

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

March 31, 2003

IN RE:

**UNITED CITIES GAS COMPANY, a Division of
ATMOS ENERGY CORPORATION
INCENTIVE PLAN ACCOUNT (IPA) AUDIT**

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**DOCKET NO.
01-00704**

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Hearing Officer, duly appointed by the Directors of the Tennessee Regulatory Authority (the "Authority" or "TRA"), upon motions for summary judgment filed by the Energy and Water Division of the Authority ("Authority Staff") and the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"). The motions for summary judgment seek to dismiss the claims of United Cities Gas Company ("United Cities," or the "Company" or "UCG") that it has properly accounted for negotiated transportation contracts and the NORA contract in its performance-based ratemaking ("PBR") mechanism. Upon review of the record in this proceeding, including the Authority Staff's Audit Report, the affidavits filed by the parties and the responses to discovery requests, the Hearing Officer denies both motions for summary judgment.

Background

United Cities' PBR Mechanism

On January 20, 1995, United Cities Gas Company ("United Cities") filed an application with the Tennessee Public Service Commission ("TPSC") proposing that

instead of reviewing United Cities' performance after-the-fact by way of a prudency review,¹ as had been traditionally done, the TPSC review its performance on an ongoing basis. United Cities requested that it be authorized to conduct a two-year experiment whereby the TPSC would determine whether the Company was performing reasonably in managing and acquiring its gas supply by measuring United Cities' performance against pre-defined benchmarks that would act as surrogates for the market price of gas. The proposal was premised on United Cities' contention that under a performance-based proposal, the Company would become more accountable to customers for its management and acquisition of gas supplies.

The TPSC convened a hearing at which evidence was presented by United Cities and the Consumer Advocate. The TPSC issued an order approving the proposal with modifications on May 12, 1995. In approving United Cities' proposal, the TPSC adopted, among others, the following modifications:

1. United Cities would be limited to a maximum of \$25,000 per month on gains and losses for all of the approved PGA mechanisms.
2. The Gas Procurement Mechanism would be modified to include a 2% reasonableness zone that applies to both sides of the market. The Company would share equally with its customers all gas costs savings below 98% of the market and would also bear a share of the costs in excess of 102% of the market. In regard to the other mechanisms, 90% of all gains or losses would go to the consumers and 10% would go to the Company.
3. The Company would be required to contract with an independent consulting firm to review this mechanism and report to the TPSC annually during the two-year experimental period. This review would be for the purpose of informing the TPSC if the proper incentives were in place and whether modifications should be made to the program.

¹ Under the Purchased Gas Adjustment (PGA) Rules (TRA Rule Section 1220-4-7-.05) an audit of the prudence of gas purchases applies to any gas company with operating revenues of \$2,500,000 or more. The Rule states that a qualified consultant, hired by the TRA, is to evaluate and report annually to the TRA on the prudence of all gas costs which were incurred by the gas company during the previous year.

4. The TPSC would again review this matter in two (2) years to consider any further adjustments and whether the program should be made permanent.²

On November 7, 1995, the TPSC approved the selection of the independent consultant, Frank H. Creamer of Andersen Consulting. On February 2, 1996, the consultant filed his first report with the TPSC, recommending certain modifications to the PBR mechanism for the second year. After the consultant's report was filed, the TPSC received pre-filed testimony from United Cities and the Consumer Advocate and conducted a hearing on the matter on March 5, 1996. During the hearing, the TPSC took administrative notice of the consultant's report but did not permit the Consumer Advocate to cross-examine the consultant. On May 3, 1996, the TPSC issued an order modifying the PBR mechanism in accordance with the consultant's report.

On June 27, 1996, the Consumer Advocate filed a petition for review of the May 3, 1996 Order in the Tennessee Court of Appeals. The Consumer Advocate argued before the Court that it was denied due process when, during the hearing giving rise to the May 3, 1996 Order, the TPSC took official notice of Frank Creamer's consulting report without permitting the Consumer Advocate to effectively challenge the report. On March 5, 1997, the Court of Appeals issued an Order vacating the TPSC's Order of May 3, 1996, upon finding that the TPSC had violated the Consumer Advocate's due process rights by denying the Consumer Advocate access to all evidence considered by the TPSC and by failing to afford the Consumer Advocate an opportunity to impeach the same by cross-examination. Because the TPSC was dissolved by act of the Tennessee General

² *In Re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism*, Docket No. 95-01134 Order (Untitled) pp. 4-5 (May 12, 1995).

