BASS, BERRY & SIMS PLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

R. DALE GRIMES
TEL: (615) 742-6244
FAX: (615) 742-2744
dgrimes@bassberry.com

AMSOUTH CENTER
315 DEADERICK STREET, SUITE 2700
NASHVILLE, TN 37238-3001
(615) 742-6200

www.bassberry.com

OTHER OFFICES

KNOXVILLE
MEMPHIS

January 5, 2009

VIA HAND DELIVERY

Chairman Tre Hargett
c/o Ms. Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: ***Gas Technology Institute Generic Contested Case Docket To Analyze And Evaluate The Cost Benefits And Funding Mechanisms For Energy Conservation Research***
Docket No. 08-00064

Dear Chairman Hargett:

Enclosed please find an original and six (6) copies of Gas Technology Institute's Response to the Initial Brief of the Consumer Advocate.

Please return two copies, which I would appreciate your stamping as "filed," and return to me by way of our courier.

Should you have any questions concerning any of the enclosed, please do not hesitate to contact me.

With kindest regards, I remain

Very truly yours,

R. Dale Grimes

RDG/smb
Enclosure

cc: Ryan L. McGehee
Archie Hickerson
Elizabeth Wade
J. W. Luna

Jennifer L. Brundige
William T. Ramsey
A. Scott Ross
James H. Jeffries IV
Gary Hotvedt
Jane Lewis-Raymond

7399694.1

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

GENERIC CONTESTED CASE TO ANALYZE AND EVALUATE THE COST BENEFITS AND FUNDING MECHANISMS FOR ENERGY	))))	**DOCKET NO. 08-00064**

GAS TECHNOLOGY INSTITUTE'S RESPONSE TO THE INITIAL BRIEF OF THE CONSUMER ADVOCATE

I. Introduction.

Gas Technology Institute ("GTI") respectfully files this Response to the Initial Brief of the Consumer Advocate to demonstrate that the Tennessee Regulatory Authority ("the TRA") possesses statutory authority to approve the recovery of gas technology research and development ("R&D") costs by local distribution companies under its jurisdiction. Pursuant to Tennessee Code Annotated § 65-4-117(a)(3), the TRA has broad power to fix just and reasonable standards, classifications, regulations, practices or services for a public utility to follow or provide. And pursuant to Tennessee Code Annotated § 65-5-101, the TRA has broad power to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules … and other special rates to be applied by a public utility. Under the liberal construction to be given to these statutes by virtue of Tennessee Code Annotated § 65-4-106, they grant ample authority to the TRA to approve the recovery of R&D costs.

Despite the fact that this is the only issue currently under consideration, the Consumer Advocate spends the bulk of its brief addressing a different question – whether the recovery of gas technology R&D costs is a good policy. Those portions of the Consumer Advocate's brief that do address the TRA's statutory authority essentially articulate numerous variations of the

same single argument: that unless a power is specifically enumerated, the TRA's governing statutes grant the TRA *only* those powers that are "in fact necessary" to govern and control public utilities. From this proposition the Consumer Advocate then asserts that funding R&D is not specifically authorized and is not in fact necessary to govern and control public utilities, and therefore the TRA has no power to approve such funding.

As discussed in detail below, the Consumer Advocate's reading of the TRA's governing statutes is unduly restrictive and contrary to Tennessee law. The General Assembly has mandated that the TRA's statutory authority shall be interpreted liberally, so that any doubt about whether the TRA possesses a power shall be resolved in favor of the existence of the power. Rather than giving the statutes the required liberal interpretation, however, in its effort to deny the TRA the full scope of its authority, the Consumer Advocate has imported words designed to limit that authority, words that are nowhere to be found in the statutory language. Pursuant to a proper liberal interpretation of its specifically granted powers, the TRA is fully authorized to consider the substantial benefits gas technology R&D will provide to Tennessee consumers and, like twenty-three other states, allow gas utilities to recover the costs of gas technology R&D through the rates charged to gas consumers.

II. The TRA Has Been Granted Broad Statutory Authority.

The primary grant of authority to the TRA is found in Tennessee Code Annotated § 65-4-104, the provision defining the TRA's general jurisdiction. BellSouth Adv. & Pub. Corp. v. Tennessee Regulatory Authority, 79 S.W.3d 506, 512 (Tenn. 2002). This section provides, "[T]he 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." Id.

Furthermore, Tennessee Code Annotated § 65-4-106 provides that this broad grant of authority "shall not be construed as being in derogation of the common law, but shall be given a liberal construction." With regard to the specific powers granted to the TRA by the TRA's enabling legislation, the liberal construction mandated by the Tennessee Code requires that "**any doubt about the existence of or extent of a power** conferred on the authority [...] **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. Tennessee courts have consistently cited § 65-4-106 as evidence of the "General Assembly's clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." BellSouth Adv. & Publ. Corp., 79 S.W.3d at 512; see also Consumer Advocate Div. v. Tennessee Regulatory Auth., 2002 Tenn. App. LEXIS 506 (Tenn. Ct. App. July 18, 2002).

Under Tennessee law, a statute's requirement of a liberal construction "allows a court to more broadly and expansively interpret the concepts and provisions within its text." Northland Ins. Co. v. State, 33 S.W.3d 727, 730 (Tenn. 2000). In general, when liberally interpreting a statute, "Words may be omitted, or supplied by implication, and sentences transformed, to render the statute a consistent whole and effectuate the legislative will.... [T]he statute should not be given a construction so technical or narrow as to defeat ... the right granted by it." American Jurisprudence, Second Ed., Statutes § 179 (2008). An excellent illustration of the nature of a "liberal construction" by Tennessee courts can be found in Hembree v. State, in which the Supreme Court of Tennessee applied a liberal construction to Tennessee's statute waiving sovereign immunity. 925 S.W.2d 513 (Tenn. 1996). Addressing a provision that allowed lawsuits involving "negligent care, custody and control of persons," the Hembree court held that

the provision also allowed lawsuits based on negligent *release* of an patient from a mental health facility, since the patient was in the custody of the State when the decision to release the patient was made. Id. Absent a liberal interpretation, the lawsuit would likely have been barred because there apparently was no allegation that the care, custody or control of the inmate was itself negligent.

Thus, a statute that is to be liberally interpreted is construed to have a meaning consistent with the "most favorable view in support of the petitioner's claim" so long as this view "is not clearly contrary to the statutory language used by the General Assembly." Stewart v. State, 33 S.W.3d 785, 791 (Tenn. 2000). In the context of the TRA's governing statutes, the General Assembly's mandate of a liberal construction means that the statutes should be read to give the most favorable view in support of the existence of the TRA's authority.

III. The Consumer Advocate's Attempt to Limit the TRA's Authority to Those Powers That Are "In Fact Necessary" to Govern and Control Public Utilities is Unfounded.

Despite this broad grant of authority and the Tennessee Code's further unambiguous instruction that the TRA's powers be construed liberally, the Consumer Advocate argues that the Tennessee Code actually grants the TRA much more limited authority. According to the Consumer Advocate, the TRA only possesses a power if it "**is in fact necessary** to effectively govern and control public utilities." See Initial Brief of the Consumer Advocate at 15. The Consumer Advocate argues that this interpretation is supported by the final clause of § 65-4-106, which states that the TRA's powers are to be construed liberally "to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction." In order to reach this conclusion, the Consumer Advocate not only violates rules of statutory construction and the obvious purpose of the statute's final clause, but usurps the function of the General

Assembly by reading into the statute words of its own choosing. The words "in fact necessary" nowhere appear in the statute, yet they are the foundation of the Consumer Advocate's entire position that the TRA has no authority to approve the recovery of R&D expenditures. Without those words, the Consumer Advocate's arguments collapse.

Even without a mandate to give a statute a liberal interpretation, the Tennessee Code is to be interpreted to give effect to legislative intent, and "[w]henever possible, legislative intent is to be ascertained from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language." Consumer Advocate Div. v. Greer, 967 S.W.2d 759, 761 (Tenn. 1998). The Consumer Advocate's narrow reading of § 65-4-106 is not supported by the natural and ordinary meaning of words in the statute, but instead adds new words to change the statute's meaning. The natural and ordinary meaning of § 65-4-106 is that the General Assembly intended to set up a simple rule: when the existence or extent of any particular TRA power is in doubt, the TRA gets the benefit of the doubt.

Under the Consumer Advocate's reading of § 65-4-106, however, when the existence of a particular TRA power is in doubt, the TRA only possesses that power if it can prove that the power is *in fact necessary* to govern and control public utilities. In other words, a party challenging the TRA's authority gets the benefit of the doubt, not the TRA. This result is directly contrary to the apparent intent of § 65-4-106, and can only be achieved by a forced reading made possible by inserting the words "in fact necessary" into the statute and ignoring all of the statute but its last clause. Instead of taking an expansive view of the statute, as did the Hembree court with the sovereign immunity provision, the Consumer Advocate has adopted a cramped and narrow reading of its words, even to the point of substituting even more narrow

wording for the actual words of the statute. This reading is the exact opposite of the liberal construction of the statute mandated by the General Assembly, and has the effect of defeating the expansive power the General Assembly intended to grant through this section.

Furthermore, the Consumer Advocate's reading violates Tennessee law prohibiting readings of the Tennessee Code that would render another part of the Code a nullity. Under Tennessee law, "courts are required to give effect to every section of [the Tennessee Code] wherever possible in order to avoid a statutory nullity." Consolidated Waste Systems, LLC v. Solid Waste Region Bd., 2003 WL 21957137, at *5 (Tenn. Ct. App. July 2, 2003). Those interpreting the Tennessee Code "must avoid strained constructions which would render portions of the [Code] inoperative or void." Greer, 967 S.W.2d at 761. The Consumer Advocate's interpretation of the phrase "to the end that the authority may effectively govern and control the public utilities" as requiring that any TRA power be *in fact necessary* to govern and control public utilities renders void the portion of this section instructing that the disputes about the existence of a TRA power be resolved in favor of the existence of the power. The Consumer Advocate's restrictive interpretation of § 65-4-106 also renders void the portion of section § 65-4-106 commanding that section be given a liberal interpretation.

No Tennessee court has read § 65-4-106 in the restrictive manner the Consumer Advocate urges. As stated above, Tennessee courts have consistently cited § 65-4-106 as evidence of the "General Assembly's clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." BellSouth Adv. & Publ. Corp., 79 S.W.3d at 512; see also Consumer Advocate Div. v. Tennessee Regulatory Auth., 2002 Tenn. App. LEXIS 506 (Tenn. Ct. App. July 18, 2002). The Consumer Advocate's creative interpretation of this

clause of § 65-4-106 vitiates the intent of the provision as a whole and ignores the principles of statutory construction employed by Tennessee Courts.

In addition to being unsupported by Tennessee law, the Consumer Advocate's interpretation would drastically limit the TRA's authority – a result that is the opposite of that intended by § 65-4-106. The Consumer Advocate's proposed standard is highly subjective, since it is hard to say what is "in fact necessary" to govern and control public utilities, and it is at least possible that the TRA could govern and control public utilities with a more narrow list of powers than it currently exercises. If the Consumer Advocate's interpretation were followed, every decision by the TRA could be reversed based on a Court's opinion that the TRA's decision was not "in fact necessary" to govern and control public utilities. Tennessee courts have not applied such a straightjacket to the TRA.

For example, in a 1998 rate case, a Tennessee appellate court ruled that the TRA was justified in approving the recovery through rates of advertising expenses incurred by a gas utility in order "to meet competition, to add new customers to existing mains, and to get existing customers to use more gas." Consumer Advocate Division v. Tennessee Regulatory Authority, 1998 WL 684536, at *4 (Tenn. Ct. App. 1998). If the Consumer Advocate's current interpretation of the TRA's rate-making authority had been employed, the TRA likely would have been held to have exceeded its statutory authority, since it is not readily apparent how the power to allow the recovery of costs for potentially load-building advertising could be considered "in fact necessary" to govern and control public utilities.

IV. The General Assembly Granted the TRA the Power to Approve Funding for Gas Technology R&D.

Because the TRA's governing statutes are to be construed broadly, the Consumer Advocate is wrong to suggest that each and every action by the TRA must be "in fact necessary

to govern and control public utilities." Instead, the TRA's governing statutes confer broad powers on the TRA, and pursuant to § 65-4-106, these powers are construed liberally. Thus, the TRA has the authority to undertake any particular action so long as the particular action falls within one of the broad categories of power delegated to the TRA. With regard to the issue before the TRA in this proceeding, the TRA's authority derives from at least two broad statutory grants of power: (1) Tennessee Code Annotated § 65-4-117(a)(3) and (2) Tennessee Code Annotated § 65-5-101.

A. Tennessee Code Annotated § 65-4-117(a)(3).

Tennessee Code § 65-4-117(a)(3) grants the TRA the broad power to "fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility." Broadly construed, as required by § 65-4-106, this section encompasses the power to support gas technology R&D funding as an example of a "practice or service" that the TRA may authorize a public utility to furnish. So long as the TRA finds that it is "just and reasonable" for public utilities to engage in the practice and service of supporting R&D funding, the TRA is expressly authorized by 65-4-117(a)(3) to order that utilities be permitted to do so.

