

**IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

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

**MOTION TO COMPEL ATMOS ENERGY MARKETING, LLC, TO ANSWER THE
FIRST DISCOVERY REQUESTS OF THE CONSUMER ADVOCATE AND
PROTECTION DIVISION**

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division ("Consumer Advocate" or "CAD"), hereby requests the Hearing Officer to compel Atmos Energy Marketing, LLC, ("AEM") to fully and completely respond to the first discovery requests of the Consumer Advocate set forth below.

INTRODUCTION

The Consumer Advocate and AEM have worked diligently to resolve the discovery issues associated with AEM's production of responses to the Consumer Advocate's first discovery requests. As noted on page 2 of the Status Report Regarding Outstanding Discovery Issues and Filing of Direct Testimony, which was filed in this docket on March 14, 2008, the Consumer Advocate and AEM began their discussions regarding these discovery issues soon after AEM produced its discovery responses on March 12, 2008. And on March 25, 2008, the Consumer Advocate communicated its final list of discovery concerns to AEM, which list included the discovery disputes that are the subject of this motion. Despite the Consumer Advocate and AEM's genuine efforts to resolve all discovery issues informally, the parties have been unable to resolve two discovery issues as of the filing of this motion. The Consumer Advocate files this motion in order to preserve and protect its discovery rights under the current procedural schedule; it will continue to work with AEM

in an effort to resolve the remaining two discovery issues prior to the Status Conference scheduled for May 15, 2008. The Consumer Advocate will immediately notify the Hearing Officer if these discovery issues are resolved informally.

Both of the discovery issues involve requests that seek information regarding the market value of the transportation and storage assets that are at issue in this docket. On page 2 of the Statement of Claims of the Consumer Advocate and Protection Division, filed in this docket on November 19, 2007, the Consumer Advocate alleged that consumers are not receiving fair compensation for the sale, lease, release, or assignment of gas transportation and storage assets by Atmos Energy Corporation (“Atmos”) to its affiliated asset manager, AEM. In its first discovery requests, the Consumer Advocate asked AEM for production of documents that would help the Consumer Advocate develop its arguments about the value of these assets, as well as the appropriate level of sharing of this value with consumers. In particular, the Consumer Advocate asked for two items of information that it has not received and that the Consumer Advocate considers indispensable to the development of its case on this claim: (a) First Discovery Request AEM4 asked AEM to produce all of its downstream and upstream sales of transportation and storage capacity involving the assets that are the subject of this docket covering the period of the current asset management contract between Atmos and AEM; and (b) First Discovery Request AEM16 asked AEM to produce its profit and loss by customer covering the period of the current asset management contract between Atmos and AEM.

It was the Consumer Advocate’s understanding that AEM did not object to providing the Consumer Advocate with the information requested in the discovery requests that are the subject of this motion. At the hearing conducted on January 23, 2008, to address issues concerning the

protective order to be entered in this docket, AEM witness Rob Ellis testified about AEM's concerns regarding the release of commercially-sensitive information to competitors. In that testimony, Mr. Ellis specifically referred to the profit and loss information requested in First Discovery Request AEM16, as an example of information that AEM would not be willing to release to competitors. Transcript, Volume IA, at 16-19, 27-28 (Jan. 23, 2008). However, Mr. Ellis testified further that AEM did not object to providing this information to the Consumer Advocate:

Providing the profit and loss for our customers in the state of Tennessee would be information that would be highly commercially sensitive in that it would give a competitor insight into the broad and scope of opportunity and the amount of resources they needed to commit to competing with AEM in the markets that they have stated they intend to compete with us in.

And for clarification, we don't have a problem providing responses to the questions and providing the information to the Consumer Advocate.

Transcript, Volume IA, at 31 (Jan. 23, 2008) (emphasis added). Indeed, the Consumer Advocate is not a gas marketer and is not in competition with AEM or anyone else in this industry.

