BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 14, 2008

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

ORDER ON PROTECTIVE ORDER DISPUTES

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. As a result of a determination at the Status Conference, a hearing was held on January 23, 2008, in order to hear testimony on one of the outstanding disputes. This order resolves each of the protective order disputes raised in the *Statement of Disputed Issues Regarding the Proposed Protective Order*, *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*, all filed on January 4, 2008.

I. RELEVANT PROCEDURAL HISTORY

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] The order also provided that

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

the Hearing Officer would convene, if necessary, a status conference on January 11, 2008, to resolve protective order disputes.[2] On December 21, 2007, counsel for Atmos Energy Marketing, LLC ("AEM") filed a letter expressing the agreement of 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."[3] The Hearing Officer accepted the proposed filing date revision by order entered on December 21, 2007.[4]

On January 4, 2008, the parties made the following filings: Stand Energy Corporation's ("Stand") *Statement of Disputed Issues Regarding the Proposed Protective Order*, *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*. Stand and AEM each attached a proposed protective order to its respective filing. The following issues were presented in the filings:

1. Should Mr. Ward and Mr. Dosker, employees of Stand, be provided access to confidential information related to AEM?
2. Should specific names of in-house counsel and employees who have access to the confidential information be listed in the final protective order?
3. Should Footnote 2 of the AEM proposed protective order be included in the final protective order?
4. Should Hal Novak be specifically listed in the final protective order?
5. Should the word "direct" be included in paragraph 3(f)?
6. Should there be prohibitions on AEC's and AEM's receipt of confidential information?
7. Should the final protective order contain language regarding the burden of establishing that information should not be treated as confidential?
8. Should paragraph 3(h) of the AEM proposed protective order remain in the final protective order?

---

[2] *Id.*
[3] Letter to Director Ron Jones from Melvin J. Malone, dated December 20, 2007, p. 1 (Dec. 21, 2007).
[4] *Order on Protective Order Disputes*, p. 1 (Dec. 21, 2007).

AEM attached to its filing an *Affidavit of Rob Ellis* and an *Affidavit of Rob Ellis* that was filed in Docket No. 05-00258[5] 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.[6]

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*"). 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.* At the January 11, 2008, Status Conference, the parties 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 Mr. Dosker and Mr. Ward should have access to confidential information and the application of that standard to the facts of the case. The Hearing Officer ruled in favor of *Stand's Motion* at the conclusion of the Status Conference and issued the *Order Granting Motion to Cross Examine Rob Ellis and to File the Affidavits of John Dosker and Mark Ward* on January 18, 2008.

On January 23, 2008, the Hearing Officer convened a hearing to take the testimony of Messrs. Ellis, Dosker, and Ward. All parties were provided the opportunity to question the witnesses. The parties in attendance were as follows:

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

---

[5] *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.*

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

Atmos Energy Marketing, LLC ("AEM") – Melvin J. Malone, Esq., Miller & Martin PLLC, 1200 One Nashville Place, 150 4th Avenue North, Nashville, Tennessee, 37219;
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.

II. ISSUES

1. Should Mr. Ward or Mr. Dosker, employees of Stand, be provided access to confidential information[7] related to AEM?

a. Legal Standard

There is no question that courts may enter protective orders which prohibit access to confidential information by a party or certain individuals related to a party.[8] Courts may deny access outright or craft a procedure through which access is afforded and have often used a multi-step analysis when determining the degree of the restriction to be ordered. The general analysis under the federal rules has been described as follows:

> First, the party opposing discovery must show that the information is a "trade secret or other confidential research, development, or commercial information," under Rule 26(c)(7) and that its disclosure would be harmful to the party's interest in the property. The burden then shifts to the party seeking discovery to show that the information is relevant to the subject matter of the lawsuit and is necessary to prepare the case for trial . . . .

[7] For the purposes of this issue, confidential information shall be defined as agreed to by the parties in the proposed protective orders filed in this docket on January 4, 2008. According to these proposals, confidential information is defined as "documents, testimony, or information in whatever form which the producing party, in good faith, and based on reasonable inquiry, deems to contain trade secrets, confidential research, development or other sensitive information protected by state or federal law, regulation or rule, and which has been specifically designated by the producing party." *Statement of Disputed Issues Regarding the Proposed Protective Order*, Attachment, para. 1 (Jan. 4, 2008); *Atmos Energy Marketing, LLC's Brief Regarding Protective Order Disputes*, Exhibit A, para. 1 (Jan. 4, 2008).

