BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	**December 8, 2014**	
PETITION OF ATMOS ENERGY CORPORATION TO ESTABLISH AN ANNUAL RATE REVIEW MECHANISM PURSUANT TO TENN. CODE ANN. § 65-5-103(d)(6)	)	**DOCKET NO. 14-00081**

ORDER GRANTING CONSUMER ADVOCATE'S MOTION TO DISMISS

This matter came before Chairman Herbert H. Hilliard, Director Kenneth C. Hill, and Director James M. Allison of the Tennessee Regulatory Authority ("TRA" or "Authority"), the voting panel assigned to this docket, at the regularly-scheduled Authority Conference held on October 10, 2014, for consideration of the *Motion to Dismiss or Deny Petition for Failure to Meet Statutory Requirement* filed on September 29, 2014, by the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate").

RELEVANT PROCEDURAL BACKGROUND

On August 28, 2014, Atmos Energy Corporation ("Atmos Energy" or "Company") filed a *Petition to Adopt Statutory Annual Review of Rates and Tariff with Procedures for Statutory Annual Rate Review* ("*Petition*"). Atmos Energy petitioned the Authority to opt into the statutory annual rate review procedure established in Tenn. Code Ann. § 65-5-103(d)(6). In support of its request, Atmos Energy submitted the pre-filed testimony and exhibits of Company witnesses Patricia J. Childers, Vice President – Rates & Regulatory Affairs for the Kentucky/Mid-States Division; Gregory K. Waller, Manager, Rates and Regulatory Affairs; and Jason L. Schneider, Director of Accounting Services. The *Petition* and pre-filed testimony and

exhibits, as well as a proposed Annual Review Mechanism tariff ("ARM"), set forth an annual rate review procedure which, according to the Company, would adjust "tariff rates annually such that they are sufficient to enable the Company to earn the authorized return on equity established in its last rate case, with the new rates to take effect January 1, 2015, and each January 1 thereafter."[1] Atmos Energy also filed cost of service schedules requesting an initial annual revenue increase of $2,517,023 under the proposed ARM.[2]

On September 10, 2014, the Consumer Advocate filed a *Petition to Intervene* under Tenn. Code Ann. § 65-4-118, which qualifies it to intervene in proceedings before the Authority for the purpose of representing the interests of Tennessee consumers of public utilities services. The Consumer Advocate asserted that consumers' interests may be adversely affected by the proposed rate increase and annual rate review mechanism set forth in the Company's *Petition* and pre-filed testimony and exhibits.[3]

At a regularly-scheduled Authority Conference held on September 15, 2014, the voting panel of Directors assigned to this docket voted unanimously to convene a contested case proceeding and appoint the Authority's General Counsel or her designee to act as Hearing Officer to prepare this matter for hearing.[4] On September 17, 2014, the Hearing Officer issued a *Notice of Status Conference* setting a status conference for September 23, 2014. During the status conference held on September 23, 2014, the Hearing Officer granted the Consumer Advocate's *Petition to Intervene*,[5] adopted a *Protective Order* proposed by Atmos Energy,[6] and established a procedural schedule for completion of the docket.[7] As memorialized in the *Order*

[1] *Petition*, p. 1 (August 28, 2014).
[2] *Id.* at 3, ¶ 7 and Schedule 1.
[3] *Petition to Intervene*, pp. 4-5, ¶ 8 (September 10, 2014).
[4] *Order Convening a Contested Case and Appointing a Hearing Officer* (September 24, 2014).
[5] *Order Granting Consumer Advocate's Petition to Intervene* (September 23, 2014).
[6] *Protective Order* (September 23, 2014).
[7] *Order Establishing Procedural Schedule* (September 24, 2014).

