BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
DOCKET TO EVALUATE CHATTANOOGA GAS COMPANY'S GAS PURCHASES AND RELATED SHARING INCENTIVES	)	**DOCKET NO. 07-00224**

CONSUMER ADVOCATE'S RESPONSE TO CHATTANOOGA GAS COMPANY'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND FOR LACK OF SUBJECT MATTER JURISDICTION BY THE TENNESSEE REGULATORY AUTHORITY

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of Attorney General ("Consumer Advocate"), respectfully submits this response to Chattanooga Gas Company's ("CGC's" or "the Company's") motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction by the Tennessee Regulatory Authority ("TRA"). The motion is contrary to well-established law and should be denied.

Introduction

The Company has filed a motion to dismiss this case for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction by the TRA due to a lack of ripeness. (CGC's motion, pages 7-8). This response addresses in two sections the motion to dismiss for failure to state a claim upon which relief can be granted. The first section explains how CGC has misapplied the law on dismissal for failure to state a claim upon which relief can be granted, and the second

section refutes the Company's allegation that the Consumer Advocate is trying to re-litigate issues that it already has litigated. The response also addresses in two sections the motion to dismiss for lack of subject matter jurisdiction by the TRA due to a lack of ripeness. The first section establishes that the TRA's subject matter jurisdiction is continuous and that the issues in this docket are ongoing, and the second section explains why the TRA is not barred from taking action in this docket by the constitutional prohibition on laws that impair the obligations of contracts.

I. The Consumer Advocate Did Not Fail to State a Claim upon which Relief can be Granted.

A. The Company Has Misapplied the Law on Dismissal for Failure to State a Claim.

The Company argues that this case should be dismissed, because the Consumer Advocate allegedly has failed to state a claim upon which relief can be granted. (CGC's motion, page 7). A fundamental problem with CGC's argument regarding this issue is that the Company's brief disregards the law on dismissal for failure to state a claim upon which relief can be granted.

> The sole purpose of a Tenn.R.Civ.P. 12.02(6) motion is to test the sufficiency of the complaint. ... A complaint should be dismissed only when it contains no set of facts that would entitle the plaintiff to relief. ... Motions to dismiss for failure to state a claim are now rarely granted in light of the liberal pleading standards in the Tennessee Rules of Civil Procedure. ... Reviewing courts must always look to the substance of the challenged complaint rather than its form. ... Thus, when the adequacy of a complaint is tested by a Tenn.R.Civ.P. 12.02(6) motion, we must review the complaint's allegations liberally in favor of the plaintiff, taking all factual allegations therein as true. *Kaylor v. Bradley*, 912 S.W.2d 728, 731 (Tenn.Ct.App. 1995), appeal denied 1995 (internal citations omitted).

Although not required to do so either by the TRA or by the Hearing Officer assigned to this docket, the Consumer Advocate has made specific allegations that the TRA must assume to be true for the purpose of the motion to dismiss for failure to state a claim upon which relief can be granted.

On March 12, 2008, the Consumer Advocate made the following five enumerated allegations:

1. Pending verification through discovery and further independent review, the Consumer Advocate believes it is more likely than not that the customers of CGC receive less than fair compensation for the sale, lease, release, relinquishment, or assignment of gas supply, pipeline capacity and storage assets (also known as "system capacity") by CGC to its asset manager, thereby depriving customers of money that should be used to lower their natural gas utility bills.

2. Pending verification through discovery and further independent review, the Consumer Advocate believes it is more likely than not that CGC is subscribing to too much system capacity relative to its jurisdictional requirements, thereby unfairly inflating customers' natural gas utility bills by charging them for more system capacity than is required to adequately serve their gas supply needs.

3. Pending verification through discovery and further independent review, the Consumer Advocate believes it is more likely than not that the Tennessee Regulatory Authority ("TRA") should modify or establish rules, regulations, tariffs, orders, or requirements regarding transactions between CGC, its parent company and affiliated entities, such as Sequent, including but not confined to standards of conduct establishing minimum standards for accounting, record-keeping, reporting, enforcement, audit, and third-party rights. CGC and Sequent share a common ownership. Through this affiliate relationship, CGC has an economic incentive to maximize the profits of CGC, CGC's parent company or CGC's affiliates at the expense of others, including ratepayers. CGC's gas supply and storage assets have value and CGC turns over the management or use of these valuable assets to Sequent in exchange for a sharing mechanism that partially compensates CGC's ratepayers. In order to maximize profits, CGC has an economic incentive to minimize the amount of the asset

management fee shared with ratepayers for its affiliate's use of CGC's assets. Without the Authority's regulatory oversight of this affiliate relationship, "it would be a simple matter, through the device of holding companies, spinoffs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent company or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers." *Tennessee Pub. Serv. Comm'n v. Nashville Gas Co.*, 551 S.W.2d 315, 321 (Tenn. 1977).

4. Pending verification through discovery and further independent review, the Consumer Advocate believes it is more likely than not that the TRA should establish periodic audits or reviews of CGC's system capacity arrangements and gas supply plans to be performed by the TRA or by an independent consultant for the purpose of evaluating the facts relevant to analyzing efficiency and fairness.

5. Pending verification through discovery and further independent review, the Consumer Advocate believes it is more likely than not that the TRA should make changes to the request for proposals ("RFP") process or to the agreements included in the RFP process. At a minimum, the subject contracts should not contain language that violates public policy.

The law is clear that the TRA must accept the truth of these claims for the purpose of the motion to dismiss for failure to state a claim upon which relief can be granted. "A Tenn.R.Civ.P. 12.02(6) motion admits the truth of all relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts." *421 Corporation v. Metropolitan Government of Nashville and Davidson County*, 36 S.W.3d 469, 479 (Tenn.Ct.App. 2000). If the allegations reiterated above are assumed to be true, which they must be for purposes of the Company's motion, the Consumer Advocate clearly has stated a claim upon which relief can be

granted, and the Company's motion must be denied.

