

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

February 22, 2008

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

**CHATTANOOGA GAS COMPANY'S REPLY
TO THE CONSUMER ADVOCATE'S BRIEF**

Chattanooga Gas Company ("CGC" or "Company") has filed its new asset management agreement with the Tennessee Regulatory Authority ("TRA" or "Authority") for approval as ordered by the TRA. As demonstrated through the information filed by CGC in this docket, CGC has complied with the bidding procedures in its Tariff, and CGC has awarded a new asset management agreement that provides significant benefit to CGC's customers. CGC respectfully requests that the agreement be approved without delay so that asset management services may continue after March 31, 2008.

A. CGC Has Followed the RFP Procedures in its Tariff (as Approved by the TRA).

The Consumer Advocate and Protection Division of the Attorney General ("CAPD") has not taken a position on whether CGC followed the RFP procedures in its Tariff. See CAPD Brief, at 1. Through the information that CGC has filed in this docket, CGC has amply demonstrated that it followed the RFP procedures set forth in its Tariff.

B. The New Asset Management Agreement Significantly Benefits CGC's Customers.

The CAPD has not taken a position on whether the contract should be approved for the benefit of CGC's customers. Id. The CAPD concedes, however, that "consumers benefit from the existence of a sharing arrangement that results from a contract of the general type under consideration in the current matter." Id. at 2. CGC agrees that the new contract that is pending before the TRA provides benefit for CGC's customers. CGC has been successful in its past asset management arrangements in sharing significant benefits with its customers. For example, CGC has shared approximately \$7.9 million in net gains from non-jurisdictional transactions over the past thirty-nine months with its customers. CGC believes that the new agreement that is pending before the TRA for approval will allow CGC to continue to provide significant net benefits to its customers.

C. The Terms and Provisions of the Executed Asset Management Agreement are Proper.

The RFP procedures in CGC's Tariff give CGC the responsibility for developing the written RFP and the content requirement of the bid proposal. The RFP included the Asset Management Agreement and Gas Purchase and Sale Agreement as the contract that would be executed by CGC and the winning bidder. CGC experts with years of experience in gas supply services and with CGC's past asset management arrangements, as well as with other asset management arrangements in the marketplace, developed the terms and provisions of the RFP, including the terms and provisions of the Asset Management Agreement and Gas Purchase and Sale Agreement (which was part of the

RFP). The terms of the RFP and agreement are proper, and CGC had a well-reasoned rationale for including the terms and provisions in the RFP.

1. Three-Year Term of the Agreement

The new asset management agreement is for a term of three years. See Section 11 of the Asset Management Agreement filed on Jan. 14, 2008 and Feb. 1, 2008. CGC decided to bid a three-year asset management arrangement because a three-year arrangement in CGC's experience is appropriate and provides the greatest value. One-year contracts do not allow the asset manager to achieve the amount of net gains of longer-term contracts. Also, one-year contracts do not allow asset managers to spread risks associated with an annual minimum guarantee over several years; thus, a one-year contract will contain lower guaranteed value, if any.

Three-year contracts allow asset managers to take advantage of the NYMEX market which trades across years and typically fluctuates over time. A multi-year arrangement allows the asset manager to reset positions or extend them to periods of even greater value, thus benefiting CGC's customers via the sharing mechanism. CGC believes that the inclusion of a contract extension provision allows the Company the flexibility to continue in a more favorable contract if market conditions at the time of the termination of the initial term dictate.

Changing the term of the contract (i.e., initial three-year term and extension opportunity) substantially and materially alters the RFP that was issued and bid upon and would have resulted in different bids and guaranteed minimum values by all bidders, which the Company believes would have been of substantially less value to its customers.

2. Cooperation Provision

The asset management agreement contains a Cooperation Provision because the Company believes that it must memorialize the relationship that is necessary to maximize the value achieved by the asset management arrangement, especially since CGC did not know who would bid on the RFP or win the contract. See Section 14 of the Asset Management Agreement filed on Jan. 14, 2008 and Feb. 1, 2008. To maximize reliability and value associated with asset management, it is necessary for CGC and the asset manager to engage in constant, consistent, and unfiltered communication regarding the distribution system condition, customer behavior, and operational capability. The Cooperation Provision was included in the RFP to ensure that a cooperative atmosphere between representatives of both CGC and the asset manager exists to encourage this type of communication.

