

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE

March 26, 2010

IN RE:	)	
	)	
PETITION OF CHATTANOOGA GAS	)	
FOR GENERAL RATE INCREASE,	)	Docket No. 09-00183
IMPLEMENTATION OF THE	)	
ENERGYSMART CONSERVATION	)	
PROGRAMS, AND IMPLEMENTATION OF	)	
A REVENUE DECOUPLING MECHANISM	)	
	)	

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RESPONSE OF CHATTANOOGA GAS COMPANY IN OPPOSITION  
TO CONSUMER ADVOCATE'S MOTION CHALLENGING THE  
CONFIDENTIALITY OF CHATTANOOGA GAS COMPANY'S LITIGATION,  
BILLINGS AND RATE CASE EXPENSES

Chattanooga Gas Company ("CGC") submits this response in opposition to the Consumer Advocate's motion (the "Motion") challenging the confidentiality of its counsel's billing statements and rate case expenses filed on March 19, 2010. The Consumer Advocate supplemented the Motion on pages 19-21 of a second motion filed on March 22, 2010. For purposes of this Response, the Motion, as supplemented, will be referred to as the Motion.

**Factual Background and Summary of the Argument**

On October 6, 2009, CGC filed redacted billing statements of its attorneys in support of its claim that its legal expenses should be recovered in Docket No. 07-00224. The attorney billing statements were filed under seal. They were originally governed by an Agreed Protective Order signed by counsel for the Consumer Advocate and Counsel for CGC and filed on March 14, 2008. The billing statements remain under seal and are governed by an Agreed Protective Order. On March 22, 2010, CGC filed additional redacted billing statements to supplement

those filed on October 6, 2009. The second filing of attorney billing statements is governed by the Agreed Protective Order filed in this docket.

The attorney billing statements which have been filed under seal include extensive and detailed narrative time entries describing the tasks performed by CGC's attorneys. Many of those time entries include the substance of communications between representatives of CGC and its attorneys and also include the mental impressions, opinions and legal theories of its attorneys.

CGC redacted portions of certain detailed narrative time entries on the billing statements to claim and preserve the attorney-client communication privilege and to assert its rights under the attorney work product doctrine. The attorney client privilege and the attorney work product doctrine protect the redacted entries on the attorney billing statements from discovery and disclosure. The Agreed Protective Order protects the unredacted entries from disclosure except as provided in the Order.

CGC filed both attorney billing statements under seal pursuant to the terms of the Agreed Protective Orders on which it relied to preserve the confidentiality of the information in the billing statements.

After the attorney billing statements were filed on October, 6, 2009, the Consumer Advocate and CGC entered into a Stipulation Regarding CGC's Requested Cost Recovery which was signed by counsel for the Consumer Advocate and counsel for CGC and filed on October 28, 2009. In the Stipulation, the Consumer Advocate stipulated and agreed in pertinent part as follows:

"The Consumer Advocate has reviewed the documentation provided in support of CGC's costs in Docket 07-00224 filed with the TRA on October 6, 2009. [the redacted attorney billing statements filed on October 6, 2009]...After a review of these records, the Consumer Advocate stipulates that it has no basis to contest that either Farmer & Luna [now the Luna Law Group, PLLC] or McKenna, Long & Aldridge, LLP, did not perform all of the work described in their monthly billings in this Docket. ... The Consumer

Advocate stipulates that it does not intend to contest the accuracy of the total amount of billings submitted on October 6, 2009.”

CGC contends that the Consumer Advocate is bound by the stipulation, and cannot now change course and claim that the work was not performed or the statements are not accurate. Given the stipulation, there would appear to be no legitimate reason for disclosing the redacted time entries and removing the attorney billing statements from the protection of the Agreed Protective Order.

CGC has sought to include its legal expenses in its rate case expenses and can only assert its claim by presenting the amount of those legal fees to the TRA and asserting that they are reasonable. To the knowledge of CGC and its counsel there is little or no precedent for its request and certainly no recent precedent for such a claim being presented to the TRA. Given the apparent absence of precedent for the treatment of the attorney billing statements CGC must file to support its claim, one is compelled to look to other cases before state agencies or cases in which the State of Tennessee is a party to learn how attorney billing statements were filed in those cases.