[8] *See generally*, Fed. R. Civ. P. 26(c)(7); Tenn. R. Civ. P. 26.03(7). Determinations with regard to the entry of a protective order are discretionary and will only be overturned on appeal upon a finding that the court abused its discretion. *Loveall v. American Honda Motor Co., Inc.*, 694 S.W.2d 937, 939 (Tenn. 1985).

> If the party seeking discovery shows both relevance and need, the court must weigh the injury that disclosure might cause to the property against the moving party's need for the information.[9]

With regard to the balancing, one court has explained:

> Because protective orders are available to limit the extent to which disclosure is made, the relevant injury to be weighed in the balance is not the injury that would be caused by public disclosure, but the injury that would result from disclosure under an appropriate protective order. In this regard, it is presumed that disclosure to a party who is not in competition with the holder of the trade secret will be less harmful than disclosure to a competitor.[10]

This same court also noted that the "balance between the need for information and the need for protection against the injury caused by disclosure is tilted in favor of disclosure once relevance and necessity have been shown."[11] Additionally, in Tennessee, the party claiming harm must demonstrate "great competitive disadvantage and irreparable harm."[12]

The courts have provided specific guidance with regard to the balancing of parties' interests when the issue involves the denial of access to in-house counsel. It is inappropriate when weighing the parties' interests to rely "on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order."[13] Instead, the determination of whether "an unacceptable opportunity for inadvertent disclosure exists" must be made on a counsel-by-counsel basis.[14] In instances where in-house counsel is "involved in competitive decisionmaking" it may be appropriate to deny access to in-house

---

[9] *In re: Remington Arms Company, Inc.*, 952 F.2d 1029, 1032 (8th Cir. 1991) (citations omitted) (quoting Fed. R. Civ. Pro. 26(c)(7)); *see Coca-Cola Bottling Company of Shreveport, Inc. v. Coca-Cola Company*, 107 F.R.D. 288, 292-93 (D. Del. 1985) (using the same multi-step analysis). Tennessee's courts have interpreted Tennessee's protective order rule, Tenn. R. Civ. Pro. 26.03(7), consistently with its federal counterpart. *See Loveall v. American Honda Motor Co., Inc.*, 694 S.W.2d 937, 939 (Tenn. 1985).

[10] *Coca-Cola Bottling Company of Shreveport, Inc. v. Coca-Cola Company*, 107 F.R.D. 288, 293 (D. Del. 1985).

[11] *Id.*

[12] *Loveall v. American Honda Motor Co., Inc.*, 694 S.W.2d 937, 939 (Tenn. 1985).

[13] *U.S. Steel Corporation v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984).

[14] *Id.*

counsel or force the party seeking access to retain outside counsel.[15] More specifically, consideration must be given to the risks and safeguards surrounding inadvertent disclosure, the nature of the claims, a party's opportunity to develop its case through alternative discovery procedures, in-house counsel's actual role in the company, in-house counsel's association and relationship with competitive decisionmakers, the size and managerial hierarchy of the company seeking access and any other factors that enhance the risk of inadvertent disclosure.[16] With regard to the need of the party seeking disclosure of confidential information to in-house counsel, it has been said: "Finally, most courts do not factor in the cost of outside counsel when assessing a party's ability to pursue its case despite restricting in-house counsel's access to discovery materials. The question, instead, is whether the party's ability to litigate through outside counsel will be impaired."[17]

In Docket No. 05-00258, the hearing officer addressed a set of facts similar to those presented by this issue. In that docket, AEC objected to sharing information related to AEM with Mr. Earl Burton, consultant and expert witness for the Atmos Intervention Group ("AIG") and a competitor of AEM. During a status conference, AEC suggested 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."[18] In resolving the dispute, the hearing officer stated that in the case of Mr. Burton, "it can only be reasonably concluded that AEM will not be

---

[15] *Id.*

[16] *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992); *Autotech Technologies Limited v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 408-10 (N.D. Ill. 2006).

[17] *Autotech Technologies Limited v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 413 (N.D. Ill. 2006).

[18] *In re: Petition of the Consumer Advocate to Open an 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*, Docket No. 05-00258, *Order Resolving Discovery and Protective Order Disputes and Requiring Filings*, p. 16 n.54 (Jun. 14, 2006) (referencing Transcript of Proceedings, pp. 73-74 (Jun. 8, 2006)).

harmed if the protective order prevents disclosure of information to Mr. Burton."[19] In reaching this conclusion and consistent with the case law cited above, the hearing officer balanced the "potential harm to AEM of disclosure with the effect of disqualifying Mr. Burton as a consultant or an expert" and found in favor of AEC.[20]

b. Application of the Legal Standard

i. Confidential Claim and Need and Relevance

In applying the multi-step analysis contemplated by the case law to the facts of this case, certain assumptions must be made because of the procedural posture of this docket. Specifically, at this time the information claimed to be confidential and in need of protection has not been produced and is not before me for inspection. Thus, as to the first two determinations to be made – (1) whether the party seeking protection has demonstrated that the information is confidential and (2) whether the party seeking production has demonstrated that the information is relevant and necessary – I assume that the parties have made the necessary demonstrations. That is, for the purposes of disposing of this issue, I assume that information that will be designated as confidential is in fact confidential information and is relevant and necessary to the prosecution of Stand's claims in this docket, whatever they may be.

