BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 21, 2009

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

ORDER ON THIRD ROUND DISCOVERY DISPUTES

This matter is before the Hearing Officer upon the April 27, 2009 filing of the *Consumer Advocate's Motion to Compel ("Third Round Motion to Compel")* with the Tennessee Regulatory Authority ("TRA" or "Authority"). In its *Third Round Motion to Compel*, the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter for the State of Tennessee ("Consumer Advocate") requests that the Hearing Officer compel Chattanooga Gas Company ("CGC") to provide complete information responsive to numerous requests originally propounded by the Consumer Advocate in its *First Discovery Requests of the Consumer Advocate ("First Discovery Requests"),* as well as those discovery requests propounded in the *Third Discovery Requests of the Consumer Advocate ("Third Discovery Requests")* in which CGC has asserted opposition thereto in its filing entitled *Chattanooga Gas Company's Objections to CAPD's Third Discovery Requests ("Objections to Third Discovery Requests").*

RELEVANT PROCEDURAL BACKGROUND

Pursuant to the *Third Amended Procedural Schedule,*[1] CGC filed its *Objections to Third Discovery Requests* with the Authority on April 22, 2009. The *Objections to Third Discovery Requests,* which also includes a general objections section, sets forth CGC's objections to specific third round discovery requests propounded by the Consumer Advocate. In particular, CGC objected to requests 1, 2, 17, 21, 23, 35, and 37 within the *Third Discovery Requests.*

On April 23, 2009, the Hearing Officer issued an *Order Setting Deadline for Filing Motions to Compel Discovery and Responses Thereto* establishing April 27, 2009 as the Consumer Advocate's deadline for filing a motion to compel discovery, and April 30, 2009 as the deadline for CGC to provide a response in the event such a motion was filed. Thereafter, in accord with the order, the Consumer Advocate filed its *Third Round Motion to Compel* requesting that the Hearing Officer compel CGC to provide responsive answers not only to the third round discovery requests objected to by CGC, but also to numerous requests originally propounded over a year earlier in its *First Discovery Requests.* Specifically, from its *First Discovery Requests,* the Consumer Advocate now seeks to compel responses to requests 1, 2, 3, 4, 5, 6, 7, 8, 9, 34, 49, 50, 51, 52, 53, 54, 63, 77, and 78.

Several of the first round requests which have been raised in the *Third Round Motion to Compel* had been included previously in the first-round *Consumer Advocate's Motion to Compel ("First Round Motion to Compel"),* and were duly considered and thereafter ruled upon by the Hearing Officer during the Status Conference held on April 24, 2008. The Hearing Officer's rulings on the *First Round Motion to Compel* were memorialized in the *Order re First Round Discovery Disputes* issued on April 29, 2008. Despite the Hearing Officer's decision to deny the

[1] *Third Amended Procedural Schedule,* attached as Exhibit B to the *Order on February 9, 2009 Status Conference* (March 2, 2009).

Consumer Advocate's request to compel answers to its first round discovery request numbers 34, 49, 50, 51, and 77 based on relevance, the Consumer Advocate did not seek reconsideration or an appeal of the decisions rendered by the Hearing Officer. In fact, none of the many decisions rendered by the Hearing Officer in the *Order re First Round Discovery Disputes* were disputed by either the Consumer Advocate or CGC.

On April 27, 2009, pursuant to the *Third Amended Procedural Schedule,* the Hearing Officer issued a *Notice of Status Conference* scheduling a Status Conference on May 4, 2009. Subsequently, on April 29, 2009, a *Notice of Rescheduled Status Conference* was issued resetting the Status Conference on May 5, 2009. Also on April 29, 2009, in its *Notice of Strike, in part, Consumer Advocate's Motion to Compel,* the Consumer Advocate withdrew first-round discovery request numbers 52, 53, 54, 63, and 78 from its *Third Round Motion to Compel.* On April 30, 2009, CGC filed its *Chattanooga Gas Company's Response to the CAPD's Motion to Compel ("Response to Third Round Motion to Compel").*

MAY 5, 2009 STATUS CONFERENCE

The Status Conference began as noticed at approximately 1:30 p.m. in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee. The following parties and their respective attorneys appeared and participated in the Status Conference:

> **Consumer Advocate – T. Jay Warner, Esq., Mary White, Esq.,** and **Stephen Brown, Ph.D.,** Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202; and

CGC – J.W. Luna, Esq. and **Jennifer L. Brundige, Esq.,** Farmer & Luna, PLLC, 333 Union Street, Suite 300, Nashville, TN 37201, **L. Craig Dowdy, Esq.,** McKenna Long & Aldridge, LLP, 303 Peachtree Street, Suite 5300, Atlanta, GA 30308, via telephone, and **Archie Hickerson**, Director, Regulatory Affairs, AGL Resources, Inc., 5100 E. Virginia Beach Blvd., Norfolk, VA 23502.

During the Status Conference, the parties informed the Hearing Officer that they had resolved their disputes concerning the following discovery requests propounded by the Consumer Advocate: 1, 2, 3, 4, 5, 6, 7, 8, and 9, from the first round of discovery, and request numbers 2, 17, 21, and 23, from the third round of discovery. Thereafter, the parties presented oral argument on the discovery requests which remained in dispute: 34, 49, 50, 51, and 77, from the first round of discovery, all of which had previously been included in the Consumer Advocate's *First Round Motion to Compel* and denied by the Hearing Officer in the *Order re First Round Discovery Disputes,* and request numbers 1, 35, and 37 from the third round of discovery.

LEGAL FRAMEWORK

The process of discovery in contested cases before the TRA is governed by the Tennessee Rules of Civil Procedure.[2] 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

[2] *See* Tenn. Comp. R. & Regs. 1220-1-2-.11(1).

> 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."[3]

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.[4] In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

> A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).[5]

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."[6]

DISCOVERY REQUESTS

For ease of reference, the question and response for each of the disputed discovery requests is reproduced below. Further, regardless of any repetition of those portions of such

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[3] *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)).
[4] Tenn. R. Civ. P. 26.02 & .03.
[5] *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).
[6] *Kuehue & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

documents reproduced herein, the Hearing Officer relies upon and incorporates as if reproduced herein in full, the written and oral arguments of the parties set forth in *Chattanooga Gas Company's Responses and Objections to CAPD's First Discovery Requests ("Responses to First Discovery Requests"),* the *First Round Motion to Compel,* the Transcript of Status Conference dated April 24, 2008, the analysis, findings and conclusions set forth in the *Order re First Round Discovery Disputes,* the written and oral arguments of the parties set forth in the *Objections to Third Discovery Requests,* the *Third Round Motion to Compel,* the *Response to Third Round Motion to Compel,* and the Transcript of Proceedings dated May 5, 2009.

I. First Round Discovery Requests

The following discovery requests were propounded by the Consumer Advocate on March 18, 2008 in its *First Discovery Requests*, included in its *First Round Motion to Compel* filed on April 22, 2008, denied as not relevant to the issues in this docket by the Hearing Officer in the *Order re First Round Discovery Disputes* on April 29, 2008, yet are raised again over a year later in the Consumer Advocate's *Third Round Motion to Compel.*

During the Status Conference, prior to the parties' presentation of oral argument on the first-round requests, the Hearing Officer advised the parties that as these requests had been considered and ruled upon previously, arguments of counsel concerning first round request number's 34, 49, 50, 51, and 77, should, 1) be brief, and 2) focus on the purported change in circumstances asserted by the Consumer Advocate as its basis for the revival, or renewal, of its motion to compel responses to these requests. Further, the Hearing Officer cautioned that counsel should not rehash arguments raised previously in support of the *First Round Motion to Compel.*[7]

[7] Transcript of Status Conference, p. 4 (May 5, 2009).

Asset Management Contracts

Question 34:

> Please provide copies of all asset management contracts between Sequent and entities other than CGC for the time period from January 1, 2004 through the present.[8]
>
> ***Response:***
>
> Sequent objects to this question as not reasonably calculated to lead to the discovery of admissible evidence, overly broad and unduly burdensome, vague and ambiguous and seeking privileged, confidential, proprietary and/or trade secret information.[9]

In its *Third Round Motion to Compel,* the Consumer Advocate asserts that its request to compel asset management contracts executed between Sequent and non-CGC affiliated third parties, which has been denied previously by the Hearing Officer, is properly renewed at this time, "in light of Mr. Sherwood's subsequent testimony regarding the RFP process and CGC's bid system for selection of an asset manager."[10] Additionally, the Consumer Advocate states that a review of Sequent's asset management contracts with non-CGC affiliated third parties is "the most obvious way to determine if preferential treatment is being extended to Sequent by CGC, or vice versa . . . to act as a base line for comparison to the existing arrangement between the parties"[11] In its *Response to Third Round Motion to Compel,* the CGC asserts that the Consumer Advocate's renewed request to compel asset management agreements executed between Sequent and private customers, municipal utilities and public utilities other than CGC, which information the Hearing Officer previously determined as not relevant in this docket in the *Order re First Round Discovery Disputes,* is improper and should be denied.[12]

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[8] *First Discovery Requests,* p. 14 (March 18, 2008).
[9] *Responses to First Discovery Requests,* unnumbered p. 29 (April 11, 2008).
[10] *Third Round Motion to Compel,* p.4 (April 27, 2009).
[11] *Id,* p.4.
[12] *Response to Third Round Motion to Compel,* pp. 2-3 (April 30, 2009).

During the Status Conference, the Consumer Advocate asserted that in his testimony CGC witness Tim Sherwood discussed or made reference to asset management agreements between Sequent and third parties, stating as follows:

> . . . witness Tim Sherwood has made reference to the asset management agreements between Chattanooga Gas and Sequent, as well as asset management agreements between third parties – approximately six full pages of testimony from his original testimony . . . [a]dditionally, in his supplemental testimony about another six pages, either in part or in total, were dedicated to the subject of asset management agreements either between Chattanooga Gas Company and Sequent or third parties.[13]
>
> Now, with regard to these being the same arguments, with all due respect, if we go back and look at Mr. Sherwood's testimony, the last six pages of his first round are dedicated to the asset management arrangements. He references third parties or third-party arrangements on multiple occasions. Now, he may not specifically refer to Sequent by name, but when he discusses what other arrangements other companies may have in either his original or his supplemental testimony, then that clearly brings those things into question.[14]

When asked by the Hearing Officer to identify specifically the portions of Mr. Sherwood's Supplemental Testimony that refer to asset management arrangements with third parties, the Consumer Advocate provided the following response:

> Well, actually, I was talking about both [the original Testimony of Tim Sherwood and the Supplemental Testimony of Tim Sherwood]. The first one I found here was in the original testimony, which is page 17, line 9 through 13.[15] And I go through the supplemental testimony and see if I can find another portion.[16]

The Consumer Advocate thereafter contends that the reference to "past asset management agreements," in line 9 on page 17 of Mr. Sherwood's original testimony, is vague because the Consumer Advocate "[doesn't] know if that's with Sequent or third parties or who that may be

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[13] Transcript of Proceedings, p. 7 (May 5, 2009).

[14] *Id.*, p. 11.

[15] The original Testimony of Tim Sherwood, page 17, line 9 through 13, reads as follows:
"Through past asset management agreements, CGC has been very successful in returning very favorable gains to its customers. Over the past thirty-nine months, CGC's customers have received approximately $7.9 million for the non-jurisdictional sale of gas supply assets that otherwise would have been sitting idle. These are very favorable results considering the small size of CGC with approximately 62,000 firm customers.

[16] Transcript of Proceedings, p. 14 (May 5, 2009).

referring to or what he may have looked at . . .,"[17] and that this alleged vagueness raises an issue concerning, or otherwise references, third parties or third-party arrangements such that all of Sequent's asset management contracts with third parties become relevant in this docket.

