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June 2, 2009

VIA HAND DELIVERY

Eddie Roberson, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Re: Docket 07-00224
Docket to Evaluate Chattanooga Gas Company's Gas Purchases and Related Sharing Incentives

Dear Chairman Roberson:

Enclosed please find an original and four (4) copies of Chattanooga Gas Company's Response to the CAPD's Motion for Interlocutory Review. This Response has been filed electronically and emailed to parties of interest.

Please do not hesitate to contact me if you have any questions.

Sincerely yours,

J. W. Luna

Enclosure

cc: Kelly Cashman-Grams, Esq.
Shannon Pierce, Esq.
Craig Dowdy, Esq.
Cynthia Kinser, Esq.
Timothy Phillips, Esq.
Mary L. White, Esq.
T. Jay Warner, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

June 2, 2009

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

CHATTANOOGA GAS COMPANY'S RESPONSE
TO THE CAPD'S MOTION FOR INTERLOCUTORY REVIEW

Chattanooga Gas Company ("CGC" or "Company") files this response to the Consumer Advocate and Protection Division's ("CAPD") motion for interlocutory review of the Hearing Officer's decision concerning third round discovery disputes. The Hearing Officer has already considered both written and oral argument two times (once in April 2008 and again in May 2009) regarding the majority of this discovery dispute for which the CAPD is seeking review by the Tennessee Regulatory Authority ("TRA" or "Authority"). Both times the Hearing Officer has determined that the information being sought by the CAPD is not relevant to the issues in this docket.

The Company files this response in support of the Hearing Officer's well-reasoned decisions set forth in the April 29, 2008 Order Regarding First Round Discovery Disputes ("First Round Order") and in the May 21, 2009 Order on the Third Round Discovery Disputes ("Third Round Order"). The Company does not believe that oral argument is necessary as these matters have been thoroughly briefed and argued and

the TRA has copies of the parties' written filings, the transcripts of the status conferences, and the Hearing Officer's Orders upon which to make its review.[1]

PROCEDURAL HISTORY

In this docket, the CAPD has propounded on CGC not less than 226 discovery requests, including subparts and compound questions. See Third Round Order, at 45. During the CAPD's first round of discovery to CGC, CGC objected to producing the information requested in CAPD discovery request nos. 34, 49, 50, 51, and 77, which are some of the requests at issue in this current dispute. Through these requests, the CAPD is seeking copies of all of Sequent's asset management agreements with non-affiliated third parties, communications and information regarding CGC's past asset management agreements, and the operational balancing agreement between Sequent and East Tennessee Natural Gas ("ETNG") Pipeline. After argument at the April 24, 2008 status conference, the Hearing Officer determined that the information being sought was not relevant to this docket and denied the CAPD's first round motion to compel as to these requests. See First Round Order, at 9, 14, & 16.

The CAPD filed its testimony on May 30, 2008, and the Company filed its responsive testimony on July 30, 2008. During the CAPD's second round of discovery requests to CGC, the CAPD did not seek to compel any of the previously denied requests from the first round of discovery based on changed circumstances, nor did the CAPD seek interlocutory review of the Hearing Officer's April 29, 2008 Order regarding the

[1] The Hearing Officer has incorporated in the Third Round Order the following documents: (1) CGC's Responses and Objections to CAPD's First Round Discovery Requests, (2) the CAPD's First Round Motion to Compel, (3) the Transcript of the April 24, 2008 status conference regarding first round discovery disputes, (4) April 29, 2008 First Round Order, (5) CGC's Objections to Third Round Discovery Requests, (6) the CAPD's Third Round Motion to Compel, (7) CGC's Response to the Third Round Motion to Compel, and (8) the Transcript of the May 5, 2009 status conference regarding third round discovery dispute.

first round discovery disputes. Instead, the CAPD filed its rebuttal testimony on October 10, 2008.

