

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

May 13, 2008

IN RE:)	
)	
UNITED CITIES GAS COMPANY, a Division of)	DOCKET NO.
ATMOS ENERGY CORPORATION)	01-00704
INCENTIVE PLAN ACCOUNT (IPA) AUDIT)	
)	
PETITION OF UNITED CITIES GAS COMPANY)	DOCKET NO.
TO AMEND THE PERFORMANCE BASED)	02-00850
RATEMAKING MECHANISM RIDER TO ITS TARIFF)	

ORDER AFFIRMING, IN PART, AND VACATING, IN PART, HEARING OFFICER'S
INITIAL ORDER

This matter came before Director Tre Hargett, Director Sara Kyle, and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on April 21, 2008 for consideration of *Atmos Energy Corporation's Motion for TRA Review of Hearing Officer's Order* ("Motion for TRA Review").

BACKGROUND

This matter has a complex and lengthy history which is detailed thoroughly in the *Initial Order of the Hearing Officer on the Merits* ("Initial Order").¹ The issue currently before the Authority is Atmos' request to review the Hearing Officer's *Initial Order*.

¹ *Initial Order*, pp. 2-19 (March 14, 2006).

On May 3, 2006, Atmos filed a *Motion for TRA Review* seeking a reversal of the *Initial Order* entered by the Hearing Officer in this matter on March 14, 2006. Initial briefs and reply briefs were filed by the parties on October 19, 2006 and November 9, 2006, respectively. The Authority heard oral argument from the parties during the March 26, 2007 Authority Conference.

POSITION OF THE PARTIES

In its initial brief filed October 19, 2006, the Company set out seven reasons as the basis for its request that the Authority reject the Hearing Officer's findings in the Initial Order. The joint reply brief filed by the Consumer Advocate and TRA Staff on November 9, 2006 offered arguments to rebut each of the seven issues. The parties' respective positions on each of the seven issues raised by the Company are set out briefly below.

1. By operation of law the TIF tariff Atmos proposed in Docket No. 02-00850 became effective in June 2003, when the last TRA order suspending the tariff expired.

Company Position: TRA suspended the effective date of Atmos' TIF tariff on three separate occasions with the last suspension ending June 5, 2003. By operation of law, the TIF tariff became effective June 6, 2003.²

Consumer Advocate/TRA Staff Position: (1) Atmos filed its petition to amend its tariff on August 9, 2002 as an alternative to the relief it was seeking in contesting the PBR audit findings. (2) Atmos failed to plead this issue at the hearing and it did not comply with the TRA rule which sets out the procedure in the event a petitioner wishes to present new evidence in a motion to reconsider. Thus, Atmos has waived the issue. (3) Atmos has made previous representations to the TRA that the tariff is not in effect.³

² *Atmos Energy Corporation's Motion for TRA Review of Hearing Officer's Order*, pp. 10-11 (October 19, 2006) (hereinafter "*Atmos Brief*").

³ *Joint Reply Brief of the Consumer Advocate and the TRA Staff in Opposition to the Request of Atmos Energy Corporation to Review the Hearing Officer's Order*, pp. 3-6 (November 9, 2006) (hereinafter "*Joint Reply*").

2. 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 initial orders be issued within 90 days of the hearing.

Company Position: Atmos construes case law on this issue as providing that if a party can demonstrate prejudice due to the delay in entry of an order beyond the statutory timeframe, then the order shall be found to be null and void. Atmos argues that it has been economically prejudiced in that it has been denied the opportunity to share in the transportation savings the Company achieved during the 14 months it took for the initial order to be issued. Over one million dollars (\$1,000,000) could have been potentially realized by the Company during this time period according to Atmos.⁴

Consumer Advocate/TRA Staff Position: These parties construe the pertinent case law on this issue to mean that the general rule is that the 90 day deadline in the statute is directory and not mandatory. Further, Atmos has not demonstrated real prejudice. Any showing of prejudice would have to include providing new evidence that would support the tariff. If the Authority reverses the decision based on prejudice to Atmos, consumers will have been prejudiced because they were denied the opportunity to challenge the new evidence.⁵

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.

Company Position: The Company recites some of the procedural history of the case as the basis for this issue.⁶

Consumer Advocate/TRA Staff Position: There is no legal authority cited by the Company which supports this issue. The Hearing Officer was correct in rejecting the proposed settlement since one party (the Consumer Advocate) did not agree on the settlement agreement.⁷

⁴ *Atmos Brief*, pp. 11-12.

⁵ *Joint Reply*, pp. 6-8.

⁶ *Atmos Brief*, pp. 13-14.

4. 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.
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.

