

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ATMOS)	
ENERGY CORPORATION FOR AN ADJUSTMENT)	CASE NO.
OF RATES AND TARIFF MODIFICATIONS)	2017-00349

ORDER

On November 29, 2017, January 3, 2018, and April 16, 2018, Atmos Energy Corporation (“Atmos”) filed petitions, pursuant to KRS 61.878¹ and 807 KAR 5:001, Section 13, requesting that the Commission grant confidential protection in perpetuity to certain designated materials filed in the pending case.

Atmos requests confidential treatment for the information provided in response to Commission Staff’s First Request for Information (“Staff’s First Request”), Item 58, which contains invoices for both legal fees and rate case expenses associated with the preparation of the rate case. Atmos argues that the legal fee invoices are subject to attorney-client privilege under Kentucky Rules of Evidence 503. Atmos further contends that the information is not publicly available, and that the disclosure of the proprietary information would result in significant or irreparable competitive harm by providing its competitors with information relating to the legal issues, advice, and strategies that were discussed or pursued. Atmos concludes that pursuant to KRS 61.878(1)(c), the information should be deemed confidential since the records are generally recognized as

¹ In the Petitions, Atmos cites to KRS 61.878, but in what appears to be typographical errors also improperly cites to KRS 61.87.

confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to its competitors.

Atmos asserts that the responses to the Commission's Second Request for Information ("Staff's Second Request") Item 24, attachment 1, should be deemed confidential since this information supplements the prior response to Staff's First Request, Item 65, concerning employee salary and benefits. Atmos states that the information provided involves specific employee health, dental, disability, and life insurance information, as well as defined benefit information which is of a personal nature and exempt from disclosure. Atmos contends that if this information were publicly disclosed it could unfairly harm Atmos's competitive position in the marketplace for utility management and skilled workers. Atmos concludes that this designated information is confidential pursuant to KRS 61.878(1)(a), which exempts the disclosure of personal information that would constitute an unwarranted invasion of personal privacy.

Atmos argues that the information provided in response to Staff's Second Request, Item 25, attachment 2, relating to consultant studies regarding employee benefits, should be deemed confidential. Atmos asserts that this information contains proprietary work product that requires confidentiality in order to retain its commercial value. Atmos states that such disclosure could unfairly harm Atmos and provide an unfair advantage to its competitors.

Atmos requests confidential protection for responses to the Attorney General's First Request for Information ("Attorney General's First Request"), Item 24, attachments 5, 6, 7, and 8; Item 32, attachment 2; and Item 50, attachment 1, all of which relate to Atmos's federal and state tax returns. Atmos argues that the designated information

should be deemed confidential because KRS 61.878(1)(k) prevents the public disclosure of records that federal law or regulation prohibits to be disclosed. Pursuant to 26 U.S.C.A., Section 6103(a),² federal tax returns shall be kept confidential and not publicly disclosed. Atmos further contends that according to KRS 131.190(1), all income tax information filed with the Kentucky Revenue Cabinet shall be treated in a confidential manner. Consequently, Atmos concludes that the state taxes are confidential pursuant to KRS 61.878(1)(l),³ which does not allow records or information to be disclosed if made confidential by the Kentucky General Assembly.

Atmos further requests confidential treatment for its responses to the Attorney General's Second Request for Information ("Attorney General's Second Request"), Item 6, attachments 1 and 2, concerning state property tax assessments for the years 2015, 2016, and 2017. Atmos argues that pursuant to KRS 131.190(1), all tax information filed with the Kentucky Revenue Cabinet shall be treated in a confidential manner. Hence, Atmos concludes that the state property tax assessments and returns are confidential and protected from disclosure by KRS 61.878(1)(l),⁴ which exempts from the Kentucky Open Records Act public records or information which are prohibited, restricted, or otherwise made confidential by enactment of the Kentucky General Assembly.