During the Status Conference, the Consumer Advocate asserted that information obtained from asset management agreements between third parties and Sequent would enable it to formulate a baseline that it could use to determine whether the asset management agreement between CGC and Sequent is fair. In support of its contention, the Consumer Advocate made the following statements:

> . . . we feel that the requested asset management agreements between third parties and Sequent would provide us a baseline with which to compare the contract between Chattanooga Gas and Sequent. Without this, we have no control – contract which we can reference and compare to determine if Chattanooga Gas has its customers' best interests at heart in negotiating this agreement."[18]
>
> . . . having these third-party contracts provides that baseline with which we can compare Sequent's dealings with other companies who aren't affiliated to the – to their dealings with Chattanooga Gas which they are affiliated with. Without these comparisons, we have no basis to determine whether or not they're treating Chattanooga Gas's customers in a fair way. All we have is the asset management contract at issue here. We have no idea what kind of agreement Sequent comes to with their other third parties. And that's obviously one of the major issues of this case here.[19]
>
> And the reason we have asked for that is, like we said, to show basically the kind of negotiations and the kind of deals they have come to with other corporations, other companies that aren't affiliated with them, so that we can determine if they're making a 50 percent sharing arrangement they have with Chattanooga based on the fact that they're affiliated corporations or based on the fact that that's what they typically – the deal they typically come to with these other companies.[20]

The Consumer Advocate additionally asserted that pursuant to the Tennessee Supreme Court's ruling in *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory*

[17] Transcript of Proceedings, p. 14 (May 5, 2009).
[18] *Id.*, p. 9.
[19] *Id.*, p. 12.
[20] *Id.*, pp. 12-13.

Authority, et al.,[21] documents and contracts held by Sequent are discoverable because "this Authority has jurisdiction over Sequent in their capacity as asset manager for Chattanooga Gas Company."[22]

In response to the Consumer Advocate's contentions, CGC asserted during the Status Conference that the Consumer Advocate was, in fact, reiterating the same arguments it had presented previously in support of its *First Round Motion to Compel* concerning this discovery request. Additionally, CGC asserted that Mr. Sherwood has not in either his original or his supplemental testimony testified concerning Sequent's asset management agreements with third parties, and stated:

> Mr. Sherwood has not testified about Sequent's asset management agreements with third-party entities. Those would be, you know, some private – my understanding is that they have contracts with private industrial customers and municipal entities. These are agreements that they have that are not regulated by this jurisdiction. He has not testified as to any of those. His testimony has been about Chattanooga Gas's regulated assets and asset management agreement dealing with those regulated assets for Chattanooga Gas Company.[23]

Further, concerning page 17, lines 9-13 of Mr. Sherwood's original testimony, which the Consumer Advocate alleges raises an issue concerning, or otherwise refers to, third parties or third-party arrangements, the CGC asserted that, in fact, the testimony does not talk about Sequent or about asset management agreements between Sequent and third parties. Rather, the portion of testimony cited by the Consumer Advocate directly refers to CGC's asset management agreements.[24]

Also during the Status Conference, CGC asserted that over a year ago the parties presented argument concerning production of asset management agreements between Sequent

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[21] 79 S.W.3d 506 (2002).
[22] Transcript of Proceedings, pp. 11 (May 5, 2009).
[23] *Id.*, pp. 9-10.
[24] *Id.*, p. 15.

and CGC affiliated and non-CGC affiliated entities. The Consumer Advocate's assertion of necessity of these agreements for comparison purposes and the relevancy of such a comparison was included in that discussion. Consistent with the instruction to the parties at the start of the Status Conference, the Hearing Officer agreed that reference to the transcript of that status conference,[25] in lieu of a reiteration or recitation of those arguments by CGC, would suffice.[26]

FINDINGS AND CONCLUSIONS

Following the Consumer Advocate's filing of its *First Round Motion to Compel,* the parties presented arguments concerning the discoverability of Sequent's asset management agreements with third parties and the relevancy of the agreements in comparison to the asset management agreement in place between Sequent and CGC and the issues set for determination in this docket. The Hearing Officer relies upon and incorporates by reference, as if reproduced in full herein, the written and oral arguments of the parties concerning discovery request 34 propounded in the *First Discovery Requests* as set forth in the *Responses to First Discovery Requests, First Round Motion to Compel,* the Transcript of Status Conference dated April 24, 2008. Upon due consideration of the pleadings and arguments of the parties, the Hearing Officer ruled in the *Order re First Round Discovery Disputes* as follows:

> . . . [T]his docket has been initiated to evaluate CGC. Whether or not Sequent has asset management contracts with entities other than CGC or its affiliates is not relevant to the issues for determination in this docket. Nevertheless, asset management contracts between AGL affiliates and their asset managers may be pertinent and contribute to an examination of affiliate transactions and relationships, an issue appropriate for evaluation in this docket.
>
> Therefore, the Hearing Officer hereby finds that the Consumer Advocate's *Motion to Compel* should be denied as to production of asset management contracts between Sequent and entities other than CGC or AGL affiliates. Nevertheless, CGC shall be compelled to provide copies of the asset management contracts between all AGL affiliates and Sequent, and the asset management

[25] Transcript of Status Conference, pp. 23-30 (April 24, 2008).
[26] Transcript of Proceedings, pp. 13-14 (May 5, 2009).

> contracts between AGL affiliates and other asset managers to the extent that they are publicly available, or if not publicly available, CGC shall provide a list sufficiently identifying the asset managers utilized by each corresponding AGL affiliate.[27]

For the most part, the Consumer Advocate has at this time reiterated the same or substantially similar arguments in support of its renewed request to compel disclosure of these agreements. Most particularly, the Consumer Advocate's assertions that the necessity of Sequent's asset management contracts with third party entities in order to conduct an assessment or comparison of CGC's asset management contract with Sequent, and its further contention that such a comparison will allow it to determine whether or not CGC customers are being treated fairly was presented previously in the Consumer Advocate's *First Round Motion to Compel* and discussed at length during the Status Conference held with the parties on April 24, 2008, for the purpose of discussing the parties' first round discovery disputes.[28] This argument, among others, was considered by the Hearing Officer in April 2008 prior to rendering the above noted ruling on the Consumer Advocate's first-round discovery request 34.

Nevertheless, the Consumer Advocate has not previously asserted that the original testimony of Mr. Sherwood, filed on July 30, 2008, discussed, referenced, or otherwise alluded to Sequent's asset management agreements with third parties. To maintain such an assertion now, more than a year after the Hearing Officer's determination that this information is not relevant to the issues in this docket and denying its request to compel disclosure, despite having had the opportunity to do so in the Consumer Advocate's second round of discovery, in which it additionally filed a motion to compel discovery, renders such argument now untimely and procedurally improper.

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[27] *Order re First Round Discovery Disputes,* pp. 8-9 (April 29, 2008).
[28] See, Transcript of Proceedings, pp. 23-30 (April 24, 2008).

In addition, the Hearing Officer further finds no substantive merit in the Consumer Advocate's assertions. Despite its assertions of numerous or multiple references to third parties or third-party arrangements in not fewer than six pages of testimony within both the original and supplemental testimonies of Tim Sherwood, the Consumer Advocate provided only one specific citation in support its allegations: page 17, lines 9-13 within the original testimony of Tim Sherwood. Nevertheless, this reference, which the Consumer Advocate contends is unclear and therefore somehow provides justification for an order to compel disclosure of private contracts between Sequent and third parties, does not substantiate the Consumer Advocate's allegation that CGC raised the issue of third party asset management agreements or arrangements in its testimony.

Both a plain reading of the isolated portion of testimony referenced by the Consumer Advocate, and when additionally examined in the context of the testimony which follows thereafter, reveals that the testimony does not, in fact, reference third party asset management agreements. Within the reference itself, CGC describes its asset management agreement payments as favorable given the number of firm customers to whom those payments are allocated.[29] In the testimony following, Mr. Sherwood discusses a quotation taken from the testimony of the Consumer Advocate's witness, Terry Buckner, which offers an assessment of the asset management agreement compensation of CGC in comparison to the two other regulated local distribution companies ("LDCs") in Tennessee.[30] Additionally, as the original testimony of Mr. Sherwood properly encompasses rebuttal or responsive argument to the Consumer Advocate's preceding testimony, Mr. Sherwood testifies that a comparison across jurisdictions is

[29] Chattanooga Gas Company (original) Testimony of Tim Sherwood, p. 17, Lines 9-10 (July 30, 2008).
[30] *Id.*, p. 18, Lines 1-6.

inappropriate.[31] At no point does the testimony make any claims about the terms of third party agreements, draw any comparisons between CGC's asset management agreement and those of third parties, nor imply that third party asset management agreements are relevant to this proceeding. Furthermore, a plain reading and thorough review of both the original Testimony and the Supplemental Testimony of Tim Sherwood in their entirety, reveals no discussion, claims, or references that either indicate that CGC has raised an issue concerning the agreements or arrangements of third parties, nor which would otherwise persuade this Hearing Officer that third party asset management agreements are relevant to this proceeding.

Additionally, in making the determination to grant the Consumer Advocate's request to compel the asset management agreements between Sequent and all CGC affiliated companies and to deny the request for all agreements between Sequent and non-CGC affiliated entities, the Hearing Officer recognized that due to the nexus between CGC and CGC's affiliated companies there may exist information, however slight, from which the contracts of CGC and CGC affiliated companies could be evaluated. Therefore, the Hearing Officer ordered that these asset management agreements be produced, and such agreements were produced by CGC on May 1, 2008.[32]

However, in regards to the Consumer Advocate's request for all other contracts in which Sequent has become involved, even as limited to the roughly five-year period of time spanning January 2004 to the present, there is no discernible connection to the issues being evaluated in this docket. Therefore, the request for all other asset management agreements in which Sequent is a party, as requested by the Consumer Advocate, is overly broad, not relevant to the issues

[31] Chattanooga Gas Company (original) Testimony of Tim Sherwood, p. 18, Lines 7-12 (July 30, 2008).
[32] See, *CGC's First Revised Responses,* Question 35, unnumbered p. 4, attachments thereto filed under seal as Confidential (May 1, 2008).

under consideration in this docket, and does not appear reasonably calculated to lead to the discovery of admissible evidence.

Finally, the Hearing Officer agrees that there is established precedent upon which the Authority may rely as it relates to the Authority's jurisdiction in governing public utilities and their non-utility subsidiaries and affiliates.[33] The Tennessee Supreme Court in *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority, et al.*[34] stated that it construes the statutes liberally to further the legislature's intent to grant broad authority to the TRA and, with reference to telecommunications services policy, that the TRA did not err in requiring BAPCO to contract with competing service providers to be on the covers of BellSouth's white pages directories. While the Court did ultimately find that the TRA had jurisdiction over BAPCO "for the purposes of these two declaratory order proceedings,"[35] its conclusion was "based upon the particular facts of these related proceedings and upon legal precedent of governing public utilities and their non-utility subsidiaries and affiliates."[36] The *BellSouth* decision does not state unequivocally that the TRA has jurisdiction over the affiliates of a public utility. Thus, the Consumer Advocate's absolute reliance thereon for its assertion that "the Authority has jurisdiction over Sequent in [its] capacity as asset manager for [CGC],"[37] is erroneous and misplaced.

Nevertheless, to the extent that documents and contracts of a non-utility subsidiary or affiliate may be reachable, there is no presumption that such documents or contracts are readily discoverable. The crux of discovery is that information requested must be relevant. While the

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[33] See, *Tennessee Public Service Commission v. Nashville Gas Company,* 551 S.W.2d 315 (Tenn. 1977).
[34] *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority, et al.,* 79 S.W.3d 506 (Tenn. 2002).
[35] *Id.,* at 516.
[36] *Id.,* at 515.
[37] Transcript of Proceedings, p. 11 (May 5, 2009).

requirement of relevancy of the information may be softened in discovery, the information sought still must bear on or reasonably lead to any other matter that could bear on, any issue that is or may be in the case. Discovery request 34 does not satisfy this criterion.

For the foregoing reasons, the Hearing Officer finds no justification for overturning or reversing the prior ruling denying the Consumer Advocate's *First Round Discovery* request 34 as set forth in the *Order re First Round Discovery Disputes*.

