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	)	

RESPONSE OF ATMOS ENERGY CORPORATION TO BRIEFS OF TRA STAFF AND THE CONSUMER ADVOCATE

Reading the Staff's far-ranging brief, it would be easy to lose sight of the real question to be decided here, which is fairly straightforward and narrow. The question is whether the *old* Atmos PBR Tariff covers income from capacity released in bulk to a professional asset manager. Authority precedent allowing Nashville Gas to recover AMA up-front fees under the *old* Nashville Gas PBR tariff supports a similar application of the *old* Atmos tariff at issue here. In the Nashville Gas case, Staff unsuccessfully made many of the same arguments they now make against Atmos. The *old* Nashville Gas tariff is materially identical to the *old* Atmos tariff. In addition to plain text, legislative history including the Authority's Order On Phase Two approving the Atmos PBR Tariff in 1999 supports the Company's position. And good sense dictates that the tariff be read to allow Atmos to share 10% of the AMA up-front fees under the Capacity Management half of the incentive plan, rather than 50% under the Gas Procurement half, or 100% if the up-front fees are held not to be covered by either part of the plan.

I. THE ISSUE HERE IS TARIFF INTERPRETATION.

The fundamental question in this case is whether the old Atmos PBR Tariff covers the benefits derived from capacity released to or managed by an asset manager. It is a question of tariff interpretation. TRA Staff agree that once enacted, the Atmos PBR tariff "was rendered law, with the same force and effect as a statute enacted by the legislature." Staff Opening Brief at 35. And the parties agree that "like a statute enacted by the legislature, the interpretation or construction of a tariff is one of law and, in determining what is 'in' the tariff, the principles of statutory construction are applied." *Id.* at 36.

Fundamentally, then, this case presents a problem of statutory construction, where the "statute" to be construed is the Atmos PBR Tariff. The parties further agree on the basic process of statutory construction. In a nutshell, statutes (and tariffs) should be construed based upon the language of the statute, precedent, good policy, and good sense. "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." *Loftin v. Langsdon,* 813 S.W.2d 475, 478 (Tenn. Ct. App. 1991). And, of course, the Authority can and should rely upon its own prior applications of similar tariffs, including the old Nashville Gas Company PBR tariff. *See generally Snodgrass v. Snodgrass,* 295 S.W.3d 240, 259-260 (Tenn. 2009) (Wade, J., concurring in pat and dissenting in part) ("Because the statute is ambiguous, however, the history of the legislation *and our prior interpretations of the specific language should guide our thinking* . . ." Emphasis added); *Coleman v. State*, 341 S.W.3d 221, 240 (Tenn. 2011) ("in instances where the proper application of the statute is not clear, the Court may confirm its interpretation of the statute by considering its legislative history, *prior interpretations of the statute*, . . ." Emphasis added).

It should be clear, then that what the parties may have said or done in past dockets, or argued in prior briefs cannot change what the Atmos PBR Tariff says, or what it covers or does not cover. As Staff have argued: "A duly filed tariff is the official published tariff of the utility and is effective and binding on both the regulated utility and its customers until suspended or set aside." Staff Opening Brief at 35 (collecting cases).

Staff themselves have taken positions in prior dockets that are inconsistent with what they now argue in this case. For example, although Staff now argue that the old Nashville Gas Tariff allowed recovery of fees paid by an asset manager because these were "off system sales" under the Nashville Gas tariff, that is decidedly *NOT* how Staff read the Nashville Gas tariff in docket number 00-00759. Instead, Staff read the Nashville Gas PBR Tariff in exactly the same way that Atmos reads the identical language in its own tariff. Staff agreed that Nashville Gas could share fees received for capacity assigned to an asset manager under "the capacity release portion of the Capacity Management Mechanism," which as discussed at length in the Atmos opening brief has exactly the same operative language as the Atmos PBR Tariff. In their audit report, Staff wrote:

> The Capacity Management Mechanism generated a total of $1,950,692 in savings, of which $300,692 was due to ***off system sales*** and $1,650,000 was due to ***capacity release.*** . . . Of the total savings, the Company retained $830,751 and $1,119,941 benefited the ratepayers.
>
> 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."*** The Company provided the following summary of its Gas Asset Management Agreement to the TRA Staff.
>
> > "Under the Gas Asset Management agreement, Nashville Gas assigns its firm pipeline transportation (capacity), storage (excluding local LNG) and supply rights to the "Asset Manager." In return for this assignment,

> ***Nashville Gas receives a lump-sum payment from the asset manager*** for the assignment of these rights.
>
> Nashville Gas retains the right to call on supply from the asset manager for its city gate needs consistent with its rights as they existed prior to their assignment to the asset manager. The asset manager's lump-sum payment is for the value acquired for utilization of the released assets when they are not needed by Nashville Gas. ***The lump-sum payment is considered a capacity release transaction*** and, as such, is accounted for in the Performance Incentive Plan under the Capacity Management Incentive mechanism.
>
> In essence, Nashville Gas and its ratepayers are "guaranteed" the up-front lump-sum payment by the asset manager, as opposed to Nashville Gas releasing capacity and entering into off-system sales transactions with third parties. . . ."

Compliance Audit Report of Nashville Gas Company's Incentive Plan Account, Docket No. 00-00759 (April, 2001) (emphasis added). Staff agreed that up-front AMA fees were covered by the capacity release portion of the Nashville Gas tariff, which as discussed in the Atmos opening brief is materially identical to the Atmos tariff. If a party's prior position were dispositive, as Staff argues with regard to Atmos, then Staff's prior position on the Nashville Gas tariff would quickly dispose of its position here, and Atmos would prevail.

But interpreting a tariff or a statute is a question of law, for the Authority to make based upon the language of the tariff, its own precedent, good policy, and good sense. Suffice it to say that both sides have made arguably inconsistent statements in other dockets. Staff argue that they have realized their error and changed their view. But they urge the Authority to deny Atmos the same leeway. As Staff acknowledge, a tariff has the force of law. The legal effect of the Atmos Tariff should be decided based upon the tariff language, precedent, good policy, and, at bottom, good sense.

II. THE AUTHORITY DOES AND SHOULD FOLLOW ITS OWN PRECEDENTS.

There are several good reasons for the Authority to recognize that the old Atmos PBR Tariff covered the Asset Management Agreements at issue here. One of them is that the Authority should follow its own precedents, most particularly its rulings involving the old Nashville Gas PBR tariff. The Authority should, and does, look to what it has done before in similar situations. Authority orders *do* carry the weight of precedent. *See, e.g.,* Order, *In re: Petition of Atmos Energy Corp. etc.*, Docket No. 11-00122, (December 19, 2011) ("Following precedents set in prior dockets, the panel noted that the Authority has established and considers four criteria . . ."); Order, *In re: Application of Piedmont Natural Gas Company, Inc. etc.*, Docket No. 10-00015 (October 28, 2010) ("Following precedents set in prior dockets . . ."). "An agency may articulate the basis of its order by reference to other decisions. For adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents." *Atchison v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (U.S. 1973)(citations and internal quotations omitted). "It is axiomatic that an administrative agency either must conform with its own precedents or explain its departure from them." *St. Luke Hosps., Inc. v. Cabinet for Health & Family Servs.*, 186 S.W.3d 746, 752 (Ky. Ct. App. 2005). And it makes good policy sense for the Authority to follow *stare decisis* in this manner. *Stare decisis* "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).

III. AUTHORITY PRECEDENT HAS REJECTED STAFF'S ARGUMENTS ABOUT THE PLAIN LANGUAGE OF THE TARIFF.

As Atmos discussed in its Opening Brief, in several dockets the Authority allowed sharing of AMA up-front fees under a materially identical PBR tariff for Nashville Gas. *See* Atmos Opening Brief at 12 et seq. (discussing dockets 03-00489, 04-00290, 05-00268). Recovery was permitted under the old Nashville Gas PBR Tariff *before* it was amended to include language expressly covering asset management agreements, and over the same objections that TRA Staff now raise as to the Atmos tariff. Like the Nashville Gas tariff, the Atmos tariff has now been amended to explicitly cover AMA up-front payments. And as it was for Nashville Gas in the referenced dockets, the issue in this case is whether Atmos may share AMA up-front payments under its PBR tariff during this interim, pre-amendment period. 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.

