BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 2, 2009

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

ORDER ON FEBRUARY 9, 2009 STATUS CONFERENCE

This matter came before the Hearing Officer during a Status Conference on February 9, 2009 to establish a procedural schedule and to address certain outstanding motions and objections that were filed with the Tennessee Regulatory Authority ("TRA" or the "Authority") by the Chattanooga Gas Company ("CGC" or the "Company") and the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate").

RELEVANT PROCEDURAL BACKGROUND

On September 24, 2008, the *Consumer Advocate's Motion for Entry of a Procedural Schedule* was filed with the Authority requesting that the hearing, scheduled to convene during the week of October 20, 2008, be rescheduled due to the unavailability of the CGC, and further that the Consumer Advocate be permitted an additional two weeks to file its pre-filed rebuttal testimony due to the Consumer Advocate's summer schedule on other matters and the discovery process taking longer than expected.[1] On September 25, 2008, the Hearing Officer issued an *Order Granting Additional Time and Issuing Amended Procedural Schedule* granting the Consumer Advocate the additional time it requested, continuing the hearing, and resetting the

[1] *Consumer Advocate's Motion for Entry of a Procedural Schedule,* p. 1 (September 24, 2008).

remaining procedural deadlines, including the scheduling of a pre-hearing conference on October 28, 2008 and a hearing on November 3-4, 2008. A *Notice of Hearing* reflecting the new hearing date was also entered on September 25, 2008. On October 1, 2008, a *Notice of Pre-Hearing Conference* was issued by the Hearing Officer. On October 13, 2008, the Consumer Advocate filed its pre-filed *Rebuttal Testimony of Steve Brown.*

On October 17, 2008, CGC filed its *Chattanooga Gas Company's Motion to Continue* requesting that the hearing date be moved from November 3, 2008, to a later date that would be the earliest available date convenient to the Authority so that recently retained legal counsel, Mr. Craig Dowdy, could assist current counsel of record, Farmer & Luna, in this proceeding.[2] On October 21, 2008, an *Order Granting Chattanooga Gas Company's Motion to Continue and Issuing a Second Amended Procedural Schedule* was issued continuing the hearing and resetting certain procedural deadlines, including setting a pre-hearing conference on December 8, 2008 and a hearing on December 15-16, 2008. Also on October 21, 2008, a *Notice of Rescheduled Pre-Hearing Conference and Hearing* was entered by the Hearing Officer.

In accordance with the *Second Amended Procedural Schedule,* the CGC filed its *Chattanooga Gas Company's Filing of Exhibits for Use during Direct and Re-Direct Testimony at the Hearing on the Merits* on December 1, 2008. Also on December 1, 2008, the Consumer Advocate sent email correspondence first informing the parties and Hearing Officer that it "does not intend to submit any exhibits during direct testimony that are part of the pre-filed testimony of Terry Buckner and Dr. Steve Brown."[3] Then, in a subsequent email, Consumer Advocate

[2] *Chattanooga Gas Company's Motion to Continue,* p. 1 (October 17, 2008).
[3] Email correspondence from Timothy Phillips, Consumer Advocate (December 1, 2008, 2:35 p.m.).

stated that it "would like to reserve the possibility of using some of the exhibits proposed by CGC for use in our direct . . . without waiving any potential objection to CGC's exhibits."[4]

On December 2, 2008, the *Chattanooga Gas Company's Motion to Strike and Objections to Portions of Dr. Brown's Direct and Rebuttal Testimony ("Motion to Strike Testimony")* was filed with the Authority. In its *Motion to Strike Testimony,* CGC lists and discusses approximately thirteen sections within Consumer Advocate witness Dr. Steve Brown's pre-filed direct and rebuttal testimony that CGC asserts contain hearsay that should be excluded and given no probative value pursuant to Tenn. Code Ann. § 65-2-109.[5] CGC asserts that throughout his pre-filed testimony, Dr. Brown incorporates extraneous and partial statements, testimony and materials, of third parties that have no bearing or relevance to the issues in this docket and are hearsay that cannot be subjected to cross-examination at hearing.[6] Further, CGC contends that the TRA is not able to analyze the accuracy of, or determine the probative value of, hearsay statements and materials which are incomplete and taken out of context as it has not been provided complete copies of the documents from which Dr. Brown has excerpted his quotations, nor full copies of the record in the dockets from which the statements and materials were originally filed.[7] Thus, as a result, the statements and materials are not reliable and do not meet the evidentiary standards set forth in either the Tennessee Rules of Evidence or Tenn. Code Ann. § 65-2-109.[8]

