BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

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

REPLY BRIEF OF TRA AUDIT STAFF

The Audit Staff of the Utilities Division of the Tennessee Regulatory Authority ("TRA Staff") respectfully submits this *Reply Brief* in support of its position set forth in its *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* ("*Initial Brief*") and the findings in its Audit Report filed in this docket on November 10, 2011. For the reasons that follow, the TRA Staff respectfully maintains that under the terms of Atmos Energy Corporation's ("Atmos" or the "Company") Performance-based Ratemaking Mechanism ("PBRM") Rider tariff, prior to 2011, Atmos is not entitled to take a percentage share of fees received from asset management contracts.

I. FEES FROM ASSET MANAGEMENT CONTRACTS ARE NOT ELIGIBLE FOR SHARING UNDER THE PBRM TARIFF

Despite the fact that asset management contracts did not exist when the PBRM tariff was created, and there exists an absence of language and terms as to the sharing of fees received under such contracts in the tariff, Atmos contends in its Opening Brief that asset management contract fees constitute payments for the release of capacity and are therefore consistent with the terms of its PBRM tariff. Hence, Atmos contends that it is entitled to a 10% share in the fees.

Contrary to Atmos' mistaken assertion of TRA Staff's position, TRA Staff does not assert that the upfront payments received under the asset management contracts are not related to a release of capacity. The fees are paid to Atmos by the asset manager for the exclusive right to manage, sell, and release ("optimize") Atmos' unutilized capacity designated under such agreements.[1] Nevertheless, for the many reasons set forth in the TRA Staff's *Initial Brief* and for those that follow herein, the TRA Staff maintains that these contract fees are not eligible for sharing under Atmos' incentive plan, as delineated in its PBRM tariff.

In its discussion concerning the manner in which the Authority should approach a question involving the interpretation of a tariff, Atmos states in its Opening Brief that the construction of a tariff proceeds in the same manner as the construction of statutes, contracts, and other legal documents. On this point, Atmos cites several cases ranging in subject matter from insurance contracts and property to criminal law, for the proposition that to ascertain and give effect to the intent and purpose of a statute or document, the document should be considered as a whole and the language therein given its usual and ordinary meaning.[2] The TRA Staff agrees that the Authority should begin its inquiry using these general precepts, and for a fuller explanation of the legal analysis and principles in this matter, including the filed-rate doctrine, TRA Staff respectfully encourages the Authority to review the comprehensive discussion set forth in its *Initial Brief.*[3]

In addition, it is important to note that, in construing statutes, contracts and other legal documents, the courts have consistently held that terms that are found to be ambiguous are to be construed *against* the drafter of the statute or document. Several cases cited by Atmos in its

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[1] *See In re: Petition for Approval of Atmos Energy Corporation for Approval of the Contract(s) Regarding Gas Commodity Requirements, Etc.*, TRA Docket No. 08-00024, *Filing of Redacted Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts* (August 11, 2008).
[2] Atmos' Opening Brief, pp. 4-6 (Feb. 22, 2012).
[3] TRA Staff's *Initial Brief,* pp. 33-37 (Feb. 22, 2012).

Opening Brief set forth and affirm this principle of statutory construction. First, in the case of *The Travelers Indemnity Company of America v. Moore & Associates,* cited by Atmos, in construing an insurance policy to determine whether the insurance company had a duty to defend its insured, the Tennessee Supreme Court stated, "any doubt as to whether the claimant has stated a cause of action within the coverage of the policy is resolved in favor of the insured."[4] In the criminal case of *State v. Levandowski,* cited by Atmos, the Tennessee Supreme Court stated the principle as follows, "[P]enal statutes are construed strictly against the State. As a general rule of statutory construction, any ambiguity in a criminal statute is construed in favor the defendant."[5] In addition, in the case of *Jackson v. Miller,* construing a release of liability for injuries received in a car accident, the Tennessee Court of Appeals stated, "Because the release is a contract, rules of construction for interpreting a contract are used in construing a release. Ambiguous language in a contract is construed against the drafter."[6] Therefore, consistent with the authority cited above, in the event that the Authority was to determine that certain language within Atmos' PBRM tariff is ambiguous, it should appropriately construe such language against Atmos, the drafter of the tariff, and in favor of the ratepayers.

In its *Initial Brief,* the TRA Staff cited authority that demonstrates that, in its review of the PBRM, the Authority should first look to the language and terms of the tariff, then to the history, surrounding circumstances, conduct and statements of the parties at the time the tariff was approved so as to ascertain and give effect to the intent and purpose of the tariff.[7] The Authority must construe the tariff as it is written, taking care not to stretch or alter the words of

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[4] *See Travelers Indemnity Co. of America v. Moore & Assoc.,* 216 S.W.3d 302, 305 (Tenn. 2007), *citing Dempster Bros., Inc., v. U.S. Fidelity & Guaranty Co.,* 388 S.W.2d 153, 156 (Tenn. Ct. App. 1965); and *see* Atmos Opening Brief, p. 5 (Feb. 22, 2012).
[5] *See State v. Levandowski,* 955 S.W.2d 603, 604 (Tenn. 1997); and *see* Atmos Opening Brief, p. 5 (Feb. 5, 2012).
[6] *See Jackson v. Miller,* 776 S.W.2d 115, 117 (Tenn. Ct. App. 1989); *see also, Healthmart USA, LLC v. Directory Assistants, Inc.,* 2011 WL 1314662 (Tenn. Ct. App. 2011) (construing enforceability of an arbitration clause).
[7] TRA Staff's *Initial Brief,* p. 37 (Feb. 22, 2012).

the tariff by implying language or terms that are not included. As held by the court in the case of *Loftin v. Langsdon,* cited by Atmos, "in construing a statute, the intention of the legislature is to be gathered from words it has used and not from words it has chosen not to include . . . This Court will not depart from *the cardinal rule of construction that the interpretation of statutes does not extend to amendment of legislation.*"[8]

Through the testimony of Rebecca M. Buchanan, filed with Atmos' Opening Brief, Atmos proposes an interpretation of the language of the Capacity Release Incentive Mechanism section of the PBRM. The first sentence of the Capacity Release Incentive Mechanism 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.[9]

In her testimony, Ms. Buchanan contends that the language of the Capacity Release Incentive Mechanism of the PBRM tariff does not assign a time, or timing, requirement on the release of capacity.[10] Despite what reasonably appears in the language of the tariff to be a time qualification, or limitation, for performance as to the release of capacity (daily), Ms. Buchanan contends that no such limitation exists. Instead, she asserts that "[p]ipeline capacity is stated in terms of daily quantities," and that "daily" in the tariff signifies quantity, not time.[11] She further contends that regardless of when, or even how much (quantity), capacity is released, a release - any release – actually constitutes "a release of daily transportation or daily storage capacity." Ms. Buchanan contends, in essence, that any and all capacity is "daily capacity" under the tariff.

