

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 4, 2008

IN RE:

PETITION OF ATMOS ENERGY CORPORATION FOR
APPROVAL OF THE CONTRACT(S) REGARDING GAS
COMMODITY REQUIREMENTS, ETC.

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DOCKET NO.
08-00024

ORDER REGARDING CONFIDENTIALITY OF THE CONTRACT

This matter came before Chairman Tre Hargett, Director Eddie Roberson, and Director Mary Freeman of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on July 14, 2008, for consideration of whether any part of Atmos Energy Corporation's ("Atmos" or "Company") *Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts* ("AMA") should remain confidential.

BACKGROUND

On June 23, 2008, the Authority approved the Company's AMA which had been filed under seal with the Authority on March 20, 2008. The Authority deferred for later consideration the issue of whether or not the AMA should remain confidential.

On June 25, 2008, TRA Staff issued a data request seeking comment from the parties, Atmos and the Consumer Advocate,¹ as to whether the redacted version of the AMA which was filed under seal by Staff on the same day was acceptable to be filed publically in this docket. The proposed contract redactions included the annual payment amount and the gas commodity

¹ Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate").

pricing. The parties filed their respective responses on July 1, 2008. The parties filed unsolicited additional filings on July 9, 2008 and July 10, 2008.

In its *Atmos Energy Corporation's Response to TRA Staff's Request Regarding Redacted Base Contract*, the Company stated that it had studied the proposed redactions and found them to be "necessary and appropriate, and acceptable in scope."² Therefore, Atmos stated that it was acceptable to the Company as well as the contractor, Atmos Energy Marketing ("AEM"), for the proposed redacted base contract to be publically filed.³ In its July 1, 2008 response, the Consumer Advocate stated that:

while [it] appreciates the efforts of the TRA to make more information about the asset management contract available to the public, [it] still believe[s] that the annual amount of the contract should be part of the publically available portion of the contract . . . [Thus, it] cannot agree that the proposed redactions satisfies [its] wishes.⁴

Because the parties are in agreement on the parts of the contract proposed to become available publically, the only issue remaining for the Authority's consideration is whether or not the annual payment amount and gas commodity pricing should remain confidential.

POSITION OF THE PARTIES

Atmos: The Company states that in a similar recent case involving Chattanooga Gas Company ("CGC"), the Authority designated the winning bid as confidential. Atmos stated that as in the CGC case, the bidding parties were promised that their confidential business information would remain confidential. Thus, the Hearing Officer entered a Protective Order in this matter to protect the confidential information.⁵

² *Atmos Energy Corporation's Response to TRA Staff's Request Regarding Redacted Base Contract*, p. 1 (June 30, 2008).

³ *Id.*

⁴ Letter from Vance L. Broemel (July 1, 2008).

⁵ *Memorandum in Support of Atmos Energy Corporation's Motion for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts*, pp. 16-17 (April 24, 2008).

Atmos asserts that disclosing AEM's confidential bid would harm not only AEM but also ultimately Tennessee consumers as bidders would be discouraged from participating in the process in the future. Further, the approved request for proposal ("RFP") procedures do not allow for the public disclosure of the winning bid. AEC conducted the RFP and bidding process strictly according to the approved procedures of its tariff, and these procedures mirrored those used by CGC which had been approved by the Authority.⁶

Consumer Advocate: The Consumer Advocate states that Atmos' refusal to make public the amount of the winning bid is not good public policy, is not supported by any legal authority, and is inconsistent with Atmos' prior action of making the value of the last asset management contract public.⁷ The Consumer Advocate states that claims of confidential business information are analyzed as to whether or not the information constitutes a trade secret, and only trade secrets are recognized as confidential business information. The Consumer Advocate maintains that the dollar amount of the winning bid is not a trade secret, particularly if it is approved by the TRA.⁸

Findings and Conclusions

The Authority previously dealt with the issue of the confidentiality of an asset management agreement in Docket No. 08-00012.⁹ In that docket, CGC sought to maintain as confidential the dollar amount of the Annual Guaranteed Minimum. Similar to this docket, CGC had promised the bidders that their bids would remain confidential.

