

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION  
NASHVILLE, TENNESSEE**

**May 14, 2021**

<b>IN RE:</b>	)	
	)	
<b>DOCKET TO EVALUATE</b>	)	<b>Docket No.</b>
<b>CHATTANOOGA GAS COMPANY'S</b>	)	
<b>PURCHASES AND RELATED</b>	)	<b>20-00139</b>
<b>SHARING INCENTIVE</b>	)	
	)	

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**CHATTANOOGA GAS COMPANY'S  
RESPONSE IN OPPOSITION  
TO THE CONSUMER ADVOCATE'S MOTION TO SET HEARING**

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Chattanooga Gas Company ("CGC" or "Company"), pursuant to Tennessee Public Utility Commission ("TPUC" or "Commission") Rule 1220-01-02-.06, and the Hearing Officer *Order Establishing Issue to be Addressed in Docket and Setting Date for Response* issued on April 7, 2021 ("Issue Order"), hereby files its Response in Opposition ("Response") to the Consumer Advocate's Motion to Set Hearing, filed May 7, 2021 ("Motion"), that seeks to deny CGC its constitutional rights to confront witnesses, freedom from confiscatory actions, due process, and a fair hearing. In support of CGC's opposition to the Motion, CGC states as follows:

1. The Consumer Advocate Unit in the Financial Division of the Office of the Attorney General ("Consumer Advocate") initiated this matter on December 23, 2020, by its Petition To Modify Chattanooga Gas Company's Performance Based Ratemaking Mechanism ("Petition"). The Petition initiated a "contested case" as defined by Tennessee law and the applicable rules of the Commission. Tenn. Code § 4-5-102(3) and Tenn. Comp. R. & Regs. §1220-01-02-.02. By its Petition, the Consumer Advocate sought Commission review on a number of

findings and recommendations made in the *Review Of Performance Based Ratemaking Mechanism Transactions And Activities* report of Exeter Associates (“Exeter Report”) filed in Docket No. 07-00224 on June 30, 2020. In addition to the audit findings associated with the triennial review of CGC’s performance based ratemaking mechanism, the Exeter Report provided additional information, including a recommendation that the Asset Management and Agency Agreement (“AMAA”) sharing percentage between CGC and ratepayers be changed from the current 50/50 split to 75%/25% in the ratepayers’ favor.

2. After filing its Petition, the Hearing Officer convened a meeting of the parties to identify the issues to be heard. The Consumer Advocate and CGC subsequently agreed to limit this matter to a single issue, *Should the sharing incentive percentage of Chattanooga Gas Company’s Asset Management and Agency Agreement be modified and if so, what is the appropriate percentage?* The Hearing Officer memorialized this agreement in the Commission’s Order Establishing Issue To Be Addressed In Docket And Setting Date For Response, issued on April 7, 2021 (“Issue Order”). This order also directed that CGC should file its Answer to the Petition by April 30, 2021, which CGC timely filed.

3. Also as set forth in the Issue Order, the parties were directed to develop a procedural schedule. The parties exchanged various communications to this end, but there was no agreement. The failure to set a schedule is because the Consumer Advocate does not want a regular hearing process as is required by due process. Such a process, as advanced by CGC, simply includes the parties filing testimony, exchanging discovery, and having a formal hearing as is required by Rule 1220-01-02-.02 for contested matters. By presenting a “traditional” testimony/evidentiary process, CGC anticipates a streamlined process that will afford the Consumer Advocate the chance to make its case to change the sharing percentage and which also provides CGC the opportunity

to challenge why such change is not in the public interest. While CGC herein provides an extensive legal argument, the seriousness of this response is required by what the Motion seeks. The proposed administrative process should not be extensive, but it is what fairness requires.

4. The Consumer Advocate is essentially proposing a summary judgment proceeding based solely on the Exeter Report without any opportunity for CGC to substantively challenge the data, analysis, or conclusion. This is especially troubling because the Consumer Advocate acknowledges that “CGC has not provided an explanation of its opposition to the independent consultant recommendations contained within the Exeter Report.” Motion, at 3. Challenging the Exeter Report through a traditional procedural process cannot be “duplicative” as the Motion asserts, when CGC has not had a forum to challenge until now as there has been no effort to change the sharing allocations until now. As proposed by the Consumer Advocate, there is no way to effectively argue against the Exeter Report if the only evidence of record is the Exeter Report.

