

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

IN RE:

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

DOCKET NO. 09-00183

COMMENTS ON PROPOSED PROTECTIVE ORDER

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), respectfully submits the following comments to the Tennessee Regulatory Authority ("TRA", "Authority").

INTRODUCTION

On December 28, 2009, the Consumer Advocate filed with the Authority a Proposed Protective Order ("PPO-2") to be considered as an alternative to the Proposed Protective Order ("PPO-1") submitted by Chattanooga Gas Company ("CGC" or "Company") on November 16, 2009. As was stated in the Consumer Advocate's December 28, 2009, filing, PPO-2 differs only from PPO-1 in that it contains language in paragraphs 1 and 10 which applies objective standards to what can and what cannot be labeled as "Confidential" under the terms of the Order. The purpose of the proposed additional language is to make clear that for any documents, testimony or other submission to be labeled as "Confidential" and shielded from public scrutiny, any and all such designations must have some basis in existing law, rule or regulation.

PPO-1 EFFECTIVELY PREEMPTS THE TENNESSEE RULES OF CIVIL PROCEDURE

The Company is a privately owned public utility providing an essential service to the consumers of Tennessee. In seeking a rate increase, CGC bears the burden of proving the proposed rates are justifiable in the course of a contested case. Tenn. Code Ann. § 65-5-103(a). Contested cases are matters of public record, and thus it follows that the TRA is subject to the requirements of the Tennessee Public Records Act. Tenn. Code Ann. § 10-7-503.

The General Assembly has directed that the Tennessee Public Records Act be “broadly construed so as to give the fullest possible public access to public records.” Tenn. Code Ann § 10-7-505 (d). In addition, Tennessee courts have recognized a clear mandate in favor of disclosure of public records. *The Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 301 (Tenn.1998). However, statutory provisions exist which provide valid exceptions to Tennessee Public Records Act provided by “state law.” Tenn. Code Ann § 10-7-503 (a).

The *Tennessee Rules of Civil Procedure* are considered “state law.” *Tennessee Department of Human Services v. Vaughn*, 595 S.W. 2d 62, 63 (Tenn.1980). As such, protective orders, granted under the authority of Rule 26 of the *Tennessee Rules of Procedure*, have the effect of “state law” and serve as an exception to the Public Records Act. *Ballard v. Herzke*, 924 S.W. 2d 652, 662 (Tenn.1996). Thus, for a protective order to have legal effect and serve as a valid exception of the Public Records Act, the moving party seeking protection must meet and comply with the requirements under Rule 26, including a showing of good cause. It is the Consumer Advocate’s opinion that PPO-1 effectively preempts the requirements under Rule 26, which will be further discussed below.

PP0-1 CONTAINS AN OVERBROAD DEFINITION OF “CONFIDENTIAL INFORMATION” AND ATTEMPTS TO SHIFT THE BURDEN OF PROOF

When a party seeks a protective order, Tennessee law places the burden of justifying the confidentiality of *each and every document* sought to be covered by a protective order upon the party seeking the order. *Id.*, 658. Tennessee law does not provide ready acceptance of labels of

confidentiality, but rather looks beyond the label to the specific facts underlying a claim for confidentiality.

Trade secrets and other confidential information enjoy no privilege from disclosure, although courts may choose to protect such information for good cause shown. ... To show good cause under Rule 26(c), the moving party must demonstrate specific examples of harm and not mere conclusory allegations. ... When confidential commercial information is involved, this standard requires a showing that disclosure will result in a clearly defined and very serious injury to the company's business, ... or, stated differently, great competitive disadvantage and irreparable harm.

Loveall v. American Honda Motor Company, 694 S.W.2d 937, 939 (Tenn. 1985) (internal citations omitted). In the context of business records or trade secrets, a company must show that disclosure will result in a specific harm if not protected. *Loveall v. American Honda Motor Company, Inc.* 694 S.W. 2d 937, 939-940 (Tenn.1985). For example, in *Loveall*, the Tennessee Supreme Court ruled that a protective order should have been granted as the company, American Honda Motor Company, showed that it would be specifically harmed if competitors were allowed access to documents pertaining to the development of the company's new products. *Id.* The holding in *Loveall* is particularly relevant as CGC has no direct competitors within the natural gas market.