Additionally, in its *Motion to Strike Testimony,* CGC asserts that in his rebuttal testimony, Dr. Brown has raised at least three new issues that were not included in his direct testimony: 1) the Management of Operating Balance Agreements ("OBAs"), 2) the "Long Term

[4] Email correspondence from Timothy Phillips, Consumer Advocate (December 1, 2008, 3:51 p.m.).
[5] *Motion to Strike Testimony* (December 2, 2008).
[6] *Id.* at 3-4
[7] *Id.*
[8] *Id.*

Value Proposition," and 3) the facts regarding the Atlanta Gas Light Company Capacity Supply Plan Stipulation.[9] CGC requests that "it be allowed to address and refute through sur-responsive testimony of Tim Sherwood the new concerns, assertions, and opinions that Dr. Brown has raised for the first time in his rebuttal testimony."[10]

On December 3, 2008, the *Consumer Advocate's Objection and Motion to Exclude Exhibits ("Motion to Exclude Exhibits")* was filed in the docket file. In its *Motion to Exclude Exhibits,* the Consumer Advocate objects to each of CGC's Exhibits 2 through 15, and asserts that the exhibits, which were generated subsequent to and contain few citations or abbreviations with reference to testimony, are a improper attempt to offer new support for the direct testimony of Tim Sherwood. The CGC contends that the exhibits are "an attempt at surrebuttal, providing specific responses to issues which CGC dealt with in such a casual manner in filing testimony as to be non-responsive,"[11] and therefore requests that the exhibits be excluded from the evidentiary record.

On December 5, 2008, CGC filed its *Chattanooga Gas Company's Reply to the CAPD's Objection and Motion to Exclude Exhibits ("Reply to Motion to Exclude Exhibits").* In its *Reply to Motion to Exclude Exhibits,* CGC contends that its exhibits refute the improper rebuttal testimony of Dr. Brown, which raises new concerns not previously addressed in either his or Tim Sherwood's prior pre-filed testimonies, and thus the exhibits are proper for admission in order to facilitate a proper review and assessment of the weight of the evidence presented. Additionally, as the exhibits may be responsive during cross-examination and used on re-direct examination,

[9] *Id.* at 5.
[10] *Id.* at 3 and 5.
[11] *Motion to Exclude Exhibits,* pp. 3-4 (December 3, 2008).

"the final decision on admissibility of the exhibits should be determined at the hearing on the merits based on the context under which they are proffered."[12]

Also on December 5, 2008, the *Consumer Advocate's Response to CGC's Objection and Motion to Strike ("Response to Motion to Strike Testimony")* was filed with the Authority. In its *Response to Motion to Strike Testimony,* the Consumer Advocate asserts that "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,"[13] and as such documents are derived from Federal Energy Regulatory Commission ("FERC") dockets and Securities Exchange Commission filings, they are trustworthy. Accordingly, the Consumer Advocate contends that the standards set forth in the Tennessee Rules of Evidence pertaining to expert testimony, specifically Tenn. Rule of Evid. 702 and 703, are satisfied. And, as "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,"[14] the testimony of Dr. Brown therefore also satisfies the reasonably prudent person standard to be applied in determining admissibility of evidence in a contested case before the Authority that is found in Tenn. Code Ann. § 65-2-109(1).

