

STATE OF TENNESSEE

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November 30, 2015

Hon. Herbert H. Hilliard, Chairman
Tennessee Regulatory Authority
502 Deaderick Street, 4th Floor
Nashville, TN 37243

Re: *Notice of Filing Depreciation Study and Request for Approval of New Depreciation Rates*
("Notice of Filing"), as filed in Tennessee Regulatory Authority ("TRA" or "Authority")
Docket Nos. 14-00146 and 15-00089

Dear Chairman Hilliard:

The purpose of this letter is twofold: first, to provide notice that the Consumer Protection and Advocate Division ("Consumer Advocate") does not intend to intervene in TRA Docket 15-00089; and second, to express the Consumer Advocate's concerns that any methodology adopted or adjustment to depreciation rates approved in TRA Docket 15-00089 would not be useable in connection with or bind the parties in an annual rate review under TRA Docket 14-00146.

Notice of Intent Not to Intervene

The Consumer Advocate has reviewed the *Notice of Filing* as originally filed by Atmos Energy Corporation ("Atmos") in TRA Docket 14-00146 (*Petition of Atmos Energy Corporation General Rate Case and Petition to Adopt Annual Review Mechanism and ARM Tariff*) on September 22, 2015, and as moved to TRA Docket 15-00089, with such docket being named *Atmos Energy Petition to Change Depreciation Rates Pursuant to It's [sic] Approved Annual Mechanism* (with the *Notice of Filing* being referenced below as the "*Petition*"). In the *Petition*, Atmos generally seeks the approval of the new depreciation rates as set out in the filed depreciation studies and states that it intends to use them in its upcoming Annual Review Mechanism Filing, which Atmos states is due to be made on February 1, 2016.

The Consumer Advocate has sent informal data requests to Atmos on the substance of Atmos' *Petition*, and Atmos has provided informal responses to the Consumer Advocate. The Consumer Advocate expresses its appreciation to Atmos for providing those responses. In view

of Atmos' responses to the data requests and certain concerns discussed below, and reserving its rights with respect to the matters described in this letter, the Consumer Advocate expresses its intent not to intervene in TRA Docket 15-00089.

Concerns About Methodologies Not Being Applicable to or Useable by Annual Rate Review Under TRA Docket 14-00146

The Consumer Advocate is concerned, in view of the terms and conditions of the *Stipulation and Settlement Agreement* between the Consumer Advocate and Atmos as filed on April 29, 2015 ("*Settlement Agreement*") and the Authority's *Order Approving Settlement* ("*Order*")¹ in TRA Docket 14-00146, that the approval sought by Atmos with respect to the subject matter of TRA Docket 15-00089, if obtained, would not result in a usable determination or bind the parties in a later proceeding seeking to implement Atmos' annual rate review mechanism – whether that later proceeding was inside or outside of TRA Docket 14-00146. We believe these concerns would be best addressed at this initial stage – that is, in connection with the *Petition* – to save the likely much higher resource costs that would result if the issue is deferred until a larger and more significant annual rate review mechanism filing.²

As background, in TRA Docket 14-00081, the TRA held, *inter alia*, that words with respect to methodologies matter and have consequences.³ In that docket, Atmos sought TRA approval of an annual rate review mechanism under Tenn. Code Ann. § 65-5-103(d)(6), a part of the alternative regulation statute. That statute requires that an annual rate review mechanism must be based on methodologies adopted in a utility's recent general rate case. In that recent general rate case, the settlement agreement and the TRA's order stated that no methodologies had been adopted. Accordingly, in the absence of required methodologies, the TRA dismissed Atmos' petition.⁴ That dismissal acknowledged and affirmed that explicit language in settlement agreements and TRA orders would be given effect. Likewise given effect would be language that neither party would be bound to positions that were taken in negotiated settlements (such as in that recent general rate case), since those settlements represented compromises that each side had made and that might be made differently under different circumstances (if they were made at all).⁵ Consequently, from the statutory requirements and their strict application in TRA Docket 14-00081, the need arose in TRA Docket 14-00146 (in which Atmos similarly sought approval of an annual review mechanism) for a mechanism to satisfy those requirements.

Recognizing the need for a mechanism that would permit the adoption of usable and binding methodologies (so that Atmos could obtain approval of an annual rate review mechanism), while preserving the important principles as to settlement negotiations and agreements (*i.e.*, that parties are not bound as to methodologies except as explicitly agreed), the

¹ See also the Authority's oral order approving the *Settlement Agreement* at its proceedings on May 11, 2015.

² The Consumer Advocate and Atmos, in e-mails dated September 22 and 23, 2015, advised the Authority of at least some of the issues described in this letter.

³ See *Order Granting Consumer Advocate's Motion to Dismiss* ("*Dismissal Order*"), filed in TRA Docket 14-00081 on December 8, 2014, pages 15-18.

