

BASS, BERRY & SIMS, P.L.C.
A PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

ERIN M. EVERITT
TEL: (615) 742-7997
eeveritt@bassberry.com

150 THIRD AVENUE, SOUTH, SUITE 2200
NASHVILLE, TN 37201
(615) 742-6200

www.bassberry.com

2009 DEC 11 PM 4:15

OTHER OFFICES

KNOXVILLE
MEMPHIS

T.R.A. DOCKET ROOM

December 11, 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 Opposition to the Consumer Advocate's Motion to Remove the Confidential Designation of Certain Documents for filing in Docket No. 09-00104. A copy of the 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*)
Ryan McGehee, Esq.
James H. Jeffries, Esq.

**IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

IN RE:

**Petition of Piedmont Natural Gas
Company, Inc. for Approval of Service
Schedule No. 317 and Related Energy
Efficiency Programs**

)
)
)
)
)
)
)

DOCKET NO. 09-00104

**PIEDMONT NATURAL GAS COMPANY, INC.'S
OPPOSITION TO THE CONSUMER ADVOCATE'S MOTION TO
REMOVE THE CONFIDENTIAL DESIGNATION OF CERTAIN DOCUMENTS**

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 Remove the Confidential Designation of Certain Documents.

INTRODUCTION

On October 13, 2009, the Consumer Advocate served discovery requests on Piedmont. Many of the discovery requests related to Piedmont's confidential and proprietary information and documents, including electronic worksheets maintained in Microsoft Excel format. Before producing these documents, Piedmont insisted on a protective order to ensure that certain categories of documents would be kept confidential. Piedmont and the Consumer Advocate engaged in extensive negotiations and filed motions concerning the precise language of a proposed protective order. On November 24, 2009, the Hearing Officer granted Piedmont's Motion for Entry of a Protective Order ("Protective Order").

On December 7, 2009, the Consumer Advocate (with no prior discussion or notice to Piedmont) filed the instant motion and supporting memorandum of law, which seeks to circumvent the clear language of the Protective Order by requesting that the confidential designation for certain financial statements and sensitive commercial information produced in response to discovery requests 27-30 and 35 be removed notwithstanding the fact that the protective order specifically covers such information. Piedmont will consent to the removal of the confidential designation for attachments produced in response to discovery request 30 but objects to removing the confidential designation for the balance of the attachments. Piedmont's responses to requests 27-30 and 35 consist of confidential financial statements and sensitive information that fall under the auspices of the Protective Order. Piedmont respectfully requests that the Consumer Advocate's motion be denied and that documents produced in response to discovery requests 27-29 and 35 retain their protection as Confidential Information.

DISCUSSION

Indisputably, financial statements are included within the definition of "Confidential Information" under the plain terms of the Protective Order. Paragraph 1 of the Protective Order states in part:

For the purpose of this Protective Order ("Order"), proprietary or confidential information, hereinafter referred to as "Confidential Information", shall mean documents, testimony, or information in whatever form which the producing party, in good faith, and based on reasonable inquiry, deems to contain trade secrets, confidential research or development, **financial statements**, confidential data of third parties or other **sensitive information**, and which has been specifically designated by the Producing Party."

Protective Order at ¶ 1 (emphasis added). Notwithstanding the explicit language of the Protective Order, the Consumer Advocate now seeks to strip these documents of the

protection to which they are entitled. The Consumer Advocate, however, fails to explain beyond conclusory statements why this material — which is clearly entitled to the protection afforded by the Protective Order and designated in good faith by Piedmont — should be subject to public scrutiny and available to Piedmont's competitors.

The Consumer Advocate, as the party seeking to undermine the existing Protective Order, has the burden of demonstrating that the need for access to these financial statements outweighs Piedmont's privacy concerns. *See Ballard v. Herzke*, 924 S.W.2d 652, 660 (Tenn. 1996). When evaluating a motion to alter a protective order, the court balances the factors it originally considered to evaluate whether there was good cause to enter the protective order. *Id.* at 660. The court also considers the parties' reliance on the protective order to evaluate whether good cause still exists. *Id.*

Piedmont agreed to produce the confidential documents relying on the fact that a protective order would be entered, which would protect its confidential financial statements from disclosure. As explained in greater detail below, the documents the Consumer Advocate seeks to make public are confidential financial statements that fit squarely within the plain terms of the Protective Order. The Consumer Advocate's effort to ignore the unambiguous terms of the Protective Order a mere three weeks after it was entered should be denied.

