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July 31, 2020

Tennessee Public Utility Commission
Attention: Ectory Lawless, Esq., Docket Clerk
Andrew Jackson State Office Building
502 Deaderick Street, 4th Floor
Nashville, TN 37243-0001

Re: Chattanooga Gas Company
Docket No. 20-00049

Dear Tory:

Enclosed please find Chattanooga Gas Company's Response in Opposition to The Consumer Advocate's Motion to Compel Discovery for Privileged Information, in the above referenced docket.

The original document will be sent via U.S. Mail.

Please let me know if you have any questions.

Sincerely,

Butler Snow LLP

J.W. Luna

JWL/am
Enclosure

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BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

July 31, 2020

IN RE:	**)**	
	)	
CHATTANOOGA GAS COMPANY	**)**	
PETITION TO OPT INTO AN	**)**	**DOCKET NO. 20-00049**
ANNUAL REVIEW OF RATES	**)**	
MECHANISM PURSUANT TO	**)**	
TENN. CODE ANN. § 65-5-103(d)(6)	**)**	

CHATTANOOGA GAS COMPANY
RESPONSE IN OPPOSITION TO
THE CONSUMER ADVOCATE'S MOTION TO COMPEL DISCOVERY
FOR PRIVILEGED INFORMATION

Chattanooga Gas Company ("Company" or "CGC"), pursuant to Rule 1220-01.02.11, of the rules of the Tennessee Public Utility Commission ("TPUC" or "Commission") and Rules 26.02, 26.03, and 37.01, Tennessee Rules of Civil Procedure, and T.C.A. § 65-5-103, hereby submits this Response in Opposition ("Response") to the Consumer Advocate's Motion to Compel Discovery ("Motion") filed on Friday, July 24, 2019. By this Motion, first, the Consumer Advocate Unit in the Financial Division of the Office of the Attorney General ("Consumer Advocate") is seeking to expand the scope of this docket and have CGC "[p]rovide a comprehensive narrative" for why legal expenses in two litigated cases should not "in some fashion" be split between ratepayers and stockholders. Fashioning a comprehensive narrative is not permissible discovery, which is compounded by the fact that however fashioned, splitting of legal expenses is not permitted by this proceeding or otherwise allowed by Tennessee law. Second,

the Consumer Advocate is improperly seeking the disclosure of privileged attorney-client communications that even on a redacted basis would reveal privileged attorney-client communications and privileged attorney work product information that is unnecessary, irrelevant, and without a sufficient basis. The filing of CGC's ARM Petition is not an automatic waiver of these privileges. The Consumer Advocate has chosen to pick a fight over attorney invoices by refusing to utilize the information provided in CGC's initial Schedules and prefiled testimony and the responses to discovery requests No. 1-56(b), 1-57, and 2-23 to seek non-privileged information, whereas in more than 100 requests the Consumer Advocate has requested and obtained non-privileged information regarding all of CGC's other expenses. Attorney invoices are an inadequate means of assessing the prudency of CGC's legal expenses, especially given the other information it could have requested. Indeed, the Motion itself includes an example of a non-privileged line of inquiry that could have been pursued and was not. The Motion is seeking the most extreme remedy without a proper basis since the Consumer Advocate has failed to exhaust, let alone seek any non-privileged discovery regarding attorney fees. The Commission has never compelled the production of legal invoices, even redacted ones, and there are no facts or law making it proper to do so here. For all these reasons, the Motion should be denied. To the extent necessary, CGC hereby also seeks a protective order from the Hearing Officer regarding the discovery sought in the Motion. In furtherance of this Response, CGC states as follows:

I. Introduction and Background

1. For context, the present review of rates process commenced when CGC filed its Petition for Approval of its 2019 Annual Rate Review Filing ("Petition"). However, the Petition does not stand alone. Rather, it is based upon and governed by the Annual Review Mechanism ("ARM") established by the Stipulation and Settlement Agreement approved by the Commission's

Order Approving Settlement Agreement dated October 7, 2019 ("ARM Order") in Docket No. 19-00047. CGC's ARM is an alternative regulatory method authorized by Tennessee Code Annotated Section 65-5-103(d)(1)(A), and the annual review of rates that is CGC's ARM mechanism is specifically authorized by Tennessee Code Annotated Section 65-5-103(d)(6).

2. The General Assembly created these statutes in order to provide for more streamlined and cost-effective regulatory proceedings. A full general requirements rate case cannot be conducted each year or reasonably every few years because of the tremendous cost in time, effort, and money it takes to present and challenge such a proceeding by the utility, Commission, and intervenors, including the Consumer Advocate. As set forth in CGC's ARM, by conducting "a once a year filing based upon known historical information and data," all the guess work and speculation about future costs, and the methodology for calculating such future costs, that you have in a rate case is removed from the process. ARM Order, at 9. The importance of a streamlined process was recognized by the Commission in approving CGC's ARM: "this mechanism will allow the Company to recover its operating costs in a timely manner while avoiding the cost and time necessary for a general rate case." ARM Order, at 10.

