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November 19, 2009

**VIA EMAIL AND HAND DELIVERY**

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

**Re: Petition of Piedmont Natural Gas, Inc. for Approval of Service Schedule  
No. 317 and Related Energy Efficiency Programs  
Docket No. 09-00104**

Dear Chairman Kyle:

Enclosed please find an original and five (5) copies of Piedmont Natural Gas, Inc.'s Response to the Consumer Advocate and Protection Division's Motion to Compel for filing in Docket No. 09-00104. An electronic copy of the public filing has also been transmitted electronically to the Tennessee Regulatory Authority Docket Manager, Sharla Dillon. Please stamp one copy 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.

Sincerely,



Erin M. Everitt

Enclosures

cc: Hon. Mary Freeman (w/o enclosure)  
Hon. Eddie Roberson, Ph.D. (w/o enclosure)  
Hon. Kenneth C. Hill (w/o enclosure)  
James H. Jeffries, Esq.

IN RE: )  
 )  
 PETITION OF PIEDMONT NATURAL GAS )  
 COMPANY, INC. FOR APPROVAL OF ) Docket No. 09-00104  
 SERVICE SCHEDULE NO. 317 AND )  
 RELATED ENERGY EFFICIENCY )  
 PROGRAMS )

Piedmont Natural Gas Company, Inc. (“Piedmont” or the “Company”), through counsel, respectfully submits the following Opposition to the Consumer Advocate and Protection Division of the Office of the Attorney General's (“Consumer Advocate”) Motion to Compel.

On October 13, 2009, the Consumer Advocate served over one hundred discovery requests, including sub-parts, on Piedmont ("Discovery Requests"). Piedmont objected to the discovery requests as overly burdensome and in excess of the forty (40) provided for in Rule 1220-1-2-.11(5)(a) of the Rules of the Tennessee Regulatory Authority ("TRA Rules"). Nonetheless, and in the interest of complying with the Hearing Officer's procedural schedule, Piedmont provided responses and produced documents where applicable to every Consumer Advocate discovery request and subpart on October 29, 2009. Shortly thereafter, the Consumer Advocate raised issues with a number of Piedmont's responses. Piedmont engaged in several telephonic conferences in an attempt to address the Consumer Advocate's concerns. As a result,

Piedmont served three supplemental responses on November 9, 11 and 12.<sup>1</sup> During those same discussions, Piedmont raised several issues regarding the inadequacy of the Consumer Advocate's responses to Piedmont's discovery requests. The Consumer Advocate has yet to supplement its responses or to fulfill the commitments it made during those discussions. However, Piedmont believed that the significant disputes were being addressed through these informal discussions and by Piedmont's continued efforts to satisfy the Consumer Advocate's demands. In fact, as recently as last week, Piedmont and the Consumer Advocate had reached a tentative agreement on what Piedmont believed was the last open issue with respect to the Consumer Advocate's discovery requests. On November 16, 2009, however, without any further communication with Piedmont, the Consumer Advocate filed the instant Motion to Compel claiming that, "communication regarding the outstanding discovery issues appears futile."

The Consumer Advocate divided its Motion to Compel into two groups. The first group consists of discovery requests to which the Consumer Advocate alleges Piedmont has not completely or substantively responded. With respect to many of those discovery requests, the Consumer Advocate demands that Piedmont perform analysis and create documents that are not presently in existence, a position that is not supported by the TRA Rules or the Tennessee Rules of Civil Procedure. The second group consists of discovery responses that the Consumer Advocate claims are incomplete because Piedmont provided the back-up information in Microsoft Excel files that are in a protected, read-only format. In its Response and despite the Consumer

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<sup>1</sup> The Consumer Advocate's Motion to Compel inaccurately states that Piedmont served two supplemental responses on November 9 and 11, 2009.

Advocate's inaccurate representation, Piedmont objected to producing Company documents that the Consumer Advocate could manipulate by editing or adjusting the data contained therein. The Consumer Advocate's complaints with respect to the second group are not substantive; the Consumer Advocate merely demands that Piedmont produce its documents in a format that the Consumer Advocate can use for its own analysis, which Piedmont maintains is not required under the TRA Rules of the Tennessee Rules of Civil Procedure. Notwithstanding, Piedmont will produce Microsoft Excel worksheets in unprotected format subject to the entry of a mutually agreeable protective order.

