

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE TENNESSEE**

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

ATMOS ENERGY CORPORATION'S OPENING BRIEF

Atmos Energy Corporation ("Atmos" or "Company") respectfully submits this Brief in support of its request for approval of the Incentive Plan Account ("IPA") Report at issue in this case. Atmos further relies upon the testimony of Rebecca M. Buchanan and the exhibits thereto.

During the April 2004 through March 2011 period in dispute, Atmos earned Tennessee ratepayers more than \$3.7 million in up-front capacity release payments under Asset Management Agreements ("AMAs").¹ Under its Performance Based Ratemaking ("PBR") Tariff, Atmos is entitled to recover a small piece – 10% – of the savings it has earned for Tennessee ratepayers. TRA Staff challenges that small piece. Of the \$3.7 million that Atmos has earned for ratepayers, Staff disputes the Company's right to recover a total of \$376,198 over the entire seven-year period.² Part of this disputed amount – \$102,881 – is included in this docket covering the April 2004 through March 2007 period. At Staff's request, the rest will be covered in a subsequent docket.

Staff asserts that payments generated by releasing capacity in bulk through an Asset Management Agreement (including up-front AMA payments) are not capacity release payments

¹ Buchanan at 6.

² *Id.*

and therefore not covered by the Atmos PBR Tariff. Atmos disagrees. By its terms, the PBR Tariff covers payments from capacity release transactions, and makes no exception for bulk capacity release pursuant to an Asset Management Agreement. The authority decided this issue for Nashville Gas under a materially identical tariff and ruled for the utility, holding that up-front asset management fees would be shared with Nashville Gas. Atmos merely seeks the same treatment.

Of course, on a going-forward basis, the issue has been decided. Effective April 1, 2011, in Docket 11-00034, the Authority approved an amendment to the Atmos PBR Tariff explicitly stating that AMA up-front payments are to be considered capacity release payments and subject to sharing under the PBR Tariff. This amendment was made at the request of Staff, even though the Company's position has been that such AMA payments have always been covered, along with all other capacity release payments. In light of the amendment, all that remains in dispute is whether prior years should be treated the same way they are treated now, and the same way they have been treated for the other utilities.

And if the Staff's position were accepted – and AMA up-front payments were not held to be capacity release payments appropriately included in the PBR Tariff – then Atmos would be entitled to retain *all* of the AMA up-front payments for the 2004 through 2011 period, not merely the 10% sharing provided under the PBR Tariff. Atmos has always credited 100% of these AMA up-front payments to the benefit of customers when filing its annual Actual Cost Adjustment (“ACA”) reports, because that is the treatment required if the AMA payments are covered under the PBR Tariff. If AMA payments were held not to be capacity release receipts covered under the PBR, as the Staff contends, then there would be no requirement that Atmos credit AMA payments against gas costs when filing the ACA. The up-front payments would be

non-operating income to the Company. If the Staff were to prevail in its position, then the Company would have under-recovered its gas costs by the *full* amount of the AMA payments. Instead of recovering the 10% sharing called for under the PBR Tariff, the Company would be entitled to restate its annual ACA filings pursuant to TRA Rule 1220-4-7-.03(1)(c)(3). And instead of recovering \$376,198 for the 2004 through 2011 period, the Company would recover \$3.7 million, the full amount of the AMA up-front payments.

Staff have argued that the Company's recovery should be limited because of delay in filing the IPA Reports at issue. But any delay has only harmed Atmos. The AMA up-front payments have always been credited against the Company's gas costs, to the benefit of the Company's customers. The funds – the entire \$3.7 million – have been in the hands of ratepayers. Atmos will recover its 10% sharing only if and when the Authority approves the Incentive Plan Account filings at issue. But even though it has not had the use of these funds over the period at issue, and even though the PBR Tariff would authorize the recovery of interest on these funds, Atmos does *not* seek to recover interest. As a result, the only party harmed by any delay in filing the Incentive Plan Account reports at issue is *Atmos*. There are explanations for the delay, including an agreement with Staff to suspend IPA filings pending the resolution of docket number 01-00704. But the real answer to arguments about delay is that because there has been no harm to anyone but Atmos, any delay in filing the IPA Reports provides no reason to deny recovery. The delay argument is a red herring.

