TENNESSEE REGULATORY AUTHORITY

460 James Robertson Parkway
Nashville, Tennessee 37243-0505

February 22, 2012

Sharla Dillon, Docket Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

RE: *In re: Audit of Atmos Energy Corporation's Incentive Plan Account (IPA) for Period of April 1, 2004 through March 31, 2007,* TRA Docket No. 11-00195

Dear Ms. Dillon:

Enclosed for filing in the above referenced docket is the *Brief of TRA Audit Staff Asserting that Atmos' PBRM Tariff/Capacity Release Incentive Mechanism Does Not Include Sharing of Fees from Asset Management Contracts with Third-Party Asset Managers.* In addition to the electronic copy that we filed earlier today, please find one (1) original and four (4) additional copies for the use and convenience of the Authority.

Sincerely,

Kelly Cashman Grams

Kelly Cashman Grams
Deputy General Counsel
Counsel for TRA Staff as a Party

Enclosures

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
AUDIT OF ATMOS ENERGY	)	**DOCKET NO.**
CORPORATION'S INCENTIVE PLAN	)	**11-00195**
ACCOUNT FOR PERIOD OF APRIL 1, 2004	)	
THROUGH MARCH 31, 2007	)	

BRIEF OF TRA STAFF
ASSERTING THAT ATMOS' PBRM TARIFF/CAPACITY RELEASE INCENTIVE MECHANISM DOES NOT INCLUDE SHARING OF FEES FROM ASSET MANAGEMENT CONTRACTS WITH THIRD-PARTY ASSET MANAGERS

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In accordance with the *Stipulation Regarding Briefing Schedule,* filed on January 12, 2012 by Atmos Energy Corporation ("Atmos"), the Audit Staff of the Utilities Division of the Tennessee Regulatory Authority ("TRA Staff"), and the Office of the Attorney General Consumer Advocate and Protection Division ("Consumer Advocate"), the TRA Staff respectfully submits its Brief along with the accompanying Affidavit of Pat Murphy, Deputy Chief of the Utilities Division (attached as **Exhibit A**), on the issue of whether fees from asset management agreements entered into by Atmos during periods prior to 2011, beginning with the audit period of April 1, 2004 through March 31, 2007 at issue in this docket, are eligible for sharing under the terms of the Capacity Release Incentive Mechanism of Atmos' Performance-Based Ratemaking Mechanism ("PBRM") Rider in Atmos' Tariff (attached as **Exhibit B**).[1]

For the reasons that follow, the TRA Staff respectfully asserts that under the terms of the PBRM tariff, prior to its 2011 revision,[2] fees received by Atmos from asset management contracts, wherein for an upfront lump-sum payment the Company sold its rights to sell and manage its excess transportation and storage pipeline capacity, are **not** eligible for sharing and, thus, should not be included in calculations made under the Capacity Release Incentive Mechanism.

I. BACKGROUND & HISTORY OF ATMOS' PBRM TARIFF

The early history of the adoption of Atmos' PBRM Tariff has been recounted both in part, and in full, within various Authority orders entered in several dockets over the years, including Docket Nos. 95-01134, 97-01364, 00-00844, and 01-00704, and also summarized in audit reports filed by the TRA Staff in Docket Nos. 00-00459, 01-00704, 05-00253, and in the

[1] See Atmos Tariff Sheet Nos. 45.1 and 45.2 (effective October 4, 2002), and 45.3 through 45.7 (effective May 5, 2007).

[2] On August 19, 2011, Atmos filed in Docket No. 11-00034 its 3rd Revised Tariff Sheet No. 45.1, which incorporates language clarifying that asset management fees are to be included in its PBRM tariff. During a regularly scheduled Authority Conference held on January 9, 2012, the Authority approved the revised tariff, effective April 1, 2012. *See* Transcript of Authority Conference, p. 55 (January 9, 2012).

instant docket. Nevertheless, for the sake of convenience and a complete record, although not exhaustive, a thorough discussion of the PBRM from its early history to the current docket is provided herein.

A. Atmos' PBRM Proposal & Experimental Period (Docket Nos. 95-01134 & 97-01364)

On January 20, 1995, United Cities Gas Company, which is now Atmos,[3] filed an application with the Tennessee Public Service Commission, now the Authority,[4] in which it proposed that the Authority review, on an ongoing basis - instead of by the traditional after-the-fact prudency review, as it had previously done - the Company's performance in managing and acquiring gas supplies.[5] Atmos' PBRM proposal was designed to incentivize the Company to perform better than ('outperform') the market by allowing it to share, with its customers, in the net financial benefits generated as a result of the Company's efforts and activities. The incentive plan acts both positively, by rewarding extraordinary efforts and results, and negatively, by penalizing the Company for its failure to perform in accordance with certain pre-defined benchmarks. Further, Atmos contended that under its PBRM, the Company would become more accountable to customers for its management and acquisition of gas supplies.[6]

On May 12, 1995, the Authority approved the proposed incentive plan in principal, and made certain modifications, including, among others, the requirement that an independent

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[3] United Cities Gas Company was structured as a division of Atmos Energy Company. On September 4, 2002, the Company made the appropriate filings with the Authority officially changing its name from United Cities Gas Company to Atmos Energy Corporation. *See* Tariff Filing No. 2002-0967. *For the sake of consistency and to avoid confusion, despite that original filings and Orders may have been filed under or referred to the name United Cities Gas Company or "UCG," with the exception of footnotes, all references made throughout this Brief are and will be "Atmos" or the "Company."

[4] Upon dissolution of the Tennessee Public Service Commission, the Tennessee General Assembly created the Tennessee Regulatory Authority, effective July 1, 1996. *For the sake of consistency and to avoid confusion, despite that original filings and Orders may name or refer to the Tennessee Public Service Commission or "TPSC" as the acting agency, with the exception of footnotes, all references made throughout this Brief are and will be the "Authority" or "TRA."

[5] *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase One,* p. 2 (January 14, 1999).

[6] *Id.* at 2-3.

consultant be retained to review the PBRM and report to the TRA annually during the two-year experimental period.[7] Following completion of the first year of the experimental period, the Authority held a hearing to review the results. In an Order issued on May 3, 1996, the TRA made certain modifications to the mechanism in accordance with the recommendations made by the consultant, and approved the incentive plan to proceed for the second year period.[8] The Consumer Advocate appealed this decision to the Tennessee Court of Appeals. On March 5, 1997, the Court vacated the TRA's May 3, 1996 Order and remanded the case back to the Authority.[9]

On February 28, 1997, the consultant filed his second report reviewing the Company's performance during the second year of the experimental period, which included his opinion that the mechanism benefited customers, and recommendation that the PBRM be implemented permanently.[10] Following entry of the Court of Appeals' March 5, 1997 Order, Atmos filed a petition on March 31, 1997, requesting adoption of the consultant's reports and approval of the PBRM permanently.[11] Upon opposition by the Consumer Advocate, the Authority convened a contested case in Docket No. 97-01364, and bifurcated consideration of the issues into Phase One, to address those associated with the remand of the May 3, 1996 Order, and Phase Two, to address issues raised by Atmos' petition to implement a permanent incentive ratemaking mechanism.[12]

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[7] *Id.* at 3-4.
[8] *Id.* at 4-5.
[9] *Id.* at 6; *see also Tennessee Consumer Advocate v. Tennessee Regulatory Authority and United Cities Gas Company,* Court of Appeals, Middle District, No. 01A01-9606-BC-00286, p. 6 (March 5, 1997).
[10] *Id.* at 5.
[11] *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase Two,* p. 5 (August 16, 1999).
[12] *Id.*

Following extensive multi-day hearings concerning each Phase of the docket, the TRA issued a *Final Order on Phase One* and *Final Order on Phase Two* on January 14, 1999 and August 16, 1999, respectively.[13] In its *Final Order on Phase One,* the Authority ruled on a variety of threshold and other Phase One issues, including, affirming its statutory power to approve a performance based ratemaking mechanism that automatically rewards or penalizes the utility for its performance;[14] finding that Atmos' proposed incentive mechanism did not violate the TRA's Purchase Gas Adjustment ("PGA") Rule;[15] affirming that the burden to prove that any and all changes in rates are just and reasonable remains on the Atmos;[16] and, holding that the Authority's May 12, 1995 order instituted a just and reasonable rate,[17] did not constitute retroactive ratemaking, and was not invalidated by the Court of Appeals' remand of the May 3, 1996 order.[18]

In addition, the Authority found the evidence sufficient to demonstrate an improvement in Atmos' gas purchasing performance to the benefit of its customers, and excluded the East-Tennessee-NORA Gas Pipeline contract ("NORA contract") from the plan's calculations because it predated the existence of the incentive plan and did not require a change in behavior or effort, nor pose additional risk to the Company.[19] Further, the TRA instituted a monthly,

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[13] While the Orders of the Authority were entered in the docket file on the dates indicated, the Authority rendered its decision on Phase One during a regularly scheduled Authority Conference held on August 18, 1998, and its decision on Phase Two on February 16, 1999.

[14] *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase One,* p. 9-11 (January 14, 1999).

[15] *Id.* at 12-14; The PGA Rule, Tenn. R. & Regs. Ch. 1220-4-7, *et seq.,* permits a gas company to recover, in a timely manner, the total cost of gas purchased for delivery to its customers and ensures that a company does not over-collect or under-collect gas costs from its customers.

[16] *Id.* at 15-16.

[17] *Id.*

[18] *Id.*

[19] The NORA contract was a seven year gas purchasing contract negotiated by United Cities in 1993 prior to implementing its experimental incentive mechanism. While the TRA excluded this contract after the first year of the incentive plan, it allowed for the possibility of its future inclusion should the contract be renewed or renegotiated. *Id.* at 26-27.

rather than transactional, method of calculating gains and losses to avoid improper "windfall" gains to the Company,[20] and adjusted the "deadband" (the range within which no savings or losses are calculated) that surrounds the benchmark price of gas against which the Company's performance is measured.[21]

In its *Final Order on Phase Two,* the Authority authorized Atmos to operate permanently under the PBRM, as modified by the Authority, beginning April 1, 1999, and determined that the PBRM should continue on an annual basis until terminated by the Company upon notice to the Authority of not less than 90 days prior to the end of any plan year, or the plan is either modified, amended, or terminated by the Authority.[22] In making this determination the Authority considered, and rejected, setting an automatic review period based on time or special trigger events, such as "a fundamental change in the utility's marketplace including the potential of unbundling."[23]

Notably, the TRA, acknowledging certain concerns that had arisen as a result of the Company's failure to notify the TRA, in violation of the PGA Rules,[24] of a gas sales agreement, and subsequent purchases, that had been executed with its affiliate company, Woodward Marketing, LLC ("Woodward"), and the potential for abuse of the incentive mechanism in the event that affiliate transactions were permitted to go unmonitored, ordered the establishment of mandatory affiliate transaction guidelines, the *Tennessee Guidelines for United Cities Gas*

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[20] *Id.* at 26-27, 29.
[21] *Id.* at 26-27.
[22] *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase Two,* p. 21-22 (August 16, 1999).
[23] *Id.*
[24] PGA Rule 1220-4-7-.03(5)(iii) empowers the TRA to review and determine the prudency of payments and purchases made to or from an affiliate.

Company's [Atmos] *Affiliate Transactions ("Affiliate Rules").*[25] In addition, the Authority ordered that before any affiliate transactions would be considered for inclusion in the computation of savings or losses under the Company's PBRM, those specific transactions must be documented, and determined, during the annual audit of the Company's Incentive Plan Account ("IPA"), to be in compliance with the *Affiliate Rules.*[26]

Further, the TRA ruled in its *Final Order on Phase Two* that adjustment of the deadband should occur every three audit years to ensure that the Company continues to use its best efforts to outpace the arithmetic mean of its historical performance;[27] increased the maximum earnings cap to encourage the Company to aggressively assume additional risk in the purchasing of natural gas and in managing its firm transportation capacity on upstream pipelines;[28] and simplified the incentive plan by collapsing the original five incentive mechanisms into the two components that exclusively contributed to savings: Gas Procurement and Capacity Management.[29]

Throughout the experimental period, Atmos itself performed the efforts and activities required to sell and release unutilized pipeline transportation and storage capacity, and did not obtain assistance in this task or transfer such activities to another company. As the gains attributable to capacity release accounted for only 35% of the total gains realized during the first year, and only 30% of the gains during the first eight months of the second year of the

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[25] *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase Two,* p. 10-21 (August 16, 1999).
[26] *Id.* at 21.
[27] *Id.* at 22-23.
[28] *Id.* at 23.
[29] *Id.* at 23-24.

experimental period, the TRA determined that it was not necessary to modify the Capacity Release Incentive Mechanism to provide additional incentive for the Company.[30]

B. Amendment to PBRM to Include NORA Contract (Docket No. 00-00844)

Relying on the Authority's *Final Order on Phase One* and language contained in Atmos' tariff (i.e., the *Affiliate Rules)*, on September 26, 2000, Atmos requested approval to include gas purchase transactions procured under its newly renegotiated NORA contract in its PBRM calculations.[31] Woodward Marketing LLC, was one of only two suppliers with capacity on the NORA/East Tennessee Gas Pipeline, and as an affiliate, the Company was required to conform to the *Affiliate Rules* that had been added to its tariff in the TRA's *Final Order on Phase Two.*[32] Noting that the purpose of the PBRM is "to motivate the Company to obtain the lowest possible price for its gas supply in order to maximize the rewards to be shared between the Company and its ratepayers," the TRA, after finding that it was negotiated in response to the PBRM and was in conformity with the *Affiliate Rules,* allowed the new NORA contract to be included in the sharing calculations.[33]

C. IPA Audit of Period April 1, 1999-March 31, 2000 (Docket No. 00-00459)

On June 2, 2000, Atmos filed with the Authority, for review and audit of the TRA Staff, its first full year of gas transactions and financial data, as required under its now permanent PBRM, for the period of April 1, 1999 to March 31, 2000.[34] The *Final Order on Phase Two* specifically required that the Company submit the following items to the TRA Staff for annual

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[30] *Id.* at 26.

[31] Upon expiration of its previous contract, United Cities executed a new NORA contract on April 19, 2000, to be effective November 1, 2000. *See In re: United Cities Gas Company's Petition Regarding Affiliated Transaction and Request for Permission to Include New Agreement Covering East Tennessee-NORA Delivery Point,* TRA Docket No. 00-00844, *Order Granting Permission to Include New Agreement Covering East Tennessee-NORA Delivery Point in Incentive Plan,* p. 2 (November 8, 2001).

[32] *Id.* at 3-4.

[33] *Id.* at 2-5 and 8-9.

[34] *See In re: United Cities Gas Company, a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) Audit,* TRA Docket No. 00-00459 (June 2, 2000).

review during the IPA audit: 1) the calculation of the Company's Reserve Margin to ensure that its level of contract demand is prudent; 2) details of the gas supply incentive and rewards program for its non-executive employees who are involved in implementing the incentive plan; and, 3) documentation of the Company's compliance with the *Affiliate Rules.*[35] Atmos complied with these requirements.

Upon review, TRA Staff's audit resulted in five findings totaling a net over-recovery of $30,946.[36] Three of the findings involved errors related to the Gas Procurement Incentive Mechanism, one finding involved the Capacity Management Incentive Mechanism, and the remaining finding was due to an erroneous interest calculation.[37] At this time, as it had during the experimental period, Atmos itself engaged in the efforts and activities necessary to sell and release unutilized pipeline transportation and storage capacity, and did not delegate this task to another company.[38] The Company agreed with all of the Staff's findings and took immediate steps to correct the errors that had been identified.[39] During a regularly scheduled Authority Conference held on January 23, 2001, the Authority unanimously approved and adopted the TRA Staff's Audit Report and findings therein.[40]

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[35] *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase Two* (August 16, 1999).
[36] *See In re: United Cities Gas Company, a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) Audit,* TRA Docket No. 00-00459, *Notice of Filing by Energy and Water Division of the Tennessee Regulatory Authority, Compliance Audit Report of United Cities Gas Company's Incentive Plan Account* (January 9, 2001).
[37] *Id.* at 6-13.
[38] Exhibit A, Affidavit of Pat Murphy ¶ 9 (February 22, 2012).
[39] The TRA Staff determined that the Company had correctly implemented the incentive plan except in its use of a transaction method of calculating gains and losses, which violated the Authority's directive in its *Final Order on Phase One* (Docket No. 97-001364) requiring calculation of the gas procurement savings on a monthly, rather than transactional, basis. *Id.*
[40] *See In re: United Cities Gas Company, a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) Audit,* TRA Docket No. 00-00459, *Order Adopting IPA Compliance Audit Report of Authority's Staff* (March 19, 2001).

D. IPA Audit of Period April 1, 2000-March 31, 2001 (Docket No. 01-00704)

On August 7, 2001, Atmos submitted its report of gas transactions and financial data for the period of April 1, 2000 through March 31, 2001, the second full year following permanent implementation of the PBRM, for the review and audit of the TRA Staff.[41] Upon completion of its audit, the TRA Staff issued its preliminary findings to Atmos on March 28, 2002, and received the Company's response to those findings on April 5, 2002.[42] Thereafter, on April 10, 2002, the TRA Staff filed its audit report, which contained six findings that totaled an over-collection of $580,742 from ratepayers.[43] The Company agreed with three of the six findings, including the one finding directly related to the Capacity Release Incentive Mechanism.[44] Just as in years past, Atmos continued to administer the release of unutilized pipeline transportation and storage pipeline capacity itself, without outsourcing such efforts to another company for an upfront payment. As such, there was no disagreement between the Company and TRA Staff as to the way in which the mechanism was to be calculated.

In its response to TRA Staff's audit finding #2, the Company vehemently disagreed with the TRA Staff's conclusion that Atmos' inclusion of transportation discounts in its calculations under the Gas Procurement Incentive Mechanism was an improper deviation from the terms of the incentive plan.[45] In its audit report and throughout the proceedings that ensued, the TRA Staff asserted consistently that, under the language of the PBRM tariff, Atmos was not entitled to regard as savings eligible for sharing under the incentive plan, the "avoided costs" that were

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[41] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704 (August 9, 2001).
[42] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Notice of Filing by Energy and Water Division of the Tennessee Regulatory Authority, Compliance Audit Report of United Cities Gas Company's Incentive Plan Account* (April 10, 2002).
[43] *Id.* at 6.
[44] *Id.* at 7-25.
[45] *Id.* at 11-14.

derived from negotiated discounts in transportation contracts. The TRA Staff asserted that the benchmark to be used under the Gas Procurement Incentive Mechanism of the PBRM tariff was clearly defined, and as that benchmark did not include - and in fact was *silent* as to - transportation discounts, a revision of the tariff was necessary before such discounts could be included within the calculation of shared savings.[46] The Consumer Advocate intervened in the docket and, agreeing that Atmos was not entitled to share in the savings generated from transportation discounts, took a position that supported and reinforced that of the TRA Staff.[47]

In response, Atmos contended that, although the discount transportation contracts did not exist when the PBRM tariff was created and were not specifically addressed therein, it was entitled to share in savings drawn from such contracts under the terms of the tariff.[48] The Company further asserted that, through its particular application of the transportation cost adjuster in the Gas Procurement Incentive Mechanism,[49] a benchmark could be created by which to measure the cost savings derived from the discount transportation contracts.[50] In addition, the Company asserted that, as a result of the incentives contained in the PBRM, it had undertaken extraordinary efforts to prepare for, research, and negotiate the discounted transportation

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[46] *Id.* at 10-11; *see also, In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Initial Order of Hearing Officer on the Merits,* pp. 6-12 and 30-31 (March 14, 2006).

[47] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Initial Order of Hearing Officer on the Merits,* pp. 26-30 (March 14, 2006).

[48] *Id* at 19-26.

[49] The transportation cost adjuster is applied to city gate purchases, whereby the Company buys local gas and avoids the full pipeline costs of transporting the gas from the Gulf of Mexico to Tennessee. *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Notice of Filing by Energy and Water Division of the Tennessee Regulatory Authority, Compliance Audit Report of United Cities Gas Company's Incentive Plan Account,* p. 11 (April 10, 2002).

[50] In Atmos' PBRM tariff, the Gas Procurement Incentive Mechanism designates that a certain level of savings associated with the Company's commodity cost of gas may be shared. The commodity cost of gas is compared to a benchmark price of gas, which is determined using the specific market indexes referenced in the tariff.

contracts.[51] The negotiation process was lengthy and difficult, and involved risk in that, should the negotiations have proven unsuccessful, the Company would have lost a return on its investment of the resources it had dedicated to pursuing the endeavor.[52] Atmos further contended that the TRA Staff's audit findings should be barred under the doctrine of estoppel because, before filing its annual report, it met with the TRA Staff and explained how it believed the transportation discounts could be treated under the PBRM. Thereafter, relying on the meeting, ultimately to its detriment, it booked as income the savings that resulted from the contracts.[53]

During the proceedings, the parties exchanged discovery, filed dispositive motions, and engaged in and eventually proposed a partial settlement of the issues. Nevertheless, neither the dispositive motions, nor the settlement agreement proved successful in resolving the case.[54] In the interim, Atmos filed, in Docket No. 02-00850, a petition to amend its PBRM tariff to incorporate a transportation index factor ("TIF") incentive mechanism for the treatment of transportation costs.[55] The TIF tariff appeared to respond to the concerns in dispute between the TRA Staff and Consumer Advocate and the Company, and was proposed to take effect with the plan year beginning April 1, 2001.[56] In light of the subject matter of the petition, the dockets were consolidated and the Hearing Officer's delegated jurisdiction extended to include the petition for tariff amendment.[57]

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[51] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Initial Order of Hearing Officer on the Merits,* pp. 24-25 (March 14, 2006).
[52] *Id. at* 21 and 24-25.
[53] *Id.* at 21-22.
[54] *Id.* at 15-18.
[55] *Id.* at 14-15.
[56] *Id.*
[57] *Id.* at 15.