Assembly on June 30, 1996, the Court of Appeals remanded the case to the Tennessee Regulatory Authority for further proceedings.³

On February 28, 1997, the consultant filed his second report containing a review of the company's performance during the second year of the mechanism and a recommendation favoring the implementation of a permanent performance-based ratemaking ("PBR") mechanism. Following the entry of the Court of Appeals' Order, United Cities filed a petition on March 31, 1997, requesting the Authority to adopt the 1996 and 1997 reports of the consultant, Frank Creamer, and to permanently approve the mechanism. The Consumer Advocate opposed United Cities' petition, and on May 20, 1997, the Authority convened a contested case in TRA Docket No. 97-01364.

The Authority bifurcated the case to consider the issues arising from the remand by the Court of Appeals (Phase One) separate from the issues arising from United Cities' petition seeking approval of a permanent performance-based rate making mechanism (Phase Two). The Phase One and Phase Two hearings took place on March 26, 27, and 31, 1998.

In Phase One, the Authority considered the issues associated with the Court of Appeals' remand of the 1996 proceeding, including the 1996 consultant's report and whether the mechanism should continue for a second year. In Phase Two, the Authority addressed the issues raised in United Cities' 1997 petition, including a review of the 1997 consultant's report and a determination as to whether the mechanism should continue on a permanent basis. The Authority issued its Final Order on Phase One and its Final Order

³ *Tennessee Consumer Advocate v. Tennessee Regulatory Authority and United Cities Gas Company*, Court of Appeals, Middle District, No. 01A01-9606-BC-00286, March 5, 1997, page 7.

Phase Two on January 14, 1999, and April 16, 1999, respectively. The determinations of the Authority in the Phase One order which are relevant to this docket include:

(1) retaining the NYMEX index as one of the basket of indices used to establish the benchmark for the price of natural gas in the ratemaking mechanism;

(2) excluding the NORA contract from the PBR plan because that contract predated the creation of the plan; and

(3) adjusting the lower end of the deadband around the benchmark price to 97.7% for the second year of the plan - a level that is 1% below the level that existed prior to the creation of the PBR plan. (The Authority did not adjust the high end level of deadband which remained at 102%.) The determinations in the Phase Two order relevant to this docket include:

(1) approving United Cities' PBR plan to be a permanent plan effective April 1, 1999;

(2) increasing the earnings cap per year on overall gains and losses from \$300,000 to \$1.25 million annually beginning April 1, 1999. The rationale provided for this increase was to

provide the Company with the necessary incentives to continue to become more aggressive by assuming additional risk in the purchasing of natural gas and in managing its firm transportation capacity on the upstream pipelines.⁴

The TRA's 2002 Audit Report

The Company's Incentive Plan Account filing for the year ended March 31, 2001, was received by the TRA Energy and Water Division on August 7, 2001. The Energy

⁴ *In Re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism*, Docket No. 97-01364, Final Order on Phase Two, p. 23 (August 16, 1999).

and Water Division completed its audit of that filing on March 22, 2002. On March 28, 2002, the Energy and Water Division issued its preliminary audit findings to the Company, and on April 5, 2002, the Company responded thereto. The Audit Report was modified to include the Company's responses and was filed in this docket on April 10, 2002. This matter was convened by the Authority to hear issues arising out of the Audit Report.

In portions of the Audit Report relevant to this matter, the Authority Staff stated as follows:

As part of this mechanism, the Company also reported an additional \$1,254,424 in "procurement savings," \$201,893 resulting from the NORA contract and \$1,052,531 resulting from negotiated transportation contracts. United Cities retained 50% of these alleged savings, for a total of \$627,212. We disagree that the calculations presented by the Company represent "savings" under the terms of the Incentive Plan. The Company's incentive plan defines savings/(losses) as those total commodity costs that fall outside the deadband. The deadband is a range surrounding the benchmark, within which no sharing takes place. The benchmark is a calculation based on approved market indexes. Any savings to be shared between the Company and the ratepayer must be below "market," as defined by the plan. Therefore, we are recommending audit adjustments to eliminate these "savings" from the Incentive Plan Account (IPA).(p.5)

Upon determining that United Cities could not claim savings resulting from the negotiated transportation contracts, the Authority Staff calculated an over-recovery of \$526,265 in the Gas Procurement Incentive Mechanism. The Authority Staff stated further:

This finding represents a deviation from the terms of United Cities' Incentive Plan tariff. The \$526,265 in savings is 50 percent of what the Company refers to as "Tennessee Negotiated Rate Savings." The savings represent "avoided costs" resulting from negotiated transportation contracts that the Company entered into with various pipelines. These avoided costs are calculated by comparing the transportation rates negotiated in the contract to the maximum pipeline tariff rates approved by the Federal Energy Regulatory Commission ("FERC").

