BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	*	
	*	
PETITION OF CHATTANOOGA GAS FOR APPROVAL OF ADJUSTMENT OF ITS RATES AND CHARGES, MODIFICATION OF ITS RATE DESIGN, AND REVISED TARIFF	*	**DOCKET NO. 09-00183**

MOTION OF CHATTANOOGA MANUFACTURER'S ASSOCIATION TO COMBINE THE REQUEST OF CHATTANOOGA GAS FOR REIMBURSEMENT OF LEGAL FEES IN DOCKET 07-00224 WITH THE REQUEST OF CHATTANOOGA GAS FOR A GENERAL RATE INCREASE IN DOCKET 09-00183

The Chattanooga Manufacturer's Association ("CMA") asks that the request by Chattanooga Gas Company ("CGC") to increase rates by $700,000 to reimburse the company for its legal fees spent in Docket 07-00224 be considered as part of the company's recently filed petition for a general rate increase of $2.6 million in Docket 09-00183. Both dockets are assigned to the same panel (Chairman Kyle, Director Hill, and Director Roberson) and, as explained further below, both requests for higher gas rates should be consolidated and considered at the same time.

SUMMARY

Accusing the Consumer Advocate and Protection Division ("CAPD") of conducting a two-year "witch hunt" and "wild goose chase" in Docket 07-00224, Chattanooga Gas claims it was the "prevailing party" in that investigation and seeks recovery of $700,000 in legal fees, not from the State, but from the ratepayers of Chattanooga.[1] CMA, which represents many of CGC's largest customers, is opposed to the gas company's request.

[1] See, Transcript of TRA agenda conference, November 9, 2009, at 48. CGC's argument for reimbursement is couched in language more suitable to a motion for sanctions made pursuant to Rule 11 of the Tennessee Rules of

(footnote continued on following page ...)

As the Tennessee Court of Appeals has held, this agency has no power to award legal fees to any party. CGC's request for $700,000 is, in essence, a petition for a rate increase to cover a specific expense. The company, however, has not given public notice of the increase, as it is required to do by the TRA's rules, nor has the TRA given ratepayers the opportunity to comment on this unusual request. Furthermore, the parties in Docket 07-00224 have not adequately addressed many of the legal and equitable issues raised by the company's reimbursement request.

In order to give ratepayers notice of the reimbursement request and the opportunity to comment, to allow the TRA to weigh the impact on customers of two, back-to-back rate increases, and to afford CMA and other potential interveners in the company's pending rate case (Docket 09-00183) the ability to make arguments concerning the reimbursement issue which the Authority has not yet heard, CMA asks that the reimbursement issue be rolled into the rate case and decided as part of this docket.

BACKGROUND

On July 9, 2007, the Authority voted to open Docket 07-00224 to "evaluate Chattanooga Gas Company's gas purchases and related sharing incentives." See TRA Docket 07-00224, Order of September 23, 2009, at 1. Concerns over the company's "sharing incentives" and its impact on ratepayers had initially been raised by both the CAPD and by CMA in the gas company's last general rate case, Docket 06-00175. Although the Authority initially agreed to hear those issues as part of the rate case, the TRA later decided, at the request of Chattanooga

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Civil Procedure. Rule 11, of course, does not apply to the TRA. CMA was not a party to Docket 07-00224 but notes that there have been no findings by the Hearing Officer or the Authority which would support the company's allegations of misconduct.

Gas, to close the rate case and open a new proceeding to investigate the company's profit sharing arrangement and other issues related to the utility's management of its regulated assets.

Early in the investigation, Chattanooga Gas requested permission "to accumulate and defer the costs incurred in defending" itself in the investigation "so that it may ultimately recover these costs from the ratepayers." See Motion of Chattanooga Gas "To Accumulate and Defer Litigation Costs" February 28, 2008, at 1. The Hearing Officer agreed to list as an issue in the case, "Should CGC be able to recover litigation costs incurred as a result of its participation in this docket from rate payers in the future" ("Order Setting Issues List," March 17, 2008, Exhibit A) and later recommended that the reimbursement request be separated from the other issues in the case and determined by the TRA Directors following "discovery, testimony and a hearing before the panel." "Re-Hearing Order," July 6, 2009, at 4. The TRA Directors agreed, ordering CGC to raise the reimbursement issue "upon completion of this docket." See "Order," September 23, 2009, at 6.

