

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 15, 2008

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

ORDER APPROVING ASSET MANAGEMENT AND AGENCY AGREEMENT

This matter came before Chairman Eddie Roberson, Director Sara Kyle, and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on February 25, 2008 for consideration of the Asset Management and Agency Agreement ("AMA") and related Gas Purchase and Sale Agreement filed by Chattanooga Gas Company ("CGC" or the "Company") on January 14, 2008.

PROCEDURAL BACKGROUND

The TRA first ordered CGC to file its AMA for Authority approval in Docket No. 03-00516.¹ In that docket, the TRA Audit Staff expressed concern that the Company's AMA had never been filed with the TRA for approval, and further, that it may not return the proper value to ratepayers for the use of assets they purchased. Ultimately, the Authority in Docket No. 03-00516 found that CGC had acted in good faith and instructed the Company to file all future AMAs with the Authority for approval prior to the effective start date.²

¹ See *In re: Tennessee Regulatory Authority's Audit of Chattanooga Gas Company's Actual Cost Adjustment ("ACA") Filing for the Period Ending June 30, 2003*, Docket No. 03-00516.

² *In re: Tennessee Regulatory Authority's Audit of Chattanooga Gas Company's Actual Cost Adjustment ("ACA") Filing for the Period Ending June 30, 2003*, Docket No. 03-00516, *Order Adopting, In Part, ACA Audit Report Of TRA's Energy And Water Division*, p. 10 (May 6, 2005).

In Docket Nos. 04-00402³ and 05-00321,⁴ the Company's two subsequent ACA audits, TRA Audit Staff expressed additional concerns pertaining to CGC's AMA. As a result of those dockets, CGC incorporated affiliate guidelines and request for proposal ("RFP") procedures into its tariff. The Company's AMA was originally scheduled to expire on March 31, 2007; however, the Company requested, and the Authority granted, a one-year extension so that the newly incorporated RFP procedures could be effectively utilized. In Docket No. 05-00322, in an order issued April 24, 2007, the Authority required the Company to re-bid its asset management agreement prior to March 31, 2008 and to submit the new agreement to the TRA for approval.⁵

On January 14, 2008, in accordance with the Authority's mandate, CGC filed with the Authority its new AMA under seal in Docket No. 05-00322. To facilitate its review, and in light of the completion of the audit in Docket No. 05-00322, the Authority opened Docket No. 08-00012 for consideration of the AMA and related Gas Purchase and Sale Agreement.

On January 28, 2008, at a regularly scheduled Authority Conference, the voting panel assigned to the docket voted unanimously to convene a contested case proceeding and to appoint the Authority's General Counsel or his designee to act as Hearing Officer to handle preliminary matters, including entering a protective order. The panel further directed CGC to submit a proposed protective order no later than 2:00 p.m. on January 31, 2008. On January 28, 2008, CGC filed its proposed protective order with the Authority.

On January 29, 2008, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed its *Petition to Intervene* in the docket. On January 31, 2008, the Hearing Officer held a brief telephone conference with the Company and the Consumer

³See *In re: Summary of the Transactions in Chattanooga Gas Company's Deferred Gas Cost Account for the Twelve Months Ended June 30, 2004 and the Computation of ACA Factor Effective January 1, 2005*, Docket No. 04-00402.

⁴See *In re: Chattanooga Gas Company Actual Cost Adjustment Filing for 12 Months Ended June 30, 2005*, Docket No. 05-00321.

⁵*In re: Chattanooga Gas Company's Annual Incentive Plan Filing for 12 Months Ended June 30, 2005*, Docket No. 05-00322, *Order Adopting IPA Report of Tennessee Regulatory Authority's Utilities Division* (April 24, 2007).

Advocate to discuss the proposed protective order that had been filed by the Company. On February 1, 2008, the Company and the Consumer Advocate filed a proposed Agreed Protective Order with the Authority, which was adopted by the Hearing Officer and entered in the docket that same day. Also on February 1, 2008, the Hearing Officer issued an *Order Granting Consumer Advocate's Petition to Intervene*.