This interpretation § 65-4-117(a)(3) is supported by Tennessee law. In an analogous situation, the Supreme Court of Tennessee held that the TRA had the power to order an incumbent local exchange carrier ("ILEC") to put the name and logo of competing local exchange carriers ("CLECs") on the cover of the White Pages published by the ILEC. See BellSouth Adv. & Pub. Corp, 79 S.W.3d at 513. There was no express statutory authority granting the TRA the specific power to require ILEC's to include CLEC's on the cover of the white pages directory. Id. Based on the broad power granted to the TRA in § 65-4-117(a)(3) to

impose practices or services to be followed or furnished by a public utility and the liberal interpretation afforded to the TRA's by 65-4-106, the Court held that the TRA possessed this power. Id.

The BellSouth decision illustrates the wide latitude afforded the TRA in determining the "practices and services" to be followed by a utility. If the Consumer Advocate's position were correct, the BellSouth court would likely have found against the TRA, since it is hard to see how requiring an ILEC to put its competitors' names and logos on the cover of the white pages is "in fact necessary" to govern and control public utilities. In BellSouth, the Court made no attempt to discern whether the TRA's specific action was "in fact necessary"; rather, the Court liberally interpreted the TRA's governing statutes as required by § 65-4-106 and found that the specific action taken by the TRA fit within the broad powers granted to it. Under BellSouth, the broad authority given the TRA in § 65-4-117(a)(3) includes the authority to allow gas utilities to be reimbursed for providing the practice and service of investing in gas technology R&D.

B. Tennessee Code Annotated § 65-5-101.

Tennessee Code Annotated § 65-5-101 grants the TRA broad power to "fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility...." Among the circumstances the TRA is directed to consider in deciding whether such rates are just and reasonable is "the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility." Tenn. Code Ann. § 65-5-101. Interpreted broadly as required by § 65-4-106, this provision grants the TRA the authority to allow gas utilities to support gas technology R&D and recover their expenditures through the rate-making process. Furthermore, if the TRA finds that gas R&D could enhance the safety,

adequacy, or efficiency of the services furnished by a gas utility, the TRA is specifically directed to consider this finding in setting the rates or special rates the utility may charge consumers.

Moreover, the TRA's rate-making authority is granted broad deference by Tennessee courts. According to the Supreme Court of Tennessee, "There is no statutory nor decisional law that specifies any particular approach that must be followed by the [TRA]. Fundamentally, **the establishment of just and reasonable rates is a value judgment to be made by the Commission** in the exercise of its sound regulatory judgment and discretion." Powell Tel. Co. v. Tennessee Public Serv. Com., 660 S.W.2d 44, 46 (Tenn. 1983) (emphasis added); see also CF Industries v. Tennessee Public Serv. Com., 599 S.W.2d 536, 542 (Tenn. 1980). "There is a presumption that the rates so established are correct and any party who attacks the Commission's findings has the burden of proving that they are illegal or unjust and unreasonable." CF Industries, 599 S.W.2d at 540. The broad deference accorded to TRA rate-making is consistent with the liberal interpretation of the TRA's powers mandated by § 65-4-106.

The TRA's broad discretion to allow the support of R&D through its rate-making power is illustrated by Consumer Advocate Division v. Tennessee Regulatory Authority, in which a Tennessee appellate court held that the general rate-making authority of the TRA provided the legal basis for the TRA to require a phone company to offer directory assistance services free to residential customers over 65 years old and to offer the service free to those with visual disabilities. 2002 Tenn. App. LEXIS 506, at *18. Despite the absence of any explicit statutory text calling for the consideration of age or disability in rate-making, the court held that setting rates based on these factors was within the authority of the TRA. Id. In so holding, the court relied on the liberal interpretation that is to be applied to the TRA's enabling statutes, reasoning that the power to set rates necessarily includes the power to impose conditions on how rates may

be charged. Contrary to the Consumer Advocate's argument that the TRA may not support a "public policy" without specific statutory authority, this case makes clear that the TRA is empowered by its broad rate-making authority to consider matters of public policy when setting its rates. Here, for example, the TRA favored a public policy in favor of accessibility to the disabled and providing discounts to senior citizens. When placed alongside the explicit statutory permission to consider safety and efficiency in setting rates, it is clear that the TRA may authorize the support of gas technology R&D through rate-making.

V. Twenty-three Other States Have Approved the Recovery of Costs of Gas Technology Research and Development.

Twenty-three other states have approved gas technology R&D costs as a component of the just and reasonable rates gas utilities may charge gas consumers through some form of recovery mechanism. As the Consumer Advocate appears to concede, nearly half of the states that have approved R&D funding through gas rates have no "explicit" statutory authorization to do so, but apparently relied upon their broad rate-making powers to approve such funding. For example:

- The Louisiana Public Service Commission recently approved recovery of R&D funding for all jurisdictional gas companies. Louisiana Public Service Commission Docket No. R-30479, Development of a Funding Mechanism for Jurisdictional Gas Utilities for Research and Development Programs, October 28, 2008. The Louisiana Public Service Commission stated, "The R&D charge ... is determined to be in the public interest and is authorized for recovery by the Group I gas utilities through its rates or via other recovery mechanism at the discretion of the Group I gas utility." Id.

- The Kentucky Public Service Commission approved recovery of R&D expenses through a rider. Case No. 2004-00067. The Kentucky Commission held, "The Commission agrees with Delta's proposal to recover monies to voluntarily fund GTI research through a tariff rider. [...] Allowing recovery via a rider is consistent with Commission decisions for two other gas utilities, Atmos Energy and Columbia Gas of Kentucky. The Commission finds that collecting contribution through a rider, rather than base rates, is reasonable." Id.

- The Idaho Public Service Commission approved recovery of R&D research through a rider, holding, "The Commission finds that it is reasonable for Intermountain Gas Company to leverage its investment in R&D by contributing to cooperative R&D organizations such as GRI. We have long recognized the value and benefit to gas customers and the industry of GRI's R&D programs and continue to support the Company's involvement in GRI." Case No. AVU-G-99-2, Order No. 28189.

- The Michigan Public Service Commission approved the recovery of R&D expenses through general rates. Case No. U-1456 1. The Michigan Commission determined that utilities "may seek recovery of R&D expenses through a general rate case proceeding .... [T]he Commission is persuaded that a request for recovery of R&D expenses at up to $0.0174/Mcf is reasonable at this time." Id.

- The Wyoming Public Service Commission approved the recovery of GTI contributions through the non-commodity portion of a utility company's rates, holding that "the research and development efforts of [GTI] have resulted in tangible results which have provided material benefits to the natural gas industry, including local distribution gas companies...." See Docket No. 30010-GP-99-50, Record No. 5299, at ¶ 7 (Dec. 8, 1999).

- The Illinois Public Service Commission approved the recovery of funding for GTI research programs through an offset to a gas utility's base revenues. See Docket No. 00-0228.

- Finally, the Arizona Corporation Commission, in a somewhat unusual case, recommended the addition of an R&D charge into the rates of a gas utility even though the charge was not included in the original rate case. See Docket No. G-0115 1A-04-0876. The staff specifically recommended that the utility invest $688,712 annually into GTI projects, but the Commission allowed the specific beneficiary of the funding to organizations to be selected by the utility. Id. The Commission specifically authorized the R&D funding to be collected through a surcharge to customers. Id.

As with the twenty-three other states' regulatory authorities that have approved gas technology R&D funding through rates charged to consumers or other recovery mechanisms, the TRA is entitled to consider the benefits that gas technology R&D will provide to Tennessee gas consumers. As discussed below, these benefits are substantial. For this reason, it is just and reasonable to allow gas utilities to recoup their investments in gas technology R&D through the rates paid by gas consumers.

VI. Gas Technology Research and Development Has Numerous Benefits for Tennessee Gas Consumers.

The Consumer Advocate's argues that including gas technology R&D is not "just and reasonable" because the benefits of R&D to Tennessee consumers are speculative or illusory.[1] In fact, gas technology R&D will benefit Tennessee consumers by supporting the development of safer and more efficient natural gas energy provision and usage.

A. Gas Technology Research Will Reduce Demand for Natural Gas, Reducing the Prices Tennessee Consumers Pay for Natural Gas.

As shown in the list of sample end-use projects submitted by GTI, numerous gas technology R&D projects relate to increased-efficiency equipment for residential, commercial, and industrial customers. This research will result in reduced overall gas usage, and thus will reduce prices paid by Tennessee gas consumers through reductions in the demand for gas.

The sample projects proposed by GTI are focused on residential and commercial space and water heating, commercial cooking, commercial and industrial steam generation, and industrial process heating. These are areas where natural gas has dominated as a fuel source, and the most likely placement of this equipment is in homes, offices, and manufacturing plants that already have older, lower-efficiency natural-gas fired equipment. As an illustration, GTI has proposed the following projects which will greatly increase gas use efficiency and thus reduce the prices paid for gas by Tennessee consumers:

- A superboiler: a 94% efficient steam generation system, fully ten efficiency percentage points better than the best existing technology, and twenty efficiency percentage points above older boilers;

---

[1] The Consumer Advocate also argues that gas technology is not a "utility service" and thus is not properly included in a rate. As with the rest of the Consumer Advocate's arguments, this claim is based on an overly narrow reading of the TRA's governing statutes – in this case, a narrow reading of the words "utility service." The Consumer Advocate's argument is refuted by Consumer Advocate Division v. Tennessee Regulatory Authority, 1998 WL 684536, at *4 (Tenn. Ct. App. 1998). As discussed previously, this case held that the TRA was within its authority to allow a gas utility to recover advertising costs through consumer rates. If gas utility advertising is a "utility service" within the liberally-interpreted meaning of the rate-making statute, then so is gas technology R&D.

- A combination space/water heater: a lower-cost, 90% efficient residential space and water heating application that allows low-income residential customers to take advantage of a 90% plus efficiency heating system without the very high costs of a fully condensing gas furnace;

- A gas heat pump (GHP): an application with 160% heating efficiency, better than the best fully condensing furnace systems on the market; and

- A commercial fryer: A gas fryer with 62% percent efficiency, nearly double the 35% efficiency of existing gas fryers.

All of these technologies will result in an overall reduction in natural gas use. Under the law of supply and demand, a reduction in overall demand will lead to reduction in prices. Thus, the implementation of these demand-reducing applications will have the effect of reducing the gas prices paid by Tennessee consumers.

One concrete example of the gas price reduction resulting from gas technology R&D is the savings to Tennessee gas consumers attributable to the development of high-efficiency gas furnaces. GTI developed the world's first fully condensing, ninety-percent efficient gas furnace, the Lennox Pulse Combustion Furnace. The Lennox Pulse Combustion Furnace and competing furnaces based on this technology now dominate the home furnace market, capturing at least a 25% share of new and replacement furnace sales. Based on GTI analysis, sales of this and similar high-efficiency furnaces between 1995 and 2000 resulted, by 2002, in a decrease in gas demand of about 50 billion cubic feet ("Bcf") annually. This represents about 0.22% of total U.S. gas demand (23,000 Bcf).[2] GTI calculates that the decrease in overall demand caused by high-efficiency furnaces alone resulted in a 0.47% reduction in the price of natural gas.[3] Given

---

[2] See http://tonto.eia.doe.gov/dnav/ng/ng_cons_sum_dcu_nus_a.htm.

[3] GTI's calculations are based on U.S. Energy Information Administration statistics showing a price elasticity of demand for natural gas of .41%. See http://www.eia.doe.gov/oiaf/analysispaper/elasticity/pdf/tbl.pdf. Price elasticity of demand is defined as the measure of responsiveness in the quantity demanded for a commodity as a result of change in price of the same commodity. In other words, it is percentage change in quantity demanded

the average residential gas price of $7.89/Mcf in 2002,[4] this resulted in a $.042/Mcf reduction in residential gas prices paid by Tennessee consumers. Because Tennessee residential gas consumers annually used on average 68.5 Mcf,[5] this one technology resulted in $2.95 of savings to each Tennessee residential gas consumer in 2002. The benefits of this one technology to Tennessee gas consumers exceeds the $.90 R&D support charge proposed by GTI.

B. Gas Technology R&D Helps Tennessee Consumers Who Are Able to Purchase High-Efficiency Appliances Because of Gas Technology R&D.

In addition to the savings gas technology research provides Tennessee gas consumers by the development of energy-efficient appliances that reduce the overall demand for gas, Tennessee consumers benefit from gas technology R&D by being able to purchase applications that would be unavailable absent such R&D. The Tennessee consumers who end up purchasing a high-efficiency application developed through gas technology R&D in turn reap benefits due to the reduction in their gas bills. According to data gathered by the Gas Appliance Manufacturers Association, over 65,700 fully-condensing gas furnaces (based on technology developed by GTI) were purchased by Tennessee consumers between 1995 and 2000. According to GTI's analysis, attached as Exhibit A, the net present value of the benefits Tennessee consumers obtained from increased efficiency due to their purchases of these 65,700 furnaces is $21.7 million. The total value of benefits to Tennessee consumers is of course far higher, given that high-efficiency furnaces continue to be purchased by Tennessee consumers.[6] The availability of new high-efficiency applications will benefit Tennessee consumers in years to come just as the development of fully-condensing gas furnaces is benefitting Tennessee consumers now.

