

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 9, 2010

IN RE:

PETITION OF CHATTANOOGA GAS COMPANY FOR  
A GENERAL RATE INCREASE, IMPLEMENTATION  
OF THE ENERGYSMART CONSERVATION  
PROGRAMS AND IMPLEMENTATION OF A  
REVENUE DECOUPLING MECHANISM

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DOCKET NO.  
09-00183

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ORDER ADDRESSING SEVERAL PRE-TRIAL MOTIONS

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These matters came before the Hearing Officer as a result of the filing of several pre-trial motions and responses thereto and subsequent discussions at the Status Conference held on March 26, 2010 and the Pre-Hearing Conference held on April 6, 2010. Based on the filings and arguments of the parties, the Hearing Officer makes certain findings as follows:

**Confidentiality of Litigation Billings and Rate Case Expenses**

On March 19, 2010, the *Consumer Advocate's Motion Challenging the Confidentiality of Chattanooga Gas Company's Litigation Billings and Rate Case Expenses* was filed. In this motion, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") moves the Tennessee Regulatory Authority ("TRA" or "Authority"):

- (a) to remove the confidential designation of legal billing statements of counsel for Chattanooga Gas Company ("CGC" or "Company") that were filed under seal pursuant to a protective order;
- (b) to remove the redactions currently present in those records unless, after conducting an *in camera* review, the Hearing Officer finds any portion of those billings to actually be protected by an asserted privilege; and
- (c) to remove the confidential designation from the amount of CGC's rate case expense.

On March 26, 2010, the *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* was filed. In this response, CGC argues that the Consumer Advocate violated the protective order by not "offering to meet and confer" prior to the filing of the motion.<sup>1</sup> CGC next argues that the redactions are justified by the attorney-client privilege and the attorney work product doctrine. CGC states that an *in camera* review by the Hearing Officer is not required if the reasonableness of the fees can be ascertained from the redacted billing statements. Finally, CGC argues that the attorney billings should continue to be governed by the protective order under which they were filed, and that the Consumer Advocate should be bound by the Stipulation Regarding CGC's Requested Cost Recovery filed on October 28, 2009.<sup>2</sup> CGC did not substantially address the rate case expense confidentiality issue.

At the April 6, 2010 Pre-Hearing Conference, after reviewing the motion and response, the Hearing Officer directed CGC to provide unredacted copies of the billing statements for an *in camera* review, which occurred on April 8, 2010. After conducting an *in camera* review, the Hearing Officer finds as follows:

- (a) because of the extent of the redactions, and because apart from those redactions the Hearing Officer does not find any proprietary information requiring that the protective order be invoked, and further can find no other exception to the public records act, the redacted billing statements should be removed from seal and be publicly available in the docket file;
- (b) the current redactions to the billing statements are appropriate as they protect the attorney-client privilege and the attorney work product privilege; and

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<sup>1</sup> Given the tight time-frame under which the parties are working, the Hearing Officer does not find that the Consumer Advocate violated the protective order given the circumstances under which this motion was filed.

<sup>2</sup> The Chattanooga Manufacturer's Association ("CMA"), an intervenor in this case who at the April 6, 2010 Pre-Hearing Conference verbally supported the Consumer Advocate's motion to remove the confidential designation of the billing statements, was not a signatory to the Stipulation referenced by CGC.

- (c) CGC did not respond in substance to the Consumer Advocate's request to remove the confidentiality designation from rate case expenses, and therefore the rate case expenses should also be available to the public, subject to privilege.

**Consumer Advocate's Motion to Compel and CGC's Motion in Limine**

On March 22, 2010, the *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* was filed. In essence, the Consumer Advocate requested that the TRA compel CGC to answer a number of discovery requests (Discovery Requests 14-26 of the Revised Second Set of Discovery Requests) which relate to the potential sale of CGC's gas supply assets to an affiliate, SouthStar Energy Services ("SouthStar").<sup>3</sup> The Consumer Advocate contends that any profit made by a CGC affiliate, such as SouthStar, on gas purchased from CGC should be imputed as revenue back to CGC, and therefore considered in this rate case.

