

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 18, 2008

IN RE:)	
)	
DOCKET TO EVALUATE ATMOS)	DOCKET NO.
ENERGY CORPORATION'S GAS)	07-00225
PURCHASES AND RELATED SHARING)	
INCENTIVES)	

**ORDER GRANTING MOTION TO CROSS EXAMINE ROB ELLIS AND TO FILE THE
AFFIDAVITS OF JOHN DOSKER AND MARK WARD**

This docket came before the Hearing Officer at a Status Conference held on January 11, 2008, in order to resolve outstanding disputes related to the entry of a protective order, including, as a preliminary matter, argument on *Stand Energy Corporation's Motion to Cross Examine Rob Ellis and Requests for Leave to File Affidavits of John Dosker and Mark Ward* filed on January 10, 2008, and *Atmos Energy Marketing, LLC's Preliminary Response in Opposition to Motion of Stand Energy Corporation and Request for Leave to File Affidavits of John Dosker and Mark Ward* filed on January 11, 2008.

I. RELEVANT PROCEDURAL HISTORY AND POSITIONS OF THE PARTIES

On November 8, 2007, the Hearing Officer issued the *Order on November 5, 2007 Pre-Hearing Conference*. The order set out a procedural schedule, which required the parties to file on December 20, 2007, "an agreed protective order or, if no agreement can be reached, a statement of the disputed issues along with the parties' positions."¹ On December 21, 2007, counsel for Atmos Energy Marketing, LLC ("AEM") filed a letter expressing the agreement of

¹ *Order on November 5, 2007 Pre-Hearing Conference*, p. 7 (Nov. 8, 2007).

all parties to “either submit an Agreed Protective Order or competing drafts of Proposed Protective Orders (or competing provisions), along with any desired support, to the Hearing Officer on or before 2:00 p.m. on January 4, 2008.”²

As a result of the filing of the letter, on December 21, 2007, the Hearing Officer issued the *Order on the Protective Order Dispute Process*. The order stated:

I find the date acceptable, but remind the parties that as part of the procedural schedule previously adopted in this docket, the parties were instructed in the event that an agreement as to the protective order could not be reached to file “a statement of the disputed issues along with the parties’ positions.”³ Whatever the form of the filings to be made on January 4, 2008, all parties shall clearly detail the disputes and set forth their positions with specificity.⁴

On January 4, 2008, the parties made the following filings: *Statement of Disputed Issues Regarding the Proposed Protective Order* filed by Stand Energy Corporation (“Stand”), *Atmos Energy Corporation’s Statement of Position Regarding Protective Order*, *Atmos Energy Marketing, LLC’s Brief Regarding Protective Order Disputes*, and *Comments of Atmos Intervention Group*. Relevant to this order is the position of AEM that no employees of Stand, “including, but not limited to, any in-house counsel, are permitted absent order of the Authority to receive or review, directly or indirectly, commercially sensitive information and trade secrets produced by AEM.”⁵ AEM attached to its filing the *Affidavit of Rob Ellis* and the *Affidavit of Rob Ellis* that was filed in Docket No. 05-00258⁶ as support for its position that the information to be produced includes confidential trade secrets and commercially sensitive information that if released to Stand will result in economic harm to AEM.⁷

² Letter to Director Ron Jones from Melvin J. Malone, dated December 20, 2007, p. 1 (Dec. 21, 2007).

³ *Order on November 5, 2007 Pre-Hearing Conference*, p. 7 (Nov. 8, 2007) (footnote in the original).

⁴ *Order on the Protective Order Dispute Process*, p. 1 (Dec. 21, 2007).

⁵ *Atmos Energy Marketing, LLC’s Brief Regarding Protective Order Disputes*, p. 3 (Jan. 4, 2008).

⁶ *In re: Petition to Open an Investigation to Determine Whether Atmos Energy Corp. Should be Required by the TRA 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*.

⁷ *Atmos Energy Marketing, LLC’s Brief Regarding Protective Order Disputes*, p. 6 (Jan. 4, 2008).

On January 10, 2008, Stand filed *Stand Energy Corporation's Motion to Cross Examine Rob Ellis and Request for Leave to File Affidavits of John Dosker and Mark Ward* (“Stand’s Motion”). As to Mr. Ellis’ affidavits, Stand argues that it should be permitted to cross-examine Mr. Ellis because of “vague and conclusory statements” in his affidavits.⁸ Stand argues that if Mr. Ellis is not available for cross-examination, the affidavits should not be considered pursuant to Tennessee Code Annotated section 4-5-313(2).⁹ As to the filing of Mr. Dosker’s affidavit, Stand argues that it is necessary because of conclusory AEM statements regarding Mr. Dosker’s duties. As to Mr. Ward, Stand argues that his affidavit should be permitted because AEM has objected to his accessing AEM information.¹⁰

On January 11, 2008, AEM filed *Atmos Energy Marketing, LLC's Preliminary Response in Opposition to Motion of Stand Energy Corporation and Request for Leave to File Affidavits of John Dosker and Mark Ward*. As to the affidavits of Messrs. Dosker and Ward, AEM argued that Stand has already had an opportunity to submit affidavits given that the *Order on the Protective Order Dispute Process* permitted the parties to set forth their positions in whatever form.¹¹ AEM next contends that Stand’s argument regarding AEM’s failure to identify discovery requests or to provide the subject matter of the documents intended to be protected is misplaced because, one, the protective order is being entered prior to the production of confidential information and, two, the proposed protective order permits parties to contest a party’s designation of information as confidential.¹² Also, AEM argues that its description of Mr. Dosker’s duties is not conclusory as AEM cites legal authority and Mr. Dosker’s testimony

⁸ *Stand Energy Corporation's Motion to Cross Examine Rob Ellis and Request for Leave to File Affidavits of John Dosker and Mark Ward*, p. 2 (Jan. 10, 2008).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Atmos Energy Marketing, LLC's Preliminary Response in Opposition to Motion of Stand Energy Corporation and Request for Leave to File Affidavits of John Dosker and Mark Ward*, p. 2 (Jan. 4, 2008).

