

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 October 12, 2017, and November 22, 2017, 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 this case.

As a basis for its request, Atmos states that the information provided in response to Commission Staff’s First Request for Information (“Staff’s First Request”), Items 35 and 53, concerns the extensive internal analysis of employee benefits and compensation. Atmos states that this information includes benchmarks and parameters to be utilized by Atmos in connection with its wage and salary plan, and contains proprietary work product that requires confidentiality in order to retain its commercial value. Therefore, Atmos believes that the designated information should be deemed confidential pursuant to KRS 61.878(1)(c).

Atmos contends that the response and amended response to Staff’s First Request, Item 65, relating to employee salary and benefits, should be deemed confidential pursuant to KRS 61.878(1)(a), which exempts the disclosure of personal information

¹ In the Petitions, Atmos cites to KRS 61.878, but in what appears to be typographical errors also improperly cites to KRS 68.878.

when the public disclosure would constitute an unwarranted invasion of personal privacy, and KRS 61.878(1)(c), which exempts the disclosure of confidential or proprietary information that, if disclosed, would permit an unfair commercial advantage to competitors. Atmos further argues that public disclosure of this information could unfairly harm Atmos's competitive position in the marketplace for utility management and skilled workers, and that employee salary and benefit information is personal in nature and should not be disclosed.

Atmos asserts that the tax data provided in response to Staff's First Request, Item 48(9), 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 contends 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 argues that the information provided in response to Staff's First Request, Item 50, should be deemed confidential because it contains vendor contracts and fees. Atmos states that the provided copies of engagement letters for the two outside consultants for this case display the cost of services to be provided, the rates charged by the vendors, and the terms and conditions of the contracted services. Atmos contends

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).

that disclosing these details will allow Atmos's competitors and vendors to have an unfair commercial advantage because they could use the information to inflate the costs of services, thus harming Atmos's financial position and increasing cost of services to the customers. Atmos further asserts that its response to Staff's First Request, Item 51, consisted of legal invoices for legal expenses for the 12 months prior to the rate case, and that these are subject to attorney-client privilege under Kentucky Rules of Evidence 503.

Atmos further argues that the amended and supplemental responses to Staff's First Request, Item 71, should be deemed confidential as they contain information pertaining to Atmos's projected gas prices, including information from which the actual price being paid by Atmos for natural gas to its supplier can be determined. Atmos asserts that it has successfully negotiated an extremely advantageous gas supply contract that is very beneficial to Atmos and its ratepayers. The responses contain detailed information concerning gas contracts, commodity costs, demand and transportation charges, and reservation fees. Atmos states that this information is not publicly available, that it would be difficult or impossible for someone to discover this information from other sources, and that, if disclosed, the information could be used by a competitor to the detriment of Atmos. Therefore, Atmos concludes that the amended and supplemental responses to Staff's First Request, Item 71 should be deemed confidential pursuant to KRS 68.878(c)(1), since the release of the information would allow its competitors an unfair commercial advantage.

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.”⁴ The exceptions to the free and open examination of public records contained in KRS 61.878 should be strictly construed.⁵ The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.⁶ 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.”⁷

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 First Request Items 35, 48(9), 53, and 71 meet the criteria for confidential treatment and are exempted from public disclosure pursuant to KRS 61.878 and 807 KAR 5:001, Section 13. The Commission finds that the response and amended response to Staff’s First Request, Item 65, containing anonymized and averaged information for non-executive staff, does not meet the criteria for confidential treatment pursuant to KRS 61.878 and 807 KAR 5:001, Section 13. Further, the Commission has generally held that executive officer salary and compensation does not meet the criteria for confidential treatment, because the salaries are included as an expense in base rate calculations and

⁴ KRS 61.872(1).

⁵ See KRS § 61.871.

⁶ 807 KAR 5:001, Section 13 (2)(c).

⁷ *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).

because certain executive salary information must be disclosed to the public in any case in other regulatory filings.⁸

Further, the Commission finds that Atmos's response to Staff's First Request, Item 51 that provides legal expenses for the 12 months prior to the rate case does not meet the criteria for confidential treatment since the related documents are not generally recognized as confidential or proprietary. The Commission finds that the response to Staff's First Request, Item 50, containing Atmos's outside consultant contracts, 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.⁹

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 and those submissions

⁸ See Case No. 2012-00221, *Application of Kentucky Utilities Company for an Adjustment of its Electric Rates* (Ky. PSC Sept. 11, 2013) at 1 (denying a request to treat executive salary and benefits as confidential for those reasons).

⁹ 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).

are not generally treated as confidential.¹⁰ Moreover, to the extent documents that pertain to the retention and payment of experts who have offered or prepared evidence in the record, the terms and conditions of their retention and the compensation they received bear on the credibility of that evidence and, therefore, are not generally considered confidential, proprietary, or of a personal nature.¹¹

IT IS THEREFORE ORDERED that:

1. Atmos's October 12, 2017 and November 22, 2017 petitions for confidential treatment are hereby granted, in part, and denied, in part.

2. The designated information contained in response to Staff's First Request, Items 35, 48(9), 53, and the amended and supplemental responses to Item 71, 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 response and amended response to Staff's First Request, Item 65 and Items 50 and 51, do 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.

¹⁰ 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).

¹¹ See *Primm v. Isaac*, 127 S.W.3d 630, 635-9 (Ky. 2004) (indicating that evidence regarding what an expert witness was hired to do in a particular matter and the compensation they received is relevant and discoverable in civil matters); Fed. R. Civ. Pro. 26(a)(2) (requiring parties in federal court proceedings to automatically disclose significant information regarding retained experts whose testimony will be offered in support of claim or defense, including information regarding their qualifications and the compensation they received for their services).

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 materials 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 materials 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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