BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF CHATTANOOGA GAS	)	
FOR GENERAL RATE INCREASE,	)	**DOCKET NO. 09-00183**
IMPLEMENTATION OF THE	)	
ENERGY SMART CONSERVATION	)	
PROGRAMS, AND IMPLEMENTATION OF	)	
A REVENUE DECOUPLING MECHANISM	)	

CONSUMER ADVOCATE'S MOTION TO COMPEL WITH REGARD TO CHATTANOOGA GAS COMPANY'S OBJECTIONS TO THE CONSUMER ADVOCATE'S SUPPLEMENTAL DISCOVERY REQUESTS AND REVISED SECOND SET OF DISCOVERY REQUESTS

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate"), respectfully moves the Tennessee Regulatory Authority ("TRA" or "Authority") to compel Chattanooga Gas Company ("CGC" and "Company") to fully and completely respond to its discovery requests as set forth below:

INTRODUCTION

The discovery in dispute involves requests that seek information regarding the potential sale of CGC's supply assets to its affiliate SouthStar Energy Services ("SouthStar"), either directly or by and through other affiliated companies, which might artificially understate CGC's profits and, thereby, overstate the need for the rate increase proposed in this docket or otherwise impacts the amount of ratepayer's bills. Specifically, the Consumer Advocate requests the hearing officer compel responsive answers to Discovery Requests 14-26 of the *Revised Second*

Set of Discovery Requests of the Consumer Advocate, March 16, 2010, and Discovery Request No. 1 of the *Supplemental Discovery Requests of the Consumer Advocate*, March 18, 2010. For the sake of organization, after establishing the Standard for Discovery, this *Motion to Compel* has been organized into two major components below, each subdivided into various subcomponents as necessary: 1) Consumer Advocate's Motion to Compel with Regard to its Second Set of Discovery Requests; and 2) Consumer Advocate's Motion to Compel with Regard to its Supplemental Discovery Requests.

STANDARD FOR DISCOVERY

Tennessee has a broad policy which favors the discovery of any relevant information:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Tenn. R. Civ. P. 26.02(1). Thus, evidence does not have to be admissible to be discoverable as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Today, it is through discovery rather than pleadings that the parties attempt "to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment." Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc., 2002 WL 1389615 at *3 (Tenn. Ct. App. 2002) (*quoting* Irving Kaufman, *Judicial Control Over*

Discovery, 28 F.R.D. 111, 125 (1962)). Accordingly, a party seeking discovery is entitled to obtain any information that is relevant to the case and not privileged. Id. Consistent with Tennessee's open discovery policy, the relevancy requirement is "**construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case's issues.**" Id. (emphasis added). Discovery, therefore, is not limited to the issues raised by the pleadings. See Id., see also Shipley v. Tennessee Farmers Mutual Ins. Co., 1991 WL 77540 at *7-8 (Tenn. Ct. App. 1991). A party may also use discovery to: define and clarify the issues; probe a variety of fact-oriented issues that are not related to the merits of the case; formulate and interject additional issues into the case which relate to the subject matter of the pleadings; and determine additional causes of actions or claims which need to be or can be asserted against a party or against third parties. See Shipley, 1991 WL 77540 at *7-8 (*quoting* Vythoulkas v. Vanderbilt University Hospital, 693 S.W.2d 350, 359 (Tenn. Ct. App. 1985)).

It is nonetheless recognized that the trial court may limit discovery under appropriate circumstances. Because of the broad policy favoring discovery, the trial court should not order limitations on discovery unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. See Duncan v. Duncan, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). The trial court should decline to limit discovery if the party opposing discovery cannot produce specific facts to support the requested limitations. *See Id.* Moreover, given the liberal construction of discovery rules, the trial court should approach any request for limitations with common sense rather than with narrow legalisms, basing the reasonableness of any ordered limitations on the character of the information sought, the issues involved, and the procedural posture of the case. Id. Rather than

denying discovery outright, it is appropriate for the trial court to fashion remedies to discovery issues by balancing the competing interests and hardships of the parties and by considering whether there are less burdensome means for acquiring the requested information. Id.

Consumer Advocate's Motion to Compel with Regard to its Second Set of Discovery Requests

The Consumer Advocate has filed this Motion to Compel with regard to Discovery Requests No. 14 – 26 of its *Revised Second Set of Discovery Requests*. As CGC has not issued specific, itemized objections, but rather blanket objections to all 13 of these requests, the Consumer Advocate will not itemize those requests again here except to the extent needed for illustrative purposes. In general, CGC has objected to these 13 discovery requests on the grounds that they are "not relevant," "not reasonably calculated to lead to the discovery of admissible information," "excessively cumulative or duplicative," "overly broad, unduly burdensome, and ambiguous;" additionally, CGC objected to Discovery Request No. 15 separately on the grounds that it sought privileged information, *Chattanooga Gas Company's Objections to CAPD's Revised Second Set of Discovery Requests*, p.4, March 18, 2010. The Consumer Advocate hereby responds to these objections and to the allegations of CGC contained in those objections as follows:

A. Relevancy of the Consumer Advocate's Discovery Requests

A simple review of Discovery Requests No. 201 and 202, of the Consumer Advocate's *First Discovery Requests* will show that the questions 14-26 proffered by the Consumer Advocate in its *Revised Second Set of Discovery Requests* are in direct relation to Requests 201

and 202, and necessary in response to CGC's repeated refusal to provide a non-evasive answer to the data requests issued by the Consumer Advocate. Requests 201 and 202 read as follows:

> **REQUEST NO. 201** Admit or Deny: Capacity Demand Costs of Chattanooga Gas Company are sold directly or indirectly through Sequent Energy Management to SouthStar Energy Services, an AGL Resources subsidiary. For purposes of this and the following interrogatory only, "Capacity Demand Costs" shall be defined as gas commodity costs, interstate pipeline capacity, or any other costs associated with the gas supply plan of Chattanooga Gas Company.
>
> If Denied, please describe what specific portions of the preceding are denied and why they are inaccurate.
>
> **REQUEST NO. 202** If the preceding interrogatory is "admitted," how much profit was earned by SouthStar on the capacity demand costs purchased from Chattanooga Gas Company through Sequent Energy Management. Please provide your answer by year from the period of 2003 until the present.

Counsel for CGC objected to those discovery requests on the grounds that these requests "seek information that is not relevant to a rate case proceeding," *Chattanooga Gas Company's Objections to CAPD's First Discovery Requests*, p.6 (January 13, 2010). CGC went on to allege that the Consumer Advocate was "seeking information regarding capacity asset issues that have been litigated for the past two years in Docket 07-00224." Id. Effectively, CGC objected to Discovery Requests 201 and 202 on the same grounds as the Requests 14-26 of the Consumer Advocate's *Revised Second Set of Discovery Requests*.

The discovery requests at issue are relevant and likely to lead to discoverable information for the same reasons that the Hearing Officer found that Discovery Requests 201 and 202 were "reasonably calculated to lead to evidence that could be admissible in this rate case proceeding," *Order Addressing Protective Order Dispute, Granting Motion to Compel, and Modifying*

Procedural Schedule, p. 6, February 26, 2010. Hearing Officer Hotvedt has already ruled that the precedent set in Docket 05-00258 is applicable to CGC's interactions with its affiliate SouthStar; specifically, Hearing Officer Hotvedt found the TRA's ruling that:

> As to the relevancy dispute, it can be comfortably concluded that the requested information is relevant in that it bears on, or reasonably could lead to other information that could bear on an issue in this docket. To explain, imputation of revenue issues do occur in the course of resolving rate cases. [footnote 37: Atmos even noted during the status conference that tin recent Chattanooga Gas rate case imputation of revenues was an issue. *See* Transcript of Proceedings (June 8, 2006) (Status Conference).] A determination to impute revenues may affect the revenue requirement of a utility. [Footnote 38: In this case, the amount of revenues imputed to the revenue requirement of Atmos could be zero. For example, it could be determined that the imputed AEM revenues should be treated as gas costs thereby reducing the amount of gas costs to be recovered from ratepayers and having no affect on the revenue requirement.] To the extent that AIG seeks to put forth an argument that the Authority should impute AEM's revenues to Atmos and thereby reduce Atmos's revenue requirement, the requested information is critical. Therefore, Atmos's argument on this point is rejected.

