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IN RE UNITED CITIES GAS COMPANY, a Division of ATMOS ENERGY CORPORATION INCENTIVE PLAN (IPA) AUDIT UNITED CITIES GAS COMPANY, a Division of ATMOS ENERGY CORPORATION, PETITION TO AMEND THE PERFORMANCE BASED RATEMAKING MECHANISM RIDER	)	Consolidated Docket Nos. 01-00704 and 02-00850

ATMOS ENERGY CORPORATION'S REPLY TO POST-HEARING BRIEFS OF THE TRA STAFF AND THE CONSUMER ADVOCATE AND PROTECTION DIVISION

As permitted by October 20, 2004 Scheduling Order in this matter, Atmos Energy Corporation ("Atmos" or "the Company") submits this Reply addressing the arguments raised in the Post-Hearing Briefs of the TRA Staff and the Consumer Advocate and Protection Division ("CAPD").

I. <u>THE SHARING OF SAVINGS FROM NEGOTIATED TRANSPORTATION DISCOUNTS THROUGH THE TRANSPORTATION COST ADJUSTER IS WITHIN THE INTENT AND SCOPE OF THE ORIGINAL PBR PLAN. (DOCKET NO. 01-00704).</u>

In its Post-Hearing Brief, the CAPD agrees that the TRA's intent in implementing the PBR plan was to avoid costly and inefficient prudency audits by putting incentives into place. The CAPD also agrees that the TRA determined in the original PBR proceedings, that, to function properly, those incentives must span the entire spectrum of Atmos' gas purchasing activities necessary to ultimately deliver gas to the end consumer, including purchases, storage, and transportation. (CAPD Post-Hearing Brief pp. 3, 4, 9; Hearing Trans. Vol. II, pp. 99-100 (Test. of

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Dan McCormac); CAPD 7/17/02 Memo. in Supp of Mot. for Partial Summ. J., p. 18) The CAPD however, urges an interpretation of the PBR plan that is completely inconsistent with the TRA's findings, intent and purpose The CAPD's interpretation would require that the TRA perform annual prudency audits - exactly the type of inefficient and costly regulatory activity that the TRA has determined, unanimously, is not in the best interests of consumers, and the precise activity the PBR was created to avoid. (See Phase 2 Order, p. 2.)

In its brief, the CAPD spends a great deal of time on semantics, claiming, without citation of authority, that the transportation cost adjustor within the PBR should apply only to "reduced" transportation costs, not "avoided" transportation costs, and that transportation costs are "reduced" only for purchases at the city gate which are "truly bundled purchases " The CAPD never defines a "truly bundled" purchase," nor does it explain why the purchases made by Woodward and billed to Atmos at one cost for delivery to the city gate are not "truly bundled."

The CAPD's semantic gymnastics are irrelevant The bottom line is that discounted transportation contracts did not exist when the PBR was created, and as such, are not specifically addressed in the PBR plan itself. Therefore, it is futile to search for definitive answers by simply parsing the language of the transportation cost adjustor within the PBR for references to transportation discounts off the maximum FERC rate. Discounted transportation contracts are not specifically addressed within the transportation cost adjustor mechanism.

The CAPD argues that using the transportation cost adjustor to calculate savings from discounted transportation contracts is somehow inconsistent with the language of the adjustor, because the adjustor does not reference the maximum FERC rate The CAPD is incorrect. The transportation cost adjustor adjusts the commodity-only indices by adding the avoided transportation cost to the basket of indices: "these 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." (PBR Tariff at Sheet 45 2) The adjustor calculates the avoided transportation cost as the difference between the actual price paid and a hypothetical amount that would have been paid if gas were purchased at some point upstream rather than at the city gate. The CAPD disagrees with the position of Atmos and TRA Staff as to what hypothetical upstream amount should be used to calculate the avoided transportation costs. The CAPD argues it must be presumed that the hypothetical upstream transportation price is always equal to the discounted transportation price that Atmos actually paid at the city gate, thus making the avoided transportation cost zero and rendering the adjustor meaningless.[1] The only evidence the CAPD offered in support of this interpretation was the testimony of Dan McCormac, who admitted that the only experience he had with purchasing within the natural gas industry was as a consumer who had gas heat in his home. (Hearing Trans. Vol. II, p. 110)[2] Atmos presented evidence, through the testimony of Frank Creamer, the expert hired by the TRA to advise in the creation of the PBR, that the hypothetical upstream transportation price that should be used is the maximum FERC rate, which was the hypothetical upstream price used to calculate the avoided transportation costs under the NORA contract during the PBR experimental period, and which is the market indicator for downstream transportation costs. The TRA Staff agrees that the maximum FERC rate is the appropriate benchmark for downstream transportation costs. (Hearing Trans. Vol II, pp. 83-84 (Test. of Pat Murphy).)