Furthermore, on February 14, 2008, the Hearing Officer entered in this docket his Order on Protective Order Disputes, which granted AEM the relief that it requested concerning nondisclosure of AEM's confidential information to AEM's competitors. And, as a result of this ruling, on February 22, 2008, the Hearing Officer entered in this docket the Protective Order submitted by AEM on February 20, 2008, which limits access to AEM's confidential and highly confidential information to only authorized persons and which explicitly prohibits disclosure of such information to AEM's competitors. *See* Protective Order at ¶ 3. Accordingly, all of the necessary protections are in place for AEM's production of all confidential and highly confidential information and documents that are responsive to the Consumer Advocate's first discovery requests.

STANDARD FOR DISCOVERY

Tennessee has a broad policy which favors the discovery of any relevant information:

Parties 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, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Tenn. R. Civ. P. 26.02(1). Thus, evidence does not have to be admissible to be discoverable as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Today, it is through discovery rather than pleadings that the parties attempt “to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment.” *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615 at *3 (Tenn. Ct. App. 2002) (*quoting* Irving Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1962)). Accordingly, a party seeking discovery is entitled to obtain any information that is relevant to the case and not privileged. *See Id.* Consistent with Tennessee’s open discovery policy, the relevancy requirement is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case’s issues.” *Id.* Discovery therefore is not limited to the issues raised by the pleadings. *See Id.*, *see also Shipley v. Tennessee Farmers Mutual Ins. Co.*, 1991 WL 77540 at *7-8 (Tenn. Ct. App. 1991). A party may also use discovery to: define and clarify the issues; probe a variety of fact-oriented issues that are not related to the merits of the case; formulate and interject additional issues into the case which

relate to the subject matter of the pleadings; and determine additional causes of actions or claims which need to be or can be asserted against a party or against third parties. *See Shipley*, 1991 WL 77540 at *7-8 (*quoting Vythoulkas v. Vanderbilt University Hospital*, 693 S.W.2d 350, 359 (Tenn. Ct. App. 1985)).

It is nonetheless recognized that the trial court may limit discovery under appropriate circumstances. Because of the broad policy favoring discovery, the trial court should not order limitations on discovery unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. *See Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). The trial court should decline to limit discovery if the party opposing discovery cannot produce specific facts to support the requested limitations. *See Id.* Moreover, given the liberal construction of discovery rules, the trial court should approach any request for limitations with common sense rather than with narrow legalisms, basing the reasonableness of any ordered limitations on the character of the information sought, the issues involved, and the procedural posture of the case. *See Id.* Rather than denying discovery outright, it is appropriate for the trial court to fashion remedies to discovery issues by balancing the competing interests and hardships of the parties and by considering whether there are less burdensome means for acquiring the requested information. *See Id.*

**SPECIFIC DISCOVERY REQUESTS THAT
ARE THE SUBJECT OF THIS MOTION**

I. FIRST DISCOVERY REQUEST AEM4.

The “Natural gas marketing segment” on page 45 of AEC’s Form 10-K for the fiscal year ended September 30, 2006, stated:

To optimize the storage and transportation capacity we own or control, we participate in transactions in which we combine the natural gas commodity and transportation costs to minimize our costs incurred to serve our customers by identifying the lowest cost alternative within the natural gas supplies, transportation and markets to which we have access. Additionally, we engage in natural gas storage transactions in which we seek to find and profit from the pricing differences that occur over time. We purchase physical natural gas and then sell financial contracts at favorable prices to lock in gross profit margins. Through the use of transportation and storage services and derivative contracts, we seek to capture gross profit margin through the arbitrage of pricing differences in various locations and by recognizing pricing differences that occur over time.

For the period April 1, 2004, through September 30, 2007, please list all natural gas optimization transactions, including, but not confined to, all downstream and upstream sales of transportation and storage capacity, involving the transportation and storage assets listed in First Discovery Request No. 1, above. For each transaction, please identify the counter-party to the transaction, the particular transportation and/or storage asset(s) involved in the transaction, the date of the transaction, the actual volumes included in the transaction, the actual sales or settlement price paid by the counter-party for the released capacity, and any internal profit and loss calculations or assumptions related to the transaction.

AEM RESPONSE TO REQUEST AEM4.