In ruling that Nashville Gas could recover AMA up-front payments in these dockets, the Authority has at least implicitly rejected several of the arguments that Staff continue to press here. The Authority's Final Order On Phase Two disposes of another. And what little is new is easily rebutted.

Staff argue that the Atmos tariff does not cover AMA up-front payments because it does not use the words "asset management agreement." But as discussed in the Company's Opening Brief at 10 et seq., the same was true for the Nashville Gas tariff. Until it was amended in 2005, the Nashville Gas tariff did not use the words "asset management." However, as Nashville Gas argued there, and as Atmos argues here, AMA up-front payments were covered by the tariff because they are payments for capacity release. *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.").[1] Ultimately, in overruling Staff's objections and approving the Nashville Gas incentive plan report in Docket 03-00489, the Authority's Order necessarily implies a holding that specific reference to "asset management" is not necessary.

Staff argued against Nashville Gas, as they do here, that the concept of an asset manager "was unheard of" when the Nashville Gas incentive plan was adopted and therefore that the Nashville Gas tariff did not cover AMA up-front payments. *See* Staff Opening Brief at 61 (quoting Staff's Audit Report regarding Nashville Gas). The Authority ultimately approved recovery for Nashville Gas despite this argument. *See* Order Adopting Incentive Plan Account Filing of Nashville Gas Company for Year Ended June 30, 2004, Docket No. 04-00290 (September 6, 2005).

Staff further argue here, and argued as to Nashville Gas, that the capacity management incentive mechanism applies only to do-it-yourself (DIY) capacity management – i.e. that it applies only when the utility "actively manage[s] its capacity" and "releas[es] unutilized capacity daily." Staff Opening Brief at 43. Staff made the same argument against Nashville Gas. *See* Staff Opening Brief at 61 (quoting Staff's Nashville Gas Audit Report) ("the Incentive Plan did not provide for the outsourcing of this capacity release function. . . . an incentive plan should provide an incentive for the Company to move beyond its normal prudent purchasing activity and incur some risk for doing so, in exchange for the possibility of rewards."). Nashville Gas

[1] Indeed, TRA Staff agreed with this reading of the applicable tariff language before later reversing course. *See* Compliance Audit Report of Nashville Gas Company's Incentive Plan Account, Docket No. 00-00759 (April, 2001) (quoted above).

opposed these positions, and in ultimately approving Nashville's recovery of AMA up-front payments, the Authority's Order in that case must necessarily be viewed as a rejection of the Staff's argument. Similarly, as discussed below, the Authority's Final Order On Phase Two regarding the Atmos PBR plan also must be viewed as a rejection of this DIY-only argument.

As part of its DIY-only argument, Staff stress that the Atmos tariff uses the phrase "actively market" in the Capacity Management Incentive Mechanism. But the same language was used in the old Nashville Gas tariff. Both tariffs identically state: "The Capacity Management incentive Mechanism is designed to encourage Nashville [Atmos] to actively market off-peak unutilized transportation and storage capacity on upstream pipelines in the secondary market." *See* Atmos Opening Brief at 10 (comparing tariff language). And of course the Authority necessarily rejected Staff's argument in allowing Nashville Gas to share the up-front fees under the terms of its old tariff.

In their desperation to distinguish the Atmos tariff from the Nashville Gas tariff under which the Authority previously allowed recovery of AMA up-front fees, Staff stress that the Atmos tariff references the release of "daily transportation or daily storage capacity," whereas the Nashville Gas tariff language did not include the word "daily." Staff then scramble the words used and argue that the reference to a release of "daily transportation or daily storage capacity" actually requires that the Company undertake a "daily release [of] its unutilized capacity." Staff Opening Brief at 39. Of course, the Tariff language does not require a "daily release" of capacity. It requires a release of "daily capacity." And, as explained in the testimony, pipeline capacity is stated in terms of daily quantities. *See* Buchannan Testimony at 8; Buchanan Reply Testimony at 4. Capacity is, by definition, a measure of the amount of gas that can be transported during a given period of time. And that period of time is universally