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[1] Alternatively, the CAPD argues that the transportation cost adjustor is unnecessary altogether, because the gas Atmos takes delivery of at the city gate is purchased by Woodward Marketing at the Henry Hub receipt point, or at some other pipeline receipt point with a specific predefined market index (See CAPD Post-Hearing Brief p 6) Of course, in all interstate gas purchases, the gas is transported from the well-head to a pipeline receipt point, and then from a pipeline receipt point to the city gate. Under the CAPD's interpretation, the transportation cost adjustor would only apply to the rare exception where Atmos purchases from less-reliable intrastate or local producers

[2] Mr McCormac also admitted that he had made no effort to contact any pipeline companies (Hearing Trans. Vol II, p 137)

Even if the analysis were to stop there, it is clear the CAPD's interpretation of the transportation cost adjustor must be rejected. The CAPD's suggested method of calculating avoided transportation cost by subtracting the actual cost from a hypothetical cost which is equal to the actual cost is nonsensical, and renders the transportation cost adjustor meaningless. The CAPD's interpretation is supported only by the testimony of one witness who admittedly has no experience in the gas purchasing industry In comparison, Atmos' interpretation of the transportation cost adjustor is supported by both TRA Staff and the TRA's PBR consultant. The CAPD's position should not be accepted.

However, the analysis does not stop there. Just as courts look to the intent of the parties for guidance in interpreting contracts where the language is silent on an issue, the TRA has consistently looked to the intent and scope of its rules and tariffs in deciding issues which are not specifically addressed in the language of the rule or tariff itself. In 2002, the TRA allowed all three regulated gas companies to recover their gas costs portion of bad debt expense through the PGA rule, even though the PGA rule did not specifically reference bad debt, because permitting such recovery was consistent with the intent of the PGA rule, which was to provide for 100% recovery of gas costs. (Jan. 20, 2002 Order in Docket No. 01-00802 at p. 5) In 2003, the gas companies petitioned the TRA to make that recovery permanent In December 2003, the TRA again looked to the intent of the PGA rule and granted the companies' request, finding that allowing recovery of the gas cost portion of bad debt expense through the PGA rule furthers the intent and purpose of the rule to ensure that the companies do not over or under collect gas costs. (12/11/03 Trans of Proceedings, Docket No 03-00209.)

In this case, it is true that negotiated transportation discounts are not specifically mentioned in the PBR plan, because such discounts did not exist when the PBR plan was created. However, it is clear that allowing Atmos to share in the savings generated from those discounts is consistent with the intent and scope of the original PBR plan, which is to avoid prudency audits by providing incentives that span the entire spectrum of all gas procurement, storage, and capacity activities, including transportation (Id.) In implementing the PBR, the TRA did not undertake to specifically foresee every possible way the Company would find to reach its goal of cost reduction, but instead provided a framework for the sharing of savings resulting from all the Company's purchasing activities. Transportation costs are included in that framework, and are addressed through the transportation cost adjustor. Disallowing the sharing of savings from the discounted transportation contracts is inconsistent with the PBR's intent and would require an annual prudency audit - the very activity the PBR was created to avoid. The TRA should therefore reject the Staff's disallowance of those savings in the audit of the 2000-2001 plan year.

