IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED

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Tennessee Claims Commission
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ATMOS ENERGY CORPORATION,	)	
	)	
Claimant,	)	
	)	
vs.	)	Claim No. D20500131
	)	
STATE OF TENNESSEE,	)	
	)	
Defendant.	)	

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JUDGMENT

The claimant, Atmos Energy Corporation, brings this action seeking recovery for damage done to an underground natural gas pipeline, which occurred during debris removal by the Tennessee Department of Transportation (TDOT). The claim was tried on September 24, 2008. William Lane, Esq., appeared for Atmos Energy Corporation. The State was represented by Assistant Attorney General Rebecca Lyford.

Pursuant to Tenn. Code Ann. § 9-8-403(i), the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

DAMAGE TO THE PIPELINE

Atmos Energy Corporation (hereinafter "Atmos"), is a Texas Corporation engaged in the distribution and transmission of natural gas. Atmos is licensed to do business in Tennessee and has its principal Tennessee office located in Williamson County. Atmos is a "utility" as defined in the Underground Utility Damage Prevention Act (UUDPA), Tenn. Code Ann. § 65-31-102(10). The UUDPA, Tenn. Code Ann. § 65-31-101 *et seq.*, requires that persons performing excavation and demolition give notice to utility operators prior to undertaking such efforts. Notice may be accomplished under the UUDPA by initiating a call to the Tennessee One-Call Service, *see* Tenn. Code Ann. § 65-31-107.

Atmos had a natural gas pipeline located at the river bed where State Route 96 crosses over the Harpeth River in Franklin, Tennessee within the State's right-of-way. In 1986, TDOT granted a utility easement permitting the installation and maintenance of the pipeline to United Cities Gas Co., an entity later acquired by Atmos.

The pipeline was originally installed in the late 1950's by the City of Franklin. It begins 15 miles away in the southeast part of Williamson County and travels into the City of Franklin. It is one of the main lines that supplies natural gas to Franklin.

Randy Hazelwood, a superintendent for the TDOT, had maintenance duties in Davidson and Williamson Counties, including State Route 96. As a part of those duties, Mr. Hazelwood was responsible for debris removal from around the bridge pillars. Mr. Hazelwood testified that debris caused turbulence in the water, which would then create erosion by scouring out the rock and dirt that surrounded the piers. Due to the threat posed to the bridge, approximately twice a year TDOT had to go in with a trackhoe to remove debris from around the bridge piers. According to Mr. Hazelwood the debris removal had been going on for at least as long as he had worked for the State, which was nearly thirty years. Atmos was aware of TDOT's maintenance in the area of the pipeline.

In 1997, TDOT had previously damaged the pipeline when a dozer that was performing maintenance drove over it, flattening the top and scraping off some of its coating. After that incident, a construction order

was prepared by United Cities Gas Company proposing to relocate 400′ of the pipe. The construction order reflected that the main was located where the State of Tennessee regularly used a trackhoe to clean out the river and that the pipeline needed to be relocated upstream of the existing main to prevent future damage. For reasons that were not disclosed in the proof, however, the project was cancelled and the relocation was never carried out. No proof was offered showing that Atmos made any effort to implement protective measures to guard against damage to the pipeline despite its previous knowledge of the hazard posed by TDOT maintenance activities.

The damage for which Atmos seeks relief occurred on May 5, 2003, when Andrew Hatcher, a TDOT employer, used a Link-Belt trackhoe to remove debris from the area near the pipeline. It is undisputed that prior to commencing this work TDOT did not provide written, telephonic or email notice to Atmos in accordance with Tenn. Code Ann. § 65-31-106. Randy Hazelwood testified that he had not believed it was necessary to notify Atmos because it was his understanding that the pipeline depth was 36 inches.

It is also clear that the dredging work being performed by TDOT to remove debris from the bridge piers met the UUDPA's definition for "excavation," which is defined as "an operation for the purpose of the movement, placement, or removal of earth, rock or other materials in or on the ground by use of mechanized equipment . . . ." Tenn. Code Ann. § 65-31-102(3).

Due to environmental rules limiting disturbance of the river bed, Mr. Hatcher had to lay a two foot pad of rock in the river bed over which the trackhoe could travel to remove the debris. Hatcher had seen the pipeline coming out of the bank and going into the water before he began. Mr. Hatcher had travelled back and forth across the pad several times carrying out debris when he noticed water start to shoot up and smelled gas. Upon realizing that the pipeline had been damaged, Mr. Hatcher immediately cut his engine and a call for assistance was made from a nearby TDOT truck. Hatcher testified that the weight of the bulldozer caused the rock to go through the pipe.

