

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

**May 11, 2010**

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

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**CHATTANOOGA GAS COMPANY'S OBJECTIONS TO CONSUMER  
ADVOCATE'S NOTICE OF FILING AFFIDAVITS OF  
DR. DAVID DISMUKES AND EMILY KNIGHT**

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Chattanooga Gas Company ("CGC" and "Company") hereby objects to the Consumer Advocate and Protection Division's ("CAPD") filing of the Affidavits of Dr. David Dismukes and Emily Knight on Friday, May 7, 2010, at approximately 2:30 p.m., on two grounds.

First, the CAPD's filing is untimely and late filed as it was filed eleven days after the close of the proof in this matter on April 26, 2010. While the Affidavit of Dr. David Dismukes is dated April 26, 2010, the CAPD waited almost two (2) weeks until two and a half (2½) hours after the filing of the post-hearing briefs by the parties to file it. Prior to the filing of the affidavits on Friday afternoon, May 7, 2010, the CAPD had not raised its inability or failure to locate the Company's pre and post Chattanooga-specific data for pilot conservation programs. There were no phone calls made, no letters sent, or no concerns raised regarding this issue prior to this filing. At a minimum, based on CGC's responses to certain discovery requests and cross examination of Dr. Dismukes at the hearing on the merits, the CAPD had inquiry notice of

CGC's pre and post usage data and should have at least inquired as to the location of the data and thus has waived its right to raise these concerns at this time.

Second, the facts support that the pre and post Chattanooga-specific usage data from pilot programs conducted from 2006-2009 was provided to the CAPD by CGC on February 5, 2010 in response to the CAPD's discovery request no. 173 and also on April 5, 2010 in a more limited form as Exhibit DJN-10 to Company witness Dan Nikolic's pre-filed rebuttal testimony, which provide the CAPD with actual notice of the existence of the data. For the reasons explained below, CGC respectfully requests that the Tennessee Regulatory Authority ("TRA" or "Authority") strike the CAPD's affidavits as late filed and untimely. In the alternative, the CAPD's affidavits should be disregarded as not credible pursuant to the facts in this matter.

### **Background**

On February 5, 2010, the Company provided its response to CAPD discovery request no. 173 of the CAPD's first set of discovery requests. As part of its response, CGC provided a CD that contains the excel files supporting its response to discovery request no. 173 which requested the annual energy savings and costs to date of the Company's current energy efficiency and conservation programs. The CD contains an excel file with a printable summary tab of the "actual level data for all verified customers who have received a rebate from the Company" for the period 2006 through 2009, as well as tabs of the data supporting the summary calculations that were stored to allow quick and easy printing of the summary. CGC's response to no. 173 along with its response to other discovery requests, including but not limited to nos. 151 & 157, put the CAPD on notice that CGC was providing actual data from its pilot conservation programs. Until the filing on May 7<sup>th</sup>, the CAPD never contacted CGC or its counsel to raise questions about its inability to locate this data in the excel files.

On April 5, 2010, the Company filed the rebuttal testimony of Dan Nikolich which addressed the Company's cost benefit analyses which were based on pre and post Chattanooga-specific usage data. On page 9-10 of his pre-filed rebuttal testimony, Mr. Nikolich states that:

**Further in answering CAPD data request number 173, the Company provided actual before and after load data from every CGC customer that received an appliance rebate from the company for energy efficient equipment.** This was the data used by the Company to arrive at its usage estimates. Given that the Company's savings estimates are based upon actual CGC data that was made available, the sub-optimal method used to arrive at the CAPD analysis energy savings estimates need not have been employed. (Emphasis added)

Then on page 11 of his pre-filed rebuttal testimony, Mr. Nikolich again references the use of the pre and post usage data that was provided in response to discovery request no. 173.

