IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
UNITED CITIES GAS COMPANY,	)	
a Division of ATMOS ENERGY	)	
CORPORATION INCENTIVE PLAN	)	
ACCOUNT (IPA) AUDIT	)	**CONSOLIDATED DOCKET NOS.**
	)	**01-00704 and 02-00850**
UNITED CITIES GAS COMPANY,	)	
a Division of ATMOS ENERGY	)	
CORPORATION, PETITION	)	
TO AMEND THE PERFORMANCE	)	
BASED RATEMAKING	)	
MECHANISM RIDER	)	

CONSUMER ADVOCATE'S REPLY TO MOTION FOR RECONSIDERATION

Comes now Paul G. Summers, Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), and hereby respectfully requests that the Hearing Officer summarily deny Atmos Energy Corporation's Motion For Reconsideration To Hearing Officer.

A. SUMMARY

The Consumer Advocate respectfully submits that this summary adequately responds to Atmos Energy Corporation's groundless motion for reconsideration, but, out of an abundance of caution, the Consumer Advocate has provided a detailed response. Consequently, the Consumer Advocate submits, in summary, that the Hearing Officer should reject Atmos Energy Corporation's motion for reconsideration for these reasons:

1. It is legally impossible, in the context of this docket and AEC's numerous concessions about the docket being "on hold," for the TIF Tariff to have become effective on June 6, 2003.

2. The Initial Order cannot possibly be void given that a) AEC's motion for reconsideration on the merits starts all applicable deadlines anew;[1] b)the motion for a reconsideration constitutes a written waiver of any concerns about timeliness at the Hearing Officer level; and c) the statute in question is directory rather than mandatory and the Hearing Officer is entitled to interpret it in a fashion that avoids an absurd result.

3. AEC's refrain that it has been denied due process and equal protection is totally without merit given that AEC has not articulated a *prima facie* case of deprivation and given that this issue was waived when AEC failed to raise it in the hearing on the merits and in its post-trial submission.

4. AEC's claim that the Hearing Officer erred in rejecting the TIF is singularly unpersuasive given the total absence of proof that the maximum FERC was an appropriate benchmark or proxy for the market.

5. AEC's claim that the TRA Staff's Audit Report findings are barred is without merit and is predicated on a wholly misplaced reliance on the doctrine of estoppel.

B. BACKGROUND AND OVERVIEW

This matter is before the Tennessee Regulatory Authority ("TRA") for review of consolidated dockets. In TRA Docket No. 01-00704 Atmos Energy Corporation ("AEC") objects to the TRA Staff's audit finding regarding the performance based ratemaking mechanism ("PBR") approved by

[1] When someone requests a court, an agency or other decision maker to "reconsider" a decision, that person is asking the decision maker "[t]o discuss or take up (a matter) again." Black's Law Dictionary, page 1300, 8th ed. (2004).

the TRA in TRA Docket No. 97-01364. In TRA Docket No. 02-00850 AEC seeks to amend the PBR. Each request attempts to establish the maximum rate for transportation of natural gas allowed by the Federal Energy Regulatory Commission ("FERC") as a market proxy. The Consumer Advocate objects to the extraordinary relief sought by AEC in these dockets. On March 14, 2006, the Hearing Officer ruled against AEC on all matters at issue. On March 29, 2006, AEC filed a motion requesting the Hearing Officer to reconsider her decision. The Consumer Advocate objects to the relief sought by AEC in its motion for reconsideration.

AEC has for five (5) years sought a method for disguising, in the first instance (through closed door meetings with TRA Staff and groundless estoppel arguments) and then, changing the character and nature of the maximum FERC rate into something it is not. Moreover, as evidenced by logic and the obvious fact that AEC has not been able to present the necessary supporting proof in this mature record, the maximum FERC rate cannot function as a proxy for the market and could not have been accidentally included in the PBR in prior TRA orders.

At each stage of this process, AEC has attempted to raise procedure over substance. Initially, AEC attempted to circumvent TRA approval and the necessary public scrutiny of its flawed approach by meeting with TRA Staff rather than filing a proper petition to amend its incentive program. AEC has tried mediation, settlement negotiations, and lengthy arguments containing conclusory statements without supporting citations. AEC laced its requests with attempts to embarrass the TRA Staff, unfounded allegations against the Consumer Advocate and misrepresentations of the record and the positions of the parties.[2]

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[2]. During the litigation of these dockets the Consumer Advocate has responded to many of the unsupported allegations of AEC, both the substantive and the personal. However, the Consumer Advocate has not responded to all. It is a difficulty faced in every instance where these types of groundless, unsupported and conclusory claims are presented to the trier of fact. To the extent the Hearing Officer is concerned with the extraneous AEC arguments, the Consumer Advocate is available to submit supplemental information. In all other respects, the Consumer Advocate incorporates by reference its previous pleadings in this docket.