---

divided by the percentage change in price of the same commodity. Dividing the total reduction in demand of .22 by the price elasticity of demand of .41% yields an aggregate effect on price of .53%.

[4] See http://tonto.eia.doe.gov/dnav/ng/ng_pri_sum_dcu_nus_a.htm.

[5] A.G.A. Gas Facts with 2006 data, p. 48.

C. Gas Technology Operations Research Will Benefit Tennessee Consumers.

Gas utility operations R&D stands to benefit Tennessee consumers through increased delivery efficiency and safety. As discussed in GTI's Natural Gas Research and Development Proposals, natural gas is delivered to the end-use customer with an efficiency of 90.5%. See GTI's R&D Proposals at 15. Increasing the efficiency of the natural gas supply, transmission, and distribution system can lead to major consumer benefits because greater operations efficiency is passed down to the consumer through lower gas rates in the rate-making process. Id. For example, 1.4% of the natural gas "used" in the natural gas system is actually leakage from the system. Id. Tennessee consumers pay for this leakage as part of "lost and unaccounted for" gas. Id. If even one half of this leakage could be reduced by advances in gas technology, the savings could be enormous – as much as $1.23 billion per year on a nationwide basis. Id.

Similarly, a plastic pipe locator is critically needed in order to allow gas utilities to safely and efficiently locate the thousands of miles of underground plastic pipe currently used to carry natural gas, but which cannot be consistently located by any device on the market. With over 3,900 miles of plastic gas mains in the jurisdictional companies' service territory, the inability to locate much of this pipe places an economic burden on the gas utilities, and increases the locating costs substantially. A plastic pipe locator that has been proven in all of Tennessee's highly variable soils types (sand, clay, shale, dirt, rocks), will help to increase operations efficiency, reduce the costs of distribution integrity management, and increase safety of Tennessee's gas systems.

---

[6] GTI does not know the exact amount of such furnaces sold in Tennessee since 2000 because the Gas Appliance Manufacturers Association stopped tracking sales of high-efficiency furnaces on a state-by state basis following the year 2000.

VII. It is Just and Reasonable to Pass the Cost of R&D Research to Gas Consumers Because Consumers, Not Gas Utilities, Reap the Majority of the Benefits From Efficiency Increases Gained Through Gas Technology R&D.

The Consumer Advocate argues that the costs of gas technology research should be paid by utility companies, not consumers, because "natural gas companies participating in this docket have a vested and long term interest in supporting conservation efforts," while the benefits of gas R&D research to Tennessee consumers are allegedly speculative. See Initial Brief of the Consumer Advocate at 32. To the contrary, it is entirely reasonable that Tennessee consumers fund gas technology research because the benefits in both energy efficiency and operations efficiency produced by gas technology research are primarily enjoyed by the consumers of gas, not by utilities.

A. It is Reasonable to Allow Utilities to Recover Expenses from Gas Technology R&D Because Utilities Stand to Lose Money From Increased Energy Efficiency.

Under current rate structures, natural gas utilities have revenues that are based on volumes sold. Increased energy efficiency will result in reductions in volumes sold. Thus, increased energy efficiency is a financial detriment to utility companies. Because of this fact, utility companies have no financial incentive to fund energy efficiency research. It is simply not reasonable to expect utility companies to use shareholder dollars to support energy efficiency R&D when that research will lower the companies' profits.

Consumers of gas, on the other hand, stand to benefit substantially in the aggregate from gains in energy efficiency. However, the gains are widely dispersed among each consumer, and thus no single consumer has an independent financial incentive to finance the entire costs of gas technology R&D. This is true even though the aggregate benefits of energy efficiency far outweigh the costs of financing the research needed to attain energy efficiency. Thus, gas technology energy efficiency R&D will only be financed if its costs are spread out widely among

the beneficiaries of the research – consumers – through the rates they pay for gas. Given the substantial benefits of energy efficiency R&D to Tennessee consumers, it is entirely reasonable to spread the costs of such research among them.

B. Gas Utilities Lack the Financial Incentive to Fund Operations Research Independently

The Consumer Advocate argues that "the gas industry" should fund the entire costs of operations research, despite the fact that Tennessee consumers will gain substantial benefits from such research. The benefits of gas technology operations research, which include increased safety, reliability and operations efficiency, are often intangible, distributed between both utilities and their customers, and difficult to recoup through increased rates. The costs of operations research, on the other hand, are tangible and substantial. The result of this skewed cost/benefit analysis is that utilities lack the financial incentive to fund research into even sorely needed projects. Manufacturers of products for gas utilities similarly lack the incentive to develop such products because the manufacturers cannot charge enough for the products to cover the costs of research and development on top of the manufacturing costs.

An example of operations research that would very much benefit consumers, but would not be developed by "the gas industry" absent consumer contributions to GTI, is the plastic pipe locator currently being developed by GTI and discussed above. This application, still under development, has taken over $10 million to reach its current stage of development, and still needs to undergo additional field trials. Given that there are only 300 gas companies servicing over 10,000 meters across the country, and fewer than a dozen servicing over a million meters, the potential sales of plastic pipe locators are limited to relatively low quantities. If a manufacturer had independently developed such a locator, the sales of locators would be in too low of a quantity to allow a manufacturer to profitably charge a price gas utilities would be

willing to pay. This is because the safety benefits of accurate plastic pipe locators generally accrue to the general public and gas consumers.

Even the gains in operations efficiency experienced by utilities because of an accurate plastic pipe locator will largely accrue to the consumer, because to a large extent the monetary gains attributable to operations efficiency will be passed on to the consumer through the rate-making process rather than being entirely appropriated by the utilities as additional profits. The safety and reliability benefits from being able to locate plastic pipe are worth millions to the general public and gas consumers, but the R&D is so expensive that no one gas company, on its own, could afford to fund the research. Thus, this type of research requires collaborative gas-consumer funding to enable these gas-consumer-interest products like the plastic pipe locator to be developed.

C. TRA-regulated Gas Utility Customers Are Currently Some of the Only Tennessee Utility Customers that Do *Not* Support R&D

The Consumer Advocate insinuates that jurisdictional gas company customers would be unfairly singled out by if they were required to support gas R&D. This insinuation is inaccurate – in fact, jurisdictional gas customers are some of the only Tennessee energy utility customers who do *not* support R&D. Currently, all TVA electric customers[7], all propane users[8], all home heating oil users[9] and most municipal gas customers[10] support R&D. Tennessee water utility customers support R&D through a contribution to the Awwa Research Foundation (AwwaRF). R&D is included in the rates of all these utilities. Thus, it would be more accurate to say that jurisdiction gas utility customers are singled-out by *not* supporting R&D.

---

[7] TVA is a member of the Electric Power Research Institute (EPRI), so all Tennessee electric customers served by TVA contribute to the EPRI R&D program.

[8] All Tennessee propane users contribute to the Propane Education & Research Council (PERC).

[9] All Tennessee home heating oil users contribute to the national Oilheat Research Alliance (NORA).

VIII. Conclusion.

For the foregoing reasons, the Tennessee Regulatory is authorized by law to allow jurisdictional gas utilities to recover investments made in gas technology research and development through the imposition of a just and reasonable rate charged to jurisdictional gas consumers.

Respectfully Submitted,

R. Dale Grimes (BPR 006223)
BASS, BERRY & SIMS PLC
315 Deaderick St., Suite 2700
Nashville, TN 37238-3001
Tel: (615) 742-6200
Fax: (615) 742-2749

Attorney for Gas Technology Institute

[10] Natural gas customers of Middle Tennessee, Memphis Gas Light & Water, and Greenville contribute to the American Public Gas Association (APGA) Research Foundation, which contributes to GTI R&D.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was served on the parties below via facsimile, U.S. Mail, hand delivery, commercial delivery, or e-mail, on the 5th day of January, 2009.

Ryan L. McGehee
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202-0207

Archie Hickerson
AGL Resources
150 W. Main Street, Suite 1510
Norfolk, VA 23510

Elizabeth Wade
AGL Resources
Ten Peachtree Place, N.W. 15th Floor
Atlanta, GA 30309

J.W. Luna, Esq.
Jennifer L. Brundige, Esq.
Farmer & Luna, PLLC
333 Union Street, Suite 300
Nashville, TN 37201

William T. Ramsey
A. Scott Ross
Neal & Harwell PLC
One Nashville Place, Suit 2000
150 Fourth Ave North
Nashville, TN 37219

Mr. James H. Jeffries IV
Moore & Van Allen PLLC
100 North Tryon Street, Suite 4700
Charlotte, NC 28202-4003

Gary Hotvedt, Esq.
Office of Legal Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Jane Lewis-Raymond
Vice President and General Counsel
Piedmont Natural Gas Company, Inc.
P.O. Box 33068
Charlotte, NC 28233

R. Dale Grimes

Benefits to Tennessee Consumers of High Efficiency Furnaces

High Efficiency (Greater than 88%) Furnace Sales

Year	1995	1996	1997	1998	1999	2000	Total
TN Sales	8,911	10,262	10,815	11,349	11,960	12,388	65,705

Ref: Gas Appliance Manufacturers Association (GAMA) Sales Data

Average Residential Gas Costs (TN)

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Gas Costs Nominal $/MMBtu	$5.77	$6.26	$6.91	$6.73	$6.53	$7.48	$10.16	$7.87	$9.70										
Gas Costs in 2003 $ / MMBtu	$6.70	$7.13	$7.72	$7.43	$7.10	$7.96	$10.58	$8.11	$9.70	$9.90	$10.11	$10.32	$10.54	$10.76	$10.99	$11.22	$11.45	$11.70	$11.94
Gas Costs $2003/Mcf	$6.90	$7.35	$7.96	$7.65	$7.32	$8.20	$10.90	$8.35	$9.99	$10.20	$10.42	$10.63	$10.86	$11.09	$11.32	$11.56	$11.80	$12.05	$12.30

Note: Actual Shown in Bold, others interpolated or extrapolated (2.1% real price increase per year assumed after 2003, per GTI Baseline Projection). 2003 price is the average of Jan-May prices.

Ref: U.S. EIA data

GDP deflator used (see below) to convert to 2003 $

1030 BTU/ cf

Assumptions:

Average Annual Gas Furnace Usage:	52.6 Mcf	Source: East South Central, AGA Gas Facts Table 11-1, ratio'ed by Heating Degree Days to TN, Table 10-6.
Wtd. Average Standard Furnace Efficiency	78.0%	NAECA min efficiency requirement
Wtd. Average High-Efficiency Furnace Efficiency:	92%	See below calculation
Capital Costs from Rheem dealer:	$3300 hi-eff.	$2750 80% eff.
Average residential gas prices:	See above	
Lifetime Assumption:	14 years	

2001 High-Efficiency Furnace Shipments by Eff.

Efficiency	Percent	Eff*Pct
90	3	270
91	4	364
92	18	1656
95.5	3	286.5
	28	2576.5
Weighted Average:		92.02

GAMA Data

93-98% Efficient

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
GDP Deflator	98.10	100.00	101.95	103.22	104.77	107.04	109.42	110.65	113.97	117.39	120.91	124.54

Note: 3% inflation assumed after 2003

Exh. A

Benefits to Tennessee Consumers of High Efficiency Furnaces

1995 Furnaces Calculations — *All in 2003 Dollars*

	Number of High Efficiency Furnaces Sold	Fuel Efficiency	Annual Fuel Use per Furnace (Mcf)	1995 Installed Capital Cost (2003$)	1995 Gas Costs	1996 Gas Costs	1997 Gas Costs	1998 Gas Costs	1999 Gas Costs	2000 Gas Costs	2001 Gas Costs	2002 Gas Costs	2003 Gas Costs	2004 Gas Costs	2005 Gas Costs	2006 Gas Costs	2007 Gas Costs	2008 Gas Costs		Total Installed and Operating Costs	Total TN Savings for 1995 Furnaces
High Efficiency	8,911	92.0%	44.6	$3,300	$307.77	$327.56	$354.66	$341.17	$326.13	$365.66	$485.86	$372.17	$445.35	$454.70	$464.25	$474.00	$483.95	$494.12		$8,997	
80% Efficiency	8,911	78.0%	52.6	$2,750	$363.09	$386.44	$418.40	$402.49	$384.75	$431.38	$573.19	$439.06	$525.40	$536.43	$547.70	$559.20	$570.94	$582.93		$9,471	
Net Present Value Multiplier at 5% consumer discount rate	--	--	--	1.477	1.477	1.407	1.340	1.276	1.216	1.158	1.103	1.050	1.000	0.952	0.907	0.864	0.823	0.784		$10,942	
NPV High Eff				$4,875.60	$454.71	$460.91	$475.27	$435.43	$396.42	$423.29	$535.66	$390.78	$445.35	$433.05	$421.09	$409.46	$398.15	$387.15		$11,220	
NPV 80%				$4,063.00	$536.45	$543.76	$560.70	$513.69	$467.67	$499.38	$631.95	$461.02	$525.40	$510.89	$496.78	$483.06	$469.71	$456.74		$278	$2,475,965
NPV Savings				-$812.60	$81.73	$82.85	$85.43	$78.27	$71.25	$76.08	$96.28	$70.24	$80.05	$77.84	$75.69	$73.60	$71.56	$69.59			