**Next, as shown in Exhibit DJN-10, based upon the Company's response to CAPD data request number 173,** kick back volumes were incorporated through use of the average customer savings amount. As shown, from 2006-2008 of the 91 customers receiving rebates for high efficiency furnaces 70 reduced their load by an average of 225 therms while 21 increased their load by 224 therms on average. For the 98 accounts who received tankless water rebates from 2006-2008, 70 averaged a 174 usage therm reduction, while 28 experienced a 100 therm usage increase. By using the overall average of 107 therms for high efficiency furnace incentives and 88 therms for tankless water heater incentive, the kick back effect of increased revenue from a percentage of customers who actually increased their load is already baked in. Building an additional amount for this into the net to gross ratio as was done for the CAPD analysis is essentially double counting of this effect. (Emphasis added)

Further, Exhibit DJN-10 was provided to the CAPD in excel format and also contains data from the Company's excel response to no. 173 but on a more limited basis. This clear and unmistakable data filed with Exhibit DJN-10 would place any reasonable person on inquiry notice as to the existence of the data.

Upon receiving this testimony on April 5, 2010, the CAPD never contacted CGC or its counsel to raise questions about its inability to locate Chattanooga-specific pre and post usage data on the excel files. Further, during the hearing on the merits, the CAPD did not cross examine Mr. Nikolich regarding the representations in his rebuttal testimony about his having provided and/or used pre and post Chattanooga-specific data. Instead, the CAPD chose to wait until almost 2 and a half (2½) hours after the parties filed their post-hearing briefs to raise these issues concerning the pre and post usage data through the affidavits of Dr. Dismukes and Ms. Knight.

### **Argument**

The CAPD's affidavits are late filed and untimely. On April 13, 2010, counsel for CGC cross examined Dr. Dismukes regarding his failure to use in his analysis the pre and post usage data from Chattanooga-specific pilot conservation programs. Dr. Dismukes claimed that he had not been provided with any such data. This was the first indication that CGC's counsel had that Dr. Dismukes had not seen the pre and post usage data. Dr. Dismukes agreed subject to check that the excel file containing CGC's response to discovery request no. 173 contained the excel spreadsheets with all of the pre and post Chattanooga-specific customer data. (Dismukes, Vol. II, Tr. 517:23 – 518:8). No mention was made of the CAPD's assertions that it had not been provided with this information until May 7, 2010, two and a half (2½) hours after the parties filed their post-hearing briefs. It should be noted, however, that Dr. Dismukes' affidavit was actually executed on April 26, 2010, which was the third and final day of the hearing on the merits and nothing was mentioned about this issue at that time when it could have been easily addressed. It goes without saying that CGC is baffled by this course of action. Unfortunately, it is this sort of litigiousness that the CAPD has engaged in throughout this docket, as well as in

Docket 07-00224. The timing of the CAPD's filing is agonizingly similar to the timing of the CAPD's challenge regarding the pro hac vice controversy. The CAPD's filing of the notice and affidavits eleven days after the close of proof in this docket and eleven days after the execution of Dr. Dismukes' Affidavit to raise for the first time the CAPD's failure to locate the Chattanooga-specific data should be sufficient grounds for summarily striking the Notice and Affidavits and excluding the filing from the record.

Second, the facts in this matter demonstrate that the CAPD was provided the information in question in the response to CAPD discovery request no. 173. The data provided is extensive and voluminous, and is contained in the Excel spreadsheets provided in the electronic response to discovery request no. 173.

In paragraph 17 of his affidavit, Dr. Dismukes asserts "It is my expert and sworn opinion that, contrary to the assertions of outside counsel and Mr. Nikolich's rebuttal testimony, the Company did not provide the pre- and post-pilot period usage information on a per-participant basis for each of the relevant rebate offerings." However, CGC did provide this information in the excel file produced on February 5, 2010 in response to discovery request no. 173, and then again in a more limited form in the excel file produced along with Exhibit DJN-10 to Mr. Nikolich's pre-filed rebuttal testimony.