Affiliate Transactions & Relationships

Question 49:

> Explain in detail the process, including all communications, CGC went through in selecting Sequent as CGC's asset manager for the period January 1, 2004 through the present.[38]
>
> ***Response:***
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> In compliance with the procedures in CGC's Tariff approved by the TRA, employees of AGL Services Company's Gas Control, Regulatory, and Legal Departments, acting on behalf of CGC, developed a written Request for Proposal (RFP) defining the company's assets to be managed, detailing the Company's minimum service requirements, describing the content requirements of the bid proposals, and the procedures for submission and evaluation of the bid proposals. After approval by senior management of CGC, the RFP was provided to twenty seven potential asset managers and the TRA Staff on November 20, 2007. In addition, advertisements inviting other potential asset managers to submit proposals were published in Platts Gas Daily publication on November 27, 2007 and December 11, 2007. (A confidential copy of the RFP provided to the potential bidders and the TRA Staff and, a confidential copy of the list of potential bidders was previously provided in TRA Docket 08-00012.)
>
> As a result of request from potential bidders the supplemental information included on Attachment A was provided to potential bidders on December 12, 2007.
>
> Responses to the RFP that were received by 12:00 noon, December 21, 2007, as provided in the RFP, were evaluated between that date and January 3, 2007. On January 4, 2007, Sequent Energy Management was notified that it was the successful bidder. (Copies of the confidential responses from all the bidders were

[38] *First Discovery Requests,* p. 18 (March 18, 2008).

previously provided in TRA Docket 08-00012 in response to the TRA Staff's Discovery Request #3.)

To the extent this request seeks information related to the previous asset management agreement, CGC objects as not reasonably calculated to lead to the discovery of admissible evidence, overly broad and unduly burdensome, vague and ambiguous and seeking privileged, confidential, proprietary and/or trade secret information.[39]

Question 50:

Describe in detail all communications between CGC, AGL, and any affiliate of CGC concerning the asset management arrangements for the period from January 1, 2004 to the present.[40]

Response:

As addressed in the response to request item 49, employees of AGL Services Company's Gas Control, Regulatory, and Legal Departments, acting on behalf of CGC, developed a written Request for Proposal (RFP) that defined the Company's assets to be managed, detailing the company's minimum service requirements, describing the content requirements of the bid proposals, and the procedures for submission and evaluation of the bid proposals. Sequent Energy Management, an affiliate of CGC, was included in the group of potential bidders that were provided a copy of the RFP on November 20, 2007. On December 12, 2007 supplemental information was provided to the potential bidders, including Sequent Energy Management. On January 4, 2008 Sequent was notified that its proposal had been accepted. After Sequent was notified that it was the successful bidder there was communication with Sequent addressing the procedural schedule for obtaining approval and discussion concerning what information included in the AMA agreement that should be classified as confidential. There was no communication between CGC and other affiliates concerning the AMA.

To the extent this request seeks information related to the previous asset management agreement, CGC objects as not reasonably calculated to lead to the discovery of admissible evidence, overly broad and unduly burdensome, vague and ambiguous and seeking privileged, confidential, proprietary and/or trade secret information.[41]

[39] *Responses to First Discovery Requests,* unnumbered p. 45-46 (April 11, 2008).
[40] *First Discovery Requests,* p. 18 (March 18, 2008).
[41] *Responses to First Discovery Requests,* unnumbered p. 47 (April 11, 2008).

Question 51:

> Provide all documents of all communications between CGC, AGL and any affiliate of CGC concerning the asset management arrangements for the period from January 1, 2004 to the present.[42]
>
> ***Response:***
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> The RFP provided to Sequent was filed in TRA Docket 08-00012, and the supplemental data provided to potential bidders is included in response to question 50. Attached is a copy of an e-mail sent to Sequent providing the procedural schedule for TRA Dockets 08-00012 and 07-00224.
>
> To the extent this request seeks information related to the previous asset management agreement, CGC objects as not reasonably calculated to lead to the discovery of admissible evidence, overly broad and unduly burdensome, vague and ambiguous and seeking privileged, confidential, proprietary and/or trade secret information.[43]

Discovery questions 49, 50, and 51 seek an explanation of the CGC's process of selecting Sequent including communications related thereto, and a description of and documentation of the communications between CGC, AGL, and any affiliate concerning asset management arrangements, beginning from January 1, 2004 to the present. In the first round of discovery, CGC agreed to provide responsive information concerning the selection process, communications, and documents of communications, related to its current selection process and asset management agreement but objected to providing such information concerning the previous asset management agreement. Also, in the first round of discovery, the Consumer Advocate stated that it accepted CGC's responses to these requests as they relate to the current asset management agreement, and limited its motion to compel to "answers for the asset management contract effective 2004-2008."[44]

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[42] *First Discovery Requests,* p. 18 (March 18, 2008).
[43] *Responses to First Discovery Requests,* unnumbered p. 48 (April 11, 2008).
[44] Transcript of Status Conference, p. 37 (April 24, 2008).

In its *Third Round Motion to Compel,* the Consumer Advocate opted to organize the above discovery requests together with preceding discovery request 34. Thus, for a summary of the argument set forth within the *Third Round Motion to Compel* itself, please refer to the discussion in discovery request 34 above. The argument is identical and therefore will not be repeated here.

In its *Response to Third Round Motion to Compel,* the CGC asserts that during the first round of discovery it responded to requests 49, 50, and 51 insofar as they called for information related to the current asset management agreement. Additionally, CGC states that as the issues in this docket involve the current bidding process and the current asset management agreement, the Hearing Officer's previous denial of these requests in the *Order re First Round Discovery Disputes* on the basis of relevancy is proper and the Consumer Advocate's renewed request for production of this information in its *Third Round Motion to Compel* is improper and should be denied.

During the Status Conference, the Consumer Advocate stated that its arguments concerning discovery requests 49, 50, and 51 are effectively the same as those it had asserted for discovery request 34, and the Consumer Advocate referred the Hearing Officer to its prior statements. Nonetheless, the Consumer Advocate thereafter reiterated that the purpose of these requests is to obtain information that it contends will facilitate an assessment and comparison with the current asset management agreement, and stated:

> And, you know, again, there's no way for us to know if this is the typical asset management agreement that Sequent or Chattanooga Gas would enter unless we compare it with either prior asset management agreements from Chattanooga Gas or third-party asset management agreements by Sequent. Without that baseline for comparison, there's no way for us to know how favorable these terms may be for either corporation or how favorable it may be for the customers.[45]

[45] Transcript of Proceedings, p.16-17 (May 5, 2009).

Additionally, the Consumer Advocate implied that the information it seeks must be inherently relevant as Mr. Sherwood has "[spent] such a significant portion of his testimony in the discussion of asset management agreements."[46]

During the Status Conference, the CGC kept its comments brief and simply reasserted its position that it is the current RFP process and asset management agreement that are relevant in this docket. CGC further asserted that the Consumer Advocate was reiterating facts previously litigated Docket No. 08-00012, in which the current RFP process and asset management agreement were approved by the TRA, and that the purpose of the current docket is to reevaluate those matters.[47]

FINDINGS AND CONCLUSIONS

In April 2008, following the Consumer Advocate's filing of its *First Round Motion to Compel,* the parties presented argument concerning the discoverability of communications surrounding CGC's prior asset management agreement and the process used to select the asset manager therein in this docket. The Hearing Officer continues to rely upon the written and oral arguments of the parties concerning discovery requests 49, 50, 51 propounded in the *First Discovery Requests* as set forth in the *Responses to First Discovery Requests, First Round Motion to Compel,* the Transcript of Status Conference dated April 24, 2008, and incorporates those arguments herein by reference. Upon due consideration of the pleadings and arguments of the parties, the Hearing Officer in the *Order re First Round Discovery Disputes* ruled, in pertinent part, as follows:

> The Hearing Officer hereby finds that the previous asset management agreement between CGC and Sequent is not relevant to the issues presented in this docket. Prior agreements executed between CGC and Sequent were not the result of an

[46] Transcript of Proceedings, p.17 (May 5, 2009).
[47] *Id.*, p.17-18.

RFP process, nor were affiliate guidelines in place at the time. Therefore, the *Motion to Compel* should be denied as to these questions.[48]

During the Status Conference, the Consumer Advocate asserted that its reasons for issuing discovery requests 49, 50, and 51, were the same or substantially similar to the arguments it had set forth previously in its discussion of discovery request 34. In essence, the Consumer Advocate now asserts that the information that it asks for in these discovery requests is needed in order to conduct an historical comparison of CGC's asset management agreements. However, the Consumer Advocate is not requesting prior asset management agreements in this discovery request, rather it requests explanations, descriptions, and communications surrounding the process of selecting previous asset managers and resulting agreements therewith. Although previously, the Consumer Advocate has stated that it needs responses to these discovery requests to understand how this process developed, the evolution from a no-bid selection of the asset manager to a public RFP can be tracked through Authority dockets.

The only asset management agreement that falls within the time frame of January 2004 to the present, as set forth in these discovery requests, is the agreement which immediately precedes CGC's current agreement. As stated in the *Order re First Round Discovery Disputes* and additionally noted above, at the time the prior agreement was executed between CGC and Sequent, the affiliate guidelines were not yet in place and the contract was not the result of any RFP process. The RFP process and affiliate guidelines currently utilized by CGC in the preparation and course of soliciting bids for the management of its excess and fallow assets were

[48] *Order re First Round Discovery Disputes,* p. 14 (April 29, 2008).

created in cooperation with the TRA Staff and approved by the Authority subsequent to the implementation of CGC's prior asset management agreement.[49]

Issues in this docket that concern CGC's asset management agreement refer to certain processes and procedures *currently* in place, and include: a review of the bidding process, evaluation of certain terms of the agreement, such as, the reasonableness of the sharing mechanism and the potential impact of alteration of the assets described in the agreement, and the affiliate guidelines, to which the CGC is required to adhere to in dealings with affiliate companies. These issues consistently address whether current practices are acceptable or should be modified. This docket is not a review of past practices; rather it is an evaluation of existing procedures and mechanisms with a view to their future progression.

Therefore, as the prior asset management agreement of CGC was not a result of, nor developed using, the processes and procedures under scrutiny in this docket, and thus, the previous processes and procedures, now outdated as a result of the Authority's decision to require the current RFP process and affiliate guidelines, fall outside the scope of review established in this docket. Thus, requests for a detailed explanation and communications surrounding the process of selecting Sequent prior to the authority's implementation of the RFP process is not relevant. Similarly, a description of communications and documents of communications between CGC, AGL, or any affiliate of CGC concerning that prior asset management agreement are also not relevant to the issues set forth for resolution in this docket.

Therefore, the Hearing Officer finds that the information sought by the Consumer Advocate in first-round discovery requests 49, 50, and 51, does not bear on or reasonably lead to any other matter that could bear on, any issue that is or may be in the case, and is therefore not

[49] See, *In re Summary of the Transactions in Chattanooga Gas Company's Deferred Gas Cost Account for the Twelve Months Ended June 30, 2004 and the Computation of ACA Factor Effective January 1, 2005,* TRA Docket No. 04-00402.

relevant. For the foregoing reasons, the Hearing Officer finds no justification for overturning or reversing the previous denial of the Consumer Advocate's *First Round Discovery* requests 49, 50, and 51 as set forth in the *Order re First Round Discovery Disputes*.

Operating Balance Agreements

Question 77:

> See Exhibit B attached to the *Order re First Round Discovery Disputes,* which for ease of reference is attached hereto as **Exhibit A**, for the text of Question 77 propounded by the Consumer Advocate[50] and the response thereto provided by CGC.[51]

In its *Third Round Motion to Compel,* the Consumer Advocate asserts that from the time when the Hearing Officer denied its first-round discovery request 77 for production of Sequent's Operating Balance Agreement ("OBA") with East Tennessee Natural Gas Pipeline ("ETNG"), the CGC has provided inconsistent or contradictory statements that now require the production of the previously-denied OBA.[52] Specifically, the Consumer Advocate cites page 17, line 7 through page 18, line 2 of the *Supplemental Testimony of Timothy Sherwood,* which states as follows:

> **Q16. How does Dr. Brown's statements regarding CGC's use of its OBA compare to the capability provided in the OBA?**
>
> A16. Dr. Brown is wrong in assigning the OBA with the ability to facilitate deliveries to delivery points on the ETNG system that are not within the firm rights of the Company. ***(Brown Rebuttal page 30, line 20-27).*** The OBA only allows CGC to balance deliveries with nominations across all of its **contracted** delivery points across all of its pipeline contracts in total rather than being balanced at the contract and gate station level. The OBA does not allow balancing of deliveries between CGC and its delivery points on ETNG and a delivery point into another pipeline such as the Saltville Storage, Patriot Pipeline or Transco. This is similar to how CGC allows its transportation customers to trade imbalance between each other

[50] *First Discovery Requests,* p. 18 (March 18, 2008).
[51] *Responses to First Discovery Requests,* unnumbered 73-84 (April 11, 2008).
[52] *Third Round Motion to Compel,* pp. 5-6 (April 27, 2009).

on a monthly basis. The Company would not allow this between customers on two separate utility systems.