Wading through the extraneous, bulky filings in this docket could not have been an easy task. The Consumer Advocate understands the task undertaken by the Hearing Officer. Further, the Consumer Advocate notes the Hearing Officer's work and determination evidenced by the fact that AEC was not able to distract or redirect this review from the substantive issues involved. Plainly speaking, AEC should accept the credit for the time required for the Hearing Officer's decision. AEC is not unsatisfied with the time passing between the hearing in this matter and the Hearing Officer's decision of March 14, 2006.[3] Rather, AEC is not pleased that its efforts to push through a flawed plan have failed. What should not be missed, as a result of AEC's complaining, is the fact that over five (5) years have passed since AEC began its attempts to pass off the maximum FERC rate as a proxy for the market. The Hearing Officer has not hampered AEC's efforts in any way. The fact is that AEC's position is untenable. Only this fact prevents AEC from producing the credible evidence necessary to establish the maximum FERC rate as a market proxy.[4] Production of this evidence, in light of the substantial evidence in the record running contrary to this conclusion, was incumbent to AEC.[5] Certainly, AEC witness Frank Creamer was given amble opportunity to produce the necessary information. Attempts to recast Mr. Creamer's testimony, either at the hearing or at this stage, add nothing of substance to the debate.

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[3] The record contains no filing by AEC following the hearing in this matter, which would suggest it was disgruntled with the delay.

[4] Nothing prevented AEC from producing the information during the fourteen (14) month period, AEC highlights in its motion.

[5] The situation is analogous to the missing witness rule A party in possession of evidence supporting its position that fails to present such evidence at trial suffers the permissive inference that the evidence was actually inconsistent with the position of the party in possession of the evidence. *State v. Bigbee*, 885 S.W. 2d 797 (Tenn.1994); *Balderacchi v Ruth*, 256 S.W. 2d 390, 392 (Tenn.Ct.App. 1952).

C. ARGUMENT

I. The TIF Tariff Did Not Become Effective on June 6, 2003.

The Company's argument that the transportation index factor ("TIF") tariff became effective on June 6, 2003 is incorrect for multiple reasons. First, Atmos is not permitted to raise new issues subsequent to the hearing on the merits. By failing to plead this issue prior to its filing of the motion to reconsider, Atmos has waived the issue. "A party waives all defenses and objections which the party does not present either by motion as hereinbefore provided, or, if the party has made no motion, in the party's answer or reply, or any amendments thereto ... ." Tenn. R. Civ. P. Rule 12.08. Amendment of the pleadings at this time would not be appropriate, because the issue was not "tried by express or implied consent of the parties." Tenn. R. Civ. P. Rule 15.02.

Also, in its Motion for Reconsideration Atmos failed to comply with the TRA rule regarding petitions for reconsideration.

> If the petitioners seek to present new evidence, the petition shall contain a statement of the cause for the failure to introduce the proposed new evidence in the original proceeding, a detailed description of any such new evidence proposed to be introduced, including copies of documents sought to be introduced, identities of proposed witnesses, and summaries of any testimony sought to be presented.

Tenn. Comp. R. & Regs. 1220-1-2-.20(1).

Furthermore, "[i]t is well-settled that issues not raised at trial may not be raised for the first time on appeal." *Cantrell v. Walker Die Casting*, 121 S.W.3d 391, 396 (Tenn. Ct. App. 2003). This rule applies to post-hearing briefs, including the Company's Motion for Reconsideration.

> No matter how informal the proceeding, a person appearing before an administrative tribunal must make timely objections to procedural errors and must raise in a timely manner the issues and questions he deems material before he will be permitted to raise them in a petition for review. To require otherwise would undercut the effectiveness of administrative proceedings and would cause serious waste of effort

> by the parties and the administrative tribunal itself. ... ***We therefore hold that ITI*** cannot raise in this appeal, and ***could not validly raise in its post hearing brief to the PSC, issues which it clearly chose not to pursue at the hearing itself.***

In re Billing and Collection Tariffs of South Central Bell, 779 S.W.2d 375, 380 (Tenn. Ct. App. 1989) (Emphasis added). Because Atmos did not raise this issue in the pleadings or at the hearing, it cannot raise the issue for the first time in a motion for reconsideration subsequent to the hearing.

