

August 25, 2021

)
)
)
)
)
)
)

In its *Motion*, the Consumer Advocate asks the Commission to set a hearing in this matter limited to oral arguments and prior to the parties conducting discovery or filing testimony. The Consumer Advocate states its position is based on the recommendations of an independent consultant's, Exeter Associates, Inc. ("Exeter"), review of CGC's incentive sharing mechanism. In

Exeter's June 2020 report, *Review of Chattanooga Gas Company's Performance Based Ratemaking Mechanism Transactions and Activities* ("Exeter Report"), Exeter recommended the sharing ratio of CGC's Asset Management and Agency Agreement ("AMMA") fees be reduced from 50%/50% to a 75%/25% sharing percentage to better reflect industry standards.¹ The Consumer Advocate points out that CGC stated it opposed this finding and would provide a substantive explanation at a later date and to date, CGC has not provided any further explanation.² Consequently, the Consumer Advocate maintains that because the Exeter Report, which contains findings of an independent third party, is the primary issue in dispute, no additional fact finding should be necessary.³ The Consumer Advocate argues that "[h]aving the traditional procedural process in this docket---involving discovery and testimony---would be duplicative and an inefficient use of resources."⁴

On July 8, 2021, the Consumer Advocate filed the *Consumer Advocate's Response to Directive to Prepare a Joint Proposed Procedural Schedule* ("Consumer Advocate Response")⁵ stating that "[t]he Consumer Advocate respects the Commission's decision to not set a hearing in this Docket at this time; however, the Consumer Advocate represents that it will not seek discovery from CGC, nor will it file direct testimony in this Docket."⁶ The Consumer Advocate states it will provide a witness to discuss the Exeter Report, if necessary and "does not challenge CGC's right to dispute the Exeter Report within the limits of the Rules of Civil Procedure and rulings of the Commission."⁷ The Consumer Advocate maintains the Exeter Report and the Commission's knowledge and expertise

¹ *Motion*, p. 1 (May 7, 2021).

² *Id.* at 1-2.

³ *Id.* at 2-3.

⁴ *Id.* at 3.

⁵ In response to a query from the parties, the Hearing Officer informed the parties via email dated May 26, 2021, that the Consumer Advocate's *Motion* was denied.

⁶ *Consumer Advocate Response*, p. 2 (July 8, 2021).

⁷ *Id.*

in reviewing the gas sharing percentages of other gas companies are sufficient for the Commission to make a decision in this docket.⁸

CGC's *RESPONSE*

CGC filed its *Response* on May 14, 2021, objecting to the Consumer Advocate's *Motion* stating the Consumer Advocate seeks to deny CGC of its constitutional right to due process, to confront witnesses, freedom from confiscatory actions and to a fair hearing.⁹ CGC argues the Consumer Advocate is essentially seeking a summary judgment proceeding based solely on the Exeter Report without affording CGC an opportunity for CGC to "substantively challenge the data, analysis, or conclusion."¹⁰ CGC states this procedure cannot be duplicative as the Consumer Advocate asserts because this proceeding is the first opportunity CGC has had to challenge the Exeter Report since this is the first time there has been an effort to change the sharing allocation.¹¹ CGC maintains it has a fundamental right to see, hear and test the Consumer Advocate's evidence through the hearing process. In addition, CGC avers it cannot test the Consumer Advocate's evidence if the only evidence is the Exeter Report, a single hearsay document.¹² CGC maintains it has the right to due process in an administrative proceeding.¹³ CGC argues its due process rights include the right to present evidence and cross-examine witnesses.¹⁴ According to CGC, the procedural schedule should be very simple in this docket since it consists of only one issue.¹⁵

⁸ *Id.* at 3.

⁹ *Response*, p. 1 (May 14, 2021).

¹⁰ *Id.* at 3.

¹¹ *Id.*

¹² *Id.* at 5.

¹³ *Id.* at 5-6 citing *Martin v. Sizemore*, 78 S.W.3d 249, 263 (Tenn. Ct. App. 2001).

¹⁴ *Id.* at 6 citing *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)).

¹⁵ *Id.* at 6.

FINDINGS AND CONCLUSIONS

The Hearing Officer is persuaded by many of the arguments set forth in CGC's *Response* and finds this matter is not ripe for a hearing at this time. The Consumer Advocate seeks to reduce CGC's profit sharing ratio of AMMA fees from 50%/50% to 75%/25%, thus reducing the amount of profits retained by CGC. It is well established that procedural due process rights apply to administrative proceedings and procedural due process requires that CGC be given an opportunity to examine the Consumer Advocate's evidence and challenge its evidence by cross-examining witnesses. In addition, CGC should be given an opportunity to present its own evidence and witnesses, as well and in order to develop its case, CGC should have an opportunity to conduct reasonable discovery. While the Consumer Advocate may not want to conduct discovery on CGC, Commission Rules allows CGC to petition for discovery. Commission Rule 1220-01-02-.11 states that "any party to a contested case may petition for discovery." Therefore, since CGC did not unreasonably delay seeking discovery and doing so will not delay a hearing on the merits, CGC's request for a traditional contested case hearing procedure that includes conducting discovery, filing testimony and presenting witnesses should be granted.

Failing to present witnesses is not only a violation of CGC's procedural due process rights, but it also violates the procedures established by the rules of the Commission. It is the longstanding procedure of the Commission to require the filing of pre-filed testimony pursuant to Commission Rule 1220-01-02-.16 (3) which provides:

- (3) In lieu of the oral examination of a witness or when required by the Commission or by these rules, the direct or redirect examination of such witness may be presented in written, question-and-answer form. Pre-filed testimony shall be filed no later than ten (10) days prior to the hearing unless otherwise provided by the Commission or the Hearing Officer. Presentation of pre-filed testimony may be required by the Commission in accordance with this rule, if it is deemed by the Commission that doing so would be in the public interest and would be conducive to a fair and expeditious disposition of the proceeding. Any party may object to the use of pre-filed testimony by a witness, and the objecting party shall have the right to be heard by the Commission or the Hearing Officer at a hearing on the objection.

In addition, if the Consumer Advocate were allowed to rely solely on the Exeter Report and not present witnesses, the Commissioners and Staff would not be able to ask questions at the hearing about the positions taken in the Exeter Report. In contested case proceedings, the Commission requires that witnesses be present in case there are questions by the Commissioners or Staff. For the foregoing reasons, the Hearing Officer finds that a hearing in this matter is premature at this juncture in the proceedings. The Hearing Officer concludes it is in the public interest and conducive to a fair and expeditious disposition of this proceeding that the Consumer Advocate file pre-filed testimony and present a witness at hearing who will be available for cross-examination by CGC and questions by the Commission. Therefore, the *Motion to Set Hearing* is denied. Since the parties are in the best position to determine their schedules and availability, the Hearing Officer will give the parties another opportunity to develop a joint proposed procedural schedule that includes, at a minimum, dates for filing discovery and pre-filed testimony. If the parties are unable to develop a proposed procedural schedule, the Hearing Officer will enter a procedural order.

IT IS THEREFORE ORDERED THAT:

- 1) The *Motion to Set Hearing* filed by the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General is **DENIED**.
- 2) The parties shall file a proposed procedural schedule by **September 8, 2021** that includes, at a minimum, dates for filing discovery requests and responses and for filing pre-filed testimony.
- 3) The Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General is directed to file pre-filed testimony in support of its Petition filed in this matter and present a witness at the hearing.



Monica Smith-Ashford, Hearing Officer