Two weeks after the issuance of a final order addressing the merits of the investigation docket, Chattanooga Gas filed "documentation and information" requesting reimbursement of approximately $700,000 in legal fees spent in connection with Docket 07-00224. But, contrary to the expectations of the Hearing Officer, no evidentiary hearing was ever held on the company's request. CGC and the CAPD filed briefs and argued orally to the TRA concerning the amount of legal expenses, if any, the company should be allowed to recover from ratepayers but there was no evidentiary hearing, no debate over whether $700,000 in legal fees was a "prudent" expense, no argument over whether the Authority has the statutory power to award legal fees, and no discussion as to whether Chattanooga customers should be forced to pay higher gas rates because of an unusually protracted legal battle between Chattanooga Gas and the CAPD. Furthermore, Chattanooga Gas never published notice of the proposed rate increase, as

the company is required to do by the TRA's rules, nor did the TRA conduct a public hearing on the company's request to raise rates by $700,000. At this time, the reimbursement request remains pending before the TRA.

On November 16, 2009, Chattanooga Gas filed a petition for a general rate increase. The matter was designated as Docket 09-00183 and assigned to Chairman Kyle, Director Freeman, and Director Roberson, the same panel assigned to hear Docket 07-00224. In that case, Chattanooga Gas seeks a rate increase of $2.6 million. CMA, which was not a party to Docket 07-00224, has intervened as a party in the rate case which is tentatively scheduled to be heard in April, 2009. CMA presumes that Chattanooga Gas will comply with the TRA's rules requiring the company to publish in a local newspaper of general circulation a summary and explanation of the proposed rate increase and the time and date of the Authority's hearing. CMA also anticipates that the Authority, as it has always done when considering an increase in utility rates, will convene a public hearing to receive comments from ratepayers and other interested persons concerning the company's rates and services.

ARGUMENT

CMA urges the TRA to make no decision on the proposal by Chattanooga Gas to increase rates by $700,000 until the public has been notified of the proposed increase in accordance with the TRA's rules and the Authority has convened a public hearing on the company's unprecedented reimbursement request. This can be easily accomplished by rolling the reimbursement issue into the company's pending $2.6 million rate case. Furthermore, these increases should be considered together, not separately, so that the agency can weigh the cumulative impact of both rate hikes on gas customers. Finally, the Authority should combine the two matters so that it can hear argument on the Authority's power under state law to award legal fees, the prudency of the company's expense of $700,000 in legal fees, and the fairness of

forcing ratepayers, rather than the State, to pay for legal expenses incurred allegedly because of "outrageous conduct" by the CAPD.[2]

I. Granting this request will insure compliance with the Authority's rules. TRA Rule 1220-4-1-05 states that "all public utilities applying for a revision of rates shall . . . cause a summary of the proposed changes and the reasons for them to be published in a newspaper of general circulation located in the utility's service area." The published notice must also "state the date and place when the application will be heard by the Authority, if known."

There is no dispute that Chattanooga Gas is "applying for a revision of rates"[3] but has failed to publish notice and an explanation of the proposed $700,000 increase as required by the TRA rule. Similarly, the Authority has not convened a public hearing to allow ratepayers to comment upon the company's $700,000 request. The TRA has never, to CMA's knowledge, allowed a pubic utility to implement a rate increase without giving ratepayers the opportunity to comment upon the utility's rates and services.[4]

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[2] See footnote 1, supra.

[3] Chattanooga Gas, in its own words, "is seeking . . . to recover the costs incurred in this contested case proceeding from the ratepayers through the Purchased Gas Adjustment Rules. "CGC's "motion to Accumulated and Defer Litigation Costs," at 2. In other words, CGC seeks to increase by $700,000 the price customers would otherwise pay for natural gas. Although CGC and the CAPD have stipulated that the $700,000 increase, or any portion thereof, should be applied to customers through the PGA rule, neither party contends that the PGA rule itself includes or authorizes the recovery of legal expenses.

