BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

April 14, 2022

IN RE:	)	
	)	
DOCKET TO EVALUATE CHATTANOOGA GAS COMPANY'S PURCHASES AND RELATED SHARING INCENTIVES	)	**DOCKET NO. 20-00139**

POST-HEARING BRIEF OF CHATTANOOGA GAS COMPANY

Chattanooga Gas Company ("CGC" or "Company"), pursuant to the *Order Establishing Post-Hearing Briefing Schedule*, hereby submits its post-hearing brief in this matter to the Tennessee Public Utility Commission ("TPUC" or "Commission"). In opposition to the Consumer Advocate Unit in the Financial Division of the Office of the Attorney General's ("Consumer Advocate") petition requesting modification of the sharing incentive percentage of CGC's Performance Based Ratemaking Mechanism ("PBRM"), CGC states as follows:

I. BACKGROUND/INTRODUCTION

CGC's current sharing incentive mechanism has a long and well-established history. The sharing mechanism is set forth in CGC's Interruptible Credit Rider and an amendment that was effective on January 1, 2003. CGC, Becker, GB-1. In 2007, the Commission opened Docket 07-00224 to address asset management and capacity issues raised by the Consumer Advocate. In a series of Commission orders beginning in 2009, the Commission required that CGC submit future asset management requests for proposals for approval by the Commission before placing them out to bid. The Commission also required that a triennial review of the transactions and activities related to CGC's PBRM be conducted every three years by an independent consultant pursuant to

procedures and criteria set forth in its October 13, 2009 Order. CGC has had three triennial reviews, in 2014, 2018, and 2020, all conducted by Exeter Associates, Inc. ("Exeter").

The Consumer Advocate filed a petition initiating this docket and seeking modification of several aspects of CGC's PBRM on December 23, 2020. As reflected in the *Order Establishing Issue to be Addressed and Setting Date for Response* dated April 7, 2021, the Consumer Advocate later narrowed the focus of this docket to a *single* issue: "Should the sharing incentive percentage of Chattanooga Gas Company's Asset Management and Agency Agreement ("AMAA") be modified and if so, what is the appropriate percentage?" More specifically, the Consumer Advocate asserts that (1) the AMAA sharing incentive percentage should be modified to a 75/25 split customers/CGC from the current 50/50 split; and (2) a cap of $900,000 annually should be imposed.[1]

Section II of this brief provides an executive summary of CGC's case in opposition to the Consumer Advocate's request for modification of CGC's sharing incentive percentage. In Section III, CGC comprehensively addresses the key issues requiring the Commission's denial of the Consumer Advocate's request. By combination of the evidence of record and the arguments presented in Section III, CGC believes that it has identified all the relevant issues and corresponding positions requiring denial of the Consumer Advocate's request for a modification of CGC's sharing incentive mechanism.

For convenience, CGC shall utilize the following abbreviations or references: The Consumer Advocate Unit in the Financial Division of the Office of Attorney General shall be referred to as "Consumer Advocate"; Chattanooga Gas Company shall be referred to as "CGC" or

[1] The Consumer Advocate initially proposed a cap of $550,000 based on incorrect information relative to the Atmos cap, i.e., Mr. Dittemore failed to recognize that the Atmos cap had been increased from $1.25 million to $2 million per year. The Consumer Advocate updated the recommendation in Mr. Dittemore's rebuttal testimony. Consumer Advocate, Dittemore Rebuttal, p. 6, l. 12-21.