The Company is seeking to avoid its obligation to justify a "confidential" label for "each and every document" it seeks to protect. *Ballard v. Herzke*, 924 S.W. 2d 652, 658 (Tenn.1996). Contrary to *Ballard*, CGC's proposed protective order removes any burden of showing that disclosure of a document will cause specific harm. Specifically, the Company's definition of "confidential information" is so broad as to invest CGC with absolute discretion in designating documents as "confidential" at whim. CGC has submitted the following definition of "confidential information" in PPO-1:

'CONFIDENTIAL INFORMATION' shall mean documents, testimony and **information in whatever form which the producing party, in good faith, deems** to contain or constitute trade secrets, confidential commercial information, confidential research, development, financial statements, confidential data of third

parties or other commercially sensitive information, *and which as been specifically designated by the producing party.* (See Paragraph #1 - Emphasis added)

The definition above, submitted by CGC, states quite clearly that CGC makes the determination as to what is protected by the confines of the protective order. The definition is so broad as to suggest even the information regularly filed in surveillance reports with the TRA could be deemed “confidential” at the discretion of the Company because they are financial statements. Not only does PPO-1 relieve CGC of the obligation to show that disclosure of a document sought to be protected will lead to specific harm, the effect of PPO-1 is to shift the burden squarely upon the shoulders of the Consumer Advocate to disprove any instance of baseless, arbitrary or bad faith labeling of documents by the Company as “confidential”. This burden shifting clearly defies the standard outlined in *Ballard v. Herzke*, 924 S.W. 2d 652, 658 (Tenn.1996), which states, “The burden of justifying the confidentiality of each and every document sought to be covered by a protective order is on the party seeking the order.” The burden should be more than merely stating that a document is a financial statement. Such discretion in the hands of a public utility that provides an essential service to Tennessee consumers is unjustified.

The arguments of the Consumer Advocate on this issue are not based strictly on public policy, but also on the practical effect of allowing utilities broad discretion to designate materials as confidential. Allowing a public utility to designate materials as confidential using broad terms such as “financial statement” or “commercially sensitive information” has had practical consequences. For example, in Docket 09-00104, a matter in which the Authority is considering proposals to implement energy conservation policy, Piedmont Natural Gas Company attempted to justify designating confidential the fact it had spent \$164,000 for “conservation education” in 2008 because this information was contained in a “financial statement.”¹ This designation was

¹ Docket 09-00104, *Opposition to the Consumer Advocate’s Motion to Remove the Confidential Designation of Certain Documents*, p.5 (December 11, 2009).

over-ruled by the Hearing Officer in that matter after the parties had to commit time and resources to a hearing.²

Rate cases are expedited proceedings with strict statutory deadlines. Procedural schedules, entailing the gathering of discovery, analysis, filing of pre-filed testimony and preparation for hearing, leave little time and resources for parties to commit to contest designations of confidential documents and material. This is all the more reason to reasonably narrow the scope of a utility's discretion to designate materials confidential within the confines state or federal law and regulations. The practical effect of not doing so only leads to wasting time and resources of the parties. Even in this docket, a rate case, CGC has designated its rate case expense, which the Company expects to recover from consumers, as confidential information. The Consumer Advocate is unaware of any rate case before the Authority in which rate case expense has been considered confidential.

In light of the broad construction of the Public Records Act in favor of disclosure and the "good cause" requirements of *Ballard*, broad protective orders restricting disclosure without a showing of specific harm by a producing party must be avoided. As an alternative to CGC's overbroad language, the Consumer Advocate has proposed PP0-2, which requires the Company to provide a basis for designating materials as confidential that is rooted in state or federal law, rules or regulations, rightfully placing the burden of showing a document is "confidential" upon the producing party. Further, PPO-2 allows the Company to designate documents as "confidential" if they are "trade secrets" as defined in statutory law. The Consumer Advocate does not deny that "confidential" status may be warranted to protect specific company information; however, this need must be weighed against the need for transparency in government and in setting utility rates.

² Docket 09-00104, *Pre-Hearing Order*, p. 2 (December 16, 2009).

PPO-1 HAS BEEN MISCHARACTERIZED AS THE “MODEL” PROTECTIVE ORDER

On December 28, 2009, the Authority filed a Notice of Public Comment, in which it was stated that CGC’s PPO-1 is essentially the “model” protective order used before the TRA for the past several years. The Consumer Advocate disagrees with this characterization and points out that the definition of “confidential information” as described in PPO-2³ has been submitted by both the Consumer Advocate and various utilities in past dockets and has ultimately been accepted and ordered by the Authority.⁴ While PPO-1 has been adopted by the TRA in previous cases, it is not the only “model” from which to choose.

CONCLUSION

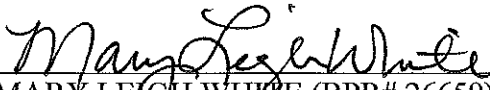
For the reasons herein, the Consumer Advocate respectfully requests that PPO-2 filed by the Consumer Advocate on December 28, 2009 be entered in this proceeding rather than PPO-1 filed by CGC.

³ 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, development or other sensitive information protected by state or federal law, regulation or rule, and which has been specifically designated by the Producing Party.

⁴ These dockets include, but are not limited to, TRA Docket No’s. 05-00258, 07-00105 and 09-00056.

RESPECTFULLY SUBMITTED,

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Dated: January 17th, 2010.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments was served via U.S. Mail or electronic mail upon:

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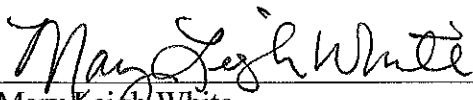
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This the 19th day of January, 2010.



Mary Leigh White