STATE OF TENNESSEE

Office of the Attorney General

ANDY D. BENNETT
CHIEF DEPUTY ATTORNEY GENERAL

LUCY HONEY HAYNES
ASSOCIATE CHIEF DEPUTY
ATTORNEY GENERAL

PAUL G. SUMMERS
ATTORNEY GENERAL AND REPORTER

MAILING ADDRESS

P.O. BOX 20207
NASHVILLE, TN 37202

Reply to:
Consumer Advocate and Protection Division
Post Office Box 20207
Nashville, TN 37202

MICHAEL E. MOORE
SOLICITOR GENERAL

CORDELL HULL AND JOHN SEVIER
STATE OFFICE BUILDINGS

TELEPHONE 615-741-3491
FACSIMILE 615-741 2009

July 17, 2002

Chairman Sara Kyle
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

RE: IN RE: UNITED CITIES GAS COMPANY, a Division of ATMOS ENERGY CORPORATION INCENTIVE PLAN ACCOUNT (IPA) AUDIT
Docket No.: 01-00704

Dear Chairman Kyle:

Enclosed is an original and thirteen copies of a Motion for Partial Summary Judgment, Memorandum in Support of Motion for Partial Summary Judgment and Affidavit of Stephen N. Brown, Ph.D. We request that these documents be filed with the TRA in this docket. Additionally, all parties of record have been served copies of these documents. If you have any questions, kindly contact me at (615) 532-3382. Thank you.

Sincerely,

Shilina B. Chatterjee

Shilina B. Chatterjee
Assistant Attorney General

Enclosures

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IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	**DOCKET NO. 01-00704**
	)	
UNITED CITIES GAS COMPANY, a Division of ATMOS ENERGY CORPORATION INCENTIVE PLAN ACCOUNT (IPA) AUDIT	)	

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW the Tennessee Attorney General, through the Consumer Advocate & Protection Division ("Attorney General") and moves for partial summary judgment before the Tennessee Regulatory Authority ("TRA") in the Incentive Plan Account ("IPA") audit and files this Memorandum in Support of Motion for Partial Summary Judgment. This Memorandum in Support of the Motion for Partial Summary Judgment will show that: inclusion of the negotiated transportation discount contracts is inconsistent with the TRA's Final Order ("Final Order") in Phase II of Docket No. 97-01364 issued on August 16, 1999 ("Original Docket"); does not conform to UCG's tariff filed with the TRA; and is unreasonable, unjust and not in the public interest.

In support of this Motion for Partial Summary Judgment, the Attorney General respectfully asserts the following in this Memorandum:

I. STATEMENT OF THE CASE

On March 31, 1997, UCG filed a petition with the TRA for permission to use an experimental incentive plan that they ultimately sought to have permanently approved. After the Attorney General intervened in that matter, the TRA convened a contested case and the case was heard in two phases. The Phase I Order was issued on January 14, 1999 and the Phase II Order was issued on August 16, 1999. The Phase II Order allowed, among other things, UCG to continue to operate under a modified incentive plan, to roll over the plan for an additional year and to continue the plan until either (a) termination at the end of the plan year upon not less than 90 days notice by UCG to the TRA or (b) modification, amendment or termination by the TRA.

UCG filed their annual report for the incentive plan on August 7, 2001 for the permanent plan period of April 1, 2000 to March 31, 2001. The TRA's Energy and Water Division staff conducted an audit of the IPA to determine whether the balance in the IPA as of March 31, 2001 was calculated to conform with the terms of the incentive plan and to verify that the factors utilized were supported by appropriate source documentation.[1] On April 10, 2002, the TRA staff issued its audit report. This docket is a result of UCG's objection to the TRA staff's audit of the IPA for the period of April 1, 2000 to March 31, 2001. After the audit report was issued, the Attorney General intervened in this matter and the TRA convened a contested case.

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[1] Compliance Audit Report of United Cities Gas Company's Incentive Plan Account, TRA Docket No. 01-00704, 4/10/02, p. 1.