CGC respectfully submits that in many of those cases, the attorney billing statements on which attorney fees are reviewed for reasonableness and approved for payment by the State of Tennessee or an agency of the State, the statements are filed under seal with the Court or agency reviewing and approving the payment of the fees. While the amount of the fees and expenses abound by the State become known to the public, the itemized narrative billing statements showing in detail the services performed would not become a part of the permanent public record as the Consumer Advocate suggests in the Motion.

Until the Consumer filed the Motion in this case, the parties had followed the available precedent by signing and filing Agreed Protective Orders pursuant to which CGC’s attorney

billing statements were filed under seal. CGC respectfully submits that the Motion represents a departure from longstanding custom and practice and can serve as precedent for the filing of attorney billing statements in cases before state agencies or in which the State of Tennessee is party. For the reasons set forth in this response, there are sound and time tested reasons for following the custom and practice of filing itemized attorney billing statements in such cases under seal

In the Motion, the Consumer Advocate asks the hearing officer to order that CGC file unredacted billing statements and that those statements be removed from the protection of the Agreed Protective Order and be open for public inspection. In an acknowledgement that the attorney billing statements do in fact include information protected from discovery and disclosure by the attorney client communication privilege and the attorney work product doctrine, the Consumer Advocate excepts from the Motion any such redacted information the Hearing Officer finds to be protected from disclosure after an in camera inspection of the billing statements.

CGC respectfully contends that the hearing officer should not order it to publicly disclose privileged attorney-client communications and the mental impressions, conclusions, opinions, and legal theories of its counsel which are included in the redacted detailed narrative time entries. CGC also contends that the Hearing Officer should not remove the attorney billing statements from the protection of the Agreed Protective Order, because the detailed narrative time entries were filed under seal in reliance on the order and in accord with custom and practice before this and other state agencies.

## Legal Argument

A.

### The Hearing Officer Should Deny the Motion Because Counsel for the Consumer Advocate Violated the Agreed Protective Order.

The Hearing Officer should deny the Motion, because counsel for the Consumer Advocate failed to meet and confer with counsel for CGC before filing the Motion.

In the Motion, counsel for the Consumer Advocate represented to the Hearing Officer at pages 1-3 of the Motion that he had complied with the provisions of paragraph 11 of the Agreed Protective Order by “offering to meet and confer” with counsel for CGC before he filed the Motion.

However, counsel for the Consumer Advocate was required to do more than merely offer to meet and confer before he filed the Motion. The Agreed Protective Order provides in pertinent part as follows:

“Prior to filing the Motion,” the party contesting the designation will offer to meet and confer with the Producing Party in a good faith effort to discuss both parties’ positions and attempt to resolve the dispute.” (Agreed Protective Order, Paragraph 11) (emphasis supplied)

Counsel for the Consumer Advocate did not meet with counsel for the Producing Party (CGC) or confer in a good faith effort to discuss both parties’ positions and attempt to resolve the dispute before he filed the Motion.

CGC respectfully submits that the requirement to meet, confer and discuss discovery disputes in good faith as provided in paragraph 11 of the Agreed Protective Order is more than a mere formality, but is a condition which must be satisfied before a discovery motion can be filed.

Because counsel for the Consumer Advocate failed to confer with counsel for CGC before filing the Motion, CGC respectfully requests that the Hearing Officer deny the Motion.

B.

**Counsel for CGC May Redact Attorney Billing Statements on Which CGC Relies in Support of Its Case to Preserve Information Protected From Discovery and Disclosure by the Attorney-Client Privilege and the Attorney Work Product Doctrine.**

CGC and its counsel may redact the billing statements to preserve the attorney-client privilege and attorney work product that is necessarily disclosed in detailed narrative billing statements.

The detailed narrative entries that have been redacted in the attorney billing statements of CGC's counsel include the substance of confidential communications between CGC and its legal counsel and the mental impressions, conclusions, opinions, or legal theories of CGC's attorneys protected by the attorney work product doctrine.

