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

**January 27, 2009**

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

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## CHATTANOOGA GAS COMPANY'S REPLY TO THE CAPD'S RESPONSE TO CGC'S MOTION TO STRIKE

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Chattanooga Gas Company ("CGC" or "Company") hereby files this reply to the Consumer Advocate and Protection Division's ("CAPD") opposition to CGC's motion to strike portions of Dr. Brown's testimony as hearsay and improper rebuttal testimony.

On December 2, 2008, CGC filed its Motion to Strike and Objections to Portions of Dr. Brown's Direct and Rebuttal Testimony that contain hearsay statements. Dr. Brown has incorporated into his direct and rebuttal testimony partially quoted hearsay statements and materials of third parties filed in other state and federal dockets that have absolutely no bearing or relevance on the issues in the present TRA docket regarding CGC's gas supply capacity and management of idle assets, and thus should be stricken. This piecemeal approach of incorporating partially quoted hearsay statements and materials into testimony is not the type of information and evidence upon which a reasonably prudent person in the conduct of their affairs regarding capacity planning and asset management would rely. Thus, pursuant to Tenn. Code Ann. § 65-2-109, CGC believes that the TRA should either strike or give no probative value to the extraneous, partially quoted hearsay statements and materials incorporated into Dr. Brown's testimony.

On December 5, 2008, the CAPD filed a response to CGC's motion to strike, relying primarily on Tennessee Rules of Evidence regarding expert opinion testimony to support the hearsay incorporated into Dr. Brown's testimony. CGC is filing this reply to address the errors in the CAPD's argument.

CAPD's defense of the piecemeal string of hearsay relies on the expert witness rule. CGC asserts that any such reliance here is misplaced and, as discussed more fully below, is premature because Dr. Brown has not been proffered as an expert in gas supply planning, capacity supply planning, or asset management and likely would not qualify if proffered. However, CAPD's reliance on the expert witness rule also does not withstand analysis.

Pursuant to Tennessee Rule of Evidence 703, an expert is allowed to base opinions on facts not in evidence only when the following requisite foundation has been laid: (1) the facts are "reasonably relied upon by experts in the particular field" and (2) the facts must be trustworthy. See Advisory Comments to Tenn. Rule of Evid. 703; see also New Jersey Zinc Co. v. Cole, 532 S.W.2d 246 (Tenn. 1975). The CAPD has failed to lay this foundation and frankly cannot do so based on the type of hearsay that Dr. Brown is attempting to incorporate into his testimony. Experts in the field of gas supply and capacity planning and asset management would not reasonably rely on the type of piecemeal hearsay statements and materials upon which Dr. Brown is attempting to base his testimony. Rather, experts in the field of gas supply and capacity planning and asset management would rely upon actual data involving CGC's assets and would perform analysis to determine firm design day requirements and load duration curves at a minimum. The CAPD has not presented any evidence to the TRA that the type of hearsay statements of third parties that Dr. Brown has incorporated into his testimony is the type of facts

upon which experts in the field of capacity planning and asset management rely, nor can the CAPD.

The CAPD has failed to provide any evidence about the hearsay testimony for the TRA to make a determination about its underlying trustworthiness. Rule 703 mandates that the TRA disallow evidence if the underlying facts or data indicate a lack of trustworthiness. McDaniel v. CSX Transportation, Inc., 955 S.W.2d 257, 264-65 (Tenn. 1997). CGC submits that the hearsay portions of Dr. Brown's testimony are not trustworthy as the statements and materials have been taken out of context by Dr. Brown and put forward as substantive evidence. The TRA has not been provided with a full copy of the record in the dockets in which these statements and materials were filed and there is no evidence in the record that would allow the TRA to fully analyze the accuracy or determine the trustworthiness or probative value of these hearsay statements and materials that Dr. Brown has incorporated into his testimony. Indeed, Dr. Brown has not even provided the entire document from which he has clipped fragmented sections.

The piecemeal hearsay statements and materials put forward in Dr. Brown's testimony in this docket are not probative evidence that would be independently admissible into this docket and thus could not be used by the TRA as a basis for its decision in this docket as to CGC's gas supply capacity or asset management arrangements. Because of the way Dr. Brown has incorporated the hearsay statements and materials of third parties directly into his testimony as if substantive evidence, it is important for the TRA to strike the series of hearsay statements to safeguard the record.[1]

[1] Further, the TRA should require CAPD to separate Dr. Brown's prefiled testimony from his exhibits. The prefiled testimony in administrative cases is meant to reflect oral testimony as if given orally from the stand. Such testimony is adopted under oath during the trial and then copied into the record. Exhibits must separately meet admissibility standards and are frequently challenged. If an exhibit does not survive an objection then it cannot be included in the record. Dr. Brown's combining of the testimony with the exhibits creates administrative issues for the TRA in addressing exhibits that do not survive objections.

Moreover, pursuant to Rule 403, the probative effect of this inadmissible evidence does not outweigh the prejudicial effect of its use in Dr. Brown's testimony. To cure this prejudicial effect, the TRA must strike the hearsay portions of Dr. Brown's testimony. Alternatively, the TRA could require the CAPD to provide the TRA with the background and full context for the filings in other jurisdictions and information about the decision maker's reliance, rejection, or indifference to the statements in making its ultimate decisions in the dockets.

Finally, as stated above, the CAPD has not affirmatively proffered Dr. Brown as an expert in the subject matters of gas supply, capacity supply planning and asset management, and CGC questions whether he is qualified to testify as an expert on these matters. CGC further questions whether the type of analysis that Dr. Brown has used (i.e., stringing together in his testimony piecemeal portions of hearsay statements and materials of third party witnesses before other jurisdictions not involving CGC's assets) would withstand a *Daubert* challenge. A review of Dr. Brown's credentials and the failure of Dr. Brown's testimony to provide any analysis of the type routinely put forward by experts in this field creates extreme doubt as to his ability to qualify as an expert, if proffered. When considering the reliability of expert testimony, the decision making body must assure itself that "the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation." McDaniel, 955 S.W.2d at 265. Dr. Brown's testimony is not based on relevant facts, processes, or data regarding CGC's asset management and gas supply capacity but rather upon Dr. Brown's mere speculation. Thus, the hearsay evidence should be stricken as untrustworthy and unreliable. CGC reserves its right to challenge the qualifications of Dr. Brown to testify as an expert in this matter and to challenge the reliability of his testimony and the ability of Dr. Brown's piecemeal hearsay analysis to meet *Daubert* standards if it is offered as expert opinion testimony.

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 27th day of January, 2009, to the following:

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