II. THE STAFF'S FINDING DISALLOWING THE SAVINGS SHOULD BE REJECTED DUE TO THE STAFF'S PREVIOUS ACTIONS.

Atmos has argued that the TRA Staff should be barred from contesting the inclusion of transportation savings on two grounds: (1) the language of the PBR tariff, and (2) the equitable doctrine of estoppel. Both the TRA Staff and the CAPD respond by arguing that equitable estoppel should not apply because Atmos did not rely on the Staff's actions in negotiating the discounted contracts. Neither the Staff nor the CAPD provide any response to Atmos' argument based on the language of the PBR tariff. Even setting aside the principles of estoppel, the PBR tariff provides that Atmos' Incentive Plan Account shall be deemed in compliance with the PBR tariff unless the Staff objects to the quarterly and annual reports within 180 days. (Tariff Sheet 45 6) (emphasis added.) This language requires Atmos to file annual ***and*** quarterly reports, and then states that the Incentive Plan Account will be deemed in compliance unless the Authority objects to ***such reports*** within 180 days, clearly indicating that the obligation to object applies to both quarterly and annual reports. Atmos filed two quarterly reports which included the transportation savings, with no objection from TRA Staff Contrary to the CAPD's accusations, the Company did not try to hide the submission of these savings, but instead held a meeting with TRA Staff to notify it of the additional savings and how those savings would be reflected in the upcoming reports The binding regulation contained within the PBR tariff, which has been approved and accepted by the Authority, states that the accounts "shall" be deemed in compliance for the periods of time covered by the quarterly reports. As such, the Staff's disallowance of those savings must, under the terms of the tariff, be rejected.

In the alternative, the Company has asserted that the Staff's findings are barred under the equitable doctrine of estoppel. In response to this alternative argument, the CAPD and the Staff argue that the element of detrimental reliance is not present The CAPD asserts that the fact that the Company booked its share of savings as income did not prejudice the Company The CAPD's assertion demonstrates an appalling lack of understanding with regard to the financial realities facing public companies in the post-Enron regulatory environment. The fact that the Company booked approximately $600,000 in income based on its understanding that the income was not at risk for disallowance most certainly does represent a substantial detrimental reliance. This reliance was clearly induced by the Staff's affirmative actions at the meeting with Atmos which led Atmos to believe Staff agreed and approved of the proposed reporting and calculation methods. As such, the Staff is now barred from taking an inconsistent position and contesting the inclusion of the transportation savings as avoided costs under the PBR.

Aside from the binding provision of the PBR tariff and the equitable doctrine of estoppel, there is a third, and perhaps even more compelling reason the TRA should reject the Staff's disallowance of the transportation savings. In two recent audit decisions for the other two regulated gas companies, the TRA has indicated an unwillingness to penalize companies by disallowing reported savings where the company acted in good faith. Instead, perhaps in recognition of the complex and volatile nature of the natural gas industry, the TRA has made a policy of making any decisions regarding incentive programs prospective only. In the case of Nashville Gas' 2003 plan year audit, the TRA Staff found that under the terms of the company's incentive plan, Nashville Gas is not entitled to share in the proceeds of the fee paid by its asset manager. (Docket No 03-00489, Audit Report p. 13.) Nevertheless, the Staff declined to disallow those savings for the audit year, on the grounds that the company had acted in good faith and had relied on previous Authority approval in including those savings in its reports. (Id.) Instead, the Staff recommended that the TRA suspend Nashville Gas' incentive plan going forward until the issue of inclusion of the asset management fee could be resolved (Id. at p. 14.) The TRA declined to suspend the incentive program, and instead asked for input from the company on the issue (10/1/04 Order in Docket No 03-00489.)

On December 13, 2004, the Authority unanimously voted to reject a Staff finding disallowing reported savings in Chattanooga Gas' 2003 plan year audit. Staff found that Chattanooga Gas had violated the terms of its tariff by entering into a flat-fee asset management arrangement with its affiliate, and sharing that fee rather than tracking the off-system sales individually and sharing in the profits as required by the terms of the tariff. (Docket No. 03-00516, Audit Report p. 9) The TRA unanimously rejected the Staff's finding and permitted Chattanooga Gas to retain its share of the fee. (Docket No. 03-00516, 12/13/04 Trans. of Proceedings pp. 59-60.) In rejecting the Staff finding, Director Jones noted for the record that his decision was influenced by the fact that Chattanooga Gas "has been very forthcoming in notifying the TRA of the agreement and its intended treatment of the revenues generated from that agreement and has included those revenues in previous tariff filings and audits." (Id. at p. 52.) Director Jones found it significant that at no point did the TRA notify Chattanooga Gas of a potential tariff violation, despite the fact that Chattanooga Gas made several filings. (Id.) Director Tate agreed, finding that "it does seem reasonable that the company relied on, if not actual approval, some kind of tacit approval over the past few years . . ." (Id. at p. 54.) Director Kyle agreed that the Staff's disallowance should be rejected, finding the TRA's decision "consistent with the policy constantly following by the Authority regarding actual cost adjustment filings." (Id. at p. 56.)

