

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

PUBLIC SERVICE
COMMISSION

APPLICATION OF ATMOS ENERGY CORPORATION)
FOR APPROVAL OF SPECIAL CONTRACT PURSUANT)
TO ITS ECONOMIC DEVELOPMENT RIDER)

CASE No.
2019-00145

**ATTORNEY GENERAL'S OBJECTION TO ATMOS' PETITION FOR
CONFIDENTIALITY**

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and hereby objects to the "Application and Petition for Confidentiality" ["Petition"] that Atmos [or "the Company"] filed with the Commission on July 1, 2019. The Attorney General asserts several grounds for his objection.

Confidential material filed before the Kentucky Public Service Commission ["Commission"] is governed by 807 KAR 5:001 § 13. As noted in multiple subsections, the burden of proof that the information identified as confidential falls under an exemption in the Kentucky Open Records Act falls upon the moving party.¹ As evidenced below, Atmos' Petition is woefully and materially inadequate, fails to meet its burden and even unsuccessfully identifies the information Atmos purports to seek confidential protection. Additionally, Atmos inexplicably seeks Commission approval to hold the requests "confidentially indefinitely."² As such, the Attorney General objects to confidential protection for the information contained in Atmos responses to Commission Staff's Initial Data Request, 1 discussed below.

¹ Subsection (2)(c) and (3)(b), *citing* KRS 61.878.

² Petition at 3.

1. Response to Commission Staff 1-1

Atmos' Petition at page 1 states, in pertinent part, that the Company:

“ . . . petitions the Commission for confidential protection of the cost analysis submitted in response to Staff DR 1-01, attachment 2. . . . Pursuant to the Staff's data request 1-01, Atmos Energy performed a cost analysis related to this special contract to determine whether the anticipated revenue from this customer will cover all variable costs incurred in serving this customer and contribute toward the Company's fixed costs. That cost analysis is attached.”

Upon examination, however, no such analysis is attached to the Company's response to PSC 1-1, either as attachment 1 or attachment 2, as the Petition represents. Therefore, it is axiomatic that the Commission must deny the protection sought by Atmos, for the plain reason that information that does not exist (or was not provided) cannot be afforded confidential treatment because Atmos cannot “show that the material falls within the exclusions from disclosure requirement enumerated in KRS 61.878.”³

2. Response to Commission Staff 1-6

Atmos' response to the Commission Staff's first data request, item number 6, contained partial redactions. However, the company's Petition did not request confidential protection for the response to this data request. Either the company should be required to provide a fully unredacted response to this data request, or it should file a new petition including this response within its scope, supported by specific grounds for why the information should be granted confidential protection. Until such time that Atmos files a new petition, the information should not be provided in a redacted form.

³ 807 KAR 5:001 §13(2)(c).

3. Response to PSC 1-7

Similar to its response to Commission Staff's data request 1-6, Atmos' response to the Commission Staff's first data request, item number 7, contained partial redactions. However, the Company's Petition did not request confidential protection for the response to this data request. Either the Company should be required to provide a fully unredacted response to this data request, or it should file a new petition including this response within its scope, supported by specific grounds for why the information should be granted confidential protection. Until such time that Atmos files a new Petition, the information should not be provided in a redacted form.

4. Response to Commission Staff's 1-9

a. General Issues

Commission Staff's data request 1-9 asked Atmos to provide copies of all correspondences between Atmos and Diageo regarding the Economic Development Agreement. Atmos' response stated tersely only, "Please see Attachment 1." However, Attachment 1 merely contains one word: "Confidential." Since no other information was provided or confidential information strictly redacted, apparently, Atmos is asserting "the entire document is confidential."⁴ However, Atmos has failed to provide *any* specific support for its assertion that all such communications are entitled to confidential protection.

Pursuant to 807 KAR 5:001 §13(3)(a)1., a request for confidential treatment of information must be made by a motion that establishes "*specific grounds*"⁵ pursuant to KRS 61.878 for why the materials at issue should be granted confidential classification. In addition, movants are required to provide copies of the material "with those portions redacted for which

⁴ 807 KAR 5:001 § 13(2)(a)3.