Id. at 5-6. However, following the ruling of Hearing Officer Hotvedt in Docket 09-00183, CGC answered the discovery questions of the Consumer Advocate by denying that it ever sold "capacity demand costs," *Response of CGC*, p.2, March 3, 2010.

In response, the Consumer Advocate filed a *Second Motion to Compel* which demonstrated that CGC did, in fact, engage in the sale of "capacity demand costs," at least as CGC defined them at the January 25, 2010 Status Conference, pp. 3-4, March 5, 2010. CGC's answer, in light of their prior statements before the TRA, led to the question from Hearing Officer Hotvedt "is this [denial] semantics?," during the March 8, 2010 telephone status conference. In response to that question, CGC stated that they did not believe their denial was a

question of semantics, and that they did not engage in the sale of "capacity demand costs." However, upon additional questioning from the Consumer Advocate it became clear that CGC's definition of "capacity demand costs" differed dramatically from the one held by the Consumer Advocate and the definition previously specified by CGC's counsel during the January 25, 2010 Status Conference. Furthermore, CGC's statement in *Chattanooga Gas Company's Objections to CAPD's Revised Second Set of Discovery Requests* that "CGC has been advised by Sequent that it would take one person at Sequent working full-time for two weeks to identify the transactions for one year made to SouthStar involving pipelines with which CGC holds capacity contracts" makes clear that Sequent, the affiliate and asset manager of CGC, does engage in sales of these assets to SouthStar from the same pipelines with which CGC holds pipeline capacity, p.4, March 18, 2010; therefore, it is very likely, if not a certainty, that CGC's "capacity demand costs" or other gas supply assets are, in fact, sold to SouthStar, by and through its affiliate Sequent. As a result of the parsing of words that apparently occurred with regard to Discovery Requests 201 and 202 in the Consumer Advocate's *First Set of Discovery Requests* and in order to uncover the information that the Consumer Advocate believes was previously asked for in those requests, it has become necessary to issue Request Nos. 14-26 of the *Revised Second Set of Discovery Requests*,

Once again, the Consumer Advocate seeks to discover if CGC sold any of its "Capacity Demand Costs" or any other gas supply assets, directly or indirectly, to SouthStar, an affiliate of CGC, and, if so, what profit SouthStar may have earned on those transactions during the specified period. Upon information and belief, SouthStar is an affiliate of CGC who has a physical presence in Tennessee and is in the business of selling various natural gas assets which

could be included in "Capacity Demand Costs." Obviously, if CGC sells its "Capacity Demand Costs" or any other gas supply assets to SouthStar, who then sells those assets for a profit, those additional profits do not flow back to CGC's ratepayers, and ratepayers are not receiving the benefit of all of CGC's revenues, unless SouthStar's additional profits are imputed to CGC. See American Association of Retired Persons v. Tennessee Public Service Commission, 896 S.W.2d 127, 134 (Tenn. Ct. App. 1994) (referring to a recognized practice of imputing earnings of BAPCO, the publisher of Yellow Pages, to its parent company, BellSouth). Similarly, if CGC sells its "Capacity Demand Costs" or other gas supply costs to an intermediary affiliate, such as Sequent, who then sells them to SouthStar, the profits from SouthStar's sales to a third party also should be imputed to CGC. Id.

Therefore, the purpose of these requests is to determine what, if any, of the revenues associated with the sale of "Capacity Demand Costs," or any other gas supply assets by an affiliated corporation, should be imputed to CGC and, as a result, reduce the need for the proposed rate increase in Docket 09-00183. To cite the example used in the Consumer Advocate's first *Motion to Compel*, assume that Sequent Energy Management ("Sequent"), the asset manager of CGC who has paid for the rights to CGC's natural gas assets, sells gas to SouthStar at a profit per unit of $2; then, SouthStar sells it to someone else at an additional $2 profit per unit. Under the sharing arrangement between Sequent and CGC, ratepayers would get one-half of the $2 profit from the sale to SouthStar, or $1. However, ratepayers get no portion of the subsequent sale by SouthStar. In this hypothetical, it would be the contention of the Consumer Advocate that the gas assets were really worth the additional $2 profit SouthStar received in the subsequent arm's-length transaction on the open-market, or a total of $4 profit,

rather than just the $2 profit Sequent received in the affiliated transaction. Therefore, CGC's ratepayers should have gotten $2, half of the total $4 profit, rather than the $1 they actually received. In effect, SouthStar would be a mere conduit to wash out the value that should have gone to consumers. The only way to get this profit back to ratepayers is to look at the dealings between SouthStar and CGC, either directly or by and through Sequent, and then at SouthStar's subsequent sale of those assets. Furthermore, based on CGC's statement in its most recent *Objections,* cited above, it would appear that this type of transaction does, in fact, take place; however, to determine if SouthStar does earn additional profits on those same assets and in what quantities, it is necessary for CGC to respond to the discovery requests of the Consumer Advocate.

Once again, the most fundamental and basic accounting rules clearly favor the disclosure of affiliate transactions. Under Generally Accepted Accounting Principles ("GAAP"), as promulgated by the Financial Accounting Standards Board ("FASB"):

> **Transactions involving related parties cannot be presumed to be carried out on an arm's length basis**, as the requisite conditions of competitive, free-market dealings may not exist. Representations about transactions with related parties, if made, shall not imply that the related party transactions were consummated on terms equivalent to those that prevail in arm's-length transactions unless such representations can be substantiated…

Statement of Financial Accounting Standards No. 57: Related Party Disclosures, p.5, ¶3 (March 1982) (emphasis added). Furthermore, the FASB explained "**for accounting information to be useful, it should be relevant (meaning that it has predictive or feedback value) and reliable (meaning that it has representational faithfulness, verifiability, and neutrality).**" Id. at 7,

¶12, *citing FASB Concepts Statement No. 2, Qualitative Characteristics of Accounting Information* (emphasis added). FASB goes on to explain that related party transactions specifically do not satisfy the requirements that data be "relevant" and "reliable." Id. at 7-8. With regard to the relevancy of related party data, FASB explains that:

> Accounting information is relevant if it is 'capable of making a difference in a decision by helping users to form predictions about the outcomes of past, present, and future events or to confirm or correct expectations.' **Relationships between parties may enable one of the parties to exercise a degree of influence over the other such that the influenced party may be favored or caused to subordinate its independent interests**....for example, the terms under which a subsidiary leases equipment to another subsidiary of a common parent may be imposed by the common parent and might vary significantly from one lease to another because of circumstances entirely unrelated to market prices for similar leases...

Id. at 7, ¶13 (emphasis added). FASB also explains that the reliability of data in related party transactions is similarly compromised:

> Reliability of financial information involves 'assurance that accounting measures represent what they purport to represent.' Without disclosure to the contrary, there is a general presumption that transactions reflected in financial statements have been consummated on an arm's length basis between independent parties. However that presumption is not justified when related party transactions exist because the requisite conditions of competitive, free-market dealings may not exist. **Because it is possible for related party transactions to be arranged to obtain certain results desired by the related parties, the resulting accounting measures may not represent what they usually would be expected to represent.**

Id. at 8, ¶15 (emphasis added). For all of the reasons espoused by FASB, related party transactions in financial statements are required to be either eliminated or accompanied by certain disclosures, including the nature of relationships involved, a description of the

transactions, the dollar amounts of transactions, and amounts due from or to related parties. Id. at 5, ¶2.

B. Overly Broad, Ambiguous, Burdensome, Excessively Cumulative and Duplicative Allegations of CGC

CGC objects to Discovery Requests 14-26 on the grounds that these Requests are overly broad, burdensome, ambiguous, excessively cumulative and duplicative. First, given that CGC apparently does not believe the Consumer Advocate asked for this same information in Requests 201 and 202, this information cannot be duplicative, or excessively cumulative. In order for a discovery request to be excessively cumulative or duplicative, the utility would have to have been asked and answered that same question at least once previously. Given CGC's response to the Consumer Advocate's prior discovery requests, the definition it provided during the January 25, 2010 Status Conference, its answer to questions asked during the March 8, 2010 Status Conference, and the information provided in its March 18, 2010 Objections, CGC clearly does not believe it has been asked about the existence of these transactions previously. Otherwise, the answers provided to Requests 201 and 202 would now appear unresponsive or incorrect.

