BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

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

RESPONSE OF TENNESSEE REGULATORY AUTHORITY STAFF TO MOTION TO COMPEL

Pursuant to the Hearing Officer's August 29, 2002 *Order Scheduling Discovery, Response and Oral Argument Relative to Motions for Summary Judgment*, the Tennessee Regulatory Authority Staff participating as a party in this matter (the "Staff") hereby respectfully submits its response to *United Cities Gas Company's Motion to Compel Further Response by the TRA Staff to United Cities Gas Company's First Data Requests* (the "*Motion to Compel*"). In its *Motion to Compel*, United Cities requests that the Hearing Officer compel the Staff to make further responses to Requests No. 4 and No. 6 in its *First Data Request from United Cities Gas Company to the Staff of the Tennessee Regulatory Authority*.

Interrogatory No. 4 *The Motion to Compel* states:

> With respect to Request No. 4, the staff has limited its response to tariffs that involved a "plan year." It was not the intent of United Cities for the staff to narrowly limit its response to only those tariffs which exclusively involve a "plan year." Accordingly, United Cities is requesting that the staff further respond to Request No. 4 and broaden its response to include any adjustments to tariff rates and/or tariff provisions

> for any utility regulated by the TRA where those adjustments are made prior to final approval of an audit by the staff of such utility.[1]

If Staff's answer to this interrogatory in its September 6, 2002 *Response to First Data Request Filed by United Cities Gas Company* was narrower than United Cities would have liked, this was not because the Staff was attempting to evade the interrogatory or withhold relevant information. Rather, the Staff was attempting to interpret the interrogatory as it was written in a meaningful manner. United Cities' interrogatory specifically refers to audits, plan years, and approval by the Authority and it is reasonable to assume that this combination was a key component of the interrogatory.

Nevertheless, the Staff will attempt to elaborate on its answer. The Authority's Telecommunications Division regulates those telecommunications companies under the Authority's jurisdiction. The Energy and Water Division regulates those gas, electric, water, and wastewater companies under the Authority's jurisdiction. All of the regulated companies have tariffs filed with the Authority. Only the Energy and Water Division performs audits of the companies it regulates under a system where the audit covers a particular period of time set forth in a tariff, as for example in the tariff section at issue in this case. The Energy and Water Division has not experienced a situation where a tariff provision related to an audit mechanism established as part of that tariff section has been changed during the corresponding audit process or before Authority approval of the relevant audit. In other words, the answer to the interrogatory is that there are no such instances. Because the Staff has provided a complete answer to this interrogatory, the Hearing Officer should deny United Cities' request that the Hearing Officer compel further response to this interrogatory.

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[1] *Motion to Compel*, September 24, 2002, p. 1.

Interrogatory/Request for Production No. 6 In its *Response*, the Staff stated that it was withholding any documents that are responsive to this interrogatory/request for production on the grounds that these documents are protected by the attorney-client privilege and the work product doctrine. In its *Motion to Compel*, United Cities states that the Staff "should be compelled to provide the responsive documents."[2] United Cities further states that "there is no attorney-client privilege and/or work product doctrine applicable to communications between the TRA and the Attorney General's office."[3]

The Tennessee Rules of Civil Procedure explicitly recognize the attorney-client privilege. Tenn. R. Civ. P. 26.02(1) provides, in part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." The attorney-client privilege is the best-established of the evidentiary privileges, and it is recognized by the Tennessee courts.[4]

The Tennessee Rules of Civil Procedure also explicitly recognize the work product doctrine. Tenn. R. Civ. P. 26.02(3) provides, in part:

> Subject to the provision of subdivision (4) of this rule, a party may obtain discovery of documents and things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[5]

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[2] *Id.*
[3] *Id.*
[4] *See Boyd v. Comdata Network Inc.*, 2002 WL 772803 (Tenn. App. April 30, 2002), at *4-6.
[5] *See id.*

Both Federal and State courts, including Tennessee courts, have held that the attorney-client privilege and attorney work product doctrine apply to communications between parties having a common interest in litigation; this extension of the attorney-client privilege and attorney work product doctrine is known as the "common interest" privilege.[6]

Because the Staff and the Consumer Advocate have a common interest in this proceeding, opposition to United Cities' proposed application of its PBR tariff, communications between the Staff and the Consumer Advocate in relation to this case are privileged communications and not subject to discovery. The Hearing Officer should, therefore, deny United Cities' *Motion to Compel* as to this interrogatory/request for production.

This is a sound result given the policy behind both the attorney-client privilege and work product doctrine. Members of the Staff and the Consumer Advocate have consulted with one another with an expectation of confidentiality as strong as that held by the separate offices with regard to internal communications. Requiring disclosure of these inter-office communications would have an unquestionable chilling effect upon similar communications in this case and future cases before the Authority. Fear of disclosure would seriously diminish prospects for effective presentation of evidence and for settlement negotiations in Authority contested cases, whether the parties involved are

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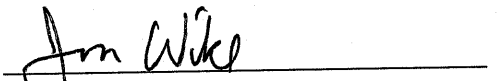
[6] *See id. See also Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. 572, 576-580 (S.D.N.Y. 1960); *Visual Scene, Inc. v. Pilkington Brothers, PLC*, 508 So.2d 437, 440-443 (Fla. App. 1987).

In its motion to compel addressed to the Consumer Advocate, United Cities states that the Staff and the Consumer Advocate have not produced a joint defense agreement, implying that such an agreement is necessary to extend the work product doctrine to communications between separate parties. *See United Cities Gas Company's Motion to Compel Further Response by the Office of the Attorney General Consumer Advocate and Protection Division to the First Data Requests from United Cities Gas Company*, September 24, 2002, pp. 3-4. Neither the Tennessee Rules of Civil Procedure nor case law requires such an agreement.

the Authority Staff, the Consumer Advocate, or one or more of the regulated utility companies.[7]

Respectfully submitted,



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[7] United Cities has made no attempt to show that it "has substantial need of the materials in the preparation of the case," as required by Tenn. R. Civ. P. 26.02(3). Further, Staff questions whether the documents United Cities seeks are relevant to the issues in this case. The two issues in this case are stated in the *Issues List for Authority Staff Participating as a Party*, filed on May 7, 2002. To the extent that United Cities' interrogatory/request for production seeks documents reflecting settlement discussions between the Staff and the Consumer Advocate, those discussions are irrelevant to the resolution of the two issues. To the extent that the interrogatory/request for production seeks documents reflecting preparation for a hearing, United Cities' request is nothing more than a bald attempt to discover the opposing parties' thoughts and theories. This is exactly the kind of discovery abuse the work product doctrine is intended to discourage. *See Hickman v. Taylor*, 329 U.S. 495, 509-511 (1947).

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2002, true and accurate copies of the foregoing were served by facsimile to:

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