The Company's misapplication of the law on dismissal for failure to state a claim upon which relief can be granted is illustrated on page 11 of its motion. CGC denies that it sells, leases, releases, relinquishes, or assigns its gas supply, pipeline capacity and storage assets to its asset manager. There are at least two problems with this denial. One problem is that a motion to dismiss for failure to state a claim upon which relief can be granted admits the truth of the allegation. Therefore, for purposes of its motion, the Company *cannot* deny the truth of the allegation. The fact that CGC has denied the allegation as a part of its argument demonstrates clearly that the Company has misapplied the law on dismissal for failure to state a claim upon which relief can be granted.

Another problem with CGC's denial of the allegation is that the Company places form over substance. CGC should and probably does understand the substance of the Consumer Advocate's allegation about CGC's sale, lease, release, relinquishment or assignment of its gas supply, pipeline capacity and storage assets to the asset manager. In order for the asset manager to act as agent for CGC with respect to these assets, CGC must *in some way* sell, lease, release, relinquish or assign the assets to the asset manager. If CGC denies the asset manager access to the assets, the asset manager cannot function as CGC's agent with respect to the assets.

Under Tennessee law a party cannot elevate form over substance. *Nashville Clubhouse Inn v. Johnson*, 27, S.W.3d 542, 545 (Tenn.Ct.App. 2000), appeal denied 2000. Particularly in the context of a motion to dismiss for failure to state a claim upon which relief can be granted, elevation of form over substance is not allowed. "Reviewing courts must always look to the substance of the challenged complaint rather than its form." *Kaylor v. Bradley*, 912 S.W.2d 728, 731 (Tenn.Ct.App. 1995), appeal denied 1995. The substance of the allegation is that CGC allows the asset manager

access to the assets in order for the asset manager to function as CGC's agent with respect to the assets. If CGC prefers a verb other than sell, lease, release, relinquish or assign, such preference cannot form a basis for dismissal for failure to state a claim upon which relief can be granted.

In summary, the Company's motion is fundamentally flawed, because it misapplies the law on failure to state a claim upon which relief can be granted. The law requires that all allegations must be accepted as true for purposes of the motion to dismiss. Accepting all of the Consumer Advocate's allegations as true, there can be no doubt that the Consumer Advocate has stated a claim upon which relief can be granted. The Company's motion to dismiss for failure to state a claim upon which relief can be granted should be denied.

B. The Consumer Advocate Has Not Yet Litigated the Issues in this Docket.

The Company's argument that the Consumer Advocate is attempting to re-litigate issues that already have been litigated in other dockets is inaccurate. The Consumer Advocate consistently has sought to address asset management and capacity issues in the context of a contested case for a significant period of time. In the latest CGC rate case, on August 23, 2006, the Consumer Advocate stated, "The issues include asset management arrangements, the appropriate level of capacity subscription for which consumers are required to pay, the role of affiliates in managing and profiting from assets paid for by consumers, and the right of consumers to benefit from the assets for which they have paid." (TRA docket number 06-00175, Consumer Advocate's Response to Discovery Objections, page 4). Also in that docket, on February 9, 2007, the Consumer Advocate filed a detailed list of specific issues to be addressed by the TRA. (TRA docket number 06-00175, Consumer Advocate's Phase 2 Issues List).

In its motion to close the rate case docket, CGC said, "CGC's current ACA docket (06-

00298) has been convened as a contested case, so this docket will afford the parties the same opportunity to discuss and litigate the capacity and asset management issues." (TRA docket number 06-00175, CGC's Request to Close Docket, page 2). In an effort to get beyond the issue of which docket was most appropriate to address these issues, the Consumer Advocate petitioned to intervene in CGC's Actual Cost Adjustment ("ACA") docket on May 17, 2007. (TRA docket number 06-00298, Consumer Advocate's Petition to Intervene).

At the TRA conference on July 9, 2007, Chairman Roberson said, "With respect to the asset management and capacity release issues proposed by the Consumer Advocate and the CMA, I move that we open a new docket in which the company, the Consumer Advocate, and the CMA may intervene." (Transcript of Authority Conference, July 9, 2007, page 33, lines 9-13). Also at that TRA conference, in voting to close the ACA docket, Director Jones said, "I vote yes and also offer the comment that the Advocate feel free to file its intervention in the new docket." (Transcript of Authority Conference, July 9, 2007, page 36, lines 21-23).

The TRA opened the present TRA docket no. 07-00224 "to consider issues concerning asset management and capacity release raised by the Consumer Advocate and Protection Division of the Office of the Attorney General and the Chattanooga Manufacturers Association." (TRA docket number 06-00175, Order Closing Phase II of Docket, page 4). The December 17, 2007 TRA order also says, "The Consumer Advocate and Protection Division of the Office of the Attorney General and the Chattanooga Manufacturers Association may file a petition to intervene in the new docket for consideration of the Authority or Hearing Officer as appropriate." (TRA docket number 06-00175, Order Closing Phase II of Docket, page 4). Clearly, the present docket is the docket that the TRA specifically chose and specifically opened for the purpose of addressing the issues in this docket.

In no other docket has the Consumer Advocate had the opportunity to participate fully and to conduct discovery of the issues. The dockets upon which CGC relies to argue that the issues already have been litigated typically were convened as contested cases specifically for the limited purpose of entering a protective order. In TRA docket number 06-00298, Chattanooga Gas Company Actual Gas Cost Adjustment Filing for the Twelve Months Ended June 30, 2006, the TRA entered an order that said, "During the January 8, 2007 Authority Conference, the panel voted unanimously to convene a contested proceeding and to appoint the Authority's General Counsel or his designee to serve as Hearing Officer for the purpose of disposing of any outstanding issues relating to the entry of a protective order." (Order Convening a Contested Case and Appointing a Hearing Officer, March 16, 2007). Similar orders convening a contested case specifically for the limited purpose of entering a protective order have been entered in cases erroneously cited by CGC as having been litigated dockets. (See for example, TRA docket number 04-00402, July 1, 2005 Order; TRA docket number 04-00403, July 1, 2005 Order; and TRA docket number 05-00321, April 18, 2006 Order).

