

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 16, 2008

IN RE:)	
)	
ATMOS ENERGY CORPORATION'S)	DOCKET NO.
TARIFF FILING TO MODIFY AND ADD)	07-00020
LANGUAGE REGARDING)	
TRANSPORTATION SERVICE)	
(TARIFF NO. 2007-0021))	

**ORDER ON MOTION TO JOIN
ATMOS ENERGY MARKETING, LLC AND PROCEDURAL SCHEDULE**

This docket came before the Hearing Officer at a Status Conference held on December 13, 2007, to hear oral arguments on: (1) the request of Stand Energy Corporation ("Stand") to join Atmos Energy Marketing, LLC ("AEM") as a party and (2) to the extent possible, to schedule the proceedings to completion.

I. RELEVANT PROCEDURAL HISTORY

On November 30, 2007, Stand filed *Stand Energy Corporation's Motion to Join Atmos Energy Marketing as a Party and Motion to Compel* ("Motion to Join"). In the motion, Stand requested, in relevant part, to join AEM as a party and to extend for thirty (30) days all previously established deadlines, including the hearing dates.¹ Stand's request to join AEM results from the response of Atmos Energy Corporation ("AEC" or "Atmos") to Stand's

¹ *Stand Energy Corporation's Motion to Join Atmos Energy Marketing as a Party and Motion to Compel*, p. 6 (Nov. 30, 2007).

Interrogatories 1-21 and 1-23. For ease of reference, the interrogatories and responses are as follows:

Interrogatory 1-21: “What assets (firm transportation and storage) of the Atmos Energy Company does Atmos Energy Marketing use to serve gas transportation customers?”²

Response of Atmos: “Subject to and without waiving its General Objections, AEC responds as follows: AEC presumes that Stand means whether Atmos Energy Marketing uses any of the utility’s firm transportation or storage capacity on a connecting interstate pipeline to ensure commodity deliveries to AEC’s city gates on account of AEM’s customers behind those city gates. In response, AEC would respond that it does not know nor is it privy to what transportation or storage capacity is actually used by AEM (whether AEM’s directly held capacity or released capacity) in connection with such activities and that specific information would need to be obtained from AEM.”³

Interrogatory 1-23: “On Atmos Energy Corporation’s peak day, what capacity does Atmos Energy Marketing use to serve its transportation customers?”⁴

Response of Atmos: “Subject to and without waiving its General Objections, AEC responds as follows: See Response to Request 1-21.”⁵

On December 3, 2007, a *Notice of Filing* issued setting December 5, 2007, as the filing date for responses to the *Motion to Join*. AEC filed a response on December 5, 2007. No other party responded. On December 6, 2007, Stand filed *Stand Energy Corporation’s Reply in Support of Motion to Join Atmos Energy Marketing as a Party and Motion to Compel*.

On December 7, 2007, the *Order on Outstanding Motions* issued in which it was determined that “oral argument is necessary prior to ruling on the request to join AEM” and “that the procedural schedule with the exception of the December 11, 2007, filing date should be held

² *Stand Energy Corporation’s First Set of Discovery to Atmos*, p. 32 (Nov. 7, 2007).

³ *Responses and Objections of Atmos Energy Corporation to Stand Energy Corporation’s First Set of Discovery*, p. 33 (Nov. 27, 2007).

⁴ *Stand Energy Corporation’s First Set of Discovery to Atmos*, p. 34 (Nov. 7, 2007).