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[8] *Loftin v. Langsdon,* 813 S.W.2d 475, 480 (Tenn. Ct. App. 1991).
[9] Atmos 1st Revised Tariff Sheet No. 45.2 (effective October 4, 2002).
[10] Direct Testimony of Rebecca M. Buchanan, p. 8 (February 22, 2012).
[11] Id.

Even if TRA Staff were to accept the Company's interpretation as a reasonable construction of the language, which it does not, it might be evidence that the language in this first sentence of the Capacity Management Incentive Mechanism is ambiguous. Even if, in fact, this sentence is susceptible to more than one reasonable interpretation, the tariff as a whole may still be determined to be unambiguous. One word or expression in a tariff may, standing alone, be capable of two meanings and yet the tariff may be unambiguous.[12] And if the term "daily" is ambiguous, such ambiguity should be construed against Atmos. Still, in accordance with the principles of statutory construction, the Authority may appropriately consider the history, scheme and circumstances of the tariff, as well as the conduct, statements, and practices of Atmos, at the time that the PBRM was approved.

As discussed in its *Initial Brief,* the TRA Staff maintains that even if the tariff does not require daily performance by Atmos in the release of capacity, the plain language of the tariff as a whole does not include sharing of fees from contracts that outsource performance of the activities that are being incentivized in the tariff.[13] This is because, upon review of the history and attendant circumstances of the tariff, asset management contracts did not exist and Atmos performed all capacity release marketing and transactions itself on an ongoing basis. It is interesting to note that, although Atmos contends that its PBRM tariff and Piedmont Natural Gas Company's ("Piedmont") tariff are "materially identical," the language of Piedmont's tariff does not include the modifying adverb, "daily."[14] Piedmont's tariff, the differences of which are

[12] *Adkins v. Bluegrass Estates, Inc.,* 2011 WL 3844200 *5-6 (Tenn. Ct. App. Aug. 30, 2011), *cert. denied* (Dec. 14, 2011), *citing Healthmart USA, LLC v. Directory Assistants, Inc.,* 2011 WL 1314662 *2 (Tenn. Ct. App. 2011) (concerning the construction of a contract that may contain an ambiguous term yet not be ambiguous overall).
[13] TRA Staff's *Initial Brief,* pp. 38-39 (Feb. 22, 2012).
[14] Atmos' Opening Brief, p.10 (February 22, 2012); and Piedmont Service Schedule No. 316, *Performance Incentive Plan,* Second Revised Page 1 of 8 (effective July 1, 2006).

discussed extensively in TRA Staff's *Initial Brief*, omits any language that might limit or modify Piedmont's obligation to release capacity; thereby, broadening its application.[15]

Further, in what appears to be an effort to demonstrate compliance with the tariff's requirement that the Company "actively market off-peak unutilized transportation and storage capacity on upstream pipelines in the secondary market," Ms. Buchanan contends even though the Company uses an asset manager "to maximize capacity utilization," the Company takes an "active role in the daily and long term administration, planning, and decisions regarding capacity and gas supply."[16] Thereafter, Ms. Buchanan discusses the purchasing strategy Atmos applies to maximize the value of its capacity and provides a lengthy list of activities that it performs "with respect to all gas supply contracts, including Asset Management Agreements (emphasis added)."[17] Finally, Ms. Buchanan discusses the activities of the Company in preparing to solicit and contract with an asset manager, who after execution of the contract holds the exclusive right to manage and sell the Company's transportation and storage capacity, and Atmos' communications with and monitoring of the asset manager to ensure that ratepayers' service is continuously and appropriately maintained.[18]

Despite the intention and purpose of the performance-based incentive plan being to motivate and incentivize the Company to move beyond its normal purchasing practices, and to take on some degree of risk in so doing, the Company's proposed interpretation of the language of the Capacity Release Incentive Mechanism requires nothing more than *a* release, as little as just one transaction that sells/releases, for several years in advance, the Company's rights to manage and sell its off-peak unutilized capacity. The element of risk that is intended to be

[15] TRA Staff's *Initial Brief*, pp. 54-58 (February 22, 2012).
[16] Direct Testimony of Rebecca M. Buchanan, p. 9 (February 22, 2012).
[17] Id. at 10.
[18] Id. at 11-12.

incumbent within the incentive plan is largely, if not entirely, removed from the Company and transferred to a third-party asset manager. The Company continues to perform its day-to-day utility operations, which as one might expect in the running of a gas utility, consists heavily of activities related to capacity and gas supply. There is no longer any need for Atmos to exert ongoing efforts to actively market and release unutilized capacity. Upon selling its rights to an asset manager, Atmos monitors the activities of the asset manger to ensure continuous and appropriate service is maintained to its ratepayers. Under the Company's interpretation, it seems that the only prerequisite for avoiding a prudence review by the Authority and collecting 10% of the proceeds of the complete and comprehensive sale of its rights to manage and sell its unutilized capacity, is to execute one contract to effectuate one release of "daily capacity" (i.e., transfer the exclusive right to all capacity). Thereafter, Atmos communicates its service requirements to and monitors the asset manager to ensure that its daily operations are within acceptable service parameters. This scenario does not comport with the terms required for sharing under Atmos' incentive plan PBRM tariff.

While the TRA Staff does agree that asset management contracts have benefit for ratepayers, as demonstrated by the presentation of Atmos' 2011 amendment for consideration of the Authority without objection from TRA Staff, it maintains that the PBRM tariff, prior to the 2011 amendment, did not contemplate and does not include provision for sharing fees from asset management contracts. In addition, despite Atmos' contentions, the 2011 amendment did <u>not</u> simply provide explicitly that which was already implicit in the tariff. That Atmos' capacity release activities should be performed by a third party under contract was never contemplated during the Authority's review, consideration, or approval of the tariff, because such arrangements were unknown at the time the PBRM was approved and Atmos' decision to

contract for such services did not commence until several years after the Authority's approval of the PBRM. In fact, an arrangement by Atmos to outsource its incentivized performance actually circumvents the intent and purpose of the tariff. Just as *the interpretation of statutes does not extend to amendment of legislation,*"[19] an interpretation of the PBRM so as to implicitly include the sharing of fees from asset management contracts cannot stand, because in so doing the plain language and intent of the tariff would be so extended and altered as to constitute an amendment of the tariff.