3. These two discovery requests subject to the Motion violate the explicit agreement of the Consumer Advocate to the process set forth in the ARM Order and seek to turn this proceeding into a general rate case in violation of the statutes and ARM Order. As will be discussed more fully below, the Consumer Advocate had available to it extensive, non-privileged, alternative discovery questions that would have elicited the information the Consumer Advocate claims it needs. By failing to purse non-privileged discovery, as it has so easily done for all of CGC's other costs, the Consumer Advocate cannot now be rewarded for failing to properly pursue discovery by being granted access to CGC's privileged information, even on a redacted basis that

still would reflect privileged information unless completely redacted. Ironically, while claiming to be concerned with CGC's legal costs, it is the Consumer Advocate that is responsible for unnecessarily running up CGC's costs by having to deal with this inappropriate Motion.

4. It is also important to note that notwithstanding the fact that this is not a general rate case, the Consumer Advocate has called it "akin in many respects to a general rate case," and has pursued discovery like it is a rate case. Motion, at 10. The Consumer Advocate has propounded in excess of 100 discrete discovery requests, which far exceeds the 40 (counting subparts) allowed by the discovery rule. Rule 1220-01-02-.11(5)(a). These discovery responses have caused CGC to produce over 40 additional spreadsheets and documents in addition to the formal written responses. CGC has participated in an unprecedented three informal discovery meetings via Zoom, each for more than an hour, by which the Consumer Advocate's experts have asked CGC's witnesses a wide range of follow up, exploratory, and background questions regarding CGC's petition, testimony, schedules, and discovery responses – the Consumer Advocate has effectively enjoyed discovery on discovery. CGC has also responded to informal verbal and email requests by which CGC has provided further explanation and details, including documents. All of this is on top of the 80+ Schedules required by the ARM Order that were provided simultaneously with the filing of CGC's Petition. Leath Prefiled Direct Testimony, at 9. There's nothing "akin" to it, in terms of scope and scale, the Consumer Advocate has pursued discovery like it is a general rate case. Nevertheless, CGC has endeavored to be as open and as responsive as possible even when it feels like the Consumer Advocate has gone beyond the four corners of the ARM Order. CGC has not objected to the voluminous number of discovery requests nor the Consumer Advocate's desire to engage in informal discovery. However, both of the

requests now at issue in the Motion far exceed the permissible scope of discovery, and the requested relief in the Motion should be denied.

II. General Response and Authority to Deny the Motion

5. CGC respects the Consumer Advocate's role in this process and its need to conduct meaningful discovery, but the right to conduct discovery is not unlimited. The guiding principle in discovery is that the material sought must be "relevant to the subject matter involved in the pending action" and "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26.02(1), Tenn. R. Civ. Pro. Moreover, the discovery must only seek relevant, non-privileged information. *White v. Vanderbilt University,* 21 S.W.3d 215 (Tenn. Ct. App. 1999); *Wright v. United Servs. Auto Ass'n,* 789 S.W.2d 911, 915 (Tenn. Ct. App.1990); *Duncan v. Duncan,* 789 S.W.2d 557, 560 (Tenn. Ct. App.1990). CGC shall more fully discuss below with respect to each specific request how the information sought by Request Nos. 1-56 and 1-57 should not be compelled because the requests fail to meet these standards.

6. The Consumer Advocate is seeking two different kinds of information. First, in Request 1-56, in subpart (a), the Consumer Advocate has asked that in connection with CGC's proposed recovery of all legal costs and expenses for Docket No. 18-00035 (CGC's "Tax Docket") and Docket No. 19-00047 (CGC's "ARM Docket") for CGC to provide "a comprehensive narrative describing why these expenses should not be split in some fashion between ratepayers and CGC's shareholders." The second area of inquiry is substantially broader and more intrusive than the 1-56(a) request. In Request 1-56(b) and Request 1-57, the Consumer Advocate is essentially seeking everything CGC has in connection with its legal expenses. Specifically, in Request 1-56(b), the Consumer Advocate has asked for "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," which does not appear to be limited the Tax Docket and ARM Docket. And in Request 1-57, the Consumer Advocate has requested:

> 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 (note that to the extent that the attorney-client privilege may apply, this request does not seek privileged information. In instances where some information may be privileged, that information may be redacted so 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.

On its face, Request 1-57 could be construed to mean all emails, memorandums, notes, pleadings in cases, and other such materials, although in its Motion the Consumer Advocate seems to be more focused on attorney invoices, and CGC shall respond in that context since the rest are either matters of public record or privileged matters not discoverable.

7. While the Consumer Advocate has somewhat mixed its arguments regarding these two different requests, CGC has responded to the Motion in a manner that organizes the Consumer Advocate's arguments in context with what has been requested.