Therefore, Dr. Brown is wrong in implying that CGC can facilitate deliveries off system because *"...CGC could schedule more deliveries than it needs and the imbalance could be taken as a delivery at another point on ETNG's system ..."* ***(Brown Rebuttal page 30, line 20-23).*** For this quote to be accurate, with relationship to CGC all delivery points must be points associated with the CGC's transportation agreement. (Emphasis in original).[53]

Additionally, the Consumer Advocate cites CGC's response to discovery request 10.b. propounded in its *Second Discovery Requests of the Consumer Advocate and Protection Division to Chattanooga Gas Company,* which states as follows:

10. At page 17, lines 9-12 Mr. Sherwood testifies:

> CGC has been very successful in returning very favorable gains to its customers. Over the past thirty-nine months, CGC's customers have received approximately $7.9 million for the non-jurisdictional sale of gas supply assets that otherwise would have been sitting idle.

ADMIT:

b. The $7.9 million CGC's customers have received does not include any compensation from Sequent for its use of CGC's assets to make non-jurisdictional sale of gas via the Transco pipeline. If denied fully explain your reply.

RESPONSE:

b. Deny. CGC has no assets on the Transco pipeline. There would be no direct non-jurisdictional sales of gas via the Transco pipeline. When SEM uses fallow CGC ETNG transportation to make a delivered sale into Transco at the ETNG/Transco pipeline interconnect (Cascade Creek), that activity is captured on CGC's ETNG transport contract(s) and documented accordingly in the CGC's third party transportation book. Revenue is captured under the ETNG pipeline and cost is captured under the TGP (or ETNG pipeline if supply was bought on ETNG). Similarly, if SEM uses fallow CGC SNG transportation to make a delivered sale into Transco at the SNG/Transco market area pipeline interconnect

[53] *Supplemental Testimony of Timothy Sherwood,* p. 17, line 7 through p. 18, line 2 (April 1, 2009).

> (Jonesboro), that activity is captured on CGC's SNG transport contract and documented accordingly in the CGC third-party transportation book. Revenue and cost is captured under the SNG pipeline. The gain from any such transaction would be shared with CGC's customers.[54]

The Consumer Advocate contends that the above referenced testimony and response to discovery, most particularly the portion of the discovery response which states, "*When SEM uses fallow CGC ETNG transportation to make a delivered sale into Transco at the ETNG/Transco pipeline interconnect,*"[55] are contradictory, that the alleged inconsistency places Sequent's OBA with ETNG at issue, and therefore, the OBA "is needed to measure the veracity of Mr. Sherwood's testimony and to aid the Consumer Advocate in determining how it is possible that Sequent can apparently use CGC's fallow transportation to act in a manner that CGC cannot."[56]

In its *Response to Third Round Motion to Compel,* the CGC asserts that there is no contradiction or conflict between the portions of Mr. Sherwood's supplemental testimony and CGC's response to second-round discovery question 10.b. cited by the Consumer Advocate.[57] CGC further states that the subject testimony and discovery response each involve separate asset management and gas supply concepts – (1) creating value through non-jurisdictional sales and (2) CGC's OBA. CGC asserts that its response to discovery request 10.b., which called for an admission that customers did not receive value for Sequent's use of CGC assets to make non-jurisdictional sale of gas via the Transco Pipeline, was a denial, followed by an affirmative statement that CGC has no assets on the Transco pipeline, thus, no direct non-jurisdictional sales of gas via the Transco pipeline would occur. Further, CGC contends that following its denial

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[54] *Chattanooga Gas Company's Responses and Objections to the CAPD's Second Discovery Requests,* p. 21 (August 26, 2008).
[55] *Id.;* additionally the quoted portion was particularly highlighted and emphasized within the *Third Round Motion to Compel,* pp. 5 and 7 (April 27, 2009).
[56] *Third Round Motion to Compel,* pp. 6-7 (April 27, 2009).
[57] *Response to Third Round Motion to Compel,* pp. 4-5 (April 30, 2009).

and responsive statement, it discussed the situation presented by the Consumer Advocate hypothetically, for the purpose of clarifying that "if CGC assets were combined with other non-CGC assets managed by Sequent to make off-system sales, CGC customers would benefit and receive value for the use of CGC's assets."[58] Further, in its *Response to Third Round Motion to Compel*, CGC asserted that Mr. Sherwood's supplemental testimony seeks to clarify various inaccuracies and misunderstandings advanced by Dr. Brown concerning the operation of CGC's OBA with ETNG, and does not discuss Sequent's OBA with ETNG, which is not relevant to the issues in this docket.[59]

Additionally, in its *Response to Third Round Motion to Compel*, CGC asserts, as it did during the first-round of discovery, that CGC's regulated assets are encompassed within CGC's OBA with ETNG, a copy of which has been provided to the Consumer Advocate. CGC asserts that it "does not have possession, custody, or control of Sequent's OBA since it does not cover CGC's regulated assets."[60] Finally, CGC contends that the Hearing Officer correctly determined that Sequent's OBA, which does not involve CGC's regulated assets, is not relevant in this docket, and therefore, the Consumer Advocate's renewed request for this information should be denied.

During the Status Conference, as its third-round discovery request 1 was formulated in light of the alleged conflict and the production of Sequent's OBA with ETNG is requested in both discovery requests, the Consumer Advocate suggested that argument concerning its first-round discovery request 77 and its third-round discovery request 1 should be presented contemporaneously. Thereafter, the parties each presented argument consolidating the two discovery requests. Discovery request 1 below provides a summary of the arguments presented

[58] *Response to Third Round Motion to Compel,* p. 5 (April 30, 2009).
[59] *Id.,* p. 5.
[60] *Id.,* p. 5.

by the parties during the Status Conference, as well as a joint discussion of the findings and conclusions of the Hearing Officer concerning first-round discovery request 77 and third-round discovery request 1.

II. Third Round Discovery Requests

The following discovery requests were propounded by the Consumer Advocate on April 15, 2009 in its *Third Discovery Requests* and objected to by CGC in its *Objections to Third Discovery Requests* filed on April 22, 2009.

Question 1:

> In reference to Mr. Sherwood's supplemental testimony from page 17 line 7 to page 18 line 2, as well as CGC's[sic] prior responses to discovery, explain how "SEM uses fallow CGC ETNG transportation to make a delivered sale into Transco at the ETNG/Transco pipeline interconnect." Include in your reply an explanation of how Sequent "uses fallow CGC ETNG transportation" to make a delivered sale to Transco without utilizing CGC's OBA and provide a copy of Sequent's Operational Balancing Agreement with ETNG.[61]

The Hearing Officer considers the arguments discussed in the *Third Round Motion to Compel* and the *Response to Third Round Motion to Compel* and as summarized above concerning the first-round discovery request 77, which are the same as or substantially similar to the arguments set forth concerning third-round discovery request 1, and hereby incorporates those arguments and summary herein by reference.

In addition to the arguments summarized above, in its *Third Round Motion to Compel,* the Consumer Advocate asserted that CGC's objection based on its lack of "possession, custody or control" of Sequent's OBA with ETNG is moot since "the TRA has already ordered that CGC is required to produce any documents that are in the 'possession, custody or control' of CGC, or any other affiliated corporations, including Sequent, see *Order Granting in Part and Denying in*

[61] *Third Discovery Requests,* p. 5 (April 15, 2009).

Part Consumer Advocate's Motion to Compel, p. 9, (September 12, 2008)."[62] Further, the Consumer Advocate asserts that CGC's response to second-round discovery request 10.b. appears based on "actual knowledge and not mere conjecture,"[63] and expresses skepticism concerning CGC's ability to obtain the OBA at issue.[64]

In addition to the arguments summarized above, in its *Response to Third Round Motion to Compel,* the CGC states that it objects to the form of discovery request 1 as it is misleading, in part, because it takes the language "out of context,"[65] but states that it will nevertheless attempt to respond to the request without waiving its objection.[66] Additionally, CGC asserts that it objects to the request to the extent that it is again seeking a copy of the OBA between Sequent and ETNG. In its *Response to Third Round Motion to Compel,* CGC states that as "Request No. 77 and Request No. 1 seek the same information,"[67] it relies upon and references its arguments set forth in response to first-round discovery request 77.

During the Status Conference, the Consumer Advocate asserted that production of Sequent's OBA with ETNG should now be compelled, despite the Hearing Officer's denial of the Consumer Advocate's previous request to do so, because of what it believes to be contradictory statements in Mr. Sherwood's testimony and in a response to discovery by CGC, as set forth in detail in the *Third Motion to Compel* and summarized above. Further, the Consumer Advocate asserts that the subject OBA is at issue in this docket because Mr. Sherwood testified "about off-system deliveries or operational balancing agreements for approximately 4 – either in part or in whole, 4 pages in his first round of testimony and around 13 pages, either in whole or

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[62] *Third Round Motion to Compel,* p. 8 (April 27, 2009).
[63] *Id.*
[64] *Id.*
[65] *Response to Third Round Motion to Compel,* p. 6 (April 30, 2009).
[66] *Id.,* pp. 5-6.
[67] *Id.,* p. 6.

in part, he dedicates to it in his supplemental testimony."[68] Finally, the Consumer Advocate contended that a review of the OBA is necessary because Sequent's ability to sell gas through the use of its own OBA agreement may create a disincentive for CGC to purchase gas in responsible quantities:

> . . . [I]f Sequent can use this OBA to do what Chattanooga Gas cannot then that's central to this case. It provides an opportunity for Chattanooga Gas to use Sequent's OBA to sell excess capacity through the Transco pipeline at a profit; therefore, they have no incentive to responsibly purchase the right quantity of natural gas. They have every incentive to purchase more than is necessary so they can, in turn, sell that through the Transco pipeline utilizing Sequent's OBA.[69]

During the Status Conference, CGC asserted that in response to inaccuracies and misconceptions within Dr. Brown's testimony, Mr. Sherwood has testified about CGC's OBA and the regulated assets of CGC that it covers; he has not discussed any OBAs that Sequent may have.[70] Further, CGC contended that there is no inconsistency between the testimony of Mr. Sherwood and the discovery response of CGC cited by the Consumer Advocate, and stated as follows:

> They're dealing with two separate asset management and gas supply concepts. One is about generating value, and the other is about the concept of an OBA. And there isn't – there isn't a conflict.[71]

> . . .[T]here is no inconsistency in the testimony of Mr. Sherwood. It's a misunderstanding by, in this case, Dr. Brown.[72]

> [Concerning CGC's response to 10.b.] But the main point was if somebody makes a [off-system] sale like that, there is a mechanism through what's been approved by the TRA for value to be received by the customers of Tennessee. That has nothing to do with an OBA. And Dr. Brown continues to misuse "OBA."[73]

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[68] Transcript of Proceedings, p. 20 (May 5, 2009).
[69] *Id.*, p. 20-21.
[70] *Id.*, p. 21-22.
[71] *Id.*, p. 21-22.
[72] *Id.*, p. 23.
[73] *Id.*, p. 24.

Additionally, CGC asserted that the Consumer Advocate's requests, which seek to elicit information in an attempt to prove that an OBA may create a disincentive for responsible gas purchasing, demonstrates a fundamental lack of understanding:

> Now, in addition, this whole concept of somehow an asset manager might have other assets, every asset manager that responds to an RFP we hope will have other assets. We don't know what those are, but their ability to bring value to the customers for fallow assets is based directly on them having assets other than ours, to be able to mix and match and create value. And so we would certainly hope that others have value. But an OBA doesn't tell you whether or not the right gas supply has been ordered or whether the right amount of capacity or storage has been ordered. The TRA's dockets, when they look at AMAs annually, this proceeding when you look at what the demand is on a peak day for Chattanooga, they tell you that reference. An OBA has no relevance to that discussion[74]

> And again, an expertise in gas supply would suggest an understanding of OBAs. These questions suggest that that's not – that there is no understanding of what an OBA does. So these aren't relevant questions to the issues, the underlying issues, they're trying to get to in terms of, "Is this the right amount of gas supply? Is this the right amount of capacity?" You make reference in those cases to, what is the demand on the system on design days, and are you within the realm of reasonableness in that regard? And you review it, as the TRA does, yearly, to make sure that the gas supply is being purchased prudently. An OBA is not going to help you in that respect.[75]

In response to the Consumer Advocate's assertion that an issue upon which the proposed experts for each side clearly disagree would certainly be relevant, CGC contended that the fact that two experts disagree on a particular point does not constitute the standard for relevance.[76] Thus, in essence, CGC asserted that while Mr. Sherwood and Dr. Brown may disagree concerning the necessity or use of Sequent's OBA with ETNG, such disagreement does not therefore make the OBA relevant in this docket.