In this docket, the Attorney General supports the findings of the audit. The audit states (1) UCG should revise its calculations for the current plan year to eliminate the alleged savings generated from negotiated transportation contracts and the alleged savings generated from the NORA calculation of avoided transportation costs, (2) UCG's method for calculation of interest should be revised to conform with the tariff, (3) UCG's customer surcharge for this audit should be terminated, and (4) UCG should comply with the PGA Rule (the Reserve Margin should be 7.5% or less).[2]

ISSUE

Whether United Cities Gas Company's inclusion in its performance based ratemaking mechanism ("PBR") of the savings resulting from the negotiated transportation discounted contracts is consistent with the TRA's Final Order on Phase II in Docket No. 97-01364, issued on August 16, 1999.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is rendered when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. Pro. 56.03. In the present case, there is no factual dispute as to the following material facts:

1. UCG's inclusion in its PBR of the savings resulting from the negotiated transportation discounted contracts is not consistent with the Final Order. The additional calculations supplementing the current formulas do not conform to the Final Order.

2. The PBR mechanism approved by the TRA for UCG accounts for all

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[2] *Id.* at p. 6.

transportation costs. Any alleged savings from discounts specified within negotiated transportation contracts are not permitted under UCG's approved PBR.

3. The calculations made by UCG are not consistent with the terms of UCG's incentive plan.

When evaluating a motion for summary judgment, the TRA should consider "(1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed fact creates a genuine issue for trial." *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993).

On the question of whether genuine issues for trial exist, UCG bears the burden of demonstrating that the transportation discount contracts should be included in the PBR. In discussing the burden upon movant, the United States Supreme Court held in *Celotex v. Catrett*, 477 U.S. 317, 325 (1986) as follows:

> We do not think . . . the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the non-moving party bears the burden of proof. Instead . . . the burden on the moving party may be discharged by "showing" - that is, pointing out to the District Court - that there is an absence of evidence to support the non-moving party's case. (emphasis added).

The United States Supreme Court's decision on this issue was adopted by the Tennessee Court of Appeals in *Moman v. Waden*, 719 S.W.2d 531, 533 (Tenn. App. 1986). The Court of Appeals stated:

> Under Rule 56.03, upon motion, summary judgment shall be entered against a party who failed to make a showing sufficient to establish the existence of an essential element to that party's case

> and on which the party will bear the burden of proof at trial. If the non-moving party fails to establish the existence of any essential element, there can be no genuine issue as to any material fact since a complete failure of the proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Additionally, *Celotex* clarifies issues as to the distribution of burdens of proof when a party has moved for summary judgment. Specifically, "where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories and admissions on file.'" *Celotex,* 477 U.S. at 324. Therefore, UCG bears the burden of proof in this proceeding.

III. UNITED CITIES GAS COMPANY CANNOT SUPPLEMENT OR ADD ADDITIONAL NEGOTIATED TRANSPORTATION CONTRACTS TO THEIR PBR THAT WERE NOT INCLUDED IN THE PREVIOUSLY APPROVED PBR

The findings by the TRA staff during the audit stated that UCG had a net over recovery of $580,742. The company's calculation resulted in a surcharge to customers of $0.00444 per CCF effective October 1, 2001.[3] The TRA audit found that there was a $526,265 over recovery in the Gas Procurement Incentive Mechanism. Specifically, it was a result of the 50% savings of what the Company referred to as "Tennessee Negotiated Rate Savings."[4] These alleged savings came from the "avoided costs" of the negotiated transportation contracts that the Company entered into with various pipelines. The calculations that were used to determine the "avoided costs" were the transportation rates negotiated in the contract subtracted from the maximum pipeline tariff

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[3] Compliance Audit Report of United Cities Gas Company's Incentive Plan Account, TRA Docket No. 01-00704, 4/10/02, p. 5.

[4] *Id.* at p. 10

rates approved by the Federal Energy Regulatory Commission ("FERC").[5]

This is very different from the approach taken by UCG in getting its PBR approved by the TRA. UCG suggested a benchmark that consists of the mathematical product of the actual purchase quantities and the appropriate price index.[6] Under the PBR approved for UCG, the current method used to calculate benefits for commodity savings is to average the three indices and then multiply it by UCG's total MCF gas purchases. If the total monthly commodity cost is below 97.7% of the benchmark, the resultant savings will be shared with the customers equally. The gas procurement incentive mechanism allows UCG to retain 50% of the savings on gas purchases below 97.7% of a predetermined index. The capacity management incentive mechanism encourages UCG to market off-peak unutilized transportation and storage capacity. Within the gas procurement incentive mechanism, UCG made gas purchases below the benchmark for 12 months during this period. However, UCG only received savings for two months since during the other months the total monthly purchases were above 97.7% and no savings or penalties were calculated.