III. A Comprehensive Narrative On Sharing Is Inappropriate And Beyond The Scope

8. The Consumer Advocate's request for "a comprehensive narrative" on why CGC's legal fees in the Tax Docket and ARM Docket is inappropriate, beyond the scope of this proceeding, and its precedents are inapplicable to this case.

9. First, the Consumer Advocate is asking for CGC to create information that does not presently exist – a comprehensive legal justification for why CGC should not split "in some fashion" its legal costs associated with these two dockets between ratepayers and stockholders. Without knowing exactly why prudently incurred expenses should be split in some "fashion," CGC

certainly does not bear the burden of developing some splitting methodology that is contrary to the law, contrary to its own best interests, and which it does not believe is appropriate, and then present its arguments against such a strawman. This request seeks to only increase what the Consumer Advocate claims it is trying to prevent – unnecessary legal expenses. It is inappropriate through discovery to seek the creation of information, whether deemed comprehensive narratives or legal opinions, especially when based upon such ambiguous and vague instructions or a legal theory rejected by the courts. *Consumer Advocate & Protection Division v. Tennessee Regulatory Authority*, 2012 WL 1964593 (Tenn. Ct. App. 2012) ("*CPAD v TRA* case"). On its face this request is a complete nonstarter, and that should be the end of the analysis on this request.

10. Second, notwithstanding the foregoing, CGC appreciates that while the Consumer Advocate can certainly challenge expenses, there is nothing within the four corners of the ARM Order that says if expenses were properly incurred, that their cost should be shared between ratepayers and stockholders. The ARM Order simply provides that upon proof of actual costs, they go into the calculation of new rates. Thus, any fashion of splitting is prohibited by the ARM Order and would be improper for this proceeding.

11. Similarly, seeking such information from CGC appears to be associated with the creation of a new policy that is contrary to both the terms of the ARM Order and Commission precedent. If the Consumer Advocate is seeking a new policy, the ARM Order expressly provides a mechanism for how changes in CGC's ARM are to be pursued. And that process is not via discovery.

12. Next, the precedents cited by the Consumer Advocate in its Motion do not apply in this situation or are misrepresented. The Consumer Advocate seems to be using these cases to argue for a sharing mechanism, and not why CGC should provide an opinion via discovery on how

sharing might work. CGC acknowledges that the expenses for recovery must have been prudently incurred and must not have been ordered to be excluded from recovery as set forth in CGC's 2018 general rate case Amended Final Order issued in Docket No. 18-00017 on January 15, 2019. As set forth in the Motion, the Virginia cases simply restate this basic rule of ratemaking – that expenses that are "exorbitant, unnecessary, wasteful, or extravagant" or which are "incongruent with the needs of the litigated case" are excluded because they are *not prudently incurred* expenses. Same thing for the Kentucky case cited – costs that are "disproportionate to the litigation, poorly documented, or improper on a procedural basis" are *not prudently incurred expenses*. CGC agrees with its obligation to demonstrate prudency, and it has established a *prima facie* case for prudency by its Petition, testimony, exhibits, and schedules, and which will be further provided at trial.

13. The last case relied upon by the Motion, the Missouri Public Service Commission decision in the Laclede Gas case, is an outlier because is based upon different statutes and precedents that make it inapplicable under Tennessee law. Most importantly for the Motion, the 50/50 splitting is not what the Consumer Advocate makes it out to be. The order states that the Missouri PSC found "a number of these litigated issues were unique shareholder focused ratemaking tools," and that there was factual support in the record to support these shareholder benefits, which were compounded by the company's admission that it "'padded' its revenue requirement beyond what it expected to receive" resulted in rate case expenses that "far" exceeded the utility's estimates and its historical rate case expense levels. *In the Matter of the Laclede Gas Company d/b/a Missouri Gas Energy's Request to Increase Its Revenues for Gas Service*, Report and Order, 2018 WL 1315107 *34 (Mo.P.S.C.) (February 21, 2018). But even the 50/50 split, which was based on "the specific facts in this case," was not 50/50 because the Commission assigned to the ratepayers 100% the cost of customer notices and the deprecation study because

they were required by the Commission. Id., at *35. Thus, none of the cases cited in the Motion demonstrate how or why CGC should provide a comprehensive narrative on some fashion of sharing for the Tax Docket and ARM Docket.

14. It must also be said that in the one previous instance in which the Commission granted the Consumer Advocate's request to "share" rate case expenses was reversed on appeal. The Court of Appeals was very clear that under Tennessee law if rate expenses are made and prudent, they are recoverable. The quote from that decision, discussed on page 11 of the Motion and which the Consumer Advocate has conveniently put in **bold and underlined** text, simply states the general rule that expenses that are "deemed unnecessary, improvident, or improper" are rightfully disallowed in recovery from the ratepayers, which means they are recovered from the stockholders. It's prudency, not sharing that is the issue. As will be more fully discussed below, if the Consumer Advocate wanted to test the prudency of CGC's legal expenses, it has multiple avenues of permissible, non-privileged discovery available, which is what it did in investigating all of CGC's other expenses. The Consumer Advocate should not be able to compel privileged information because it chose to not use proper discovery.