As to the allegation that these questions are "overly broad," "ambiguous" or "burdensome" the Consumer Advocate would respectfully assert that it is the actions of CGC with regard to these discovery requests which has required the Consumer Advocate to proffer sixteen additional questions in order to obtain the information it was straightforwardly attempting to obtain in just two requests previously. In its objections, CGC provided no specifics clarifying or even supporting its statements that these requests are "ambiguous" or

"overly broad." However, the Consumer Advocate has tailored these requests as narrowly as possible, given CGC's prior reliance on semantic arguments and word parsing, in order to reach the information in question. Clearly, if this is the only method in which to obtain the information the Consumer Advocate believes necessary in this rate proceeding, and which has already been ruled relevant for discovery purposes by the Hearing Officer, then it is, by definition, not "overly burdensome" for the Consumer Advocate to ask only that which is necessary to obtain the information in question.

As evidence for its assertion that the Consumer Advocate's discovery requests are "overly broad and unduly burdensome" CGC states that:

> It would require tremendous expenditure of time and resources to attempt to determine the answer, if even possible in this proceeding. CGC has been advised by Sequent that it would take one person at Sequent working full-time for two weeks to identify the transactions for one year made to SouthStar involving the pipelines with which CGC holds capacity contracts.

Chattanooga Gas Company's Objections, at 4. This argument is unconvincing for a number of reasons.

The Consumer Advocate first requested the information referred to in this objection on January 6, 2010, and the responses to its most recent discovery requests are not due until April 5, 2010, a full three months after CGC was put on notice that this information was being requested. Even if CGC's generous time calculations are accurate, even a single person at Sequent could have pulled together six years of these transactions during that period of time. Quite simply, CGC is a regulated utility in the State of Tennessee which is requesting an increase in the rates it charges to its customers. If a utility is going to request that ratepayers provide more of their

hard-earned dollars to pay for natural gas, the utility must, at the very least, satisfy its burden of proof in discovery. The Consumer Advocate could hardly be more accommodating with regard to discovery in this docket. The Consumer Advocate allowed the Company a full seven weeks to provide just the first round of requested discovery, and agreed to a scheduling order granting an additional twenty days to provide answers to the 26 second round discovery requests, while the Consumer Advocate has agreed to provide its responses to all 98 discovery requests of CGC in a mere thirteen days, barring a currently unanticipated request for an extension of that deadline. In light of all this, the company will have had more than adequate time to answer the discovery requests set forth by the Consumer Advocate; the TRA cannot be sympathetic if a utility has chosen to squander the time it was provided to answer discovery. If CGC cannot provide basic accounting information within a three month window, it is the opinion of the Consumer Advocate that the Company has two remedies available before it: 1) the Company can voluntarily move to extend the procedural schedule and suspend any implementation of the rate tariff until it can comply with the discovery requests served upon it; or 2) CGC can risk an order dismissing its rate case by the TRA for failure to comply with the procedural schedule of the TRA.

C. TRA's Authority Over SouthStar

With regard to CGC's arguments that the TRA has no authority over SouthStar because SouthStar "has no legal obligation to provide CGC this type of detailed information about SouthStar's profits or business transactions," the Consumer Advocate respectfully disagrees, *Chattanooga Gas Company's Objections*, p. 5, March 18, 2010. Primarily, the Consumer

Advocate disagrees with this statement as SouthStar Energy Services, LLC, is a registered limited liability company doing business in the State of Tennessee with a registered agent at 2908 Poston Ave., Nashville, Tennessee 37203 (See "Filing Information" from the Tennessee Secretary of State at attached "Exhibit A"). As a business entity in the State of Tennessee, SouthStar is subject to the laws of the State of Tennessee and, thus, the jurisdiction of the Authority.

Furthermore, as the Consumer Advocate pointed out during the January 25, 2010 Status Conference, the Tennessee Supreme Court has previously held that the TRA, or the Public Service Commission in the specific case on point, can and frequently does "consider the entire operating system of utility companies in determining, from the standpoint of both the regulated carrier and the consuming public fair and reasonable rates of return," Tennessee Public Service Commission v. Nashville Gas Company, 551 S.W.2d 315, 320 (Tenn. 1977) (See case attached as "Exhibit B"). The Court went on to state that:

> Management decisions, for legitimate reasons, may have placed the industrial sales and facilities requisite therefor in the parent company, but this does not prevent the public regulatory body from considering them as part of one operating system and taking them into account in determining the proper rate base and rate structure of the subsidiary. Otherwise, it would be a simple matter, through the device of holding companies, spinoffs or other corporate arrangements, to place the cream of a utility market in the hands of a parent or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers.

Id. at 321. The Supreme Court cited this decision as authority to similarly permit the TRA to consider the profits of a subsidiary of BellSouth more recently in BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority, 79 S.W.3d 506, 515-16 (Tenn.

2002). Therefore, the case law from the highest court in Tennessee can leave no doubt that the operations of SouthStar fall under the scrutiny and jurisdiction of the TRA, at least insomuch as those operations occur in relation with its regulated affiliate CGC.

D. Reiteration of the Issues of Docket 07-00224

Counsel for CGC has repeatedly argued that the Consumer Advocate is attempting to relitigate the issues of TRA Docket 07-00224, dealing with CGC's asset management agreement with Sequent. These are the exact same arguments that CGC raised as a result of Discovery Requests 201 and 202, of which the Hearing Officer overruled. While the Consumer Advocate believes that it has made clear, repeatedly, that it is in no way attempting to relitigate Docket 07-00224, the Consumer Advocate once again denies this allegation. Discovery Requests 14-26 seek only to obtain information about the sale of CGC assets to its affiliate, namely SouthStar, and whether or not all revenues obtained from the sale of those assets by CGC, or its affiliates, are properly included in the calculation of rates or the amounts CGC charges consumers. The involvement Sequent has in these discovery requests is only insofar as it acts as an intermediary between CGC and its dealings with SouthStar.

The Consumer Advocate would once again point out that the issues contemplated by these discovery requests were not included in the issues list of Docket 07-00224, and to the knowledge of the Consumer Advocate, at no time in Docket 07-00224 was SouthStar ever referred to in any way. As stated in the Consumer Advocate's first *Motion to Compel*, Docket 07-00224 explored the issue of whether the arrangement between CGC and its asset manager, Sequent, was organized in the best interests of CGC's ratepayers. These discovery requests have

nothing to do with those issues; in fact, even if you presume that CGC's dealings with Sequent are fully negotiated arm's-length, market transactions, it does not lessen the risk associated with sales of CGC's "Capacity Demand Costs" or gas supply assets to SouthStar, or the need to ensure that any such transactions are taking place at full market value. The inclusion of Sequent in these discovery requests is to point out that the sales might take place between CGC and SouthStar by and through Sequent as the representative of CGC, and to ensure that all such sales are fully and properly recorded. The Consumer Advocate has no interest in exploring the issues of Docket 07-00224 further in the present rate case; any future examination of those issues will properly take place during the triennial review which was ordered by the Authority at the conclusion of Docket 07-00224. However, the Consumer Advocate does assert that it is absolutely necessary to explore any sales of CGC's "Capacity Demand Costs" to SouthStar in order to make certain that CGC's revenues are not artificially understated due to affiliated transactions.

Quite simply, this issue has nothing to do with Docket 07-00224 except that it asks for information from CGC and its affiliates, as do virtually all discovery requests proffered in any docket involving CGC before the TRA. Beyond this most recent, and hopefully last necessary, denial that the Consumer Advocate is relitigating the issues of Docket 07-00224, the Consumer Advocate does not feel that the accusations of CGC with regard to the Consumer Advocate's behavior are germane to the discovery disputes in question, nor do they warrant any additional response.

E. Objections to Discovery Request No. 15

Discovery Request No. 15 of the Consumer Advocate read as follows:

> **REQUEST NO. 15** In its first discovery requests in this case, the Consumer Advocate asked the following question:
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> > **REQUEST NO. 201** Admit or Deny: Capacity Demand Costs of Chattanooga Gas Company are sold directly or indirectly through Sequent Energy Management to SouthStar Energy Services, an AGL Resources subsidiary. For purposes of this and the following interrogatory only, "Capacity Demand Costs" shall be defined as gas commodity costs, interstate pipeline capacity, or any other costs associated with the gas supply plan of Chattanooga Gas Company.
>
> If Denied, please describe what specific portions of the preceding are denied and why they are inaccurate.
>
> Please provide the names of the person or persons who answered, supplied information, or were consulted with by CGC in responding to this request No. 201, and state the nature of the answer, information, or consultation provided.

