

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESEE

June 20, 2008

IN RE:

DOCKET TO EVALUATE

CHATTANOOGA GAS COMPANY'S GAS
PURCHASES AND RELATED SHARING
INCENTIVES

DOCKET NO.
07-00224

ORDER DENYING MOTION TO DISMISS

This matter came before Chairman Eddie Roberson, Director Sara Kyle, and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on May 19, 2008 for consideration of *Chattanooga Gas Company's Motion to Dismiss* ("Motion to Dismiss") filed on April 8, 2008.

RELEVANT PROCEDURAL BACKGROUND

On July 9, 2007, the panel assigned to *In re: Petition of Chattanooga Gas Company for Approval of Adjustment of Its Rates and Charges, Comprehensive Rate Design Proposal and Revised Tariff* (Docket No. 06-00175) voted unanimously to approve *Chattanooga Gas Company's Request to Close Docket* and determined that a separate docket would be opened in which to consider matters raised by the intervening parties,¹ specifically, issues related to asset management and capacity release.² Additionally, the panel voted to permit the parties that had intervened in

¹ The Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") and the Chattanooga Manufacturers Association were granted intervention in Docket No. 06-00175.

² *In re: Petition of Chattanooga Gas Company for Approval of Adjustment of Its Rates and Charges, Comprehensive Rate Design Proposal and Revised Tariff*, TRA Docket No. 06-00175, *Order Closing Phase II of Docket* (December 17, 2007).

Docket No. 06-00175 to file a petition to intervene in the new docket for the consideration of the Authority or Hearing Officer, as appropriate.³

On September 26, 2007, the Authority opened Docket No. 07-00224 for the evaluation of Chattanooga Gas Company's ("CGC" or "Company") gas purchases and related sharing incentives. On December 28, 2007, the Consumer Advocate and Protection Division of the Office of the Attorney General filed its *Petition to Intervene* in the docket. On January 14, 2008, at a regularly scheduled Authority Conference, the panel voted unanimously to convene a contested case proceeding and to appoint the Authority's General Counsel or his designee to act as the Hearing Officer for the purpose of preparing this matter for hearing, including establishing an issues list and procedural schedule, ruling on intervention requests and entering a protective order, if necessary.

On January 30, 2008, the Hearing Officer issued a *Notice of Status Conference* setting a Status Conference for February 11, 2008. During the Status Conference on February 11, 2008, the Hearing Officer granted the Consumer Advocate's *Petition to Intervene*, adopted the Procedural Schedule proposed by the parties with slight modification, ordered the filing of a Statement of Claims and Issues by the Consumer Advocate along with a response thereto by CGC, and set a briefing schedule for the oral motion of CGC to accumulate and defer litigation costs associated with its participation in the docket. On February 19, 2008, an *Order on February 11, 2008 Status Conference* memorializing the Hearing Officer's decisions was issued in the docket.

The Consumer Advocate filed its *Consumer Advocate's Statement of Claims and Issues* on February 20, 2008. On February 25, 2008, CGC filed its *Chattanooga Gas Company's Response to the Consumer Advocate's Statement of Claims and Issues*. On February 27, 2008, the Hearing Officer issued a *Notice of Status Conference* setting a Status Conference on March 7, 2008.

³ *Id.*

On February 28, 2008, the Consumer Advocate filed *Consumer Advocate's Motion for Leave to Serve More than Forty (40) Discovery Requests* with the Authority. Also, on February 28, 2008, CGC filed a *Motion to Accumulate and Defer Litigation Costs*.

On March 4, 2008, the Company and the Consumer Advocate filed a proposed *Agreed Protective Order*, which was adopted by the Hearing Officer and entered in the docket on the same date. On March 5, 2008, the Consumer Advocate filed a *Response to CGC's Motion to Accumulate & Defer Costs*. Also, CGC filed *CGC's Response to the Consumer Advocate's February 28th Filing* opposing the Consumer Advocate's request for additional discovery.

On March 11, 2008, the Hearing Officer issued an *Order On March 7, 2008 Status Conference*. On March 12, 2008, the Consumer Advocate filed its *Identification of Issues, Claims and Remedies*. On March 14, 2008, Chattanooga Gas filed its *Response to Consumer Advocate's March 12, 2008 Identification of Issues, Claims and Remedies*. On March 17, 2008, the Hearing Officer filed an *Order Setting Issue List*. On March 18, 2008, the Consumer Advocate filed its *Motion to Serve More than Forty (40) Discovery Requests*. On March 28, 2008, the Hearing Officer filed the *Order Granting the Consumer Advocate's Motion for Leave to Serve More than Forty (40) Discovery Requests*.

On April 8, 2008, CGC filed its *Motion to Dismiss*, requesting that the TRA dismiss the claims asserted against it by the Consumer Advocate and the issues set forth in the final Issues List attached to the *Order Setting Issue List* issued by the Hearing Officer in this docket. On April 18, 2008, the Hearing Officer filed the *Order Granting Joint Motion To Revise Procedural Schedule*. The *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* ("Consumer Advocate's Response") was filed on April 22, 2008. Also on April 22, 2008, the Consumer Advocate filed a *Motion to Compel* the

responses of certain Discovery Requests. A *Notice of Status Conference* was issued by the Hearing Officer on April 18, 2008 for a Status Conference to be held on April 24, 2008 to address any disputes that may exist regarding the first round of discovery. At the regularly scheduled Authority Conference held on May 5, 2008, the panel heard oral argument from the parties on the *Motion to Dismiss*.