Inconsistent with its approved PBR, UCG reported $1,052,531 from negotiated transportation contracts and retained $526,265. Thus, UCG incorrectly included the negotiated transportation discount contracts in the gas procurement incentive mechanism.

The TRA's Final Order specifically states that **all** transportation benefits were included in the PBR program and the Final Order was specific about the components that were to constitute

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5 *Id.*

6 Affidavit of Stephen N. Brown, Ph.D., ¶6, p. 2.

shared savings in the commodity costs.[7] In the Original Docket (Docket No. 97-01364), the TRA considered whether the original five incentive mechanisms should be collapsed into two mechanisms. The original five incentive mechanisms were (1) gas procurement, (2) seasonal pricing differential, (3) storage gas commodity, (4) transportation capacity cost and (5) storage capacity cost.[8] The TRA determined that the savings were attributable exclusively to gas commodity and capacity release mechanisms and ordered that the five mechanisms be collapsed into two to simplify the plan, since there were no adverse consequences to ratepayers.[9] The Final Order shows that the transportation mechanism of the PBR was merged into two main mechanisms: gas commodity and capacity release.[10] The record contains evidence by UCG that the PBR and the indices accounted for the effects of market-driven pipeline transportation rates and there is no testimony, reference or other proof that negotiated transportation discount contracts were to be included in the PBR. Additionally, there is no mention of discounted transportation contracts in either the gas commodity or the capacity release mechanisms of the PBR. UCG cannot include the discount transportation contracts in the PBR.

UCG was aware that when the five mechanisms in the PBR were reduced to two, the gas procurement incentive mechanisms included transportation costs. UCG decided that they would not deal with transportation costs separately in the IPA. Rather, all transportation costs were

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7 *In Re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism*, Docket No. 97-01364, Final Order Phase Two, August 16, 1999, Page 28.

8 *Id.* at p. 23.

9 *Id.* at page 23-24.

10 *Id.* at p. 28.

included. UCG's expert, Mr. Frank Creamer stated:

> . . . instead of having five mechanisms, collapse those into two mechanisms. The first mechanism would have anything to do with the commodity cost. The second mechanism would have anything do with the fixed cost of transportation and storage.
>
> It's our belief by making the mechanism easier to understand as well as to monitor that these two mechanisms -- collapsing five into two would be easier to understand." [Trans. Vol. 2 p. 447 lines 9 - 16]

There is additional testimony in the record that proves transportation charges for the movement of natural gas are commodity costs. UCG provided testimony by Mr. Woodward as follows:

> Q. Could you please explain how you can use somebody else's transportation in the way you have your business arrangement and have that as an economic incentive?
>
> A. Yes. And I would like to draw a picture, if this would make this a little bit clearer, a little later. In a number of our contracts that we have with our primarily municipalities and some of our local distribution companies, we are also the agent for their transportation contracts. And depending upon the type of transaction that I have with that customer, we have rights to use his transportation when he's not using it. And we basically -- the obligation is to reimburse him his commodity cost which is the cost that the pipeline charges for the actual movement of the gas. **That's different than the reservation charge. The reservation is just a fixed cost every month. So the transportation charge that we refer to is a commodity charge, is the rate that's actually charged for the movement of the gas. So I control that now.** (emphasis added) [Trans. Vol. 3 p. 691 line 25 thru p. 692 line 220].

These statements of UCG's own witnesses, Mr. Creamer and Mr. Woodward, categorically prove that transportation costs were not separate in the PBR and UCG did not provide for the inclusion

of negotiated transportation discount contracts or supplemention to their PBR. Therefore, these negotiated transportation contracts cannot now be included in the PBR.

Perhaps the strongest indicator that the gas procurement incentive formula includes the effects of transportation prices was testimony by UCG's expert witness, Mr. Frank Creamer. Mr. Creamer stated that the formulas did not have to be changed, even though the mechanisms were being reduced from five to two:

> "We also recommended that while although collapsing five mechanisms into two that the sharing formulas remain unchanged for the program." [Trans. Vol. 2 p. 447 lines 16 - 21]

Mr. Creamer testified that the sharing formulas would remain unchanged. This suggests that UCG did not intend to include the negotiated transportation contracts and had accounted for all their transportation costs. These recent additional calculations that change the sharing formulas were not part of UCG's original calculations or the original PBR.

