BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	**Docket No. 08-00024**
PETITION OF ATMOS ENERGY	)	
CORPORATION FOR APPROVAL OF	)	
THE CONTRACT(S) REGARDING GAS	)	
COMMODITY REQUIREMENTS AND	)	
MANAGEMENT OF TRANSPORTATION/	)	
STORAGE CONTRACTS	)	
	)	

CONSUMER ADVOCATE'S BRIEF

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), respectfully submits this Brief regarding the proposed asset management contract between Atmos Energy Corporation ("AEC" or "Atmos") and its affiliate Atmos Energy Marketing Corporation ("AEM"). The Brief will address the following issues related to the asset management contract; a brief statement of the Consumer Advocates's position is set forth after each issue:

1. Whether Atmos has complied with its Tariff in bidding and awarding the asset management contract?

The Consumer Advocate does not take a position on this question.

2. Whether the asset management contract is in the best interests of Atmos's customers?

The Consumer Advocate maintains that the issue of whether the contract is in the best

interests of Tennessee consumers is not subject to litigation in this docket but instead will be addressed in TRA Docket Number 07-00225, Docket to Evaluate Atmos Energy Corporation's Gas Purchases and Related Sharing Incentives.

3. Whether the currently confidential amount of the winning bid for the asset management contract should be made public?

The Consumer Advocate maintains that the amount of the winning bid should be made public, particularly since the amount of the last winning bid for the asset management contract has been made public by Atmos.

These issues and positions are discussed further below. These issues are essentially the same ones set forth in the Hearing Officer's Order of Aril 18, 2008, in this docket. Order of Hearing Officer, Docket No. 08-00024, March 28, 2008, at attachment Exhibit A.

1. WHETHER ATMOS HAS COMPLIED WITH ITS TARIFF IN BIDDING AND AWARDING THE ASSET MANAGEMENT CONTRACT?

The Consumer Advocate does not take a position on this question.

2. WHETHER THE ASSET MANAGEMENT CONTRACT IS IN THE BEST INTERESTS OF ATMOS'S CUSTOMERS?

The Consumer Advocate does not take a position on this question because this is not the proper docket to determine the actual benefit of the contract at issue; instead that determination will be made in TRA Docket Number 07-00225, Docket to Evaluate Atmos Energy Corporation's Gas Purchases and Related Sharing Incentives. The Consumer Advocate is unable to predict what the discovery, testimony, and analysis will reveal about the issues in that docket. Therefore, whether the agreement at issue in the current matter will be in the best interests of

consumers is uncertain as of this time.

The Consumer Advocate set forth its position that the present docket is not the proper docket to determine whether the proposed asset management contract is in the best interests of consumers at a Status Conference on March 28, 2008. At that Conference, the Consumer Advocate made clear that the "valuation of the gas supply assets" should not be an issue in this case. Transcript of Status Conference, Docket No. 08-00024 (March 28, 2008), at pages 7:9-8:6. The Hearing Officer agreed with this position as reflected in the list of three issues set forth as an attachment Exhibit A to his Order of April 18, 2008 (these three issues are the same ones addressed by the Consumer Advocate in the Brief)..

Furthermore, in the Hearing Officer's Order of April 18, 2008, he explicitly recognized that the valuation of gas supply assets would not be an issue in this case:

> The Hearing Officer determines that issues concerning valuation of gas supply assets and consumer benefits that should flow from those assets will not be addressed in this docket because of judicial and administrative economy and the need to expedite the resolution of this docket. The Hearing Officer specifically recognizes that the Consumer Advocate is not waiving these issues by not asserting them and can reasonably expect to have these issues addressed in Docket No. 07-00225.

Order of Hearing Officer, Docket No. 08-00024, March 28, 2008, at page 4.

Accordingly, since there is to be no valuation of the gas supply assets in the present docket, the Consumer Advocate maintains that it is not possible to state with certainty that the asset management contract is "in the best interests" of Tennessee consumers.

Moreover, if future developments, including what transpires in TRA Docket Number 07-00225, show that the contract is harming the interests of Tennessee consumers, the Consumer Advocate will not hesitate to bring this matter to the attention of the TRA and seek changes to

the amount of compensation flowing to consumers prior to the expiration of the contract's three year term. It is anticipated, however, that Atmos may argue that the TRA is barred from making such changes affecting the asset management contract due to the provision in the Tennessee Constitution that prohibits laws impairing the obligations of contracts. This argument is incorrect for several reasons.

