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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

POSITION BRIEF OF THE CONSUMER ADVOCATE IN RELATION TO CHATTANOOGA GAS COMPANY'S REQUEST FOR COST RECOVERY

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate"), respectfully provides the following Brief of the Consumer Advocate's Position in relation to Chattanooga Gas Company's ("CGC") request for cost recovery in Tennessee Regulatory Authority ("TRA" or "the Authority") Docket 07-00224, as requested by Hearing Officer Kelly Cashman-Grams in the Order filed October 23, 2009.

INTRODUCTION

During the regularly scheduled TRA Conference on August 24, 2009, the Directors ordered the parties to attempt to resolve the issue of CGC's requested cost recovery, if possible, under the direction of Hearing Officer Kelly Cashman-Grams. Counsel for CGC filed documentation in support of the company's costs with the TRA on October 6, 2009. Specifically, the law firm of Farmer & Luna, PLLC, has submitted billings of $467,148.62 as of August 31, 2009, in its capacity as counsel in this Docket and anticipates additional billings of

approximately $14,000 for the month of September. Additionally, the law firm of McKenna, Long & Aldridge, LLP, has billed CGC $205,109.71 as of August 31, 2009, and has made no attempt to anticipate amounts incurred since that time. On Wednesday, October 14, 2009, the parties notified the Hearing Officer via email that the Consumer Advocate was willing to stipulate that it had no basis to contest the accuracy of amounts itemized in the bills submitted by counsel for CGC (See the formal stipulation filed by the Consumer Advocate with the TRA on October 28, 2009). The parties further notified the Hearing Officer that while the Consumer Advocate did not intend to dispute the accuracy of counsel's billings, the parties could not agree as to what amount, if any, of those costs CGC should be allowed to recover and over what period of time that recovery should take place.

In light of the information provided by the parties, the Hearing Officer ordered the parties to file briefs on the subject of CGC's requested cost recovery no later than Wednesday, October 28, 2009, at 2:00 p.m. (C.D.T.). Furthermore, this matter was set for deliberation before the Directors at the TRA's regular conference on Monday, November 9, 2009. The following brief was drafted by the Consumer Advocate in order to assist the Directors in reaching a decision and in compliance with the instructions of the Hearing Officer.

COST RECOVERY OF CHATTANOOGA GAS COMPANY

I. The Consumer Advocate's Position

The Consumer Advocate takes the position that any cost recovery awarded to CGC should be limited to no more than a maximum of one-half of the company's expenses in Docket

07-00224.[1] The Consumer Advocate reached this position after a careful review of the Authority's rulings in prior TRA Dockets. Primarily, the Consumer Advocate based its opinion on the proceedings in Dockets 05-00165, *Review of Nashville Gas Company's Incentive Plan Account and Relating to Asset Management Fees*, and 08-00039, *Petition of Tennessee American Water Company to Change and Increase Certain Rates and Charges so as to Permit it to Earn a Fair and Adequate Rate of Return on its Property Used and Useful in Furnishing Water Service to its Customers*. Furthermore, if the Authority allows CGC to recover almost $700,000 in this Docket, as requested by the utility, a dangerous precedent would be set for future non-ratemaking dockets.

The Consumer Advocate maintains that it is within the discretion of the TRA to completely deny CGC's request for cost recovery. To date, CGC has offered no statutory authority for such cost recovery and, as will be shown below, the Consumer Advocate has not found any authority to support an award of costs outside of a rate case proceeding before the Authority. However, given the unique history of this matter, including extensive discovery filed by the Consumer Advocate in an attempt to gather information in this complex Docket of first impression, the Consumer Advocate understands that some recovery of costs may be appropriate under the circumstances.

[1] The Authority may recall that in support of the Proposed Settlement Agreement between the parties, during the July 13, 2009 Hearing, the Consumer Advocate stated that it did not take issue with CGC recovering its total estimated costs at that time, subject to a review for prudency, *Transcript of Proceedings*, p. 15: 15-20, July 13, 2009. It is important to note that this statement was made in support of the pending Proposed Settlement Agreement, the terms of which bound the Consumer Advocate to support all parts of that agreement until such time as it may have been rejected by the Authority. Pursuant to the Tennessee Rules of Evidence and established legal precedent, the Consumer Advocate ceased to be bound by that Agreement and related statements following the TRA's rejection of the same.