⁵ *Responses and Objections of Atmos Energy Corporation to Stand Energy Corporation’s First Set of Discovery*, p. 35 (Nov. 27, 2007).

in abeyance.”⁴ Oral argument was scheduled to be held during a status conference on December 13, 2007.⁵

A *Notice of Status Conference* issued on December 7, 2007. The Status Conference began as noticed on December 13, 2007, in the Hearing Room of the Tennessee Regulatory Authority (“TRA” or “Authority”). The parties in attendance were as follows:

Atmos Energy Corporation (“AEC” or “Atmos”) – A. Scott Ross Esq., Neal & Harwell, 150 4th Avenue North, Suite 2000, Nashville, Tennessee, 37219;

Atmos Intervention Group (“AIG”) – Henry M. Walker, Esq., Boulton, Cummings, Connors & Berry, PLC, 1600 Division Street, Suite 700, P.O. Box 340025, Nashville, Tennessee 37203;

Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”) – Timothy Phillips, Esq., Vance Broemel, Esq., and Steve Butler, Esq., Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202; and

Stand Energy Corporation (“Stand”) – D. Billye Sanders, Esq., Waller, Lansden, Dortch & Davis, LLP, 511 Union Street, Suite 2700, Nashville, Tennessee 37219.

During the Status Conference, each party argued its position with regard to the *Motion to Join*.

On December 13, 2007, following the Status Conference, AEC filed a letter in which it stated that AEM has “agreed voluntarily to provide responses to the two discovery requests that prompted Stand to file its motion – Stand 1-21 and 1-23.”⁶ On December 14, 2007, Stand filed a responsive letter and asserted that AEM’s voluntary agreement may resolve the production issue, but does not moot the *Motion to Join*. On January 2, 2008, AEM filed responses to the two discovery requests. No other related filings have been made.

II. *MOTION TO JOIN*

A. TRA AUTHORITY

In the *Order on Outstanding Motions*, Stand was directed to address in detail during oral argument its position with regard to the application of Rule 19.01 of the Tennessee Rules of

⁴ *Order on Outstanding Motions*, pp. 5-6 (Dec. 7, 2007).

⁵ *Id.* at 5.

⁶ Letter from Scott Ross, Counsel for AEC, to Director Ron Jones (Dec. 13, 2007).

Civil Procedure and the authority of the TRA to join AEM.⁹ During the oral argument, there was no dispute that generally the Authority can join a party. Authority Rule 1220-1-2-.22(2) specifically permits the Authority in any contested case to join parties.¹⁰ However, the parties did dispute whether the Authority can join AEM, specifically.

AEC argued that the Authority does not have jurisdiction over AEM; therefore, the Authority cannot force AEM to act as a party in this case or order AEM to do anything.¹¹ Stand disagreed and cited case law supporting the contention that, because AEM is an affiliate of a regulated utility and manager of regulated assets, the Authority can exercise jurisdiction over AEM by making it a party to this docket.¹² AIG asserted that if the Authority were to craft relief directed at AEM then AEM should be made a party. However, AIG cautioned that making the affiliate a party may not be the best approach. Alternatively, AIG stated that the Authority can require the regulated provider to obtain information in the hands of the affiliate.¹³

I do not in this order address the very specific issue of whether the Authority has jurisdiction over AEM sufficient to allow the Authority to join AEM because of my analysis, *infra*, of the other requirements set forth in Rule 19.01. Instead, I proceeded with my analysis based on the conclusion that the Authority has sufficient jurisdiction over AEM to require its participation in this docket. However, I emphatically note that I cannot and will not, as a director of this agency, condone or otherwise give credence to any action by a regulated utility that serves to shield activities otherwise within the control of this agency from the agency's reach.

⁹ *Order on Outstanding Motions*, p. 5 (Dec. 7, 2007).

¹⁰ Tenn. Comp. R. & Regs. 1220-1-2-.21(2) (July 2006 (Revised)).

¹¹ Transcript of Proceedings, p. 49 (Dec. 13, 2007) (Status Conference).

¹² *Id.* at 19-22.

¹³ *Id.* at 39-40.