I. INTERPRETATION OF THE ATMOS PERFORMANCE BASED RATEMAKING TARIFF

The Company's PBR Tariff has been in place since 1999. The Atmos PBR consists of two parts, a gas procurement incentive mechanism, and a capacity management incentive mechanism. Under the capacity management incentive mechanism, net incentive benefits are to be shared between the Company and customers on a 90% customer, 10% Company basis. The PBR contains an annual cap of \$1.25 million on overall incentive savings.³

Under the terms of the Tariff, payments from capacity release transactions are covered by the PBR Tariff and subject to a 10% sharing provision. The Tariff provides:

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.

With regard to the capacity management incentive mechanism, the tariff further provides 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 percentage caused by refunds or surcharges shall be recorded in the current Incentive Plan Account (IPA).

(Emphasis supplied).

As a general matter, deference is afforded to the Authority's interpretation of a tariff when it is "reasonable [and] based upon factors within [its] expertise." *BellSouth*

³ The relevant Atmos Tariff is attached as Exhibit A to the Buchanan testimony.

Telcoms. v. Bissell, 1996 Tenn. App. LEXIS 537, 22-23 (Tenn. Ct. App. Aug. 28, 1996).

Tariff construction proceeds in the same manner as the construction of statutes, contracts and other legal documents:

The construction to be given to a carrier's tariff schedule, and the application thereof, ordinarily present questions of law where the language used is not technical, the meaning of the words is clear, and there is no ambiguity; *such questions do not differ in character from those presented when the construction and application of the provisions of any other document are in dispute*. The meaning and effect of particular provisions are to be ascertained from the language employed, the connection in which they are used, and their evident purposes. It may be necessary, however, in some instances, to resort to extrinsic evidence, such as with regard to the customary practice of the carrier.

Rebel Motor Freight v. Malone & Hyde, Inc., 813 S.W.2d 470, 473 (Tenn. Ct. App. 1991) (emphasis supplied). Statutes, contracts, and other documents are to be construed “fairly and reasonably giving the language its usual and ordinary meaning,” and “should be construed as a whole in a reasonable and logical manner.” *Travelers Indem. Co. of Am. v. Moore & Assocs.*, 216 S.W.3d 302, 305-306 (Tenn. 2007) (commenting on the construction of contracts and insurance policies); *see also Loftin v. Langsdon*, 813 S.W.2d 475, 478 (Tenn. Ct. App. 1991) (“A statute's meaning is to be determined, not from special words in a single sentence or section, but from the act taken as a whole, and viewing the legislation in the light of its general purpose.”); *State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997) (“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.”); *Griffis v. Davidson County Metro. Gov't*, 164 S.W.3d 267, 274 (Tenn. 2005) (“In construing a deed, our primary task is to ascertain the grantor's intent from the words of the deed as a whole and from the surrounding circumstances.”). In construing a legal document, “[i]t is improper . . . to

lift one sentence, word or clause . . . and construe it alone, without reference to the balance” of the document. *Loftin, supra* (commenting specifically on the construction of statutes).

Construing the Atmos PBR Tariff reasonably and logically as a whole, it is clear that the purpose of the Tariff is to incentivize the Company to improve the bottom line for customers as it relates to its handling of gas procurement and pipeline capacity. The tariff divides these activities into two broad areas, gas procurement and capacity management. And as to the latter, the tariff provides that if the Company is able to reduce cost and return benefit for customers by releasing capacity in the secondary market, then it will be rewarded by sharing a small portion (10%) of the resulting benefit. As discussed below, like other gas companies, Atmos can extract maximum value by releasing capacity in bulk in exchange for an up-front fee pursuant to an asset management agreement. When construed sensibly and as a whole, the Tariff clearly contemplates that up-front AMA fees are to be covered by the PBR Tariff, and shared between the Company and its customers on a 10% Company, 90% customer basis.

