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

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

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division ("Consumer Advocate"), hereby respectfully submits this reply brief in response to the Response Brief of Gas Technology Institute ("GTI") filed on January 5, 2009.

I. INTRODUCTION

The initial matter before the Hearing Officer is the threshold issue of whether implementing the proposal of GTI for a mandatory consumer surcharge to support research and development in our nation's laboratories is within the Tennessee Regulatory Authority's ("TRA") statutory authority. Briefly, GTI performs and manages a variety of research and development projects related to energy and the natural gas industry. GTI's proposal in this docket calls upon Tennessee consumers to pay a mandatory surcharge to support its activities. In exchange, GTI asserts that Tennessee consumers will receive benefits annually.

The process of GTI's proposal, as the Consumer Advocate understands it, by which GTI's proposal would begin with consumers paying the required surcharge to the local natural gas distributors ("Industry") through rates. The funds raised are then passed to GTI. The fruits of GTI's labor over the course of years may result in a product such as an appliance or natural gas maintenance equipment which GTI would patent. The patents would be sold to manufacturers whom would produce the product, which in turn would be sold in the public marketplace at market price. Thus, Tennessee consumers would be both subsidizing GTI and manufacturers.

While there are many questions about the actual merits of GTI's proposal, the issue of disagreement at present is whether statutory authority exists. At the start of this proceeding, no party could point to a specific statutory provision authorizing GTI's surcharge. In a lengthy initial brief filed on November 21, 2008, the Consumer Advocate submitted that there is presently no statutory authority from which the TRA could approve GTI's proposal. On January 5, 2009, GTI filed a reply brief which, in summary, asserted that general rate-making authority and the power to set standards and classifications were sufficient authority to approve GTI's proposal. The Consumer Advocate herein responds.

II. GTI HAS NOT CITED A STATUTORY PROVISION FROM WHICH THERE IS A NECESSARY IMPLICATION AUTHORIZING IT'S CONSUMER SURCHARGE

In the American system, legal authority for an administrative agency to act should be derived expressly or implied by positive law. Sutherland Statutory Construction, Vol. 3 § 65:1, p. 373 (2006, 6th Ed.). In this matter there is no express statutory grant. GTI's arguments rely upon a broad and expansive interpretation of rate-making authority and the power to set standards. At no point has GTI, or any of the other parties to this docket, cited to a statute or

legislative policy statement from which it could be implied that a consumer funded surcharge to support GTI is authorized.

It is important to note from the beginning two very prominent points that are matters of settled law. The Tennessee Supreme Court has stated that the primary source of statutory authority of the TRA is found in Tenn.Code Ann. § 65-4-104 which provides jurisdiction, general supervisory power and control over public utilities, their property and property rights. *BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W. 3d 506, 512 (Tenn.2002). The Court has further stated that any authority exercised by the TRA must be the result of an express grant of authority or arise by *necessary* implication from the expressed statutory grant of power. *Tennessee Public Service Commission v. Southern Railroad Co.*, 554 S.W. 2d 612, 613 (Tenn.1977).

Thus, bearing these points in mind, one must consider that the chief role of the TRA is to regulate, monitor and control public utilities under its charge from the legislature. Furthermore, when considering GTI's proposal for a mandatory surcharge upon Tennessee consumers to subsidize GTI's activities in support of research and development in our nation's research labs, one must consider over whom the TRA is actually asserting control and jurisdiction upon. GTI's proposal does not call upon the Industry to subsidize GTI. Therefore, it does not affect the property interests of the Industry. The proposal calls upon consumers to fund GTI directly on an open ended basis. Thus, GTI's proposal calls upon the TRA to levy a surcharge, in effect a tax, upon consumers to support research and development within our nation's laboratories.