Following a hearing on these matters, the Hearing Officer issued an *Initial Order of Hearing Officer on the Merits* on March 14, 2006.[58] In the Order, the Hearing Officer found that transportation discounts were not available or did not exist at the time the PBRM was approved, and therefore, the Authority could not and did not contemplate the market conditions necessary to consider an appropriate incentive mechanism for sharing savings resulting from transportation contracts.[59] The Hearing Officer further found that the omission in the tariff of a transportation costs section, absence of specificity as to a benchmark to be used in determining whether savings have been realized, and the lack of methodology with which to calculate any such savings, evidenced a lack of intent by the Authority to include these discounts in the PBRM tariff.[60]

In addition, the Hearing Officer held that transportation discounts were not captured under the language or terms of the PBRM.[61] The Company's calculation of the transportation discount savings using the transportation cost adjuster in the Gas Procurement Incentive Mechanism was inconsistent with the TRA's *Final Order on Phase Two* and the PBRM tariff itself.[62] Further, finding no evidence that any action of the TRA induced Atmos to act in reliance, then to its detriment, in negotiating the contracts, the Hearing Officer held that the audit findings were not barred under the doctrine of estoppel, which is generally disfavored, particularly as against the government, under Tennessee law.[63] Based on these findings, the Hearing Officer concluded:

> [T]hat the *Compliance Audit Report of United Cities Gas Company's Incentive Plan Account* should be approved. In addition, the Company should be directed

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[58] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Initial Order of Hearing Officer on the Merits* (March 14, 2006).
[59] *Id.* at 32.
[60] *Id.*
[61] *Id.* at 32-33.
[62] *Id.*
[63] *Id.* at 34-35.

> to file its quarterly and annual PBR reports in accordance with this Order so that audits of the PBR mechanism can be conducted for subsequent plan years.[64]

Next, as to Atmos' request to amend its PBRM tariff by adding a TIF mechanism for transportation contracts, the Hearing Officer found that the record in the docket was insufficient to support the percentage sharing split between the Company and ratepayers.[65] Due to the absence of documentation or market data to indicate how the sharing percentages were determined, support the proposed benchmark market proxy, demonstrate the element of risk to be incurred or to quantify cost savings and efficiencies from Company resources, the Hearing Officer concluded that the TIF tariff amendment should be denied without prejudice.[66] Thereafter, the Hearing Officer approved the TRA Staff audit report, denied the TIF tariff amendment, and ordered Atmos to file all outstanding PBRM reports, [67] which at that time would have been for plan years beginning April 2001, 2002, 2003, 2004, and 2005.

On March 29, 2006, Atmos filed with the Hearing Officer a motion for reconsideration of the *Initial Order of Hearing Officer on the Merits.* In its motion, Atmos raised objections to the Order on a variety of factual, procedural, and constitutional grounds. Notably, Atmos contended that its rights to due process and equal protection had been violated by the Hearing Officer's "failure to apply the TRA's 'established policy' regarding the disallowance of incentive plan items for gas companies."[68] Concerning this assertion, on reconsideration, the Hearing Officer held as follows:

> 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

[64] *Id.* at 36.
[65] *Id.* at 36-37.
[66] *Id.* at 37.
[67] *Id.* at 37-38.
[68] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Order Denying Motion for Reconsideration,* p. 2 (April 18, 2006).

> *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 estoppels 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 (emphasis added).***[69]

In addition, Atmos reiterated its contention that the sharing of transportation discounts is within the scope of the original PBRM, that the plain language of the PBRM precluded disallowance of transportation savings, and that the audit findings were barred under the doctrine of estoppel.[70] On these objections, the Hearing Officer found such issues had been addressed in the *Initial Order* and affirmed the findings, conclusions, and decisions on the merits as set forth therein, and denied the motion.[71]

On May 3, 2006, Atmos filed a motion for TRA review and sought reversal of the Hearing Officer's *Initial Order* of March 14, 2006. Following the submission of briefs and oral argument from the parties, the voting panel of Directors, during a regularly scheduled Authority Conference held on April 21, 2008, voted unanimously to affirm the Hearing Officer's findings as to approval of the TRA Staff's audit report, that the proposed TIF tariff was not in effect, and that the settlement agreement had been properly denied.[72] While not adopting each and every finding, the panel concluded that the following findings of the Hearing Officer were proper and should be affirmed:

> ***[T]hat the absence of similar specificity regarding transportation discounts*** to that provided for gas commodity costs and capacity release and the absence of a

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[69] *Id.* at 4.
[70] *Id.* at 2.
[71] *Id.* at 5.
[72] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Order Affirming, in Part, and Vacating, in Part, Hearing Officer's Initial Order* (May 13, 2008).

> 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. . . .[T]he Hearing Officer rejected Atmos' contention that estoppel should apply. . .[T]he Hearing Officer determined [in the order denying reconsideration] that she had not found in the initial order that there was an established policy; therefore, Atmos' argument is without merit. The Hearing Officer further determined that each case must be evaluated on its own particular circumstances and evidence *(emphasis added).*[73]

In addition, with regard to the *Final Order on Phase Two* and the PBR tariff, the panel found that,

> [T]he 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 Company could calculate savings from negotiated transportation contracts. . . . [and] that ***it is inappropriate to craft a methodology for calculating the amount of such savings in the course of an audit (emphasis added).***[74]

Unequivocally, the panel affirmed the determination that the PBRM tariff did not contain an incentive provision for sharing savings derived from transportation contracts, and explicitly rejected the implication that such a provision or methodology either could or should be crafted after the filing was made or during the course of an audit. At that time of the panel's determination, the Company's annual reports for plan years beginning April 2001, 2002, 2003, 2004, 2005, 2006, and 2007, were outstanding and, upon affirmation of the Hearing Officer's initial order, were required to be promptly filed by the Company.

Finally, the panel vacated the remaining findings on the TIF tariff, and allowed the parties the opportunity to file supplemental evidence, brief the issue of retroactive ratemaking, and appointed a hearing officer to prepare the issue concerning the TIF tariff for rehearing before

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[73] *Id.* at 6-7.
[74] *Id.* at 7.

the panel.[75] Nevertheless, all claims remaining were subsequently dismissed with prejudice by agreement of the parties.[76]

The dispute over the sharing of savings generated from discounted transportation contracts between TRA Staff, Consumer Advocate, and the Company, set in motion litigation that lasted more than six years and was not definitively resolved until 2008. In light of the past many communications between TRA Staff and Atmos, and as gleaned from its filings in other dockets, particularly 11-00137, TRA Staff anticipates a striking similarity will emerge in considering the current positions of the TRA Staff and Company when compared with the parties' positions and many of the countervailing arguments put forth by the Company in Docket No. 01-00704. Interestingly, many of the reasons advanced - *unsuccessfully* - by the Company in Docket No. 01-00704 may be recycled, and reiterated by the Company in this docket, in apparent hopes of justifying its present quest to retain a larger share of monies under the Capacity Release Incentive Mechanism.

E. Relevant Developments (Docket Nos. 05-00253, 05-00258 & 07-00225)

On September 15, 2005, Atmos filed, in Docket No. 05-00253, its Actual Cost Adjustment (ACA) report for the twelve months ending June 30, 2005.[77] Previously unknown to TRA Staff, Atmos had executed a contract, effective April 1, 2004, outsourcing the asset management and capacity release function to its affiliate company, Atmos Energy Marketing, LLC ("AEM"). As this was first audit in which fees derived from the asset management contract

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[75] *Id.* at 8-9.

[76] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Agreed Order of Dismissal with Prejudice* (August 26, 2008).

[77] Under the PGA Rules, the Company is required to file a report annually that reflects transactions in the Company's Deferred Gas Cost account. *PGA Rule 1220-4-7-.03(2).* The ACA is the difference between the revenues billed to customers by means of the gas charge adjustment (GCA) and the cost of gas invoiced to the Company by suppliers plus margin loss (if allowed by order of the TRA) as reflected in the Deferred Gas Cost account. The ACA then "trues-up" the difference between actual gas costs and the gas costs that are recovered from customers through a surcharge or refund. *See PGA Rules,* Appendix A.

were included and tracked, in conjunction with its audit, TRA Staff reviewed in detail the asset management contract.

On April 21, 2006, TRA Staff filed its audit report, in which it made seven findings and raised several issues relating to asset management, including, as to the way in which Atmos had implemented the RFP process outlined in the *Affiliate Rules*, the relationship between Atmos and its asset manager AEM, an affiliate company, and the amount of the fees paid to Atmos, by AEM, for the use of the ratepayer's assets (gas capacity purchased with monies paid by the ratepayer).[78] At this time, TRA Staff confirmed that Atmos had been properly crediting 100% of all fee payments derived under its asset management contract to ratepayers and had not shared in any of the funds.[79] As a result of these concerns, the TRA Staff recommended, among other things, certain improvements to the RFP procedures, that Atmos file all future proposed contracts relating to asset management and gas procurement for prior approval of the Authority, and that a separate docket be opened to consider and address the inclusion of fees derived from asset management contracts under the PBRM and determine an appropriate sharing mechanism and sharing percentage for such fees.[80]

During a regularly scheduled Authority Conference on May 15, 2006, the voting panel of Directors unanimously approved the adoption of the seven findings and the recommendations contained in the audit report, except for the TRA Staff's recommendations concerning asset

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[78] *See In re: Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, *Notice of Filing by the Utilities Division of the Tennessee Regulatory Authority, Compliance Audit Report,* pp. 14-15 (April 21, 2006).
[79] *Id.* at 14, fnt. 4.
[80] *Id.* at 15-16.

management.[81] Finding that Atmos did not have sufficient time to respond to the concerns of TRA Staff, and that the record did not contain sufficient information upon which to approve the recommendations made by TRA Staff, the panel directed that the TRA Staff and Atmos "meet to discuss the effects of incorporating the asset management arrangement into the [PBRM]" and left open the option of convening a contested case or alternative action after the conclusion of the discussions.[82]

The day after Atmos made its annual 2004-2005 ACA filing with the TRA, the Consumer Advocate filed a petition on September 16, 2005, asking the Authority to initiate an investigation and open a Show Cause docket requiring Atmos to demonstrate that it was not over earning in violation of Tennessee law and that it was charging rates that were just and reasonable.[83]

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[81] The panel declined to adopt TRA Staff's Recommendations 1, and 2A through C, relating to asset management noted below:

1. The Company allowed only ten (10 days for third party prospective asset managers to submit bids on its RFP for asset management. In addition the Company sent the RFP only to an established list of bidders. The result was the one bid received from its affiliate. Given the complexities of the asset management agreement, Audit Staff believes the length of time given was too short for a prospective bidder to consider the proposal and submit a bid. At a minimum, the Audit Staff recommends the following:
    a. The company should allow at least thirty (30) days for a prospective bidder to respond to its RFP.
    b. The company should advertise the RFP in appropriate trade publications.
2. The Company awarded its asset management contract to its affiliate AEM. The contract calls for AEM to pay Atmos $782,978 annually for the right to sell the Company's excess pipeline capacity. This amount is credited 100% to the Company's ratepayers. Compared to similar agreements in place for the other TRA regulated gas companies [one company has a third party manager and the other has an affiliate manager], the amount paid for the right to use these assets appears to be extremely low. The Audit Staff believes that since AEM is an affiliate of Atmos, customers are entitled to a reasonable percentage of the <u>total</u> profits realized by AEM in the sale of the *ratepayer's assets* (*emphasis in original).* Audit Staff therefore recommends the following:
    a. The Company should provide Audit Staff documentation of the total profits realized by AEM from the sale of customer assets. This documentation should be provided in its annual Actual Cost Audit filing.
    b. The Company should credit 100% of this profit to ratepayers in its ACA Account.
    c. The Authority should open a separate docket to address the inclusion of asset management fees in the Company's Performance Based Ratemaking Rider ("PBR") and the appropriate sharing mechanism and percentage applicable to these fees. *Id.* at 15-16.

[82] *See In re: Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, *Order Adopting ACA Audit Report of the Tennessee Regulatory Authority's Utility Division,* pp. 4-5 (December 7, 2006).

[83] *See in re: Petition to Open an Investigation to Determine Whether Atmos Energy Corp. Should be Required by the TRA to Appear and Show Cause that Atmos Energy Corp. is not Overearning in Violation of Tennessee Law and that it is Charging Rates that are Just and Reasonable,* TRA Docket No. 05-00258, *Consumer Advocate's Petition*

Ultimately, the Authority convened a contested case docket and several parties intervened in the proceedings. During the course of discovery, Atmos objected to questions relating to asset management, the PBRM, and the imputation of earnings, which had been propounded by the Consumer Advocate and another intervenor, the Atmos Intervention Group ("AIG"). In an attempt to expedite the proceedings, the panel bifurcated the issues and deferred consideration of asset management issues to Phase Two.[84] A hearing on Phase One issues was held August 29-31, 2006.

On June 30, 2006, the Hearing Officer set a Phase Two procedural schedule that required the parties to file proposed issues lists on September 12, 2006.[85] During the exchange of pleadings on the issues to be established in Phase Two, Atmos filed a letter with the Authority advising that it was ready to meet with TRA Staff concerning the incorporation of asset management into the PBR, as directed previously by the panel in Docket No. 05-00253, and, subsequently, filed a formal motion requesting that the Authority implement its previous Order concerning same, on September 11, 2006, and October 2, 2006, respectively.[86] On October 6, 2006, in conjunction with his recommendation that Phase Two should proceed as previously determined by the panel and that the Phase Two issues should not be diverted to a rulemaking proceeding, as had been requested by certain intervening parties, the Hearing Officer issued a separate order establishing the issues to be addressed in Phase Two, which included:

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to Open an Investigation to Determine Whether Atmos Energy Corp. Should be Required by the TRA to Appear and Show Cause that Atmos Energy Corp. is not Overearning in Violation of Tennessee Law and that it is Charging Rates that are Just and Reasonable (September 16, 2005).

[84] Transcript of Authority Conference, pp. 26-28 (June 26, 2006).

[85] *See in re: Petition to Open an Investigation to Determine Whether Atmos Energy Corp. Should be Required by the TRA to Appear and Show Cause that Atmos Energy Corp. is not Overearning in Violation of Tennessee Law and that it is Charging Rates that are Just and Reasonable,* TRA Docket No. 05-00258, *Order Addressing Intervention of AEM and the Procedural Schedules for Phases One and Two* (July 13, 2006).

[86] *See In re Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, Letter to Sara Kyle, Chairman, from Misty Smith Kelley, Counsel for Atmos (September 11, 2006), and *Atmos Energy Corporation's Request for Implementation of the Order of the Authority* (October 2, 2006).

> Should Atmos Energy Corporation share in the lump sum fee it receives from Atmos Energy Marketing under the terms under the asset management contract through its existing Performance Based Ratemaking ("PBR") plan? If so, how would such a ***change*** affect the balance of incentives in the current PBR plan?[87]

During the November 6, 2006, Authority Conference, the panel held in abeyance its consideration of the Hearing Officer's recommendations in order to allow briefs to be filed on an issue raised concerning the appropriate forum in which to determine asset management issues.[88]

Moreover, on April 12, 2007, "for the benefit of the Tennessee Regulatory Authority, the Company's customers and the public interest," and to provide clarity to the complex issues and mechanisms at issue in the docket, on its own initiative, Atmos filed a document titled *Atmos Energy Corporation's Verified Supplementation of the Record* ("*Verified Supplementation*") (attached as **Exhibit C**).[89] In its *Verified Supplementation,* Atmos correctly explains the way in which the asset management fee is treated and what revenue is subject to sharing under its Capacity Release Incentive Mechanism:

> Under the Agreement, AEM pays an annual lump sum of $500,000 as payment for the right to manage Atmos' assets. (TRA Docket No. 05-00253, 4/21/06 Staff Audit Report, p.15) ***Atmos does not retain any portion of the lump sum payment. The full $500,000 is flowed 100% through to the ratepayers under the Purchased Gas Adjustment ("PGA") mechanism.*** (Id.) That $500,000 payment is shared between Tennessee and Virginia ratepayers according to the percentage allocation for shared demand costs between the states. (TRA Docket No. 05-00253, 6/14/06 Memo To File, p.1.) Prior to July 1, 2005, Tennessee ratepayers were allocated 69.5% of the annual fee, or $347,500. After July 1, 2005, Tennessee ratepayers will receive 64% of the fee, or $320,000 per year. (Id.) *(emphasis added).*

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[87] *See in re: Petition to Open an Investigation to Determine Whether Atmos Energy Corp. Should be Required by the TRA to Appear and Show Cause that Atmos Energy Corp. is not Overearning in Violation of Tennessee Law and that it is Charging Rates that are Just and Reasonable,* TRA Docket No. 05-00258, *Order Adopting Phase Two Issues and Modifying the Phase Two Procedural Schedule, Attachment A, Phase Two Issues List #7* (October 6, 2006).

[88] Transcript of Authority Conference, pp. 11-12 (November 6, 2006).

[89] *See In re Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, *Atmos Energy Corporation's Verified Supplementation of the Record* (April 12, 2007).

In addition to, but separate from, the above, there are a few assets (in the form of pipeline contracts) that are <u>not</u> included within the AEM agreement, and which Atmos manages <u>itself</u>. The revenue from these non-AEM asset management activities are shared with ratepayers under the Capacity Release Incentive Mechanism of the Company's PBR. To get a total amount of dollars received by consumers from both Atmos' non-AEM asset management activities and the AEM agreement, it would be necessary to add the Capacity Release Mechanism dollars to the annual AEM lump sum fee. The following chart demonstrates the approximate amount of TOTAL asset management dollars flowed through to consumers since the AEM contract began in April 2004:

	AEM Lump Sum Fee	Ratepayer Share of Additional Capacity Release Dollars Under the PBR.[3]	Total Asset Management Dollars to Consumers[4]
2004-2005 Audit Year	$347,500	$82,238	$429,738
2005-2006 Audit Year	$320,000	$76,266	$396,266

[3] Due to the pending PBR case, TRA Consolidated Dockets No. 01-00704 and 02-00850, Atmos has not filed a PBR report since the 2000-2001 year. Therefore, since that time the Company has not recouped its share of the savings under the PBR, and 100% of those savings have flowed through to consumers. The figures in the chart represent the ratepayers' share under the PBR plan.

[4] This column represents the TOTAL amount of dollars received by consumers from both Atmos' non-AEM asset management activities and the AEM agreement.

These amounts represent dollars flowed through to consumers resulting solely from asset management. These amounts do not include additional dollars consumers received from Atmos' gas procurement activities *(emphasis added)*.[90]

The TRA Staff agreed then, and continues to agree with Atmos' clear and correct explanation of the treatment of the AEM asset management fees, as being distinct and separate from shared non-AEM revenue under the PBRM.

[90] *Id.* at 2-3.

Ultimately, on August 20, 2007, the panel decided to close Docket No. 05-00253 and Phase Two of Docket No. 05-00258, and open a new docket in which to consider the asset management issues that had arisen, and remained pending, in both dockets. Thereafter, the panel ordered that Docket No. 07-00225 be established and, among other conditions, that the Phase Two issues list in Docket No. 05-00258 and remaining issues from Docket No. 05-00253 be incorporated for consideration into the new docket.[91]

The proceedings in Docket No. 07-00225 commenced, and on November 5, 2007, the Hearing Officer held a status conference to establish a procedural schedule. Later, the issues list, which had carried over and incorporated the issues identified in Docket Nos. 05-00253 and 05-00258, was expanded and also included certain claims identified by the parties. The Hearing Officer resolved a variety of disputes concerning the entry of a protective order, and other objections that arose in the first round of discovery. During a Status Conference held on February 29, 2008, at the request of AEM, an intervenor in the docket, and without objection of the parties, the Hearing Officer granted an extension of time for AEM's responses to discovery and suspended the procedural schedule indefinitely.[92] Since that time, at the request of the parties, the docket has remained in abeyance.

F. Asset Management Contracts (Docket Nos. 08-00024 & 11-00034)

Without notice to the Authority, Atmos executed its first asset management contract, effective April 1, 2004. As a result, on TRA Staff's recommendation, the Authority, during a regularly scheduled Authority Conference held on May 16, 2006, directed that Atmos file all

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[91] *See In re: Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, and *In re: Petition to Open an Investigation to Determine Whether Atmos Energy Corp. Should be Required by the TRA to Appear and Show Cause that Atmos Energy Corp. is not Overearning in Violation of Tennessee Law and that it is Charging Rates that are Just and Reasonable,* TRA Docket No. 05-00258, *Order Closing Dockets and Moving Remaining Issues into a New Docket,* pp. 6-8 (December 5, 2007).