"Company"; Exeter Associates, Inc. shall be referred to as "Exeter"; references to the Hearing Transcript shall be noted as "Tr." followed by "at" and the page number and line references; references to prefiled testimony shall be to the format "Party, Witness Last Name, Direct/Rebuttal" if Consumer Advocate and "at" followed by the Page and Line Numbers(s); references to prefiled testimony exhibits shall be in the form "Party, Witness Last Name, Direct/Rebuttal" if Consumer Advocate, exhibit number as identified by the witness; hearing exhibits shall be "Exhibit" followed by the number assigned at the hearing; references to the "Consumer Advocate's Response to CGC's First Set of Discovery Requests," dated October 28, 2021, shall be to the format "Consumer Advocate Response" followed by "at" and the number of the response; references to "Exeter Associates, Inc. Responses to Discovery Requests" filed November 5, 2021, shall be to the format "Exeter Response" followed by "at" and the number of the response/exhibit and page number of the exhibit where appropriate; the "Chattanooga Gas Review of Performance Based Ratemaking Mechanism Transactions and Activities" prepared by Exeter Associates, Inc. dated June 2020 shall be referred to as the "Exeter Report"[2]; Piedmont Natural Gas Company shall be referred to as "Piedmont"; Atmos Energy Corporation shall be referred to as "Atmos"; Chattanooga Gas Company's Asset Management and Agency Agreement shall be referred to as "AMAA";[3] references to the statutes shall be to the Tennessee Code Annotated or "T.C.A."; references to the rules shall be to the rules shall be to the Tennessee Rules and Regulations or "Tenn. Comp. R. & Regs."

[2] The Exeter Report was originally filed in Docket No. 07-00224 on June 30, 2020, and is CGC, Dittemore, Direct, DND-3 in this docket.
[3] The relevant portion of the AMAA is hearing Exhibit 1.

II. EXECUTIVE SUMMARY

The Consumer Advocate has wholly failed to carry its burden of proof justifying modification of CGC's PBRM from a 50/50 sharing incentive to a 75/25 customer/utility sharing incentive. The Consumer Advocate's case is based solely on a recommendation in the Exeter Report which, in turn, is based solely on the fact that Atmos and Piedmont are also regulated by the Commission and have different mechanisms (90/10 and 75/25, respectively). The recommendations in the Exeter Report are not self-executing. Absent evidence or analysis supporting the Exeter Report recommendation and, by extension, the Consumer Advocate's request, the Commission must deny the request.

The Consumer Advocate's entire position is based upon a paragraph recommendation in the Exeter Report that is completely unsupported by analysis or evidence. There is nothing in the Exeter Report that suggests that the current 50/50 split harms or disadvantages customers. Likewise, there is nothing in the Exeter Report that analyzes whether a change from 50/50 to 75/25 customers/utility will benefit CGC's customers. Further, there is nothing in the Exeter Report indicating why the sharing percentages of Atmos or Piedmont are an appropriate surrogate for CGC other than the fact that all three are regulated by the Commission. In fact, the Exeter Report fails to acknowledge that the Atmos and Piedmont mechanisms differ from each other and are different from CGC, including different sharing splits. The Exeter Report provides no basis for arbitrarily recommending a 75/25 split (like Piedmont) rather than a 90/10 split (like Atmos). On the contrary, the Exeter Report specifically indicates that there is no observable difference between a 90/10 split and a 75/25 split without analyzing whether there is a material difference between a 50/50 split and a 75/25 split. The Consumer Advocate has acknowledged that it did not do any independent analysis of the issue, nor did it even attempt to analyze, let alone demonstrate the

relevance of the Atmos and Piedmont sharing mechanisms. Rather, the Consumer Advocate has relied solely on the Exeter Report.

Despite these deficiencies in analysis and evidence in the Exeter Report, the Consumer Advocate apparently believes that the Exeter Report is self-executing and that a bare recommendation in the Exeter Report is all that is needed to disregard the nineteen years of history for CGC's sharing mechanism. This cannot and has never been the law. The Consumer Advocate's request is not supported by *any* actual evidence or analysis because Exeter does not support its recommendation with any actual evidence or relevant analysis. As such, the Consumer Advocate has failed to meet its burden of proof and its request should be denied.

Similarly, the Consumer Advocate's requested annual cap of $900,000 on the sharing incentive should be rejected. First, there is no support of any kind in the Exeter Report or otherwise for a cap for CGC. Moreover, since the Consumer Advocate relies exclusively on the Exeter Report for its entire case, Exeter did not recommend a cap. Second, assuming, as the Consumer Advocate asserts, that $900,000 is a reasonable amount for CGC to retain, the Consumer Advocate fails to recognize that under the present AMAA, CGC earns less than the $900,000 the Consumer Advocate has proposed. On cross, the Consumer Advocate was simply unable to explain how a 75/25 customer/CGC split was appropriate when under the current 50/50 split CGC earns less than the Consumer Advocate's own proposed cap. Rather than supporting implementation of a cap, the Consumer Advocate's argument highlights the deficiencies in changing from the current and long-standing 50/50 split.

