26.02(1).
[8] *Id.* at 26.02 & .03.

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.[9] "Decisions to grant a motion to compel rest in the trial court's reasonable discretion."[10]

III. CONSUMER ADVOCATE DISCOVERY REQUESTS: CAPACITY RELEASE (ITEMS 1.A, 1.B, 1.C, 1.D, 1.E, 1.F, 1.G, 1.H(a) and (b), 3.A, 3.H, 3.I, 3.J and 3.K)

Atmos objects to these items by asserting that they are "not reasonably calculated to lead to the discovery of relevant information and [are] thus beyond the scope of legitimate discovery in this proceeding."[11] Atmos further explains that the requests seek gas cost information and that such costs have no bearing on rates to be set in this docket and are regulated instead through the Purchased Gas Adjustment ("PGA") Rule and the Actual Cost Adjustment ("ACA") audits.[12] Atmos also objects by arguing that the request is inconsistent with previous Tennessee Regulatory Authority ("Authority") orders waiving prudency audits while the Performance Based Ratemaking ("PBR") mechanism is in effect.[13]

The Consumer Advocate counters that the "release is relevant and crucial in this case because, as Atmos itself has admitted, it receives income from capacity release, and the sale of capacity affects the cost of gas to consumers."[14] The Consumer Advocate next notes that Atmos has referenced in an SEC Form 10-K filing that it receives "other income" and argues that this "other income" is not part of the PGA review process.[15]

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[9] *Id.* at 37.01(2).
[10] *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002). It was not required in this docket that a party requesting discovery file a motion to compel. Instead, it was agreed that the Hearing Officer would hear any outstanding disputes at a status conference on June 8, 2006 and rule on the disputes thereafter. Transcript of Proceedings pp. 18, 21-25 (May 22, 2006) (Status Conference).
[11] *See, e.g., Atmos Energy Corporation's Objections to First Discovery Request of the Consumer Advocate*, 3 (Jun. 2, 2006).
[12] *See, e.g., id.*
[13] *See, e.g., id.* at 3-4 (citing Docket No. 97-01364, *In re: Application of United Cities Gas Company to Establish an Experimental Performance Based Ratemaking Mechanism*).
[14] *See, e.g., Consumer Advocate's Response to Atmos Energy Corporation's Objections to First Discovery Request of the Consumer Advocate and Motion to Compel*, 2 (Jun. 7, 2006).
[15] *See, e.g., id.* at 3.

During the status conference, both parties were asked questions with regard to this matter. The Consumer Advocate admitted that they needed to know more about the "other income" and agreed that this "other income" could be used to calculate Atmos's net operating income.[16] The Consumer Advocate further asserted that the credits that are the subject of the requests are not tracked through the PGA.[17] Atmos explained that 100 percent of the "other income" is flowed-through the PGA and then a percentage is returned to the Company through the PBR mechanism.[18] Atmos further stated that the pass through of the credits is included in the ACA audit.

As a general proposition, information related to the cost of gas, which includes the commodity and transportation costs offset by any revenues derived from use of the natural gas assets, is not relevant to this docket because such costs are not a factor used in calculating a company's rate base, operation and maintenance expenses, net operating income, rate of return, or base rates, all issues in this docket. Instead, gas costs are regulated independent of these items. Such costs are passed directly through to consumers via the PGA. Upon filing, the Authority audits gas cost recovery via the PGA using the ACA audit and assesses a surcharge or credit as necessary to ensure that only actually incurred natural gas costs are recovered from consumers. A second audit, the PBR audit, reviews the allocation of revenues or losses derived from the sale or purchase of natural gas between consumers and stockholders. Thus, information related solely to gas costs is not relevant to the determinations to be made in this docket.

During the course of the status conference it became clear that the "other income" referenced to by the Consumer Advocate included an amount equal to approximately $30,000.[19]

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[16] Transcript of Proceedings (June 8, 2006) (Status Conference).
[17] *Id.*
[18] *Id.*
[19] *Id.*

Although the exact amount is not of consequence, what is of importance is the fact that the $30,000 is a portion of the income received by Atmos in exchange for allowing Atmos Energy Marketing, Inc. ("AEM") to manage Atmos's natural gas assets.[20] The Consumer Advocate has failed to demonstrate that the $30,000 that it references as a basis for obtaining the requested capacity release information is anything other than income derived from the use of natural gas assets. As noted above, such revenues should be included in the cost of gas and recovered by ratepayers through the PGA, but are not relevant to the determinations to be made in this docket.