The Gas Procurement Incentive Mechanism section of the Company's tariff states that it is the savings associated with its commodity cost of gas that is available for sharing. The commodity cost of gas is compared to a "benchmark." If the total monthly commodity cost of gas falls below 97.7% of the benchmark amount, then the resultant savings will be shared 50/50 with the customers. The benchmark is the mathematical product of the actual purchase quantities and the appropriate price index.

...

For each type of purchase, the benchmark is clearly defined. Some purchases allow an adjustment of the indexes; however, nowhere in the tariff is there mention of sharing savings associated with transportation discounts. The only mention of transportation costs is in conjunction with the definition of the appropriate index for city gate purchases. A city gate purchase is one where the Company buys local gas and avoids the full pipeline costs of transporting the gas from the Gulf of Mexico to Tennessee. However, the pipeline purchases that United Cities was able to negotiate lower transportation rates for were not city gate purchases.

...

Including savings associated with transportation rates in the Incentive Plan would require a revision of the Incentive Plan. If the Company decides to take that approach, a problem would arise in establishing a benchmark with which to compare negotiated rates. The definition of Gas Procurement savings in the current tariff is a discount below "market" prices. The tariff establishes indexes as a proxy for the commodity "market." Since there is no known "market" price for transportation rates (other than the rate paid by United Cities Gas), there is no way to know if the maximum FERC approved tariff rates are appropriate proxies. Without a valid benchmark, savings (if any) cannot be quantified. (pp. 10-11)

United Cities provided its Response which was paraphrased in the Audit Report as follows:

UCG respectfully disagrees with Staff Finding #2 that UCG over-recovered under the Gas Procurement Incentive Mechanism. UCG believes that the PBR mechanism, as documented in the Final Order on Phase II in Docket No. 97-01364 ("Phase II Order") provides for savings associated with transportation discounts and that Staff's current position is contrary to that order. Furthermore, UCG believes that Staff's current position is inconsistent with the prior discussion it had with UCG on the treatment of transportation discounts as savings under the PBR mechanism and that Staff had failed to object to UCG's quarterly reports, which reported these transportation discounts as savings, within 180 days of filing as required by the tariff.

In January 2001, UCG requested a meeting with Staff to provide notice of its renegotiated transportation contracts that went into effect in November of 2000. On January 31, 2001, Staff met with UCG to discuss the treatment within the PBR framework of the avoided costs resulting from the renegotiated transportation contracts on the Tennessee Gas pipeline, East Tennessee Natural Gas pipeline, and the Columbia Gulf pipeline. Attached as Exhibit 1 is a copy of the meeting agenda and the summary sheets reflecting how these savings would be treated under the PBR mechanism. UCG discussed in detail with Staff the reporting methods they intended to follow in regard to inclusion of these avoided costs in its quarterly reports. At no time during or immediately following this meeting did Staff indicate that UCG was incorrect in its treatment of these avoided costs as savings under the PBR mechanism or in UCG's method of reporting.

The quarterly reports for October through December 2000 and January through March 2001 were filed pursuant to the guidelines of the tariff on March 1, 2001 and May 31, 2001, respectively. The Authority failed to provide any written notification to UCG of any exceptions within 180 days of the filing of those reports. Accordingly, pursuant to the tariff (Sheet No. 45.6) UCG's incentive plan account is deemed in compliance with the provisions of the PBR. Accordingly, UCG booked as income its share of benefits earned under the PBR program. This income has been recognized by the Company since November 2000.

