

IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE

IN RE:

CHATTANOOGA GAS COMPANY
PETITION FOR APPROVAL OF AN
ADJUSTMENT IN RATES AND
TARIFF; THE TERMINATION OF THE
AUA MECHANISM AND THE
RELATED TARIFF CHANGES AND
REVENUE DEFICIENCY RECOVERY;
AND AN ANNUAL RATE REVIEW
MECHANISM

DOCKET NO. 18-00017

CONSUMER ADVOCATE'S MOTION TO COMPEL DISCOVERY

Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee, by and through the Consumer Protection and Advocate Division of the Office of the Attorney General (Consumer Advocate), pursuant to Tenn. R. Civ. P. 37.01 and TPUC Rule 1220-1-2-.11(9), respectfully moves the Hearing Officer for an order requiring Chattanooga Gas Company (CGC) to provide accurate and complete answers to the Consumer Advocate's discovery requests, specifically CPAD Requests 1-178 and 1-400. The grounds for this *Motion*, as demonstrated below, are that CGC failed to offer accurate and complete responsive answers to the Consumer Advocate's requests and, after the Consumer Advocate made several good faith attempts to resolve this issue without the need for a motion to compel, nevertheless submitted incomplete responses alongside untimely and unfounded objections.

BACKGROUND

On March 23, 2018, the Hearing Officer issued the *Order Establishing Procedural Schedule* in this Docket. Prior to that, on March 20, 2018, the Consumer Advocate issued its

first set of discovery requests to CGC. Under the Procedural Schedule, CGC was required to respond to the Consumer Advocate's requests by March 10, 2018.¹ When CGC provided its response to CPAD Request 1-178, it failed to provide information concerning parent capital structures and cost rates for The Southern Company for the attrition year ending June 30, 2019. Specifically, for subparts (f) and (g), the Company stated "[t]herefore, Southern Company, consolidated and parent only are not the appropriate level for the determination of the cost of capital for Chattanooga Gas Company in this proceeding." Thus, the Company provided only this statement, averring that the information is not proper for this proceeding, but it failed to file a specific objection with its response at that time.

On June 6, 2018, CGC updated its response to Request 1-178. For the first time, the Company included a paragraph of specific objections.⁵ Interestingly, the updated response appears to offer as support the objections made by two affiliates of CGC to providing similar information in their respective rate cases, but both of those affiliates are outside of the State of Tennessee and not subject to the same rules as this jurisdiction.

Later, on May 24, 2018, the Consumer Advocate submitted a supplemental set of requests relating to the initial round of discovery,² which included CPAD Request 1-400. The Company provided numerous blanket and vague objections to the information requested. Despite the Consumer Advocate's best efforts to obtain this information without the need to file a motion to compel, the Company continues to object and continues to be unwilling to provide an accurate and complete response.

¹ In fact, the Consumer Advocate worked with CGC when the Company needed additional time to respond to several requests.

² See *Third Supplement to First Discovery Request of the Consumer Protection and Advocate Division to Chattanooga Gas Company*.

As discussed in detail below, the information requested by the Consumer Advocate in these two requests is vital to this Docket. The Consumer Advocate must be able to analyze this data and, as relevant, use such data in providing testimony that would offer a meaningful position to the Commission. Further, it is worth noting that Commission Staff may need this information in analyzing and making recommendations to the Commission with respect to each Party's testimony and arguments and with respect to its own analysis of the case. CGC's failure to provide this relevant information is improper, and an order compelling production is necessary.

THE COMPANY'S FAILURE TO OBJECT TO CPAD REQUEST 1-178
BY THE DATE SET FORTH IN THE PROCEDURAL SCHEDULE
RESULTS IN A WAIVER OF THE OBJECTION

Tenn. R. Civ. Pro. 26.02(5) requires parties making a claim that information is either privileged or protected as trial preparation material to “*make the claim expressly* and [to] describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected” (Emphasis added). Further, it is the duty of “the party opposing discovery [to] demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary to protect it from, among other things, oppression or undue burden or expense.” *State ex. rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006).

When served with discovery, the “party on whom a request for discovery has been served must serve a written response” *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Intern., Inc.*, 2002 WL 1389615, *4 (Tenn. Ct. App. June 27, 2002) (citing Tenn. R. Civ. Pro. 34.02). “If that party objects to any request, the reasons for objection must be stated.” *Id.*

Further, Tenn. R. Civ. Pro. 34.02 states:

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for objection. If objection is made to part of an item or category, the part shall be specified.³

At the time the Company provided its response to the Consumer Advocate's request, it failed to state any specific objection. The Company's response merely suggested that the entities named in the request "are not the appropriate level for the determination of the cost of capital . . . in this proceeding." While the Company's response may constitute a factual argument for a position the Company may take in pre-filed testimony or at a hearing on the merits, the response in no way constitutes an objection. Thus, the Company has failed to preserve its objection and should be disallowed from withholding this information from the Consumer Advocate and the Commission.

