

**IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE**

IN RE:)	
)	
JOINT REQUEST OF CHATTANOOGA)	
GAS COMPANY AND KORDSA, INC.)	DOCKET NO. 21-00094
FOR APPROVAL OF SPECIAL)	
CONTRACT)	
)	

**MOTION TO FILE PRE-HEARING BRIEF OF CHATTANOOGA GAS
COMPANY AND KORDSA, INC.**

Chattanooga Gas Company and Kordsa, Inc. (the Petitioners) asks permission to file the attached pre-hearing brief to assist the Commission and Staff in preparing for a hearing in this matter. The attached brief is based on the pre-filed testimony of the three witnesses in this case, one from each of the parties. The brief lists the four criteria that the Commission will use to evaluate the proposed Special Contract, summaries the testimony of the witnesses on each point and states the Petitioners' opinion as to whether each issue has been resolved or remains open.

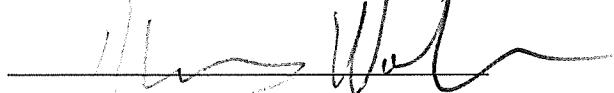
The Petitioners submit that the attached brief is comparable to the opening statements that will be made by the attorneys for the Petitioners at the beginning of the hearing. By filing this brief, the Petitioners will limit their opening statements and save the Commission considerable time at the hearing.¹ More importantly, this brief will help the Commissioners, the Staff and the Consumer Advocate better understand and prepare for the evidence and arguments that will be introduced. Finally, the brief is only seven pages long and a draft of the brief was provided to the

¹ If this motion is granted, the Petitioners will agree to limit their opening statements to five minutes each.

Consumer Advocate on February 11, 2022. Therefore, the Consumer Advocate has had—and still has—ample time to file its own pre-hearing brief prior to hearing on February 28, 2022.

Therefore, the Petitioners ask the Hearing Officer to permit the Petitioners to file this pre-hearing brief.

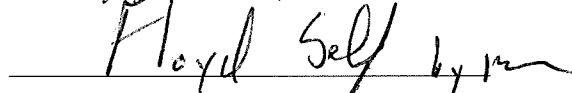
RESPECTFULLY SUBMITTED,



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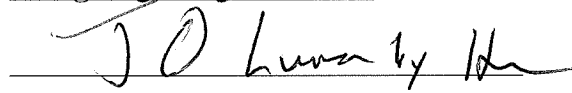
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**IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE**

IN RE:

**JOINT REQUEST OF CHATTANOOGA
GAS COMPANY AND KORDSA, INC.
FOR APPROVAL OF SPECIAL
CONTRACT**

DOCKET NO. 21-00094

**PRE-HEARING BRIEF OF CHATTANOOGA GAS
COMPANY AND KORDSA, INC.**

To assist the Commissioners and Staff in preparation for a hearing in this matter, Chattanooga Gas Company and Kordsa, Inc. ("the Petitioners") submit the following pre-hearing brief. Similar to an opening statement, the brief summarizes the issues in the case, explains the Petitioners' understanding of the positions of the parties and their witnesses on each issue and concludes with the Petitioners' views as to which issues have been resolved and which remain open.

- I. Here are the four criteria that the Commission has in the past used to determine whether to approve a special contract with a customer who is considering bypassing the local gas company.¹ The Commission will consider whether:
- A. Customer bypass is imminent;**
- B. Such bypass would be uneconomic;**

¹ See Docket No. 14-00118, "Order Approving Special Contract," at 3.

C. The contract rates and terms as just and reasonable and are not unduly preferential or unduly discriminatory; and

D. The contract rates are the highest that could be negotiated.

II. Based on the pre-filed testimony of the three witnesses in this case, listed below are the positions of the parties on each of these four criteria.

A. Is the bypass imminent?

The witness for the Consumer Advocate, Mr. Hal Novak, testifies that bypass is not imminent for three reasons.

1. Mr. Novak testifies (at 14-15) that bypass is not imminent because, according to the original plans, building the easement line will require Kordsa to obtain two easements but Kordsa only has one easement, an easement from the city, at this time.

Response. In rebuttal, Kordsa's witness Ben Gibson testifies that the consultant who designed the bypass route (Rod Walker & Associates) amended the original design so that the route only requires one easement, an easement from the city.² Attached to Mr. Gibson's rebuttal testimony is an affidavit from Jeremy Walker of Rod Walker & Associates confirming that information.

Petitioners believe that this issue is resolved.

2. Mr. Novak testifies that bypass is not imminent because it is not clear whether the employees at the Kordsa plant in Chattanooga have obtained the necessary

² One can see how the pipeline route was changed by comparing the map of the original pipeline route, shown on p. 21 of the 2019 feasibility study (Exhibit 1 to Gibson's Direct Testimony), to the map attached to the affidavit of Jeremy Walker filed as an exhibit to Gibson's Rebuttal Testimony.

corporate approvals to build the bypass line and that “there is no firsthand information that has been filed in this Docket by a Kordsa officer that has authority to bind the company to these statements.” Novak Testimony at 12, footnote 20.