Also, the issue does not reach the merits of the Hearing Officer's decision. Even if the TIF tariff went into effect (which it did not), it would not inhibit in any way the ability and the duty of the Hearing Officer to decide the merits of the case. This case was heard as a contested case proceeding by order of the TRA, and Atmos has cited no legal authority for the proposition that a hearing officer assigned to a contested case is prohibited from deciding the merits of the case merely because the tariff (supposedly) is in effect. In other words, even if the tariff is in effect (which it is not), the Hearing Officer had both the right and the duty to decide the merits of the contested case. "No agency decision pursuant to a hearing in a contested case shall be reversed, remanded or modified by the reviewing court unless for errors that affect the merits of such decision." Tenn. Code Ann. § 4-5-322(i).

In any event, Atmos is incorrect about this issue factually. Atmos has agreed that the tariff is not in effect and has represented to the TRA that the tariff is not in effect. In its Motion to Consolidate and for Approval of Settlement Agreement filed on March 8, 2004, Atmos said, "Docket No. 02-00850 was placed on hold pending the resolution of the audit case in Docket No. 01-00704 since resolution of the audit case would materially impact Docket No. 02-00850." Based at least in part on the Company's representation that Docket No. 02-00850 "was placed on hold," the Hearing Officer's Order Granting Motion to Consolidate and to Approve Settlement Agreement in Part,

Granting Motion for Extension of Time to Respond in Part, and Setting Procedural Schedule, said, "Docket No. 02-00850 shall be deemed closed after entry of this Order." (Order, p. 5).

At the March 3, 2003 TRA conference, Atmos represented to the TRA that the Company would not and could not know whether it would pursue the TIF tariff until after the resolution of the contested case.

> Director Jones: I will accept that amendment, and can I add a further one to that?
>
> And, Mr. Conner, this is a statement and question for you. I'm assuming that if the -- if you prevail in Docket 01-00704 that you would not desire to go forward with this tariff in Docket 02-00850; is that correct?
>
> Mr. Conner: Not necessarily, Director. What -- we may wish to proceed in an effort to clear up any confusion to the extent they're -- the staff may find that there is some confusion in the original language, and so there is a possibility that in the event that we are successful in the prior pending case that we may also wish to proceed, but in that instance we would hope that it would be with the approval of both the Consumer Advocate's office as well as the staff and not in an adversary nature.
>
> Director Jones: So, regardless of how -- regardless of the outcome in 01-00704, you would pursue this particular tariff filing?
>
> Mr. Conner: Well, again, I can't really say for sure until I know what the outcome is.
>
> Director Jones: Okay.
>
> Mr. Conner: But I think to say that this case would simply go away based on a particular result in the prior proceeding, I can't say that either at this stage.
>
> Director Jones: I understand. I will accept that amendment.

(Transcript, page 113, line 16 through page 114, line 19, March 3, 2003 conference).

The unrebutted testimony of Ms. Pat Murphy at the hearing on the merits, during the cross examination by the Company's lawyer, was the following:

> Question: With respect to the 850 docket, isn't it true that there has been also an agreement to stay the implementation of the 850 docket pending the outcome of this proceeding?
> Answer: Yes.

(Hearing Transcript, page 88, lines 15-19).

Given that Atmos intentionally elicited this testimony at the hearing with a leading question on cross examination, it is both inexplicable and unacceptable that Atmos now seeks to refute the testimony. "The rule is well established that during the course of litigation a party is not permitted to assume or occupy inconsistent and contradictory positions, and while this rule is frequently referred to as 'judicial estoppel,' it more properly is a rule which estops a party to play fast-and-loose with the courts." *Webber v. Webber*, 109 S.W.3d 357, 359 (Tenn. Ct. App. 2003).