After an amendment in the procedural schedule, CGC was allowed to file supplemental testimony to address the three new issues that Dr. Brown improperly raised for the first time in his rebuttal testimony. See Order on February 9, 2009 Status Conference (dated March 2, 2009), at 3-4 & 10. The CAPD was allowed to serve limited discovery requests regarding issues involving CGC's supplemental testimony during a third round of discovery (which actually is the fourth round of overall discovery). See id.; see also Transcript of Feb. 9, 2009 Status Conference, at 4-5. CGC objected to several of the CAPD's requests in the third round, including nos. 1 and 37, which are included in the present dispute. See CGC Objections to CAPD's Third Discovery Request (filed April 22, 2009), at 3-4 & 6. Through these requests, the CAPD is seeking a copy of the OBA between Sequent and ETNG and a narrative of the tariff-based RFP process.

On April 27, 2009, the CAPD filed a motion to compel regarding nos. 1 and 37 of the third round and renewed its request for discovery from Nos. 34, 49, 50, 51, and 77 of the first round even though the Hearing Officer had already determined that these requests were not relevant to the issues in this docket. CGC filed a response in opposition to the CAPD's third round motion to compel on April 30, 2009. At the May 5, 2009 status conference, the Hearing Officer heard the parties' arguments about these discovery disputes and found that there were no changed circumstances to overrule the First Round Order and that the information requested by the CAPD was not relevant to the issues in the present docket. See Third Round Order, at 12, 14-16, 22-23, & 33-34.

The Hearing Officer also determined that request no. 37 is cumulative, repetitive, and unduly burdensome. Id. at 46. Thus, the Hearing Officer denied the CAPD's motion to compel as to first round discovery request nos. 34, 49, 40, 51, and 77 and third round discovery request nos. 1 and 37. Id. at 47-48.

At the May 5, 2009 status conference, the CAPD asked for permission for interlocutory review, and the Hearing Officer replied that a finding would be made on the issue in the order that would be forthcoming. See Transcript of May 5, 2009 Status Conference, at 39. On May 19, 2009, the CAPD filed a motion for interlocutory review to the TRA prior to the Hearing Officer's issuance of a written order. On May 21, 2009, the Hearing Officer issued the Third Round Order and established a briefing schedule for interlocutory review of the Third Round Order.

In the Third Round Order, the Hearing Officer determined that the CAPD's May 19, 2009 motion for interlocutory review contained new arguments and facts that were not previously presented to the Hearing Officer and thus were improper for the TRA to consider. See Third Round Order, at 46-47. Pursuant to the briefing schedule established in the Third Round Order, CGC files this response in support of the Hearing Officer's well-reasoned decisions set forth in the Third Round Order and also in the First Round Order.

ARGUMENT

Pursuant to TRA Rule 1220-1-2-.06(6), a party may seek interlocutory review by the Authority of a Hearing Officer's decision.[2] Because this is a review of the Hearing

[2] As the CAPD waited over a year to raise new arguments concerning the first round discovery propounded on CGC on March 18, 2008 when the CAPD had ample opportunity to do so during the second round of discovery disputes, this renders these new arguments untimely and procedurally improper at this late stage of these proceedings. See Third Round Order, at 12.

Officer's decision, only the facts and arguments raised and considered by the Hearing Officer may be raised and considered by the TRA. Any new arguments that are raised before the TRA for the first time upon interlocutory review are untimely and must be considered waived. The TRA must disregard these arguments and base its decision on a review of the facts and arguments presented to the Hearing Officer which form the basis for the Hearing Officer's decision.

While the Tennessee Rules of Civil Procedure allow discovery on any matter not privileged and relevant to the subject matter of the pending action, the Rules also contemplate limitations and protections being afforded to a party when the requests are unreasonably cumulative or duplicative or are unduly burdensome, when the discovering party has had ample opportunity to discovery the information sought, and when the discovery is unduly burdensome or expensive taking into account among other factors the needs of the case and the issues at stake in the litigation. See Tenn. R. Civ. P. 26.02(1). The Rules give the trial court or initial decision maker discretion to decide discovery disputes. See Duncan v. Duncan, 789 S.W.2d 557, 560 (Tenn. Ct. App. 1990). The Tennessee Court of Appeals has instructed that a decision maker should "balance the competing interests and hardships involved when asked to limit discovery" and if the decision maker 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." Id. at 561 (citations omitted).