One reason that any argument based on contractual impairment is incorrect is that the RFP explicitly required any resulting contract to contain a "regulatory out" provision that recognizes the potential of future TRA actions that impact the contractual obligations of AEC and the asset manager. Atmos Energy Corporation's Preliminary Filing of Request for Proposals in Expectation that Atmos Will Seek Approval of Any Resulting Contract Once Bidding Process Is Complete, Exhibit B at pp. 12-13, TRA Docket Number 08-00024 (February 7, 2008). For incorporation of this RFP provision into the contract, see provision 14.14 of the Base Contract for Sale and Purchase of Natural Gas, attached as Exhibit A to Atmos's Motion for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts, TRA Docket Number 08-00024 (March 20, 2008) (filed under seal).

Additionally, TRA orders changing the contractual obligations of a regulated utility is constitutional, notwithstanding the contract's provisions. "It is well settled that '[t]he prohibition upon the passage of state laws impairing the obligation of contracts refers only to the law of a state, and not to judicial decisions, or the acts of state tribunals or officers under statutes in force at the time of the making of the contract the obligation of which is alleged to have been impaired.'" *Rawls v. Sundquist*, 929 F.Supp. 284, 288 (M.D.Tenn. 1996), affirmed 113 F.3d 1235 (C.A.6, 1997), quoting *Hanford v. Davies*, 163 U.S. 273, 278, 16 S.Ct. 1051, 1054 (1896).

Furthermore, even if an order of the TRA were considered to be a law, an order impairing the obligations of an asset management contract still would be constitutional. According to Tennessee law, "[a]ll contracts are subject to be interfered with, or otherwise affected by, subsequent statutes and ordinances enacted in the bona fide exercise of police power." *Profill Development, Inc. v. Dills*, 960 S.W.2d 17, 33 (Tenn.Ct.App. 1997), appeal denied 1997, quoting *Sherwin Williams Co. V. Morris*, 156 S.W.2d 350, 352 (Tenn.Ct.App. 1941). The regulation of a public utility by a state regulatory authority is within the police power of the State, and an order of such regulatory authority does not constitute an impairment of the obligations of the public utility's contracts. *Utilities Commission v. North Carolina Natural Gas Corporation*, 375 S.E.2d 147, 154 (N.C. 1989).

The law in existence at the time of the contract becomes a part of the contract. *First American National Bank of Knoxville v. Olsen*, 751 S.W.2d 417, 420 (Tenn. 1987). According to Tennessee law at the time at which the asset management agreement became effective (and now), the TRA had (and has) "practically plenary authority over the utilities within its jurisdiction." *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W.2d 151, 159 (Tenn.Ct.App. 1992), appeal denied 1992. The TRA's practically plenary authority over Atmos that existed at the time that the asset management agreement became effective, and which clearly is within the State of Tennessee's police power, in essence became a part of the asset management agreement.

The Tennessee Supreme Court has utilized this type of analysis in deciding an allegation of the unconstitutional impairment of the obligations of a contract. According to the Tennessee Supreme Court,

> [T]he principle on which the doctrine of non-impairment of contracts stands is, that the law for its enforcement and execution existing at the time makes a part of the contract, so enters into it as to become a part of it, and therefore stands protected by the constitutional inhibition.
>
> By this principle the contract in this case must be held to have been entered into in view of the right on the part of the city to exercise its police powers for the benefit of all its citizens, and so this legal and constitutional right in its proper exercise, entered into the contract of the parties, or rather, it was made in subservience to the exercise of the granted favor found in the charter, as the law of its creation. The property was in the city, the contract to be executed in the city, and as a matter of course subject to the exercise of all the rightful powers of the city government, charged with the protection and guardianship of the property of the people within its limits.
>
> This being so, the only question is, was the ordinance in question an exercise of the lawful powers of the mayor and alderman, or was it for any cause void or inoperative? Its incidental effect in preventing the completion of the contract of building cannot be considered.

Corporation of Knoxville v. Bird, 80 Tenn. 121 (1883).

In summary, Atmos cannot defeat the State of Tennessee's police powers in general, or the TRA's practically plenary authority over the public utilities within its jurisdiction in particular, by entering into contracts. The TRA's authority over Atmos is part of the asset management agreement both explicitly within the contract and implicitly by operation of law. In any event, an order of the TRA is not a law within the meaning of the constitutional prohibition on laws impairing the obligations of contracts. For all of these reasons, any argument by Atmos that the TRA is barred by the Tennessee Constitution from entering orders that impair the obligations of the asset management agreement is incorrect.