Any action taken by an administrative agency, no matter how mundane, routine, inventive or extraordinary requires legislative authority. There is no direct statutory authority that directly encompasses authorizing GTI's proposal. This point is conceded as the Tennessee

legislature has never so much as remarked upon this particular subject within black letter statute, legislative preamble or policy. In response to the *Initial Brief* of the Consumer Advocate, GTI has opined that a broad interpretation of the TRA's rate-making authority and power to set standards for public utilities more than grants the statutory authority to levy a surcharge upon consumers. Thus, the issue rightly examined is whether such power exists and arises by *necessary* implication from the expressed statutory grant of power.

The Consumer Advocate would submit that the issue in regards to the theory of statutory authority proposed by GTI raises fundamental questions as to the nature of the TRA's jurisdiction. Given that GTI's proposal does not touch upon the Industry or the Industry's property rights but rather levies a surcharge strictly upon consumers, the central question raised is whether the GTI's proposal calls upon the TRA to exercise sovereignty directly over consumer's pocket books, rather than the Industry. This is a particularly relevant question as GTI's proposal calls for mandatory consumer funding of a public policy in which the Tennessee General Assembly has not spoken upon or authorized.

III. THE INDUSTRY AND THE ITS PROPERTY ARE THE OBJECTS OF THE TRA's PLENARY AUTHORITY

As the Tennessee Supreme Court has stated, the primary source of authority is within Tenn.Code Ann. §65-4-104. The text of the statute makes clear that the intent of the legislature is for the TRA to have practically plenary authority over the Industry.

> The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be ***necessary*** for the purpose of carrying out the provisions of this chapter. However, such general supervisory and regulatory power and jurisdiction and control shall not apply to street railway companies. (emphasis added).

As stated in the Consumer Advocate's *Initial Brief*, the "plenary authority" of the TRA extends as far as may be *necessary* to carry out the provisions of the agency's enabling statutes.

Furthermore, the legislature made clear the nature of the TRA's authority is to be liberally interpreted in favor of the TRA "to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction." Tenn.Code Ann. § 65-4-106. Thus, the intent of the legislature is to bestow complete control over public utilities rather than consumers.

This point is not in doubt. Indeed, Tennessee courts have confirmed the superiority of the TRA's powers over public utilities time and again. The Consumer Advocate's position does not contest this settled principal. The issue that must be considered and confronted in this docket is whether the statutory authority that is intended to allow the TRA to govern and control public utilities and their property is further intended to govern and control the pocket books of consumers to fund a public policy having little or no connection to the utility service received and paid for by consumers. In other words, the question the Consumer Advocate poses is whether the TRA's authority to control public utilities extends to requiring consumers to fund a public policy the General Assembly has not specifically authorized. GTI's response brief fails to grasp this distinction. What GTI fails to recognize is that the TRA regulates, controls and governs public utilities, not consumers.

IV. GTI'S LIBERAL INTERPRETATION THEORY IS BEYOND TENN. CODE ANN. §65-4-106

GTI's arguments concede that the authority to implement its proposed surcharge on consumers is based upon a broad interpretation "as required by Tenn.Code Ann. § 65-4-106."[1] GTI's responsive argument to the applicable limits of a liberal interpretation in this matter glosses over statutory language and mischaracterizes the position of the Consumer Advocate

[1] GTI's Response to the Initial Brief of the Consumer Advocate (January 5, 2009), p.1, 7-11,

with its fixation on the phrase "is necessary" in the context of the Consumer Advocate's argument.

As the *Initial Brief* of the Consumer Advocate stated, the liberal interpretation language employed in Tenn.Code Ann. § 65-2-121 and Tenn.Code Ann. § 65-4-106 contain nearly identical language.[2] However, Tenn. Code Ann. § 65-4-106, which is the only applicable liberal interpretation statutory provision applicable in this matter, ends with the following clause: "..., to the end that the authority may effectively govern and control public utilities placed its jurisdiction by this chapter." This phrase has been within this statute since 1919 when the General Assembly first implemented a liberal interpretation. Public Acts of 1919, ch. 49 § 12. It has survived the various amendments the legislature has made to the enabling statutes of the TRA and it's predecessors over the last century. The resilience of the final clause in the face of various changes to Tennessee utility regulatory law over so many decades cannot be so easily dismissed. Further it must be noted that the words that were chosen and employed in a statute are the outcome of a deliberative process and it must considered that the General Assembly meant what it said. *State v. Medicine Bird*, 63 S.W. 3d 734, 754 (Tenn.Ct.App.2001) (cert.denied).