[92] *See In re Docket to Evaluate Atmos Energy Corporation's Gas Purchases and Related Sharing Incentives,* TRA Docket No. 07-00225, *Order on February 29, 2008 Status Conference: Granting an Extension and Suspending the Procedural Schedule,* p. 4 (March 5, 2008).

future proposed asset management contracts or renewals for pre-approval by the TRA.[93] The Authority also approved a revised tariff filed by Atmos that included *RFP Procedures for Selection of Asset Manager and/or Gas Provider,*[94] effective May 5, 2007.[95] On February 7, 2008, in Docket No. 08-00024, Atmos made a preliminary filing of its RFP, which it had issued to prospective asset managers on January 29, 2008, and further indicated that it would file the resulting asset management contract with the Authority for its consideration.[96] In anticipation of the filing of confidential documents in the future, Atmos also filed a proposed protective order in the docket file.[97]

On February 15, 2008, Stand Energy Corporation ("Stand") filed a petition to intervene and to stay the proceedings.[98] Atmos Intervention Group ("AIG") and the Consumer Advocate each filed a petition to intervene on February 25, 2008 and February 27, 2008, respectively.[99] The Hearing Officer denied Stand's motion to stay, in part, because Docket No. 08-00024 had been opened to consider the contract approval process, and not the RFP approval process, which had resulted in the approval of a revised tariff in Docket No. 05-00253.[100] Therefore, the Hearing

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[93] *See In re Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, *Order Adopting ACA Audit Report of the Tennessee Regulatory Authority's Utility Division* (December 7, 2006).
[94] Atmos 2nd Revised Tariff Sheet Nos. 45.3 and 45.4 (effective May 5, 2007).
[95] *See In re Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, *Order Approving Tariff,* pp.1-2 (December 6, 200).
[96] *See In re: Petition of Atmos Energy Corporation for Approval of the Contract(s) Regarding Gas Commodity Requirement, Etc.,* TRA Docket No. 08-00024, *Atmos Energy Corporation's Preliminary Filing of Request for Proposals in Expectation that Atmos will Seek Approval of Any Resulting Contract Once Bidding Process is Complete* (February 7, 2008).
[97] *Id.*
[98] *See In re: Petition of Atmos Energy Corporation for Approval of the Contract(s) Regarding Gas Commodity Requirement, Etc.,* TRA Docket No. 08-00024, *Petition to Intervene* and *Stand Energy Corporation's Motion to Stay* (February 15, 2008).
[99] *See In re: Petition of Atmos Energy Corporation for Approval of the Contract(s) Regarding Gas Commodity Requirement, Etc.,* TRA Docket No. 08-00024, *Petition to Intervene of Atmos Intervention Group* (February 25, 2008) and [Consumer Advocate's] *Petition to Intervene* (February 27, 2008).
[100] *See In re: Petition of Atmos Energy Corporation for Approval of the Contract(s) Regarding Gas Commodity Requirement, Etc.,* TRA Docket No. 08-00024, *Order Denying Motion to Stay,* pp. 6-7 (February 29, 2008).

Officer held that Stand's motion to stay was premature.[101] On March 12, 2008, Stand filed a notice of its withdrawal from intervention in the docket.

On March 20, 2008, Atmos filed its already-executed contract with AEM with the Authority for approval.[102] During a regularly scheduled Authority Conference on June 23, 2008, the panel considered the asset management contract, determined that Atmos had complied with the terms of its tariff in bidding and awarding the asset management contract, and based on the detailed bid evaluation Atmos had provided, also found that the asset management contract benefited consumers.[103] As a result, the Authority approved Atmos' three (3) year contract with its affiliate company, AEM, effective April 1, 2008.[104]

On March 3, 2011, Atmos filed in Docket No. 11-00034, a new three-year contract with AEM, which replaced the contract approved by the Authority in Docket No. 08-00024.[105] In its filing, Atmos requested that the Authority expedite its consideration of the new contract so that services could commence on April 1, 2011. On March 17, 2011, Atmos filed the Direct Testimony of Rebecca M. Buchanan in support of its petition. Also on March 17, 2011, TRA Staff filed a copy of an email that had been received by Ms. Pat Murphy, Deputy Chief, Utilities Division, from Ms. Patricia Childers, Vice President, Rates and Regulatory Affairs, Mid-States Division, for Atmos Energy Corporation, as to concerns that the asset management contract would be effective prior to the TRA's deliberations on the matter. Ms. Childers responded that the contract contains a "regulatory out" clause that provides for the termination and unwinding of

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[101] *Id.*

[102] *See In re: Petition of Atmos Energy Corporation for Approval of the Contract(s) Regarding Gas Commodity Requirements, Etc.*, TRA Docket No. 08-00024, *Motion for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation Storage Contracts* (March 20, 2008).

[103] *See In re: Petition of Atmos Energy Corporation for Approval of the Contract(s) Regarding Gas Commodity Requirements, Etc.*, TRA Docket No. 08-00024, *Order Approving Contract Regarding Gas Commodity Requirements and Management of Transportation/Service Contracts* (July 9, 2008).

[104] *Id.*

[105] *In re: Petition for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts,* TRA Docket No. 11-00034 (March 3, 2011).

the agreement in the event the regulatory agency does not approve it.[106] On March 31, 2011, the Consumer Advocate filed a petition to intervene in the proceedings.[107]

On August 19, 2011, Atmos filed its 3rd Revised Sheet No. 45.1, which incorporates clarifying language that asset management fees were to be included in the PBRM tariff.[108] With that filing, Atmos asserted that despite its filing, it "continues to believe that its current PBR tariff rider covers all revenue from asset management whether by upfront fees from asset managers or otherwise..."[109] Nevertheless, the revised tariff was filed in response to the TRA Staff's consistent assertions that upfront lump-sum asset management are not permitted for sharing under the terms of the PBRM tariff.

On September 2, 2011, the Hearing Officer in Docket No. 11-00034 granted the Consumer Advocate's request for intervention in the proceedings.[110] On December 20, 2011, Atmos filed a petition requesting that the Authority rule as the matter was "ripe for resolution at the next Authority Conference."[111] Atmos stated that the two issues pending resolution in the docket, both of which were unopposed by the TRA Staff and the Consumer Advocate were: (1) approval of its asset management contract, effective April 1, 2011, and (2) approval of its revised tariff with a concurrent effective date of April 1, 2011, which explicitly authorized Atmos to

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[106] *See In re: Petition for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts*, TRA Docket No. 11-00034, Email to Pat Murphy, Deputy Chief, Utilities Div., from Pat Childers, Atmos Energy (March 17, 2011).

[107] *See In re: Petition for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts*, TRA Docket No. 11-00034, *Petition to Intervene* (March 31, 2011).

[108] *See In re: Petition for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts*, TRA Docket No. 11-00034, Atmos 3rd Revised Tariff Sheet No. 45.1 (effective April 1, 2011) (August 19, 2011).

[109] *See In re: Petition for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts*, TRA Docket No. 11-00034, *Cover Letter to Tariff filing from Pat Childers, Atmos* (August 19, 2011).

[110] *See In re: Petition for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts*, TRA Docket No. 11-00034, *Order Granting Petition to Intervene of Consumer Advocate* (September 2, 2011).

[111] *See In re: Petition for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts*, TRA Docket No. 11-00034, *Atmos Energy Corporation's Request for Ruling*, p. 1 (December 20, 2011).

share in the asset management fees under the PBRM going forward.[112] In addition, Atmos acknowledged its agreement that the issue of whether it is permitted to share in asset management fees for any period prior to April 1, 2011, will be presented for the Authority's consideration in a separate docket.[113]

On December 21, 2012, the Consumer Advocate filed a notice of its intention not to contest approval of the new asset management agreement between Atmos and AEM or the 3rd revised tariff.[114] At a regularly scheduled Authority Conference held on January 9, 2012, the panel found that Atmos had complied with the RFP and bidding procedures in its tariff and that the contract is "necessary in order that Atmos may continue to serve its customers and those customers may share in the transportation and storage assets as of that date."[115] Thereafter, the panel unanimously approved the contract and tariff amendment, effective April 1, 2012.[116]

G. Atmos' Petition for Approval of Unaudited IPA Reports from April 1, 2001-March 31, 2011 (Docket No. 11-00137) & IPA Audit of Period April 1, 2001-March 31, 2004 (Docket No. 11-00158)

Despite the Authority's May 13, 2008 Order,[117] which affirmed the Hearing Officer's ruling requiring the prompt filing of all past-due annual IPA reports, Atmos delayed and did not file its reports as required. Not until September 2010 did Atmos contact TRA Staff to report it was now seeking to catch up its past-due reports.[118] Nearly a year elapsed during which Staff and Atmos representatives exchanged frequent communications as to what would be the most

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[112] *Id.* at 1.
[113] *Id.* at 1-2.
[114] *See In re: Petition for Approval of Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts*, TRA Docket No. 11-00034, *Statement of the Consumer Advocate's Intent Not to Contest the Asset Management Agreement with Atmos Energy Marketing, LLC and the Third Revised Sheet No. 45.1 of Atmos' Tariff* (December 21, 2011).
[115] Transcript of Authority Conference, pp. 54-55 (Monday, January 9, 2012).
[116] Id.
[117] *See In re: United Cities Gas Company's Incentive Plan Account (IPA) for the Period April 1, 2000 Through March 31, 2001*, TRA Docket No. 01-00704, Order Affirming, in Part, and Vacating, in Part, Hearing Officer's Initial Order (May 13, 2008).
[118] See Exhibit A, Affidavit of Pat Murphy, ¶18 (February 22, 2012).

efficient way for TRA Staff to audit ten years of back-logged reports.[119] Then, much to the surprise of TRA Staff, on August 23, 2011, Atmos filed all ten years of reports in Docket No. 11-00137, and petitioned the Authority to approve all years as filed.[120] Also, on that same date, Atmos filed a proposed protective order.

On September 8, 2011, TRA Staff requested that the Authority establish a docket for the auditing of Atmos' IPA reports covering the plan years beginning April 1, 2001, April 1, 2002, and April 1, 2003.[121] This action by TRA Staff was in direct response to the August 23, 2011 filing by Atmos of IPA reports covering ten years, from April 1, 2001 to March 31, 2011.[122] Throughout its communications with Atmos representatives, the TRA Staff anticipated that it would audit the first three years of Atmos' ten past-due reports in order that customers could begin receiving the refund to which they were entitled as a result of the Authority's decision in Docket No. 01-00704. Thereafter, Atmos could file the remaining IPA plan years, in which Atmos contended that it had included for sharing payments it had received from asset management contracts. The TRA Staff clearly and consistently communicated to Atmos that, under the terms of it PBRM, it was not permitted to share in such payments.[123]

In the course of these discussions between TRA Staff and the Company, as noted above, Atmos filed all ten years of past-due reports in Docket No. 11-00137.[124] Because Atmos had already provided TRA Staff with the necessary documentation to support the reports covering 2001-2004 and Staff had completed a pre-filing review of that documentation, Staff opened a docket in which to file its audit report (Docket No. 11-00158). Included in the recommendations

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[119] *Id.* at ¶18, 20, and 21.
[120] *See In re: Petition for Approval of Incentive Plan Reports for the Period April 1, 2001 through March 31, 201,* TRA Docket No. 11-00137 (August 23, 2011).
[121] *See In re: Audit of Atmos Energy Corporation's Incentive Plan Account for Period of April 1, 2001 through March 31, 2004,*TRA Docket No. 11-00158 (September 8, 2011).
[122] See Exhibit A, Affidavit of Pat Murphy, ¶21-22 (February 22, 2012).
[123] *Id.,* at ¶20-21.
[124] *Id.,* at. ¶21.

in its audit report, Staff advised that the Authority order the Company to file tariffs to refund the credit balance of $213,781.78 in the IPA account within thirty (30) days of the approval of Staff's audit report, with an effective date of December 1, 2011.[125]

On September 14, 2011, Atmos filed in Docket Nos. 11-00158 and 11-00137 its *Motion to Consolidate* the dockets, and contended that because the years encompassed in Docket No. 11-00158 (2001-2004) were also included in the years reported in Docket No. 11-00137, there would be greater efficiency and less cost associated with addressing all ten years in Docket No. 11-00137.[126] On September 19, 2011, TRA Staff filed its *Response of TRA Staff to Atmos Energy Corporation's Motion to Consolidate Dockets 11-00137 and 11-00158,* in which it opposed consolidation of the dockets.[127] The TRA Staff asserted that it had a duty to audit the IPA Reports under the terms of the PBRM tariff.[128] In the event that the Authority granted Atmos' request for consolidation, because TRA Staff was not a party in Docket No. 11-00137, TRA Staff would be improperly precluded from carrying out the performance of its audit duties, as mandated by the tariff.[129]

Further, TRA Staff asserted that in the event that the Authority granted Atmos' request and approved the reports in Docket No. 11-00137 as filed, such action would authorize Atmos to share in asset management payments back to its report year beginning April 1, 2004, which TRA

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[125] *See In re: Audit of Atmos Energy Corporation's Incentive Plan Account for Period of April 1, 2001 through March 31, 2004*, TRA Docket No. 11-00158, *Notice of Filing by Utilities Division of the Tennessee Regulatory Authority, Exhibit A, Compliance Audit Report,* pp. 5-6 (September 8, 2011).
[126] *See In re: Audit of Atmos Energy Corporation's Incentive Plan Account for Period of April 1, 2001 through March 31, 2004*, TRA Docket No. 11-00158, *Motion to Consolidate*, pp. 1-2 (September 4, 2011).
[127] *See In re: Audit of Atmos Energy Corporation's Incentive Plan Account for Period of April 1, 2001 through March 31, 2004*, TRA Docket No. 11-00158, *Response of TRA Staff to Atmos Energy Corporation's Motion to Consolidate Dockets 11-00137 and 11-00158*, p 3. (September 19, 2011).
[128] *Id.* at 2-3; Atmos Tariff 2nd Revised Sheet Nos. 45.6 and 45.7, *Determination of Shared Savings* and *Filing with the Authority* (May 5, 2007). See also, Purchased Gas Adjustment Rule 1220-4-7-.03(2).
[129] *Id.* at 3.

Staff had consistently maintained was a deviation from the terms of the PBRM tariff.[130] TRA Staff recommended that the Authority determine the disputed issue concerning the exclusion of asset management fees from sharing under the PBRM during the next audit period beginning 2004, which was the first year Atmos had an executed asset management contract and had sought to retain a share of the fees it had received under that contract.[131]

In addition, TRA Staff informed the Authority that the audit covering 2001-2004, the first three years of delinquent reports, was complete, and that the parties had agreed on the ending balance in the IPA account as of March 31, 2004.[132] These three years could then be considered by the Authority swiftly, and a known over-collection refunded to the ratepayers without further delay.[133] TRA Staff further explained that in accordance with the PBRM tariff, the deadband must be reset every three years and that this could only occur by following the orderly audit process.[134] Therefore, Staff asserted that it would not be more efficient or less costly to consider those years together with later year periods in Docket No. 11-00137.

Atmos filed a reply in support of its motion to consolidate on September 21, 2011 in Docket Nos. 11-00137 and Docket No. 11-00158.[135] In its reply, Atmos contended that, after a lengthy period of discussions, TRA Staff declined to continue negotiations. Therefore, Atmos contended that, in an attempt to provide another vehicle for negotiations and "clear the way for all interested parties to have meaningful discussions and work toward a negotiated solution, or, failing that, to posture the case so as to allow a straightforward order resolving the matter with a

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[130] *Id.* at 2.
[131] *Id.* at 4.
[132] *Id.* at 3.
[133] *Id.*
[134] *Id.* at 3-4.
[135] *See In re: Audit of Atmos Energy Corporation's ("Atmos") Incentive Plan Account for Period of April 1, 2001 Through March 31, 2004*, TRA Docket No. 11-00158, *Reply in Support of Atmos Energy Corporation's Motion to Consolidate Dockets 11-00137 and 11-00158* (September 21, 2011).

minimum of fuss," it filed its petition in Docket No. 11-00137.[136] Nevertheless, ultimately, Atmos admitted that TRA Staff would need to audit the IPA years at issue before resolution of the matters disputed between the parties could be finalized, and therefore, that TRA Staff would need to be added as a party to Docket No. 11-00137.[137] Opposing TRA Staff's recommendation to refund the monies that it owed to ratepayers, Atmos contended that it would be inefficient to refund monies that would ultimately return to Atmos upon the Authority's approval of the remaining IPA years, in which it had included asset management payments in its sharing calculations.[138]

The Consumer Advocate filed a *Petition to Intervene for Purposes of Filing a Motion to Dismiss* and its *Motion to Dismiss* on September 22, 2011.[139] In its filings, the Consumer Advocate asserted that the Authority must rely on TRA Staff's audit reports in order to monitor and ensure that the incentive plan reporting by regulated utilities continues to reflect prudent gas purchasing activities that benefit consumers and appropriately calculate shared revenue.[140] In addition, the Consumer Advocate asserted that the procedural course advocated by Atmos would not streamline the resolution of the issues in the docket:

> The suggestion by Atmos that the Consumer Advocate should intervene and negotiate a settlement, prior to completion of TRA Staff's work, is simply placing the cart before the horse."[141]

Importantly, the Consumer Advocate maintained that the procedural course proposed by Atmos would delay the processing of refunds to which consumers are entitled, and as no dispute existed

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[136] *Id.* at unnumbered pp. 1-3.
[137] *Id.* at unnumbered p 3.
[138] *Id.* at unnumbered pp. 3-4.
[139] *See In re: Petition for Approval of Incentive Plan Reports for the Period April 1, 2001 through March 31, 2011,* TRA Docket No. 11-00137 (August 23, 2011).
[140] *See In re: Petition for Approval of Incentive Plan Reports for the Period April 1, 2001 through March 31, 2011,* TRA Docket No. 11-00137, *Motion to Dismiss the Petition of Atmos Energy*, pp. 1-2 (September 22, 2011).
[141] *Id.* at 2.

concerning the balance of the IPA account as of March 31, 2004, subjecting these audit years to a contested case will only delay these refunds.[142]

On September 26, 2011, the Authority voted to convene a contested case proceeding and appoint a hearing officer in Docket No. 11-00158.[143] On October 4, 2011, TRA Staff filed its audit report in that docket. On November 4, 2011, the parties filed in Docket Nos. 11-00158 and 11-00137 a *Stipulation Regarding Procedure,* which reflected their agreement, in pertinent part as follows:

1. Docket No. 11-00137 will be dismissed without prejudice;

2. The Audit Report in Docket No. 11-00158 is unopposed and may be approved without delay;

3. Audit Staff will complete its audit of the next three IPA Account plan years (4/1/04-3/31/07) and file its audit report no later than November 10, 2011;

4. Should the Authority convene a contested case, the parties will file briefs regarding the asset management issue with opening briefs due by January 17, 2012 and reply briefs due by January 31, 2012; and

5. Following the Authority's ruling, Audit Staff will complete and file its audit report on the remaining years (4/1/07-3/31/11) within 60 days. [144]

During a regularly scheduled Authority Conference held on November 7, 2011, the Authority considered the TRA Staff's audit report, filed on October 4, 2011, and determined that Atmos' motion to consolidate was moot and voted unanimously to deny the motion. The

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[142] *Id.* at 3-4.

[143] *See In re: Audit of Atmos Energy Corporation's Incentive Plan Account for Period of April 1, 2001 through March 31, 2004*, TRA Docket No. 11-00158, *Order Convening a Contested Case and Appointing a Hearing Officer* (October 11, 2011).

[144] *See In re: Petition for Approval of Incentive Plan Account Reports for the Period April 1, 2001 through March 31, 2011*, TRA Docket No. 11-00158, *Stipulation Regarding Procedure*, pp. 1-2 (November 4, 2011).

Authority further approved the audit report and directed Atmos to file tariffs, effective December 1, 2011, to refund to ratepayers the undisputed credit balance in its IPA account of $213,781.78.[145]

H. IPA Audit of Period April 1, 2004-March 31, 2007 (Docket No. 11-00195)

On November 4, 2011, a *Stipulation Regarding Procedure* was filed in Docket Nos. 11-00137 and 11-00158.[146] The stipulation detailed, among other things, a procedure by which to complete the audit period covered in Docket No. 11-00158, from 2001-2004, and expedite the audit approval process for reporting periods from 2004 to 2011, which had been included by Atmos in its petition filed in Docket 11-00137. Pursuant to its stipulation, on November 8, 2011, TRA Staff requested that a docket be established for the purpose of issuing an audit report for the three (3) year period covering April 1, 2004 through March 31, 2007, at issue in the current docket (Docket No. 11-00195). The TRA Staff's Audit Report, issued on November 10, 2011, contained two findings. The first audit finding noted that Atmos had overstated its share of incentive "savings" by $102,880. This was the result of Atmos including asset management payments of $1,028,805 in its calculated savings and claiming a 10% share for Atmos. The second finding noted the occurrence of an understatement of the related interest owed to customers in the amount of $14,306. The total of the audit findings identified an over-recovery of incentive saving by Atmos in the amount of $117,186.

During a regularly scheduled Authority Conference held on November 21, 2011 the Authority voted to convene a contested case proceeding and appoint a hearing officer. On January 9, 2012, the Authority's General Counsel filed a Memorandum in the docket file that

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[145] *See In re: Petition for Approval of Incentive Plan Account Reports for the Period April 1, 2001 through March 31, 2011*, TRA Docket No. 11-00158, *Order Adopting Incentive Plan Report of Tennessee Regulatory Authority's Utilities Division*, p. 2 (December 19, 2011).