CGC and Sequent are the parties to the executed asset management agreement that is pending before the TRA. The Cooperation Provision, as well as all of the provisions in the agreement, defines the relationship between CGC and Sequent. Since the beginning of the CAPD's intervention in this docket, CGC has explained that this provision is not intended to and thus does not prevent the asset manager from appearing before the TRA and providing truthful, relevant testimony and information when properly compelled to do so in accordance with the powers and procedures of the TRA.

3. Early Termination Provision

The asset management agreement contains an early termination provision if the TRA should change its long-established legal policy and assert jurisdiction over third-party asset managers. See Section 18.1(i) of the Asset Management Agreement filed on

Jan. 14, 2008 and Feb. 1, 2008. Over the years, through communications with potential asset management service providers, it has become clear that these parties would not participate in asset management arrangements if their businesses should become regulated by a regulatory entity such as the TRA. Asset managers are non-regulated entities participating in a competitive business. To maximize the level of participation in the RFP process, CGC included in the asset management agreement the provision that the asset manager could terminate the agreement should it fall under the regulation of the TRA.

CGC is a public utility under the laws of Tennessee and is regulated by the TRA. Sequent is not.¹ CGC is responsible for providing the TRA with information about its regulated assets when requested and as required under the rules and regulations of the TRA.

D. Approving the Asset Management Agreement That is Pending Before the TRA Does Not Allow Subsequent Modifications to the Terms of the Agreement by Non-Parties to the Agreement.

As a result of the RFP process, CGC has awarded the asset management agreement to Sequent Energy Management, L.P. ("Sequent") because its bid clearly projected the greatest net benefit to CGC and its customers. The executed asset management agreement that the TRA has pending before it, if approved, is a legally binding contract between CGC and Sequent based on the contract terms and provisions that were bid through the RFP process. The agreement will be legally binding during the three-year term of the agreement.

¹ CGC disagrees with the CAPD's general statement that "Tennessee law extends the jurisdiction to an affiliate of a regulated entity." See CAPD Brief, at 10. As this issue is not determinative of the purpose of this docket (which is to approve the new asset management agreement), CGC will reserve briefing this issue until it is properly before the TRA.

This docket was convened for the TRA to determine whether to approve the asset management agreement that resulted from the RFP process. The docket is not about whether different businessmen or their attorneys would have drafted and set forth different contractual language and terms in the RFP. The CAPD, even in setting forth all of its "concerns" with the terms and provisions of the agreement, has not advocated why (or even if) this agreement is harmful to CGC's customers or why it should be disapproved. Rather, the CAPD as a non-party wants to continue to litigate the terms of the agreement after the agreement becomes effective. This is contrary to principles of general contract law.² Either the contract becomes effective or it does not and, once effective, its terms are binding on the parties for the duration of the contract. As CGC has demonstrated that this asset management agreement will provide substantial benefits to its customers, the agreement pending before the TRA should be approved immediately so that asset management services may continue after March 31, 2008.

E. The Annual Minimum Guarantee and Bid Information Are Confidential, Proprietary Information.

CGC has designated the bid information and the annual minimum guarantee of the asset management agreement as confidential, commercial information and has filed this information with the TRA under seal pursuant to the Protective Order in this docket. This information is properly designated as confidential, commercial information and is the type of business information that is generally protected from public dissemination. Further, this information is considered by non-regulated asset managers to be

² Basic contract law provides that a modification to a contract occurs when one or more of the parties to the contract propose a change and the parties mutually agree to alter and amend the contract to include the agreed upon modification. See Am. Jur.2d *Contracts* § 507 (2007). Legally, non-parties to an agreement cannot modify a legally binding agreement to which they are not a party.

confidential, proprietary commercial information that would not customarily be released to the public by these companies.