As a basic fact, the wording of both of the liberal interpretation clauses applicable to the TRA are undeniably different. The final text of Tenn. Code Ann. §65-4-106, beginning with "to the end" must also be considered and interpreted when this statute is applicable. It is quite clear that a liberal interpretation of the enabling statues is required "to the end" of effectively governing and controlling public utilities. The "end", or the goal as it were, of a liberal

[2] See Initial Brief (November 21, 2008), p. 14. The Consumer Advocate's Initial Brief on pages p.14-15 provides and quotes both statutes in full.

interpretation under this provision is to insure the TRA has absolute power, governance and control over public utilities. This is indisputable. However, the question of merit in this docket is whether GTI's proposal of a mandatory consumer surcharge to fund its activities contributes to insuring the TRA can effectively control and govern public utilities. In other words, is a mandatory consumer surcharge necessary or required to allow the TRA to better control and govern public utilities?

GTI's proposal, if approved, would neither aid nor negate the authority of the TRA to govern and control public utilities. Rather, approval of GTI's proposal would extend the jurisdiction of the TRA over consumers by requiring them to fund a public policy which the General Assembly has not addressed or authorized in any form. This is contrary to other public policies the General Assembly has specifically authorized funding for such as a state universal service program or TDAP.[3] Thus, in the context of the enabling statutes of the TRA as a whole, GTI's proposal is not *necessary* nor a required means to an end of effectively governing and controlling public utilities. Rather, GTI's proposal would raise funds from Tennessee consumers in apparent perpetuity to fund a policy which the General Assembly has not authorized.

GTI's arguments in this docket do not address this issue head on. Rather than offer an interpretation of what the final clause of Tenn.Code Ann. §65-4-106 means under Tennessee law, GTI simply casts the statutory language aside. GTI opines that what the General Assembly really intended was a simple rule: when the existence or extent of any particular TRA power is

[3] See the Initial Brief of the Consumer Advocate (November 21, 2008), specifically the discussion of "Negative Implications Apparent Within the Actions of the General Assembly", pp. 16-19.

in doubt, the TRA gets the benefit of the doubt.[4] While this basic concept of a liberal interpretation is stated correctly, the additional language contained in Tenn. Code Ann. § 65-4-106 that differs from Tenn.Code Ann. § 65-2-121 cannot be ignored. In essence, GTI's argument seeks to substitute the liberal interpretation language contained in Tenn. Code Ann. § 65-4-106 with that contained within Tenn.Code Ann. § 65-2-121.

If the General Assembly intended for both Tenn.Code Ann. § 65-2-121 and § 65-4-106 to be interpreted in the exact same way, they would not have distinguished them. If both statutes were intended to be interpreted in the exact same way the legislature could have opted to simply have both statutes with the exact same language or simply have Tenn. Code Ann. § 65-4-106 applicable to all of the chapters of the enabling statutes of the TRA. However, the reality is that two separate and distinguishable liberal interpretation statutes exist and apply with subtle differences to the procedural and substantive powers of the TRA.

Even without the specific boundary required by Tenn.Code Ann. § 65-4-106, a "liberal" interpretation of the authority of an agency such as the TRA has limitations. *BellSouth v. Greer*, 972 S.W. 2d 663, 680 (Tenn.Ct.App.1997) (cert.denied). There are legal and practical boundaries of reason and law that check the unilateral exercise of power that exceeds the authority granted by statute. *Id.* citing *Pharr v. Nashville*, C& St. L. Ry. 186 Tenn. 154, 161. The discretion of the TRA does not extend beyond the boundaries established by statutes and constitutional provisions that govern the agency. *Consumer Advocate v. Tennessee Regulatory*, 2007 WL 2316458*3 (Tenn.Ct.App.2007) at Attachment D of the Consumer Advocate's *Initial Brief* of November 21, 2008. Any authority exercised by the TRA must be the result of an express grant of authority by statute or arise by *necessary* implication from an express grant of

