BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	**Docket No. 08-00012**
REQUEST OF CHATTANOOGA GAS	)	
COMPANY FOR APPROVAL OF	)	
ASSET MANAGEMENT AGREEMENT	)	
	)	

CONSUMER ADVOCATE'S BRIEF

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), respectfully submits this brief regarding the proposed contract between Chattanooga Gas Company ("CGC") and its affiliate Sequent Energy Management ("Sequent").

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?

The Consumer Advocate does not take a position on this question.

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

The Consumer Advocate does not take a position on this question. Currently, the asset management arrangement and related issues are the subject of litigation in TRA docket number 07-00224. The Consumer Advocate is unable to predict what the discovery, testimony, and analysis will reveal about the issues in that docket. Therefore, whether the agreement at issue in

the current matter will be in the best interests of consumers is uncertain. The Consumer Advocate will not make a commitment that it will wait the full term of three years to seven years before making recommendations of potential changes to the contractual arrangement.

On the other hand, it would not be in the best interests of consumers for the assets subject to the proposed contract to remain unutilized or under-utilized, thereby ending or reducing the amount of money from which consumers benefit from the sharing with the asset manager. In other words, consumers benefit from the existence of a sharing arrangement that results from a contract of the general type under consideration in the current matter. Had CGC chosen to bid out a one-year or at most a two-year arrangement for utilization of the assets in consideration of the likelihood for a docket such as TRA docket number 07-00224, the Consumer Advocate potentially would have been more willing to support the proposed contract. However, that did not happen. Instead, the proposed contract includes a term of three years, plus an extension of four years by mutual agreement of CGC and Sequent, for a total possible term of seven years with no approval of the extension by the TRA. Depending on what transpires in TRA docket number 07-00224, the Consumer Advocate might seek changes to the contractual arrangement prior to the expiration of the initial three year term.

3. Is the dollar amount of the Annual Guaranteed Minimum properly designated as confidential by Chattanooga Gas Company? (P. 7, ¶ 4).

CGC's designation of the Annual Guaranteed Minimum as confidential is erroneous and is not supported by statutory authority, and the TRA should find that CGC has failed to carry its burden of proof on this issue.

The Tennessee Rules of Civil Procedure provide for the entry of a protective order for the

purpose of protecting trade secrets from public disclosure:

> Upon motion by a party or by the person whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.] Tenn. R. Civ. P. Rule 26.03(7).

The Uniform Trade Secrets Act provides a definition of trade secrets for the context in which a party seeks an injunction or damages from another party for the misappropriation of trade secrets.

> "Trade secret" means information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that
> (A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
> (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Tenn. Code Ann. § 47-25-1702(4).

The Tennessee Court of Appeals in *B&L Corporation v. Thomas and Thorngren, Inc.*, 162 S.W.3d 189, 211 (Tenn.Ct.App. 2004), permission to appeal denied 2005, summarized the Tennessee law on trade secrets in the context in which a business sues a former employee for the misappropriation of trade secrets as follows:

> This court previously has held that "confidential business information is akin to trade secrets," which consist of "any formula, process, pattern, device or compilation of information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it." ... Information cannot constitute a trade secret and thus, is not confidential if the

> subject matter is "of public knowledge or general knowledge in the industry" or if the matter consists of "ideas which are well known or easily ascertainable."
>
> In the absence of evidence to the contrary, this court has held that the following types of information are not confidential:
>
> (1) Remembered information as to a business's prices;
>
> (2) The specific needs and business habits of certain customers; and
>
> (3) An employee's personality and the relationships which he has established with certain customers.
>
> ... [T]his court listed some factors to be considered in determining whether certain information constitutes a business's trade secret:
>
> (1) the extent to which the information is known outside of [the] business;
>
> (2) the extent to which it is known by employees and others involved in [the] business;
>
> (3) the extent of measures taken by [the business] to guard the secrecy of the information;
>
> (4) the value of the information to [the business] and to [its] competitors;
>
> (5) the amount of money or effort expended by [the business] in developing the information;
>
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *B&L Corporation v. Thomas and Thorngren, Inc.*, 162 S.W.3d 189, 211 (Tenn.Ct.App. 2004), permission to appeal denied by Supreme Court Jan. 10, 2005 (internal citations omitted).

The sources of law on trade secrets make clear that for information to qualify as a trade secret, it must be secret and difficult to ascertain, and it must derive independent economic value from its secrecy.