Despite Atmos's explanation that 100 percent of the other income is gas cost related and properly accounted as such, it cannot be found as a matter fact from the record that the $30,000 discussed by Atmos accounts for all of the "other income" information requested by the Consumer Advocate. Given this, it cannot be known at this time (1) whether there is any income in addition to the $30,000 and (2) if so, whether such income should be accounted for solely as gas costs. Assuming there is income in addition to the $30,000, it may be that the income should be accounted for as part of the base rate calculation. Thus, to the extent that the "other income" referenced by the Consumer Advocate includes amounts in excess of the $30,000 figure discussed by Atmos, it is fair to conclude that information as to those excess amounts reasonably could lead to information that could bear on an issue in this docket, and therefore, Atmos should respond accordingly.

Based on the foregoing, the objections of Atmos to Consumer Advocate request items 1.A, 1.B, 1.C, 1.D, 1.E, 1.F, 1.G, 1.H(a) and (b), 3.A, 3.H, 3.I, 3.J and 3.K are sustained as to the

[20] The $30,000 amount is calculated as follows. AEM pays Atmos $782,978 for the use of Atmos's assets. Atmos then pays AEM $282,978 for gas procurement functions. This results in net income in the amount of $500,000 dollars to Atmos. *See In re: Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit*, Docket No. 05-00253, *Notice of Filing by the Utilities Division of the Tennessee Regulatory Authority*, 15 n.5 (Apr. 21, 2006). Thereafter, the $500,000 is allocated between Tennessee and Virginia operations such that approximately $300,000 is allocated to Tennessee. *See id.* at 12 (explaining the allocation of shared demand costs). Atmos then applies the sharing mechanism contained in its PBR mechanisms and calculates its stockholders' 10% share as $30,000.

$30,000 described by Atmos, but overruled with regard to any income amounts included in the "other income" description of the SEC Form 10-K other than the $30,000 figure. Atmos shall produce information as required by the Order in accordance with the procedural schedule.

IV. AIG REQUESTS

A. ITEM 1

Through item 1, AIG requests information related to Atmos's income statements and balance sheets. Atmos objects to item 1 by asserting that the information requested is confidential or trade secret information protected by Tennessee law. It further contends that the request is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant information.[21] AIG asserts that the information is needed to segregate Atmos's Tennessee regulated operations from other of Atmos's businesses.[22]

The objection should be overruled. Atmos's contention that it should not have to provide the requested information because it is confidential and trade secret information should be rejected. This claim alone should not operate to deny a party an opportunity to review otherwise discoverable materials because measures can be taken to protect the dissemination of the information.[23] Atmos's claim with regard to the protective order is discussed further in part V of this Order. Atmos's claims that the request is overly broad and unduly burdensome must also be rejected because Atmos failed to provide sufficient justification for these claims. Lastly, the argument that the request is not reasonably calculated to lead to the discovery of relevant information is rejected. The income statement and balance sheet of the regulated portion of the

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[21] *See Atmos Energy Corporation's Objections to Atmos Intervention Group's First Round of Discovery*, 2 (Jun 2, 2006).
[22] *See Response of Atmos Intervention Group to the Objections of Atmos Energy Corporation*, 4 (Jun. 7, 2006).
[23] *See Loveall v. American Honda Motor Company, Inc.*, 694 S.W.2d 937, 939 (Tenn. 1985) (holding that "[t]rade secrets and other confidential commercial information enjoy no privilege from disclosure, although courts may choose to protect such information for good cause shown"); Tenn. R. Civ. P. 26.03 (2005).

company is particularly relevant to the ratemaking process and the requested information, as asserted by AIG, will help to segregate the combined information contained in Atmos's stockholders' annual report.