Mr. Creamer also stated in the Original Docket that all costs for delivering gas to the end user were included in the PBR:

> In summary, the performance ratemaking mechanism covered all the associated commodity costs purchasing, **delivering**, and storing of gas **to the end consumer** (emphasis added) [Trans. Vol. 1 p. 61, lines 6-9].

> Similar to the first year, the performance-based ratemaking mechanism continued to cover all aspects of gas purchasing, including the commodity cost, the **delivering** (emphasis added) of that commodity, as well as the storage of that gas to the end customer. [Trans. Vol. 2 p. 445 lines 6 - 10]

Mr. Creamer's recommendation was accepted by the TRA, which they acknowledged that the

remaining two PBR mechanisms were inclusive of **all** transportation prices.[11] The Final Order of the TRA states:

> "The five incentive mechanisms of gas procurement, seasonal price differential, storage gas commodity, transportation capacity cost and storage capacity cost are collapsed into two mechanisms - Gas Commodity and Capacity Release Sales." [Final Order Page 28]

The first year of the permanent plan period was from April 1, 1999 to March 31, 2000. When UCG filed their IPA for this period, they did not separately include any negotiated transportation contracts. Since they did not have these negotiated transportation discount contracts in the PBR during their first full year of the permanent plan, it is apparent that it was not part of the originally approved IPA. UCGs sudden inclusion of negotiated transportation discount contracts in their IPA is a significant departure from the terms of their original IPA and violates the Final Order.

IV. TRA REGULATIONS DO NOT ALLOW UCG TO SUPPLEMENT THEIR PBR WITH ADDITIONAL TRANSPORTATION COSTS THAT WERE NOT ORIGINALLY PART OF THE PBR APPROVED BY THE TRA

There are no provisions in the TRA regulations that allow for PGA calculations to be supplemented with additional calculations following approval of the IPA by the TRA. TRA Regulation 1220-4-7-.01(1) provides that:

> "Gas Costs" shall mean the total delivered cost of gas paid or to be paid to Suppliers, including, but not limited to, all commodity/gas charges, demand charges, peaking charges, surcharges, emergency gas purchases, over-run charges, capacity charges, standby charges, gas inventory charges, minimum bill charges, take-or-pay charges

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[11] *In Re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism*, Docket No. 97-01364, Final Order Phase Two, August 16, 1999, Page 28.

> and take-and-pay charges, storage charges, service fees and **transportation charges** and other similar charges which are paid by the Company to its gas suppliers in connection with the purchase, storage or **transportation of gas** for the Company's system supply. (emphasis added)

The TRA regulations anticipated that transportation costs were part and parcel of the meaning of gas costs and do not provide for gas costs to be supplemented with additional transportation calculations. The TRA regulations do not allow for inclusion of negotiated transportation discounts and UCG is not permitted to include them in their IPA.

V. INCLUSION OF THE NEGOTIATED TRANSPORTATION CONTRACTS IN THE PERFORMANCE BASED RATEMAKING MECHANISM IS A DEVIATION FROM BOTH THE TARIFF FILED BY UNITED CITIES GAS COMPANY AND THE FINAL ORDER ISSUED BY THE TRA

UCG should not be permitted to include the negotiated transportation contracts in the PBR since it deviates from their tariff and the Final Order. UCG's tariff filed with the TRA states "if the commodity cost of gas in a month falls within a deadband of 97.7% to 102% of the total of the benchmark amounts, there will be no incentive savings or costs."[12] The deadband defines the savings of the commodity costs outside the deadband and the savings must be shared when purchases are made below market. Moreover, UCG's tariff details the type of purchase being made and the proper index that is to be used for that purchase.[13] The

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[12] Tariff of United Cities Gas Company, A Division f Atmos Energy Corporation, TRA No. 1, 1st Revised Sheet No. 45.1, Canceling Original Sheet No. 45.1, Issued by Thomas R. Blose, Jr., President, Date Issued March 16, 1999, Effective Date: April 1, 1999 at Original Sheet No. 45.2.