In its Opening Brief, Atmos contends that its 2007 tariff amendment, adding RFP procedures to the affiliate rules in its PBRM, gives rise to eligibility for sharing asset management fees in the PBRM tariff.[20] In its *Initial Brief,* the TRA Staff discussed the reasons that the Authority required affiliate rules to be included in the PBRM in 1999, and the way in which the RFP procedures were later added in 2007.[21] Neither the affiliate rules, nor the RFP procedures, address the sharing of fees from asset management contracts. In light of its affiliate relationship with Woodward Marketing, LLC, the Authority recognized the possibility of Atmos engaging an affiliated entity for gas procurement and, therefore, mandated the inclusion of affiliate rules at the time the PBRM was originally implemented.

The RFP procedures later evolved as a result of concerns that were initially raised by TRA Staff in Chattanooga Gas Company's ("CGC") Docket No. 04-00402, as to the relationship and treatment of its affiliated asset manager, Sequent Energy Marketing ("Sequent"), in the context of asset management. TRA Staff sought to ensure that such contracts were properly placed out for bid so that affiliated entities did not receive preferential treatment in the contract solicitation and selection process. The RFP procedures further aim to ensure that ratepayers

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[19] *Loftin v. Langsdon,* 813 S.W.2d 475, 480 (Tenn. Ct. App. 1991).
[20] Atmos' Opening Brief, p. 8 (February 22, 2012)
[21] TRA Staff's *Initial Brief,* pp. 5-6, 50-52 (February 22, 2012).

receive fair market value for the assets sold under asset management contracts, as these assets are purchased entirely with ratepayer funds. The RFP procedures do not address and were never intended to encompass a provision for sharing of fees from asset management contracts. Such an application of the amendment was simply not necessary because CGC had been prior to the amendment, and was at that time of the amendment, entitled to a portion of asset management fees under the terms of its IMCR tariff.[22]

In Atmos' ACA Docket No. 05-00253, the TRA Staff raised similar concerns about the way in which Atmos had solicited and selected its affiliate, Atmos Energy Marketing, LLC ("AEM"), for asset management services and whether the ratepayers had received appropriate value for the sale of assets. In that docket, TRA Staff recommended, as it had with CGC, that Atmos amend its tariff to include RFP procedures to govern its solicitation and selection of an asset manager. Although the TRA directed that TRA Staff and Atmos meet to discuss and resolve issues involving Atmos' selection of an asset manager, when such discussions were delayed, Atmos in the absence of discussion proceeded to file on April 5, 2007, an amendment to add RFP procedures that were essentially identical to those that had been previously approved for CGC. Also at that time, the Authority directed Staff and Atmos to meet and discuss incorporating asset management arrangements into the PBRM. Unfortunately, on this issue, despite the resolution of similar issues in Piedmont's Docket No. 05-00165, Atmos did not take action until 2011 to amend its tariff to add provision for fee sharing of asset management contracts. Until amendment was made in 2011, Atmos' PBRM tariff remained silent and the intent and purpose of the incentive tariff, as further supported by its history, does not support fee sharing from asset management contracts.

[22] CGC has shared fees from asset management arrangements under the provisions of its IMCR tariff. First, under a bailment agreement for off-system sales, and additionally, following its 2003 tariff amendment expanding the scope of sharing to include all non-jurisdictional transactions.

While an effect of the RFP procedures may have been an increase of fees received from asset management contracts, the RFP procedures were designed and implemented in order to prevent the extension of preferential treatment from the regulated utility to its affiliated entity in the solicitation and selection of an asset manager, should the utility desire to engage one. Further, the RFP procedures were needed to ensure that ratepayers were appropriately compensated for the sale and release of assets that are funded and purchased entirely by ratepayers. Therefore, Atmos' assertion that the RFP procedures were "designed to maximize the amount of upfront fees" received from asset management contracts, and therefore, is evidence of the inclusion of such fees as eligible for sharing, is simply incorrect.[23]

Atmos is and has been well aware that the amendment adding RFP procedures did not address and is not evidence of an intention that fees derived from asset management contracts are eligible to be shared by the utility. Atmos filed its amendment to add RFP procedures to the affiliate rules in the PBRM only *one week* before filing its *Verified Supplementation of the Record ("Verified Supplementation")* in Docket No. 05-00253.[24] As TRA Staff discussed in its *Initial Brief,* Atmos filed its *Verified Supplementation* to "clarify the record" that all asset management payments were credited 100% to ratepayers and admitted that it did not share in such fees under the PBRM.[25] Although its RFP amendment had been filed just one week earlier, the *Verified Supplementation* made no mention of the amendment, and did not indicate that the RFP amendment was intended to or would impact the sharing arrangements of the PBRM.

Finally, contrary to Atmos' assertion in its Opening Brief, and as also discussed in its *Initial Brief,* TRA Staff maintains that the Authority did not implicitly approve sharing of asset

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[23] Atmos' Opening Brief, p. 8 (February 22, 2012).

[24] In Docket No. 05-00253, Atmos filed its RFP amendment on April 5, 2007, and then filed its *Verified Supplementation* just one week later on April 12, 2007.

[25] TRA Staff's *Initial Brief,* pp. 20-21, 44-46 (Feb. 22, 2012).

management fees when it approved Atmos' requests for approval of its asset management agreements.[26] Rather, quite the opposite. In its review of Atmos' request for approval of its Asset Management Agreement with AEM in Docket No. 08-00024, the Authority acknowledged Atmos' assertion that "the sole issue to be decided by the TRA is whether Atmos complied with the provisions of its tariff as those provisions relate to the RFP process and issuance of the AMA."[27] The Authority further acknowledged that the Consumer Advocate had agreed that other issues relating to the appropriate sizing and valuation of Atmos' gas supply assets and the appropriate sharing of the value of those assets would be addressed in Docket No. 07-00225.[28] The Authority in deferring the issue, first in Docket No. 05-00253, then in Docket Nos. 05-00258 and 07-00225, recognized that the issue of whether to include asset management fees in the PBRM, and if so, how and under what terms, has remained an open one. The issue was resolved, on a going forward basis, on January 9, 2012, when the Authority approved Atmos' 2011 tariff amendment. It is TRA Staff's position that the 2011 amendment added the necessary terms provision to allow sharing of fees generated from asset management contracts, effective as of April 1, 2011.