Even if the Authority determines that the Staff may now raise exceptions to the previously filed quarterly reports, although no exceptions were made within 180 days of filing those reports, Staff's current conclusion that transportation discounts should not be included in the PBR plan is categorically incorrect. Both the initial PBR plan and the permanent PBR plan covered the entire associated commodity cost of purchasing, delivering and storing of gas to the end consumer. In the Phase II Order, the Authority specifically identified transportation costs as a component in its definition of the total cost of gas:

The total cost of gas includes the commodity cost and the transportation cost to move the gas from its source to the city gate. In general, the closer the gas source is to the city gate, the higher the commodity cost, but, since the distance to be moved is less, the transportation cost is less. In contrast, the farther the gas is from the city gate, the cheaper the commodity cost, but the transportation cost to move it a greater distance is more. It is, therefore, possible that the total of commodity and transportation costs for the higher cost gas could be lower than the total cost (commodity plus transportation) for the cheaper gas.

...

The negotiated transportation discounts were a direct result of the incentives presented by the PBR. In the final Order on Phase Two the Authority found that the cap should be increased to \$1.25 million to provide the Company with the necessary incentives to become more aggressive. Staff met with UCG on two occasions to discuss the treatment of transportation discounts. During those meetings, UCG specifically identified to Staff that "city gate purchases" included both raw commodity costs and transportation costs necessarily incurred for the delivery of the commodity to the city gate. Attached, as Exhibit is an invoice from Woodward Marketing, LLC dated December 29, 2000, which illustrates that the total invoice amount charged to UCG for city gate purchases includes transportation costs.

As noted above, UCG also disagrees with the Staff's conclusion that including savings associated with transportation rates would require a revision of the Incentive Plan. Furthermore, UCG disagrees with the conclusion that a problem exists in establishing a benchmark of performance against which to compare the negotiated transportation rates. The absence of published benchmarks providing comparative analysis on discounted transportation rates should not preclude the Staff from including transportation discounts in the PBR mechanism. . . . When transportation contracts are renegotiated, the benefit derived from the new contract is easily quantifiable – it is based on the prior period costs, which in this case were the maximum FERC rates. In calculating the benefit to the ratepayers and UCG, the first contract renewal would be compared to the prior period rate, the undiscounted, published FERC rate. This approach is inward looking, and measures UCG's performance against itself. This approach would be consistent with a prudence audit, if one were to be performed. It should be noted that under the PBR sharing formula, the ratepayer receives the first 2.3% of the discount and one-half of any discount greater than 2.3%. (pp. 11-14)

The Audit Report also contained an exception based on United Cities' treatment of the NORA contract. As a result, the Authority Staff calculated an over-recovery of \$100,947 in the Gas Procurement Incentive Mechanism. The Authority Staff explained the reason for this exception in the following manner:

The NORA contract was initially excluded from United Cities' Incentive Plan in Docket No. 97-01364. The primary reason for the exclusion was that it pre-dated the plan and did not require any additional effort by the Company to generate savings. But the Authority's Phase One Order (January 14, 1999) stated that if, when the contract was renewed or

renegotiated, the Company was still operating under its Incentive Plan, the contract could be considered for inclusion. A new NORA contract was entered into on April 19, 2000, with an effective date of November 1, 2000. On September 26, 2000, United Cities filed a petition with the TRA, requesting permission to include the new NORA contract in its Incentive Plan. Since the contract was no longer pre-existing and met the requirements of the Affiliate Rules contained in the Company's Incentive tariff, the Authority approved the Company's request at its June 12, 2001 Conference.

The Company's calculation of the "savings" related to the NORA contract does not conform to the terms of its Incentive Plan. As discussed in Finding #2 above, the Gas Procurement section of the Company's tariff specifies that the commodity cost for each purchase will be compared to the appropriate benchmark for that purchase. Then the total commodity cost of all purchases for the month will be compared to total benchmark cost. Only the amount of purchases that falls below 97.7% of the benchmark is available for sharing.

The terms of the current NORA contract call for United Cities to pay the appropriate Inside FERC index each month plus a premium for volumes delivered. Through a data request to the Company, Staff has learned that Inside FERC is the commodity price of the NORA gas and the "premium" is the transportation cost for delivery of the gas from the NORA delivery point to the East Tennessee service area.