CGC explained in the RFP that all bids submitted would be treated as confidential. The Company proceeded this way to encourage bidders to bid without fear that the details of their bids, such as the annual minimum guarantee, would place them at a competitive disadvantage in other competitive bidding processes. CGG included the confidentiality provision to encourage the highest level of participation in the RFP as possible. If the annual minimum guarantee is not protected as confidential commercial information, future bidders in subsequent RFPs will not be encouraged to provide their highest level of participation for fear of providing their competitors with information and insight into their competitive bidding practices, and CGC's customers will lose.

1. Confidential, Commercial Information Pursuant to Tenn. Code Ann. § 47-25-1702(4)

The annual minimum guarantee is confidential, commercial information that warrants similar protection from non-disclosure as a trade secret under the Tennessee Uniform Trade Secret Act, Tenn. Code Ann. § 47-25-1702(4). See Wright Medical Technology v. Grisoni, 135 S.W.3d 561, 588 (Tenn. Ct. App. 2001) ("Confidential information is closely analogous to a trade secret and warrants similar protection."). A trade secret is defined as information that "[d]erives 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 . . . [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Tenn. Code Ann. § 47-25-1702(4).

There are several relevant factors to consider in determining whether commercial information falls within the definition: (1) the extent to which the information is known outside the business; (2) the extent of measures taken by the business to guard the secrecy of the information; (3) the value of the information both to the business and to its competitors; (4) money that was spent to develop the information; and (5) the ease or difficulty with which it could be acquired by outsiders. Id. at 589. The annual minimum guarantee is confidential and is not known outside Sequent's business. The knowledge that Sequent and other asset managers have developed in the business of asset management to develop the bidding strategies that they used to bid on CGC's RFP was obtained through the investment of much time, resources, and experience in the asset management industry. Information about competitive businesses, including competitive bidding strategies, is not readily available and ascertainable by the public or competitors in the asset management industry. In the business world, much effort is made to ensure and maintain the confidentiality of business contracts and relationships. Further, courts have determined that business information contained in business agreements of the type pending before the TRA should be maintained confidentially and not disclosed to the public.³ The entry of a protective order properly allows the confidential information to be utilized in the preparation of this contested case, but protects the confidential information from being disclosed generally to the public and creating a competitive disadvantage for the bidders.

³ See generally Essex Wire Corp. v. Eastern Electric Sales Co., 48 F.R.D. 308 (E.D. Pa. 1969) ("The terms of an agreement or a contract have often been the subject matter of a protective order designed to ensure that this type of confidential business information is not revealed to the public.") (cited by the Tennessee Supreme Court in Loveall v. American Honda Motor Co., 694 S.W. 2d 937 (Tenn. 1985), to support the statement that courts can choose to protect confidential, commercial information when disclosure will result in great competitive disadvantage and irreparable harm).

**2. Confidential, Commercial Information Pursuant to Tenn.
Code Ann. § 65-3-109**

Even if the subject information is deemed not to be a trade secret under Tenn. Code Ann. § 47-25-1702(4), the TRA may, nevertheless, maintain the bid information and minimum guaranteed value in the asset management agreement as confidential information pursuant to Tenn. Code Ann. § 65-3-109.⁴ This section has been previously construed to create an exception from the disclosure requirements of the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-101, et seq. In Op. Tenn. Atty. Gen. No. 82-208, at 2 (July 27, 1982), the Attorney General noted that Tenn. Code Ann. § 10-7-503(a) requires all governmental records to be open for public inspection unless otherwise provided by state laws and that "Section § 65-3-109 provides for just such an exception" with regard to "information obtained by the [Public Service] Commission relating to employment contracts between individuals and regulated utilities." The Attorney General recognized that it is not just the contract documents themselves that are protected from disclosure by Tenn. Code Ann. § 65-3-109, but the information contained in those documents that may injuriously affect the company submitting the documents.

