BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

June 21, 1999

IN RE:	)	
	)	
NASHVILLE GAS COMPANY APPLICATION FOR APPROVAL OF NEGOTIATED GAS REDELIVERY AGREEMENT WITH STATE INDUSTRIES	)	**Docket No. 98-00338**
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	)	
IN RE:	)	
	)	
NASHVILLE GAS COMPANY APPLICATION FOR APPROVAL OF NEGOTIATED GAS REDELIVERY AGREEMENT WITH BRIDGESTONE/FIRESTONE	)	**Docket No. 98-00339**
	)	

MOTION FOR REVIEW OF INITIAL ORDER OF THE HEARING OFFICER

This Motion for Review of the Hearing Officer's Initial Order is predicated upon: (1) an appraisal of the rationale developed in support of the Tennessee Regulatory Authority's ("TRA" or "Authority") July 21, 1998, actions; (2) a requisite evaluation of Nashville Gas Company's ("NGC" or "company") February 5, 1999, motions for rehearing of the Authority's January 22, 1999, orders; and, (3) an assessment of the congruity of subsequent reasoning and actions undertaken that resulted in the conclusions set forth in the Initial Order. There is but a single reason for seeking this review, and that is to ensure sound public policy that is in harmony with the public interest.

In this cause, NGC exercised its right in invoking the Authority's legal sympathies by filing motions for rehearing of the Authority's January 22, 1999, orders. NGC's

premier objection was that the Authority's "January 22 Order is not based upon facts in the record, is based upon unlawful proceedings and is unfair." *Motions of NGC for Rehearing, p. 1, February 5, 1999.* Specifically, the company protests that:

1. "Nashville Gas did not request the Authority to rule on its right to recover margin losses during Phase I."
2. "The Authority made its Phase I ruling on its own motion without notice to Nashville Gas and without providing Nashville Gas an opportunity to address the Phase I issue."
3. The Authority's support of its Phase I findings that "...the discounted rates granted Bridgestone/Firestone did not, at that time, result from immediate competition from alternative fuels" is contrary to the facts as stated in NGC's application.
4. "[T]he Commission's [sic] 90%/10% ruling was also made without any notice to Nashville Gas...."
5. The Authority condones the asymmetrical treatment of gains and losses that are unfair and unreasonable.

Motions of NGC for Rehearing, February 5, 1999. The Authority responded swiftly by granting the company's motions and assigning a Hearing Officer to conduct a hearing and to render a decision on the merits. All Authority actions that involve the applicability of law, statute, or rule have consequences that extend far beyond instant proceedings. Temperance, even if well-intentioned, in applying regulatory requirements in specific instances so that desired outcomes may be achieved have the unsavory potential of creating profound ill effects when invoked in later proceedings before the Authority. The

potential for such ill effects, given the manner in which the company's protests were resolved, is the fundamental reason for this request for Review.

The Hearing Officer, in his discretion, permitted NGC to amend, rather than defend, its original applications, thus altering the set of salient facts upon which the Authority's July 21, 1998, decisions were based. Specifically, NGC deleted paragraph 6 of its applications, where it prayed for 100% recovery of margin losses "consistent with action taken by the Authority in Docket No. 98-00128." The company additionally amended its prayers for relief (the "WHERFORE" paragraph) on page 3 seeking approval of rates effective January 1, 1998, instead of August 1, 1998, as stated in the company's original petitions. Oddly, the company took no steps, consistent with its other actions, to amend references to Rate Schedule 9 in paragraph 4 of its Bridgestone/Firestone Petition.

Relevant decisions and language from the Initial Order include:

1. Acceptance of the company's withdrawal of its reliance on Rate Schedule 9 in exchange for approval of the company's agreement for Phase I to be effective May 12, 1998, and continue until July 31, 1998, (NGC requested an effective date of January 1, 1998 for recovery of margin losses). All margin losses are shared 10% by the company and 90% by customers.
2. "The Authority has already approved the agreements that set forth the rates to be charged to these two customers."
3. "[T]he only issue before the Hearing Officer at this time is how Nashville Gas and its ratepayers should share the margin losses that result from these negotiated rates."