These two decisions represent a clear indication of TRA policy regarding the disallowance of incentive plan items for gas companies. Recognizing that the complex and ever changing nature of the natural gas industry prevents the Authority from being able to draft an incentive plan that will foresee and specifically address all possible purchasing arrangements, the TRA has refused to penalize gas companies that notify the Authority of their intentions, and rely in good faith on the tacit approval they receive in response. Atmos is entitled to the same deference extended to Nashville Gas and Chattanooga Gas Atmos met with Staff to notify it of the newly negotiated discount transportation contracts, it reported the savings as outlined in the meeting, and the Company relied on the Staff's indication of approval. The Company has acted in good faith. As such, the TRA should reject the Staff's disallowance of the transportation savings for the audit year and make any changes or determinations regarding future treatment of such savings on a going forward basis only.

III. <u>THE TIF TARIFF IS JUST AND REASONABLE AND SHOULD BE APPROVED (DOCKET NO. 02-00850).</u>

All parties agree that the natural gas market has changed significantly since the implementation of the PBR. When the PBR was created, all transportation contracts were priced

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at the maximum FERC rate, leaving no opportunity for the generation of savings in that aspect of gas purchasing activities. Since then, the Company has been able to take advantage of changes in the gas pipeline market to negotiate discount rates on some of its pipeline contracts Both the TRA's PBR consultant Frank Creamer, and TRA Staff agree that if transportation discounts had been a feature of the marketplace when the PBR was implemented, the TRA would have included incentive sharing of those savings in the PBR (Hearing Trans Vol II p 84 (Test. of Pat Murphy); Direct. Test. of Frank Creamer pp. 20-23.)

The CAPD agrees that the TRA implemented the PBR with the specific purpose of avoiding prudency audits. The CAPD also agrees that the TRA found that, in order to serve its purpose of avoiding prudency audits, the PBR incentives must span all of the Company's purchasing activities necessary to deliver gas to the end consumer, including purchase, storage, and transportation. The CAPD, which opposed the PBR from its inception and characterized the PBR plan as an "illegal scheme," now argues that the availability of discount transportation contracts has rendered the TRA's goals impossible to reach. The CAPD claims that because there is no published market index for downstream transportation costs, it is impossible to design a PBR plan that encompasses all purchasing activities, and thus, the TRA must return to the practice of prudency audits. The CAPD's objection to the TIF amendment Atmos proposed to specifically address transportation discounts is simply an attempt to gut the PBR plan the CAPD so vehemently opposes

One of the CAPD's main objections in the audit case was that although the maximum FERC rate has always been used to gauge the Company's savings under the NORA contract, the TRA had never issued a ruling specifically recognizing the maximum FERC rate as the appropriate benchmark for downstream transportation costs. Approval of the TIF tariff will remedy this alleged defect. The CAPD now claims that the maximum FERC rate cannot be used as a benchmark within the PBR because it is not a published market index. Atmos established, through the testimony of the TRA's PBR consultant Frank Creamer, that the maximum FERC rate serves as the proxy for the downstream transportation market, and is therefore the appropriate benchmark to gauge the Company's performance with regard to downstream transportation purchases (Direct Test. of Frank Creamer, pp 11-12, Hearing Trans Vol II, pp. 71-72 (Test. of Frank Creamer).) Mr. Creamer's conclusions were based on his own experience as a consultant and prudency auditor for the TRA, his extensive research on the pipeline transportation market industry-wide, and his review of other state public utility commission PBR decisions. (Rebuttal Test. of Frank Creamer, pp. 4-5.) The TRA Staff agrees with Mr. Creamer's conclusions. (Hearing Trans. Vol. II, pp. 83-84 (Test. of Pat Murphy))

