

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

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**PETITION OF CHATTANOOGA GAS FOR
APPROVAL OF ADJUSTMENT OF ITS RATES
AND CHARGES, MODIFICATION OF ITS
RATE DESIGN, AND REVISED TARIFF**

DOCKET NO. 09-00183

**MOTION AND REPLY BRIEF OF CHATTANOOGA MANUFACTURER'S
ASSOCIATION**

The Chattanooga Manufacturer's Association ("CMA") requests permission to submit the following reply to the comments filed by Chattanooga Gas Company ("CGC" or "Chattanooga") and by the Consumer Advocate and Protection Division of the Office of the Attorney General ("Attorney General" or "CAPD").

INTRODUCTION

Without public notice or the opportunity for public comment, Chattanooga Gas asks the Authority to do something the agency has never done before: impose a special assessment on ratepayers to allow the utility to recover more than \$700,000 in legal fees the utility has spent defending itself in a regulatory proceeding, Docket 07-00224.

CMA opposes that request, and as explained in CMA's earlier filing, asks that this issue be moved out of Docket 07-00224 and into Docket 09-00183. In response to CMA's motion, Chattanooga raises a variety of objections. On the whole, CGC's arguments rest on a mischaracterization of Docket 07-00224 and a misunderstanding of the Authority's regulatory powers.

To understand why the utility's arguments are wrong, it is necessary to recall how the Authority got to this point in the first place.

BACKGROUND

TRA Docket 07-00224 was opened as a direct result of allegations raised by CMA and the Attorney General in Chattanooga's last rate case (Docket 06-00175) that the utility was sharing too much money with an unregulated affiliate, Sequent Energy, and shortchanging ratepayers.¹ In order to keep the docket manageable, the parties agreed to bifurcate the rate case into "Phase I" and "Phase II". Phase I would address traditional ratemaking issues. CMA and the Attorney General agreed that the Chattanooga/Sequent revenue sharing issue could be addressed in Phase II. When Phase I finished, however, Chattanooga Gas asked that the rate docket be closed and that the intervenors' concerns about the utility's profit sharing be addressed in another docket. Based on the intervenors' understanding that closing the rate case and opening a new docket would have no substantive effect on the purpose or result of the proceeding, CMA and the Consumer Advocate did not oppose Chattanooga's motion. Therefore, the rate case docket was closed and a new docket, No. 07-00224, was opened for the purpose of allowing the Authority to address the concerns raised by CMA and the CAPD about Chattanooga's profit sharing with Sequent.

ARGUMENT

Now, two years later, the TRA has addressed most of the issues in Docket 07-00224, ruling that the current profit sharing arrangement between Chattanooga and Sequent should not be changed but that the agency will monitor Chattanooga's sharing plans more closely in the future. Only one issue in Docket 07-00224 remains. Chattanooga Gas asks to collect a special

¹ In a similar case involving another gas utility, the TRA ruled that questions about the utility's payments to an affiliate could appropriately be raised in a rate case since a ruling against the utility could result in an order imputing additional revenues to the utility and reducing its revenue requirement. See TRA Docket 05-00258, Transcript of Authority Conference, June 26, 2006, at 29.

assessment from its ratepayers to reimburse the company for its legal fees spent in Docket 07-00224.

CMA opposes Chattanooga's request. As CMA and the Attorney General have pointed out, the TRA has no statutory authority to award legal fees except as provided in T.C.A. § 4-5-325, a statute which is inapplicable to the circumstances of this case.²

A utility may, of course, file a petition for an increase in rates and, as part of the request, seek recovery of its regulatory expenses, including legal and other professional fees which the utility expects to pay in connection with preparing and litigating the rate case. These projected rate case expenses, like the utility's other projected financial information, are normally debated and resolved in the rate case.

Chattanooga, however, continues to insist that Docket 07-00224, despite its origin, is not a rate case and that the company's motion to recover over \$700,000 in legal fees, despite its impact on customers, is "not. . . a rate increase." CGC Reply, at 1.

If this is not a rate case (though it is difficult to understand how a rate increase is "not . . . a rate increase"), the utility's motion to recover its attorneys' fees has no statutory basis and should be summarily denied. But it is, of course, a rate case. The company's motion is, in essence, a request for a rate increase to cover excess expenses arising out of the company's 2006