Blaine Woods, a "first responder" with Atmos, responded to the call. A "first responder" is the person first dispatched to a site when there has

been a report of damages to a pipeline. When Mr. Woods arrived, he saw the rock bed that had been placed in the river over the pipeline. He also recalled seeing the pipeline on the bank. Woods had to isolate and cut off the valves on each side of the bridge to keep the gas from blowing. According to an Atmos construction survey, the leak area was ¾ of an inch square.

REPAIR OF THE PIPELINE

Robert Arnold, Atmos Senior Design Engineer, participated in Atmos's deliberations regarding repairing the pipeline and went to the scene of the accident shortly after it occurred. Arnold testified that it has been Atmos's unwritten policy to try to keep pipeline buried to avoid erosion that can happen in the river bed. Arnold testified that he was unaware of any rule or regulation that required the pipeline to be covered, although federal regulations impose minimum depths at which pipelines must be buried. Exposure develops due to erosion of the surrounding earth. Arnold testified that prior to the accident, the pipeline had been working fine and that there was no indication that it needed to be replaced. According to Mr. Arnold, Atmos had a program to monitor

pipeline integrity by performing leak surveys, electrical surveys and visual inspections, and the pipeline in the Harpeth fell under the program. Mr. Arnold testified that Atmos has not gained any benefit from the repair, which he characterized as a replacement in-kind. The pipeline, however, was more than 50 years old when it was damaged. Atmos did not know how deep the pipe was buried in the river bed or whether it was exposed at the time of the accident.

If Atmos had been notified by the One-Call System of TDOT's intent to clear the river bed, Mr. Arnold testified that Atmos would have marked the line and taken measures to protect it. If Atmos had concluded that the pipeline was exposed, it would have worked with the contractor to minimize any damage. Arnold testified that it is against Atmos's policy to allow large rock to lie directly on the pipe. Atmos provides a padding around the pipe consisting of clean dirt or sand that is free of large rock to avoid this.

As a temporary measure, a crew was sent out after the accident to turn off the valves on each side of the river. After the valves were turned off, the gas was allowed to escape and dissipate before a crew dug onto the

pipe on both sides and cut the pipeline into two. The existing pipe was cut out of the ground and couplings were used to attach a pipe with a welded cap to insure that gas would not escape if the valves were to bleed. Including the loss of gas, Atmos's costs to perform the temporary repairs was $2,130.43.

Atmos took advantage of the lower summertime gas usage to study the Franklin system before determining a course of action with respect to the repairs. Using computer modeling, different options were considered, including abandoning the pipeline altogether. Atmos wanted to replace the pipeline with a pipeline of the same size at a location where it could be installed at the lowest cost. One of the options, replacing the pipeline by performing open-cut excavation directly into the river bed was excluded on the basis that it presented "too many environmental issues." Arnold testified that although they had been given permission to use this method if they took all of the necessary steps and obeyed the environmental standards, they worried about the risk of flooding and not completing the project soon enough.

The ultimate decision was that the pipeline needed to be replaced with the same size pipe at a location upstream under the river bed. This would be accomplished by attempting to bore the river. The estimated cost of the design was $320,000.

After studying the matter for a number of months, construction was begun in September of 2003. The contractor that was hired to excavate dug twenty feet and hit an eight foot shelf of rock. This rock had to be drilled through. The project, which was originally estimated require three weeks, took seven to eight weeks to complete. To save money, Atmos had decided to do the project in-house. The new main was relocated to a place upstream of the existing pipe and not directly under the original pipe. The new pipe is 25 feet below ground.

ATMOS'S EXPENSES

The first invoice generated for the project was for $246,000, which was submitted to TDOT for payment. A revised invoice was later issued for $277,359.96.[1]

[1] Subsequent to the trial, the parties filed a stipulation that the total amount sought by Atmos is $275,675.31.

Gregory Waller, Vice Presiding of Finance for the Kentucky Mid-States Division of Atmos, is responsible for monitoring and analyzing Atmos's financial performance, developing its budget and ensuring compliance with corporate accounting policies, Generally Accepted Accounting Principles, and regulatory requirements.

Atmos contends it incurred direct costs of $123,108 to replace the pipeline. These cost included labor, material, contractor, equipment rental, and crew travel and lodging. Atmos also claims indirect and overhead costs of $152,567.31. According to Waller:

> [The costs] represent actual real charges that [Atmos] has to incur to operate [its] business like any business has to have to operate. There are things such as rent, utilities, transportation cost, quite a bit of labor, supervision labor, includes engineering labor, engineering tech labor, those kind of things that any business would have to operate. They are costs directly related to construction activities and therefore [Atmos] capitalizes them as overhead and apply an equitable portion of that capitalized overhead to each of the projects that [it] does within a given time period.