5. Moreover, the discussion of the AMAA by Exeter was admittedly for “informational purposes.” Exeter Report, at 43. Exeter named some of the states it has performed gas audits, but it did not provide any specific information on those other state programs, and the only specific information was for Atmos and Piedmont in Tennessee, without explaining how or why the Atmos and Piedmont situations were the same as CGC. Exeter Report, at 43-45. It is also hard to call Exeter’s conclusion a recommendation when it merely said, “Exeter concludes that for AMA fees, a 75% customer / 25% utility sharing incentive *would be more appropriate* for CGC and reflect a reasonable balance of incentives.” Exeter Report, at 45 (emphasis added). The entire independent analysis relied upon by the Consumer Advocate is a total of three pages of summary information. With only this in the record, the Consumer Advocate simply wants the parties to only provide argument. Such a process does not provide CGC with a fair hearing that is required by

due process. CGC has a fundamental right to see and hear and test the evidence of the Consumer Advocate, which is exactly what the traditional hearing approach provides. Quite simply, because the Consumer Advocate is seeking to change established policy, such a process ***requires an evidentiary record*** that three pages from a report plus legal argument cannot accomplish.

6. A contested hearing process is also required because, as CGC noted in its Answer, the Consumer Advocate bears the burden of proof. The Consumer Advocate is the party seeking to change an existing policy of the Commission that has been followed for more than eighteen (18) years. What is especially concerning about the Motion, the Consumer Advocate wants the Commission to decide CGC's substantive rights based solely on a single hearsay document, the 2020 Exeter Report. As CGC quoted in its Answer, "a party is required to carry its own burden of proof and is thus required to present relevant and reliable evidence sufficient to support its assertions." Docket 07-00224, *Order on February 9, 2009, Status Conference*, at 24 (Mar. 2, 2009), citing Tenn. Code Ann. §65-2-109(5); see also Tenn. Comp. R. & Regs. §1220-01-02-.16(2). The Consumer Advocate is seeking to avoid its burden by simply having the Commission act based solely upon the three pages of the Exeter Report. This is wrong.

7. The Consumer Advocate's Motion cites Tenn. Code Ann. § 65-4-118 as the basis for its hearing request. That statute provides, in pertinent part, that the Consumer Advocate may initiate a proceeding "in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and the rules of the commission. Tenn. Code § 65-4-118(b)(1). Title 4, chapter 5 of the Tennessee Code ("UAPA") defines "contested case" to mean, in pertinent part, "a proceeding . . . in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing." In order to have a fair hearing, there needs to be testimony and other evidence, which is accomplished

through a traditional hearing process as CGC is seeking.

8. Tennessee law requires a hearing in this matter. “The commission has the power to: [. . .] After hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility[.]” Tenn. Code §65-4-117(a)(3). Moreover, the Tennessee Constitution, like the United State Constitution, guarantees due process of law, the right to confrontation of witnesses, and the right to be free from confiscatory actions. See, Const. art. 1, §§ 8, 21; U.S.C.A. Const. Amends. 5, 14. Reliance solely on the Exeter Report to change the AMAA sharing percentage is confiscatory, and CGC must be provided with procedural due process. Accordingly, there can be no doubt that this is a contested case meriting a traditional hearing process.

9. It must also be recognized that just because the Commission said that the Consumer Advocate may initiate proceedings based upon recommendations in the Exeter Report and its own July 9, 2020, Comments, initiation of a docket does not grant the Consumer Advocate the power to limit the evidence in this docket to just the Exeter Report. CGC in filing the Exeter Report expressly reserved its rights to object to the Exeter Report’s AMAA sharing recommendation, which CGC will do in this docket if given a chance. Moreover, an untested “be more appropriate” comment in another proceeding does not constitute a sufficient legal basis for the Commission to change a longstanding policy. If the Exeter Report alone was sufficient to change the AMAA sharing percentage, the Commission would have done so in Docket 07-00224. But it did not. Instead, the Commission rightfully took no action on the AMAA sharing statement other than to acknowledge that the Consumer Advocate could petition to seek such a change.

10. That fact that this is an administrative proceeding does not change CGC’s right to due process: “The protections of procedural due process apply to administrative proceedings.”