Additionally, in its *Response to Motion to Strike Testimony,* the Consumer Advocate asserts that CGC's witness, Tim Sherwood, strategically refrained from providing certain depth of detail in his direct testimony, choosing instead to give only an overview of the issues presented in the docket. Further, "Dr. Brown's rebuttal testimony simply provides specific detail on the issues covered by Mr. Sherwood."[15] Thus, the Consumer Advocate contends that CGC's

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[12] *Reply to Motion to Exclude Exhibits,* p. 2 (December 5, 2008).
[13] *Response to Motion to Strike Testimony,* p. 2 (December 5, 2008).
[14] *Id.* at 3.
[15] *Id.* at 5.

request for sur-responsive testimony is an improper attempt to submit surrebuttal testimony, which is not contemplated within the procedural schedule or Tenn. Code Ann. § 65-2-109. Finally, the Consumer Advocate asserts that it has no obligation to supplement the record with complete copies of the materials quoted by Dr. Brown under the "Rule of Completeness" set forth in Tenn. Rule of Evid. 106 because the rule is not applicable "given the institutional knowledge and learned staff available to" the Authority panel in this matter[16] and the absence of a jury in this case.

On December 8, 2008, the Hearing Officer convened a pre-hearing conference in accordance with Tenn. Code Ann. § 4-5-306 for the purposes of addressing the motions and objections of the parties, and to finalize certain matters in anticipation of the hearing on the merits scheduled to occur the following week. During the pre-hearing conference, the parties requested that the hearing scheduled on December 15-16, 2008, be postponed indefinitely to provide them additional time in which to continue settlement discussions, which were characterized as likely to be "very fruitful."[17] At the request of the parties, the Hearing Officer agreed to continue the date of the hearing and to defer consideration of the motions and objections filed by the parties. Further, the parties were directed to file a joint status report in the docket file on December 16, 2008. On December 9, 2008, a *Notice of Cancellation of Hearing* was issued notifying the public of the cancellation of the hearing set on December 15-16, 2008.

On December 16, 2008, a *Joint Status Report* was filed on behalf of the parties by counsel for CGC advising the Hearing Officer that settlement discussions were continuing between the parties and that an additional status report would be filed on December 17, 2008. On December 17, 2008, the parties sent an email again advising that settlement discussions were

[16] *Id.* at 5-6.
[17] Transcript of Status Conference, pp. 3-4 (December 8, 2008).

on-going and that an additional status report would be filed the following day. On December 18, 2008, CGC emailed an electronic copy of its *Status Report of Chattanooga Gas Company,* a hard copy of which was filed in the docket file on December 19, 2008, informing the Hearing Officer that settlement discussions had become unproductive and requesting the setting of a status conference and hearing date.[18] In an emailed response sent on December 18, 2008, and filed in the docket on December 19, 2008, the Consumer Advocate concurred with CGC's recommendation to set the pending motions for hearing.[19] On January 22, 2009, a *Notice of Status Conference* setting a status conference on January 28, 2009 was issued by the Hearing Officer.

On January 27, 2009, *Chattanooga Gas Company's Reply to the CAPD's Response to CGC's Motion to Strike ("Reply to Consumer Advocate's Response to Motion to Strike Testimony")* was filed with the Authority. In its *Reply to Consumer Advocate's Response to Motion to Strike Testimony,* CGC asserts that the Consumer Advocate's reliance on the expert witness rule[20] is misplaced because the requisite foundation for the use of the type of hearsay statements and materials incorporated into Dr. Brown's testimony has not been laid. CGC further contends that the Consumer Advocate cannot demonstrate the proper foundation because,

> 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.[21]

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[18] *Status Report of Chattanooga Gas Company* (December 19, 2008).
[19] Email correspondence between the parties and Hearing Officer (December 18, 2008).
[20] Tenn. Rule of Evid. 703.
[21] *Reply to Consumer Advocate's Response to Motion to Strike Testimony,* p. 2 (January 27, 2008).

Additionally, CGC asserts that the Consumer Advocate has "failed to provide any evidence about the hearsay testimony for the TRA to make a determination about its underlying trustworthiness."[22] The TRA has not been provided a full copy of the record in the dockets in which the statements and materials were filed, or even a copy of the complete document from which the quoted sections were taken. Further, it is the contention of CGC 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."[23] Therefore, CGC urges the TRA to strike portions of Dr. Brown's testimony as hearsay and improper rebuttal testimony.