[4] GTI's Response to the Initial Brief of the Consumer Advocate, (January 5, 2009) p. 5.

authority. *Tennessee Public Service Commission v. Southern Railroad Co.*, 554 S.W. 2d 612, 613 (Tenn.1977). Thus, any regulatory action or policy the TRA authors and implements must specifically be authorized by or reasonably arise from a statute. *Id.* The fact that the legislature has spoken on issues related to GTI's proposal should not be cast aside so easily.

V. RATE-MAKING AND STANDARDS & CLASSIFICATIONS DO NOT ENTAIL GTI FUNDING VIA CONSUMER SURCHARGES

a. GTI Has Failed to Describe The Necessary Implication in Support of its Argument

There is no express statutory directive authorizing GTI's proposal. The Tennessee Supreme Court has stated that any authority exercised by the TRA must be the result of an express grant of authority or arise by *necessary* implication from the expressed statutory grant of power. *Tennessee Public Service Commission v. Southern Railroad Co.*, 554 S.W. 2d 612, 613 (Tenn.1977). Thus, whether there is a necessary implication within these statutes is paramount. GTI's position relies upon a broad interpretation of the TRA's rate-making and standards and classifications powers. However, GTI fails to state or show how the authority to implement GTI's proposal is necessarily implied within or arises from the statutory provisions cited. On the contrary, the enabling statutes as a whole contain several examples of a negative implication. When the General Assembly has intended for Tennessee utility rate-payers to fund a program, such as a state universal service fund, it has issued a clear and detailed directive.[5]

b. GTI's Broad and Expansive Interpretation of Rate-making and the Power to Set Standards Has Been Rejected in Other States

GTI's argument in support of its position relies solely upon a broad interpretation of the TRA's rate-making and power to create standards and practices for utilities to follow. The limits

[5] *Initial Brief* of the Consumer Advocate (November 21, 2008), p. 16-19.

of rate-making as authority to promulgate specific public policies funded by rate-payers has been tested in other jurisdictions and found lacking. *Arkansas Gas Consumers v. Arkansas Public Service Commission*, 118 S.W. 3d 109 (2003); *Mountain States Tel. & Tel. Co. v. Public Service Commission*, 754 P. 2d 928 (Utah.1988); *Process Gas Consumers Group v. Pennsylvania Public Utility Commission*, 511 A. 2d 1315; *Mountain States Legal Fund v. New Mexico State Corp. Commission*, 687 P. 2d 92, (1984); *Colorado Municipal League v. Public Service Commission*, 591 P. 2d 577 (Colo.1979).

The Arkansas Supreme Court decision from 2003 is particularly instructive in this docket. *Arkansas Gas Consumers v. Arkansas Public Service Commission*, 118 S.W. 3d 109 (2003). Specifically, as it relates to GTI's assertion that rate-making authority and the power to create standards and practices that public utilities must follow is the basis of authority for GTI's surcharge. In the Arkansas matter, the Public Service Commission instituted a policy in which rate-payers subsidized the reconnection of low-income consumers during a particularly harsh winter. The Commission asserted that the authority to promulgate this policy was based upon general rate-making power and the power to set standards and regulate utilities. *Id.*, 117. However, on appeal and by a majority decision, the Arkansas Supreme Court rejected this argument, declining to interpret such power in an exceeding broad manner. *Id.* 118. The Court went on to state that had the state legislature intended for the Commission to have such power, it would have provided it by statute as other state legislatures had. *Id.*, 124.

c. GTI's Broad and Expansive Interpretation of Rate-making in Tennessee Is Not Supported