Request No. 34 of the CAPD's First Round of Discovery Dated March 18, 2008

During the first round of discovery, the CAPD sought to obtain copies of all asset management agreements between Sequent and other entities beyond CGC. See First

Round Discovery Request No. 34 (filed March 18, 2008). CGC argued that Sequent's asset management contracts with private customers, municipal utilities, and public utilities other than CGC are not relevant to this docket regarding CGC's regulated assets. See First Round Order, at 8. Upon hearing the arguments, the Hearing Officer determined that "[w]hether 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." See id. at 9. The Hearing Officer denied the CAPD's request to the extent that it required production of asset management contracts between Sequent and entities other than CGC or AGL affiliates. See id.

In its third round motion to compel and arguments presented at the May 5, 2009 status conference, the CAPD in essence tried to create an argument for changed circumstances based on the pre-filed testimony of Mr. Sherwood.[3] The CAPD argued that Mr. Sherwood testified about Sequent's asset management agreements with non-affiliated third parties. See Transcript of May 5, 2009 Status Conference, at 11. However, when asked by the Hearing Officer to cite to those references in Mr. Sherwood's *supplemental* testimony filed on April 1, 2009 (which was the only reason for the CAPD's third round of discovery), the CAPD cited to page 17, line 9 through 13, of Mr. Sherwood's *responsive* testimony filed on July 30, 2008.[4] Id. at 14. The CAPD

[3] The Third Round Order presents a more detailed summary of the written and oral arguments considered by the Hearing Officer concerning the third round motion to compel and discovery disputes. See Third Round Order, at 7-11. CGC is merely providing a brief summary herein and incorporates the detail and citations contained in the Third Round Order at pages 7-11 herein.

[4] The responsive (original) testimony of Tim Sherwood filed on July 30, 2008 provides on page 17, line 9 through 13 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."

claimed that this testimony makes all of Sequent's asset management agreements relevant to this docket. Id. The CAPD further argued that Sequent's asset management agreements with non-affiliated third parties are necessary to compare to CGC's asset management agreement to determine whether the *negotiations* between Sequent and CGC result in asset management agreements that are fair to CGC's customers.[5] Id. at 9, 12-13.

CGC responded in its filings and at the May 5, 2009 status conference that Mr. Sherwood has only testified about CGC's regulated assets and the asset management agreement that deals with those regulated assets.[6] Id. at 9-10. CGC commented that the cited portion of Mr. Sherwood's responsive testimony does not discuss Sequent's asset management agreements with third parties, but only refers to CGC's asset management agreement. Id. at 15. CGC also relied upon the arguments set forth at the April 24, 2008 status conference regarding the non-relevance of Sequent's third party asset management agreements to the issues in this docket and did not reiterate those arguments again as instructed by the Hearing Officer. Id. at 13-14.

After presentation of the arguments on May 5, 2009, the Hearing Officer once again denied the CAPD's renewed motion to compel regarding Sequent's asset management agreements with non-affiliated third parties. First, the Hearing Officer acknowledged that the CAPD's assertions about comparing Sequent's asset management contracts with third party entities to CGC's asset management agreement to determine whether CGC's customers are being treated fairly were argued before the Hearing Officer

[5] And as discussed further in this response, CGC's asset management agreement was not the subject of negotiations but rather of a TRA-approved RFP process.

[6] Sequent's asset management agreements with third parties that are being sought by the CAPD are not in CGC's possession, custody, or control.

at the April 24, 2008 status conference and were considered by the Hearing Officer in the First Round Order. See Third Round Order, at 12.

Second, the Hearing Officer determined that the CAPD's new assertion that the original testimony of Mr. Sherwood referenced or alluded to Sequent's asset management agreements with third parties was untimely and procedurally improper in that the CAPD waited more than a year after the Hearing Officer's determination that the information was not relevant to raise these arguments, despite having the opportunity to raise them in the CAPD's second round motion to compel. Id.

Third, the Hearing Officer found no substantive merit to the CAPD's new assertions regarding Mr. Sherwood's testimony and stated:

> 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. 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. 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 inappropriate. **At no point does the testimony make any claims about the terms of third party agreements, draw any comparisons between CGC's asset management agreements 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.
>
> . . .
>
> 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 under consideration in this docket, and does not appear reasonably calculated to lead to the discovery of admissible evidence.**

Third Round Order, at 13-15 (footnotes omitted) (emphasis added).