15. Lastly, and this cannot be emphasized enough, all of the "splitting" cases cited in the Motion were **general rate cases**, and not limited proceedings such as CGC's Tax Docket and CGC's ARM Docket. General rate cases are very different, complex matters that involve numerous issues and an extensive review based upon the issues raised. Moreover, the Tax Docket was initiated by the Commission's actions, not CGC's, and CGC has a right and duty to defend itself when the Commission is seeking to reduce its rates and earnings when it was in an underearning position. And while CGC did initiate the ARM Docket, as the Commission has noted, ratepayers are the ultimate beneficiaries of a more streamlined process that avoids "the cost

and time necessary for a general rate case" when an annual review of rates process is utilized. ARM Order, at 10. Thus, the concept of sharing for non-rate case expenses is even more inappropriate.

16. In the final analysis, fashioning a comprehensive narrative for the splitting of legal costs is not CGC's job, and what the Consumer Advocate appears to be seeking is not permissible under Tennessee law. The focus of the Consumer Advocate's efforts should be on relevant, non-privileged discovery leading to determining whether the costs were prudently incurred. This request for a "comprehensive narrative" does not seek the discovery of relevant information that is reasonably calculated to lead to admissible evidence. As is discussed in the next section, the same is true regarding the production of attorney fee invoices.

IV. There Was No Waiver of Privilege and No Basis for Producing Legal Invoices

17. There are three fundamental problems with the Consumer Advocates' arguments with respect to Requests 1-56(b) and 1-57 and producing redacted attorney invoices: filing an ARM does not constitute a waiver of CGC's privilege when it seeks to recover its attorney fees; the Consumer Advocate could have sought discovery of non-privileged information as it did for all of CGC's other expenses and it should not be rewarded for its failure to do so by compelling the production of privileged information; and producing even redacted invoices involves the production of privileged communications which is unnecessary given the non-privileged information available but not requested. The Commission has never compelled the production of attorney invoices, and these circumstances do not merit a change in policy.

18. The Consumer Advocate's arguments for the production of CGC's attorney fee invoices under Request 1-56(b) and 1-57 are inadequate to compel their production even on a redacted basis. Contrary to the Consumer Advocate's assertions on page 4 of its Motion, CGC has

not sought "to withhold documents that would allow the Consumer Advocate to make its case." If the Consumer Advocate had asked for information in the same manner as it did for all of CGC's other expenses, it would have obtained relevant information by which it could make its case. Quite simply, on this issue, the Consumer Advocate chose to ask the wrong questions and seek highly confidential, privileged information which on a redacted basis would still be privileged. Moreover, the Consumer Advocate has completely ignored the extensive documentation provided by CGC regarding its attorney fees by law firm by month that could have been the basis for reasonable follow up discovery, as it has done with other expenses. Instead, the Consumer Advocate has chosen to waste time and money fighting over access to redacted privileged information that even if granted will likely be unsatisfactory precipitating another potential motion for fewer redactions or the entirety of the privileged information. This action, which is contrary to long standing Commission precedent, should be stopped now before more wasted effort, and more attorney fees, are expended on this unnecessary and useless discovery.

19. CGC is taking a very strong position on this issue because the inherent danger in producing legal invoices, even on a redacted basis, is that the Consumer Advocate can glean CGC's legal strategies and theories. The invoices being requested are not rate case invoices, but rather the invoices for all of the matters CGC had before the Commission in 2019, which includes some ongoing and recurring matters. Attorney billing statements by their nature provide information on issues and strategies through detailed time entries that reveal who lawyers are talking to, what is being discussed on calls or in meetings, what they are reading, the scope of legal research, consultants and experts who may be engaged, the identification of fact witnesses, what other matters may be related to a CGC matter, alternatives being considered, litigation priorities, settlement ideas, and desired outcomes or alternatives. Access to this information would be

destructive of both the attorney-client communication privilege and the attorney work product privilege.

20. By its very nature, an attorney invoice is a privileged attorney-client communication because it involves the lawyer communicating information to the client regarding the lawyer's work on behalf of the client. The confidentiality of this attorney-client communication is a mainstay of our system of justice. The privilege shelters communications not otherwise disclosed that occur between a client and the client's attorney(s) in the course of the client receiving legal advice. The attorney-client privilege encourages full and frank communication between attorney and client by sheltering these communications from disclosure. *Culbertson v. Culbertson*, 455 S.W.3d 107 (Tenn. Ct. App. 2014). Because of the sensitive information contained in these invoices, they are not disclosed outside of the few individuals who need to know their content.