Revised Second Set of Discovery Requests, p.9. In addition to CGC's objection to providing any information regarding SouthStar, as requested in Discovery Request 201, CGC has also objected to providing information regarding the identity of the person who "answered" Discovery Request 201. The Consumer Advocate believes that the identity of any individuals who supplied information on the SouthStar issue may be useful at trial, particularly in cross-examining any witnesses who may have supplied information in association with the response given to Discovery Request 201; such a witness may be apt to stand on "semantics" and will therefore have to be questioned carefully. In addition, information about how request 201 was answered is relevant on the issue of litigation costs since it is anticipated that CGC will be attempting to

argue that the Consumer Advocate, not CGC, was responsible for many of the discovery disputes in this case.

Under Tennessee law, the identity of persons with discoverable information is clearly discoverable. *Strickland v. Strickland*, 618 S.W.2d 496, 499 (Tenn. Ct. App. 1981). Accordingly, the Hearing Officer should find that the identity of the persons responding to Discovery Request 201, and the information given, are discoverable.

F. Conclusion on Revised Second Set of Discovery Requests

As the Consumer Advocate stated in its first *Motion to Compel*, in Docket 09-00183, the Authority is the decision maker who may be affected by the reliability and relevancy of the data provided by CGC in its filing requesting a rate increase. It is the Authority that must determine if CGC has presented the appropriate level of revenues and expenses in those filings. However, any sales of "Capacity Demand Costs" or other gas supply assets from CGC to its affiliate SouthStar creates problems with the relevancy and reliability of that data. It is imperative that the Consumer Advocate receive answers to these discovery requests in order to ensure that all "Capacity Demand Costs" or gas supply assets sold by CGC to SouthStar are at full market value (i.e. that they include the profits of all sales by SouthStar of CGC assets), before they are again sold by SouthStar on the open market; if not, SouthStar is improperly recording profits that should be imputed to CGC, thereby artificially inflating CGC's need for an increase in the rates charged to its customers.

In light of the above, the Consumer Advocate has clearly demonstrated that these discovery requests are consistent with Tennessee's open discovery policy, as explained by the

Court of Appeal's in Duncan v. Duncan, "the Tennessee Rules of Civil Procedure embody a broad policy favoring the discovery of any relevant, non-privileged evidence," 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). Furthermore, these requests meet the relevancy requirement, which is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case's issues," Kuehne & Nagel, Inc., at 3. However, it should be noted that the Consumer Advocate has no burden of proof in relation to these discovery requests; rather, as ordered by the Court of Appeals in Duncan, "the party opposing discovery must demonstrate with more than conclusory statements and generalizations that the discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense," at 561. Additionally, the Duncan Court held that "a trial court should decline to limit discovery if the party seeking the limitations cannot produce specific facts to support its request." Id. Therefore, it is CGC, not the Consumer Advocate, with the burden of proof in relation to these discovery requests, and, at present, CGC has not satisfied this burden.

CONSUMER ADVOCATE'S MOTION TO COMPEL WITH REGARD TO ITS SUPPLEMENTAL DISCOVERY REQUESTS

CGC has objected to Discovery Request No. 1 of the Consumer Advocate's *Supplemental Discovery Requests* on the grounds that the unaltered copies sought by the Consumer Advocate seek "privileged information, including but not limited to information protected from disclosure by the attorney client privilege, and as such, CGC will be redacting them to protect the privileged information." The Discovery Request in question specifically asks CGC to:

> Please provide complete and unaltered original documentation or complete and unaltered copies of such original documentation of any and all billings of counsel, underlying records, litigation costs, or other documentation that supports any costs, for which Chattanooga Gas Company is currently seeking reimbursement and/or recovery in Docket 09-00183, which were incurred by Chattanooga Gas Company in connection with TRA Docket 07-00224, including but not limited to the original and unaltered bills submitted by counsel for payment in relation to Docket 07-00224, or full and complete copies thereof, and, upon which, Chattanooga Gas Company bases its requested recovery of $744,743.81.

The issue in question is whether or not the redactions which CGC proposes to include in these billings are protected by any applicable privilege. The Consumer Advocate asserts that at least some portion of those arguments will likely not be protected by any applicable privilege and would refer the Authority and the parties to the arguments it's already asserted on this issue in the pending *Consumer Advocate's Motion Challenging the Confidentiality of Chattanooga Gas Company's Litigation Billings and Rate Case Expenses, supra*, March 19, 2010 (See attached "Exhibit C"). The Consumer Advocate proposes that CGC file an unaltered original of the billings in question for the review of Hearing Officer Hotvedt, *in camera*, who will make the determination of whether or not these redactions protect privileged information, as asserted by CGC. However, CGC should file copies of the requested billings with any proposed redactions in place, at least on a temporary basis, no later than the current deadline for supplemental discovery, Monday, March 29, 2010.

For purposes of judicial economy and in an effort to streamline the number of motions in this Docket and the expenses of the parties, the Consumer Advocate filed its *Motion Challenging Confidentiality* on Friday, March 19, 2010, and would suggest that the parties argue that motion, along with the other, intertwined discovery issues at the scheduled status conference on

Wednesday, March 24, 2010. Alternatively, CGC requires a full seven days to respond to this Motion, the Consumer Advocate would propose moving the scheduled status conference from Wednesday, March 24, 2010, to Friday, March 26, 2010, so that all issues may be heard simultaneously, with the understanding that no extension of time in responding to discovery, nor other change in the procedural schedule will be permitted as result of that move. However, regardless of when this issue is heard, the Consumer Advocate hereby refers the Authority and the other parties to the arguments on this issue asserted in its *Motion Challenging Confidentiality* and hereby incorporates those arguments herein.

WHEREFORE, the Consumer Advocate respectfully requests that the Authority enter an order compelling CGC to produce full and complete answers to the Consumer Advocate's discovery requests as outlined above.

Respectfully submitted,

T. Jay Warner by Vance Broemel w/ permission

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via first-class U.S. Mail, postage prepaid, or electronic mail upon:

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Tennessee Regulatory Authority
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This the 22nd day of March, 2010.

T. Jay Warner by Vance Broemel
T. Jay Warner
Assistant Attorney General

STATE OF TENNESSEE
Tre Hargett, Secretary of State
Division of Business Services
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Filing Information

Name: **SOUTHSTAR ENERGY SERVICES LLC**

General Information

Control # :	**368710**	Formation Locale:	Delaware
Filing Type:	Limited Liability Company - Foreign	Date Formed:	07/01/1998
Filing Date:	04/05/1999 11:43 AM	Fiscal Year Close	12
Status:	Active	Member Count:	6
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Managed By:	Board Managed		
Public/Mutual Benefit:	Mutual		

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The following document(s) was/were filed in this office on the date(s) indicated below:

Date Filed	Filing Description	Image #
04/01/2009	2008 Annual Report	6497-2479
01/28/2008	2007 Annual Report	6188-2411
03/22/2007	2006 Annual Report	5998-2017
03/27/2006	2005 Annual Report	5734-1483
03/02/2005	2004 Annual Report	5375-0237
02/10/2005	Registered Agent Change (by Entity)	5354-1677
09/27/2004	Registered Agent Change (by Agent)	5243-0482
03/16/2004	2003 Annual Report	5067-3039
04/17/2003	2002 Annual Report	4794-1458
04/22/2002	2001 Annual Report	4486-1026
12/05/2001	2001 Annual Report	4361-0772
10/19/2001	Notice of Determination	ROLL 4326
05/02/2000	2000 Annual Report	3900-0693
04/05/1999	Initial Filing	3663-1403

Active Assumed Names (if any)	Date	Expires

Westlaw.
551 S.W.2d 315
20 P.U.R.4th 66, 551 S.W.2d 315
(Cite as: 20 P.U.R.4th 66, 551 S.W.2d 315)

H

Supreme Court of Tennessee.
TENNESSEE PUBLIC SERVICE COMMISSION et al., Appellants-Defendants,
v.
NASHVILLE GAS COMPANY, Appellee-Plaintiff.
March 21, 1977.