⁴ Section 65-3-109 provides that "[t]he department shall not give publicity to any contracts, leases or engagements obtained by it in its official capacity, if the interests of any company would thereby be injuriously affected, unless, in the judgment of the department, the public interest requires it." The reference in the current statute to "the department" is to the Tennessee Department of Transportation. Legislation creating the TRA, 1995 Tenn. Pub. Acts Ch. 305, amended several statutes within Title 65 (including Tenn. Code Ann. § 65-3-109) which previously applied to the TRA's predecessor agency, the Public Service Commission, by substituting references to "the department" for prior references to "the commission." However, 1995 Tenn. Pub. Acts Ch. 305 § 11 provides:

In order to carry out the functions, duties and responsibilities maintained under the provisions of this act, the public service commission shall retain and have the authority to exercise any and all of its powers and duties existing under Title 65 prior to enactment of this act, including, but not limited to, the power to subpoena, the power to take evidence, and the power to examine. Upon the termination of the public service commission, the Tennessee regulatory authority is expressly granted the same powers and duties as set forth above for the public service commission in order to carry out its responsibilities established by the provisions of this act.

Thus, Tenn. Code Ann. § 65-3-109 continues to apply to the TRA by virtue of § 11 quoted above.

CGC's asset management agreement currently pending before the TRA is a business contract for services between a regulated utility and another non-regulated business entity which is analogous to the employment contracts discussed in the Attorney General's Opinion.

Tenn. Code Ann. § 65-3-109 implicates two considerations: (1) potential injury to the company, and (2) the public interest. As noted in the Attorney General's Opinion, supra, at 3, the statute allows the TRA "to weigh the competing interests of the public and the regulated company." CGC believes that its interests in non-disclosure outweigh any interest that its customers may have in disclosure. In fact, CGC submits that CGC and its customers have the same interests in non-disclosure because the Company and its customers have the same interest in obtaining through the RFP process the greatest annual minimum guarantee and the greatest net gain from non-jurisdictional transactions.

The annual minimum guarantee and the bid information are maintained as confidential information pursuant to the Protective Order in this docket. The TRA and the CAPD have access to this information and can evaluate whether the TRA should approve the asset management agreement. There is no advantage to CGC's customers to disclose publicly in this docket the minimum guarantee amount. Annually, CGC's customers will have access to the Company's Interruptible Margin Credit Rider ("IMCR") filing that will explain the total amount of the net gain, which will either equal or hopefully exceed the annual minimum guarantee, that is being credited to CGC's customers through the PGA. Thus, there is no need for the disclosure of the exact amount of the annual minimum guarantee. The CAPD has not presented any argument why disclosure would benefit the customers of CGC. On the other hand, disclosing the

minimum guarantee value places CGC and its customers at a disadvantage in subsequent RFPs and asset management arrangements. Additionally, Sequent will have a competitive disadvantage in future bidding processes.

The Company has demonstrated that there is harm in disclosure. There has been no showing how CGC's customers are harmed by the TRA's maintaining this information confidentially pursuant to the Protective Order. The CAPD has not been forthcoming in explaining why it is challenging the confidential designation of this information and why the CAPD thinks it is in CGC's consumers' interests to disclose this information. The CAPD has not taken a position in this docket on whether the agreement will benefit the public. Nor has the CAPD taken a position on whether and how the approval of the asset management agreement will harm CGC's consumers. Why, then, does the CAPD seek to disclose publicly the annual minimum guarantee, to which the CAPD already has access?

If the TRA should decide to disclose the minimum guarantee of the winning bidder, will the other bids become public information? If so, in future bids, CGC may have to warn bidders that the Company has been unsuccessful in the past of maintaining bids as confidential. This will undoubtedly chill the bidding process and prevent the Company and its customers from getting the greatest benefit that the market will allow.

CGC submits that Tenn. Code Ann. § 65-3-109 applies to the asset management agreement and the confidential information contained in this agreement. CGC submits that, based on the facts of this case and the purpose of this docket, the TRA should find that CGC and its customers have the same interest in protecting the bidding process and

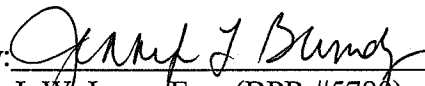
thus decide to maintain the annual minimum guarantee and bid information as confidential information pursuant to the Protective Order.

Conclusion

CGC has successfully bid and awarded the new asset management agreement in accordance with the RFP procedures in its Tariff. The new agreement that is pending before the TRA provides significant benefit and great value to CGC's customers and should be approved as written so that asset management may continue after March 31, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by electronic mail on this the 22th day of February, 2008, to the following:

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