In TRA docket number 06-00298, the TRA said the following:

> During the Authority Conference, the voting panel reasoned that in light of the Authority's decision to close Phase II of Docket No. 06-00175 and open a new docket to address asset management and capacity release issues, also rendered on July 9, 2007, the stated purpose for the Consumer Advocate's intervention in this docket is no longer compelling. Further, the Consumer Advocate is able to file its intervention with the Authority in the newly opened docket and pursue its interests therein. (Order Denying Intervention and Closing Docket, December 18, 2007, pages 1-2).

The new docket that the TRA referenced as a reason to deny the Consumer Advocate's petition to intervene in TRA docket number 06-00298 is the present docket. (Order Denying

Intervention and Closing Docket, December 18, 2007, page 1, footnote 2). The TRA created the present docket specifically to address the issues in this docket.

CGC's reliance on *Consumer Advocate Division v. Tennessee Regulatory Authority*, 2001 WL 575570 (Tenn.Ct.App.) (copy attached), is misplaced. Only one aspect of that case, the breach of contract claim, was dismissed by the TRA for failure to state a claim upon which relief can be granted. *Id.* at pages *5-*6. In that case the TRA's decision not to convene a contested case was a decision of the TRA that the issues already had been litigated adequately in other dockets. *Id.* That decision was not a dismissal for failure to state a claim upon which relief can be granted. The present docket is not a situation in which the TRA has decided that a contested case is not needed. In fact, the exact opposite is true. The present docket is a situation in which the TRA already has decided that a contested case is needed. Because the present contested case was convened by the TRA, *Consumer Advocate Division v. Tennessee Regulatory Authority*, 2001 WL 575570 (Tenn.Ct.App.), is inapplicable. The Court of Appeals ruled in that case that the TRA did not abuse its discretion in declining to convene a contested case, but in the present docket the TRA has convened a contested case. The facts are not only distinguishable; they are the exact opposite.

Ultimately, regardless of the law on dismissal for failure to state a claim upon which relief can be granted, there never was any requirement that the Consumer Advocate state a claim upon which relief can be granted. This docket was created by the TRA, and the Consumer Advocate petitioned to *intervene*. In other words, the docket already existed prior to the Consumer Advocate's petition to intervene. Furthermore, the Hearing Officer assigned to this docket specifically directed the Consumer Advocate as follows: "All claims and issues to be decided by the panel should be framed in the form of a question." (Order on February 11, 2008 Status Conference, page 6). Thus, there

was never any need for the Consumer Advocate to state a claim upon which relief can be granted, because the TRA already had determined the need for the docket, and the Hearing Officer assigned to the docket merely wanted enumeration and formalization of the specific issues to be decided by the TRA.

In summary, the Consumer Advocate consistently has attempted to address the issues in the present docket in the context of a contested case, and the history discussed above supports this fact. Many of the dockets cited by CGC as contested cases were convened as contested cases specifically for the limited purpose of entering a protective order. The Company also misapplies *Consumer Advocate Division v. Tennessee Regulatory Authority*, 2001 WL 575570 (Tenn.Ct.App.). In the present case, the TRA has determined the need for the docket, which is the opposite of the TRA's decision in the case cited by CGC. In any event, there never was any real need for the Consumer Advocate to state a claim upon which relief can be granted, because this docket already existed at the time that the Consumer Advocate filed its petition to intervene, and the Hearing Officer directed the Consumer Advocate to state its claims in the form of questions. For all of these reasons, plus the fact that CGC has fundamentally misapplied the law on dismissal for failure to state a claim, the motion to dismiss for failure to state a claim upon which relief can be granted should be denied.

II. The TRA Has Not Lost Subject Matter Jurisdiction Due to a Lack of Ripeness.

A. The TRA's Subject Matter Jurisdiction is Continuous, and the Issues are Ongoing.

The Company cites Tenn. Comp. R. & Reg. 1220-1-2-.03(2)(a) as a basis for dismissal of the case, i.e., "lack of jurisdiction over the subject matter[.]" (CGC's motion, page 8). The basis for the Company's argument that the TRA lacks subject matter jurisdiction over the issues in this docket is the incorrect allegation that the issues are not ripe for decision. The TRA's subject matter jurisdiction

over the issues in this docket is continuous, and the issues are ongoing.

Tennessee law establishing the TRA's subject matter jurisdiction over the issues in this docket is clear. "The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter." Tenn. Code Ann. § 65-4-104 (in pertinent part). "The authority has the power to: Investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility as defined in § 65-4-101[.]" Tenn. Code Ann. § 65-4-117(a)(1). "The authority has the power to: After hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility[.]" Tenn. Code Ann. § 65-4-117(a)(3).

These statutory provisions giving the TRA jurisdiction over the issues in this docket must be construed liberally in favor of the TRA's jurisdiction.

> This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence of a power conferred on the authority by this chapter or chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter. Tenn. Code Ann. § 65-4-106.

The TRA has "practically plenary authority over the utilities within its jurisdiction." *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W.2d 151, 159 (Tenn.Ct.App. 1992), appeal denied 1992. Given the broad grant of authority by Tennessee law to the TRA in the realm of regulating utilities, CGC's argument that the TRA lacks subject matter jurisdiction over the issues in this docket is incorrect. The TRA's subject matter jurisdiction over the

issues in this docket is clearly established in the law and is continuous in nature.