[13] *Id.*

tariff shows there is a corresponding benchmark for every different type of purchase.[14] The benchmarks used are defined and do not show or mention transportation discounts.[15]

In fact, UCG's tariff did not mention sharing savings associated with the transportation discounts from negotiated contracts, where the discounts are based on a maximum price for transportation. However, there is no "market" index for maximum transportation rates and no established way to know that index.[16] UCG's PBR tariff states that the "[b]enchmark amount will be computed by multiplying actual purchase quantities for the month . . . by the appropriate price index . . . . The price index will be a simple average of the appropriate *Inside FERC Gas Market Report*, *Natural Gas Intelligence* and *NYMEX* indexes for that particular month."[17] Additionally, the tariff stated that "[t]hese indexes will be adjusted for the avoided transportation costs that would have been paid if the upstream capacity were purchased versus the demand charges actually paid to the supplier."[18] This procedure is different from and not consistent with UCG's novel practice of comparing its actual price of transportation costs to a

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14 *Id.*

15 Compliance Audit Report of United Cities Gas Company's Incentive Plan Account, TRA Docket No. 01-00704, 4/10/02, p. 11.

16 Affidavit of Dr. Stephen N. Brown, ¶7, p. 3.

17 Tariff of United Cities Gas Company, A Division of Atmos Energy Corporation, TRA No. 1, 1st Revised Sheet No. 45.1, Canceling Original Sheet No. 45.1, Issued by Thomas R. Blose, Jr., President, Date Issued March 16, 1999, Effective Date: April 1, 1999 at Original Sheet No. 45.2.

18 *Id.*

single pipeline's maximum transportation price.[19] If the company were allowed to include the negotiated transportation contracts, the PBR would not conform to the tariff.

The PBR specifies the manner in which the calculations for savings will be obtained. The formulas do not provide for any additional transportation calculations to be included. Therefore, UCG cannot now supplement their calculations by including the negotiated transportation contracts in the PBR.

UCG must adhere to the terms of their PGA that they set forth in their tariff. TRA Regulation 1220-4-7-.02(4) provides that:

> The rates for gas service set forth in all of the Rate Schedules of the Company shall be adjusted pursuant to the terms of the PGA, or any specified portion of the PGA as determined by individual Rate Schedule(s)

UCG has violated the TRA regulation by supplementing their PBR with the additional sharing formulas which do not conform to the tariff.

The Final Order does not allow UCG to include the supplemental calculations for transportation discounts. Also, UCG did not separate transportation costs. UCG considered transportation delivery costs and they considered them to be incidental to commodity costs. Also, the indices already included the effect of transportation prices. Mr. Flaherty's cross examination of Dr. Stephen N. Brown illustrates this point. During the cross-examination by Mr. Flaherty, the following was stated:

> Q (Mr. Flaherty). Would you agree that the Inside FERC index and the NGI index that United Cities proposes to use in this case

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[19] Affidavit of Stephen N. Brown, Ph.D., ¶6, p. 2-3.

are tied to pipelines that are used to transport gas from the gas fields to Tennessee?

A (Dr. Brown). Yes, and not only Tennessee but throughout various other parts of the country.

Q (Mr. Flaherty). And would you agree that those two indexes don't separate out or have a separate index for electric generators, LDCs, industrial customers; there's just one index?

A (Dr. Brown). Yes.

[Transcript Vol. 2, p. 426, line 15 - p. 427, line 3].

Mr. Creamer, UCG's expert, also testified in the Original Docket that all transportation prices were included in the indices.

> The mechanism has three baskets of indices, are widely followed by the industry. And to the extent of transportation prices, those are included within the program itself. The indices are not a perfect replication of the marketplace, they are a proxy. They are the best indices that we have and the best series of buckets of standards against which to judge the company's performance. [Trans. Vol. 1 p. 97 line 25 - p. 98 line 8]

The most telling flaw in UCG's approach is the fact that no such index or "proxy" exists for measuring these negotiated transportation discount contracts.[20] At the time the PBR was filed with the TRA, UCG had no intention of including negotiated transportation discount contracts and did not incorporate them into the PBR. Thus, UCG cannot include them now since they were not part of and not approved in the original PBR.

