BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

SUPPLEMENTAL BRIEF OF ATMOS ENERGY CORPORATION SUPPORTING TRA STAFF'S PROPOSED REDACTIONS

On June 25, TRA Staff circulated a proposed redacted version of the Atmos Energy Corporation Base Contract with Atmos Energy Marketing, which was filed under seal in this docket on April 8, 2008. The Staff's proposed redactions would allow the bulk of the Contract to be removed from seal and filed as a public document, while still protecting AEM's proprietary interest in its pricing strategy, embodied in the contract's pricing terms. TRA Staff's proposed redactions are eminently sensible and should be adopted. The Consumer Advocate opposes the proposed redactions in one specific respect: its position is that the "annual amount of the asset management contract should be made public." July 1 Letter from Vance L. Boemel to Darlene Standley. In view of the Advocate's continued insistence on public disclosure of the annual contract amount, Atmos has submitted this memorandum and the accompanying affidavit of Mark H. Johnson.

As Atmos noted in prior briefing and oral argument, the factual record in this case regarding confidentiality is undisputed. The only factual material submitted on the issue of

confidentiality has been submitted by Atmos. Nothing contradictory (indeed nothing at all) has been submitted by any other party.

In its discovery responses in this case, AEC explained why the Authority should maintain the confidentiality of AEM's price terms (the same treatment recently afforded to Chattanooga Gas Company's Asset Management Agreement). *See* AEC's Supplemental Response to Consumer Advocate's Discovery Request No. 5 (filed April 29, 2008). As the discovery response explained, if AEC 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.

Although nothing has been offered to contradict the factual record on this point, out of an abundance of caution AEC submits herewith a supplemental affidavit from Mark H. Johnson, a representative of Atmos Energy Marketing. Mr. Johnson's affidavit further explains AEM's proprietary interest, and the competitive harm AEM would suffer from public disclosure, and therefore disclosure to its competitors. As the affidavit explains, AEM's methods of evaluating requests for proposals and its methodology of determining its bids in response thereto are uniquely developed within AEM, not generally known to the public or to AEM's competitors, and are carefully guarded by AEM from public disclosure. Johnson Aff. ¶ 10. If the annual amount of the Contract were made public and thus generally available, AEM's competitors likely would attempt to utilize such information in a manner that would be unfairly disadvantages to

AEM in future bids in and outside of Tennessee. *Id.* ¶ 13. AEM's competitors would be able to free ride on the work and expertise that AEM has invested in developing its bid here. *Id.*

In short, the undisputed record, including Mr. Johnson's affidavit, amply demonstrates the propriety and need for continued protection of the pricing terms in AEM's winning bid, including the annual payment amount. The price terms in the base contract should remain protected from public disclosure under the Confidentiality Order in this case, as proposed by the TRA Staff. In this regard, Atmos merely seeks the same treatment for its asset management agreement that the Authority recently afforded to Chattanooga Gas Company's asset management agreement. The Staff's proposed redactions to the AEC/AEM Base Contract should be adopted.[1]

Respectfully submitted,

NEAL & HARWELL, PLC

By: _____
A. Scott Ross, #15634
2000 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219-2498
(615) 244-1713 – Telephone
(615) 726-0573 – Facsimile

Counsel for Atmos Energy Corporation

[1] In prior briefing the CAPD advocated public disclosure on the grounds that the TRA is a state regulatory agency. But examples can be found of state public service commissions that have protected the confidential commercial information of a regulated utility from public disclosure. *See, e.g., Hamm v. South Carolina Pub. SERv. Comm'n,* 439 S.E.2d 853 (S.C. 1994) (attached). In prior briefing, Atmos Intervention Group suggested that disclosure of AEM's winning bid may be required under the Tennessee Code provisions that govern the bidding of state and county procurement contracts, Tenn. Code Ann. §§ 12-3-101 et seq. (Public Purchases), 5-13-101 et seq. (County Fiscal Procedure Law of 1957). Simply put, these statutes have absolutely no application here, as they apply only to state and county procurement contracts. And the cases cited by AIG are inapplicable for the same reason.

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 9 day of July, 2008.

( ) Hand
( ) Mail
( ) Fax
( ) Fed. Ex.
(X) E-Mail

Vance Broemel, Esq.
Joe Shirley, Esq.
Office of Tennessee Attorney General
425 Fifth Avenue, North, Third Floor
P. O. Box 20207
Nashville, TN 37202-0207

( ) Hand
( ) Mail
( ) Fax
( ) Fed. Ex.
(X) E-Mail

Henry M. Walker, Esq.
Boult, Cummings, Conners, & Berry, PLC
1600 Division Street, Suite 700
P. O. Box 340025
Nashville, TN 37203

Steven W. Hamm, Consumer Advocate for the State of South Carolina, Appellant, v. South Carolina Public Service Commission and South Carolina Electric and Gas Company, Respondents.

Opinion No. 23991

SUPREME COURT OF SOUTH CAROLINA

312 S.C. 238; 439 S.E.2d 853; 1994 S.C. LEXIS 17

October 6, 1993, Heard
January 17, 1994, Filed

SUBSEQUENT HISTORY: [***1] Rehearing Denied February 16, 1994.

PRIOR HISTORY: Appeal From Richland County. L. Henry McKellar, Judge

DISPOSITION: AFFIRMED

COUNSEL: Steven W. Hamm and Nancy Vaughn Coombs, both of South Carolina Department of Consumer Affairs, of Columbia, for appellant.

F. David Butler, for Respondent South Carolina Public Service Commission; Robert T. Bockman and Elizabeth F. Mallin, of the McNair Law Firm, of Columbia, for Respondent South Carolina Electric and Gas Company.