In paragraph 13 of his affidavit, Dr. Dismukes states that he reviewed "the Company's Response to CAPD DR 173 in full". Further he states in paragraph 15 that "the excel spreadsheet contains only one sheet or tab labeled 'summary'". An examination of the excel file would show that the summary sheet contains formulas that reference supporting data files that can be accessed. For example, clicking on box B7 of the excel summary sheet (i.e., 15 participants in the 90% furnace program for 2006), the following formula is revealed:

"=SUM(Pivot!B41:B45)". This means that data from B41 is added through B45 from the Pivot sheet to sum to 15. The Pivot sheet can be revealed by clicking on "format", then "sheet", then "unhide". When this is done a dialog box appears that reveals other tabs labeled "Data 2006-2008", "2006\_Rebate\_usage\_before\_after", "2007\_Rebate\_usage\_before\_after", and "2008\_Rebate\_usage\_before\_after". A "full examination of the simple "summary" tab should have involved looking at the formula contents of the individual spreadsheet cells, something an expert of Dr. Dismukes' caliber, extensive curriculum vitae, and ability to work with excel as demonstrated by his electronic work papers submitted in response to the Company's data requests should readily know how to perform and thus access the before and after usage information. If CGC had known that the CAPD did not have the expertise, CGC would gladly have explained how to access the information.<sup>1</sup> However, CGC and its counsel were never informed that the CAPD and its expert Dr. Dismukes did not know how to access the excel data. Following the hearing on April 13<sup>th</sup>, CGC believed that this issue had been resolved.

CGC worked hard to implement pilot programs and to develop Chattanooga specific data that it could use in its proposal for the energySMART conservation program. CGC was proud of these results and had absolutely no reason not to provide the data to the intervenors and the TRA. In fact, this information has been in the CAPD's possession since February 5, 2010 which was early in this case.

Through the Company's responses to discovery requests including but not limited to nos. 151 and 157, CGC put the CAPD on notice that CGC had provided pre and post usage data. Further, CGC provided the CAPD with some Chattanooga-specific pre and post usage data through the excel file accompanying Exhibit DJN-10 to Mr. Nikolich's pre-filed rebuttal

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<sup>1</sup> If the CAPD or Dr. Dismukes did not desire to contact CGC about how to access and utilize the data, the Microsoft office website excel page provides an easy to use video demonstration of the "Pivot Table".

testimony. As the CAPD claims in its Notice that it believes that CGC inadvertently failed to provide the data, a reasonable person would have inquired about the data that it believed was inadvertently not provided based on the statements made by CGC in its discovery responses, in its rebuttal testimony, and at the hearing on the merits. The CAPD never contacted CGC or its counsel to inquire about the CAPD's alleged failure or inability to locate the information at issue. From CGC's pre-filed testimony and discovery responses, it is abundantly clear that CGC had a pilot program from 2006 to 2009 and that CGC had measured the pre-usage of each customer that participated in the program and also measured the post-usage of each of these customers. For all of these reasons, the CAPD's affidavits should be excluded as late-filed or alternatively disregarded and provided no weight as the TRA weighs the evidence and deliberates in this docket.

In conclusion, CGC contends that the hearing is over, the post-trial briefs have been filed, and Dr. Dismukes has been cross-examined on this issue on April 13<sup>th</sup>. This last minute attempt on May 7, 2010 to raise discovery issues should not be considered. For all of the foregoing, CGC requests that the affidavits be excluded from the record and not be considered by the Authority.

Respectfully submitted,

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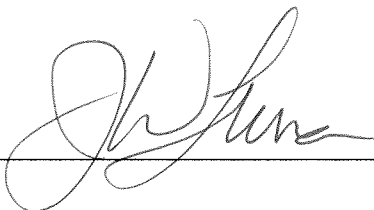
**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of May 2010, a true and correct copy of the foregoing was served on the persons below by electronic mail:

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