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Reply to:
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September 30, 2002

Chairman Sara Kyle
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

RE: IN RE: UNITED CITIES GAS COMPANY, a Division of ATMOS ENERGY CORPORATION INCENTIVE PLAN ACCOUNT (IPA) AUDIT
Docket No.: 01-00704

Dear Chairman Kyle:

Enclosed is an original and fourteen copies of the Office of the Attorney General's Response to United Cities Gas Company's Motion to Compel Further Response by the Office of the Attorney General Consumer Advocate and Protection Division to the First Data Requests from United Cities Gas Company. We request that these documents be filed with the TRA in this docket. Please be advised that all parties of record have been served copies of these documents. If you have any questions, kindly contact me at (615) 532-3382. Thank you very much.

Sincerely,

Shilina B. Chatterjee

Shilina B. Chatterjee
Assistant Attorney General

Enclosures

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IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	**DOCKET NO. 01-00704**
	)	
UNITED CITIES GAS COMPANY, a	)	
Division of ATMOS ENERGY	)	
CORPORATION INCENTIVE PLAN	)	
ACCOUNT (IPA) AUDIT	)	

RESPONSE TO UNITED CITIES GAS COMPANY'S MOTION TO COMPEL FURTHER RESPONSE BY THE OFFICE OF THE ATTORNEY GENERAL CONSUMER ADVOCATE AND PROTECTION DIVISION TO THE FIRST DATA REQUESTS FROM UNITED CITIES GAS COMPANY

The Tennessee Office of the Attorney General, through the Consumer Advocate & Protection Division ("Attorney General"), hereby responds to United Cities Gas Company's ("UCG") Motion to Compel Further Response by the Office of the Attorney General Consumer Advocate and Protection Division to the First Data Requests from United Cities Gas Company received by the Attorney General after the filing deadline on September 24, 2002.

The Attorney General has provided UCG with proper responses to their first data request. All discovery practice and procedure is governed by the Tennessee Rules of Civil Procedure. TRA Rule 1220-1-2.11 provides that discovery in contested cases before the TRA are to be "effectuated in accordance with the Tennessee Rules of Civil Procedure." Therefore, it is proper to look to the Tennessee Rules of Civil Procedure for a guide on how discovery should proceed

in this matter.

It is through the discovery process that the parties openly try "to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment.[1]" Pretrial discovery is used to uncover information that will assist in defining or clarifying the issues in the case or that will illuminate issues for a court in the administration or adjudication of the case.[2] The purpose of discovery is "to narrow and clarify the basic issues between the parties . . ."[3] In addition, the parties may use various methods of discovery. Rule 33.01 permits the parties to propound written interrogatories upon one another. TENN. R. CIV. P. 34.01 allows for requests to produce and permits inspection of documents. Where the party responding does not want to respond, the Tennessee Rules of Civil Procedure require that they may object to the request and state the reasons for the objection.[4]

The Tennessee Rules of Civil Procedure are broad and give the parties broad scope in the discovery process.[5] Rule 26.02(1) of the Tennessee Rules of Civil Procedure permits the parties to obtain any information that is relevant and not privileged.[6] Rule 26.02 was designed for the

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1 Irving Kaufman, Judicial Control Over Discovery, 28 F.R.D. 37 (p. 125) (1962).

2 6 Moore's Federal Practice, §26.41[6][a], 26-115 (3rd ed.).

3 *Interborough News Co. v. Curtis Publishing Co.* (S.D.N.Y. 1953) 14 FRD 408, 410.

4 TENN. R. CIV. P. 33.01.

5 *See Duncan v. Duncan*, 789 S.W.2d 557, 560 (Tenn. Ct. App. 1990).

6 TENN. R. CIV. P. 26.02.

discovery of facts that enables the litigants to prepare for trial free from the element of surprise.[7] Nevertheless, there are limits on discovery of information and the Tennessee Rules of Civil Procedure provide that discovery of information can be limited when it is unreasonably cumulative or duplicative, obtainable from another source or unduly burdensome.[8] UCG's Motion to Compel is clearly unnecessary and frivolous based on a proper reading of the rules concerning discovery and the responses that have already been provided to UCG.

The relevant case law in Tennessee indicates that in the event dispute arises concerning discovery, it is within the discretion of the decision maker to determine the resolution of those disputes.[9] Additionally, courts have held that the decision maker in discovery disputes "should decline to limit discovery if the party seeking the limitations cannot produce specific facts to support its request.[10]"

The Attorney General has provided UCG with answers to their data request that was filed and served upon UCG and the TRA on September 6, 2002. Rule 37.01(2) states that when a party fails to answer a question propounded under Rule 30 or 31 or a party fails to answer an interrogatory submitted under Rule 33, the discovering party may move for an order compelling an answer. Additionally, Rule 37.01(3) states that an evasive or incomplete answer is to be

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7 *Strickland v. Strickland*, 618 S.W.2d 496, 501 (1981).