The CAPD did not cross-examine Mr. Creamer at the hearing regarding any of his research or conclusions with respect to the market for downstream transportation costs. At no time has the CAPD made any challenge to Mr. Creamer's expertise or research methods. The CAPD did not dispute any of Mr. Creamer's findings regarding the number of discounted contracts present in the downstream transportation market. Instead, the CAPD, relying exclusively on the arguments set forth by Dr Stephen Brown, contends that a maximum price can never serve as the proxy for a marketplace of purchases. As explained in the rebuttal testimony of Mr Creamer, Dr Brown's assumption is based on his misunderstanding of the fundamental market index design principles for the gas commodity marketplace, as compared to the transportation pipeline marketplace. (Rebuttal Test. of Frank Creamer, pp. 2-3.) This is not the first time Dr. Brown has demonstrated a lack of understanding of the pipeline market. Early on in this docket, Dr. Brown took the position that the commodity indexes do include downstream transportation costs, insisting that although he did not have documentation of that fact, it was "common knowledge" in the industry. (See CAPD's 9/6/02 Resp to First Data Req., p. 3) The CAPD has since conceded that Dr. Brown was incorrect, and admits that the indexes do not include downstream transportation costs.

Dr Brown cited no authority for his conclusion that the maximum FERC rate is not the proxy for the pipeline transportation marketplace, other than his own knowledge and expertise. Contrary to Mr. Creamer's extensive experience and research, Dr. Brown admitted he has no personal experience in the area of pipeline negotiations, and that he made no effort to contact anyone with such knowledge or experience in the industry, even though he attached a phone list to his testimony with the names and numbers of pipeline company executives, some of whom were personally involved in the negotiation of the transportation contracts at issue in this docket.

It is clear from the various positions taken by Dr Brown in this case that his knowledge of the natural gas industry is extremely limited, especially with regard to the pipeline market, and that he made no effort to supplement that knowledge through research before reaching his conclusions. Dr. Brown's lack of knowledge of the pipeline market has been made evident repeatedly throughout this matter, ranging from the most basic factual mistakes (e.g , contending that Atmos' only choices for pipeline transportation in 1999 were East Tennessee and Tennessee Gas, when there were actually at least 4 other pipeline companies Atmos researched as possible sources in addition to East Tennessee and Tennessee Gas)[3], to stunning misconstructions of regulatory action (e g , claiming a July 2003 FERC order reversed FERC's policy and found negotiated rates not in the public interest, when the order actually did just the opposite by rejecting that argument and reaffirming the effectiveness of the negotiated rate policy).[4] Dr Brown has also demonstrated a

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[3] (See Brown Rebuttal Test , pp 18-19, Hearing Trans. Vol. I, p. 31 (Test of John Hack))
[4] (See CAPD's 5/4/04 Objections to Proposed Settlement, p 10, Atmos 5/21/04 Resp , p 13)

troubling inattention to detail (e.g., asserting that a FTC notice was "surely" a foundational document in Atmos' negotiations when the notice was issued 4 months after negotiations were completed)[5], and a disturbing tendency to draw illogical conclusions from known facts (e.g., arguing that the PBR could not possibly have motivated Atmos' negotiation of the contracts because no employee was given incentive compensation specifically tied to PBR results).[6] Finally, Dr. Brown's willingness to accuse other witnesses of lying under oath about events of which he has no personal knowledge or experience, while making no effort to investigate the truth himself, provides perhaps the most damaging evidence of Dr Brown's lack of credibility as a witness. The CAPD has not given the Authority any reason to reject the testimony of Mr. Creamer, which has been accepted by TRA Staff, and which conclusively establishes that the maximum FERC rate is the appropriate benchmark to judge downstream transportation costs within the PBR.