II. The Initial Order is Not Null and Void.

The statute on which Atmos relies for its argument that the initial order is null and void does not say that the failure to render the order within 90 days makes the order null and void. "A final order rendered pursuant to subsection (a) or initial order pursuant to subsection (b) shall be rendered in writing within ninety (90) days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless such period is waived or extended with the written consent of all parties or for good cause shown." Tenn. Code Ann. § 4-5-314(g). It also is significant that none of the three cases cited by Atmos held that the decision at issue was null and void. This argument by Atmos is unprecedented in the TRA and would have an unacceptably chaotic effect on the regulation of public utilities in Tennessee. If the Hearing Officer cannot rule against Atmos and for Tennessee consumers after 90 days, she also cannot rule for Atmos and against Tennessee consumers after 90 days. The apparent result would be that the entire process of litigating this contested case would have to start from scratch, which would be an absurd result.

In *Garrett v. State*, the Tennessee Supreme Court refused to nullify an administrative order for forfeiture of a truck.

> As we have said in the past, forfeiture statutes are to be strictly construed because forfeitures are not favored in the law. Also, because forfeiture proceedings are *quasi criminal* in nature, we cannot ignore the presumption of innocence that attaches in our

> courts. Similarly, we cannot allow the taking of private property by forfeiture without sufficient proof of wrongdoing. ... Although the legislative intent behind the ninety day requirement is not clear, ***the general rule in this state is that statutory provisions relating to the time of doing an act to which the statute applies are directory rather than mandatory.*** This is ***especially*** true absent some showing of prejudice. Thus, in cases like the present one where no prejudice has been shown, we can infer that the legislature intended for the ninety day provision to be directory in nature. Since the statute is directory rather than mandatory, violation of the ninety day rule does not nullify the forfeiture hearing or order.

Garrett v. State, 717 S.W.2d 290, 291 (Tenn. 1986) (Internal citations omitted; emphasis added).

A careful reading of this decision shows that Atmos has exaggerated the significance of the case. The case says that ***the general rule is that such statutes are directory rather than mandatory***. The general rule is ***especially*** true in the absence of prejudice. The case does ***not*** say that a claim of prejudice by the losing party defeats the general rule. A party that has failed to establish the merits of its case has ***not*** shown prejudice. *Id.*

Atmos claims as prejudice the theory that it could have filed the tariff again with additional proof, but it does not say what that additional proof would have been. Furthermore, Atmos has not explained why it held back this hypothetical proof from the current contested case. *Garrett* does not say that an order that is rendered after 90 days is null and void on the mere claim of a hypothetical and theoretical prejudice. The reality is that Atmos has not suffered any prejudice, and it certainly has failed to establish any real prejudice in its Motion for Reconsideration. In its Motion for Reconsideration Atmos failed to comply with the TRA rule regarding petitions for reconsideration.

> If the petitioners seek to present new evidence, the petition shall contain a statement of the cause for the failure to introduce the proposed new evidence in the original proceeding, a detailed description of any such new evidence proposed to be introduced, including copies of documents sought to be introduced, identities of proposed witnesses, and summaries of any testimony sought to be presented.

Tenn. Comp. R. & Regs. 1220-1-2-.20(1). Atmos has failed to comply with this rule in the context of the hypothetical proof that supposedly supports its theoretical tariff. The simple fact is that such proof does not exist. Should such proof exist then AEC should proffer the proof, so that the Hearing Officer may decide whether supplementing the record is appropriate.

In any event, AEC's motion for reconsideration is itself a waiver of any claim that the Hearing Officer's Initial Order is void on timeliness grounds. In other words, AEC cannot be heard to complain about delay at the one level (the Hearing Officer level) when it has asked for a reconsideration on that same level — when other viable options to seek review at the Directors' level was indisputably available. Any applicable deadline, therefore, starts anew when reconsideration is sought. Similarly, the request that the Hearing Officer reconsider the merits of this case presupposes that the Initial Order is not void as a matter of law and is written consent for the Hearing Officer to take additional time with the merits of the case.

If the Hearing Officer were to reverse the decision in this case on the basis of prejudice to Atmos, such decision would prejudice Tennessee consumers who would be deprived of the opportunity to challenge the Company's theoretical new tariff based on its hypothetical new proof. Again, the result would be that the Hearing Officer could not rule in this case, and the entire contested case process would have to begin from scratch. There is no Tennessee case law in which an order has been nullified by a court for failure to render the order within 90 days. Also, the statute explicitly permits the rendering of an order beyond ninety days "for good cause shown." Tenn. Code Ann. § 4-5-314(g). Furthermore, "No agency decision pursuant to a hearing in a contested case shall be reversed, remanded or modified by the reviewing court unless for errors that affect the merits of such decision." Tenn. Code Ann. § 4-5-322(i). The initial order in this contested case is not null

and void on the basis of hypothetical proof supporting a theoretical tariff that Tennessee consumers have had no opportunity to challenge.