Additionally, even if the TRA's subject matter jurisdiction is not considered inherently continuous, the issues related to the asset management agreement, the capacity issues, and the other issues in this docket are continuous concerns. The transactions and the sharing at issue occur on an ongoing basis and have ongoing impacts, and the affiliate relationship between CGC and its asset manager is continuous. Issues that are continuous or ongoing are ripe for review. *The Wilderness Society v. Kane County Utah*, 470 F.Supp. 1300, 1308, footnote 2 (D.Utah, 2006); *Natural Gas Pipeline Company of America v. Energy Gathering, Inc.*, 99 F.3d 1134 (C.A.5, 1996); *Daniels v. Bursey*, 313 F.Supp. 790, 802 (N.D.Ill, 2004); and *C.H. v. Sullivan*, 718 F.Supp. 726, 733, footnote 9 (D.Minn. 1989).

Also, CGC's argument is based on the speculative assumption that the asset management contract will be in place for the next three years. Pages 13 and 14 of the asset management agreement provide many circumstances under which one of the parties to the contract can terminate it prior to the expiration of the three-year term. In fact, the contract says, "CGC, upon written notice to the Asset Manager, may at any time demand that Asset Manager discontinue its management of the Assets that are the subject of this Agreement for any reason including, but not limited to, an Order by the TRA directing CGC to discontinue this agreement." (Contract, page 9, ¶ 11). Thus, CGC claims the right to terminate the contract at any time for any reason. Given these facts, the Company's argument that the asset management contract will be in place for the next three years is entirely speculative.

Even if the contract remains in place for the next three years, the Company has the option of petitioning the TRA to extend the contract beyond the three-year term. The Company's petition for

approval of the contract extension will be due to be filed with the TRA in *less than two years*. Given that litigation takes time, CGC's argument that the issues in this docket are not ripe for review is clearly incorrect.

Moreover, the Company takes the extreme position that the TRA lacks subject matter jurisdiction over the issues in this docket "until a new contract is placed out for bid." (CGC's motion, page 13). If the TRA accepts this argument, the TRA would not obtain subject matter jurisdiction over the issues in this docket until after it is too late for the TRA to influence the content of the new contract that is placed out for bid. This situation would be unfair to consumers. According to *Baltimore Gas and Electric Company v. United States*, 133 F.Supp.2d 721, 728 (D.Md., 2001), "a lack of ripeness occurs only if the systemic interest in postponing adjudication due to a lack of fitness of the issues for judicial determination, outweighs the hardship on the parties created by the postponement." The Company is incorrect to argue that the issues in this docket do not become ripe until after it is too late for the TRA to influence the content of the new asset management contract that is put out for bid.

In summary, the TRA's subject matter jurisdiction over the issues in this docket is well-established in law, and any doubt as to the TRA's jurisdiction is liberally construed in favor of the TRA's jurisdiction. The interests at issue in this docket are continuous or ongoing in nature, and therefore the issues are ripe for review at any time. The Company's allegation of when the issues will become ripe for review is unreasonable. The asset management contract is subject to termination under various circumstances by the parties to the contract, and CGC claims the right within the contract to terminate it at any time for any reason. Also, CGC's time for filing a petition for an extension of the contract term will be due to be filed with the TRA in less than two years. For all of

these reasons, the Company's argument that the TRA lacks subject matter jurisdiction over the issues in this docket due to a lack of ripeness is incorrect, and the motion to dismiss for lack of subject matter jurisdiction should be denied.

B. The Constitutional Bar on Laws Impairing Contract Obligations Does Not Apply.

The Company argues that the TRA is barred from changing the current asset management agreement due to the provision in the Tennessee Constitution that prohibits laws impairing the obligations of contracts. (CGC's motion, page 12). This argument is incorrect, because the contract both explicitly and implicitly includes the TRA's authority to impair the obligations of the contract, because a TRA order is not a law, and because the regulation of public utilities is within the State of Tennessee's police power.

The asset management agreement itself explicitly includes the right of the TRA to impair the contractual obligations. The contract says, "CGC, upon written notice to the Asset Manager, may at any time demand that Asset Manager discontinue its management of the Assets that are the subject of this Agreement for any reason including, but not limited to, an Order by the TRA directing CGC to discontinue this agreement." (Contract, page 9, ¶ 11). This provision of the contract establishes clearly that the contract itself explicitly accepts that the TRA has the right to impair the obligations of the contract.

According to the contract, "The Agreement is subject to all present and future valid orders, rules, and regulations of any regulatory body having jurisdiction." (Contract, page 17, ¶ 21). The contract also says, "The Parties further agree that they will carry out their respective obligations hereunder, in compliance with all valid and existing laws, orders, rules or regulatory requirements currently in existence or which may be enacted in the future." (Contract, page 17, ¶ 21). Given these

provisions of the asset management contract, in essence it is not really possible for any order by the TRA to impair the obligations of the contract, because the contract itself explicitly incorporates present *and future* orders of the TRA, and the parties contractually agree that they will comply with all TRA orders "currently in existence or which may be enacted *in the future*." (Contract, page 17, ¶ 21, emphasis added). Thus, present *and future* orders by the TRA are *included explicitly in the asset management agreement*.

Even if the contract did not explicitly include future orders of the TRA in the contract, TRA orders changing the contract would be constitutional. "It is well settled that '[t]he prohibition upon the passage of state laws impairing the obligation of contracts refers only to the law of a state, and not to judicial decisions, or the acts of state tribunals or officers under statutes in force at the time of the making of the contract the obligation of which is alleged to have been impaired.'" *Rawls v. Sundquist*, 929 F.Supp. 284, 288 (M.D.Tenn. 1996), affirmed 113 F.3d 1235 (C.A.6, 1997), quoting *Hanford v. Davies*, 163 U.S. 273, 278, 16 S.Ct. 1051, 1054 (1896).