[4] Even the hearing on the TRA's investigation of the CGC's sharing incentives included the opportunity for any members of the general public to make oral comments to the Authority. See "PreHearing Order" in Docket 07-00224 at 8. That hearing, however, did not address the issue of whether the company could recover its litigation costs. That issue was separated from the hearing on the merits and, according to the Hearing Officer, was to be the subject of another evidentiary hearing at a later date. "Pre-Hearing Order" at 4. Because CGC and the CADP entered into a stipulation agreeing to certain facts, no evidentiary hearing was ever held on the reimbursement issue. The parties presented oral argument on the issue during a regularly scheduled TRA agenda conference on November 9, 2009, but, according to the transcript of the conference, there was no request or opportunity for pubic comment on the reimbursement question.

Both of these issues can be addressed by including the reimbursement request as an issue in Docket 09-00183. The company can include notice of the request in the same publication notifying ratepayers of the general rate case. Moreover, the TRA can hear comments from ratepayers on both matters when the TRA convenes a public hearing on the general rate case in April.

II. The TRA should move the reimbursement question into the rate case in order to have a better appreciation of the full impact of the combined requests of $700,000 and $2.6 million. Depending upon how $700,000 increase is collected from ratepayers and over what period of time, ratepayers potentially face a total increase of $3.3 million, significantly more than the $2.6 million announced by the company in connection with the filing of its general rate case. Ratepayers should be told that they face a larger increase and have the opportunity to address the total impact of the two requests.

III. The TRA should include the reimbursement issue in the general rate case in order to hear argument from CMA and any other parties who may intervene in the rate case concerning the legality and fairness of awarding $700,000 in legal fees to Chattanooga Gas. CMA respectfully suggests that neither CGC nor the CAPD has adequately briefed these questions.

For example, although the CAPD noted that the TRA has apparently never awarded legal fees to a party (other than allowing a utility to recover its reasonably incurred expenses in bringing a rate case), the CAPD did not question the agency's statutory authority to award fees in this case. ("[T]he Consumer Advocate maintains it is in the discretion to . . .[allow CGC] to recover all their costs, some of their costs, or none of their costs." Transcript of TRA agenda conference on November 9, 2009, at 41-42. More importantly, neither CGC nor the CAPD has cited any statute which authorizes the TRA to award legal fees in this case. No such authority exists. As the Tennessee Public Service Commission held almost thirty years ago, "no

Tennessee statute" gives the agency the power to award legal fees. See PSC Docket G-81-4-4, April, 1981, and PSC Docket U-82-7183. The PSC's ruling that it lacked the authority under state law to award legal fees was affirmed by the Tennessee Court of Appeals in an unpublished opinion issued February 5, 1985, Kingsport Power Company v. Tennessee Public Service Commission et al. A copy of that opinion is attached.

In 1994, nine years after the Court of Appeals decision, the Tennessee legislature amended the Tennessee Uniform Administrative Procedures Act ("UAPA") to allow an administrative agency to award legal expense under limited circumstances. See T.C.A. §4-5-325. That is the only statute which permits a party to a contested case proceeding under the UAPA to recover legal fees. It allows the hearing officer to award legal fees to the prevailing party when "a state agency issues a citation" which is later found to be "not well grounded" or to have been issued "for an improper purpose." Since the TRA's investigation did not arise from the issuance of a citation, that statute appears inapplicable to this case.

Furthermore, no one has challenged whether the company's legal fees were "prudently" incurred, which is the legal test for recovery. The CAPD stipulated to "the accuracy of the total amount" and explained that it has "no basis to contest" that the lawyers employed by CGC "did not perform all of the work described in their monthly billings." See "Stipulation Regarding CGC's Requested Cost Recovery" at 1. But no one has apparently investigated, much less challenged, the prudency of spending $700,000 in legal fees in this investigation.[5]

[5] CMA has not investigated CGC's legal bills and has no reason at this time to question the prudency of the company's expenses. Unfortunately, no one else appears to have done an investigation either. The CAPD was provided "heavily redacted" copies of CDC's legal bills and stipulated only to the "accuracy of the total amount" and did not contest that "all of the work described" was actually done. "Stipulation," October 28, 2009, at 1-2. But the CAPD did not stipulate to the reasonableness or prudency of those expenses, even though CGC attempted to characterize the stipulation as saying more than it does. See "Brief of Chattanooga Gas Company Regarding Cost Recovery," October 28, 2009, at 3 and 19.