CGC'S OBJECTIONS TO CPAD REQUESTS 1-178 AND 1-400 FAIL TO REFLECT THE PROPER APPLICATION OF TENNESSEE LAW, LACK FOUNDATION, AND CONTRADICT THE LETTER AND PURPOSE OF DISCOVERY

A. The Consumer Advocate's First Discovery Requests Are Relevant, Not Overly Broad, and Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

CGC initially failed to provide responsive information to one of the Consumer Advocate's requests, namely CPAD Request 1-178, subparts (f) and (g). After discussions and numerous good faith attempts by the Consumer Advocate to receive this relevant information, CGC modified its approach and lodged its specific objection – as well as renditions of its

³ This rule subsequently allows that "[t]he party submitting the request may move for an order under Rule 37.01 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested." Tenn. R. Civ. Pro. 34.02.

General Objections – on the grounds that the information sought is overly broad, not relevant, not calculated to lead to the discovery of relevant information, or a similar formulation or combination of those objections.

CGC has also failed to provide a response to CPAD Request 1-400, in which the Consumer Advocate seeks information concerning the Company's allocated plant, a common area in general rate case proceedings before the Commission. While the Company did provide some responsive information to portions of the request, the Company excluded the majority of the information sought. CGC then provided numerous objections that the request is "overly broad, unduly burdensome, expensive, oppressive, and excessively time consuming and not reasonably calculated to lead to the discovery of admissible evidence nor is the information being sought relevant to the subject matter of this docket as set forth in the Petition", without providing meaningful data or discussion substantiating its objections.

Regardless of how formulated or combined, CGC's objections are not proper applications of the Tennessee rules, lack foundation, and contradict the letter and purpose of discovery, especially in the context of a general rate case before TPUC that is, by its nature and by statutory requirement, severely time constrained. Further, they fail to take into account the needs of the case stemming from the Company's own corporate structure and the Petition filed by CGC.

1. Tennessee's discovery rules and cases permit and virtually encourage broad discovery.

Tenn. R. Civ. P. 26.02 allows for broad discovery.⁴ Specifically, the rule provides that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party

⁴ The Consumer Advocate incorporates by reference its *Memorandum in Support of the Consumer Advocate's Motion for Leave to Issue More Than Forty Discovery Requests*, as filed in this Docket on March 20, 2018, as well as the *Order Granting Consumer Advocate's Motion for Leave to Issue More than Forty Discovery Requests* issued by the Hearing Officer on April 12, 2018.

seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(Emphasis added). Perhaps the most important underlying policy of discovery is “that discovery should enable the parties and the courts to seek the truth so that disputes will be decided by facts rather than by legal maneuvering.” *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). Discovery should allow both the court and the parties to “have an intelligent grasp of the issues to be litigated and knowledge of the facts underlying them.” *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 356 (Tenn. Ct. App. 1985) (internal citations omitted), *superseded on other grounds by statute*, Tenn. R. Civ. P. 26.02(4)(B), *as recognized in West v. Schofield*, 460 S.W.3d 113, 125 (Tenn. 2015). Accordingly, “[a] party seeking discovery is entitled to obtain information about any matter, not privileged, which is relevant to the subject matter involved, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” *State ex. rel. Flowers v. Tenn. Trucking Ass’n Self Ins. Grp. Tr.*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006) (internal citations omitted).

Consistent with Tennessee’s open discovery policy, the relevancy requirement is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case’s issues.” *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Int’l, Inc.*, 2002 WL 1389615, *3 (Tenn. Ct. App. June 27, 2002) (internal citations omitted). Further, discovery is not limited to the issues raised by the pleadings. *Id.*, *see also Shipley v. Tenn. Farmers Mut. Ins. Co.*, 1991 WL 77540, *7-*8 (Tenn. Ct. App. May 15, 1991).

Under Tennessee's lenient discovery standards, a party may also use discovery to: define and clarify the issues; formulate and interject additional issues into the case; determine additional causes of actions or claims against a party or a third-party; or probe a variety of fact-oriented issues unrelated to the merits of the case. *Shipley*, 1991 WL 77540 at *7-8. Because of this broad policy favoring discovery, limitations on discovery should not be ordered unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the requested discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). Accordingly, a party objecting to any discovery request must state the reasons for the objection. *Id.*; see also *Kuehne & Nagel, Inc.*, 2002 WL 1389615 at *4. As a general matter, the rules favor the production of the requested information in all cases where the request is reasonable. *Kuehne & Nagel, Inc.*, 2002 WL 1389615 at *4.