3. WHETHER THE CURRENTLY CONFIDENTIAL AMOUNT OF THE WINNING BID FOR THE ASSET MANAGEMENT CONTRACT SHOULD BE MADE PUBLIC?

Atmos's refusal to make public the amount of the winning bid is not good public policy, nor is it supported by statutory authority; moreover this refusal is inconsistent with Atmos's prior action of making the amount of the value of the last asset management contract public. Accordingly, the TRA should find that the amount of the winning bid should be made public.

A. Atmos Has Made the Prior Bid Amount Public

In a prior case, Atmos had no problem with making the amount of the winning bid for the asset management contract public. Thus, to cite but one example, in a filing made at the TRA, Atmos stated as follows:

> First and foremost, Atmos customers do not receive $30,000 from the AEM agreement (the "Agreement")) — they actually receive more than ten (10) times that amount. Under the Agreement, Atmos pays an annual lump sum of $500,000 as payment for the right to manage Atmos' assets. (TRA Docket No. 05-00253, 4/21/06 Staff Audit Report, p. 15.) Atmos does not retain any portion of the lump sum payment. The full $500,000 is flowed 100% through to the ratepayers under the Purchased Gas Adjustment ("PGA") mechanism. (Id.) That $500,000 payment is shared between Tennessee and Virginia ratepayers according to the percentage allocation for shared demand costs between the states. (TRA Docket No. 05-00253, 6/14/06 Memo. To File, p. 1) Prior to July 1, 2005, Tennessee ratepayers were allocated 69.5% of the annual fee, or $347,500. After July 1, 2005, Tennessee ratepayers will receive 64% of the fee, or $320,000 per year. (Id.)

Atmos Energy Corporation's Verified Supplementation of the Record, TRA Docket No. 05-00253, p.2, (April 12, 2007).

If the amount of the prior winning bid was made public, along with the amount flowed through to consumers, there is no reason Atmos cannot do the same thing in this docket.

B. The Amount of the Winning Bid Is Not a Trade Secret

The Tennessee Rules of Civil Procedure provide for the entry of a protective order for the purpose of protecting trade secrets from public disclosure:

> Upon motion by a party or by the person whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.]

Tenn. R. Civ. P. Rule 26.03(7).

The Uniform Trade Secrets Act provides a definition of trade secrets for the context in which a party seeks an injunction or damages from another party for the misappropriation of trade secrets.

> "Trade secret" means information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that
> (A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
> (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Tenn. Code Ann. § 47-25-1702(4).

The Tennessee Court of Appeals in *B&L Corporation v. Thomas and Thorngren, Inc.*, 162 S.W.3d 189, 211 (Tenn.Ct.App. 2004), permission to appeal denied 2005, summarized the Tennessee law on trade secrets in the context in which a business sues a former employee for the misappropriation of trade secrets as follows:

> This court previously has held that "confidential business information is akin to trade secrets," which consist of "any formula, process, pattern, device or compilation of information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it." ... Information cannot constitute a trade secret and thus, is not confidential if the subject matter is "of public knowledge or general knowledge in the industry" or if the matter consists of "ideas which are well known or easily ascertainable."
>
> In the absence of evidence to the contrary, this court has held that the following types of information are not confidential:
>
> (1) Remembered information as to a business's prices;
>
> (2) The specific needs and business habits of certain customers; and
>
> (3) An employee's personality and the relationships which he has established with certain customers.
>
> ... [T]his court listed some factors to be considered in determining whether certain information constitutes a business's trade secret:
>
> (1) the extent to which the information is known outside of [the] business;
>
> (2) the extent to which it is known by employees and others involved in [the] business;
>
> (3) the extent of measures taken by [the business] to guard the secrecy of the information;
>
> (4) the value of the information to [the business] and to [its] competitors;
>
> (5) the amount of money or effort expended by [the business] in developing the information;
>
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

B&L Corporation v. Thomas and Thorngren, Inc., 162 S.W.3d 189, 211 (Tenn.Ct.App. 2004), permission to appeal denied by Supreme Court Jan. 10, 2005 (internal citations omitted).

The sources of law on trade secrets make clear that for information to qualify as a trade secret, it must be secret and difficult to ascertain, and it must derive independent economic value from its secrecy.