Stand contends that resolution of this issue is premature because the information has not yet been produced and the procedural schedule provides sufficient opportunities to address AEM's concerns in the future.[21] In my opinion, the fact that I do not have specific information in front of me does not preclude my consideration of this issue. To explain, the issue encompasses all information that parties may designate as confidential information that is related

[19] *Id.* at 19.
[20] *Id.*
[21] Transcript of Proceedings, vol. I B, p. 96 (Jan. 23, 2008) (Hearing).

to AEM. This is where the assumption related to the confidentiality of the information becomes important because the relevant determination when evaluating the possible harm to AEM is whether the release of information properly designated as confidential to Mr. Ward and Mr. Dosker will harm AEM. This determination can be made without reliance on the actual information.

Additionally, I find that neither party is prejudiced by my assumptions because the protective orders proposed by the parties and the protective order that will ultimately be entered in this docket include a provision that allows any party to challenge another party's designation of information as confidential information.[22] Similarly, there are multiple opportunities in the procedural schedule for a producing party to challenge the relevance of information requested through discovery.[23] Thus, to the extent that there is any dispute as to the confidential designation of information or the relevancy of information, all parties have a vehicle through which to assert that there is a dispute and an opportunity to have their arguments heard.

ii. Balancing Interests

Having explained the underlying assumptions, I am now faced with the task of balancing Stand's need and AEM's harm. As a starting point, I note that as to this case in particular, the relevant considerations to balance are the need of Stand's General Counsel, Mr. Dosker, and Vice-President of Regulatory Affairs, Mr. Ward, to have access to confidential information related to AEM and the harm that will be caused to AEM, if any, by the disclosure of that information by Mr. Ward and Mr. Dosker. When evaluating the harm to AEM, the evaluation

---

[22] *See Statement of Disputed Issues Regarding the Proposed Protective Order*, Attachment, para. 10 (Jan. 4, 2008); *Atmos Energy Marketing, LLC's Brief Regarding Protective Order Disputes*, Exhibit A, para. 10 (Jan. 4, 2008). I note also that with regard to the customer information, Stand recognized that the information is highly sensitive. Transcript of Proceedings, vol. I A, pp. 66-67 (Jan. 23, 2008) (Hearing).

[23] The procedural schedule in this docket allows three rounds of discovery, including three opportunities to object to discovery requests as being irrelevant. *Order on December 13, 2007 Status Conference*, Attachment B (Dec. 21, 2007).

will center on the harm, if any, that will result if the protective order proposed by Stand were adopted. In other words, the relevant determination is to what degree AEM will be harmed if Mr. Ward and Mr. Dosker were to inadvertently disclose confidential information. I find it appropriate when evaluating the evidence with regard to Mr. Ward to rely on the same factors the courts have utilized when determining whether in-house counsel should have access to information. I find those factors to be generally applicable to anyone whose role may be in question. Specifically, I conclude that in resolving this issue as to both Mr. Ward and Mr. Dosker due consideration must be given to the risks and safeguards surrounding inadvertent disclosure, the nature of the claims, a party's opportunity to develop its case through alternative discovery procedures, the person's actual role in the company, the person's association and relationship with competitive decisionmakers, the size and managerial hierarchy of the company seeking access and any other factors that enhance the risk of inadvertent disclosure.

Applying the factors above in this case, it is my conclusion that there is significant opportunity for inadvertent disclosure by Mr. Ward and Mr. Dosker. The testimony reveals that Stand is a very small corporation with approximately twenty-five employees and that Stand utilizes additional marketing affiliates that are not Stand employees.[24] Stand is run by Judith Phillips, Stand's President and fifty percent owner. [25] Ms. Phillips oversees all aspects of the company and has the final decisionmaking authority with regard to this litigation.[26] Mr. Ward reports directly to the Ms. Phillips[27] and meets with her on an as-needed basis.[28] Mr. Ward is directly involved with Stand's operations and marketing departments in that he is responsible for