2. In view of the Tennessee rules and cases, the Consumer Advocate's discovery requests are relevant, not overly broad, and reasonably calculated to lead to the discovery of admissible evidence.

In the context of this TPUC Docket 18-00017, it is worth noting that CGC has not filed a general rate case since 2009.⁵ Additionally, as CGC also seeks to use this general rate case filing to also establish riders based on Tennessee's alternative regulation statute, adequate responses to discovery requests are even more crucial to the intervenors and to the Commission and Commission Staff.

When the Consumer Advocate intervenes in a rate case, its aim is to present a complete case to the Commission. By referencing a "complete case," the Consumer Advocate means a case that not merely opposes selected parts of a company's petition, but one that presents a virtually parallel case that sets forth an alternative number for every number presented by the

⁵ See TPUC Docket No. 09-00183.

company. By presenting a complete case the Consumer Advocate believes it is not only representing consumers to the fullest extent possible, but also providing a useful framework for TPUC as it works to decide the case. It should be noted that the discovery process is the principal procedural vehicle available to the Consumer Advocate to gather evidence and conduct analysis prior to the hearing in this matter.

Furthermore, the magnitude of the rate increase that CGC is requesting – as well as the riders CGC seeks – and the complexity of the issues in the general rate case justify substantial discovery by the Consumer Advocate. The Consumer Advocate’s discovery requests reflect the need for a substantial amount of information that is needed to analyze and consider the substantial and complex requests made by CGC.

3. CGC’s objections are not proper applications of the Tennessee rules, lack foundation, and contradict the letter and purpose of discovery, especially in the context of TPUC dockets that are, by their nature and by statutory requirement, severely time constrained.

CGC appears before the Commission with a complex case presented by many witnesses and seeks to deny the Consumer Advocate the data and information the Consumer Advocate needs. That denial takes the form of the objections put forward by the Company and its legal counsel.

The consequences of the denial of the discovery requested would include the inability of the Consumer Advocate to test the merits of CGC’s proposed rate increase and to evaluate the general rate case and related policy issues presented in the Company’s *Petition*. And this would mean that the Consumer Advocate would not have the ability to develop fully prepared positions on the myriad of issues presented in the *Petition*. Without the additional requested discovery – and without receiving discovery responses in the format requested – the Consumer Advocate will be severely constrained in representing the interests of households and businesses

in CGC's service territory, some 64,000 customers. Discovery and resulting pre-filed testimony present the only opportunities for consumers to receive due process with a representative and evidentiary voice regarding the rates charged to them by CGC prior to the hearing. And a hearing that occurs without the benefit of robust discovery prevents the Consumer Advocate from effectively representing consumers' interests.

B. The Consumer Advocate's First Discovery Requests Are Not Unduly Burdensome or Expensive, Especially Taking Into Account the Complexity and Magnitude of the Case

CGC has objected to CPAD Request 1-178, subparts (f) and (g), and 1-400, on the grounds that the Consumer Advocate's requests are unduly expensive and burdensome, or a similar formulation or combination of that objection. Regardless of how CGC's objections are formulated or combined, though, the Consumer Advocate's requests are not unduly burdensome or expensive to CGC and its affiliates.

CGC is a part of one of the largest public utility conglomerates in the United States – The Southern Company – and effectively is the only source for most of the information that is needed to analyze and develop information with respect to this Docket. The reality of this Docket is that CGC has not had a general rate case in nearly a decade, and the issues presented in CGC's current general rate case are broad and highly complex. And CGC seeks a rate increase of about \$6.1 million. With that context, CGC and its affiliates should not be allowed to limit discovery by claiming that it would be burdened by responding to the Consumer Advocate's requests.

As with most large rate cases filed by public utilities, CGC's initial filing is voluminous and only represents CGC's argument in favor of the substantial rate increase and other relief sought by the Company. The case, and the discovery responses provided by the Company, require substantial review and analysis by the Consumer Advocate. After that review and

analysis, the Consumer Advocate's experts will then put together a complete alternative rate case using the information that CGC has provided and data and information that it has obtained through discovery. If the Consumer Advocate's experts are denied discovery simply by the unfounded claim that providing that discovery would unduly burden one of the largest utility conglomerates in the country, then the Commission would be denied the valuable recommendations of the Consumer Advocate's experts and consumers would be denied perhaps the only means of obtaining due process with respect to the substantial rate increase that CGC seeks to impose on them.

