

**IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

IN RE;)	
)	
PETITION OF ATMOS ENERGY CORPORATION FOR ANNUAL REVIEW OF RATES)	DOCKET NO. 14-00081
)	

**CONSUMER ADVOCATE'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS OR DENY PETITION
FOR FAILURE TO MEET STATUTORY REQUIREMENT**

The State of Tennessee, by and through Attorney General and Reporter Robert E. Cooper, Jr., on behalf of the Consumer Advocate and Protection Division ("Consumer Advocate"), pursuant to TRA Rule 1220-1-2-.03 and the Hearing Officer's request and Procedural Schedule, has, concurrently herewith, filed with the Tennessee Regulatory Authority ("Authority" or "TRA") a Motion to Dismiss or Deny Petition For Failure To Meet Statutory Requirement ("Motion") that moves the Authority to dismiss or deny the Petition of Atmos Energy Corporation for Annual Review of Rates ("Petition") filed in this TRA Docket by Atmos Energy Corporation ("Atmos Energy" or "Utility"), because the Petition fails to meet a statutory requirement of Tenn. Code Ann. § 65-5-103(d)(6)(A).

In this TRA Docket, Atmos Energy filed its Petition for an annual rate review pursuant to Tenn. Code Ann. § 65-5-103(d)(6)(A), which provides that: "[a] public utility may opt to file for an annual review of its rates based upon the methodology adopted in its most recent rate case pursuant to § 65-5-101 and subsection (a), if

applicable.” The Petition, however, cannot meet the statutory requirement of a review “based upon the methodology adopted in its most recent rate case” because the Authority explicitly stated that it did not adopt any “specific . . . methodologies” in Atmos’ most recent rate case. Specifically, in that case, the Authority “panel found that, in accepting the Stipulation and Settlement Agreement,¹ the Authority was not adopting any specific means, models or methodologies used to calculate the resulting agreed-upon terms.”² Thus, the Petition should be dismissed or denied.

In support of its Motion, the Consumer Advocate respectfully submits this Memorandum.

Summary

Atmos Energy has filed a Petition that opts to file for an annual rate review under Tenn. Code Ann. § 65-5-103(d)(6). Tenn. Code Ann. § 65-5-103(d)(6) requires, for a utility to opt to file for an annual rate review, that the utility must have engaged in a general rate case within the past five years³ and that a methodology must have been adopted in that general rate case.

In the Utility’s most recent general rate case, TRA Docket 12-00064, the Parties entered into the Settlement Agreement by which the requests for relief in TRA Docket 12-00064 were resolved.⁴ Neither the Prior Order nor the Settlement Agreement adopted a methodology with respect to the agreed-upon compromises

¹ Stipulation and Settlement Agreement (“Settlement Agreement”) in TRA Docket 12-00064 (October 30, 2013).

² Order Approving Settlement Agreement (“Prior Order”) in TRA Docket 12-00064 (December 4, 2012), page 4 (emphasis added).

³ By virtue of TRA Docket 12-00064, the Utility meets this requirement of having engaged in a general rate case within the past five years.

⁴ The Authority incorporated the Settlement Agreement into the Prior Order by reference, so both are included in the discussion below for clarity. See Prior Order, page 5, Order 1.

and negotiated terms of that settlement – in fact, each explicitly did not adopt any methodology. Since no methodology was adopted in the Prior Order or Settlement Agreement, there is no methodology that may form the basis for an annual rate review – there is no methodology upon which to evaluate a proposed annual rate review petition, including the current Petition. Consequently, the Utility’s Petition does not meet the statutory requirements to opt in to an annual rate review under Tenn. Code Ann. § 65-5-103(d)(6). Thus, the Consumer Advocate’s Motion should be granted.

