BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

July 16, 1999

IN RE:	)	
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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**

DISSENTING OPINION OF CHAIRMAN MALONE TO THE INITIAL ORDER OF THE HEARING OFFICER

The most appropriate word that comes to mind upon reviewing the actions of the majority in these cases is "***abracadabra***." This word like few others accurately captures the illusory thought processes that must have been conjured up to cause the majority to so easily embrace the rationale offered on July 13, 1999. John Campbell, a British jurist, commented in 1854 that "Hard cases, it is said, make bad law." The majority has demonstrated here that it is equally true that simple cases make bad law.

While I am very mindful and respectful of the fact that the Directors of the Tennessee Regulatory Authority ("TRA" or "Authority") often have differing views on the many cases and issues that come before us, those differing views normally find their haven,

in some manner, in controlling law and the rules of the Authority. Finding no such lawful haven in the majority's rationale in these cases, I dissent.

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 June Initial Order, wherein I outlined my objections to the June Initial Order. After reviewing the Motion for Review, 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, as this dissent reveals, 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.[1] This fact is perplexing since the Hearing Officer was persuaded to issue the July Initial Order after the objections to the June Initial Order were filed. To my consternation, on July 13, 1999, the majority adopted the rationale of the Hearing Officer in full.

A brief, but necessary, chronological review of the company's actions in these cases, which actions are omitted in the July Initial Order, provides essential insight here. 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.[2] In its May 12, 1998, petitions concerning both Bridgestone and State, NGC

[1] I filed a Second Motion for Review of Initial Order of the Hearing Officer on July 9, 1999. This second motion was rejected by the majority on July 13, 1999.

[2] Rate Schedule No. 9, among other things, "is designed to permit the Company to sell ... gas at special rates for the purpose of enabling the Company to compete with alternative fuels available for use by its customers."

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 I, 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, 1999, the date on which the above-referenced testimony was filed, NGC knowingly, voluntarily, and exclusively relied upon Rate Schedule 9 in these dockets for the Phase I period.

In the July Initial Order, the Hearing Officer recognized the assertion in the June 21, 1999, Motion to Review, that under the plain and unambiguous language of TRA Rule 1220-4-1-.07[3] special contracts must be approved by the Authority **before** rates become effective. *Initial Order of the Hearing Officer, TRA Docket Nos. 98-00338, 98-00339, July 6, 1999, p. 7.* Rate Schedule 9, on the other hand, a tariff, permits NGC to place reduced rates into effect and to recover the resulting margin loss for a seven (7) month period without filing a contract and without Authority review.[4]

As conceded by the Hearing Officer, it is axiomatic that "when a utility seeks to place its rates into effect, it must do so by ... tariff or special contract." *July Initial Order,*

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[3] TRA Rule 1220-4-1-.07 captioned "SPECIAL CONTRACTS," which has been in effect for over twenty (20) years, provides: "Special contracts between public utilities and certain customers prescribing and providing rates, services and practices not covered by or permitted in the general tariffs, schedules or rules filed by such utilities are subject to supervision, regulation and control by the [Authority]. A copy of such special agreements shall be filed, subject to review and approval."

[4] The seven (7) month limitation contained in the tariff explains why the Company submitted the petitions for approval for the period beginning August 1, 1998, and further demonstrates the Company's longstanding intentions to proceed under Rate Schedule 9.

p. 6. Hence, NGC had two (2) equally available choices prior to January 1, 1998, - proceed under a special contract or proceed under a tariff, here Rate Schedule 9. The choice was NGC's alone. Since NGC, by its own internal strategic election, made no attempt whatsoever to place the Phase I rates into effect by special contract, pursuant to TRA Rule 1220-4-1-.07, before the rates became effective on January 1, 1998, as the above chronology demonstrates, NGC placed its reliance upon Rate Schedule 9. This the majority does not, nor could it, refute.

