

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

October 26, 2020

IN RE:

CHATTANOOGA GAS COMPANY PETITION
FOR APPROVAL OF ITS 2019 ANNUAL RATE
REVIEW FILING PURSUANT TO TENN. CODE
ANN. § 65-5-103 (d)(6)

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DOCKET NO.
20-00049

ORDER GRANTING, IN PART AND DENYING, IN PART THE CONSUMER
ADVOCATE'S *MOTION TO COMPEL*

This matter is before the Hearing Officer upon the *Consumer Advocate's Motion to Compel Discovery* ("Motion to Compel") filed by the Consumer Unit in the Financial Division of the Office of the Tennessee Attorney General ("Consumer Advocate") on July 24, 2020. Chattanooga Gas Company ("CGC" or the "Company") filed *Chattanooga Gas Company Response in Opposition to the Consumer Advocate's Motion to Compel Discovery for Privileged Information* ("CGC Response") on July 31, 2020.

MOTION TO COMPEL

In its *Motion to Compel*, the Consumer Advocate states that in its *First Discovery Requests to Chattanooga Gas Company* issued on June 12, 2020, the Consumer Advocate seeks discovery pertaining to the legal costs CGC wants to recover from ratepayers for the 2019 calendar year. The Consumer Advocate states that while CGC provided some information, it did not "provide enough

details for the Consumer Advocate to analyze or test the merits of the Company's proposal to saddle its customers with the entirety of these legal bills."¹ CA Request 1-56 states:

56. The Company proposes to recover the entirety of legal costs and expenses for Docket Nos. 18-00035 and 19-00047:
- a. Provide a comprehensive narrative describing why these expenses should not be split in some fashion between ratepayers and CGC's shareholders; and
 - b. Provide support, including all relevant documents, for the legal costs incurred by outside vendors and by CGC in 2019 in the current matter and sought for recovery.

CA Request 1-57 seeks the following:

57. Produce all legal invoices and similar documents incurred in 2019 from outside vendors. The documents should be provided in a way that identifies the following:
- a. The corresponding docket(s) that the invoice relates to;
 - b. The general nature of work provided on the docket (if some information is determined to be privileged, it may be redacted, as long as a general description of the work performed is included); and
 - c. The billed amount/cost of the work performed in total and on an hourly basis.²

The Consumer Advocate maintains that CGC relies on several improper objections and CGC's arguments must fail. According to the Consumer Advocate, CGC has waived any privilege that may have existed and CGC's objections do not provide a blanket protection over the documents. In addition, the Consumer Advocate asserts it has written the questions in a manner that respect the attorney-client relationship and the Company must produce the documents if it seeks to recover the costs from ratepayers.³ The Consumer Advocate argues that in *Tennessee-American Water Company v. TRA*, the Court of Appeals indicated that the Commission's final order should have included "'specific expenses the TRA deemed unnecessary, improvident, or improper....' In fact, the Court went so far as to affirm that; [s]uch an examination should have taken m place....' According to the Consumer Advocate, "[n]ot only are these documents relevant,

¹ *Motion to Compel*, p. 1 (July 24, 2020).

² *Id.* at 2-3.

they are required for CGC to prove that it should recover all or a portion of these costs.”⁴ For the foregoing reasons, the Consumer Advocate asks the Hearing Officer to grant the *Motion to Compel* and order CGC to provide complete and accurate responses, including legal invoices, in response to CA Request Nos. 1-56 and 1-57.

CGC RESPONSE

On July 31, 2020, CGC filed the *CGC Response*. CGC argues that this is not a general rate case but is meant to be a more streamlined annual review of revenues and expenses to determine whether rates would be adjusted up or down to enable CGC to earn its authorized rate of return.⁵ Further, according to CGC,

[t]he process is established by statute, and the form and format for this proceeding are governed by the terms of the Commission’s ARM Order. Fashioning a comprehensive narrative on a splitting of legal expenses is improper discovery, it is beyond the four corners of the ARM Order, and it is a process that is not permitted by Tennessee law, especially since this is not a rate case.⁶

CGC also argues that the production of legal invoices is beyond the scope of this proceeding because the level of detail required by the invoices is beyond the scope of the ARM Order. In addition, CGC maintains the redacted legal invoices are protected by attorney-client communication and privileged attorney work product and CGC has not waived its privilege.⁷

FINDINGS AND CONCLUSIONS

I. GENERAL DISCOVERY PRINCIPLES

Pursuant to Commission Rule 1220-1-2-.11, when informal discovery is not practicable, any party to a contested case proceeding may petition for a discovery schedule and, thereafter, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure. The

⁴ *Id.* at 11.

⁵ *CGC Response*, p. 24 (July 31, 2020).

⁶ *Id.*

⁷ *Id.* at 10-15.