Finally, no one has questioned whether it is fair for the TRA to, in essence, punish ratepayers because of what CGC argued was a "witch hunt" by the CAPD. Transcript, at 48. In summarizing CGC's argument for reimbursement, the utility's attorney described the CAPD's "outrageous course of action" (id., at 41) and argued that this "type of tactic needs to come to an end." Id., at 48. "One way to help it come to the end," he told the TRA, "is to have the full cost recovery granted as we respectfully requested." Id., at 48-49. CMA suggests that if the Authority has the power to award CGC recovery of its legal expenses – which CMA disputes – the costs should be paid by the State, not the ratepayers. As previously discussed, there is only one statute authorizing state agencies to award legal fees, T.C.A. §4-5-325, and that statute provides that the hearing officer may order the prevailing party's expenses paid by the state agency responsible for instigating the proceeding.

The TRA has yet to hear any of these arguments which should be addressed before the Authority rules on the merits of CGC's request for reimbursement. By including that request in the utility's pending rate case, the Authority will have the benefit of hearing these issues flushed out and debated by CMA and, perhaps, other interveners. The TRA should not take the unprecedented step of awarding legal fees to a prevailing party without full consideration of these legal and equitable arguments.

CONCLUSION

To put the matter bluntly, CGC's motion to increase rates by $700,000 to reimburse the utility for its legal fees in the investigation docket must be either (1) a rate case or (2) a request for the award of legal fees. If it is a rate case, then none of the procedural rules or evidentiary submissions required in a rate case have been followed. If it is a request for an award of legal fees, the TRA has no statutory authority to grant the request. The only appropriate action for the Authority to take is to recognize the company's motion for what it is – a request for a rate increase – and to consider the motion as part of the company's pending request for a general rate increase in Docket 09-00183.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS, LLP

By: _____

Henry M. Walker, Esq.
1600 Division Street, Suite 700
Nashville, Tennessee 37203
615-252-2363

CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of December, 2009 served the foregoing Motion of Chattanooga Manufacturer's Association To Combine The Request of Chattanooga Gas For Reimbursement of Legal Fees In Docket 07-00224 With The Request of Chattanooga Gas For A General Rate Increase In Docket 09-00183, either by fax, electronic transmission, overnight deliver service or first class mail, postage prepaid, to all parties of record at their addresses shown below:

J.W. Luna, Esq.
333 Union Street, Suite 300
Nashville, Tennessee 37201
Fax: 615-254-7123

Cynthia Kinzer
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202

Steven L. Lindsey, Vice President and General Manager
Chattanooga Gas Company
2207 Loan Mills Drive
Chattanooga, TN 37421
Fax: 423-490-4326

Archie Hickerson, Director Regulatory Affairs
AGL Resources Inc.
150 W. Main Street, Suite 1510
Norfolk, VA 23510
Fax: 757-616-7508

Elizabeth Wade, Senior Regulatory Counsel
AGL Resources Inc.
Ten Peachtree Place, NW, 15th Floor
Atlanta GA 30309
Fax: 404-584-3714

Henry M. Walker

06/13/84 KINGSPORT POWER COMPANY v. TENNESSEE

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION AT NASHVILLE

Docket Number available at www.versuslaw.com

Citation Number available at www.versuslaw.com

June 13, 1984

KINGSPORT POWER COMPANY, PLAINTIFF-APPELLANT
v.
TENNESSEE PUBLIC SERVICE COMMISSION, FRANK D. COCHRAN, KEITH BISSELL, AND JANE ESKIND, COMMISSIONERS, AND KINGSPORT POWER USERS ASSOCIATION, DEFENDANT-APPELLEES

Davidson Equity; APPEAL FROM CHANCERY COURT, DAVIDSON COUNTY, TENNESSEE; THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR.