Tr. 125.

Mr. Waller testified that indirect costs are capitalized as overhead and are then equitably apportioned to each of the projects done within a given time. There are three overhead "pools:" a corporate level, a business

unit or division level, and a state level. At the corporate level is Atmos Energy Corporation, at the business unit level is the Kentucky Mid-States Division of Atmos, which operates in seven states, including Tennessee, and at the state level are costs incurred in the State of Tennessee. Waller testified that overhead is allocated to projects in proportion to the direct dollars spent on the project. According to Mr. Waller, Atmos overhead was calculated using Generally Approved Accounting Standards (GAAP) and in accordance with Federal Energy Regulatory Commission ("FERC") regulations.[2]

As proof of its overhead costs, Atmos offered a document labeled "2004 Overheads and Overhead Rate Budget," which lists costs in a number of categories, i.e. "salary –direct capital," "Materials –without stores," "Structures," "Expense Reports –direct," "Other Expenditures," Capitalized Insurance," "IT Other Purchases." (Exhibit 17). No explanation was offered as to the nature of the costs included in these general categories.

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[2] The Federal Energy Regulatory Commission (FERC), regulates the interstate transmission of natural gas. 15 U.S.C.A. § 717, *et seq.* Natural gas pipeline companies under FERC jurisdiction are required to maintain their books and records in accordance with the Commission's Uniform System of Accounts.

Atmos also offered a "Project Detail Report," which is a line item report of indirect and direct costs allocated to the project to replace the pipeline. The report contains the categories of expenses, the date that the expense was incurred, the amount of the expense, and in limited circumstances the employee or supplier to whom the expense relates. The report, however, does not identify or specify the nature of the expense other than the category to which it belongs, *e.g.* corporate A&G, labor – overhead.

During the course of the hearing, Mr. Waller was asked to explain how Atmos arrived at an overhead cost that was approximately 123% of the direct costs and testified as follows:

> Q. Now Mr. Waller, there is –there has been a big question with regard to the overhead associated with this Project Detail Report in that you know, it shows that the overhead is approximately, plus or minus a few percentage points, 120, 123 percent of the direct cost. Can you explain to me why that number is what it is?
>
> A. Sure, I mean that number is what it is ultimately because it is consistent with the way we budgeted those overheads, the way we then incurred those overhead costs, and like I said before, and then trued them up at the end of the year. So, you know again, it is consistent with the 2004 overhead report that we admitted as Exhibit 17. And you know, again, encompasses all of the kinds of things, many of

> which are listed here and many listed in what we just labeled Exhibit No. 19 as things directly related to construction and necessary for any business to operate.

Tr. 136-37. Explaining why Atmos assigned a percentage of the overhead costs to the project rather than attempting to match overhead costs to the project, Waller further explained:

> To the extent you could do that, you would book those cost as direct cost to the project. There are many costs that are necessary again for us to operate and for us to have a construction program that it is not feasible or the accounting would be overly burdensome to make that sort of one-to-one direct connection. What we do is we determine that the costs are clearly related to construction activities, and then as FERC requires, we allocate an equitable portion of those costs to each project that we do.

Tr. 138.

CONCLUSIONS OF LAW

THE UNDERGROUND UTILITY DAMAGE PREVENTION ACT

The UUDPA requires that persons intending to excavate, defined as the "movement, placement, or removal of earth, rock or other materials in or on the ground by use of mechanized equipment," must first give notice in accordance with Tenn. Code Ann. § 65-31-106, which requires written, telephonic, or email notice to the One-Call system. *Ward v. City of Lebanon,*

2008 WL 1850864, (Tenn.Ct.App. Apr 25, 2008)(No. M2006-02520COAR3CV). Notice must be provided at least three working days prior to the date of excavation and must contain:

> the name, address, telephone number and e-mail address of the person filing the notice of intent and, if different, the person responsible for the excavation or demolition, the starting date, the anticipated duration of the excavation or demolition, the type of excavation or demolition operation to be conducted, the specific location of the proposed excavation or demolition, and whether or not explosives are anticipated to be used.

Tenn. Code Ann. § 65-31-106(b). Upon receipt of the notice of intent to excavate, an operator is required to "stake or otherwise mark, prior to the noticed time of the proposed excavation or demolition, the surface of the tract or parcel of land affected by the excavation or demolition to indicate the approximate location of all its underground utilities that may be damaged as a result of the excavation or demolition." Tenn. Code Ann. § § 65-31-108(a)(1). A utility operator is not required to indicate the depth of the utility, however, only the approximate ground location under which the utility is located. *Id.* Responsibility for determining utility depth rests with the excavator, who is required to use reasonable care.