While GTI insists that a broad interpretation of rate-making authorizes a surcharge levied upon consumers, it falls to explain in any detail how such a proposal fits within rate-making

principals and practice. Tennessee case law has never commented upon the legality of the use of rate-making to raise funds for a public policy the General Assembly has not authorized. The term "just and reasonable" rates has been defined as a rate which allows a public utility to earn a return on the value of property which it employs for serving consumers to that generally being made as other businesses with similar risk and sufficiently reasonable to assure the financial soundness of the utility. *Bluefield Water Works vs. Public Service Commission of West Virginia*, 262 U.S. 679 (1923); *Federal Power Commission vs. Hope Natural Gas Co.*, 320 U.S. 591 (1944). In describing the traditional objectives of rate-making, Tennessee courts have opined that just and reasonable rates should be fixed in fairness to both the utility and the consumer, that the rate should insure a fair return on the investment of the utility, and that the rates should not be so low as to affect the quality of service. *Southern Bell Telephone v. Tennessee Public Service Commission*, 304 S.W. 2d 640, 642-263 (Tenn.1957) citing *Smyth v. Ames*, 169 U.S. 466.

In essence, the objective of rate-making is to provide fair compensation for a public utility in exchange for the utility service provided to consumers. *Id.*, *CF Industries v. T.P.S.C.*, 599 S.W. 2d 536, 543 (Tenn.1980); *Powell Telephone v. T.P.S.C.*, 660 S.W. 2d 44 (Tenn.1983); *AARP v. T.P.S.C.*, 896 S.W. 2d 127, 133 (Tenn.Ct.App.1994). However, GTI's proposal has little connection to compensating a public utility for the cost of service and return on investments made by the Industry in delivering natural gas to consumers.

Requiring consumers to fund the development of a product that will in turn be patented, purchased by a manufacturer and then sold in the public market at market price is not a process which could arguably be considered a *utility service.* GTI's proposal would not aid the Industry

in terms of delivering natural gas to the households of consumers. Furthermore, funding GTI's activities would not be an investment made by the Industry, but rather a mandatory investment made by consumers in the development of products that do not currently exist. Nor would consumers be compensating the Industry for used and useful property employed for the delivery of natural gas.

Again, the Consumer Advocate would note the example of GTI's proposed plastic pipe finder. This particular GTI project has been in development since at least 2003 when GTI proposed it during a rate case.[6] Yet the project has not yet produced a piece of equipment for the public market. According to GTI, most projects take years to develop. Thus, while Tennessee consumers would be paying a surcharge to fund specific GTI projects, the property produced would not be available for the Industry to utilize for a period of years. This is contrary to the used and useful doctrine of just and reasonable rates. Just as plant-held-for-future-use is excluded from rate base because it is not used and useful, costs or surcharges for research and development of speculative projects which may never yield a measureable or useful benefit for Tennessee rate-payers should not be included in rates.[7]

d. Tennessee Consumers Will Not Reap a Tangible Benefit from a Mandatory Surcharge

As part of the argument for a broad interpretation of rate-making and standards and practices authority, GTI submits that it will deliver benefits to Tennessee consumers in the form of lower rates. However, this claim overlooks several significant factors. GTI has testified

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[6] Docket 03-00313, Rebuttal Testimony of Ron Edelstein, p. 9 (September 3, 2003).

[7] The TRA adheres to the "used & useful" doctrine as first articulated in *Smyth v. Ames*, as most recently noted in Docket 06-00187 (November 27, 2007), p. 16.

under oath in other jurisdictions, no one can predict what projects will actually succeed or fail.[8] Consumers have no guarantee for the mandatory investment GTI's proposal would require them to make. Under GTI's proposal, the risk of investment is placed on the shoulders of consumers for GTI's failures. However, any benefits that possibly could arise from GTI's success will not accrue solely to Tennessee consumers. Gas utilities, natural gas producers, interstate pipelines, manufacturers and retailers will benefit from GTI's research, yet GTI's proposal requires that only natural gas consumers provide funding. *Re: Boston Gas Company*, 2003 WL 22964772, * 197-200, D.T.E. 03-40 (October 31, 2003) at Attachment B of the Consumer Advocate's *Initial Brief* of November 21, 2008 (excerpt only due to volume). GTI does not calculate the benefits it provides to the Industry and others.