[146] *See In re: Petition for Approval of Incentive Plan Reports for the Period April 1, 2001 Through March 31, 2011* TRA Docket No. 11-00137, *Stipulation Regarding Procedure* (November 4, 2011).

identified Kelly Cashman-Grams, Pat Murphy and Michelle Ramsey as TRA employees participating as parties in this docket. On January 12, 2012, the Company, TRA Staff, and the Consumer Advocate filed a *Stipulation Regarding Briefing Schedule*, which amended the briefing schedule and set initial briefs due for filing no later than February 22, 2012, and reply briefs due no later than March 14, 2012.[147]

II. LAW & ARGUMENT

As the preceding history demonstrates, a myriad of issues have arisen over the years concerning the PBRM and asset management. While the depths might remain relatively uncharted, these matters are not of first impression. The question now before the Authority is also not unique. The TRA Staff respectfully asserts that, as to the issue in controversy in these proceedings, which also pertains to all of Atmos' IPA audits pending through March 2011, the Authority has the law, and its own sound reasoning set forth in previous dockets, upon which to draw in reaching the proper and definitive conclusion: that the fees Atmos has derived from its asset management contracts with AEM for the periods of 2004 through 2011 are not eligible for sharing under the terms of the tariff.

A. Tariffs

1. The PBRM tariff, as Approved by the Authority, has the Force and Effect of Law, Binds Both the Utility and Its Customers, and Governs their Relationship in Lieu of a Contract.

The PBRM is a "tariff," which, simply put, is a public document filed with the Authority by a regulated utility that sets forth and encompasses all of the services that the utility offers, rates and charges for those services, and rules, regulations, and practices governing those

[147] *See In re: Petition for Approval of Incentive Plan Reports for the Period April 1, 2004 Through March 31, 2007* TRA Docket No. 11-00195, *Stipulation Regarding Briefing Schedule* (January 12, 2012).

services.[148] Incumbent to its ratemaking authority, Tenn. Code Ann. § 65-2-102 empowers the Authority "to require every such public utility to file with it complete schedules of every classification employed and of every individual or joint rate, toll, fare, or charge made or exacted by it for any product supplied or service rendered within this state as specified in such requirement."[149] Exercising sound regulatory judgment and discretion, it is the duty of the Authority to fix and approve of such rates, tolls, fares, charges, and schedules upon being satisfied that the same is just and reasonable.[150] In fixing rates that are just and reasonable, the Authority has power to suspend a tariff pending a hearing.[151]

In addition, the TRA has promulgated various rules specifying the form, style, format, and contents of the tariffs that are to be filed by the utilities that it regulates.[152] The Authority requires that "all tariffs, rate schedules or supplements thereto containing any change in rates, tolls, charges or rules and regulations must be filed with the Authority at least thirty (30) days before the effective date of such changes. . ."[153] Thus, any changes to be made to a tariff must be filed well in advance of its proposed effective date to give notice of the utility's intentions to the Authority, the public, and other utilities.[154]

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[148] *See BellSouth Telecommunications, Inc. v. Bissell, et al.,* 1996 WL 482975, fn. 1 (1996); *see also* 64 Am. Jur. 2d *Public Utilities* § 61 (2001).
[149] Tenn. Code Ann. § 65-2-102.
[150] Tenn. Code Ann. § 65-5-101; *see also, CF Industries v Tennessee Pub. Serv. Comm'n,* 599 S.W.2d 536, 542 (Tenn. 1980).
[151] Tenn. Code Ann. §§ 65-5-101 and 65-5-103.
[152] Tenn. R. & Regs. 1220-04-01-.02 & 1220-4-01-.03.
[153] Tenn. R. & Regs. 1220-04-01-.04.
[154] *GBM Communications, Inc. v. United Inter-Mountain Tel. Co.,* 723 S.W.2d 109, 112 (Tenn. Ct. App. April 18, 1986), *app. denied* (Sept. 8, 1986), *citing City Messenger Serv. v. Capitol Records Distributing Corp.,* 446 F.2d 6, 7 (6th Cir. 1971), *cert. denied.,* 404 U.S. 1059, 92 S. Ct. 738, 30 L. Ed. 2d 746 (1972); *see also Offc. of the Atty. Gen. v. Tenn. Regulatory Auth.,* 2005 WL 3193684 (Tenn. Ct. App. Nov. 29, 2005).

A duly filed tariff is the official published tariff of the utility and is effective and binding on both the regulated utility and its customers until suspended or set aside.[155] The "filed rate" doctrine "prohibits regulated entities from charging rates for their services other than those properly filed with the appropriate regulatory authority. Likewise, the doctrine precludes the rate-setting body from altering filed and approved rates retroactively.[156] Upon the Authority's approval, the PBRM rider to Atmos' tariff was rendered law, with the same force and effect as a statute enacted by the legislature.[157] The Sixth Circuit Court of Appeals has stated the principle as follows:

> Filed as [the tariff] was under compulsion of [Statute § 403(a) of the Civil Aeronautics Act of 1938], the tariff carried the statutory mandate [of § 403(b)] that it and it alone was to be the sole standard for services to be rendered and charges assessed and collected. In the implementation of this stringent legislative policy, the courts have been equally emphatic that the basis for the charge or credit must be found in the tariff. If it is not in the tariff, it is not allowable. It is not a mere matter of contract. For 'a rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law.' *Louisville & N.R. Co. v. Dickerson,* 6th Cir., 1911, 191 F. 705, 709. 'Such tariffs, at least those which are factors in determining carrier's charges, have the force and effect of statutes.' *American Ry. Express. Co. v. American Trust Co.,* 7 Cir., 1931, 47 F.2d 16, 18. The tariffs are both conclusive and exclusive; they may not be added to through reference to outside contracts or agreements or understandings or promises.[158]

Though strict application of the doctrine has the potential to cause harsh results at times, the rule furthers the goal of preventing unreasonable and discriminatory charges by regulated entities.[159]

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[155] *Tenn. Am. Water Co. v. Tenn. Regulatory Auth.,* 2011 WL 3344678 (Tenn. Ct. App. Jan. 28, 2011), *app. denied* (May 25, 2011); *see also, Keogh v. Chicago & Northwestern Railway,* 260 U.S. 156, 162-163, 43 S.Ct 47, 49, 67 L.Ed.183 (1922).

[156] *Sw. Bell Tel. Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 692 (Tex. App. 1996), *citing Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576-578 (1981); *see also Blackburn & McCune, PLLC v. Pre-Paid Legal Services, Inc.*, 2010 WL 2670816 * 29-30 (Tenn. Ct. App. June 30, 2010), appeal denied (Dec. 7, 2010).

[157] *GBM Communications, Inc. v. United Inter-Mountain Tel. Co.,* 723 S.W.2d 109, 112 (Tenn. Ct. App. April 18, 1986), *app. denied* (Sept. 8, 1986).

[158] *City Messenger Serv. v. Capitol Records Distributing Corp.,* 446 F.2d 6, 7 (6th Cir. 1971), *cert. denied,* 404 U.S. 1059, 92 S. Ct. 738, 30 L. Ed. 2d 746 (1972).

[159] *Blackburn & McCune, PLLC v. Pre-Paid Legal Services, Inc.*, M200901584COAR3CV, 2010 WL 2670816 (Tenn. Ct. App. June 30, 2010), appeal denied (Dec. 7, 2010), *citing Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*,

The provisions of the PBRM tariff approved by the Authority, effective April 1, 1999, bind and govern the parties, strictly. Just like customers must pay the utility the rate that is in its duly filed tariff, irrespective of a reasonable misunderstanding on the customer's part or under-collection by the utility, Atmos may only charge customers according to provisions of the tariff.[160] More simply, "[i]f it is not in the tariff, it is not allowable."[161]

2. As Law, Tariffs are Interpreted Using the Principles of Statutory Construction

A duly filed and effective tariff functions in lieu of a contract between the customer and utility; it is not a mere contract, but law. As such, like a statute enacted by the legislature, the interpretation or construction of a tariff is one of law and, in determining what is 'in' the tariff, the principles of statutory construction are applied. In *Consumer Advocate v. TRA,* the Tennessee Court of Appeals explained the general tenets of statutory construction as follows:

> A statute must be construed so as to ascertain and give effect to the intent and purpose of the legislation, considering the statute as a whole and giving words their common and ordinary meaning. *Marion County Bd. of Commissioners v. Marion County Election Commission,* 594 S.W.2d 681 (Tenn. 1980). When approaching statutory text, courts must presume that the legislature says in a statute what it means and means in a statute what it says there. *Worley v.. Weigel's, Inc.,* 919 S.W.2d 589, 593 (Tenn.1996). A corollary to that statement is that ***the absence of certain words in a statute must also be given due notice.*** Accordingly, ***we must construe statutes as they are written***, *Jackson v. Jackson,* 210 S.W.2d 332, 334 (1948), and our search for the meaning of statutory language must always begin with the statute itself. *Neff v. Cherokee Ins. Co.,* 704 S.W.2d 1, 3 (Tenn.1986). Where the parties legitimately have different interpretations of the same statutory language, an ambiguity exists, and we may consider the legislative history and the entire statutory scheme for interpretive guidance. *See Carter v. State,* 952 S.W.2d 417, 419 (Tenn.1997); *Owens v.. State,* 908 S.W.2d 923, 926 (Tenn.1995); *Lyons v. Rasar,* 872 S .W.2d 895, 897 (Tenn.1994) *(emphasis added).*[162]

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524 U.S. 214, 223, 118 S. Ct. 1956, 1963, 141 L. Ed. 2d 222 (1998); *see also, Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 128, 110 S. Ct. 2759, 2767, 111 L. Ed. 2d 94 (1990).

[160] *Id.*

[161] *City Messenger Serv. v. Capitol Records Distributing Corp.*, 446 F.2d 6, 7 (6th Cir. 1971), *cert. denied,* 404 U.S. 1059, 92 S. Ct. 738, 30 L. Ed. 2d 746 (1972).

[162] *Consumer Advocate Div. v. Regulatory Auth.*, 2000 WL 1514324 *3 (Tenn. Ct. App. Oct. 12, 2000).

In addition, it is important to note that "interpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts."[163] In short, the Authority should look first to the language of the terms and conditions of the tariff, then, if appropriate, consider the history and general scheme of the tariff, such as marketplace conditions and utility practices that existed at the time the tariff was deemed effective.

B. Atmos' PBRM Tariff

The PBRM was approved by the Authority in the proper exercise of its regulatory authority and discretion, upon being satisfied, after a hearing, that the proposed tariff was just and reasonable. Duly filed and effective, it is binding and enforceable law. The TRA Staff maintains that the terms of the PBRM are clear as written, and that the absence of any reference to the sharing of fees from asset management contracts is significant. Even so, consideration of the history and design of the PBRM when it was approved by the TRA, specifically, as to the marketplace conditions and utility's practice of performing its own capacity release activities, the TRA Staff's position is only further bolstered in showing that the Capacity Release Incentive Mechanism does not and was not intended to encompass such fees.

1. The Plain Language of the PBRM Terms Support TRA Staff's Position

The initial section of the PBRM describes the purpose of the tariff and assigns certain parameters on the time of the plan year and the life of the PBRM as follows:

> The Performance-Based Ratemaking Mechanism (the PBRM) replaces the reasonableness or prudence review of the Company's gas purchasing activities overseen by the Tennessee Regulatory Authority (the Authority) in accordance with Rule 1220-4-7-.05, Audit of Prudence of Gas Purchases. This PBRM is designed to encourage the utility to maximize its gas purchasing activities at minimum costs consistent with efficient operations and Service reliability and will provide for a shared savings or costs between the utility's customers and share holders. Each plan year will begin April 1. The annual provisions and filings herein will apply to this annual period. The PBRM will continue until it is either

[163] *Collins v. McCanless*, 169 SW 2d 850 (Tenn. 1943); *Riggs v. Burson*, 941 SW 2d 44 (Tenn. 1997).

> (a) terminated at the end [of] a plan year by not less than 90 days notice by the Company to the Authority or (b) either modified, amended, or terminated by the Authority.[164]

As an initial matter, this tariff is a ***performance based incentive*** mechanism. It is deliberately designed to motivate and encourage the Company to strive to perform at its very peak levels of efficiency in meeting its utility service obligations. It seeks to drive maximum results through the enticement of a "financial bonus" for doing well its public duty. In business, it is also sometimes called, "pay for performance." The Authority, as well as many other state public service commissions, has determined this method of ratemaking to be acceptable, and even favorable, so long as it demonstrates a true benefit to the consumer.[165]

To this end, the PBRM is structured into two parts: a Gas Procurement Incentive Mechanism and the Capacity Release Incentive Mechanism. In relevant part, the next section, titled *Overview of Structure*, the Capacity Release Incentive Mechanism is described as follows:

> The Capacity Release Incentive Mechanism is designed to encourage the Company to ***actively*** market off-peak unutilized transportation and storage capacity on upstream pipelines in the secondary market. The net incentive benefits will be shared between the Company's customers and the Company on a 90%/10% basis *(emphasis added)*.[166]

Also noted is the maximum financial award available to the Company each plan year, which states, "The Company is subject to a cap on overall incentive savings or costs on both mechanisms of $1.25 million annually." The terms of the *Capacity Management Incentive Mechanism* are as follows:

> To the extent the Company is able to release ***daily*** transportation or ***daily*** storage capacity, the associated savings will be shared by the Company's customers and the Company on a 90/10 basis. The sharing percentages shall be determined

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[164] Atmos 2nd Revised Tariff Sheet No. 45.1, *Applicability* section (effective October 4, 2002).
[165] *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase One,* p. 29 ¶¶ 6 and 10 (January 14, 1999).
[166] *Id.*

> based on the actual demand costs incurred by the Company (exclusive of credits for capacity release) for transportation and storage capacity during the plan year, as such costs may be adjusted due to refunds or surcharges from pipeline and storage suppliers. Any incentive savings or cost resulting from adjustments to the sharing percentages caused by refunds or surcharges shall be recorded in the current Incentive Plan Account (IPA) *(emphasis added)*.[167]

The TRA Staff asserts that there is no true issue of tariff construction in this matter, as the terms of the PBRM tariff are clear on its face. The tariff unambiguously states that the mechanism is designed to encourage the Company to actively market, and daily release, its unutilized capacity:

> The Capacity Release Incentive Mechanism is designed to encourage the Company to ***actively*** market off-peak unutilized transportation and storage capacity on upstream pipelines in the secondary market.[168]
>
> * * *
>
> To the extent the Company is able to release ***daily*** transportation or ***daily*** storage capacity, the associated savings will be shared by the Company's customers and the Company on a 90/10 basis.[169]

In addition, the absence of any language in the tariff, whereby, the Company is permitted to *share* in fees derived from selling its right to manage and release unutilized and underutilized capacity to another party is significant. "The absence of certain words in a statute must be given due notice."[170] That the tariff is completely devoid of any reference or provision allowing the sharing of fees or revenue generated from asset management contracts with a third-party demonstrates that the tariff does not incentivize the Company under such arrangements.

Furthermore, the tariff states, "The PBRM will continue until it is either (a) terminated at the end [of] a plan year by not less than 90 days notice by the Company to the Authority or (b)

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[167] Atmos 1st Revised Tariff Sheet No. 45.2 (effective October 4, 2002).
[168] Atmos 2nd Revised Tariff Sheet No. 45.1 (effective October 4, 2002).
[169] Atmos 1st Revised Tariff Sheet No. 45.2 (effective October 4, 2002).
[170] *Consumer Advocate Div. v. Regulatory Auth.*, 2000 WL 1514324 *3 (Tenn. Ct. App. Oct. 12, 2000), *citing Jackson v. Jackson,* 210 S.W.2d 332, 334 (Tenn. 1948).

either modified, amended, or terminated by the Authority."[171] This provision explicitly provides the means for altering the tariff in the event of a change in market conditions or utility practices. Just as its customers are bound, so is Atmos to the terms of the tariff. At any time prior to, or following, its decision to enter into a sales contract to transfer its rights to actively manage and daily release capacity, it could have requested to modify or amend its tariff to include a provision that would have encompassed such activity. It failed to do so. Because there is no provision that allows sharing of fees under these circumstances, Atmos cannot receive any portion of such fees, as they properly belong to the ratepayers.

2. *The History and Scheme of the PBRM Tariff Supports Denial of Sharing*

Although it does not, even if the TRA Staff were to concede that the tariff requires construction, "so as to ascertain and give effect to [its] intent and purpose,"[172] the TRA Staff maintains that a review of the history and overall scheme of the PBRM tariff further supports its position. First, the inclusion for sharing of fees from an asset management contract, whereby, Atmos would sell its rights to actively manage and daily release its unutilized capacity was not contemplated by the Authority when it approved the PBRM tariff.

The capacity release transactions that the Authority examined during the Phase One and Phase Two hearings and those reported by Atmos from 1999 to 2004, are substantially different in both nature, and character, than the transactions reported after April 1, 2004, when Atmos entered into an asset management agreement with its affiliate, AEM. During the time when Atmos filed its incentive plan proposal and the Authority approved the PBRM as a permanent ratemaking mechanism, and even for an additional five years thereafter, Atmos itself performed the activities required to sell and release its unutilized pipeline transportation and storage

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[171] Atmos 2nd Revised Tariff Sheet No. 45.1, *Applicability* section (effective October 4, 2002).
[172] *Consumer Advocate Div. v. Regulatory Auth.*, 2000 WL 1514324 *3 (Tenn. Ct. App. Oct. 12, 2000), *citing Marion County Bd. of Commissioners v. Marion County Election Commission,* 594 S.W.2d 681 (Tenn. 1980).

capacity and did not transfer or delegate this task to another company long term in exchange for a fee.

While it is true that Atmos had an 'all requirements' contract[173] with another affiliate, Woodward, the capacity release task under that contract was performed on a transaction by transaction basis. Atmos received a credit for capacity release on the invoices that it received from Woodward, in which Woodward retained 10% for its services. Unlike Atmos' asset management contract with AEM, Woodward never took possession, nor had it purchased the right to do so, of Atmos' total pipeline contracts for an upfront lump-sum payment.[174]

Therefore, when the PBRM was approved, Atmos itself expended the efforts, and performed the activities, involved in marketing and releasing its unutilized capacity, and its contract with Woodward, which included certain capacity release transactions, was of a distinctly different type than that of AEM. The Capacity Release Incentive Mechanism approved by the Authority was intended to encourage Atmos to release capacity daily that was not then needed to serve customers so as to reduce the overall cost of gas for customers. The Woodward contract was in place at the time of the Phase Two hearings, and the Authority examined the testimony of several witnesses to ascertain and ensure that the contract was consistent with the incentive plan. Sharing in 10% of the capacity release savings, as Woodward did, was intended to provide an incentive for Atmos to aggressively pursue capacity release activities. Furthermore, because Atmos owned 45% of Woodward, the Authority also ordered that the *Affiliate Rules* be included to prevent preferential treatment by Atmos.[175]

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[173] All requirements in this instance meant that Woodward was responsible for making all nominations, scheduling volumes and releasing capacity. *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase Two,* p. 14 (August 16, 1999).

[174] Exhibit A, Affidavit of Pat Murphy, ¶ 13.

[175] Exhibit A, Affidavit of Pat Murphy, ¶ 14.

During the Phase Two hearings, the Authority considered whether the Capacity Release Incentive Mechanism should be modified to further increase Atmos' incentive to perform well its capacity release activities. Nevertheless, the TRA determined that modification was not necessary because the gains attributable to capacity release accounted for only 35% of the total gains realized during the first year, and only 30% of the gains during the first eight months of the second year of the experimental period.[176]

In sharp contrast, during the first year of the contract between Atmos and AEM (2004-2005), all savings reflected under the plan were derived from the Capacity Management Incentive Mechanism.[177] As shown in its Atmos' audit filing, although zero commodity savings were reported under the Gas Procurement Incentive Mechanism, a total of $420,872 in Capacity Release savings was reported. Of this amount, $351,953 constituted the upfront fees derived from asset management. That means **83.6%** of the total savings under the Capacity Release Incentive Mechanism, and total overall, for that year resulted from fees received under the AEM asset management contract.[178] This is quite a substantial disparity from the 30-35% experienced during the incentive plan hearings.

The wide divergence in gains attributable to capacity release activities when the PBRM tariff was approved and following Atmos' execution of the asset management contracts, further demonstrates that asset management agreements, like those between Atmos and AEM, were not the norm, nor was the possibility of such contracts raised during the hearings. As such, the

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[176] *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase Two,* p. 26 (August 16, 1999).
[177] Exhibit A, Affidavit of Pat Murphy, ¶ 15.
[178] Id.

Authority had no opportunity to and did not examine these types of arrangements when it approved the terms of the current PBRM.[179]

When the Authority authorized Atmos to operate permanently under the PBRM, it determined that the PBRM should continue, as is, unless modified, amended, or terminated.[180] In making this determination the Authority considered, and *rejected*, assigning an automatic review period based on time or special trigger events, such as "a fundamental change in the utility's marketplace including the potential of unbundling."[181] Rather than imposing certain pre-determined limits or conditions, the Authority allowed the plan to maintain continuity, while providing the remedies of modification, amendment, or termination, should a change in conditions, or some other situation or event arise that required a change or discontinuation of the plan.

As the foregoing demonstrates, the PBRM tariff was not intended to include sharing of fees from contracts like those between Atmos and AEM. The explicit, unambiguous language of the PBRM tariff was intended to encourage the Company to actively manage its capacity and to reward it for releasing unutilized capacity daily. This was consistent with the market conditions and Atmos' own practices at the time that the Authority approved the tariff. Further, the absence of any reference or provision either allowing or prohibiting the Company to *share* in fees derived from selling its right to manage and release unutilized and underutilized capacity to another party further demonstrates that it was not intended for inclusion the tariff. Thus, the Authority did not contemplate the existence of a contractual situation such as is now proposed by Atmos for

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[179] Id.