Lastly, the Final Order does not mention that the sharing formulas can be altered, amended or supplemented in any way. It is improper to include the negotiated transportation

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[20] Affidavit of Stephen N. Brown, Ph.D., ¶7, p. 3.

contracts in the PBR as proposed by UCG. Thus, summary judgment is appropriate since no genuine issue of material fact exists concerning the inclusion of transportation costs in the PBR.

VI. THE TRA DID NOT WAIVE THEIR RIGHT TO OBJECT BECAUSE THEY ONLY OBJECTED TO THE ANNUAL REPORT AND NOT THE QUARTERLY REPORTS FILED BY UNITED CITIES GAS

The TRA is not required to object to quarterly report filings within 180 days and failure to raise objections to the quarterly reports filed by UCG does not constitute a waiver. The tariff allows the TRA to raise objections to either the quarterly reports or annual reports within 180 days. UCG's tariff states:

> The Company will **file calculations of shared savings and shared costs quarterly** with the Authority not later than 60 days after the end of the quarter **and will file an annual report not later than 60 days** following the end of the plan year. Unless the Authority provides written notification to the Company **within 180 days of such reports**, the Incentive Plan Account shall be deemed in compliance with the provisions of this Rider. (emphasis added)[21]

The TRA acted in accordance with the tariff because they raised their objections to UCG's annual report. UCG's assertion that the TRA's failure to object to the inclusion of the transportation costs within 180 days of the filing of their quarterly reports constitutes approval of their PBR with the negotiated transportation contracts is erroneous. Silence does not

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[21] Tariff of United Cities Gas Company, A Division f Atmos Energy Corporation, TRA No. 1, 1st Revised Sheet No. 45.1, Canceling Original Sheet No. 45.1, Issued by Thomas R. Blose, Jr., President, Date Issued March 16, 1999, Effective Date: April 1, 1999 at Original Sheet No. 45.6.

necessarily mean acquiescence as UCG construes. As a matter of law, the TRA is not required to object to quarterly reports.

Moreover, the TRA is not under an obligation to provide written notification to a public utility concerning objections or raise issues concerning quarterly report filings by utility companies. UCG incorrectly stated that the TRA staff is under an obligation to "provide written notification of exceptions to the quarterly reports within 180 days."[22] Under the TRA regulations, written notification is only required for annual reports. TRA Regulation 1220-4-7-.03(2). This regulation states:

> Each year, the Company shall file with the Commission **an annual report** reflecting the transaction in the Deferred Gas Cost Account. Unless the Commission provides **written notification to the Company within one hundred eighty (180) days** from the date of the filing of the report, the Deferred Gas Cost Adjustment Account shall be deemed in compliance with the provisions of these Rules. This 180 day notification day period may be extended by mutual consent of the Company and the Commission Staff or by order of the Commission. (emphasis added)

It is not consistent with the statutory mandate granted to the TRA by the General Assembly and the rules and regulations of the TRA for the TRA to raise objections to filings of quarterly reports.

Further, there are no statutory limitations for TRA investigations or rulings. Tenn. Code Ann. § 65-4-117 states the TRA has the power to "investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility as defined in § 65-4-101."

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[22] Compliance Audit Report of United Cities Gas Company's Incentive Plan Account, TRA Docket No. 01-00704, 4/10/02, p. 11.

Tenn. Code Ann. § 65-4-104 endows the TRA with "general supervisory and regulatory power, jurisdiction, and control" over all public utilities. Essentially, the compliance audit report issued by the TRA resulted in an investigation and the TRA can exercise authority over the practices of UCG and direct them to act in accordance with their filed tariff and instruct them to make necessary changes so that it adheres to the terms of their PBR, as previously approved by the TRA so that it conforms to the TRA's Final Order.

Even if the TRA was required to supply objections and exceptions in writing to the company for quarterly reports, the TRA has the ability to alter or waive the filing requirements by order.[23] The TRA rules concerning the audit of gas purchases (Audit of Prudence of Gas Purchases - Section 1220-4-7-.05 of Purchased Gas Adjustment Rules) were waived by the TRA in the Final Order[24] and therefore, are not applicable in this proceeding. Therefore, the TRA does not have to even raise or provide objections or address issues concerning annual reports within the 180 day period in this docket. Nevertheless, the TRA did raise objections concerning the annual reports within the agreed time line with extensions from both the company and the TRA. There is no genuine issue of material fact and it is proper for summary judgment to be granted because UCG's claim fails as a matter of law.