POSITION OF THE PARTIES

A. CGC's *Motion to Dismiss*

In CGC's *Motion to Dismiss*, CGC requests that the TRA dismiss the claims asserted by the Consumer Advocate and the issues set forth in the final Issues List attached as Exhibit A to the Hearing Officer's March 17, 2008 Order. First, CGC argues that the Consumer Advocate failed to state a claim for which relief can be granted. Second, CGC states that the Consumer Advocate's claims should be dismissed because of failure to state a claim that is ripe and upon which relief can be granted.⁴

CGC claims that the TRA has already settled the claims and issues brought forth by the Consumer Advocate in previous dockets and there is no need to re-litigate the claims and issues in this docket. Specifically, CGC argues that the TRA has taken action regarding CGC's gas capacity assets and asset management agreements in its annual ACA audit dockets for over the past five years and the claims and issues raised by the Consumer Advocate have already been litigated and determined by the TRA in other contested case proceedings. Further, CGC argues that the TRA has previously addressed the RFP issue in prior dockets (Docket Nos. 04-00402 and 08-00012) and that these issues should be dismissed from the current docket. CGC states that the new asset management agreement was approved by the TRA on February 25, 2008 in Docket No. 08-00012 and no evidence was presented to show that the RFP procedures were not fair and reasonable or

⁴ *Motion to Dismiss*, p. 1 (April 8, 2008).

why revisions to the RFP procedures were necessary to protect consumers. CGC suggests that it would be more appropriate to revisit the RFP procedures in the future upon a showing of changed circumstances.⁵

CGC argues that the claims should be dismissed pursuant to Tenn. Comp. R. & Reg. 1220-1-2-.03(2)(a) which allows the Authority to dismiss a case for lack of jurisdiction. CGC argues that the TRA lacks subject matter jurisdiction over the issues in this docket as the claims are not ripe and thus can not create a case or controversy. The TRA approved the new Asset Management Agreement which is legally binding for at least three years, and any issues concerning future asset management arrangements are only hypothetical. CGC states that in *Consumer Advocate Division v. Tennessee Regulatory Authority*, 2001 WL 575570 (Tenn. Ct. App.), the Court of Appeals upheld the dismissal of the Authority's decision not to relitigate issues that were previously decided by the TRA. In that docket, the TRA dismissed a docket for failure to state a claim upon which relief can be granted and the Court of Appeals upheld the Authority's decision.⁶

CGC also argues that the new asset management contract is a binding contract upon the TRA's approval and cannot be retroactively changed by the TRA. CGC argues that the TRA is barred under the Tennessee Constitution from impairing its contractual rights.⁷

CGC requests that in the event that the TRA does not dismiss the Consumer Advocate's claims in this docket, that the TRA alternatively limit this docket solely to the Consumer Advocate's claim that CGC has excess capacity.⁸

⁵ *Id.*, pp. 8-10.

⁶ *Id.*, pp.7-8.

⁷ *Id.*, p. 12.

⁸ *Id.*, pp. 14-15.

B. Consumer Advocate's Response

The Consumer Advocate argues that this motion is contrary to well-established law and should be denied. The Consumer Advocate argues that the purpose of a Tenn. R. Civ. P. 12.02(6) motion is to test the sufficiency of a complaint and that a complaint should be dismissed only when it contains no set of facts that would entitle the plaintiff to relief. Additionally, the Consumer Advocate argues that courts rarely grant motions to dismiss in light of liberal pleading standards in the Tennessee Rules of Civil Procedure. When the adequacy of a complaint is tested by a Rule 12.02(6) motion, courts 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).⁹

The Consumer Advocate states that they did intervene in past dockets when the TRA considered these issues. However, they have been unable to address the issues. The Consumer Advocate states that they are not attempting to relitigate the claims and issues in this docket. The Consumer Advocate intervened in the most recent CGC audit docket and the TRA denied the intervention and determined that it would better to open another docket for the purposes of addressing the Consumer Advocate's and Chattanooga Manufacturers Association's ("CMA") issues concerning asset management and capacity.¹⁰

The Consumer Advocate argues that it has been attempting to address asset management and capacity issues since the filing of CGC's rate case in 2006. In Docket No. 06-00175, the intervenors wanted to be heard on CGC's asset management and capacity release issues. Both the Consumer Advocate and CMA agreed that an ACA audit docket would be an acceptable forum for litigation of the issues. However, since the ACA audit docket (Docket No. 06-00298) was

⁹ *Consumer Advocate's Response*, p. 2.