21. The attorney billing statements by their nature are also privileged attorney work product. *Culbertson v. Culbertson*, 455 S.W.3d 107 (Tenn. Ct. App. 2014). The work product doctrine is designed to prevent one party from discovering materials prepared in anticipation of litigation by other party's attorney; the intent of the rule is to prohibit a third party from learning of the attorney's mental impressions, conclusions, and legal theories of case.

22. Because the work product doctrine is grounded in an attorney's right to conduct the client's case with a certain degree of privacy, materials prepared in anticipation of litigation by the attorney are cloaked with a veil of confidentiality. *Memphis Pub. Co. v. City of Memphis*, 871 S.W.2d 681 (Tenn. 1994). The policy underlying the work product doctrine is that attorneys preparing for litigation should be permitted to assemble information, to separate the relevant facts from the irrelevant, and to use the relevant facts to plan and prepare their strategy without undue

and needless interference. *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602 (Tenn. Ct. App. 2006), *appeal denied*, (Oct. 30, 2006). The work product doctrine embodies the policy that attorneys, doing the sort of work that attorneys do to prepare a case for trial, should not be hampered by the prospect that they might be called upon at any time to hand over the results of their work to their adversaries. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203 (Tenn. Ct. App. 2002). Materials which are prepared in anticipation of litigation need not be prepared for the specific case in which discovery is sought in order to be protected by the work product doctrine. *Arnold v. City of Chattanooga, 19 S.W.3d 779 (Tenn. Ct. App. 1999)*. Work product, privileged during prior litigation, retains that privilege in subsequent related litigation so as to be non-discoverable. *Downing v. Bowater, Inc.,* 846 S.W.2d 265 (Tenn. Ct. App. 1992). While the billing statements reflect past work, the way the attorney reports that work is as valuable and confidential as the strategies and actions being reported. Even what may seem like an innocent statement on a billing statement – for example, that a lawyer reviewed a document or pleading by another utility in an unrelated case – within the context of a billing statement that reflects the date and time spent on a activity and even a few words left after redacting most information, this billing entry can provide incredibly valuable information regarding CGC's legal strategy and its approach to dealing with that issue in its own case. By having access to the information contained in attorney invoices, even on a redacted basis, it will provide the Consumer Advocate with a tremendous advantage in its present and future litigation with CGC that cannot be undone. Disclosure of any of each lawyer's statement would be grossly unfair and unjust, and it is not required.

23. Compelling the production of attorney invoices, even on a redacted basis, would be setting a new precedent that is contrary to well established Commission practice and orders. The Commission has never compelled production of legal invoices even on a redacted basis. This

request is especially insidious because the Consumer Advocate wants all bills for all matters, meaning it can review every single proceeding CGC participated in during 2019, some of which are ongoing or recurring. Again, the Consumer Advocate has failed to ask less intrusive discovery that would enable it to assess prudency just as it has done for every other expense. If from that proper discovery there is some basis to allege that there is something wrong with CGC's invoices, then the Commission may request them, and the Commission Hearing Officer may conduct an *in camera* review of those invoices. But given the prima facie case CGC has presented, and the failure of the Consumer Advocate to ask non-privileged cost questions like it did for all of CGC's other expenses, there is no basis to compel redacted invoices or conduct an *in camera* inspection.

24. The practice of mandating the production of these privileged attorney invoices would have a chilling effect on the attorney-client relationship, which is against the interests of justice. If the Commission begins to compel production of attorney invoices, even redacted, attorneys would be forced to be less descriptive in their time entries out of fear that the billing invoice may be discoverable by the Consumer Advocate and other adversaries. This could cause the client to be less informed and less able to assess the work done and whether it should be paid for – yes, clients can and do reject invoices for a variety of reasons. The Commission should not now change its policy, and violate public policy, by compelling the production of CGC's attorney invoices, even on a redacted basis. Hereafter, CGC shall now address each of the specific arguments raised by the Consumer Advocate in its Motion.

A. <u>CGC Has Not Waived Privilege</u>

25. The Consumer Advocate takes the remarkable position that the mere filing of a case automatically waives all privileged matters, which is not the law. Merely filing a case that puts all of the utility's revenues and expenses at issue does not open the door to CGC having its privileged

communications and work product disclosed to an "Advocate" who is CGC's litigation opponent in most every proceeding it has before this Commission. There are specific requirements requiring waiver which have not been met and which do not entitle the Consumer Advocate to review CGC's invoices. CGC did not waive its privilege.

26. First, there is clearly an attorney-client relationship between the law firms performing work for CGC and CGC, all of which is reflected on the Confidential Attachment provided in response to Request 1-57. All of the law firms identified in that Confidential Attachment have long standing relationships with CGC, and it is especially preposterous for the Consumer Advocate to suggest that there is no such attorney-client relationship with the Luna Law/Butler Snow and Berger Singerman law firms. The Consumer Advocate has been in litigation against CGC's lawyers and law firms for years. If there was not an attorney-client relationship, these law firms and lawyers would not be billing CGC, and CGC would not be paying the invoices. It is absurd to assert otherwise, and yet the Consumer Advocate has done just that.