B. ITEM 2

In item 2, AIG requests the following information on Atmos's 50 largest Tennessee customers: 1) monthly sales volumes for January 1, 2003 through December 31, 2005; 2) contact information; and 3) copies of communications and notes concerning gas usage or rates between January 1, 2004 and May 1, 2006. Atmos objects to item 2 by asserting that the information requested is confidential or trade secret information protected by Tennessee law. It further contends that the request is overly broad and unduly burdensome to the extent the request exceeds the Minimum Filing Requirements. Lastly, Atmos asserts that the request is not reasonably calculated to lead to the discovery of relevant information.[24] AIG counters Atmos's objections by arguing that the information is needed to determine whether the customers expect any significant changes in future usage and to calculate industrial revenues. AIG further states that it intends to use the information "to consider proposals for alternative rate design, including multiple volumetric steps within the Industrial Class."[25]

As with item 1, Atmos's reliance on the requested information being confidential or trade secret to support its objection is rejected.[26] Atmos's other claims are also rejected. Simply stating that the request requires production in excess of that required by the Minimum Filing Guidelines is not sufficient justification to prevail on Atmos's claim that the request is overly broad or unduly burdensome. More support is needed. Moreover, as the title of the guidelines

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[24] *See Atmos Energy Corporation's Objections to Atmos Intervention Group's First Round of Discovery*, 3 (Jun 2, 2006).
[25] *See Response of Atmos Intervention Group to the Objections of Atmos Energy Corporation*, 5 (Jun. 7, 2006).
[26] *See supra* Part IV.A.; *infra* Part V.

states, they are **minimum** guidelines. Finally, gas sales volumes and the related information needed to verify the possibility of significant changes to those volumes relate directly to the establishment of just and reasonable base rates. For example, the operations and maintenance expenses and the revenues of a utility will vary depending on the forecast volume of gas sales. Operation and maintenance expenses and revenues are a critical part of the revenue requirement calculation.

C. ITEMS 3, 4 AND 7 THROUGH 9 (QUESTIONS RELATED TO THE ASSET MANAGEMENT AGREEMENT)

Item 3 requests a copy of Atmos's current Tennessee asset management agreement, and in relation thereto, item 4 requests a copy of the latest request for proposal for the management of Atmos's pipeline and storage assets and procurement of gas and the responses thereto. Items 7 and 8 request information by month on the total number of Atmos's Rate 260 transportation customers that purchase gas from AEM and the total volumes and profits attributable to transporting gas using Atmos's regulated assets realized by AEM for Rate 260 transportation customers and non-jurisdictional customers. Item 9 requests AEM's total monthly profits attributable to the management of Atmos's regulated storage assets.

Atmos objects to these requests first by asserting that they seek confidential and trade secret information protected by Tennessee law.[27] Next, Atmos contends that the requests are "not reasonably calculated to lead to the discovery of relevant information and [are] thus beyond the scope of legitimate discovery in this proceeding."[28] Atmos further explains that the requests seek gas cost information and that such costs are not relevant to the base rates and rate of return to be set in this docket and are regulated instead through the PGA, the ACA audits, and the PBR

[27] *See, e.g., Atmos Energy Corporation's Objections to Atmos Intervention Group's First Round of Discovery*, 3 (Jun. 6, 2006).
[28] *See, e.g., id.*

mechanism.[29] Atmos also objects by arguing that the requests are inconsistent with previous Authority orders waiving prudency audits while the PBR mechanism is in effect and the Authority's order in Docket No. 05-00253.[30] Atmos also asserts that considering the asset management agreement would expand this docket beyond the foundation provided in the *Report and Recommendation of Investigative Staff* and thereby would raise due process concerns.[31]

According to AIG, each of these requests relate to the issue of whether Tennessee ratepayers are being treated fairly under the current asset management agreement.[32] AIG asserts that a rate case often involves a review of affiliate relationships and the Authority has the right to impute profits earned by AEM through the use of Atmos's regulated assets thereby reducing Atmos's annual revenue requirement.[33] AIG also supports its requests with the fact that the Authority's Audit Staff in Docket No. 05-00253 raised concerns about the amount AEM paid Atmos for the use of ratepayer assets and Atmos's response to the audit that the concerns of the staff should be addressed in a contested case.[34] AIG counters Atmos's assertions that requiring Atmos to provide the information would be inconsistent with Docket Nos. 97-01304 and 05-00253 by asserting that Atmos did not explain the inconsistency and that there is nothing in either docket precluding review of the asset management agreement in this docket.[35]