> Excavators must use reasonable care to ascertain for themselves the exact depth of the underground utilities below the surface of the ground. If, after so ascertaining, the excavator learns that its excavation or demolition is likely to interfere with the operation of the underground utility facilities, it must again notify the affected operator of such underground utility facilities and reasonably cooperate with the operator of the underground facilities to conduct its excavation or demolition in such a way that the operations of the underground utility facilities are not disturbed or the affected underground utility facilities are placed out of the way of the proposed excavation or demolition.

Tenn. Code Ann. § 65-31-108(f).

NEGLIGENCE

In order to prove a claim for negligence, claimant must show by a preponderance of the evidence: (1) a duty owed to the plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) injury or loss; (4) cause in fact; and (5) proximate cause. *Kilpatrick v. Bryant*, 868 S.W.2d 594 (Tenn. 1993); *Lewis v. State*, 73 S.W.3d 88, 92 (Tenn.Ct.App. 2001). When the standard of conduct expected of a reasonable person is prescribed in a statute, a violation of the statute may be deemed to be negligence per se. *Whaley v. Perkins*, 197 S.W.3d 665, 672 - 673 (Tenn. 2006). To establish negligence per se in Tennessee, claimant must show that (1) " the statute violated was designed to impose a duty or

prohibit an act for the benefit of a person or the public " and that (2) " the injured party was within the class of persons that the statute was meant to protect." *Id.*

While the effect of declaring conduct negligent per se is to render the conduct negligent as a matter of law, a finding of negligence per se is not equivalent to a finding of liability per se and plaintiffs in negligence per se cases must still establish causation in fact, legal cause, and damages. *Rains v. Bend of the River*, 124 S.W.3d 580, 590 (Tenn.Ct.App. 2003).

As reflected by its name, the purpose of the UUDPA is the prevention of damage to underground facilities utilities by requiring that notice be conveyed by those intending to perform excavation or demolition to utility operators, who can then mark the location of their facilities. Inasmuch as the purpose of the act is the protection of underground utilities, it would appear that Atmos, an underground utility operator, was one of its intended beneficiaries. It is undisputed that the UUPDA imposes upon excavators a duty to notify operators and that TDOT did not provide notice to Atmos before commencing its work. It is also undisputed that Atmos's pipeline was damaged when a TDOT

worker drove a bulldozer over it. Thus, the first three elements of Atmos's claim for negligence appear to have been proven.

It is well settled, however, that "proof of negligence without proof of causation is nothing." *Mosley v. Metropolitan Government of Nashville and Davidson County,* 155 S.W.3d 119 (Tenn.Ct.App. 2004). Despite TDOT's violation of the notice requirements, Atmos must still establish that the breach of this duty was the cause in fact and legal cause of its injury and must prove its damages.

"A negligence claim requires proof of two types of causation: causation in fact and proximate cause." *Hale v. Ostrow,* 166 S.W.3d 713, 718 (Tenn. 2005). Both must be proven by the plaintiff by a preponderance of the evidence." *Kilpatrick v. Bryant,* 868 S.W.2d 594, 598 (Tenn. 1993). If testimony in a lawsuit leaves a determinative fact unresolved, then the evidence does not preponderate. *See Reserve Life Ins. Co. v. Whittemore,* 442 S.W.2d 266, 275 (Tenn.Ct.App. 1969).

Thus, Atmos bears the burden of proving that the negligence alleged – TDOT's failure to provide notification via the one-call procedure - was the cause in fact and proximate cause of the damage to its pipeline. These

are different inquiries. Cause in fact requires a determination of the cause and effect relationship between the defendant's breach of the duty of care and the plaintiff's injury. "Causation, or cause in fact, means that the injury or harm would not have occurred 'but for' the defendant's negligent conduct." *Willis v. Settle,* 162 S.W.3d 169 (Tenn.Ct.App. 2004), citing *Kilpatrick v. Bryant,* 868 S.W.2d 594, 598 (Tenn. 1993).

In order to be considered a cause in fact of an injury, the defendant's conduct must be shown to have been a "necessary antecedent" to the plaintiff's injury. *Waste Management, Inc. of Tennessee v. South Central Bell Telephone Co.,* 15 S.W.3d 425, 432 (Tenn.Ct.App. 1997). Tennessee's courts have consistently recognized that conduct cannot be a cause in fact of an injury when the injury would have occurred even if the conduct had not taken place. *Id.* at 430 -431.