II. AMA FEES ARE CAPACITY RELEASE PAYMENTS

An AMA up-front payment is, at bottom, a payment for capacity release.⁴ Like other gas companies, Atmos is required to purchase gas pipeline capacity and gas storage capacity sufficient to supply peak day demand. The requirement to meet peak day demand results in

⁴ See Buchanan at 7 et seq. Indeed, before reversing course in its 2003 audit of Nashville Gas, TRA Staff agreed that asset management agreement fees are payments for capacity release. *See, e.g.,* Compliance Audit Report of Nashville Gas Company’s Incentive Plan Account, Docket 00-00759 at 3 (“The capacity release portion of the Capacity Management Mechanism generated significantly greater savings this plan year as compared to last year. Last year’s savings was \$11,510. The \$1,650,000 savings for this year was the result of Nashville Gas assigning its pipeline capacity to an ‘asset manager.’); Compliance Audit Report of Nashville Gas Company’s Incentive Plan Account, Docket 02-0933 at 3 (“The Capacity Management Mechanism generated a total of \$3,016,497 in savings of which \$516,497 was due to off system sales and \$2,500,000 was due to capacity release. The capacity release savings resulted from payment the Company received from its Asset Manager.”).

unutilized gas pipeline and/or storage capacity on days when demand is below the peak. Even though gas utilities like Atmos must retain the first right to use all of this capacity to serve their customers, the right to make use of otherwise unutilized pipeline and storage capacity has value in the secondary market. Capacity release transactions provide the mechanism by which unutilized pipeline and storage capacity can be sold and bought. From the utility's point of view, capacity release is a means by which the utility can extract additional value, for itself and its customers, from pipeline and storage capacity.

Economies of scale often dictate that released capacity will have greatest value when packaged and released in bulk, as under an asset management agreement. The Company can obtain more value for ratepayers by releasing the capacity in the context of an Asset Management Agreement than could be obtained by releasing the capacity in a series of individual capacity release transactions. Of course, as part of a qualified Asset Management Agreement, the released capacity released remains available to the utility to serve the utility's customers whenever it is needed, and the capacity is fully recallable. The scale of the release does not change the essential character of the transaction, however. At its core, an Asset Management Agreement functions as a capacity release transaction.

Atmos has obtained far more for Tennessee customers by releasing capacity in bulk through asset management agreements than it ever could have received through piecemeal capacity release transactions. Under the Atmos Asset Management Agreements at issue here, the Company obtained annual up-front payments for Tennessee totaling \$3.7 million over the 2004 through 2011 period in dispute. This has provided great benefits to the utility's customers, and assuming that the Company's position is accepted here, 90% of this benefit will continue to inure to them.

III. SUBSEQUENT DEVELOPMENTS FURTHER SUGGEST THAT UP-FRONT AMA FEES ARE COVERED BY THE ATMOS PBR TARIFF

As further evidence that AMA fees are covered by the PBR Tariff, in 2007 the Atmos PBR Tariff was amended to include RFP procedures to govern the Company's entry into such Asset Management Agreements.⁵ In other words, the Tariff that Staff contends does not cover up-front AMA fees was amended to include procedures designed to maximize the amount of those very same up-front fees. Moreover, the Atmos PBR Tariff was recently amended, at the request of TRA Staff, to explicitly acknowledge that it covers up-front AMA fees. Both of these developments further indicate that the Tariff should be read to cover all forms of capacity release payments, including up-front AMA fees.

After the Authority approved an amendment to the Chattanooga Gas Company tariff adopting RFP procedures for the selection of an asset manager, Atmos was looking ahead to the need to soon re-bid its own Asset Management Agreement. Atmos therefore moved to amend its PBR Tariff to include RFP procedures identical to those adopted by Chattanooga Gas. These were approved in Docket No. 05-00253. *See* Order Approving Tariff, Docket No. 05-00253 (December 6, 2007). The same PBR Tariff that provides for sharing of capacity release fees was amended to include RFP procedures governing how the Company would ensure that it maximizes the up-front AMA fees received.