Background

Atmos Energy’s Settlement of Its Most Recent General Rate Case. On October 30, 2012, in TRA Docket 12-00064, the Parties⁵ entered into a Settlement Agreement. In the Settlement Agreement, as occurs in many settlement negotiations and agreements, each Party acknowledged and agreed that it made decisions and took positions to settle the issues in TRA Docket 12-00064 that, if the case had been heard at an Authority panel hearing or been negotiated in a different context, each Party may or may not have made or taken differently.⁶ To assure that the Parties’ “agreements reached in compromise and solely for the purposes of settlement of this matter” could not be used in later proceedings, the Parties memorialized their compromise positions and negotiated agreements in the Settlement Agreement.⁷

Specifically, the Settlement Agreement provides that:

⁵ The Parties in TRA Docket 12-00064 were the Consumer Advocate and Atmos Energy.

⁶ See Settlement Agreement, page 6, paragraph 14.

⁷ See Settlement Agreement, page 2, paragraph 5, and page 6, paragraph 14.

[n]one of the signatories to this Settlement Agreement shall be deemed to have acquiesced in any ratemaking or accounting methodology or procedural principle, including without limitation, any cost of service determination or cost allocation or revenue-related methodology.⁸

The Parties agreed “that the settlement of any issue provided for herein shall not be cited as precedent by any of the Parties hereto in any unrelated or separate proceeding or docket before the Authority.”⁹ The Parties’ statement that the “Settlement Agreement shall not have any precedential effect in any future proceeding or be binding on any of the Parties in this or any other jurisdiction except to the limited extent necessary to implement the provisions [of the Settlement Agreement]”¹⁰ emphasized their intent. And, in deference to the approval requirement of the Authority, the Parties stated at that time that they:

agree and request the Authority to order that the settlement of any issue pursuant to this Stipulation and Settlement Agreement shall not be cited by the Parties or any other entity as binding precedent in any other proceeding before the Authority or any court, state or federal.¹¹

The Authority’s Order in TRA Docket 12-00064. The Authority implemented the Settlement Agreement request of the Parties. The Authority ordered that “[t]he settlement of any issue pursuant to the Stipulation and Settlement Agreement shall not be cited by the Parties or any other entity as binding precedent in any other proceeding before the Authority or any court, state or federal.”¹² Further, the Authority “panel found that, in accepting the Stipulation and Settlement Agreement, the Authority was not adopting any specific means, models or

⁸ Settlement Agreement, page 6, section 14 (emphasis added).

⁹ Settlement Agreement, page 6, section 14 (emphasis added).

¹⁰ Settlement Agreement, page 6, section 15.

¹¹ Settlement Agreement, page 6, section 16, and as noted in the Prior Order, page 3.

¹² Prior Order, page 5, Order 2 (emphasis added).

methodologies used to calculate the resulting agreed-upon terms.”¹³ It is worth noting that the Authority ordered that “[t]he Stipulation and Settlement Agreement . . . is approved, adopted, and incorporated in this [Prior] Order as if fully rewritten herein.”¹⁴ Taking the Parties’ explicit language in the Settlement Agreement with the Authority’s explicit language in the Prior Order, it is clear that the Authority chose only to approve and adopt the “agreements reached in compromise and solely for the purposes of settlement of this matter[,]” and not any specific methodology used to determine any compromise or negotiated settlement amount in the Prior Order.

Atmos Energy’s Current Petition. On August 28, 2014, Atmos Energy filed the Petition opting into the annual rate review procedure established under Tenn. Code Ann. § 65-5-103(d)(6).¹⁵ In the Petition, Atmos Energy asks the TRA to adjust the Utility’s tariff rates to enable the Utility to earn the return on equity set out in its most recent general rate case, with the new rates to take effect on January 1, 2015,¹⁶ and with such rates being adjusted each January 1 thereafter, until the annual review plan may be terminated pursuant to Tenn. Code Ann. § 65-5-103(d)(6)(D).¹⁷ With the Petition, the Utility filed a proposed Annual Review Mechanism tariff (“ARM tariff”),¹⁸ which the Utility asserts would allow for an

¹³ Prior Order, page 4 (emphasis added).

¹⁴ Prior Order, page 5, Order 1.

¹⁵ Petition, page 1, first sentence.