B. POSITIONS OF THE PARTIES WITH REGARD TO RULE 19.01 AND THE ANALYSIS THEREOF

1. Positions of the Parties

The legal authority upon which Stand relies is Rule 19.01 of the *Tennessee Rules of Civil Procedure*.¹⁴ This rule states:

19.01. Persons to Be Joined if Feasible. – A person who is subject to service of process shall be joined as a party if (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest, or (ii) leave any of the person’s already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Stand relies on both Rule 19.01(1) and (2) although the lion’s share of Stand’s argument focuses on (2). With regard to (1), Stand argues that if AEM is not in the case, then “complete relief could not be awarded if this Authority was planning to issue some relief against AEM.”¹⁵ Stand anticipates that the relief will be issued against AEC, but argues that AEM is AEC and the two cannot be separated for the purposes of this tariff.¹⁶

With regard to Rule 19.01(2), Stand asserts that the issue here is not merely about receiving responses to discovery, but, more importantly, the issue involves ensuring that AEM has an opportunity to protect its interests in a docket with which AEM is closely situated.¹⁷ As an example of AEM’s interest, Stand explains that it is attempting to determine whether the AEC

¹⁴ This order addresses only the application of Rule 19.01 to the facts of this case as this was the sole basis upon which Stand requested joinder. However, this order should not be read for the proposition that the Authority may only join a party upon a showing pursuant to Rule 19.01.

¹⁵ Transcript of Proceedings, p. 60 (Dec. 13, 2007) (Status Conference).

¹⁶ *Id.*

¹⁷ *Id.* at 6, 8, 11 & 16.

tariff as applied results in unequal treatment of marketers. Stand describes the possibility of unequal treatment as follows:

For example, if AEM has the ability to use Atmos' assets to store gas, to avoid penalties for its customers, then it will have a competitive advantage against companies like my client, Stand Energy, or other transportation customers who are on the system.

It might appear on the face of the tariff that the fees are being charged in the same manner, but, again, if AEM has an ability to use Atmos' assets to store gas in order to avoid charges, then the way the tariff is applied is actually unequal to the other customers and other marketers who have customers on that system.¹⁸

Tying this claim to AEM's interests in this docket, Stand asserts that "a ruling by the TRA that orders Atmos to modify its arrangement with AEM would certainly affect AEM's interests."¹⁹ Similarly, Stand argues that in the event that the Authority determines that the arrangement between AEM and AEC is somehow inappropriate, then AEM's interests in that arrangement could be affected.²⁰

As to Rule 19.01(2)(ii), specifically, Stand asserts that if AEM is not made a party to this docket, "AEM could seek redress and Stand and other parties would be subject to the risk of participating in another proceeding regarding these issues."²¹ Stand urges that the joinder rule seeks to prevent a party from being able to come in and seek relief as a result of not being a party to the earlier proceeding and seeks to prevent the parties to the earlier proceeding from having to litigate another proceeding.²²

Aside from asserting that the Authority lacks jurisdiction over AEM and, therefore, cannot join AEM under Rule 19.01, AEC argues that the focus of this dispute should be on the

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 10.

²⁰ *Id.* at 16 & 30.

²¹ *Id.* at 11.

²² *Id.* at 29.

relief in this case.²³ AEC continues that the issue in this docket is the transportation tariff and the relief is the adoption, revision or modification of the tariff - relief the Authority could provide absent the intervention of any person or entity.²⁴ AEC contends that in this docket the relief to be afforded will be directed at AEC alone.²⁵

The Consumer Advocate is not opposed to joining AEM and did not offer any specific argument as to whether the standard contained in Rule 19.01 has been met. The Consumer Advocate argues in favor of full disclosure of information in the hands of AEC and AEM and stated that joining AEM is one way to attain full disclosure.²⁶

AIG poses the question as “do we need to make [AEM] a party in order to make sure that whatever relief is ordered can be carried out.”²⁷ AIG submits that if the potential relief is ordering AEM to do or not to do something, then they are an indispensable party.²⁸

2. Analysis

In order to substantiate the requirements of Rule 19.01, Stand relies on the relief the Authority may want to order in the event the Authority determines that the tariff is discriminatory or that the transactions between AEC and AEM are somehow inappropriate. Stand contends that the Authority may wish to order AEM to take specific action or to order AEC to take specific action that has a collateral effect on AEM. Stand distinguishes AEM from other similarly situated marketers by claiming that AEM as AEC’s affiliate and asset manager is uniquely situated to be affected by any relief afforded in this docket. In my opinion, Stand’s

²³ *Id.* at 49-50.