⁵ 807 KAR 5:001 § 13 (3)(a)1. [emphasis added].

confidentiality is sought.”⁶ Movants likewise bear the burden of establishing that the materials at issue fall within the exclusions established in KRS 61.878.⁷

Atmos states that confidential protection should be provided to the correspondence between itself and Diageo because it contains “confirmation of terms of the agreement which could allow a competitor to determine the scope of Atmos’ negotiation options as well as specific conditions for obtaining the specific contract terms.”⁸ As an initial matter, it must be noted that the proposed special contract is based solely on the discount factor provided for by Atmos’ publicly-filed and accessible Economic Development Rider (EDR) tariff.⁹ Given that fact, Atmos “negotiated” no terms subject to the proposed agreement. Further, “confirmation” of public information is nevertheless public. Atmos has argued that the only discount or benefit in this case is the EDR tariff discount, and that “[t]he attached Contract fully complies with Atmos Energy’s EDR Special Terms.”¹⁰

As support that the discussions between Atmos and Diageo are confidential, Atmos cites KRS 61.878(1)(c), stating that publicly disclosing the information “would permit an unfair commercial advantage to competitors of the entity that disclose the records.”¹¹ Atmos’ assertion that its correspondence with Diageo falls under this provision is unpersuasive. The discount provided to Diageo is the one contained in Atmos EDR tariff.¹² Generic statements about competitiveness and disadvantage aside, anyone who applies and can comply with the provision of Atmos’ EDR tariff can receive the same deal as Diageo, thus there are no

⁶ 807 KAR 5:001 § 13 (3)(a)3; 807 KAR 5:001 § 13 (2)(c).

⁷ 807 KAR 5:001 § 13 (2)(c).

⁸ Petition at 2.

⁹ *See, e.g.*, Atmos response to AG 1-9, “The EDR discount is set forth in the Company’s approved EDR tariff.”

¹⁰ Application at 2.

¹¹ Petition at 2, *citing* KRS 61.878(1)(c).

¹² Application at 1.

“specific conditions for obtaining the specific contract terms.”¹³ Further, the Petition states that “public disclosure of the customer name, customer identifiable information, monetary terms negotiated with each customer and critical monetary terms would permit an unfair advantage to those competitors,” asserting further that these terms are “exempt from public disclosure pursuant to KRS 61.787(c)(1).”¹⁴ Atmos may be right that these items *can* be considered exempt from public disclosure, but the facts here do not support such an assertion. In fact, 1) Atmos disclosed, and continues to disclose the name of the customer throughout this proceeding, 2) Atmos failed to cite any specific “customer identifiable information” that may be subject to the exemption, and 3) the terms subject to the agreement are the ones provided for in Atmos’ publically-available EDR tariff. Ignoring Atmos’ inapplicable buzzwords regarding competitive advantage, Atmos’ support that the correspondence should be afforded confidential protection is found wanting.

Furthermore, upon reviewing the correspondence it is abundantly clear that not all of the information included within the correspondence qualifies under any recognized exemption to the Open Records Act. For instance, names, dates, times, page numbers and numerous other items contained in the correspondence fall under no exemption under the Kentucky Open Records Act. Should the Commission afford any protection to a portion of the emails, Atmos must strictly limit its redactions to only those portions of the Communications that it can even claim are confidential. As the General Assembly stated, the Kentucky Open Records Act “shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.”¹⁵

¹³ Petition at 2.

¹⁴ Petition at 3.

¹⁵ KRS 61.871.

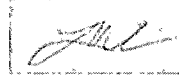
b. “Preliminary Discussions”

Atmos’ Petition asserts that the above-cited communications purportedly contain “preliminary discussions,” ostensibly using the term hoping the Commission believes that public dissemination of those conversations will somehow place the Company at a competitive disadvantage.¹⁶ KRS 61.878(1)(i) sets forth an exclusion for “[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;” however, this exception applies to public agencies and to final decisions of such public agencies. Importantly, although it used the term “preliminary discussions,” Atmos never argues that the primary status of those discussions afford them confidential protection under the relevant law. Thus, once again, Atmos has failed to cite “*specific grounds*” as to why the requested communications fall within one of the KRS 61.878 exclusions to the Kentucky Open Records Act.

In conclusion, the Attorney General objects to Atmos’ Petition and respectfully moves the Commission to require Atmos to file amended, unredacted responses to the above-referenced data requests.

¹⁶ Petition at 2.

Respectfully submitted,
ANDY BESHEAR
ATTORNEY GENERAL



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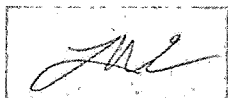
Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Ms. Gwen R. Pinson, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were mailed via First Class U.S. Mail, postage pre-paid, to:

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This 18th day of July, 2019.



Assistant Attorney General