The Company did not compare the NORA commodity cost with the average of the three indexes for its monthly spot purchases as specified in the tariff. When questioned in a data request, the Company responded that the comparison with the benchmark showed minimal savings and the savings fell within the deadband each month. Therefore, the Company elected to calculate "savings" based on the transportation cost. The calculation is similar to the one for the transportation discounts, addressed in Finding #2. The premium was compared to the maximum tariff rates allowed by FERC. Then 97.7% of the difference was deemed "savings" by the Company to be shared 50/50 with the customer. This type of calculation is not covered under the current Incentive Plan tariff. Additionally, the Company separated out this calculation from the other calculations, so that it led to shared "savings" each month. The tariff is clear that the "total" commodity costs for the month must fall outside the deadband before sharing of savings or losses will occur. (pp. 17-18)

The Audit Report contains a paraphrase of United Cities' response to the exception as follows:

The Company's response to finding #3 is two part. First, it appears that the Staff has chosen to disallow transportation costs on the same basis as set forth in finding #2. Accordingly, UCG adopts its response to finding #2 in regard to savings resulting from avoided transportation costs.

Secondly, the Staff has objected to the method of calculation by the Company of the cost savings resulting from the NORA contract. The method of calculation for the savings associated with the NORA contract have been well documented beginning with the experimental PBR program. Although the NORA contract was subsequently deleted, the method of the calculation nonetheless remained intact as evidenced in Staff's own Table included in their discussion of Finding #2 that noted the type of purchase that the NORA contract falls under, i.e. citygate purchase. It appears that Staff has failed to adjust the commodity portion for the avoided transportation cost when comparing to the indices benchmark.

On or about September 21, 2001, UCG filed a petition requesting permission to include the new NORA contract in the current PBR. TRA Docket No. 00-00844. This petition included attachments which illustrated the inclusion of the avoided cost savings in the PBR calculation. The PBR calculation set forth in the petition is identical to the PBR calculation set forth in the quarterly reports filed thereafter as well as in the annual report. (p. 18)

Travel of the Case

Following the filing of the Audit Report, United Cities requested an opportunity to address the Directors of the Authority regarding its interpretation of the Authority's orders approving the PBR mechanism and its conduct in including the negotiated transportation contracts and the NORA contract in the PBR mechanism. What began as an opportunity for United Cities to make remarks to the Directors grew into a controversy in which a contested case was convened and the Consumer Advocate was granted intervention.⁵ Later the Directors appointed a Hearing Officer to preside over the hearing and render a decision on the merits of United Cities' claim.⁶

⁵ *Order Convening A Contested Case Proceeding, Granting Intervention to Consumer Advocate and Appointing A Pre-Hearing Officer* (May 13, 2002).

⁶ *Order Appointing A Hearing Officer* (June 28, 2002).

Certain members of the Energy and Water Division have been separated from advisory staff, have been designated as a party and are represented by counsel in this proceeding. The Consumer Advocate has intervened in this proceeding largely in part because of its active role in the formation of United Cities' PBR mechanism and its interpretation of that mechanism which is in agreement with the Authority Staff's position. United Cities has retained the services of Frank H. Creamer, the independent consultant who reviewed and made recommendations for modifications in the original PBR mechanism and testified in the 1998 hearings before the TRA. Mr. Creamer supports the position of United Cities in this proceeding.

This matter was originally set for hearing on May 20, 2002, but was continued by joint motion of the parties. Thereafter, all parties in this proceeding engaged in ongoing settlement negotiations. When it appeared that negotiations had reached an impasse, the parties expressed to the Hearing Officer a desire to proceed with an evidentiary hearing. After the hearing was rescheduled for August 27-28, 2002, the Consumer Advocate and Authority Staff filed their motions for summary judgment. At that point the Hearing Officer established a procedural schedule for discovery and responses to the motions for summary judgment. United Cities initiated discovery to the parties primarily in an attempt to determine the bases for those parties' motions for summary judgment. Following the resolution of several discovery disputes, oral argument on the motions for summary judgment were heard by the Hearing Officer on October 24, 2002. There has been no supplementation to the record since the oral arguments. A Status Conference was held with the parties on March 11, 2003, during which the parties agreed that no further briefing on the motions would be necessary.

The Parties' Motions for Summary Judgment

During the preparation for the hearing, the parties entered into discussions regarding the issues that are central to this proceeding. The parties have agreed to the following issues:

1. Whether UCG's inclusion in the PBR of the savings resulting from negotiated discounted transportation contracts is consistent with the Authority's Final Order on Phase Two in Docket 97-01364 (the "Phase Two Order").
2. How should the savings associated with avoided costs resulting from a negotiated gas supply agreement for requirements from the East Tennessee-NORA Gas Pipeline (the "NORA Contract") be accounted for in the PBR under the terms of the Phase Two Order and the Order in Docket No. 00-00844 authorizing inclusion of the NORA contract in the PBR.