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23 Final Order Phase II, TRA Docket 97-01364, 8/16/99, p. 27.

24 *Id.*

VII. THE DOCTRINE OF EQUITABLE ESTOPPEL CANNOT BE ASSERTED AGAINST A GOVERNMENTAL AGENCY UNDER THE FACTS OF THIS MATTER

UCG cannot claim that they relied on the TRA raising objections when they filed their quarterly reports. The TRA's silence concerning UCG's quarterly reports does not constitute a situation where the doctrine of estoppel can be invoked. There are no exceptional circumstances to invoke the doctrine of equitable estoppel. Tennessee courts have repeatedly declared that "public agencies are not subject to equitable estoppel to the same extent as private parties and very exceptional circumstances are required to invoke this doctrine against the state and its governmental subdivisions." *Bledsoe County v. McReynolds*, 703 S.W.2d 123, 124 (Tenn. 1985).[25] In *Bledsoe County*, the Court held that a private party could not invoke the doctrine of estoppel when they made improvements to a public road under the belief that it was a private road. The Court stated:

> It is significant to observe that in those Tennessee cases where estoppel has been applied, or could have been applied, the public body took affirmative action that clearly induced a private party to act to his or her detriment, as distinguished from silence, non-action, or acquiescence. In the instant case defendants have nothing upon which to predicate the essential element of inducement, except silence and inaction.

Bledsoe County, 703 S.W.2d at 125. Similarly, although the TRA staff did not object to the quarterly reports and took no action until the audit was conducted of the annual report, this is consistent with the holding in *Bledsoe County* and the doctrine of equitable estoppel cannot be applied in this case. Moreover, UCG never obtained oral or written advice from the TRA staff

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[25] See *also Sexton v. Sevier County*, 948 S.W.2d 747, 750 (Tenn. Ct. App. 1997); *Paduch v. City of Johnson City*, 896 S.W.2d 767, 772 (Tenn. 1995).

regarding approval of their quarterly reports. Since the staff is not under a requirement to object to quarterly reports, the reliance that UCG asserted on objections being made when they filed their quarterly reports is misplaced. Therefore, under Tennessee case law, silence and inaction is not sufficient to invoke the doctrine of equitable estoppel.

Since the TRA did not take any affirmative acts, there was no detrimental reliance by UCG. Essentially, UCG reformulated their PBR and hoped that the TRA would not discover the inconsistencies among their annual report, tariff and the Final Order. UCG cannot now lay the blame for their reformulation of the PBR at the doorstep of the TRA. UCG did not rely on any assertion of the TRA or detrimentally rely under the meaning of the common law. Therefore, summary judgment is appropriate since no genuine issue of material fact exists concerning the doctrine of equitable estoppel.

VIII. INCLUSION OF THE NEGOTIATED TRANSPORTATION DISCOUNT CONTRACTS IS NOT "JUST AND REASONABLE" AND NOT IN THE PUBLIC INTEREST

UCG cannot include the negotiated transportation costs because it is not permitted under the PBR filed by UCG. Further, including these additional transportation costs is prohibited since Tennessee law mandates that rates must be "just and reasonable." Tenn. Code Ann. § 65-5-201 states that all tariffed rates must be "just and reasonable:"

> **65-5-201. Power to fix rates of public utilities.** --The Tennessee Regulatory Authority has the power after hearing upon notice, by order in writing, to fix **just and reasonable individual rates**, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-4-101, whenever the authority shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule

> thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established. In fixing such rates, joint rates, tolls, fares, charges or schedules, or commutation, mileage or other special rates, the authority shall take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility. Tenn. Code Ann. § 65-5-201 (emphasis added).

The effect of UCG's revisionist view of its PBR results in "unjust and unreasonable" rates because consumers are being overcharged for natural gas. At present, UCG's PBR has benefit-sharing formulas but, UCG supplemented the formulas with additional transportation calculations. The current sharing formulas accounted for all transportation costs and UCG did not treat transportation costs separately when they originally filed for approval of the PBR. UCG's PBR accounted for all transportation costs and they chose to treat transportation costs as part of the commodity cost. UCG cannot decide after the TRA approved the PBR to change their formulas and separate out transportation costs. Since UCG's inclusion of such additional calculations and their interpretation of same in their current PBR results in "unjust and unreasonable" rates to consumers, it is not in the public interest.