The attorney-client privilege and attorney work product are not governed by the Agreed Protective Order at all, but are governed by long-standing and well-established applicable rules of law that protect both confidential communications between attorney and client and attorney work product from discovery.

In The Tennessean v. Tennessee Department of Personnel, 2007 WL 1241337 (Tenn. Ct. App.) the Tennessean Newspaper and one of its reporters requested that the state of Tennessee Department of Personnel produce employment harassment investigation files pursuant to the Public Records Act. The State of Tennessee produced most of the documents requested but withheld some of the documents on the basis of attorney-client privilege and/or work product doctrine. 2007 WL 1241337\*1. The trial court elected to view the withheld documents in camera to evaluate the claims of the State of Tennessee. After reviewing the documents, the trial court found they were protected by the attorney-client privilege and attorney work product doctrine. (Id.)

On appeal by The Tennessean, the Court of Appeals found that in order to avoid producing the withheld documents as required by the Public Record Act, the documents must be made confidential pursuant to state law whether by statute, common law or rule promulgated by the Tennessee Supreme Court. 2007 WL 1241337\*5

The Court found that the attorney-client privilege had long been a part of Tennessee common law and that the policy behind the privilege is that “the administration of justice requires that communications between clients and their attorneys be free of concern that the communication would be publicly disclosed (citations omitted). (Id.) The Court found that the privilege also applied to the attorney’s communication to the client when the communication is based upon the client’s confidential communications. (Id.)

The Court also found that documents can be protected from disclosure and discovery by the provisions of Rule 26.02(3) of the Tennessee Rules of Civil Procedure protecting attorney work product. The rule protects documents from discovery which are prepared in anticipation of litigation or for trial and requires that the Court in ordering discovery of any of those materials protect against the disclosure of mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation. 2007 WL 1241337\*9 The Court found that the policy behind the work product doctrine is based upon a desire that an “attorney should not be inhibited in representing his or her client by concern that the attorney’s file could be opened to scrutiny and demand. (citation omitted) 2007 WL 1241337\*10. The client’s willingness to speak openly with an attorney should not be hampered by concern that secrets embodied in the attorney’s work product would be opened to inspection (citation omitted). (Id.)

The Court of Appeals applied the rules and the policies described in its opinion and summarized above to affirm the decision of the trial court upholding the State of Tennessee's decision to withhold certain documents from disclosure under the Public Records Act.

The TRA should do the same in this case by denying the Motion.

C.

**The Hearing Officer Need Not Conduct An In Camera Review Of The Unredacted Attorney Billing Statements If The Reasonableness Of The Fees Can Be Determined By A Review Of The Redacted Billing Statements.**

Although the Hearing Officer may, in his discretion, conduct an in camera review of CGC's unredacted attorney billing statements, the Hearing Officer is not required to do so. The Hearing Officer need only review the redacted billing statements to determine that there is sufficient information in the statements to conclude that the time devoted to the tasks described and the amount charged for that time are reasonable.

In Wisniewski v. Grzelak-Johannsen, 549 F. Supp. 2d 965 (N. D. Ohio 2008), a successful petitioner under the International Child Abduction Remedies Act filed a motion to recover his attorney's fees and costs. 549 F. Supp 2d 965 at 967 The respondent argued that the petitioner's attorney billing statement contained redactions that concealed information and that several time entries were completely redacted. The Petitioner responded that the bills were redacted to preserve the attorney-client privilege and attorney work product privilege. Although the Petitioner offered, without waiving his privileges, to provide the Court with unredacted copies for in camera review, the Court declined the invitation:

There should be no need for the Court to concern itself with attorney-client privilege or any other form of protection. Time records must be presented to the Court in a way that 'will enable the reviewing Court to identify distinct claims.' Hensley, 461 U.S. at 437, 103 S. Ct. at 1941. Furthermore, the alternative of *in camera* review of an unredacted statement is equally unattractive



because it interjects an element of *ex parte* review in this matter and deprives respondent of an opportunity to raise arguments. Itemized time entries certainly can be presented in a format which does not infringe on attorney-client privilege or other protection without need for redaction. ... In any event, the respondent's challenge is unsuccessful because most entries, albeit redacted, provide sufficient information to ascertain the subject matter of the time expenditure.

