BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 12, 2008

IN RE:	)	
	)	**DOCKET NO.**
DOCKET TO EVALUATE CHATTANOOGA GAS COMPANY'S GAS PURCHASES AND RELATED SHARING INCENTIVES	)	**07-00224**

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

This matter is before the Hearing Officer upon the *Consumer Advocate's Motion to Compel ("Motion to Compel")* filed with the Tennessee Regulatory Authority ("TRA" or "Authority") on September 2, 2008.

RELEVANT PROCEDURAL BACKGROUND

On August 6, 2008, in accordance with the *Order Granting Joint Request to Revise the Procedural Schedule Concerning Third Round Exchange of Discovery*, the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter for the State of Tennessee ("Consumer Advocate") filed its *Second Discovery Requests of the Consumer Advocate and Protection Division to Chattanooga Gas Company ("Second Discovery Requests")* with the Authority. On August 26, 2008, Chattanooga Gas Company ("CGC") filed its *Chattanooga Gas Company's Responses and Objections to CAPD's Second Discovery Requests.*

In its *Motion to Compel*, filed September 2, 2008, the Consumer Advocate states that "CGC's responses reveal an attempt to answer the request propounded . . . specific objections are

not a concern;"[1] rather, its "main complaint is CGC's lack of completeness in providing responsive answers."[2] The Consumer Advocate thereafter requests that the TRA enter an order compelling CGC to produce full and complete answers to several discovery requests. In *Chattanooga Gas Company's Response to the CAPD's Motion to Compel ("Response"),* filed with the Authority on September 4, 2008, the CGC asserts that it "has provided complete, responsive answers and has provided all requested documents when such documents exist"[3] to the discovery requests propounded by the Consumer Advocate.

On September 3, 2008, a *Notice of Status Conference* was issued setting a Status Conference on September 8, 2008. A *Notice of Rescheduling of Status Conference* was issued on September 8, 2008 resetting the Status Conference for September 9, 2008.

SEPTEMBER 9, 2008 STATUS CONFERENCE

The Status Conference began at approximately 2:30 p.m. in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee. The parties in attendance were as follows:

> **CGC** - J.W. Luna, Esq. and Jennifer L. Brundige, Esq., Farmer & Luna, PLLC, 333 Union Street, Suite 300, Nashville, TN 37201; and,
>
> **Consumer Advocate** - Timothy Phillips, Esq. and Steve Brown, Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202.

Upon commencement of the Status Conference and in response to inquiry by the Hearing Officer, the parties reported that prior to the Status Conference they had engaged in discussions in an attempt to reconcile their disputes, but were unable to come to any amicable resolutions. Thereafter, oral argument was heard concerning the CGC's responses to the Consumer Advocate's discovery questions 2, 3, 5, 6, 7 (a)(b)(c)(d), 9(a) and (b).

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[1] *Motion to Compel,* p. 3 (September 2, 2008).
[2] *Id.*
[3] *Response,* p. 1 (September 4, 2008).

LEGAL FRAMEWORK

The process of discovery in contested cases before the TRA is governed by the Tennessee Rules of Civil Procedure.[4] According to Rule 26.02(1),

> 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 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 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.

Further, 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 reasonably could lead to any other matter that could bear on, any issue that is or may be in the case."[5]

Nevertheless, Tennessee's rules governing discovery do provide some limitations and protections. Specifically, Tenn. R. Civ. P. 26.02(1) provides:

> The frequency or extent of use of the discovery methods set forth in subdivision 26.01 shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Additionally, Rule 26.03 permits a court to issue protective orders as justice requires.[6] In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

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[4] *See* Tenn. Comp. R. & Regs. 1220-1-2-.11(1).
[5] *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)).
[6] Tenn. R. Civ. P. 26.02 & .03.