Subsequent asset management agreements have been approved by the Authority pursuant to the terms of these RFP procedures. *See* Order Approving Contract Regarding Gas Commodity Requirements And Management Of Transportation/Storage Contracts, Docket No. 08-00024 (July 9, 2008); Docket Number 11-00034, approving the Company's most recent Asset Management Agreement (effective April 1, 2011).

⁵ Buchanan at 18 et seq.

Moreover, in recent months, the Authority approved an amendment to the Company's PBR Tariff that resolves the controversy over whether up-front AMA payments are to be included in the PBR mechanism and shared 90%/10% with customers. This amendment explicitly provides that AMA up-front payments are covered by the PBR Tariff and subject to 90/10 sharing. No other provisions of the Tariff were changed. Notably, the amendment was made at Staff's request and approved without opposition from the Consumer Advocate, in Docket Number 11-00034.⁶

IV. FOR OTHER TENNESSEE GAS UTILITIES AMA UP-FRONT FEES HAVE BEEN TREATED AS CAPACITY RELEASE PAYMENTS SUBJECT TO THE PBR TARIFF

As discussed above, construing it reasonably and logically as a whole, the Atmos Tariff clearly contemplates that up-front AMA fees are to be covered and shared between the Company and its customers on a 10% company, 90% customer basis. This becomes even more clear when one compares the tariffs and experience of Nashville Gas and Chattanooga Gas.

During the relevant period, both Nashville Gas and Chattanooga Gas were allowed to share in up-front AMA payments, even though neither utility's tariff expressly addressed recovery of AMA fees.⁷ Like Atmos, both utilities have recognized up-front AMA fees for what they are – capacity release payments. The Nashville Gas Incentive Plan Tariff provisions were materially identical to the Atmos Tariff. Chattanooga's tariff was completely different. Neither tariff explicitly addressed AMA fees. For Nashville Gas, TRA Staff made the same challenge that they now make against Atmos, arguing that up-front AMA payments are not covered by Nashville's Incentive Plan Tariff. The TRA rejected Staff's challenge, holding that a separate docket should be opened to consider whether Nashville's tariff should be amended on a going-

⁶ The revised tariff provision is attached as Exhibit D to the Buchanan testimony.

⁷ The relevant Nashville Gas and Chattanooga Gas Company tariffs are attached as Exhibits B and C to the Buchanan testimony.

forward basis, but that in the meantime the AMA up-front fees would be covered by the Nashville Gas tariff and subject to sharing. Atmos merely seeks the same treatment.

During the relevant period, Nashville Gas Company's Incentive Plan Tariff was materially identical to the Atmos PBR Tariff. As it was for Atmos, the Nashville Gas tariff was later amended to expressly reference AMA payments and provide that they are subject to the sharing provisions. But also like Atmos, prior to this amendment the Nashville Gas tariff did not specifically reference asset management agreements.

The relevant provisions of the two tariffs are shown side-by-side below:

Nashville Gas	Atmos
Nashville's Performance Incentive Plan is comprised of two interrelated components	The Performance-Based Ratemaking Mechanism consists of two parts:
Gas Procurement Incentive Mechanism	Gas Procurement Incentive Mechanism
Capacity Management Incentive Mechanism.	Capacity Management Incentive Mechanism.
The Gas Procurement Incentive Mechanism . .	The Gas Procurement Incentive Mechanism . .
The Capacity Management incentive Mechanism is designed to encourage Nashville to actively market off-peak unutilized transportation and storage capacity on upstream pipelines in the secondary market. The net incentive benefits or costs will be shared between the Company's customers and the Company utilizing a graduated sharing formula with sharing percentages for Nashville ranging between zero and fifty percent. . . .	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.
CAPACITY MANAGEMENT INCENTIVE MECHANISM	CAPACITY MANAGEMENT INCENTIVE MECHANISM
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,	To the extent the Company is able to release daily transportation or storage capacity, the associated savings will be shared by the Company's customers and the Company on a

the associated cost savings shall be shared by Nashville and customers according to the following sharing formula [sliding scale sharing percentage from 0/100 to 50/50 split]	90/10 basis.
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 (IPA).	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).
The Company will have a cap on incentive gains and losses. During the initial plan year, Nashville's overall gains or losses cannot exceed \$1.6 million annually. . . .	The Company is subject to a cap on overall incentive savings or costs on both mechanisms of \$1.25 million annually.
Nashville Gas Service Schedule No. 14 Performance Incentive Plan (effective July 1, 1996)	Atmos Performance Based Ratemaking Mechanism Rider (effective October 4, 2002)