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[29] *See, e.g., id.*; *Atmos Energy Corporation's Motion for Protective Order*, 3 (June 7, 2006).
[30] *See, e.g., Atmos Energy Corporation's Objections to Atmos Intervention Group's First Round of Discovery*, 3-4 (Jun. 6, 2006) (citing Docket No. 97-01364, *In re: Application of United Cities Gas Company to Establish an Experimental Performance Based Ratemaking Mechanism* and Docket No. 05-00253, *In re: Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit*).
[31] *Atmos Energy Corporation's Motion for Protective Order*, 4 (Jun. 7, 2006).
[32] *See Response of Atmos Intervention Group to the Objections of Atmos Energy Corporation*, 1 (Jun. 7, 2006).
[33] *Id.* at 2, 10.
[34] *Id.* at 1-3.
[35] *Id.* at 10-11.

Atmos's contention that it should not have to provide the requested information because it is confidential and trade secret information should be rejected as discussed with regard to item 1 above. This issue is discussed further in part V of this Order.[36]

As to the relevancy dispute, it can be comfortably concluded that the requested information is relevant in that it bears on, or reasonably could lead to other information that could bear on an issue in this docket. To explain, imputation of revenue issues do occur in the course of resolving rate cases.[37] A determination to impute revenues may affect the revenue requirement of the utility.[38] To the extent that AIG seeks to put forth an argument that the Authority should impute AEM's revenues to Atmos and thereby reduce Atmos's revenue requirement, the requested information is critical. Therefore, Atmos's argument on this point is rejected.

Atmos's argument that allowing AIG to proceed with obtaining information with an eye toward asserting that the Authority should impute certain affiliate revenues necessarily expands the docket beyond the intended scope must also be rejected. This docket was convened, as Atmos notes, for "'the purpose of establishing a fair and reasonable return for Atmos.'"[39] During the deliberations resulting in the decision to proceed with a rate case, the panel neither limited the docket to a review of the conclusions set forth in the *Report and Recommendation of Investigative Staff* nor placed limitations on the regulatory ratemaking theories that could be asserted. The only directive was to establish a fair and reasonable return for Atmos. Such a task cannot be performed successfully without calculating the revenue requirement of the company.

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[36] *See supra* Part IV.A.; *infra* Part V.

[37] Atmos even noted during the status conference that in the recent Chattanooga Gas rate case imputation of revenues was an issue. *See* Transcript of Proceedings (June 8, 2006) (Status Conference).

[38] In this case, the amount of revenues imputed to the revenue requirement of Atmos could be zero. For example, it could be determined that the imputed AEM revenues should be treated as gas costs thereby reducing the amount of gas costs to be recovered from ratepayers and having no affect on the revenue requirement.

[39] *Atmos Energy Corporation's Motion for Protective Order*, 3 (Jun. 7, 2006) (quoting Transcript of Proceedings, 24 (May 15, 2006) (Authority Conference)).

Atmos was aware of the lack of any limitations at the time it agreed to the procedural schedule. It should not now be permitted to rely on the expeditious schedule to avoid a particular argument.

During the status conference Atmos repeatedly argued that a decision to impute revenues would eliminate the incentive provided by the PBR mechanism and that considering imputation is inconsistent with the panel's decision in Docket No. 05-00253. These arguments are rejected. In order to determine that affiliate revenue imputation eliminates the PBR incentive, one must assume that 100 percent of the imputed revenues would be treated as non-gas costs and not flowed through the PBR. It is impossible to know at this point in the proceeding what amount of imputed revenues, if any, will be considered for regulatory purposes as non-gas costs. As to Docket No. 05-00253, there is no inconsistency. In that docket the panel voted to have:

> our audit staff and the company meet to discuss the effects of incorporating the asset management arrangement into the performance-based ratemaking mechanism. In the event that the agreement on any issue cannot be reached or if audit staff believes that issues remain unresolved, then the panel -- this panel may then consider whether to convene a contested case on those issues or to take some other actions.[40]

This directive goes to whether the Authority should flow through the PGA mechanism the revenues Atmos receives from AEM,[41] not the profits of AEM attributable to transporting gas using Atmos's regulated assets.