549 F. Supp. 2d 965 at 975

See also Cummings Inc. v. BP Products North America, Inc. 2010 WL 796825 (M. D. Tenn. 2010) (Court was able to ascertain the tasks performed and determine reasonableness of attorney billing statements redacted to protect attorney-client privilege.)

Therefore, the focus should be not on learning the content of privileged communications between CGC representatives and its counsel or the strategies and mental impressions of CGC's counsel. The focus should be on reviewing the redacted attorney billing statements to determine whether from the information provided, the Hearing Officer can determine whether time was devoted to those tasks that were necessary and that the fees charged for the time devoted to those tasks were reasonable. A cursory review of the redacted billing statements demonstrates that the statements reveal a description of each task performed, when the task was performed, the attorney or paralegal performing the task, the amount of time devoted to performing the task and the charge for the performance of each task.

**D.**

**The Attorney Billing Statements Should Continue to be Governed by the Agreed Protective Order Pursuant to Which the Statements Were Filed.**

For the reasons set forth in the opening section headed Factual Background and Summary of the Argument and for the reasons set forth below, the itemized attorney billing statements

filed under the Agreed Protective Order should continue to be governed by the Agreed Protective Order and should remain under seal.

Neither the rate payers nor the Consumer Advocate will be prejudiced in any way by continuing to protect the attorney billing statements pursuant to the terms of the Agreed Protective Order. The Agreed Protective Order includes provisions for the use of the billing statements at the hearing of this case. The provisions of the Agreed Protective Order simply prohibit the Consumer Advocate and others from making use of the billing statements outside this case. The Consumer Advocate has stipulated that it has no basis to contend that the services described in the billing statements were not performed and has stipulated that it does not intend to challenge the accuracy of the statements. The Consumer Advocate can use the billing statements in the proof in above captioned case. It would therefore appear that the Consumer Advocate is not prejudiced by the Agreed Protective Order. The Consumer Advocate would therefore gain nothing by the Motion other than the ability to make some use of the unredacted billing statements outside this case. CGC contends that any use of the statements outside this case would cause prejudice to it.

In addition, the provisions of the Agreed Protective Order governing motions such as this one to challenge the Producing Party's designation of documents as "Confidential" and governed by the Agreed Protective Order should not apply to the Consumer Advocate in this case. The provisions of paragraph 11 permitting a party to challenge a designation are by their terms intended to address a situation in which the Producing Party has unilaterally designated a document as "Confidential" and not a situation such as this one in which the Consumer Advocate has acquiesced in the designation of the attorney billing statements as "Confidential" and even entered into a stipulation regarding the accuracy of the statements. This is not a situation in

which the Producing Party has designated a document as "Confidential" over the timely objection of the other party. It is a situation in which the Consumer Advocate has been fully aware of the designation of the billing statements and has not objected to the designation until he has apparently changed his mind for a strategic reason. The Consumer Advocate should be bound by his stipulation with CGC and the Motion should be denied.

**Conclusion**

For the foregoing reasons, CGC respectfully requests that the Hearing Officer deny the Consumer Advocate's motion challenging the confidentiality of CGC's litigation billings and rate case expenses.

Respectfully submitted,

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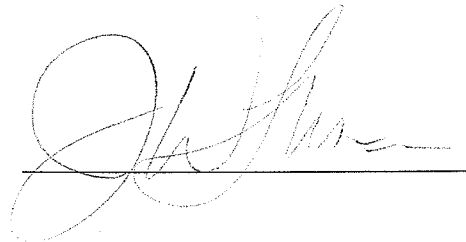
CERTIFICATE OF SERVICE

I hereby certify that on this 26<sup>th</sup> day of March 2010, a true and correct copy of the foregoing was served on the persons below by electronic mail:

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A handwritten signature in dark ink, appearing to read "H. Walker", is written over a horizontal line.