On February 6, 2008, the Hearing Officer convened a telephone conference with the parties. During that telephone conference, the parties stated that they would continue to work together to frame the issues for resolution in the docket and agreed to file a status report including their proposed issues, both those agreed to and those that remain in dispute, no later than 2:00 p.m. on February 8, 2008. Additionally, the parties confirmed their availability to attend a Status Conference on February 11, 2008.

On February 8, 2008, the Hearing Officer issued a *Notice of Status Conference* setting a Status Conference on February 11, 2008. As noticed, the purpose of the Status Conference was to discuss: the issues proposed for resolution in the docket, whether discovery is needed, establishing a procedural schedule, and any other matters preliminary to a hearing. Also on February 8, 2008, *Chattanooga Gas Company's Status Report* and the *Consumer Advocate's Status Report* were filed with the TRA.

On February 11, 2008, the Consumer Advocate filed its *Consumer Advocate's Statement of Issues* and *Consumer Advocate's Discovery Requests*. Also on February 11, 2008, in accordance with the notice issued previously, the Hearing Officer convened a Status Conference. During the Status Conference, the Hearing Officer and parties discussed a variety of matters, including issues to be included for resolution in the docket, the discovery requests filed by the Consumer Advocate and a procedural schedule to bring this matter before the Authority Panel for a Hearing during the next regularly scheduled Authority Conference on February 25, 2008. On February 12, 2008, the Hearing

Officer issued an *Order Setting Issues for Resolution, Discovery and Procedural Schedule* memorializing decisions made during the Status Conference. In addition to setting specific deadlines for discovery and filings of the parties, CGC stated that it intended to respond as quickly as possible to accommodate the Hearing date set forth by the Hearing Officer and the dates suggested by CGC for doing so were incorporated into the Procedural Schedule. Additionally, the Hearing Officer determined that the issues, as proposed by the parties, for consideration of the Authority in the docket are:

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;
2. Whether the Asset Management and Agency Agreement submitted for approval of the Tennessee Regulatory Authority should be approved for the benefit of CGC's customers;
3. Is the dollar amount of the Annual Guaranteed Minimum properly designated as confidential by Chattanooga Gas Company (AMA, p. 7, ¶ 4);
4. Is the Cooperation section properly included in the Asset Management and Agency Agreement (AMA, p. 10, ¶ 14);
5. Is the Early Termination provision concerning the TRA's jurisdiction over the Asset Manager properly included in the Asset Management and Agency Agreement (AMA, p. 14, ¶ 18.1(i)); and,
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 (AMA, p. 7, ¶ 4)?

Thereafter, in accordance with the Procedural Schedule, CGC submitted its responses to the Consumer Advocate's discovery requests on February 13 and 15, 2008. Further, for consideration of the Authority, CGC and the Consumer Advocate each filed initial briefs setting forth their respective positions on the issues listed above on February 20, 2008 and reply briefs on February 22, 2008.

POSITIONS OF THE PARTIES

CGC: The purpose of this docket is for the TRA to determine whether CGC has complied with its Tariff in bidding and awarding the AMA to Sequent Energy Management, LLC ("Sequent"), the

bidder chosen by CGC, and whether the AMA should be approved. CGC has followed the RFP procedures that were approved by the TRA and there are no allegations to the contrary. The provisions and terms of the agreement have been determined as a part of the RFP process and the TRA should consider the contract as a whole. If it is not approved as it is written, Sequent is no longer bound to its bid and the agreement.⁶

The TRA in approving the RFP procedures gave CGC the responsibility of developing the written RFP and the content requirements for the bid proposals. It does not appear that the TRA intended to dictate the specifics of the AMA. This docket is not about whether different businessmen or their attorneys would have drafted and set forth different contract language and terms in the RFP but rather whether the contract was executed through the RFP process and whether the contract is beneficial to CGC customers.⁷ Sequent offered the highest bid, the most experience, financial stability and strength, and proven ability to perform the RFP requirements as CGC's existing asset manager. Thus, the AMA pending before the TRA provides benefit to CGC's customers in that it will allow CGC to continue its past success with asset management agreements and provide significant net benefits to its customers.⁸