¹² *Id.*

in Docket No. 07-00105.¹³ Finally, AEM notes that Mr. Ellis' affidavits are not essential to the resolution of the protective order language disputes, and if the Authority determines that section 4-5-313(2) is applicable, AEM, in the interest of moving this matter forward, will proceed without the affidavits.

A Status Conference began as noticed¹⁴ on January 11, 2008, at 9:00 a.m. in the Hearing Room of the Tennessee Regulatory Authority. The parties in attendance were as follows:

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

Atmos Energy Marketing, LLC ("AEM") – Melvin J. Malone, Esq., Miller & Martin PLLC, 1200 One Nashville Place, 150 4th Avenue North, 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") – Vance Broemel, Esq. and Joe Shirley, 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.

The Status Conference began with a discussion of *Stand's Motion*. Stand and AEM each argued the points made in their respective filings as well as the standard for determining the merits of the issue of whether Messrs. Dosker and Ward should have access to AEM's confidential information and the application of that standard to the facts of the case.

¹³ *In re: Petition of Atmos Energy Corporation for Approval of Adjustments to its Rates and Revised Tariff*.

¹⁴ A Notice of Status Conference issued on January 8, 2008.

II. DECISION OF THE HEARING OFFICER

Stand's Motion presents two questions: (1) should Stand be permitted to cross-examine Mr. Ellis and (2) should Stand be permitted to file in support of its position on the protective order dispute the affidavits of Messrs. Dosker and Ward. At the conclusion of the Status Conference, I answered these two questions affirmatively. After having studied the filings and listened to oral arguments, it became readily apparent to me that the resolution of the issue with regard to whom should have access to confidential information pursuant to a protective order likely hinges on factual determinations regarding the roles played at Stand by Messrs. Ward and Dosker. In my opinion, the need to make these factual determinations necessitates consideration of the affidavits of Messrs. Ellis, Ward, and Dosker.

Moreover, I find the decision on this particular protective order dispute is of such significant consequence that cross-examination should be permitted and that I should have the opportunity to question the witnesses at a live hearing. AEM strenuously urges that the terms of the protective order are not sufficient to protect AEM from the harm that will follow from allowing Messrs. Dosker and Ward access to AEM's confidential information.¹⁵ On the other hand, Stand urges that it will not be able to effectively prosecute its case if its in-house personnel are prevented from seeing AEM's confidential information.¹⁶ Thorough consideration of these arguments requires that I utilize all available processes, including a hearing, to create a complete record upon which I can base my decision.

Additionally, I find that there is no prejudice to any party by adopting this approach. All parties will be afforded the opportunity to cross-examine the affiants. Moreover, it is my intention to hold the hearing and to issue a ruling on all protective order disputes in time to

¹⁵ See, e.g., Transcript of Proceedings, pp. 20-21 (Jan. 11, 2008) (Status Conference).

¹⁶ See, e.g., *Id.* at 61.

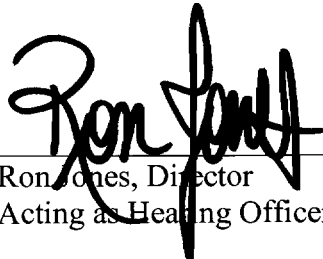
permit the filing of a protective order in advance of the due date for responses to the first round of discovery disputes, which is February 19, 2008.

As to Stand's argument with regard to the application of Tennessee Code Annotated section 4-5-313(2), I do not make a specific ruling. While I question the application of the statute to the Status Conference scheduled in this docket, I do not base my decision herein to allow the affidavits into the record on this statute. Instead, it is my opinion that the most prudent, fair, and equitable manner in which to proceed is to allow the three affidavits into the record and to permit all parties and the Hearing Officer to question the affiants.

IT IS THEREFORE ORDER THAT:

1. *Stand Energy Corporation's Motion to Cross Examine Rob Ellis and Requests for Leave to File Affidavits of John Dosker and Mark Ward* filed on January 10, 2008, is granted.

2. A Hearing with regard to the issue of whether Mr. Mark Ward and Mr. John Dosker, employees of Stand Energy Corporation, should be permitted to receive information related to Atoms Energy Marking, LLC pursuant to the terms of a protective order shall be held on January 23, 2008, beginning at 9:00 a.m. in the Hearing Room of the Tennessee Regulatory Authority.



Ron Jones, Director
Acting as Hearing Officer¹⁷

¹⁷ During the deliberations in Docket Nos. 05-00253 and 05-00258 on August 20, 2007, the panel voted to open a new docket and appointed Director Jones to serve as the Hearing Officer for the purposes of preparing the newly-opened docket for hearing by the panel. *See* Transcript of Authority Conference, pp. 36-50 (Aug. 20, 2007).