BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

RESPONSE TO THE CONSUMER ADVOCATE'S BRIEF

Atmos Energy Corporation ("Atmos" or "AEC") respectfully submits this Response to the Consumer Advocate's Brief.[1] Significantly, the Consumer Advocate does not oppose AEC's position on the main question here – whether to approve the bundled supply and asset management contract that AEC entered into with Atmos Energy Marketing (AEM) following a sealed competitive bidding process. In its Motion for approval, AEC showed that

- AEC conducted the bidding process in strict accordance with its approved tariff; and
- AEC chose AEM's bid because it contained the best price terms (i.e. the lowest overall net gas cost).

The Consumer Advocate "does not take a position" – i.e. does not oppose – any of this. The remaining intervenor, Atmos Intervention Group, likewise does not oppose the relief AEC has requested.[2] For the reasons discussed at length in AEC's opening brief, therefore, the Authority should grant AEC's motion, and approve the subject contract.

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[1] The Procedural Schedule in this matter calls for all parties to submit opening briefs on April 24, and response briefs on April 30.

[2] Atmos Intervention Group merely adopted the Consumer Advocate's brief.

That should be the end of the matter. But the Advocate's Brief raises two tangential issues, neither of which has any bearing on the question to be decided in this proceeding – i.e. whether the AEC/AEM contract should be approved – and neither of which has any merit.

First, the Consumer Advocate worries about how the Authority's ruling here could be construed in future proceedings, including Docket Number 07-00225 (the "Phase II" case). The Advocate worries about what Atmos might argue someday in that other case. And it even goes so far as to try to rebut, in advance, a constitutional legal argument that Atmos has not made, that is not relevant to the issue to be decided in this case, and that may never become an issue in any case. In light of the fact that Atmos *has not made* the constitutional impairment of contracts argument that the Consumer Advocate spends so much effort trying to rebut,[3] it would be wholly premature and in appropriate for the Authority to reach out and try to decide this issue now. "Ripeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision. . . . The central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[4] In part, the ripeness doctrine recognizes that "premature litigation will lead to ill-advised adjudication."[5] The impairment of contracts issue has not been raised as a defense in this case. It has nothing to do with the issues to be decided in this case. And it may or may not ever be raised in the Phase II case. Resolution of the issue should be left for a case in which it actually has been raised as a defense, if and when that ever occurs.

It would be equally inappropriate for the Authority to try to decide, in advance, what kind of effect its decision here may have in the Phase II case (or any other case). That is an issue for resolution in the Phase II case (if the question ever actually arises there, which is far from

[3] *See* Consumer Advocate's Brief at 4-6.
[4] 13A Wright, Miller, Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3532).
[5] *Id.* § 3532.1.

certain). It is inappropriate for a court to attempt to determine the future *res judicata* effect of its own order. *See Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 525 (7th Cir. 1985) ("[T]he first court does not decide the preclusive effect of its judgments. The second court must decide for itself what matters were settled in the first case."); *Nat'l Union Fire Ins. Co. v. Cont'l Ill. Corp.*, 673 F. Supp. 267, 270 n.7 (N.D. Ill. 1987) ("[F]or purposes of issue preclusion (collateral estoppel) it is for the later court, not the original source of a decision, to decide what the first court decided."); *Taylor v. Taylor*, 223 S.E.2d 699, 700-01 (Ga. 1976) ("[T]he defense of res judicata is a question to be presented by pleadings and evidence to the court having jurisdiction of the litigation in which the plea of res judicata is appropriately raised . . . ").

The Consumer Advocate invites the Authority to consider (and reject) an argument that Atmos has not raised, and to decide in advance the future *res judicata* effect of its decision here. As a matter of law, neither would be appropriate. AEC, therefore, respectfully submits that the Authority should decline the Advocate's invitation to climb out on this limb.

As its second disputed (and tangential) issue, the Consumer Advocate asks the Authority to unseal and publish the winning AEC bid. In doing so, the Advocate asks the Authority to ignore the promise of confidentiality extended equally to all of those who submitted bids, modify the provisions of the Protective Order entered in this case, and reverse the Authority's ruling on *the same issue* in the recent Chattanooga Gas case, where the Authority *rejected* the same argument that is made by the Consumer Advocate in this case. AEC anticipated that the Advocate would take another run at the confidentiality question in this case, and briefed the issue thoroughly in its opening brief. A few rebuttal points are made below.

The Consumer Advocate makes a significant factual error when it discusses the AEM bid as if it were a single dollar amount. That may have been the case for the asset-management-only

deal at issue in the recent Chattanooga Gas Company case (where the Consumer Advocate originally briefed this issue), but it is decidedly *not* the case here. As AEC explained in detail in its Supplemental Response to Consumer Advocate's Discovery Request No. 5 (filed April 29, 2008), the contract at issue in this case was a combined gas supply / asset management deal, under which prospective bidders were asked to submit their bids based upon index-based commodity prices, city-gate delivery services where specified, asset management consideration, and miscellaneous services. *Id.* AEC selected the bid that represented the best overall combined value for ratepayers in the form of the lowest gas cost. *Id.* In this case, that was the bid submitted by AEM. *Id.* After factoring in the pricing for baseload commodity, the provision of city-gate delivery services, the provision of miscellaneous services such as nominations and scheduling, and the amount to be received from the asset manager for the conditional use (subordinate to the needs of the utility) of the pipeline and storage capacity assets, the net cost to AEC under the AEM bid was the lowest.

In other words, this is not a contract for which the winning bid is a single price. Each pricing component is a key piece to the overall bid structure. *Id.* This pricing structure is entitled to confidential treatment and should not be made public either piecemeal or in its entirety. *Id.* If AEC, within the context of a competitive bidding arrangement, were required to inform bidders that their bids, or parts of their bids, would be made public, then the effectiveness of the RFP process would be diluted or even nullified, because companies bidding on these contracts would be reluctant to bid knowing that by doing so they would risk disclosing such information to their competitors. *Id.* In the end, publication of the winning bid would harm Tennessee consumers by making the next bidding process less competitive.

The Advocate has offered nothing to rebut the factual record AEC has made on these points. Indeed, they have made *no factual record at all* on the confidentiality question. Instead, they resort to unsupported assumptions: they assume (without support in the record) that the AEM winning bid would provide no competitive advantage to other asset managers in future transactions; and they assume (again without support) that the details of AEM's bid will have no value after the passage of a few years. AEC's discovery responses expressly address and contradict both of these contentions.[6] It bears emphasis that the *only factual record* on these issues is the one that has been made by AEC in its discovery responses, which directly contradict the Consumer Advocate's unsupported assumptions.

Respectfully submitted,

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[6] Response of Atmos Energy Corporation to First Discovery Request of the Consumer Advocate and Protection Division No. 5.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel, this the 30th day of April, 2008.

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