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February 20, 2009

VIA HAND DELIVERY

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

filed electronically in docket office on 02/23/09

**Re: *Generic Contested Case to Analyze and Evaluate the Cost Benefits and
Funding Mechanisms for Energy, Docket No. 08-00064
Gas Technology Institute's Sur-Reply to the Reply Brief Filed by the Consumer
Advocate***

Dear Chairman Roberson:

Enclosed please find an original and six (6) copies of Gas Technology Institute's Sur-Reply to the Reply Brief Filed by 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

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

**GENERIC CONTESTED CASE TO
ANALYZE AND EVALUATE THE
COST BENEFITS AND FUNDING
MECHANISMS FOR ENERGY**

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DOCKET NO. 08-00064

**GAS TECHNOLOGY INSTITUTE’S SUR-REPLY
TO THE REPLY BRIEF FILED BY THE CONSUMER ADVOCATE**

Gas Technology Institute (“GTI”) respectfully files this Sur-Reply to the Reply Brief filed by the Consumer Advocate. In its Reply Brief, the Consumer Advocate continues to insist, despite law to the contrary, that the Tennessee Regulatory Authority (“the TRA”) lacks the authority to approve the recovery of gas technology research and development costs.

The Consumer Advocate’s argument depends on several essential assumptions that are not supported by logic or Tennessee law. First, the Consumer Advocate sets up a straw man, arguing that TRA approval of gas technology R&D funding would constitute improper “regulation” of consumers. This is clearly a distortion of reality. Nonetheless, if looked at in this manner, the TRA is granted explicit authorization to regulate the rates paid by consumers, and thus necessarily has been granted the authority to indirectly “regulate” consumers by determining the costs utility companies may include in the rates charged to consumers. Second, the Consumer Advocate adopts a novel interpretation of the statute mandating a liberal construction of the TRA’s authority, arguing that the statute in fact was intended to narrow the scope of the TRA’s authority. In fact, the opposite is true. Third, the Consumer Advocate assumes – ignoring the evidence to the contrary provided by GTI – that gas technology R&D

“does not touch upon the [gas utility] Industry” and has “little or no connection to the utility service received and paid for by consumers.” See Reply Brief at 4-5. As discussed in detail below, the Consumer Advocate’s assumptions are illogical and unsupported by Tennessee law.

I. TRA Approval of Gas Research R&D Funding is Regulation of Utilities, Not of Regulation of Consumers.

A cornerstone of the Consumer Advocate’s argument is that the TRA does not have authority to approve gas technology R&D funding because “the TRA regulates, controls and governs public utilities, not consumers.” See Reply Brief at 5. The Consumer Advocate concedes that the TRA has been granted “complete control over public utilities” and that liberal interpretation of the TRA’s governing statutes is intended to ensure that “the TRA has absolute power, governance, and control over public utilities.” See Reply Brief at 5, 7. The Consumer Advocate sets up a straw man to get around this concession, arguing that the TRA would be regulating *consumers*, not utilities, if it approves gas technology R&D funding. This is a red herring, as this docket is about whether the TRA should exercise its regulatory power *over public utilities* to allow the utilities to include costs associated with research as part of the costs of service recovered through the rates to consumers. Clearly the TRA has that authority.

Even if the Consumer Advocate means to argue that the TRA would be “regulating or controlling” consumers *indirectly* by approving R&D funding because consumers may pay a slightly higher rate for natural gas if R&D funding is approved, the Consumer Advocate’s argument is unreasonable. The Consumer Advocate disregards the reality that the TRA constantly indirectly “regulates” consumers in this same manner by approving the rates that consumers can be charged and determining what types of costs for which a utility company may seek reimbursement in its rates. For example, the TRA allows gas utilities to recover in rates from consumers the cost of electric power purchased by the utilities as part of its cost of service.

Under the Consumer Advocate's theory, the TRA would be forcing consumers to pay for this electric power and would therefore have exceeded its authority by "regulating and controlling" consumers. Indeed, under the logic of the Consumer Advocate's argument, *any* time the TRA approves rates to be charged to consumers, the TRA would be subjecting consumers to an illegitimate "tax."

In reality, nearly every exercise of authority by the TRA over a public utility affects consumers in some way, since every exercise of authority by the TRA is intended to ensure that consumers receive quality utility services at just and reasonable rates. Under the current GTI proposal, gas utilities will be allowed to include the costs expended for research and development in their costs of service, which the TRA allows the companies to recover in rates charged to customers. Under the current proposed rate design, this would result in a charge per consumer per month, but the rate could be designed differently. The mere fact that consumers may pay rates that are designed to cover the cost of R&D does not mean that the TRA has exceeded its authority by "regulating" consumers. In fact, this is a necessary feature of the regulation of public utilities.

II. The Consumer Advocate's Interpretation of Tennessee Code § 65-4-106 as a Limitation on the TRA's Authority is Unsupported by Law.

Tennessee Code Annotated § 65-4-106 provides that the TRA's authority shall be liberally construed, and 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."¹ The Consumer Advocate spends the bulk of its brief defending its assertion that § 65-4-106 should be interpreted to mean that the TRA possesses authority *only* if that authority is

¹ This provision applies to all sections of Chapter 1, 3, 4 and 5 of Title 65 of the Tennessee Code.

“*necessary or required* to govern and control public utilities.” See Reply Brief at 7. The Consumer Advocate insists that the phrase “to the end that the authority may effectively govern and control the public utilities” operates as a limit on the mandatory liberal interpretation of the TRA’s power rather than an explanation of the reasons why the TRA’s broad power is necessary.