D. ITEM 5

Through item 5, AIG asks Atmos to provide "a copy of the Company's latest gas supply plan for its Tennessee customers and the reserve margin associated with the peak day demand requirements."[42] Atmos objections to this request are similar to the others discussed thus far.

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[40] Transcript of Proceedings, 7-8 (May 15, 2006) (Authority Conference).
[41] *See supra* note 20.
[42] *Atmos Intervention Group's First Round of Discovery to Atmos Energy Corporation*, 9 (May 26, 2006).

First, Atmos asserts that the request seeks confidential and trade secret information protected by Tennessee law.[43] Second, Atmos argues that the request is "not reasonably calculated to lead to the discovery of relevant information."[44] Atmos further explains that the request seeks gas cost information and that such costs are not relevant to this proceeding and are regulated instead through the PGA and the ACA audits.[45] Third, Atmos raises the argument that the request is inconsistent with previous Authority orders waiving prudency audits while the PBR mechanism is in effect and the Authority's order in Docket No. 05-00253.[46]

According to AIG, the information requested through item 5 is needed to allow it to "review the Company's current capacity requirements and the total capacity and reserve margin that Atmos believes is needed to serve jurisdictional customers."[47] AIG contends that Atmos's relationship with AEM may create an incentive to Atmos to retain more regulated storage and pipeline assets than is needed to serve jurisdictional requirements.[48]

Once again, Atmos's contentions that the information should not be provided because, as Atmos claims, the requested information contains confidential or trade secret information and is not relevant and consideration of the information would be inconsistent with the waiver of the prudency audits and the Authority's decision in 05-00253 are rejected. Similar to the gas sales volumes requested by item 2, the information requested by item 5 bears on, or reasonably could lead to other information that could bear on an issue in this docket. For example, Atmos's operations and maintenance expenses may vary depending on the gas supply plan and the reserve

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[43] *See Atmos Energy Corporation's Objections to Atmos Intervention Group's First Round of Discovery*, 4 (Jun. 6, 2006).
[44] *See id.*
[45] *See id.* at 5.
[46] *See id.* (citing Docket No. 97-01364, *In re: Application of United Cities Gas Company to Establish an Experimental Performance Based Ratemaking Mechanism* and Docket No. 05-00253, *In re: Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit*).
[47] *Response of Atmos Intervention Group to the Objections of Atmos Energy Corporation*, 7-8 (Jun. 7, 2006).
[48] *See id.* at 7.

margin associated with the peak day demand requirements. Operation and maintenance expenses are a critical part of the revenue requirement calculation.

E. CONCLUSIONS

Based on the foregoing, it is my determination that discovery request items 1 through 9 sent to Atmos by AIG call for the production of discoverable information. Atmos shall produce the requested information in accordance with the procedural schedule.

V. PROTECTIVE ORDER DISPUTE

Having determined that the information requested by AIG is discoverable, the next question is whether the Authority should require Atmos to share information related to AEM with Mr. Earl Burton, AIG's consultant and expert witness and a competitor of AEM.[49] AIG and Atmos do not dispute the need for a protective order only the degree of protection afforded AEM information under the protective order. The Consumer Advocate and Investigative Staff have taken a neutral position on this issue.

Atmos proposes to alter the proposed protective order circulated to all parties by expressly stating that the agreement prohibits disclosure to anyone associated with the marketing of services in competition with Atmos Energy Corporation and its affiliates or other producing party. Atmos also seeks to clarify that Mr. Burton is not a party to the docket for purposes of the protective order.[50] Atmos contends that the information constitutes protected trade secrets and that the requests constitute an abuse of regulatory process because they appear to have been drafted to aid Mr. Burton's competitive efforts.[51]

AIG opposes Atmos's modifications to the proposed protective order. According to AIG, Atmos's position with regard to Mr. Burton effectively prevents Mr. Burton from acting as a

[49] *See Atmos Energy Corporation's Motion for Protective Order*, 2 (Jun. 7, 2006).
[50] *See id.* at 4-5.
[51] *See id.* at 6-7.

consultant or expert witness on behalf of AIG.[52] In response to Atmos's arguments, AIG contends that Mr. Burton will be subject to the protective order and AIG has specifically refrained from asking for the names of AEM customers or any AEM customer specific information. AIG further asserts that granting Atmos's request would hinder the ability of AIG and the Authority to obtain expert opinions.[53]