[180] Atmos 2nd Revised Tariff Sheet No. 45.1 (effective October 4, 2002); *See also In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase Two,* p. 21-22 (August 16, 1999).

[181] *In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase Two,* p. 21-22 (August 16, 1999).

inclusion in the PBRM when it approved the tariff. As no modification or amendment had been timely filed, as required under the tariff and the statutes and rules of the Authority, such fees are not eligible for sharing.

3. Atmos' Interpretation & Understanding of the Capacity Release Incentive Mechanism is Consistent with TRA Staff's Position as Evidenced by Its Own Practice and Verified Supplementation Filed in Docket No. 05-00253

Despite its assertions that the fees are eligible for sharing, Atmos has not only demonstrated through its proper treatment of such fees in each of its ACA audit filings, but it has, in fact, admitted that it also interprets and understands the mechanism in a manner consistent with TRA Staff's position. First, Atmos has credited 100% of the AEM asset management payments appropriately to the ACA Account for the benefit of ratepayers each and every year in which Atmos has received such fees. These reporting years span from 2004 through 2011.[182]

Moreover, as noted previously herein, on April 12, 2007, "for the benefit of the Tennessee Regulatory Authority, the Company's customers and the public interest," and to provide clarity to the complex issues and mechanisms at issue in the docket, on its own initiative, Atmos filed its *Verified Supplementation* (see **Exhibit C**).[183] In its *Verified Supplementation,* Atmos explained clearly that it retains none of the asset management fees from AEM, and that only revenue generated from non-AEM asset management capacity release activities are subject to sharing under its Capacity Release Incentive Mechanism:

> Under the Agreement, AEM pays an annual lump sum of $500,000 as payment for the right to manage Atmos' assets. (TRA Docket No. 05-00253, 4/21/06 Staff Audit Report, p.15) ***Atmos does not retain any portion of the lump sum***

[182] Exhibit A, Affidavit of Pat Murphy, ¶ 11.

[183] *See In re Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, *Atmos Energy Corporation's Verified Supplementation of the Record* with *Verification,* signed by Patricia Childers, Vice President, Rates and Regulatory Affairs. Mid-States Division, Atmos Energy Corporation, attached thereto. (April 12, 2007).

payment. The full $500,000 is flowed 100% through to the ratepayers under the Purchased Gas Adjustment ("PGA") mechanism. (Id.) That $500,000 payment is shared between Tennessee and Virginia ratepayers according to the percentage allocation for shared demand costs between the states. (TRA Docket No. 05-00253, 6/14/06 Memo To File, p.1.) Prior to July 1, 2005, Tennessee ratepayers were allocated 69.5% of the annual fee, or $347,500. After July 1, 2005, Tennessee ratepayers will receive 64% of the fee, or $320,000 per year. (Id.)

* * *

In addition to, but separate from, the above, there are a few assets (in the form of pipeline contracts) that are not included within the AEM agreement, and which Atmos manages itself. The revenue from these non-AEM asset management activities are shared with ratepayers under the Capacity Release Incentive Mechanism of the Company's PBR. To get a total amount of dollars received by consumers from both Atmos' non-AEM asset management activities and the AEM agreement, it would be necessary to add the Capacity Release Mechanism dollars to the annual AEM lump sum fee. The following chart demonstrates the approximate amount of TOTAL asset management dollars flowed through to consumers since the AEM contract began in April 2004:

	AEM Lump Sum Fee	Ratepayer Share of Additional Capacity Release Dollars Under the PBR.[3]	Total Asset Management Dollars to Consumers[4]
2004-2005 Audit Year	$347,500	$82,238	$429,738
2005-2006 Audit Year	$320,000	$76,266	$396,266

[3] Due to the pending PBR case, TRA Consolidated Dockets No. 01-00704 and 02-00850, Atmos has not filed a PBR report since the 2000-2001 year. Therefore, since that time the Company has not recouped its share of the savings under the PBR, and 100% of those savings have flowed through to consumers. The figures in the chart represent the ratepayers' share under the PBR plan.

[4] This column represents the TOTAL amount of dollars received by consumers from both Atmos' non-AEM asset management activities and the AEM agreement.

> These amounts represent dollars flowed through to consumers resulting solely from asset management. These amounts do not include additional dollars consumers received from Atmos' gas procurement activities *(emphasis added.)*.[184]

To further clarify its description of the workings of the PBRM, Atmos provided the above chart to illustrate the flow of monies it receives as a result of asset management and capacity release activities. The years chosen by Atmos for illustration, 2004-2005 and 2005-2006, fall squarely within the IPA audit years that TRA Staff has audited in this docket. The TRA Staff agreed then, in Docket No. 05-00253, and continues to agree, with Atmos' clear explanation of the correct treatment of fees received from its AEM asset management contracts, and the shared non-AEM revenue, as provided under the PBRM. Specifically, that the lump sum payment received by Atmos under its agreement with AEM is separate and distinct from revenue generated from non-AEM assets, managed by Atmos itself, and that, under the PBRM, only the revenue from non-AEM activities are shared with ratepayers.[185]

The *Verified Supplementation* was filed by Atmos, "in a good faith attempt to clarify the record with regard to the amounts flowing to consumers under the AEM agreement" for the benefit of the Authority, Company's customers, the public interest, and to correct what Atmos asserts were apparent "uncertainties" or misstatements expressed by the Consumer Advocate.[186] The filing is accompanied by a sworn Certificate of Verification signed by Patricia Childers, who is Vice President, Rates and Regulatory Affairs, Mid-States Division, for Atmos Energy Corporation.[187] The TRA Staff asserts that the *Verified Supplementation*, which has been on file with the Authority, without objection, since 2007, is accurate, reliable, and should be accepted and relied upon by the Authority in this case.

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[184] *Id.* at 2-3.
[185] *Id.*
[186] *Id.* at 1 and 5.
[187] *Id.* at 6.

4. Atmos' IPA Docket No. 01-00704 is Properly Analogized and the TRA's Sound Reasoning and Decision Rendered Therein Should be Applied in this Docket

In Docket No. 01-00704, Atmos contended that, although the negotiated discount transportation contracts it had entered into did not exist when the PBRM tariff was created and were not specifically addressed therein, it was entitled to share in savings drawn from such contracts under the terms of the tariff.[188] Further, the Company asserted that through its particular application of the transportation cost adjuster in the Gas Procurement Incentive Mechanism,[189] a benchmark could be fashioned by which to measure the cost savings derived from the discount transportation contracts.[190] Atmos asserted that because of the incentives contained in the PBRM, it had undertaken extraordinary efforts, actively pursued, and successfully negotiated the discounted transportation contracts, which generated savings for its customers.[191]

Nevertheless, the Hearing Officer held that as the PBRM tariff did not capture savings flowing from negotiated transportation discounts because they were not available at the time of the tariff was approved, the TRA ***could not*** and ***did not*** contemplate the conditions necessary to consider an appropriate mechanism for savings.[192] The Hearing Officer further found that the lack of a specific section along with only a miniscule reference to transportation costs, and the absence of a methodology or benchmarks as how shared savings were to be calculated,

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[188] *See In re: Audit of United cities Gas Company, a Division of Atmos Energy Corporation Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Initial Order of the Hearing Officer on the Merits,* pp. 19-26 (March 14, 2006).

[189] The transportation cost adjuster is applied to city gate purchases, whereby the Company buys local gas and avoids the full pipeline costs of transporting the gas from the Gulf of Mexico to Tennessee. *Id.* at 11.

[190] In Atmos' PBRM tariff, the Gas Procurement Incentive Mechanism designates that a certain level of savings associated with the Company's commodity cost of gas may be shared. The commodity cost of gas is compared to a benchmark price of gas, which is determined using the specific market indexes referenced in the tariff. *Id.* at 10.

[191] *Id.* at 19-20.

[192] *Id.* at 32.

demonstrated a lack of intent to include the discounts in the PBR mechanism.[193] Finally, the Hearing Officer rejected Atmos' assertion that transportation discounts were captured under the language or terms of the PBRM through another portion of the Gas Procurement Incentive Mechanism.[194]

In its petition for reconsideration of the Hearing Officer's initial order, Atmos contended that its rights to due process and equal protection had been violated by the Hearing Officer's failure to apply, as had been done for other gas companies, the TRA's 'established policy' on disallowing incentive plan items under certain conditions.[195] Concerning this allegation, the Hearing Officer held as follows:

> 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 estoppels 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 *(emphasis added)*.[196]

The Authority affirmed the Hearing Officer's findings on the issues above, including the finding that, in the absence of specificity concerning transportation discounts consistent with the pattern of the tariff for gas commodity costs and capacity release, and the absence of a methodology or benchmarks, the TRA lacked intent to include transportation discounts in the PBRM. In addition, the Authority affirmed the Hearing Officer's finding that no "established policy"

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[193] *Id.*
[194] *Id.* at 32-33.
[195] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Order Denying Motion for Reconsideration,* p. 2 (April 18, 2006).
[196] *Id.* at 4.

concerning the disallowance of incentive plan items for gas companies existed, and that Atmos' argument in this regard was without merit. The panel agreed that each case must be evaluated on its own particular circumstances and upon the evidence presented. In addition, the Authority held:

> [T]he 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 Company could calculate savings from negotiated transportation contracts. . . . [and] that ***it is inappropriate to craft a methodology for calculating the amount of such savings in the course of an audit (emphasis added).***[197]

The Authority definitively affirmed the Hearing Officer's determination that the PBRM tariff did not contain an incentive provision for sharing savings through the implication of another part of the tariff, and explicitly rejected the proposition that an overlooked or omitted provision or methodology should, or even could, be crafted into the tariff during the course of an audit.

While the issues in Docket No. 01-00704 involved the Gas Procurement Incentive Mechanism of the PBRM, the TRA Staff asserts that Atmos' contentions in this docket that fees from its asset management contracts with AEM are or should be eligible for sharing under the Capacity Release Incentive Mechanism are strikingly similar and analogous. Just as the alleged savings from transportation discount contracts did not exist or were not available, and therefore could not and were not contemplated by the Authority in the PBRM tariff; the bulk sale of Atmos' rights to manage and release its capacity contracts for a year, or multiple years, at a time, for an upfront lump-sum payment, was not contemplated by the Authority. When the TRA approved the Capacity Release Incentive Mechanism of the PBRM, such asset management arrangements were not widely available or utilized, and, in fact, were not used by Atmos or consistent with the capacity release practices then exercised by Atmos.[198]

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[197] *Id.* at 7.
[198] Exhibit A, Affidavit of Pat Murphy, ¶ 12 & 13.

In addition, consistent with the Authority's determination that sharing savings could not be applied through the implication of the transportation cost adjuster, and rejection of the proposition that an overlooked or omitted provision or methodology should, or even could, be crafted into the tariff during the course of an audit; the TRA Staff asserts herein that the sharing of fees from asset management contracts with AEM cannot be implied from other provisions of the tariff, nor can such a provision or methodology be incorporated after the IPA period of review, during the course of an audit. The TRA Staff respectfully requests that the sound reasoning and decisions established by the Authority in Docket No. 01-00704, be likewise applied to the issues raised in this docket.

5. Neither the Affiliate Rules nor Subsequent RFP Amendment Permits Sharing of Asset Management Fees Received Under Asset Management Contract(s)

In 1999, acknowledging certain concerns due to the Company's failure to notify the TRA of a gas sales agreement and subsequent purchases, which had been executed with its affiliate company, Woodward, and recognizing the potential for abuse of the incentive mechanism should affiliate transactions be permitted to continue unmonitored, the Authority ordered the establishment of the *Affiliate Rules*.[199] In addition, the Authority ordered that before any affiliate transactions would be considered for inclusion in the computation of savings or losses under the Company's PBRM, those specific transactions must be documented, and determined, during the annual audit of the Company's Incentive Plan Account ("IPA"), to be in compliance with the *Affiliate Rules*.[200]

Following the Authority's incorporation of RFP procedures for the selection of an asset manager into the affiliate rules of Chattanooga Gas Company's incentive plan, the TRA Staff

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[199] *See In re: Application of United Cities Gas Company to Establish an Experimental Performance-Based Ratemaking Mechanism,* TRA Docket Nos. 95-01134 & 97-01364, *Final Order on Phase Two,* p. 10-21 (August 16, 1999).

[200] *Id.* at 21.

expressed certain concerns as to the way in which Atmos had implemented the RFP process outlined in its *Affiliate Rules* in Docket No. 05-00253.[201] As a result of these concerns, the TRA Staff recommended, among other things, certain improvements to the RFP procedures, that Atmos file all future proposed contracts relating to asset management and gas procurement for prior approval of the Authority, and that a separate docket be opened to consider and address whether fees derived from asset management contracts should be included under the PBRM and, if so, determine the appropriate sharing mechanism and sharing percentage of such fees.[202]

In response to TRA Staff's concerns, on April 5, 2007, Atmos filed a request to amend its PBRM tariff to expand the *Affiliate Rules* to include RFP procedures that were essentially identical to those that had been previously approved by the TRA for Chattanooga Gas Company.[203] The RFP procedures outline the process to be followed "to engage the services of an asset manager to provide system gas supply requirements and/or manage its assets regulated by the [Authority]. . ."[204] On June 25, 2007, the Authority approved the RFP procedures for incorporation in the *Affiliate Rules* of the PBRM in Docket No. 05-00253.[205] While the rules acknowledge a situation wherein Atmos might choose to contract with an asset manager, and provides the process for so doing, there is no reference to or provision for sharing fees received under such contracts. The Authority's approval and incorporation of RFP procedures into the *Affiliate Rules* section of the PBRM does not provide for sharing of fees from asset management

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[201] *See In re: Atmos Energy Corporation's Annual Cost Adjustment (ACA) for the Twelve Months Ended June 30, 2005,* TRA Docket No. 05-00253, *Notice of Filing by Utilities Division of the Tennessee Regulatory Authority, Exhibit A, Compliance Audit Report,* pp. 14-15 (April 21, 2006).
[202] *Id.* at 15-16.
[203] *In re: Summary of the Transaction in Chattanooga Gas Company's Deferred Gas Cost Account for the Twelve Months Ended June 30, 2004 and the Computation of ACA Factor Effective January 1, 2005,* TRA Docket No. 04-00402, *Order Adopting Tariff Revisions* (December 5, 2006).
[204] Atmos 2nd Revised Tariff Sheet No. 45.3 (effective May 5, 2007).
[205] *See In re: Atmos Energy Corporation's Annual Costs Adjustment (ACA) for the Twelve Months Ended June 30, 2005,* TRA Docket No. 05-00253, *Order Approving Tariff* (December 6, 2007).

contracts, nor any methodology for calculating such sharing, and neither can sharing be implied by the Authority for the reasons previously discussed herein above.

6. Over the Course of Several Dockets, the Parties & the Authority have Implicitly Recognized that the PBRM does not Include Sharing of Fees from Asset Management Contracts

That the PBRM tariff does not provide for sharing of revenue generated under asset management contracts, like those between Atmos and AEM, has been implicitly recognized by the Authority in several dockets. The Authority's deferral of this issue in Docket No. 05-00253, first to Docket No. 05-00258,[206] and again later to Docket 07-00225,[207] evidences the TRA's consistent realization of the PBRM's impotence under these circumstances, and its willingness to consider how and to what extent the PBRM may be appropriately modified to include such sharing. While Docket No. 07-00225 remains pending, at the request of the parties therein, the Authority has not explicitly rendered an opinion as to whether Atmos should be allowed to include asset management fees under the PBRM, and if it is allowed, the terms of such sharing.

Notwithstanding the foregoing, this issue appears to be resolved on a going-forward basis, as in Docket No. 11-00034, at the request of TRA Staff, Atmos filed a revision to the PBRM tariff that incorporated the language, "sharing of asset management fees paid by asset managers and other forms of compensation received by the company for the release and/or utilization of the Company's transportation and storage assets by third-parties" is included in the

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[206] *See In re: Petition of the Consumer Advocate to Open an Investigation to Determine Whether Atmos Energy Corp. Should be Required by the Tennessee Regulatory Authority to Appear and Show Cause that Atmos Energy Corp. is not Overearning in Violation of Tennessee Law and that It is Charging Rates that are Just and Reasonable*, TRA Docket No. 05-00258, *Order Adopting Phase Two Issues and Modifying the Phase Two Procedural Schedule, Attachment A* (October 6, 2006).

[207] *See In re: Docket to Evaluate Atmos Energy Corporation's Gas Purchases and Related Sharing Incentives*, TRA Docket No. 07-00225, *Order on December 13, 2007 Status Conference, Attachment A* (December 21, 2007).

Capacity Release Incentive Mechanism.[208] During its regularly scheduled Authority Conference held on January 9, 2012, the Authority approved Atmos' revised PBRM tariff, effective April 1, 2011.[209]

III. ATMOS' PBRM TARIFF AND HISTORY ARE UNIQUE AND MUST BE CONSIDERED ON ITS OWN MERITS

1. Atmos' Reliance on the Terms, Evolution, or History of Dockets Related to Piedmont's Incentive Tariff, is Unsupported and Without Merit

As it failed to timely file a modification to its PBRM tariff that provided for sharing of asset management fees, Atmos now seeks relief from the Authority by pressing an unsupported reading of the tariff that would implicitly allow sharing, and is unjustified in its heavy reliance upon a fairness or equal protection type of argument. Atmos has essentially asserted that because Nashville Gas Company, now Piedmont Natural Gas Company ("Piedmont"),[210] was able to retain sharing proceeds under its incentive plan tariff during a similar controversy on fees-sharing that occurred between TRA Staff and Piedmont; therefore, Atmos should be entitled to claim a share of the fees from its asset management contracts, despite the TRA Staff's objections and assertions to the contrary.[211] The TRA Staff respectfully asserts that Atmos reliance on its comparisons to Piedmont, and any contentions stemming from such reliance concerning fairness or equality, are woefully misplaced and improper. Neither the terms or

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[208] *See In re: Request of Atmos Energy Corporation for Approval of Contract(s) Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts,* TRA Docket No. 11-00034, Atmos 3rd Revised Tariff Sheet No. 45.1 (August 19, 2011).

[209] *See In re: Request of Atmos Energy Corporation for Approval of Contract(s) Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts,* TRA Docket No. 11-00034, Transcript of Authority Conference, pp. 53-55 (January 9, 2012).

[210] Nashville Gas Company was originally structured as a division of Piedmont Natural Gas Company, but later changed its name from Nashville Gas Company to Piedmont Natural Gas Company. *For the sake of consistency and to avoid confusion, despite that original filings and Orders may have been filed under or referred to the name Nashville Gas Company or "NGC," with the exception of footnotes, all references made throughout this Brief are and will be "Piedmont."

[211] *See In re: Atmos Energy Corporation Incentive Plan (IPA) for the Years 2001-2011,* TRA Docket No. 11-00137, *Petition for Approval of Incentive Plan Account Reports for the Period April 1, 2001 through March 31, 2011* (August 23, 2011).

evolution of the tariff, nor the history of the dockets on the issue of asset management fee-sharing as to Piedmont, support a finding that Atmos and Piedmont are sufficiently similar such that Atmos is entitled, or should be allowed, to share in asset management fees under its PBRM during the period of 2004 through 2011.

Indeed, while the subject matter may overlap, the terms of Atmos' tariff and the circumstances under which this dispute has arisen are wholly separate and distinct from those of Piedmont, and therefore, a disparate treatment of the companies is entirely justified. Furthermore, TRA Staff asserts that, as has been made clear by the Authority in previous dockets, in lieu of an "established policy" as to the disallowance of incentive plan items for gas companies, each case must be evaluated on its own particular circumstances and evidence.[212] Therefore, Atmos' contentions that it is entitled to the same or similar treatment as was accorded to Piedmont on the issue of sharing of asset management fees under its PBRM Tariff are without foundation and meritless.

a. The Terms of Piedmont's Incentive Tariff are Substantially Different from Atmos' PBRM Tariff

The terms of Atmos' tariff are distinctly different than those of Piedmont, and, as such, Atmos cannot rely on the Authority's past rendering of Piedmont's tariff to support its contentions of entitlement to the same or similar treatment and, thus, share asset management fees under its PBRM tariff. While the introductory sections of Atmos' tariff and Piedmont's incentive tariff, prior to revision following settlement in Docket No. 05-00165, may appear identical, the language in the Capacity Management Incentive Mechanism sections of the tariffs

[212] *See In re: Audit of United Cities Gas Company a Division of Atmos Energy Corporation, Incentive Plan Account (IPA) for the Period of April 1, 2000 through March 31, 2001,* TRA Docket No. 01-00704, *Order Affirming, in part, and Vacating, in part Hearing Officer's Initial Order,* p. 7 (May 13, 2008).

are not. The TRA Staff asserts that the differences between the tariffs alter significantly the terms under which the sharing of fees might have been allowed.

As discussed at length earlier herein, the terms of Atmos' *Capacity Management Incentive Mechanism* are narrow and require the Company to *daily* release its unutilized capacity, as follows:

> To the extent the Company is able to release ***daily*** transportation or ***daily*** storage capacity, the associated savings will be shared by the Company's customers and the Company on a 90/10 basis. The sharing percentages shall be determined based on the actual demand costs incurred by the Company (exclusive of credits for capacity release) for transportation and storage capacity during the plan year, as such costs may be adjusted due to refunds or surcharges from pipeline and storage suppliers. Any incentive savings or cost resulting from adjustments to the sharing percentages caused by refunds or surcharges shall be recorded in the current Incentive Plan Account (IPA) *(emphasis added)*.[213]

In stark contrast, when TRA Staff first objected to them, the terms of Piedmont's Capacity Management Incentive Mechanism are more broadly crafted and do not specify the timing of Piedmont's release of capacity or generation of margin, as follows:

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[213] Atmos 1st Revised Tariff Sheet No. 45.2 (effective October 4, 2002).