Establishing Procedural Schedule, the Hearing Officer also established a schedule for the Authority to hear any dispositive motions in light of discussions during the status conference held on September 23, 2014 concerning the Consumer Advocate's expectations to file a motion to dismiss or deny Atmos Energy's *Petition* for failure to meet statutory requirements. On September 23, 2014, Atmos Energy filed a *Request for Official Notice*, requesting the Authority to take official notice of the record in Atmos Energy's most recent general rate case, TRA Docket No. 12-00064. The Hearing Officer issued a *Notice of Official Notice* on September 24, 2014, stating that the Authority would take official notice in these proceedings of the full administrative record in TRA Docket No. 12-00064, *In re: Petition of Atmos Energy Corporation for a General Rate Increase*.

On September 29, 2014, the Consumer Advocate filed its *Motion to Dismiss or Deny Petition for Failure to Meet Statutory Requirement* ("*Motion to Dismiss*") and *Consumer Advocate's Memorandum in Support of Its Motion to Dismiss or Deny Petition for Failure to Meet Statutory Requirement* ("*Memorandum*"). On October 1, 2014, Atmos Energy filed its *Response of Atmos Energy Corporation to Consumer Advocate's Motion to Dismiss or Deny Petition for Failure to Meet Statutory Requirement* ("*Response*"). On October 1, 2014, the Hearing Officer issued a *Notice of Oral Argument* setting the *Motion to Dismiss* for hearing before the voting panel of Directors assigned to this docket at the regularly-scheduled Authority Conference on October 10, 2014. At the regularly-scheduled Authority Conference held on October 10, 2014, the panel heard oral argument from the parties on the *Motion to Dismiss*.

POSITION OF THE PARTIES

A. *Consumer Advocate's Motion to Dismiss and Memorandum*

In its *Motion to Dismiss*, the Consumer Advocate requests the Authority to dismiss or deny Atmos Energy's *Petition* on the ground that it fails to meet a statutory requirement necessary for it to be granted.[8] The Consumer Advocate argues that Tenn. Code Ann. § 65-5-103(d)(6)(A) requires Atmos Energy's proposed ARM to be based upon the methodology adopted in its most recent general rate case, but since no such methodology was adopted the Company's *Petition* requesting approval of the ARM should be dismissed for failure to meet this statutory requirement:

> 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 years and that a methodology must have been adopted in that general rate case.
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> 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. Neither the Prior Order nor the Settlement Agreement adopted a methodology with respect to the agreed-upon compromises 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.[9]

The Consumer Advocate relies on specific language contained in the *Stipulation and Settlement Agreement* filed in Atmos Energy's most recent general rate case, TRA Docket No. 12-00064, to argue that the parties did not agree to any ratemaking methodology when resolving that case:

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[8] *Motion to Dismiss*, p. 1 (September 29, 2014).
[9] *Memorandum*, pp. 2-3 (September 29, 2014) (citations omitted).

Specifically, the Settlement Agreement provides that:

> [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.

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." 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 provision [of the Settlement Agreement]" 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.[10]

The Consumer Advocate also quotes language from the Authority's *Order Approving Settlement Agreement* issued in TRA Docket No. 12-00064 to buttress its position:

> 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." Further, the Authority "panel found that, in accepting the Stipulation and Settlement Agreement, the Authority was not adopting any specific means, models or methodologies used to calculate the resulting agreed-upon terms." 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."[11]

Thus, according to the Consumer Advocate, the express language included in the *Stipulation and Settlement Agreement* and *Order Approving Settlement Agreement* makes it clear that the Authority approved the parties' agreements reached in compromise solely for the purpose of

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[10] *Id.* at 3-4 (citing *Stipulation and Settlement Agreement*, p. 6, ¶¶ 14-16) (emphasis in original).

[11] *Id.* at 4-5 (citing *Order Approving Settlement Agreement*, TRA Docket No. 12-00064, pp. 4-5 (December 4, 2012)) (emphasis in original).

settling the last rate case and expressly not for the purpose of adopting any specific methodology for determining the agreed-upon rates.[12]

The Consumer Advocate argues further that adoption of methodologies in the most recent rate case is a condition precedent for invoking the annual rate review statute because such adoption establishes "the reference points and critical calculations for the source data and schedules to be reviewed by the Authority in its annual rate review."[13] The Consumer Advocate claims that since the revenue deficiency, revenue requirement, and rates authorized in Atmos Energy's most recent rate case were the product of a negotiated settlement reached in compromise, and without agreement or acquiescence to the methodology used to compute those amounts, there are no clear reference points or bases on which the Authority could perform its annual rate review obligations under the statute.[14]