Piedmont's has provided its specific responses to the Consumer Advocate's Motion to Compel within this memorandum. The Consumer Advocate's Motion to Compel includes the relevant discovery requests at issue, Piedmont's initial and supplemental responses, as well as the Consumer Advocate's legal position related to those individual requests.

### **DISCUSSION**

While Tennessee has a broad policy that favors discovery of relevant information, Tennessee courts consistently have discouraged and prohibited overly burdensome discovery. *State ex. rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006). The Courts recognize that "there is a far greater cost in complying with a discovery request than in making a discovery request." *Id.* In determining these issues, "[a] trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider

whether less burdensome means for acquiring the requested information is available.”

*Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

**I. Piedmont’s Responses to CAPD Discovery Requests 2, 4, 6, 7, and 10 are Sufficient.**

The Consumer Advocate’s Motion to Compel first raises issue with Piedmont’s responses to CAPD Discovery Request 2, which concerns the identification and background information of expert witnesses. Piedmont will address the specific subparts below, but notes that the Consumer Advocate has failed to identify its own expert witnesses or produce similarly requested information in response to Piedmont’s discovery requests. On October 29, 2009, Piedmont identified Mr. Feingold and produced a significant amount of information and data related to Mr. Feingold’s past publications, presentations and testimony. Piedmont also identified Company employees that may provide expert opinion testimony. In contrast, in the Consumer Advocate’s response to Piedmont’s discovery requests, the Consumer Advocate identified just one witness from its own staff even though it has informally identified two outside experts. Piedmont and the Consumer Advocate have engaged in discussions related to expert witnesses and their findings, including Piedmont’s proposal that the parties agree to a mutual supplementation date. The Consumer Advocate, however, refused to agree to a date. Despite knowing the identity and background of Piedmont’s primary expert for almost three weeks, the Consumer Advocate has failed to identify its own expert witnesses or produce related information in response to the Company’s discovery requests.

Piedmont's Response to CAPD Motion to Compel, CAPD Request 2(c): Piedmont will produce Mr. Feingold's publications and presentations within its possession that pertain to revenue decoupling. In its response to the Consumer Advocate's request, Piedmont produced Mr. Feingold's ten-page curriculum vitae ("CV"), as well as a table that identifies the state, docket number, commission, client and subject matter of Mr. Feingold's previous testimony. Mr. Feingold's CV lists over sixty-five (65) publications, including titles. Examples of titles include: *Update on Revenue Decoupling and Utility Based Energy Conservation Efforts*, American Gas Association, Rate and Regulatory Issues Conference Webcast, May 30, 2007, and *Revenue Decoupling Programs: Aligning Diverse Interest*, The Institute for Regulatory Policy Studies, Illinois State University, May 2005. Ostensibly, these titles provide the Consumer Advocate with enough information to determine if the publication may be of interest. Further, and in its initial response, Piedmont stated that Mr. Feingold would provide copies of any publications that are in his possession upon the Consumer Advocate's request. After further discussion and prior to this Motion to Compel, Piedmont agreed to provide Mr. Feingold's publications within its possession that are related specifically to revenue decoupling. This agreement was contingent upon the Consumer Advocate reciprocating by identifying its experts and providing the corresponding documents for its expert witnesses. As previously indicated, the Consumer Advocate has failed to respond to Piedmont's reciprocal proposal in this regard, as well as provide any further information or documents of this nature to Piedmont.

Piedmont's Response to CAPD Motion to Compel, CAPD Request 2(d) and (h):

Piedmont will supplement its response to these requests once it reaches decisions and conclusions related to these subjects. Piedmont is not withholding information responsive to these discovery requests in anticipation of filing testimony. As previously explained, Piedmont attempted to negotiate a firm date with the Consumer Advocate for mutual supplementation on this subject in order to avoid potential procedural issues about the timeliness of responses or potential prejudice arising from late supplementation, but the Consumer Advocate declined to agree to a specific date for such supplementation.