AEM objects to this request on the grounds that it is overly burdensome and the costs to produce such information exceed the benefit to the CAD. Specifically, the information requested

does not exist in the designated format and the information as requested is not kept in the normal course of AEM's business practices. Without waiving these objections, see the documents produced by AEM to the CAD's discovery request number five to AEM. The documents provided in response to AEM 5 and the information contained therein constitute HIGHLY CONFIDENTIAL - AEM MATERIAL (Outside Counsel Only) that is subject to the Protective Order in this matter.

MOTION TO COMPEL RESPONSE TO REQUEST AEM4.

With regard to whether the information sought is beneficial or not, the CAD would maintain that there is no information more beneficial or relevant in determining the value of an asset than what the asset sold for in an exchange between a willing buyer and willing seller in a competitive marketplace. This is simply indispensable information for the CAD to have in determining value of the assets at issue in this case.

With regard to AEM's objection based on burdensomeness and costs to produce, the CAD believes that only AEM, and no one else, is in possession of this information; the CAD knows of no other source from which to obtain or develop the information on its own.

As for AEM's objection regarding the designated format, the CAD is willing to accept the information in any alternative format so long as the information provided is responsive and includes AEM's actual sales data in a discernable format. The information provided in the referenced AEM5 response is not acceptable to the CAD because it does not contain the actual sales data that was requested.

II. FIRST DISCOVERY REQUEST AEM16.

Please provide the excel spreadsheets by AEM customer, which indicate the profit and loss for each AEM customer for the fiscal years ended September 30, 2005, September 30, 2006, and

September 30, 2007. Include in your response a narrative of the assumptions used in calculating the profit and loss for each AEM customer.

AEM RESPONSE TO REQUEST AEM16.

AEM objects to this request on the grounds that it is overly burdensome and the costs to produce such information exceed the benefit to the CAD. Specifically, the documents requested do not exist in the designated format and the information as request is not kept in the normal course of AEM's business practices. See AEM17.

MOTION TO COMPEL RESPONSE TO REQUEST AEM16.

Information regarding the profit and loss for AEM customers is beneficial and relevant to the issue of whether the compensation to consumers for the use of assets is fair and reasonable. Profit and loss information contains information regarding sales of the Tennessee and Virginia assets at issue in this case, as well as information regarding costs of sales and AEM's general and overhead costs. The profit and loss information is needed to determine the value of the assets and the profits generated from AEM's utilization of the assets. Determination of the value of the assets and profits generated from the utilization of the assets is beneficial, indeed essential, to the CAD's claim regarding fair compensation to consumers. Without knowing the market value of the assets, it is difficult or impossible to determine whether consumers are being fairly compensated. Furthermore, in an analogous case involving the profit and loss information attributable to Sequent Energy Management's utilization of Chattanooga Gas Company's gas supply assets, the Hearing Officer in that case recently found that such profit and loss information was relevant and discoverable by the CAD. *See Order Re First Round Discovery Disputes*, TRA Docket No. 07-00224 at p. 5 (Apr. 29, 2008).

With regard to objections based on burdensomeness and cost, the CAD believes that only AEM, and no one else, is in possession of the information sought; the CAD knows of no other source from which to obtain or develop the information on its own.

As for AEM's objection to the designated format, the CAD is willing to accept the information in any alternative format so long as the information provided is responsive and includes profit and loss information for the Tennessee and Virginia gas transportation and storage assets that are at issue in this case.

WHEREFORE, the Consumer Advocate respectfully requests the Hearing Officer to enter an order compelling Atmos to produce full and complete answers to the Consumer Advocate's discovery requests on or before May 30, 2008.

RESPECTFULLY SUBMITTED,



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Dated: May 2, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via first-class U.S. Mail, postage prepaid, or electronic mail upon:

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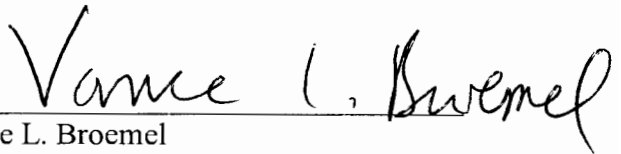
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This the 2nd day of May, 2008.


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