Finally, any decision regarding the award of attorney's fees should take into account the fact that CGC consistently opposed the relief requested by the Consumer Advocate and that was ultimately granted in this case, a triennial review of CGC's asset management program. To cite just one example, in its opening statement before the hearing in this matter, CGC stated as follows:

> In addition, the evidence will show in this case that the review process that you already have in place, the fact that annually filings are made by the company related to the ACA, to the PBR, and to the IMCR, all are a process that provides sufficient oversight with your staff and their competence to be able to review.

Transcript of Proceedings, p.35: 6-12, July 13, 2009. The TRA, however, ruled otherwise when it ordered a triennial review similar to the one in place for Piedmont Natural Gas Company, Inc. CGC, therefore, was not the prevailing party in this case.

II. Prior Authority for the Position of the Consumer Advocate

First, Nashville Gas Company, or "Piedmont" as it is now known, did not recover any of the expenses it incurred in Docket 05-000165, a docket substantially similar to the present case; See *Order Approving Settlement*, December 14, 2007. In that Docket, just as in the present Docket, the TRA convened a contested case "to review Nashville Gas' IPA relating to asset management fees," *Petition to Intervene*, Docket 05-000165, p.2, ¶6, July 7, 2005. Ultimately, in that Docket the TRA ordered a triennial review of the Performance Incentive Plan of Nashville Gas Company, which it once again ordered, practically word-for-word, in the present Docket, *Order Approving Settlement*, Docket 05-00165, Exhibit A, p.5, December 12, 2007; see also *Handout Given at the August 24, 2009 Conference*, Docket 07-00224, August 26, 2009.

In light of the TRA's order in Docket 05-00165, there is certainly an argument that CGC should not be allowed any recovery of costs in the present Docket. In fact, the Consumer Advocate can find no authority to support CGC's contention that it should be allowed to recover its actual costs in this Docket. There is no dispute that this is a not a rate case. Counsel for CGC stated specifically during the March 7, 2008 Status Conference that,

> This isn't a rate case. We're not going to get into cost of service issues. We're not going to get into capital structures. We're not going to get into cost of equity, all of those issues. This is about asset management, gas costs, our capacity assets. And it's not – it's not of the complexity of a rate case,

Transcript of Proceedings, p.32:8-17, March 7, 2008. In researching prior rulings of the Authority in non-ratemaking dockets brought by the TRA, the Consumer Advocate has been unable to find a single docket in which a party has been allowed to recover its fees.[2]

The Consumer Advocate recognizes that this has been a protracted case with extensive discovery and involving complex issues, many of first impression, therefore some award of costs could be justified. However, if the TRA does choose to award CGC a portion of its attorney fees incurred in this Docket, the Consumer Advocate believes that the Authority's ruling in Docket 08-00039, *Petition of Tennessee American Water Company to Change and Increase Certain Rates and Charges so as to Permit it to Earn a Fair and Adequate Rate of Return on its Property Used and Useful in Furnishing Water Service to its Customers,* should serve as precedent for allowing a maximum recovery of one-half of CGC's costs. In that matter, Tennessee American

[2] The Consumer Advocate reviewed all non-ratemaking dockets brought by the TRA since 2004. This review found a total of thirty-six non-ratemaking dockets brought by the TRA, including both closed and currently pending dockets: 09-00096, 09-00065, 09-00061, 09-00033, 09-00032, 08-00064, 07-00253, 07-00199, 07-00183, 07-00179, 07-00073, 07-00073, 07-00063, 07-00062, 07-00060, 07-00059,07-00058, 07-00053, 06-00309, 06-00080, 05-00327, 05-00284, 05-00237, 05-00165, 05-00105, 05-00046, 05-00014, 04-00434, 04-00405, 04-00381, 04-00342, 04-00284, 04-00258, 04-00251, 04-00205, 04-00010, and 02-01274.

Water Company ("TAWC") projected regulatory expenses of $543,384 for the relevant period of time, and requested full recovery of those costs, *Order*, Docket 08-00039, p.24, January 13, 2009. However, the Authority voted to only "allow one-half of [that] docket's rate case expense of $275,000 in the calculation of regulatory expenses," in addition to one-half of various other studies and balances, for a total allowed recovery of $194,852. Id. at 25. Furthermore, the Directors "noted that in the future the Authority should closely examine the costs associated with rate case filings to determine the portions to be recovered from rate payers and shareholders." Id.