CGC has requested a rate increase of approximately \$6.1 million. It should be noted that this amount is multiplied in a rate-making setting – this is not simply a matter of \$6.1 million, but rather CGC is seeking an extra \$6.1 million *per year* from the 64,000 households and businesses in its service territory through increased rates, and the riders that the Company has indicated it will seek would utilize the numbers and methodologies approved by the Commission as a result of this case. It must be said that CGC's resources, and those of The Southern Company, one the largest utility conglomerates in the United States, are vast.

Thus, CGC's hollow objection that the Consumer Advocate's requests would be unduly burdensome to a member of one of the largest utility conglomerates in the country should be rejected.

MOTION TO COMPEL WITH RESPECT TO CPAD DISCOVERY
REQUEST NO. 1-178, subparts (f) and (g)

CPAD REQUEST: Provide the forecasted capital structure and cost rates on short term debt, long term debt, preferred stock, and common equity for the attrition year ending June 30, 2019, for: . . . (f) Southern Company, consolidated; and (g) Southern Company, parent only. Include in your response all supporting source documentation, work papers, and calculations.

INITIAL RESPONSE:

. . . (e), (f), & (g) The Company's financing is provided by AGL Resources, Inc. consolidated (prior to July 1, 2016) and Southern Company Gas, consolidated (since June 1, 2016). Therefore, Southern Company, consolidated and parent only are not the appropriate level for the determination of the cost of capital for Chattanooga Gas Company in this proceeding.

REVISED RESPONSE (June 6, 2018):

CGC objects to this request in that it seeks information and/or documents from other entities that are not within CGC's possession, custody, or control. Moreover, this request is not reasonably calculated to lead to the discovery of admissible evidence nor is the subject matter of the request relevant to the subject matter of this action as set forth in the Petition to the extent this request is seeking projected or forecasted capital structure and costs associated with Southern Company Parent and Southern Company Consolidated. CGC affiliated companies Nicor Gas and Florida City Gas have objected in their respective rate cases to providing the projected or forecasted capital structure and costs associated with Southern Company Parent and Southern Company Consolidated, and Nicor Gas and Florida City Gas have not produced such information. Notwithstanding the foregoing and without waiving its objections, CGC states:

. . . (e), (f), & (g) The Company's financing is provided by AGL Resources, Inc. consolidated (prior to July 1, 2016) and Southern Company Gas, consolidated (since June 1, 2016). Therefore, Southern Company, consolidated and parent only are not the appropriate level for the determination of the cost of capital for Chattanooga Gas Company in this proceeding.

MOTION TO COMPEL: The Southern Company is the parent of its subsidiary Southern Company Gas, which is the parent of Chattanooga Gas Company. The Southern Company provides equity financing to Southern Company Gas, which provides financing

generally for Chattanooga Gas. The Southern Company is the only entity whose stock is traded publicly.

Tennessee regulators dating from the Tennessee Public Service Commission have recognized the parent-subsidary relationships of regulated utilities owned by other companies, in part, by adopting the so-called double-leverage capital structures for those utilities.⁶ The double-leverage capital structure substitutes the capital structure of the parent company for the equity portion of the subsidiary's capital structure. This discovery request merely asks for information necessary to double-leverage the capital structure originally proposed by Chattanooga Gas witness Rachel Johnson in this proceeding.

Whether the Tennessee Public Utilities Commission chooses to implement double-leverage in this case or not, the requested information is not only relevant but entirely necessary to give the Commission that option. The Company's response to CPAD Request 1-177 provides historical capital structures for The Southern Company that could be used to construct historical double-leverage structures, but these will not match the attrition year capital structure proposed by CGC. Use of historical data for The Southern Company to double-lever the proposed attrition year capital structure will also create a mismatch.

During discussions between the parties concerning this outstanding discovery, CGC indicated that this information exists, but it has not been provided. Until its late-filed objection, CGC's response only cited an argument that such capital structures are "not appropriate" for use in this proceeding. Therefore, any argument that providing this information would be unduly burdensome is without merit. In order for the Consumer Advocate to provide testimony and the

⁶ Additionally, the Consumer Advocate posed a nearly-identical question to the utility in Docket No. 16-00001; not only did that Company not object to providing the information, the Company provided it publicly in the Docket and without seeking confidentiality from the Protective Order. See TPUC Docket No. 16-00001, *Second Partial Responses of Kingsport Power Company to First Discovery Request of the Consumer Protection and Advocate Division*, Response CPAD 1-047 (February 23, 2016).