² In response to the argument that the TRA has no power to award legal fees, CGC contends that since the PGA rules allow a utility to recover the costs of hiring an independent, TRA-approved consultant to evaluate the company's gas purchasing practices, the PGA rules can be expanded to allow CGC to recover its legal fees spent defending its sharing arrangement with Sequent. The short answer to that argument is that the PGA rule is merely a mechanism for calculating gas costs and passing them on to ratepayers. It provides no independent basis for TRA jurisdiction. As CMA and the Attorney General have explained, the Tennessee Court of Appeals has held that the Authority has no power to award legal fees. The longer explanation is that requiring a utility and, indirectly, its customers, to reimburse the government for the state's costs of regulation is a common practice and has been upheld by the Tennessee courts. Paying for an outside consultant selected by the TRA to evaluate the utility's gas purchasing practices is no different than a utility paying the TRA an annual fee to fund the agency's regulatory staff. It is not the same as the utility paying its own attorneys. The former is a state expense; the later is an utility expense.

rate case. Since the ratemaking phase of the 2006 docket has long since closed, the only way in which the TRA can legally consider the \$700,000 request is to roll the reimbursement issue into the utility's recently filed, \$2.6 million rate filing, Docket 09-00183.

Moving Chattanooga's request for legal fees into the new rate case raises a number of ratemaking policy issues. Asking to increase rates in the future to recover losses from a prior period is retroactive ratemaking and contrary to sound ratemaking policy.³ Furthermore, it is not fair to make Chattanooga ratepayers to charge them \$700,000 because the utility accuses the Attorney General's office of overzealous litigation tactics.⁴ Nevertheless, a request to increase rates to recover rate case expenses from a prior docket is at least something the Authority has the power to grant, unlike a motion to award legal fees.

For these reasons, the reimbursement issue must be raised, if at all, in a rate case, and it must be accompanied by public notice and the opportunity for public comment. That has not been done. Notice and the opportunity for comment can be provided, however, if the Directors assigned to Docket 07-00224 agree with the Directors assigned to Docket No. 09-00183 to move the requested \$700,000 increase from the older docket to the newer one.⁵

In its response to CMA's motion, CGC raises two other points. First, Chattanooga Gas objects to CMA's motion on the grounds that CMA is not a party in Docket 07-00224. But CMA

³ Tennessee American Water Company made a similar, though unsuccessful, request in its last rate case. See "In Re: Petition of Tennessee American Water Company . . .," Docket 08-00039. Pre-filed Direct Testimony of Mike Miller at 20-21 and Rebuttal Testimony of Miller at 83-85. In a 2006 rate case, the utility had projected (and was awarded) \$400,000 in rate case expenses. The utility's actual expenses in that case exceeded \$1 million. In its next rate case, the utility asked to recover, in part, those excess expenses. All of the intervenors, including CMA, opposed the company's request, and the Authority denied it.

⁴ As CMA has previously observed, there is nothing in the many decisions of the Hearing Officer in Docket 07-00224 to substantiate CGC's allegations that the CAPD acted improperly during the two-year proceeding.

⁵ Fortuitously, the panels are the same; the same Directors can both give and receive the reimbursement issue.

need not be a party if the panel assigned to Docket 07-00224 decides on its own motion to transfer the reimbursement issue to Docket 09-00183. In the alternative, the CAPD has suggested that CMA be allowed to intervene in Docket 07-00224 for the limited purpose of addressing the reimbursement issue. If the Authority agrees, CMA will file a request for limited intervention in that docket. Finally, Chattanooga's objection may be moot since the CAPD, which is a party to Docket 07-00224, has filed copies of CMA's motion and the parties' responses in Docket 07-00224 and joined CMA in suggesting that the reimbursement issue could be transferred into the new rate case.⁶ CGC also states that if the reimbursement issue is combined with the utility's new rate case as CMA has requested, CGC asks that the issue be decided "as presented by the Company – the recovery of gas related costs through the PGA – not as presented by the CMA." Although the company's meaning is not clear, CGC appears to be saying that even if the utility's \$700,000 is rolled into the rate case, the assessment, if granted, should still be collected through the PGA and not through base rates. CMA opposes the company's special assessment but agrees that, if the reimbursement request is granted, in whole or in part, the money could be collected through the PGA.

CONCLUSION


Therefore, CMA reiterates its motion that Chattanooga's request in Docket 07-00224 for a \$700,000 rate increase be taken out of that docket and moved into Docket 09-00183 so that (1) as required by the TRA's rules, the public will have notice of the requested increase and the opportunity to comment, (2) the Authority can decide both requested increases at the same time

⁶ The Attorney General's "Response" states (at 1) that the reimbursement issue could be heard in either docket but also says (at 9) that the TRA should allow public comment on the company's request. That can only be done by rolling the reimbursement issue into Docket 09-00183.

and (3) CMA can make arguments the Authority has not yet heard about the unfairness of penalizing Chattanooga ratepayers because of allegedly improper actions by the State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of January, 2010 served the foregoing Motion and Replay of Chattanooga Manufacturer's Association, either by fax, electronic transmission, overnight deliver service or first class mail, postage prepaid, to all parties of record at their addresses shown below:

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