

Docket No. 01-00704: *Audit of United Cities Gas Company's Incentive Plan Account (IPA) for the Period of April 1, 2000, Through March 31, 2001*

Motion of Director Ron Jones

In the *Initial Order of Hearing Officer on the Merits* (“Initial Order”), the Hearing Officer concluded that “the *Compliance Audit Report of United Cities Gas Company's Incentive Plan Account* should be approved.”¹ Atmos listed seven claims in its October 19, 2006, motion for review of the Initial Order. Claims five through seven specifically address the Hearing Officer’s conclusion with regard to the Audit Report. The claims are as follows:

5. The Hearing Officer acted arbitrarily and capriciously in disregarding the uncontradicted evidence demonstrating that the sharing of transportation savings is within the scope and intent of the original PBR plan.
6. The Hearing Officer's disallowance of the transportation savings is precluded by both the plain language of the original PBR tariff and the doctrine of estoppel.
7. The Hearing Officer's decision violates Atmos' rights to due process and equal protection by refusing to follow the TRA's policy and practice that gas companies which notify the TRA of their intentions with regard to incentive plans, and rely in good faith on the tacit approval they receive in response, should not be penalized.

With respect to these three claims the Hearing Officer made multiple findings and conclusions. First, the Hearing Officer concluded that neither the *Final Order on Phase Two* nor the PBR mechanism tariff captures negotiated transportation discounts. In relation thereto, yet going a step further, the Hearing Officer concluded that the absence of similar specificity regarding transportation discounts to that provided for gas commodity costs and capacity release and the absence of a methodology or benchmarks indicate a lack of intent to include transportation discounts in the PBR mechanism. The Hearing Officer also rejected the argument that the

¹ *Initial Order of Hearing Officer on the Merits*, p. 36 (March 14, 2005).

transportation discounts are captured in the current PBR mechanism through the application of the transportation cost adjuster in the Gas Cost Commodity mechanism.²

Second, the Hearing Officer rejected Atmos's contention that estoppel should apply to prevent sharing in the audit period covered in Docket No. 01-00704. The Hearing Officer concluded that there was "no evidence of any affirmative action on the part of TRA Staff."³ Moreover, as explained by the Hearing Officer, no action of the TRA Staff could "have induced the Company to act with regard to the negotiated transportation discounts, since the contracts were executed before [Atmos] had contact with the TRA Staff."⁴

Third, the Hearing Officer concluded that the findings in the IPA Audit Report are not barred by Audit Staff's failure to object to the March 1, 2001 and May 31, 2001 quarterly reports within 180 days.⁵ The Hearing Officer concluded that the tariff language when read in conjunction with the *Final Order on Phase Two* requires written objections within 180 days of the annual report. Additionally, the Hearing Officer reasoned that the interpretation offered by Atmos would result in a burden too onerous for the Authority to have approved.⁶

Fourth, with regard to claim 7, the Hearing Officer determined in the April 18, 2006, *Order Denying Motion for Reconsideration* that she had not found in the initial order that there was an established policy; therefore, Atmos's argument is without merit. The Hearing Officer further determined that each case must be evaluated on its own particular circumstances and evidence.⁷

² *Id.* at 32-33.

³ *Id.* at 35.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 35-36.

⁷ *Order Denying Motion for Reconsideration*, 4 (April 18, 2006).

Having reviewed the Hearing Officer's orders and the record in this matter, it is my opinion that the Hearing Officer correctly concluded that the *Compliance Audit Report of United Cities Gas Company's Incentive Plan Account* should be approved. While not adopting each and every finding and conclusion of the Hearing Officer, I have determined that the final determination is proper and should be affirmed. With regard to the *Final Order on Phase Two* and the current PBR tariff, in my opinion, the tariff in effect at the time the Company filed its August 7, 2001, IPA filing did not include a mechanism by which the Authority or the Company could calculate savings from negotiated transportation contracts. I find that it is inappropriate to craft a methodology for calculating the amount of such savings in the course of an audit. Additionally, I conclude, as did the Hearing Officer, that estoppel is not applicable to the facts of this case. Atmos did not establish an affirmative action by the TRA Staff or that Atmos acted to its detriment as a result of the meeting with the TRA Staff. The record established that Atmos entered into the contracts resulting in the transportation savings prior to its meeting with TRA Staff and based on Atmos' own reading of the PBR mechanism.⁸ Similarly, I agree with the determinations regarding the treatment of dockets on a case-by-case basis and the interpretation of the language regarding the 180-day objection requirement.

I now turn to the second and fourth claims listed in Atmos' brief on review of the Initial Order. Specifically, Atmos' second claim states: "The Hearing Officer's Initial Order, issued 511 days after the hearing, is null and void due to failure to comply with the requirement in Tenn. Code Ann. § 4-5-314(g) that written orders be issued within 90 days of the hearing."⁹ Generally, the case law is favorable to agencies – the Tennessee Supreme Courts having held

⁸ Transcript of Proceedings, vol. I, pp. 13-14 (Hearing Oct. 19, 2004) (cross-examination of Mr. John Hack).