Through its arguments relying on the The Uniform Trade Secrets Act and the doctrine of inevitable disclosure,[54] Atmos would have the Hearing Officer conclude that this agency (or for that matter any court) would be liable for misappropriation if it allowed a trade secret as defined by Section 47-25-1702 of Tennessee Code Annotated to be shared with a competitor through the discovery process even if a court entered a protective order relating to the information.[55] Such a conclusion is inconsistent with Rule 26.03(7) of the Tennessee Rules of Civil Procedure. Rule 26.03(7) of the Tennessee Rules of Civil Procedure permits a court to enter a protective order requiring that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."[56] Thus, a court may permit the discovery of trade secret and confidential materials, although it may choose to enter a protective order upon determining that justice requires such protection. At the Authority, discovery in contested cases is effectuated in accordance with the Tennessee Rules of Civil

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[52] *See Response of Atmos Intervention Group to the Objections of Atmos Energy Corporation*, 11 (Jun. 7, 2006).
[53] *See id.* at 12.
[54] During the status conference, Atmos described the doctrine of inevitable disclosure with regard to this docket as meaning that once Mr. Burton reviews the information it will always be with him and he will not be able to filter out the trade secret information when acting as a competitor. Transcript of Proceedings (June 8, 2006) (Status Conference).
[55] Atmos suggests that if this agency were to allow Mr. Burton to review the information, the agency could be liable for misappropriation under The Uniform Trade Secrets Act because the agency is a person as defined by the act. The definition of person includes government and governmental subdivision or agency and, therefore, in my opinion under Atmos's theory would include courts as well. *See Atmos Energy Corporation's Motion for Protective Order*, 7 (Jun. 7, 2006); Tenn. Code Ann. § 47-25-1702.
[56] Tenn. R. Civ. P. 26.03(7) (2005).

Procedure.[57] Thus, the Authority may require Atmos to produce the requested, discoverable information and may enter a protective order as justice requires. Based on the foregoing, Atmos's argument that the Authority may be held liable for allowing the production of the information requested in this docket must be rejected.

The next question to be resolved is whether justice requires that the requested information related to AEM not be disclosed to Mr. Burton or be disclosed only in a particular manner. The first issue to resolve is whether the requested information qualifies as a trade secret. It is likely that the information does qualify as such. To explain, Section 47-25-1702(4) defines a trade secret as information deriving "independent economic value" from not being generally known and that is the subject to reasonable efforts to maintain its secrecy.[58] Although the specific requests related to AEM may not require the production of information that standing alone derives independent economic value, the information taken as a whole does derive such value in that an expert in this area, as AIG claims Mr. Burton to be, could make certain assumptions and draw conclusions from an analysis of the information that would derive independent economic value from not being generally known.[59] Moreover, Atmos has asserted through the affidavit of Rob Ellis, AEM's Senior Vice President of Marketing, that AEM maintains the requested information as confidential trade secrets and that sharing the information with Mr. Burton or other competitors of AEM would harm AEM economically.[60] AIG did not contest the confidential treatment of the information by AEM. Based on these determinations, it is my conclusion that the requested information should be treated as though it is trade secret information as defined by The Uniform Trade Secret Act.

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[57] Tenn. Comp. R. & Regs. 1220-1-2-.11(1) (July, 2003 Revised).
[58] Tenn. Code Ann. § 47-25-1702(4).
[59] *See Wright Medical Technology, Inc. v. Grisoni*, 135 S.W.3d 561, 589 (Tenn. Ct. App. 2001) (finding that under common law a combination of information that may be publicly known may still be treated as a trade secret.)
[60] *Atmos Energy Corporation's Motion for Protective Order*, Exhibit B, p. 7 (Jun. 7, 2006).

Next, is the issue of how the information should be protected. One option is to allow Mr. Burton to have full access to the information for the purposes of this proceeding with the mandate that Mr. Burton shall not use the AEM information at any time now or in the future for the purposes of marketing services in competition with AEM. AIG favors this approach arguing that the protection afforded by this option is sufficient. Atmos objects to this option arguing that under the doctrine of inevitable disclosure, Mr. Burton will necessarily use the information he gained through this proceeding when marketing his services to potential clients.