This issue, which hereafter will be referred to as the "SouthStar issue", came up in the first round of discovery, where the Consumer Advocate moved to compel answers to Discovery Requests 201 and 202. In the February 26, 2010 *Order Addressing Protective Order Dispute, Granting Motion to Compel, and Modifying Procedural Schedule*, the Hearing Officer stated the following:

This Hearing Officer takes no position on whether an affiliate's revenue may be imputed for purposes of this rate case. Nor is this Hearing Officer determining that such information (if it exists) will be admissible at the hearing on the merits. Nevertheless, following the above-described discovery ruling as precedent, this Hearing Officer finds that in the instant docket, the information sought in Request Nos. 201 and 202 is reasonably calculated to lead to evidence that could be admissible in this rate case proceeding.<sup>4</sup>

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<sup>3</sup> In this motion, the Consumer Advocate also reiterates its previous motion regarding the confidentiality of legal billing statements, which is dealt with above.

<sup>4</sup> See Tenn. R. Civ. P 26.02(1).

Because of TRA precedent, the Hearing Officer ordered CGC to respond to Requests Nos. 201 and 202, which CGC did. The Consumer Advocate was not satisfied with the answer it received, and followed-up with Discovery Requests 14-26 of the Revised Second Set of Discovery Requests. When CGC objected and the Consumer Advocate filed the instant motion to compel, the Hearing Officer requested an affidavit from a Company representative to establish that no “sweet-heart deals” were being given to SouthStar by CGC or Sequent Energy Management, L.P. (“Sequent”), CGC’s asset manager.

On April 1, 2010, CGC filed the March 31, 2010 *Affidavit of Lance J.E. Roth*. Mr. Roth has primary responsibility for the asset management agreement (“AMA”) between CGC and Sequent. In the affidavit, he explains how Sequent manages CGC’s assets, which includes some purchases of both transportation and supply by SouthStar from Sequent, and specifically states:

6. Sequent has a fiduciary duty under the AMA as asset manager for CGC to generate the highest value for CGC in the utilization of the AMA assets. As such, Sequent enters into transactions at prices arrived through arms-length negotiations and that would be indicative of prevalent market rates.

This Affidavit of Lance Roth provides sufficient assurance for the purpose of this docket that CGC and its asset manager, Sequent, are not taking advantage of the customers of CGC through “sweet-heart deals” with SouthStar.

Nevertheless, on April 5, 2020, the *Consumer Advocate’s Statement in Opposition to the Affidavit of Lance Roth of Sequent on the SouthStar/Affiliate Discovery Issue* was filed. In this response, the Consumer Advocate is now resorting to the same type of semantic word games of which it has so vividly criticized CGC. Notwithstanding its lengthy discussion of the Affidavit, the Consumer Advocate’s argument boils down to a disagreement over terminology, not substance. After two years litigating Docket No. 07-00224, the Consumer Advocate still seems convinced that CGC is somehow gaming the ratepayers. Absent substantial and material evidence, the TRA can not sanction unlimited discovery on matters of questionable relevance.

After reviewing Mr. Roth's sworn Affidavit, and the Consumer Advocate's Statement in Opposition, hearing the oral arguments at both the Status and Pre-Hearing Conferences, and considering the very recent conclusions the Authority reached in Docket No. 07-00224, the Hearing Officer finds that no further discovery inquires into the SouthStar issue are relevant to this rate case.

While the SouthStar issue is no longer relevant to this rate case, the Consumer Advocate does have a forum for its concerns. In the Authority's September 23, 2009 *Order* in Docket No. 07-00224, the panel very clearly directed a Triennial Review for the purpose of examining issues such as the SouthStar issue. Exhibit 1 of that Order states:

The scope of the triennial reviews may include **all transactions and activities** related either directly or indirectly to the PBRM as **conducted by CGC or its affiliates**, including, but not limited to, the following areas of transactions and activities: (a) natural gas procurement; (b) **capacity management**; (c) **storage**; (d) hedging; (e) reserve margins; and (f) **off-system sales**. The scope of each triennial review **shall include a review of each of the foregoing matters** as well as such additional matters as may be reasonable identified by CGC, the TRA Staff, or the **CAD [Consumer Advocate]** relative to the operation or results of the PBRM. (Emphasis added).