⁹ *Atmos Energy Corporation's Brief on Review of Initial Order of Hearing Officer on the Merits and Request for Oral Argument*, p. 1 (Oct. 19, 2006).

that the requirement of section 4-5-314 is directory, not mandatory.¹⁰ However, there is also language in the case law suggesting that corrective action could be required in the event that a party is prejudiced as a result of a delay beyond the 90 day limit.¹¹ Here, the Initial Order issued long after the 90-day period expired, and Atmos alleges that the delay deprived Atmos of any opportunity to share in the transportation savings achieved during the 14 months.¹²

The fourth claim asserted by Atmos states: “The Hearing Officer acted arbitrarily and capriciously in unreasonably disregarding uncontradicted and expert testimony demonstrating that the TIF tariff Atmos proposed and Staff endorsed is just and reasonable.”¹³ Atmos asserts that had there been questions of its witnesses, it would have offered additional proof on the topics of the maximum FERC rates as benchmarks and the sharing percentages.¹⁴

Taking into consideration the delay of the Initial Order and the suggestion of Atmos that it has further proof available to support its position on the issues of sharing percentages and the use of the maximum FERC rates as benchmarks, it is my opinion that it would be appropriate and prudent to vacate the findings in the Initial Order with regard to the proposed TIF tariff filing. In my opinion, the panel should rehear the issues related to the tariff and make a final determination with regard to the approval or disapproval of the tariff. While the current record will remain part of the proceeding, parties should be permitted to submit supplemental evidence in support of or in opposition to the tariff. Additionally, it is apparent from a review of the procedural history of this docket that the application of the retroactive ratemaking doctrine has

¹⁰ *Garrett v. Department of Safety*, 717 S.W.2d 20, 2901 (1986).

¹¹ *Id.*; *Daley v. University of Tenn. at Memphis*, 880 S.W.2d 693, 695 (Tenn. Ct. App. 1994); *Murray v. Wood*, 1987 WL 7966, *4 (Tenn. Ct. App. Mar. 18, 1997).

¹² *Atmos Energy Corporation’s Brief on Review of Initial Order of Hearing Officer on the Merits and Request for Oral Argument*, pp. 11-12 (Oct. 19, 2006).

¹³ *Id.* at 4.

¹⁴ Transcript of Proceedings, pp. 42-43, 100 (Mar. 26, 2007).

been a significant hurdle to the resolution of the issues in this docket and that questions remain outstanding. Therefore, I find that it would be helpful for the parties to brief the issue of the applicability of the doctrine of retroactive ratemaking to this docket, specifically addressing the effect of Atmos not making IPA filings since the August 7, 2001, filing and the Authority not conducting the related audits.

The remaining claims raised in Atmos' brief are claims 1 and 3. These claims are stated by Atmos as follows:

1. By operation of law, the TIF tariff Atmos proposed in Docket No. 02-00850 became effective on June 2003, when the last TRA order suspending the tariff expired.
....
3. The Hearing Officer's denial of the joint request by Atmos and TRA Staff to allow the Company to withdraw its objections to the 2000-2001 audit at issue in Docket No. 01-00704 is arbitrary and capricious, and deprived Atmos of due process by forcing the Company to litigate objections it wished to concede.¹⁵

Having reviewed the Hearing Officer's findings and conclusions with regard to Atmos' claims 1 and 3,¹⁶ I find that the Hearing Officer correctly determined that the proposed TIF tariff is not in effect and that the settlement agreement was properly denied in the *Order Granting in Part and Denying in Part Consumer Advocate's Renewed Motion to Summarily Deny Motion for Summary Judgment and Denying Motion to Approve Settlement Agreement* issued on August 12, 2004. Therefore, I conclude that the Hearing Officer should be affirmed with regard to these claims.

¹⁵ *Atmos Energy Corporation's Brief on Review of Initial Order of Hearing Officer on the Merits and Request for Oral Argument*, p. 1 (Oct. 19, 2006).

¹⁶ *Order Denying Motion for Reconsideration*, pp. 3-4 (April 16, 2006).

Based on these comments, I move that the panel:

1. affirm the Hearing Officer's findings in the Initial Order that:
 - a. the *Compliance Audit Report of United Cities Gas Company's Incentive Plan Account* be approved,
 - b. the proposed TIF tariff is not in effect; and
 - c. the settlement agreement was properly denied;
2. vacate the remaining findings of the Initial Order related to the proposed TIF tariff and rehear the issues related to the TIF tariff;
3. permit the parties to submit supplemental evidence regarding the proposed TIF tariff and to brief the applicability of the retroactive ratemaking prohibition to the effective date of the proposed TIF tariff; and
4. appoint a hearing officer solely for the purpose of preparing this matter for hearing by the panel, including setting a status conference, during which a list of remaining issues will be compiled and a procedural schedule will be established, and setting a hearing before the panel by May 31, 2008.