Although Atmos could have filed an amendment to include sharing of fees from asset management contracts at anytime, and, in TRA Staff's opinion, should have filed it when the controversy with Piedmont began or, at least, upon notice by TRA Staff in Docket No. 05-00253 that the PBRM did not allow such sharing. But, Atmos did not do so. TRA Staff has not and doers not reject the proposition that fees from asset management contracts are appropriate to be considered for sharing. Rather, its position has always been that asset management arrangements

[26] TRA Staff's *Initial Brief*, pp. 50-52 (Feb. 22, 2012).
[27] *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/Storage Contracts*, p. 4 (July 9, 2008).
[28] *Id.*

and fees were unknown, and thus not contemplated or included, at the time that the PBRM tariff was approved. The absence of specific language and terms in the tariff (prior to the 2011 amendment) demonstrate and reinforce this fact. Atmos may only charge ratepayers, and the Authority may only enforce such charges, according to the terms of Atmos' tariff. If it is not in the tariff, the law does not allow it.

II. No Settled Policy or Precedent Compels the Authority to Permit Atmos to Take 10% of the Fees Received from Asset Management Contracts

Atmos also contends that it is entitled to a 10% incentive share of the fees from asset management contracts executed prior to 2011, despite the language and intent of its PBRM tariff, because Piedmont and CGC have each been able to retain similar fees under their tariffs. Atmos claims that it only seeks the same treatment that other companies have received and cites the doctrine of stare decisis as persuasive authority in support of its demands. For the many reasons set forth in its *Initial Brief* and herein, TRA Staff maintains that Atmos' tariff must be considered on its own merits and that no settled policy or precedent compels the Authority to permit Atmos to take from ratepayers a share of asset management fees. On the contrary, under the terms of the tariff, Atmos is not entitled to a share of asset management fees, and by law, the Authority may not permit it to take a portion of such revenue.

In general, the judicial doctrine of stare decisis, derived from the latin phrase, *et non quieta movere* (meaning to stand by precedents, and not disturb settled points), is the principle that once a question of law is settled by judicial decision or established by long standing custom, it forms a precedent which is not to be departed from or lightly overruled, even if it seems archaic.[29] In order for a court to apply the doctrine, the issues or points in controversy must be

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[29] *Willis & Turner v. Moore & Davis,* 271 S.W. 736. 737 (Tenn. 1925); *see also,* 79 A.L.R.2d 1126 §1 (Originally published in 1961).

identical to those rendered in the former decision.[30] As discussed extensively by TRA Staff in its *Initial Brief,* Atmos' tariff and history are not identical to Piedmont, and neither has the Authority rendered a decision or established a policy or custom on the issue in controversy in this case.

Moreover, stare decisis, being a judicial precept, is *not* binding on the Authority. An administrative agency is not bound by its prior decisions, but, nevertheless, cannot arbitrarily establish a change of policy or depart from settled practice. Therefore, to avoid arbitrariness, a reasoned explanation of the agency's determination is required:

> The commission's view of what is best in the public interest may change from time to time. . . in such a case, if the conclusion is challenged as arbitrary, it would seem that the court, in the process of adjudicating that issue, can require a statement of the premises for and the reasoning toward the general policy.[31]

In the case of *Lien v. Metropolitan Government of Nashville,* the Tennessee Court of Appeals stated the principle as follows:

> The determination of arbitrariness within the structure of an administrative law decision is to compare the decision at issue with the precedent in prior cases. Thus, if an agency treats individuals differently, it must acknowledge and explain that difference in treatment or be subject to a determination of arbitrariness. When an agency does not have a sufficient record of precedents or the record of precedents is not made, there is no occasion to find that the decision was arbitrary (internal citations omitted).[32]

Therefore, as in this issue, where there is no established policy or precedent, the Authority cannot be said to have acted arbitrarily in its decision. Nevertheless, where the agency determines that its decision constitutes a departure from its prior treatment of an issue is justified, it must provide a reasoned basis for its decision so as to avoid a judgment of arbitrariness or

[30] *Union Trust Co. v. Williamson Co. Bd. Of Zoning Appeals,* 500 S.W.2d 608, 614 (Tenn. 1973); *see also Dotson v. Blake,* 29 S.W.3d 26, 30-31 (Tenn. 2000).
[31] *Alltel Tennessee, Inc. v. Tennessee Public Service Commission,* 1990 WL 20132 at D1 (Tenn. Ct. App 1990); *see also United Cities Gas v. Tennessee Public Service Commission,* 769 S.W. 256, 258-259 (Tenn. 1990)
[32] *Lien v. Metropolitan Government of Nashville,* 117 S.W.3d 753, 761 (Tenn. Ct. App. 2003).

abuse of discretion on appeal. The Sixth Circuit Court of Appeals similarly articulates this standard and holds that inconsistent, but rationally explained, decisions of an agency for the purpose of correcting past error is not grounds for judicial relief:

> [I]nconsistency with past practice can represent arbitrary and capricious conduct by an administrative agency. Yet, an administrative agency may reexamine its prior decision and may depart from its precedents provided the departure is explicitly and rationally justified. Inconsistencies due to "simple agency oversight" or acknowledged errors" that are corrected, do not warrant judicial relief.[33]

Included in its discussion of the differences that exist between the tariff and history of Atmos and Piedmont in its *Initial Brief*, TRA Staff readily admitted that in 2004 when TRA Staff first raised the issue as to whether or not fees from asset management contracts were appropriate or eligible for sharing under Piedmont's incentive tariff, it had previously lacked knowledge and expertise concerning asset management arrangements, which were new in the industry.[34] As a result TRA Staff failed to immediately recognize and understand the nature of the fees being claimed by Piedmont in its first several IPA audit years. Thus, Piedmont's IPA filings, which included asset management fees, were approved without comment or objection. Nevertheless, as soon as it learned of the nature of the fee arrangement, TRA Staff immediately raised an objection and recommended that such fees be disallowed in future years because they did not comport with the terms of the tariff.[35] The Authority directed TRA Staff and Piedmont to discuss and reach agreement as to a resolution, and ultimately established Docket No. 05-00165. In 2007, the Authority approved the parties' settlement agreement filed in Docket No. 05-00165, which substantially overhauled Piedmont's incentive plan and included amendment of its tariff to add specific language allowing Piedmont to share asset management fees.

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[33] *Maximum Home Health Care, Inc. v. Shalala,* 136 F. Supp. 814, 830 (6th Cir. 2001).

[34] TRA Staff's *Initial Brief,* pp. 59-60 (Feb. 22, 2012).

[35] *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).

Although a pattern and expectation of sharing asset management fees may have inadvertently started in Piedmont's case, no such expectation has been established as to Atmos. Further, upon realizing its error in the Piedmont audits, TRA Staff immediately took corrective action. None of the Authority's decisions in the Piedmont's audits ruled that fees from asset management contracts were included in the terms of the tariff. Furthermore, the Authority's approval of the parties' settlement agreement established a substantially new approach to Piedmont's incentive plan and added a specific provision to allow asset management fee sharing at that time. Hence, all of Piedmont's audit periods after July 1, 2006, when the amendment was effective, have included the sharing of asset management fees and been approved as in compliance with its tariff.