Furthermore, even if an order of the TRA were considered to be a law, an order impairing the obligations of an asset management contract still would be constitutional. According to Tennessee law, "[a]ll contracts are subject to be interfered with, or otherwise affected by, subsequent statutes and ordinances enacted in the bona fide exercise of police power." *Profill Development, Inc. v. Dills*, 960 S.W.2d 17, 33 (Tenn.Ct.App. 1997), appeal denied 1997, quoting *Sherwin Williams Co. V. Morris*, 156 S.W.2d 350, 352 (Tenn.Ct.App. 1941). The regulation of a public utility by a state regulatory authority is within the police power of the State, and an order of such regulatory authority does not constitute an impairment of the obligations of the public utility's contracts. *Utilities Commission v. North Carolina Natural Gas Corporation*, 375 S.E.2d 147, 154 (N.C. 1989).

The law in existence at the time of the contract becomes a part of the contract. *First American National Bank of Knoxville v. Olsen*, 751 S.W.2d 417, 420 (Tenn. 1987). According to Tennessee law at the time at which the asset management agreement became effective (and now), the TRA had (and has) "practically plenary authority over the utilities within its jurisdiction." *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W.2d 151, 159 (Tenn.Ct.App. 1992), appeal denied 1992. The TRA's practically plenary authority over CGC that existed at the time that the asset management agreement became effective, and which clearly is within the State of Tennessee's police power, in essence became a part of the asset management agreement.

The Tennessee Supreme Court has utilized this type of analysis in deciding an allegation of the unconstitutional impairment of the obligations of a contract. According to the Tennessee Supreme Court,

> [T]he principle on which the doctrine of non-impairment of contracts stands is, that the law for its enforcement and execution existing at the time makes a part of the contract, so enters into it as to become a part of it, and therefore stands protected by the constitutional inhibition.
>
> By this principle the contract in this case must be held to have been entered into in view of the right on the part of the city to exercise its police powers for the benefit of all its citizens, and so this legal and constitutional right in its proper exercise, entered into the contract of the parties, or rather, it was made in subservience to the exercise of the granted favor found in the charter, as the law of its creation. The property was in the city, the contract to be executed in the city, and as a matter of course subject to the exercise of all the rightful powers of the city government, charged with the protection and guardianship of the property of the people within its limits.
>
> This being so, the only question is, was the ordinance in question an exercise of the lawful powers of the mayor and alderman, or was it for any cause void or inoperative? Its incidental effect in preventing the completion of the contract of building cannot be

considered. *Corporation of Knoxville v. Bird*, 80 Tenn. 121 (1883).

In summary, CGC cannot defeat the State of Tennessee's police powers in general, or the TRA's practically plenary authority over the public utilities within its jurisdiction in particular, by entering into contracts. The TRA's authority over CGC is part of the asset management agreement both explicitly within the contract and implicitly by operation of law. In any event, an order of the TRA is not a law within the meaning of the constitutional prohibition on laws impairing the obligations of contracts. For all of these reasons, CGC's argument that the TRA is barred by the Tennessee Constitution from entering orders that impair the obligations of the asset management agreement is incorrect. Because the TRA has clearly-established legal authority establishing its subject matter jurisdiction over the issues in this docket, and because the TRA is not constitutionally barred from impairing the obligations of the asset management contract, CGC's motion to dismiss for lack of subject matter jurisdiction should be denied.

Conclusion

This case is not subject to dismissal for failure to state a claim upon which relief can be granted, and the TRA does not lack subject matter jurisdiction over the issues in this docket due to a lack of ripeness. The Company's arguments to dismiss this case are incorrect, and the motion to dismiss should be denied. The Consumer Advocate respectfully asks the TRA to deny CGC's motion.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the parties of record via U.S. Mail, electronic mail, facsimile, hand delivery, or commercial delivery on April 22, 2008.

Stephen R. Butler

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Westlaw.

Not Reported in S.W.3d
Not Reported in S.W.3d, 2001 WL 575570 (Tenn.Ct.App.)
(Cite as: Not Reported in S.W.3d, 2001 WL 575570)

Consumer Advocate Div. ex rel. Tennessee Consumers v. Tennessee Regulatory Authority
Tenn.Ct.App.,2001.
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
CONSUMER ADVOCATE DIVISION, on behalf of TENNESSEE CONSUMERS,
v.
TENNESSEE REGULATORY AUTHORITY and Bellsouth Telecommunications, Inc.
No. M1999-01170-COA-R12-CV.

May 30, 2001.

An Appeal from the Tennessee Regulatory Authority, No. 99-00391;Sara Kyle, Director.

Paul G. Summers, Attorney General & Reporter; Michael Moore, Solicitor General; and L. Vincent Williams, Assistant Attorney General, for appellant, Consumer Advocate Division.
J. Richard Collier and Julie Woodruff, Nashville, TN, for appellee, Tennessee Regulatory Authority.
Guy M. Hicks and Patrick W. Turner, Nashville, TN, for appellee, BellSouth Telecommunications, Inc.

LILLARD, J., delivered the opinion of the court, in which CRAWFORD, P.J., W.S. and HIGHERS, J., joined.

OPINION

LILLARD.
***1** This is an appeal from an order by the Tennessee Regulatory Authority. The Tennessee Regulatory Authority denied the Consumer Advocate Division's request for a declaratory order as to the applicability of Tennessee Code Annotated §§ 65-5-208(a) and 65-5-209 to a telephone company's proposed tariff. It also denied the Consumer Advocate Division's request for a declaratory order as to the applicability of a previous order by the Authority approving the telephone company's application for price regulation, dismissed its claim for breach of contract, and denied its request for injunctive relief. Consequently, the proposed tariff was approved. The Consumer Advocate Division appeals. We affirm.

