

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 17, 2009

IN RE:

DOCKET TO EVALUATE CHATTANOOGA GAS  
COMPANY'S GAS PURCHASES AND RELATED  
SHARING INCENTIVES

DOCKET NO.  
07-00224

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ORDER AFFIRMING HEARING OFFICER'S ORDER  
ON THIRD ROUND DISCOVERY DISPUTES

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This matter came before Chairman Eddie Roberson, Director Sara Kyle, and Director Mary W. Freeman of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at the regularly scheduled Authority Conference held on June 15, 2009, for consideration of the *Consumer Advocate's Motion for Interlocutory Review* ("Motion for Interlocutory Review") filed by the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") on May 19, 2009.

**RELEVANT PROCEDURAL BACKGROUND**

At the December 8, 2008 Status Conference, the parties in this docket, the Consumer Advocate and Chattanooga Gas Company ("CGC"), requested the December 15, 2008 hearing be canceled to allow the parties more time to negotiate as they believed a settlement was impending.<sup>1</sup> On December 18, 2008, CGC notified the TRA that settlement negotiations had

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<sup>1</sup> Several preliminary motions were filed in anticipation of a December 8, 2008 pre-hearing conference and a December 15, 2008 hearing, including 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 at 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, 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.

taken an unproductive turn. In an emailed response sent on December 18, 2008, and filed in the docket on December 19, 2008, the Consumer Advocate concurred with CGC's recommendation to set the pending motions for hearing. On January 22, 2009, a *Notice of Status Conference* setting a status conference on January 28, 2009 was issued by the Hearing Officer. On January 27, 2009, the Hearing Officer issued a *Notice of Rescheduling of Status Conference* resetting the January 28, 2009 Status Conference for February 9, 2009.<sup>2</sup>

At the Status Conference held on February 9, 2009, the parties proposed a new procedural schedule that included a third round of discovery for the Consumer Advocate which was granted by the Hearing Officer.<sup>3</sup> The Consumer Advocate filed the *Third Discovery Requests of the Consumer Advocate* ("*Third Discovery Requests*") on April 15, 2009. Pursuant to the *Third Amended Procedural Schedule*,<sup>4</sup> CGC filed its *Objections to Third Discovery Requests* with the Authority on April 22, 2009. In the *Consumer Advocate's Third Round Motion to Compel* ("*Third Round Motion to Compel*") filed on April 27, 2009, the Consumer Advocate requested that the Hearing Officer compel 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*"),<sup>5</sup> as well as discovery requests propounded in the *Third Discovery Requests*.

During the May 5, 2009 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 requests

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<sup>2</sup> See *Order on February 9, 2009 Status Conference* (March 2, 2009).

<sup>3</sup> *Id.*, pp. 9-12.

<sup>4</sup> *Third Amended Procedural Schedule*, attached as Exhibit B to the *Order on February 9, 2009 Status Conference* (March 2, 2009).

<sup>5</sup> The Consumer Advocate did not seek reconsideration or an appeal of the decisions rendered by the Hearing Officer in the *Order re First Round Discovery Disputes* ("*First Round Order*") which was filed on April 29, 2008. All of the first round discovery issues raised by the Consumer Advocate in the *Third Round Motion to Compel* had been previously raised in the original *Consumer Advocate's Motion to Compel* and denied by the Hearing Officer in the *First Round Order*.

numbered 2, 17, 21, and 23, from the third round of discovery. Thus, the discovery requests which remained in dispute were: 34, 49, 50, 51, and 77 from the first round of discovery and discovery requests 1, 35, and 37 from the third round of discovery. After hearing arguments of counsel, the Hearing Officer orally ruled that the remaining disputed discovery requests were not relevant to the case. On May 19, 2009, the *Consumer Advocate's Motion for Interlocutory Review* ("Motion for Interlocutory Review") was filed. The *Order on Third Round Discovery Disputes* memorializing the Hearing Officer's decision rendered on May 5, 2009 was filed on May 21, 2009. On May 26, 2009, the *Consumer Advocate's Notice of Intent Not to Supplement* was filed, and on June 2, 2009, *Chattanooga Gas Company's Response To The CAPD's Motion For Interlocutory Review* ("CGC Response") was filed.