JUDGES: TOAL, HARWELL, CHANDLER, FINNEY, MOORE

OPINION BY: TOAL

OPINION

[*239] **[**853]** **TOAL, A.J.:** The Appellant ("Consumer Advocate") appeals an order from the circuit court affirming two orders of the Public Service Commission ("Commission"). We affirm.

FACTS

The Commission conducts a semi-annual review of the fuel purchasing practices of South Carolina Electric & Gas Company, Inc. ("SCE&G"). This review is mandated by S.C.Code Ann. § 58-27-865 (Supp.1992) to determine the reasonableness of SCE&G's fuel purchasing practices. The Consumer Advocate intervened and became a party in the 1989 proceedings.

[*240] Thereafter, the Consumer Advocate served interrogatories on SCE&G. The interrogatories, among other things, requested the production **[***2]** of SCE&G's coal purchasing contracts and their coal transportation contracts.

SCE&G objected to the production of the contracts on the ground that publication of the contracts would impair its negotiating position in the future with coal vendors and transportation service providers. The Consumer Advocate filed a motion to compel, and SCE&G responded with a motion for a protective order.

SCE&G's motion for a protective order did not seek to prohibit the Consumer Advocate from viewing the documents. Rather, SCE&G sought to prevent the documents from becoming public.

The Commission denied the Consumer Advocate's motion to compel. SCE&G, however, agreed to release the contracts to the Consumer Advocate provided the Consumer Advocate sign a confidentiality agreement preventing the public disclosure of the contracts. The Consumer Advocate filed a notice of appeal and moved for a continuance of the rate hearing pending the appeal of the Commission's discovery order. The Commission denied the Consumer Advocate's motion for a continuance, and the Consumer Advocate appealed.

The circuit court found the Commission did not abuse its discretion in denying both motions. The Consumer Advocate appeals [***3] to this Court.

LAW/ANALYSIS

We must decide whether the Commission abused its discretion in proceeding with the hearing while the discovery order was on appeal, and whether the Commission abused its discretion in granting SCE&G's motion for a protective order.

"The granting or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." *South Carolina Dept. of Social Servs. v. Broome,* 307 S.C. 48, 413 S.E.2d 835 (1992). The Commission, as an administrative law tribunal, has similar discretion.

The Consumer Advocate based his motion for a continuance on the fact that the appeal of the Commission's prior discovery order was pending before the circuit [*241] court. Discovery orders, however, are interlocutory and are not immediately appealable. *Ex parte Whetstone,* 289 S.C. 580, 347 S.E.2d 881 (1986). Thus, we find no abuse of discretion by the Commission in refusing to grant a continuance where the basis for the motion was the unresolved appeal of an order not yet ripe for appeal.

Once the Commission [***4] issued its final order on the merits, the discovery order became appealable. The Consumer Advocate claims that SCE&G's assertions that its future negotiating position with coal suppliers and transporters would be hampered if its contracts were made public is not supported by the record. Under these facts, we disagree.

Rule 26, SCRCP, allows broad pre-trial discovery. "The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. . . . Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties." *Seattle Times Co.* [**854] *v. Rhinehart,* 467 U.S. 20, 30, 104 S. Ct. 2199, 2206, 81 L. Ed. 2d 17, 25 (1984).

When the discovery process threatens to become abusive or to create a particularized harm to a litigant or third party, the Rules allow the trial judge broad latitude in limiting the scope of discovery. *See Palmetto Alliance v. South Carolina Pub. Serv. Comm'n,* 282 S.C. 430, 434, 319 S.E.2d 695, 698 (1984) (scope and conduct within sound discretion of trial judge). Rule 26, SCRCP, provides [***5] "upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . may make any order which justice requires to protect a party or person."

The person requesting protection from the court or commission must initially show good cause by alleging a particularized harm which will result if the challenged discovery is had. 4 JAMES W. MOORE, ET.AL., MOORE'S FEDERAL PRACTICE P 26.75 (2nd ed. 1993). The allegations of a particularized harm are usually in the form of a motion, either for a protective order or a return to a motion to compel production. Once the party seeking the protective order has met its burden of showing good cause by alleging a particularized harm, the party seeking the discovery must come forward and show that [*242] the information sought "is both relevant and necessary to the case. When both parties meet their burden of proof, the court must weigh the opposing factors." *Id.* at 26-402.

Here, SCE&G alleged that its future negotiating position with coal producers and coal transports would be impaired if the contracts were made public. Thus, SCE&G met its burden of showing good cause by alleging a particularized harm. The Consumer [***6] Advocate also met his burden by alleging that the contracts were relevant and necessary to the Consumer Advocate's case. [1] The Commission then properly weighed each parties' competing interest in the discovery materials and fashioned a remedy which protected SCE&G's confidential contracts from public disclosure while at the same time allowed the Consumer Advocate full access to the information he sought. The Consumer Advocate was prevented only from disseminating the information.

1 SCE&G admitted that the contracts were relevant.

In determining whether an abuse of discretion has occurred in an administrative tribunal's ruling on discovery matters, the reviewing Court also must weigh the competing interests of the parties in the material sought. The circuit court found, and we agree, that "the Commission's decision fully protected the Consumer Advocate's rights to secure access to relevant information in discovery, to seek broader disclosure of information and present admissible evidence in the Commission's hearing. [***7] Those decisions likewise protected the bargaining power of SCE&G in its fuel supply and transportation negotiations." Order of The Honorable L. Henry McKeller dated September 18, 1992 (ROA at 7). The Commission's order placed little burden on either party. We, like the circuit court, find no abuse of discretion in the Commission ordering the least restrictive means of protecting the interests of both parties.

Affirmed.

HARWELL, C.J., CHANDLER, FINNEY and MOORE, JJ., concur.