

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF ATMOS)	CASE NO.
ENERGY CORPORATION FOR AN)	2021-00214
ADJUSTMENT OF RATES)	

ORDER

On January 6, 2022, Atmos Energy Corporation (Atmos) filed a petition, pursuant to 807 KAR 5:001, Section 13, and KRS 61.878, requesting that the Commission grant confidential protection for an indefinite period for information provided in response to Commission Staff's Sixth Request for Information (Staff's Sixth Request), Items 13 and 15.

LEGAL STANDARD

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 otherwise provided by KRS 61.870 to 61.884."¹ Exceptions to the free and open examination of public records contained in KRS 61.878 should be strictly construed.² The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.³

¹ KRS 61.872(1).

² See KRS 61.871.

³ 807 KAR 5:001, Section 13(2)(c).

In support of its petition, Atmos argued that information provided in response to Staff's Sixth Request, Item 13, was exempt from public disclosure under KRS 61.878(1)(c)(1), which exempts "[r]ecords confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records."

Atmos also argued that information it provided in response to Staff's Sixth Request, Item 15, was exempt from public disclosure under KRS 61.878(1)(k), which exempts from public disclosure "[a]ll public records or information the disclosure of which is prohibited by federal law or regulation or state law." Disclosure of tax returns and "return information" is prohibited by 26 U.S.C. § 6103(a). Return information is defined, in relevant part, as:

A taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.⁴

KRS 131.190(1) also prohibits disclosure of "information regarding the tax schedules, returns, or reports required to be filed with the department [of revenue] . . ."

⁴ 26 U.S.C. § 6103(b)(2)(A).

However, tax returns or return information is not prohibited from disclosure if this information has already been publicly disclosed.⁵

ARGUMENT

Staff's Sixth Request, Item 13, requested a copy of the most recent available copy of the publication entitled "RRA Regulatory Focus - Major Rate Case Decisions" published by S&P Global Market Intelligence. Atmos argued that this publication was proprietary information subject to copyright laws protecting it from disclosure, which required Atmos to take reasonable steps to prevent public, unauthorized disclosure.

Staff's Sixth Request, Item 15, sought updated attachments provided in Atmos's previous rate case.⁶ Attachment 1 is a spreadsheet summary of Accumulated Deferred Income Tax (ADIT) balances arising from accelerated depreciation for all Atmos divisions from 2008 to 2021 and ADIT balances arising from all book-tax timing differences for Divisions 002, 012, 009, and 091 from September 30, 2019 through September 30, 2021. Attachment 2 is a spreadsheet summary of bonus depreciation balances for all Atmos divisions from 2008 to 2021. Atmos claimed that these documents are contents of tax returns and exempt from public disclosure pursuant to KRS 61.878(1)(k). Atmos also noted that the original versions were granted confidential treatment in its previous rate case.⁷

⁵ *Lampert v. U.S.*, 854 F.2d 335, 338 (9th Cir. 1988); *William E. Schrambling Accountancy Corp. v. U.S.*, 937 F.2d 1485, 1489—90 (9th Cir. 1991); *Rowley v. U.S.*, 76 F.3d 796, 802 (6th Cir. 1996); *In re U.S.*, 817 F.3d 953, 962—3 (6th Cir. 2016).

⁶ Case No. 2018-00281, *Electronic Application of Atmos Energy Corporation for an Adjustment of Rates* (filed Jan. 11, 2019), Atmos's Response to Commission Staff's Third Request for Information, Item 25.

⁷ Case No. 2018-00281, *Atmos Energy Corporation* (Ky. PSC Feb. 26, 2020), Order at 2.

FINDINGS

Having considered the petition and the material at issue, the Commission finds that Atmos's petition is granted in part and denied in part. S&P Global Market Intelligence's publication contains proprietary information intended for confidential use. Public disclosure could jeopardize Atmos's ability to obtain this type of information in the future and might represent a copyright law violation. This type of information is generally recognized as confidential and proprietary and would permit an unfair commercial advantage to Atmos's competitors if disclosed.⁸

Attachment 2 provided in response to Staff's Six Request, Item 15 contains the bonus depreciation Atmos claimed on its federal taxes for each division in each year since 2008. Although the spreadsheet was not part of a tax return, it contains information that qualifies as return information under 26 U.S.C. § 6103(b)(2)(A). Therefore, the Commission finds that the designated material contained in Atmos's responses to Staff's Sixth Request, Item 13 and Attachment 2 provided in response to Staff's Sixth Request, Item 15, are records that meet the criteria for confidential treatment and are exempted from public disclosure pursuant to KRS 61.878(1)(c)(1) and (1)(k), respectively, and 807 KAR 5:001, Section 13.