stated in terms of "daily capacity" – the volume of gas that can be delivered per day. Whenever pipeline capacity is released, it is a release of "daily capacity," whether that task is performed once a day, once a month, once a year, or for a longer period. *See id.* Contrary to Staff's position, the word "daily" has no particular significance because *all* pipeline capacity is "daily" capacity, and this provides no reason to distinguish the Atmos tariff from the Nashville Gas tariff under which recovery of AMA up-front fees were held to be recoverable. Indeed, as Staff's own witness acknowledges, Atmos has always released capacity on a less-than-daily basis. As Ms. Murphy admits: "All capacity releases before and during the Phase One and Phase Two hearings in Docket No. 97-01364 were made *monthly*. . ." Murphy Aff. ¶ 13 (emphasis added.)

Staff also argue that the Nashville Gas tariff included reference to "off system or wholesale sales-for-resale," whereas the Atmos tariff does not. But asset management agreements are capacity release transactions – and thus covered by the tariff language allowing both Nashville Gas and Atmos to share in revenue generated from capacity release transactions. *See* Buchannan testimony at 7. That is what Nashville Gas successfully argued in Docket No. 03-00489: "the asset management arrangements are the functional equivalent of a bulk capacity release transaction." 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. And as discussed above, even TRA Staff did not read the Nashville Gas tariff to lump asset management agreement fees under "off system sales." *See* Compliance Audit Report of Nashville Gas Company's Incentive Plan Account, Docket No. 00-00759 (April, 2001) (discussed above).

The old Nashville Gas and old Atmos PBR tariffs are, as to the matters at issue here, in all material respects the same. Nothing in either tariff suggests that up-front AMA payments

were meant to be included in one tariff but not the other. As to Nashville Gas, the issue now before the Authority was litigated and resolved in the gas company's favor. Atmos respectfully submits that the same result should be reached in this matter.

IV. THE LEGISLATIVE HISTORY OF THE ATMOS TARIFF, INCLUDING THE ORDER APPROVING IT, SUPPORTS THE COMPANY'S POSITION HERE.

Staff argue that the Authority should look back to circumstances as they existed when the Atmos PBR Tariff was approved. Indeed, Staff rely upon the Authority's Final Order on Phase Two, Docket Nos. 95-01134, and 97-01364 (August 16, 1999). *See* Staff Opening Brief at 41 et seq. One certainly could dispute the premise of Staff's argument, that statutes (or tariffs, which are interpreted in the same manner) can only apply to situations or circumstances as they existed at the time of enactment. Statutes often must be applied to situations that did not exist at the time of enactment, and may not have been anticipated by the drafters. "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotations omitted).

But even looking back to 1999, when the Atmos PBR Tariff was approved, one finds support for the Company's position that the PBR Tariff was intended to include, and thereby incentivize, benefits derived from asset management, including those derived from an agreement with a professional asset manager. Contrary to the Staff's position, the Authority's Final Order on Phase Two considered and approved for inclusion exactly this type of agreement with a professional asset manager. As that order indicates, during the second year of the experimental PBR tariff, United Cities beat its gas supply performance benchmarks and saved $2.4 million in gas costs. *See* Final Order On Phase Two, Docket Nos. 95-01134, and 97-01364 (August 16, 1999) at 10. It did so in part by entering into an all requirements gas supply agreement with its