Gas utility filed complaint alleging that rate structure authorized by Tennessee Public Service Commission was confiscatory. The Equity Court, Davidson County, Ben H. Cantrell, Chancellor, resolved most of disputed issues in favor of Commission and generally approved its order, but as to issues which were resolved in favor of utility, Commission appealed. The Supreme Court, Harbison, J., held that: (1) operations and revenues of parent corporation were a proper and relevant consideration for Commission in fixing reasonable rates for subsidiary; (2) a fundamental principle of rate making was not violated by Commission when it failed to separate interstate from intrastate operations where it was clear that Federal Power Commission only partially regulated operations of parent and that prices charged by parent to its customers were not regulated; (3) it was within jurisdiction of Commission to determine that it did not have enough information about present contracts, depreciation schedules, and historical costs to determine extent to which industrial sales of parent were to be taken into account in fixing appropriate rates for subsidiary, and (4) expenses which subsidiary allegedly incurred in counsel fees, consulting fees, and other charges in preparation and presentation of its case were to be reconsidered by Commission with a view toward further explanation or supporting testimony.

Reversed as to issues involved in appeal and remanded.

West Headnotes

[1] Gas 190 ⇐14.3(2)

190 Gas
190k14 Charges
190k14.3 Administrative Regulation
190k14.3(2) k. Federal Power Commission. Most Cited Cases
Prices which parent corporation charged subsidiary for natural gas were subject to regulation by Federal Power Commission and, though volumes and priorities of natural gas sold by parent to its three large industrial customers were also subject to regulation by Commission, prices at which such gas was sold to those industries were not subject to regulation by Commission. T.C.A. § 65-403; Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 3.

[2] Commerce 83 ⇐62.2

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k62.2 k. Gas. Most Cited Cases
Provisions of Natural Gas Act were not designed to remove from states substantial regulation of natural gas industry, but rather were designed to provide federal regulation in certain areas which were not subject to state jurisdiction under interstate commerce clause. T.C.A. § 65-403; Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 3.

[3] Gas 190 ⇐1

190 Gas
190k1 k. Power to Control and Regulate. Most Cited Cases
Dual regulation is clearly contemplated both by terms of Natural Gas Act and by cases interpreting it. T.C.A. § 65-403; Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 3.

[4] Gas 190 ⚿1

190 Gas
190k1 k. Power to Control and Regulate. Most Cited Cases
Inasmuch as parent corporation of subject utility was regulated by Federal Power Commission as to volumes and priorities of natural gas sold by it to three large industrial customers in area, it was inappropriate for Tennessee Public Service Commission to undertake such regulation, but inasmuch as prices charged by parent corporation were not regulated, it was beyond question that Tennessee Public Service Commission had jurisdiction and authority to regulate those prices directly if it saw fit to do so. T.C.A. § 65-403; Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 3.

[5] Corporations 101 ⚿1.6(1)

101 Corporations
101I Incorporation and Organization
101k1.6 Particular Occasions for Determining Corporate Entity
101k1.6(1) k. In General. Most Cited Cases
Tennessee Public Service Commission is not bound in all instances to observe corporate charters and form of corporate structure or stock ownership in regulating a public utility and in fixing fair and reasonable rates for its operations. T.C.A. §§ 4-507 et seq., 65-220.

[6] Commerce 83 ⚿62.2

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k62.2 k. Gas. Most Cited Cases
Operations and revenues of parent corporation were not an improper and irrelevant consideration for Tennessee Public Service Commission in fixing reasonable natural gas rates for subsidiary, even though direct sales of parent corporation to industrial customers in area were a part of interstate commerce by reason of parent's being a natural gas company subject to federal Natural Gas Act, where sales were essentially local in nature and were expressly subject to state gross receipts tax and, though parent was regulated by Federal Power Commission as to volumes and priorities of natural gas sold to industrial customers, prices charged by parent to those customers were not regulated and it was beyond question, therefore, that Tennessee Public Service Commission was vested with jurisdiction and authority to regulate those prices directly if it saw fit to do so. T.C.A. § 65-403; Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 3.

[7] Commerce 83 ⚿62.2

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k62.2 k. Gas. Most Cited Cases
Statute exempting from state regulation public utilities "engaged in interstate commerce for the government or regulation of which jurisdiction is vested in the interstate commerce commission or other federal board or commission" did not operate to preclude Tennessee Public Service Commission from regulating prices on which gas was sold by parent corporation to three large industrial customers in area, notwithstanding that sales were part of interstate commerce, where operations of parent corporation were only partially regulated by Federal Power Commission and state and federal statutes operated to afford a complete system of dual regulation of natural gas industry. T.C.A. § 65-403; Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 3.

[8] Commerce 83 ⚿62.2

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General

83k62.2 k. Gas. Most Cited Cases
Tennessee Public Service Commission, in considering operations and revenues of parent corporation in fixing reasonable rates for subsidiary, did not violate a fundamental principle of rate making by failing to separate interstate from intrastate operations, where subsidiary was entirely subject to regulation by Commission and direct sales of parent to industrial customers were also subject to such regulation. T.C.A. § 65-403; Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 3.

[9] Public Utilities 317A ⇐165

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(B) Proceedings Before Commissions
317Ak165 k. Evidence. Most Cited Cases
(Formerly 317Ak15)
Tennessee Public Service Commission was entirely justified in acting within its jurisdiction in determining that it did not have enough information about present contracts, depreciation schedules, historical costs and the like to determine the extent to which the industrial sales of the parent corporation should be taken into account in fixing appropriate rates for the subsidiary. T.C.A. § 65-403; Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 3.

[10] Gas 190 ⇐14.3(3)

190 Gas
190k14 Charges
190k14.3 Administrative Regulation
190k14.3(3) k. Proceedings in General. Most Cited Cases
Expenses which utility claimed to have incurred in counsel fees, consulting fees, and other charges in preparation and presentation of its case in rate hearing were to be reconsidered by Tennessee Public Service Commission with a view toward further explanation and supporting testimony. T.C.A. § 65-403.
***316** Eugene W. Ward, Gen. Counsel, T.P.S.C., T. E. Midyett, Jr., Asst. Gen. Counsel, T.P.S.C., Larry D. Woods, Jinx S. Thomas, Nashville, for appellants-defendants.

John W. Kelley, Jr., Leslie B. Enoch, II, Nashville, William W. Bedwell, Washington, D.C., for appellee-plaintiff.

OPINION

HARBISON, Justice.

Appellee, Nashville Gas Company, is a gas distributing company, serving Metropolitan Nashville and portions of several adjacent counties in Middle Tennessee. It ***317** is a Tennessee corporation, engaged solely in intrastate commerce, and is a public utility subject to the jurisdiction of and regulation by the Tennessee Public Service Commission.

All of the stock of appellee is owned by another Tennessee corporation, Tennessee Natural Gas Lines, Inc., which is publicly held. This corporation is a "natural gas company" within the meaning of the federal Natural Gas Act of 1938,[FN1] but it is such only because it sells natural gas to its wholly-owned subsidiary, Nashville Gas Company, for resale. Otherwise, it is a domestic corporation operating wholly within the boundaries of the state. Other than its subsidiary, it has three other customers to which it makes direct sales of natural gas, all of these being large industries situated in Davidson County and being within the area authorized to be served by the subsidiary, Nashville Gas Company, under its certificate of convenience and necessity. [FN2]

FN1. 15 U.S.C.A. s 717 et seq.

FN2. The subsidiary was apparently not franchised by the City of Nashville to sell outside the city limits, and it did not receive a franchise from local government to serve all of Davidson County until the advent of Metropolitan Government in 1963.

> Nevertheless it was certificated by the Commission to serve Nashville and its environs in the 1930s or before, and it made sales outside the Nashville city limits under that certificate long before 1963. Its franchised territory under local government and its certificated area by the Commission are not and have never been identical.

Tennessee Natural Gas Lines, Inc., does not have a certificate from the state Commission. Since it is a "natural gas company" within the meaning of the federal statute, its operations are regulated by the Federal Power Commission, to the extent of the jurisdiction of that Commission. It is undisputed, however, that the Federal Power Commission does not fix the prices which Tennessee Natural Gas Lines, Inc., charges to its direct industrial customers in the Nashville area, nor does it have jurisdiction to do so under present statutory provisions.