This case is an appeal of an order by the Tennessee Regulatory Authority. The appellant, the Consumer Advocate Division (the "Consumer Advocate"), is a division of the Office of the Attorney General & Reporter which represents the interests of Tennessee consumers of public utilities. *See*Tenn.Code Ann. §§ 65-4-118(c), 65-5-210(b) (Supp.2000). The appellee Tennessee Regulatory Authority ("Authority")is vested with "general supervisory and regulatory power, jurisdiction, and control over all public utilities."Tenn.Code Ann. § 65-4-104. The predecessor to the Authority was the Tennessee Public Service Commission ("Commission"). BellSouth Telecommunications, Inc. ("BellSouth") is a public utility providing telecommunication services in Tennessee.

In October 1994, BellSouth filed with the Commission a proposed tariff. BellSouth sought to amend its existing tariff to include a charge for directory assistance. The Consumer Advocate filed a petition to intervene, in opposition to the tariff. The Consumer Advocate's petition to intervene was granted by the Commission. On January 5, 1995, the Commission approved BellSouth's proposed tariff, on the condition that BellSouth file an amended tariff meeting certain conditions by February 1, 1995. BellSouth failed to file the amended tariff by the required date. Consequently, the Commission voted to reconsider the January order conditionally approving the tariff.

Before the Commission reconsidered BellSouth's proposed tariff, BellSouth and the Consumer Ad-

vocate entered into a settlement agreement altering the proposed directory assistance charge so that the net effect of the charges would be as close to zero as possible. The proposed settlement agreement stated that the agreement would be presented and recommended to the Commission, and recognized that the Commission had "the authority to approve or disprove tariffs, rates, and related issues."On February 3, 1995, BellSouth and the Consumer Advocate submitted to the Commission the settlement agreement and the revised tariff. They asked that the agreement be placed on the agenda for the Commission's next conference. The Commission, however, took no further action on the proposed agreement and revised tariff.

In June 1995, the Tennessee Legislature enacted new legislation, The 1995 Tennessee Telecommunications Act, which substantially altered the manner in which public utilities in Tennessee are regulated. *See* 1995 Tenn. Pub. Acts, ch. 408; Tenn.Code Ann. § 65-5-201*et seq.* The Act created a new procedure by which companies such as BellSouth could elect price regulation. It also terminated the Commission effective June 30, 1996 and created the Authority effective July 1, 1996. *See* 1995 Tenn. Pub Acts, ch. 305. As a result, on June 28, 1996, the Commission entered a general order terminating all pending business effective June 30, 1996. This included BellSouth's proposed settlement agreement and revised tariff.

***2** On July 18, 1996, the new Authority entered an administrative order accepting recommencement of cases pending at the sunset of the Commission. However, the Consumer Advocate did not recommence BellSouth's case. In August 1996, the Authority sent a letter to BellSouth informing BellSouth that its 1994 filing seeking approval of the directory assistance tariff was closed and "*will not* become effective." (emphasis in original).

Citing changes in the regulatory landscape, BellSouth sent a letter dated May 30, 1996 to the Consumer Advocate, informing the Consumer Advocate that its October 1994 tariff had been [FN1]The letter asserted that changes in the regulatory environment and the withdrawal of the tariff now made the settlement agreement between the parties "moot." The letter stated that BellSouth had no immediate plans to make a similar filing, and that before it made such a filing, it would contact the Consumer Advocate "to discuss [the] matter in a manner consistent with the negotiation procedure which produced the draft settlement agreement."

> FN1. As the Authority points out in its brief, it is unclear whether BellSouth notified the Commission of the withdrawal of the tariff. There is nothing in the record confirming the withdrawal of the tariff, and, in its complaint the Consumer Advocate alleges "[t]hat no hearing or motion withdrawing the tariff was ever held."

Meanwhile, in June 1995, BellSouth filed an application with the Commission for price regulation. Its application for price regulation was finally approved in December 1998 [FN2]. Subsequently, on June 1, 1999, BellSouth filed a proposed tariff to begin charging $0.29 for each directory assistance call. On June 15, 1999, the Consumer Advocate filed a petition with the Authority seeking declaratory orders and injunctive relief. In the petition the Consumer Advocate sought a declaratory order as to the applicability of Tennessee Code Annotated sections 65-5-208(a) [FN3] and 65-5-209 [FN4] to BellSouth's proposed tariff, as well as a declaratory order as to whether the Authority's order approving BellSouth's application for price regulation was applicable to the 1995 settlement agreement between the Consumer Advocate and BellSouth. The Consumer Advocate alleged that, under sections 65-5-208(a) and 65-5-209, directory assistance is a basic service for price regulation purposes, and, therefore, under the statutes, BellSouth was precluded from increasing its price for a period of four years after BellSouth became subject to price regulation. The petition also alleged that BellSouth breached a contract with the Consumer Advocate by failing to contact the Consumer Advocate before

BellSouth filed the 1999 proposed tariff, pursuant to the 1995 settlement agreement. The complaint requested that the charge for directory assistance be enjoined until resolution of the Consumer Advocate's breach of contract claim.

FN2. The Commission had tentatively approved BellSouth's application to elect price regulation in January 1996 with the condition that BellSouth reduce its rates by fifty-six million. BellSouth appealed. In *BellSouth Telecommunications, Inc. v. Greer,* 972 S.W.2d 663 (Tenn.Ct.App.1997) (*perm. to appeal denied* June 15, 1998), the Court of Appeals reversed the Commission and remanded the cause for approval of the application. *Id.* at 682.On remand the Authority approved the price regulation plan. The Authority's order was subsequently affirmed on appeal. *See Consumer Advocate Div. v. Tennessee Regulatory Auth.,* No. M199902151COAR12CV, 2000 WL 13794 (Tenn.Ct.App. Jan. 10, 2000), *reh'g denied* Feb. 11, 2000.

FN3.Section 65-5-208(a) provides:

> (a) Services of incumbent local exchange telephone companies who apply for price regulation under § 65-5-209 are classified as follows:
>
> (1) "Basic local exchange telephone services" are telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two-way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on June 6, 1995, or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on June 6, 1995. Rates for these services shall include both recurring and nonrecurring charges.
>
> (2) "Non-basic services" are telecommunications services which are not defined as basic local exchange telephone services and are not exempted under subsection (b). Rates for these services shall include both recurring and nonrecurring charges.