The Commission further finds that Atmos failed to establish that Attachment 1 provided in response to Staff's Sixth Request, Item 15 is entitled to confidential treatment. The ADIT balances arising from book-tax timing differences do not represent something recorded on a tax return but rather represent the tax-effected differences between what

⁸ See Case No. 2020-00131, *Electronic Application of Meade County Rural Electric Cooperative Corporation for an Adjustment of Rates* (Ky. PSC Jan. 25, 2022), Order at 3.

is recorded for tax purposes and what is recorded for book purposes. In addition, the monthly ADIT balances for Divisions 002, 012, 009, and 091 in Attachment 1 correspond directly with other information that has been publicly disclosed in this case as well as previous Atmos cases in Kentucky.⁹ Atmos also publically provides ADIT balances arising from accelerated depreciation for Divisions 002, 012, 009, and 091 in Kentucky cases,¹⁰ and provides ADIT balances for other divisions in cases in other jurisdictions.¹¹ Therefore, Attachment 1 provided in response to Staff's Sixth Request, Item 15, does not meet the criteria for confidential treatment and is not exempted from public disclosure pursuant to KRS 61.878(1)(k) and 807 KAR 5:001, Section 13.

IT IS THEREFORE ORDERED that:

1. Atmos's petition for confidential treatment for its responses to Staff's Sixth Request, Items 13 and 15, is granted in part and denied in part.
2. Atmos's petition for confidential treatment for its response to Staff's Sixth Request, Item 13 and Attachment 2 provided in response to Staff's Sixth Request, Item 15, is granted.

⁹ Atmos's Response to Commission Staff's First Request for Information (filed Aug. 3, 2021), Item 55, ADIT_for_KY_04-30-21.xlsx; Atmos's Response to Attorney General's First Request for Information (filed August 23, 2021), Item 19; Case No. 2015-00343, *Application of Atmos Energy Corporation for an Adjustment of Rates and Tariff Modifications*, (filed Dec. 7, 2015) Atmos's Response to Commission Staff's First Request for Information, Item 59, Attachment 2; Case No. 2018-00281, *Atmos Energy Corporation* (filed Dec. 7, 2018) Atmos's Response to Commission Staff's Second Request for Information, Item 69; Case No. 2017-00349, *Electronic Application of Atmos Energy Corporation for an Adjustment of Rates and Tariff Modifications*, (filed Feb. 14, 2018) Atmos's Response to Commission Staff's Fourth Request for Information, Item 6, Attachment 2

¹⁰ Atmos's Response to Attorney General's First Request for Information (filed June 30, 2021), Item 19.

¹¹ See, e.g. *Atmos Energy Corporation—2018 ARM Reconciliation Filing*, Docket No. 18-00097, 2019 WL 2568536 (TN PSC, June 19, 2019), Order (publically discussing ADIT balances for Atmos's Tennessee divisions).

3. Atmos's petition for confidential treatment for Attachment 1 provided in response to Staff's Sixth Request, Item 15, is denied.

4. The designated material granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for an indefinite period or until further Order of this Commission.

5. Use of the designated material granted confidential treatment by this Order in any Commission proceeding shall comply with 807 KAR 5:001, Section 13(9).

6. Atmos shall inform the Commission if the designated material granted confidential treatment becomes publicly available or no longer qualifies for confidential treatment.

7. If a nonparty to this proceeding requests to inspect the material granted confidential treatment by this Order and the period during which the material has been granted confidential treatment has not expired, shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions from disclosure requirements established in KRS 61.878. If Atmos is unable to make such demonstration, the requested material shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.

8. The Commission shall not make the requested material for which confidential treatment was granted available for inspection for 30 days from the date of service of an Order finding that the material no longer qualifies for confidential treatment in order to allow Atmos to seek a remedy afforded by law.

9. The designated material denied confidential treatment by this Order is not exempt from public disclosure and shall be placed in the public record and made available for public inspection.

10. If Atmos objects to the Commission's determination that the requested material not be granted confidential treatment, it must seek either rehearing pursuant to KRS 278.400 or judicial review of this Order pursuant to KRS 278.410. Failure to exercise either of these statutory rights will be deemed as agreement with the Commission's determination of which materials should be granted confidential treatment.

11. Within 30 days of the date of service of this Order, Atmos shall file a revised version of the designated material for which confidential treatment was denied, reflecting as unredacted the information that has been denied confidential treatment.

12. The designated 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 service of this Order to allow Atmos to seek a remedy afforded by law.

By the Commission



ATTEST:


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