[24] Transcript of Proceedings, vol. I A, pp. 54, 56-57 (Jan. 23, 2008) (Hearing).
[25] *Id.* at 43-44, 64-65.
[26] *Id.* at 44, 64-65.
[27] *Id.* at 43.
[28] *Id.* at 54.

ensuring their proper understanding of various tariffs and local distribution company rules, including analysis of whether there is a level playing field between marketers and affiliates.[29] Mr. Dosker is the only in-house counsel at Stand and has acknowledged that compartmentalizing confidential information, a regular requirement of his position, is a constant challenge.[30] Mr. Dosker reports to Ms. Phillips and to Mr. Matt Toebben, the other owner of Stand.[31] Mr. Dosker has involvement with sophisticated customers that want to negotiate contract language. In those instances, he negotiates on behalf of Stand with the customer's designee.[32] Stand's salespeople bring to Mr. Dosker's attention issues regarding competitive opposition to Stand's marketing efforts in Tennessee, such as allegations of predatory pricing.[33] During the course of this proceeding, Mr. Dosker and Mr. Ward will continue to have contact with Stand's marketing representatives just as they presently do in the performance of their normal day-to-day duties.[34]

In my opinion, the culture at Stand is a close-knit one with Mr. Ward and Mr. Dosker having integral roles that intersect with management and the marketing and operational divisions. Mr. Ward and Mr. Dosker report directly to Ms. Phillips, who will not have access to confidential information, but who is charged with making the ultimate determinations with regard to this litigation. This factual scenario is similar to that described in *Autotech Technologies Limited v. Automationdirect.com, Inc.* In that case, the parties could not agree

---

[29] *Id.* at 46-48.
[30] *Id.* at 64, 86-87. Mr. Dosker also noted that he is able to meet this challenge and references in support of his success that no ethical complaints or other professional complaints have been filed against him. As I explained during the hearing, the question here is not one of intentional misconduct. We are here today to address a contention that Mr. Ward and Mr. Dosker could inadvertently disclose information and that disclosure would be harmful to AEM even if a protective order such as the one proposed by Stand is adopted. I have stated previously that protective orders are documents of honor and I will assume, until it is shown otherwise, that signatories to those orders will act in accordance with the terms of the orders. Mr. Dosker's clean record with regard to his professional conduct speaks to his lack of intentional misconduct, but adds little to the discussion of inadvertent disclosure.
[31] Transcript of Proceedings, vol. I A, p. 64 (Jan. 23, 2008) (Hearing).
[32] *Id.* at 68-69.
[33] *Id.* at 78.
[34] *Id.* at 81-82.

whether in-house counsel for Autotech Technologies Limited should have access to customer information and communications without redaction. When reviewing the facts, the District Court afforded great weight to the size and one dimensional managerial hierarchy of the company seeking disclosure.[35] The District Court concluded that the two in-house counsel should be denied access to unredacted information because the person to whom they reported, Mr. Kumar, was the "heart and soul" of the company, did not have access to unredacted information, was involved in every facet of the litigation, and would be personally affected by the outcome of the litigation.[36] The District Court concluded that under these circumstances the risk of inadvertent disclosure "would be heightened to an unacceptable degree."[37]

In this case, there are no buffers between those that will have access to confidential information and those that will not, but who are charged with ultimate decisionmaking authority. Additionally, those that would have access to the confidential information are charged with reporting to those that will not have access on a number of varied and intertwined issues. This situation creates an optimal environment for inadvertent disclosures to occur. Stand does not offer any safeguards against inadvertent disclosure other than coding customer names and locations with number or letters.[38] This single safeguard will likely prove ineffective to the extent that customers may be identified by the other information that will be provided, such as monthly volumes, pipeline interconnect, city gate and/or master meter used, whether the customer is inside or outside AEC's authorized service area, profit and loss, and the assumptions used in calculating profit and loss.[39] Moreover, the proposed safeguard is useful only with

---

[35] *Autotech Technologies Limited v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 410 (N.D. Ill. 2006).
[36] *Id.* at 410-11. Presumably, Ms. Phillips and Mr. Toebben would also be personally affected as they are the two owners of Stand. Transcript of Proceedings, vol. I A, p. 64 (Jan. 23, 2008) (Hearing).
[37] *Autotech Technologies Limited v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 410 (N.D. Ill. 2006).
[38] Transcript of Proceedings, vol. I A, pp. 66-67 (Jan. 23, 2008) (Hearing).
[39] *First Discovery Requests of the Consumer Advocate and Protection Division to Atmos Energy Corporation and Atmos Energy Marketing, LLC*, p. 22, AEM9 & p. 24, AEM16 (Dec. 28, 2007)).

regard to a portion of the information related to AEM that is likely to be designated as confidential information.