> 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).[7]

While Rule 37.01(2) permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer, "[d]ecisions to grant a motion to compel rest in the trial court's reasonable discretion."[8]

DISCOVERY REQUESTS AT ISSUE

Consumer Advocate Questions 2 & 3:

> 2. ADMIT:
>
> For each month from August 1, 2005 through July 31, 2008, CGC's LNG storage facilities never contained any natural gas delivered to CGC via the East Tennessee Natural Gas Pipeline (ETNG). If denied, identify by month the amount of natural gas placed into each storage site via the ETNG pipeline, the total cost of the natural gas placed into storage, a description of the individual components of the total cost and the amount of each individual component.
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> ***CGC Response:***
>
> Deny. Gas used for liquefaction into the LNG storage tank at the CGC peaking facility is not separately tracked by pipeline. However, due to the nature of system operations, the Company can confirm that some gas delivered via East Tennessee Natural Gas pipeline was delivered, liquefied and stored in the LNG tank. See the table below for the cost. (LNG Liquefaction Volumes and Cost table is herein omitted.)
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> 3. ADMIT:
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> For each month from August 1, 2005 through July 31, 2008, CGC's LNG storage facilities never contained any natural gas delivered to CGC via the Southern Natural Gas Pipeline (SONAT). If denied, identify by month the amount of natural gas placed into each storage site via the SONAT pipeline, the total cost of the natural gas placed into storage, a description of the individual components of the total cost and the amount of each individual component.

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

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

CGC Response:

> Deny. Gas used for liquefaction into the LNG storage tank at the CGC peaking facility is not separately tracked by pipeline. However, due to the nature of system operations, the Company can confirm that some gas delivered via Southern Natural Gas pipeline was delivered, liquefied and stored in the LNG tank. See the table below for the cost. (LNG Liquefaction Volumes and Cost table is herein omitted.)

As the CGC's responses to the questions noted above are denials, the Consumer Advocate states that CGC is specifically required to "identify by month the amount of natural gas placed into each storage site via the [ETNG or SONAT] pipeline."[9] The Consumer Advocate complains that CGC has not provided complete information in its response because it has failed to provide how much natural gas goes into its LNG storage facility from each pipeline utilized by CGC during the specific dates requested. Further, the Consumer Advocate contends that CGC, or its parent company, AGL Resources, should know and have documentation to support such information.

In its *Response,* CGC stated, "gas used for liquefaction is not separately metered by pipeline. CGC cannot, therefore, provide the amount of natural gas placed into the LNG storage site via the [ETNG or SONAT] pipeline."[10] Additionally, during the Status Conference, counsel for CGC conducted a demonstration to illustrate its assertion using five plastic cups to represent distinct components of the utility's gas distribution chain: ETNG pipeline, SONAT pipeline, CGC's "city gate," CGC's LNG storage site, and CGC customers. During the demonstration, CGC explained that natural gas from the ETNG and SONAT pipelines flow to CGC's city gate where it is combined or co-mingled, and is no longer distinguishable. From the city gate, the gas is directed to either CGC customers or its LNG facility. Thus, CGC asserts that because the gas

[9] *Second Discovery Requests,* Questions 2 and 3 (August 6, 2008).
[10] *Response,* p. 2 (September 4, 2008).

that is deposited into its LNG storage facility comes from its city gate and not directly from a particular pipeline, it is unable to distinguish or to state with specificity how much of the total amount of natural gas deposited into the LNG storage facility comes from a particular pipeline.

In a follow-up e-mail sent by CGC to the Hearing Officer and Consumer Advocate on September 10, 2008, CGC stated that although Questions 2 and 3 do not specifically ask for this information, CGC will provide the Consumer Advocate with "the volume of gas provided by pipeline on a daily basis and the days when gas is injected into the LNG storage tank."[11] In a responsive e-mail, also sent on September 10, 2008, the Consumer Advocate reiterated that it seeks to learn how much of the LNG storage comes from each separate pipeline, and does not state or require the manner in which such information is being maintained by the Company. CGC transmitted another e-mail to the Hearing Officer and the Consumer Advocate on September 11, 2008 reiterating its position.[12] Thereafter, the Hearing Officer responded to the parties that no further argument on the matter is necessary or requested.[13]

The Hearing Officer finds that the CGC has responded to the question as it has been posed by the Consumer Advocate and therefore, the *Motion to Compel* as to Questions 2 and 3 is DENIED. Nevertheless, in issuing this ruling, the Hearing Officer acknowledges that the CGC has agreed and shall produce certain information that may help in determining the volume of gas deposited into CGC's LNG storage facility.