> Although secrecy is a basic element of the existence of a trade

> secret, the fact that particular information may be unknown to others and/or may have been deemed "secret" or "confidential" by its owner does not necessarily mean that information will qualify as a trade secret. Trade secret status specifically requires a plaintiff to additionally demonstrate the information is not readily ascertainable by others and derives independent economic value from its secrecy.

Hauck Manufacturing Company v. Astec Industries, Inc. 376 F.Supp. 808, 814 (E.D.Tenn. 2005).

In Tennessee, the courts analyze all claims of confidential business information under the law on trade secrets. In other words, a trade secret is the only type of confidential business information recognized by Tennessee law. This point is made clear in a series of Tennessee cases and is summarized in *Hickory Specialties, Inc. v. Forest Flavors International, Inc.*, 26 F.Supp.2d 1029, 1031-33 (M.D.Tenn. 1998), a federal case interpreting Tennessee law.

> Moreover, the terms "trade secret" and "confidential information" as used in Tennessee case law are synonymous for all practical purposes, and confidential business information is only protectible to the extent that it qualifies as a trade secret.
> ...
> As these cases illustrate, courts as well as companies suing former employees mechanically recite the phrase "trade secrets and other confidential information" without necessarily stopping to clarify that trade secrets are made up of confidential information, and confidential information will only be subject to protection to the extent it qualifies as a trade secret -- in other words, that it really is confidential and not easily ascertainable, and it affords the owner a competitive advantage.
> ...
> As illustrated in the above discussion of trade secrets and confidential information, a former employee is not, under Tennessee law, bound not to divulge confidential information unless that information would qualify as a trade secret -- that is, that it is actually secret, business related, and affords a competitive advantage. ... If it fits those criteria, it will be protected as a trade secret; if it does not, the employer will not have a valid reason to protect that information.

Hickory Specialties, Inc. v. Forest Flavors International, Inc., 26 F.Supp. 1029, 1031-33 (M.D.Tenn. 1998) (internal citations omitted).

Although the bulk of legal authority on trade secrets relates to lawsuits filed by businesses against former employees, the context of the current matter is relevant to the analysis. The TRA has entered a protective order to protect trade secrets from public disclosure, pursuant to Tenn. R. Civ. P. Rule 26.03(7), which is substantially the same as Federal Rules of Civil Procedure 26(c). The significance of this context is made clear in *Loveall v. American Honda Motor Company*, 694 S.W.2d 937 (Tenn. 1985), a decision of the Tennessee Supreme Court.

> Trade secrets and other confidential information enjoy no privilege from disclosure, although courts may choose to protect such information for good cause shown. ... To show good cause under Rule 26(c), the moving party must demonstrate specific examples of harm and not mere conclusory allegations. ... When confidential commercial information is involved, this standard requires a showing that disclosure will result in a clearly defined and very serious injury to the company's business, ... or, stated differently, great competitive disadvantage and irreparable harm.

Loveall v. American Honda Motor Company, 694 S.W.2d 937, 939 (Tenn. 1985) (internal citations omitted).

In the context of a Rule 26 protective order, the burden of proof is on the party seeking protection from the disclosure of trade secrets. *AT&T Communications of West Virginia, Inc. v. Public Service Commission of West Virginia*, 423 S.E.2d 859, 862 (W.Va. 1992).

Another aspect of the context that is relevant to the current matter is that the TRA is a state regulatory agency. The benefit to the public of the disclosure of information relevant to the regulation of public utilities is significant and should be considered in the analysis.

What is reasonable under the circumstances should be entirely

> different in the context of a utility filing contracts with an agency, such as the PSC, as compared to an exchange of information between private parties. In other words, one might expect a more encompassing definition of a trade secret in litigation between private parties than would be recognized when a utility files a document with the PSC. Certainly the fact that contracts, although private, were negotiated for the benefit of the public must be taken into consideration.

Great Falls Tribune v. Montana Public Service Commission, 82 P.3d 876, 887 (Mont. 2003).

The balancing of the potential harm caused by the public disclosure of information with the benefit to the public of access to relevant information in the possession of a state regulatory agency is an analysis that can be decisive to the result.

> The trial court, in its order, balanced the commercial harm that could be caused by disclosure against the perceived benefits. ... The trial court concluded that, while some harm may indeed befall the railroad because of disclosure, this harm is a cost of doing business with the government and that the benefits associated with disclosure outweigh the costs.