Finally, the Hearing Officer determined that the CAPD's absolute reliance on BellSouth Advertising and Publishing Corporation ("BAPCO") v. Tennessee Regulatory Authority, 79 S.W.3d 506 (Tenn. 2002), for its assertion that the TRA has jurisdiction over Sequent as an affiliate is erroneous and misplaced because "the BellSouth decision does not state unequivocally that the TRA has jurisdiction over the affiliates of a public utility." Third Round Order, at 15. The Tennessee Supreme Court limited its finding that the TRA had jurisdiction over BAPCO to the particular facts of the proceedings in that case. Id.

In its May 19, 2009 motion for interlocutory review, the CAPD argues that it needs copies of all of Sequent's asset management agreements (which in essence is requesting copies of Sequent's entire asset management business) to determine whether Sequent *negotiated* with CGC in good faith compared to how Sequent *negotiates* in arms length transactions with non-affiliated third parties. See CAPD Motion for Interlocutory Review, at 4-5. However, this is not relevant to the issues in this docket, which include

whether the *current bidding process* is fair and reasonable. See Exhibit A to March 17, 2008 Order Setting Issues, Issue #2. Sequent did not negotiate with CGC. As ordered by the TRA, CGC issued a request for proposals ("RFP") and allowed the asset management industry to submit bids based on the RFP. As part of the RFP pursuant to its tariff, CGC set forth criteria upon which to evaluate the bids and determine the winner. The bidding process and the selection of Sequent as the asset manager was considered and approved by the TRA in Docket 08-00012. The CAPD intervened in that docket and was given the opportunity to seek discovery and present written and oral argument about the RFP process and the resulting asset management agreement. Any asset management agreement resulting from a negotiation between two willing parties in an arm's length transaction would not be relevant to CGC's agreement that resulted from an RFP process without negotiation. There may be parties that argue that one process is better than the other, but it would be difficult to argue that different processes, such as an RFP or negotiations, will not in most cases lead to different asset management agreements. Even more than this, the type of assets, the amount of assets, the geographic location of the assets, and the conditions or limitations that the contracting party places on the use of the assets will have an effect on what an asset manager would agree to pay for the use of those assets.

For the first time in the motion for interlocutory review, the CAPD asserts that it needs a copy of the alleged asset management agreement that was negotiated between the Tennessee LDC, Piedmont Natural Gas, and Sequent. Id. at 5. As this was never argued before the Hearing Officer, this is an improper argument and should not be considered by the TRA. However, if the TRA should go beyond the Third Round Order and consider

new arguments, CGC was not even aware of the alleged asset management agreement between Piedmont Natural Gas (f/k/a Nashville Gas) and Sequent prior to the CAPD's motion for interlocutory review. Even if such an agreement exists, it would not be relevant to this docket because it does not provide any insight regarding the RFP process that CGC used to award, with the TRA's approval, its asset management agreement. Further, the alleged agreement is not in CGC's possession, custody, control. The alleged asset management agreement has no bearing on whether CGC's current bidding process is fair and reasonable, which is the issue in this docket.

As CGC has argued before the Hearing Officer, Sequent is not a regulated entity. While Sequent has an asset management agreement with CGC that covers CGC's assets, only those assets are regulated by the TRA and CGC is answerable to the TRA for the handling of those assets by Sequent.[7] The rest of Sequent's asset management business pertains to assets and companies that are not regulated by the TRA. In fact, much of its asset management business involves contracts with private industrial customers, municipal utilities, and non-investor owned public utilities. A number of its contracts result from arms length negotiations, not RFPs. These contracts deal with different types of assets, different amounts of assets, different geographic location of assets, and different limitations and conditions that are placed on the use of the assets by the contracting party. With so many differences, they are not subject to the overly simplified comparison that the CAPD wishes to make. It is not enough to take a sharing percentage from an asset management agreement and argue that it would be better for CGC

[7] Contrary to the CAPD's assertions in the motion for interlocutory review, CGC's attorneys do not represent Sequent. Sequent is not a party to these proceedings. CGC, as the regulated entity responsible for its regulated assets, has provided all relevant information required in this docket that pertains to CGC's regulated assets. CGC's asset management agreement is an agency agreement meaning that CGC retains control over the regulated assets.

ratepayers without conducting an assessment and evaluation of the type and amount of assets that are being managed, the geographic location of the assets, the limitations and conditions that the contracting party has placed on the use of the assets, and the amount of value that is being returned by the asset manager to the customers. A percentage is meaningless without an understanding and evaluation of the value being generated to return to the customers. An expert in the field of capacity planning and asset management would not use the type of comparison that the CAPD is seeking to make as a basis for expert opinion.