III. ISSUES

A. The Consumer Advocate fails its Burden of Proof

As the party seeking to change an existing policy of the Commission that has existed for nineteen years, the Consumer Advocate bears the burden of proof. T.C.A.§ 65-2-109(5) ("The burden of proof shall be on the party or parties asserting the affirmative of an issue"); Tenn. Comp. R. & Regs. 1220-1-2-.16(2) ("The burden of proof shall be on the party asserting the affirmative of an issue"). Even though the Commission acknowledged the right of the Consumer Advocate to *initiate* a proceeding to raise some or all of the issues identified in the Consumer Advocate's July 9, 2020, Comments, such a recognition is not a decision to *change* Commission policy nor does it shift the burden to CGC to prove why the existing policy should continue. In an analogous context considering which party had the burden of proof to challenge an existing Contract Service Arrangement ("CSA") it was held that the party challenging the CSA would have the burden of proof. *In re BellSouth Telecommunications, Inc.,* Docket No. 98-00559, 2000 WL 33770000 (Feb. 3, 2000); *see also Tennessee Am. Water Co. v. Tennessee Regulatory Auth.,* 2011 WL 334678, *14 (Tenn. Ct. App. 2011) ("There is also a presumption that the rates so established are correct and any party who attacks the Commission's findings has the burden of proving that they are illegal or unjust and unreasonable. When the rates set by the agency are attacked there is a heavy burden on those who attacked them to make a convincing showing that the rates are valid." (citations omitted)). Likewise, the Consumer Advocate was held to have the burden of persuasion to show why a prior docket decision did not apply to the regulated entity. *In re United Telephone-Southeast, Inc.,* Docket No. 07-00269, 2008 WL 704072 (Feb. 14, 2008). The burden of proof includes both the burden of persuasion and the burden of production. The burden of production is also known as the *burden of going forward with evidence*. *Id.* at n. 7 (quoting Black's Law

Dictionary, 7th Ed., p. 190). For the reasons explained below, the Consumer Advocate has failed to produce any evidence supporting its request and, therefore, has failed to carry its burden of proof.

The only piece of evidence allegedly supporting changing the CGC sharing mechanism is the Exeter Report. Mr. Dittemore expressly testified to the Exeter Report as the sole basis for the Consumer Advocate's proposal. Tr. at p. 21, l. 1 – p. 23, l. 7. In fact, the Consumer Advocate has readily admitted that its sole witness, Mr. Dittemore, did not review any other utilities' sharing mechanisms, and did not "perform an investigation, study, or other analysis that involves sharing of revenues, margins, or other financial benefits between a utility and its ratepayers," Consumer Advocate Response at 1-2, 1-3; *see also* Tr. at p. 21, l. 1 – p. 23, l. 7. The Consumer Advocate has gone so far as to admit that it "does not have any evidentiary support to offer in this Docket other than the Exeter Report." Consumer Advocate Response at 1-5. Therefore, the heart of this case is whether the Exeter Report, *alone*, supports changing CGC's long-standing sharing incentive mechanism. It does not.

The Consumer Advocate apparently believes that the Exeter Report recommendations are self-executing. The Consumer Advocate relies on the following statement from Exhibit 1 of the Commission's September 23, 2009 Order in Docket 07-00224 for this conclusion: "The independent consultant shall not propose changes to the structure of the PBRM itself; however, the TRA Staff, CGC, or the CAD may use the report of the independent consultant as grounds for making recommendations or proposed changes to the Authority . . . ." While the Commission has recognized that the Exeter Report may be relied upon to propose changes, at no point has the Commission suggested that the Exeter Report, alone, provides a *sufficient* evidentiary basis to

support a change. On the contrary, the Commission's prior practice recognizes that the Exeter Report is not enough.