In addition to showing that the defendant's conduct was the cause in fact of his injury, a plaintiff must also prove that his injuries were proximately caused by the defendant's conduct. In Tennessee, there is a three-pronged test for proximate causation: (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being

complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. *McClenahan v. Cooley,* 806 S.W.2d 767, 775 (Tenn. 1991). Thus, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. *Bennett v. Putnam County,* 47 S.W.3d 438, 443 (Tenn.Ct.App. 2000).

Atmos argues that causation was proved when Mr. Hatcher testified that he had damaged the pipeline while attempting to extract debris. According to claimant, but for TDOT's failure to use the one-call system, it would have had an opportunity both to locate the pipeline and take steps necessary to protect it. The Commission agrees. The Commission notes as well that had Atmos been offered the opportunity to locate and mark the line, as provided for by Tenn. Code Ann. § 65-31-108(f), it would still have been TDOT's responsibility to use reasonable care to ascertain the exact depth of the pipeline and to notify Atmos again if the excavation was

likely to interfere with operation of the pipeline, and work with Atmos to avoid damage. Therefore, the Commission concludes that TDOT's use of the bulldozer to remove debris in violation of the UUPDA was the cause in fact and proximate cause of the damage to Atmos's pipeline.

DAMAGES

As damages, Atmos seeks recovery of its temporary repair costs, the cost to install a new pipeline at a new location upstream of the damaged pipeline and some 24-25 feet below the river bed, and certain indirect costs and overhead charges. It is not disputed that Atmos incurred direct costs of $123,108 to make temporary repairs and to install a new pipeline at its new location. Atmos also contends, however, that in addition to its direct costs, it should be also be reimbursed for indirect costs of $152,567.31, for a total amount award of $275,675.31.

"Without proof of damages, there can be no award of damages." *Inman v. Union Planters Nat'l Bank*, 634 S.W.2d 270, 272 (Tenn.Ct.App.1982). "The party seeking damages has the burden of proving them." *Id.* at 272. Damages may not be based on speculation or conjecture. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 703 (Tenn.Ct.App. 1999).

"The purpose of compensatory damages is to compensate a party for loss or injury caused by a wrongdoer's conduct. The goal is to restore the injured party, as nearly as possible, to the position the party would have been in had the wrongful conduct not occurred." *Waggoner Motors, Inc. v. Waverly Church of Christ,* 159 S.W.3d 42, 57 (Tenn. Ct. App. 2004), *appeal denied,* (Feb. 28, 2005). However, there can be no recovery in tort unless the damages are proximately caused by an act of the defendant. *Simmons v. O'Charley's, Inc.,* 914 S.W.2d 895, 903 (Tenn. Ct. App. 1995).

While the amount of damages to be awarded in a given case is not controlled by fixed rules of law or mathematical formulas, the evidence upon which a party relies to prove damages must be sufficiently certain to enable the trier of fact, using its discretion, to make a fair and reasonable assessment of damages. *BancorpSouth Bank, Inc. v. Hatchel,* 223 S.W.3d 223, 230. The measure of damages for personal property that is capable of being repaired is the cost of repair plus loss of use. *Tire Shredders, Inc. v. ERM-North Central, Inc.,* 15 S.W.3d 849 (Tenn.Ct.App. 1999). Where repairs are necessary, in order to recover the cost of its repairs, a plaintiff "must provide a foundation that would allow a fair and reasonable assessment of

damages." *Michael Hannan et al., v. Alltel Publishing Co.*, __ S.W.3d __, 2008 WL 4755788 (Tenn. 2008).

A. Relocation of the pipeline.

TDOT argues that Atmos's damage request is unreasonable, as it would place Atmos in a better position than if the accident had not occurred by permitting Atmos to recover the value of a new pipe located at a depth some 25-30 feet lower than the 50 year old pipe it replaced. The Commission would be inclined to agree with this argument if there were proof of the average life expectancy of the pipeline and that the pipeline could have been replaced more cheaply at its original or some other location. That was not the proof, however. Without the context provided by its expected life, the fact that Atmos's pipeline was 50 years old does not permit the inference that Atmos obtained the benefit of some additional life expectancy by reason of its replacement with a new pipeline. The proof also showed that replacement of the pipeline at its current location was not feasible due to environmental concerns, testimony with which the State did not disagree.

B. Indirect and Direct Costs.

Atmos presented proof of damages of $275,675.31, which it contends represented its direct and indirect cost for replacing the pipeline and for temporary repairs performed to the damaged pipeline on May 30, 2003. Of those costs, $123,108 were direct costs for temporary repairs to the old pipe and for labor, materials, contractor charges, equipment, crew travel and lodging incurred in the course of the installation of the replacement pipeline. The remaining $152,567.31 represents fixed overhead costs that were not incurred as a direct result of the pipeline relocation, but which Atmos contends were necessary nonetheless to the work as a cost of doing business.