Both companies' tariffs enact a two-part incentive mechanism, one part covering gas procurement and the other part covering capacity management. In both tariffs, the capacity management incentive mechanism states that it is "designed to encourage [the company] to actively market off-peak unutilized transportation and storage capacity on upstream pipelines in the secondary market." For both companies, the tariff provides that the "net incentive benefits" will be "shared between the Company's customers and the Company." For Nashville Gas, the sharing percentages operated on a sliding scale, with a maximum of 50/50 sharing. For Atmos, all sharing was 90/10, with 10% to the Company. Both tariffs further provide that capacity release payments are to be shared "to the extent" that the company is able to release capacity. The tariffs are materially identical. Indeed, one appears to have been copied from the other, with changes made to accommodate (1) a sliding scale sharing percentage for Nashville versus a fixed

90/10 split for Atmos, and (2) a lower cap on overall incentive recovery for Atmos. Nothing in either tariff suggests that up-front AMA payments were meant to be included in one tariff but not the other. As to the matters at issue here, they are the same.

The Chattanooga Gas Company tariff, on the other hand, is completely different, appearing in the company's Interruptible Margin Credit Rider. Significantly, like Nashville Gas, Chattanooga Gas has been permitted to share asset management fees even though its tariff makes no explicit reference to asset management agreements or to up-front payments received from such agreements. The Chattanooga Gas tariff provides in relevant part as follows:

This Interruptible Margin Credit Rider is also intended to authorize the Company to recover not more than fifty percent (50%) of the gross profit margin that results from transactions with non-jurisdictional Customers that rely on the Company's gas supply assets (all such transactions including off-system sales) should such transactions be made by the Company. The Company shall also recover through this Rider other costs authorized by the Authority.

Chattanooga Gas Company Tariff, Tenth Revised Sheet No. 48. Comparing the Chattanooga Gas and Nashville Gas tariffs, both of which have been interpreted to allow sharing of up-front AMA payments, makes it clear that no magic language or specific words have been required. Rather, these tariffs have been interpreted as they should, sensibly and as a whole. Even though neither tariff specifically mentions asset management agreements or AMA up-front fees, reading them sensibly as a whole they have been read to cover AMA fees because asset management agreements extract additional value for ratepayers from the gas companies' supply assets, which is the point of these incentive plans.

As to Nashville Gas, the issue now before the Authority was litigated and resolved in the gas company's favor. TRA Staff made the same argument that it now makes against Atmos and the Authority overruled it, allowing Nashville Gas to share up-front AMA fees under the *old* version of its Tariff (i.e. the one compared to the Atmos Tariff above). In Nashville Gas Docket

No. 03-00489, TRA Audit Staff argued that fees received from an asset manager were not covered by Nashville's incentive plan tariff and should be excluded from the incentive plan calculation under the terms of the Nashville Gas PBR Tariff. Audit Staff recommended that the Authority suspend the Nashville Gas incentive plan pending resolution of whether asset management fees should be included. Nashville Gas opposed this recommendation, asserting that up-front AMA payments are capacity release transactions and covered under the incentive plan tariff. *See* Nashville Gas Company's Response to the Energy and Water Division's Incentive Plan Account Audit Report, Docket No. 03-00489 (filed April 8, 2004 in) at 13 et seq. ("the asset management arrangements are the functional equivalent of a bulk capacity release transaction whereby the Company releases all available capacity rights not needed to meets its requirements in exchange for a substantial guaranteed payment by the asset manager."). Ultimately, the Authority ruled that Nashville Gas would be allowed to share the up-front AMA payments under the existing tariff. Nashville Gas was ordered to file a proposed revision to the tariff. But of particular importance here, the Authority refused to suspend the Nashville Gas incentive plan while these issues were being addressed. *See* Order Adopting, In Part, IPA Compliance Audit Report Of Tennessee Regulatory Authority's Energy And Water Division, Docket No. 03-00489 at 2 (October 1, 2004). In the meantime, Nashville Gas was allowed to continue to share the up-front AMA fees.