Response. In rebuttal, Kordsa’s witness Ben Gibson testifies that his immediate superior, Mr. Kadir Toplu, is the head of Kordsa’s operations for North and South America and that Mr. Toplu has approved the bypass project. Attached to Mr. Gibson’s testimony is an affidavit from Ms. Amy Mohn. She states that she is a corporate officer (the treasurer) of Kordsa and one of the people who has the authority to sign a contract to build the bypass line. She testifies that the purpose of her affidavit “is to confirm the information provided by Mr. Ben Gibson” and that “Kordsa has decided to build a pipeline bypassing the facilities” of CGC if the Commission does not approve the special contract. Finally, she explains that Kordsa’s corporate board does not need to approve the plan to build a bypass line because the project will cost less than \$5 million.

Petitioners believe that this issue is resolved.

3. Mr. Novak testifies that he does not believe that Kordsa is prepared to build the line because, “There is no supporting evidence for Kordsa’s calculated cost of a bypass pipeline.” Testimony at 12.

Response. In direct testimony, Kordsa’s witness Ben Gibson testifies that, based on the results of a competitive bidding process, the bypass line could be constructed for “approximately \$1.5 million” including the tap fee for East Tennessee and the cost of a new meter station, and that the company’s consultants estimated that the total cost of building and operating the line would be “approximately \$200,000 per

year or a little less.” As an exhibit, Mr. Gibson provided estimates from three contractors of the total cost of building the pipeline ranging from \$1.4 to \$1.7 million including a 20% contingency allowance.

In rebuttal, Mr. Gibson explains that the company’s consultant, Rod Walker & Associates, evaluated three bids for constructing the bypass line and advised Kordsa that the total cost of building the line, including the cost of building a meter station and obtaining a tap from East Tennessee pipeline, is "approximately \$1.6 million" including a 20% contingency allowance. Attached to Mr. Gibson’s rebuttal testimony is an affidavit from Rod Walker & Associates confirming this information. Attached also are documents provided by Rod Walker & Associates showing the bids of the three contractors, the consultant’s evaluation of the bids and the consultant’s conclusion that the total cost of the project would be \$1,682,127, including a contingency allowance of \$127,355.

During informal discovery, Kordsa provided the Consumer Advocate with a chart created by Mr. Earl Burton, another Kordsa consultant, showing that the estimated annual cost of operating the pipeline, including an annual carrying charge, would be \$158,374. As shown on the chart, the estimate of the annual cost of the project is based on an estimate of \$30,000 for operating and maintenance expenses, \$5,000 for insurance expenses and an annual carrying charge of \$123,374. The chart shows that Mr. Burton calculated the annual carrying charge by using \$1.5 million as the cost of construction and amortizing that figure over 20 years with a 6% cost of capital.

Petitioners believe that this issue is resolved. Moreover, since there is apparently no dispute that the bypass project— even if it costs the higher amount estimated by CGC —would be cheaper than paying the tariffed rates (see Section B below), it is not necessary to calculate the exact cost of the project in order to find that the threat of bypass is imminent.

B. Is the proposed bypass uneconomic?

Bypass is "uneconomic" if the customer's costs of building and using bypass facilities are greater than the utility's cost of providing service. Mr. Novak's testimony does not dispute that Kordsa's bypass would be "uneconomic bypass" because it will cost Kordsa more to construct and operate the bypass facilities than CGC's cost to provide the service to Kordsa. Similarly, he does not dispute the testimony from CGC and Kordsa that the cost of bypass would be cheaper for Kordsa than continuing to pay CGC's tariffed rates.

It appears that this is not an issue.

C. Are the rates and terms just and reasonable and not unjustly preferential or unduly discriminatory?

1. Mr. Novak testifies that the contract should include a provision requiring Commission approval if the contract is assigned to another customer.

Response. In rebuttal, Kordsa and CGC have agreed to amend the contract to include such a provision.

This issue is resolved.

2. Mr. Novak recommends (at 18) that the length of the contract should be shortened to five (5) years instead of the longer period of time (which is confidential) that is set forth in the special contract.

Response: Kordsa and CGC have agreed to the longer term of this special contract just like the special contract between CGC and DuPont was a long-term contract. The price in the DuPont contract was fixed for the term of the contract and that contract was approved by the Commission. Because circumstances may change over the longer term, the proposed Kordsa special contract provides that if rates to other customers are increased during the term of the contract, Kordsa's rates will also increase up to a set capped amount (the exact cap has been filed as confidential) per year. This cap provision ameliorates the potential for an adverse impact on the general body of ratepayers by operation of a long-term special contract.