Consumer Advocate Question 5:

During the Status Conference, the Consumer Advocate and CGC were able to reach agreement concerning their disputes concerning this question and CGC agreed to supplement its response to Question 5 (a) and (b) to specifically include the word "ADMIT."

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[11] *Copy of Email between Kelly Grams [Hearing Officer] and Jennifer Brundige* (September 10, 2008).
[12] *Copy of Email Exchange between Kelly Grams, Hearing Officer and Parties* (September 11, 2008).
[13] *Id.*

Consumer Advocate Question 6:

6. At page 13, lines 7-10, Mr. Sherwood testifies:

> More importantly, neither Southern Natural Gas nor East Tennessee have firm seasonal capacity posted as available on their systems and both have specifically refused to provide such service to CGC, if CGC were not willing to accept interruptions in service in the winter period or pay the same annual price for the service.

QUESTION:

a. Provide all documents supporting Mr. Sherwood's statement and identify the dates when such requests were made and the dates when such requests were refused.

CGC Response:

a. CGC reviews information posted on Southern Natural Gas and East Tennessee Natural Gas's electronic bulletin board ("EBB") for available capacity. During any number of discussions with pipeline representatives questions regarding available capacity may also be discussed. Neither has resulted in the Company identifying available seasonal capacity at this point. The EBBs for the pipelines can be accessed using the following links: (the website addresses for Southern Natural Gas and East Tennessee Natural Gas are herein omitted).

In this question, the Consumer Advocate requests documentation supporting or substantiating the specific refusal of both pipelines to provide seasonal capacity to CGC unless certain conditions were accepted, as asserted by Mr. Sherwood in his Pre-filed Testimony. CGC has responded that no documentation exists, as all exchanges between the pipelines and CGC concerning requests for such seasonal capacity were made verbally only. CGC asserts that no transcripts, minutes, records, or other forms of documentation exist, and thus, it is unable to produce any documents to the Consumer Advocate. CGC has stated unequivocally that no documents exist, and the Consumer Advocate has presented as no proof or other evidence to demonstrate that such documentation does in fact exist; therefore, the Hearing Officer has no alternative but to DENY the Consumer Advocate's *Motion to Compel* as to Question 6.

Consumer Advocate Question 7(a):

7. At page 12, lines 3-15, Mr. Sherwood testifies:

> The company originally held a single firm transport contract on ETNG for 46,350 Dth/d. For added contract level flexibility the company negotiated with ETNG to break this single contract down into 3 separate contracts. Contracts 410203 for 13,000 Dth 410204 for 28,350 Dth/d and 410199 for 5,000 Dth/d. In total the contracted capacity matched the single contract being replaced. As a part of the negotiations with the pipeline to disaggregate the capacity contract, the utility elected to move 5,000 Dth receipt capacity off of Ridgetop and move it to Hartsville. This capacity was destined to be turned back to the pipeline. Without breaking the capacity contract into 3 separate contracts any reduction would have to be made on a pro-rata basis across all the receipt and delivery points under contract. CGC did not want to proceed in that manner. The parties agreed to move receipt capacity off of Ridgetop to allow the pipeline to offer that capacity in the marketplace. So the pipeline was able to re-market capacity and the utility was able to reduce its contracted capacity per the pipeline's FERC approved tariff.
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> QUESTION:
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> a. Provide all documents identifying the date and time when CGC decided that its contract 33653 with ETNG should be subdivided into new contracts 410203, 410204, and 410299.
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> ***CGC Response:***
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> a. The Company does not have date specific documents to provide that relates to its decision regarding contract 33653 with ETNG and its subdivision contracts 410203, 410204, and 410199. The Company's decision to proceed in this way was the result of routine internal business planning meetings.

