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May 8, 2008

**VIA HAND DELIVERY**

Honorable Ron Jones, Hearing Officer  
c/o Sharla Dillon, Docket & Records Manager  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-0505

**RE: Docket to Evaluate Atmos Energy Corporation's Gas Purchases and Related  
Sharing Incentives, TRA Docket No. 07-00225**

Dear Hearing Officer Jones:

Enclosed please find one (1) original and thirteen (13) copies of Atmos Energy Marketing, LLC's *Opposition to Motion to Compel Atmos Energy Marketing, LLC to Answer the First Discovery Requests of the Consumer Advocate and Protection Division* for filing in the above-captioned docket. We have also attached a copy of this filing to be file-stamped for our records.

If you have any questions or require additional information, please let me know.

Respectfully submitted,



E. Todd Presnell

ETP/mdf

cc: Parties of Record

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

<b>IN RE:</b>	)	
	)	
<b>DOCKET TO EVALUATE</b>	)	
<b>ATMOS ENERGY CORPORATION'S</b>	)	
<b>GAS PURCHASES AND RELATED</b>	)	<b>DOCKET NO. 07-00225</b>
<b>SHARING INCENTIVES</b>	)	
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**OPPOSITION TO MOTION TO COMPEL ATMOS ENERGY MARKETING, LLC  
TO ANSWER THE FIRST DISCOVERY REQUESTS OF THE  
CONSUMER ADVOCATE AND PROTECTION DIVISION**

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Pursuant to the Tennessee Regulatory Authority's ("Authority" or "TRA") *Order on Second Status Report Regarding Outstanding Discovery Issues* in the above-captioned matter, Atmos Energy Marketing, LLC ("AEM"), by and through its undersigned counsel, hereby respectfully submits this response in opposition to the Office of the Tennessee Attorney General and Reporter, Consumer Advocate and Protection Division's (the "CAD") motion to compel (the "*Motion*").

As the CAD admits, it and AEM have "worked diligently," and continue to work, to resolve the outstanding issues that are the subject of the *Motion*. Nonetheless, AEM submits this response to preserve both its objections to the discovery requests at issue and its opposition to the *Motion*. As set forth below, and consistent with AEM's responses to the CAD's first set of discovery requests, AEM respectfully requests that the *Motion* be denied in the entirety.

## **I. RELEVANT PROCEDURAL HISTORY**

The CAD objects to AEM's original responses to AEM4 and AEM16. Initially, AEM responded to AEM4 in the following manner:

**RESPONSE:** 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 AEM5 and the information contained therein constitute HIGHLY CONFIDENTIAL – AEM MATERIAL (Outside Counsel Only) that is subject to the Protective Order in this matter. (emphasis added).

Further, AEM initially responded to AEM16 in the following manner:

**RESPONSE:** 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 requested is not kept in the normal course of AEM's business practices*. See AEM17. (emphasis added).

As shown above, with respect to both AEM4 and AEM16, AEM responded, in part, on March 11, 2008, that “the information as requested is not kept in the normal course of AEM's business practices.” Further, with respect to AEM4, the CAD was referred, in good faith, to the documents produced in relation to AEM5, and with respect to AEM16, the CAD was referred, in good faith, to AEM17.

As noted in the status reports that have been filed in this matter with respect to outstanding discovery issues involving the CAD and AEM, AEM and the CAD have worked in a cooperative manner to either eliminate or reduce any outstanding discovery issues with respect to the CAD's First Discovery Requests to AEM. Due to and consistent with those efforts, on May 7, 2008, AEM submitted *Atmos Energy Marketing, LLC's Supplemental Responses to the Consumer Advocate and Protection Division's First Discovery Requests* (“Supplemental

*Responses*”). In the *Supplemental Responses*, AEM further responded to AEM4 and AEM16.

The *Supplemental Responses* are not inconsistent with, and do not modify in any respect, AEM’s original objections to AEM4 and AEM16. Rather, the *Supplemental Responses* represent AEM’s good faith attempt to respond at the most granular level at which the requested information is available in the normal course of AEM’s business practices. In sum, other than what was produced in the *Supplemental Responses*, AEM does not have, and thus is unable to produce, the information requested by the CAD in AEM4 and AEM16.

## **II. LAW AND ARGUMENT**

In the *Motion*, the CAD appears to argue that AEM has no right to object to producing the requested documents and that it is willing to accept the responsive documents in an alternative format. As explained below, however, AEM respectfully submits that these two assertions are misplaced and obscure the simple fact that AEM has no documents responsive to the CAD’s requests in AEM4 and AEM16.