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[74] Transcript of Proceedings, p. 24-25 (May 5, 2009).
[75] *Id.*, p. 26.
[76] *Id.*, p. 28.

Finally, CGC asserted that "to the extent that the CAPD tries to push for disclosure from asset managers of data unrelated to the regulated assets of Chattanooga, then they will, in fact, chill other asset managers from participating in future RFPs and, therefore, decrease the potential value to Chattanooga customers."[77]

FINDINGS AND CONCLUSIONS

Following the Consumer Advocate's filing of its *First Round Motion to Compel,* the parties presented argument on discovery request 77, which requests CGC's, AGL's, and Sequent's OBAs with ETNG, limited to the necessity and relevancy of Sequent's OBA with ETNG. The written and oral arguments of the parties concerning discovery request 77 propounded in the *First Discovery Requests* as set forth in the *Responses to First Discovery Requests, First Round Motion to Compel,* the transcript of the April 24, 2008 Status Conference, continue to be relied upon by the Hearing Officer and are incorporated herein by reference.

During the first round of discovery, the CGC agreed to provide the Consumer Advocate with the OBAs entered into between CGC and ETNG and between AGL and ETNG. Concerning the request for the OBA between Sequent and ETNG, CGC agreed to provide the following response: "that Sequent does have this balancing agreement, but that it does not and can't by definition include any points covered by the balancing agreement for Chattanooga Gas and Atlanta Gas Light Company."[78] Upon due consideration of the pleadings and arguments of the parties, in the *Order re First Round Discovery Disputes,* the Hearing Officer agreed with CGC that the OBA between Sequent and ETNG was not relevant to the issues in this docket and, therefore, denied the Consumer Advocate's request to compel its production.[79]

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[77] Transcript of Proceedings, pp. 26-27 (May 5, 2009).
[78] Transcript of Status Conference, p. 47 (April 24, 2008).
[79] *Order re First Round Discovery Disputes,* pp. 14-15 (April 29, 2008).

The Consumer Advocate's renewed attempt to obtain Sequent's OBA with ETNG in its *Third Round Motion to Compel* by alleging an inconsistency between a particular portion of Mr. Sherwood's testimony and a CGC response to discovery is without merit. The testimony of Mr. Sherwood and discovery response cited by the Consumer Advocate on page 5 of the *Third Round Motion to Compel*, reproduced above in discovery request 77, are not contradictory. A plain reading of Mr. Sherwood's testimony reveals a discussion that references the OBA between CGC and ETNG, a document which the Consumer Advocate was granted access to during the first round of discovery. The testimony further explains that the OBA between CGC and ETNG does not allow deliveries on the ETNG pipeline to be balanced with delivery points into other pipelines. Further, the discovery response does not describe how imbalances are calculated; rather, it describes Sequent's accounting of compensation for the use of CGC's fallow assets. As the testimony and discovery response are not, in fact, contradictory, the Consumer Advocate's assertion that Sequent's OBA with ETNG is required in order to "measure the veracity of Mr. Sherwood's testimony"[80] is without merit.

The Consumer Advocate further asserts that the OBA between Sequent and ETNG is necessary "to aid the Consumer Advocate in determining how it is possible that Sequent can apparently use CGC's fallow transportation to act in [a] manner that CGC cannot."[81] It is generally understood within the industry that an asset manager has assets in addition to the assets of a particular LDC, that, when combined with the assets of an LDC, allow it to make deliveries and trades that the LDC would not otherwise be able to make on its own. This is one of the ways asset managers add value. The manner in which an asset manager physically may arrange such deliveries is not an issue for resolution in this docket.

[80] *Third Round Motion to Compel,* p. 5 (April 27, 2009).
[81] *Id.,* pp. 5-6.

Finally, the assertion concerning the potential chilling effect on future RFPs that could result from an asset manager being compelled to provide business information unrelated to the regulated assets of a client-LDC, is of limited application in this docket. First, Sequent is not simply the asset manager of CGC, but also the company affiliate of CGC. As stated above, the Tennessee Supreme Court has established precedent concerning the Authority's jurisdiction in governing public utilities and their non-utility subsidiaries and affiliates.[82] Therefore, there are circumstances that may reasonably justify the compelled production of sensitive business information from a non-regulated affiliate of a regulated public utility. Nevertheless, the argument presented by the Consumer Advocate's in support of its now, second request for Sequent's OBA with ETNG in this docket does not create such a circumstance.

The Consumer Advocate attempted to compel Sequent's OBA with ETNG previously in its *First Round Motion to Compel.* During the status conference on April 24, 2008, the Consumer Advocate was provided ample opportunity in which to present argument in support of its request, and it, in fact, did present its arguments. Upon due consideration of those arguments, and the arguments put forth by CGC, the Hearing Officer determined that this information is not relevant to the issues in this docket and denied the Consumer Advocate's request to compel disclosure of the OBA in question. As justification for the revival of its request, the Consumer Advocate maintains that the OBA is necessary to "remedy a blatant contradiction between the discovery responses provided and the testimony of Mr. Sherwood."[83] However, a plain reading of the testimony and discovery response at issue demonstrates that they are not, in fact, contradictory. Each statement discusses an associated but distinctly different facet of asset

[82] See, *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority,* 79 S.W.3d 506, 515-516 (Tenn. 2002) and *Tennessee Public Service Commission v. Nashville Gas Company,* 551 S.W.2d 315 (Tenn. 1977).
[83] *Third Round Motion to Compel,* p. 7 (April 27, 2009).

management and gas supply methodology. Therefore, finding no inconsistency between the testimony and the discovery response, the Hearing Officer finds no justification for overturning or reversing the prior ruling denying the Consumer Advocate's *First Round Discovery* request 77 for production of asset management contracts between Sequent and entities other than CGC or AGL affiliates as set forth in the *Order re First Round Discovery Disputes*. For the foregoing reasons, the Hearing Officer similarly concludes that the Consumer Advocate's *Third Round Discovery* request 1 should be denied.

Supplementation of Discovery Responses

Question 35:

> Please provide supplemental answers to all discovery requests previously propounded in this docket; these supplements should include but not be limited to any discovery requests not previously answered in full as well as any and all updates that may be necessary as a result of a change of circumstance, unusual occurrence, the passage of time, internal change within CGC, AGL, Sequent or any other Affiliated Companies or employees, change of business model, contractual or other legal obligation, matter of going concern, and/or any other customer, employee, or transactional change which may have resulted in the need to supplement/update either the answers provided to these or prior discovery requests.[84]

In its *Third Round Motion to Compel,* the Consumer Advocate requests that CGC "fully answer and/or supplement all previous discovery requests propounded by the Consumer Advocate."[85] The text of the discovery request 35 further expounds a number of factors that should be taken into account within such supplemental answers of CGC.[86] In its *Response to Third Round Motion to Compel,* the CGC asserts that it "understands its duty to seasonally supplement in accordance with the Tennessee Rules of Civil Procedure and will provide such

[84] *Third Discovery Requests,* p. 13 (April 15, 2009).
[85] *Third Round Motion to Compel,* p. 10 (April 27, 2009).
[86] *Third Discovery Requests,* p. 13 (April 15, 2009).

supplements when necessary in accordance with the Tennessee Rules of Civil Procedure."[87] Further, CGC objected to the request insofar as it seeks to impose obligations beyond those required in the Tennessee Rules of Civil Procedure ("TRCP").[88]

During the Status Conference, the parties each reiterated the arguments set forth in the filings. Additionally, the Consumer Advocate referred the Hearing Officer to Rule 26.05(3) of the TRCP and asserted that, in compliance with the rule cited, its request for supplementation of the prior responses provided by CGC initiates the timing of the duty to supplement and imposes such obligation upon CGC immediately.[89]

FINDINGS AND CONCLUSIONS

The duty of a party to supplement responses to discovery is set forth in TRCP Rule 26.05, which states as follows:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of that testimony.
>
> (2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which the party (A) knows that the response was incorrect when made, or (B) knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
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> (3) A duty to supplement responses also may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses. [Amended effective July 1, 1979; July 1, 2002.][90]

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[87] *Response to Third Round Motion to Compel,* p. 8 (April 30, 2009).
[88] *Id.*
[89] Transcript of Proceeding, pp. 29-30 (May 5, 2009).
[90] Tenn. R. Civ. P. 26.05.

Specifically, the Consumer Advocate relies on TRCP 26.05(3) for its assertion that a duty to supplement may be imposed *at any time* prior to trial through new requests for supplementation of prior responses. The plain language of the rule itself supports the interpretation that the duty of a party to supplement prior responses may be initiated through a new request to so supplement, as asserted by the Consumer Advocate. Therefore, pursuant to the TRCP, the Hearing Officer finds that discovery request 35 is appropriate and should be granted. CGC is hereby directed to respond to discovery request 35 within the *Third Discovery Requests.*

Request for Proposal ("RFP") Process

Question 37:

> With regard to the selection of Sequent as the asset manager of CGC, Mr. Sherwood says in his supplemental testimony at page 24 lines 17-20:
>
> > Sequent was selected as the asset manager for CGC as a result of a tariff based RFP process in which they were the party offering the highest minimum annual guarantee payment to CGC's customers.
>
> In view of this statement, please provide a detailed narrative of the "tariff based RFP process" used to select CGC's asset manager as well as a listing of any other asset managers who may have participated in this process within the last five years; include in your answer the factors that are reviewed in selecting an asset manager, the weight assigned to each of those factors, which company and employees make the selection of an asset manager, whether or not any company other than CGC is involved in the selection process in any way, whether or not any company other than CGC provides advice or guidance in the selection process, a listing of participating asset managers' in the selection process by year, and any and all documents which support any part of your answer, were used in drafting your answer, that evidence the existence of selection criteria, or that more fully describe this process.[91]

In its *Third Round Motion to Compel,* the Consumer Advocate asserts that despite CGC's contention that it has been provided information responsive to this request, it does not have the information, most specifically, that it has not been provided a narrative explanation of the tariff-

[91] *Third Discovery Requests,* p. 14 (April 15, 2009).

based RFP process utilized by CGC.[92] Additionally, the Consumer Advocate contends that even if it does have information responsive to this request in its possession already, it would be irrelevant because no evidentiary rule prevents a party from requesting information already in its possession.[93] Additionally, the Consumer Advocate states that information obtained from prior dockets could be outdated, irrelevant to the specific facts of this docket, or changed due to a variety of circumstances.[94]

In its *Response to Third Round Motion to Compel,* the CGC asserts that the information sought in discovery request 37 concerns CGC's RFP process and the selection of CGC's current asset manager, and that such information has been provided to the Consumer Advocate either in this docket or in Docket No. 08-00012, or is otherwise readily available through the TRA's public records.[95] The CGC further asserts that much of the information requested in third-round discovery request 37 was already provided by CGC in its responses to the Consumer Advocate's previous requests 49, 50, 51, 53, & 54 in the first round of discovery.[96] Additionally, CGC contends that the issue of CGC's RFP process and selection of its asset manager was the very issue that was fully litigated in TRA Docket 08-00012, a docket in which the Consumer Advocate intervened, propounded discovery and received responses thereto from CGC.[97]

Finally, the CGC states, "As the bidding process and selection process was concluded by January 2008 and the TRA has fully reviewed the process for selecting CGC's current asset manager and approved the current asset management agreement that commenced on April 1, 2008, there have been no changed circumstances or new information."[98] The CGC contends that