Finally, the Consumer Advocate claims that the problems associated with computing the Company's rates under the proposed ARM – which essentially inputs Atmos Energy's current budget into certain schedules that were attached to the *Stipulation and Settlement Agreement* – are demonstrated by the Company's use of compromise adjustments negotiated in the prior rate case for certain ratemaking components, such as rate base and operation and maintenance expense.[15] The Consumer Advocate states that use of such compromise adjustments to calculate rates for future years does not recognize that a negotiated settlement might arrive at much different compromise amounts in subsequent years.[16]

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[12] *Id.* at 5.
[13] *Id.* at 9.
[14] *Id.* at 10-11.
[15] *Id.* at 12-13 (citing Gregory K. Waller, Pre-filed Direct Testimony at 10-11, 18-19 (August 28, 2014)).
[16] *Id.* at 12.

B. ***Atmos Energy's Response***

Atmos Energy argues that the *Motion to Dismiss* should be denied because the Consumer Advocate has misinterpreted the statutory requirements for Authority approval of the proposed ARM and that Atmos Energy otherwise meets the statutory criteria for opting into the annual rate review procedure. According to Atmos Energy, the only eligibility criteria that a utility must satisfy to opt into annual rate review is the requirement set forth in Tenn. Code Ann. § 65-5-103(d)(6)(B) that the utility engage in a general rate case within the last five years:

> Eligibility to "opt into" an annual rate review is expressly defined by whether the utility has "engaged in" a general rate case within the last five years. Eligibility does not require the rate case have been resolved by an order specifically approving a set of rate-setting formulas, as the Advocate now contends. No specific form of order is required. Eligibility does not require a litigated resolution, or exclude resolution of the case by stipulation or settlement. Indeed, the section is drafted so as to be independent of how the rate case was resolved. What is required is simply that the utility have "engaged in" a general rate case within the past five years. It is beyond dispute that Atmos Energy "engaged in" a general rate case in Docket No. 12-00064, less than five years ago. It is, therefore, "***eligible*** to make an election to ***opt into*** an annual rate review" under the express terms of the statute.[17]

Atmos Energy argues further that the Consumer Advocate's interpretation of the annual rate review statute is incorrect because Tenn. Code Ann. § 65-5-103(d)(6)(A) does not require the Authority to approve a methodology as a precondition to a utility's selection of the annual review procedure:

> If subsection (d)(6)(A) were meant to require Authority approval of a specific methodology, as the Advocate contends, then it must be presumed that the Legislature would have used the same terminology it had used elsewhere in the statute – that it would have said "approved by the authority" if it had meant "approved by the authority," as the Advocate now contends.[18]

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[17] *Response*, pp. 12-13 (October 1, 2014) (quoting Tenn. Code Ann. § 65-5-103(d)(6)(B)) (footnote omitted) (emphasis in original).
[18] *Id.* at 10.

According to Atmos Energy, it is reasonable to read the language in Tenn. Code Ann. § 65-5-103(d)(6)(A) as referring to "the methodology adopted by the public utility in its most recent general rate case" and not "as a strict prerequisite or precondition to application of the annual rate review mechanism."[19] The Company, therefore, concludes that the annual rate review procedure "is available whether or not – or regardless of the degree to which – a 'methodology' was 'adopted' in the most recent rate case."[20]

Atmos Energy also contends that the Consumer Advocate's interpretation of the annual rate review statute is contrary to legislative policy because it unfairly punishes the parties for resolving the Company's last rate case by agreement and contradicts the Legislature's goal to reduce protracted and expensive rate case litigation.[21] Atmos Energy states that the Consumer Advocate's position would require a fully-litigated rate case, which in turn would defeat the Legislature's intent of making the ratemaking process more efficient and less-costly.[22] It also states that the Consumer Advocate's interpretation would defeat the statute's fundamental purpose to reduce rate case litigation by requiring utilities to engage in a fully litigated rate case and seek a litigated ruling on every issue prior to opting into the annual rate review procedure.[23]