#### **THE DISPUTED DISCOVERY REQUESTS – POSITIONS OF THE PARTIES**

*Note: The discovery requests are grouped together in the same manner as the arguments presented by the parties in their pleadings.*

##### **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.<sup>6</sup>

##### **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.<sup>7</sup>

##### **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.<sup>8</sup>

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<sup>6</sup> *First Discovery Requests*, p. 14 (March 18, 2008).

<sup>7</sup> *First Discovery Requests*, p. 18 (March 18, 2008).

<sup>8</sup> *First Discovery Requests*, p. 18 (March 18, 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.<sup>9</sup>

Consumer Advocate: In its *Third Round Motion to Compel*, the Consumer Advocate consolidated its arguments on each of the first round discovery requests it was raising anew and asserted that its request to compel asset management contracts executed between Sequent and non-CGC affiliated third parties 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.”<sup>10</sup> 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.”<sup>11</sup> The Consumer Advocate additionally asserted that pursuant to the Tennessee Supreme Court’s ruling in *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority, et al.* (“BAPCO”)<sup>12</sup> 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.”<sup>13</sup> Also, the Consumer Advocate relied on BAPCO in its *Motion for Interlocutory Review* to make an argument for the first time for discovery of a specific asset management agreement.<sup>14</sup>

CGC: CGC asserts that the Consumer Advocate’s renewed request to compel asset management agreements executed between Sequent and private customers, municipal utilities

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<sup>9</sup> *First Discovery Requests*, p. 18 (March 18, 2008).

<sup>10</sup> *Third Round Motion to Compel*, p.4 (April 27, 2009).

<sup>11</sup> *Id.*

<sup>12</sup> 79 S.W.3d 506 (2002).

<sup>13</sup> *Order on Third Round Discovery Disputes*, p. (May 21, 2009).

<sup>14</sup> *Motion for Interlocutory Review*, p. 5.

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.<sup>15</sup> 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. 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.<sup>16</sup> Finally, CGC argues that the Consumer Advocate's assertion that it needs a copy of the "alleged asset management agreement" between Piedmont and Sequent is improperly argued as this issue was never raised before the Hearing Officer.<sup>17</sup>

CGC also 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.<sup>18</sup>

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<sup>15</sup> *CGC Response*, pp. 2-3 (April 30, 2009).

<sup>16</sup> *Id.*, p. 15.

<sup>17</sup> *Id.*, p. 10.

<sup>18</sup> *Id.*, pp. 14-16.

*Because the Consumer Advocate addressed first round discovery request No. 77 together with third round discovery request No. 1 in its Third Round Motion to Compel and for the sake of clarity, the positions of the parties on these requests are consolidated below.*

**Question 77:**

[P]rovide 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.

**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.<sup>19</sup>

Consumer Advocate: 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"), CGC has provided inconsistent or contradictory statements that now require the production of the previously-denied OBA.<sup>20</sup> 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."<sup>21</sup>

The Consumer Advocate also 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,

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<sup>19</sup> *Third Discovery Requests*, p. 5 (April 15, 2009).

<sup>20</sup> *Third Round Motion to Compel*, pp. 5-6 (April 27, 2009).

<sup>21</sup> *Id.*, pp. 5-6.

custody or control' of CGC, or any other affiliated corporations, including Sequent, see *Order Granting in Part and Denying in Part Consumer Advocate's Motion to Compel*, p. 9, (September 12, 2008).<sup>22</sup> 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,"<sup>23</sup> and expresses skepticism concerning CGC's ability to obtain the OBA at issue.<sup>24</sup>

CGC: 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,"<sup>25</sup> but states that it will nevertheless attempt to respond to the request without waiving its objection.<sup>26</sup> 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.