¹⁶ See Petition, page 5, request for relief number 2.

¹⁷ Petition, page 5-6, request for relief number 3.

¹⁸ See Petition, page 4, paragraph 9, and the Pre-Filed Testimony of Gregory K. Waller on Behalf of Atmos Energy Corporation (“Waller Direct Testimony”), Exhibit GKW-1.

orderly implementation of the annual review mechanism,¹⁹ and asks the Authority to approve such tariff, with any amendments that the Authority may order.²⁰

As support for the Petition, Atmos Energy contends that Tenn. Code Ann. § 65-5-103(d)(6) “gives utilities a statutory right to opt for an annual review of their rates.”²¹ With respect to opt-in requirements, Atmos Energy asserts that since it engaged in a general rate case within the past five years, it qualifies to file to opt in for an annual rate review.²² Atmos Energy adds that “[t]he final order in [TRA] Docket No. 12-00064 was entered on December 4, 2012, and approved, inter alia, a return on equity of 10.1%.”²³ Other than a focus on the five-year requirement, the Utility offers no legal analysis with respect to the meaning of a “statutory right” to opt in. The Utility, though, offers an indication of what the parameters of such “statutory right” may be as its Petition moves directly from its contention of a statutory right to file to opt in by the Utility to the calculation of rates by the Authority.²⁴ The Utility similarly fails to provide its analysis as to the TRA’s approval authority in connection with a Tenn. Code Ann. § 65-5-103(d)(6) filing; omits an analysis of the scope and depth of what the Authority’s annual review should encompass; and, further, does not identify the standard by which an annual

¹⁹ Petition, page 4, paragraph 9.

²⁰ Petition, page 6, request for relief number 4.

²¹ Petition, page 2, paragraph 4.

²² Id.

²³ Id. The Utility appears to assert that this return on equity is, effectively, set in stone by Tenn. Code Ann. § 65-5-103(d)(6)(C), though the legislative history indicates that such rate would be open for review. See Testimony by then-Chairman Allison before the Tennessee General Assembly, Utilities Committee, at a hearing on March 6, 2013 (“If the rate of return gets out of kilter we can open up a rate case to look at the rate of return. There’s nothing in here that prohibits us from doing that and we will continue to do that just like we’ve done in the past.”).

²⁴ See Petition, pages 2-3, paragraphs 4-5.

rate review would be performed. With the foregoing in mind, the Utility's argument seems to be more of an election into alternative regulation and, with no methodologies adopted by the Authority, the only question being how much of a rate increase/decrease will the Utility receive after its election.²⁵

Argument

Atmos Energy's Petition Should Be Dismissed or Denied Because It Does Not Satisfy the Statutory Requirement Of Using Methodologies Adopted in Its Most Recent Rate Case

Under Tenn. Code Ann. § 65-5-103(d), a utility may opt to file for an annual review of rates based upon the methodology adopted in its most recent general rate case,²⁶ in lieu of filing a general rate case proceeding under the general rate case statute.²⁷ In connection with a utility's decision to opt to file for an annual review, certain requirements must be met.²⁸

All of the alternative regulation arrangements require Authority approval, as Tenn. Code Ann. § 65-5-103(d)(6)(D) indicates and the legislative history demonstrates. As then-Chairman Allison testified at a hearing on the legislation at the Tennessee General Assembly, in the Finance Ways and Means Committee on April 2, 2013:

²⁵ The Utility appears to take the position that it may "opt" to file for an annual rate review similarly to the way telecommunications companies may "elect" market regulation, with no review by the TRA under the market regulation statute, Tenn. Code Ann. § 65-5-109(l)(1) ("[the utility] may, in its sole discretion, elect to operate pursuant to market regulation, by filing notice of its intent to do so with the [A]uthority, which shall be effective upon filing."). The Consumer Advocate submits that what appears to be an approach by the Utility akin to that of utilities electing market regulation is not the approach contemplated by the alternative regulation provisions under Tenn. Code Ann. § 65-5-103(d)(6).