Having little substantive support for its positions, the CAPD resorts in its brief to manufacturing "inconsistencies" in Atmos' testimony. Upon closer examination it is clear that the testimony is not inconsistent at all. The CAPD claims that the separate calculation of transportation and commodity costs in the proposed TIF tariff is inconsistent with Atmos' position that the PBR should include both commodity and transportation. The CAPD's claim is nonsensical As explained in the testimony of Frank Creamer, Atmos is proposing, through the TIF, to include both commodity and transportation costs in the PBR plan, but to do so with separate calculations. With regard to Atmos' proof regarding the negotiation of the discounted transportation contracts, the CAPD questions the validity of the entirety of John Hack's testimony

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[5] (See Brown Rebuttal, p 1 and Sch 1 (FTC Order); Hearing Trans Vol I, pp 28, 30 (Test of John Hack)
[6] (See Brown Rebuttal, p 4; Hearing Trans Vol I, p 44 (Test. of John Hack))

because he made references to both "spring" and "fall" in describing the commencement of the various negotiations over the course of the 3 years this docket has been pending The CAPD also claims that Mr. Creamer's statement that he called Duke Energy to verify the accuracy of John Hack's account is inconsistent with his previous testimony. However, the citation the CAPD provides to the previous testimony it claims is inconsistent simply references Mr. Creamer's recitation of the documents he relied upon in preparing his direct testimony. Obviously, a phone call would not be listed among documents he relied upon. The CAPD's accusations of inconsistencies are entirely unfounded.

The CAPD also argues that the TIF tariff should not be approved because it may not produce the least cost gas for the consumers. When pressed for an explanation of how the TIF, which provides an incentive for the Company to maximize savings and reduce costs, would nonetheless produce higher gas costs for consumers, the CAPD, through the testimony of Dan McCormac, postulated a hypothetical situation which again reveals a lack of understanding about the natural gas purchasing market as a whole. The only possible higher cost gas example Mr. McCormac could create was one involving the purchase of locally produced gas. As explained in Atmos' Post-Hearing Brief and the testimony of John Hack, Mr. McCormac's hypothetical is completely unrealistic and ignores the fact that it is highly unlikely that locally produced gas, even where available, would represent the lowest cost feasible option because such purchases are not backed by primary firm transportation, and require additional purchases of backup capacity in order to meet the Company's service obligations. In its Post-Hearing Brief, the CAPD throws out an additional hypothetical higher cost scenario (that Atmos would add legs to the transportation path to increase savings at the expense of the customer), but even the CAPD admits this is "unlikely." In reality, the CAPD's uninformed hypotheticals provide no reason to doubt the finding made by the TRA at the original PBR proceeding - that providing the Company with incentives, through the PBR plan, results in lower gas costs for consumers and is in the public interest.

IV **THE TIF TARIFF DOES NOT RESULT IN IMPERMISSIBLE RETROACTIVE RATEMAKING.**

In its Post-Hearing Brief, the CAPD begins its retroactive ratemaking discussion by admitting that neither Dr. Brown nor Mr McCormac, neither of whom are lawyers, are qualified to testify as to whether the TIF tariff violates the legal prohibition against retroactive ratemaking. As such, the Authority should disregard both witness' testimony on that issue as incompetent, and lend it no weight.

As demonstrated in Atmos' Post-Hearing Brief, there exists binding precedent from the Tennessee Court of Appeals which specifically holds that allowing utilities to share in past earnings through prospective rate adjustments, as the proposed TIF tariff does, does not constitute impermissible retroactive ratemaking.[7] See American Ass'n of Retired Persons ("AARP") v. Tenn. Pub. Svc. Comm'n, 896 S.W 2d 127, 134 (Tenn. Ct. App. 1994), Consumer Advocate Division ex rel. v Tennessee Regulatory Authority, 2000 WL 13794 at *3 (Tenn. Ct. App. Jan. 10, 2000). The CAPD concedes that the cases do state that holding, but urge the Authority to disregard the Court's statements, based on what the CAPD claims "seems to be" the real desire of the Court. (See CAPD Post-Hearing Brief at p. 38.) The CAPD's only point to distinguish the previous court decisions is an unspecific claim that the "retroactiveness" of the proposed TIF tariff is somehow "more material" than the retroactiveness of the rate adjustments at issue in the Courts'

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[7] The position of the TRA Staff is that the retroactive ratemaking prohibition applies only to base rate proceedings, and not to incentive plans or surcharge proceedings. (See TRA Staff's 5/21/04 Response to CAPD, at p 10, citing UGI Utilities, Inc. v. Pennsylvania Utility Comm'n, 677 A 2d 882, 887 (Pa 1996) (citing other cases))

opinions. The CAPD does not explain how the TIF tariff is "more materially retroactive," but even if it did, the CAPD is simply arguing for a change in the law, something the TRA is not authorized to do. The TRA must follow the law as set forth in the previous court decisions, without amendment or revision to allow for a "more materially retroactive" exception to the prospective rate rule set forth by the opinions