While the CAPD relies on the BellSouth case as the absolute justification for the TRA to regulate Sequent's entire business as an affiliate of CGC (id. at 6), a close review of the case shows that this is not the holding of the case. The Tennessee Supreme Court clearly stated that its "conclusion is based upon the particular facts of these related proceedings and upon legal precedent governing public utilities and their non-utility subsidiaries and affiliates." BAPCO, 79 S.W.3d, at 515. In the case, BellSouth, the regulated entity, was required by law to provide a white pages directory in its market area. Id. at 508. BellSouth contracted with BAPCO, an affiliated company within BellSouth's parent corporation, and gave BAPCO *exclusive control* over BellSouth's duties regarding the directory. Id. at 508 & 515. Upon changes in Tennessee law which abolished the monopolistic control of local telephone services, the TRA required BellSouth to continue its duty regarding the white pages and determined that competing local exchange telephone companies should be included on the cover of the directory. Id. at 508. BellSouth required these competing local companies to negotiate directly with BAPCO, who had exclusive control over the directory. Id. at 515. The Court found that

the TRA had jurisdiction over BAPCO for purposes of implementing BellSouth's duty. Id. at 516-17. Otherwise, BellSouth could escape the legal responsibilities placed upon it by the TRA. Id.

This case is factually distinguishable from the current docket. CGC has not turned over its regulated assets to Sequent. Instead, CGC's asset management agreement is an agency agreement. CGC makes all of the decisions regarding what capacity is available for Sequent to use for non-jurisdictional transactions on a given day. CGC is responsible to the TRA for all legal requirements involving CGC's regulated assets. Further, the BellSouth case also limits the TRA's jurisdiction over BAPCO for the limited purpose of implementing BellSouth's legal duty that it has turned over to BAPCO. CGC has not turned over any of its duties regarding its regulated assets; CGC has merely entered into an agency agreement for the management of idle capacity assets to create value to return to CGC's customers.

Further, Sequent's asset management agreements with third parties contain confidentiality provisions. An order to produce these agreements would place Sequent in violation of these provisions because the third parties to the agreements are not subject to this proceeding or the regulation of the TRA. A private industry would not expect to have its asset management agreement with an unregulated business become the subject of a proceeding regarding the regulated assets of another one of Sequent's clients. These unregulated third parties have the right to have their agreements and business practices maintained confidentially. No protective order can cure the chilling effect that such a production will have on the asset management industry in Tennessee. Tennessee ratepayers will suffer because asset managers will likely not wish to open their entire

business up to a fishing expedition by the CAPD merely by bidding on, and being successful bidders to, RFPs of LDCs in Tennessee, thus harming CGC's ratepayers. It would also have a chilling effect on Sequent's ability to obtain business from third parties if third parties believe that their contracts will be turned over to and reviewed by the CAPD in similar circumstances.

For all of the foregoing reasons, Sequent's asset management contracts with non-affiliated third parties continue not to be relevant to issues in this docket. Thus, the Hearing Officer's decision to deny the CAPD's request for this information is correct, and the CAPD's third round motion to compel regarding request no. 34 should be denied.

Request Nos. 49, 50, 51 of the CAPD's First Round of Discovery Dated March 18, 2008

In first round discovery request nos. 49-51, the CAPD seeks certain information about the selection of Sequent as the asset manager for the current asset management agreement that commenced on April 1, 2008, and for past asset management arrangements. The CAPD has not requested copies of past asset management agreements in request nos. 49-51. CGC answered these discovery requests regarding the current asset management agreement but objected to providing information about previous asset management arrangements. See First Round Order, at 13. The CAPD did not dispute CGC's responses to these discovery requests regarding the current asset management agreement.

