BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

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

UNITED CITIES GAS COMPANY'S REPLY TO CONSUMER ADVOCATE DIVISION'S REPLY TO PETITION FOR RECONSIDERATION

COMES NOW United Cities Gas Company, a division of Atmos Energy Corporation, (United Cities), and files its reply to the Consumer Advocate Division's (CAD) response to United Cities' petition for reconsideration.

I. THE PUBLIC SERVICE COMMISSION ORDER OF MAY 3, 1996 WAS REVERSED AND VACATED ON PROCEDURAL GROUNDS AND THE RATIONALE SET FORTH IN THE *VILLAGE OF NORTH PALM BEACH v. MASON* CASE IS APPLICABLE TO THE PRESENT CASE

United Cities' petition for reconsideration is based upon the rationale set forth in the case of *Village of North Palm Beach v. Mason et al.*, 188 So.2d 778 (1966). That case stands for the proposition that when a Commission order is remanded back to the Commission because of a procedural defect, and the decision in the first order is affirmed on remand, the rights of the parties are fixed as of the date of the entry of the first order by the Commission instead of the Commission order issued on remand. Because the rights of the parties are fixed as of the date of the entry of the first order by the Commission, United Cities in this case could collect the additional savings of up to $600,000 without violating the rule against retroactive rate making. United Cities is asking the TRA to reconsider its decision not to allow United Cities the right to collect the additional savings of up to $600,000 which was approved by the TPSC in its May 6, 1996 order, and which was earned

by United Cities during the second year of the PBR experiment, on the basis that such does not violate the rule against retroactive rate making under the rationale set forth in the *Village of North Palm Beach* case and on the basis that fairness and equity suggests that the passage of time did not make this question moot.

CAD argues that the facts in the present case are different than the facts set forth in the case of *Village of North Palm Beach v. Mason et al.*, 188 So.2d 778 (1966), and therefore, the rationale set forth in that case should not apply. CAD argues that the cases are different because the Florida PUC order in *Village of North Palm Beach* was quashed due to a procedural defect, while the Tennessee Public Service Commission (TPSC) order in the present case was reversed and remanded to the TRA for "far more than purely procedural grounds." CAD's argument is wrong. The TPSC's order of May 3, 1996 was reversed and vacated on procedural grounds. It is clear from a reading of its decision that the Tennessee Court of Appeals did not rule on any of the merits of the TPSC's order of May 3, 1996. Instead, the Court of Appeals reversed and remanded the case back to the TRA because the TPSC had failed to follow its own procedural rules in conducting its proceeding. It is that same type of error which occurred in the *Village of North Palm Beach* case, i.e., the PUC did not follow its own rules in writing its order. It is clear that in the present case the Tennessee Court of Appeals remanded the case back to the TRA because the TPSC had failed to follow its procedural rule which required it to provide CAD the opportunity to cross examine Mr. Creamer.[1]

The fact that the procedural defects in the two cases may have been different, or that an

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[1]The CAD argues that the Tennessee Court of Appeals did not reverse and remand the TPSC's May 3, 1996 order due to a procedural defect because under TCA §4-5-322(5)(i) "no agency decision shall be reversed or modified by the reviewing court unless for errors which affect the merits of such decision." CAD misinterprets this provision and ignores TCA §4-5-322(4)(h)(3) which specifically states that an agency's decision can be "reversed or modified" if the decision is made "upon unlawful procedure." TCA §4-5-322(5)(i) simply means that the court can reverse or remand the agency only if the agency's error is material.

additional hearing was required in the present case and not in the *Village of North Palm Beach* case, does not mean that the rationale set forth in the *Village of North Palm Beach* is inapplicable to the present case. This is especially true given the fact that the TRA found that there was no substantive objections raised on remand in regards to the recommendations that had been made by Mr. Creamer and accepted by the TPSC in its order of May 3, 1996. As pointed out by the TRA in its order dated January 14, 1999, the CAD did not choose to dispute Mr. Creamer's modifications that were approved by the TPSC in its order of May 3, 1996. *TRA Order dated January 14, 1999, page 19.* One of the modifications recommended by Mr. Creamer was that the incentive cap should be increased to $600,000 for the second year of the experiment. As set forth in United Cities' petition for reconsideration, United Cities performed under that incentive cap, and but for the procedural defect in the TPSC's order of May 3, 1996, United Cities would have had the right to earn the additional incentive. If the TRA agrees with United Cities that equity and fairness suggests that the incentive approved by the TPSC in May of 1996 has not been made moot by the passage of time, then under the rational set forth in the *Village of North Palm Beach* case, the TRA can legally approve the increase in the incentive cap for the second year of the experiment without violating the rule against retroactive rate making.