In addition, the methods employed to calculate the benefits of GTI's work are suspect. The benefits arrived at depend upon a project being successful when in fact projects can fail. GTI ignores the lag time of years that will pass before a "benefit" is produced. GTI assumes the price of natural gas, the number of GTI related products that would be sold, and how much gas or energy efficiency they would provide. Market forces are completely ignored.[9] The result is purely an exercise in the abstract. In essence, attempting such calculations with any accuracy is quite difficult and is dependent upon a myriad of changing factors, including the future behavior of consumers and the future price of natural gas. While GTI argues that its work will reduce the

[8] Pre-filed Direct Testimony of Ronald Edelstein on behalf of Atmos Energy before the Georgia Public Service Commission in Docket No. 20298 (October 24, 2005), p. 2.

[9] While GTI suggests that the theory of supply and demand supports its theory of benefits, it does not apply the same theory to itself and its funding. Research and development is in demand in the market. GTI receives some of its funding from the market, yet continues to insist that captive Tennessee rate-payers must fund it on a mandatory basis. There is no justification for mandatory consumer funding when market demand will produce investment in GTI.

price of natural gas, the organization is actually contributing to a new sector of research and development that will further increase market demand for natural gas through the organization's work and research on natural gas powered vehicles.[10]

VI. GTI's Reliance On Tennessee Court Opinions Regarding Price Cap Regulated Telephone Companies Has No Bearing On This Matter

a. GTI's Linkage of Rate-making and Directory Assistance Policy Lacks Credibility

GTI's reliance upon *Consumer Advocate v. TRA* in support of its rate-making argument is utterly misplaced.[11] The statement that the "Tennessee Court of Appeals 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" is not accurate.[12] Tenn. Code Ann. §65-5-101 and traditional rate-making had no bearing on that appeal which involved a price cap regulated telephone company and the creation of directory assistance exemptions. The court opinion cited does not discuss or so much as cite Tenn. Code Ann. § 65-5-101 or safety and efficiency factors in setting rates. Indeed, TRA orders related to directory assistance matters do not contain references to rate-making authority.

In any event, directory assistance is a utility service offered by a public utility. GTI's proposal does not offer a utility service to Tennessee consumers. The decision of the TRA to impose directory assistance requirements on a price cap regulated telephone company, a public

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[10] LNG Interchangability/Gas Quality: Results of the National Energy Technology Laboratory's Research for the FERC on Natural Gas Quality and Interchangeability; DOE/NETL-2007/1290 (June 2007), p. 4-40.

[11] GTI cites *Consumer Advocate v. TRA*, No. M1997-00238-COA-R3-CV at 2002 Tenn.App.Lexis 506 (July 18, 2002). A copy of the case was attached to GTI's Brief submitted on January 5, 2009.

[12] The quoted statement appears in *GTI's Response to the Initial Brief of the Consumer Advocate*, (January 5, 2009) p. 10. The argument based on this statement continues into p. 11.

utility, has no logical or supportable link to imposing a surcharge upon the consumers of rate of return regulated natural gas in order to subsidize GTI's activities.

b. GTI's Linkage of Appeals Involving Price Cap Regulated Telephone Companies to this Matter is Misplaced

GTI's reliance upon opinions such as *BellSouth Advertising v.TRA* is misplaced. GTI suggests that the Tennessee Supreme Court held the TRA had broad authority under Tenn. Code Ann. § 65-4-117(a)(3) as liberally interpreted by Tenn. Code Ann. §65-4-106 and thus affirmed the decision of the TRA. What GTI fails to note is the reliance of the TRA upon the General Assembly's codified telecommunications policy within Tenn.Code Ann. § 65-4-123 and the provisions of Tenn. Code Ann. § 65-4-124 that grants rule-making authority in regards to telephone directories. *BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W. 3d 506, 513-14 (Tenn.2002). The Court, in making its decision, noted these specific statutory grants and in fact reproduced them word for word in its decision. *Id.*