To the extent Nashville is able to release transportation or storage capacity, or generate transportation or storage margin associated with off-system or wholesale sales-for-resale, the associated cost savings shall be shared by Nashville and customers according to the following formula

Capacity Management Incentive cost savings as a percent of Nashville's annual transportation and storage demand costs.	**Sharing percentages Nashville/Customers (Percent)**
Less than or equal to 1 percent	0/100
Greater than 1 percent but less than or equal to 2 percent	10/90
Greater than 2 percent but less than or equal to 3 percent	25/75
Greater than 3 percent	50/50

The sharing percentages shall be determined based on the actual demand costs incurred by Nashville (exclusive of credits for capacity release) for transportation and storage capacity during the plan year, as such costs may be adjusted due to refunds or surcharges from pipeline and storage suppliers. Any incentive gains or losses resulting from adjustments to the sharing percentages caused by refunds or surcharges shall be recorded in the current Incentive Plan Account.[214]

Where the terms in Atmos' tariff are more narrowly tailored, Piedmont's are broad. Not only is the qualification of "daily" omitted in Piedmont's tariff, but reference to the generation of margin (revenue) associated with off-system or wholesale sales-for-resale is included. Atmos' tariff requires daily release of capacity. Piedmont's tariff does not contain such a requirement. Where Atmos' tariff is silent and does not include any reference to revenue generated from other sales, Piedmont's tariff is more expansive to encompass margin from off-system and wholesale sales-for-resale. These differences are significant, and are alone sufficient to substantiate distinct

[214] Nashville Gas Company [Piedmont] Service Schedule No. 14, Performance Incentive Plan, Original Sheet, Page 4-5 of 6 (effective July 1, 1998).

readings of the tariffs, and thus, particularized treatment and applications of the Capacity Release Incentive Mechanisms.

Even after Piedmont's tariff was revised by agreement entered in Docket No. 05-00165, the terms of Piedmont's revised Capacity Management Incentive Mechanism, which became effective July 1, 2006,[215] specifically included reference to asset management fees in its overview and remained unrestricted as to the timing of Piedmont's release of capacity or generation of margin, as follows:

> The Plan also is designed to encourage the Company to actively market off-peak unutilized transportation and storage capacity on pipelines in the secondary market. ***It also addresses the sharing of asset management fees paid by asset managers, and other forms of compensation received by the Company for the release and/or utilization of the Company's transportation and storage assets by third-parties***. . . . *(emphasis added)*. [216]
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> * * *
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> To the extent the Company is able to release transportation or storage capacity, or generate transportation or storage margin associated with off-system sales or wholesale sales-for-resale, ***the associated cost savings and/or asset management fees, or other forms of compensation associated with such activities***, shall be shared by the Company and customers according to the following sharing formula: 75%-customers / 25%-stockholders. The Company shall notify the TRA Staff and the Consumer Advocate and Protection Division of the Office of the Attorney General (CAD) of all "other forms of compensation" prior to inclusion of such compensation in the plan *(emphasis added)*.[217]

The tariffs, even now, remain distinct and each must be considered on its own merits. Therefore, the TRA Staff asserts that while it objected to Piedmont's inclusion of asset management fees, just as it has also objected to the inclusion of such fees by Atmos, the language and terms of the two tariffs are clearly distinguishable and, thus, justify any dissimilar treatment by the Authority.

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[215] *See In re: Review of Nashville Gas Company's IPA Relating to Asset Management Fees,* TRA Docket No. 05-00165, *Order Approving Settlement, Exhibit 1,* p. 2 (December 14, 2007).
[216] Piedmont Service Schedule No. 316, *Performance Incentive Plan*, Second Revised Page 1 of 8 (effective July 1, 2006).
[217] *Id.* at page 4 of 8.

Atmos cannot rely on the Authority's early handling of Piedmont's incentive tariff as support that it is entitled to receive the same treatment, and therefore be permitted to share in an asset management fees in clear contravention of the language of its tariff.

b. The Evolution of Piedmont's Tariff & the History of Dockets as to Its Incentive Plan are Distinguishable from those of Atmos

The evolution of the tariffs and the history of the incentive plans of Atmos and Piedmont are distinguishable. As the following will demonstrate, concerning the way in which asset management fees originated in their incentive plans, Atmos and Piedmont are not similarly situated. Thus, Atmos' contentions that it is entitled to share in asset management fees it received from 2004 through 2011, despite the absence of tariff terms permitting such sharing simply because Piedmont was permitted to retain shared proceeds, despite TRA Staff's contrary recommendation, has no reasonable basis and should be declined.

On May 31, 1996, the Authority issued an Order in Docket 96-00805 approving an incentive plan for Piedmont on an experimental basis.[218] The experimental period of Piedmont's incentive plan began on July 1, 1996, and ended on June 30, 1998. The details of the incentive plan were included in Service Schedule No. 14 Tariff, *Performance Incentive Plan*, which was issued on April 22, 1996 and effective on July 1, 1996. On March 31, 1998, Piedmont filed an application for an extension of its performance incentive plan in order to allow the plan to continue on an annual basis. Beginning July 1, 1998, the Authority authorized Piedmont to continue to operate under a modified incentive plan, and ordered that the plan roll automatically to a new year each July 1, and continue until the incentive plan is either (a) terminated at the end

[218] *See In re: Application of Nashville Gas Company, a Division of Piedmont Natural Gas Company, to Establish a Performance Incentive Plan,* TRA Docket No. 96-00805, *Order Approving Performance Incentive Plan* (March 11, 1999).

of a plan year by not less than 90 days notice by Nashville Gas to the Authority or (b) modified, amended or terminated by the Authority.[219]

On October 1, 1999, Piedmont submitted its first annual incentive plan report covering July 1, 1998 through June 30, 1999 in Docket 99-00207.[220] On May 3, 2000, the TRA Staff filed its audit report and made no official findings.[221] The Authority approved the audit report in full on May 23, 2000.[222] Piedmont filed its next three annual incentive plan reports on August 25, 2000, September 6, 2001 and September 4, 2002, respectively.[223] In its audit report in 2000, Staff made one finding as to capacity release, one finding as to interest in its 2001 audit report, and it made no findings in its 2002 audit report.[224] The Authority approved these audit reports as filed.

Earlier, on November 11, 1999, approximately one year after the Authority approved its incentive plan, Piedmont entered into its first asset management contract. Piedmont included the sharing of its fees received under the asset management contract in its calculations in each of Piedmont's annual reports in 2000, 2001, and 2002. Although, Piedmont had been straightforward in its filings as to its asset management arrangements, at that time, the practice of a utility selling its rights to manage its assets, including excess capacity, to another was a new and innovative practice in the industry, and the TRA Staff lacked knowledge and experience

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[219] *Id.* at 9-10.

[220] *See In re: Audit of Incentive Plan Year Ended June 30, 1999,* TRA Docket No. 99-00207 (June 29, 1999).

[221] *See In re: Audit of Incentive Plan Year Ended June 30, 1999,* TRA Docket No. 99-00207, *Notice of Filing by Energy and Water Division of the Tennessee Regulatory Authority, Exhibit A, Compliance Audit Report,* p. 3 (May 3, 2000).

[222] *See In re: Audit of Incentive Plan Year Ended June 30, 1999,* TRA Docket No. 99-00207, *Order Adopting IPA Compliance Audit Report of Authority's Staff* (June 5, 2000).

[223] *See In re: Audit of Nashville Gas Company's Incentive Plan Account (IPA) for Year Ended June 30, 2001,* TRA Docket No. 01-00776 (September 6, 2001) and *See In re: Audit of Nashville Gas Company's Incentive Plan Account (IPA) for Year Ended June 30, 2002,* TRA Docket No. 02-00993 (September 4, 2002).

[224] *See In re: Audit of Nashville Gas Company's Incentive Plan Account (IPA) for Year Ended June 30, 2000,* TRA Docket No. 00-00759, *Compliance Audit Report* (June 12, 2001), and *See In re: Audit of Nashville Gas Company's Incentive Plan Account (IPA) for Year Ended June 30, 2001,* TRA Docket No. 01-00776, *Compliance Audit Report* (February 11, 2002) and *See In re: Audit of Nashville Gas Company's Incentive Plan Account for Plan Year Ended June 30, 2002,* TRA Docket No. 02-00933, *Compliance Audit Report* (February 3, 2003).

concerning such contract arrangements. As such, it simply did not comprehend the parameters and implications of the arrangement or its application to Piedmont's incentive plan tariff.

Nevertheless, after auditing Piedmont's annual report filing for plan year 2003, filed in Docket No. 03-00489, the TRA Staff began to challenge the propriety of Piedmont's inclusion of asset management fees under the terms of its incentive plan. In its audit report that year, the TRA Staff expressed its concerns and recommended that, as the payment received under the asset management contract had arisen subsequent to the TRA's consideration of the incentive plan, the addition of such fees constituted a material deviation from the terms of the tariff, which did not include provision for sharing under such conditions. Finally, the TRA Staff only recommended, but did not issue an audit finding, that the payment should be excluded in future audit plan years on a going forward basis.[225]

On April 26, 2004, a majority of the voting panel of Directors voted to order Piedmont to file a proposal to remedy the areas of concern identified by the TRA Staff, including among others, the issue concerning inclusion of the asset management fee, and then approved the remainder of the audit report.[226] Subsequently, during a regularly scheduled Authority Conference held on September 13, 2004, the Authority accepted Piedmont's proposed improvements to the IPA process, declining to make a determination regarding the three issues that remained unresolved between Piedmont and the TRA Staff, one of which was the inclusion of asset management fees.[227]

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[225] *See In re: Audit of Nashville Gas Company's Incentive Plan Account (IPA) for Year Ended June 30, 2003,* TRA Docket No. 03-00489, *Compliance Audit Report* (March 29, 2004).

[226] *See In re: Audit of Nashville Gas Company's Incentive Plan Account (IPA) for Year Ended June 30, 2003,* TRA Docket No. 03-00489, *Order Adopting, in Part, IPA Compliance Audit Report of Tennessee Regulatory Authority's Energy and Water Division* (October 1, 2004).

[227] *See In re: Audit of Nashville Gas Company's Incentive Plan Account (IPA) for Year Ended June 30, 2003,* TRA Docket No. 03-00489, *Order Accepting Company's Proposed Improvement to Company's IPA* (February 4, 2005).

On March 4, 2005, the TRA Staff filed its audit report for Piedmont's plan year 2004.[228] This time, the TRA Staff issued a finding in its audit report that Piedmont had over-stated the amount available for sharing under the Capacity Release Incentive Mechanism as a result of its improper inclusion of fees received under its asset management contract with a third-party.[229] TRA Staff reiterated its assertion that, under the terms of the tariff, fees from asset management contracts were not allowed, and further explained as follows:

> The Compliance Staff erroneously treated these fees as released capacity transactions for plan years 1999-2000, 2000-2001, and 2001-2002. In Docket 03-00489 for plan year 2002-2003, Staff realized that the language of the Incentive Plan did not provide for the outsourcing of this capacity release function. The concept of an asset manager separate from the utility was unheard of in 1996. Therefore, although Staff agrees that the intent of an incentive plan is to encompass all purchasing activities of a company, an asset manager was not addressed or even anticipated in Nashville's original Incentive Plan.[230]
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> * * *
>
> Staff has several reasons for believing that the Incentive Plan as written does not include the concept of an outside asset manager. First, the language of the Incentive Plan tariff makes no mention of an outside asset manager. The terms of the tariff address efforts made by the Company. In fact, the asset manager concept was not even utilized in 1996. Second, use of an outside asset manager does not allow for *calculation of savings* as stipulated in the tariff language. "Profits" as such cannot be determined or audited by Staff. Transparency of transactions is very important since the Enron scandal and the enacting of the Sarbanes-Oxley Act of 2002 by Congress and does not exist in an asset management arrangement. Third, an incentive plan should provide an incentive for the Company to move *beyond its normal prudent purchasing activity* and incur some risk for doing so, in exchange for the possibility of rewards. In the Company's own words, "In short, the inclusion of Asset Management fees as savings under the Incentive Plan Account is consistent with the purpose of the plan, has been highly beneficial to ratepayers, and **presents no risk of any kind to ratepayers or the Company *(emphasis in original)*.**"[231]

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[228] *See In re: Audit of Nashville Gas Company's Incentive Plan Account (IPA) for Year Ended June 30, 2004,* TRA Docket No. 04-00290, *Compliance Audit Report* (March 4, 2005).

[229] *Id.* at 6-9.

[230] *Id.* at 7. Also, note that TRA Staff similarly observed in Atmos Docket No. 01-00704, that transportation discounts were not anticipated or contemplated in the original incentive plan and therefore, not specifically provided for in the tariff. The Authority ultimately agreed, and affirmed the Hearing Officer's finding that the TRA lacked intent to include such discounts.

[231] *Id.*

During a regularly scheduled Authority Conference held on June 13, 2005, the voting panel of Directors noted that in Docket No. 03-00489, it had ordered that Piedmont's IPA plan continue while TRA Staff and Piedmont worked together to resolve the matter of asset management fees, and determined that, in light of its ruling and because the parties had not yet been able reach agreement, it would be improper to disallow inclusion of the fees in Piedmont's 2004 filing.[232] In addition, the panel ordered that a separate docket be established (Docket No. 05-00165) for a contested case proceeding in which it could consider the issues concerning inclusion of asset management fees and the appropriate form or structure for the sharing of such fees into the tariff.[233] Notably, although the Authority had maintained the status quo, it did not find that sharing of asset management fees was permitted under or encompassed within the terms of the incentive plan tariff. Instead, it deferred the controversy to another docket.

Over the next two years, the TRA Staff, Consumer Advocate, and Piedmont, proceeded to litigate the asset management fee-sharing issues and other incentive plan matters. On June 5, 2007, the parties in Docket No. 05-00165 filed a proposed settlement agreement, in which the incentive plan was substantially overhauled, incorporating, among various other changes, the adoption of a triennial review procedure of IPA operations by an outside consultant beginning in the fall of 2008.[234] Moreover, the parties proposed an "expansion of the existing tariff language to expressly include asset management fees and other forms of compensation received for

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[232] *See In re: Audit of Nashville Gas Company's Incentive Plan Account (IPA) for Year Ended June 30, 2004,* TRA Docket No. 04-00290, *Order Adopting Incentive Plan Account Filing of Nashville Gas Company for Year Ended June 30, 2004,* p. 4 (September 6, 2005).

[233] *Id.*

[234] *See In re: Review of Nashville Gas Company's Incentive Plan Relating to Asset Management Fees,* TRA Docket No. 05-00165, *Joint Request for Approval of Proposed Settlement Agreement of Nashville Gas Company, the Office of Attorney General, Consumer Advocate and Protection Division, and the Audit Staff of the Tennessee Regulatory Authority* and *Proposed Settlement Agreement* (June 5, 2007).

capacity management activities."[235] Following oral presentation of the proposed settlement agreement on two separate occasions, the Authority approved the proposed settlement agreement, including Piedmont's revised incentive plan tariff, as filed, during a regularly scheduled Authority Conference held on October 22, 2007.[236]

Atmos has no reasonable basis upon which to rely on the evolution of Piedmont's tariff or the history of the sharing of asset management fees as they were applied by Piedmont, and its observation of these events should have prompted Atmos to take precautionary measures. Astonishingly, Atmos took no action at all. As demonstrated herein below, because the situations of Atmos and Piedmont are not alike, and due to Atmos inaction and failure to timely revise its tariff, its contentions that it should be treated in the same or a similar manner as Piedmont are improper and without merit.

First, unlike Piedmont, Atmos waited until five (5) years after the Authority approved its permanent incentive plan and PBRM tariff to engage an asset manager. Although unknown to TRA Staff at the time, Atmos' first asset management contract became effective April 1, 2004. As shown above, prior to that date, on March 9, 2004, the TRA Staff issued an IPA audit report in Piedmont Docket No. 03-00489, wherein it expressed significant concerns about the inclusion of asset management payments as part of an incentive plan.[237] One of the issues that TRA Staff raised in that audit report was the fact that Piedmont's asset management contract had arisen and become effective after the Authority approved the incentive plan. Even, barring the several other concerns articulated in that report, this fact should have given Atmos pause before it unilaterally

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[235] *Id.*

[236] *See In re: Review of Nashville Gas Company's Incentive Plan Relating to Asset Management Fees,* TRA Docket No. 05-00165, *Order Approving Settlement* (December 14, 2007).

[237] These concerns were ultimately considered and resolved in Docket No. 05-00165, *Review of Nashville Gas Company's IPA Relating to Asset Management Fees.* A Settlement Agreement was reached that wholly and substantially revised Piedmont's incentive plan tariff.

executed its own asset management agreement – that is, at least if Atmos had anticipated that it would share in any fees derived from the contract. Clearly, Atmos took no such pause.

Second, as the issue was later raised again in Piedmont Docket No. 04-00289, and then transferred to Docket No. 05-00165, Atmos was keenly aware of the controversy surrounding the payments being claimed by Piedmont as part of its incentive plan. Yet, Atmos remained silent and inert. That is, until TRA Staff raised similar concerns in Docket No. 05-00253. Opened to review Atmos' ACA period of July 1, 2004 through June 30, 2005, this docket constituted the very first instance in which Atmos noted its receipt of fees from its asset management contract with AEM, which was structured to include an annual lump-sum payment for the right to manage Atmos' assets and capacity.

In its audit report in Docket No. 05-00253, while making no audit finding, the TRA Staff recommended that the Authority open a separate docket to address the potential inclusion of asset management fees in Atmos' PBRM and to consider an appropriate sharing mechanism and sharing percentages under which to implement such sharing.[238] In contrast to Piedmont, the actions and recommendations of TRA Staff in this docket were made long before Atmos filed any of its IPA annual reports or had ever even attempted to share in asset management payments under its PBRM.

Third, as discussed in detail earlier in section 3 of this part, in order to alleviate the concerns of TRA Staff and the Consumer Advocate, and to give public notice, Atmos filed in Docket No. 05-00253 its *Verified Supplementation,* in which it clarified the appropriate handling of proceeds received from assets managers under its AEM asset management contract and those

[238] *See In re Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, *Compliance Audit Report* (April 21, 2006).

that it managed itself, or non-AEM assets.[239] In its *Verified Supplementation,* it admits that it cannot share in the lump-sum fees it received from AEM, and can only share in revenue generated from assets and capacity it sold and released itself.[240] This document, verified by a senior executive of Atmos, should be considered highly relevant and credible evidence of Atmos' clear and accurate understanding that its PBRM tariff, prior to 2011, does not include sharing of asset management fees.

The asset management fee-sharing issue raised in Docket No. 05-00253 was later included in Phase Two of the Atmos Show Cause Docket No. 05-00258. Subsequently, upon closing Docket Nos. 05-00253 and 05-00258, the Authority moved Phase Two into Docket No. 07-00225.[241] Docket No. 07-00225 remains open and is pending resolution, but has been held in abeyance for over three years at the request of the parties in the docket. Therefore, prior to Atmos filing its revised tariff in 2011 incorporating certain language as to inclusion of asset management contract fees, similar to that added to Piedmont's tariff in Docket No. 05-00165, the Authority had not yet ruled as to whether Atmos was permitted under the language of its tariff to include fees from asset management contracts, nor whether it *should* be so allowed going forward, nor in the event it determined that Atmos should be so permitted, the parameters of the terms under which sharing would occur. The divergent evolution of the tariffs and history of the dockets related to the issue of sharing asset management fees for Atmos and Piedmont does not support similar handling or treatment by the Authority.

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[239] *See In re Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket No. 05-00253, *Atmos Energy Corporation's Verified Supplementation of the Record* (April 12, 2007).
[240] *Id.*
[241] *See In Re: Docket to Evaluate Atmos Energy Corporation's Gas Purchases and Related Sharing Incentives,* TRA Docket No. 07-00225.

2. *Atmos' Contentions that Fairness & Equal Protection Entitle It to Similar Treatment as that Accorded Piedmont, are Misplaced and Improper*

Due to the numerous differences between Atmos and Piedmont, the TRA Staff asserts that there is no reasonable basis upon which to find that Atmos should be allowed to share in fees it received under its asset management contracts with a third-party asset manager. Indeed, because of these differences and Atmos' unique tariff and circumstances, the issue raised herein must be considered on its own merits and evidence.

To reiterate, whereas Piedmont filed three (3) annual reports under its incentive plan that included sharing of asset management fees, which the Authority approved before the TRA Staff recognized and raised the issue of discrepancy between the tariff provisions and Piedmont's practice of including in its calculations the sharing of fees under such circumstances; here, the Authority has not previously approved any IPA audits in which Atmos has asserted an entitlement to sharing of asset management fees. The annual IPA filings made by Atmos in the instant docket, Docket 11-00195, constitute the first time Atmos has claimed such entitlement. Indeed, Atmos' contention that it should now be allowed to share such fees directly contradicts its own verified statements filed in Docket No. 05-00253.

