BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

In Re: Application of United Cities Gas Company	)	
to Establish an Experimental Performance-Based	)	Docket No. 95-01134
Ratemaking Mechanism	)	now, Docket No. 97-01364

CONSUMER ADVOCATE DIVISION'S REPLY TO PETITION FOR RECONSIDERATION

Comes the Consumer Advocate Division of the Office of Attorney General, and hereby responds to the Petition for Reconsideration of United Cities Gas Company ("United Cities"). In its Petition for Reconsideration, United Cities argues that the Tennessee Regulatory Authority ("TRA") should "reconsider its decision not to allow United Cities to collect the additional savings of up to $600,000 for the second year of the experiment [of incentive-based ratemaking]." United Cities' Petition for Reconsideration at 1. The TRA, however, should not change its decision on this issue of how much of the ratepayers' money United Cities can keep under the incentive plan for 1997.

United Cities bases its Petition for Reconsideration on two grounds:

1. "Procedural Defect" Ground--United Cities contends that the TRA should raise the amount of money available to United Cities to $600,000 because in a prior order of May 3, 1996, the Tennessee Public Service Commission allowed such an increase, and (according to United Cities) this order was allegedly vacated by the Tennessee Court of Appeals as the result of a mere "procedural defect." United Cities Petition at 3 (¶ 3). This ground, however, fails because the Court of Appeals actually held that the order was "reversed, vacated and the cause is remanded to the Tennessee

Regulatory Authority for such further proceedings and actions as it may deem appropriate . . . ." Tennessee Consumer Advocate Division (Consumer Advocate) v. TRA, et al., Appeal No. 01A01-9606-BC-00286 (March 5, 1997), at 7. Thus, as will be discussed further below, the order was found to be defective on far more than purely "procedural" grounds.

2. "Retroactive Ratemaking" Ground--United Cities contends that the TRA could allow an increase of money to United Cities from $300,000 to $600,000 for 1997 without engaging in "retroactive" ratemaking, a practice generally prohibited under Tennessee law. As will be shown below, however, giving more money to United Cities for 1997 would constitute retroactive ratemaking under the facts of this case.

I. THE PUBLIC SERVICE COMMISSION ORDER OF MAY 3, 1996 WAS REVERSED AND VACATED ON MORE THAN MERE "PROCEDURAL" GROUNDS

United Cities' Petition for Reconsideration is premised entirely on the argument that the Public Service Commission order of May 3, 1996 was reversed and vacated on mere "procedural" grounds. In support of this argument United Cities cites only one case, Village of North Palm Beach v. Mason et al., 188 So.2d 778(1966). The facts of this Florida case, however, are completely different from the facts of the present case. As will be shown below, the order at issue in the present case was reversed on far more than mere "procedural" grounds. Accordingly, the TRA should reject United Cities' Petition for Reconsideration.

In Village of North Palm Beach, a Florida court was confronted with the issue of at what time the rights of certain parties were "fixed" in a case where an order issued by the Florida Public Service Commission was "quashed" by the court and remanded to the Commission, which then issued a second order. 188 So.2d at 780. One party argued that the rights of the parties were fixed as of the date of the entry of the first order by the Commission, prior to the "quashing;" the opposing party

argued that the rights were fixed as of the later date when the Commission reentered the order pursuant to the court's decision to "quash."

The Florida court held that the earlier date of the Commission's initial order was the effective date of the parties' rights. 188 So.2d at 781-782. In so holding, the Florida court found that the original order was defective merely because:

> the commission had not written into its order the necessary findings of fact to support its conclusion. As the commission has demonstrated, this deficiency was easily corrected by entry of an amendatory or supplemental order upon the same record on which the original order was entered.

188 So.2d at 781.

In the present case, however, the reversal of the Public Service Commission order of May 3, 1996 was based on far more than a mere failure to have "written into its order the necessary findings of fact to support its conclusion." 188 So.2d at 781. On the contrary, the Tennessee Court of Appeals reversed and vacated the order of May 3, 1996 and instructed the Commission or its successor to undertake an entirely new hearing which could result in a totally different result ("For the foregoing reasons, the order entered by the Public Service Commission on May 3, 1996, is reversed, vacated, and the cause is remanded to the Tennessee Regulatory Authority for such further proceedings and actions as it may deem appropriate including a reconsideration of the subject of the May 3, 1996 order of the Public Service Commission."). Tennessee Consumer Advocate v. TRA at 7.