The Authority Staff has moved for summary judgment on both issues. The Consumer Advocate has filed a motion for summary judgment only as to the first issue. The limited discovery conducted in this matter has focused on the factual and legal basis for the motions for summary judgment.

The Consumer Advocate moved for partial summary judgment on the issue of whether United Cities could include in its PBR mechanism the savings resulting from the negotiated transportation discounted contracts. The Consumer Advocate asserts that such inclusion is inconsistent with the Authority's Final Order of Phase II in Docket No. 97-01364. The Consumer Advocate asserts that there is no dispute of material fact and that United Cities' claim that it can include those contracts in the PBR mechanism must be dismissed as a matter of law.

Notwithstanding the Consumer Advocate's assertion that the material facts are undisputed, United Cities argues that all of the facts put forth by the Consumer Advocate

are in dispute and therefore the motions for summary judgment must be denied. United Cities also asserts that the motions for summary judgment filed by the Consumer Advocate and the Authority Staff must be denied because neither motion complies with Rule 56.03 of the Tennessee Rules of Civil Procedure. In addition, United Cities has alleged that its plan for including the negotiated transportation contracts was discussed with members of the Energy and Water Division in a meeting before taking the action that was cited as an exception in the Audit Report. After the meeting, United Cities reported its activity in two separate quarterly reports which were not challenged by the Energy and Water Division. Because of these events, United Cities argued that the Authority Staff is estopped from finding exception against United Cities for over-recoveries under the PBR mechanism. Quite simply, United Cities responds that

Because the material facts alleged by the CAD are disputed, and because the Staff failed to allege any undisputed material facts, the CAD and Staff cannot meet the standard for summary judgment under Tennessee law, and both motions for summary judgment must be denied.⁷

Findings and Conclusions

The parties have aptly stated the general law governing the consideration of a motion for summary judgment. Nevertheless, there are additional criteria included in the standard for summary judgment that are applicable to this matter. The seminal case in this area appears to be the Tennessee Supreme Court's decision in *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993). In that case the Court concisely stated the standard for a trial court considering a motion for summary judgment:

[T]he trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of

⁷ *United Cities Gas Company's Memorandum in Response to the Motions for Summary Judgment Filed by the Staff of the Tennessee Regulatory Authority and the Consumer Advocate and Protection Division of the Attorney General's Office*, p. 4 (October 21, 2002).

that party, and discard all countervailing evidence. Then if there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied....The court is simply to overrule the motion where a genuine dispute exists as to any material fact. The phrase "genuine issue" contained in Rule 56.03 refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts. The critical focus is limited to facts deemed "material", which is to say those facts that must be decided in order to resolve the substantive claim or defense at which the motion is directed....Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. (Citations omitted)⁸

As required, the Hearing Officer has examined the filings by the parties to determine which facts are material and has considered the arguments of the parties to determine whether there exist any genuine and material factual disputes. To determine which facts are material the Hearing Officer must look to the agreed-upon list of issues in this proceeding. Each issue requires a conclusion that is legal in nature but that is based on a presentation of facts. Examining only the PBR mechanism and the orders that created and modified it will not in this case lead to a full and complete resolution of the issues. Even though this case may ultimately involve an interpretation of the PBR mechanism as a matter of law, there are facts regarding the circumstances surrounding the formation of the PBR mechanism and regarding the conduct of the parties arising from different interpretations of the PBR mechanism.

The Authority Staff and the Consumer Advocate have argued that they are entitled to summary judgment as a matter of law because there are no genuine issues of material facts. However, even in cases where the basic facts are not in dispute, summary

⁸ *Byrd v. Hall*, 847 S.W.2d 208, 210-211 (Tenn. 1993).

judgment is not proper where “parties in good faith may disagree nevertheless about the inferences to be drawn from the facts.”⁹

In this proceeding, basic facts are in dispute. Notwithstanding the excellent presentation of the history leading up to this controversy and explanation of the PBR mechanism in the Authority Staff’s memorandum and the detailed factual assertions of Dr. Steven Brown in his affidavit in support of the Consumer Advocate’s motion, United Cities has disputed many basic and material facts through its four affidavits and a detailed response to the material facts as characterized by the Consumer Advocate. In addition, United Cities’ position was articulated from the outset in its responses to the Energy and Water Division’s Audit Report. Mr. Creamer’s affidavit set forth numerous areas in which parties differ over facts and interpretations of facts, most of which are material to the determination of the agreed upon issues. These issues may, in the end, be resolved against United Cities. However, at this point in the proceeding, United Cities has demonstrated that facts material to the resolution of those issues are in dispute. A summary judgment should be granted “only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion.”¹⁰ In this matter, it is clear that a reasonable person could reach more than one conclusion from the facts.