Atmos had observed the controversy surrounding Piedmont's inclusion of asset management fees for sharing, and knew the reasons proffered by TRA Staff as to why sharing was not included under the tariff. Yet, it took no action to review or revise its own tariff. Not when the issues first surfaced in Piedmont's dockets, nor when these issues were definitively resolved by agreement in Docket No. 05-00165. Instead, it admitted in Docket No. 05-00253 that a proper reading and understanding of its PBRM tariff did not include sharing. Although its IPA filings were delayed due to litigation in Docket No. 01-00704, the IPA reports became due upon the Authority's affirmation of the Hearing Officer's order, as it related to the audit. Still

Atmos delayed further, more than two years, before it contacted TRA Staff to discuss filing its back log of IPA reports.

Finally for foregoing reasons, there is no reasonable support or justification for the Authority to consider the sharing of asset management fees based on fairness or equal protection grounds. On the contrary, the clear differences between the tariffs and history of Atmos and Piedmont dockets on this issue, as discussed above, clearly requires a particularized determination of the issues based on the merits of the circumstances and evidence herein.

IV. CONCLUSION

As has been established in detail above, Atmos may not share in fees from asset management contracts prior to 2011. Duly filed and approved by the Authority in the proper exercise of its regulatory authority and discretion, the PBRM tariff is effective and binding as with the force and effect of law. As such, the Authority must enforce its terms strictly. The terms of the PBRM are clear as written and devoid of reference to the sharing of fees or revenue received under contract with a third-party. The purpose of the tariff is to induce the Company to perform, expend effort, take risk, and operate at optimal efficiency, through enticement of reward and threat of loss. The terms of the PBRM are narrowly crafted and require the Company to *actively* market, and *daily* release, its unutilized capacity. The sale of its rights to actively manage and daily release its unused capacity for an annual upfront lump-sum payment, directly contravenes the purpose and explicit terms of the PBRM.

When the PBRM was approved for implementation, both during the experimental period and on a permanent basis, as well as for several years thereafter, Atmos itself expended the efforts and performed the activities necessary to market and release its unutilized capacity, without transferring those tasks to another company. In addition, the use of asset management

contracts were uncommon and not widely used in the industry at the time the PBRM was approved. As such, in approving the PBRM, the Authority did not contemplate incentivizing the Company under such circumstances, as is reflected in the terms used and the absence of any reference to the sharing of fees from asset management contracts, as well as the market conditions and Atmos' own practices at the time.

As revealed in its *Verified Supplementation* filed on April 12, 2007 in Docket No. 05-00258, Atmos too has interpreted and understood the PBRM to apply in the manner maintained by TRA Staff. In fact, Atmos filed an amendment to include RFP procedures in its tariff on April 5, 2007, which were approved by the Authority on June 25, 2007. This amendment recognized that the Company might choose to contract with an asset manager that was also an affiliate, and did not include any provision for the sharing of fees from an asset management contract. Despite the Authority's implicit acknowledgement that the PBRM does not include fee-sharing for asset management contracts, moving from docket to docket the issue of whether it should and, if so, how it could include such provision, Atmos failed to take any action to propose a modification or amendment of its tariff, which is the proper course according to the tariff itself and the statutes and rules of the TRA.

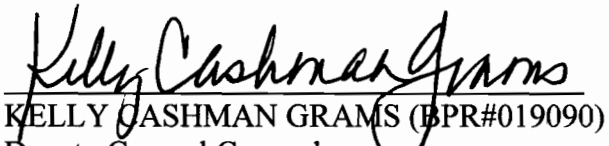
As dictated by the filed rate doctrine and rules of statutory construction, the Authority is required to enforce the PBRM strictly, as written. Regardless, of the sometimes seemingly harsh consequences of a strict application, the Authority is precluded from altering the tariff retroactively by implying terms not contained therein. In addition, the Authority has refused to incorporate terms or methodologies into a tariff during the course of an audit, finding such action inappropriate. The TRA's sound reasoning and decisions in previous dockets, one of which is

particularly analogous, Docket No. 01-00704, the Authority has recognized and upheld these precepts.

Finally, while the subject matter may overlap, the numerous and varied differences between the terms, evolution of the issue, and histories of the incentive plan dockets, of Atmos and Piedmont not only justify a disparate treatment, but mandate consideration of Atmos' PBRM on its own evidence and merits. The Authority has no basis upon which it can support, on grounds of fairness or equity, or permit Atmos to share in fees that properly belong to its ratepayers. Accordingly, the TRA Staff respectfully requests that this Authority find as follows:

1. Under the language and terms of the PBRM tariff, prior to its 2011 revision, fees received from asset management contracts are not eligible for inclusion in the calculations made under the Capacity Release Incentive Mechanism; and,
2. That the above finding applies not only in the present docket covering the audit period of April 1, 2004 through March 31, 2007, but also applies to any IPA reporting periods prior to April 1, 2011 that remain pending for review and audit by the TRA Staff.

Respectfully submitted,



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Counsel for TRA Staff as a Party

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

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C. Scott Jackson, Esq.
Office of the Attorney General
Consumer Advocate & Protection Division
P.O. Box 20207
Nashville, TN 37202-0207

This the 22nd day of February, 2012.

KELLY CASHMAN GRAMS
Deputy General Counsel
Counsel for TRA Staff as a Party

Exhibit A

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 22, 2012

IN RE:	)	
	)	
AUDIT OF ATMOS ENERGY	)	**DOCKET NO.**
CORPORATION'S INCENTIVE PLAN	)	**11-00195**
ACCOUNT FOR PERIOD OF APRIL 1, 2004	)	
THROUGH MARCH 31, 2007	)	

AFFIDAVIT OF PAT MURPHY

I, Pat Murphy, being duly sworn, do hereby depose and state as follows:

1. My name is Pat Murphy, and I am employed as Deputy Chief of the Utilities Division by the Tennessee Regulatory Authority, 460 James Robertson Parkway, Nashville, Tennessee. I have worked for the Authority since 1996. From 1991 to 1996, I was employed by the Authority's predecessor, the Tennessee Public Service Commission. Prior to my current position, I was Manager of Energy and Water.

2. I received a B.A. degree in Mathematics from Southern Adventist University in Collegedale, Tennessee in 1967. Between 1988 and 1990 I completed twenty-seven (27) credit hours in Accounting at Belmont University in Nashville, Tennessee.

3. I have been a Certified Public Accountant in Tennessee since 1992.

4. My current duties at the Authority include overseeing the audits of the natural gas utilities regulated by the Authority. These audits include Incentive Plan Account audits of three (3) gas companies, Actual Cost Adjustment audits of five (5) gas companies, weather

normalization audits of three (3) gas companies, and compliance audits as needed on all regulated energy, water, and wastewater companies.

5. From 1992 to 2010, I either performed or directly supervised all audits conducted.

6. I have direct personal knowledge of Atmos Energy Corporation's ("Atmos") Performance-Based Ratemaking Mechanism Rider ("PBRM" or "Incentive Plan"). Since I have been a member of the TRA Staff from the inception of Atmos' Incentive Plan, I was involved in an advisory capacity during the Phase One and Phase Two hearings, and have conducted or directly supervised the auditing of all of Atmos' Incentive Plan and Actual Cost Adjustment audits, I am able to provide a first-hand account of the Capacity Release Mechanism approved by the Authority and events that have transpired since that time.

7. Atmos filed an application on January 25, 1995 in Docket No. 95-01134 to establish an experimental Performance-Based Ratemaking Mechanism for United Cities Gas Company. A two (2) year experimental plan was approved in that docket, and in Docket No. 97-01364, the Authority approved a permanent Incentive Plan for United Cities.

8. In the second year of the permanent plan, TRA Audit Staff ("Staff") made a finding in its Audit Report that the transportation discount savings Atmos had included in its annual report were not provided for under the terms of the Incentive Plan. A contested case proceeding was convened by the Authority on April 30, 2002 in which a hearing was held. The Hearing Officer issued an Order directing Atmos to "file its quarterly and annual PBR reports ... so that audits of the PBR mechanism can be conducted for subsequent plan years."

9. Atmos' first Asset Management Agreement (AMA) was effective April 1, 2004. Prior to that date, on March 9, 2004, Staff issued an Audit Report for Piedmont Natural Gas's ("Piedmont" or "PNG") Incentive Plan in Docket No. 03-00489. In that report, Staff expressed

its concerns about the inclusion of asset management payments in PNG's Incentive Plan, since asset management was a practice that arose after the TRA's consideration of an Incentive Plan for Piedmont. These concerns were ultimately considered and resolved in Docket No. 05-00165, *Review of Nashville Gas Company's IPA Relating to Asset Management Fees*. A Settlement Agreement was reached that totally revised Piedmont's Incentive Plan tariff.

10. Likewise, Atmos engaged an asset manager five (5) years after the Authority approved a permanent Incentive Plan for Atmos. Atmos received notice of Staff's concerns regarding Atmos' AMA in Docket No. 05-00253 (ACA Audit covering period 7/1/04-6/30/05), when Staff issued its Audit Report filed on April 21, 2006. Staff became aware of Atmos' AMA for the first time when auditing the ACA. Staff specifically recommended that the Authority open a separate docket to address *possible* inclusion of AMA fees in Atmos' Incentive Plan and address the appropriate sharing mechanism and sharing percentages. This recommendation was made long before Atmos filed annual reports claiming sharing of AMA payments under its Incentive Plan. This issue was included in Phase 2 issues in Atmos Show Cause Docket No. 05-00258. Phase 2 issues were moved into Docket No. 07-00225, a contested case docket that remains pending. The Authority never ruled that Atmos should be allowed to include AMA fees in its Incentive Plan, or if it should be so permitted, the terms controlling how sharing would take place for the periods in dispute, 2001-2011.

11. Atmos has appropriately credited 100% of asset management payments to the ACA Account for the benefit of ratepayers in ACA reporting years 7/1/04-6/30/05, 7/1/05-6/30/06, 7/1/06-6/30/07, 7/1/07-6/30/08, 7/1/08-6/30/09, 7/1/09-6/30/10, and 7/1/10-6/30/11. Atmos even clarified its treatment of AMA fees in Docket No. 05-00253. According to documents contained in the public record, which I have personally reviewed, in the *Verified*

Supplementation filed in Docket No. 05-00253, Atmos admitted that the Company credits 100% of AMA fees to ratepayers and "does not retain any portion of the lump sum payment." Atmos admitted, "...there are a few assets (in the form of pipeline contracts) that are not included within the AEM agreement, and which Atmos manages ***itself***. The revenue from these non-AEM asset management activities are shared with ratepayers under the Capacity Release Mechanism of Atmos PBR *(emphasis added)*." See TRA Docket No 05-00253, *Atmos Energy Corporation's Verified Supplementation of the Record*, p. 2 (April 12, 2007). On page 3 of that document, Atmos provides a chart illustrating the dollars flowed through to ratepayers in the ACA, resulting from the AMA. The years used in the illustration (2004-2005 and 2005-2006) fall squarely within the Incentive Plan years that Staff audited in the instant docket.

12. In Docket No. 01-00704, Atmos argued, unsuccessfully, that its calculated transportation discount savings were eligible to be shared under the PBRM, asserting, in part, that to avoid the possibility of the company "gaming" the plan to its own advantage, an incentive plan should encompass the full spectrum of a company's gas purchasing activities. The TRA Staff did not then, and does not now, disagree with this premise. Nevertheless, Staff's position is that, like the alleged transportation discount savings that the Authority determined were not contemplated in the original Incentive Plan tariff, a bulk release of Atmos' capacity contracts for a year or multiple years in exchange for an upfront payment was also not contemplated by the Authority in approving the terms of the Capacity Release Incentive Mechanism. Therefore, Staff requested a separate docket be opened to consider these issues. The Authority opened Docket No. 07-00225.

13. All capacity releases before and during the Phase One and Phase Two hearings in Docket No. 97-01364 were made monthly in transactions with various pipelines. Although

Atmos had an all requirements contract with Woodward Marketing, the capacity release function was transaction by transaction. Atmos received a credit for capacity release on its invoices from Woodward and Woodward retained 10% of this amount for its services. Woodward never took possession of Atmos' total pipeline contracts in return for an upfront payment from Woodward to Atmos. Therefore, Staff contends that the type of contract entered into with an Asset Manager was not contemplated at the time of the Phase Two hearings, and therefore could not have been considered by the Authority. As further proof, Atmos's Performance Based Ratemaking Mechanism Rider tariff states "To the extent Atmos is able to release ***daily*** transportation or ***daily*** storage capacity, the associated savings will be shared by Atmos's customers and Atmos on a 90/10 basis *(emphasis added)*." Atmos' Performance Based Ratemaking Mechanism Rider, Sheet No. 45.2, *Capacity Management Incentive Mechanism.*

14. The Authority encouraged the release of capacity not needed at the time to serve customers in order to reduce the overall cost of gas for customers. The 10% sharing in these capacity release credits was meant to provide incentive for Atmos to aggressively pursue this activity. The contract with Woodward was in place at the time of the Phase Two hearings. The Authority examined the testimony of several witnesses to make certain the contract was the result of the Incentive Plan and not the other way around. Since Atmos owned 45% of Woodward, the Authority also made sure there were appropriate affiliate rules in place to prevent preferential treatment by Atmos.

15. One of the Phase Two issues decided by the Authority was "whether the TRA should modify the Capacity Release Incentive Mechanism to provide additional incentive for Atmos." Since this mechanism accounted for only 35% of the incentive savings in the first year of the experimental plan and 30% of the incentive savings during the first eight (8) months of the

second year, the Authority determined it was not necessary to modify the Capacity Release Incentive Mechanism to provide more incentive to Atmos to increase this activity. In contrast, during the first year the Asset Management Agreement between Atmos and Atmos Energy Marketing was in place (2004-2005), total savings under the plan (as reported by Atmos in its filing) were derived from the Capacity Management Incentive Mechanism. No Commodity savings were reported under the Gas Procurement Incentive Mechanism. A total of $420,872 in Capacity Release savings was reported in Atmos' annual filing. Of this amount, $351,953 was the upfront AMA fee. That means 83.6% of the total Capacity Release (and overall) savings for that year were the result of the Asset Management Agreement, a far cry from the 30-35% experienced during the Incentive Plan hearings. I think this is proof that asset management agreements were not the norm and the Authority had no opportunity to examine these types of arrangements when approving the terms of the current Incentive Plan.

16. When deliberating whether the experimental Incentive Plan should be made permanent, the Authority also considered whether there should be an automatic review period established, based on either a time line or special "trigger" events. One such event referenced in the Authority's Order was "a fundamental change in the utility's marketplace including the potential of unbundling [emphasis added]." Rather than set pre-determined limits on the plan, the Authority added the following language to the tariff: "The PBRM will continue until it is either (a) terminated at the end of a plan year by not less than 90 days notice by the Company to the Authority or (b) modified, amended or terminated by the Authority [emphasis added]." The Authority made provision for the possibility of a change in marketplace conditions that would necessitate a modification or termination of the plan.

17. From Staff's point of view, the preceding facts show that:

a. Capacity release transactions reported from 1999 to 2004 and examined by the Authority during the Phase One and Phase Two hearings are totally different in nature from the asset management arrangements that Atmos entered into with its affiliate beginning April 1, 2004;

b. Payments under asset management arrangements constitute a much larger percentage of capacity release calculated savings than the capacity release transactions experienced at the time the Authority considered whether to approve an Incentive Plan for Atmos and designed the appropriate incentives; and,

c. The wholesale gas marketplace has changed significantly since Atmos' Incentive Plan was approved by the Authority, and the plan should be re-examined to determine if the terms are still appropriate or should be changed.

18. With that background in mind, the present issues come into focus. Approximately 4 ½ years after the Hearing Officer's Initial Order and 2 ½ years after the Authority's Order affirming Hearing Officer's Initial Order, Atmos representatives contacted Staff in September 2010, to arrange a conference call to discuss the filing of audit years 2001-2002 through 2009-2010. Staff and Atmos explored various scenarios from auditing all nine (9) years at one time to auditing three (3) years at a time. Because the tariff specifies that the lower end of the deadband will be reset every three (3) years, Staff and Atmos mutually concluded, after lengthy and protracted meetings and discussions, that auditing three (3) years at a time would be preferable.

19. Initially, Atmos did not include any asset management sharing on the schedules provided to Staff. Subsequently, Atmos brought it to Staff's attention that there was asset

management fees related to the three (3) year Asset Management Agreement with Atmos Energy Marketing, effective April 1, 2008. At that time, Staff informed Atmos that asset management fees had also been credited to the ACA Account for plan years 2004-2005 through 2007-2008. After checking its records, Atmos agreed that such credits were reflected in its records as well.

20. Starting approximately March 2011, communications began between Staff and Atmos regarding whether Atmos would file annual reports that included sharing in asset management fees. Staff clearly stated what its position would be on the inclusion of asset management fees. Staff advised Atmos that Asset Management Agreement upfront payments are not eligible for sharing between customers and Atmos under the terms of the current Incentive Plan as approved by the TRA on August 16, 1999.

21. In August 2011, Atmos attempted to arrange a meeting between Atmos, the Consumer Advocate and TRA Staff, including respective attorneys, to negotiate the issue of asset management fees. On August 18, 2011, I informed Pat Childers by email that Staff could not meet to discuss asset management issues under those conditions. Staff was not a party at that point since nothing had been formally filed with the Authority and there was another open contested case docket (11-00034) that was considering Atmos' current Asset Management Agreement. I told Atmos that they should file the first three (3) annual reports that did not include asset management fees. Staff would issue its audit report, so that customers could begin receiving the $213,781.78 in refunds due to them. Then Atmos could file the remaining seven (7) annual reports and contest Staff audit findings regarding asset management. Instead, Atmos elected to file all ten (10) annual reports in Docket No. 11-00137, petitioning the Authority to approve these reports as filed. There were a total of nine (9) reports outstanding when talks began between TRA Staff and Atmos. By August 2011, another year had elapsed.

22. On October 4, 2011, Staff filed its Audit Report covering the years 2001-2002 through 2003-2004 in Docket No. 11-00158. The Authority approved this report at its November 7, 2011 regularly scheduled conference.

23. On November 10, 2011, Staff filed its Audit Report covering the next three (3) years through 2006-2007. In its report, Staff found that Atmos' share of "savings" was overstated by $102,880 (10% of asset management fees). At the November 21, 2011 TRA Conference, the Authority voted to convene a contested case proceeding to determine whether asset management fees received by Atmos during this period can be included in the capacity release incentive calculation under its Incentive Plan.

24. In summary, TRA Staff asserts that Asset Management Agreement upfront payments are not eligible for sharing between customers and Atmos under the terms of the current Incentive Plan as approved by this Authority on August 16, 1999. Atmos was fully aware of Staff's position regarding inclusion of AMA fees in the Incentive Plan based on the recommendations in Atmos ACA Docket No. 05-00253 and similar recommendations made in Piedmont IPA Docket No. 03-00389. Atmos at no time petitioned the Authority for a revision to its Incentive Plan to include asset management payments.

FURTHER AFFIANT SAYETH NOT.

Pat Murphy

Pat Murphy
Deputy Chief, Utilities Division
For Staff as a Party

Subscribed and sworn to before me this 22nd day of February, 2012.

Laura Jean Foreman

Notary Public
My Commission Expires: 02/04/2015

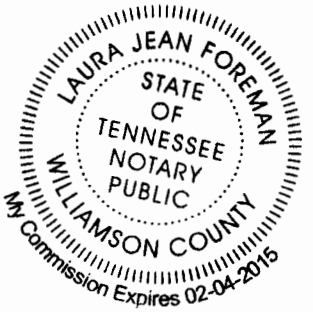

Exhibit B

PERFORMANCE BASED RATEMAKING MECHANISM RIDER

Applicability

The Performance-Based Ratemaking Mechanism (the PBRM) replaces the reasonableness or prudence review of the Company's gas purchasing activities overseen by the Tennessee Regulatory Authority (the Authority) in accordance with Rule 1220-4-7-.05, Audit of Prudence of Gas Purchases. This PBRM is designed to encourage the utility to maximize its gas purchasing activities at minimum costs consistent with efficient operations and Service reliability, and will provide for a shared savings or costs between the utility's customers and share holders. Each plan year will begin April 1. The annual provisions and filings herein will apply to this annual period. The PBRM will continue until it is either (a) terminated at the end a plan year by not less than 90 days notice by the Company to the Authority or (b) modified, amended or terminated by the Authority.

Overview of Structure

The Performance-Based Ratemaking Mechanism consists of two parts:

Gas Procurement Incentive Mechanism
Capacity Management Incentive Mechanism

The Gas Procurement Incentive Mechanism establishes a predefined benchmark index to which the Company's commodity cost of gas is compared. It also addresses the use of financial instruments or private contracts in managing gas costs. The net incentive savings or costs will be shared between the Company's customers and the Company on a 50% / 50% basis.

The Capacity Management Incentive Mechanism is designed to encourage the Company to actively market off-peak unutilized transportation and storage capacity on upstream pipelines in the secondary market. The net incentive benefits will be shared between the Company's customers and the Company on a 90% /10% basis.

The Company is subject to a cap on overall incentive savings or costs on both mechanisms of $ 1.25 million annually.