1996 Furnaces Calculations — *All in 2003 Dollars*

	Number of High Efficiency Furnaces Sold	Fuel Efficiency	Annual Fuel Use per Furnace (Mcf)	1996 Installed Capital Cost (2003$)	1995 Gas Costs	1996 Gas Costs	1997 Gas Costs	1998 Gas Costs	1999 Gas Costs	2000 Gas Costs	2001 Gas Costs	2002 Gas Costs	2003 Gas Costs	2004 Gas Costs	2005 Gas Costs	2006 Gas Costs	2007 Gas Costs	2008 Gas Costs	2009 Gas Costs		Total Installed and Operating Costs	Total TN Savings for 1996 Furnaces
High Efficiency	10,282	92.0%	44.6	$3,300	$0.00	$327.56	$354.66	$341.17	$326.13	$365.66	$485.86	$372.17	$445.35	$454.70	$464.25	$474.00	$483.95	$494.12	$504.49		$9,194	
80% Efficiency	10,282	78.0%	52.6	$2,750	$0.00	$386.44	$418.40	$402.49	$384.75	$431.38	$573.19	$439.06	$525.40	$536.43	$547.70	$559.20	$570.94	$582.93	$595.17		$9,703	
Net Present Value Multiplier at 5% consumer discount rate	--	--	--	1.407	1.477	1.407	1.340	1.276	1.216	1.158	1.103	1.050	1.000	0.952	0.907	0.864	0.823	0.784	0.746		$10,632	
NPV High Eff				$4,643.43	$0.00	$460.91	$475.27	$435.43	$396.42	$423.29	$535.66	$390.78	$445.35	$433.05	$421.09	$409.46	$398.15	$387.15	$376.46		$10,934	
NPV 80%				$3,869.53	$0.00	$543.76	$560.70	$513.69	$467.67	$499.38	$631.95	$461.02	$525.40	$510.89	$496.78	$483.06	$469.71	$456.74	$444.13		$302	$3,110,146
NPV Savings				-$773.91	$0.00	$82.85	$85.43	$78.27	$71.25	$76.08	$96.28	$70.24	$80.05	$77.84	$75.69	$73.60	$71.56	$69.59	$67.67			

1997 Furnaces Calculations — *All in 2003 Dollars*

	Number of High Efficiency Furnaces Sold	Fuel Efficiency	Annual Fuel Use per Furnace (Mcf)	1997 Installed Capital Cost ($)	1995 Gas Costs	1996 Gas Costs	1997 Gas Costs	1998 Gas Costs	1999 Gas Costs	2000 Gas Costs	2001 Gas Costs	2002 Gas Costs	2003 Gas Costs	2004 Gas Costs	2005 Gas Costs	2006 Gas Costs	2007 Gas Costs	2008 Gas Costs	2009 Gas Costs	2010 Gas Costs		Total Installed and Operating Costs	Total TN Savings for 1997 Furnaces
High Efficiency	10,815	92.0%	44.6	$3,300	$0.00	$0.00	$354.66	$341.17	$326.13	$365.66	$485.86	$372.17	$445.35	$454.70	$464.25	$474.00	$483.95	$494.12	$504.49	$515.09		$9,381.60	
80% Efficiency	10,815	78.0%	52.6	$2,750	$0.00	$0.00	$418.40	$402.49	$384.75	$431.38	$573.19	$439.06	$525.40	$536.43	$547.70	$559.20	$570.94	$582.93	$595.17	$607.67		$9,924.73	
Net Present Value Multiplier at 5% dicount rate	--	--	--	1.340	1.477	1.407	1.340	1.276	1.216	1.158	1.103	1.050	1.000	0.952	0.907	0.864	0.823	0.784	0.746	0.711		$10,315.94	
NPV High Eff				$4,422.32	$0.00	$0.00	$475.27	$435.43	$396.42	$423.29	$535.66	$390.78	$445.35	$433.05	$421.09	$409.46	$398.15	$387.15	$376.46	$366.06		$10,638.23	
NPV 80%				$3,686.26	$0.00	$0.00	$560.70	$513.69	$467.67	$499.38	$631.95	$461.02	$525.40	$510.89	$496.78	$483.06	$469.71	$456.74	$444.13	$431.86		$322.29	$3,485,554
NPV Savings				-$737.05	$0.00	$0.00	$85.43	$78.27	$71.25	$76.08	$96.28	$70.24	$80.05	$77.84	$75.69	$73.60	$71.56	$69.59	$67.67	$65.80			

1998 Furnaces Calculations — *All in 2003 Dollars*

	Number of High Efficiency Furnaces Sold	Fuel Efficiency	Annual Fuel Use per Furnace (Mcf)	1998 Installed Capital Cost ($)	1995 Gas Costs	1996 Gas Costs	1997 Gas Costs	1998 Gas Costs	1999 Gas Costs	2000 Gas Costs	2001 Gas Costs	2002 Gas Costs	2003 Gas Costs	2004 Gas Costs	2005 Gas Costs	2006 Gas Costs	2007 Gas Costs	2008 Gas Costs	2009 Gas Costs	2010 Gas Costs		2011 Gas Costs	Total Installed and Operating Costs	Total TN Savings for 1998 Furnaces
High Efficiency	11,349	92.0%	44.6	$3,300	$0.00	$0.00	$0.00	$341.17	$326.13	$365.66	$485.86	$372.17	$445.35	$454.70	$464.25	$474.00	$483.95	$494.12	$504.49	$515.09		$525.90	$9,552.85	
80% Efficiency	11,349	78.0%	52.6	$2,750	$0.00	$0.00	$0.00	$402.49	$384.75	$431.38	$573.19	$439.06	$525.40	$536.43	$547.70	$559.20	$570.94	$582.93	$595.17	$607.67		$620.43	$10,126.76	
Net Present Value Multiplier at 5% consumer discount rate	--	--	--	1.276	1.477	1.407	1.340	1.276	1.216	1.158	1.103	1.050	1.000	0.952	0.907	0.864	0.823	0.784	0.746	0.711		0.677		
NPV High Eff				$4,211.73	$0.00	$0.00	$0.00	$435.43	$396.42	$423.29	$535.66	$390.78	$445.35	$433.05	$421.09	$409.46	$398.15	$387.15	$376.46	$366.06		$355.95	$9,986.03	
NPV 80%				$3,509.77	$0.00	$0.00	$0.00	$513.69	$467.67	$499.38	$631.95	$461.02	$525.40	$510.89	$496.78	$483.06	$469.71	$456.74	$444.13	$431.86		$419.93	$10,321.97	
NPV Savings				-$701.95	$0.00	$0.00	$0.00	$78.27	$71.25	$76.08	$96.28	$70.24	$80.05	$77.84	$75.69	$73.60	$71.56	$69.59	$67.67	$65.80		$63.98	$335.94	$3,812,575

Benefits to Tennessee Consumers of High Efficiency Furnaces

1999 Furnaces Calculations — *All in 2003 Dollars*

	Number of High Efficiency Furnaces Sold	Fuel Efficiency	Annual Fuel Use per Furnace (Mcf)	1999 Installed Capital Cost ($)	1995 Gas Costs	1996 Gas Costs	1997 Gas Costs	1998 Gas Costs	1999 Gas Costs	2000 Gas Costs	2001 Gas Costs	2002 Gas Costs	2003 Gas Costs	2004 Gas Costs	2005 Gas Costs	2006 Gas Costs	2007 Gas Costs	2008 Gas Costs	2009 Gas Costs	2010 Gas Costs	2011 Gas Costs	2012 Gas Costs		Total Installed and Operating Costs	Total TN Savings for 1998 Furnaces
																								$9,748.63	
High Efficiency	11,960	92.0%	44.6	$3,300	$0.00	$0.00	$0.00	$0.00	$326.13	$365.66	$485.86	$372.17	$445.35	$454.70	$464.25	$474.00	$483.95	$494.12	$504.49	$515.09	$525.90	$536.95		$10,357.73	
80% Efficiency	11,960	78.0%	52.6	$2,750	$0.00	$0.00	$0.00	$0.00	$384.75	$431.38	$573.19	$439.06	$525.40	$536.43	$547.70	$559.20	$570.94	$582.93	$595.17	$607.67	$620.43	$633.46			
Net Present Value Multiplier at 5% consumer discount rate	--	--	--	1.216	1.477	1.407	1.340	1.276	1.216	1.158	1.103	1.050	1.000	0.952	0.907	0.864	0.823	0.784	0.746	0.711	0.677	0.645		$9,696.17	
NPV High Eff				$4,011.17	$0.00	$0.00	$0.00	$0.00	$396.42	$423.29	$535.66	$390.78	$445.35	$433.05	$421.09	$409.46	$398.15	$387.15	$376.46	$366.06	$355.95	$346.12		$10,049.48	
NPV 80%				$3,342.64	$0.00	$0.00	$0.00	$0.00	$467.67	$499.38	$631.95	$461.02	$525.40	$510.89	$496.78	$483.06	$469.71	$456.74	$444.13	$431.86	$419.93	$408.33		$353.31	$4,225,631
NPV Savings				-$668.53	$0.00	$0.00	$0.00	$0.00	$71.25	$76.08	$96.28	$70.24	$80.05	$77.84	$75.69	$73.60	$71.56	$69.59	$67.67	$65.80	$63.98	$62.21			

2000 Furnaces Calculations — *All in 2003 Dollars*

	Number of High Efficiency Furnaces Sold	Fuel Efficiency	Annual Fuel Use per Furnace (Mcf)	2000 Installed Capital Cost ($)	1995 Gas Costs	1996 Gas Costs	1997 Gas Costs	1998 Gas Costs	1999 Gas Costs	2000 Gas Costs	2001 Gas Costs	2002 Gas Costs	2003 Gas Costs	2004 Gas Costs	2005 Gas Costs	2006 Gas Costs	2007 Gas Costs	2008 Gas Costs	2009 Gas Costs	2010 Gas Costs	2011 Gas Costs	2012 Gas Costs	2013 Gas Costs	Total Installed and Operating Costs	Total TN Savings for 1998 Furnaces
High Efficiency	12,388	92.0%	44.6	$3,300	$0.00	$0.00	$0.00	$0.00	$0.00	$365.66	$485.86	$372.17	$445.35	$454.70	$464.25	$474.00	$483.95	$494.12	$504.49	$515.09	$525.90	$536.95	$548.22	$9,970.72	
80% Efficiency	12,388	78.0%	52.6	$2,750	$0.00	$0.00	$0.00	$0.00	$0.00	$431.38	$573.19	$439.06	$525.40	$536.43	$547.70	$559.20	$570.94	$582.93	$595.17	$607.67	$620.43	$633.46	$646.76	$10,619.74	
Net Present Value Multiplier at 5% consumer discount rate	--	--	--	1.158	1.477	1.407	1.340	1.276	1.216	1.158	1.103	1.050	1.000	0.952	0.907	0.864	0.823	0.784	0.746	0.711	0.677	0.645	0.614	$9,445.31	
NPV High Eff				$3,820.16	$0.00	$0.00	$0.00	$0.00	$0.00	$499.38	$631.95	$461.02	$525.40	$510.89	$496.78	$483.06	$469.71	$456.74	$444.13	$431.86	$419.93	$408.33	$397.06	$9,819.70	
NPV 80%				$3,183.47	$0.00	$0.00	$0.00	$0.00	$0.00	$76.08	$96.28	$70.24	$80.05	$77.84	$75.69	$73.60	$71.56	$69.59	$67.67	$65.80	$63.98	$62.21	$60.49	$374.39	$4,637,943
NPV Savings				-$636.69	$0.00	$0.00	$0.00	$0.00	$0.00	$76.08	$96.28	$70.24	$80.05	$77.84	$75.69	$73.60	$71.56	$69.59	$67.67	$65.80	$63.98	$62.21	$60.49		