Thus, the case authority submitted by United Cities is completely inappropriate to the present case. United Cities attempts to pad its argument by misrepresenting what the Tennessee Court of Appeals held, going so far as to write that the "Tennessee Court of Appeals held only that there was a procedural defect in the TPSC's order." United Cities' Petition at 3 (¶ 4). The words "procedural defect," however, appear nowhere in the decision. Furthermore, the Tennessee Court of Appeals made

it very clear that the ground for reversal, namely, the refusal of the Public Service Commission to allow the Consumer Advocate Division to cross-examine the company's expert who drew up the plan that the company was asking the Commission to implement, was a breach of fundamental fairness:

> This Court concludes that the Commission committed a violation of basic principles of fairness in failing to afford the Consumer Advocate reasonable opportunity to cross-examine or otherwise impeach the origin of such materials.

Tennessee Consumer Advocate v. TRA at 7.

Furthermore, § 4-5-322(i) of the Tennessee Uniform Administrative Procedures Act, which controls this case, provides that "[n]o agency decision pursuant to a hearing in a contested case shall be reversed, remanded or modified by the reviewing court unless for errors which affect the merits of such decision." In the Court of Appeals case, the Court did, in fact, reverse and remand the PSC order. Accordingly, under the UAPA, the reversal and remand had to be for a reason that went to the "merits of such decision." Thus, the reversal and remand was for more than a mere procedural error.

Finally, it should be noted that in the present case, unlike the Florida case, the TRA properly created an entirely new record on which to base its decision. In the Florida case, the court found that the "deficiency [at issue] was easily corrected by entry of an amendatory or supplemental order upon the same record on the original order was entered." 188 So.2d at 781. In the present case, however, it certainly comes as a surprise to all who participated in days of hotly contested hearings to learn that we were all wasting our time because, according to United Cities, the TRA could have rendered its decision based upon the original record of the Public Service Commission!

Accordingly, the TRA should reject United Cities' argument that it was a mere "procedural" oversight that denied them the right to keep $600,000, rather than $300,000 of the ratepayers' money. The TRA, therefore, should also reject United Cities' Petition for Reconsideration.

II. TO ALLOW UNITED CITIES TO INCREASE THE AMOUNT OF RATEPAYERS' MONEY IT CAN KEEP IN THIS CASE WOULD BE RETROACTIVE RATEMAKING

As set forth above, United Cities' request for reconsideration is based entirely on the argument that the rehearing of this case was ordered after the Tennessee Court of Appeals found a mere "procedural" defect in the Public Service Commission order of May 3, 1996. As established above, however, this argument is without merit.

The failure of the "procedural" defect argument is sufficient to reject United Cities' entire Petition for Reconsideration. United Cities, however, also raised the issue of whether the TRA's statement that a finding that United Cities was entitled to $600,000 rather than $300,000 of the ratepayer's money for alleged savings made under the incentive-based plan could constitute "retroactive" ratemaking, which is generally impermissible under Tennessee law. As will be shown below, however, the TRA's statement was correct.

At the time of the hearing in this case before the TRA, United Cities was limited to $25,000 per month of alleged savings, for a total of $300,000 per year. TRA Order on Phase One, January 14, 1999, at 17. United Cities' expert, Mr. Frank Creamer, proposed that the amount be should be increased from $300,000 to $600,000. Id. In denying the proposed increase, the TRA noted that the "second year of the plan concluded on March 31, 1997, and stated that to allow the increase "at this point in time could be construed as retroactive ratemaking." Id. at 18.

Given the fact that the second year of this unique "incentive-based" plan had a definite termination date that occurred long before the decision in this case, and the fact that the proposal at issue called for a direct increase in money for United Cities from so-called "savings," it is reasonable for the TRA to conclude, especially in light of the lack of contrary arguments from United Cities, that the proposal for an increase could be construed as retroactive ratemaking under the specific facts of

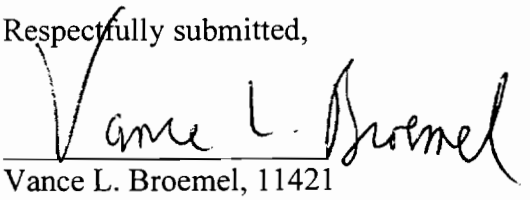
this case. In particular, an increase in money directly available to United Cities is distinguishable from the acceptance or rejection or modification of a component of the plan such as the NORA contract by the TRA.

Finally, if United Cities is going to ask the TRA reconsider its decision on this issue of retroactive ratemaking, it is incumbent on them to come forward with at least some authority in support of their position that there is some error in fact or law, or that some new evidence has been discovered. Tenn. Code Ann. § 65-2-116 (Grounds for Rehearing). United Cities, however, has clearly offered nothing that would support a change in position by this Authority.

CONCLUSION

For the foregoing reasons, the TRA should deny United Cities' Petition for Reconsideration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Vance L. Broemel, hereby certify that a copy of the foregoing Reply to Petition for Reconsideration has been served on the following parties of record by facsimile or hand delivery and by depositing a copy of the same in the United States mail, postage prepaid, addressed to them, in accordance with the following list, this 24th day of February 1999:

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