It is also my conclusion that the harm that could result from inadvertent disclosure is substantial. Stand recognizes AEM as a competitor.[40] Stand is a successful enterprise that would like to secure more customers in Tennessee,[41] but has had little success, despite having had salespeople calling on customers over the last year or two.[42] AEM asserts that the information it seeks to protect is confidential information that "is not generally known"[43] and that would give competitors great insight into AEM's business.[44] AEM further asserts that "AEM has consistently worked to keep this type of information confidential and to prevent disclosure to the public in general and to AEM's competitors in particular."[45] AEM asserts that release of the customer information, even if coded, "would be a how to manual on how to make money in marketing natural gas in Tennessee."[46] Stand recognizes that the release of customer information to a competitor's marketing department could result in the erosion of AEM's customer base.[47] Given the roles served by Mr. Ward and Mr. Dosker and the organizational hierarchy of Stand, any inadvertent disclosure would likely be to individuals that include the entire spectrum of competitive decisionmakers. For example, if an inadvertent disclosure were to occur it would likely be to the two owners or individuals in the operational or marketing area of Stand – the former having competitive decisionmaking authority with regard to all aspects of

[40] Transcript of Proceedings, vol. I A, pp. 46-47 (Jan. 23, 2008) (Hearing).
[41] *Id.* at 45.
[42] *Id.* at 45 - 46.
[43] *Atmos Energy Marketing, LLC's Brief Regarding Protective Order Disputes*, Exhibit D, *Affidavit of Rob Ellis*, para. 6 (Jan. 4, 2008); *see* Transcript of Proceedings, vol. I A, p. 19 (Jan. 23, 2008) (Hearing).
[44] Transcript of Proceedings, vol. I A, p. 26 (Jan. 23, 2008) (Hearing).
[45] *Atmos Energy Marketing, LLC's Brief Regarding Protective Order Disputes*, Exhibit D, *Affidavit of Rob Ellis*, para. 6 (Jan. 4, 2008); *see* Transcript of Proceedings, vol. I A, p. 19 (Jan. 23, 2008) (Hearing).
[46] Transcript of Proceedings, vol. I A, p. 28 (Jan. 23, 2008) (Hearing).
[47] *Id.* at 50.

Stand and the latter having competitive decisionmaking authority with regard to the details of day-to-day customer operations and marketing. Moreover, to the extent that an inadvertent or unknowing disclosure is made to an independent, marketing affiliate, the harm to AEM would be immeasurable.

The next step is to determine the need for Stand's General Counsel and Vice-President of Regulatory Affairs to have access to confidential information related to AEM. Stand contends that it is unreasonable to expect Stand to prepare testimony and to be knowledgeable about the issues without having access to the information.[48] Stand further asserts that the requested restriction on its access precludes Stand from "actively and effectively participating in this proceeding."[49] I cannot agree with Stand's conclusions. First, Stand will have access to the information through its outside counsel. If counsel is without sufficient knowledge to effectively evaluate the information, Stand may hire an expert or consultant that could gain access to the information. Also, Stand has not requested that Ms. Phillips, the person that will be making the final determinations with regard to this litigation, have access to confidential information. Thus, whether it is Mr. Dosker, Mr. Ward or an outside hire reviewing the confidential information and advising the client, that is, Ms. Phillips, the ultimate determinations with regard to the positions Stand will take in this litigation will be made by Ms. Phillips absent her review of the confidential information related to AEM. Moreover, I note that the record indicates that Stand, specifically Ms. Phillips, relies on outside counsel and advisors with regard to other matters.[50] I conclude that the need for Mr. Ward and Mr. Dosker to have access to the information is

[48] Transcript of Proceedings, vol. I B, p. 98 (Jan. 23, 2008) (Hearing).
[49] *Id.* at 99.
[50] Transcript of Proceedings, vol. I A, p. 69 (Jan. 23, 2008) (Hearing).

minimal and Stand is not prevented from actively participating in this docket as a result of having to rely on outside counsel and/or an outside expert or consultant.