FN4.Section 65-5-209 states in pertinent part:

> (f) Notwithstanding the annual adjustments permitted in subsection (e), the initial basic local exchange telephone services rates of an incumbent local exchange telephone company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange telephone company becomes subject to such regulation....
>
> (h) Incumbent local exchange telephone companies subject to price regulation may set rates for non-basic services as the company deems appropriate, subject to the limitations set forth in subsections (e) and (g), the non-discrimination provisions of this title, any rules or orders issued by the authority pursuant to § 65-5-208(c) and upon prior notice to affected customers....

After receiving the Consumer Advocate's petition, the Authority suspended BellSouth's tariff for thirty days. The Authority then considered the Consumer Advocate's petition at its regularly scheduled July 27, 1999 conference. After hearing oral arguments, the Authority deferred action on the tariff, expressing concern about charging elderly persons for dir-

ectory assistance. Subsequently, BellSouth filed an amended proposed tariff. Thereafter, on July 29, 1999, the Authority dismissed the Consumer Advocate's petition and complaint, *sua sponte,* and approved BellSouth's amended tariff.

***3** In its July 29 order, the Authority found that there was no basis for granting the declaratory relief sought by the Consumer Advocate. The Authority concluded that "the classification of BellSouth's tariff to implement a charge for directory assistance as a 'non-basic' service [was] consistent with [section] 65-5-208(a)(1)" as determined in the Authority's prior decision in *United Telephone-Southeast, Inc. Tariff No. 96-201, To Reflect Annual Price Cap Adjustment,* Docket No. 96-01423 (Sept. 4, 1997).FN5 In this prior decision, the Authority concluded that directory assistance was a non-basic service under section 65-5-208(a). In the July 29 order, the Authority also declined to a convene a contested case, asserting that the Consumer Advocate had already litigated the same issues in two cases previously decided by the Authority, and which were pending at that time before the Court of Appeals.[FN6]The Authority found that the proposed settlement agreement was not binding on either the Consumer Advocate or BellSouth because it was never approved by the Commission, it pre-dated the 1995 Tennessee Telecommunications Act, and because the Consumer Advocate did not recommence the action regarding the proposed agreement after the Commission ceased to exist. The Authority concluded, therefore, that there was no basis for issuing a declaratory order as to the applicability of the proposed agreement to the tariff. From this order, the Consumer Advocate now appeals.

> FN5. This case arose out of a tariff filed by United Telephone-Southeast, Inc. seeking to increase in rates for non-basic services. At issue was the methodology used by United Telephone-Southeast to determine the amount of the proposed increase. The Authority found that the method used by United Telephone-Southeast complied with the section 65-5-209(e) and approved the tariff. The Consumer Advocate appealed, and in *Consumer Advocate Division v. Tennessee Regulatory Authority,* No. M1999-01699-COA-R12-CV, 2000 WL 1514324 (Tenn.Ct.App. Oct. 12, 2000) (hereinafter *United Telephone*), this Court affirmed.
>
> FN6. In both cases the Authority's decision was affirmed. *See Consumer Advocate Div.,* 2000 WL 13794 at *3;*United Telephone,* 2000 WL 1514324 at * 5 & n. 3.

Our review of this case is governed by Tennessee Code Annotated section 4-5-322(h), which sets forth the standard of review for the decision of an agency such as the Tennessee Regulatory Author- ity:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn.Code Ann. § 4-5-322(h)(1998).

On appeal, the Consumer Advocate argues that the Authority did not properly interpret Tennessee Code Annotated sections 65-5-208(a) and 65-5-209 as they relate to charges for directory assistance under an incumbent local exchange telephone company price regulation plan. The Consumer Advocate contends that, under the statutes, BellSouth was precluded from increasing its rate for directory assistance for four years after the company became subject to price regulation,[FN7] because directory assistance is a basic service as defined in section 65-5-208(a), and the ordinary and natural meaning of the terms "usage," "provision," and "recurring and nonrecurring charges" include directory assistance.

> FN7.Section 65-5-209(f) precludes increasing rates on a basic service for four years after a local exchange telephone company becomes subject to price regulation:
>
> > (f) Notwithstanding the annual adjustments permitted in subsection (e), the initial basic local exchange telephone services rates of an incumbent local exchange telephone company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange telephone company becomes subject to such regulation....

***4** In the order which is the subject of this appeal, the Authority did not reach the merits of the issues raised by the Consumer Advocate. Instead, the Authority denied the Consumer Advocate's petition seeking declaratory relief and declined to convene a contested case because it determined that the issues raised by the Consumer Advocate had been determined in previous cases. The order also dismissed the Consumer Advocate's complaint, *sua sponte,* for failure to state a claim. The Consumer Advocate does not argue, under Tennessee Code Annotated § 4-5-322(h) that the Authority's decision was in violation of constitutional or statutory provisions, in excess of its statutory authority, made by unlawful procedure, or that it is unsupported by substantial material evidence. Therefore we surmise that, by our statutory standard of review, the issue on appeal is whether the Authority's decision to decline to grant declaratory relief, decline to convene a contested case, and to dismiss the complaint for failure to state a claim was an abuse of the Authority's discretion.

The Consumer Advocate argues first that the Authority's order should be reversed because the Agency failed to provide a sufficient statement of the underlying facts to support its findings, as required by Tennessee Code Annotated § 4-5-314(c). The Consumer Advocate argues that the Authority failed to detail facts regarding why directory assistance is not a basic service as defined in section 65-5-208(a); what the terms usage, provision, or charges mean as they relate to local basic exchange service; whether the United Telephone-Southeast tariff in the Authority's prior decision was sufficiently similar to the BellSouth tariff so that the Authority's decision in that matter would be applicable in this case; the relevant issues and part of the decision in the two cases named by the Authority in its order related to this case; and why the 1995 agreement was not binding.