In Question 7(a), the Consumer Advocate requests that the Company produce documentation "identifying . . . when CGC decided that its contract . . . with ETNG should be subdivided . . ."[14] As no documents have been produced, the Consumer Advocate asserts that CGC's answer is non-responsive. In its *Response* and during the Status Conference, CGC responded that the decision to subdivide was made during routine internal business meetings, of which no minutes, transcripts, or other records exist. Further, the Company asserts that its parent company, AGL Resources, has no involvement in such decisions and likewise has no supporting

[14] *Second Discovery Requests,* Question 7(a) (August 6, 2008).

documentation. Nevertheless, an e-mail produced in response to Question 9(b), which provides explanation concerning Sequent's process of executing and implementing its decision to change receipt points, appears sufficiently detailed so as to suggest that there may be additional information regarding the timing of the decision to subdivide the contract.

Accordingly, the Hearing Officer finds that the *Motion to Compel* as to Question 7(a) should be GRANTED to the extent that the Company is able to provide and/or to obtain through Sequent Energy Management, any data, documents, records, or other written form of information to supplement its responses, the same shall be produced to the Consumer Advocate.

Consumer Advocate Questions 7(b), (c), & (d):

QUESTION:

b. Provide a full explanation of the facts and considerations which caused CGC to decide that its contract 33653 with ETNG should be subdivided into new contracts 410203, 410204, 410299.

CGC Response:

b. Mr. Sherwood's original testimony explained the facts and considerations which caused CGC to subdivide contract 33653 into contracts 410203, 410204, and 410199. (Mr. Sherwood's testimony stated in large part at #7 above was then reiterated by CGC in its response to this question.)

QUESTION:

c. Provide a full explanation of the facts and considerations which caused CGC to decide "to move 5,000 Dth/d receipt capacity off of Ridgetop."

CGC Response:

c. East Tennessee Natural Gas agreed to subdivide the contracts as previously described knowing CGC planned on turning the capacity back to them. To facilitate this potential loss of revenue the parties agreed to shift 5,000 Dth/d of Ridgetop receipt entitlements to an alternative point. By moving off of Ridgetop it freed up capacity that ETNG knew it could re-sell to other shippers. It is in both party's best interest for the pipeline to contract for as much firm transport capacity as possible across its system to spread the cost of service as completely as possible.

QUESTION:

d. Provide a full explanation of the facts and considerations which caused CGC to decide to keep 4,899 Dth/d receipt capacity at Dickenson County Receipt Point in Virginia.

CGC Response:

d. CGC elected to retain the 4,899 Dth/d of receipt capacity from Dickenson County Receipt Point in Virginia to provide a level of geographic supply diversity. Supply diversity was introduced and discussed in the Company's response to Data Request #1 herein.

As to subparts (b), (c), and (d) to Question 7, the Consumer Advocate asserts that a full explanation of the facts and considerations concerning decisions of the Company specified in the questions have not been provided. The Consumer Advocate contends that a complete response should include not only the "how" but the "why" such decisions were made or arrived at; essentially, the Consumer Advocate appears to want to know what precipitated CGC's actions. CGC asserts that its answers include such information in both its response to the specific question and in its Pre-filed Testimony, and reiterates its Pre-filed testimony in its response.

The Hearing Officer finds that the *Motion to Compel* seeking further explanation or clarifying information to subparts (b), (c), and (d) to Question 7 should be GRANTED to the extent that the Company is able to provide additional explanation, clarification, expound upon or provide bases for its decisions, including, but not limited to, what prompted these contract negotiations and why the 5,000 Dth/d "was destined to be turned back to the pipeline."[15] Additionally, in the event that the Company references or utilizes any data, documents, records, or other written form of information to supplement its response, the same shall be produced to the Consumer Advocate.