II. TO ALLOW UNITED CITIES TO COLLECT THE ADDITIONAL INCENTIVE RECOMMENDED BY MR. CREAMER AND APPROVED BY THE TPSC BACK IN 1996 DOES NOT VIOLATE THE RULE AGAINST RETROACTIVE RATE MAKING

As set forth above, under the rationale set forth in the *Village of North Palm Beach* case, the TRA can allow United Cities to collect the additional incentive recommended by Mr. Creamer and approved by the TPSC in 1996 without violating the rule against retroactive rate making. As set forth above, the *Village of North Palm Beach* case stands for the proposition that when a Commission order is remanded back to the Commission because of a procedural defect, and the decision in the

first order is affirmed on remand, the rights of the parties are fixed as of the date of the entry of the first order by the Commission instead of the Commission order issued on remand. Because the rights of the parties are fixed as of the date of the entry of the first order by the Commission, United Cities in this case could collect the additional savings of up to $600,000 without violating the rule against retroactive rate making. Because this case is one of first impression in Tennessee, it is appropriate for the TRA to consider the rationale set forth in the *Village of North Palm Beach* case in making its determination of the issue raised by United Cities in its petition for reconsideration.

Because the TRA can legally allow United Cities to collect the additional incentive recommended by Mr. Creamer and approved by the TPSC in 1996 without violating the rule against retroactive rate making, the question raised by United Cities' petition for reconsideration becomes whether fairness and equity suggest that this issue has not been made moot by the passage of time.

Contrary to the statements contained in CAD's reply, United Cities has shown in its petition for reconsideration that fairness and equity suggest that this issue has not been made moot by the passage of time and that the TRA should consider allowing United Cities to collect the additional incentive . The record in this proceeding showed that during the second year of the experiment, (April 1, 1996 - March 31, 1997), United Cities performed as if the additional incentive/penalty provision was in effect. As pointed out in its petition for reconsideration, the Court of Appeals denied the CAD's request to stay the second year of the experiment pending the appeal. This meant that during the appeal the incentive/penalty provision was in effect. Moreover, United Cities had reached the increased incentive earnings cap by the seventh month of the second year of the experiment. This meant that all savings that would have been earned by United Cities under the increase in the cap would have occurred prior to the Court of Appeals' decision. Because United Cities' performance during the second year of the experiment was done under the increased incentive earnings cap, and because United Cities had nothing to do with causing the procedural defect that has

now been cured by the TRA, it is inequitable and unfair to disallow United Cities the right to receive the incentive that it earned under the increased cap that was approved by the TPSC back in May of 1996. The CAD does not rebut the fact that United Cities operated under the increased incentive that had been approved by the TPSC. The passage of time does not change the fact that United Cities operated under the increased incentive that had been approved by the TPSC. Nor does it make that fact moot. Fairness and equity dictate that the TRA recognize that United Cities was asked to perform under an incentive plan which contained specific rewards and penalties, and that United Cities performed under that plan with the understanding that it would be rewarded or penalized pursuant to the plan approved by the TPSC. The soundness of recognizing that United Cities should be entitled to the increased incentive approved by the TPSC in 1996 is demonstrated by the fact that if United Cities had performed poorly under the plan and had been penalized under the plan, it is likely that CAD would be arguing that United Cities should be required to pay said penalty.

United Cities respectfully requests that the TRA modify its order to allow United Cities to collect the savings that it earned during the second year of the PBR experiment under the increased incentive cap that was recommended by Mr. Creamer and approved by the TPSC on May 3, 1996.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 4th day of February, 1999, addressed to:

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