Atmos has now over the span of several years observed the evolution of this issue as to Piedmont and its ultimate resolution. Yet, Atmos took no action to amend its tariff, even after having been given explicit notice that its tariff did not include sharing of asset management contract fees in ACA audit Docket No. 05-00253 - its first recorded receipt of asset management fees. Further, Atmos filed its *Verified Supplement* in Docket No. 05-00253, acknowledging that fees from asset management contracts were separate and distinct from the capacity release assets that it managed itself and were not subject to sharing under the PBRM. The TRA Staff's *Initial Brief* provides additional and extensive discussion of the differences between the tariffs and history of Piedmont and Atmos.[36]

In its Opening Brief, Atmos admits that "Chattanooga's tariff [is] completely different," yet still contends that it is entitled to share fees because CGC shares fees from its asset management contracts.[37] TRA Staff wholeheartedly agrees that CGC's tariff is completely

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[36] TRA Staff's *Initial Brief,* 53-67 (February 22, 2012).
[37] Atmos' Opening Brief, pp. 9, 12 (February 22, 2012).

different from Atmos' tariff; in fact, so much so that CGC's tariff is not reasonably comparable to Atmos' tariff and provides no basis for Atmos' demands for like treatment. CGC's tariff is distinct in structure, language, and the way in which the mechanism operates. Foremost among the differences is that the terms of CGC's tariff include and allow for sharing of fees from asset management contracts.

First, the structure of CGC's tariff is remarkably different from both Atmos and Piedmont. CGC has a Performance-based Ratemaking ("PBR") tariff (an incentive plan) and an Interruptible Margin Credit Rider ("IMCR"). It is through the IMCR, not the PBR, that CGC is permitted to retain a portion of the fees it receives from asset management contracts. CGC's PBR was established by the Authority on January 8, 2002 in Docket No. 01-00619 and made effective on September 11, 2001. CGC's PBR tariff differs from both Atmos' and Piedmont's incentive plans in that the CGC does not share in any profits or losses that it may realize as a result of a comparison between its actual gas cost purchases and the predetermined benchmark in the tariff. The incentive in CGC's tariff is exclusively a waiver of the prudence audit of gas purchases required under the PGA Rule.[38] CGC's PBR tariff was amended to include Affiliate Transaction Guidelines after the TRA Staff raised concerns as to CGC's asset management agreement with its affiliate Sequent in Docket 04-00402 (403).[39] The tariff was later amended again to include RFP Procedures for Selection of [an] Asset Manager and/or Gas Provider, effective September 1, 2006.[40]

While CGC's PBR incentive plan acts to waive the prudence review, CGC is entitled to share in payments it receives from asset management contracts under its IMCR. The IMCR

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[38] TRA Rule 1220-4-7-.05.

[39] *In re: Summary of the Transactions 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*, Staff Audit Report (September 9, 2005); and see CGC *Performance-Based Ratemaking*, Second Revised Sheet No. 56A.

[40] CGC *Performance-Based Ratemaking*, Revised Sheet No. 56B and Original Sheet No. 56C.

tariff is not an incentive plan and was initially established to allow CGC to recover 90% of its gross profit margin losses that resulted from rates that it negotiated under Special Service Rate Schedule SS-1 and 50% of the gross profit margin resulting from off-system sales of gas. In 2003, CGC amended the Intent and Application section of the IMCR to enable it to enter into other transactions (i.e., asset management arrangements) that utilized CGC's gas supply assets, and to retain a portion of the revenue generated under those transactions. Attached as Exhibit C to the Direct Testimony of Rebecca M. Buchanan, CGC's IMCR tariff provides, in pertinent 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 transaction 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.[41]

With just a cursory review, it is abundantly clear that CGC's IMCR tariff is not at all similar to Atmos' PBRM. Again, on this point, TRA Staff agrees with Atmos' assessment, CGC's tariff is totally different from Atmos' – in its structure, language used, the way that the mechanism works, and in the terms and authority it conveys. Thus, it provides no support for Atmos' contentions in this matter.

In 2001, CGC executed a Gas Storage Asset Bailment Agreement with its marketing affiliate, Sequent.[42] Under the bailment agreement, Sequent paid CGC a fee for the use of CGC's assets and retained any profits gained through the use of CGC's assets when making off-system sales.[43] In late 2002, after determining that changing market conditions warranted a new

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[41] CGC *Interruptible Margin Credit Rider*, Tenth Revised Sheet No. 48.
[42] *See In re: Chattanooga Gas Company's Actual Cost Adjustment Audit,* TRA Docket No. 03-00516, *Staff Audit Report,* p. 9 (June 4, 2004).
[43] *Id.*

arrangement, CGC terminated its bailment agreement.[44] CGC amended its tariff, effective January 1, 2003, to further expand the scope of its terms to include all transactions with non-jurisdictional customers subject to sharing, not just off-system sales to be consistent with its asset management contracts entered into from 2003 forward.[45] Under its tariff, upon receipt of asset management payments, CGC allocates 50% to ratepayers and retains 50%. Annually, CGC files a tariff to refund to ratepayers their 50% with interest. This is a dramatically different mechanism than that which is set forth in Atmos' PBRM tariff; wherein, Atmos is required to credit 100% to ratepayers through its ACA filings then, upon approval, receive 10% back through its IPA.

About the same time that TRA Staff became aware of the discrepancy with Piedmont's tariff, TRA Staff also began to inquire about CGC's asset management arrangements. On June 4, 2004, TRA Staff issued its ACA Audit Report on CGC for the period ended June 30, 2003 in Docket No. 03-00516. During the proceedings that followed, after receiving additional information responsive to its concerns, TRA Staff withdrew several of the recommendations it had issued in its report. Ultimately, the Authority was satisfied that CGC had complied with the terms of its IMCR tariff concerning the sharing of off-system sales under the bailment agreement. CGC's tariff amendment, effective January 1, 2003, specifically includes all non-jurisdictional transactions, which is consistent with CGC's asset management agreements approved by the Authority in Docket Nos. 08-00012 and 10-00049. Thus, although CGC's IMCR tariff utilizes different language to describe its activities and a distinct structure and mechanism for effectuating revenue sharing than the tariffs of Piedmont and Atmos, its tariff is sufficient and does specifically provide for sharing of asset management fees by CGC. Atmos'

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[44] *Id.* at 12-13.

[45] CGC Tariff filing No. 03-00408 (June 16, 2003).

contention that it should be allowed to share in asset management fees under its tariff because CGC has been permitted to share under its IMCR is without merit.