[15] *Second Discovery Requests,* Question 7(a) (August 6, 2008).

Consumer Advocate Questions 9(a) & (b):

9. At page 12, line 22 to page 13 line 2, Mr. Sherwood testifies:

> It is CGC's understanding that Sequent had placed a request for a receipt point shift for existing capacity in the pipeline's firm service queue. When the capacity became available it was awarded by the pipeline to the parties in the queue in accordance with the provisions of the pipeline's FERC approved tariff.

QUESTION:

a. Provide a full explanation of the circumstances which led to CGC's understanding, as described by Mr. Sherwood.

CGC Response:

a. Mr. Sherwood asked Sequent and they explained the process they went through to make the receipt point change.

QUESTION:

b. Provide copies of any communications to or from CGC where such communications assisted CGC to establish its understanding as described by Mr. Sherwood.

CGC Response:

b. A note to Mr. Sherwood from Sequent is attached.

The Consumer Advocate contends that CGC's responses to the above subparts to Question 9 are non-responsive, incomplete, and misleading. Further, the Consumer Advocate asserts that the response to subpart (a) provided by CGC employs circular reasoning and fails to provide the information requested. While the e-mail correspondence, dated July 18, 2008, that was produced in response to subpart (b) to Question 9 addresses what Sequent went through to execute the decision to request and implement a change in the receipt point, the Consumer Advocate contends that the responses fail to address or provide sufficient explanation of the reasons or basis for such action. Nevertheless, the question propounded by the Consumer Advocate asked for "explanation of the circumstances which led to *CGC's understanding*, as

described by Mr. Sherwood *(emphasis added),*"[16] and does not ask why Sequent requested the change.

The CGC asserts that it has responded in full to the questions propounded by the Consumer Advocate, and that it has no other responsive documentation in its possession concerning how it discovered that Sequent had made the change in receipt point. Accordingly, the Hearing Officer finds that the *Motion to Compel* seeking further explanation or clarifying information to subparts (a) and (b) to Question 9 should be DENIED because the question asked by Consumer Advocate was answered by CGC.

IT IS THEREFORE ORDERED THAT:

1. The *Consumer Advocate's Motion to Compel* as to Discovery Questions 2 and 3 is DENIED; except as otherwise agreed by Chattanooga Gas Company to produce the volume of gas provided by pipeline on a daily basis and the days when gas is injected into the LNG storage tank.

2. The Hearing Officer renders no decision as to the *Consumer Advocate's Motion to Compel* Discovery Question 5, as it is rendered moot since Chattanooga Gas Company will supplement its response thereto.

3. The *Consumer Advocate's Motion to Compel* as to Discovery Question 6 is DENIED.

4. The *Consumer Advocate's Motion to Compel* as to Discovery Question 7(a) is GRANTED and Chattanooga Gas Company is hereby directed to produce and/or to obtain through Sequent Energy Management and produce, any data, documents, records, or other written form of information responsive to the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter for the State of Tennessee.

[16] *Second Discovery Requests,* Question 7(a) (August 6, 2008).

5. The *Consumer Advocate's Motion to Compel* as to Discovery Questions 7(b), (c) and (d) is GRANTED and Chattanooga Gas Company is hereby directed to provide additional or further explanation, clarification, expound upon or provide bases for its decisions to the extent that it is able, including, but not limited to, concerning what prompted the contract negotiations and why the 5,000 Dth/d "was destined to be turned back to the pipeline." Furthermore, any data, documents, records, or other written form of information used or referred to by Chattanooga Gas Company in supplementing its response shall be produced and provided to the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter for the State of Tennessee.

6. The *Consumer Advocate's Motion to Compel* as to Discovery Questions 9(a) and (b) is DENIED.

7. The Chattanooga Gas Company shall have until Wednesday, September 17, 2008 to supplement its responses as ordered herein.

Kelly Cashman-Grams

Kelly Cashman-Grams, Hearing Officer