The Hearing Officer determined that the issues set forth in this docket involve the current bidding process, the current sharing mechanism, and the current asset management agreement. See id.; see also Exhibit A to March 17, 2008 Order, Issue # 1, 2, and 10. The Hearing Officer found that information about prior asset management

agreements between Sequent and CGC is not relevant to the issues in this docket because prior agreements were not the result of the RFP process nor were the affiliate guidelines in place at the time. See First Round Order, at 14.

In the third round motion to compel, the CAPD again sought discovery of information regarding the selection of past asset managers and communications concerning past agreements. In its written motion and upon oral argument at the May 5, 2009 status conference, the CAPD argued that the information is needed for the same reasons that discovery request no. 34 is needed. See Third Round Order, at 19. In essence, the CAPD is seeking to conduct an historical comparison of CGC's asset management agreements. CGC continued to rely on the arguments made during the April 24, 2008 status conference regarding the first round discovery disputes and reiterated that the current docket only deals with issues concerning CGC's current RFP process and the current asset management agreement. Id. at 20.

After presentation of the arguments on May 5, 2009, the Hearing Officer once again determined that information concerning CGC's past asset management agreements was not relevant to the current docket. In the Third Round Order, the Hearing Officer found that the CAPD is asking to conduct an historical comparison of CGC's asset management agreements but has not requested copies of prior asset management agreements. Id. at 21. Instead, the CAPD is seeking information and communications about the selection of past asset managers. However, the issues in the present docket pertain to the current processes and procedures that currently are in place and whether they are acceptable. Id. at 22. The Hearing Officer states that "[t]his docket is not a review of past practices; rather it is an evaluation of the existing procedures and

mechanisms with a view to their future progression." Id. The Hearing Officer found that, since the prior asset management agreements were "not a result of, nor developed using, the processes and procedures under scrutiny in this docket, . . . 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. Id. Further, the communications concerning the prior agreements are not relevant to the issues set forth in this docket. Id.

In its May 19, 2009 motion for interlocutory review, the CAPD for the first time cites to new portions of Mr. Sherwood's original responsive testimony to support its argument that the process of selecting prior asset managers is relevant. See CAPD's Motion for Interlocutory Review, at 8-10. As this was never argued before the Hearing Officer, this is an improper argument and should not be considered by the TRA.

Alternatively, if the TRA should consider the CAPD's new argument, Mr. Sherwood's original testimony does not detail the selection process and communications process for past asset management agreements. Instead, Mr. Sherwood was offering testimony regarding the 50/50 sharing arrangement in the current asset management agreement. The CAPD witness Terry Bucker filed testimony on May 30, 2008 that addressed the 50/50 sharing arrangement and its origination. CGC filed the original responsive testimony of Tim Sherwood to respond to and address the rationale for the current 50/50 sharing arrangement. Mr. Sherwood does not address this issue in his supplemental testimony that was filed to address the new issues that Dr. Brown improperly raised in his rebuttal. The sole purpose for the CAPD's third round of discovery is to allow the CAPD to seek information about Mr. Sherwood's supplemental

testimony that could possibly be used for Dr. Brown's sur-rebuttal testimony to the extent rebuttal testimony is necessary. As Mr. Sherwood did not address the 50/50 sharing in his supplemental testimony, it would be improper for Dr. Brown to include any discussion in his sur-rebuttal testimony.

Therefore, the Hearing Officer's denial of the CAPD's request for information concerning CGC's past asset management agreements is correct, and the CAPD's third round motion to compel regarding Request Nos. 49-51 should be denied.

Request No. 77 of the CAPD's First Round of Discovery Dated March 18, 2008 And Request No. 1 of the CAPD's Third Round of Discovery Dated April 15, 2009

In the CAPD's first set of discovery requests, the CAPD requested production of the operating balancing agreement ("OBA") between Sequent and East Tennessee Natural Gas ("ETNG") Pipeline. See First Round Discovery Request No. 77 (filed on March 18, 2008). CGC argued that Sequent's OBA with ETNG does not involve CGC's regulated assets and is not relevant to this docket. The Hearing Officer denied the CAPD's request to obtain a copy of the OBA between Sequent and ETNG. See First Round Order, at 15-16.