In the following year, TRA Audit Staff again objected to the Nashville Gas IPA Report, again arguing that asset management fees should not be included. Staff again recommended that the Authority suspend the Nashville Gas incentive plan, pending the outcome of a separate docket to resolve whether asset management fees should be included in the PBR Tariff. Nashville Gas opposed these recommendations, and the Authority ultimately rejected them,

again declining to suspend the Nashville Gas incentive plan. For a second time, the Authority approved the Nashville Gas incentive plan filing – including Nashville’s sharing of the up-front AMA fee. The Authority ordered that a separate docket be opened to resolve the question whether asset management fees should be included in the Nashville Gas PBR. In the meantime, however, the Authority declined to suspend the operation of the Nashville Gas incentive plan account or to disallow the inclusion of up-front AMA fees pending resolution of this separate docket. Order Adopting Incentive Plan Account Filing Of Nashville Gas Company For Year Ended June 30, 2004, Docket No. 04-00290 (September 6, 2005).

In subsequent years, Nashville Gas continued to include asset management fees in its annual IPA filings. In response, TRA Audit Staff adopted the position that although they believed that the Nashville Gas tariff language and the original intent of the incentive plan did not allow for inclusion of asset management payments, Staff would not make an audit finding on this issue because the Authority had decided to address this issue separately in Docket No. 05-00165. In the meantime, the Audit Reports did not recommend that up-front asset management fees be excluded from the Nashville Gas incentive plan account. The Authority approved these Nashville Gas IPA filings in their entirety, even though they included the up-front AMA fees. Order Adopting Incentive Plan Account Filing Of Nashville Gas Company For Year Ended June 30, 2005, Docket No. 05-00268 (July 13, 2006); Order Adopting Incentive Plan Account Filing Of Nashville Gas Company For Year Ended June 30, 2006, Docket o. 06-00220 (July 16, 2007).

Ultimately, as with Atmos, the Nashville Gas tariff was amended to expressly allow sharing of up-front AMA fees under the capacity management incentive mechanism. It is the treatment of these fees during the period *prior* to this amendment that is critical here. During that pre-amendment period, the Authority allowed Nashville Gas to share the up-front AMA

payments like any other capacity release receipts. Atmos merely seeks the same interim relief that was afforded to Nashville Gas. That is, for the years prior to 2011, Atmos respectfully submits that, like Nashville Gas, it should be entitled to include asset management fees in its incentive plan account and to recover in accordance with the terms thereof.

“The doctrine of stare decisis is one of commanding importance, giving, as it does, firmness and stability to principles of law. Stability in the law allows individuals to plan their affairs and to safely judge of their legal rights.” *In re Estate of McFarland*, 167 S.W.3d 299, 305-306 (Tenn. 2005) (internal quotations and citations omitted). “This doctrine is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Jordan v. Knox County*, 213 S.W.3d 751, 780 (Tenn. 2007) (internal quotations omitted). Fairness and respect for the Authority’s prior rulings for Nashville Gas demand that AMA up-front payments be included for Atmos just as they were for Nashville Gas.

V. THE TIMING OF THE ATMOS FILINGS DOES NOT JUSTIFY A DIFFERENT APPLICATION OF THE TARIFF

Staff have asserted that the Company should not be allowed to recover its 10% sharing percentage of the AMA up-front fees because, in their view, too much time has passed. There are reasons for the delay, including the lengthy pendency of a docket that suspended the filing of the Company’s incentive plan account reports for a number of years. But more fundamentally, delay itself should not play into the Authority’s resolution of this matter for the simple reason that it has not harmed anyone but Atmos. That is so because the disputed funds have been credited to the benefit of customers and Atmos does not seek to recover interest on the lost time value of its 10% share.