The new AMA is for a term of three years. In CGC's experience, a three-year arrangement is appropriate and provides the greatest value. The inclusion of a contract extension provision allows CGC the flexibility to continue in a more favorable contract if market conditions at time of the termination of the initial term so dictate.⁹

The Cooperation Provision, as well as all of the provisions in the AMA, defines the relationship between CGC and Sequent. The provision is not intended and does not prevent the asset manager from appearing before the TRA and providing truthful, relevant testimony and information

⁶ *Chattanooga Gas Company's Brief Requesting Approval of the Pending Asset Management Agreement*, pp. 4-5 (February 20, 2008).

⁷ *Id.*, pp. 5-6.

⁸ *Chattanooga Gas Company's Reply to the Consumer Advocate's Brief*, p.2 (February 22, 2008).

⁹ *Id.*, p. 3.

when compelled to do so in accordance with the powers and procedures of the TRA.¹⁰

The Annual Minimum Guarantee amount and bid information are confidential and have been filed with the TRA under seal pursuant to the protective order that has been entered 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. CGC explained in the RFP that bids would be confidential in order to encourage bidders to bid without fear that the details of their bids, such as the Annual Minimum Guarantee, would place them in a competitive disadvantage with other bidders. If the Annual Minimum Guarantee amount does not remain protected, future bidders in subsequent RFPs will not be encouraged to provide their highest level of participation. There is no advantage to CGC's customers to disclose publically the Annual Minimum Guarantee. Annually, CGC's customers will have access to the Company's Interruptible Margin Credit Rider filing that will explain the total amount of the net gain, which will at least equal the Annual Minimum Guarantee that is being credited to customers through the purchased gas adjustment.¹¹

Consumer Advocate: The Consumer Advocate takes no position on whether CGC has complied with its tariff in bidding and awarding the AMA. Neither does it take a position on whether the AMA benefits CGC's customers. Because the asset management arrangement and related issues are the subject of litigation in Docket No. 07-00224, it is uncertain whether the AMA in the instant docket is of benefit to customers.¹²

The Consumer Advocate asserts that CGC's designation of the Annual Guaranteed Minimum amount as confidential is erroneous and is not supported by statutory authority. The Consumer Advocate argues that “. . . a trade secret is the only type of confidential business information

¹⁰ *Id.*, p. 4.

¹¹ *Id.*, pp. 6-7, 10.

¹² *Consumer Advocate's Brief*, pp. 1-2 (February 20, 2008).

recognized by Tennessee law.”¹³ The dollar amount of the Annual Guaranteed Minimum “. . . is not a trade secret, particularly if the contract is approved by the TRA.”¹⁴ Consumers have an interest in having access to knowledge of the dollar amount of the Annual Guaranteed Minimum because the assets that are to be managed under the AMA are purchased by consumers through the purchased gas adjustment.¹⁵

Given the existence of Docket No. 07-00224, the Consumer Advocate considers the three year term of the contract to be 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. Even if the TRA accepts the three year term, the provision for a four-year extension of the contract based on the mutual agreement of the parties creates the potential for this contract to exist for seven years. At a minimum, the TRA should require CGC to provide 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.¹⁶

FINDINGS AND CONCLUSIONS

At the regularly scheduled Authority Conference held on February 25, 2008, the panel considered whether to approve the AMA. After hearing the arguments of counsel and considering the record as a whole, the panel found that CGC had complied with its existing tariffed RFP procedures and asset manager selection criteria. The panel further found that the AMA, in particular the Cooperation section, does not affect the TRA’s powers and duties under Title 65, Chapter 4, Part 1.¹⁷ The panel also found that the AMA was in the public interest because it guarantees an annual payment to CGC ratepayers with the possibility of higher payments depending on market conditions

¹³ *Id.*, p. 5.

¹⁴ *Id.*, p. 7.

¹⁵ *Id.*, pp. 2, 5, 7, 8.

¹⁶ *Id.*, p. 11.