Benefits to Tennessee Consumers of High Efficiency Furnaces

Savings

Total Savings:	$21,747,815
Average Savings per Impacted TN Consumer	$330.99

GRI FERC Costs Per Consumer

	1995	1996	1997	1998	1999	2000	Totals	
Nominal Cents per Mcf	1.74	1.74	1.74	1.74	1.51	1.38		Converted by GDP deflator
2003 Cents per Mcf	2.02	1.98	1.95	1.92	1.64	1.47		Assumes gas water heater, space heater, and range
Mcf per Customer	80.6	80.6	80.6	80.6	80.6	80.6		
2003 $ per year per customer	$1.63	$1.60	$1.57	$1.55	$1.32	$1.18	$8.85	
NPV Multiplier	1.477	1.407	1.340	1.276	1.216	1.158		Converted by 5% consumer discount rate
NPV GRI R&D $\	$2.41	$2.25	$2.10	$1.98	$1.61	$1.37	$11.71	
Total Gas Customers							1,094,200	
Total GRI Costs							$12,815,158	

Benefit/Cost Ratio:	$0.14 per month

Benefit/ Cost Ratio:	1.70

Gas Saved Analysis (2002)

Total Furnaces	Gas Saved Per Furnace in 2002 (Mcf)	Total Gas Saved in 2002 (Mcf)	Total Gas Saved in 2002 (Bcf)
65,705	8.0	526,434	0.526

Analysis of Total Gas Customers

	No. of Customers	Notes
Chatanooga Gas	60,155	
Memphis Gas	308,405	
Knoxville	76,933	
Middle Tennessee	50,492	
Nashville Gas	230,000	Estimate
Atmos Energy	100,000	Estimate
Totals	825,985	

Second Approach: TN residential gas customers from AGA 2002 Gas Facts, from Table 8-3:
1,094,200 We will use this number, as a conservative estimate.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

GENERIC CONTESTED CASE TO ANALYZE AND EVALUATE THE COST BENEFITS AND FUNDING MECHANISMS FOR ENERGY	))))	**Docket No. 08-00064**

INDEX OF UNREPORTED CASES CITED IN GAS TECHNOLOGY INSTITUTE'S RESPONSE TO THE INITIAL BRIEF OF THE CONSUMER ADVOCATE

Consumer Advocate Div. v. Tennessee Regulatory Auth., 2002 Tenn. App. LEXIS 506 (Tenn. Ct. App. July 18, 2002)

Consolidated Waste Systems, LLC v. Solid Waste Region Bd., 2003 WL 21957137 (Tenn. Ct. App. July 2, 2003)

Consumer Advocate Division v. Tennessee Regulatory Authority, 1998 WL 684536 (Tenn. Ct. App. 1998)

LEXSEE 2002 TENN. APP. LEXIS 506

CONSUMER ADVOCATE DIVISION v. TENNESSEE REGULATORY AUTHORITY

No. M1997-00238-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

2002 Tenn. App. LEXIS 506

July 18, 2002, Filed

PRIOR HISTORY: [*1] Tenn. R. App. P. 12 Petition for Review; Judgment of the Tennessee Regulatory Authority Affirmed. Appeal from the Tennessee Regulatory Authority. No. TRA 96-01423. Melvin Malone, Director.

DISPOSITION: Affirmed.

COUNSEL: John Knox Walkup, Attorney General & Reporter; Michael E. Moore, Solicitor General; L. Vincent Williams, Consumer Advocate; Vance L. Broemel, Assistant Attorney General, for appellant, Consumer Advocate Division.

Guy M. Hicks, Nashville, Tennessee and Patrick William Turner, Atlanta, Georgia, for appellee, BellSouth Telecommunications.

Citizens Telecommunication Company, Pro se.

Dennis McNamee, J. Richard Collier and William Valerius Sanford, Nashville, Tennessee, and H. Edward Phillips, Wake Forest, North Carolina, for appellee, Tennessee Regulatory Authority.

Joseph F. Welborn, Robert Dale Grimes and Theodore G. Pappas, Nashville, Tennessee for appellee, United Telephone Southeast, Inc.

JUDGES: BEN H. CANTRELL, P.J., M.S., WILLIAM C. KOCH, JR., J., WILLIAM B. CAIN, J.

OPINION BY: BEN H. CANTRELL

OPINION

The principal issue in this case is whether telephone directory assistance service is basic or non-basic under the statutory [*2] scheme. Secondary issues involve the practice of grandfathering existing customers when a new tariff is approved, the exemptions to directory assistance charges, and whether the Tennessee Regulatory Authority was authorized to transfer a contested case to another docket. We affirm.

PER CURIAM

This is a direct appeal by the Consumer Advocate Division [CAD] of the office of the Attorney General.

The genesis of this litigation dates from the filing of a tariff by United Telephone [United] with the Tennessee Regulatory Authority [TRA] for an increase in rates, particularly for directory assistance, which was provided without charge to a telephone customer.

The filing was made pursuant to Tennessee Code Annotated § 65-5-209(e) which allows regulated telephone companies that have qualified under a price regulation plan to adjust prices for non-basic services so long as the annual adjustments do not exceed lawfully imposed limitations.

Intervening petitions were filed by CAD, by Citizens Telecommunications Company of Tennessee [Citizens], by BellSouth Telecommunications, Inc. [BellSouth] and AT&T Communications of the South Central States, [*3] Inc. [AT&T], all of which were granted.

The telephone services described as basic services are subject to a four-year price freeze under Tennessee Code Annotated § 65-5-209(f), that is, if a service is basic, its rates cannot be raised for four years.

United insisted that directory service was not a basic service and hence not subject to the price freeze. As the case progressed, CAD raised other issues of (1) whether United was entitled to have its 911 Emergency Service and educational discounts classified as non-basic and therefore subject to a price increase; (2) whether a company could continue to offer a service to certain classes

of customers while refusing the service to newer customers; (3) whether a previously approved tariff filed by United limiting to five the number of lines at a single location could be considered residential service.

By order entered September 4, 1997, the TRA ruled that (1) directory service is non-basic and approved the tariff as filed subject "to free-call allowance up to six inquiries with an allowance of two telephone numbers per inquiry for residents and business access lines per billing period," an exemption for [*4] customers over sixty-five and those with a confirmable visual or physical disability; (2) a previous tariff filed by United which limited the number of access lines that could be charged a residential rate to five per location was not proper to be considered in this proceeding; and (3) a previous tariff approving a business service to existing customers but denying it to newer customers was not proper to be considered in this proceeding.

CAD appeals and presents for review the issues of (1) whether directory service is a basic or non-basic service; (2) whether the TRA erred in holding that the five-line tariff would be adjudicated in another proceeding; and (3) whether the TRA erred in holding that United could obsolete a business service, change its characteristics, and offer it to new customers for an increased price.

BellSouth presents an additional issue for review: Whether the TRA erred in requiring United to provide free directory assistance in certain instances.

United presents for review issues similar to those presented by CAD and BellSouth.

Appellate review is governed by *Tennessee Code Annotated § 4-5-322(h)* which provides:

The [reviewing] [*5] 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 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 . . .

Directory Assistance

Tennessee Code Annotated § 65-5-209, a 1995 enactment, allows a telecommunications company to utilize a price regulation plan in the calculation of rates. This plan establishes, inter alia, a cap on the amounts a company can raise its rates for basic and non-basic telephone service as defined in Tennessee Code Annotated § 65-5-208(a)(1), with the maximum rate increase indexed to the rate of inflation, and the rates for basic service are frozen for four years from the date the company elects to [*6] be bound by the price regulation plan. United elected to be bound by the plan and its application was approved October 15, 1995. Tariff 96-201, the predicate of the case at Bar, sought a rate increase for non-basic services for an amount less than the rate of inflation. United proposed a charge for directory assistance because it was a non-basic service and therefore not subject to the price freeze. The TRA agreed, and approved the proposed rate increase subject to Tennessee Code Annotated § 65-5-208 as follows:

Classification of Services - Exempt services - Price floor - Maximum rates for non-basic services. - (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 [*7] 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.

CAD insists that the TRA erred in its interpretation of the statute because directory assistance was a part of the "usage" enjoyed by customers who subscribed to telephone service, in contrast to United's insistence that since the statutory definition of basic services does not refer to "directory assistance," it is a non-basic service.

The sub-issue of statutory construction is thus squarely posed. We begin our analysis by observing that "interpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts." *Collins v. McCanless, 179 Tenn. 656, 169 S.W.2d 850 (Tenn. 1943)*; *Riggs v. Burson, 941 S.W.2d 44 (Tenn. 1997)*. [*8]

The TRA seemingly was cognizant of the long-standing principle that the legislative intent should be ascertained from the natural and ordinary meaning of the language used without a forced or subtle construction that would limit or extend the meaning of the language, *Hamblen County Ed. Asso.v. Bd. of Education, 892 S.W.2d 428 (Tenn. Ct. App. 1994)*; *Worrall v. Kroger Co., 545 S.W.2d 736 (Tenn. 1977)*, since each party argued that the plain language of the statute supported its position, the TRA concluded that the language was susceptible of more than one meaning and hence was unclear, which justified recourse to its legislative history.

What we held in *BellSouth Tele. v. Greer, 972 S.W.2d 663 (Tenn. Ct App. 1997)* is apropos in the case at Bar:

The legislative process does not always produce precisely drawn laws. When the words of a statute are ambiguous or when it is just not clear what the legislature had in mind, courts may look beyond a statute's text for reliable guides to the statute's meaning. We consider the statute's historical background, the conditions giving rise to the statute, and the circumstances contemporaneous with [*9] the statute's enactment. (Citations omitted).

Courts consult legislative history not to delve into the personal, subjective motives of individual legislators, but rather to ascertain the meaning of the words in the statute. The subjective beliefs of legislators can never substitute for what was, in fact, enacted. There is a distinction between what the legislature intended to say is the law and what various legislators, as individuals, expected or hoped the consequences of the law would be. The answer to the former question is what courts pursue when they consult legislative history; the latter question is not within the courts' domain.

Relying on legislative history is a step to be taken cautiously. (Citations omitted). Legislative records are not always distinguished for their candor and accuracy, and the more that courts have come to rely on legislative history, the less reliable it has become. (Citation omitted). Rather than reflecting the issues actually debated by the legislature, legislative history frequently consists of self-serving statements favorable to particular interest groups prepared and included in the legislative record solely to influence the courts' interpretation [*10] of the statute. (Citations omitted).

Even the statements of sponsors during legislative debate should be evaluated cautiously. (Citation omitted). These comments cannot alter the plain meaning of a statute (citations omitted), because to do so would be to open the door to the inadvertent, or perhaps planned, undermining of statutory language. (Citation omitted). Courts have no authority to adopt interpretations of statutes gleaned solely from legislative history that have no statutory reference points. (Citation omitted). Accordingly, when a statute's text and legislative history disagree, the text controls. (Citation omitted).

The Legislature considered and debated at length the issue of whether directory service was a basic or non-basic service. A transcript of the debate is included in the record and we have carefully studied it; suffice to say that the Legislature, by a substantial majority, approved the bill as now codified, reflecting its intent to exclude directory service as a basic service.

The interpretation of a statute is strictly one of law, *Roseman v. Roseman, 890 S.W.2d 27*, (Tenn. 1994), and courts must construe statutes as they are written, *Jackson v. Jackson, 186 Tenn. 337, 210 S.W.2d 332 (Tenn. 1948)*. [*11] While the logicality of the argument of CAD is obvious, the counter-arguments of the TRA and BellSouth are equally logical: That basic services are those specifically enumerated in the statute, and that if every "use" of a telephone were a basic service, Unified could not increase its rates for any service during the first four years of the price regulation plan and the price freeze admittedly applies only to basic services. Upon a consideration of all the recognized principles of statutory construction, we conclude that the meaning attributed to the statute by the TRA is the correct one.

The Five-Line Tariff

In the process of reviewing United's proposed rate filing, CAD discovered that United had raised the rates for residential customers with more than five access lines, and insisted that these lines were a basic service and subject to the statutory price freeze. Tenn. Code Ann. § 65-5-209(f). After hearing testimony concerning this issue, the TRA ruled that it should be heard in another docket. CAD challenges the action of the TRA, insisting that it had no authority to transfer the case to another docket after hearing proof on the issue [*12] in the case at Bar.

The tariff at issue was permitted to take effect by the Public Service Commission in October 1995. CAD argues that the tariff was never approved, but did not intervene in the proceeding. [1] TRA argues that it had the discretion to reopen the issue of the tariff in the case at Bar within a proceeding of its choosing. We agree that the TRA acted within its discretion in considering that the issue raised by CAD was more appropriately joined in another pending case. *See,* ***South Central Bell Tele. Co. v. TPSC, 675 S.W.2d 718 (Tenn. Ct. App. 1984).*** We are referred to no rule or statute which forbids the TRA from ordering that this issue should be heard in another docket, and thus cannot fault the TRA for doing so.

1 **New tariffs automatically became effective unless suspended.** ***See, Consumer Ad. Div. v. Bissell, 1996 Tenn. App. LEXIS 589,*** No. 01-A-01-9601-BC-00049 (Tenn. Ct. App. 1996).

The Grandfathering Issue

During the progress of the directory assistance docket, CAD raised the issue that **[*13]** United impermissibly raised rates for its ABC Service, described as a kind of advanced business service. A witness for CAD testified that United made some changes in its ABC Service, renamed it "Centrex Services," and increased its rates above those charged to ABC customers. CAD specifically alleges that Centrex Services is not a new service, but merely a new name with a new way of combining and pricing the service provided under the ABC Service tariff.