> Although secrecy is a basic element of the existence of a trade secret, the fact that particular information may be unknown to others and/or may have been deemed "secret" or "confidential" by its owner does not necessarily mean that information will qualify as a trade secret. Trade secret status specifically requires a plaintiff to additionally demonstrate the information is not readily ascertainable by others and derives independent economic value from its secrecy. *Hauck Manufacturing Company v. Astec Industries, Inc.* 376

F.Supp. 808, 814 (E.D.Tenn. 2005).

In Tennessee, the courts analyze all claims of confidential business information under the law on trade secrets. In other words, a trade secret is the only type of confidential business information recognized by Tennessee law. This point is made clear in a series of Tennessee cases and is summarized in *Hickory Specialties, Inc. v. Forest Flavors International, Inc.*, 26 F.Supp.2d 1029, 1031-33 (M.D.Tenn. 1998), a federal case interpreting Tennessee law.

> Moreover, the terms "trade secret" and "confidential information" as used in Tennessee case law are synonymous for all practical purposes, and confidential business information is only protectible to the extent that it qualifies as a trade secret.
> ...
> As these cases illustrate, courts as well as companies suing former employees mechanically recite the phrase "trade secrets and other confidential information" without necessarily stopping to clarify that trade secrets are made up of confidential information, and confidential information will only be subject to protection to the extent it qualifies as a trade secret -- in other words, that it really is confidential and not easily ascertainable, and it affords the owner a competitive advantage.
> ...
> As illustrated in the above discussion of trade secrets and confidential information, a former employee is not, under Tennessee law, bound not to divulge confidential information unless that information would qualify as a trade secret -- that is, that it is actually secret, business related, and affords a competitive advantage. ... If it fits those criteria, it will be protected as a trade secret; if it does not, the employer will not have a valid reason to protect that information. *Hickory Specialties, Inc. v. Forest Flavors International, Inc.*, 26 F.Supp. 1029, 1031-33 (M.D.Tenn. 1998) (internal citations omitted).

Although the bulk of legal authority on trade secrets relates to lawsuits filed by businesses against former employees, the context of the current matter is relevant to the analysis. The TRA has entered a protective order to protect trade secrets from public disclosure, pursuant to Tenn.

R. Civ. P. Rule 26.03(7), which is substantially the same as Federal Rules of Civil Procedure 26(c). The significance of this context is made clear in *Loveall v. American Honda Motor Company*, 694 S.W.2d 937 (Tenn. 1985), a decision of the Tennessee Supreme Court.

> Trade secrets and other confidential information enjoy no privilege from disclosure, although courts may choose to protect such information for good cause shown. ... To show good cause under Rule 26(c), the moving party must demonstrate specific examples of harm and not mere conclusory allegations. ... When confidential commercial information is involved, this standard requires a showing that disclosure will result in a clearly defined and very serious injury to the company's business, ... or, stated differently, great competitive disadvantage and irreparable harm. *Loveall v. American Honda Motor Company*, 694 S.W.2d 937, 939 (Tenn. 1985) (internal citations omitted).

In the context of a Rule 26 protective order, the burden of proof is on the party seeking protection from the disclosure of trade secrets. *AT&T Communications of West Virginia, Inc. v. Public Service Commission of West Virginia*, 423 S.E.2d 859, 862 (W.Va. 1992).

Another aspect of the context that is relevant to the current matter is that the TRA is a state regulatory agency. The benefit to the public of the disclosure of information relevant to the regulation of public utilities is significant and should be considered in the analysis.

> What is reasonable under the circumstances should be entirely different in the context of a utility filing contracts with an agency, such as the PSC, as compared to an exchange of information between private parties. In other words, one might expect a more encompassing definition of a trade secret in litigation between private parties than would be recognized when a utility files a document with the PSC. Certainly the fact that contracts, although private, were negotiated for the benefit of the public must be taken into consideration. *Great Falls Tribune v. Montana Public Service Commission*, 82 P.3d 876, 887 (Mont. 2003).

The balancing of the potential harm caused by the public disclosure of information with

the benefit to the public of access to relevant information in the possession of a state regulatory agency is an analysis that can be decisive to the result.