Atmos Energy asserts that the Consumer Advocate's contention that a methodology was not adopted in the Company's most recent rate case is incorrect because the Authority's *Order Approving Settlement Agreement* issued in Docket No. 12-00064 approved the parties' *Stipulation and Settlement Agreement*, including all of its agreed schedules, and in so doing adopted the methodology agreed to in the settlement:

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[19] *Id.* at 11.
[20] *Id.*
[21] *Id.* at 7.
[22] *Id.* at 6-7.
[23] *Id.* at 7-8.

> The ordering paragraph of the Order approves, adopts and incorporates by reference the Settlement Agreement, which in turn includes an agreed set of schedules used to calculate the Company's costs of service and resulting rates . . . The Order approving the Atmos Energy / Advocate settlement did, in fact, adopt and approve the settlement, and in the process approved the schedules the parties agreed were a "fair and reasonable" statement of the company's costs of service and resulting rates. There are, in fact, approved rate-making methodologies underlying those schedules . . . Those methodologies are embodied in the approved Settlement Agreement and attached schedules, the same way that a "methodology" would be embodied in any other rate case resolved by settlement.[24]

Further, Atmos Energy contends that it is not attempting to use the *Order Approving Settlement Agreement* issued in Docket No. 12-00064 as binding precedent but rather seeks its enforcement as a binding consent decree:

> The Order approving the Atmos Energy / Advocate Settlement Agreement is in legal effect a consent order or consent decree . . . Fundamentally, then, the Order approving the Atmos Energy / Advocate settlement of Docket 12-00064 "approved, adopted, and incorporated" the Settlement Agreement in the Order "as if fully rewritten herein." In legal effect, the Settlement Agreement became the Order of the Authority. And that Agreement included an agreed set of 14 schedules setting-forth the determination of Atmos Energy's cost of service and the determination of its rates. The Order is legally binding to the same extent as a judgment rendered after litigation. It is conclusive and binding even if it could be said that the Authority might not have reached all of the same conclusions if the matter had been fully litigated and there had been no settlement . . . What we have here is not an application of precedent, or *stare decisis*. The Agreement is not being used as *precedent* by another utility arguing that the Atmos Energy / Advocate settlement established a generally applicable legal principle. It is instead a simple application of finality, or *res judicata*. The Atmos Energy Settlement Agreement was a final and binding resolution of the most recent Atmos Energy rate case. In legal effect, it was a consent order, which as discussed above has the same binding effect on the parties as a judgment reached after a fully litigated hearing.[25]

Finally, Atmos Energy argues that even if the Consumer Advocate's interpretation of Tenn. Code Ann. § 65-5-103(d)(6) prevails, the Authority should approve the Company's

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[24] *Id.* at 15.
[25] *Id.* at 15-16, 18 (emphasis in original).

proposed ARM under Tenn. Code Ann. § 65-5-103(d)(7).[26] According to Atmos Energy, the proposed ARM satisfies the overriding goals of subsection 103(d)(7) to "promote 'a more timely review and revision of [] rates' and . . . 'streamline the regulatory process' and 'reduce cost and time' as compared to traditional rate case litigation."[27] Thus, Atmos Energy concludes that the Authority is authorized to grant the relief requested in the Company's *Petition* under subsection 103(d)(7).[28]

FINDINGS AND CONCLUSIONS

A. *TRA's Statutory Authority*

Tenn. Code Ann. § 65-5-103(d)(1)(A) states "[t]he authority is authorized to implement alternative regulatory methods to allow for public utility rate reviews and cost recovery in lieu of a general rate case proceeding before the authority." The annual rate review alternative requested by Atmos Energy is set forth in subsection 103(d)(6):

> (A) 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.
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> (B) In order for a public utility to be eligible to make an election to opt into an annual rate review, the public utility must have engaged in a general rate case pursuant to § 65-5-101 and subsection (a) within the last five (5) years; provided, however, that the authority may waive such requirement or increase the eligibility period upon a finding that doing such would be in the public interest.
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> (C) Pursuant to the procedures set forth in subdivision (d)(1), the authority shall review the annual filing by the public utility within one hundred twenty (120) days of receipt and order the public utility to make the adjustments to its tariff rates to provide that the public utility earns the authorized return on equity established in the public utility's most recent general rate case pursuant to § 65-5-101 and subsection (a).
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> (D) (i) A public utility may terminate an approved annual review plan only by filing a general rate case pursuant to § 65-5-101 and subsection (a).