In the interests of safeguarding the record, CGC further recommends that the Consumer Advocate be required to separate Dr. Brown's substantive pre-filed testimony from his exhibits. Finally, CGC asserts that the Consumer Advocate "has not affirmatively proffered Dr. Brown as an expert in the subject matters of gas supply planning and asset management, and CGC questions whether he is qualified to testify as an expert on these matters."[24] CGC states that "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," and suggests that the type of analysis utilized by Dr. Brown would not withstand a *Daubert*[25] challenge if offered as expert testimony.[26]

On January 27, 2009, the Hearing Officer issued a *Notice of Rescheduling of Status Conference* resetting the January 28, 2009 Status Conference on February 9, 2009. The purposes of the Status Conference, as set forth in the notice, were to address the outstanding motions and

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[22] *Id.* at 3.
[23] *Id.*
[24] *Id.* at 4.
[25] See *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993).
[26] *Reply to Consumer Advocate's Response to Motion to Strike Testimony,* p. 4 (January 27, 2008).

objections of the parties and to discuss a procedural schedule to completion. On February 5, 2009, counsel for the Consumer Advocate, on behalf of the parties, emailed a *Draft Procedural Schedule* to the Hearing Officer.

FEBRUARY 9, 2008 STATUS CONFERENCE

The Status Conference began as noticed at approximately 1:00 p.m. in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee. The parties in attendance were as follows:

> **Consumer Advocate - Timothy Phillips, Esq., Mary White, Esq.,** and **Stephen Brown, Ph.D.,** Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202; and
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> **CGC – L. Craig Dowdy, Esq.,** McKenna Long & Aldridge, LLP, 303 Peachtree Street, Suite 5300, Atlanta, GA 30308, **J.W. Luna, Esq.** and **Jennifer L. Brundige, Esq.,** Farmer & Luna, PLLC, 333 Union Street, Suite 300, Nashville, TN 37201.

I. Procedural Schedule

Upon commencement of the Status Conference, following an inquiry by the Hearing Officer as to whether the parties had any updates or announcements to discuss, the parties directed the Hearing Officer to the *Draft Procedural Schedule* proposed by the parties and explained the terms upon which the parties had come to agreement thereon. Specifically, the parties stated that upon adoption by the Hearing Officer, the procedural schedule as proposed, which provides for a fourth round of discovery, the filing of additional pre-filed testimony from each party, and a hearing date at the end of July 2009, was intended to resolve the Consumer Advocate's *Motion to Exclude Exhibits* in its entirety and a portion of the CGC's *Motion to Strike Testimony,* leaving only those objections related to the use of hearsay within Dr. Brown's testimony for resolution by the Hearing Officer.[27]

[27] Transcript of Proceedings, pp. 4-5 (February 9, 2009).

Thereafter, the Hearing Officer questioned and engaged the parties in further discussion concerning the reasons for, necessity, and scope of the incorporation of certain components of the proposed procedural schedule, including the additional discovery and pre-filed testimony, and the length of time proposed for completion of the docket. The parties stated that the proposed procedural schedule was structured to include additional discovery and pre-filed testimony in order to address the issues raised by the parties in their preliminary motions.[28] The parties further asserted that while the conclusion of the docket would be lengthened somewhat, the supplemental discovery and pre-filed testimony would allow the parties to present a better, more complete, record in this matter.[29] Concerning the scheduling of dates, the parties stated that a late July hearing date was preferred due to concerns related to the availability of counsel, the parties, and witnesses. Specifically, CGC stated that it was not available for a hearing during the month of June.[30]

Thereafter, the Hearing Officer consented to the general format of the proposed procedural schedule, but directed the parties to continue to work together to revise the specific dates in order to accommodate a hearing on the merits in May.[31] The Hearing Officer further advised the parties that all additional pre-filed testimony would be required to include clear and specific citations cross-referencing the portions of the most recent previously-filed opposing testimony that is being responded to or rebutted in and throughout the new testimony.[32]

Subsequently, on February 12, 2009, the TRA Staff notified the parties that, unfortunately, at this time the Authority was not able to confirm a firm hearing date in May and

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[28] *Id.* at 4-5.
[29] *Id.* at 6-9.
[30] *Id.* at 10.
[31] Subject to the confirmation of the Authority panel, the Hearing Officer suggested May 18-19, 2009, as a potential hearing date.
[32] Transcript of Proceedings, pp. 12-13 (February 9, 2009).