8 TENN. R. CIV. P. 26.02(1).

9 *Roberts v. Blount Mem'l Hosp.*, 963 S.W.2D 744, 747 (Tenn. Ct. App. 1997); *Price v. Mercury Supply*, Co., 682 S.W. 2d 924, 935 (Tenn. Ct. App. 1984).

10 *Duncan*, 789 S.W. 2d at 561.

treated as a failure to answer. Furthermore, Rule 37 imposes a sanction for discovery abuses and violations.

Rule 37.01(4) states:

> If the motion is granted, the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the nonmoving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

In UCG's Motion to Compel, they have stated that our objections raised to Data Request #1 are "baseless." UCG seeks to have the Attorney General regurgitate the entire Memorandum of Law in Support of the Motion for Partial Summary Judgment. It would a repetitive and wasteful exercise and under Tenn. R. Civ. P. Rule 26.02(1) would be unreasonably cumulative and duplicative. The claim that the Attorney General has responded in a "broad and encompassing" manner is simply non sequitur when one examines the Motion for Partial Summary Judgment and supporting Memorandum of Law. The Memorandum of Law speaks for itself and is replete with citations of fact from the record and law that support the Attorney General's three asserted facts. The Attorney General has systematically and consistently set forth its case thoroughly and with supporting legal authority in their pleadings filed in this docket.

Additionally, in the Motion to Compel, UCG made assertions and objections concerning the deficiency of the response provided by the Attorney General to Data Request #1. However, upon review of the answer, it is clear that UCG's claim concerning the Attorney General's response is misplaced. Rule 33.02 states that an interrogatory is not necessarily objectionable

merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time. The answers provided are sufficient since all questions posed by UCG rested on the Memorandum of Law in Support of the Motion for Partial Summary Judgment. UCG's comments regarding Rule 56.06 are better left to argument against the Attorney General's Motion for Partial Summary Judgment.

UCG states in their Motion to Compel that the Attorney General has not adequately responded to First Data Request #2. Clearly, UCG is seeking information that it already has been provided not only in the Attorney General's Memorandum of Law in Support of the Motion for Partial Summary Judgment but, it was reiterated in the responses provided to UCG. The issues raised by UCG in their Motion to Compel concerns information that UCG has already been provided and also has available. UCG incorrectly believes that the Attorney General must provide citations within the transcript. It is not necessary for the Attorney General to provide all citations to the transcript in Docket No. 97-01364. Again, UCG's argument does not fit within the clearly defined structures of the discovery process. UCG is free to make this argument in response to the summary judgment motion should it have nothing else to offer.

Rule 26.02(1) states that discovery shall be limited by the court if it determines that: the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought;

or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations of the parties' resources, and the importance of the issues at stake in the litigation." It is not the duty or obligation of the Attorney General to provide exact locations of information within a transcript and be precise about references within documents when responding to the data request. Nevertheless, in several responses, the Attorney General did provide specific references within documents and transcripts. It would be absurd for the Attorney General to provide specific references and do the research and spoon feed exact locations of information within a transcript when responding to data requests.

As for UCG's request for "factual basis" of the statements made in Attorney General's Motion for Partial Summary Judgement, such a request is inappropriate. That document cites legal authority, expert testimony, and specific references to the record. Statements and conclusions that were made are based on the cited authority, record citations, experience and knowledge. The citations in the document are a sufficient explanation of the Attorney General's position and how we came to our conclusions. Further explanation of "factual basis" may constitute legal advice and would also violate the attorney work-product privilege.

The responses provided properly answer UCG's data requests and the responses are sufficient. When UCG demonstrates that there is undue hardship in obtaining the material, only then can they ask the hearing officer to compel the Attorney General to provide further responses. Rule 26.02(3) states that "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of such materials by other means." UCG has failed to show that

there is any undue hardship in obtaining the information that they seek.