Gas Procurement Incentive Mechanism

Commodity Costs:

On a monthly basis, the Company will compare its commodity cost of gas to the appropriate benchmark amount. The benchmark amount will be computed by multiplying actual purchase quantities for the month, including quantities purchased for injection into storage, by the appropriate price index. For monthly spot

purchases, the price index will be a simple average of the appropriate *Inside FERC Gas Market Report, Natural Gas Intelligence,* and NYMEX indexes for that particular month. For swing purchases, the published *Gas Daily* rate for the first business day of gas flow will be used as the index. For long-term purchases, i.e., a term more than one month, these indexes will be adjusted for the Company's rolling three-year average premium paid to ensure long-term supply availability during peak periods. For city gate purchases, these indexes will be adjusted for the avoided transportation costs that would have been paid if the upstream capacity were purchased versus the demand charges actually paid to the supplier.

Gas purchases under the Company's existing seven-year Nora supply contract effective November 1, 1993, will be excluded from the incentive mechanism. The Company will continue to recover 100% of the Nora and through its PQA with no savings or loss potential. If, upon the expiration of the current Nora contract if the Company continues to operate under the PBRM, the contract is renewed or renegotiated, it will be considered for inclusion in the PBRM at that time.

If the total commodity cost of gas in a month falls within a deadband of 97.7% to 102% of the total of the benchmark amounts, there will be no incentive savings or costs. If the total commodity cost of gas falls outside of the deadband, the amount falling outside of the deadband shall be deemed incentive savings or costs under the mechanism. Such savings or costs will be shared 50/50 between the Company's customers and the Company. At the end of each three-year period, the deadband will be readjusted to 1% below the most recent annual audited results of the incentive plan.

Financial Instruments or Other Private Contracts

To the extent the Company uses futures contracts, financial derivative products, storage swap arrangements, or other private agreements to hedge, manage or reduce gas costs, any savings or costs will flow through the commodity cost component of the Gas Procurement Incentive Mechanism.

Capacity Management Incentive Mechanism

To the extent the Company is able to release daily transportation or daily storage capacity, the associated savings will be shared by the Company's customers and the Company on a 90/10 basis. The sharing percentages shall be determined based on the actual demand costs incurred by the Company (exclusive of credits for capacity release) for transportation and storage capacity during the plan year, as such costs may be adjusted due to refunds or surcharges from pipeline and storage suppliers. Any incentive savings or cost. resulting from adjustments to the sharing percentages caused by refunds or surcharges shall be recorded in the current Incentive Plan Account (IPA).

N

Affiliate Transactions

The following guidelines present the minimum conditions deemed necessary to ensure that affiliate transactions between the Company and its affiliate(s) do not result in a competitive advantage over others providing similar services. These guidelines will remain in effect as long as the Company is operating under a performance based ratemaking plan. We note that these guidelines may fail to anticipate certain specific methods by which such advantages may be conferred by the Company on its marketing affiliates. All parties should be aware that to the extent such instances arise in the future, they will be judged according to this stated intent.

Definitions:

Terms used in these guidelines have the following meanings:

I. Affiliate, when used in reference to any person in this standard, means another person who controls, is controlled by, or is under common control with, the first person.

2. Control (including the terms "controlling", "controlled by", and "under common control with"), as used in this standard, includes, but is not limited to, the possession, directly or indirectly and whether acting a lone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a company. Under all circumstances, beneficial ownership of more than ten percent (10%) of voting securities or partnership interest of an entity shall be deemed to confer control for purposes of these guidelines of conduct.

3. Marketing, as used in this standard, means selling or brokering natural gas to any person or entity, including the Company, by a seller that is not a local distribution company.

RFP Procedures for Selection of Asset Manager and/or Gas Provider:

1. In each instance in which Atmos Energy Corporation (Company) intends to engage the services of an asset manager to provide system gas supply requirements and/or manage its assets regulated by the Tennessee Regulatory Authority (TRA), the Company shall develop a written request for proposal (RFP) defining the Company's assets to be managed and detailing the Company's minimum service requirements. The RFP shall also describe the content requirements of the bid proposals and shall include procedures for submission and evaluation of the bid proposals. N

2. The RFP shall be advertised for a minimum period of thirty (30) days through a systematic notification process that includes, at a minimum, contacting potential asset managers, including past bidders and other approved asset managers, and publication in trade journals as reasonably available. This thirty (30) day minimum period may be shortened with the written consent of the TRA Staff to a period of not less than fifteen (15) days. N

3. The procedures for submission of bid proposals shall require all initial and follow-up bid proposals to be submitted in writing on or before a designated proposal deadline. The Company shall not accept initial or follow-up bid proposals that are not written, or that are submitted after the designated proposal deadline. Following receipt of initial bid proposals, and on a non-discriminatory basis, the Company may solicit follow-up bid proposals in an effort to obtain the most overall value for the transaction. N

04-00009

4. All initial and follow-up bid proposals shall be evaluated as they are received. The criteria for choosing the winning bid proposal shall include, at a minimum, the following: (a) the total value of the bid proposal; (b) the bidder's ability to perform the RFP requirements; (c) the bidder's asset management qualifications and experience; and (d) the bidder's financial stability and strength. The winning bid proposal shall be the one with the best combination of attributes based on the evaluation criteria. If, however, the winning bid proposal is lower in amount than any other initial or follow-up bid proposal(s), the Company shall explain in writing to the TRA why it rejected each higher bid proposal in favor of the lower winning bid proposal. The Company shall maintain records demonstrating its compliance with the evaluation and selection procedures set forth in paragraph 4 above. N

5. An incumbent asset manager shall not be granted an automatic right to match a winning bid proposal. If the incumbent asset manager desires to continue its asset management relationship with the Company after expiration of its asset management agreement, it shall submit a written bid proposal in accordance with the Company's RFP procedures. The bid proposal shall be evaluated pursuant to the procedures set forth in paragraph 4 above. N

6. The Company May develop additional procedures for asset management selection as it deems necessary and appropriate so long as such procedures are consistent with the agreed-upon procedures described herein. N

7. The Company shall retain all RFP documents and records for at least four (4) years and such documents and records shall be subject to the review and examination of the TRA staff. The Asset Manager shall maintain documents and records of all transactions that utilize the Company's gas supply assets. All documents and records of such transactions shall be retained for two years after termination of the agreement and shall be subject to review and examination by the Company and the TRA Staff. N

Standards of Conduct:

The Company must conduct its business to conform to the following standards:

I. If there is discretion in the application of tariff provisions, then the Company must apply such provisions relating to any service being offered in a consistent manner to all similarly situated entities.

2. The Company must strictly enforce a tariff provision for which there is no discretion in the application of the provision.

3. The Company must process all similar requests for services in the same manner and within the same period of time.

4. The Company may not give its marketing affiliate preference over nonaffiliated companies in natural gas supply procurement activities.

5. The Company may not give its marketing affiliate preference over nonaffiliated companies in its upstream capacity release activities.

6. The Company may not disclose to its marketing affiliate any information that the local distribution company receives from a non-affiliated marketer, unless the prior written consent of the parties to which the information relates has been voluntarily given.

7. To the extent the Company provides information related to its natural gas supply activities and upstream capacity release activities, it must do so contemporaneously to all nonaffiliated marketers, that have submitted a written request for such information to the Company.

8. To the extent the Company provides information related to natural gas services being offered to a marketing affiliate, it must do so contemporaneously to all non-affiliated marketers, that have submitted a written request for such information to the Company.

9. In transactions that involve either the purchase or receipt of information, assets, goods or services by the Company from an affiliated entity, the Company shall document both the fair market price of such information, assets, goods, and services and the fully distributed cost to the Company to produce the information, assets, goods or services for itself.

10. When the Company purchases information, assets, goods or services from an affiliated entity, the Company shall either obtain competitive bids for such information, assets, goods or services or demonstrate why competitive bids were neither necessary nor appropriate.

11. To the maximum extent practicable, the Company's operating employees and the operating employees of its marketing affiliate must function independently of each other. For the purposes of these guidelines, operating employees are those who are in any way involved in identifying and contracting with customers, locating gas supplies, making any and all arrangements with intervening pipelines and in any way managing or facilitating those contracted services.

12. The Company must maintain its books of accounts and records separately from those of its affiliate.

13. If the Company offers a discount to an affiliated marketer, it must make a comparable offer contemporaneously available to all similarly situated non-affiliated marketers.

14. The Company may not condition or tie its agreement to release its dedicated, stored, inventoried or optioned gas or supply contracts or upstream transportation and storage contracts to an agreement with a producer, customer, end-user or shipper relating to any service by its marketing affiliate, any services offered by the Company on behalf of its marketing affiliate, or any services in which its marketing affiliate is involved.

15. Prearranged, non-posted, capacity release transactions may not be entered into with any affiliate of the Company in any two consecutive thirty-day periods.

16. The Company must maintain a written log of tariff provision waivers which it grants. It must provide the log to any person requesting it within 24 hours of request. Any waivers must be granted in the same manner to the same or similar situated persons.

17. The Company shall maintain sufficiently detailed records that compliance with these guidelines can be verified at any time.

Complaints:

Any party may file a complaint relating to violations of these guidelines.

1. Any customer, marketer, or other interested third-party may file a complaint with the Authority relating to alleged violations of the affiliate standards set forth in these guidelines. At or before the time of filing, the complainant shall serve a copy of the complaint on the Company.

2. Within ten (10) days of service of the complaint upon the Company, the Company shall file a written response to the c6niklaint with the Authority.

3. The Authority may hold hearings on any complaint filed or may take such other action (as it may deem appropriate), including requesting further information from the parties or dismissing the complaint.

4. After notice and opportunity for a hearing, should the Authority find that the Company has violated the standards contained in these guidelines, the Authority may impose any penalty or remedy provided for by law.

Reserve Margin

The Company may maintain a reserve of natural gas in excess of its projected peak day requirement and recover the cost of the reserve from their customers through the purchased gas adjustment (PGA). The projected peak day requirement shall be based upon a five-yea recurrence interval or the coldest day expected in a five-year period. All firm peak day capacity contracted for by the Company, excluding the daily delivery capacity of liquefied natural gas and propane storage facilities, shall be considered as gas available to meet peak day demand. "Contract demand" shall be the amount of firm peak day capacity the Company is entitled to on a daily basis, pursuant to contract. The maximum peak day firm demand of the projected heating season shall form the base period demand to establish the Company's maximum peak day firm demand. *A* reserve margin of 7.5% or less in excess of the base period firm demand adjusted for specific gain or loss of customers and/or throughput on a specific case by case basis will be presumed reasonable.
All capacity available to meet the peak day demand in excess of an amount needed to meet the base period peak day demand plus a 7.5% reserve margin must be shown by the Company to be necessary to meet its customers' requirements before it can be included in the PGA. All capacity available to meet demand less than an amount of base period demand plus a 7.5% reserve margin is presumed to be reasonable unless a factual showing to the contrary is made.

Determination of Shared Savings

Each month during the term of the PBRM, the Company will compute any savings or costs in accordance with the PBRM. If the Company earns any savings, a separate below the line Incentive Plan Account (IPA) will be debited with such savings. If the Company incurs any costs, that same IPA will be credited with such costs. During a plan

year, the Company will be limited to overall savings or costs totaling *$1.25* million. Interest shall be computed on balances in the IPA using the same interest rate and methods as used in the Company's Actual Cost Adjustment (ACA) account. The offsetting entries to IPA savings or costs will be recorded to income or expense, as appropriate.

Savings or costs accruing to the Company under the PBRM will form the basis for a rate increment or decrement to be filed and placed into effect separate from any other rate adjustments to recover or refund such amount over a prospective twelve-month period.

Each year, effective October 1, the rates for all sales customers will be increased or decreased by a separate rate increment or decrement designed to amortize the collection or refund of the March 31 IPA balance over the succeeding twelve month period. The rate increment or decrement will be established by dividing the March 31 IPA balance by the appropriate sales billing determinants for the twelve months ended March 31. During the twelve-month amortization period, the amount collected or refunded each month will be computed by multiplying the sales billing determinants for such month by the rate increment or decrement, as applicable. The product will be credited or debited to the IPA, as appropriate. The balance in the IPA will be tracked as a separate collection mechanism. Each October 1 the unamortized amount of the previous year's IPA balance will be trued-up in the new rate increment or decrement.

Filing with the Authority

The Company will file calculations of shared savings and shared costs quarterly with the Authority not later than 60 days after the end of the quarter and will file an annual report not later than 60 days following the end of each plan year. Unless the Authority provides written notification to the Company within 180 days of such reports, the Incentive Plan Account shall be deemed in compliance with the provisions of this Rider. The Company will file calculations annually to verify the reasonableness of its reserve margin.

Incentive and Rewards Program

The Company will have in place an incentive and rewards program for selected Gas Supply non-executive employees involved in the implementation of the Company's PBRM in a manner consistent with the benefits achieved for customers and shareholders through improvements in gas procurement and secondary marketing activities. Participants in the program will receive incentive compensation as recognition for their contribution to the customers and shareholders of the Company through lower gas costs and savings related thereto.

During the time this tariff is in effect, the Company will continue to have in place a gas supply Incentive and Rewards Program, the details of which will be provided to the Authority on an annual basis within 60 days of the beginning of each plan year. Unless the Company is advised within 60 days, said details will become effective. No filing for prior approval is required for changes in the performance measures.

Exhibit C

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
	)	
ATMOS ENERGY CORPORATION	)	Docket No. 05-00253
ACTUAL COST ADJUSTMENT	)	
("ACA") AUDIT	)	

ATMOS ENERGY CORPORATION'S VERIFIED SUPPLEMENTATION OF THE RECORD

Since the issuance of the Audit Report, a review of the record in this docket reveals that, at a minimum, there has been a fair amount of uncertainty with respect to the dollar amount Atmos Energy Corporation's ("Atmos" or "Company") customers receive from the Company's asset management agreement with Atmos Energy Marketing, LLC ("AEM"). Given the complexities of the issues and mechanisms involved, such uncertainty is understandable. Absent clarification, however, it appears that said uncertainties are, albeit unintentionally, compounding with the passage of time.[1] Moreover, due to the pendency of TRA Docket No. 05-00258, Atmos and Audit Staff have not had the opportunity to clarify the foregoing in ongoing discussions, as they would under traditional circumstances, which is, again, understandable. For the benefit of the Tennessee

[1] For example, at the March 26, 2007, Authority Conference, counsel for the Consumer Advocate and Protection Division made the following statement with regard to the amount consumers receive under the AEM agreement:

> And in this case there's already been a **finding** that at least $30,000 was shared with consumers from the asset management program. We think this figure is far too low, and we want to challenge that. (emphasis added).

Transcript of Authority Conference, p. 112 (Mar. 26, 2007).

Regulatory Authority ("TRA" or "Authority"), the Company's customers and the public interest, AEC respectfully submits this verified supplementation.[2]

I. THE LUMP SUM PAYMENT FLOWED THROUGH TO CUSTOMERS

First and foremost, Atmos customers do not receive $30,000 from the AEM agreement (the "Agreement") – they actually receive more than ten (10) times that amount. Under the Agreement, AEM pays an annual lump sum of $500,000 as payment for the right to manage Atmos' assets. (TRA Docket No. 05-00253, 4/21/06 Staff Audit Report, p. 15.) Atmos does not retain any portion of the lump sum payment. The full $500,000 is flowed 100% through to the ratepayers under the Purchased Gas Adjustment ("PGA") mechanism. (Id.) That $500,000 payment is shared between Tennessee and Virginia ratepayers according to the percentage allocation for shared demand costs between the states. (TRA Docket No. 05-00253, 6/14/06 Memo. to File, p. 1.) Prior to July 1, 2005, Tennessee ratepayers were allocated 69.5% of the annual fee, or $347,500. After July 1, 2005, Tennessee ratepayers will receive 64% of the fee, or $320,000 per year. (Id.)

II. THE CAPACITY RELEASE SAVINGS SHARED WITH CUSTOMERS

In addition to, but separate from, the above, there are a few assets (in the form of pipeline contracts) that are not included within the AEM agreement, and which Atmos manages itself. The revenue from these non-AEM asset management activities are shared with ratepayers under the Capacity Release Mechanism of the Company's PBR. To get a total amount of dollars received by consumers from both Atmos' non-AEM asset management activities and the AEM agreement, it would be necessary to add the Capacity Release Mechanism dollars to the annual AEM lump sum

[2] While the matters asserted herein will be thoroughly reviewed and subjected to scrutiny either in this docket or in TRA Docket No. 05-00258, the Company nonetheless considered it essential at this stage to attempt to add clarity to the issue for the benefit of all involved, particularly the ratepayers.

fee. The following chart demonstrates the approximate amount of TOTAL asset management dollars flowed through to consumers since the AEM contract began in April 2004:

	AEM Lump Sum Fee	Ratepayer Share of Additional Capacity Release Dollars Under the PBR[3]	Total Asset Management Dollars to Consumers[4]
2004-2005 Audit Year	$347,500	$82,238	$429,738
2005-2006 Audit Year	$320,000	$76,266	$396,266

These amounts represent dollars flowed through to consumers resulting solely from asset management. These amounts do not include additional dollars consumers received from Atmos' gas procurement activities.

III. BUNDLED VERSUS UNBUNDLED ACTIVITIES

It has been suggested in this docket that the amounts Atmos' customers have received are significantly less than the amounts received by the customers of both Chattanooga Gas Company and Nashville Gas Company.[5] Such statements compare two (2) totally different and distinct things.

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[3] Due to the pending PBR case, TRA Consolidated Dockets No. 01-00704 and 02-00850, Atmos has not filed a PBR report since the 2000-2001 year. Therefore, since that time the Company has not recouped its share of the savings under the PBR, and 100% of those savings have flowed through to consumers. The figures in the chart represent the ratepayers' share under the PBR plan.

[4] This column represents the TOTAL amount of dollars received by consumers from both Atmos' non-AEM asset management activities and the AEM agreement.

[5] For instance, counsel for the Intervention Group made the following statement with regard to the dollars flowing to consumers under the AEM agreement:

> Now, as a result, this contract that they worked up with their affiliate ended up giving a relatively small amount of money back to ratepayers. Much smaller than the amount that goes back to ratepayers through Chattanooga or Nashville Gas. This is the – for ratepayers this is the worst deal in the state . . . .

AEM's agreement is fundamentally different from the asset management arrangements the other companies have in that AEM only performs asset management services; **it does not perform Atmos' gas procurement functions.** Both Chattanooga Gas and Nashville Gas have "bundled" asset management arrangements. Under these bundled arrangements, their asset managers perform both asset management and gas procurement services. Therefore, comparing, for example, the lump sum fee paid by Nashville Gas' asset manager, or the profits shared by Chattanooga's asset manager, on the one hand, to the AEM lump sum fee, on the other hand, is tantamount to comparing apples and oranges.

Unlike Chattanooga Gas and Nashville Gas, Atmos handles gas procurement itself, and the ratepayers share in the benefits from that gas procurement, not through an asset management agreement, but instead through the PGA (in lower commodity costs) and through the Company's PBR mechanism (additional shared savings). The amounts that ratepayers have received from Atmos' gas procurement activities under the PBR are, to say the least, not insignificant. In the 2004-05 audit year, Atmos' gas procurement efforts produced approximately $1.8 million in savings for consumers,[6] and for the 2005-2006 audit year, the total savings was approximately $847,000.[7] For ease of reference, the following chart demonstrates the total amount of asset management (both Atmos' non-AEM asset management activities and the AEM agreement) and gas procurement dollars flowing through to Atmos' consumers since the AEM contract went into

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Transcript of Authority Conference, p. 119 (Mar. 26, 2007). *See also* Notice of Filing by Utilities Division of the Tennessee Regulatory Authority, *In Re: Atmos Energy Corporation's Annual Cost Adjustment (ACA) for the Twelve Months Ended June 30, 2005*, TRA Docket No. 05-00253, p. 15 (April 21, 2006) ("The amount credited to ratepayers' seems to be significantly less than the amounts paid for the use of Nashville Gas and Chattanooga Gas assets.").

[6] Under the PBR amendment proposed by Atmos in TRA Docket No. 02-00850, consumers will retain approximately $1.1 million of those savings.

[7] Again, under the treatment proposed by Atmos in TRA Docket No. 02-00850, ratepayers will retain approximately $563,000 of that total amount.

effect:

	AEM Lump Sum Fee	Ratepayer Share of Additional Capacity Release Dollars Under the PBR[8]	Total Asset Management Dollars to Consumers	Total Gas Procurement Dollars to Consumers Under the PBR	TOTAL Asset Management and Gas Procurement Dollars to Consumers
2004-2005 Audit Year	$347,500	$82,238	$429,738	$1,100,000	$1,529,738
2005-2006 Audit Year	$320,000	$76,266	$396,266	$563,000	$959,266

IV. CONCLUSION

The Company trusts that this good faith attempt to clarify the record with regard to the amounts flowing to consumers under the AEM agreement will prove beneficial to the Authority, the ratepayers and the public interest.

BAKER, DONELSON, BEARMAN
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[8] Due to the pending PBR case, TRA Consolidated Dockets No. 01-00704 and 02-00850, Atmos has not filed a PBR report since the 2000-2001 year.

VERIFICATION

STATE OF TENNESSEE)
)
COUNTY OF WILLIAMSON)

I, Patricia Childers, after being first duly sworn, do hereby state that I have read the foregoing and that based on information known or furnished to me, the factual statements made therein are true and correct to the best of my knowledge, information and belief.

Patricia Childers

SWORN to and subscribed before me this 11th day of April, 2007.

PAMELA TODD
TENNESSEE
NOTARY
PUBLIC
DAVIDSON COUNTY, TENN.

My Commission Expires 05-24-08

Pamela Todd
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail, postage prepaid, upon the following this the 12th day of April, 2007:

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