The Consumer Advocate, however, cites *no* case in which a Tennessee court has read § 65-4-106 to limit the TRA’s power in this manner. GTI has pointed to several cases in which Tennessee courts have approved TRA actions that were not explicitly authorized in the TRA’s governing statutes and that were not strictly necessary to govern and control public utilities. See BellSouth Adv. & Pub. Corp. v. Tennessee Regulatory Authority, 79 S.W.3d 506 (Tenn. 2002) (competitor logos on cover of white pages); Consumer Advocate Div. v. Tennessee Regulatory Auth., 2002 Tenn. App. LEXIS 506 (Tenn. Ct. App. July 18, 2002) (free directory assistance for the blind and seniors). The Consumer Advocate’s attempt to distinguish these cases fails because it misses their central point: Tennessee courts have broadly interpreted the TRA’s authority and have not limited the TRA’s powers to those that are strictly “necessary” to govern and control public utilities. With regard to the white pages case, the Consumer Advocate notes that the Court also relied on a provision which required the telephone company to provide each customer with a basic white pages directory listing and on the general telecommunications policy articulated by Tennessee. The fact remains, however, that the legislature had expressed no explicit policy preference about whether competitors’ logos should appear on the white pages, and the Court approved the TRA’s decision by relying on the liberal interpretation of the TRA’s powers mandated in § 65-4-106 without inquiring into whether the TRA’s action was necessary to govern and control public utilities. See BellSouth Adv. & Pub. Corp., 79 S.W.3d at 513. Similarly, with regard to the directory assistance case, the Court affirmed the TRA’s requirement

of free directory assistance for seniors and the blind by relying solely on the authority of the TRA under Tennessee Code Annotated § 65-4-117(a)(3) to set practices and services to be offered by utilities. See Consumer Advocate Div., 2002 Tenn. App. LEXIS 506.²

Since no case law supports the Consumer Advocate's view, the Consumer Advocate depends *entirely* on the absence of a "to the end that" clause in another liberal construction statute, Tennessee Code Annotated § 65-2-121.³ The absence of such a clause can be explained simply: § 65-2-121 deals not with the TRA's authority to regulate public utilities, but rather with the rules of procedure before the TRA. Even if the Consumer Advocate is correct that the absence of such a clause means that the two provisions have subtle differences in meaning, the Consumer Advocate has failed to explain how its restrictive interpretation of § 65-4-106 could possibly be correct, given that the narrow interpretation the Consumer Advocate proposes effectively guts the remainder of the statutory language. It is simply the opposite of a liberal construction to require the TRA to demonstrate that "any action" it takes, "no matter how mundane [or] routine" is *necessary* to effectively govern and control public utilities. See Reply Brief at 3.

III. Gas Technology R&D is a Part of the Utility Services Provided to Consumers

The proposal currently before the TRA would allow gas utilities to recover the costs of research and development regardless of whether it is conducted by GTI or by another

² GTI's Response Brief erroneously stated that the Court in the directory assistance case relied on Tenn. Code Ann. § 65-5-101, which sets forth TRA's general rate-making authority. In fact, the Court relied on Tenn. Code Ann. § 65-4-117(a)(3). The error is not relevant to GTI's analysis, however, since neither statute provides explicit direction that directory assistance be provided free to the blind or seniors. Indeed, the provision of directory services free to such groups is precisely the kind of "public policy" the Consumer Advocate asserts that the TRA has no authority to order. The Consumer Advocate relies heavily on an Arkansas case holding that the Arkansas Public Service Commission had no authority to approve subsidized reconnection of low-income consumers. See Reply Brief at 10. As the directory assistance case demonstrates, Tennessee courts have not restricted the authority of the TRA in the same manner Arkansas courts apparently have restricted the Arkansas Public Service Commission.

³ This provision only applies to Chapter 2 of Title 65, whereas Tennessee Code Annotated § 65-4-106 applies to Chapters 1, 3, 4 and 5.

organization such as Vanderbilt University. Gas utilities are not required to participate in GTI programs, or any R&D program for that matter – this docket would grant gas utilities permission to recover R&D costs, but would not mandate that gas utilities incur such costs in the first place. The choice of what type of research to fund and whether to undertake research in-house or through outside parties is entirely up to the utilities.

Notwithstanding these facts, the Consumer Advocate boldly asserts that gas utility R&D has “little or no connection to the utility service received and paid for by consumers” and “does not touch upon the [gas] Industry or the Industry’s property rights.” This statement, like many others in the Consumer Advocate’s brief, is made baldly without reference to any supporting law. The Consumer Advocate’s position on this matter is especially hard to understand, given that the gas technology research projects proposed by GTI clearly “touch on” the gas industry and have a “connection” with gas utility service. The plastic pipe locator cited by the Consumer Advocate, for example, should greatly increase the safety and efficiency of the services provided by gas utilities. The record establishes that the research and development programs recommended in this docket relate to the cost and usage of natural gas by utilities and their customers.

Furthermore, the Consumer Advocate’s argument that gas technology R&D “has little or no connection to the utility service received and paid for by customers” goes to the merits of the research, not to the jurisdiction of the TRA which is the focus of this inquiry. The question before the TRA is whether the TRA has authority to approve gas technology R&D funding in general, not whether any particular R&D project merits funding.

IV. Conclusion

The Consumer Advocate's argument that the TRA has no authority to approve the funding of gas technology R&D is based on faulty assumptions and has no support in Tennessee law. The Tennessee Regulatory Authority is authorized by law to allow jurisdictional gas utilities to recover investments made in gas technology research and development through just and reasonable rates charged to their customers.

Respectfully Submitted,



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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 20th day of February, 2009.

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