UCG is incorrect in asserting that the Attorney General was required to provide supporting affidavits to support our Motion for Partial Summary Judgment. Tenn. R. Civ. P. 56.01 provides that when a party moves for summary judgment, they may move with or without supporting affidavits for a summary judgment in the party's favor upon all or any party thereof. UCG incorrectly asserts that affidavits must be provided to support our motion for summary judgment. Tenn. R. Civ. P. 56.06 states that the allegations or denials in the motion for summary judgment must set forth specific facts showing there is no genuine issue for trial and must be supported "by affidavits or as otherwise provided in this rule." The Attorney General filed a Memorandum of Law in Support of the Motion for Summary Judgment and set forth specific facts therein showing that there was no genuine issue for trial. UCG's reliance on Tenn. R. Civ. P. 56.06 is misplaced and erroneous.

In UCG's Motion to Compel, they have requested further responses to Data Request #3. UCG claims in the motion that the Attorney General does not present any factual basis in regards to a statement on p. 13 of Attorney General's Memorandum of Law in Support of Motion for Partial Summary Judgment that the indices already included the effect of transportation costs. The Attorney General admits to a lack of documentation in the industry, however does cite in its response testimony of UCG's expert witness to the fact that UCG and the industry widely accept that the indices include transportation costs. UCG's Motion to Compel conveniently omits this fact. The Motion to Compel fails to state a remedy or desire for more information in regards to Attorney General's response to data request #3 and therefore, has no legitimate purpose in the

Motion itself.

In UCG's Motion to Compel, they have asked the TRA to compel further responses to Data Request #15. The Attorney General does not believe that any further response is necessary and should not be compelled to provide anything further. Our response was complete and answered the interrogatory that UCG asked. Moreover, it is not necessary for Dr. Stephen Brown to define terms for UCG. UCG incorrectly asserts that Dr. Brown failed to define specific terms. Specifically, the terms "receipt", "delivery" and "point" were not defined since they appear several hundred times in the tariff volumes that were sent to UCG in response to your request. For example, a tabulation by pipeline company and term appears below. Based on the numerous and repeated occurrences of the terms, it is clear that they refer to the transportation of natural gas between two points, or two spots, or two zones, depending on the nomenclature used by the company, where "receipt" means "received at" and delivered means "sent from."

Pipeline Company & Tariff	Term	Number of Times Word Occurs in Tariff
COLUMBIA GULF TRANSMISSION COMPANY SECOND REVISED VOLUME NO. 1	receipt	391
COLUMBIA GAS TRANSMISSION CORPORATION SECOND REVISED VOLUME NO. 1	receipt	673
EAST TENNESSEE NATURAL GAS COMPANY, SECOND REVISED VOLUME NO. 1	receipt	687
TENNESSEE GAS PIPELINE COMPANY, FIFTH REVISED VOLUME NO. 1	receipt	1729
TEXAS EASTERN TRANSMISSION CORPORATION, SIXTH REVISED VOLUME NO. 1	receipt	1216

COLUMBIA GULF TRANSMISSION COMPANY SECOND REVISED VOLUME NO. 1	delivery	313
COLUMBIA GAS TRANSMISSION CORPORATION SECOND REVISED VOLUME NO. 1	delivery	621
EAST TENNESSEE NATURAL GAS COMPANY, SECOND REVISED VOLUME NO. 1	delivery	672
TENNESSEE GAS PIPELINE COMPANY, FIFTH REVISED VOLUME NO. 1	delivery	1825
TEXAS EASTERN TRANSMISSION CORPORATION, SIXTH REVISED VOLUME NO. 1	delivery	1336
COLUMBIA GULF TRANSMISSION COMPANY SECOND REVISED VOLUME NO. 1	point	239
COLUMBIA GAS TRANSMISSION CORPORATION, SECOND REVISED VOLUME NO. 1	point	408
EAST TENNESSEE NATURAL GAS COMPANY, SECOND REVISED VOLUME NO. 1	point	674
TENNESSEE GAS PIPELINE COMPANY, FIFTH REVISED VOLUME NO. 1	point	1619
TEXAS EASTERN TRANSMISSION CORPORATION, SIXTH REVISED VOLUME NO. 1	point	1892

UCG cannot state that such terms need further definition and that they do not have the information to deduce what the definitions mean. Clearly, this is another example of the tactics UCG is using to complicate the discovery process and create undue hardship and delay.

UCG errs by stating that we cannot make broad and encompassing citations in support of our assertions. It is incorrect to state that citations cannot be made. Moreover, throughout the proceedings, UCG has failed to cite any legal authority in their pleadings to support its statements and its pleadings merely state opinions as to various issues in the pleadings filed by the Attorney General. It is proper to provide pertinent legal authority in the pleadings to allow

the decision maker to render a proper legal decision.