¹⁷ In interpreting the Cooperative section, CGC specifically stated to the panel during oral argument on February 25, 2008 that none of the language in the Agreement is intended to inhibit the ability of the TRA to obtain necessary information from CGC or its asset manager.

and the success of the asset manager. Also, the AMA provides more benefit to consumers than the other bids received by CGC. Further, the panel found that CGC could terminate the agreement if so ordered by the Authority should the outcome of Docket No. 07-00224 demonstrate fundamental flaws in the agreement or the TRA discovers any inappropriate affiliate transactions occurring under the AMA.

Finally, a majority of the panel found that the dollar amount of the Annual Guaranteed Minimum is properly designated as confidential. TRA Rule 1220-1-1-.01(3)(g) defines proprietary information as including documents and information “. . . which the producing party in good faith deems to contain or constitute trade secrets, confidential research or development or commercially sensitive information.” The authority of the TRA to issue protective orders in contested case proceedings is established in Rule 26.03 of the Tennessee Rules of Civil Procedure as applied to administrative contested cases through the Uniform Administrative Procedures Act, specifically Tenn. Code Ann. § 4-5-311(a). It is clear that the protective order process and Tenn. Code Ann. § 65-3-109¹⁸ provide authority by which the TRA may maintain the confidentiality of certain information.¹⁹

A majority of the panel found that a protective order had been issued in this docket, interested bidders had been instructed in the RFP that their bids would be considered confidential, and making the bids public now could disadvantage CGC when issuing its next AMA RFP because

¹⁸ Tenn. Code Ann. § 65-3-109 states: “The department of transportation shall not give publicity to any contracts, leases, or engagements obtained by it in its official capacity, if the interests of the company would thereby be injuriously affected, unless, in the judgment of the department of transportation, the public interest requires it.” This section, as well as other sections in Chapter 3 of Title 65, continues to apply to the Tennessee Regulatory Authority through 1995 Tenn. Pub. Acts Ch. 305 § 11.

¹⁹ Tennessee Courts look at a number of factors in determining whether certain information should be protected as confidential. Several factors include:

- (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 both 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.

Wright Medical Technology v. Grisoni, 135 S.W.3d 561, 589 (Tenn. Ct. App. 2001).

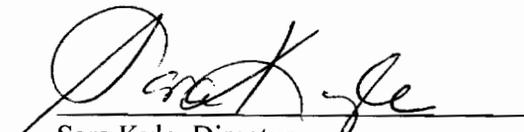
bidders would be hesitant to participate if ultimately the prevailing bid did not remain confidential. In light of these findings, a majority of the panel voted to approve the AMA in its entirety, including maintaining the confidentiality of the Annual Guaranteed Minimum amount. The panel further voted to require the Company to file notice with the Authority of its intent to exercise its option to extend the agreement one year prior to expiration of the initial three year term.

IT IS THEREFORE ORDERED THAT:

1. The Asset Management and Agency Agreement and related Gas Purchase and Sale Agreement filed by Chattanooga Gas Company on January 14, 2008 are approved, including maintaining the confidentiality of the Annual Guaranteed Minimum amount.

2. The Company shall file notice of its intent to exercise its option to extend the Asset Management and Agency Agreement one year prior to the expiration of the initial three year term.


Eddie Roberson, Chairman


Sara Kyle, Director

* * *

Ron Jones, Director²⁰

²⁰ Director Jones voted in favor of (1) approving the Asset Management and Agency Agreement, (2) the directive to CGC to bring to the Authority for approval the four-year extension one year prior to the expiration of the initial three-year term, and (3) the qualification that approval of the Asset Management and Agency Agreement does not affect the jurisdiction of the Authority. Director Jones noted that, in his opinion, with regard to issues four and five, the order should reflect in detail the concerns raised by the Consumer Advocate Division and CGC's responses thereto, explaining the intended meaning of the agreement provisions that are the subject of issues four and five. Finally, Director Jones dissented from the determination that the Annual Guaranteed Minimum should be treated as confidential information. Director Jones' term of office expired before the issuance of this order.