BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE:	)	
PETITION OF B&W PIPELINE, LLC	)	
FOR AN INCREASE IN RATES	)	**DOCKET NO. 15-00042**

CONSUMER ADVOCATE'S RESPONSE TO *PETITION TO RECONSIDER*

Comes the Consumer Protection and Advocate Division of the Office of the Attorney General ("Consumer Advocate"), and hereby opposes B&W Pipeline, LLC's ("B&W") *Petition to Reconsider* ("*Petition*") filed with the Tennessee Regulatory Authority ("TRA") on March 28, 2016. B&W presents three issues in its *Petition to Reconsider*: (1) the pipeline has value; (2) the projected estimate of throughput is unrealistic; and (3) rates should be periodically adjusted based on actual pipeline usage.

As will be shown, none of the three arguments presented by B&W merits revising the TRA's *Final Order* ("*Order*") in this case. Accordingly, the *Petition* should be denied.

1. **The Pipeline Value Issue**

In its *Petition*, B&W contends that the TRA erred in its decision setting the value of the pipeline at zero for ratemaking purposes; that is, the TRA found the pipeline was fully depreciated and therefore had no value. B&W's main support for its contentions that the pipeline has value is the alleged "new information" contained in records of Titans Energy, a previous owner of the pipeline. *Petition* at 2-4. According to B&W, these records support the contention that the pipeline had a value of $1,212,892.80 in 2010.

There is, however, no statement, and certainly no proof, that this so-called "new information" was not readily available at the time of the original hearing in this case.

The Uniform Administrative Procedures Act ("UAPA") provides as follows with regard to considering new evidence:

> (d) An order granting the petition [for reconsideration] and setting the matter for further proceedings shall state the extent and scope of the proceedings, which shall be limited to argument upon the existing record, and no new evidence shall be introduced unless the party proposing such evidence shows good cause for such party's failure to introduce the evidence in the original proceeding.

Tenn. Code Ann. § 4-5-317 (emphasis added). B&W has not shown good cause for its failure to introduce this "new evidence" in the original proceeding. B&W, therefore, should not be allowed to introduce it at this time.

In addition to the UAPA standard applicable to administrative orders, the standards for reconsidering court judgments suggests that this "new evidence" should not be considered. For example, when considering whether to revise a grant of summary judgment in light of new evidence, Tennessee courts consider these factors:

> 1) the movant's efforts to obtain evidence to respond to the motion for summary judgment; 2) the importance of the newly submitted evidence to the movant's case; 3) the explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment; 4) the likelihood that the nonmoving party will suffer unfair prejudice; and 5) any other relevant factor.

Harris v. Chern, 33 S.W.3d 741 (Tenn. 2000). Although B&W now claims this information is important to its case, B&W does not indicate that it made any efforts to obtain this evidence before the hearing on the merits and does not explain why it failed to seek and procure this evidence. The Consumer Advocate spent approximately $30,000 in expert expense to analyze B&W's data and prepare for the hearing. Undue prejudice would result if the Consumer Advocate were required to duplicate that effort and expense because B&W choose not to pursue this evidence originally.

At the original hearing in this case B&W made a decision to argue that the value of the pipeline for ratemaking purposes was $2,633,085, the "acquisition price" it paid to obtain the pipeline. *Order* at 10. In hindsight, B&W may wish it had used a lower pipeline value number, but at the time B&W apparently wanted to go for the home-run figure of $2.6 million. Any lower number would only undercut its position, so B&W had no incentive to look for the "new information" it has now unearthed that suggests a much lower value of $1.2 million. That, however, was a choice of trial strategy and does not establish the unavailability of the alleged new information.

Finally, B&W makes the argument that the pipeline was not listed by its then owner, Gasco, as a "regulated asset" in 2008 and, therefore, TRA's use of a 2008 valuation date is invalid. *Petition* at 3. B&W bases this argument on a series of references to various treatises and rules that define the "original cost" of utility plan as arising at the point the plan was first "dedicated to public use." *Petition* at 3. But merely because Gasco did not list the pipeline as a "regulated asset" does not mean that it was not dedicated to public use. More likely, it simply means that Gasco did not have a CCN for what was, in fact, a public utility.

Accordingly, B&W's *Petition to Reconsider* as to the pipeline value should be denied.

2. The Projected Value Of Throughput Issue

B&W claims that the projected amount of throughput for 2016 in the TRA's *Order* is too low. This claim is based on data for the first quarter of 2016. One quarter of data, however, is too little upon which to base a revision of the TRA's *Order*.

Accordingly, B&W's *Petition to Reconsider* as to throughput should be denied.

3. The Periodic Adjustment Of Rates Issue

B&W claims that rates should be periodically adjusted. This is the same argument B&W presented in its *Motion for Clarification* filed February 24, 2016. The TRA denied the *Motion for Clarification* on March 14, 2016. The *Petition to Reconsider* as to periodic adjustments should, therefore, be denied for the same reasons.

CONCLUSION

B&W's *Petition for Reconsideration* should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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

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This the 8 day of April, 2016.

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