Piedmont's Response to CAPD Motion to Compel, CAPD Request 2(i):

Piedmont maintains its objection to this request as overly broad, burdensome and beyond the scope of Tennessee Rules of Civil Procedure Rule 34. Subject to and notwithstanding these objections, and to the extent that the information is in Piedmont's and Mr. Feingold's possession, Piedmont will produce testimony and/or references/links to Mr. Feingold's testimony that address revenue decoupling.

Piedmont's Response to CAPD Motion to Compel, CAPD Request 4, 6, 7 & 10:

Piedmont disputes the Consumer Advocate's characterization that the Company requested modifications of Discovery Requests 4, 6, 7, and 10. As an initial matter, and as indicated in Piedmont's initial responses to these data requests, Piedmont has answered the questions contained in these requests to the fullest extent of its abilities. In subsequent discussions with the Consumer Advocate, it became apparent that the

information the Consumer Advocate was seeking was something other than what it had asked for. Discussions occurred between the parties and Piedmont attempted to address the Consumer Advocate's concerns underlying these requests by providing information that the Company maintained in its possession (which was different than what the Consumer Advocate had originally requested. However, Piedmont did not agree to perform additional calculations to satisfy the Consumer Advocate's "modified" discovery requests.

Piedmont objects to these requests as overly broad and burdensome, and beyond the scope of Rule 34 because the Consumer Advocate is requesting that Piedmont create new documents or perform new analysis. Rule 34(a) requires a party to provide documents that "are in the possession, custody, or control of the party upon whom the request is served." Rule 34 does not require a party to create or prepare documents that are not already in existence. Tenn. R. Civ. P. 34; *see also*, *Alli v. Savitz*, No. 07-CV-10670, 2008 U.S. Dist. LEXIS 63571, at \*5 (E.D. Mich. Aug. 20, 2008) ("Initially, a request to produce cannot ask the responding party to 'create' documents, such as lists. Rule 34 'can be used only to require the production of things in existence.'") (citations omitted); *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093 FMC, 2007 U.S. Dist. LEXIS 46364, at \*26 (C.D. Cal. May 29, 2007) ("Rule 34 only requires a party to produce documents that are already in existence."); *Precision Prefinishing, Inc. v. Sherwin-Williams Corp.*, No. 89-759-FR, 1990 U.S. Dist. LEXIS 10132, at \*3 (D. Or. July 27, 1990) ("Under Fed. R. Civ. P. 34, an adverse party may not be required to prepare something that is not already in existence."); *Wagener v. SBC Pension Benefit Plan-Non-Bargained Program*, No. 1:03-CV-00769, 2007 U.S. Dist.



LEXIS 21190, at \*10 (D.D.C. Mar. 26, 2007) (“Because these calculations do not already exist in any form, the Plan is not required to create documents under the Federal Rules of Civil Procedure.”); *Wright v. Wright (In re Wright)*, No. 04-9156, 2005 Bankr. LEXIS 1881, at \*16 (N.D. Ga. Aug. 9, 2005) (“Rule 34 of the Federal Rules of Civil Procedure does not require the Defendant to create documents simply for the purpose of producing them to the Plaintiff. ‘Rule 34 cannot be used to require the adverse party to prepare, or cause to be prepared, a writing to be produced for inspection, but can be used only to require the production of things in existence.’”) (citations omitted). Moreover, Rule 33 (*Interrogatories to Parties*) does not require the creation of documents not in existence and allows the production of business records that contain requested information. See Tenn. R. Civ. P. 33(d). Piedmont previously has provided all documents and analyses in its possession that are responsive to these requests.