> The trial court, in its order, balanced the commercial harm that could be caused by disclosure against the perceived benefits. ... The trial court concluded that, while some harm may indeed befall the railroad because of disclosure, this harm is a cost of doing business with the government and that the benefits associated with disclosure outweigh the costs. *Freedom Newspapers, Inc. v. Denver and Rio Grande Western Railroad Company*, 731 P.2d 740, 743 (Colo.App. 1986), rehearing denied 1986, certiorari denied 1987.

In the current matter, CGC seeks to protect as a trade secret the dollar amount of the Annual Guaranteed Minimum. This information is not a trade secret, particularly if the contract is approved by the TRA. The CGC system is a unique system, and only one entity is the asset manager at any given time. The pipeline capacity and storage assets of CGC are unique to CGC, and the Annual Guaranteed Minimum for the CGC system for the term of this contract is unique to this one contract. Any perceived competitive advantage that other asset managers allegedly might have over Sequent is hypothetical and at best minimal.

The Annual Guaranteed Minimum does not establish with precision the value that Sequent places on the CGC system. Sequent logically would want to make as much profit as possible from the contract, and therefore Sequent has an economic incentive to bid as the Annual Guaranteed Minimum an amount that it does not anticipate having to pay beyond the amounts to be paid through the sharing formula. Also, three to seven years later, when the contract must be rebid, the information will be stale. Natural gas marketing is dynamic and volatile, and the value of any given set of assets is likely to change significantly over such periods of time.

Furthermore, the assets that Sequent intends to manage for CGC are paid for by

consumers through the PGA, and the Annual Guaranteed Minimum is substantially for the benefit of consumers. Therefore, consumers have an interest in having access to knowledge of the dollar amount of the Annual Guaranteed Minimum. At this point it is worth reiterating the standard established by the Tennessee Supreme Court for analyzing allegations of trade secrets in the context of a Rule 26 protective order.

> To show good cause under Rule 26(c), the moving party must demonstrate specific examples of harm and not mere conclusory allegations. ... When confidential commercial information is involved, this standard requires a showing that disclosure will result in a clearly defined and very serious injury to the company's business, ... or, stated differently, great competitive disadvantage and irreparable harm. *Loveall v. American Honda Motor Company, Inc.*, 694 S.W.2d 937, 939 (Tenn. 1985) (internal citations omitted).

The type of information that CGC alleges to be a trade secret in the current matter has been found not to be a trade secret in the past.

> Not every piece of information created in the ordinary course of business that appellants wish to keep confidential qualifies as a trade secret. Pricing policies, cost markups or the amount of a company's bid for a particular project, while ordinarily kept confidential in the business world, are not "trade secrets." *Wisconsin Electric Power Company v. Public Service Commission of Wisconsin*, 316 N.W.2d 120, 123 (Wis.App. 1981).

CGC's designation of the dollar amount of the Annual Guaranteed Minimum as a trade secret is erroneous and is not supported by law, and the Consumer Advocate respectfully requests that the TRA find that CGC has failed to carry its burden of proof on this issue and authorize disclosure of the contract in full.

4. Is the Cooperation section properly included in the Asset Management and Agency Agreement? (P. 10, ¶ 14).

The Consumer Advocate accepts that Sequent can contractually waive its rights to litigate against CGC to the extent that such litigation only affects CGC. However, the contract should not be allowed to restrict the evidence that the TRA, the Consumer Advocate, or other government agencies may seek in the performance of their functions protecting the public interest. In this context the public interest is at issue and not merely a private right. In *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999), the Court of Appeals held as follows:

> Under general principles of contract law, it is axiomatic that the courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein. Accordingly, one individual cannot contractually waive the statutory rights of one who is not a party to the contract, and one individual cannot, by waiving her statutory right to vindicate her own interest, waive the statutory right of a federal sovereign to vindicate the public interest unless the government agrees to such waiver. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999).

What constitutes a violation of public policy in this context is established in *Osbourne v. Allen*, 226 S.W. 221, 224 (Tenn. 1920), a case decided by the Tennessee Supreme Court.

> Contracts made for the purpose of unduly controlling or affecting official conduct of the exercise of legislative, administrative, and judicial functions, are plainly opposed to public policy. They strike at the very foundations of government and intend to destroy that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society. The principle is universal and is applied without any reference to the mere outward form and purpose of the alleged transaction. If a contract does unduly interfere with governmental functions or with relations of the citizen towards his own government in any of its departments, whether the interference be direct or indirect, such agreement is illegal, whatever form it may have assumed. *Osbourne v. Allen*, 226 S.W. 221, 224 (Tenn. 1920). See also *Lane v. Sumner County*, 298 S.W.2d 708, 710 (Tenn. 1957) and *Whitley v. White*, 140 S.W.2d 157, 159-60 (Tenn. 1940).