For the many reasons set forth here and in its *Initial Brief,* the TRA Staff maintains that there is no established policy or precedent that compels the Authority to allow Atmos to take a share of the fees generated from asset management contracts. Moreover, the differences between the tariffs and history of Atmos and the other gas companies requires a consideration of Atmos' tariff on its own merits, and sufficiently justifies any disparate treatment that might result. Nevertheless, any perception of inconsistency is reasonably explained in that, initially, when asset management arrangements began to appear in the filings made with the Authority, they were innovative in the industry. Consequently, the TRA Staff lacked knowledge and expertise of such arrangements and did not immediately recognize the discrepancy between the nature of asset management contracts and the tariff terms of the gas utilities subject to its regulatory oversight. Hence, in the early years when asset management contracts were just coming into play in the industry, approximately from 2000 to 2004, the TRA Staff unknowingly allowed Piedmont to retain asset management fees as evidenced in its ACA report filings. TRA Staff has admitted that its failure in immediately identifying the tariff violations was error. Nevertheless, upon recognizing its error, TRA Staff promptly objected to the sharing and the Authority has since corrected course.

The Authority determined that CGC's operations under its bailment agreement complied with its tariff, and both CGC and Piedmont have specifically amended their tariffs in 2003 and 2007 respectively -- well in advance of the time Atmos filed its first IPA report in 2011. Atmos knew from its first ACA filing in Docket No. 05-00253 that it was TRA Staff's opinion that Atmos' tariff did not allow it to share fees from asset management contracts. Despite TRA

Staff's recommendation, and even after observing the related proceedings and actions of the other gas companies on this issue, Atmos did not amend its tariff. There is simply no reasonable basis to permit Atmos to take advantage of the agency's past error, which has been acknowledged and corrected, so as to gain a windfall at the expense of and to the detriment of ratepayers. The ratepayers have paid for these assets, and Atmos' actions in selling its rights to manage and release unutilized capacity to a third-party asset manager for a one-time upfront payment does not comport with the sharing provisions of its PBRM. Therefore, it is not entitled to a portion of such fees for any period prior to 2011, when it amended it tariff.

III. THE EQUITABLE DOCTRINE OF LACHES DOES NOT APPLY; THE TERMS OF THE TARIFF MUST BE STRICTLY APPLIED AND ENFORCED

In its Opening Brief, Atmos contends that TRA Staff claims that Atmos cannot share 10% of the fees from asset management contracts because "too much time has passed."[46] This is a gross oversimplification and simply wrong. While the TRA Staff agrees that Atmos unreasonably delayed in filing its IPA reports, that delay is not what prevents Atmos from sharing. TRA Staff maintains that, if delay has played a role, it is Atmos' delay in filing a tariff amendment to add asset management arrangements and fee-sharing eligibility for fees generated from those arrangements in its PBRM tariff.

"The defense of laches, in its most basic terms, provides that "equity will not intervene on behalf of one who has delayed unreasonably in pursuing his rights."[47] The defense of laches acts to bar a claim that is brought after inexcusable delay, and such delay results in prejudice or injury to the rights of innocent parties. Laches depends on the facts of each case and is sustained

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[46] Atmos' Opening Brief, p. 15 (February 22, 2012).

[47] *See Dennis Joslin Co., LLC v. Johnson*, 138 S.W.3d 197, 200 (Tenn. Ct. App. 2003), *citing Hannewald v. Fairfield Communities, Inc.*, 651 S.W.2d 222, 228 (Tenn. Ct. App. 1983).

by courts only in rare instances.[48] The Tennessee Court of Appeals has stated the defense of laches as follows:

> The defense of laches presents a mixed question of law and fact. Two essential elements of fact are negligence and unexcused delay on the part of the complainant in asserting his alleged claim, which result in injury to the party pleading laches. *Sunderhaus v. Perel & Lowenstein* (1965) 215 Tenn. 619, 388 S.W.2d 140. The question whether in view of the established facts, relief is to be denied—that is, whether, it would be inequitable or unjust to the defendant to enforce the complainants' right—is a question of law. 27 Am.Jur.2d, Equity, § 176, pp. 722–723.[49]

While TRA Staff does assert that if the Company were allowed, in violation of its tariff, to take 10% of the fees received from asset management contracts, the rights of ratepayers would be prejudiced and harmed, this does not evoke laches. TRA Staff's position is not that Atmos' claim that it should share in asset management fees should be barred because it filed its reports too late. Rather, TRA Staff maintains that Atmos has no reasonable claim to a share of the fees because the terms and history of the tariff do not include the sharing of fees from asset management contracts. Any harm to Atmos due to the fact that it is not able to share in asset management fees can only be attributed to its own failure to act sooner in amending its tariff. Prior to its 2011 amendment adding such provision, Atmos has no reasonable entitlement to share in ratepayer monies.

Finally, Atmos states that it does not seek interest on the 10% share it requests. In effect, Atmos purports to waive the interest on seven years' worth of asset management fees, approximately $376,198, to which it claims entitlement. The filed-rate doctrine prohibits regulated entities from charging rates other than those that have been properly filed with the

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[48] *See Whitehaven Util. Dist. of Shelby County v. Ramsay*, 215 Tenn. 435, 441, 387 S.W.2d 351, 353 (1964); and *see Frye v. Postal Employees Credit Union*, 713 S.W.2d 324, 326 (Tenn. Ct. App. 1986).
[49] *See Frye v. Postal Employees Credit Union*, 713 S.W.2d 324, 326 (Tenn. Ct. App. 1986).

Authority and precludes the Authority from altering such rates retroactively.[50] The filed rate doctrine is the law of the land, regardless of whether one wishes to enforce or not enforce certain provisions. By law, the rate filed is, without exception, the rate that must be charged. Only by strict application can the goal of preventing unreasonable and discriminatory charges be achieved.

While it is the TRA Staff's position that the Company is not entitled to any monies for asset management fees under the PBRM prior to 2011, in the event that the Authority determines otherwise, Atmos cannot waive interest on monies due to them under the tariff. The language and terms of the tariff are strictly applied, regardless of whether such application so happens to favor the ratepayer or the Company. The terms of the tariff require interest to be accrued and applied, and thus, the TRA Staff is bound by law to do so despite Atmos' offer to forego interest. It seems that just as it ignores the terms of the tariff when it insists on taking a percentage share of fees from asset management contracts, Atmos likewise ignores the tariff in stating that it will, as if it had a choice, forgo interest. Simply put, it is the terms of the tariff that control. There is no discretion. Neither the preferences of the TRA Staff, nor the whims of the Company, determine the rates and charges to customers. In order to change the terms of the tariff on a going forward basis, an amendment to the tariff must be properly filed and approved by the Authority. Until such action is taken, the rate on file is the rate that is charged. Enforcement is not optional.