affiliate Woodward Marketing, LLC. *Id.* at 10, 14. The Consumer Advocate challenged whether the savings resulting from this agreement should be included in the PBR mechanism, *id.* at 11, and proof was introduced concerning the Company's contract with Woodward Marketing. The contract with Woodward was a bundled asset management and gas supply agreement. Among other things, this contract gave Woodward the right to manage all of United Cities' upstream capacity. *Id.* at 16. Testimony established and the Authority found that Woodward Marketing was providing United Cities with very favorable rates for gas supply. *Id.* at 20. Importantly, testimony also established that the *reason* Woodward could provide such good gas supply prices was that the contract allowed Woodward to serve as an asset manager and try to earn a profit by releasing unused capacity on the secondary market. "Mr. Woodward testified that WMLLC [Woodward Marketing] could not afford to offer such a guaranteed low price to United Cities if it could not use United Cities' capacity to generate a profit." *Id.* at 19. The Authority ultimately approved of this arrangement between United Cities and Woodward Marketing and held that Woodward had been billing United Cities appropriately pursuant to the contract. *Id.* at 16, 20. The significance of this holding was that the resultant savings on the gas cost side – those favorable gas costs made possible by granting Woodward the right to act as an asset manager – would be included within the Company's incentive plan account.

On a forward looking basis, the Authority adopted affiliate transaction guidelines to govern transactions of this type with an affiliate that result in benefits to be shared with the Company under its incentive plan account. The Authority held:

> [B]efore any affiliate transactions can be included in the computation of savings or losses from the Company's PBR mechanism in Tennessee, those specific transactions must first comply with the Tennessee Guidelines for United Cities Gas Company's Affiliate Transactions, a copy of which is attached as Exhibit 1 hereto. Documentation of the Company's compliance with these guidelines is to be presented to the Authority during

its annual audit of the Incentive Plan Account. A determination of compliance with all of the affiliate guidelines will be made at the conclusion of each annual audit.

Id. at 21 (underlining original).[2]

In sum, United Cities entered into a bundled asset management and gas supply contract with Woodward Marketing. This contract resulted in considerable cost savings on the gas supply side. The gas cost savings were made possible by income that Woodward could generate from management of United Cities assets under the asset management piece of the contract. United Cities rightly included these cost savings in its PBR mechanism, this was challenged by the Consumer Advocate, and ultimately the Authority rejected the challenge. Although under this particular asset management agreement Woodward paid United Cities for the right to manage its assets by offering below-market gas prices, it could have just as easily paid United Cities the same amount in cash in the form of an up-front payment. The net result to United Cities and its ratepayers would have been the same. And there is nothing in the Authority's decision in the Phase Two order to suggest that if Woodward and United Cities had structured the transaction as an up-front payment it would not have been covered by the PBR, or subject to sharing. The Order on Phase Two not only indicates that asset management agreements of the type at issue here were contemplated at the time that the Atmos PBR was adopted, but also that the resulting economic benefit of these transactions would be covered by the PBR.

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[2] Notably, the Authority's Order did not require that asset management agreements or other contracts with affiliates be filed for pre-approval by the Authority. Rather, the Company's compliance with the affiliate guidelines was to be determined "at the conclusion of each annual [Incentive Plan Account] audit." *Id.* In other words, the time to file an asset management agreement between Atmos and AEM would come when the Incentive Plan Account for that year was being audited. Because the Atmos IPA audits were suspended during the pendency of the 01-00704 docket, this opportunity to file and seek approval of the 2004 Asset Management Agreement was not available. However, it appears to be undisputed that the Company nonetheless submitted information and responded to questions about the Asset Management Agreement in connection with the contemporary ACA audit. Docket 05-00253. *See* Staff Opening Brief at 16-17. The Authority later changed this aspect of its Final Order On Phase Two and ordered that Atmos file all future proposed asset management contracts for pre-approval by the Authority. Order, Docket No. 05-00253 (December 7, 2006). Atmos has complied with this Order. Staff misread PGA Rule 1220-4-7-.03(5)(iii) to require approval of contracts involving payments to or from an affiliate. In fact, this rule applies only to payments "to an affiliate," not from.

Moreover, the Final Order on Phase Two disposes of another one of the Staff's arguments here – that the PBR tariff was intended to cover only do-it-yourself (DIY) capacity release revenue. The agreement with Woodward Marketing provided that Woodward would manage the Company's Tennessee assets, in exchange for below-market gas prices. Contrary to Staff's argument here, the Authority did not rule that retaining a professional asset manager to handle capacity release transactions would take the contract outside of the PBR, or defeat its purpose. Instead, the Authority focused only on whether the agreement with Woodward Marketing could be said to have *predated* adoption of the PBR plan. *See id.* at 11 et seq. In other words, the dispositive question was whether the PBR plan could be said to have encouraged United Cities to enter into this agreement with Woodward Marketing – i.e. entered into a bundled asset management/gas supply agreement with a professional asset manager. By accepting that benefits flowing from an agreement assigning capacity to a professional asset manager could be covered by the PBR, the Authority's holding clearly disposes of Staff's position that only income from DIY capacity release transactions can be covered by the PBR.