TRA argues that CAD has impermissibly sought appellate review by collaterally attacking an agency decision that was rendered in another contested case hearing initiated upon a complaint filed by a customer of United. Docker Number 96-00462 was assigned, a hearing on the merits was held, and a final judgment was rendered on October 3, 1996, which was modified to approve a stipulation between regarding ABC Service on January 22, 1997. These judgments required United, inter alia, to revise the terms of its central office-based service; to comply, United filed a tariff which included the grandfathering of ABC Service and a revised service called Centrex Services, which was approved by the TRA by Order entered January 22, 1997.

TRA further **[*14]** argues that since it found that Centrex Services was a unique bundling of products and pricing arrangements, it was not a service offered on June 6, 1995, [2] and that as a new service the Centrex tariff was "specifically considered and approved by the TRA in a prior docket and not found to be contrary to law."

2 Referring to the language of the tariff then in effect.

It was further found by TRA that the proposed tariffs to obsolete ABC Service and that introduced Centrex Services were filed in September 1996 with a revision filed in December 1996. The initial filing was served on CAD which did not intervene or otherwise participate in the hearing.

The TRA thereupon determined that there was no legal basis for the position urged by CAD, which should not be permitted to attack collaterally a TRA decision for which appellate review is time barred. [3]

3 Judicial review must be sought within sixty days from entry of judgment. *Tenn. Code Ann. § 4-5-322*; Rule 12(a) T.R.A.P.

[*15] CAD contends that grandfathering is not permitted under Tennessee law because a telephone company must "treat all alike and it cannot discriminate in favor of one of its patrons against another," citing *Breeden v. Southern Bell Telephone & Telegraph Co., 199 Tenn. 203, 285 S.W.2d 346 (Tenn. 1955).* If, as CAD argues, United provides services to one group of customers while refusing to provide the same service to another group - new customers - we agree that the practice is contrary to Tennessee law. *Tenn. Code Ann. § 65-4-122*; § 65-5-204.

TRA ordered United to obsolete the ABC Service tariff following a docket hearing involving a complaining customer. TRA found that the ABC Service tariff as it applied to the complaining customer, ZETA Images, Inc., was insufficient, discriminatory, unreasonable and excessive.

The Centrex tariff was approved January 22, 1997. CAD insists that it is no different from the ABC tariff; that the ABC Service and Centrex Services are the same.

There are differences between the tariffs. ABC Service is distant-restrictive but Centrex Services is not. ABC Service charges only for outgoing traffic over Network **[*16]** Access Registers, while Centrex Services charges for outgoing and incoming traffic. ABC Service requires a customer to purchase basic features separately, while Centrex Services included the basic features in the price of the line. Minimum service for ABC Service requires the use of two access lines and one NAR while Centrex Services requires two access lines and two NARs.

Grandfathering [4] is not, per se, illegal. But if it results in discrimination between old and new customers, and is unjust or unduly preferential and thus violative of the statutes, it cannot be permitted. The thrust of CAD's argument is that ABC and Centrex Services are essen-

tially the same, and to require one class of customer to pay more for the same service is unjust discrimination and unlawful.

> 4 A provision in a new law or regulation exempting those already in or a part of an existing system which is being regulated. An exception to a restriction that allows those already doing something to continue doing it even if they would be stopped by the new restriction. Black's Law Dictionary, 699 (6th ed. 1990).

[*17] The record reflects that if the ABC Service had been obsoleted without grandfathering the existing customers, they would have been required to pay the rate under the Centrex Services tariff, an increase in their cost of service. United has the right to price a non-basic service as it chooses, but any rate increase must be accompanied by off setting rate reductions which result in the rate increase being revenue neutral. Otherwise, United would be in violation of Tennessee Code Annotated § 65-5-209(e). The TRA argues that without a showing of a revenue neutral rate increase, United cannot obey its order to obsolete ABC Service without grandfathering the existing service. This argument has merit. If United is required to offer ABC Service to existing and new customers, it could not obsolete that service unless the service was withdrawn. But under the revenue neutral requirements, United could only obsolete a service where existing customers did not experience a rate increase or where a rate increase was neutralized by other rate deceases.

The CAD argues that grandfathering constitutes unjust discrimination and an undue preference as a matter of law and, **[*18]** is illegal in this case because the company has the technical ability to offer the service but chooses to offer it only to a certain group of customers. As we have seen, the statutes only prohibit discrimination that is unjust or unreasonable or preferences that are undue or unreasonable. The TRA is permitted to establish separate classifications of customers for the purposes of assessing different rates and has done so many times over the years.

Tennessee Code Annotated § 65-4-122 provides as pertinent here:

(a) If any common carrier or public service company, directly or indirectly, by any special rate, rebate, drawback or other device, charges, demands, collects, or receives from any person a greater or less compensation for any service of a like kind under substantially like circumstances and conditions, and if such common carrier or such other public service company makes any reference between the parties aforementioned such common carrier or other public service company commits unjust discrimination, which is prohibited and declared unlawful.

(b) Any such corporation which charges, collects, or receives more than a just and reasonable rate of toll **[*19]** or compensation for service in this state commits extortion, which is prohibited and declared unlawful.

(c) It is unlawful for any such corporation to make or give an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic or service, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service to any undue or unreasonable prejudice or disadvantage.

The operative language "for any service of a like kind under substantially like circumstances and conditions" is significant in this case because there is material proof that the Centrex Services was a new service, and one that was not offered on June 6, 1995. We cannot say that the action of the TRA was not supported by substantial and material evidence.

Exemptions from Directory Assistance Charges

United argues that while the TRA properly determined that directory assistance is a non-basic service, thus allowing United to set rates as it deems appropriate subject to certain safeguards, the TRA impermissibly ordered it to amend its tariff (1) to increase the directory assistance free [*20] call allowance to six inquiries with an allowance of two telephone numbers per inquiry per billing period; (2) to exempt from directory assistance charges those customers who are unable to use the directory owing to visual or physical disability, and (3) to exempt from directory assistance charges residential customers who are older than sixty-five years. United argues that these requirements are in excess of the authority of TRA. We disagree. ***Tennessee Code Annotated § 65-4-117*** **provides:**

The Authority has the power to:

* * * * *

(3) after hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices and services to be furnished, imposed, observed and followed thereafter by any public utility.

This statute is required to be liberally construed, ***Tennessee Code Annotated § 65-4-106,*** **and thus any reasonable doubt as to whether the language is sufficiently broad to include the right of TRA to impose conditions should be resolved in favor of the existence of that right. We therefore conclude that the action United complains of is authorized by the statutes.**

The judgment is affirmed. [*21] Costs are assessed to CAD and United Telephone equally.

PER CURIAM

H
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
CONSOLIDATED WASTE SYSTEMS, LLC,
v.
SOLID WASTE REGION BOARD of the METROPOLITAN GOVERNMENT of NASHVILLE and Davidson County, et al.
and
Metropolitan Government of Nashville and Davidson County, Tennessee,
v.
Solid Waste Disposal Control Board, et al.
Nos. M2002-00560-COA-R3-CV, M2001-01662-COA-R3-CV.

Feb. 14, 2003 Session.
July 2, 2003.

Appeal from the Chancery Court for Davidson County, No. 00-4014-I, Irvin Kilcrease, Chancellor & No. 00-1799-II; Claudia Bonnyman, Sp. Chancellor.

Thomas G. Cross, John L. Kennedy and Daniel W. Champney, Nashville, Tennessee, for the appellant, The Metropolitan Government of Nashville and Davidson County.
Joe W. McCaleb, Hendersonville, Tennessee, Frank M. Fly, Murfreesboro, Tennessee, and Thomas F. Bloom, Nashville, Tennessee, for the intervenor/appellant, Sherard Caffey Edington.
Thomas G. Cross, Daniel W. Champney and John L. Kennedy, Nashville, Tennessee, for the respondent/appellee, Solid Waste Region Board of The Metropolitan Government of Nashville and Davidson County.
James L. Murphy, III, Nashville, Tennessee, for the petitioner/appellee, Consolidated Waste Systems, LLC.
Sohnia Whitney Hong and R. Stephen Jobe, Nashville, Tennessee, for the defendant/appellee, Tennessee Department of Environment and Conservation.

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and L. CRAIG JOHNSON, Sp. J., joined.

OPINION

WILLIAM B. CAIN, J.
***1** This appeal involves two chancery court cases concerning the proper interpretation of Tennessee Code Annotated section 68-211-814. From a decision dismissing their counterclaims, the Metropolitan Government Solid Waste Region Board and Sherard Caffey Edington appeal. From a decision affirming the State's issuance of a Class IV landfill permit, the Metropolitan Government appeals. We affirm.

This appeal involves the consolidation of two cases concerning the same administrative action of the Solid Waste Region Board of Metropolitan Nashville and Davidson County ["the Region Board"] on Consolidated Waste Systems, LLC's ["CWS"] application for permission to construct a Class IV construction and demolition landfill in the community of Old Hickory. CWS initiated the permit process by filing an application with the Division of Solid Waste Management of the Tennessee Department of Environment and Conservation on December 29, 1999. Pursuant to the Solid Waste Management Act of 1991, CWS caused a copy of that petition to be filed with the Region Board. *See*Tenn.Code Ann. § 68-211-814(b)(2)(A)(2001). Also consistent with the Act the Region Board conducted a public hearing for the purposes of considering the application consistent with its Region Plan of Solid Waste Management. Tenn.Code Ann. § 68-211-814(a)(1).

The Region Board conducted its hearing on May

11, 2000. At the hearing on CWS's application, several citizens of Old Hickory, Lakewood and the surrounding community gave statements in opposition to the establishment of the landfill. Residents and council members provided oral and written statements in support of rejecting the application. Among those arguing for rejection were the appellant, Sherard Edington, counsel Courtney Hollins Edington, and Lorette Geyer and her husband, Richard Geyer. Although the Region Board was comprised of fifteen members, only nine were present. CWS, for its part, presented evidence suggesting a need for the landfill in light of decreased life expectancies for other facilities in the region and the need for a recycling facility, in light of the Region Plan's 25% waste reduction policy. According to the administrative record, the Region Board Chair, April Ingram, abstained from voting on the application, reducing the number of voting board members to eight.

After more than an hour of discussion concerning Old Hickory's need for another Class IV landfill, whether the landfill would be located in a flood plain, whether the landfill encroached upon burial grounds, and the nature of the site as a 'landfill only' or a 'landfill/recycling facility,' the Board entertained the first of what would be three motions regarding whether the application should be granted or rejected. The first motion was to reject the application. This motion to reject met with a four-four tie vote. The members who had voted for rejection of the application voiced their concern about the doubts presented to the Board concerning the location and nature of the landfill and the need for such a landfill. Two more votes were taken-one to accept and one more to reject. Both resulted in four-four ties. At no time did the Region Board Chair vote to break the tie. The Region Board issued no formal ruling rejecting the application as non-compliant with the Region's waste disposal plan. Likewise, no formal ruling issued approving the application.

*2 On May 12, 2000, the Board Chair forwarded a letter to the Commissioner of Environment and Conservation. In that letter the Chair reported that "it may be concluded that no decision was reached by this board on the Cumberland Corners' application within the ninety-day time frame mandated by T.C.A. § 68-211-814(b)(2)(A)." CWS filed the first and only petition for judicial review of the Region Board proceedings on June 9, 2000. In that petition, CWS averred that the Region Board had either failed to act, as provided in section 814, within the required ninety day period or, in the alternative, should the court find that the failure to approve amounted to a rejection of the application, that the Region Board acted arbitrarily and capriciously, and the rejection is unsupported by substantial or material evidence consistent with the standard of judicial review enunciated in Tennessee Code Annotated section 4-5-322.

The Region Board responded to that petition on July 14, 2000. On July 28, Appellant Edington filed his motion to intervene in this case, number 00-1799-II. Mr. Eddington sought an order remanding the case to the Region Board for a vote or, in the alternative, to declare that the tie vote constituted a rejection of the petition.

On October 19, while its original petition for judicial review was still pending, CWS filed an application with the State Control Board seeking a ruling vindicating the Commissioner's authority to issue a permit without an affirmative vote granting the application. On December 5, the State Control Board held that the Region Board lost its opportunity to decide within the statutory ninety day period and, as a result, the Commissioner had the authority to issue the landfill permit. Consistent with that ruling, the Commissioner issued the permit on December 13, 2000.

As a result, Metro filed its Petition for Writ of Certiorari challenging the actions of the Control Board and Commissioner as arbitrary and capricious, and seeking a declaration that CWS's application with the Control Board was not timely filed. This Petition for Writ of Certiorari in case number 00-4014-I was filed simultaneously with the Solid Waste Re-

gion Board's motion to amend response and to assert a counter claim in case number 00-1799-II. That counterclaim sought an injunction against CWS from taking further actions based on the permit issued by the Commissioner.