27. In terms of whether the communications were intended to be confidential, CGC treats communications with its lawyers as confidential. CGC engages attorneys for the purpose of providing legal representation and securing legal advice. The billing invoices supplied by those attorneys is both a communication between a lawyer and the client subject to the privilege, and the invoices themselves also capture information regarding specific attorney-client communications that are privileged. Because of the highly sensitive nature of attorney invoices, as is reflected on the Confidential Attachment CGC provided in response to 1-57, attorney fee invoices are reviewed by and the responsibility of in-house attorney Elizabeth Wade, who as the Commission knows is the Chief Regulatory Counsel for the Company and listed as one of the representatives of CGC on the Petition. Ms. Wade hired and has supervisory oversight over the attorneys working for CGC,

and she reviews not only CGC attorney invoices but the invoices for all of the Southern Company Gas LDC utilities. Thus, these invoices are communications by attorneys to their client, and Ms Wade, herself an attorney, is the recipient of those invoices and she treats them as confidential and they are not made available to individuals other than those who need access to that information within the Company. There is unquestionably an attorney-client relationship with the intent that these invoice communications are to be confidential. CGC has complied with and has not waived its privilege to these privileged materials.

B. CGC Complied with the Privilege Log

28. The Consumer Advocate asserts that CGC failed to produce a privilege log. CGC acknowledges it did not provide a document labeled "Privilege Log," but that it has substantively complied with such a requirement. It has been said that the privilege log "must adequately identify the materials so that the opposing party can have a fair opportunity to challenge the privilege claim and the court will have information that will help it rule on the privilege claim (*i.e.*, the communication was to or from an attorney, the communication was for the purpose of securing legal advice, the party asserting the privilege must explain how including the attorney in communication was for the purpose of securing legal advice, or provide some specific context for the communication, etc.)." *Swafford Settlement Servs. Inc. v. Title Indus. Assurance Co., RRG*, No. CV 07-00094-KD-C, 2007 WL 9717902, at *13 (S.D. Ala. Oct. 26, 2007) (applying Tennessee law, which tracks the Federal Rules). CGC met these requirements.

29. CGC did not merely object to the request for invoices under Requests 1-56(b) and 1-57 and move on. Rather, CGC provided highly responsive and useful information in response to Request 1-57 which has been identified as "CA 1-057 CONFIDENTIAL Attachment A 2020-06-03." This is an Excel workbook containing five tabs with the following information that

demonstrative substantive compliance with providing a privilege log: (a) Tabs 2, 3, 4, and 5 each have columns identifying the law firms rendering an invoice to CGC – Tab 1 is a summary overview, Tab 2 provides month by month invoices for each law firm for all regulatory matters except the 2019 ARM Docket, Tab 3 reflects payments to those law firms, Tab 4 specifically identifies just the CGC 2019 ARM Docket invoices so the Consumer Advocate can see the specific invoices by month by firm, and Tab 5 is month by month invoices for non-regulatory matters; (b) as previously discussed, the requested attorney invoices specifically relate to providing legal advice services; (c) again, these are exclusively communications by the respective attorneys with the client regarding legal services performed and provided to an attorney within the Company whose job includes, among other things, the supervision of outside counsel and the review of legal invoices. When read in full, this Confidential Attachment provides very specific and detailed information by which the Consumer Advocate could reasonably ask follow up questions without specifically reviewing the invoices themselves. The Consumer Advocate's Motion did not inform the Hearing Officer that this extensive information was provided. The Commission should not elevate form over substance, and instead recognize that the information CGC has provided fulfills the requirements of the Rule.

C. Initiating its ARM Case Does Not Waive Privilege

30. The Consumer Advocate's reliance on the *State v. Bryan* case, a page 5, for the proposition that CGC has failed in its burden is completely irrelevant. First, *State v. Bryan* was a criminal case in which an attorney was asked to testify whether the client was apprised of his right against self-incrimination. Thus, the initiation of the case related to the communication itself. Clearly, CGC's annual review of rates under its ARM is not a case about the content of communications between CGC's outside attorneys and in-house attorneys or others acting on

behalf of CGC. Further, the Consumer Advocate has twisted this case to claim that every supporting document for every cost is subject to its review upon request. On its face, the review of revenues and expenses pursuant to CGC's ARM Petition does not automatically trigger a review of CGC's privileged communications. Moreover, as was already discussed above, unlimited access to every single invoice or supporting document is contrary to the express terms of the ARM Order which establishes that this is not a rate case, this is to be a more streamlined and less costly process, and that the documentation to be produced is set forth within the four corners of the ARM Order. As will be more thoroughly discussed below, there are alternative questions the Consumer Advocate could have asked, consistent with the types of questions it asked regarding all of CGC's other expenses, that would have provided the Consumer Advocate with the information it requires for its review of legal expenses.