In further support of this conclusion, I note that I agree with Stand's characterization of this docket as an investigation.[51] However, I disagree with what this characterization means for Stand. The Authority initially determined that these issues should be considered as a second phase of AEC's rate case in Docket No. 05-00258.[52] Later, the Authority voted to move the phase two issues into a newly-opened docket.[53] Thus, the Authority opened on its own motion what is now being characterized as an investigation. It is the duty of the Authority to investigate the relationship between AEM and AEC, and the Authority's decision to open this docket is a reasonable approach to fulfilling that duty. The Authority must be cautious, however, whenever it opens a docket of this nature that it does not act unreasonably to the detriment of the entities under investigation. At this point, we do not know whether, in fact, there has been any wrongdoing. The Authority is fully capable of obtaining information needed to accomplish a full investigation and of evaluating the evidence to determine whether wrongdoing has actually occurred. Therefore, the intervention of Stand, while welcome, is not necessary to the resolution of this docket. Given this assessment of the docket, it is my opinion that Stand's need for the information is minimal and, further, that it would be unreasonable for the Authority in this investigation to give an AEM competitor access to confidential information with no more restrictions than those provided in a typical Authority protective order.

---

[51] Transcript of Proceedings, vol. I B, pp. 100 & 112 (Jan. 23, 2008) (Hearing); Transcript of Proceedings, pp. 6 & 61- 62 (Jan. 11, 2008) (Status Conference).

[52] Transcript of Authority Conference, pp. 26-29 (Jun. 26, 2006).

[53] *In re: Petition of the Consumer Advocate to Open an 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*, Docket No. 05-00258, *Order Closing Dockets and Moving Remaining Issues to a New Docket*, pp. 6-7 (Dec. 5, 2007).

Finally, I address Stand's suggestion that the restriction proposed by AEM is a tactic to increase the costs to Stand of participating in this docket.[54] Presumably, a company's costs are increased when an outside expert or counsel is hired. However, that alone is not a sufficient basis on which to allow a competitor access to confidential information.[55] Additionally, Stand has not provided any evidence that Stand lacks the ability to bear the additional cost. To the contrary, the evidence in the record is that Stand is a very successful company.[56]

c. Conclusion

I have assumed that the information that AEM seeks to protect is in fact confidential and that the information is relevant and necessary to Stand's prosecution of its claims. I have found that there is a significant opportunity for inadvertent disclosure and that the harm to AEM that will result from such disclosure is substantial. Further, I have found that Stand's need for the information is satisfied by affording access to outside counsel and/or an outside consultant or expert and that Stand's ability to litigate this case is not unreasonably impaired by this restriction. Based on these findings, I conclude that the interests of AEM outweigh those of Stand. Therefore, neither Mr. Ward nor Mr. Dosker should be provided access to confidential information related to AEM. I am of the opinion that this conclusion is consistent with the case law and the Authority's determination in Docket No. 05-00258.

2. Should specific names of in-house counsel and employees who have access to the confidential information be listed in the final protective order?

This issue was raised by Stand. Specifically, Stand contends that no party's employees, with the exception of the Consumer Advocate, should have broad access to confidential information. Therefore, Stand requests that "the specific names of in-house counsel and

[54] Transcript of Proceedings, vol. I B, p. 108 (Jan. 23, 2008) (Hearing).
[55] *Autotech Technologies Limited v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 413 (N.D. Ill. 2006).
[56] Transcript of Proceedings, vol. I A, p. 45 (Jan. 23, 2008) (Hearing).

employees who need to have access to the information be listed in the Protective Order."[57] Stand also requests the "opportunity to review the names, positions and brief job description of those who AEC and AEM would designate to have access to confidential information."[58] During the January 11, 2008, Status Conference, Stand asserted that this request is particularly important given that AEC "has one legal department where different attorneys are assigned to AEM and AEC."[59]

AEM responded to Stand's request during the January 11, 2008, Status Conference by asserting that under its proposed protective order AEM employees, including in-house counsel, will not receive access to Stand's confidential information.[60] AEC stated that it would agree to not disclose Stand confidential information to AEC employees, including its in-house counsel, if such an agreement would facilitate resolution of the issue.[61] In light of the responses of AEM and AEC, Stand stated that it was not opposed to handling Stand's confidential information as proposed by AEM and AEC.[62]

In light of Stand's agreement to proceed as suggested by AEM and AEC, I conclude that the protective order should contain the language proposed by AEM at paragraph 3(h). Additionally, AEC should be added to the list of entities in paragraph 3(h) whose employees, including in-house counsel, may not review information Stand designates as confidential.

---

[57] *Statement of Disputed Issues Regarding the Proposed Protective Order*, pp. 3-4 (Jan. 4, 2008).
[58] *Statement of Disputed Issues Regarding the Proposed Protective Order*, p. 4 (Jan. 4, 2008).
[59] Transcript of Proceedings, pp. 70-71 (Jan. 11, 2008) (Status Conference).
[60] *Id.* at 71-72 (referring to *Atmos Energy Marketing, LLC's Brief Regarding Protective Order Disputes*, Exhibit A, p. 4 (Jan. 4, 2008)).
[61] *Id.* at 73.
[62] Transcript of Proceedings, pp. 73-74 (Jan. 11, 2008) (Status Conference).