On January 16, 1975, appellee, Nashville Gas Company, made application to the Tennessee Public Service Commission for an emergency rate increase, seeking additional revenues in order to enable it to meet the requirements of a maturing bond issue. Temporary rate increases were authorized and put into effect, under bond, on March 13, 1975. On April 14, 1975 appellee filed with the Commission an application for a general permanent rate increase, and the two matters were consolidated for hearing and disposition.

Extensive hearings were held and a voluminous record compiled before the Commission in September and October 1975. On October 14, the Commission entered an order finding that Nashville Gas Company was entitled to a rate structure which would yield 13.5% return on common equity and 12.14% return on its rate base. In order to accomplish this return, the Commission found that appellee required additional annual gross revenues of $3,056,132.00. The emergency rate increases under bond were found to produce $1,909,088.00 of this amount, and these increases were made permanent. The Commission found that an additional $1,147,044.00 in gross revenues, over the bonded revenues, were required. It authorized tariffs to produce this additional revenue subject, however, to an offset or reduction by the revenues received by the parent corporation, Tennessee Natural Gas Lines, Inc., from its direct industrial sales within the Nashville area. The Commission found that the appellee had declined to furnish it with the necessary data to compute accurately the amount of this offset or reduction, referred to in the record as an "imputation adjustment". It directed appellee immediately to file with the Commission additional data which the Commission felt necessary in order for it to determine the effect of the operations of the parent upon the authorized rate structure of the subsidiary. One member of the Commission dissented as to this portion of the order, stating that he regarded the operations of the parent corporation as entirely separate and distinct from those of the subsidiary; therefore, he considered irrelevant and illegal the additional information ordered by the majority.

***318** Continuing its refusal to furnish the requested data, appellee filed a petition for certiorari to the Chancery Court pursuant to T.C.A. s 65-220, [FN*] and also filed an original complaint in that court, alleging that the rate structure authorized by the Commission was confiscatory.

> FN* Neither party has cited the Uniform Administrative Procedures Act, T.C.A. ss 4-507 et seq. However, its application would not affect the issues presented to us.

Both before the Commission and in the Chancery Court there were numerous contested issues, involving many factors and considerations which go into the complex process of utility rate making. The Chancellor resolved most of the disputed issues in favor of the Commission and generally approved its October 14, 1975 order, with two exceptions. The two issues which he resolved in favor of appellee form the basis of the present appeal to this Court by the Commission.

The Chancellor held that the Commission was in error in taking into consideration the operations and revenues of the parent corporation, Tennessee Natural Gas Lines, Inc., and in directing the filing of additional data concerning its industrial sales in Davidson County, holding that these were an improper and irrelevant consideration in fixing reasonable rates for the subsidiary. He also resolved in favor of appellee a disputed issue concerning the reasonableness of expenses and fees incurred in the present rate proceedings. We will consider these two issues separately.[FN3]

> FN3. In support of its assignments of error, appellant Commission has attached as "Exhibits" to its brief a number of documents not introduced in evidence in the Commission hearings or before the Chancellor. This is improper practice, and we sustain appellee's Motion to Strike these documents and the references thereto in appellant's brief. No consideration has been given to them by the Court.

I. The Parent-Subsidiary Issue

[1] It is clear from the record in this case that the prices which the parent corporation, Tennessee Natural Gas Lines, Inc., charges its subsidiary for natural gas are regulated by the Federal Power Commission. Also regulated by that Commission are the volumes and priorities of natural gas sold by the parent to its three large industrial customers in the Nashville area. The prices at which such gas is sold to these industries is not, however, regulated by the Federal Power Commission nor, under the settled interpretation of the Natural Gas Act, are those prices subject to regulation by that Commission. See Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961); Cities Service Gas Co. v. U. S., 500 F.2d 448, 205 Ct.Cl. 16 (1974).

[2][3] It is also well settled that the Natural Gas Act was not designed to remove from the states substantial regulation of the natural gas industry, but rather it was designed to provide federal regulation in certain areas which were not subject to state jurisdiction under the interstate commerce clause of the United States Constitution. Dual regulation is clearly contemplated both by the terms of the federal statute and by the cases interpreting it. Memphis Natural Gas Co. v. McCanless, 183 Tenn. 635, 194 S.W.2d 476 (1946), appeal dismissed, 329 U.S. 670, 67 S.Ct. 99, 91 L.Ed. 591 (1946).

In the case of Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128 (1947), the United States Supreme Court expressly held that direct sales to industrial customers by an interstate pipe line carrier are subject to regulation by state utility commissions, even though such sales are a part of interstate commerce. See also Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993 (1951), where an interstate pipe line was required to obtain a certificate of convenience and necessity from a state commission before making direct industrial sales to natural gas customers. There the Court said:

". . . the sale and distribution of gas to local customers made by one engaged in interstate commerce is 'essentially*319 local' in aspect and is subject to state regulation without infringement of the Commerce Clause of the Federal Constitution, article 1, s 8, cl. 3. In the absence of federal regulation, state regulation is required in the public interest." 341 U.S. at 333, 71 S.Ct. at 779.

[4] Since, in the present case, the parent corporation, Tennessee Natural Gas Lines, Inc., is regulated by the Federal Power Commission as to volumes and priorities, it would not be appropriate for the local Commission to undertake such regulation. Inasmuch as the prices charged by the parent corporation to its customers are not regulated, however, we think that it is beyond question that the Tennessee Public Service Commission has jurisdiction and authority to regulate those prices dir-

ectly, if it should see fit to do so.

We have previously pointed out that the parent corporation is in "interstate commerce" solely and exclusively because of the language of the federal Natural Gas Act, 15 U.S.C.A. s 717 et seq. which places under the Federal Power Commission sales in interstate commerce for resale. Were it not for the sales made by the parent directly to its subsidiary for resale, the entire system of the parent and the subsidiary would be wholly intrastate, and would be subject to regulation in its entirety by the Tennessee Public Service Commission. The parent corporation does not operate across state lines, but its pipeline taps onto an interstate pipeline in Cheatham County, Tennessee, and brings natural gas into Davidson County, where it is sold to the subsidiary and to the three industrial customers.

Tennessee Natural Gas Lines, Inc. has no operating employees. Nashville Gas Company has some three hundred and forty-two operating employees. These perform various tasks for the parent as well as the subsidiary, and the parent reimburses the subsidiary for their services. The two corporations have common officers and directors, some of the officers being wholly paid by the subsidiary and some of them being paid by the parent. The parent acquired all of the stock of the subsidiary in 1945, and has held it continuously since that time.

The dissenting member of the Public Service Commission felt that it was improper for the Commission to consider any of the operations and sales of the parent, because of the separate corporate structure and because the parent is engaged in interstate commerce, subject to federal regulation. He also felt that it was improper to "pierce the corporate veil" because there was no evidence of fraud, misconduct or impropriety in the management and operation of the two companies.

We are in agreement with the latter statement of the Commissioner, and because of certain statements and comments made in the briefs and in the record we feel constrained to state that we find no evidence whatever of any misconduct, illegality or impropriety in any of the management decisions and transactions which are reflected in this record. The decisions by the management of the two companies to have the direct sales made to industrial customers by the parent, rather than the subsidiary, were based upon legitimate financial and corporate concerns at the time, probably including the fact that the sales were not subject to federal regulation and had not in fact been regulated locally. There were many other considerations which entered into the decisions, however, all of which were justified from a management and financial standpoint.

[5] Having said this, we are, on the other hand, equally convinced that a regulatory body, such as the Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure or stock ownership in regulating a public utility, and in fixing fair and reasonable rates for its operations. The filing of consolidated reports by parent and subsidiary corporations, both for tax purposes and regulatory purposes, is so commonplace as to be completely familiar in modern law and practice. Considerations of "piercing the veil", which are involved in cases involving tort, misconduct or fraud, are largely irrelevant in the regulatory and ***320** revenue fields. In order for taxing authorities to obtain accurate information as to revenues and expenses, the filing of consolidated tax returns by affiliated corporations is frequently required, and rate-making and regulatory bodies frequently can and do consider entire operating systems of utility companies in determining, from the standpoint both of the regulated carrier and the consuming public fair and reasonable rates of return.