In Docket No. 08-00012, a majority of the panel found that the dollar amount of the Annual Guaranteed Minimum was properly designated as confidential. In that docket, the Authority held:

TRA Rule 1220-1-1-.01(3)(g) defines proprietary information as including documents and information "... which the producing party in good faith deems to contain or constitute trade secrets, confidential research or development or commercially sensitive information." The

⁶ *Id.*, pp. 18-19.

⁷ *Consumer Advocate's Brief*, p. 7 (April 24, 2008).

⁸ *Id.*, pp. 10, 12.

⁹ *See In re: Request Of Chattanooga Gas Company For Approval Of Asset Management Agreement*, Docket No. 08-00012.

authority of the TRA to issue protective orders in contested case proceedings is established in Rule 26.03 of the Tennessee Rules of Civil Procedure as applied to administrative contested cases through the Uniform Administrative Procedures Act, specifically Tenn. Code Ann. § 4-5-311(a). It is clear that the protective order process and Tenn. Code Ann. § 65-3-109¹⁰ provide authority by which the TRA may maintain the confidentiality of certain information.¹¹

A majority of the panel found that a protective order had been issued in this docket, interested bidders had been instructed in the RFP that their bids would be considered confidential, and making the bids public now could disadvantage CGC when issuing its next AMA RFP because bidders would be hesitant to participate if ultimately the prevailing bid did not remain confidential. In light of these findings, a majority of the panel voted to approve the AMA in its entirety, including maintaining the confidentiality of the Annual Guaranteed Minimum amount.¹²

In considering the issue of whether the annual payment amount and the gas commodity pricing should remain confidential in the AMA in the instant docket, the panel made the following findings. TRA Rule 1220-1-1-.01(3)(g) defines proprietary information as including documents and information “. . . which the producing party in good faith deems to contain or constitute trade secrets, confidential research or development or commercially sensitive information.” Both the protective order process under Rule 26.03 of the Tennessee Rules of Civil Procedure as applied to the Uniform Administrative Procedures Act and Tenn. Code Ann. §

¹⁰ Tenn. Code Ann. § 65-3-109 states: “The department of transportation shall not give publicity to any contracts, leases, or engagements obtained by it in its official capacity, if the interests of the company would thereby be injuriously affected, unless, in the judgment of the department of transportation, the public interest requires it.” This section, as well as other sections in Chapter 3 of Title 65, continues to apply to the Tennessee Regulatory Authority through 1995 Tenn. Pub. Acts Ch. 305 § 11.

¹¹ Tennessee Courts look at a number of factors in determining whether certain information should be protected as confidential. Several factors include:

- (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 both 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.

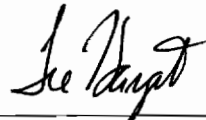
Wright Medical Technology v. Grisoni, 135 S.W.3d 561, 589 (Tenn. Ct. App. 2001).

¹² *In re: Request Of Chattanooga Gas Company For Approval Of Asset Management Agreement*, Docket No. 08-00012, *Order Approving Asset Management And Agency Agreement*, pp. 8-9 (July 15, 2008).

65-3-109 provide authority whereby the TRA may maintain the confidentiality of certain information. The panel further found that the additional information filed by the parties on July 9, 2008 and July 10, 2008 had neither been requested by the Authority nor approved for filing in the procedural schedule and therefore, would not be considered. In light of these findings, the panel voted unanimously to direct Atmos to publicly file the AMA with the annual payment amount and gas commodity pricing redacted pursuant to TRA Rule 1220-1-1-.01(3)(g) and Tenn. Code Ann. § 65-3-109.

IT IS THEREFORE ORDERED THAT:

Atmos Energy Corporation shall publicly file the *Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts* with the annual payment amount and gas commodity pricing redacted pursuant to TRA Rule 1220-1-1-.01(3)(g) and Tenn. Code Ann. § 65-3-109.



Tre Hargett, Chairman



Eddie Roberson, Director



Mary Freeman, Director