[26] *Id.* at 27.
[27] *Id.* at 28 (quoting Tenn. Code Ann. § 65-5-103(d)(7)).
[28] *Id.* at 28.

(ii) The authority may terminate an approved annual review plan only after citing the public utility to appear and show cause why the authority should not take such action pursuant to the procedures in § 65-2-106.
(iii) The authority or the public utility may propose a modification to the approved annual review plan for consideration by the authority. The authority shall determine whether any proposed modification is in the public interest and should be approved within the time frame set forth in subdivision (d)(6)(C). If the authority denies a modification to the approved annual review plan, the authority shall set forth with specificity the reasons for its denial.

Further, the General Assembly has granted the Authority "general supervisory and regulatory power, jurisdiction and control over all public utilities."[29] Under Tenn. Code Ann. § 65-4-117(a)(3) the Authority has the power to "fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility." Tenn. Code Ann. § 65-5-101(a) authorizes the Authority "to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-4-101." The Authority's jurisdiction over public utilities is to be liberally construed in favor of the Authority under Tenn. Code Ann. § 65-4-106.[30] The Authority has a broad grant of authority under Tennessee law over the utilities within its jurisdiction.[31]

B. ***Standard of Review for Granting Tenn. R. Civ. P. 12.02(6) Motions***

The authority of the Authority to adjudicate a motion to dismiss is derived through the Uniform Administrative Procedures Act ("UAPA"). "The UAPA 'directs the [administrative

[29] Tenn. Code Ann. § 65-4-104.
[30] Tenn. Code Ann. § 65-4-106 states: "This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter."
[31] *See, e.g., CF Industries v. Tennessee Public Service Commission*, 599 S.W.2d 536, 542 (Tenn. 1980); *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992); *Laurel Hills Condominiums Property Owners' Association v. Tennessee Regulatory Authority*, 2014 WL 1494126, *4-*8 (Tenn. Ct. App. Apr. 14, 2014), *perm. app. denied* (Tenn. Oct. 15, 2014).

judge] to permit the parties to submit motions at appropriate stages in the proceedings."[32] Additionally, TRA Rule 1220-1-2-.03(2)(e) allows parties to seek relief through a motion to dismiss for failure to state a claim upon which relief can be granted.[33] The standards for reviewing such motions are well established:

> When considering a motion to dismiss for failure to state a claim upon which relief can be granted, we are limited to an examination of the complaint alone. *See Wolcotts Fin. Serv., Inc. v. McReynolds,* 807 S.W.2d 708, 710 (Tenn.Ct.App. 1990). The basis for the motion is that the allegations in the complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law. *See Cornpropst v. Sloan,* 528 S.W.2d 188 (Tenn. 1975). Although allegations of pure legal conclusion will not sustain a complaint, *see Ruth v. Ruth,* 213 Tenn. 82, 372 S.W.2d 285, 287 (1963), a complaint "need not contain in minute detail the facts that give rise to the claim," so long as the complaint does "contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial." *Donaldson v. Donaldson,* 557 S.W.2d 60, 61 (Tenn. 1977); *White v. Revco Discount Drug Centers,* 33 S.W.3d 713, 718, 725 (Tenn. 2000); *accord, Givens v. Mullikin ex rel. McElwaney,* 75 S.W.3d 383, 391, 399, 403-404 (Tenn. 2002). In short, a Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss seeks only to determine whether the pleadings state a claim upon which relief can be granted, and such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof. *Bell ex rel. Snyder v. Icard,* 986 S.W.2d 550, 554 538*538 (Tenn. 1999). In considering such a motion, the court should construe the complaint liberally in favor of the plaintiff, taking all the allegations of fact therein as true. *See Cook ex. rel. Uithoven v. Spinnaker's of Rivergate, Inc.,* 878 S.W.2d 934, 938 (Tenn. 1994). However, we are not required to accept as true factual inferences or conclusions of law. *Riggs v. Burson,* 941 S.W.2d 44, 47-48 (Tenn. 1997). An appellate court should uphold the grant of a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief. *Young v. Barrow,* 130 S.W.3d 59, 63 (Tenn.Ct.App. 2003).[34]