In some of the federal cases most relied upon by appellee in its brief, the courts have considered parent and subsidiary corporations as a group or as an operating system, and have considered for rate-making purposes many aspects of inter-company relationships, including sales between affiliated companies, expenses charged and the like. Thus, in the case of Smith v. Illinois Bell Telephone Co.,

282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930), relied upon by appellee for the proposition that intrastate and interstate revenues, property and expenses must be allocated in fixing utility rates, the Supreme Court of the United States set aside and reversed a district court order which had found confiscatory certain rates set by an Illinois regulatory commission. The Court remanded the case for further proof and specific findings as to the reasonableness of charges made to the regulated intrastate company by its interstate parent and an interstate affiliate, the parent owning 99% of the stock of both the regulated company and the affiliated corporation, Western Electric Company.

In that case, the Court expressly held that the relationship between the subsidiary, its parent and its sister corporation demanded "close scrutiny" even though it recognized that separate corporate structures and operations should be observed. In that case the Court referred to Western Electric Company as "virtually the manufacturing department" of the entire system, and its net profits were specifically required to be taken into consideration in connection with the rates of the intrastate company, Illinois Bell Telephone Company, then under consideration.

Similarly, in Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 65 S.Ct. 829, 89 L.Ed. 1206 (1945), the Federal Power Commission treated two separate companies, subsidiaries of larger oil companies, as having been "operated as a single enterprise." 324 U.S. at 588, 65 S.Ct. 829. In that case transactions by which leaseholds had been transferred to a subsidiary were ignored, and certain interstate wholesale rates were required to be reduced because of an excess of revenues over cost. The Court said:

"The fact that the negotiations between Southwestern and Standard were at arm's length has no bearing on the present problem. The end result is that property has been transferred at a write-up from one of Southwestern's pockets to another. The impact on consumers of utility service of write-ups and inflation of capital assets through intercompany transactions or otherwise is obvious. The prevalence of the practice in the holding company field gave rise to an insistent demand for federal regulation." 324 U.S. at 608, 65 S.Ct. at 841.

See also Cities Service Gas Co. v. Federal Power Commission, 424 F.2d 411 (10th Cir. 1969), cert. dismissed, 400 U.S. 801, 91 S.Ct. 9, 27 L.Ed.2d 33 (1970); Cities Services Gas Co. v. Federal Power Commission, 155 F.2d 694 (10th Cir. 1946), cert. den., 329 U.S. 773, 67 S.Ct. 191, 91 L.Ed. 664 (1946).

[6] Even though the direct sales of the parent corporation in the present case are a part of interstate commerce, by reason of the parent's being a natural gas company subject to the federal Natural Gas Act, these sales are essentially local in nature and have been expressly held to be subject to a state gross receipts tax. Tennessee Natural Gas Lines, Inc. v. Atkins, 199 Tenn. 468, 287 S.W.2d 67 (1956).

***321** The appellee insists that the Tennessee Public Service Commission has no jurisdiction over the direct sales of its parent to the industrial customers because in 1969 the Commission dismissed proceedings which it had initiated contemplating possible total regulation of the parent. We find the contention of the appellee to be unpersuasive. Whether or not the Commission could or could not regulate all phases of the operations of the parent corporation, we think it unquestionable from the federal cases construing the Natural Gas Act that the Tennessee Commission does have authority to regulate the prices charged in these direct industrial sales. We do not regard the 1969 proceedings as having any significance with respect to the present rate case.

[7] Appellee contends further, however, that the Tennessee statutes themselves prohibit the Commission from regulating interstate commerce, citing T.C.A. s 65-403. This statute exempts from state regulation public utilities "engaged in interstate commerce for the government or regulation of

which jurisdiction is vested in the interstate commerce commission or other federal board or commission."

We have already noted that the Federal Power Commission only partially regulates the operations of the parent corporation, and certainly both the state statutes and the federal Natural Gas Act contemplate a complete system of dual regulation of the natural gas industry.

Finally it is insisted on behalf of appellee that the industrial sales were contracted by the parent, and the pipelines and facilities built at the expense of the parent, wholly separate from the subsidiary, and at a time when the subsidiary could not financially have afforded the capital outlay necessary to enable it to make these sales.

There is no question but that the two companies have had in the past separate historical development, and we have already stated that we find no illegality whatever in the management decisions which resulted in the present situation. It must be remembered, however, that Nashville Gas Company is wholly owned by Tennessee Natural Gas Lines, Inc. Throughout the record and throughout its brief on appeal, appellee stresses the frequent subsidization of the subsidiary by the parent over the years, and it seems to us that the subsidiary in actuality is nothing more than an operating division of the parent. Management decisions, for legitimate reasons, may have placed the industrial sales and the facilities requisite therefor in the parent company, but this does not prevent a public regulatory body from considering them as part of one operating system and taking them into account in determining the proper rate base and rate structure of the subsidiary. Otherwise, it would be a simple matter, through the device of holding companies, spinoffs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers. See Industrial Gas Co. v. Public Utilities Comm'm of Ohio, 135 Ohio 408, 21 N.E.2d 166 (1939).

[8] Throughout the lengthy involved hearings reflected in the record in this case, much information concerning the parent corporation and its sales was introduced into the record. The Commission felt, however, that it did not have enough information about present contracts, depreciation schedules, historical costs and the like to determine the extent to which the industrial sales of the parent should be taken into account in fixing appropriate rates for the subsidiary. We cannot, therefore, at this time know what significance, if any, the Commission will ultimately give to the data which it requested, but we believe that the Commission was entirely justified and acting within its jurisdiction in taking these into account. From such information as is already contained in the record, it appears ***322** that the parent corporation receives substantial profits from these sales, reflecting a net return on the equity capital of the consolidated enterprise not greatly less than that which the Commission found necessary and proper for the subsidiary alone.[FN4]

> FN4. The general rate increase proposed in this case did not involve residential customers. Its effect, therefore, will be to raise the rates charged to industrial and commercial customers of the subsidiary, and it therefore seems particularly relevant that consideration should be given to the revenues received by the parent from its industrial sales in the same marketing area.

[9] The Chancellor held that the Commission had violated a fundamental principle of rate making in failing to separate interstate from intrastate operations. He stated that even if the parent and subsidiary were merged into one corporation, such allocation would still have to be made. This, however, overlooks the fact that if the two corporations were merged, there would be no interstate commerce involved at all, because there would be no "sales for resale" and the entire system would be an intrastate distributing company.

While the principle referred to by the Chancellor is a well-recognized and fundamental one, it is usu-

ally applied in cases where a regulatory body has only partial jurisdiction over a utility, or where a utility company has separate non-utility operations, not subject to regulation. Such a situation is not presented in the present case, where the subsidiary is entirely subject to regulation by the Tennessee Public Service Commission, and the direct sales of its parent are also subject to such regulation.

The decree of the Chancellor in this case is reversed, insofar as it dealt with the parent-subsidiary relationship, and this cause will be remanded to the Chancery Court, with directions to refer it to the Commission for the production by the Nashville Gas Company of the information ordered to be supplied by the Commission, and further consideration by the Commission after that information has been supplied.

II. Rate Case Expenses

The Commission authorized the applicant Nashville Gas Company to include in its cost of services $100,000.00 for expenses incurred in counsel fees, consulting fees and other charges in the preparation and presentation of this case. By an exhibit, filed several days after the close of the hearings before the Commission, appellee claimed $203,420.00 in expenses, more than double the amount allowed by the Commission. In its complaint in the chancery court, appellee alleged that it was never given a hearing on its late-filed exhibit, and that the action of the Commission was unreasonable. The Chancellor found no evidence contrary to that contained in the exhibit and allowed the entire amount of claimed expenses, to be amortized over a three-year period.

[10] Since we have ordered a remand of this case to the Commission, we think that the item of expenses should also be reconsidered by the Commission, with both the appellee and the commission staff having an opportunity to present such additional evidence as they desire. We are not prepared to accept some of the items contained in the late-filed exhibit, nor do we believe that the Commission was obligated to do so, at least without some explanation or supporting testimony. We think a further hearing on this entire issue would be appropriate.

The decree of the Chancery Court is reversed as to the two issues involved on this appeal, and the cause is remanded to that Court for reference to the Commission as above indicated. Costs incident to the appeal to this Court will be taxed to appellee. ***323** All other costs will be fixed by the Chancel- lor.