Company Position: Atmos presented the uncontradicted expert testimony of Frank Creamer who both advised on the creation of the original PBR plan as well as authored the proposed TIF tariff. TRA staff presented testimony asserting that it agreed with his conclusions.⁸

On the estoppel issue, Atmos maintains that as a result of a meeting it had with TRA staff on January 31, 2001 regarding its intention to include its newly negotiated discounted transportation contracts in the avoided costs provision of the PBR plan, that inclusion was, at a minimum, tacitly approved by the TRA Staff. Further, Audit Staff did not object to two quarterly audit reports filed after the January 31 meeting in which the transportation savings were included. The Company relied on this tacit approval to its detriment.⁹

Consumer Advocate/TRA Staff Position: Mr. Creamer's testimony does not constitute credible evidence on the issues of whether the maximum transportation rate set by FERC can serve as a market proxy or whether the sharing of transportation savings is within the scope and intent of the original PBR plan. The Consumer Advocate presented the relevant expert testimony of Dan McCormac and Dr. Steve Brown on these issues.¹⁰

On the estoppel issue, the Consumer Advocate/TRA Staff argue that as a general rule estoppel can not be raised against the state. They further maintain that the TRA's perceived tacit

⁷ *Joint Reply*, pp. 9-11.

⁸ *Atmos Brief*, pp. 14-17.

⁹ *Id.*, pp. 19-20.

¹⁰ *Joint Reply*, pp. 12-31.

approval is not sufficient to be considered as an affirmative action that induced the Company to act to its detriment.¹¹

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.

Company Position: In recent cases involving Nashville Gas and Chattanooga Gas, the TRA did not penalize the companies for past activity that was found to be inconsistent with their PBR plans. Atmos' due process and equal protection rights are violated by being treated differently.¹²

Consumer Advocate/TRA Staff Position: The factual differences in the Nashville Gas and Chattanooga cases negate any argument regarding an equal protection violation. Atmos is not "similarly situated" as is required for an equal protection violation to be found. The Company provides no legal authority for its due process claim.¹³

FINDINGS AND CONCLUSIONS

In reviewing the Hearing Officer's *Initial Order* and the entire record in this matter, the panel made findings relating to each of the seven claims raised in the *Atmos Brief*. The panel first considered the issues relating to the audit report.

In the *Initial Order*, the Hearing Officer concluded that "the *Compliance Audit Report of United Cities Gas Company's Incentive Plan Account* should be approved."¹⁴ Claims five through seven in the *Atmos Brief* 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.

¹¹ *Id.*, pp. 32-37.

¹² *Atmos Brief*, pp. 20-23.

¹³ *Joint Reply*, pp. 38-40.

¹⁴ *Initial Order*, p. 36.

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 transportation discounts are captured in the current PBR mechanism through the application of the transportation cost adjuster in the Gas Cost Commodity mechanism.¹⁵

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."¹⁶ 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."¹⁷

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

¹⁵ *Id.* at 32-33.

¹⁶ *Id.* at 35.

¹⁷ *Id.*

within 180 days.¹⁸ 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.¹⁹

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.²⁰

The panel found 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, the panel 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, the panel found that 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. The panel found that it is inappropriate to craft a methodology for calculating the amount of such savings in the course of an audit. Additionally, the panel concluded, 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

¹⁸ *Id.*

¹⁹ *Id.* at 35-36.

²⁰ *Order Denying Motion for Reconsideration*, 4 (April 18, 2006).

the PBR mechanism. Similarly, the panel agreed 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.

The panel next considered 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." Generally, the case law is favorable to agencies – the Tennessee Supreme Courts having held that the requirement of section 4-5-314 is directory, not mandatory.²¹ 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.²² 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.

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." 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.

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, the panel found that it would be appropriate and prudent to vacate the findings in the *Initial Order* with regard to the proposed TIF tariff filing.

²¹ *Garrett v. Department of Safety*, 717 S.W.2d 20, 2901 (1986).

²² *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).

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 been a significant hurdle to the resolution of the issues in this docket and that questions remain outstanding. Therefore, the panel found 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. Having reviewed the Hearing Officer's findings and conclusions with regard to Atmos' claims 1 and 3, the panel found 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, the panel concluded that the Hearing Officer's decisions should be affirmed with regard to these claims.

In light of these findings, the panel voted unanimously to:

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.

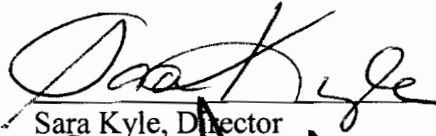
IT IS THEREFORE ORDERED THAT:

1. The Hearing Officer's findings in the *Initial Order* are affirmed 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. The remaining findings of the *Initial Order* related to the proposed TIF tariff are vacated, and the panel shall rehear the issues related to the TIF tariff.
3. The parties shall be permitted 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

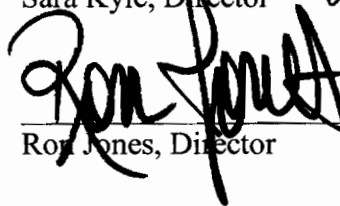
4. A hearing officer is appointed solely for the purpose of preparing this matter for hearing by the panel, including setting a status conference, during which a list of remaining issues will be compiled and a procedural schedule will be established, and setting a hearing before the panel by May 31, 2008.



Tre Hargett, Director



Sara Kyle, Director



Ron Jones, Director