III. AEC has suffered no deprivation of its due process rights.

IV. The tariff filed by AEC in TRA Docket No. 02-00850 is flawed.

V. The transportation cost adjuster does not permit AEC to take additional profits from consumers.

VI. The claimed "savings" were properly denied.

VII. The Findings of the Audit Report are Not Barred by the Doctrine of Estoppel.

The Consumer Advocate arguments related to sections III-VII in this matter have been presented in good faith and not for the unethical purposes suggested by AEC.[6] AEC adds nothing new to its arguments and substantial briefing has already been filed by the parties. The clear intent of the AEC motion is to distract, rather than illuminate.

The lone complaint against the Hearing Officer respecting due process rights asserted by AEC concerns the Hearing Officer's rejection of the settlement proposed by AEC and the TRA Staff. The Hearing Officer was correct in her ruling that one (1) or more parties may not force a settlement on another party. It is difficult to ascertain from the AEC argument what misconduct on the part of the Hearing Officer, AEC identifies as grounds for granting its motion. Ironically in section "III" of the motion to reconsider, AEC accuses the Hearing Officer of preventing it from withdrawing certain objections to the TRA Staff audit findings. In fact, the motion for reconsideration is inconsistent with AEC's wish to simply withdraw its objections to the TRA Staff findings related to the 01-00704 docket. If AEC is sincere about its wish to withdraw objections to the TRA Staff findings, then it should do so.

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[6] In particular, the prohibition against retroactive ratemaking is clearly applicable and has been fully briefed. Estoppel has been fully briefed at several points in this litigation

The attempt by AEC to argue that it has a right to exact additional profit out of its customers based on positions it claims that parties took during settlement discussions is as improper now as it was when it was first briefed in this docket.

It is incorrect to suggest that any portion of the information submitted through the testimony of Frank Creamer was not directly contradicted by the Consumer Advocate. First, simple logic dictates that the maximum FERC rate cannot serve as a proxy to a market. To conclude otherwise, ignores the fact that there are price points below the maximum FERC rate, which would push the market downward. Any valid proxy rate would rest below the maximum. Moreover, the testimony, written and oral, of Dr. Steve Brown and Dan McCormac are replete with clear and accurate proof demonstrating that the maximum FERC rate is not an appropriate proxy for the market, that the inference drawn from the import of the NORA contract by AEC is incorrect and that no matter what the "genesis" of the "TIF tariff" might be, it is fundamentally flawed. What contradiction Mr. Creamer does not provide to his own testimony is clearly contained in the remainder of the proof in this record.

AEC's emphasis on what the Consumer Advocate may have done at the hearing on the merits regarding Mr. Creamer's testimony does not support the position taken by AEC. It was not necessary for the Consumer Advocate to confront Mr. Creamer at the hearing on each and every point he proposed. Cross examination is not intended to rehash the proof previously established. Judicial economy and good sense were better served by a more efficient approach.

Elimination of the prudency audit was not the motivating factor for establishing the incentive based rate making plan.[7] The true motivation is providing incentive to AEC to make gas purchases in such a manner as to lower the cost of gas to consumers. While there can be little doubt that

[7] Nor would enforcement of the prohibition against retroactive ratemaking invalidate all incentive based ratemaking plans.

consumers would be better off when proper prudency audits are resumed and the TRA should seriously consider such, the incentive program which is the subject of TRA Docket No. 01-00704 does not require a prudency audit.

VIII. The Initial Order Does Not Violate the Company's Rights to Due Process and Equal Protection.

The United States Supreme Court already has rejected the type of equal protection and due process argument asserted by Atmos. "[T]he Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, any more than in guaranteeing due process it assures immunity from judicial error." *Milwaukee Electric v. State of Wisconsin*, 252 U.S. 100, 105, 40 S.Ct. 306, 309 (1920) (Internal citations omitted). "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions (or) immunity from judicial error.' Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck v. Washington*, 369 U.S. 541, 554-55, 82 S.Ct. 955, 962-63 (1962) (Internal citations omitted). The decision of a hearing officer in a contested case in the TRA is judicial or at least quasi judicial in nature. *Gulf Mobile & Ohio Railroad v. Railroad and Public Utilities Commission*, 271 S.W.2d 23, 27 (Tenn. Ct. App. 1954). Administrative hearings at which witnesses were called, evidence was presented, and findings of fact were made are judicial or quasi judicial in nature. *Anderson v. City of Dallas*, 116 Fed.Appx. 19, 31 (5th Cir. 2004). Because the Hearing Officer's decision in this contested case was judicial or quasi judicial in nature, Atmos has no claim for equal protection or due process.

