BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

July 9, 1999

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

SECOND MOTION FOR REVIEW OF INITIAL ORDER OF THE HEARING OFFICER

On June 9, 1999, the Hearing Officer in this matter filed the Initial Order of the Hearing Officer (hereinafter referred to as the "June Initial Order"). On June 21, 1999, I filed a Motion for Review of Initial Order of the Hearing Officer, wherein I outlined my objections to the June Initial Order. After reviewing the Motion for Review of Initial Order of the Hearing Officer, and I assume in response thereto, on July 6, 1999, the Hearing Officer filed the Initial Order of the Hearing Officer (hereinafter referred to as the "July Initial Order").

Regrettably, in my opinion, the July Initial Order filed by the Hearing Officer in this matter varies little in substance, if any, from the June Initial Order. Hence, like my first Motion for Review, this Second Motion for Review of the Hearing Officer's July

Initial Order is also 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 July Initial Order.

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. The potential for such ill effects, given the manner in which the company's protests were resolved, is once again 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.

A chronological review of the company's actions in these cases provides insight essential to a proper review of the actions taken by the Hearing Officer. NGC

commenced negotiations with both Bridgestone/Firestone, Inc. ("Bridgestone") and State Industries ("State") well before January 1, 1998. In December of 1997, NGC informed the Authority that in order to retain Bridgestone on its system until a long term contract could be negotiated, it would provide a reduced rate under the provisions of Rate Schedule 9. In its May 12, 1998, petitions concerning both Bridgestone and State, NGC relied, with respect to the period of January 1, 1998, to July 31, 1998, (the "Phase I" period) upon Rate Schedule 9. In its February 5, 1999, motions for rehearing in both dockets, NGC acknowledged and defended its reliance upon Rate Schedule 9 for Phase 1, and affirmed its position as set forth in the motions at the April 6, 1999, Authority Conference. Finally, the testimony of NGC witnesses Bill Morris and Chuck Fleenor, which were admitted into evidence by the Hearing Officer, strongly defends NGC's reliance upon Rate Schedule 9. What this chronology unambiguously demonstrates is that since December of 1997, through April 14, 1997, the date on which the above-referenced testimony was filed, NGC knowingly and voluntarily relied upon Rate Schedule 9 in these dockets.

The July Initial Order affirmed that "when a utility seeks to place its rates into effect, it must do so by ... tariff or special contract." *Initial Order of the Hearing Officer, TRA Docket Nos. 98-00338, 98-00339, July 6, 1999, p. 6.* The company's withdrawal of its reliance on Rate Schedule 9, which may have been premature, is of crucial legal importance to the Authority since we now must consider under what authority can the TRA, as determined by the Hearing Officer, now approve, not only margin loss recovery, but the company's Phase I rates as well.

In the July Initial Order, the Hearing Officer acknowledged the assertion in the June 21, 1999, Motion to Review, that special contracts must be approved by the Authority before rates become effective. *July Initial Order, p. 7.* Neither NGC nor the Hearing Officer maintain that NGC filed a special contract **before** the January 1, 1998, Phase I rates became effective. To be sure, there was some discussion of "oral contracts" between NGC and Bridgestone and State during Phase I at the April 15, 1999, hearing. According to NGC, "rates in Phase I were intended to go into effect pursuant to oral contracts[.]" *July Initial Order, p. 6.* It appears that the Hearing Officer accepted, in some manner, the "oral contracts" theory in the June Initial Order. *June Initial Order, p. 2 ("It is apparent from the pleadings in this case and the evidence presented at the hearing that the parties to the negotiations intended the rates for Bridgestone/Firestone and for State Industries to be effective January 1, 998.").* Likewise, it also appears that the Hearing Officer accepted, in some fashion, the "oral contracts" theory in the July Initial Order as well. Still, TRA Rule 1220-4-1-.07 contemplates, and in fact requires, that any special contract submitted under said rule must be "filed" with the Authority (reduced to writing), and "subject to review and approval" before rates become effective.

Notwithstanding the above, the Hearing Officer's July Initial Order permits NGC to recover 90% of the margin loss during the period of May 12, 1998, (the date on which NGC filed its petitions) to July 31, 1998. *July Initial Order, p. 8.* I am uncertain as to what basis the Hearing Officer employed to support such a determination. As established above, and as recognized by the Hearing Officer, before a company can recover any margin loss, it must first have placed reduced rates into effect by either a tariff or an approved special contract. NGC has abandoned its reliance on Rate Schedule 9, a tariff,

and irrespective of the amendments to the petitions, it is undisputed that there was never a filed and approved special contract for Phase I rates. In my opinion, it is inappropriate and constitutes a fiction of convenience to resort to amendments, as NGC has herein, to skirt, avoid, or circumvent a long-standing, unambiguous, well-familiar rule of the Tennessee Regulatory Authority. Thus, under the circumstances as they now exist, particularly the removal of Rate Schedule 9 from these cases, I find no grounds under which the Hearing Officer, as set forth in the July Initial Order, may legally permit NGC to recover margin losses for any time period during Phase I. To the extent the Hearing Officer was attempting to craft a legally justifiable exception, it is not readily identifiable. Perhaps NGC too easily abandoned that to which it had held firmly - - reliance upon Rate Schedule 9.

As I have opined countless times before, "retrofitting" legal requirements in order to forge amicable resolutions to complex issues may often have the effect of stretching the legal fabric of interpretation and creating precedent that may either wreak havoc with the Authority's aim of avoiding inconsistent and contradictory positions or cause the

Authority to abandon and/or disregard the legal requirement at issue on an ongoing basis.

For the foregoing reasons, while I may find myself in the minority, I request that this Motion for Review be approved.

Respectfully submitted,

CHAIRMAN MELVIN J. MALONE

ATTEST:

Executive Secretary