²⁴ *Id.* at 50.

²⁵ *Id.* at 51.

²⁶ *Id.* at 38-39.

²⁷ *Id.* at 40.

²⁸ *Id.* at 41-42.

arguments fail to fully take into consideration the limited scope of this docket as well as the purpose of Docket No. 07-00225, another docket currently pending before the Authority.

The purpose of this docket is to review the transportation tariff filed by AEC and to determine whether that tariff should be permitted to go into effect. Intervenors are free to raise any argument in support of their claims that the tariff should not be allowed to go into effect. In the event that the Authority finds in favor of any one of those arguments, the Authority's options are limited and should be directed at AEC's tariff. The Authority may deny the tariff thereby preventing it from becoming effective. The Authority may also choose to suggest revisions that AEC could make to the tariff in order to attain approval. In the end, however, AEC may choose to withdraw the tariff rather than to implement the tariff with the suggested Authority revisions. Thus, for example, if the Authority were to determine that the tariff is discriminatory as applied because of contract terms between AEM and AEC, including AEM's use of AEC's storage, the appropriate relief would be to deny the tariff or to provide AEC the opportunity to revise the tariff. At that time, it would be left to AEM and AEC as to whether to modify those contract terms to eliminate the discriminatory application of the tariff.

Stand's argument that the Authority may order AEC and AEM to modify their agreement goes beyond what is before the agency in this docket. It is not the task of this agency to modify agreements entered into outside the tariff so that the Authority can then approve the tariff. If the Authority denies a tariff, it is the decision of the proponent of the tariff as to whether to cure the defect. In this docket, if the contention is that the terms of the contract between AEM and AEC are inappropriate, that is a separate matter for the Authority's consideration and, in fact, the

Authority is considering this very issue in Docket No. 07-00225, *In re: Docket to Evaluate Atmos Energy Corporation's Gas Purchase and Related Sharing Incentives*.²⁹

Stand describes this docket and Docket No. 07-00225 as follows:

In this docket, you know, the relief will be that the TRA will order some relief in relationship to the docket. You know, they might order a fee that's different. They might order a fee that's calculated different. They might not allow a fee.

In the asset management case, we're not dealing with a particular tariff. We're dealing with the general overall scope of how Atmos Energy Corporation and AEM relate to one another. You know, it may result in some guidelines being established. It may result in the TRA ordering certain things happening, but this specific tariff is not on the table in that docket.³⁰

Stand's own description of the two dockets bears out the distinction I have described here. The appropriateness of the transactions between AEM and AEC is a determination to be made in Docket No. 07-00225, not this docket. Compared to Docket No. 07-00225, this docket is very narrow in scope.

The Tennessee Court of Appeals has held that "Rule 19 is designed to protect the interests of absent persons as well as those already before the court from multiple litigation and inconsistent judicial determinations."³¹ Permitting Stand in this docket to raise issues as to the appropriateness of the transactions between AEM and AEC would serve only to subject all parties to the possibility of litigating the same issues in both dockets. In fact, the very discovery

²⁹ Docket No. 07-00225 has an extensive issues list, which includes the issue of whether AEC is properly compensated for the use of its assets. As part of such inquiry, a party could certainly raise issues with regard to AEM's use of AEC's storage. See *In re: Docket to Evaluate Atmos Energy Corporation's Gas Purchase and Related Sharing Incentives*, Docket No. 07-00225, *Order on December 13, 2007 Status Conference*, Attachment A (Dec. 21, 2007).