For example, in Docket No. 07-00224[4], the Consumer Advocate submitted comments regarding CGC's AMAA triennial review, including, *inter alia*, comments related to the request for proposals ("RFP") process and a 75/25 customer/utility sharing split. The Commission reviewed the comments and the Exeter Report itself and did *not* find the recommendations self-executing. Rather, the Commission "directed Commission Staff to work closely with CGC to ensure implementation of Exeter's proposals in the Company's next RFP, to be brought before the Commission for prior approval as required by the September 23, 2009 Order in this docket." *Order Concerning 2020 Triennial Review and Extending Review Process,* Docket No. 07-0024 at 8 (Oct. 27, 2020). As a result, CGC collaborated with Commission Staff to develop revisions to the RFP process. *Order Approving Revised Asset Manager Request for Proposal,* Docket No. 21-00069 at 3 (September 8, 2021). The revisions ultimately approved by the Commission did not simply track the Exeter Report. Rather, some of the recommendations relative to the RFP process were implemented, some were not, and some were modified. *Id.* at 6-8. Therefore, the Commission did not simply implement the recommendations in the Exeter Report as if self-executing. Rather the directive "to ensure implementation" included "work" to evaluate, assess, and bring back for approval only those changes that should be implemented. In short, the Commission's practice demonstrates that recommendations in the Exeter Report are not, alone, enough to support modifications to the PBRM or otherwise. The Exeter Report is not self-executing.

Further, with regard to the recommendations relative to the AMAA, the Commission did not move forward with any changes just because Exeter proposed them. In fact, none were adopted

[4] The Commission took administrative notice of Docket No. 07-00224 on August 27, 2021.

based solely on the Exeter recommendation. Rather, the Commission recognized that an expansion of the scope of Exeter's work would be necessary to those support changes:

> [T]he panel referred the Consumer Advocate to the Review Procedures and Process, attached as Exhibit 1 to the Commission *Order Regarding Triennial Review Procedures and Criteria* dated October 13, 2009. That document details how the Consumer Advocate may propose *expanding the scope of work for the independent consultant* and use the consultant's report as grounds to propose changes to the PBRM itself. Following these procedures, the Consumer Advocate may file a Petition if it so chooses.

Order Concerning 2020 Triennial Review and Extending Review Process, Docket No. 07-0024 at p. 9 (Oct. 27, 2020) (emphasis added). The Consumer Advocate completely misses the point of the Exeter recommendations, which is simply to identify potential changes – taking action on those recommendations requires an agreement or an evidentiary process, such as this docket, with supporting *evidence*.

There are numerous reasons why the Exeter recommendation standing alone is legally insufficient to support changing the CGC sharing mechanism. The Consumer Advocate points to the Exeter Report's four-page comparison of CGC's sharing percentages to those of Atmos and Piedmont. Exeter Report (pages 43-46). But the substance of Exeter's actual recommendation is limited to *one* paragraph:

> In other jurisdictions, sharing percentages that range from 90% customer / 10% utility to 75% customer / 25% utility have generally been adopted for AMA fees, capacity release revenues and off-system sales margins realized by the utility. In Tennessee, AMA fees realized by Atmos are subject to a 90% customer / 10% utility sharing incentive, and for Piedmont, a 75% customers / 25% utility sharing incentive. Exeter has observed no material differences in the resource efforts of natural gas utility to generate AMA fees, capacity revenues, or off-system sales margins under a 25% sharing incentive compared to a 10% sharing incentive, nor has Exeter observed a natural gas utility failing to devote sufficient resources to maximize these revenues/margins when provided a sharing incentive. An incentive mechanism should provide a utility with an

> incentive sufficient to ensure ratepayer benefits are maximized since it is resources paid for by ratepayers that are used to generate AMA fees, capacity release revenues, and off-system sales margins. Therefore, Exeter concludes that for AMA fees, a 75% customer / 25% utility sharing incentive would be more appropriate for CGC and reflect a reasonable balance of incentives.

Exeter Report at 45. That is it. This analysis, standing alone, is legally insufficient to support a change to CGC's sharing incentive mechanism.

First, there is nothing in the Exeter Report that says that under the current 50/50 split customers are being harmed or disadvantaged in any way. Likewise, there is nothing that says that with a change from 50/50 to 75/25 customers/utility split CGC's customers will derive any benefit over what they have now.