**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.<sup>27</sup>

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<sup>22</sup> *Third Round Motion to Compel*, p. 8 (April 27, 2009).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Response to Third Round Motion to Compel*, p. 6 (April 30, 2009).

<sup>26</sup> *Id.*, pp. 5-6.

<sup>27</sup> *Third Discovery Requests*, p. 14 (April 15, 2009).

Consumer Advocate: 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-based RFP process utilized by CGC.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

CGC: 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

Finally, CGC states, "[a]s 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

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<sup>28</sup> *Third Round Motion to Compel*, p. 10 (April 27, 2009).

<sup>29</sup> *Id.*, pp. 10-11.

<sup>30</sup> *Id.*,

<sup>31</sup> *Response to Third Round Motion to Compel*, p. 8 (April 30, 2009).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, p. 8-9.



manager and approved the current asset management agreement that commenced on April 1, 2008, there have been no changed circumstances or new information.”<sup>34</sup> The CGC contends that requiring CGC to re-produce this information is unduly burdensome, unreasonably cumulative and duplicative and the Consumer Advocate’s request should be denied.<sup>35</sup>

### **FINDINGS AND CONCLUSIONS**

The panel considered the *Motion for Interlocutory Review* at its regularly scheduled Authority Conference held on June 15, 2009. After considering argument of counsel and the entire record, the panel made the following findings and conclusions.

As a preliminary matter to ruling, the panel noted that its decision neither relied on nor should be construed as rendering an opinion on any precedent contained in *BAPCO*. Thereafter the panel ruled as follows:

1. To the extent that any facts or arguments have been raised for the first time in the *Motion for Interlocutory Appeal* and were not presented to the Hearing Officer, the panel found that those facts and arguments were improper and should not be considered.

2. In regard to the first round discovery requests Nos. 34, 49, 50, 51, and 77, the panel noted that the Hearing Officer allowed the Consumer Advocate - during the third round of discovery and over a year after her ruling initially denying those requests - to revive its motion to compel responses based on a purported change of circumstances. After reviewing the testimony of the Company’s witness, Mr. Sherwood, and considering the arguments made by the parties, the panel voted unanimously to uphold the Hearing Officer’s conclusions and adopted her reasoning – except in regard to any reliance placed on *BAPCO*.

3. As to the third round discovery requests 1 and 37, the panel voted unanimously to uphold the Hearing Officer’s conclusions and adopt her reasoning. Thereafter, the panel voted to

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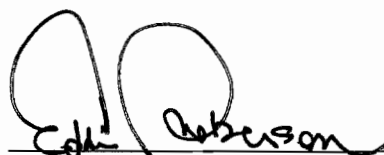
<sup>34</sup> *Id.*

<sup>35</sup> *Response to Third Round Motion to Compel*, p. 8-9 (April 30, 2009).

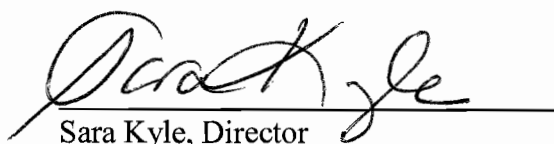
uphold the Hearing Officer's *Order on Third Round Discovery Disputes*, except to the extent that the Hearing Officer relied on *BAPCO* in her reasoning.

**IT IS THEREFORE ORDERED THAT:**

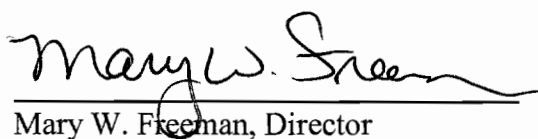
The Hearing Officer's *Order on Third Round Discovery Disputes*, is affirmed, adopting her conclusions and reasoning, except to the extent that the Hearing Officer relied on *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority, et al.*

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Eddie Roberson, Chairman

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Sara Kyle, Director

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Mary W. Freeman, Director