If there was any question about this, three weeks later the Authority repeated its position in its October 13, 2009 *Order Regarding Triennial Review Procedures and Criteria*, which clarified the procedures and recited the same language as Exhibit 1, above. For these reasons, the Consumer Advocate's motion to compel is denied.<sup>5</sup>

Also on April 5, 2010, *Chattanooga Gas Company's Motion in Limine* was filed. Here, CGC moves to strike the portions of the pre-filed testimony of the Consumer Advocate's witness, Terry Buckner, which address the SouthStar issue. Initially, CGC objected to discovery requests relating to the SouthStar issue on relevancy grounds. At this stage, CGC is objecting to the admissibility of testimony concerning the SouthStar issue. On April 7, 2010, the *Consumer*

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<sup>5</sup> By email dated April 8, 2010, CGC agreed to answer Discovery Request 15 from the Consumer Advocate's second set of discovery requests, by Friday, April 9, 2010.

*Advocate's Response to CGC's Motion in Limine to Strike the SouthStar Testimony of Mr. Buckner* was filed. Both CGC and the Consumer Advocate have turned their respective arguments into a repetitive loop, and the Hearing Officer finds that no new light has been shed on the issue by either side. However, due to the above determination that the SouthStar issue is no longer relevant to this rate case, the Hearing Officer grants CGC's motion *in limine* and hereby strikes from the record the March 10, 2010 pre-filed testimony of Terry Buckner, page 29, line 1 through page 31, line 19, and his pre-filed supplemental testimony of March 29, 2010, page 7, line 1 through page 13, line 5.

### **Conclusion**

The affidavit of Lance Roth, together with the Authority's findings in Docket No. 07-00224, convinces this Hearing Officer that neither CGC nor Sequent, CGC's asset manager, is gaming the system at the expense of CGC's ratepayers. The Consumer Advocate has recourse to pursue the SouthStar issue during the next triennial review.

Because of the timing and nature of the rulings in this Order, the Hearing Officer directs the parties to appeal any adverse ruling directly to the panel at the start of the hearing.

The order of proof for the hearing on the merits is attached as *Exhibit 1*.

### **IT IS THEREFORE ORDERED THAT:**

1. The confidentiality designation shall be removed from the legal billing statements submitted by CGC in support of its litigation expenses in Docket No. 07-00224 and any rate case expenses attributable to the instant docket. The redactions contained within these filed documents are appropriate given the cited privileges.
2. The Consumer Advocate's Motion to Compel is denied and CGC's Motion *in Limine* is granted.



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Gary Hotvedt, Hearing Officer

**EXHIBIT 1**

**CHATTANOOGA GAS COMPANY  
DOCKET NO. 09-00183**

**Order of Proof for Rate Case Hearing**

**April 12-13, 2010 & April 26, 2010**

**I. Chattanooga Gas Company (CGC)**

- A. Direct testimony – 8 witnesses
  - 1. Steve Lindsey
  - 2. Donna Peeples
  - 3. Dan Nikolich
  - 4. Ronnie Hanson
  - 5. Marcie Shields
  - 6. Rhonda Watts
  - 7. Dan Yardley
  - 8. Archie Hickerson
- B. Cross-examination by Intervenors
  - 1. Chattanooga Manufacturers Association (CMA)
  - 2. Consumer Advocate

**II. Chattanooga Manufacturers Association (CMA)**

- A. Direct testimony – 1 witness
  - 1. Edward Colucci (replaces Phillip Pickett, PE and will adopt his prefiled testimony per CMA)
- B. Cross-examination
  - 1. Consumer Advocate
  - 2. Chattanooga Gas

**III. Consumer Advocate & Protection Division (CAPD)**

- A. Direct testimony – 4 witnesses
  - 1. Dr. David Dismukes
  - 2. Terry Buckner, CPA
  - 3. John Hughes
  - 4. Dave Peters
- B. Cross-examination
  - 1. Chattanooga Manufacturers Assoc.
  - 2. Chattanooga Gas

#### **IV. APRIL 26, 2010 – COST OF CAPITAL WITNESS**

- A. Chattanooga Gas Company Witness
  - 1. Dr. Roger Morin
  - a. Cross examination
    - 1. Chattanooga Manufacturers Assoc.
    - 2. Consumer Advocate
- B. Consumer Advocate Witness
  - 1. Dr. Chris Klein
  - a. Cross examination
    - 1. Chattanooga Manufacturers Assoc.
    - 2. Chattanooga Gas

TRA Staff may question the witnesses following cross-examination, prior to re-direct.  
The Directors may ask questions at will.