Freedom Newspapers, Inc. v. Denver and Rio Grande Western Railroad Company, 731 P.2d 740, 743 (Colo.App. 1986), rehearing denied 1986, certiorari denied 1987.

In the current matter, Atmos seeks to protect as a trade secret the dollar amount of the winning bid. This information is not a trade secret, particularly if the contract is approved by the TRA. The Atmos system is a unique system, and only one entity is the asset manager at any given time. The pipeline capacity and storage assets of Atmos are unique to Atmos, and the bid amount for the Atmos system for the term of this contract is unique to this one contract. Any perceived competitive advantage that other asset managers allegedly might have over AEM is hypothetical and at best minimal.

Furthermore, the assets that AEM intends to manage for Atmos are paid for by consumers

through the PGA, and the winning bid is substantially for the benefit of consumers. Therefore, consumers have an interest in having access to knowledge of the winning bid. At this point it is worth reiterating the standard established by the Tennessee Supreme Court for analyzing allegations of trade secrets in the context of a Rule 26 protective order.

> To show good cause under Rule 26(c), the moving party must demonstrate specific examples of harm and not mere conclusory allegations. ... When confidential commercial information is involved, this standard requires a showing that disclosure will result in a clearly defined and very serious injury to the company's business, ... or, stated differently, great competitive disadvantage and irreparable harm.

Loveall v. American Honda Motor Company, Inc., 694 S.W.2d 937, 939 (Tenn. 1985) (internal citations omitted).

The type of information that Atmos alleges to be a trade secret in the current matter has been found not to be a trade secret in the past.

> Not every piece of information created in the ordinary course of business that appellants wish to keep confidential qualifies as a trade secret. Pricing policies, cost markups or the amount of a company's bid for a particular project, while ordinarily kept confidential in the business world, are not "trade secrets."

Wisconsin Electric Power Company v. Public Service Commission of Wisconsin, 316 N.W.2d 120, 123 (Wis.App. 1981).

Atmos's designation of the winning bid as a trade secret is erroneous and is not supported by law, and the Consumer Advocate respectfully requests that the TRA find that Atmos has failed to carry its burden of proof on this issue and authorize disclosure of the contract in full.

C. Sound Public Policy Favors Disclosure of the Winning Bid

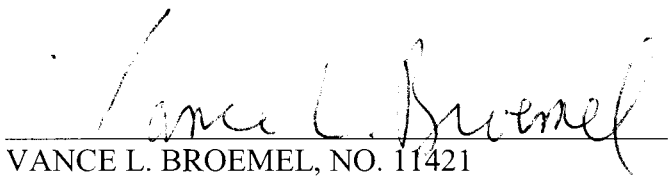
The deal between Atmos and AEM is not just another business transaction between two

private companies. The TRA's granting of an exclusive public utility franchise to Atmos benefits Atmos in many ways. But accompanying these benefits are attendant obligations. The gas supply assets at the center of this deal are regulated assets purchased by Atmos but paid for by consumers. And, as set forth above, the TRA has supervisory authority over Atmos's purchase and use of these assets. This is the very reason why Atmos must present the asset management contract to the TRA for approval -- unlike any other private business deal. Because the deal that is struck between Atmos and AEM involves the use of regulated assets, and because the utilization of these assets under the proposed asset management contract will directly affect the amount of money that Atmos's customers pay for natural gas utilities service, consumers have a right to know how much this deal is worth to them. When this type of basic information is held in secret, consumers have no way of learning about the business decisions of company officials and regulators that consumers are required to fund. Keeping consumers in the dark about information as fundamental as the approved regulated revenue streams of public utilities does nothing to foster the system of open regulation that all Tennesseans deserve.

Additionally, publishing the amount of the winning bid will help assure that the best deal is approved. If the winning bid is announced, other companies submitting bids will be in a better position to make decisions regarding whether their further involvement in the process is warranted. Such information is routinely published on the bid opening date for RFPs involving public goods and services. Furthermore, disclosure of the winning bid will not cause any significant harm to Atmos or AEM. In three years when the contract must be rebid, this information will be stale. Natural gas marketing is dynamic and volatile, and the value of any given set of assets is likely to change significantly over such periods of time. The substantial

differences in the amounts of the bids received by Tennessee companies for asset management services over the last couple of RFP cycles confirm this point.

Respectfully submitted,



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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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This the 24th day of April, 2008.

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