This issue is open.

3. Mr. Novak recommends (at 19) that the contract should be amended to eliminate the provision making the reduced rate effective as of August 24, 2021, the date when the contract was filed with the Commission. He states that this would establish a bad precedent for the Commission in considering other special contracts. The Consumer Advocate attorneys have also argued that this violates the legal prohibition against retroactive ratemaking and rely on the Court of Appeals holding in AARP v. Tennessee Public Service Commission, 896 S.W. 2d 127 (Tenn. Ct. App., 1994).

Response: In rebuttal, Kordsa's witness Mr. Gibson states that the parties bargained for and agreed to this provision, that Kordsa loses \$13,000 to \$15,000 every month that the contract is not approved, and that Kordsa should not be penalized because of the length of time (now 6 months) it has taken the Commission to rule on this request. He also explains that if the excess payments made since August 24, 2021 are returned to Kordsa through prospective rate reductions, that would not be retroactive ratemaking.³

This issue is open.

D. Are the contract rates the highest that could be negotiated?

1. Mr. Novak testifies (at 18-19) that the cap on annual increases in the contract price should be removed so that there would be no limit on how much the rate in the special contract could increase every year.

³ The Consumer Advocate's reliance in *AARP v. Tennessee Public Service Commission*, 896 S.W. 2d 127 (Tenn. Ct. App., 1994) is misplaced. In that case, the Court found that a Commission ratemaking order that required a utility to refund to ratepayers excessive charges collected during a prior period is not illegal, retroactive ratemaking as long as the refunds are made in the form of prospective rate reductions.

In 1993, the Commission adopted a ratemaking plan that set a rate of return for BellSouth and then, once the utility's actual earnings were known, the Commission would prospectively adjust the utility's rates up or down to offset earnings in the prior period that were either above or below the authorized range. As the Court explained, "The rule speaks of sharing the excess earnings with customer either through rate reductions or through service improvements" but the order "does not require refunds to customers nor does it provide for rates to be adjusted retroactively." *Id.*, at 134.

The Court affirmed the Commission's order explaining that since no refunds were being made and rates were being adjusted prospectively, not retroactively, this was not retroactive ratemaking. In sum, as long as the agency prospectively reduces rates in order to offset excess profits earned during a prior period, that is not considered "retroactive" ratemaking, even though the result is the same as if the agency ordered the utility to retroactively change its rates and re-bill the customer.

Similarly, in this case, if the Commission decides that the special contract rate between Kordsa and CGC should be made effective August 24, 2021, the Commission cannot order CGC to retroactively adjust Kordsa's rates and send out new, revised bills for usage during that period. Instead, the Commission can effectively accomplish the same result by directing CGC to lower the rates charged to Kordsa on a going-forward basis until the amount saved by Kordsa is equal to the amount of excess revenue paid to CGC since August 24, 2021.

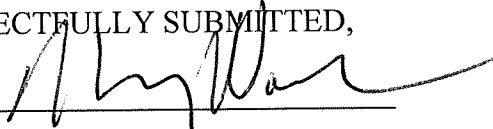
Response. In rebuttal, Mr. Gibson states that there is no point in having a special contract if the rate in the contract can be increased by any amount. In that situation, Kordsa will proceed to build the bypass line.

This issue is open.

2. Aside from the escalator/cap, Mr. Novak does not otherwise challenge the proposed rates in the special contract nor does he dispute the testimony of CGC that the rates are above CGC's confidential, incremental costs and the highest that could be negotiated.

It appears that this is not an issue.

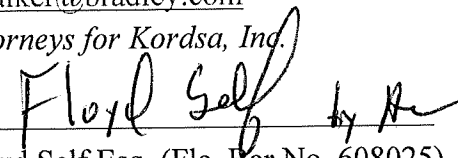
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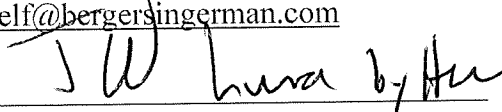
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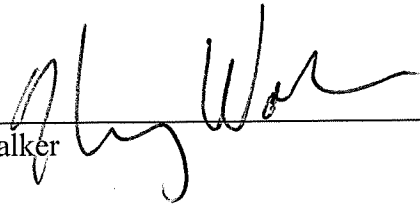
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via either U.S. Mail, postage prepaid, or email to the following this 14 day of February, 2022:

Vance Broemel
Office of the Tennessee Attorney General
500 Dr. Martin L. King Jr. Blvd.
Nashville, Tennessee 37243

Consumer Advocate Unit

Henry Walker

A handwritten signature in black ink, appearing to read "Henry Walker", is written over a horizontal line.