In the CAPD's third set of discovery requests, the CAPD again requested production of the OBA between Sequent and ETNG. See Third Round Discovery Request No. 1 (filed on April 15, 2009). CGC continued to object to the CAPD's request for this document.

In its third round motion to compel, the CAPD moved to compel production of the OBA between Sequent and ETNG by claiming that there is conflict between CGC's response to second discovery request no. 10.b. and portions of Mr. Sherwood's supplemental testimony (page 17, line 7, through page 18, line 2). The CAPD sought

production of Sequent's OBA through first round request no. 77 and also through third round request no. 1.

In its response and at the May 5, 2009 status conference, CGC explained that, contrary to the CAPD's position, there was no conflict between the Company's discovery response and testimony as the two involve separate asset management and gas supply concepts – (1) creating value through non-jurisdictional sales, and (2) CGC's OBA. See CGC Response to Third Round motion to Compel (filed April 30, 2009), at 4-5; see also Transcript of May 5, 2009 Status Conference, at 21-22.

In second round request no. 10.b., the CAPD asked CGC to admit that customers did not receive *value* for Sequent's use of CGC assets to make non-jurisdictional sale of gas via the Transco Pipeline. The request required CGC to explain fully any denial. CGC denied this request and explained hypothetically that, when Sequent uses fallow CGC assets to make a delivered sale into Transco at the ETNG/Transco Pipeline interconnect, the value would be captured for CGC and its customers. Contrary to the CAPD's position in its motion to compel, the Company was not admitting that Sequent uses CGC's fallow assets to make a non-jurisdictional sale of gas via the Transco Pipeline. In fact, the Company explained to the CAPD in its response to request no. 10.b. that no direct non-jurisdictional sales of gas via the Transco Pipeline would occur, which is consistent with Mr. Sherwood's testimony. The Company's response was simply made to clarify 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 through the mechanism approved by the TRA. See Transcript of May 5, 2009 Status Conference, at 23-24. This concept has nothing to do with an OBA.

In Mr. Sherwood's supplemental testimony, he clarifies Dr. Brown's inaccuracies and misunderstandings regarding the operation of CGC's OBA with ETNG. Mr. Sherwood does not discuss Sequent's OBA with ETNG, which is not relevant to the issues in the docket. Further, CGC does not have possession, custody, or control of Sequent's OBA since it does not cover CGC's regulated assets. Contrary to the CAPD's assertions, an OBA does not support whether the right gas supply has been ordered or whether the right amount of capacity or storage has been arranged. See id. at 24. An expertise in gas supply would suggest an understanding of OBAs. See id. at 26. Rather, in determining the right amount of capacity, the expert looks to the demand on the system on design days. See id.

After considering the written filings and the arguments made at the May 5, 2009 status conference, the Hearing Officer determined that the discovery response and cited testimony 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" 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." **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.**

Third Round Order, at 32 (footnotes omitted) (emphasis added). The Hearing Officer also concluded that the circumstances in the case did not reasonably justify the compelled production of sensitive business information from Sequent, the non-regulated affiliate of CGC. See id. at 33. The Hearing Officer found that there was no justification for overturning the First Round Order regarding request no. 77 and further concluded that third round request no. 1 should be likewise denied. Id. at 34.

In its motion for interlocutory review, the CAPD argues that it needs a copy of Sequent's OBA to determine whether CGC is purchasing appropriate quantities of natural gas. See CAPD's Motion for Interlocutory Review, at 15. The CAPD also argued that Sequent's being an affiliate of CGC makes Sequent's OBA discoverable even if it is deemed to be confidential. Id.

CGC continues to rely upon the arguments set forth in its filings and oral argument concerning the first round discovery dispute concerning request no. 77 and in its filings and oral argument concerning the third round discovery dispute concerning request no. 1. Sequent's OBA does not involve CGC's regulated assets. Experts in gas supply and capacity planning understand that an OBA has no relevance in determining the appropriate capacity for a public utility. To the extent that Sequent is able to create value for CGC's customers by combining sales of CGC's assets with other assets owned or managed by Sequent, that is the very essence of asset management and creating value with idle capacity assets for the benefit of the customer's of the utility. CGC also

believes for the reasons stated in pages 12-13 herein that the affiliate status of Sequent does not justify the production of sensitive business information not related to CGC's regulated assets subject to the jurisdiction of the TRA.