An agency, when issuing a final order, must provide a concise and explicit statement of the underlying facts supporting the agency's findings.Tenn.Code Ann. § 4-5-314(c). Findings of fact made by the agency should be based exclusively on the evidence of the record and on matters noted in the proceeding. Tenn.Code Ann. § 4-5-314(d). Exactness in form and procedure is not required; rather, the findings based on the evidence need only be specific and definite enough so that a reviewing court may determine the pertinent questions of law and whether the agency's general findings should stand, particularly when the findings are material facts at issue. *See Levy v. State of Ten-*

nessee Bd. Of Exam'rs for Speech Pathology and Audiology, 553 S.W.2d 909, 911-12 (Tenn.1977) (quoting *State Bd. of Med. Exam'rs v. Grandy,* 149 S.E.2d 644, 646 (S.C.1966))."The sufficiency of an agency's findings of fact must be measured against the nature of the controversy and the intensity of the factual dispute."*CF Industries v. Tennessee Pub. Serv. Comm'n,* 599 S.W.2d 536, 541 (Tenn.1980).

***5** Therefore, in order to comply with the requirements of section 4-5-314, an agency need only set forth facts sufficient to support its legal conclusions and to afford the Court an effective review of its findings. In denying the Consumer Advocate's petition, the Authority asserted that there was no basis for issuing the requested declaratory order as to the applicability of sections 65-5-208 and 65-5-209 or for convening a contested case because the issues raised by the Consumer Advocate had been addressed by the Authority in prior decisions. The Authority stated that it had previously ruled in *United Telephone-Southeast* that directory assistance was classified as a non-basic service, rejecting the same argument the Consumer Advocate now advances in this proceeding, namely, that directory assistance is a basic service under the statutory term "usage." The Authority then dismissed the Consumer Advocate's claim for breach of contract, finding that it failed to state a claim, based on the following facts: that the proposed agreement had required, but never received, approval of the Commission; the Consumer Advocate's failure to preserve the docket which included the agreement; and the fact that the 1995 Tennessee Telecommunications Act expressly established what constituted basic and non-basic services and superseded any preexisting agreement or tariff which classified services to the contrary. The Authority noted that since the agreement was not binding, it had no effect on BellSouth's proposed tariff. Under these circumstances, the Authority's decision was supported by a sufficient statement of the underlying facts that served as the basis for its decision.

We next address whether the Authority abused its discretion by refusing to issue the requested declaratory relief and by refusing to convene a contested case. The decision of whether to issue a declaratory order is within an agency's discretion. Tenn.Code Ann. § 4-5-223(a)(2) (1998). Upon an agency's refusal to issue a requested declaratory order, an affected person may file a lawsuit in the Chancery Court of Davidson County. Tenn.Code Ann. § 4-5-225 (1998).

As noted above, the Authority based its decision not to issue a declaratory order as to the applicability of sections 65-5-208 and 6-5-209 on the fact that the Consumer Advocate sought a ruling on issues that had been addressed by the Authority in a previously contested case, *United Telephone-Southeast.*Under these circumstances, we cannot conclude that the Authority abused its discretion in refusing to issue the requested declaratory relief.

The Consumer Advocate also sought a declaratory order as to the applicability of the 1995 proposed settlement agreement between the parties. The Authority's refusal to grant declaratory relief as to the applicability of the proposed settlement stems largely from its determination that the proposed agreement was not binding on either party. The Authority found that the proposed agreement was contingent upon its approval by the Commission, approval which was never granted. The proposed agreement expressly contemplated acceptance by the Commission, and acknowledged that the Commission had the authority to "approve or disprove tariffs, rates, and related issues."Moreover, the classification of services in the 1995 Tennessee Telecommunications Act supersedes classifications in any prior agreements or tariffs. In addition, the proposed agreement did not survive the dismissal of the 1994 tariff docket. *See Sandstrom v. Chemlawn Corp.,* 904 F.2d 83 (1st Cir.1990); *Frank Rudy Heirs Assoc. v. Sholodge,* 967 S.W.2d 810 (Tenn.Ct.App .1997). The Consumer Advocate argues that the May 30th letter shows that BellSouth contemplated the sunset of the Commission and in-

dicates that BellSouth would negotiate regarding future filings. Regardless, the proposed agreement was expressly contingent on the approval of the Commission. Consequently, we find no error in the Authority's dismissal of the Consumer Advocate's breach of contract claim for failure to state a claim, and we find no abuse of discretion in its decision not to issue declaratory relief as to the applicability of the proposed agreement on the 1999 tariff.

***6** Finally, the Consumer Advocate argues that the Authority erred in refusing to convene a contested case. The Authority has the discretion to decide whether to convene a contested case to consider complaints filed with the agency. *See Consumer Advocate Div. v. Greer,* 967 S.W.2d 759, 763-64 (Tenn.1998). The Authority's decision in this case was based on its finding that the issues presented by the Consumer Advocate in its petition had been previously decided by the Authority, and that the Consumer Advocate's breach of claim contract failed to state a claim because the proposed agreement was based on a contingency that never occurred. Under these circumstances, we find no abuse of discretion in the Authority's decision.

In sum, we affirm the Authority's decision to refuse to issue the requested declaratory relief, the dismissal of the breach of contract claim for failure to state a claim, and the decision to decline to convene a contested case. All other issues raised in this appeal are pretermitted.

The decision of the Tennessee Regulatory Authority is affirmed. Costs are taxed to the appellant, the Consumer Advocate Division and its surety, for which execution may issue if necessary.

Tenn.Ct.App.,2001.
Consumer Advocate Div. ex rel. Tennessee Consumers v. Tennessee Regulatory Authority
Not Reported in S.W.3d, 2001 WL 575570 (Tenn.Ct.App.)

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