Commission to make a determination concerning this subject – notably, the capital structure offered by CGC’s own expert witness – the Company must provide this information.

MOTION TO COMPEL WITH RESPECT TO CPAD DISCOVERY
REQUEST NO. 1-400

CPAD REQUEST: Refer to the Company’s response to CPAD 1-336 regarding allocated plant and provide the following information.

- a. Identify each entity that was allocated costs from AGL Services Company (GL29) from January 2010 through December 2017.
- b. For each entity identified above, provide the annual income statement from 2010 through 2017 in the same format as the “(D) & (E) Inc Stmt All (12.2017)” tab of the response to CPAD 1-336, along with the monthly allocation factor for each entity.
- c. For each entity identified above, provide the annual number of customers from 2010 through 2017.
- d. For each entity identified above, provide the annual net investment (plant less accumulated depreciation) from 2010 through 2017.

RESPONSE:

(a) CGC objects to this request in that it is overly broad, unduly burdensome, expensive, oppressive, and excessively time consuming and not reasonably calculated to lead to the discovery of admissible evidence nor is the information being sought relevant to the subject matter of this docket as set forth in the Petition. Notwithstanding the foregoing and without waiving its objections, CGC states:

Subject to and without waiving this objection, please see the Company’s revised response to CPAD-1-148 for a copy of the Company’s affiliate transaction report for the twelve-month

ending period September 2017. This report provides service company costs allocated to affiliate companies by service provider. Additionally, please refer to the Company's initial response to CPAD 1-148, attachments 1-148a – 1-148c, which provide, by month and by affiliate, allocated comparisons of actual to budget allocated costs for 2015 – 2017. These attachments provide the affiliates that were allocated costs during those three years.

(b) through (d): CGC objects to this request in that it seeks information and/or documents from other entities that are not within CGC's possession, custody, or control. This request is overly broad, unduly burdensome, expensive, oppressive, and excessively time consuming and not reasonably calculated to lead to the discovery of admissible evidence nor is the information being sought relevant to the subject matter of this docket as set forth in the Petition. This request is seeking detailed financial information regarding every company allocated costs by AGL Services Company, none of which, other than CGC, are subject to the jurisdiction of this Commission. The time periods and level of detail requested is irrelevant. Notwithstanding the foregoing and without waiving its objections, CGC states:

Please see the Company's response to CPAD-1-144 for the allocation factors used by the Company to allocate service company costs. The response provides the end use customers, which are used to allocate costs from certain service providers to the distribution utilities of GAS.

Also see the Company's response to CPAD-1-347. This response includes the composite ratio allocation and its components. This includes the income statement requested in part (b) above and net investments, requested in part (d) above, which includes total assets less intercompany accounts as a component of the composite ratio.

Finally, it is important to note that the company does not have allocation factors by entity as requested in part (b) above. Rather, AGL Service Company allocates costs by service provider, and the allocation factors used are dependent on the service provider providing the services. Please refer to CPAD 1-13 for the services agreement, specifically Exhibit I of the agreement which is the Policies and Procedures Manual for allocating costs from AGL Services Company to its affiliates receiving services. This manual provides the list of service providers and the specific services they provide as well as the allocation factor used by each service provider.

MOTION TO COMPEL: The Consumer Advocate's Request 1-400 seeks information concerning the Company's allocated common plant costs. Specifically, the Company allocates common plant costs on the basis of "charged costs." Even at this stage of the discovery process, the Consumer Advocate is uncertain whether the Company's method of allocating common plant costs to CGC ratepayers is fair or appropriate. In order to test the Company's common plant cost allocation methodology, the CPAD requested the monthly income, net plant, and number of customers by month from 2010 through 2017 for each entity that is allocated common plant costs by AGL Services Company.

This information is necessary to examine and analyze CGC's relationships with its affiliates. Without this data, the Consumer Advocate cannot perform the review and analysis that are required to come to a fully evaluated and supported position – and it must be noted that the Commission will likewise be denied the data and information it needs to make an informed decision. At this point, the only methodology for establishing cost allocation in this case at this time has been provided by CGC – the Consumer Advocate must be provided the data requested so that it can test the Company's methodology and, if appropriate, develop a more accurate one.

The Consumer Advocate should be allowed to undertake its own analysis to make these determinations.

CONCLUSION

For the reasons stated above, the Consumer Advocate requests that the Hearing Officer grant this *Motion to Compel Discovery* and order CGC to provide the information described above.

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 12th day of June, 2018.



Daniel P. Whitaker, III