Atmos requests confidential treatment to the response to the Attorney General's Second Request, Item 24, attachment 3, which includes details of financing and debt

² Atmos incorrectly cites to 26. U.S.C.A. 5 6103(a). The correct citation is 26 U.S.C.A. Section 6103(a).

³ Atmos incorrectly cites to KRS 61.878(1)(1). The correct citation is KRS 61.878(1)(l).

⁴ Atmos incorrectly cites to KRS 61.878(1)(1). The correct citation is KRS 61.878(1)(l).

calculations that expose the internal financial operations of the company. The procedures, methodologies, and controls for assuring financial accuracy directly expose the most sensitive details of Atmos's financial workings, and the information provides details of Atmos's financial condition as well as the financial strategies. Atmos argues that the Supreme Court of Kentucky held that disclosure of financial information would unfairly advantage competing operators, with the most obvious disadvantage being the ability to ascertain the economic status of the entities without the hurdles systematically associated with acquisition of such information.⁵

Atmos is also requesting confidential protection for the response to Attorney General's Second Request, Item 29, attachments 1 and 2, and Item 31, concerning the compensation study performed on behalf of the company, and the supplemental executive retirement plan. Atmos argues that this information contains detailed classification and evaluation system benchmarks and parameters to be utilized by Atmos in connection with its wage and salary plan for its employees and executives. Further, the information contains proprietary work product that requires confidentiality to retain its commercial value, and which if disclosed would provide competitors access to exclusive information regarding compensation strategies. Atmos argues that public disclosure of this information would unfairly harm Atmos's competitive position in the marketplace for utility management and skilled workers, and that the information thus should qualify for confidential treatment pursuant to KRS 61.878(1)(c).

The Commission is a public agency subject to Kentucky's Open Records Act, which requires that all public records "be open for inspection by any person, except as

⁵ *Marina Mgmt. Serv., Inc. v. Com. of Ky., Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995).

otherwise provided by KRS 61.870 to 61.884.”⁶ The exceptions to the free and open examination of public records contained in KRS 61.878 should be strictly construed.⁷ The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.⁸ In determining whether materials should be exempt from disclosure, the Commission must balance the potential harm from disclosure with “the effect of protecting a given document from scrutiny by the public and potential intervenors.”⁹

Having carefully considered the petitions and the materials at issue, the Commission finds that the designated information contained in Atmos’s responses to Staff’s Second Request Item 25, attachment 2; Attorney General’s First Request, Item 24, attachments 5, 6, 7, and 8; Attorney General’s First Request, Item 32, attachment 2; Attorney General’s First Request, Item 50, attachment 1; Attorney General’s Second Request, Item 6, attachments 1 and 2; Attorney General’s Second Request, Item 24, attachment 3; Attorney General’s Second Request, Item 29, attachments 1 and 2; and Attorney General’s Second Request, Item 31, meets the criteria for confidential treatment and is exempted from public disclosure pursuant to KRS 61.878 and 807 KAR 5:001, Section 13.

The Commission finds that Atmos’s response to Staff’s Second Request, Item 24, attachment 1, containing anonymized and average information for Atmos’s staff, does not

⁶ KRS 61.872(1).

⁷ See KRS § 61.871.

⁸ 807 KAR 5:001, Section 13 (2)(c).

⁹ *Southern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004).

meet the criteria for confidential treatment pursuant to KRS 61.878 and 807 KAR 5:001, Section 13. Further, the Commission finds that the response to Staff's First Request, Item 58, which contains invoices for Atmos's legal fees and rate case expense associated with the preparation of the rate case, does not meet the criteria for confidential treatment. Costs and services incurred in preparation of this rate case and related documents are not of a personal nature, and are not generally recognized as confidential or proprietary. Although this rate case is before an administrative agency, the proceedings are adversarial in nature, and Atmos is seeking to recover its costs and fees associated with the rate case. The costs and fees associated with pursuing or defending a civil action, including fees paid to experts and attorneys, are not generally recognized as confidential or proprietary.¹⁰ In fact, when parties seek to recover costs and fees incurred in litigation in both federal and state courts, they are required to submit itemized explanations of those costs and fees sufficient to allow courts to assess their reasonableness; those submissions are not generally treated as confidential.¹¹