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[32] *Hardy v. State of Tennessee, Department of Health, Division of Health Related Boards*, 2010 WL 175107, *3 (Tenn. Ct. App. Jan. 19, 2010) (quoting *Yokley v. State Board of Education*, 305 S.W.3d 523, 526 (Tenn. Ct. App. 2009)); *see also* Tenn. Code Ann. § 4-5-308(a).

[33] TRA Rule 1220-1-2-.03(2)(e) provides "[e]very defense, in law or fact, to an order or notice commencing a contested case or to an initial petition, shall be asserted in an answer, except that the following defenses may, at the option of respondent, be made by motion in writing . . . (e) failure to state a claim upon which relief can be granted."

[34] *PNC Multifamily Capital Institutional Fund XXVI Limited Partnership v. Bluff City Community Development Corporation*, 387 S.W.3d 525, 537-38 (Tenn. Ct. App. 2012).

C. ***October 10, 2014 Authority Conference Deliberations***

At the regularly-scheduled Authority Conference held on October 10, 2014, the voting panel of Directors assigned to this docket considered the *Motion to Dismiss*. Based upon the pleadings of the parties, the argument of counsel and the entire administrative record, the panel made the following findings:

1. By enacting Tenn. Code Ann. § 65-5-103(d)(6), the Legislature authorized the Authority to implement annual rate review procedures for setting utility rates and charges as a more streamlined and inexpensive alternative to fixing such rates and charges through traditional, full-scale rate cases. Prior to implementing an annual rate review mechanism under the statute, however, certain criteria must first be satisfied.

2. Under Tenn. Code Ann. § 65-5-103(d)(6)(B), to be eligible to elect annual rate review a public utility must have engaged in a general rate case pursuant to Tenn. Code Ann. §§ 65-5-101 & -103(a) within the last five years unless the Authority finds that waiving this five-year requirement would be in the public interest. The five-year requirement, however, is not the sole criterion to be considered by the Authority prior to authorizing the implementation of an annual rate review mechanism.

3. In accordance with Tenn. Code Ann. § 65-5-103(d)(6)(A), implementation of an annual rate review mechanism also requires the adoption of a ratemaking methodology. For annual rate review to work as intended under the statute, an adopted ratemaking methodology must be used to compute the changes in a public utility's annual costs of providing public utilities services. Based on the Authority's review of such changes in costs, the Authority may then order annual adjustments to the public utility's rates and charges to allow the utility to earn the authorized return on equity established in its most recent general rate case. Thus, under

annual rate review a public utility's earnings are adjusted annually through application of an adopted ratemaking methodology, thereby allowing the utility to earn its authorized return on equity each year without having to file a full-scale rate case.

4. The Legislature's authorizing the Authority to implement alternative regulatory methods under Tenn. Code Ann. § 65-5-103(d) did not alter or limit the Authority's general supervisory, regulatory and rate-setting powers over public utilities within its jurisdiction. Pursuant to these powers, and consistent with the alternative regulation statute, the Authority has the authority and discretion to determine the methods required to fix "just and reasonable" rates and charges for public utilities services. The ratemaking methodology underlying a proposed annual rate review mechanism is therefore subject to the Authority's review and approval. Further, the Authority has the power and discretion to review each annual rate review filing to determine, *inter alia*, whether the adopted ratemaking methodology is being properly applied and whether the tariff rate adjustments produced by the annual rate review mechanism are achieving the desired result of allowing the public utility to earn its authorized return on equity.[35]