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[92] *Third Round Motion to Compel,* p. 10 (April 27, 2009).
[93] *Id.,* pp. 10-11.
[94] *Id.,*
[95] *Response to Third Round Motion to Compel,* p. 8 (April 30, 2009).
[96] *Id.*
[97] *Id.,* p. 8-9.
[98] *Id.*

requiring CGC to re-produce this information is unduly burdensome, unreasonably cumulative and duplicative and the Consumer Advocate's request should be denied.[99]

During the Status Conference, the Consumer Advocate acknowledged that its request contains some overlap in the issues reviewed in Docket No. 08-00012, but asserted that it contains information not previously requested as well, and stated:

> And while we would agree that there is obviously going to be some overlap, given the nature of the prior docket, we don't feel that this is – this asks for information, at least in whole, that was provided in the prior docket. We think there are several new areas of requests, and we also at no point are asking for a narrative answer in this regard in the prior docket.[100]
>
> . . . [S]ome of the questions we have asked in here we don't feel have been asked in any capacity prior – particularly with regard to companies that may weigh in on the decision of personnel, that may weigh in on the decision as to an asset manager.[101]

Additionally, the Consumer Advocate contended that if CGC feels that it has previously provided certain information, it should respond with that answer and cite where it has provided such information.[102] The Consumer Advocate further asserted that it thinks that "the gist of this question is not duplicative," and the CGC's citation and reference to Docket No. 08-00012 is not sufficient.[103] Finally, the Consumer Advocate asserted that the RFP process is an issue in this case regardless of having been covered in a prior docket:

> And beyond that, I mean, going back to the testimony of Mr. Sherwood, in his original testimony he cites this on page 15, page 16, page 17, page 18, page 19, and page 20. In his supplemental testimony he cites the asset management arrangement on page 24, 25, 26, 27, 28, and 29. So quite clearly this is a fairly central issue in this case.[104]

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[99] *Response to Third Round Motion to Compel,* p. 8-9 (April 30, 2009).
[100] Transcript of Proceedings, pp. 30-31 (May 5, 2009).
[101] *Id.,* pp. 32-33.
[102] *Id.,* pp. 32.
[103] *Id.,* pp. 35-36.
[104] *Id.,* pp. 35.

During the Status Conference, CGC asserted that it is overly burdensome, redundant and cumulative to require it to reproduce information that it has provided to the Consumer Advocate in this docket and/or in Docket No. 08-00012, or to require it to reproduce such information in another form (i.e., a narrative form).[105] CGC referred to the actions of the parties in the exploration and processing of the very issue recently litigated Docket No. 08-00012:

> And the information they're seeking is about the selection of Sequent as the asset manager through the RFP process. We litigated that in Docket No. 08-00012. There were discovery that was served upon the company by the TRA staff and by the Consumer Advocate. We answered all those questions. We also provided information about the process. We briefed. We orally argued. We had Mr. Sherwood here, who answered questions, that was available at a hearing. We have provided all of the information about that process, how the RFP was issued, what we went through; plus, these questions were asked through the first round of discovery in this case, and we have answered those questions also. So the information sought has been given. They have it in their possession.[106]
>
> . . . [I]t would be one thing if this were a small issue raised by another party in a prior proceeding and CAPD was participating but that wasn't really their issue and, therefore, they don't really know where the information is or what the information was. But the issues they're raising here are the same issues they tried to raise there, and it was their central case.[107]
>
> . . . [I]t's not just a previous docket. It's a recent docket in which CAPD litigated these specific issues. And you can read the question, the interrogatory, or data request. I mean clearly they did not try to conform it to the information they already had.[108]

Finally, CGC asserts that in its *Objections to Third Discovery Requests* and in its *Response to Third Round Motion to Compel* it has provided the Consumer Advocate the locations where information responsive to this discovery request was provided previously: throughout Docket

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[105] Transcript of Proceedings, p. 31-32 (May 5, 2009).
[106] *Id.*
[107] *Id.*, pp. 34-35.
[108] *Id.*, pp. 36.

No. 08-00012 and in response to first round discovery requests 49, 50, 51, 53, and 54 in this docket.[109]

FINDINGS AND CONCLUSIONS

While it is true that "Tennessee has a broad policy which favors the discovery of any relevant information,"[110] the rules governing discovery also provide limitations and protections to guard against a misuse or abuse of the discovery process which may result from, among other things, a lack of diligence or unreasonable demands of the parties. As discussed previously herein, 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, the Tennessee Court of Appeals in *Duncan v. Duncan* held that:

> A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).[111]

Procedurally, the docket is currently in a *fourth* round of discovery overall. The current round of discovery constitutes the *third* round of discovery propounded by the Consumer Advocate to CGC. This round of discovery was not originally contemplated by the parties or the Hearing Officer, but was proposed by the parties on or about February 5, 2009, approximately

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[109] Transcript of Proceedings, pp. 33, 34 (May 5, 2009).
[110] *Third Round Motion to Compel,* p. 2 (April 27, 2009).
[111] *Duncan v. Duncan,* 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

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[109] Transcript of Proceedings, pp. 33, 34 (May 5, 2009).
[110] *Third Round Motion to Compel,* p. 2 (April 27, 2009).
[111] *Duncan v. Duncan,* 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

seventeen (17) months after this docket was opened by the Authority.[112] During a status conference held on February 9, 2009, in response to questioning by the Hearing Officer concerning the necessity and scope of the additional discovery proposed, the parties asserted that additional discovery, despite the late stage of the proceedings, was appropriate and necessary in order to address the issues raised by the parties in their preliminary motions.[113] Following the conclusion of this additional discovery, the Consumer Advocate will have the opportunity to file a second rebuttal, or surrebuttal, testimony. Upon requests of the parties, the hearing in this docket, which is now scheduled to commence on July 13, 2009, has been canceled and reset not fewer than three times.

With this procedural posture of the case as background, now approximately nineteen months into this docket, the Consumer Advocate, in its third set of discovery requests to CGC asserts that the statement, "Sequent was selected as the asset manager for CGC as a result of a tariff based RFP process in which they were the party offering the highest minimum annual guarantee payment to CGC's customers,"[114] which is mentioned in the supplemental testimony of Mr. Sherwood, specifically prompted, and further necessitates, its request for comprehensive information concerning the RFP process in discovery request 37. A breakdown of the request is as follows:

1) a detailed narrative of the tariff based RFP process used to select CGC's asset manager;

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[112] The Authority opened Docket No. 07-00224 on September 26, 2007.

[113] Transcript of Proceedings, pp. 4-5 (February 9, 2009). These preliminary motions, filed in anticipation of a December 8, 2008 pre-hearing conference and a December 15, 2008 hearing, included the *Chattanooga Gas Company's Motion to Strike and Objections to Portions of Dr. Brown's Direct and Rebuttal Testimony* filed on December 2, 2008, which in part, asserted that the rebuttal testimony of Dr. Brown raised least three new issues that had not been included in his direct testimony: 1) the Management of Operating Balance Agreements ("OBAs"), 2) the "Long Term Value Proposition," and 3) the facts regarding the Atlanta Gas Light Company Capacity Supply Plan Stipulation,[113] and the *Consumer Advocate's Objection and Motion to Exclude Exhibits* filed on December 3, 2008, which objected to the exhibits filed by CGC December 1, 2008 on the grounds that they constituted an improper attempt to offer new support for the direct testimony of Tim Sherwood.

[114] *Supplemental Testimony of Tim Sherwood,* p. 24, lines 17-20 (April 1, 2009).

2) a listing of any other asset managers who may have participated in this [RFP] process within the last five years;

3) include in your answer the factors that are reviewed in selecting an asset manager;

4) the weight assigned to each of those factors;

5) which company and employees make the selection of an asset manager;

6) whether or not any company other than CGC is involved in the selection process in any way;

7) whether or not any company other than CGC provides advice or guidance in the selection process;

8) a listing of participating asset managers' in the selection process by year; and,

9) any and all documents which support any part of your answer, were used in drafting your answer, that evidence the existence of selection criteria, or that more fully describe this process

During the Status Conference held on February 9, 2009, the parties represented to the Hearing Officer that an additional round of discovery was needed for the purpose of addressing certain issues raised by the parties in previously-filed preliminary motions. The above discovery request falls outside the scope of those preliminary motions.[115] Moreover, the Consumer Advocate prefaces its discovery request 37 with the statement noted above from Mr. Sherwood's supplemental testimony. At this late stage in the progression of the docket, it seems disingenuous for the Consumer Advocate to contend that this statement, the substance of which should be a surprise to no one even casually associated with this docket, should prompt or result in the generation of such a broad multi-layered request.

The Consumer Advocate's request appears all the more curious when one considers that the substance of the request, and the information it intends to elicit, are squarely encompassed

[115] See, footnote 113 above.

within the issues recently evaluated by this Authority in Docket No. 08-00012; a docket in which the Consumer Advocate was an active participant and its only intervening party. In conjunction with Docket No. 08-00012, the TRA addressed the following issues:

1. Whether CGC has complied with its Tariff in bidding and awarding the Asset Management and Agency Agreement submitted for approval of the Tennessee Regulatory Authority?

2. Whether the Asset Management and Agency Agreement submitted for approval of the Tennessee Regulatory Authority should be approved for the benefit of CGC's customers?

Although the Consumer Advocate took no official position on these issues in Docket No. 08-00012, CGC produced a list of all companies that received the RFP, the responses to the RFP, a description of the departments involved in reviewing the RFP, CGC's internal documentation of the evaluation process, and the basis for selecting the winning bid.[116] As a party, the Consumer Advocate was granted access to all information, public and confidential, filed in the docket.

Furthermore, within its *First Discovery Requests,* the Consumer Advocate propounded several questions concerning the RFP process and selection of CGC's asset manager:

49. Explain in detail the process, including all communications, CGC went through in selecting Sequent as CGC's asset manager for the period January 1, 2004 through the present.[117]

50. Describe in detail all communications between CGC, AGL, and any affiliate of CGC concerning the asset management arrangements for the period from January 1, 2004 to the present.[118]

51. Provide all documents of all communications between CGC, AGL and any affiliate of CGC concerning the asset management arrangements for the period from January 1, 2004 to the present.[119]

53. Describe in detail all information supplied to Sequent pertinent to Sequent's valuation of the subject asset management arrangement.[120]

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[116] See, CGC Responses to Staff Data Requests (February 1, 2008).
[117] *First Discovery Requests,* p. 18 (March 18, 2008).
[118] *Id.*
[119] *Id.*

54. Describe in detail all information supplied to all other bidders in TRA docket no. 08-00012, which is in any pertinent, or could be pertinent, to each bidder's valuation of the asset management arrangement.[121]

CGC provided the Consumer Advocate with responses to each of these requests with the timeframes set forth for the first round of discovery, objecting only in part to questions 49, 50, and 51 as they specifically related to Sequent.[122] With the exception of the partial objections of CGC, the Consumer Advocate accepted and did not challenge the responses.

The Consumer Advocate asserts that the burden should be on CGC to respond to this request, which it freely admits overlaps with the substantive issues encompassed within Docket No. 08-00012,[123] and that CGC should repeat, reproduce, and/or reform a multitude of information that it has provided to the Consumer Advocate already, or otherwise provide specific citations as to where each such piece of information may be located. In the drafting of discovery request 37 in its *Third Discovery Requests*, the Consumer Advocate appears to have made no attempt to narrow or otherwise tailor its request in the light of information it has already been provided in this docket or Docket No. 08-00012, or which it may readily obtain from a convenient source, the TRA. The CGC has informed the Consumer Advocate where information

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[120] *First Discovery Requests,* p. 19 (March 18, 2008).
[121] *Id.*
[122] See section I of this Order for a discussion of the objections raised by CGC to discovery requests 49, 50, and 51 propounded by the Consumer Advocate in its *First Discovery Requests.*
[123] During the Status Conference, the Consumer Advocate admitted on at least three occasions that due to the formulation of the question itself or the nature of Docket No. 08-00012, its request elicits information which overlaps the issues recently reviewed in Docket No. 08-00012, as follows:

> "While we would agree that there is obviously going to be some overlap, given the nature of the prior docket. . ." Transcript of Proceedings, p. 30 (May 5, 2009).
>
> "I mean, certainly we – as I stated earlier, I think there's some overlap here. We are speaking about the asset management agreement. Transcript of Proceedings, p. 32 (May 5, 2009).
>
> "Like I said, it's you know, because of the way this question is drafted and what this question deals with, there is inherently going to be a little overlap." Transcript of Proceedings, p. 34 (May 5, 2009).

pertaining to its request may be located: in its own possession, in certain responses to its first-round discovery requests, and in Docket No. 08-00012.

