BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
DOCKET TO EVALUATE CHATTANOOGA GAS COMPANY'S GAS PURCHASES AND RELATED SHARING INCENTIVES	)	**DOCKET NO. 07-00224**

CONSUMER ADVOCATE'S RESPONSE TO CGC'S OBJECTION AND MOTION TO STRIKE

INTRODUCTION

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate"), respectfully objects and responds to *Chattanooga Gas Company's Motion to Strike and Objections to Portions of Dr. Brown's Direct and Rebuttal Testimony.*

ARGUMENT

On December 2, 2008, Chattanooga Gas Company ("CGC") filed *Chattanooga Gas Company's Motion to Strike and Objections to Portions of Dr. Brown's Direct and Rebuttal Testimony* ("Motion") in this matter. The Consumer Advocate objects to the relief sought by CGC.

A. Reliance on Hearsay

By statute, the Authority is not strictly bound by the Tennessee Rules of Evidence. Tenn. Code Ann. §65-2-109 (1); Tenn. Code Ann. § 4-5-313(1); TRA Rules & Regulations 1220-1-2-.16(1). The Uniform Administrative Procedures Act (UAPA), as adopted by the State of Tennessee, further reflects that administrative agencies are not strictly bound by the Tennessee Rules of Evidence. Tenn. Code Ann. § 4-5-313(1). The proper standard for determining the admissibility of evidence during a contested case before the Authority is laid out in Tenn. Code

Ann. §65-2-109(1):

> The authority shall not be bound by the rules of evidence applicable in a court, ***but it may admit and give probative effect to any evidence which possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs***; provided, that the authority shall give effect to the rules of privilege recognized by law; and provided further, that the authority may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence; (emphasis added).

This standard allows the Authority to admit additional evidence that would generally be prohibited by Tennessee Courts should that evidence possess probative value of such that it would be accepted by a reasonably prudent person.

If consideration is given to the Tennessee Rules of Evidence, Rule 703 of the Tennessee Rules of Evidence clearly identifies the basis upon which an expert opinion may rely:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate a lack of trustworthiness.

An expert witness is asked to form an opinion about matters of which he has expert knowledge. Tenn. R. Evid. 702. In forming this opinion, an expert may base his opinion on data or other facts obtained which would be reasonably relied upon by other experts. Tenn. R. Evid. 703. Additionally, when such a foundation is established, "inadmissible hearsay could support an admissible expert opinion". Tenn. R. Evid. 703 (Advisory Commission Comment).

Dr. Brown has relied upon sworn statements and public filings, which would reasonably be relied upon by other experts when other sources of data are not readily available. These

statements and filings are trustworthy as they are derived from statements filed in a recent Federal Energy Regulatory Commission dockets and filings submitted to the Securities Exchange Commission. As such, the data relied upon by Dr. Brown meets the standard outlined by the Tennessee Rules of Evidence.

In an analysis for the admissibility of evidence under a "reasonably prudent person in the conduct of their affairs" standard, the Consumer Advocate would submit that a reasonably prudent person would give probative value to any expert testimony reasonable and trustworthy enough to meet the standard outlined in the Tennessee Rules of Evidence. As such, the testimony of Dr. Brown is carries the requisite probative value to be held admissible by the Authority.

B. Except for Proper Cross-Examination the Proof Is Closed in this Docket

CGC's primary goal is supplementing the direct testimony of Tim Sherwood. This effort is untimely and prohibited by the standard practice before the Tennessee Regulatory Authority ("TRA"). It would be better handled in cross-examination of the Consumer Advocate's witnesses.

The scheduling order in this matter contemplates a specific path. Tennessee Code Annotated § 65-2-109 does provide a party the opportunity of rebuttal. It does not specifically call for surrebuttal. The scheduling ordered entered by agreement calls for rebuttal to be pre-filed. If CGC wanted the opportunity for surrebuttal it should have raised its concern then. Further, if the TRA intends to change its practice and allow surrebuttal in this matter, the entire industry needs to understand that the Consumer Advocate will have surrebuttal in the future when the utility has the burden of proof and files first.