5. Atmos Energy's most recent rate case was resolved by the Authority's approval of a *Stipulation and Settlement Agreement* filed jointly by Atmos Energy and the Consumer Advocate in TRA Docket No. 12-00064. The Authority's *Order Approving Settlement Agreement* entered in that docket does not constitute a binding consent decree that controls the parties' or the Authority's actions in this docket. Paragraph 15 of the settlement agreement, which was by reference approved and incorporated verbatim into the Authority's order, states 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

[35] As Counsel for Atmos Energy correctly stated, "So on some level the Authority must use its inherent ratemaking discretion under this statute year upon year to set the rates that it determines, in its discretion, will allow the utility to earn its approved return on equity." Transcript of Proceedings, p. 44 (October 10, 2014).

necessary to implement the provisions hereof."[36] The Authority's order states further 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] This docket does not concern implementation or enforcement of the prior settlement in TRA Docket No. 12-00064 but rather Atmos Energy's request for a new annual rate review mechanism under the recently-enacted alternative regulation statute. Rather than implementing or enforcing the prior settlement, the Company's proposed ARM would have the effect of adjusting the tariff rates agreed upon by the parties and approved by the Authority in TRA Docket No. 12-00064.

6. Although a ratemaking methodology contained in a general rate case settlement agreement could establish the basis for an annual rate review mechanism if such methodology was agreed-upon by the parties and approved by the Authority, the Consumer Advocate argues correctly that the *Stipulation and Settlement Agreement* filed and approved in TRA Docket No. 12-00064 cannot in this instance provide a proper foundation for Atmos Energy's proposed ARM. It is clear from the plain language of the *Stipulation and Settlement Agreement* and the *Order Approving Settlement Agreement* entered in TRA Docket No. 12-00064 that a ratemaking methodology was expressly not adopted in Atmos Energy's most recent rate case. Paragraph 14 of the settlement agreement provides:

> The Parties agree to support this Stipulation and Settlement Agreement before the Authority in any hearing, proposed order, or brief conducted or filed in this proceeding; provided, however, 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. The provisions of this Settlement Agreement are agreements reached in compromise and solely for the purpose of settlement of this matter. They do not necessarily reflect the positions

[36] *Order Approving Settlement Agreement*, TRA Docket No. 12-00064, Exh. A – *Stipulation and Settlement Agreement*, p. 6, ¶ 15 (December 4, 2012)).
[37] *Id.* at 5.

> asserted by any party, and no party to this Settlement Agreement waives the right to assert any position in any future proceeding, in this or any other jurisdiction. None 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.[38]

The Authority's final order further finds:

> Following the Hearing and presentation of the proposed *Stipulation and Settlement Agreement*, the panel deliberated this matter on November 7, 2012. The panel found that the terms of the agreement were within the "zone of reasonableness" that takes into consideration both the interests of the consumer and the utility, and further promote the public interest by balancing the interests of the utility consumers and the provider. In addition, the panel found that, in accepting the *Stipulation and Settlement Agreement*, the Authority was not adopting any specific means, models or methodologies used to calculate the resulting agreed-upon terms.[39]

Additionally, counsel for Atmos Energy acknowledged that the Authority did not approve the methodology underlying the parties' settlement of the Company's most recent rate case and that the parties to that case did not agree on the underlying formulas that were used to compute the agreed-upon rates:

> MR. ROSS: [T]he settlement did resolve that case, and it did set rates, and we did agree on how to get to those rates to some extent.
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> DIRECTOR HILL: You agreed what rates were going to be charged. You did not agree necessarily - - or let me put it this way. From what I can read, the TRA did not agree to any methodology.
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> MR. ROSS: The methodology underlying the agreed-upon terms, right.
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> I - - you need to read the whole order, though. The order did approve that settlement agreement. It did say, okay, we approve your agreement, and our agreement did include a set of schedules that set forth how to calculate O&M and all the other things that I read.
>
> Now, we didn't agree on the underlying formulas, but there - - you set out what we're agreeing to, and then we have this statute that comes along that says you can apply to update your last rate case, essentially, as long as it's been within five

[38] *Id.* at Exh. A – *Stipulation and Settlement Agreement*, p. 6, ¶ 14.
[39] *Id.* at 4 (footnote omitted).