COOPER, C. J., and FONES and BROCK, JJ., concur.
HENRY, J., not participating.
Tenn. 1977.
Tennessee Public Service Commission v. Nashville Gas Co.
20 P.U.R.4th 66, 551 S.W.2d 315

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C

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF CHATTANOOGA GAS	)	
FOR GENERAL RATE INCREASE,	)	**DOCKET NO. 09-00183**
IMPLEMENTATION OF THE	)	
ENERGY SMART CONSERVATION	)	
PROGRAMS, AND IMPLEMENTATION OF	)	
A REVENUE DECOUPLING MECHANISM	)	

CONSUMER ADVOCATE'S MOTION CHALLENGING THE CONFIDENTIALITY OF CHATTANOOGA GAS COMPANY'S LITIGATION BILLINGS AND RATE CASE EXPENSES

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate"), and in compliance with the Protective Order submitted to the Tennessee Regulatory Authority ("TRA" or "the Authority") in Docket 09-00183, respectfully moves the TRA to order that the billings of counsel submitted by Chattanooga Gas Company ("CGC") in support of its litigation expenses in Docket 07-00224 no longer be treated as confidential under the controlling Protective Order, that any such billings of counsel for CGC be full, complete and without redaction, and that the amount of CGC's rate case expense in Docket 09-00183 no longer be treated as confidential under the Protective Order.

As required by the Protective Order in Docket 09-00183, the Consumer Advocate has offered to "meet and confer" with counsel for CGC. That offer has been accepted and the parties are currently scheduled to meet at 1:30 p.m. on Monday, March 22, 2010. Should the parties reach a resolution on one or more of these issues at the scheduled meeting, the Consumer

Advocate will notify the TRA of our intention to withdraw all or a portion of this Motion. However, in light of the fact that the next status conference on any discovery issues is set for Wednesday, March 24, 2010, the Consumer Advocate is filing this Motion now in order to ensure that all parties have an opportunity to adequately respond prior to that time.

INTRODUCTION

This Motion flows from the confidential billings of legal counsel submitted by CGC on October 6, 2009, in support of its request for recovery of litigation costs in Docket 07-00224. Specifically, Farmer & Luna, PLLC, submitted heavily redacted billings of $467,148.62, in its capacity as counsel of CGC; additionally, the law firm of McKenna, Long & Aldridge, LLP, has billed CGC $205,109.71 as of August 31, 2009.

On February 1, 2010, the Authority issued an Order granting the Motion of Chattanooga Manufacturer's Association ("CMA") requesting that CGC's request for recovery of litigation costs in Docket 07-00224 be combined with CGC's requested rate increase in Docket 09-00183. Additionally, on March 8, 2010, during a conference call between the TRA and the parties, the Authority ordered that the billings submitted on October 6, 2009, in Docket 07-00224, be moved into the record of Docket 09-00183 subject to the Protective Order already in effect in Docket 09-00183. The Consumer Advocate has complied with Paragraph 11 of the Protective Order in this docket and offered to "meet and confer with the Producing Party" on this matter. The Consumer Advocate now moves for the TRA to remove these bills from the designation "confidential" under the Protective Order in this docket and, therefore, be moved into the public record of Docket 09-00183, *Protective Order*, p.7 ¶11 (February 19, 2010). Similarly, that removal from confidentiality should include the removal of any redactions currently present on those records, as no portion of the records would remain "confidential," unless, after an *in camera* review by the Hearing Officer, the TRA finds any portion of those billings to actually be protected by an asserted privilege.

In addition, on March 5, 2010, CGC filed additional testimony from Archie R. Hickerson regarding its request for recovery of litigation costs. In that testimony, Mr. Hickerson stated that since August 31, 2010, CGC has incurred additional litigation billings of $72,485.48, *Testimony of Archie R. Hickerson*, p.20:20-23 (March 5, 2010). While this total was not labeled confidential by CGC and was publicly filed, CGC has not yet submitted billings in support of this number. On March 15, 2010, the Consumer Advocate submitted a discovery request for any billings of counsel that may support the additional legal expenses of $72,485.48, referred to in Mr. Hickerson's testimony. Id. At present, these billings have not been submitted by CGC, as they are not yet due. However, in order to achieve judicial economy and make the most effective use of the Authority's time, the Consumer Advocate has already complied with Paragraph 11 of the Protective Order in this docket and offered to "meet and confer with the Producing Party" on this matter. The Consumer Advocate moves that these amounts be prevented from being labeled "confidential" under the applicable Protective Order in Docket 09-00183 and that, upon their receipt by the Authority, these billings be moved directly into the public record of this docket, *Protective Order*, p.7 ¶11. In addition, the Consumer Advocate would again move that this inclusion in the public record require the removal of any redactions as no part of the records would remain confidential, unless, after an *in camera* review by the Hearing Officer, the TRA finds any portion of those billings to actually be protected by an asserted privilege.

Finally, in its initial rate case filing on November 16, 2009, CGC declared that the amount of its rate case expense in Docket 09-00183 was also confidential. The Consumer Advocate similarly contests the confidentiality of CGC's rate case expense in Docket 09-00183. Once again, the Consumer Advocate has already complied with Paragraph 11 of the Protective Order in this docket and offered to "meet and confer with the Producing Party" on this matter and now moves the TRA to remove CGC's estimated rate case expense from the designation of

"confidential" under the Protective Order in this docket and, thus, be moved into the public record of Docket 09-00183.

POSITION OF THE CONSUMER ADVOCATE IN BRINGING THIS MOTION

The Consumer Advocate is of the opinion that there is simply no reason to permit the billings of counsel for CGC in Docket 07-00224 to be deemed confidential under the Protective Order. Furthermore, if CGC is going to ask ratepayers to be solely responsible for its litigation costs in Docket 07-00224, then ratepayers have a right to see what they are being asked to pay. Almost all companies perform a reasonableness review of litigation billings it receives from counsel prior to their payment; why then should ratepayers be expected to pay these same bills without having a similar opportunity for a reasonableness review? It is simply inequitable to ask ratepayers to pay the bills of counsel when they have never had an opportunity to review the reasonableness of those bills, or, as CGC would request, to even see the bills at all.

In addition, major sections of the bills already submitted by CGC on October 6, 2009, were redacted, removing almost any explanation for significant portions of the bills submitted. In fact, the redactions in the billings submitted by CGC are so extensive that the burden of proof should be on CGC to show why any redactions are necessary and proper in this matter. For this reason, both the legal bills already submitted by CGC and those that it will submit in response to the Consumer Advocate's discovery filed on March 15, 2010, should be filed in the public record without redaction.

Similarly, the Consumer Advocate can find no reason to justify CGC's labeling of its estimated rate case expenses in Docket 09-00183 as "confidential" under the Protective Order. It is highly unusual for CGC to make such a designation in its rate case filing. The amount of a utility's estimated rate case expense is a key component of a rate case filing and, traditionally, a contested issue at the hearing on the merits or in proposed settlements between the parties. To

allow a declaration that this number is now "confidential" would require the closing of significant portions of the Hearing on the Merits to the public, including most likely the opening and closing statements of the parties in which this expense will likely be discussed. Furthermore, the utility is once again asking ratepayers to make public comment about a rate case in which they are asked to pay for the company's rate case expense, without ever even having seen the amount that CGC is requesting for this expense. While the utility may benefit in the form of avoiding public scrutiny on the amount of the expenses for which it seeks reimbursement, allowing this figure to remain "confidential" would lead to an unjust result for CGC's ratepayers.

WHEREFORE, the Consumer Advocate respectfully moves that the Authority enter an order removing the label of confidentiality and all redactions from the billings of counsel submitted by CGC in support of its request for litigation expenses in Docket 07-00224, and enter an order removing the confidentiality of CGC's estimated rate case expense in Docket 09-00183, unless, after an *in camera* review by the Hearing Officer, the TRA finds any portion of those billings to actually be protected by an asserted privilege.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via first-class U.S. Mail, postage prepaid, or electronic mail upon:

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Hearing Officer Gary Hotvedt
Tennessee Regulatory Authority
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This the 19th day of March, 2010.

T. Jay Warner
Assistant Attorney General