The Consumer Advocate’s Motion to Compel demands that the Company perform new analyses. See, e.g., Motion to Compel Response to CAPD Discovery Request 4 (“It is the understanding of the Consumer Advocate that the Company updates their normal degree days on a daily basis. Therefore, it would be more accurate to use a 30-year average of normal degree days by month . . . .”); Motion to Compel Response to CAPD Discovery Request 6 (“It is the understanding of the Consumer Advocate that the Company can recalculate this amount for the later test periods.”); Motion to Compel Response to CAPD Discovery Request 7 (“It is the understanding of the Consumer Advocate that the Company can recalculate this amount for the later test periods.”); Motion to Compel Response to CAPD Discovery

Request 10 (“Piedmont possesses the information to perform the calculation.”). Neither the TRA Rules nor the Tennessee Rules of Civil Procedure require a responding party to perform new or specific analyses at the behest of the requesting party. Further, nothing prevents the Consumer Advocate from performing its own work and analyses. In truth, the Consumer Advocate seeks to have Piedmont perform analyses (which it has not otherwise performed) for the Consumer Advocate to use against Piedmont in this contested case. The Consumer Advocate is a party opponent in this proceeding and has no right to force Piedmont to conduct new and original analyses to aid the Consumer Advocate in its litigation efforts and Piedmont strongly objects to its efforts to compel such a result. The fact that it would be more convenient for the Consumer Advocate to receive Piedmont’s direct assistance in opposing Piedmont’s petition in this Docket provides no basis for compelling such a result when that obligation would be well beyond any discovery obligation provided for by the TRA Rules and the Tennessee Rules of Civil Procedure. Accordingly, Piedmont’s previous responses and production are sufficient to satisfy its discovery obligations under the TRA Rules and Rules 33 and 34.

**II. Piedmont’s Responses to CAPD Requests 1, 3, 5, 9, 11, 15, 16, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 39, 41, 43, 45, 54, 60, 66, which Included Read-Only Microsoft Excel Sheets and PDFs are Sufficient.**

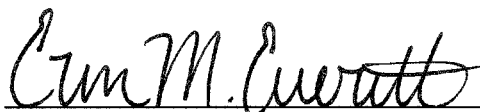
Subject to the entry of a mutually agreeable protective order that addresses the Company’s electronic workpapers and proprietary information, Piedmont will produce its Microsoft Excel workpapers in an unprotected format. Absent agreement and entry of such an order, Piedmont maintains its objection to providing the Company’s electronic workpapers, which the Consumer Advocate and other third parties could edit,

manipulate or change the data contained therein. Despite the Consumer Advocate's statement to the contrary, Piedmont raised this objection in its initial response to the Consumer Advocate's discovery requests. In its "General Objections" to the Consumer Advocate's discovery requests, Piedmont stated:

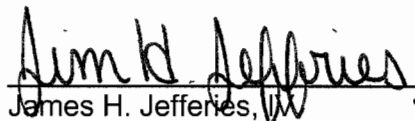
8. Piedmont objects to producing Microsoft Excel spreadsheets as the spreadsheets are kept in the normal course of business by Piedmont. The Microsoft Excel spreadsheets produced as attachments to Piedmont's Responses to the Discovery Requests are in a "read only" format that will not permit the Consumer Advocate to view the formulas or to edit, copy or format the spreadsheets or the data contained therein.

Piedmont's Objections and Responses to the Consumer Advocate's Discovery Requests, at 3 (Oct. 29, 2009). The Consumer Advocate characterizes these documents as "non-working" Excel format. However, the information provided (with the exception of formulas) is readily apparent. The "read-only" format merely prevents an unauthorized user from changing the information contained in the document. As previously stated, the TRA Rules and the Tennessee Rules of Civil Procedure do not require a party to prepare the requesting party's case. Accordingly, Piedmont respectfully requests that the Hearing Officer deny the Consumer Advocate's Motion to Compel and enter an Order consistent with Piedmont's positions on this matter.

Respectfully submitted this 19th day of November, 2009.



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*Attorneys for Piedmont Natural Gas, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of **Piedmont's Opposition to the Consumer Advocate's Motion to Compel** was served upon the parties in this action by depositing a copy of the same in the United States Mail, First Class Postage Prepaid, addressed as follows:

Ryan L. McGehee  
C. Scott Jackson  
Assistant Attorney General  
Office of the Consumer Advocate and Protection Division  
Post Office Box 20207  
Nashville, Tennessee 37202

This the 19th day of November, 2009.

  
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