Although Staff have not yet framed their timeliness objection in legal terms, the doctrine of laches provides the most analogous legal framework for analysis. But the law of laches is clear that delay alone is never enough to preclude a claim. There must also be proof that the delay has *harmed* the party who seeks to invoke the doctrine of laches – i.e. harmed Atmos ratepayers. “With reference to the question of laches, it is axiomatic that the party pleading laches must be injured by the delay in that his position has changed for the worse in some one or more respects.” *Shoaf v. Bringle*, 198 Tenn. 526, 529 (Tenn. 1955). *See also Fisher v. Durand*, 179 Tenn. 635, 644 (Tenn. 1940) (“The party pleading laches must be injured by the delay.”); *Chappell v. Dawson*, 202 Tenn. 672, 677 (Tenn. 1957); *Edwards v. Puckett*, 196 Tenn. 560, 572 (Tenn. 1954) (“There is no merit in the contention that this action is barred by laches, or negligence of the remainderman. The defendants have not been prejudiced by his failure to sooner claim title to the land.”).

Simply put, any argument about delays in filing the disputed incentive plan account reports is not relevant here because the delay has not harmed Atmos ratepayers. In accord with the treatment required of capacity release payments under the Company’s PBR tariff, Atmos has credited 100% of its up-front AMA payments against gas costs, in each of its annual ACA filings. The Company will recover-back its 10% share only if and when the Authority approves each disputed Incentive Plan Account filing. The result is that customers have to this point retained the use of the disputed 10% share of AMA fees.⁸ Atmos is not seeking to recover interest on the amounts at issue. Even though the Company has in a real sense lost the time value of the Incentive Plan Account payments for these past years that is a loss the Company will bear. As a result, any delay in filing the disputed IPA reports has inured *entirely* to the benefit of

⁸ See Buchanan at 13-14.

Atmos ratepayers. With no harm to anyone but Atmos, any delay in filing the IPA reports should provide no reason to deny recovery.

Moreover, there are reasons for the delay, the bulk of which stems from a long-running docket. Following an audit of the Company's annual incentive plan account ("IPA") report for the period April 1, 2000 through March 31, 2001, Docket No. 01-00704 was opened to resolve an issue under the gas procurement incentive mechanism of the PBR Tariff. Due to a dispute over how to calculate savings under the gas procurement incentive mechanism of the PBR, Atmos and TRA Staff agreed to postpone filing of future IPA annual reports until Docket No. 01-00704 had been resolved.⁹ That agreement was referenced in a Motion to Consolidate and for Approval of Settlement Agreement at 3 (filed March 8, 2004). Unfortunately, a proposed settlement of the matter was opposed and litigation continued in Docket 01-00704 for several more years. Following an initial order of the Hearing Officer on March 14, 2006, an appeal to the Authority resulted in an order dated May 13, 2008 affirming in part and vacating in part the Hearing Officer's initial order, and directing further proceedings. Ultimately, the case concluded on August 26, 2008 by entry of an Agreed Order of Dismissal with Prejudice of all remaining claims in the case.

Following that ruling there was an a lengthy period of negotiations between Atmos and TRA Staff prior to the Company's formal filing of the PBR reports for these years in August 2011.¹⁰ Those discussions were initiated by Atmos and began in early September 2010. During that period of discussions, the Company provided TRA Staff with the account information ultimately included in its formal PBR filings, and there were negotiations concerning a number of issues, most of which were fully resolved prior to the Company's formal filing in August

⁹ Buchanan at 14 et seq.

¹⁰ Buchanan at 15.

2011. On August 23, 2011, the Company filed all of the outstanding Incentive Plan Account Reports, covering the period April 1, 2001 through March 31, 2011. *See* Petition, Docket No. 11-00137.