Moreover, United Cities has raised an issue of estoppel claiming that it acted to its detriment in reliance on its interpretation of the actions of TRA staff members. Regarding the January 31, 2001 meeting, United Cities has provided extremely detailed information through the Affidavit of John Hack that if unrefuted would indicate

⁹ *Prescott v. Adams*, 627 S.W.2d 134, 139 (Tenn. App. 1981).

¹⁰ *McCann v. Hatchett*, 19 S.W.3d 218, 219 (Tenn. 2000).

acquiescence, if not agreement, on the part of the Energy and Water staff regarding United Cities' interpretation of the PBR mechanism and its plan to include the negotiated transportation contracts therein. Mr. Hack, Director of Gas Supply Planning for Atmos Energy Corporation, explained United Cities' basis for claiming reliance in his Affidavit as follows:

9. Sometime around the beginning of January 2001, UCG contacted Mike Horne, then Chief of the TRA Energy and Water Division, to request a meeting between UCG representatives and TRA staff. The purpose of the meeting was to discuss the transportation discounts UCG had recently negotiated and how they would be accounted for under UCG's PBR tariff.

10. The meeting was held on January 31, 2001, at the TRA offices in Nashville. I participated in the meeting. The meeting was fairly lengthy, lasting more than an hour.

11. TRA Chief of Energy and Water Division Mike Horne, and TRA staff members Dave McClanahan and Pat Murphy were present at the meeting.

12. UCG had arranged for several members of its management to attend the meeting, and had asked me and Patti Dathe, Gas Supply Analyst, to travel from the home office of Atmos in Dallas, Texas to attend. Present at the meeting representing UCG were, in addition to Ms. Dathe and myself:

(1) Patricia Childers, then Manager of Rates and Regulatory Affairs;

(2) her supervisor, Attorney Mark Thessin, then Vice-President of Rates and Regulatory affairs;

[(3)] Alicia Rye, Rate Analyst; and

[(4)] Ms. Rye's supervisor, Bob Cline, Manager of Rate Administration.

13. At the meeting, UCG representatives provided all of the attendees with packet of information, which included a Meeting Agenda. A copy of the information packet is attached as collective Exhibit 1 to the Affidavit of Patricia Childers.

14. The purpose of the January 31 meeting was to inform the TRA staff that UCG had successfully negotiated discounted rates for a substantial portion of its transportation contracts. At the meeting, UCG informed the TRA staff that UCG, motivated by the PBR provisions allowing UCG to share in savings from avoided costs, had actually begun efforts to negotiate discounted transportation rates in late 1999. UCG informed the TRA staff at the meeting that around October of 1999, UCG was successful in completing negotiated discounts for three of its transportation contracts. The combined totals for these contracts represented a very small portion of UCG's total transportation costs. The second page of the information packet UCG provided to the attendees at the January 31 meeting showed the savings that resulted from those discounted transportation contracts, which totaled \$1,160,050 for UCG's 1999-2000 PBR plan year. (Childers Aff. Exhibit 1 at p.2.)

15. At the meeting, UCG informed the TRA staff, that due to an oversight, UCG had neglected to report the savings resulting from the discounted contracts in its annual report for the 1999-2000 PBR plan year. In response to concerns raised by the TRA staff regarding making corrections to the 1999-2000 plan year, which had already been closed, UCG agreed that it would not seek recovery of its share of the \$1,160,050 in savings for the 1999-2000 plan year.