²⁶ See Tenn. Code Ann. § 65-5-103(d)(6).

²⁷ See Tenn. Code Ann. § 65-5-103(d)(1)(A) and, with respect to general rate case proceeding, Tenn. Code Ann. § 65-5-101.

²⁸ See Tenn. Code Ann. § 65-5-103(d)(6)(A), (B), and (D).

I think it's important to understand that all of the alternative ratemaking arrangements are permissive. They're not required. It requires the company to ask for the alternative ratemaking treatment and then the Authority enters into deliberation as to whether or not agreeing to that alternative arrangement is in the public interest.

With that in mind, the critical requirement with respect to the Petition is whether there was an adoption of a "methodology in the utility's most recent rate case pursuant to [Tenn. Code Ann.] § 65-5-101 and subsection (a) [of Tenn. Code Ann. § 65-5-103], if applicable."²⁹ In this regard, the language of Tenn. Code Ann. § 65-5-103(d)(6)(A) is clear and unambiguous in that it demands that any rates approved by the Authority pursuant to this provision be based on the "methodology" adopted in the utility's most recent rate case. "The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention or purpose of the legislature as expressed in the statute."³⁰ When statutory language is clear and unambiguous, its plain meaning must be applied without a forced interpretation that would limit or expand the statute's application.³¹ In this TRA Docket 14-00081, the applicable statutory language is abundantly clear that the legislature intended that the Authority take a specific action – adopt a methodology in the utility's most recent rate case – as a condition precedent to approving rates in accordance with the provisions of Tenn. Code Ann. § 65-5-103(d)(6).

The Utility, though, skips over the condition precedent and provides extensive testimony from three witnesses that purportedly describe the

²⁹ See Tenn. Code Ann. § 65-5-103(d)(6)(A).

³⁰ Austin v. Memphis Publishing Company, 655 S.W.2d 146, 148, quoting Worrall v. Kroger Co., 545 S.W.2d 736, 738 (Tenn. 1977) (emphasis added).

³¹ Eastman Chemical Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004).

"methodologies" that the Utility has divined from the Prior Order and Settlement Agreement.³² The condition precedent -- the adoption of a methodology by the Authority -- must not be skipped over in favor of the Utility's current interpretation of how rates were determined in the most recent rate case. The condition precedent is important because it would establish the reference points and critical calculations for the source data and schedules to be reviewed by the Authority in its annual rate review and is statutorily required.

The Waller Direct Testimony, in particular, demonstrates why the condition precedent is important. As referenced the Waller Direct Testimony, the Utility filed eleven schedules ("Supporting Schedules")³³ in connection with the Utility's proposed rate increase in this TRA Docket -- with the Supporting Schedules being proposed in the ARM tariff to be used to calculate the potential rate increase on every January 1st.³⁴ The Supporting Schedules essentially reflect the input of Atmos Energy's current budget into certain schedules that were attached to the Utility's most recent rate case.³⁵ In the Waller Direct Testimony, the reference points are Atmos Energy's current budget, as incorporated into the Supporting Schedules, without using any adopted methodology. While the Waller Direct Testimony and the testimony of other Utility

³² The Utility filed testimony by Patricia J. Childers, Vice-President Rates and Regulatory Affairs of the Kentucky/Mid-States Division and Jason L. Schneider, Director of Accounting Services, as well as the Waller Direct Testimony. Petition, pages 4-5, paragraph 10.

³³ See Waller Direct Testimony, page 3, line 19, through page 4, line 7. See also Petition, page 3, paragraph 7, and pages 4-5, paragraph 10.

³⁴ Petition, page 4, paragraph 9.