Second, in proposing a change from a 50/50 split to a 75/25 split, there is no analysis, no consideration, and no review of any kind of how changing CGC's sharing from 50/50 to 75/25 will work as well or provide the same type of incentives as the 75/25 customer/utility split for Piedmont or as effectively as the 90/10 split for Atmos. Exeter recognizes that the purpose of the sharing mechanism is to incentivize utilities to maximize AMA fees. Exeter Response at 3d. Yet, Exeter did not assess whether there is any material difference in the resource efforts of natural gas utilities to generate AMA fees under a 50% sharing incentive compared to either a 25% or 10% sharing mechanism. Exeter Response at 7a.

In fact, the Exeter Report recognizes that the current 50/50 split may not provide *enough* of an incentive. Under the CGC mechanism, there are three things subject to the 50/50 split—the asset manager fee, the margins from capacity releases, and the margins from off-system sales. However, as Exeter notes, currently the only sharing is occurring relative to the asset manager fee. Exeter Report at 33-34. In discussing why the off-system sales did not continue, the Report states: "It is reasonable to conclude that [the agent for the sales] found the balance of incentives under

the sharing mechanism insufficient to continue to pursue the off-system sale[s] . . . ." Exeter Report at 46. Similarly, in discussing the termination of the capacity releases, the Report states: "It is uncertain whether [the agent] found the balance of incentives under the sharing mechanism insufficient to continue to pursue Excluded Assets off-system sales, or the relatively minimal revenue in total generated by these transactions that caused [the agent] to discontinue these off-system transactions." Exeter Report at 46. Absent an evaluation of whether a 50/50 split is actually insufficient, it would be irresponsible to change the sharing percentage to 75/25 or any other percentage.

Finally, reliance on Atmos and Piedmont "because they were both regulated by the Tennessee Public Utility Commission" is not evidence, let alone sufficient evidence to carry the burden of proof. Exeter Response at 4c. Exeter expressly did not rely on other utilities and has acknowledged that the only relevance of the Atmos and Piedmont mechanisms is that "they are also regulated by the Tennessee Public Utility Commission." Exeter Response at 4d, 4g. This is problematic for several reasons. There is nothing in the Exeter Report or otherwise that suggests that Atmos or Piedmont are appropriate surrogates for CGC. Indeed, there is nothing in the Report to indicate that CGC is in any way similar to Atmos or Piedmont, both of which are more than twice the size of CGC and each of which has its own unique service territory and customer mix issues. CGC, Becker, at p. 6, l. 4-10. In addition, Atmos and Piedmont each have their own sharing mechanisms that are different from each other, and each is different from CGC's. CGC, Becker, at p. 6, l. 13-18. There is no explanation or consideration for whether the differences in the mechanisms between Atmos and Piedmont are material or whether their differences from CGC are material.

In fact, not only are the Atmos and Piedmont mechanisms different from each other and from CGC, they each have different sharing splits. *Id.* While Piedmont may have a 75/25 customer/utility split as Exeter is advocating for CGC, the Atmos mechanism is a 90/10 customer/utility split. Exeter makes no effort to reconcile the different Atmos and Piedmont splits to CGC in its unique circumstances. There is no explanation for these differences or why 75/25 is appropriate for CGC. In fact, the choice of 75/25 is completely arbitrary as the Report specifically recognizes that Exeter has not observed any material differences between a 90/10 split versus a 75/25 split.

Exeter's reliance on Atmos and Piedmont is particularly disturbing because, in addition to there being no evidence of the relevance of these two utilities to CGC, the Exeter expert who recommended using Atmos and Piedmont as a basis for setting CGC's sharing percentage, in another case said that it is inappropriate to base the decisions for one utility on the decisions of another utility simply because they are regulated by the same body. Exeter Response at 1, Mierzwa Rebuttal Testimony, at p. 5, l. 122-126 ("The relationship between Nicor's gas costs and those of other Illinois utilities is not a proper consideration in this proceeding. This Commission does not set rates for one Illinois gas utility based on the costs of another. Many factors can affect the gas cost rates of a utility, and a direct comparison of rates is not a valid basis for evaluating utility performance.").

Simply put, the Consumer Advocate has not offered sufficient evidence to support changing to a 75/25 split, let alone sufficient evidence to carry its burden of proof. Because this record lacks such competent, substantial evidence to support a change in the status quo, there is no basis for changing the sharing mechanism.