3. Should Footnote 2 of the AEM proposed protective order be included in the final protective order?

Footnote 2 relates to the issue of whether the asset management agreement between AEM and AEC is subject to confidential treatment, who should be permitted to review the agreement, and which party should bear the burden in the event of a dispute. At the conclusion of the January 23, 2008, hearing, AEM stated that it will produce the asset management agreement in such a way so as to permit Mr. Dosker and Mr. Ward to review the agreement.[63] AEM did not speak to the issue of whether Mr. Burton or Tennessee Energy Consultants will have access to the agreement. This silence is not fatal, however, to the resolution of the issue. It is my opinion based on my reading of the proposed protective orders that the footnote is unnecessary and should not be included in the order. To the extent that any document, including the asset management agreement, is produced as confidential that designation can be challenged pursuant to paragraph 10 of the proposed protective orders. Thus, there is no need for a footnote to preserve the right of a party to challenge the confidential designation of the asset management agreement. Additionally, that portion of the footnote that places the burden of establishing confidentiality on the producing party is also unnecessary given my decision, *infra*, with regard to issue 7. Based on the foregoing, I conclude that footnote 2 should be deleted from the proposed protective order.

4. Should Hal Novak be specifically listed in the final protective order?

During the January 11, 2008, Status Conference, the parties agreed to a resolution of this issue.[64]

---

[63] Transcript of Proceedings, vol. I B, p. 115 (Jan. 23, 2008) (Hearing).
[64] Transcript of Proceedings, p. 67 (Jan. 11, 2008) (Status Conference).

5. Should the word "direct" be included in paragraph 3(f)?

Stand asked that the word "direct" be added to make it clear that Mr. Dosker and Mr. Ward would not be included in the category of those associated with the marketing of services in competition with the products, goods, or services of the producing party.[65] Given the decision with regard to issue 1, I find that there is no need at this time to include the word "direct" in the protective order.

6. Should there be prohibitions on AEC's and AEM's receipt of confidential information?

This issue involves the exchange of confidential information between AEC and AEM. According to Stand:

> AEC should not have access to confidential information provided by AEM and AEM should not have access to confidential information provided by AEC unless the producing party already had access to the information prior to receiving the Discovery Request and the other parties are notified that the information being produced was previously available to the receiving party.[66]

According to Stand, its proposal is supported by 18 C.F.R. § 358, *et seq.* and the Authority affiliate transaction rules applicable to AEC.[67]

During the January 11, 2008, Status Conference, AEC argued that Stand failed to provide specific citations in support of its request and that the provision requiring notice of previously disclosed information would be undoable.[68] In the closing arguments of the January 23, 2008, hearing, AEC stated that according to 18 C.F.R. § 358.1(a), 18 C.F.R. § 358, *et seq.* does not apply to AEC or AEM.[69] AEM argued that, to the extent that Stand relied on paragraph 11 of the affiliate guidelines, paragraph 11 does not prevent counsel from sharing information. Instead,

---

[65] *Statement of Disputed Issues Regarding the Proposed Protective Order*, p. 4 (Jan. 4, 2008).
[66] *Id.* at 5.
[67] *Id.*
[68] Transcript of Proceedings, p. 84 (Jan. 11, 2008) (Status Conference).
[69] Transcript of Proceedings, vol. I B, p. 93 (Jan. 23, 2008) (Hearing).

asserts AEM, the paragraph refers to operating employees.[70] Thus, AEM proposes that with regard to AEC and AEM confidential information that "anything that the guidelines would otherwise prohibit us sharing, we will not share among operating employees."[71]

In response, Stand first noted that its proposed notice provision should not be burdensome because if AEM and AEC are operating in accordance with the affiliate guidelines then the companies should be aware of what they have shared with one another.[72] Also, Stand noted that it needed to know what confidential information had already been shared because this docket concerns the relationship between AEM and AEC.[73]

I find that Stand has failed to establish that its proposed restrictive provision should be included based on AEC's affiliate transaction guidelines on file at the Authority or 18 C.F.R. § 358, *et seq.* Nevertheless, I find that the guidelines require that operating employees, as defined in AEC's affiliate guidelines as "those who are in any way involved in identifying and contracting with customers, locating gas supplies, making any and all arrangements with intervening pipelines and in any way managing or facilitating those contracted services,"[74] should not have access to the confidential information of the company for which they are not employed. Thus, AEM's operating employees shall not have access to AEC's confidential information and vice versa.