16. UCG then told the TRA staff that just a few months earlier, around November of 2000, UCG had successfully completed negotiated discounted rates for the Tennessee Gas Pipeline Company and the East Tennessee Pipeline systems. These newly negotiated discounted contracts represented a significant portion of UCG's total transportation costs as compared to the 1999 discounts. Page 3 of the information packet UCG provided to the attendees at the meeting gave a breakdown of the savings. This sheet listed the maximum FERC rate, the negotiated rate, and the resulting discount for each contract, and computed total monthly and annual savings resulting from those discounts. (Childers Aff. Exhibit 1 at p.2.) UCG explained to the TRA staff that the savings resulting from the discounted transportation contracts UCG had negotiated would be considered "avoided costs" under the PBR tariff, and consequently, UCG would be able to share in those savings under the PBR tariff.

17. At the January 31 meeting, UCG also explained to the TRA staff how those savings would be calculated under the PBR. UCG walked through the fact that the transportation discounts would be calculated by subtracting the negotiated rate from the maximum FERC rate for each particular pipeline. UCG also explained that the monthly discounts for all transportation contracts would be added together to reach a total annual savings, which UCG would then be able to share in according to the percentages outlined in the PBR tariff. (Childers Aff. Exhibit 1.) UCG

informed the TRA staff at the meeting that they would begin using this calculation in future quarterly reports, which were due in the upcoming months.

18. The response from the TRA staff at the January 31 meeting was positive. The TRA staff members actively participated in meeting and asked numerous questions. It appeared that the TRA staff agreed with UCG's position that the savings from the negotiated discounts were to be included within the avoided costs provisions of the PBR, and did not object to UCG's proposed method of calculating the savings.¹¹

The Authority Staff has not sufficiently refuted the factual details regarding this meeting, and it is obvious from the affidavits of the parties and the narrative content of the Audit Report itself that there is disagreement between the parties not only as to what transpired before, during and after the meeting of January 31, 2001, but also to the significance of those events. Establishing what happened and what understandings could be reasonably carried away from that meeting would be developed primarily through credible witness testimony. Where an issue may be determined in part on the credibility of witnesses, "findings of credibility are for the trier of fact and cannot be made in the context of a motion for summary judgment."¹² Moreover, the dispute between United Cities and the Authority Staff over what the word "reports" means in the context of the requirement that the Energy and Water Division notify United Cities within 180 days of the filing of "reports" lends itself to resolution through the introduction of factual evidence. These factual matters are material to United Cities' claim of estoppel. The Hearing Officer is unable to reject the claim of estoppel as a matter of law.

¹¹ Affidavit of John Hack (October 17, 2002) paras. 9-18.

¹² *Winsett v. Orr* (Tenn Ct. App. 1997) 1997 Tenn. App. LEXIS 805.

United Cities has also argued that the motions for summary judgment should be denied because the Authority Staff and the Consumer Advocate did not comply with Rule 56.03 of the Tennessee Rules of Civil Procedure (TRCP) which requires that

In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.

Notwithstanding the Authority's express adoption of certain Tennessee Rules of Civil Procedure for use as part of its practice and procedural rules, the Authority has not adopted TRCP 56.03 in a similar manner. As an administrative agency, the TRA is not bound by the rules of evidence applicable in a court¹³ and conducts contested case hearings according to its own rules and the Tennessee Uniform Administrative Procedures Act (Tenn. Code Ann. § 4-5-301 et seq.). The TRA's predecessors, the Railroad & Public Utilities Commission and the Tennessee Public Service Commission have been held on several occasions to be an administrative body and not a "court."¹⁴ Based upon the foregoing, the Hearing Officer is not inclined to enforce strictly Rule 56.03 to reject the motions for summary judgment filed by Authority Staff and the Consumer Advocate. As such, United Cities' request relying on Rule 56.03 for dismissal of the motions for summary judgment is denied.

¹³ See Tenn. Code Ann. § 65-2-109(1).

¹⁴ See *In Re: Cumberland Power Co.*, 249 S.W. 818, 147 Tenn. 504 (1923); *GBM Communications v. United Inter-Mountain Telephone Company*, 723 S.W.2d 109 (Tenn. App. 1986).

Based upon the foregoing findings and conclusions,

IT IS HEREBY ORDERED THAT:

1. The Consumer Advocate's Motion for Partial Summary Judgment is denied;
2. The Authority Staff's Motion for Summary Judgment is denied; and
3. A Status Conference is scheduled for Monday, April 7, 2003, following the TRA's Authority Conference to establish a procedural schedule for this matter.

J. Richard Collier
J. Richard Collier, as
Hearing Officer

March 31, 2003
Date