³⁵ See, e.g., Waller Direct Testimony, pages 6, line 22 through page 7, line 11; and page 20, line 9, through page 29, line 6.

witnesses³⁶ state repeatedly that they use methodologies consistent with the Prior Order, it is important to keep in mind that the Prior Order (and the Settlement Agreement approved by the Prior Order) specifically states that no methodology was adopted that order, and that “[t]he settlement of any issue pursuant to the Stipulation and Settlement Agreement shall not be cited by the Parties or any other entity as binding precedent in any other proceeding before the Authority or any court, state or federal.”³⁷ Without clearly established referenced points – as would be established in an Authority order adopting a methodology – there is no basis on which the Authority could perform its obligations required in connection an annual rate review under Tenn. Code Ann. § 65-5-103(d)(6)(A).

With the statutory requirements and explicit language of the Prior Order and Settlement Agreement in view, the Utility fails to explain its references to or reliance upon, in its witnesses’ testimony, methodologies that were explicitly not adopted in the Prior Order and Settlement Agreement. The Authority Staff appears to have a similar concern – in the TRA Data Request, the Authority Staff listed 42 “direct testimonial references in [the testimony filed by Atmos Energy in this TRA Docket 14-00081] to methodology adopted in Docket No. 12-00064, Atmos’ most recent rate case[.]”³⁸ and asked the Utility, for each such reference, to “provide the date such methodology was filed with the Authority in Docket No. 12-00064 and the

³⁶ See references noted in the letter issued by the Authority, on September 17, 2014, to the Utility from Mr. David Foster, Chief of the Authority’s Utilities Division, requesting information about aspects of the Petition (“TRA Data Request”), pages 1-2.

³⁷ See Prior Order, page 5, Order 2.

³⁸ TRA Data Request, page 1.

specific citation to the Authority's adoption of each methodology."³⁹ The Authority Staff goes on to request that:

[i]f Atmos is unable to cite to the Authority's adoption of any methodology used in any calculation referenced in the testimony in this [TRA Docket 14-00081], please explain [the Utility's] rationale for the use of such methodology in light of the requirements set forth in Tenn. Code Ann. § 65-5-103(d)(6)(A).⁴⁰

The Authority continues on in the TRA Data Request to ask the Utility to "discuss the basis for using calculations and results from the [Settlement Agreement] in Docket No. 12-00064 in light of[.]"⁴¹ (i) the Authority's finding in the Prior Order that the Authority was, in its acceptance of the Settlement Agreement, "not adopting any specific means, models, or methodologies used to calculate the resulting agreed-upon terms[.]"⁴² (ii) the Parties' language in the Settlement Agreement and the Prior Order providing that the "[t]he settlement of any issue pursuant to the Stipulation and Settlement Agreement shall not be cited by the Parties or any other entity as binding precedent in any other proceeding before the Authority or any court, state or federal[.]"⁴³ and (iii) the Parties' language in the Settlement Agreement stating that "the revenue deficiency, revenue requirement and rates are fair and reasonable for the limited purpose of settling/resolving the docket/proceeding."⁴⁴

With respect to the issues and concerns reflected above, the Waller Direct

³⁹ TRA Data Request, page 2.

⁴⁰ TRA Data Request, pages 2-3.

⁴¹ TRA Data Request, page 3.

⁴² TRA Data Request, page 3 (citing the Prior Order, page 4).

⁴³ TRA Data Request, page 3 (citing the Settlement Agreement, paragraphs 14-16, and the Prior Order, ordering clause 2).

⁴⁴ TRA Data Request, page 3 (citing the Settlement Agreement, paragraphs 8 through 10)

Testimony also demonstrates the problems associated with using amounts arrived at in the Settlement Agreement that were the result of extensive discussions and "give and take" negotiations to resolve all known disputed issues, and, consequently, were "agreements reached in compromise and solely for the purposes of settlement of this matter."⁴⁵ By way of example, with respect to a Settlement Agreement schedule line labeled "Misc. Rate Base Adjustment – Settlement" in the amount of about \$6.5 million,⁴⁶ the Waller Direct Testimony simply states that the Utility:

will model the level of rate base in the Forward Looking Test Year to include the adjustment that was agreed upon in the [P]arties' settlement and approved and incorporated by reference in the Authority's Final Order.⁴⁷

In other words, the Waller Direct Testimony says essentially that because a negotiated settlement that resulted in this compromise adjustment was made in one year, that amount should automatically be an adjustment in this year and every year in which the annual rate review was in place under Tenn. Code Ann. § 65-5-103(d)(6)(A). The Waller Direct Testimony glosses over the fact that, in this year or subsequent years, a negotiated settlement might arrive at a much different compromise amount. Other adjustments explained in the Waller Direct Testimony reflect similar concerns about the use of negotiated, compromise

⁴⁵ See Settlement Agreement, page 2, paragraph 5, and page 6, paragraph 14.