Black's Law Dictionary defines "overhead" as "[b]usiness expenses (such as rent, utilities, or support-staff salaries) that cannot be allocated to a particular product or service; fixed or ordinary operating costs. -- Also termed *administrative expense; office expense*." Black's Law Dictionary (8th ed. 2004). Although Atmos contends that overhead costs should be included in the cost of the repair necessitated by TDOT's negligence, no Tennessee authority is cited for this proposition and the Commission has

found no Tennessee cases that specifically address whether overhead may be recovered as an element of damages in tort.

Courts elsewhere have considered this question with varying results. *See generally* Overhead Expense As Recoverable Element of Damages, 3 A.L.R. 3d 689 (1965); 22 Am. Jur. 2d Damages, § 416 (1988)(noting that to be recoverable overhead must be reasonable and properly allocated, but may not include fixed overhead cost that would have to be paid regardless of the damage because such expenses are not a natural consequence of the defendant's negligence).

A majority of courts have recognized that overhead costs related to the repair or replacement of negligently damaged property may be recovered as damages. Explaining the basis for such an award, the Court in *U.S. v. Capital Sand Co., Inc.*, 466 F.3d 655, 658 -659 (8th Cir. 2006) noted:

> The purpose of overhead is to allow a company to recover "its general operating expenses, which are not directly allocable to a particular project." This recovery is allowable as part of the cost of repairs even if the party suffering an injury decides to make the necessary repairs itself, as any company hired to do the repairs would have included overhead charges in its bill to the injured party. "Increased overhead and indirect expenses are compensable, but only where there exists justification for awarding these costs." (Citations omitted.)

Id. at 658-659. In *Capital Sand,* the Court determined that overhead charges need only bear a "reasonable relationship" to a repair project and that such charges need not be directly connected to the repair. *Id.* at 659-660.

In *Pennsylvania Electric Co. v. Taube,* 10 Pa.D. & C.3d 744 (1978), the Court determined that overhead expenses related to the costs of operating and maintaining vehicles that had been used to make repairs had been properly allocated according to the time involved and number and type of vehicles used. The Court allowed a portion of the utility's operating and maintenance costs for all vehicles used in the utility's business, including labor, depreciation, gasoline, tires, repairs, parts, insurance and overhead related to vehicle maintenance, to be recovered as damages.

In *Central Hudson Gas & Elec. Corp. v. The Tug M/V Scott Turecamo,* 496 F. Supp.2d 331 (S.D.N.Y. 2007), a federal district court determined that a gas utility whose pipe was damaged by defendant's anchor could recover its internal labor cost and company overhead, which included a mark up of its internal labor and materials costs to apportion a share of burdens (e.g. vacation, sick days, purchasing expenses, etc.) that were incurred for all employees and material used on a company-wide basis.

Rejecting the defendant's argument that plaintiff had not demonstrated that these costs bore a direct relationship to work actually performed, the Court noted:

> Defendants' argument, however, misapprehends the nature of overhead, which constitutes "business expenses (as rent, insurance, or heating) not chargeable to a particular part of the work or product . . . ." Merriam-Webster Online Dictionary, available at http://www.m-w.com.
>
> We have no reason to doubt that the claimed overhead accurately allocates a portion of Central Hudson's general expenses to the project. In addition to the costs, such as salary or wage, health insurance and pensions, directly associated with the employees that responded to the Incident, Central Hudson no doubt sustained administrative costs whenever it purchased materials or issued paychecks. There is no reason to deny it recovery for these expenses, for they were actually incurred, despite their generic nature. (Citation omitted).

496 F. Supp.2d at 342.

Similarly, in *Hartford Electric Light Company v. Board*, 3 Conn. Cir. Ct. 323 (1965), the Court held that an electric utility could recover overhead as damages for a traffic light struck by an automobile, including payroll taxes, pension costs, vacation and holidays for employees and engineering and supervision personnel costs where it proved that its indirect costs were computed on sound accounting principles based on the company's

experience over time. *See also Baltimore & Ohio Railroad Co. v. Commercial Transport, Inc.*, 273 F.2d 447, 449 (7th Cir. 1960)(holding that a railroad could recover overhead expenses expense as calculated on a formula utilized by railroads in charging one another for repairs where property was damaged by a negligent motorist); *Duquesne Light Co. v. Rippel*, 329 Pa.Super. 289, 292, 478 A.2d 472, 473 (Pa. Super. 1984)(overhead expenses may be properly included in determining the actual cost of repairing a utility pole).