At no time prior to April 14, 1999, did NGC seek to amend its petitions to rely upon TRA Rule 1220-4-1-.07 with respect to Phase I because NGC, being well-familiar with the rule and State law, was fully aware of the fact that the rule requires that special contracts must be filed and subjected to review and approval by the Authority **before** rates become effective. Instead, NGC relied upon its **only** legally justifiable ground remaining for recovering margin losses during Phase I, Rate Schedule 9.

With this most important and irrefutable background, we must now consider under what authority the majority approved both margin loss recovery and rates for Phase I. Neither NGC, the Hearing Officer, nor the majority maintained that NGC filed a special contract **before** the January 1, 1998, Phase I rates became effective. While there was some discourse between the Hearing Officer and NGC about an "oral contracts" theory being used to satisfy TRA Rule 1220-4-1-.07 for Phase I, I need not expend much time here defending the irrefutable certainty that the rule contemplates, and in fact requires, that any special contract submitted thereunder must be "filed" with the Authority (reduced to writing), and "subject to review and approval" before rates become effective. Oral

contracts by their very nature cannot be "filed." Additionally, the novel, indefensible "oral contracts" were never "subject to review and approval."

Notwithstanding the above, the majority has permitted NGC to recover 90% of the margin loss during a portion of the Phase I period, May 12, 1998, (the date on which NGC filed its petitions) to July 31, 1998. There exists no basis 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.

At the July 13, 1999, Authority Conference, the Hearing Officer stretched to the winds in search of legal currents on which the defense and support of the action set forth in the July Initial Order could glide. As it was humid that day, the wind was still and the currents idle. Grasping at air, the Hearing Officer stated:

> Let me make very clear that the proposal to remove Rate Schedule 9 from consideration originated with Nashville Gas' attorney, Jerry Amos[.] . . . I determined that due to the Authority's previous disallowance of the Company's reliance on Rate Schedule 9 in the January 22, 1999, orders, the Company should be allowed to amend its pending petition. My legal authority for allowing NGC to so amend its petition during the rehearing is supported in footnote #5 of my Initial Order. Since the Authority, during its July 21, 1998, deliberations determined that Rate Schedule 9 was not applicable, the negotiated gas redelivery agreements were unanimously approved as special contracts with rates to be effective August 1, 1998. In the Company's amended petition, however, NGC also has requested that the reduced rates be effective as of January 1, 1998, rather than the previously approved August 1, 1998, date.

Comments of the Hearing Officer, Director Greer, July 13, 1999, Authority Conference, filed July 13, 1999. Aye, there's the rationale. The justification for the action taken by the

Hearing Officer and adopted by the majority is based on the fact that the Authority disallowed NGC's request to proceed under Rate Schedule 9 and thus the Company should be permitted to amend its petitions. This rationale offered by the Hearing Officer and adopted by the majority must fail due to the background set forth above.

Strangely, the Hearing Officer appeared to find some zone of comfort in announcing the following - "Let me make very clear that the proposal to remove Rate Schedule 9 from consideration originated with Nashville Gas' attorney, Jerry Amos." *Id.* Well, it matters little with whom the proposal originated because the Authority vested the Hearing Officer with the responsibility to guide these cases and rule on the merits, not Mr. Amos. The fact that Mr. Amos suggested a bad course does not, in any respect, justify the Hearing Officer taking it, ostensibly to support an end result. The offerings or proposals of parties should never mesmerize the decision maker, as may have happened here.

Next, it is true that the Authority rejected NGC's initial attempts to rely upon Rate Schedule 9 in its January 22, 1999, orders. But, this is the very reason that a Hearing Officer was appointed to rehear the cases anew. In its motions for rehearing of the January 22, 1999, orders, NGC stated the following:

> [T]he Authority ruled that 'NGC's request to recover margin losses resulting from Phase I . . . is denied. . . . Nashville Gas respectfully submits that the January 22, 1999, Order is not based upon facts in the record[.] . . . [T]he Authority supported its Phase I ruling 'because the discounted rates granted Bridgestone/Firestone did not, at that time, result from immediate competition from alternate fuels.' This finding is contrary to the facts as stated in Nashville Gas' application. Since the facts stated in that application are not disputed by any record evidence, there is simply no evidence in this case to support the Authority's finding of fact.