A. Financial Statements That Estimate Piedmont's Returns Had The Decoupling Program Been In Effect.

Piedmont's responses to Consumer Advocate Discovery Request Nos. 27-29 consist of financial statements, sensitive information and projections generated specifically in response to the Consumer Advocate's requests. The Consumer Advocate asked Piedmont to calculate the return on equity and the return on rate base

for past time periods (August 2008-September 2009; October 2008-September 2009) that would have been realized had the proposed Margin Decoupling Plan been in effect. These projections are based on specific figures from Piedmont's financial statements. In addition, the documents generated and produced represent a level of granularity that ordinarily would not be available to the public. Further, Piedmont did not maintain the produced documents within the course of its normal business. Under normal circumstances, Piedmont would not have utilized the Consumer Advocate's requested methodology and limited timeframe to calculate return on equity and return on rate base. Consequently, the results of the calculation can be misleading. Piedmont merely compiled the information and created those documents solely to satisfy the Consumer Advocate's particular discovery requests in this proceeding. In agreeing to perform these calculations, Piedmont relied upon the coverage of the Protective Order and the inclusion of "financial statements" and "sensitive information" in the definition of Confidential Information.

The Tennessee Supreme Court explained in *Ballard* that a court should balance the factors it originally used to decide whether to enter the protective order and it should also consider the parties' reliance on the protective order when evaluating whether to alter a protective order. *Ballard*, 924 S.W.2d at 660. As a preliminary matter, the Consumer Advocate does not explain why the balance of equities would be any different now than they were less than a month ago when the TRA agreed to cover financial statements in the Protective Order. The Consumer Advocate knew when the Protective Order was entered that it had requested financial statements and that financial statements would be covered by the Protective Order.

In its motion and supporting memorandum, the Consumer Advocate has failed to demonstrate why the public has any viable interest in financial statements that were created only to respond to the Consumer Advocate's discovery requests. These financial statements were generated from Piedmont's historical financial statements, which are also protected by the Protective Order. The Consumer Advocate mandated the timeframe within which to calculate the results. The Consumer Advocate's argument that these financial statements should be made public because the public has a right to know how its rates may be affected overlooks the fact that these financial statements are hypothetical projections of historical returns; they do not reveal what returns Piedmont will realize going forward.

Further, the methodology and truncated timeframe underlying the calculation result in potentially misleading information. The Consumer Advocate will have every opportunity during the hearing – which will be in the public record – to make its case if it believes decoupling will negatively impact customers' rates. But the Consumer Advocate's interest in making these financial statements and sensitive information public does not overcome Piedmont's logical desire to keep detailed financial records confidential, particularly in light of Piedmont's reliance on the unambiguous terms of the Protective Order before agreeing to perform the requested calculations. The Consumer Advocate has not met its burden so these documents should remain confidential.

B. Income Statements that Contain Piedmont's Advertising Expenses.

The Consumer Advocate's motion also seeks to remove the confidential designation from certain income statements that Piedmont produced in response to discovery request 35. Discovery request 35 asked for financial statements regarding the amount of advertising Piedmont spent on natural gas use in Tennessee for the

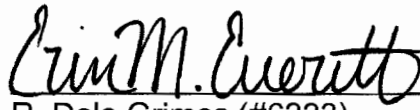
previous five years. Piedmont produced detailed income statements that show not only how much Piedmont spent on marketing overall, but how much it spent per method of marketing (direct mail, yellow pages, etc.). These income statements are also “financial statements” that are covered by the Protective Order.

These documents are confidential because they contain detailed information regarding Piedmont’s marketing efforts that are not available to the public, and particularly Piedmont’s competitors. This information also is largely irrelevant to these proceedings because it is historical information relating to promoting natural gas. It does not logically follow that this information relates to how much Piedmont will spend in the future to promote energy efficiency. The Consumer Advocate’s motion fails to provide any credible explanation as to why the public has an interest in historical information regarding Piedmont’s efforts to market natural gas use. Consequently, the Consumer Advocate does not meet its burden to prove that this information should be made public because the public’s *de minimis* interest in Piedmont’s historical marketing efforts do not overcome Piedmont’s legitimate concerns about the confidentiality of its financial statements, and Piedmont’s reasonable reliance on the Protective Order.

CONCLUSION

For the foregoing reasons, Piedmont respectfully requests that the Consumer Advocate’s motion to remove the confidential designation of certain documents be denied.

This 11th day of December, 2009.



R. Dale Grimes (#6223)
Erin M. Everitt (#027213)
Bass, Berry and Sims PLC
150 Third Ave., South, Suite 2800
Nashville, TN 37201
(615) 742-6200



James H. Jefferies, IV *EMC by permission*
NC Bar No. 15911
Brian S. Heslin
NC Bar No. 33432
Moore & Van Allen, PLLC
100 North Tryon Street
Suite 4700
Charlotte, NC 28202-4003
Telephone: (704) 331-1000
Facsimile: (704) 331-1159

Attorneys for Piedmont Natural Gas, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Discovery Request was served via U.S. Mail upon:

C. Scott Jackson, Senior Counsel
Ryan L. McGehee, Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
PO Box 20207
Nashville, Tennessee 37202-0207

This 11th day of December, 2009.

Kim M. Everett