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[50] *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).

IV. IN THE EVENT THAT ATMOS IS DENIED A SHARE OF ASSET MANAGEMENT FEES, UNDER THE PBRM TARIFF, ATMOS WOULD NOT THEN BE ENTITLED TO RETAIN 100% OF THE FEES, AND THE CIRCUMSTANCES WOULD NOT WARRANT CORRECTION OR A RESTATEMENT OF ANY OF ATMOS' PAST ACA FILINGS

Finally, in its Opening Brief, Atmos makes a rather novel, albeit erroneous, argument that if the Authority does not find that the provisions of its PBRM tariff allow it to take a 10% percent share of asset management fees, then Atmos will simply restate its previous ACA filings to omit the fees altogether and retain 100%. Basically, Atmos contends that if denied a percentage share of the fees, then it is entitled to a windfall of 3.7 million dollars for the sale of assets funded exclusively by ratepayers. Atmos provides little explanation or analysis as to how it has arrived at such an outrageous conclusion, but the argument appears to TRA Staff to be built upon several faulty assumptions.

First, as discussed in its *Initial Brief* and stated earlier herein, while the TRA Staff *does* consider asset management fees to be payments for or related to capacity, specifically, the exclusive right to manage, sell, and release all of Atmos' capacity, including its off-peak unutilized capacity, it *does not* agree that such payments are either contemplated or included (eligible) for sharing under the terms of Atmos' PBRM tariff. The TRA Staff maintains that Atmos continues to be obligated under its tariff and the Authority's PGA rules to include asset management fee payments in its Actual Cost Adjustment ("ACA") filings.

Atmos has understood this obligation, reported its costs and credits, and filed its ACA reports with the Authority as required since 2004. As it explained in its *Verified Supplementation* in Docket No. 05-00253, Atmos recognizes its obligation to credit asset management fees to its deferred gas cost account and to include such credits in its ACA report filing – without expectation that it should later receive a percentage share of such fees:

> *Atmos does not retain any portion of the lump sum payments.* The full $500,000 is flowed 100% through to the ratepayers under the Purchased Gas Adjustment ("PGA") mechanism. . . . In addition to, but separate from, the above, there are a few assets (in the form of pipeline contracts) that are not included with 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[M].[51]

The TRA Staff has audited, and the Authority has approved, all of Atmos' ACA report filings from 2004 through 2011. Atmos' contention that if it cannot share in the fees under the PBRM, then it is not required to include such monies in its ACA filings, is clearly a new position that differs significantly from its previous statements to the Authority. Atmos' position on this point is not correct or credible.

The TRA Staff maintains that the assets at issue are funded entirely by ratepayers, and, as such, must be accounted for by Atmos. Because revenues generated from the sale of capacity assets belong to the ratepayers, they are considered jurisdictional or regulated income. Under the terms of its PBRM, the Company has an incentive opportunity to share in a portion of these revenues when it performs in accordance with the requirements of the tariff. As the tariff, prior to 2011, does not allow or contemplate the sharing of fees under the circumstances of an asset management contract, those fees are not eligible for sharing. Accordingly, ratepayers are entitled to retain all of the revenue generated from the sale of the assets that they have funded. This remains consistent with Atmos' own understanding of the PBRM, as demonstrated in its *Verified Supplementation.*

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[51] *See In re: Atmos Energy Corporation Actual Cost Adjustment ("ACA") Audit,* TRA Docket 05-00253, *Atmos Energy Corporation's Verified Supplementation of the Record,* p. 2 (April 12, 2007).

In her testimony, Ms. Buchanan cites as relevant to the Authority's consideration in this matter a provision of Atmos' tariff titled, Capacity Assignment Credit Rider ("CACR"), which is reproduced as follows:[52]

> <u>Applicability</u>
> The intent of this Rider is to allow the Company during certain periods to enter into contractual agreements with others to temporarily assign or release capacity held by the Company. The specific terms of such assignment and/or release shall be set forth in a contract between the Company and the assignee/lessee. Contracts with customers within the Company's service territories shall be filed with and approved by the Tennessee Regulatory Authority.
>
> <u>Determination of Capacity Assignment Credit</u>
> Revenues related to commodity costs, fuel and related surcharges shall be a credit to the Deferred Gas Cost Account. Revenues, related to any fixed demand costs, related surcharges and any additional administrative charges levied by the Company and/or its subsidiary shall be shared between the Company's customers and the Company on a 90%/10% basis.
>
> <u>Filing With the Tennessee Regulatory Authority</u>
> The determination period of any revenues to be credited to the Deferred Gas Cost Account shall correspond with the Company's Reconciliation Year which ends June 30 each year. Supporting documentation of these transactions shall be maintained by the Company and made available to the Tennessee Regulatory Authority upon request.[53]

Atmos provides no analysis or explanation in either its Opening Brief or in Ms. Buchanan's testimony as to how this provision relates to or impacts the Authority's decision in this matter. Nevertheless, the TRA Staff agrees that it is relevant, but only insofar as it demonstrates that capacity release transactions performed by Atmos itself were the type recognized and considered by the Authority at the time the PBRM was approved. Further, that Atmos was even then required to credit such revenues to its Deferred Gas Cost Account and reconcile them in its annual ACA filings. But, for much the same reasons that the PBRM does not convey an interest or percentage share in asset management fees to the Company, neither does the CACR provide a

[52] Direct Testimony of Rebecca M. Buchanan, p. 5 (February 22, 2012).
[53] See United Cities Gas Company, a Division of Atmos Energy Corporation, T.R.A. No. 1, Original Sheet 45 (effective September 2, 1997).

vehicle under which the Company may take a portion of asset management fees. As a result, the CACR is not applicable or useful to the Authority's consideration as to whether the Company is permitted to take a portion of the fees received from asset management arrangements for audit years 2004 through 2011.

The CACR pre-dates the PBRM and, as a result, was superseded by the PBRM and is not a part of Atmos' incentive plan.[54] The CACR was the mechanism that Atmos used to account for capacity release transactions prior to its PBRM. Although it was not considered an incentive plan and did not work so as to replace or waive the annual prudence audit, as the PBRM does, it demonstrates that "piecemeal" capacity releases occurred, were accounted for, and were thought to be beneficial to customers. The CACR allowed the Company to retain a portion of any additional margin created by revenues generated from its temporary assignment or release of capacity. These were the types of capacity transactions considered by the Authority when it approved the PBRM. The PBRM covers these same transactions that had been covered under the CACR, but the PBRM provides a new process to be following in accounting for and sharing in the revenues generated by such transactions.