The CAPD argues that ***any*** decision which allows Atmos to recoup its share of past transportation savings, ***either*** through implementation of the TIF tariff (Docket No. 02-00850), ***or*** through a decision in Atmos' favor in the Audit Case (Docket No 01-00704), is a "rate change" rather than a "rate adjustment," and therefore violates the prohibition against retroactive ratemaking. (CAPD Post-Hearing Brief p. 40.) The CAPD has conveniently constructed a retroactive ratemaking rule that would invalidate any decision in either docket that is not in its favor. Perhaps not insignificantly, the retroactive ratemaking rule the CAPD has constructed would also invalidate the entire PBR plan as a whole The CAPD argues that the TIF (or a construction of the current PBR plan that permits sharing of transportation savings) is an impermissible "rate change" rather than a "rate adjustment" based on agreed-upon losses and savings, because "there is presently no agreement as to what the losses and savings might be." (CAPD Post-Hearing Brief p. 40.) The CAPD is correct. There is presently no final determination or agreement between the parties as to what the Company's losses and savings will be for the 2001-2004 audit years. However, this is true in any incentive plan There is never any agreement on losses and savings until the TRA Staff completes its audit of the Company's incentive plan reports In this case, the reports for the 2001-2004 audit years have not been filed, much less audited. Therefore, even the TRA Staff agrees that those audit years remain open. (Hearing Trans. Vol II pp 84, 88-89 (Test of Pat Murphy)) Because the audit years remain open, and because the effective date of the TIF tariff has been suspended by agreement of the parties due to those audit years remaining open, implementation of the TIF tariff effective the beginning of the 2001 plan year, and allowing the Company to recoup its share of transportation savings for the 2001-2004 audit years through prospective rate adjustments does not result in impermissible retroactive ratemaking.

V. **CONCLUSION.**

In this matter, the CAPD is urging the Authority to adopt an interpretation of Atmos' PBR plan that will make it impossible for the TRA to reach its intended goal of providing incentives for the Company in all gas purchasing areas in order to avoid the costly and inefficient practice of conducting yearly prudency audits. The CAPD's position is not surprising, given its longstanding opposition to the PBR plan as a whole. Perhaps in an attempt to distract from the practical result of its position, the CAPD, in its Post-Hearing Brief, makes the inaccurate and misleading statement that "the parties are in agreement that an audit is necessary." (CAPD Post-Hearing Brief, p. 36.) At no point have the parties agreed that any type of audit is necessary. The CAPD has called for a full audit of ***all*** Atmos' purchasing and operations The Staff and Atmos disagree. The parties do agree that the TRA will have no choice but to conduct a prudency audit of transportation purchases for the audit year and all subsequent years, ***if the CAPD prevails on its argument that transportation cost savings are excluded from the PBR.*** If, however, the TRA accepts the interpretation of the current plan set forth by its PBR consultant Frank Creamer, and accepts the TIF tariff recommended by Atmos, Mr Creamer, and TRA Staff, no prudency audit will be necessary.

The TRA should enter a decision in this matter which is consistent with the goals, findings, intent and purposes of the PBR plan. As such, Atmos should be permitted to share in the savings

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail, postage prepaid, upon the following this the 4th day of January, 2005:

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January 4, 2005

Tennessee Regulatory Authority
Attn: Chairman Pat Miller
c/o Sharla Dillon, Docket Manager
460 James Robertson Parkway
Nashville, TN 37243-0505

Via Federal Express
Priority Overnight Delivery

Re: Consolidated Docket Nos. 01-00704 and 02-00850

Dear Chairman Miller:

Please find enclosed the original and fourteen copies of Atmos Energy Corporation's Reply to Post-Hearing Briefs of the TRA Staff and the Consumer Advocate and Protection Division for filing in the above-referenced matter. Please stamp the extra enclosed copy "filed" and return it to me in the enclosed envelope.

If you have any questions about this filing please give me a call.

Sincerely,

Kasey Cannon

Kasey Cannon,
Assistant to Misty Smith Kelley

/klc
Enclosures

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