31. The Motion at the bottom on page 6 also seems to somewhat confuse the work product privilege, which involves work done for or in anticipation of litigation, and the attorney-client privilege which pertains to attorney-client communications that are intended to be confidential. Nevertheless, in issuing the ARM Order, CGC has been on notice since that time that every year it would be having an annual review of rates in which all revenues and expenses authorized by the Amended Order in the 2018 rate case would be at issue and in which the Consumer Advocate would be a party. The ARM Order is the proof that everything prepared in anticipation of this ARM Docket was done in anticipation of litigation. As for the invoices, as previously stated, the invoices themselves are privileged attorney-client communications and work product, with the detailed billing statements reflecting privileged attorney-client communications that have occurred and as well as reporting work product privileged information. In the final analysis, filing this ARM case does not automatically waive privilege.

D. There is No Demonstrated Need Because No Exhaustion of Alternatives

32. The Consumer Advocate has failed to demonstrate its substantial need for the privileged information other than saying it needs the invoices to carry out its duties. The Consumer Advocate's argument is that it "has no other way of examining the specific costs and presenting an argument for consideration by TPUC." Motion, at 7. But that is not true. First, when looking at all of CGC's other costs, it has not sought detailed invoices (with one minor exception that CGC objected to) for all of CGC's other costs. There are thousands of costs in this case which ultimately have invoices, paychecks, and other original source documentation that ultimately back them up. The Consumer Advocate has not asked for that backup, and yet it has not said it is unable to prepare its case with respect to those costs. Why should attorney costs be different from every other cost, especially when this is not a rate case and certainly not an audit?

33. CGC did provide relevant information in the substantive responses to 1-56 and 1-57, even while objecting. But more importantly, CGC provided extensive billing and invoice information in the Confidential Attachment to CA 1-57, and CGC provided additional, detailed, non-privileged information in responding to 2-23 regarding proceedings and legal costs that expressly related back to and supplemented the responses to 1-56 and 1-57, which the Consumer Advocate has also failed to mention in its Motion. When read together, the extensive information CGC has provided constitutes an ample basis to test CGC's legal expenses and serve as a basis for non-privileged follow up discovery. But the Consumer Advocate has not pursued such discovery that does not require production of privileged information.

34. Indeed, in its Motion the Consumer Advocate has admitted that it could have used other means but did not. The Motion provides one very appropriate line of inquiry that the

Consumer Advocate never made – whether CGC is seeking the recovery of any legal expenses associated with Docket No. 18-00032. And yet it never asked this question.

35. The Consumer Advocate's discovery requests provide multiple examples of seeking information on whether costs are appropriate. In Requests 1-71 and 2-15, the Consumer Advocate asked several probative questions to obtain relevant, admissible information as to whether the disallowed incentive compensation was not included in CGC's case. Further with respect to spot and retention bonuses, the Consumer Advocate again asked formal questions and a series of questions in the July 22, 2020, informal meeting that were directed to understanding what these costs are and whether they are the same thing as the disallowed incentive compensation. The Consumer Advocate does not need to conduct an audit or even get any further documents in order to make its case as to whether it believes spot bonuses are or are not the same thing as incentive compensation. These examples, and most of the other discovery, prove that the Consumer Advocate is capable of seeking reasonable documentation and information regarding CGC's costs, it just chose not to do so for attorney fees.

36. Finally, the Consumer Advocate asserts that it has presented a carefully tailored request that expressly excluded privileged information. Again, the invoices are attorney-client privileged communications and work product that include information regarding both attorney-client privileged communications that have occurred and attorney work product information. Practically speaking, to redact the invoices is to effectively leave nothing to see. At best, even if CGC did not redact actions or the identification of dockets, a hypothetical redacted time entry might look like this:

March 15, 2019. Attorney Name. Phone conference [redacted]

Docket No. 18-00001 [redacted]. Legal research and analysis [redacted]. Exchange emails with [redacted]. Review Atmos [redacted].

Time 3.2 Hours, at $435.00/hour.

But even this level of hypothetical redaction by its very nature reveals confidential and privileged information on a daily basis as to CGC's litigation and regulatory actions and priorities, the production of which even on a redacted basis reveals insight into CGC's litigation strategy and communications. On the other hand, redacted information is not very useful in assessing whether the work done, and time spent was prudent. Attorney invoices are highly subjective and unique, and while responsible attorneys review each invoice before it is sent to the client, the level of detail and the descriptions provided may provide more or less information. This is further complicated by the fact that except for the ARM Docket costs, which were separately billed by each firm, the other "general" matter invoice presented each month usually includes time entries for multiple dockets and non-docketed matters over the course of a month, and there may be multiple matters handled on a single day presented in a single time entry that reflects all the work done that day. Notwithstanding its objection to providing invoices, to assist the Consumer Advocate, in the Response to 2-23, CGC provided specific information regarding dockets handled in 2019 as well

as other information by which the Consumer Advocate could obtain further relevant, discoverable information, which it has not acted upon.