The purpose of discovery is to facilitate the mutual exchange of information, obtain knowledge of all relevant facts prior to trial or hearing, to do away with trial by ambush, and to generally rid trials of an element of surprise that often leads to results based not upon the merits but upon unexpected legal maneuvering.[124] Concerning cases which rely heavily on the opinions of experts, the Tennessee Supreme Court has further stated:

> . . .[P]re-trial investigation of the opinions of an opponent's experts may tend to encourage a contest of successive employment of experts, each to report or elaborate upon some element of the opinion expressed by the last. Such a contest, with its financial burdens, could well amount to the 'oppression' which the statute proscribes (citation omitted). And limitless pre-trial investigation of the views of opposing experts might well defeat the expedition of trial, which is one objective of discovery. The possible evils of unrestricted discovery of experts' views in cases turning largely upon expert testimony, such as condemnation, have been recognized . . .[125]

Discovery is therefore not intended to be used as a method by which to harass, abuse, or otherwise oppress an opponent, nor as a shortcut to the preparation of one's case.

Over the course of three sets of discovery requests, the Consumer Advocate has propounded not less than 226 requests, including subparts and compound questions, to CGC in this docket.[126] The Consumer Advocate has requested and been granted ample time and opportunity to gather all relevant facts, develop its position, and construct its case in this docket.

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[124] See, *Strickland v. Strickland*, 618 S.W.2d 496 (Tenn. App. 1981); *Pettus v. Hurst,* 882 S.W.2d 783 (Tenn. App. 1993).

[125] *Lutz v. John Bouchard and Sons Co., Inc.,* 575 S.W.2d 7 (Tenn. App. 1974).

[126] The total number of questions plainly LISTED in all sets of discovery propounded by the Consumer Advocate combined is 137. However, the ACTUAL total number of questions is 226 including subparts and/or compound questions. The breakdown by round of discovery is as follows: (1) 3/18/08 1st discovery requests, 90 questions listed, ACTUAL: 132 including subparts and/or compound questions; (2) 8/06/08 2nd discovery requests, 10 listed, ACTUAL: 44 including subparts and/or compound questions; (3) 4/15/09 3rd discovery requests, 37 listed, ACTUAL: 50 including subparts and/or compound questions. Notably, TRA Rule 1220-1-2-.11, which states, "No party shall serve on any other party more than forty (40) discovery requests including sub-parts without first having obtained leave of the Authority or a Hearing Officer." Despite this requirement, the Consumer Advocate did not obtain leave of the Hearing Officer prior to propounding either its second or third sets of discovery requests.

The relevancy of the information sought is not in dispute; nonetheless, discovery request 37 is cumulative, repetitive, and unduly burdensome. Further, while the information sought may not have yet been specifically produced in a narrative format, as is now requested, information responsive to the request has been provided to the Consumer Advocate either in this docket or in related Docket No. 08-00012, or is otherwise readily obtainable in the public records located at the TRA. For the foregoing reasons, in light of the existing procedural posture, and to avoid further unnecessary delay in the resolution of this docket, the Hearing Officer finds that the Consumer Advocate's *Third Round Discovery* request 37 should be denied.

III. Consumer Advocate's Request to Appeal Decision

During the Status Conference, upon the conclusion of the Hearing Officer's verbal rulings on the discovery requests in dispute between the parties, the Consumer Advocate requested permission to appeal the Hearing Officer's decisions directly to the Authority panel. At that time, the Hearing Officer advised the Consumer Advocate that due consideration would be given and notice provided in this Order. Nevertheless, on May 19, 2009, the *Consumer Advocate's Motion for Interlocutory Review ("Motion for Interlocutory Review")* was filed with the Authority.

In its *Motion for Interlocutory Review,* the Consumer Advocate incorporates new arguments, and/or references particular facts and testimony in support of its argument, which were not raised or presented previously in either written pleadings or oral argument in the present round nor in any previous round of discovery. As such arguments were not offered for the consideration of the Hearing Officer; they have not been discussed or addressed in this Order. Further, it is the opinion of the Hearing Officer that any arguments, including any and all facts, testimony, or other detail referenced in support of such arguments, not raised or presented for

consideration previously are procedurally improper and should not be now considered by the Authority.

The Hearing Officer grants the Consumer Advocate's request for review and hereby defers to the wisdom and expertise of the Authority panel on these matters. In light of the premature filing of its motion by the Consumer Advocate in advance of this Order, and the Consumer Advocate's request for an expedited hearing on its motion, the following briefing scheduling for the submission of pleadings by the parties is hereby established:

- In light of this Order being entered after the filing of the *Motion for Interlocutory Review,* the Consumer Advocate may supplement its Motion. Any supplement to the *Motion for Interlocutory Review* shall be filed by the Consumer Advocate no later than 2:00 p.m. on **Tuesday, May 26, 2009**; and,
- The CGC's response to the *Motion for Interlocutory Review* and any supplement filed thereto shall be filed no later than 2:00 p.m. on **Tuesday, June 2, 2009**.

Late or untimely filings shall be considered a violation of this Order and may be subject to being stricken or disregarded by the Authority. No party shall attempt to file additional responses or otherwise file a reply beyond that provided for in the briefing schedule set forth herein.

IT IS THEREFORE ORDERED THAT:

1. The *Consumer Advocate's Motion to Compel* renewing its request to compel discovery request number 34 propounded during the first round of discovery and limited to production of asset management contracts between Sequent and third-party non-CGC and AGL affiliated entities is DENIED.

2. The *Consumer Advocate's Motion to Compel* renewing its request to compel discovery requests 49, 50, and 51, propounded during the first round of discovery is DENIED.

3. The *Consumer Advocate's Motion to Compel* renewing its request to compel discovery request 77 propounded during the first round of discovery and limited to production of the Operating Balance Agreement between Sequent and East Tennessee Natural Gas Pipeline is DENIED.

4. The *Consumer Advocate's Motion to Compel* discovery request 1 propounded during the third round of discovery is DENIED.

5. The *Consumer Advocate's Motion to Compel* discovery request 35 propounded during the third round of discovery is GRANTED.

6. The *Consumer Advocate's Motion to Compel* discovery request 37 propounded during the third round of discovery is DENIED.

7. Any supplements to the *Consumer Advocate's Motion for Interlocutory Review,* if desired, shall be filed by the Consumer Advocate and Protection Division of the Office of the Attorney General no later than **2:00 p.m.** on **Tuesday, May 26, 2009**.

8. The Chattanooga Gas Company's response to the *Consumer Advocate's Motion for Interlocutory Review* and any supplements thereto shall be filed no later than **2:00 p.m.** on **Tuesday, June 2, 2009**.

9. Additional responses, or replies, beyond those provided for in the briefing schedule set forth herein are not permitted.

Kelly Cashman-Grams, Hearing Officer

Exhibit A

to

Order on Third Round Discovery Disputes
Filed in Docket No. 07-00224
(May 21, 2009)

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 29, 2008

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

ORDER RE FIRST ROUND DISCOVERY DISPUTES

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 April 22, 2008. In the *Motion to Compel*, the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter for the State of Tennessee ("Consumer Advocate") requests that the TRA compel Chattanooga Gas Company ("CGC") to provide complete information responsive to several discovery requests. By agreement of parties, and adopted by the Hearing Officer, CGC agreed to forgo the filing of a written response to the *Motion to Compel,* opting instead to rely upon their initial objections provided in response to the requests and present oral argument during the Status Conference on April 24, 2008.

RELEVANT PROCEDURAL BACKGROUND

On March 18, 2008, in accordance with the Procedural Schedule, the Consumer Advocate filed its *First Discovery Requests of the Consumer Advocate and Protection Division to Chattanooga Gas Company* and its *Consumer Advocate's Motion for Leave to Serve More than Forty (40) Discovery Requests* with the Authority. On March 28, 2008, without objection

Question 77:

If the response is "Yes" to either of the two requests immediately above, then provide copies of all Operating Balance Agreements between CGC and East Tennessee Natural Gas Pipeline, between Sequent and East Tennessee Natural Gas Pipeline, and between AGL and East Tennessee Natural Gas Pipeline.

Response

Rate Schedule LMS-PA
Load Management (Pooling Area) Service

1. AVAILABILITY

1.1 Transporter shall provide a monthly balancing service to parties (herein referred to as "Balancing Parties") who have executed an Operational Balancing Agreement ("OBA") for use at receipt points. A Receipt Point OBA will be available to:

(a) the operator of connecting facilities at a receipt point(s) on Transporter's system;

(b) a pipeline operator whose facilities interconnect with Transporter's system;

(c) A supply aggregator ("Aggregator") who has obtained consent from two or more receipt point operators authorizing the Aggregator to operate such points, which authorization shall include, but not be limited to, changing physical flow at receipt points; provided however that the sum of all the MDROs at all points covered by one Aggregator's Balancing Agreement shall not exceed 5,000 Dth.

2. APPLICABILITY

The terms, conditions, and charges set forth in this Rate Schedule governing daily variances and monthly balancing shall apply to all gas flowing through meters covered by a Receipt Point OBA. A Receipt Point OBA may cover an unlimited number of points designated as Primary Receipt Points under FT-A and/or FT-GS Agreement(s), or an unlimited number of points designated as Primary Receipt Points under an FT-L Agreement, subject to the limitation in Section 1.1(c) above. A single Receipt Point OBA may not cover points on that portion of Transporter's system designated as an Incremental Lateral and points on that portion of Transporter's system not designated as an Incremental Lateral.

3. SCHEDULING AND CONFIRMATION BY BALANCING PARTY

The Balancing Party will submit confirmations to Transporter via LINK® by Transporter's confirmation deadline(s) set forth in Section 15 of Transporter's General Terms and Conditions. The Balancing Party's confirmation shall specify the quantity to be transported by each Shipper to or from Balancing Party's receipt point.

4. DAILY VARIANCES

4.1 The daily variance shall be the difference between the total Scheduled Quantity at that point and the actual quantity delivered into Transporter's system at that point on any day.

Issued by: D. A. McCallum, Director, Rates and Tariffs
Issued on: August 16, 2006 Effective on: October 29, 2006
Filed to comply with order of the Federal Energy Regulatory Commission, Docket No. CP05-413-000, issued February 8, 2006, 14 FERC ¶ 61,122

East Tennessee Natural Gas, LLC
FERC Gas Tariff First Revised Sheet No. 192
Third Revised Volume No. 1 Superseding
Original Sheet No. 192

Rate Schedule LMS-PA
Load Management (Pooling Area) Service (Continued)

4.2 A Balancing Party may be subject to an Action Alert Penalty or a Balancing Alert Penalty for quantities delivered above the Daily Limit as set forth in Section 5.

4.3 Based upon the best information available, a Balancing Party shall take action to correct any imbalances occurring during the month by making adjustments in nominations or receipts. If Balancing Party fails to take such corrective action, then Transporter may, upon 48 hours notice, adjust Balancing Party's scheduled receipts over the remainder of the calendar month in order to maintain a balance of receipts and nominations.

5. DELIVERIES IN EXCESS OF DAILY LIMIT

5.1 On any day on which Transporter has issued an Operational Flow Order ("OFO") affecting Balancing Party's point pursuant to Section 14 of Transporter's General Terms and Conditions, and Balancing Party delivers gas in excess of the Daily Limit

applicable to the receipt point, such Balancing Party shall be subject to an Action Alert Penalty or a Balancing Alert Penalty, as applicable, as set forth in Section 14.9 of Transporter's General Terms and Conditions for each dth of excess quantities delivered beyond a two percent allowable variation. The Daily Limit shall be stated in the OFO.

5.2 In addition to the remedy set forth in 5.1 above, in the event Balancing Party delivers gas in excess of the Daily Limit applicable to the receipt point and Transporter believes it is necessary to take actions (i.e., buying or selling gas, etc.) to maintain system integrity or to prevent interrupting firm service, Transporter shall have the right, but not the obligation, to take such remedial actions as it deems necessary. If Transporter takes these actions, it shall be made whole by the Balancing Party that failed to observe the Daily Limit for all costs that Transporter incurs.