On February 6, 2001, CWS nonsuited its petition for judicial review in case number 00-1799-II. Edington and Metro opposed the nonsuit and filed motions to continue the litigation. CWS filed a response in opposition to intervenor's motion to continue litigation, which the trial court considered as a motion to dismiss for failure to state a claim under Tennessee Rules of Civil Procedure 12.02. On May 25, 2001, the chancery court filed its Memorandum and Order dismissing the counter claims in case number 00-1799-II, finding in pertinent part:

T.C.A. § 68-211-814(b)(2)(B) requires written analysis by the Region Board for a rejection to occur: the legislation places a burden upon the Region Board to show in writing why the application is inconsistent with its own solid waste disposal plan. Further, the statute makes clear that pursuant to T.C.A. § 68-211-814(b)(2)(B) the Region Board *shall* make a decision about the application during a 90 day period. The Region Board did not carry these burdens. It did not express an intent to reject the application. The opportunity to exercise decision making power over the application for this permit by the Region Board was lost with the lapse of the ninety day statutory period.

***3** The Region Board's response and counterclaim admit that it failed to have a quorum at two meetings during which it expected to vote on the application and that it did not vote on those dates. It admits that the Region Board members voted (resulting in a tie vote) but complains that moving the application decision to the commissioner (five months after the Region Board's tie vote) kept the Region board from voting again. No authority is cited by the Region Board for a remand and supplemental vote. Instead, the Region Board argues that its demand for another vote survives the Rule 41 dismissal taken by Consolidated.

For purposes of this motion, this court finds that the tie vote was not a rejection of the application which, pursuant to T.C.A. § 68-211-814(b)(2)(C) could prevent the Commissioner from granting the permit. The ninety (90) day period for voting by the Region Board lapsed in May 2000.

The Court applied the rules of statutory construction to reach these conclusions. "Legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language ..." *JoAnn White Mooney v. Joe Sneed* 30 S.W.3d 304, 306, (Tenn.2000) (citing *State v. Pettris* 986 S.W.2d 540, 544 (Tenn.1999)).

When considering a Motion to Dismiss pursuant to Rule 12.02(b) of the Tennessee Rules of Civil Procedure, the trial court must accept all of the factual allegations in the complaint as true, and construe the complaint liberally in favor of the plaintiff. *See, Wallace v. National Bank of Commerce,* 938 S.W.2d 684 (Tenn.1996). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See, Coulter v. Hendricks,* 918 S.W.2d 424 (Tenn.App.1995). The Region Board asserts no set of facts to support its claim that the Region Board should retain the power to control the application decision after the ninety (90) day lapse. Regardless of the permit outcome before the Commissioner, there is no authority to show that Consolidated deprived the [Region] Board of its vote or its power to vote. The Region Board's counterclaim is dismissed.

The Intervenor participated as an aggrieved party in the role of defendant. Its answer is captioned "Response by Intervenor to Petition for Judicial Review."This Response seeks an order sending the permit application back to the Region Board for a vote, or for a declaration that a tie vote by the Region Board is a rejection of the application. For all the reasons set forth above, the Intervenors fail to state a claim and are dismissed as parties pursuant to Rule 12.02 of the Tennessee Rules of Civil Pro-

cedure.

This lawsuit was begun and then dismissed by Consolidated. Court costs are taxed to Consolidated.

It is so ORDERED.

From this order Sherard Edington appeals, asserting as error the trial court's determination that the tie vote of the Region Board was not a rejection of the application and that the Commissioner had authority to issue a permit without the approval of the Region Board.

*4 On February 15, 2002, the chancery court entered its memorandum in case no. 00-4014-I holding that the Control Board's actions were supported by substantial and material evidence and affirming the Control Board's finding that the Commissioner did have authority to issue the permit. In support of this order, the trial court relied, as did the Control Board, on section 68-211-814(b)(2)(A) requiring a final decision on the application within ninety days of the filing of said application. From this order Metro appealed. These cases were consolidated for argument and disposition because both involve the same issues, the effect of the tie votes in the Region Board and the resulting authority and jurisdiction of the Control Board and the Commissioner.

For his part, Edington argues that Roberts Rules of Order, the commonly recognized source for parliamentary procedure, provides that affirmative motions pass only upon a majority vote. He asserts that failure of CWS's application to receive such a majority vote has the effect of a rejection of the application. Metro joins in this argument only so far as to say that the application before the Board was not approved. Absent such approval, Metro argues the Commissioner of the Department of Environment and Conservation and the Control Board respectively did not have jurisdiction to pass upon CWS's application. CWS, the State Control Board, and the Commissioner, for their part, assert that since the Region Board deadlocked and issued no formal findings approving or rejecting the application, no action was taken by the Board. CWS's Petition for Judicial Review and the Metro Region Board's Petition for Writ of Certiorari were both resolved by the trial court in favor of CWS and the State Control Board and the Commissioner. The controlling issue, the result of the four four tie vote, is a question of law. As such, it receives de novo review with no presumption of correctness. Tenn. R.App. P. 13; *see Winchester v. Little,* 996 S.W.2d 818, 822 (Tenn.Ct.App.1998).

The Metro Region Board was created as a result of the Solid Waste Management Act of 1991. The statute providing for the Region Board's existence devolved upon the Board power concomitant to the Department of Environment and Conservation. The statutory purpose of that legislation was to require local participation in the solid waste management and flow control policies of the state, to reduce inter county flow of solid waste, to encourage local responsibility for locally generated solid waste. *See*Tenn.Code Ann. § 68-211-101, *et seq.* (2002). As the Region Board argues, the statutes do provide "after the plan is approved the region must approve an application for a permit for a solid waste disposal facility or incinerator within the region as is consistent with the Region's disposal needs before any permit is issued by the Commissioner pursuant to this Chapter."*See*Tenn.Code Ann. § 68-211-814(b)(1)(D)(2001). However, the statute also provides, in part:

*5 The region shall render a decision on the application within ninety (90) days after receipt of a complete application. The region shall immediately notify the Commissioner of its acceptance or rejection of an application.

This provision is immediately followed by:

(B) The region may reject an application for a new solid waste disposal facility or incinerator or expansion of an existing solid waste disposal facility or incinerator within the region *only upon determining that the application is inconsistent with the solid*

waste management plan adopted by the county or region and approved by the department, and the region shall document in writing the specific grounds on which the application is inconsistent with such plan.

Tenn.Code Ann. § 68-211-814(b)(2)(B)(2001)(emphasis added).

When the Region Board, with eight voting members present and a chairperson who abstained from voting, had first voted on a Motion to Reject, which resulted in four affirmative votes, four negative votes, and an abstention, a motion to adopt was made. This motion resulted in four votes in the affirmative, four votes in the negative with the chairperson abstaining. After this second tie vote was taken a very pertinent question was posed to metropolitan legal counsel present for the meeting.

"Unidentified Speaker: Does failure to approve constitute a disapproval in the statute?

Ms. Knight: No, it does not. First of all, the first decision was to reject. Your first decision was to reject, but not to approve, and the second decision was a failure to approve, and failure to approve-a rejection is required if there is a rejection based on the failure to meet the requirements of the plan.

So without that-without specifically setting it up in writing the reasons why he's failing to meet the requirements of the plan, it's not a valid decision."

Following this imminently correct advice, a second Motion to Reject resulted in four votes in the affirmative, four votes in the negative and another abstention by the chair.

As determined by the State Control Board, the Commissioner and the Chancellor, Tennessee Code Annotated section 68-211-814(b)(2)(B)(2001) is susceptible of no other reasonable construction than that given to the Region Board by metropolitan legal counsel.

The authority of the Region Board as well as the Control Board is statutory. In construing the application of this statute, courts are required to give effect to every section wherever possible in order to avoid a statutory nullity. *See Tidwell v. Collins,* 522 S.W.2d 674 at 676 (Tenn.1975). The statute by its terms places three essential requirements upon the Region Board. First, the Region Board is to issue a decision accepting or rejecting a permit within ninety days after the application is filed. Second, the Region Board must accept and approve applications which are consistent with the Region plan for waste management. Third, should the Region Board find that an application is inconsistent with that plan, the Board is to reject that application in writing, listing the material facts and legal conclusions which result in the denial. It is also clear from the face of the statute, that the power of the Region Board is co-existent with the power of the State Control Board with the exceptions of the aforementioned requirments. Edington and the Metro Region Board would argue that Roberts' Rules of Order dispenses with the statutory requirements of an approval or a rejection as contemplated by the statutes. Such a result would render the provisions of the statute meaningless. Neither chancery court decision resulted in such a finding, and both decisions are affirmed in their entirety. The costs of this appeal are taxed 75% against the Metropolitan Government of Nashville and 25% against Sherard Caffey Edington. The causes are remanded to their respective trial courts for further proceedings as may be necessary consistent with this opinion.

Tenn.Ct.App.,2003.
Consolidated Waste Systems, LLC v. Solid Waste Region Bd., Metropolitan Government of Nashville
Not Reported in S.W.3d, 2003 WL 21957137 (Tenn.Ct.App.)

END OF DOCUMENT

C

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
CONSUMER ADVOCATE DIVISION, Petitioner/Appellant,
v.
TENNESSEE REGULATORY AUTHORITY; Nashville Gas Company, Respondents/Appellees.
No. 01A01-9708-BC-00391.

July 1, 1998.

Appeal No. 01-A-01-9708-BC-00391Tennessee Regulatory Commission.

JOHN KNOX WALKUP Attorney General & Reporter.
L. VINCENT WILLIAMS Assistant Attorney General 425 Fifth Avenue North Nashville, Tennessee 37243 Attorney for Petitioner/Appellant.
H. EDWARD PHILLIPS, IIITennessee Regulatory Authority 460 James Robertson Parkway Nashville, Tennessee 37243-0505 Attorney for Respondent/Appellee Tennessee Regulatory Authority.
T.G. PAPPASJOSEPH F. WELBORN III 2700 First American Center Nashville, Tennessee 37238.
JERRY W. AMOS P.O. Box 787 Greensboro, North Carolina 27402 Attorneys for Respondent/Appellee Nashville Gas Company.
HENRY WALKER 414 Union Street, Suite 1600 Nashville, Tennessee 37219 Attorney for Intervening Appellant Associated Valley Industries.

OPINION

CANTRELL, J.
*1 This petition under Rule 12, Tenn. R.App. Proc., to review a rate making order of the Tennessee Regulatory Authority presents a host of procedural and substantive issues. We affirm the agency order.

I.

On May 31, 1996 Nashville Gas Company (NGC) filed a petition before the Tennessee Public Service Commission requesting a general increase in its rates for natural gas service. The proposed rates would produce an increase of $9,257,633 in the company's revenue. The Consumer Advocate Division (CAD) of the State Attorney General's office filed a notice of appearance on June 6, 1996 and Associated Valley Industries (AVI), a coalition of industrial users of natural gas, entered the fray on August 20, 1996.

The Public Service Commission was replaced on July 1, 1996 by the Tennessee Regulatory Authority (TRA), a new agency created by the legislature. By an administrative order, TRA laid down the procedure by which it would accept jurisdiction of matters previously filed before the Public Service Commission, and the parties successfully navigated the uncharted waters of the TRA to get the case ready for a final hearing on November 13, 1996.

At a scheduled conference on December 17, 1996, the TRA orally approved a general rate increase for NGC, effective January 1, 1997, that would produce approximately $4,400,000 in new revenue. When a final order had not been filed by December 31, 1996, NGC began charging the rates orally approved at the conference on December 17. On February 19, 1997 TRA filed its written order adopting the oral findings of December 17, 1996. The order allowed the increased rates "for service rendered on and after January 1, 1997."

II. The Procedural Issues

a.

Was the TRA required to appoint an administrative law judge or hearing officer to conduct the hearing?

The Tennessee Administrative Procedures Act provides that a contested case hearing shall be conducted (1) in the presence of the agency members and an administrative judge or hearing officer or (2) by an administrative judge or hearing officer alone. Tenn.Code Ann. § 4-5-301(a). The CAD asserts that the TRA's order in this case is void because the agency did not follow the mandate of this statute.

The TRA, however, is also governed by an elaborate set of procedural statutes. *See*Tenn.Code Ann. § 65-2-101, et seq. Tenn.Code Ann. § 65-2-111 provides that the TRA *may* direct that contested case proceedings be heard by a hearing examiner, and we held in *Jackson Mobilphone Co. v. Tennessee Public Service Comm.,* 876 S.W.2d 106 (Tenn.App.1994), that the TRA's predecessor, the Public Service Commission, could conduct a contested case hearing itself *or* appoint a hearing officer. We think that decision is still good law and that it applies to the TRA.

b.

Did the TRA staff conduct its own investigation and improperly convey ex parte information to the TRA?

The CAD argues that the TRA violated two sections of the UAPA in the proceeding below: (1) the section prohibiting a person who has served as an investigator, prosecutor, or advocate in a contested case from serving as an administrative judge or hearing officer in the same proceeding, Tenn.Code Ann. § 4-5-303; and (2) the section prohibiting ex parte communications during a contested case proceeding, Tenn.Code Ann. § 4-5-304.