¹⁰ See e.g. *Asbury University v. Powel*, 486 S.W.3d 246, 265 (Ky. 2016) (in which the court referenced the total amount sought in attorney fees, total amount sought in costs, the hourly rates of the attorneys, the total hours billed down to the tenth of the hour, and the general work performed by the attorneys in the order and noted that the claimed fees were supported by affidavits from counsel with timesheets attached); see also *Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.3d 762, 766 (Ky. App. 2005) (in which the court remanded an appeal to the trial court with instructions to obtain evidence regarding the reasonableness of the attorney fees claimed, in part, because an award of fees must be based on the facts and circumstances of each case and the reasonableness of the claimed fees).

¹¹ See e.g. *Johnson v. Zimmer Holdings, Inc.*, 73 F. Supp.3d 814, 825-6 (E.D. Ky. 2014) (in which the court reviewed and discussed itemized bills from a party's attorneys submitted in support of a claim for fees, large portions of which were included in the order itself, that provided information regarding the dates on which attorneys' work was completed, the tasks that were performed on each day, the hours per day that each attorney worked on the tasks down to the tenth of the hour, and the names of each attorney who worked on the tasks); *Couch v. Transworld Systems, Inc.*, 3:16-CV-00618-CRS, 2017 WL 1520426 (W.D. Ky. Apr. 24, 2017) (in which the court reviewed an attorney's rates and specific billing entries to access whether the claimed attorney fees were reasonable).

IT IS THEREFORE ORDERED that:

1. Atmos's November 29, 2017, January 3, 2018, and April 16, 2018 petitions for confidential treatment are hereby granted, in part, and denied, in part.

2. The designated information contained in Atmos's responses to Staff's Second Request Item 25, attachment 2; Attorney General's First Request, Item 24, attachments 5, 6, 7, and 8; Attorney General's First Request, Item 32, attachment 2; Attorney General's First Request, Item 50, attachment 1; Attorney General's Second Request, Item 6, attachments 1 and 2; Attorney General's Second Request, Item 24, attachment 3; Attorney General's Second Request, Item 29, attachments 1 and 2; and Attorney General's Second Request, Item 31, shall not be placed in the public record or made available for public inspection until further Order of this Commission.

3. The designated information in Atmos's responses to Staff's First Request, Item 58 and Staff's Second Request, Item 24, attachment 1, does not meet the criteria for confidential treatment pursuant to KRS 61.878 and 807 KAR, 5:001, Section 13, and therefore, shall be made available to the public.

4. Within 20 days of the date of entry of this Order, Atmos shall file a revised version of the designated information for which confidential protection was denied, reflecting as unredacted the information that has been denied confidential treatment.

5. The material for which Atmos's request for confidential treatment has been denied shall neither be placed in the public record nor made available for inspection for 30 days from the date of entry of this Order in order to allow Atmos to seek a remedy afforded by law pursuant to 807 KAR 5:001, Section 13(5).

6. Use of the material for which confidential treatment was granted in any Commission proceeding shall be in compliance with 807 KAR 5:001, Section 13(9).

7. Atmos shall inform the Commission if the material for which confidential treatment was granted becomes publicly available or no longer qualifies for confidential treatment.

8. If a non-party to this proceeding requests to inspect materials granted confidential treatment by this order, Atmos shall have 20 days from receipt of written notice of the request to demonstrate that the materials are exempt from disclosure, pursuant to KRS 61.878. If Atmos is unable to make such demonstration or the non-party establishes that an exemption does not apply, the requested materials shall be made available for inspection.

9. Nothing in this Order shall be construed as preventing the Commission from revisiting the confidential treatment of materials and information.

By the Commission

ENTERED
MAY 17 2018
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2017-00349

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