⁴ *Id.*

⁵ See *id.*

Consumer Advocate and Atmos negotiated a settlement in TRA Docket 14-00146 that allowed a very limited future use of methodologies – that is, that the adopted methodologies could only be used in the docket in which they had been adopted.⁶ As to the specifics, in TRA Docket 14-00146, the parties agreed and the Authority ordered that “[e]xcept to the limited extent necessary to allow the Authority to implement an annual review mechanism under Tenn. Code Ann. § 65-5-103(d)(6) *in this Docket* (and, for the avoidance of doubt, *only in this Docket* 14-00146),” the *Settlement Agreement* would not have precedential effect in any other proceeding or bind the parties, the parties would not be deemed to have acquiesced in any methodology, and no provision of the *Settlement Agreement* would be deemed an admission.⁷ That same-docket mechanism was agreed by the parties and ordered by the TRA to permit the annual rate review mechanism in and only in TRA Docket 14-00146. Thus, a determination made in TRA Docket 15-00089 would not be usable or bind the parties in a proceeding with respect to matters covered by TRA Docket 14-00146 – and that gives the Consumer Advocate pause as to the consequences.

The consequences of a determination outside of TRA Docket 14-00146, under the terms of the *Settlement Agreement* and *Order*, would mean that such determination would not have precedential effect and the parties would not be bound in the implementation of the annual review mechanism described in TRA Docket 14-00146. Likewise, the methodologies adopted inside of TRA Docket 14-00146 would not apply to filings in dockets outside of TRA Docket 14-00146. It also should be noted that the use of different dockets would essentially give Atmos what it argued for and lost in TRA Docket 14-00081.⁸ In that docket, Atmos wanted the TRA to affirm the broad adoption of methodologies that would be nebulous enough that Atmos could argue about who was bound to what without being constrained by clear, bright line methodologies⁹ – like those created by and required to be used through the same-docket mechanism in TRA Docket 14-00146.

A more specific, and practical, consequence of not following the same-docket mechanism would be that the Consumer Advocate and TRA Staff essentially would have to confirm, for

⁶ Atmos filing of its *Petition* in TRA Docket 14-00146 reflects this agreement of the parties. It should be noted that the “same docket” mechanism does not restrict Atmos in any way from filing in a docket other than TRA Docket 14-00146, and thereby serving clear and distinct notice that the previously agreed-to methodologies are not binding on any of the parties in that new proceeding.

⁷ *Settlement Agreement*, page 30, paragraph 22 (italics and bold added) and *Order*, page 10, ordering paragraph 1. Other provisions in the *Settlement Agreement* emphasize the narrow applicability of the limitation to the specified docket. For example, the *Settlement Agreement* provides that “[n]one of the Parties waives its right to take other positions with respect to matters similar to those settled herein in future proceedings before the Authority[.]” and “[t]he resolution of issues reflected herein is the result of give and take negotiations between the Parties and does not necessarily reflect the position of any single Party on any discrete issue, and no Party waives the right to assert any position in any future proceeding.” *Settlement Agreement*, pages 29 and 30, paragraphs 20 and 21.

⁸ See *Response of Atmos Energy Corporation to Consumer Advocate’s Motion to Dismiss or Deny Petition for Failure to Meet Statutory Requirement*, filed in TRA Docket 14-00081 on October 1, 2014; the *Dismissal Order* at pages 7-10; and the transcript of the oral argument held on October 10, 2014 (“*Transcript*”), on the *Consumer Advocate’s Motion to Dismiss or Deny Petition for Failure to Meet Statutory Requirement*, filed in TRA Docket 14-00081 on September 29, 2014.

⁹ For examples of this, see the *Dismissal Order* at pages 7-10 and Atmos’ (unsuccessful) arguments in the *Transcript* in TRA Docket 14-00081.

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each filing in a docket inside or outside of TRA Docket 14-00146, that each and every methodology was being accurately applied by Atmos (since if Atmos inadvertently disregarded or modified a methodology, it could simply argue that it is not bound anyway). The time and cost required – and the burden of keeping up with which methodology applied and how it applied in the context of multiple dockets – would be substantial. And, to the Consumer Advocate, that substantial cost would defeat at least one of the principal purposes that the alternative regulation statute sought to achieve – the reduction of ratemaking cost -- especially when compared to the lower cost of simply filing annual review mechanism filings in the same docket, as agreed by the parties and ordered by the Authority.

Consumer Advocate's Reservation of Rights

The Consumer Advocate reserves its right to intervene with respect to any proposed amendments or other relief that may be requested subsequent to the filing of this letter, and notes that the expression of intent in this letter may not be used for any purpose other than the expression of intent not to intervene as stated herein. The Consumer Advocate also reserves its rights under the terms and conditions of the *Settlement Agreement* and *Order*.

The Consumer Advocate respectfully requests that copies of this letter be filed in TRA Dockets 14-00146 and 15-00089.

Sincerely,



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cc: A. Scott Ross, Esq.