Staff also argue that asset management agreements were not contemplated at the time of the Phase Two Order because the percentage of total savings generated from capacity release transactions at that time was 30% to 35% and, according to Staff's calculations, became a much larger percentage of the total in the years under review. However, Staff's argument is based upon a mistake in calculating the percentages. Staff evidently overlooked the effect of the deadband under the Atmos Gas Procurement Incentive Mechanism. Although there were substantial Gas Procurement savings during the period under review, because they fell within the deadband they could not be recovered. Buchanan Reply Testimony at 5. Correcting Staff's calculation error, the AMA upfront payment for the three-year period under review actually

averaged 37% of total overall savings, falling into the same range as United Cities' capacity release savings at the time of the Final Order On Phase Two. *Id.* at 5. Moreover, during the same period of time, in 1999, up-front AMA payments were 74% of total incentive savings claimed by Nashville Gas. *Id.* at 9. Staff's argument that AMA up-front fees could not have been foreseen, or that their magnitude could not have been foreseen in 1999 when the Final Order On Phase Two was issued, simply does not withstand factual scrutiny. And, of course, the Woodard Marketing Agreement discussed in the Final Order On Phase Two was itself a bundled asset management and gas supply agreement.

V. GOOD POLICY AND GOOD SENSE SUPPORT THE COMPANY'S POSITION.

It pays to step back and look at the plain sense of the matter. What would Staff's interpretation of the tariff mean in plain terms, and does that make good sense? Under Staff's reading of the tariff, Atmos would have been entitled to share 10% of any capacity release revenue it might have been able to obtain by releasing capacity itself in daily transactions. It appears to be undisputed that this would have resulted in far less capacity release revenue for Tennessee consumers than the Company ultimately received by releasing capacity in bulk to an asset manager. *See* Buchannan Testimony at 8-9. Indeed, this difference in magnitude is a central tenet of the Staff's argument. But Staff's argument acknowledges that Atmos would have recovered something – 10% of a much lesser amount – if it had not increased the amount flowing to Tennessee consumers. At bottom, then, in plain terms, Staff argue that the tariff should be construed to punish Atmos because it obtained millions of dollars of additional benefit for Tennessee consumers by entering into asset management agreements.

Or instead, Atmos could have followed exactly in the footsteps of its predecessor, United Cities, and entered into an all requirements supply agreement like the one approved in the Final

Order on Phase Two, discussed above. Atmos could have bundled its asset management and gas supply agreements, like United Cities did in that case, trading the right to manage the company's assets for below-market gas prices. If Atmos had pursued this course, then it could have recovered *more* than 10% of the resultant savings, because under the Company's Gas Procurement Incentive Mechanism, the applicable sharing percentage at the margin is 50%. In short, then, Staff's interpretation of the tariff would punish Atmos for seeking to share 10%, rather than 50%, of the benefit generated by releasing capacity in bulk to an asset manager.

Or, if the Staff's ultimate position is accepted here, and AMA up-front fees are held not to be covered by the Atmos PBR Tariff, then Atmos will be entitled to retain 100% of those up-front fees, not 10%. In that case, the Company should go back and adjust its ACA filings for these prior years by removing the AMA up-front payments from its gas cost calculations, 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 should recover $3.7 million, the full amount of the AMA up-front payments.

CONCLUSION

The plain language of the tariff, precedent, good policy, and good sense sense support the Company's position here. For the reasons stated herein, in the Company's Opening Brief, and in the Company's testimony, 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 recognized for what they are, capacity release payments covered by the Tariff.

Respectfully submitted,

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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 14th day of March, 2012.

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