T. Arthur Scott, Jr., Hunter, Smith & Davis, 1212 N. Eastman Road, P.o. Box 3740, Kingsport, Tennessee 37664, Attorney For Plaintiff-appellant

Henry Walker, Cordell Hull Building, Room C1-103, Nashville, Tennessee 37219, Attorney For Defendant-appellee, Tennessee Public Service Commission

D. Bruce Shine, The R & W Building, Suite 201, 433 East Center Street, Kingsport, Tennessee 37660, Attorney For Defendant-appellee, Kingsport Power Users Association

Todd, Presiding Judge, Middle Section wrote the opinion. Concur: Houston Goddard, Judge, Samuel L. Lewis, Judge

The opinion of the court was delivered by: Todd

HENRY F. TODD, PRESIDING JUDGE, MIDDLE SECTION

Plaintiff, Kingsport Power Company, has appealed from the judgment of the Chancellor dismissing its petition for review of an order of the defendants, members of the Tennessee Public Service Commission.

Issues presented by appellant are:

I. Whether a party against whom a determination has been made by an administrative agency without the authority to make that determination may have that determination reviewed pursuant to the Tennessee Administrative Procedures Act?

A. Whether an Order by the Tennessee Public Service Commission in excess of the Commission's statutory authority is void and, therefore, may not be used in subsequent judicial or administrative proceedings to the prejudice of Plaintiff-Appellant?

B. Whether Plaintiff-Appellant is aggrieved by a void Order of the Public Service Commission in excess of the Commission's statutory authority and prejudicial to Plaintiff-Appellant in judicial proceedings already instituted?

On October 1, 1982, plaintiff filed its petition for review before the Chancery Court. The record does not indicate the date of service of the Petition, but it must be presumed to have been served promptly.

T.C.A. § 4-5-322 provides that a transcript of proceedings before the administrative agency must be certified to the reviewing court within 45 days after service of the petition, or within further time allowed by the court. There is no evidence that the reviewing court extended the 45 days which would have expired during November, 1982 if the petition were served within 15 days after filing.

Strangely, the transcript was not transmitted to the Trial Court, and is not in this record. There is no copy of the order entered by the defendants. There are only references to it in the pleadings and appellate briefs. The only direct quotation is found in the answer of defendants as follows:

"The Commission has not statutory authority from the Tennessee legislature to award litigation costs to any party. We will, however,

make a determination of those costs in light of the standards set forth in the federal statute. If the utility chooses to pay this amount to the intervening consumer, we will treat this expense as an operating cost of the utility. If the utility does not pay the costs which we find are appropriate for reimbursement, the consumer group may seek appropriate relief in the state courts.

The petition gives very few details of the order, but states that:

(14) While conceding that it does not have the authority to order reimbursement to the Association, the Commission has, nevertheless, made a determination of the amount of costs which it feels should be allowed in a state court proceeding to collect same and, further, has asserted its opinion that the "contribution" of the Association in the various proceedings was "substantial".

On December 10, 1982, without having filed a transcript as required by law, the defendants filed an "answer", admitting and denying various parts of the petition and containing considerable argument in favor of its position. The answer asserted the following defenses:

1. The final Order of the Commission in Docket U-82-7183, issued August 4, 1982, is not a final decision in a "contested case" as that term described in T.C.A. 4-5-322 and 4-5-102(3) and the Order is not subject to review under 4-5-322.

2. The Kingsport Power Company has not been "aggrieved" by the Commission's order in Docket U-82-7183 since that Order does not affect the rights or privileges of any person and the Company therefore has no standing under T.C.A. 4-5-322 to petition this Court for review of that Order.