### **A. AEM Did Not Waive Its Objections**

In support of the *Motion*, the CAD asserts that “[i]t was the Consumer Advocate’s understanding that AEM did not object to providing the Consumer Advocate with the information requests that are the subject of this motion.”<sup>1</sup> More specifically, the CAD relies upon statements made by AEM at the hearing conducted by the Hearing Officer in this docket on January 23, 2008.<sup>2</sup> Finally, the CAD maintains that AEM should be ordered to produce the information requested in AEM4 and AEM16 because CAD “is not a gas marketer and is not in competition with AEM or anyone else in this industry.”<sup>3</sup> The CAD’s reliance upon matters

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<sup>1</sup> *CAD’s Motion to Compel*, TRA Docket No. 07-00225, p. 2.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.*

surrounding the protective order disputes among Stand Energy Corporation (“Stand”), Atmos Invention Group (“AIG”) and AEM, is misplaced.

As the official record in this matter demonstrates, any statements and arguments made by AEM with respect to the protective order disputes among Stand, AIG, and AEM were intended for the sole purpose of advocating AEM’s positions with respect to its competitors and the proposed protective order. In advocating its positions on the proposed protective order, AEM did not contend that it did not wish to respond to any pending or subsequent discovery requests from the CAD on competitive grounds. Moreover, statements and arguments made by AEM in relation to the protective order disputes do not constitute responses to discovery. Notwithstanding the issues relative to the protective order disputes, AEM maintained—and did not waive—the right to “formally” respond to discovery.

A review of AEM’s objections to AEM4 and AEM16 clearly reveal that the same are not based upon competitive grounds. In fact, AEM has produced more than 14,000 substantive documents to the parties in relation to the CAD’s First Discovery Requests to AEM, most of which are HIGHLY CONFIDENTIAL. As discussed below, AEM’s objections to AEM4 and AEM16 are, primarily, that “the information as requested is not kept in the normal course of AEM’s business practices.”<sup>4</sup> Simply put, AEM does not have, and thus is unable to produce, the information requested by the CAD in AEM4 and AEM16.

**B. AEM Cannot Produce Documents It Does Not Have**

It seems self evident that a party cannot be compelled to produce documents that it does not have. Nevertheless, Rule 34 of the Tennessee Rules of Civil Procedure provides that a party is only obligated to produce documents “which are in the possession, custody or control” of that

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<sup>4</sup> AEM does not waive, in any respect, the other objections to AEM4 and AEM16, which are expressly and duly noted in its March 11, 2008, responses to CAD’s First Discovery Requests to AEM.

party. TENN. R. CIV. P. 34.01. It logically follows that, “if a document or thing does not exist, it cannot be in the possession, custody, or control of a party and therefore cannot be produced for inspection.” *Gray v. Faulkner*, 148 F.R.D. 220, 223 (D. Ind. 1992). Accordingly, “Rule 34 only requires a party to produce documents that are already in existence.” *Alexander v. Federal Bureau of Investigation*, 194 F.R.D. 305, 310 (D.D.C. 2000) (citing *Rockwell Int’l Corp. v. H. Wolfe Iron & Metal Co.*, 576 F. Supp. 511, 513 (W.D. Pa. 1983)).

An important corollary to this axiom is that “[a] party is not required to prepare, or cause to be prepared, new documents solely for their production.” *Alexander*, 194 F.R.D. at 310. *See also Rockwell*, 576 F. Supp. at 513 (stating that “Rule 34 cannot be used to require the adverse party to prepare, or cause to be prepared, a writing to be produced for inspection”). Rather, the requesting party must request documents that are in existence and in the possession, custody, or control of the adverse party.


Based upon these fundamental rules, it is clear that AEM has ventured well beyond its duties and obligations to comply with the CAD’s discovery requests. With respect to AEM4 and AEM16, AEM initially responded—under the authority of Rule 34—that it did not maintain the requested data as part of its business practices. Rather than obstinately standing on its response, AEM continued to work with the CAD to resolve what the CAD perceived to be a discovery “dispute.” That cooperation resulted in AEM creating a document—even though that act is outside the scope of Rule 34—that is responsive to the CAD’s modified AEM4 and AEM16 requests. The CAD, however, apparently continues to seek documents from AEM that simply do not exist. The CAD’s quest to obtain something that does not exist, which lacks any basis in logic or law, must be denied in its entirety.

### III. CONCLUSION

For the foregoing reasons, AEM respectfully requests that the *Motion* be denied.

Respectfully Submitted,

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*Attorneys for Atmos Energy Marketing, LLC*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent electronically to the following parties of record this 8<sup>h</sup> day of May, 2008.

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