Moreover, the supplemental transportation calculations for the negotiated transportation discount contracts in the IPA results in retroactive ratemaking. The post hoc inclusion of the negotiated transportation costs into the current PBR tariff would have a retroactive effect. Retroactive rate-making is prohibited based on the general principle that prohibits a public utility commission from setting future rates to allow a utility to recoup past

losses or to refund to consumers excess utility profits.[26] State courts over the past 70 years have been consistent in their decisions and rejected retroactive ratemaking. It has become a basic canon of public utility regulation.[27] The crux of the issue is that ratemaking is prospective in nature rather than retroactive.[28] Additionally, courts should not invoke the retroactive ratemaking doctrine merely to protect mere claims that a particular party relied on prior commission approved rates.[29] If the negotiated transportation costs are allowed into the current PBR tariff, it would result in retroactive ratemaking which is contrary to the public interest.

Only in exceptional/emergency circumstances can retroactive ratemaking be permitted. In *South Central Bell vs. Tennessee Public Service Commission*, 675 S.W.2d 718, 719 (Tenn. Ct. App. 1984), the court found that the Legislature allowed the Commission the power to institute retroactive ratemaking only under emergency circumstances. Similarly, in *Tennessee Cable Television Assn. vs. Tennessee Public Service Commission*, 844 S.W. 2d 151 (Tenn. Ct. App. 1992), the court found that the Commission could exercise this power if the service and financial conditions of a company were serious considerations. This suggests that when an utility company is in dire straits and there is a legitimate public interest for emergency action, courts will allow retroactive ratemaking. However, there must be exceptional/emergency

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26 Stefan H. Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings* , 1991 U. Ill. L. Rev. 983, 984 (1992).

27 *Id.* at 988.

28 *Id.* at 1007.

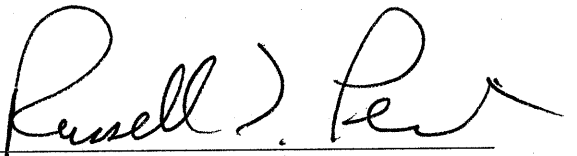
29 *Id.* at 1041.

circumstances. In this docket, the facts of this case do not indicate any emergency situation requiring emergency action by a regulatory body to allow retroactive ratemaking. The Attorney General maintains that the rate design presented by UCG does not benefit the consumers of UCG and results in retroactive ratemaking and is not permitted and would be unjustified and unreasonable.

CONCLUSION

The Attorney General maintains that the negotiated transportation discount contracts cannot be included in the rate design presented by UCG in their PBR. It is inconsistent with the Final Order of the PBR that was approved by the TRA in the Original Docket. UCG's IPA for the period of April 1, 2000 to March 31, 2001 is not consistent with the Final Order, does not conform to UCG's filed tariff and offends the public interests of the citizens of Tennessee. The IPA filed by UCG harms consumers, provides no benefit to consumers of UCG and is at a high cost to consumers. Based on the foregoing, we respectfully request that the TRA grant the motion for summary judgment on behalf of Tennessee consumers since there is no genuine issue of material fact and it is appropriate as a matter of law.

RESPECTFULLY SUBMITTED,



RUSSELL T. PERKINS, B.P.R. #10282
Deputy Attorney General

TIMOTHY C. PHILLIPS, B.P.R. #12751
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
(615) 741-3533

SHILINA B. CHATTERJEE, B.P.R. #20689
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 532-3382

Dated: July 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile and/or hand delivery on July 17, 2002.

Sara Kyle
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505
(615) 741-2904

Richard Collier, Esq.
General Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505
(615) 741-5015

Joe A. Conner, Esq.
Baker, Donelson, Bearman & Caldwell
1800 Republic Centre
633 Chestnut Street
Chattanooga, Tennessee 37450-1800
(423) 752-9527

Jon Wike, Esq.
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505
(615) 532-7479 (Fax)

Shilina B. Chatterjee
Assistant Attorney General

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