To the extent that the contract restricts the evidence that the TRA, the Consumer

Advocate, or other government officers might seek in any potential litigation or investigation, the contract is contrary to public policy in Tennessee. At a minimum the TRA should clarify that the contractual provision is enforceable only as between CGC and Sequent and is not enforceable against the TRA, the Consumer Advocate, or any other government entity protecting the public interest.

5. Is the Early Termination provision concerning the TRA's jurisdiction over the Asset Manager properly included in the Asset Management and Agency Agreement? [P. 14, ¶ 18.1(i)].

The implication of this contractual provision is that the TRA does not have any jurisdiction over Sequent as the asset manager for CGC. There are at least two sources of law establishing some degree of TRA jurisdiction over Sequent as the asset manager for CGC. At least one source of TRA jurisdiction is in the Tennessee code.

> The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter. Tenn. Code Ann. § 65-4-104 (in pertinent part).

Given that the TRA has jurisdiction over the property and property rights of CGC, the TRA has jurisdiction over Sequent to the extent that Sequent has contractual rights to or actual use of any property or property rights of CGC.

Another source of TRA jurisdiction over Sequent is based on the affiliate relationship between CGC and Sequent. Tennessee law extends the TRA's jurisdiction to an affiliate of a regulated utility, when the affiliate enters into contracts with the regulated utility for the purpose of functioning on behalf of the regulated utility. The TRA's jurisdiction exists to the extent of

those functions. *Tennessee Public Service Commission v. Nashville Gas Company*, 551 S.W.2d 315, 319 (Tenn. 1977) and *BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W.3d 506, 515-16 (Tenn. 2002).

For the reasons discussed above, TRA jurisdiction over Sequent to the extent discussed above should not be a contractual basis for early termination of the contract. If the contractual provision is interpreted as meaning only that the TRA does not have jurisdiction over all of the operations of Sequent as though Sequent were a regulated utility in the same sense as CGC, the provision would not pose the problems discussed above.

6. Is the Term of three years, plus a four-year extension, for a total Term of seven years properly included in the Asset Management and Agency Agreement? (P. 9, ¶ 11).

Given the existence of TRA docket number 07-00224, the three-year term of the contract is problematic. If that docket results in findings that would alter the contract, the contract might need to be changed prior to the end of the three-year term. A contract of one year or at most two years would have been more practical in these circumstances.

Even if the TRA accepts the three-year term of the contract, the provision for a four-year extension of the contract based on the mutual agreement of CGC and Sequent creates the potential that this contract could exist for seven years. That is a very long time. The dollar amount of the Annual Guaranteed Minimum might be obsolete before the seven-year term is over. At a minimum the TRA should require CGC to file a notice of extension of the contract no later than one year before the end of the original three-year term so that the TRA would have six months to analyze the potential extension before the six-month notice period in the contract arrives. That would give the TRA the opportunity to review the proposed extension and approve,

disapprove, or modify the extended contract before the time for agreement to the contract extension arrives.

Conclusion

The TRA potentially could remedy all of the issues raised by the Consumer Advocate (other than the problem that the initial term is three years) without actually changing the language of the proposed contract. The TRA could issue an order specifying that the Annual Guaranteed Minimum is not protected as a trade secret; that the Cooperation section does not limit the information or documents available to the TRA, the Consumer Advocate, or any other government entity in litigation or investigations; that the Early Termination provision concerning the TRA's jurisdiction over the Asset Manager only applies if the TRA is found to have complete jurisdiction over the Asset Manager as though it were a regulated utility; and that requires CGC to file a notice of extension of the contract (if CGC wants to extend the contract) no later than one year before the end of the original three-year term. Nonetheless, even if the TRA enters such an order, it is still possible that TRA docket number 07-00224 will progress to the point that the Consumer Advocate might seek changes to the contractual arrangement prior to the expiration of the initial three-year term.

Respectfully submitted,

STEPHEN R. BUTLER, BPRN 14772
Assistant Attorney General
Office of the Tennessee Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-8722
Fax: (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, electronic mail, or hand delivery, upon the parties of record in this case on the 20 day of February, 2008.

Stephen R. Butler
Assistant Attorney General