For the foregoing reasons, the Hearing Officer's determination that the OBA between Sequent and ETNG is not relevant to the issues in the current docket as set forth in the First Round Order and the Third Round Order should be upheld upon review and the CAPD's third round motion to compel regarding first round request no. 77 and third round request no. 1 must be denied.

Request No. 37 of the CAPD's Third Round of Discovery Dated April 15, 2009

In third round discovery request no. 37, the CAPD is asking for a narrative description of the tariff-based RFP process that CGC used to select its current asset manager and asset management agreement.

CGC objected to the information requested by the CAPD as being unduly burdensome, unreasonably cumulative, and duplicative. CGC provided the requested information regarding the RFP process and the selection of CGC's current asset manager to the CAPD in Docket 08-00012 and in its response to first round discovery requests no. 49, 50, 51, 53, and 54. As the bidding process and selection process concluded in January 2008 and the TRA reviewed the process for selecting the current asset management agreement that commenced on April 1, 2008, there have been no changed circumstances or new information. Thus, requiring CGC to re-produce this information is unduly burdensome, unreasonably cumulative, and duplicative.

After presentation of the arguments on May 5, 2009, the Hearing Officer found in the Third Round Order that request no. 37 falls outside of the scope of the additional third

round of discovery which is limited for the purpose of addressing the three new issues that Dr. Brown raised in his rebuttal testimony (dated October 10, 2008). See Third Round Order, at 42. The Hearing Officer determined that the substance of the CAPD's request was "squarely encompassed 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." Id. at 42-43. In that docket, "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." Id. at 43. Further, the Hearing Officer noted that CGC has provided responses timely to discovery requests nos. 49, 50, 51, 53, and 54, which concern the RFP process and the selection of CGC's asset manager. Id. at 44. The Hearing Officer found that discovery is to facilitate the exchange of information and to obtain knowledge of relevant facts but is not intended to harass or abuse an opponent. Id. at 45. The Hearing Officer found that discovery request no. 37 was cumulative, repetitive, and unduly burdensome. Id. at 46.

In its motion for interlocutory review, the CAPD maintains that, while it may have information in its possession responsive to this request, it does not have a narrative explanation of the tariff-based RFP process. See CAPD's Motion for Interlocutory Review, at 17. The CAPD is asserting for the first time that, because Mr. Sherwood made a factual statement in his supplemental testimony that Sequent was selected as the asset manager through the tariff-based RFP process, the request for comprehensive information about the RFP process in the form of a narrative is necessary and appropriate at this late stage of the proceeding.

The CAPD's new arguments should not be considered for the first time by the TRA; thus, the TRA's review should be limited to the Hearing Officer's Third Round Order. The purpose of discovery is to provide for the exchange of information. The CAPD has all of the information about the tariff-based RFP process. In fact, the CAPD has had the information since January 2008 when the information was provided by CGC in Docket 08-00012. The Tennessee Rules of Civil Procedure specifically allow for discovery to be limited when it is unreasonably cumulative and duplicative, when the party has had ample opportunity by discovery in the action to obtain the information sought, and when the discovery is unduly burdensome or expensive when taking into account the needs of the case. See Tenn. R. Civ. P. 26.02(1).

The CAPD's request is nothing more than an attempt to have CGC and its attorneys do work for the CAPD and summarize the information that is in the CAPD's possession, custody, and control. At this late stage of this case, when the CAPD has already had ample opportunity and has already received information previously requested about the RFP process, this cumulative discovery request should be denied.

The Hearing Officer's determination to deny the CAPD's third round motion to compel as to request no. 37 is correct, and the TRA should uphold the hearing Officer's denial in the Third Round Order.

CONCLUSION

For all of the foregoing reasons, the Hearing Officer's determination regarding the CAPD's current discovery dispute in the Third Round Order and First Round Order are correct and should be upheld. Thus, the CAPD's motion must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June 2009, a true and correct copy of the foregoing was served on the persons below by electronic mail:

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