37. CGC has demonstrated, indeed, the Consumer Advocate by its Motion has demonstrated by its reference to Docket 18-00032, that it can obtain relevant, discoverable, non-privileged information regarding legal fees using the tools available, as it has done regarding all of CGC's other expenses. The Consumer Advocate should not now be allowed to benefit from its own failure to pursue other discovery, as it has done for all other expenses. The Consumer Advocate should be denied access to privileged information, even on a redacted basis.

E. CGC's Objections Are Proper, and the Consumer Advocate's Requests Lack Merit

38. CGC has provided more than just spreadsheets and schedules to support its case. CGC has also provided testimony from three witness who validate and support the documents CGC has produced pursuant to the requirements of the ARM Order. Again, context is very important, and it bears repeating – this is not a rate case. It is an annual review of rates that relies on actual revenues and expenses to determine whether the utility has over recovered or under recovered on its rate of return. CGC has already provided much useful information regarding its legal fees and cost that would enable meaningful, relevant discovery. Instead, the Consumer Advocate seeks irrelevant and privileged information that is beyond the scope of the proceeding.

39. The argument on page 8 of the Motion that the scope of discovery is broad is generally true but lacking in context. As has been already said, this is an annual review of rates pursuant to the ARM Order the specifies the documents to be provided. The ARM Order does not reach down to the level of an audit and allow the production of invoices. The Consumer Advocate may not like this limitation, but it is what the Consumer Advocate agreed to in the Stipulation that is the basis for the ARM Order. Nevertheless, the Consumer Advocate has propounded over 100

substantive questions regarding the details associated with CGC's case by formal discovery, and then there have been three informal discovery video conferences of over an hour each that have been further supplemented by several emails seeking further follow up and clarification. The ARM Order draws a line in the sand regarding documentation for CGC's case, and legal invoices, indeed, any invoices, are outside the scope of the proceeding.

40. As previously stated, and in response to the arguments on page 9-12, the Consumer Advocate makes the fatal assertion that because this proceeding "is akin in many respects to a general rate case," Motion at 10, its request for legal fee invoices are reasonably calculated to lead to the discovery of admissible evidence. While CGC's return on equity is not at issue, again the level of detail and investigation associated with a rate case are not present in an ARM proceeding. The remaining argument in this section goes to the Court of Appeals splitting issue that has been addressed above as well as demonstrating that Motion details a proper line of inquiry regarding attorney fees that would not require the production of privileged information, redacted or otherwise.

41. In its final argument on pages 12-14, the Consumer Advocate's assertion that it must have these redacted invoices in order to make its case has been demonstrated to be untrue. Most of this section has already been addressed above, but there are two additional issues to respond to. The cases relied upon by the Motion are rate case decisions, not ARM proceedings. As previously addressed, the Tax Docket was initiated by the Commission, and CGC has the right to contest an attempt to reduce rates at a time when it was already underearning. The ARM Docket is not a rate case but a proceeding specifically authorized by statute to provide for a streamlined, more efficient form of regular review of rates to ensure the utility is not over earning or under earning. Finally, the fact that another utility may have produced legal expenses in 2012 is not

dispositive of CGC's right to protect its privileged materials. Moreover, the request for legal expense information in that 2012 was requested by the Commission Staff in what was a rate case, among other unique legal issues none of which are applicable here.

42. In the final analysis, the Consumer Advocate is attempting to transform this proceeding into a general rate case. That is wrong – it is a violation of the statute and of the ARM Order. Discovery questions such as those posed in the Motion regarding Docket 18-00032 or as the Consumer Advocate has posed regarding every other expense would more than adequately permit the Consumer Advocate to represent ratepayers and make its case. The Motion lacks merit on every point made, and it should be denied.

V. Conclusion

43. This is not a general rate case, but rather a more streamlined, limited proceeding designed to annually review revenues and expenses to determine whether rates should be adjusted up or down so that CGC has an opportunity to earn a reasonable rate of return.

44. The 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.

45. Production of redacted legal invoices is also beyond the scope of this proceeding as invoices are a level of detail outside the four corners of the ARM Order. Moreover, redacted invoices, however redacted, are still protected attorney-client communications and work product that include both privileged information on attorney-client communications and attorney work product information.

WHEREFORE, Chattanooga Gas Company respectfully requests that the Hearing Office deny the Consumer Advocate's Motion to Compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing document has been served by electronic mail, postage pre-paid U.S. First-Class Mail, and/or delivering a copy by hand, upon the following person(s) on this 31st day of July, 2020:

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