B. There is No Basis for an Annual Cap

In addition to a change to the sharing incentive percentage, the Consumer Advocate is also requesting imposition of a cap on CGC's sharing earnings in the amount of $900,000. Consumer Advocate, Dittemore Direct, at p. 5, l. A.12. This recommendation is not found in the Exeter Report. Rather it is based solely on a comparison to the per customer retentions of Atmos and Piedmont. *Id.* This is inexplicable given that the Consumer Advocate has admitted that its request in this docket is based on the Exeter Report. Dittemore Direct, at p. 6, l. A13. In addition, it fails to recognize that under the AMAA, the Consumer Advocate proposed cap is "significantly higher" than CGC's actual retention at 50%, and would be half again at 25%. Tr. p. 35, l. 18. As acknowledged at the hearing, CGC retains an amount "astronomically below $900,000." Tr. at p. 35, l. 24-25.

The cap recommendation has multiple other problems. First, as with the sharing percentage, there is no evidence that Atmos' and Piedmont's retention caps are relevant to CGC. Again, Atmos' and Piedmont's sharing mechanisms are different from each other and different from CGC. There is simply no evidence that the Atmos and Piedmont sharing caps are relevant to CGC.

Second, even assuming that Atmos' and Piedmont's caps are relevant to CGC, CGC is retaining far below what Mr. Dittemore believes would be a fair retention for CGC. Under the AMAA, CGC's retention is limited to half of the contract fee, which is a confidential number set forth in Exhibit 1. Obviously, this is far below the $900,000 cap requested by the Consumer Advocate. To further illustrate, Mr. Dittemore's recommendation for CGC is based on a comparison to the Atmos and Piedmont retention per customer. At present, under its cap, Atmos is entitled to retain $13 per customer per year; Piedmont is entitled to retain $8.25 per customer

per year. Consumer Advocate, Dittemore Rebuttal, p. 6, l. 10-21. Mr. Dittemore multiplied the Atmos retention of $13 per customer per year by the approximately 69,000 CGC customers to arrive at the $900,000 recommendation. Under CGC's AMAA, however, CGC's retention is set *below* that of Atmos and the even lower Piedmont number on a per customer basis (for the CGC number, divide the confidential contract fee by the CGC 50% and then divide that by 69,000 CGC customers; if the CGC sharing percentage was 25% as proposed by the Consumer Advocate, then the CGC fee would be less than half the lower Piedmont per customer number). This highlights not only the fatal flaw in the Consumer Advocate's requested cap, but also the flaw in comparing Atmos' and Piedmont's sharing percentages with CGC's. Assuming a comparison to Atmos and Piedmont is appropriate, the comparison should be to the amount retained per customer, rather than the sharing percentage. As Mr. Dittemore's testimony highlights, CGC is already retaining far less than Atmos or Piedmont per customer.

In sum, there is no basis in the Exeter Report or otherwise for implementation of an annual cap on CGC's retention. CGC is already retaining far less total and per customer than Mr. Dittemore acknowledges is reasonable. Again, the Consumer Advocate has wholly failed in its burden of proof.

IV. CONCLUSION

The Consumer Advocate has wholly failed to carry its burden of proof justifying modification of CGC's sharing incentive mechanism from a 50/50 split to a 75/25 customer/utility split. The Consumer Advocate's request is based solely on a recommendation in the Exeter Report which, in turn, is based solely on the fact that Atmos and Piedmont are also regulated by the Commission and have different mechanisms. The recommendations in the Exeter Report are not

self-executing. Absent evidence or analysis supporting the Exeter Report recommendation and, by extension, the Consumer Advocate's request, the Commission must deny the request.

Similarly, the Consumer Advocate's requested annual cap of $900,000 on the sharing incentive should be rejected. There is no support of any kind in the Exeter Report or otherwise for a cap for CGC. Interestingly, assuming, as the Consumer Advocate asserts, that $900,000 is a reasonable amount for CGC to retain, the Consumer Advocate fails to recognize that under the AMAA, CGC already retains far less than that the Consumer Advocate asserts is reasonable. Again, the Consumer Advocate has failed to carry its burden of proof and the Commission should deny the request.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the forgoing Post-Hearing Brief of Chattanooga Gas Company has been forwarded via electronic mail on this the 14th day of April, 2022 to:

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