Still other Courts, however, have denied overhead costs as an element of damages in tort. In *Central Ill. Light Co. v. Stenzel*, 44 Ill.App.2d 388, 195 N.E.2d 207(1963), the Court determined that overhead costs should be denied in an action for damage to a utility transmission pole, noting:

> There is no connection between the breaking of the pole by the defendant, and salaries of the clerks in offices, the superintendents of construction, operation and line supervisors, not only in the Springfield division, but also in the Pekin and Lacon divisions of the plaintiff. The salaries or a proportionate share of the salaries of these clerks, supervisors and superintendents did not flow as a consequence of the negligence of the defendant.

195 N.E.2d 207, 211 – 212.

In *Louisiana Power & Light Co. v. Smith, Louisiana Power & Light Co. v. Smith,* 343 So.2d 367 (La.App.1977), the Fourth Circuit Court of Appeals discussed the elements that can properly be included in an award of compensatory damages when a utility company undertakes its own repairs and concluded that only those damages were recoverable which were proximately caused by the defendant's actions. The Court excluded from damages recovery portions of general operation expenses, such as salaries for office personnel, which it characterized as "remote matters from the accident" and noted would have been paid regardless of the damage. *Id.* at 369.

Recognizing that indirect expenses can constitute a portion of an injured parties damages, the Court in *Ohio Edison Co. v. Beavers,* 1997 WL 401541 (Ohio App. 11 Dist.), nonetheless determined that the costs had not been proved where the plaintiff:

> did not articulate the details of the computations for each separate category with the requisite degree of specificity, e.g., that appellant was required to pay a certain number of employees at a certain hourly rate for a certain number of hours, which resulted in a certain figure, including information concerning which classifications of employees were used and which tasks were performed.

Id. at *5.

In *Curt's Trucking Co. v. City of Anchorage*, 578 P.2d 975 (Alaska 1978), the Court recognized that indirect damages were recoverable for damage to an overhead utility line, including routine administrative overhead cost related to repair, if they are a fair and reasonable allocation of actual repair costs. Overhead costs relating to risk management or claims processing, however, were denied by the Court because they are similar to expenses incurred in preparing for litigation, and thus do not represent indirect costs of repair. *Id.* at 981.

In *U. S. v. Denver & R. G. W. R. Co.* 547 F.2d 1101, 1105 (C.A.Utah 1977), the Court recognized that reasonable overhead expenses may be recovered in a tort action when repairs have been made to damaged property by the plaintiff. To be recoverable, the amount awarded for overhead expenses must be shown as reasonably paid or incurred as part of the cost of repairs required as a result of the tortfeasor's negligence and may not be arbitrarily assessed. *Denver* involved a damages action for restoration of government land due to fire damage. The Court denied recovery of overhead expenses of 25% of the direct costs, finding that the

evidence did not show that the overhead or indirect expenses were attributable to the specific fire involved, despite proof that it was standard policy of the Bureau of Land Management to assess a pre-determined percentage of the direct costs as indirect costs. *Id.* at 105.

Similarly, in *Public Service Co. of New Mexico v. Jasso,* 96 N.M. 800, 635 P.2d 1003 (Ct.App. 1981), overhead expenses incurred in connection with the replacement of a utility pole were not allowed after the court determined that the proof did not show that the fringe benefits and other overhead expenses were incurred by the utility as a result of defendant's negligence. To the contrary, the Court noted, the evidence showed that the expenses were included in the utility's charges to its customers, the rate-payers, and were therefore not losses to the utility. 635 P.2d at 1005.

Most of the jurisdictions considering the question have determined that overhead may be included as an element of damages to recover costs of the repair or replacement of personal property, where the costs have been proved with reasonable certainty and have been assessed in accordance with sound accounting principles. *See e.g. Warren Tel. Co. v. Hakala,* 105 Ohio App. 459, 152 N.E.2d 718 (1957).

In *Dominion Resources, Inc. v. U.S.* 84 Fed.Cl. 259, 283 (Fed.Cl. 2008), the Court held that a nuclear facility had not established damages for internal labor costs with reasonable certainty where accounting records did not provide hours and amounts per employee or the tasks performed. Similarly, in *Ohio Edison v. Beavers, supra,* the Court held that indirect costs had not been proven with reasonable certainty where plaintiff had not articulated the "details of the computations for each separate category with the requisite degree of specificity, e.g., that appellant was required to pay a certain number of employees a certain hourly rate for a certain number of hours, which resulted in a certain figure, including information concerning which classifications of employees were used and which tasks were performed. 1997 WL 401541 at *5 (Ohio App. 11 Dist.).