4. "[C]ounsel for Nashville Gas stated that the Company did not (and does not now) intend for the Authority to rule on the applicability of Rate Schedule 9. Furthermore...the Authority could avoid ruling on the applicability of Rate Schedule 9 by approving the Phase I rates under the negotiated contracts effective January 1, 1998."
5. "Tenn. Comp. R & Regs. r. 1220-4-1-.07 provides that the special contracts entered into between a utility and a ratepayer are subject to the review and approval of the Authority."

Initial Order of the Hearing Officer, TRA Docket Nos. 98-00338, 98-00339, June 9, 1999.

Each of these critical points warrants being addressed separately.

The company's withdrawal of its reliance on Rate Schedule 9 is of crucial legal importance to the Authority since we now must consider under what authority can the TRA now approve, not only margin loss recovery, but the company's Phase I rates as well. The Hearing officer's reliance on TRA Rule 1220-4-1-.07 (number 5 above) to achieve this end is, in my opinion, a miscalculation of the application of the Rule. The Rule, very simply stated allows special contracts ***subject to*** Authority review and approval. This is an exercise that is clearly required before a special contract can take effect. To now "retrofit" this legal requirement in order to forge an amicable resolution of the issues in the instant proceedings stretches the legal fabric of interpretation and creates precedent that may either wreak havoc with the Authority's aim of avoiding inconsistent and contradictory positions or cause the Authority to abandon the above-referenced requirement of the Rule on an ongoing basis. The law for special contracts is unambiguous. Where there is justifiable support, it is so submitted and considered ***before***

special rates take effect, not after. NGC, in my opinion, fully understands this requirement. One has but to review its contracts in these dockets, ARTICLE III, Term of Agreement, Section 3.01. The contracts provide that "subject to the terms and conditions herein, this agreement shall become effective the first of the month **following TRA approval**, and shall continue in effect until December 31, 2002." (emphasis added). NGC, to the extent it believes that Phase I rates could be approved pursuant to our Rule after the fact, could have easily inserted contract language addressing Phase I rates. The company chose, however, and appropriately so, not to include Phase I rates in the contract language.

The record in this proceeding does not support a conclusion that "the Authority has already approved the agreements that set forth the rates to be charged to these two customers." *Initial Order of the Hearing Officer, p. 3.* In fact, the record clearly demonstrates that the Authority's approval of rates was limited to Phase II rates. Phase I rates were never the subject of TRA scrutiny. In fact, in my opinion, our July 21, 1998, deliberations never considered Phase I rates, since these, absent prior approval, could only, arguably, become effective pursuant to the tariff provisions of Rate Schedule 9, and would undoubtedly become the focus of a subsequent ACA audit. As I have stated above, I am convinced that the company had no other legal authority to put rates into effect before TRA approval, except by tariff (Rate Schedule 9). To the extent the Hearing Officer's comments encompassed Phase I rates, I believe them to be in error.

NGC's statement that "the Company did not (and does not now) intend for the Authority to rule on the applicability of Rate Schedule 9. Furthermore...the Authority could avoid ruling on the applicability of Rate Schedule 9 by approving the Phase I rates

under the negotiated contracts effective January 1, 1998"[1] is totally unconvincing and not borne out by the original record in this proceeding, nor in the filings as amended. As discussed above, this case cannot legally be resolved without considering the applicability of Rate Schedule 9, either now or in an ACA audit. In fact, as also discussed above, the company's action in omitting Phase I terms from its contracts strongly suggests that it was very much aware that the Authority had to, at some point, rule on the applicability of Rate Schedule 9. Furthermore, there exists, in my opinion, no legal device, craft, or maneuver that will allow TRA approval of negotiated rates under 1220-4-1-.07, effective January 1, 1998, or May 12, 1998, consistent with my comments above.

For the foregoing reasons, I request that this Motion for Review be approved.

Respectfully submitted,

CHAIRMAN MELVIN J. MALONE

ATTEST:

Executive Secretary

[1] *Initial Order of the Hearing Officer at 3.*