Rather than rely simply upon a broad interpretation of rate-making authority and the power to set standards and practices followed by public utilities, the agency relied on a specific statutory policy declaration and telephone specific statutory provision. In other words, requiring the logos of competitors to be printed on phone books was not outside of the province of specific statutory authority related to the TRA's mandate to insure Tennessee's telecommunication policy. The TRA presented a fundamental source of law and authority outside of the power to set standards and practices. It did not rely solely upon Tenn.Code Ann. § 65-4-117 as a source of authority. In this docket, GTI has not pointed to an underlying statutory provision or policy statement authored by the General Assembly remotely authorizing or suggesting a surcharge levied upon consumers for GTI's purposes. The Consumer

Advocate's *Initial Brief* discusses the General Assembly's silence on the subject matter of this docket.[13]

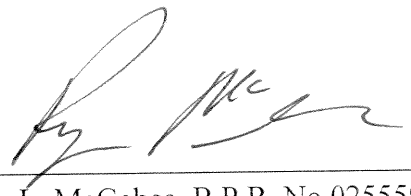
Furthermore, GTI's reliance on the Tennessee court opinions affirming the power and authority of the TRA over price cap regulated telephone companies misses the mark. In every case cited, the court affirmed the decision of the TRA in its exercise of authority over a public utility rather than an exercise of authority over consumers. Again, the fundamental concept that GTI's *Response Brief* does not grasp is the issue of the scope of the TRA's power and authority over *utilities* rather than *consumers*. The agency regulates and controls public utilities with practically plenary authority. However, the agency does not regulate or control consumers. GTI's proposal for a mandatory surcharge would be imposed upon and paid by consumers rather than the Industry to fund a public policy. GTI does not cite an example of a Tennessee court affirming a surcharge levied upon Tennessee utility consumers for conservation or research and development purposes.

[13] *Initial Brief* of the Consumer Advocate (November 21, 2008), p. 16-19.

VII. CONCLUSION

For the reason herein, the Consumer Advocate would submit that GTI's proposal calls for the TRA to act beyond the agency's statutory authority.

Respectfully submitted,



Ryan L. McGehee, B.P.R. No.025559
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Brief was served on the party below via facsimile, U.S. Mail, hand delivery, commercial delivery, or e-mail, on the 3 day of February, 2009.

J. W. Luna, Esq.
Jennifer L. Brundige, Esq.
Farmer & Luna, PLLC
333 Union Street, Suite 300
Nashville, TN 37201
Telephone: (615) 254-9146
jwluna@farmerluna.com
jbrundige@farmerluna.com

Archie Hickerson
AGL Resources
150 W. Main Street, Suite 1510
Norfolk, VA 23510
Telephone: (757) 616-7510

Elizabeth Wade
AGL Resources
Ten Peachtree Place, N.W. 15th Floor
Atlanta, GA 30309
Telephone: (404) 584-4000
ewade@aglresources.com

R. Dale Grimes
Bass, Berry & Sims, PLC
AmSouth Center
315 Deaderick Street, Ste.2700
Nashville, Tennessee 37238-3001
Telephone: (615) 742-6244
dgrimes@bassberry.com

William T. Ramsey
A. Scott Ross
Neal & Harwell PLC
One Nashville Place, Suite 2000
150 Fourth Avenue North
Nashville, Tennessee 37219
Telephone: (615) 244-1713
ramseywt@nealharwell.com
sross@nealharwell.com

Mr. James H. Jeffries IV
Moore & Van Allen PLLC
100 North Tryon Street, Suite 4700
Charlotte, NC 28202-4003
Telephone: (704) 331-1079
jeffriesj@mvalaw.com

Gary Hotvedt, Esq.
Office of Legal Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505
Telephone: (615) 741-2904
Gary.Hotvedt@state.tn.us

Jane Lewis-Raymond
Vice President and General Counsel
Piedmont Natural Gas Company, Inc.
P.O. Box 33068
Charlotte, North Carolina 28233
Jane.Lewis-Raymond@piedmontng.com

Ryan L. McGehee
Assistant Attorney General