

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

April 18, 2006

IN RE:

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

PETITION OF UNITED CITIES GAS COMPANY
TO AMEND THE PERFORMANCE BASED
RATEMAKING MECHANISM RIDER TO ITS TARIFF

DOCKET NO.
01-00704

ORDER DENYING MOTION FOR RECONSIDERATION

This matter came before the Hearing Officer upon the filing of *Atmos Energy Corporation's Motion for Reconsideration to Hearing Officer ("Reconsideration Motion")* by Atmos Energy Corporation ("Atmos") on March 29, 2006.

Positions of the Parties

On March 14, 2006, the *Initial Order of Hearing Officer on the Merits ("Initial Order")* was issued in this docket.¹ In the *Reconsideration Motion*, Atmos raises a number of objections to the *Initial Order*, citing factual, procedural and constitutional grounds. Specifically, Atmos asserts that the TIF Tariff became effective on June 6, 2003 because the Authority only suspended the effective date of the tariff through June 5, 2003. In addition, Atmos argues that the *Initial Order* is null and void for failure to comply with the 90 day deadline contained in Tenn. Code Ann. § 4-5-314. Atmos further alleges that it has been deprived of due process

¹ The *Initial Order* contains a summary of the procedural background of the docket and the previous arguments of the parties, as well as the Hearing Officer's prior findings and conclusions.

protection by the Hearing Officer's denial of the *Motion to Consolidate and for Approval of the Settlement Agreement* filed on March 8, 2004 by Atmos and the Audit Staff. Atmos further contends that its rights to due process and equal protection have been violated by the failure to apply the TRA's "established policy" regarding the disallowance of incentive plan items for gas companies. Finally, Atmos objects to a number of the findings made in the *Initial Order*, arguing that the TIF Tariff is supported by sufficient evidence, the sharing of transportation discounts is within the scope of the original PBR plan, the plain language of the PBR plan precludes the disallowance of the transportation savings, and the findings in the Audit report are barred by the doctrine of estoppel. Atmos requests that the Hearing Officer grant the *Reconsideration Motion*, sustain Atmos' objections to the 2000-2001 audit or, in the alternative, grant the TIF Tariff.

On April 12, 2006, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed the *Consumer Advocate's Reply to Motion for Reconsideration*. The Consumer Advocate argues that the TIF Tariff did not become effective on June 6, 2003 and cites the *Motion to Consolidate and for Approval of the Settlement Agreement* filed on March 8, 2004, and statements on the record before the directors and at the hearing on the merits, as evidence that Atmos has agreed that the TIF Tariff is not in effect. Further, the Consumer Advocate asserts that Atmos is not permitted to raise new issues subsequent to the hearing on the merits and that by failing to raise it in the pleadings or at the hearing, Atmos has waived the issue. The Consumer Advocate contends that the *Initial Order* is not void because the *Reconsideration Motion* on the merits starts all applicable deadlines anew; the *Reconsideration Motion* constitutes a written waiver of any concerns about timeliness at the Hearing Officer level; and Tenn. Code Ann. § 4-5-314 is directory rather than mandatory. The Consumer Advocate asserts that Atmos waived its due process or equal protection violation

claims because Atmos failed to raise it at the hearing on the merits or its post-hearing filings. In addition, the Consumer Advocate argues this matter was a contested case proceeding that was quasi-judicial or judicial in nature and, therefore, no uniformity of decision can be guaranteed under the Constitution. The Consumer Advocate distinguishes this matter from the instances cited by Atmos as setting an “established policy.” According to the Consumer Advocate, Atmos has not supported its claim of a due process violation. Further, the Consumer Advocate contends that Atmos’ claim that the Hearing Officer erred in rejecting the TIF Tariff is unpersuasive given the absence of proof that the maximum FERC rate was an appropriate benchmark or proxy for the market. Finally, the Consumer Advocate argues that the Audit Report is not barred and that Atmos’ reliance on the doctrine of estoppel is misplaced.

Also on April 12, 2006, the Audit Staff filed the *Staff Response to Atmos Energy Corporation’s Motion for Reconsideration to Hearing Officer* (“*Staff Response*”). The Audit Staff limited its response to the issue of whether the TIF Tariff took effect on June 6, 2003. In the *Staff Response*, Audit Staff asserts that there was an agreement in place that consideration of the TIF Tariff would be postponed pending the outcome of consolidated Docket No. 01-00704.

Findings and Conclusions

Atmos raises for the first time in the *Reconsideration Motion* its assertion that the TIF Tariff took effect on June 6, 2003. Atmos did not raise this issue in any pleading, at the hearing on the merits or in its post-hearing briefs. The Hearing Officer finds that this issue has been waived. In addition, as noted by both the Consumer Advocate and Audit Staff, this assertion is contrary to the representation made by Atmos to the Authority in the *Motion to Consolidate and for Approval of the Settlement Agreement* and is contrary to evidence presented at the hearing on the merits, all of which indicate that the effective date of the TIF Tariff had been placed on

“hold” by agreement pending the outcome of these proceedings. Therefore, even if this assertion were not waived, it would be factually incorrect based upon the record in this matter.

The *Initial Order* is not null and void for failure to comply with the 90 day deadline contained in Tenn. Code Ann. § 4-5-314. The Hearing Officer finds that the statute is directory, rather than mandatory, and therefore the Hearing Officer’s failure to release the *Initial Order* within 90 days of conclusion of the Hearing does not nullify the *Initial Order*.

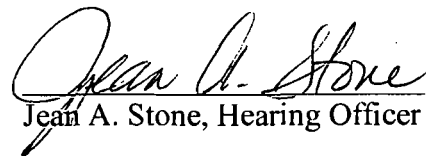
Atmos argues that the Hearing Officer’s denial of the *Motion to Consolidate and for Approval of the Settlement Agreement* was arbitrary and capricious and deprived Atmos of due process by forcing Atmos to litigate objections it wished to withdraw. The Hearing Officer adheres to the findings and conclusions contained in the *Order Granting in Part and Denying in Part Consumer Advocate’s Renewed Motion to Summarily Deny Motion to Approve Settlement Agreement and Alternatively to Treat the Motion as a Motion for Summary Judgment and Denying Motion to Approve Settlement Agreement* issued on August 12, 2004.

Atmos further contends that its rights to due process and equal protection were violated by the Hearing Officer’s failure to apply the TRA’s “established policy” regarding the disallowance of incentive plan items for gas companies. In the *Initial Order*, the Hearing Officer noted that although in certain audit decisions the TRA had declined to make audit findings where the companies had notified the Authority of their intentions, had acted in good faith or had relied on the Authority’s tacit approval, there was no requirement that the Authority do so in the absence of the factors required for estoppel or other legal mandate. There was no finding that an “established policy” existed. Indeed, each case must be evaluated on its own particular circumstances and upon the evidence presented. Therefore, because no “established policy” exists, the Hearing Officer finds Atmos’ argument to be without merit.

The remainder of Atmos' arguments concern matters previously addressed in the *Initial Order*. After careful review and consideration of the filings of the parties in this docket, the Hearing Officer adheres to the findings, conclusions and decisions on the merits as stated in the *Initial Order*. For these reasons, the *Reconsideration Motion* is denied.

IT IS THEREFORE ORDERED THAT:

Atmos Energy Corporation's Motion for Reconsideration to Hearing Officer filed by Atmos Energy Corporation on March 29, 2006 is denied.


Jean A. Stone, Hearing Officer