On June 16, 1983, over 8 months after the filing of the petition, and over 6 months after filing their answer, defendants filed a "Motion to Dismiss" setting out the following facts:

Defendant, Kingsport Power Users Association, filed a petition with Defendant, Tennessee Public Service Commission, for the reimbursement of litigation expenses arising out of the Association's participation in proceedings involving Petitioner, Kingsport Power Company, Docket No. U-82-7183. Reimbursement is sought pursuant to the Public Utility Regulatory Policies Act of 1978 (hereinafter PURPA), 16 U.S.C. § 2632.

The Commission determined in its Order in Docket No. U-82-7183 that it lacked statutory authority to award legal fees or other costs to any party. Therefore, the Order does not affect the rights or privileges of any person. The Order, as it states, was written to make a determination, but not an award of fees and costs which the Commission has found are reimbursable under 26 U.S.C. § 2632. Should the utility decline to pay those costs, the Order is intended to assist a state court in determining whether the consumer group is entitled to an award under federal standards.

The motion to dismiss concludes as follows:

Therefore, because the Tennessee Public Service Commission has no statutory authority to award costs, Plaintiff, Kingsport Power Company, has not been "aggrieved" by the Commission's Order in Docket No. U-82-7183 because that Order does not affect the rights or privileges of any person. Therefore, Kingsport Power Company has no standing under T.C.A. § 4-5-322 to petition this Court for review of that Order.

Thereafter, on June 20, 1983, plaintiff filed a "Motion" as follows:

Comes the plaintiff, Kingsport Power Company, pursuant to TRCP 12.03, and moves the Court to enter judgment on the pleadings in this case in favor of the plaintiff in that the pleadings show that the defendant has acted in a manner wholly outside of its statutory authority, thus rendering its purported order of August 4, 1982 (Docket No. U-82-7183) null and void.

Upon the foregoing pleadings without transcript, affidavit or other evidence, on August 3, 1983, the Chancellor entered a "Memorandum and Order" concluding as follows:

Plaintiff's motion for judgment on the pleadings is hereby denied. Defendants' motion to dismiss is granted. Costs are taxed against plaintiff.

It is so ORDERED.

The briefs present a substantial and important question of law which must eventually be resolved. However, this Court has determined that the record was not in suitable condition for decision by the Chancellor, and it is not in suitable condition for a decision on appeal.

The principal reason for this is that the Chancellor and this Court have been asked to exercise judicial review of an order which has never been furnished to either court.

Ordinarily, it would be expected that the plaintiff's pleading would set out fully the facts upon which the suit is based, which, in this case, would include the pertinent background facts and the exact contents of the order of the commission. If this had been done, the issue could have been disposed of upon a timely motion to dismiss on the ground that the petition (complaint) fails to state a claim for which relief can be granted. TRCP Rule 12.02 (6). The same rule requires the motion to be filed before or with other defenses. If the motion relies upon facts outside plaintiff's pleading, the motion is to be treated as motion for summary judgment which requires the production of evidence by affidavit or otherwise.

It is understandable that petitioner might omit details expecting them to be supplied by the transcript which the statute requires to be filed. Without details in the petition or in a transcript or supplied by other evidence, this case was not ready for Disposition on a motion to dismiss.

The same may be said of plaintiff's motion for judgment on the pleadings which, as stated, do not contain sufficient information upon which to act summarily. TRCP Rule 12.03.

It is necessary for this cause to be remanded for further proceedings to build a record that will support a Disposition of the issue now being pressed by the parties. Upon remand, the Chancellor should enter such orders as in his judgment seem best calculated to produce the desired information. He may require the petitioner to plead more specifically, presenting a certified copy of the order complained of; he may require the defendant's to perform their statutory duty of producing a transcript, complete or abridged by consent; he may require the defendants to support their motion to dismiss with certified excerpts from the transcript; or he may take other suitable action to produce a substantial record of the facts upon which his decision and, if appealed, that of this Court must rest.

The judgment of the Chancellor is vacated. The cause is remanded for further proceedings. One half of the costs of this appeal is taxed against the petitioner-appellant. One half of the costs of this appeal is taxed against the appellee-commission.

Vacated & Remanded.

Concur: HOUSTON M. GODDARD, JUDGE, SAMUEL L. LEWIS, JUDGE

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