A second option is to prevent Mr. Burton from reviewing any information related to AEM. Atmos favors this approach based on the doctrine of inevitable disclosure and its contention that these requests were made specifically to provide Mr. Burton with competitive information, actions that Atmos describes as an abuse of regulatory process. AIG, not surprisingly, objects to this option concluding that such protections would eliminate Mr. Burton from participating as a consultant or witness.

In 2004 when resolving a motion to compel in Docket No. 03-00585, the Hearing Officer made the following statement:

> Further and most important, it is my opinion that granting the ICOs the requested relief fails to recognize that the protective order is a document of honor. The CMRS carriers have emphatically asserted that they will abide by the terms of the order, and the ICOs have failed to demonstrate or convince that the information will be misused or that they will suffer harm if the terms of the existing protective order are followed.[61]

Today, the proposition that a protective order must be viewed as a document of honor remains valid. In that case, however, it was also concluded that the producing party would not suffer harm if the terms of the protective order were followed. In this instance, the same conclusion cannot be made if the only protection provided in the order is to prevent Mr. Burton from using

[61] Transcript of Proceedings, p.7 (Jul. 29, 2004) (Deliberations on Motion to Compel - Docket No. 03-00585, *In re: Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless*).

the AEM information at any time now or in the future for the purposes of marketing services in competition with AEM. Instead, it can only be reasonably concluded that AEM will not be harmed if the protective order prevents disclosure of information to Mr. Burton. When balancing the potential harm to AEM of disclosure with the effect of disqualifying Mr. Burton as a consultant or an expert, the harm to AEM is heavier. Regardless of whether it is referred to as inevitable disclosure, clearly, Mr. Burton cannot wipe clean his memory as to these matters when acting in his role as competitor to AEM. In addition, it may be difficult because of the nature of the information to determine if Mr. Burton ever actually uses the information in a competitive bid to a potential client in violation of the protective order.

Additionally, as Atmos notes, this Authority often uses language in protective orders that prevents the dissemination of information to "'anyone associated with the marketing of services in competition with the producing party.'"[62] Mr. Burton is without question associated with the marketing of services in competition with AEM. Although Atmos is the producing party, affording merit to this distinction would elevate form over substance.

Based on the foregoing, the protective order should prevent disclosure of any information related to AEM to Mr. Burton.[63] Such information includes balance sheets, income statements, the asset management agreement, AEM's response to Atmos's request for proposal, total monthly volumes and total monthly profits.

IT IS THEREFORE ORDERED THAT:

1. The objections of Atmos Energy Corporation to request items 1.A, 1.B, 1.C, 1.D, 1.E, 1.F, 1.G, 1.H(a) and (b), 3.A, 3.H, 3.I, 3.J and 3.K of the Consumer Advocate and Protection

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[62] *Atmos Energy Corporation's Motion for Protective Order*, 4-5 (Jun. 7, 2006) (quoting proposed protective order circulated by the Consumer Advocate) (citing Docket Nos. 05-00165, 04-00034, and 06-00093).

[63] This conclusion should not be construed as inconsistent with my pronouncement during the May 22, 2006 status conference that I plan to be liberal with regard to discovery because this issue is not one of whether information is discoverable, which was the subject of my comment.

Division of the Office of the Attorney General are sustained as to the $30,000 described by Atmos, but overruled with regard to any income amounts included in the "other income" description of the SEC 10-K form that do not include the $30,000 figure.

2. The objections of Atmos Energy Corporation to the request items 1 through 9 of the Atmos Intervention Group are overruled.

3. Atmos Energy Corporation shall produce the requested information in accordance with this Order and the procedural schedule attached to the *Order Granting Interventions and Setting Procedural Schedule* issued on May 25, 2006.

4. The parties shall file by 2:00 p.m. on Wednesday, June 21, 2006 an agreed protective order for the signature of the Hearing Officer.

5. The parties shall file by 2:00 p.m. on Friday, June 16, 2006 responses to the letter of Director Pat Miller filed in this docket on Thursday, June 8, 2006.

Ron Jones, Chairman
Acting as Hearing Officer[64]

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