And during the intervening period, Atmos fully disclosed the amount of its up-front AMA payments. As required for capacity release receipts under the terms of the PBR Tariff, Atmos included the up-front payments in the Company's annual ACA filings. In fact, TRA Staff raised an issue about these AMA payments in their audit report concerning the Company's ACA filing for the year ended June 30, 2005.¹¹ There, TRA Staff argued that the Company's PBR Tariff should not include fees received for capacity released to an asset manager. In Item 2(c) of its audit recommendations, Staff recommended that the Authority open a separate docket to address the inclusion of asset management fees in the Company's PBR. The Authority ultimately rejected this Staff recommendation, instead ordering that TRA Audit Staff and the Company meet to discuss the effects of incorporating the asset management arrangement into the PBR. Order Adopting ACA Audit Report Of The Tennessee Regulatory Authority's Utilities Division, Docket No. 05-00253 at 4 (December 7, 2006). Unfortunately, due to the pendency of Docket No. 05-00258 (Phase II), over a period of several years the Company and TRA Audit Staff were unable to meet and resolve these issues. In 2008, the Company Asset Management Agreement was filed with and approved by the Authority in docket number Docket No. 08-00024. The amount of the annual AMA payment to the Company featured prominently in that case.

¹¹ Buchanan at 16.

VI. IF AMA FEES ARE NOT CAPACITY RELEASE PAYMENTS COVERED BY THE PBR TARIFF, THEN ATMOS IS ENTITLED TO 100% OF THOSE FEES, NOT 10%

For each applicable year, the Company has credited the up-front payment to the favor of customers in its annual ACA filings. The net effect of this has been to reduce the Company's net gas costs by the amount of the AMA up-front payment, thus providing a dollar-for-dollar benefit to customers. Atmos treated the up-front payments in this way because that is the treatment required under the terms of the Company's PBR Tariff for income received from capacity release transactions. The Company complied with the Tariff by including its AMA up-front payments each year in its annual ACA filings. Each year, Tennessee ratepayers received the benefit of these up-front AMA payments, which were credited against the Company's demand charges in accordance with the terms of the PBR tariff applicable to capacity release income.

If the up-front AMA payments were not considered to be payments for capacity release, then there would be no requirement to credit them against the Company's gas costs. The net effect would be that the Company would retain 100% of the up-front AMA payments. Indeed, if these up-front AMA payments are deemed not to be capacity release payments, the Company would have the right to go back and adjust its ACA filings for these prior years by removing these AMA up-front payments from the gas cost calculations, pursuant to TRA Rule 1220-4-7-.03(1)(c)(3). The net effect would be that instead of recovering 10% of these up-front AMA payments, pursuant to the terms of the PBR tariff, as the Company seeks here, the Company would recover 100% of those up-front payments.

VII. CONCLUSION

For the foregoing reasons, Atmos submits that the Authority should read the pre-amendment Atmos PBR Tariff as a whole to cover AMA up-front payments, just as it did for Nashville Gas prior to the amendment of its own tariff. Such AMA up-front payments

should be regarded as capacity release payments covered by the Tariff. However, if the Authority disagrees and holds that AMA up-front payments are not covered by the PBR Tariff, then Atmos submits that it will be entitled to restate its ACA filings for these prior years pursuant to TRA Rule 1220-4-7-.03(1)(c)(3), removing these AMA up-front payments from its gas cost calculations. The net effect would be that instead of recovering 10% of these up-front payments pursuant to the terms of the PBR tariff, the Company should recover 100% of those up-front AMA payments.

Respectfully submitted,

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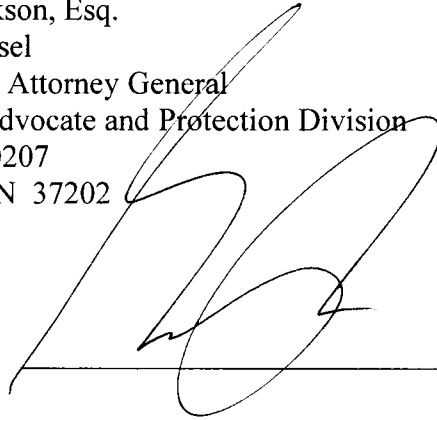
Counsel for Atmos Energy Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel of record, this the 22nd day of February, 2012.

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A handwritten signature in black ink, appearing to read 'C. Scott Jackson', is written over a horizontal line.