Should the Directors choose to treat this matter as a rate case and award CGC some portion of its attorneys' fees, the Consumer Advocate believes that an award of no more than one-half of CGC's reasonable costs is more than fair under the particular facts of the present Docket. At present, CGC is responsible for drafting a capacity supply plan providing for an amount of transportation and supply assets that it believes are necessary to meet the needs of its customers; all of these transportation and supply assets are paid for entirely by CGC's ratepayers. Then, all capacity not used by CGC's customers, and resulting from the plan drafted by CGC, is sold by Sequent, CGC's asset manager and affiliate. In return, Sequent receives a portion of the proceeds from these sales, currently fifty (50%) percent, which will flow as income to Atlanta Gas & Light Resources, Inc. ("AGL"), the parent company of both CGC and Sequent. In essence, the entity drafting the Capacity Supply Plan will also sell all "excess capacity" generated by that plan and retain a significant portion of the revenues flowing from those sales. Therefore, CGC and its affiliates/parent certainly benefit from engaging in the business of asset management and the sale of "excess capacity" generated in that business; businesses that are statutorily regulated by the TRA.

Given that asset management and the sale of "excess capacity" to third parties are regulated by the TRA and are relatively new to the natural gas industry, rulemaking and investigatory dockets initiated by the TRA are an inevitable part of that business. CGC, however, would have the TRA apply a double-standard in which the utility is responsible for none of the costs of occasional and inevitable rulemaking or investigatory dockets, while still allowing the company to recover one-half of the profits generated from the sale of assets purchased completely by its ratepayers. Clearly, CGC benefits from engaging in the asset management business and should therefore be responsible for at least a portion of the costs associated with that business. It is simply inequitable to allow CGC's ratepayers to recover only one-half of the revenues earned from the sale of natural gas, paid for completely by them, only to then require them to pay for a full 100% of CGC's costs, over which ratepayers have no control. In light of the present situation, it would be more than fair to the utility to make CGC responsible for at least one-half of its costs in this Docket.

III. Clarification of the Record

Throughout this Docket, CGC has argued that it was entitled to full cost recovery and that it was the Consumer Advocate who brought CGC into this Docket. To cite a recent example of those arguments, during the Hearing on the Merits in this Docket, counsel for CGC stated,

> In terms of cost recovery, our view is this, and that is that, one, when you start with the regulatory compact it is that the expenses – normal O&M expenses of a utility are the type of things that are recovered. The issue is how should they be recovered. **In this case this is a proceeding related to gas supply and asset management. You have a precedent in your rules for other costs being recovered similar to this through the ACA.** Since the ACA deals with gas supply and capacity supply management, we believe that's the most appropriate place to do it. But in addition to that, as you know, this is not a case that we brought or filed. In fact, this is a case that we moved early on to dismiss unsuccessfully, so the case has

> proceeded to this point and costs have been incurred. We state that they've been incurred prudently. But that is – **that is Chattanooga responding to the issues and the requests laid out in this proceeding, again, one started by the Attorney General's office and certainly not by the utility,** [*sic*]

Transcript of Proceedings, p.15: 21 – 16: 17, July 13, 2009 (Emphasis Added). A review of the above statement of CGC during the July 13, 2009 Hearing on the Merits, will reveal several unsupported assertions similar to others made previously in this Docket.

First, CGC asserts that there is some precedent for full recovery of its costs in this matter. Id. As stated above, the Consumer Advocate cannot find a single non-ratemaking docket brought by the Authority in which either party was awarded any portion of its costs.[3] Furthermore, if CGC feels that it should recover its costs in this matter, the burden is on the company to provide specific references to any such existing authority. At present, the utility has failed to satisfy that burden.

Second, while CGC has repeatedly asserted that this Docket was "one started by the Attorney General's office," this is a misstatement of the record. While it is true that this Docket was convened as a result of concerns raised by the Consumer Advocate in a prior rate case, it was ultimately the decision of the Authority whether or not to open a contested case. In relation to their reasons for opening this Docket, the Directors stated,

> the Authority opened this docket and convened a contested case to address issues about asset management and capacity release raised in a prior docket by the Consumer Advocate and the Chattanooga Manufacturers Association ("CMA"). Although those entities were granted the right to intervene, **this docket is an effort by this agency to address those issues,**

[3] See Footnote 2.

Order Denying Motion to Dismiss, p.9, ¶1, June 20, 2008 (Emphasis Added). Clearly, this Docket was not brought entirely by the Consumer Advocate. Furthermore, in rejecting the Proposed Settlement Agreement prior to the Hearing on the Merits, the Authority reiterated its position that it has the power to conduct a review without any input from the Consumer Advocate, "it is well with the agency's discretion to open a contested case and order an evaluation and report on the prudency of CGC's gas supply plan, asset management, RFP process, and IMCR filings," *Transcript of Proceedings*, p.26: 3-7, July 13, 2009.