Rules of Civil Procedure permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.⁸ Through these instruments, a party “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 seeking discovery or to the claim or defense of any other party.”⁹ The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.¹⁰ The Tennessee Court of Appeals has commented on relevancy as follows:

Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase “relevant to the subject matter involved in the pending action” has been construed “broadly to encompass any matter that bears on or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”¹¹

Further, parties may learn of information related to books, documents or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.¹² However, Tennessee’s rules do provide some limitations. Rule 26.02 permits a court to limit discovery under certain circumstances, such as undue burden, and Rule 26.03 permits a court to issue protective orders as justice requires.¹³ In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).¹⁴

⁸ Tenn. R. Civ. P. 26.01.

⁹ *Id.* at 26.02(1).

¹⁰ *Id.*

¹¹ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).

¹² Tenn. R. Civ. P. 26.02(1).

¹³ *Id.* at 26.02 & .03.

¹⁴ *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.¹⁵ “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”¹⁶

The Hearing Officer held a Status Conference with the parties on August 6, 2020 during which the parties presented arguments on the Consumer Advocate’s *Motion to Compel*. The Hearing Officer is persuaded by the arguments of the Consumer Advocate set forth in its *Motion to Compel*. Based on the record, the Hearing Officer finds that while the ARM proceeding is a streamlined review of rates, the process necessarily involves an examination of the revenues and expenses of the Company and a possible adjustment to customer rates so that the Company earns its authorized rate of return. Among other expenses, CGC seeks reimbursement for legal expenses from ratepayers. The Hearing Officer finds it is appropriate for the Consumer Advocate and the Commission to review legal expenses to verify their validity and a reasonable method of doing so is by reviewing the legal invoices. The Commission has previously reviewed the legal expenses and legal invoices of certain utilities in dockets before the Commission.¹⁷ In addition, in *Tennessee-American Water Company v. TRA*, the Commission [formerly TRA] split legal expenses between utility and the ratepayers and the utility appealed. While the Court found in favor of the utility, it was not because it was improper for the Commission to split legal expenses but because the Commission should have included the specific expenses it found were improper or unnecessary.¹⁸ If the Consumer Advocate wanted to argue that shareholders should share in some of the legal expenses, there would need to be a basis for the percentage the shareholders should pay. If the Consumer Advocate cannot review the legal invoices, it would not be able to validate the expenses,

¹⁵ Tenn. R. Civ. P. 37.01(2).

¹⁶ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

¹⁷ See e.g. *In Re: Petition of Laurel Hills Condominiums Property Owners Association for a Certificate of Public Convenience and Necessity*, Docket No. 12-00030, *Branstetter, Stranch, and Jennings Response to Staff Data Requests*, Exhibit B (February 8, 2013).

¹⁸ See *Tennessee-American Water Company v. TRA*, 2011 WL 334678 (Tenn.Ct.App. January 28, 2011).

nor would it be able to provide a basis for arguing shareholders should pay a particular portion of the legal expenses. After the Status Conference, the Hearing Officer communicated the ruling to the parties via email on August 7, 2020 and indicated it would be memorialized later in a written order. Based on the record and the arguments of the parties, the Hearing Officer concludes that:

- the Consumer Advocate conceded that CA Request No. 1-56(a) is moot because Chattanooga Gas has responded;
- CA Request No. 1-56 (b) is **GRANTED**;
- CA Request No. 1-57 is **GRANTED**.
- The legal invoices and similar documents incurred from 2019 outside vendors should be provided in a way that identifies the following:
 - a. The corresponding docket(s) that the invoice relates to;
 - b. The general nature of work provided on the docket (if some information is determined to be privileged, it may be redacted, as long as a general description of the work performed is included); and
 - c. The billed amount/cost of the work performed in total and on an hourly basis.
 - d. The corresponding docket(s) that the invoice relates to;
 - e. The general nature of work provided on the docket (if some information is determined to be privileged, it may be redacted, as long as a general description of the work performed is included); and
 - f. The billed amount/cost of the work performed in total and on an hourly basis.

Further, the Hearing Officer concludes that consistent with the language of the Consumer Advocate's Request in 1-57, any information that may be considered privileged may be redacted. In addition, the responses maybe filed as confidential, if necessary. At the request of the parties, the Hearing Officer clarified the ruling via email that CGC was only ordered to provide the legal *invoices* with the information outlined in the ruling, not copies of the actual work done.

IT IS THEREFORE ORDERED THAT:

Consistent with the provisions set forth in the Hearing Officer's findings and conclusions, the *Consumer Advocate's Motion to Compel Discovery* is granted, in part and denied, in part.

A handwritten signature in black ink that reads "Monica Smith-Ashford". The script is cursive and fluid, with the first name "Monica" being the most prominent.

Monica Smith-Ashford, Hearing Officer