*Martin v. Sizemore*, 78 S.W.3d 249, 263 (Tenn. Ct. App. 2001). Tennessee courts recognize that due process includes the rights to present evidence and to cross-examine witnesses. *Rayder v. Grunow*, 1993 WL 95561, at \*5 (Tenn. Ct. App. Apr. 2, 1993) (citing *Goldberg v. Kelly*, 397 U.S. 254, 268, 90 S.Ct. 1011, 1020 (1970)). In the context of a utility rate making case where the constitutional issue of confiscation is presented, the Tennessee Supreme Court held that the substantial evidence test satisfies federal constitutional requirements. *Pub. Serv. Comm'n v. Gen. Tel. Co. of Se.*, 555 S.W. 2d 395, 402 (Tenn. 1977).

11. Finally, it must be remembered that the Exeter Report is hearsay. While hearsay evidence is admissible in administrative proceedings, it must be corroborated by other evidence to support a finding of fact. *See, e.g., Crosby v. Holt*, 320 S.W.3d 805, 815 (Tenn. Ct. App. 2009) and Tenn. R. Ev. R. 801. As such, an evidentiary hearing is necessary. Moreover, CGC is entitled to probe into the basis for Exeter's conclusion under both the Tennessee and United States Constitutions. *See, e.g., Martin v. Sizemore*, 78 S.W.3d 249, 267 (Tenn. Ct. App. 2001) (acknowledging the rights to present evidence and cross-examine witnesses in contested cases under the UAPA). A traditional hearing process provides this opportunity.

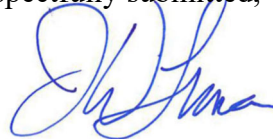
12. In this docket, with only one single issue to be determined, the Procedural Schedule should be relatively simple. The Consumer Advocate as moving party in this contested case should file its testimony and evidence. CGC will conduct discovery and file its testimony. If needed, the Consumer Advocate can conduct discovery on CGC's testimony and file its rebuttal testimony. We then have a hearing if a settlement cannot otherwise be reached. Such a simple, traditional Procedural Schedule will afford CGC due process of law.

13. CGC requests oral argument on this motion, under Tenn. Comp. R. & Regs. § . 1220-01-02-.06(4), unless the Hearing Officer will simply deny the Motion and order the parties

to set a traditional hearing schedule.

WHEREFORE, CGC respectfully requests that the Consumer Advocate's Motion to Set Hearing be denied, and that the Hearing Officer be directed to work with the parties to establish a contested case procedural schedule that includes the Consumer Advocate filing direct testimony in support of its case, discovery by CGC, responsive testimony by CGC, discovery by the Consumer Advocate of CGC's testimony, rebuttal testimony by the Consumer Advocate, and any other proceedings required by due process that are necessary for a fair hearing to be held. Absent denial of the Motion and directing the parties to set a traditional procedural schedule, CGC further requests that oral argument be granted to the parties before any ruling is made.

Respectfully submitted,



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J. W. Luna, Esq. (Tenn. No. 5780)  
Butler Snow LLP  
150 3rd Avenue South, Suite 1600  
Nashville, TN 37201  
Telephone: (615) 651-6749  
[JW.Luna@butlersnow.com](mailto:JW.Luna@butlersnow.com)

and

Floyd R. Self, Esq. (Fla. Bar No. 608025)  
Berger Singerman LLP  
313 North Monroe Street, Suite 301  
Tallahassee, Florida 32301  
Direct Telephone: (850) 521-6727  
Email: [fself@bergersingerman.com](mailto:fself@bergersingerman.com)

*Attorneys for Chattanooga Gas Company*

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing Response has been provided to the following via electronic mail on this the 14<sup>th</sup> day of May, 2021:

Daniel P. Whitaker, III  
Karen H. Stachowski  
Rachel C. Bowen  
Vance Broemel  
Office of the Tennessee Attorney General  
Economic and Regulatory Section  
Financial Division, Consumer Advocate Unit  
P.O. Box 20207  
Nashville, TN 37202-0207  
[Daniel.Whitaker@ag.tn.gov](mailto:Daniel.Whitaker@ag.tn.gov)  
[Karen.Stachowski@ag.tn.gov](mailto:Karen.Stachowski@ag.tn.gov)  
[Rachel.Bowen@ag.tn.gov](mailto:Rachel.Bowen@ag.tn.gov)  
[Vance.Broemel@ag.tn.gov](mailto:Vance.Broemel@ag.tn.gov)

Kelly Cashman Grams, Esq.  
General Counsel  
Tennessee Public Utility Commission  
Legal Division  
502 Deaderick Street, 4<sup>th</sup> Floor  
Nashville, TN 37243  
[Kelly.Grams@tn.gov](mailto:Kelly.Grams@tn.gov)



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