Additionally, a thorough review of the record in this case further undercuts CGC's assertion that this matter was brought by the Consumer Advocate and that the company's participation was somehow unavoidable. Specifically, at the TRA Conference on July 9, 2007, Chairman Roberson moved "with respect to the asset management and capacity release issues proposed by the Consumer Advocate and the CMA, I move that we open a new docket in which the company, the Consumer Advocate, and the CMA **may intervene**," *Transcript of Authority Conference*, p.33: 9-11, July 9, 2007 (Emphasis Added). Further, Director Jones added, "I vote yes and also offer the comment that the [Consumer] Advocate feel free to file its intervention in the new docket." Id at 36: 21-23. The TRA rightfully ordered a contested case on the subject of "asset management and capacity release" to address the issues raised by the Consumer Advocate and because those issues had "not previously been litigated in any meaningful way," *Order Denying Motion to Dismiss*, p.9, ¶¶ 1-2, June 20, 2008. The comments of the Directors make clear that it was the TRA that ultimately opened this Docket, and that the participation of both CGC and the Consumer Advocate was strictly voluntary. While CGC certainly has an interest in the outcome of this Docket, neither the Authority nor the Consumer Advocate required the company to participate. Therefore, CGC's position that it was unavoidably dragged into

litigation at the whim of the Consumer Advocate is simply not supported by the record in this Docket.

PERIOD OF COST RECOVERY

With regard to the period of time over which any cost recovery granted to CGC should be spread, the Consumer Advocate is of the opinion that any cost recovery from ratepayers should be evenly distributed over a minimum of three years. Given that CGC has requested the recovery of $686,258.33 or more in costs, it would be unduly burdensome on ratepayers to pay these costs by way of either the Actual Gas Cost Adjustment ("ACA") or the Purchase Gas Adjustment ("PGA") in less than three years. This position is based on prior rulings of the Authority, as well as the history of this particular Docket.

Unfortunately, Docket 05-00165, *Review of Nashville Gas Company's Incentive Plan Account and Relating to Asset Management Fees*, can provide no guidance on this subject because, once again, Nashville Gas did not recover any of its costs in that Docket. Therefore, should the Authority choose to grant CGC's request in whole or in part, the Consumer Advocate would submit that guidance can be found in Docket 08-00039, *Petition of Tennessee American Water Company to Change and Increase Certain Rates and Charges so as to Permit it to Earn a Fair and Adequate Rate of Return on its Property Used and Useful in Furnishing Water Service to its Customers, Order*, Docket 08-00039, p.24, January 13, 2009. In that Docket, the Directors ordered that costs be recovered over a period of three years. Id at 25. Furthermore, at no time in this Docket have the parties openly contemplated spreading any cost recovery to be borne by ratepayers over a period of less than three years, and the Consumer Advocate does not believe that it would be proper to do so now for all of the above-referenced reasons.

CONCLUSION

In summary, while the Consumer Advocate does not intend to contest the accuracy of the billings submitted by CGC on October 6, 2009, in relation to its costs in this Docket, the Consumer Advocate does not believe that CGC should be allowed to recover the full amount of those costs. Should the Authority grant CGC recovery of a portion of its costs in this Docket, the Consumer Advocate would argue that based on prior precedent before the TRA, any recovery should be limited to no more than one-half of any costs deemed reasonable by the Directors. However, as addressed more fully above, CGC has not yet presented any authority that would support recovery of its costs and the Consumer Advocate has found no prior non-ratemaking dockets brought by the TRA in which a party was able to recover any of its costs. Therefore, the Consumer Advocate would aver that it is completely within the authority and discretion of the TRA to award no recovery of costs to CGC. Finally, any recovery from ratepayers that may be granted by the Authority should be spread equally over a minimum of three years.

Respectfully submitted,

ROBERT E. COOPER, JR., No. 010934
Attorney General and Reporter

T. JAY WARNER, B.P.R. # 026649
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202
Telephone: (615) 532-3382
Facsimile: (615) 532-2910

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via first-class U.S. Mail, postage prepaid, or electronic mail upon:

J.W. Luna, Esq.
Jennifer Brundige, Esq.
Farmer & Luna
333 Union Street
Suite 300
Nashville, TN 37201

L. Craig Dowdy, Esq.
McKenna Long & Aldridge LLP
303 Peachtree Street
Suite 5300
Atlanta, GA 30308

Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

This the 28th day of October, 2009.

T. Jay Warner
Assistant Attorney General