⁴⁶ See Settlement Agreement, Attachment A, Schedule 3.

⁴⁷ Waller Direct Testimony, page 18, line 18, through page 19, line 2.

amounts.⁴⁸

In spite of the foregoing, the Consumer Advocate anticipates that the Utility may argue that the Authority should somehow ignore all the explicit language in the Prior Order and Settlement Agreement because, if it were not ignored, no utility could ever file to opt in for an annual rate review based on a rate case which was settled. It does not follow that just because this or any other order or settlement agreement precludes a filing to opt in for an annual rate review under Tenn. Code Ann. § 65-5-103(d)(6) (because of explicit, relevant language), that all orders and settlement agreements would be precluded from an opt in filing and annual rate reviews. To be clear, the Consumer Advocate does not argue in its Motion or this Memorandum that a settlement agreement resulting from negotiations and compromises would always preclude a utility from opting in to an annual rate review under Tenn. Code Ann. § 65-5-103(d)(6), although in this specific TRA Docket the Consumer Advocate respectfully submits that the Utility is precluded.

Along those same lines, and again in spite of the foregoing, the Consumer Advocate anticipates that the Utility may argue that the Authority should somehow ignore all the explicit language in the Prior Order and Settlement Agreement and argue that the second ordering paragraph in the Prior Order adopts the Settlement Agreement, which in turn somehow, in spite of explicit language to the contrary in those documents, adopts the methodologies. This

⁴⁸ See, e.g., Waller Direct Testimony, page 10, line 18, through page 11, line 18 (reflecting a complex calculation by which the Utility claims it attempts to remain true to a negotiated specific level of O&M expense that was negotiated and resulted in a compromise in the Settlement Agreement).

indirect adoption argument is rendered wholly invalid by both the direct rejection language of the Prior Order and adopted Settlement Agreement, and, as noted, runs directly contrary to the explicit language of the order and agreement. It would be a baseless argument to infer that the Authority and Parties somehow adopted methodologies indirectly when the Authority and Parties directly stated that they were not adopting any methodologies in utilizing the Settlement Agreement to resolve TRA Docket 12-00064. This argument by the Utility would turn plain meaning on its head.

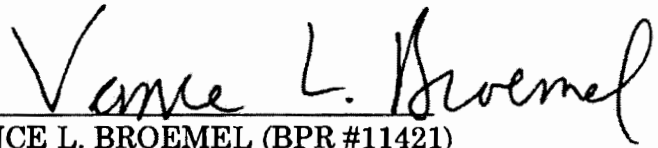
In view of the foregoing, and in particular the requirement in Tenn. Code Ann. § 65-5-103(d)(6) of the adoption of a methodology and the explicit language in the Prior Order and the Settlement Agreement stating that no methodology was adopted in that order or agreement, Atmos Energy's Petition should be dismissed or denied.

Conclusion

Accordingly, the Consumer Advocate respectfully requests that its Motion to Dismiss or Deny For Failure to Meet Statutory Requirement be granted.

[signature page follows]

RESPECTFULLY SUBMITTED,



VANCE L. BROEMEL (BPR #11421)

Senior Counsel

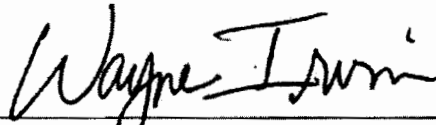
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Dated: 29 September, 2014.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via
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This the 29th day of September 2014.

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