Mr. Sherwood's direct should have contained the rebuttal of the Consumer Advocate's witnesses. Instead, CGC offered sound bites and a stump speech, rather than the particulars CGC now hopes to introduce. The scheduling order allowed for rebuttal, which the Consumer

Advocate pre-filed.

Although, the use of pre-filed testimony draws the presentation of proof out over a longer time period, it is similar to any trial. The plaintiff/prosecutor is allowed to present their case. Subsequently, the defense enters the proof it wishes. Strategic decisions are made on the part of the defense as to how much proof to present. Similarly, CGC chose to submit testimony on July 30, 2008, which frankly suffers from a lack of support. The Consumer Advocate then had the opportunity to propound discovery and respond in the rebuttal phase, much as the utility is normally able to do in a rate case. If CGC is allowed to supplement its direct testimony at this stage, the Consumer Advocate will have lost the opportunity to adequately discover and respond as envisioned by the normal practice and standards set by the TRA and specifically as set out in the scheduling order. CGC does not get surrebutal.

Mr. Sherwood's direct testimony focused on the issues in this matter as CGC chose. On page 1 of Mr. Sherwood's direct testimony, he specifically claims to "address the items on the issues list filed in this docket." His testimony is, however, only an overview. CGC strategically chose to address the issues from 30,000 feet. Any portion of Dr. Brown's direct testimony could have been dealt with more specifically in the direct testimony of Tim Sherwood.

In fact, any claim CGC seeks to make regarding judicial economy is not factually supportable. CGC has had three opportunities to mode the proof in this matter into proper form. First, before filing the Consumer Advocate's direct testimony on May 30, 2008, the Consumer Advocate shared drafts of the testimony with CGC. Specifically, the Consumer Advocate sought out CGC's response to the direct testimony CGC now seeks to suppress. CGC had the testimony in advance of the meeting, Dr. Brown carefully presented the testimony to CGC, and the Consumer Advocate offered to answer questions. However, the meeting was an exercise in futility. The representatives of CGC merely suggested that they did not agree with some of Dr. Brown's facts and conclusions, but did not give any specific references. Attached to this response is a copy of email communication from legal counsel following the meeting.

CGC's second opportunity to address the concerns set out in the Motion came with the

July 30, 2008 filing of the direct testimony of Tim Sherwood. Finally, CGC had every opportunity to raise these concerns with the Consumer Advocate subsequent to the filing of Tim Sherwood's testimony. An opportune time to discuss changes in the procedural schedule would have been this past October when Dr. Brown's rebuttal testimony was filed on October 13, 2008 and the motion for a new procedural schedule was filed by CGC on October 17, 2008. Instead, the Exhibit List and Motion filing this week is the first direct indication the Consumer Advocate has received that CGC realized the level of proof was not on its side. This collateral attack on the evidentiary record is a poor substitute for the detailed analysis needed by the TRA to review the issues before it.

Dr. Brown's rebuttal testimony simply provides specific detail on the issues covered by Mr. Sherwood. The Consumer Advocate has committed no wrong in this instance. CGC's Motion is an attempt at submission of "sur-responsive" testimony, providing specific responses to issues which CGC dealt with in such a casual manner in filing testimony on July 30, 2008.

C. The Rule of Completeness

When a portion of a document is submitted into evidence, Tennessee Rule of Evidence 106 allows the submission of an entire document "which ought in fairness ... be considered contemporaneously with it." The Consumer Advocate agrees. However, the Consumer Advocate does not agree that it has the obligation to produce these documents and somehow help CGC assess whether the "fairness" test has been met.

As described *supra*, the timing of CGC's efforts have made this matter more difficult to prepare for presentation to the panel in this docket. All the supporting material cited by the Consumer Advocate's witness in direct testimony could have been addressed by CGC's direct testimony. Additionally, CGC has had a standing offer from the Consumer Advocate to work through any concerns with the proof pre-filed in this docket. Now, just under two weeks before the hearing CGC raises concerns related to the Rule of Completeness.

It is also important to note that there is no jury in this matter. The panel hearing this matter will not retire immediately to a sequestered location without the evidentiary exhibits and

deliberate in secret until they come out with a decision. The rule is "designed to let the jury assess related information at the same time rather than piecemeal." Tennessee Law of Evidence, 3rd Ed., § 106.1. The Consumer Advocate is confident that the panel in this matter will not be mislead given the institutional knowledge and learned staff available to it.