> years, and the Authority will update your rates so that you earn your approved return on equity.[40]

Accordingly, Atmos Energy's tariff rates established in its most recent general rate case are not based on an adopted ratemaking methodology but instead are based on the Authority's approval of negotiated rates which the Authority found were within the "zone of reasonableness" and which promoted the public interest by balancing the interests of consumers and the Company. Without adoption of a ratemaking methodology detailing the practices, procedures, and formulas for computing the various ratemaking components required to determine tariff rates, the annual rate review mechanism contemplated by the statute cannot be implemented.[41] Therefore, Atmos Energy's *Petition*, which requests approval of the proposed ARM based on the schedules and compromise adjustments negotiated by the parties in the Company's last rate case, should be dismissed on the ground that no ratemaking methodology has been adopted that would allow for the establishment of an annual rate review mechanism in accordance with Tenn. Code Ann. § 65-5-103(d)(6).

7. Atmos Energy's argument that its proposed ARM should be considered and approved under Tenn. Code Ann. § 65-5-103(d)(7) is without merit. Subsection 103(d)(7) empowers the Authority to implement "other alternative regulatory methods" upon a public utility's request for "an alternative method not prescribed."[42] The annual rate review procedure requested by Atmos Energy, however, is prescribed by subsection 103(d)(6). "[W]here the mind of the legislature has been turned to the details of a subject and they have acted upon it, a statute

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[40] Transcript of Proceedings, pp. 51-52 (October 10, 2014).

[41] These ratemaking components include revenues, operating expenses, depreciation, taxes, rate base, capital structure, cost of debt, return on equity, and rate design.

[42] Tenn. Code Ann. § 65-5-103(d)(7) states: "In addition to the alternative regulatory methods described in this subsection (d), a public utility may opt to file for other alternative regulatory methods. Upon a filing by a public utility for an alternative method not prescribed, the authority is empowered to adopt policies or procedures, that would permit a more timely review and revisions of the rates, tolls, fares, charges, schedules, classifications or rate structures of public utilities, and that would further streamline the regulatory process and reduce the cost and time associated with the ratemaking processes in § 65-5-101 and subsection (a)."

treating the subject in a general manner should not be considered as intended to affect the more particular provision."[43] The Authority is therefore bound to apply the particular criteria established in subsection 103(d)(6) when considering implementation of annual rate review mechanisms, including the panel's determination that such mechanisms must be based on an adopted ratemaking methodology.

As a result of the foregoing findings and conclusions, the voting panel of Directors assigned to this docket voted unanimously to grant the Consumer Advocate's *Motion to Dismiss*.[44]

IT IS THEREFORE ORDERED THAT:

1. The *Motion to Dismiss or Deny Petition for Failure to Meet Statutory Requirement* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General is hereby granted.

2. Atmos Energy Corporation's *Petition to Adopt Statutory Annual Review of Rates and Tariff with Procedures for Statutory Annual Rate Review* is hereby dismissed.

Chairman Herbert H. Hilliard, Director Kenneth C. Hill, and Director James M. Allison concur.

ATTEST:

Earl R. Taylor, Executive Director

[43] *Arnwine v. Union County Board of Education*, 120 S.W.3d 804, 809 (Tenn. 2003) (quoting *Woodroof v. City of Nashville*, 192 S.W.2d 1013, 1015 (Tenn. 1946)).

[44] After voting to grant the *Motion to Dismiss*, Director Allison suggested that if Atmos Energy remained interested in alternative regulatory programs, the Company, the Consumer Advocate and the TRA Staff should work cooperatively together to develop such alternative approaches. Chairman Hilliard agreed with this suggestion. Transcript of Proceedings, pp. 64-66 (October 10, 2014).