Although Tennessee Courts have not opined as to the availability of overhead has an element of damages in tort, such damages have been discussed with respect to breach of contract occasioned by delay. In *Moore Const. Co. v. Clarksville Dept. of Electricity,* 707 S.W.2d 1, 15 (Tenn.Ct.App.1985), the Court of Appeals held that damages for breach of contract depended upon the unique facts of each case, but could include

"increased payroll and other labor costs, increased material costs, costs resulting from the loss of efficiency of the use of equipment, increased costs for extended bonding and insurance coverage, and other increased overhead items that can be reasonably attributed to the performance of the work that was delayed." 707 S.W.2d at 15. However, the Court noted, plaintiff "must present adequate proof of these damages in order to recover." *Id.*

Atmos has submitted an itemized project report that lists the categories of overhead expenses billed to the project, the amount of the charge, and the date of its assessment. Nowhere in the report, however, is there any explanation of nature of the expenses. While the difficulty of apportioning overhead costs to a particular project might be understandable, the lack of evidence of exactly what is being apportioned is not. Even if it were concluded that the nature of overhead requires that Atmos be excused from showing that these costs were directly traceable to the repair project, they must still be proved with reasonable certainty. *Overstreet v. Shoney's, Inc.* 4 S.W.3d 694, 703 (Tenn.App. 1999). The proof here, which identifies overhead expenses only by category in which they

have been placed by Atmos's accounting system, does not satisfy this requirement. Therefore, the Commission finds that claimant's overhead damages were not proven with reasonable certainty and are not compensable. Accordingly, the Commission finds that Atmos proved damages of $123,108.00.

COMPARATIVE NEGLIGENCE

The State has raised Atmos's comparative negligence as a basis for barring or reducing its recovery. The State argues that Atmos exposed its pipeline to an unreasonable risk of damage by not relocating the pipeline to a new location. TDOT cites the construction order prepared by United Cities Gas Company, Atmos's predecessor, proposing to relocate 400′ of the pipeline because it was located where the State of Tennessee regularly used a trackhoe to clean out the river. According to the construction order, the pipeline needed to be relocated upstream of the existing main to prevent future damage. TDOT argues that Atmos had prior knowledge that its pipeline was subject to damage when TDOT performed required maintenance and had gone so far as to propose the relocation of the pipeline. This project, however, was never undertaken.

Atmos presented proof that prior to the accident, the pipeline had been working fine and that there was no indication that it needed to be replaced. Atmos had a program to monitor pipeline integrity by performing leak surveys, electrical surveys and visual inspections and the pipeline in the Harpeth fell under the program. There was no proof that Atmos had deviated from any state, federal, or industry standards with respect to the location, maintenance or inspection of the pipeline.

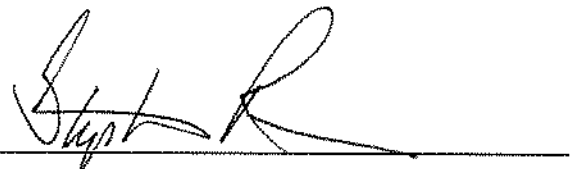
Nor does the proof demonstrate that damage to the pipeline was inevitable because of its placement and TDOT's maintenance activities. The testimony indicated that TDOT performed maintenance every six months at the location. The evidence was that although the pipeline had been damaged twice by TDOT during the course of its maintenance, such activities had been occurring at least twice a year for at least a thirty year period of time.

In *Ward v. City of Lebanon*. 273 S.W.3d 628, 634 (Tenn.Ct.App. 2008), the Court noted that the factors that must be considered in determining whether a risk is an unreasonable one include the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential

harm or injury; the importance of social value of the activity; the usefulness of the conduct; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct. *Id.* at 634. Although Atmos clearly knew that there was the possibility that the pipeline could be damaged by TDOT, it is also clear that relocation of the pipeline could only be accomplished at a relatively high cost and burden. Moreover, it is not clear that Atmos could not have successfully taken measures to mitigate the possibility of damage had TDOT provided notification via the UUDPA. Atmos could reasonably expect that the UUDPA would be complied with. Having considered this evidence, the Commission finds that the proof does not demonstrate that Atmos's failure to relocate the pipeline was unreasonable given the circumstances and therefore concludes that it was not comparatively negligent for not relocating its pipeline despite recognition of a risk posed by TDOT maintenance activities.

Therefore, the Commission finds that Atmos Energy Corporation should recover $123,108 for the damage to its pipeline.

It is so **ORDERED** this the 23rd day of March, 2009.



STEPHANIE R. REEVERS
Claims Commissioner

CERTIFICATE OF SERVICE

This is to certify that I have mailed a true and correct copy of the foregoing document to the following parties:

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This 24 of March, 2009.

Marsha Richeson

Marsha Richeson, Administrative Clerk
Tennessee Claims Commission