Right now there is no way to analyze whether this docket is incomplete. CGC has not proffered the documents it claims are necessary. Submission of these documents with their Motion is essential to CGC actually demonstrating that Dr. Brown's testimony is incomplete in some manner. It's ironic that CGC relies on hearsay statements to make its case for inclusion of additional material in this record. Contained within the Motion are only legal counsel's arguments. While it appears that CGC's legal counsel has access to these documents and makes some representations about them, legal counsel's statements may not be considered facts. The best evidence in this situation is the documents.

The Consumer Advocate believes that it has provided CGC with the proper citations to these documents so that CGC may retrieve them. The documents are available to the public. If CGC needs assistance in obtaining the documents, the Consumer Advocate will help. The Consumer Advocate is also willing to review the particular documents CGC wishes to submit after some explanation with respect to the "fairness" test and with citations to the documents, so that the record will be complete. What the Consumer Advocate is not willing to do is waste time during the week leading up to the hearing on this matter helping CGC do the work that could have been done this past summer by CGC.

CONCLUSION

In consideration of the foregoing, the Consumer Advocate requests that the relief sought by CGC be denied.

Respectfully submitted,

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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 December 5, 2008.

Timothy C. Phillips
Senior Counsel

Timothy Phillips

From: Timothy Phillips [Timothy.Phillips@state.tn.us]
Sent: Friday, May 30, 2008 3:59 PM
To: Luna, J W.
Cc: Butler, Stephen; Phillips, Timothy
Subject: Re: CGC 07-00224

J.W.,

I hope you are well. No matter when it happens losing your Mother is difficult.

I need to send you a couple comments as a follow up to our meeting on Wednesday. First, thank you for coming over and getting the CGC folks on the line to talk. Second, I do want to document my expression of disappointment that the CGC folks did not respond specifically to the facts and issues in the draft testimony we provided CGC. Consequentially, you will see that the testimony we filed today has not changed significantly. I understand that CGC does not wish to talk informally again until after CGC files its testimony. We remain open to further discussions, but will wait for CGC to call.

Thank you.

Timothy C. Phillips
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>>> "J W. Luna" <jwluna@farmerluna.com> 5/23/2008 8:54:32 AM >>>

Tim, my mother passed away early this week and i am out of the office attending to family matters and jennifer is in transit to an out of state wedding and probably not able to access emails until later today. I will try to call archie and get. Back with you as soon as i can
---
Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Timothy Phillips <Timothy.Phillips@state.tn.us>
To: Jennifer L. Brundige; J W. Luna
Cc: Butler, Stephen <Stephen.Butler@state.tn.us>; Phillips, Timothy <Timothy.Phillips@state.tn.us>

Sent: Fri May 23 08:39:00 2008
Subject: CGC 07-00224

Jennifer and J.W.,

You will recall that some time ago I asked that we modify the procedural schedule to include some time to talk about the issues. CGC was not willing to accept this arrangement. Instead, CGC wanted to stick to a schedule that required us to file our Direct today. I would like to suggest an alternate approach. We have finished our Direct Testimony. We would like to share the present draft of the Direct with CGC today and set a day next week to discuss the issues dividing the Consumer Advocate and CGC. We recommend next Wednesday for the meeting.

This would allow us to get CGCâ€™s reaction to the Direct and provide ways for us to verify CGCâ€™s potential disagreement with the points made in the Direct. Our discussions may reduce or simplify our disagreements, improve the Direct testimony, increase our understanding of CGCâ€™s point of view and lower the costs related to this docket. It is possible that our talk could be the beginning of a path that resolves some or all of the issues in this matter. We would want all copies of the draft Direct returned. Here is how we would inform the hearing officer of our wishes.

â€œIn order to facilitate the exchange of information and ideas the parties would like to modify the procedural schedule, so that the Consumer Advocateâ€™s Direct Testimony is not due until May 30, and the second round of discovery will not be due June 6. The remainder of the schedule would stay the same.â€□

Please let me know if CGC would like to pursue this route. I would like to know by 10:30 Central.

Thank you.

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