---

[70] *Id.* at 95 (Jan. 23, 2008). Paragraph 11 of the Standards of Conduct provides:

> To the maximum extent practicable, the Company's operating employees and the operating employees of its marketing affiliate must function independently of each other. For purposes of these guidelines, operating employees are those who are in any way involved in identifying and contracting with customers, locating gas supplies, making any and all arrangements with intervening pipelines and in any way managing or facilitating those contracted services.

Atmos Energy Corporation, T.R.A. No. 1, 2nd Revised Sheet No. 45.5, para. 11 (Issued April 5, 2007, Effective May 5, 2007).

[71] Transcript of Proceedings, vol. I B, pp. 95-96 (Jan. 23, 2008) (Hearing).

[72] Transcript of Proceedings, pp. 89-90 (Jan. 11, 2008) (Status Conference).

[73] *Id.* at 91.

[74] Atmos Energy Corporation, T.R.A. No. 1, 2nd Revised Sheet No. 45.5, para. 11 (Issued April 5, 2007, Effective May 5, 2007).

I also find that Stand's notification requirement should be adopted in part. Specifically, I conclude that in the event that counsel learns that confidential information of one company has been disclosed to an operating employee of the other company, counsel shall notify all parties of this fact. Thus, counsel is not charged with determining whether each bit of confidential information has been shared in the past, but, instead, is required to report any disclosure that counsel learns of in the course of this proceeding.

7. Should the final protective order contain language regarding the burden of establishing that information should not be treated as confidential?

This issue was discussed at the January 11, 2008, Status Conference. At that time, there were no objections to the proposal of AEM and AEC to add the following language to paragraph 10: "Upon the filing of such a motion, the designating party shall bear the burden of supporting its designation of the documents or information at issue as CONFIDENTIAL INFORMATION."[75] Given the lack of objections and my opinion that the proposed sentence serves to improve the protective order, the sentence should be included in the protective order.

8. Should paragraph 3(h) of the AEM proposed protective order remain in the final protective order?

As part of the resolution of Issue 2, I concluded that paragraph 3(h) should remain in the protective order. Therefore, this issue is resolved consistent with Issue 2, and the paragraph shall remain in the protective order and be amended to add AEC to the list of entities whose employees may not review information Stand designates as confidential.

[75] *Atmos Energy Marketing, LLC's Brief Regarding Protective Order Disputes*, Exhibit A, p. 7, para. 10 (Jan. 4, 2008).

IT IS THEREFORE ORDERED THAT:

1. Mr. Mark Ward and Mr. John Dosker, employees of Stand Energy Corporation, shall not be provided access to confidential information related to Atmos Energy Marketing, LLC.

2. The protective order shall contain the language proposed by Atmos Energy Marketing, LLC at paragraph 3(h).

3. Atmos Energy Corporation shall be added to the list of entities in paragraph 3(h) whose employees, including in-house counsel, may not review information Stand Energy Corporation designates as confidential.

4. Footnote 2 as proposed by Atmos Energy Marketing, LLC shall not be included in the protective order.

5. The protective order shall reflect the parties' agreement with regard to Mr. Novak.

6. The word "direct" shall not be added to paragraph 3(f) as proposed by Stand Energy Corporation.

7. A provision shall be included in the protective order to provide that Atmos Energy Marketing, LLC's operating employees, as that term is defined in Atmos Energy Corporation's tariff,[76] shall not have access to Atmos Energy Corporation's confidential information. Likewise, a provision shall be included in the protective order to provide that Atmos Energy Corporation's operating employees, as that term is defined in Atmos Energy Corporation's tariff, shall not have access to Atmos Energy Marketing, LLC's confidential information.

[76] Atmos Energy Corporation, T.R.A. No. 1, 2nd Revised Sheet No. 45.5, para. 11 (Issued April 5, 2007, Effective May 5, 2007).

8. A provision shall be included in the protective order requiring counsel for Atmos Energy Marketing, LLC and Atmos Energy Corporation to report to all other parties any disclosure, in the past or present, of confidential information to operating employees that counsel learns of in the course of this proceeding.

9. The language proposed by Atmos Energy Marketing, LLC for inclusion in paragraph 10 shall be included in the protective order.

10. Atmos Energy Marketing, LLC shall amend Exhibit A to *Atmos Energy Marketing, LLC's Brief Regarding Protective Order Disputes* filed on January 4, 2008, in accordance with this order and shall file the amended protective order by **Tuesday, February 19, 2008 at 2:00 p.m.** for issuance by the Hearing Officer.

Ron Jones, Director
Acting as Hearing Officer[77]

[77] 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).