Like the PBRM, the CACR required that revenues be credited to the Deferred Gas Cost Account to offset gas costs and, according to its terms, enabled the Company to retain a portion of those revenues. But, the CACR required the Company to credit 90% of the revenues related to any fixed demand costs, related surcharges and additional administrative charges against gas costs in its Deferred Gas Cost Account, as filed with the Authority in its ACA reports. Whereas, the PBRM requires that 100% of the revenues be credited in the Deferred Gas Cost Account, and

[54] *See In re: Tariff No. 97-233 to Change Name of the Company from United Cities Gas Company to United Cities Gas Company, a Division of Atmos Energy Corporation,* TRA Docket No. 96-01299, *Order Approving Tariff to Reflect Name Change* (October 20, 1997). The effective date of the revised tariffs was September 2, 1997.

upon review and approval, the Company may surcharge a 10% share back to its Incentive Plan Account.

Upon approval of the PBRM, the CACR was superseded and probably, for the sake of avoiding confusion, should have been removed from the Company's tariff. Nevertheless, the CACR demonstrates the Company's continuing obligation to credit these types of revenues in its Deferred Gas Cost Account and to account for them in its ACA report filings. It further demonstrates the necessity of a specific tariff allowing the Company to retain a portion of revenue generated from the assignment, sale or release or capacity, before it may do so. In the absence of specific tariff designation and permission that the Company may share, revenues from assets funded entirely by ratepayers flows through to the ratepayers.

Finally, TRA Staff disagrees that under TRA Rule 1220-4-7-.03(1)(c)(3), Atmos is entitled to restate its ACA filings to omit from reporting the asset management fees and retain them in full for the benefit of its shareholders. Surprisingly, Atmos provides no analysis in either its Opening Brief or the testimony of Rebecca M. Buchanan to support this conclusion. TRA Rule 1220-4-7-.03(1)(c)(3), which is included in the ACA section of the PGA rules, states as follows:

> Adjustments to Prior Period ACAs. In the event that circumstances warrant a correction to or restatement of a prior period ACA, such correction or restatement shall be made in accordance with the ACA calculation in effect for the time period(s) to which the correction or restatement relates. The resulting adjustment shall then be added to or deducted from the appropriate ACA in the next ensuing ACA filing with the Authority.[55]

This rule permits the Authority to allow adjustment of an ACA from a previous audit period in the event that circumstances warrant correction or restatement of a prior filing. In the past, when an audit has been completed and the audit period closed, the Authority has utilized the above rule

[55] TRA Rule 1220-4-7-.03(1)(c)(3).

to effectuate adjustments to correct inaccurate information in a prior annual filing in situations such as the following:

1. If the sales volumes that had been used to calculate the recovery from a prior period are determined to have been inaccurate, an adjustment to the current period is performed using the PGA recovery factor in effect during the month to which the adjustment relates; or,
2. If the utility receives a revised invoice from a supplier for a prior period, any dollar adjustment to the current period must be calculated using the commodity/demand rate, allocation factor, etc., that was in effect during the month to which the adjustment relates.

In addition, the rule contemplates that "the resulting adjustment [arising from the prior period] shall then be added to or deducted from the appropriate ACA in the next ensuing ACA filing with the Authority."[56] The language of the rule, while not foreclosing the possibility of going back multiple audit periods, appears to more readily apply to a recently preceding audit period. This application would also be consistent with the Authority's past practice of this rule. It is important to note, "with respect to an agency's interpretation of its own rules and regulations, courts afford deference and controlling weight to such determinations unless plainly erroneous or inconsistent with the regulation."[57]

As the rule has not been previously utilized in the manner proposed by Atmos, the TRA Staff asserts that the Authority would be required to determine whether the circumstances presented by Atmos would warrant a restatement of its past seven years of ACA filings. Further, Atmos has admitted that its purpose in restating its filings would be to retain for itself the full

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[56] *Id.*
[57] *See Jones v. Bureau of TennCare,* 94 S.W.3d 495, 501 (Tenn. Ct. App. 2002).

amount of all fees it has received from asset management contracts. In essence, to effectuate for itself a 3.7 million dollar windfall generated exclusively from ratepayer assets. TRA Staff respectfully asserts that such action would constitute a gross misuse of the TRA rules, is certainly not the kind of action that the adjustment rule is intended to accommodate, and is not how the rule has been interpreted or applied by the Authority in the past.

Furthermore, in the event that a utility was found or reasonable suspected to be making transactions using ratepayer assets and booking all revenue below the line to benefit stockholders, the Authority is authorized to conduct an investigation of such activity and make a determination as to whether such action reflected, at the least, reasonable and prudent management decision-making. In addition, as the asset management contracts would no longer appear to benefit ratepayers, the Authority would also then have to consider unwinding Atmos' current contract arrangements and not approving future agreements.[58] TRA Staff maintains that Atmos is not entitled to share in asset management fees prior to 2011, and further asserts that a denial of sharing in such fees does not constitute sufficient grounds so as to warrant a correction to or restatement of Atmos' past ACA filings. Revenue that is not subject or eligible for sharing under the terms of the PBRM belongs to the ratepayers and must properly be flowed-through to their benefit.

V. CONCLUSION

For the reasons herein and set forth previously in TRA Staff's *Initial Brief*, TRA Staff respectfully requests that the Authority find that the terms of the PBRM tariff do not include sharing of asset management fees as to all years prior to 2011. Further, that the circumstances do

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[58] Upon finding that the Asset Management Agreement benefits customers, the Authority approved each of Atmos' asset management contracts. *See* TRA Docket No. 08-00024, *Order Approving Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts* (July 9, 2008) and TRA Docket No. 11-00034, *Order Approving Contract Regarding Gas Commodity Requirements and Management of Transportation/Storage Contracts* (February 24, 2012).

not warrant the correction or a restatement of any of Atmos' past ACA filings for the purpose of hindering or diverting the flow-through of such fees to ratepayers, and that Atmos is prohibited from attempting to take such actions. Finally, TRA Staff requests that the Authority affirm its findings as stated in the Compliance Audit Report for Atmos' Incentive Plan Account for the period from April 1, 2004 through March 31, 2007 filed by TRA Staff on November 10, 2011.

Respectfully submitted,

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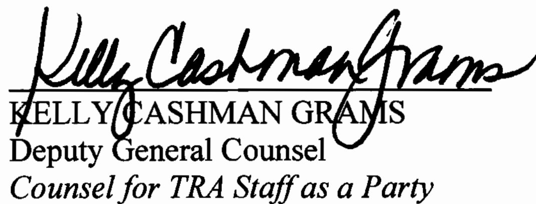
This the 14th day of March, 2012.



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