¹⁰ *Id.*, p. 7.

completed, introduction of additional issues would have created unnecessary delay in the resolution of the audit docket. Therefore, the TRA panel determined that a separate docket addressing asset management and capacity release issues proposed by the Consumer Advocate and CMA should be opened.¹¹

The Consumer Advocate argues that CGC misapplies *Consumer Advocate Division v. Tennessee Regulatory Authority*, 2001 WL 575570 (Tenn. Ct. App.), for the proposition that the Court of Appeals upheld the dismissal by the TRA of a case, for failure to state a claim upon which relief can be granted. The dismissal of the breach of contract claim was only one aspect of the case. In that case, the decision of the TRA not to convene a contested case was because the issues had already been litigated in other dockets. In the present case, the TRA opened this contested case to evaluate Chattanooga Gas Company's gas purchases and related sharing incentives.¹²

The Consumer Advocate argues that the TRA has the authority to impair obligations of the Asset Management Agreement between CGC and Sequent under its police powers. Courts have stated that "all 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), 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). Therefore, the TRA's legal authority over CGC and its ability to impair the contractual obligations between CGC and Sequent are not only explicitly stated in the contract but also exist by operation of the law.¹³

¹¹ *Id.*, pp. 6-7.

¹² *Id.*, p. 9.

¹³ *Id.*, pp. 14-17.

FINDINGS AND CONCLUSIONS

A. TRA's Statutory Authority

Under Tenn. Code Ann. § 65-4-117(a)(1), 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 Tenn. Code Ann. § 65-4-101. Additionally, under Tenn. Code Ann. § 65-4-117(a)(3), the Authority has power to fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility. The TRA's jurisdiction is to be liberally construed in favor of the TRA under Tenn. Code. Ann. § 65-4-106.¹⁴ The TRA has a broad grant of authority under Tennessee law over regulated utilities within its jurisdiction. *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W. 2d 151, 159 (Tenn. Ct. App. 1992).

B. The Standard of Review for Granting Tenn. R. Civ. P. 12.02(6) Motions

The authority of the TRA to adjudicate a motion to dismiss is derived from the Tennessee Rules of Civil Procedure through the Uniform Administrative Procedures Act ("UAPA"). Under Tennessee law, a "motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof."¹⁵ A motion to dismiss "admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action as a matter of law."¹⁶ Essentially, the truths set forth are admitted on all relevant and material factual allegations in the complaint. Unless

¹⁴ The statute provides:

This chapter shall not be construed as being a derogation of the common law, but shall be given 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.

¹⁵ *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn.1999); *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn.1999).

¹⁶ *Winchester v. Little*, 996 S.W.2d 818, 821-22 (Tenn.Ct.App.1998); *Smith v. First Union Nat'l Bank*, 958 S.W.2d 113, 115 (Tenn.Ct.App.1997).

there is no cause of action that results from those facts, the motion to dismiss should be denied. Further, in reviewing a motion to dismiss, the complaint must be construed liberally in favor of the plaintiff by taking all factual allegations in the complaint as true and giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts.¹⁷ A dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief or when the complaint is totally lacking in clarity and specificity.¹⁸

C. May 19, 2008 Authority Conference Deliberations

At the regularly scheduled Authority Conference held on May 19, 2008, the panel considered the *Motion to Dismiss*. Based upon the argument of counsel and the entire record, the panel made the following findings.

1. The Authority opened this docket and convened a contested case to address issues about asset management and capacity release raised in a prior docket by the Consumer Advocate and the Chattanooga Manufacturers Association. Although those entities were granted the right to intervene, this docket is an effort by this agency to address those issues. The Authority could have delayed approval of the Company's asset management agreement pending the outcome of this docket, but instead the Authority chose to move forward to address those issues in this docket.

2. These issues have not previously been litigated in any meaningful way and the Company's argument that these issues are being re-litigated or are somehow precluded by the approval of the asset management agreement is rejected.

3. Asset management and gas capacity issues are on-going and continuous for the Company and consumers. The TRA has subject matter jurisdiction to review these issues at any

¹⁷ *Id.*

¹⁸ *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn.Ct.App.1992).

time. It is unnecessary for a new RFP to address these issues. The notion that the issues are not ripe for review is rejected.

4. The argument that the Authority would be retroactively changing the law or improperly impairing the current contract is without merit. The terms of the contract anticipate the possible exercise of the TRA's proper regulatory powers.

5. The Consumer Advocate has stated a claim upon which relief can be granted.

In light of these findings, the panel voted unanimously to deny the *Motion to Dismiss* and to deny the Company's request to limit this docket to the issue of excess capacity.

IT IS THEREFORE ORDERED:

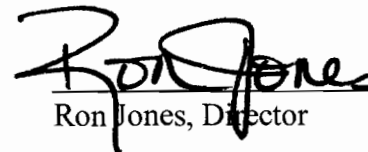
Chattanooga Gas Company's Motion to Dismiss is denied, and the request to limit this docket to the issue of excess capacity is also denied.

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Eddie Roberson, Chairman

A handwritten signature in black ink, appearing to read "Sara Kyle", written over a horizontal line.

Sara Kyle, Director

A handwritten signature in black ink, appearing to read "Ron Jones", written over a horizontal line.

Ron Jones, Director