Motion[s] of Nashville Gas Company for Rehearing, TRA Docket Nos. 98-00338 and 98-00339, February 5, 1999. When I made the motion to grant the rehearing motions, it was

based upon the arguments of NGC quoted above. Thus, as demonstrated by the April 14, 1999, testimony of NGC witnesses Bill Morris and Chuck Fleenor, NGC was strongly defending its reliance upon Rate Schedule 9. NGC sought and was granted the opportunity to persuade the Authority of the applicability of Rate Schedule 9. Certainly the Hearing Officer, sitting on the merits, was aware of the purpose of the rehearing, since none other than what was argued in NGC's Motions was presented.

Still, even if the Hearing Officer was "persuaded" to exercise discretion and proceed in a different manner, it does not follow that because the Authority initially denied the Company's reliance upon Rate Schedule 9 that the Company should be permitted to amend its original petitions.

While the footnote authoritatively cited by the Hearing Officer and relied on by the majority correctly quotes the Tennessee Rules of Civil Procedure, I am fully convinced that counsel for NGC, if not the majority, who has practiced in the area of utility regulation for more years than I, knows that the use of an amendment under the circumstances herein merely constitutes a fiction of convenience that neither the Tennessee Rules of Civil Procedure nor TRA Rule 1220-4-1-.07 countenance. A requirement fixed in a rule and supported by state law, here the filing of special contracts for review and approval **prior** to rates becoming effective, cannot be satisfied with Disney-like effects, under the circumstances presented, by an amendment. Indeed, as I am certain the majority is aware, the enabling legislation of the Tennessee Regulatory Authority, Tenn. Code Ann. § 65-2-102(a)(3) provides that "the [A]uthority shall abide by any such rule adopted by it, until it shall have been changed in the manner provided for in this chapter[.]" Contrary to the

apparent belief of the majority, as of the filing of this dissent, TRA Rule 1220-4-1-.07 has not been excepted from § 65-2-102(a)(3).[5]

Therefore, given the removal of Rate Schedule 9 from these cases, I find no grounds under which the majority may legally permit NGC to recover margin losses for any time period during Phase I. In my opinion, NGC too easily abandoned that to which it had held firmly for approximately seventeen (17) months - - reliance upon Rate Schedule 9.

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, notwithstanding the undermining of state law and Authority rules, was, in my opinion, knowingly ignored by the majority. Unfortunately, but clearly, the majority has freely endorsed and engaged in "retrofitting" legal requirements in order to forge an amicable resolution and has thus stretched the legal fabric of interpretation and created 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 requirements at issue herein on an ongoing basis. In sum, there are unavoidable consequences to poorly developed decisions.

[5] Equally important is the majority's apparent belief that its authority to allow amendments to NGC's petitions pursuant to the Tennessee Rules of Civil Procedure preempts state law. No such authority, either explicitly or implicitly is provided by the TRCP.

It is most telling to note here that other resolutions fully capable of reaching a similar substantive result were available. It was not necessary to take the ill-advised and in fact illegal approach recommended by the Hearing Officer and adopted by the majority. We can do better.

A lawyer's primer states that if you don't have the law, argue the facts; if you don't have the facts, you argue the law; if you have neither the facts nor the law, then you argue the Constitution. The majority has added to this primer: if you have neither the facts, the law nor the Constitution, shout "***abracadabra***."

For the foregoing reasons, and consistent with the public interest, I dissent.

Respectfully submitted,

CHAIRMAN MELVIN J. MALONE

ATTEST:

Executive Secretary