³⁰ Transcript of Proceeding, p. 26 (Dec. 13, 2007) (Status Conference).

³¹ *Citizens Real Estate & Loan Co., Inc. v. Mountain States Development Corporation*, 633 S.W.2d. 763, 766 (Tenn. Ct. App. 1981).

interrogatories that resulted in the filing of the *Motion to Join*, Stand Interrogatories 1-21 and 1-23, are now listed on the issues list in Docket No. 07-00225.³²

In conclusion, as to Rule 19.01(1), the relief in this docket is not to be directed at AEM. Relief is limited to specifically addressing the effectiveness of AEC's tariff. Such relief can be accorded without AEM's participation as a party. As to Rule 19.01(2)(i), because the direct or indirect action Stand suggests the Authority may take against AEM is outside the scope of this docket, Stand has not established that AEM's lack of participation in this docket will impair or impede AEM's ability to protect its interest. Finally, I cannot accept the contention that the requirement of Rule 19.01(2)(ii) has been met. To the contrary, it is my conclusion that moving forward in this docket as Stand suggests will likely result in identical disputes being litigated in both this docket and Docket No. 07-00225.

Despite the decision herein to deny the joinder of AEM, I emphasize, as I did at the conclusion of the status conference,³³ that I fully support the Consumer Advocate's pleas for full disclosure. To the extent that information is requested that is relevant to the evaluation of the proposed transportation tariff, that information will be obtained and made a part of the docket. Moreover, any attempts to avoid responding to requests for such information will be reviewed with the highest of scrutiny.

III. PROCEDURAL SCHEDULE

In the *Order on Outstanding Motions*, the procedural schedule was held in abeyance.³⁴ At the conclusion of the December 13, 2007, Status Conference, I stated that I would attach to

³² See *In re: Docket to Evaluate Atmos Energy Corporation's Gas Purchase and Related Sharing Incentives*, Docket No. 07-00225, *Order on December 13, 2007 Status Conference*, Attachment A, Issues 10 and 12 (Dec. 21, 2007).

³³ Transcript of Proceeding, p. 61 (Dec. 13, 2007) (Status Conference).

³⁴ *Order on Outstanding Motions*, p. 15 (Dec. 7, 2007).

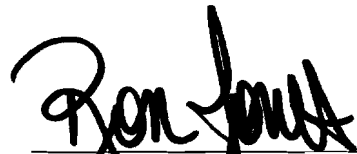
this order a proposed procedural schedule and that the parties, with Mr. Ross acting as facilitator, would discuss the schedule to resolve any conflicts. Below is the proposed schedule:

Intervenors' Pre-filed Testimony Due	Friday, January 25, 2008
AEC's and CAPD's Pre-filed Rebuttal Testimony	Friday, February 22, 2008
Pre-Hearing Conference	Friday, March 14, 2008
Hearing on the Merits	Thursday, March 20, 2008 (starting at 9:00 a.m.)
Post-Hearing Briefs	Friday, April 18, 2008

AEC shall file on behalf of all parties by 2:00 p.m. on Tuesday, January 22, 2008, a statement confirming that all parties agree to the above, proposed procedural schedule or proposing modifications thereto.

IT IS THEREFORE ORDERED THAT:

1. The request to join Atmos Energy Marketing, LLC contained in *Stand Energy Corporation's Motion to Join Atmos Energy Marketing as a Party and Motion to Compel* is denied.
2. Atmos Energy Corporation shall file on behalf of all parties by 2:00 p.m. on **Tuesday, January 22, 2008**, a statement confirming that all parties agree to the proposed procedural schedule set forth herein or proposing modifications thereto.



Ron Jones, Director
Acting as Hearing Officer³⁵

³⁵ The panel voted to appoint Director Jones as the hearing officer to hear this docket on the merits during the July 9, 2007, Authority Conference. See Transcript of Authority Conference, pp. 38-39 (July 9, 2007).