5.3 Any penalty revenue collected by Transporter pursuant to this Section 5 will be credited to Non-offending LMS-PA Balancing Parties pursuant to Section 47.4 of the General Terms and Conditions of this FERC Gas Tariff.

6. IMBALANCE TRADING

LMS-PA Balancing Parties will be allowed to trade imbalances occurring during the month.
Transporter shall allow LMS-PA Balancing Parties to trade imbalances with other LMS-MA or
LMS-PA Balancing Parties within the same Operational Impact Area, as defined in Section 1
of the General Terms and Conditions, if the two Balancing Parties' imbalances are offsetting balances for the month, such that the net imbalance for each Balancing Party after the completion of the trade would be reduced to a quantity closer to zero. A Balancing Party may trade any imbalance with another Balancing Party, provided that the trade shall not result in a transportation path which crosses a Posted Point of Restriction, as defined in Section 1 of the General Terms and Conditions, for that month.

A Transportation Component for each imbalance to be traded will be calculated and applied pursuant to Section 8.4 of Rate Schedule LMS-MA.

Rate Schedule LMS-PA
Load Management (Market Area) Service (Continued)

Transporter will provide the ability to post and trade imbalances at any time during the gas flow month, and until the seventeenth Business Day after the end of the month during which the imbalances occurred. To facilitate the trading process, Transporter will, upon receipt of an LMS-PA Balancing Party's authorization, post an LMS-PA Balancing Party's imbalance quantity on its Web site. Authorizations to Post Imbalances that are received by Transporter by 11:45 a.m. will be effective by 8:00 a.m. the next Business Day (central clock time). An Authorization to Post Imbalances will remain in effect until cancelled by the LMS-PA Balancing Party. Imbalances previously authorized for posting will be posted as they become available, but no later than the ninth Business Day of the month; however, Transporter will not be required to post zero imbalances. The information posted will identify the LMS-PA Balancing Party, the contract number, the Operational Impact Area and the gas flow month applicable to the posted imbalance quantity. Transporter will provide to all Customers the ability to view, and upon request, download posted imbalance information.

Transporter shall enable the imbalance trading process by (i) receiving the Request for Imbalance Trade, (ii) receiving the Imbalance Trade Confirmation, (iii) sending the Imbalance Trade Notification to all affected parties, and (iv) reflecting the trade prior to or on the next monthly Shipper Imbalance or cash-out. When trading imbalances, the quantity to be traded must be specified. After receipt of an Imbalance Trade Confirmation, Transporter will send the Imbalance Trade Notification to the initiating trader and the confirming trader no later than noon (central clock time) on the next Business Day. Imbalance trades can only be withdrawn by the initiating trader and only prior to the confirming trader's confirmation of the trade. Imbalance trades are considered final when confirmed by the confirming trader and effectuated by Transporter. Transporter shall update the LMS-PA Balancing Party's imbalance data to reflect any final trades of imbalance quantities no later than 9:00 a.m. CT on the next Business Day after the trade is finalized.

Rate Schedule LMS-PA
Load Management (Pooling Area) Service (Continued)

7. MONTHLY IMBALANCES

7.1 The LMS-PA Balancing Party's monthly imbalance shall be the net total of daily variances from all points covered by the LMS-PA Balancing Party's OBA(s) adjusted for make-up quantities and imbalance trading transactions, with the exception that monthly imbalances created on that portion of Transporter's system not designated as an Incremental Lateral shall not be netted against monthly imbalances created on that portion of Transporter's system designated as an Incremental Lateral. Unless Transporter and the Balancing Party mutually agree to correct the imbalance in kind on a nondiscriminatory basis, each month Transporter and the Balancing Party shall "cash out" any imbalance between Scheduled Quantities and actual receipts. To determine the % monthly imbalance, Transporter shall divide the lesser of the monthly imbalance based on Operational Data or the actual monthly imbalance by the total scheduled quantities for all days of the month for all points covered by the Balancing Agreement, then multiply by 100.

7.2 (a) If the monthly imbalance is due to an excess of actual receipts relative to scheduled quantities, then the monthly imbalance shall be considered a "positive" imbalance and Balancing Party/Shipper shall sell to Transporter, and Transporter shall buy from the Balancing Party/Shipper, in accordance with the formula listed in Section 7.2(a) of this Rate Schedule. If the monthly imbalance is due to a deficiency in actual receipts relative to scheduled quantities, then the monthly imbalance shall be considered a "negative" imbalance and Transporter shall sell to the Balancing Party/Shipper, and Balancing Party/Shipper shall buy from Transporter, in accordance with the formula listed in Section 7.2(a)(ii).

The amounts due hereunder shall be paid in accordance with

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Rate Schedule LMS-PA
Load Management (Pooling Area) Service (Continued)

(i) The Balancing Party or Shipper (hereinafter referred to as the "Party") and Transporter shall "cash out" the actual monthly imbalance at the applicable price described below.

(A) For each month, the monthly "Low Price" or "LP" for each Market Area shall be established by taking the lowest weekly Market Area Region Price ("MARP") set forth in Tennessee's tariff pursuant to its Rate Schedule LMS-MA established for the Market Area applicable to the month.

(B) For each month, the monthly "High Price" or "HP" for each Market Area shall be established by taking the highest weekly MARP established for the Market Area applicable to the month.

(C) For each month, the monthly "Average Price" or "AP" for each Market Area shall be determined by taking the simple arithmetic average of the weekly MARP figures established for the Market Area applicable to the month.

In the event that these prices are no longer available or valid, Transporter will file to change its tariff and may, at its discretion, select a representative price in the interim period, subject to refund. In the event that a more representative posting is established, Transporter will file to change its tariff.

(ii) For all Parties whose % monthly imbalance is less than or equal to 5% (as

calculated according to Section 7.1 of this Rate Schedule) or whose monthly imbalance (either actual or operational) is less than or equal to 1,000 Dth, the following definitions shall apply to the formula under which the Parties' imbalance volumes are "cashed out":

- "Total Positive Imbalance" or "P" shall mean the absolute value ("abv") of the sum of all actual positive imbalances under Section 7.2(a) of this Rate Schedule LMS-PA.

- "Total Negative Imbalance" or "N" shall mean the abv of the sum of all actual negative imbalances under Section 7.2(a) of this Rate Schedule LMS-PA.

- "Net Pipeline Imbalance" or "I" shall mean the difference between the Total Positive Imbalances and the Total Negative Imbalances (I=P-N).

- Each of the imbalances (P, N, and I) shall be calculated once, no later than the first billing of cash outs after the close of the month.

The Parties' actual imbalance volumes shall be "cashed out" according to the following formula:

(A) If I > or = zero then:

- Price for negative imbalances and imbalances less than or equal to 1,000 Dth = AP

- Price for positive imbalances = $\frac{(abv(I) \times LP)}{P} + \frac{(N \times AP)}{P}$

(B) If I < zero then:

- Price for negative imbalances =
$$\frac{(abv(I) \times HP)}{N} + \frac{(P \times AP)}{N}$$

- Price for positive imbalances and imbalances less than or equal to 1,000 Dth = AP

(iii) For all Parties whose % monthly imbalance is greater than 5% (as calculated according to Section 7.1 of this Rate Schedule) and greater than 1,000 Dth, the actual negative imbalance volumes shall be "cashed out" according to the following formula:

Imbalance Tier	Price
0 - 5%	100% of HP
> 5% - 10%	115% of HP
> 10% - 15%	130% of HP
> 15% - 20%	140% of HP
> 20% -	150% of HP

For purposes of determining the tier at which an imbalance will be cashed out, the price will apply only to volumes within a tier. For example, if there is a 7% imbalance, volumes that make up the first 5% of the imbalance are priced at 100% of the HP. Volumes making up the remaining 2% of the imbalance are priced at 115% of the HP.

(iv) For all Parties whose % monthly imbalance is greater than 5% (as calculated according to Section 7.1 of this Rate Schedule) and greater than 1,000 Dth, the actual positive imbalance volumes shall be "cashed out" according to the following formula:

Imbalance Tier	Price
0 - 5%	100% of LP

>	5%	- 10%	85% of LP
>	10%	- 15%	70% of LP
>	15%	- 20%	60% of LP
>	20%	-	50% of LP

For purposes of determining the tier at which an imbalance will be cashed out, the price will apply only to volumes within a tier. For example, if there is a 7% imbalance, volumes that make up the first 5% of the imbalance are priced at 100% of the LP. Volumes making up the remaining 2% of the imbalance are priced at 85% of the LP.

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Load Management (Pooling Area) Service (Continued)

(b) Access to Information - Transporter will make available within one Business Day following the day of gas flow the best information it has concerning the total physical receipts. Transporter will also make available by electronic means the best information it has concerning the scheduled and allocated receipts at all receipt points. This information will include electronic gas measurement data at meters where such data is used for billing purposes (Electronic Data). Transporter will designate where Electronic Data is available. No later than 11:00 a.m. Central Time on the third full Business Day following the day of gas flow, the information regarding the scheduled and allocated receipts shall become "Operational Data" and Operators will be entitled to rely on the Operational Data for purposes of correcting imbalances during the month. Imbalances will be cashed out on the basis of actual

receipts and scheduled quantities; provided that the Imbalance Tier and tiered pricing associated with imbalances will be based upon the lesser of (1) the monthly operational imbalance reported by Transporter based upon the Operational Data or (2) the monthly imbalance based upon actual receipts and receipts at such locations; provided that, if the monthly imbalance reported by Transporter as of the 20th day of the calendar month based upon Electronic Data is subsequently adjusted during the remainder of the month and (1) such adjustments materially increase the level of the imbalance and (2) the Balancing Party did not have adequate time to correct the imbalance by adjusting nominations or receipts, then the Imbalance Tier associated with imbalances at points where Electronic Data is available will be based upon the lesser of (a) the imbalance reported as of the 20th day of the calendar month plus the imbalance reported for each subsequent day in the calendar month or (b) the monthly imbalance based upon actual receipts at such points to the extent the Balancing Party documents the situation. Notwithstanding anything to the contrary, if the Electronic Data at any point is inaccurate, through no fault of Transporter, but rather as the result of the action or inaction of third parties, then the Imbalance Tier associated with monthly imbalances occurring at such points will be based upon actual receipts.

Rate Schedule LMS-PA
Load Management (Pooling Area) Service (Continued)

(c) Limitation on Tiered Pricing - Any imbalances caused by an event of force majeure as set forth in Section 24 of the

General Terms and Conditions of Transporter's FERC Gas Tariff or caused by Transporter's actions (1) will not be included in the calculation of the total monthly imbalance for purposes of determining the appropriate cash-out level and (2) will be cashed out at the 0-5% tolerance level, as set forth in 7.2 above.

(d) Operational Integrity - Nothing in this Section 7 shall limit Transporter's right to take action as may be required to adjust receipts and deliveries of gas in order to alleviate conditions that threaten the integrity of its system.

8. DISPOSITION OF CHARGES

At the conclusion of each annual period, Transporter will determine the net cashout activity under its LMS Rate Schedules and Section 8 of Rate Schedule PAL. In the event that charges collected by Transporter under its cashout provisions exceed the actual cost of providing service under this Rate Schedule, Transporter shall credit such excess revenues to all eligible Balancing Parties. Credits shall be applied based on volumes transported during the past year. Any credits due hereunder shall be made within 45 days following approval by the Federal Energy Regulatory Commission of Transporter's report and refund plan concerning such credits. To the extent that the cashout activity in any annual period results in a negative balance, such balance will be carried forward and applied to the next annual determination of cashout activity. Within 150 days after each anniversary of the Implementation Date, Transporter will file a report and refund plan with the Commission.

9. GENERAL TERMS AND CONDITIONS

9.1 Shipper shall provide Transporter with such information as is needed to meet the requirements placed on Transporter by regulation, rule, and/or order by any duly authorized agency. Furthermore, any terms or conditions not specified in this Rate Schedule shall be determined consistent with the General Terms and Conditions of Transporter's FERC Gas Tariff, which are incorporated into this Rate Schedule.

9.2 In the event of a conflict between the provisions of this Rate Schedule and Transporter's General Terms and Conditions, the provisions of Transporter's General Terms and Conditions shall govern.

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