Furthermore, even if the Hearing Officer's decision were not judicial or quasi judicial in nature, Atmos has failed to show an equal protection or due process violation. First, Atmos has failed to argue a due process violation. All four of the case citations in the Company's brief address equal protection. Atmos has not cited authority for its alleged due process argument, and therefore,

no additional response is needed to the unsupported allegation. Also, the Company's equal protection argument lacks merit. Because Atmos is not a suspect class, the analysis, if it were needed, would be under the rational basis test. *State of Tennessee v. Southern Fitness and Health*, 743 S.W.2d 160, 162 (Tenn. 1987). "Moreover in determining whether a rational basis exists, 'the burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute; and if any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable, the statute must be upheld.'" *Id.* at 163.

"[T]he Equal Protection Clause does not require things which are different in fact or opinion to be treated in law as though they were the same." *Champion's Auto Ferry v. Michigan Public Service Commission*, 588 N.W.2d 153, 164 Mich. Ct. App. 1998). The Company's argument that the TRA has an "established policy" in which natural gas monopolies are "entitled" to "deference" is unsupported by the facts. Neither of the two examples cited by Atmos involved a claim that the natural gas monopoly should be allowed to charge Tennessee consumers for theoretical "savings" every time the natural gas monopoly paid anything less than the ***maximum*** transportation rate permitted by FERC. The argument that Atmos, as a natural gas monopoly, is "entitled" to "deference" in this context pursuant to an "established policy" of the TRA lacks any basis whatsoever in fact or law. If the TRA had intended to require the Hearing Officer to rule in favor of Atmos and against Tennessee consumers in this context pursuant to an "established policy" in which natural gas monopolies are "entitled" to "deference," the TRA would not have convened a ***contested case***. The argument that the Equal Protection Clause requires the Hearing Officer to rule in favor of Atmos and against Tennessee consumers in this ***contested case*** is obviously incorrect.

In the Chattanooga Gas example discussed in the Company's brief, the TRA did not convene a contested case. (Transcript of Authority Conference, December 13, 2004, page 59, lines 4 through 13). According to Director Kyle, "There is no evidence that Chattanooga Gas Company violated its interruptible margin credit rider tariff regarding the sharing of gross profit margin on off-system sales, because absent a tracking system audit staff had no way to determine if such violation exists[.]" (Transcript of Authority Conference, December 13, 2004, page 56, lines 8 through 13). Even in rejecting the staff's recommendation, Director Jones said, "This conclusion should not, however, be construed to represent that I approve of the bailment agreement as an appropriate affiliate transaction vehicle." (Transcript of Authority Conference, December 13, 2004, page 52, lines 5 through 8). Chattanooga Gas did not assert that the ***maximum*** FERC rate should be a benchmark for determining alleged "savings" on transportation costs. Obviously, for these reasons and many others too numerous to elaborate, the facts in the Chattanooga Gas example were very different than the facts in the case at bar.

In the Nashville Gas example discussed in the Company's brief, Nashville Gas claimed that the asset management fee that it received in exchange for turning over its excess capacity to the asset manager should be treated as a capacity release transaction for purposes of its incentive plan account. Nashville Gas did not claim that the ***maximum*** FERC rate should be a benchmark for determining alleged "savings" on transportation costs. Quite simply, the Nashville Gas example is a different case with different facts and different issues, and the differences are too numerous to elaborate. The Company's argument that the Equal Protection Clause compels a specific result in this ***contested case*** is unsupported by the facts or the law.

D. CONCLUSION

The foregoing considered, the Consumer Advocate respectfully requests that the motion for reconsideration filed by AEC be denied. The positions set forth by AEC have been weighed in painstaking fashion. AEC knew from the very beginning of this process that it had to show that the maximum FERC rate could in some manner function as a proxy to the market for the transportation of natural gas. AEC has failed to do so, even though it has had over five (5) years to generate a colorable claim of such.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail on Wednesday, April 12, 2006.

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