***2** As to the first contention, there is nothing in the record that supports it. The Regulatory Authority members sat as a unit to hear the proof in the hearing below. We have held that they were entitled to do so. There is no proof that any of them had served as an investigator, prosecutor, or advocate in the same proceeding.

As to the second contention, it is based on the CAD's suspicion that members of the TRA staff had taken part in an investigation of NGC, had prepared a report for the Authority, and had, in fact, continued to communicate with NGC and relay that information to the Authority members.

At the beginning of the hearing the Consumer Advocate moved to discover what he described as a report from the staff that augmented or boosted the position of one party or the other. He admitted that he did not know that such a report existed but that he believed it did, because of the past practice before the Public Service Commission.

The Authority chairman moved to deny the motion with the following explanation:

I believe that as a director I have a right to have privileged communication with a member of my staff for the purpose of understanding issues and analyzing the evidence in the many complicated proceedings that this Agency has to hear. I reject your allegation that I have abdicated my responsibility as a decision maker. I rely on my staff expertise as the law permits me to do so. Therefore, I move that your motion be denied.

The Agency members unanimously denied the CAD's motion.

On this part of the controversy we are persuaded that the TRA was correct. The TRA deals with highly complicated data involving principles of finance, accounting, and corporate efficiency; it also deals with the convoluted principles of legislative utility regulation. To expect the Authority members to fulfill their duties without the help of a competent and efficient staff defies all logic. And, we are convinced, the staff may make recommendations or suggestions as to the merits of the questions before the TRA. *See*Tenn.Code Ann. § 4-5-304(b). Otherwise, all support staff-law clerks, court clerks, and other specialists-would be of little service to the

person(s) that hire them. We are satisfied that any report made by the agency staff based on the record before the TRA was not subject to the CAD's motion to discover it.

The other part of the CAD's contention is more troubling. It contains an assertion that members of the TRA staff were passing along to the TRA evidence received from NGC. We would all agree that such ex parte communications are prohibited. *See*Tenn.Code Ann. § 4-5-304(a) and (c).

In support of his contention Consumer Advocate called the manager of the utility rate division who testified that he did an investigation of NGC under an audit. At that point the parties engaged in a general discussion about the Authority's prior ruling that the staff members' advice could not be discovered. A question about whether his advice was based on anything other than the facts in the record was excluded after an off-the-record discussion, and the witness was asked only one other question. He answered "yes" when asked if he had talked with the company or company officials since the time of the audit. There were no questions bearing on the nature of the conversations, or whether the witness received or disseminated any information pertinent to the NGC proceeding.

*3 We cannot find on the basis of the evidence in this record that the Agency received any ex parte communications that were prejudicial to the CAD's position. We would add only one further point: that administrative agencies should ensure compliance with the Administrative Procedures Act.

c.

Did NGC unlawfully put its new rates into effect on January 1, 1997?

The CAD argues that since no written order had been entered allowing the rate increase, NGC had no authority to start charging the increased rates, and the TRA's February order amounted to retroactive ratemaking.

The TRA has the power to fix just and reasonable rates "which shall be imposed, observed, and followed thereafter" by any public utility. Tenn.Code Ann. § 65-5-201. But the statutory scheme-which is the same as it was during the existence of the Public Service Commission-recognizes that a public utility may set its own rates, subject to the power given to the TRA to determine if they are just and reasonable. Tenn.Code Ann. § 65-5-203(a).*See Consumer Advocate Division v. Bissell,* No. 01-A-01-9601-BC-00049 (Tenn.App., Nashville, Aug. 26, 1996). The increased rates may be suspended for an outside limit of nine months while the TRA conducts its investigation, *id.,* but after six months the utility may, upon notice to TRA, place the increased rates into effect. Tenn.Code Ann. § 65-5-203(b)(1). The authority *may* require a bond in the amount of the proposed annual increase. *Id.*

In this case, NGC filed its petition on May 31, 1996. Because the Public Service Commission was replaced by the TRA on July 1, 1996, NGC refiled the petition on July 29, 1996. The CAD argues that the petition, therefore, had not been pending for the six months period that would allow NGC to put the rates into effect.

Under the circumstances of this case, however, we think that argument exalts form over substance. The TRA had heard the proof, and in an open meeting had announced its decision to allow part of the rate increase to go into effect on January 1, 1997. While a written order had not been entered, NGC notified the TRA that it would put the approved rates into effect on the date specified in the TRA's oral decision.

In our view, the increased rates had been pending since May. The hiatus between May and July was caused by a massive overhaul of the state regulatory machinery, and that fact cannot be attributed to NGC. So, under the statutory scheme, NGC had the power to put the approved rates into effect on Janu-

ary 1, 1997.

In addition, Tenn.Code Ann. § 65-2-112 says "Every final decision or order rendered by the authority in a contested case shall be in writing, or stated in the record...." NGC could have used the TRA's oral decision as the basis for its action of putting the rates into effect. The decision had been "stated in the record" on December 17, 1996. We add this caveat, however. The statute goes on to say that either a written or oral decision "shall contain a statement of the findings of fact and conclusions of law upon which the decision of the authority is based."We do not express an opinion on whether the December 17 oral decision complies with that mandate. But we do agree that findings of fact and conclusions of law are a necessary requirement for a meaningful review of an administrative agency's decision. *See Levy v. State Bd. of Examiners for Speech Pathology & Audiology,* 553 S.W.2d 909 (Tenn.1977).

III. The Substantive Issues

a. Hearsay

*4 The CAD argues that some of the evidence offered by NGC's expert on the projected increase in company expenses was based on rank hearsay. We notice, however, that Tenn.Code Ann. § 65-2-109 allows TRA to admit and give probative effect to any evidence that would be accepted by reasonably prudent persons in the conduct of their affairs. The same statute relieves the TRA from the rules of evidence that would apply in a court proceeding.

The CAD does not address the question of whether the evidence it calls hearsay is, nevertheless, of the kind that would be relied on by reasonably prudent persons in the conduct of their affairs. NGC argues that the evidence was not hearsay because it was based on the company records that are kept in the ordinary course of business. *See*Tenn. R. Evid. 801, 803(6). We need not decide whether the proffered evidence was hearsay because we are satisfied that the evidence was reliable and could be considered by the TRA. The TRA heard the objections to the evidence and the CAD's argument that its evidence on the same subject should have been received. The TRA chose NGC's evidence as more reliable. We find no fault with the TRA's decision on this issue.

b. Advertising

This is an issue on which the briefs of the principal parties seem to be speaking different languages. The following explanation is the best we can glean from the record. In 1984 the Public Service Commission adopted a rule that disallowed as a recoverable expense by a utility any "promotional or political advertising." The prohibition covered advertising for the purpose of encouraging any person to select or use gas service or additional gas service. It did not cover (among other things) advertising informing customers how to conserve energy or to reduce peak demand for gas, or advertising promoting the use of energy efficient appliances. *See* former Rule 1220-4-5-.45, Tenn. Regis.

In a 1985 proceeding involving a rate increase application by NGC, the Commission deviated from the rule and allowed advertising expenses up to .5% of revenues. In March of 1996 the Commission repealed 1220-4-5-.45 and proposed a new rule that would allow a utility to recover "all prudently incurred expenditures for advertising."Apparently the rule had not made it completely through the adoption procedure when the TRA heard this case below.

Nevertheless, based on proof of $1,486,000 in external advertising expenses, $800,000 in marketing personnel payroll and $300,000 in miscellaneous sales expenses, the TRA allowed the recovery of all but approximately half of the external advertising expenses. The CAD urged disallowance of all the related expenses except approximately $647,000 and NGC claims that the TRA erred in reducing the

external operating expenses because there was no proof that they were imprudently incurred.

We think the TRA was justified in its conclusion on this issue. Based on the testimony in the record that the advertising expenses were incurred to meet competition, to add new customers on existing mains, and to get existing customers to use more gas, the TRA concluded that the rate payers benefited from at least part of the external advertising.

c. The Long Term Incentive Plan

*5 The TRA allowed NGC to recover approximately one-half of the cost of its Long Term Incentive Plan. The CAD opposes the allowance of any of this expense on the basis that the plan encourages executives to seek growth through rate increases instead of through performance gains. According to the CAD, the plan does not promote improved service.

NGC offered evidence, however, that the plan had increased employee efficiency and had reduced the number of company employees per customer in Tennessee. The savings amounted to $7 million annually in wages and salaries. The same witness rebutted the CAD witness who testified that the plan encourages employees to seek rate increases rather than improved efficiency.

None of the parties to the appeal cited any authority governing the allowance of incentive payments in utility rate cases. The proof included some references to cases in other jurisdictions where that state's utility commission had allowed either 100% of the incentive payments or some fraction thereof. The consensus seems to be to look at each plan on a case by case basis and view each plan in the context of the utility's total compensation package.

We do not think the TRA erred in the treatment of the long term incentive plan in this case.

d. Rate of Return

NGC requested a rate of return on equity in the range of 13% to 13.25%. The CAD requested an 11% rate of return and offered expert testimony showing that monthly compounding of the company's income would raise the rate of return to 11.60%. The TRA set a rate of return of 11.5%.

We fail to see how either side could make much of a case on appeal. The TRA's findings and conclusions are supported by evidence in the record that is both substantial and material. *See*Tenn.Code Ann. § 4-5-322(h). A proper rate of return is not a point on a scale, *Tennessee Cable Television Ass'n v. PSC,* 844 S.W.2d 151 (Tenn.App.1992), it covers a fairly broad range, as indicated by the testimony of the competing experts in this case. We affirm the TRA's decision on this point.

We take no position on the issue of the compounding effect of the company's receipts. It is a concept that is new to us in utility regulation, and its merits need to be explored more thoroughly than they have been in this record.

IV. The Rate Design

The intervenor, AVI, challenges the part of the TRA's order that raised the "tailblock" rate for gas supplied to NGC's largest interruptible customers. The tailblock rate is the lowest rate charged per unit and it applies to usage of over 9,000 decatherms per month.[FN1]NGC's petition did not seek any increase in the rates falling in this category. The CAD's proof proposed that any changes be spread to all customer classes, but the intervenor sought an overall rate decrease. AVI's witness testified that industrial rates were set well above costs and should not be increased The TRA's order increased the tailblock rate from $0.21 per decatherm to $0.228 per decatherm. The TRA said in its order:

> FN1. There are three other blocks in the interruptible industrial category of users. Block one applies to usage of 1-1,500 decatherms per month; block two covers the

> 1,501-4,000 category; and block three applies to the 4,001-9,000 category.

*6 After careful consideration of the testimony and exhibits of the parties, the Authority finds that the rate increase approved herein should be spread equally to all customers. It is the intent of the Authority to spread this increase to all ratepayers, including interruptible Sales customers, Transportation customers, and Special Contract customers, in order to minimize the overall impact of this rate change. In addition, the Authority concludes that the residential customer charge should be increased from $6.00 per month to $7.00 per month.

We think the question of whether to spread the rate increase to all classes of users was within the discretion of the TRA. In *CF Industries v. Tenn. Pub. Serv. Comm.*, 599 S.W.2d 536 (1980), our Supreme Court said:

Specifically, there is no requirement in any rate case that the Commission receive and consider cost of service data, or what such data, if in the record, are to be accorded exclusivity. It is self-evident that cost of service is of great significance in the establishment of rates but is of lesser value in arriving at rate design. A fair rate of return to the regulated utility is one thing; the establishment of rates among various customer classes is quite another.

599 S.W. at 542.

* * *

Thus, the Public Service Commission in rate making and design cases is not solely governed by the proof although, of course, there must be an adequate evidentiary predicate. The Commission, however, is not hamstrung by the naked record. It may consider all relevant circumstances shown by the record, all recognized technical and scientific facts pertinent to the issue under consideration and may superimpose upon the entire transaction its own expertise, technical competence and specialized knowledge. Thus focusing upon the issues, the Commission decides that which is just and reasonable. This is the litmus test-nothing more, nothing less.

599 S.W. at 543.

We think it would be a rare case where the court would interfere with a rate increase spread evenly over all classes of users. If the rate design is inequitable it was not established in this proceeding. Therefore, a request that the rate increase be applied unevenly is, in fact, a request to change the rate design-on which the intervenor would have the burden of proof. A change would have to be shown by a greater amount of proof than appears in this record.

The TRA's order is affirmed and the cause is remanded to the Tennessee Regulatory Authority for enforcement. Tax the costs on appeal to the Consumer Advocate Division.

CONCUR: HENRY F. TODD, PRESIDING JUDGE, MIDDLE SECTION, WILLIAM C. KOCH, JR., JUDGE.

Tenn.App.,1998.
Consumer Advocate Division v. Tennessee Regulatory Authority
Not Reported in S.W.2d, 1998 WL 684536 (Tenn.Ct.App.), Util. L. Rep. P 26,665

END OF DOCUMENT