UCG should not be permitted to compel further responses from the Attorney General to Data Request #21. The Attorney General responded to Data Request #21 by asserting work-product doctrine and privileges. It is proper for the Attorney General to assert a privilege in response to a data request and it constitutes a full response. Rule 26.02(5) states that "[w]hen a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection." The purpose of work-product protection is to "promote the adversary system by safeguarding fruits of attorney's trial preparations from discovery attempts of opponents."[11] In addition, those communications between parties with a common interest are also afforded protection under the work-product doctrine.[12] The Attorney General stated the privilege and provided an explanation for asserting such a privilege.

Contrary to UCG's assertion, the Attorney General's consultation and cooperative investigative work with the TRA Staff did not constitute a waiver of work-product privilege. UCG seems to suggest that there has somehow been a disclosure of information otherwise

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[11] *Edwards v. Whitaker*, 868 F. Supp. 226 (M.D. Tenn. 1994).

[12] *United States of America v. American Telephone and Telegraph Company*, 642 F.2d 1285 (1980).

protected by the privileges and immunities involved. There is clear reasoning supportive of why limited disclosure does not constitute a waiver found in the leading case of *United States v. American Telephone and Telegraph Company*, 642 F.2d 1285, 1299-1301 (D.C. Cir. 1980)(emphasis added):

> The work-product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempt of the opponent. The purpose of the work-product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. . . .A disclosure made in pursuit of such trial preparation [including preparing legal theories and planning strategies] and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege . . . .
>
> The existence of common interest between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work-product privilege. But 'common interest' should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interest in sharing the fruit of the trial preparation efforts. Moreover, with common interest on a particular issue against a common adversary, the transferee is not at all likely to disclose the work-product material to the adversary. When the transfer to a party with such common interest is conducted under a guarantee of confidentiality, the case against waiver is even stronger.

In *United States v. AT&T, Id.*, the court held there was no waiver of work-product privilege when there was a shared interest in separate litigation. The exchange of the work-product database was likened to "a consultation on tactics and strategies, the very things the work-product privilege is

designed to protect." *Id.*, quoting *Special Master's Report*. The court also equated the exchanged information with expert advice, which is within privilege. *Id.* at 1301. Similar to paid experts, expert consultation and advice from and between experienced law enforcement personnel in this case should be considered protected.

Similarly, the exchange of investigative techniques, legal strategies and theories, among governmental law enforcement agencies in this coordinated enforcement effort is of the consultative nature intended to be covered by the work-product privilege. Attorney work-product privilege is not waived by disclosure to parties anticipating potential litigation against a common adversary, even if the transferor and transferee do not later become co-parties in actual litigation. *See generally In re United Mine Workers Employee Benefit Plan Litigation*, 159 F.R.D. 307, 314, n.5 (D.C. 1994), applying *AT&T* criteria. The court in *United Mine Workers*, even found that the common interest rule is concerned with the relationship between the transferor and the transferee at the time that the confidential information is disclosed, and is not necessarily negated by the fact that the parties' interests have diverged over the course of litigation -- so that they may now even be adversarial. *Id.* at 314, *citing, United States v. Gulf Oil Company*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985).

The Attorney General and the TRA Staff shared a common interest[13] in exchanging confidential information, investigative techniques, and litigation strategies and theories in preparing the coordinated joint enforcement of the rules of the TRA, the orders of the TRA and

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[13] There is no foundation in the law for UCG's alluding to a "joint defense agreement."

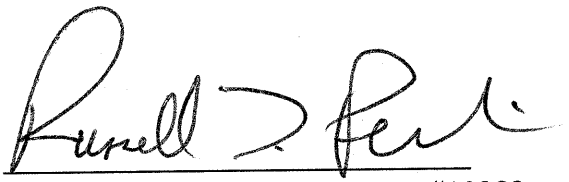
the laws of the State of Tennessee. Clearly, none of these parties had adverse interest in making the disclosures and exchanging confidential work-product information. At the time of the exchange, litigation was contemplated and possible against UCG.

The data requests and subsequent Motion to Compel appear to be more dilatory in nature, constitute an unnecessary burden and potential infringements on privileges. Discovery was designed to prevent the tactic of ambush by trial. At its heart, discovery is a process that allows neither party to employ evidence in a trial that the opposing party has never examined. There can be no ambush in this matter when the documents and facts the Attorney General relies on come from the record which is open and available for inspection to the general public.

CONCLUSION

For the reasons provided above, the Attorney General respectfully requests that the TRA deny UCG's Motion to Compel Further Responses by the Office of the Attorney General.

RESPECTFULLY SUBMITTED,



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Dated: September 30, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile (with copy by U.S. Mail) and/or hand delivery on September 30, 2002.

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