directed the parties, on behalf of the Hearing Officer, to continue preparing a proposed procedural schedule that would accommodate an early May hearing date. In response, on February 13, 2009, counsel for the Consumer Advocate requested that a date-certain hearing date be provided to allow the parties to schedule procedural deadlines so to avoid operating under an unnecessarily compressed time period. Thereafter, on February 17, 2009, the Hearing Officer, provided the parties the following email response concerning the setting of a hearing date, a copy of which is attached hereto as Exhibit A:

> This email is in response to the various emails exchanged between the parties and Authority Staff on Friday. First, I appreciate the parties' cooperative efforts in proposing a procedural schedule aimed at resolving certain evidentiary disputes. The outcome of the parties' agreement allows for a fourth round of discovery to occur, resulting in a third round of questions propounded by the Consumer Advocate, as well as additional pre-filed testimony to be filed by each party. Further, I understand the parties' preference for working toward a date-certain hearing date. However, this docket has been proceeding for over a year already and date-certain hearing dates have been set three separate times. All three hearings have been postponed at the request of one or both of the parties.
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> As you are aware, at this time, the Authority is not able to schedule a firm hearing date in May. In spite of this I have been advised that, as we get closer in time to concluding the preliminary matters in this docket, there is a possibility - although no guarantee - that certain May hearing dates may become available. The Authority is available in June; however, Chattanooga Gas is not. It is in the interests of the Authority, the citizens of the state of Tennessee, the parties participating in this docket as well as in other dockets pending before the Authority, to avoid unnecessary delays in the resolution of the issues presented in this docket.
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> Nevertheless, while not ideal, upon further consideration of the request of the parties in light of the current difficulties of scheduling a firm hearing date to occur within the first half of this year, I will consider a procedural schedule that concludes all preliminary matters in this docket by the end of June in anticipation of a July 13-14 hearing date. Such a schedule provides more than ample time in which to complete the additional discovery and pre-filed testimony requested by the parties. No further extensions of time will be granted, unless extraordinarily exceptional circumstances develop in the interim. **The parties shall submit an agreed proposed procedural schedule for the consideration of the Hearing Officer by Thursday, February 19, 2009.**[33] (Emphasis in original)

[33] See Exhibit A attached hereto; Email from Hearing Officer to the parties (February 17, 2009).

Thereafter, on February 19, 2009, the parties notified the Hearing Officer that an additional day was needed to complete their preparation of an agreed proposed procedural schedule. On February 20, 2009, the parties submitted a revised Draft Procedural Schedule that concludes all preliminary matters on June 29, 2009 for the consideration of the Hearing Officer.

FINDINGS AND CONCLUSIONS

The goals of the procedural schedule, as proposed by the parties pursuant to the parameters set forth by the Hearing Officer, are to efficiently move this docket toward deliberations on the issues raised by the parties and to provide the parties a reasonable and adequate amount of time to conduct an additional, and final, round of discovery, prepare and submit supplemental pre-filed testimony, and prepare for Hearing. Incorporating the Draft Procedural Schedule proposed by the parties with slight modification, the Hearing Officer adopts the *Third Amended Procedural Schedule,* attached as Exhibit B.

The procedural schedule denotes that pre-filed testimony shall include clear and specific citations cross-referencing the portions of the most recent previously-filed opposing testimony that is being responded to or rebutted in and throughout the new testimony. Such citations are mandatory and an essential component of all pre-filed testimony hereafter filed in the docket. It is expected that incorporation of such citations will assist the Hearing Officer and the Authority in tracking the arguments of the parties; thus, ensuring that all subsequent testimony remains within the bounds of the preceding opposing testimony and does not expand the scope of the issues, concerns, or arguments therein nor introduce any new issues, concerns, or arguments. In the event of an allegation that certain testimony has exceeded the scope of the preceding opposing testimony, the presence of cross-referencing citations should facilitate a timely

verification and assessment of the substance of the testimony by the Hearing Officer or Authority.

Further, the Hearing Officer reminds the parties that as with any schedule, the effectiveness of this procedural schedule is directly dependent upon the extent of cooperation on the part of the parties in meeting the individual benchmark dates. Nevertheless, as this matter has been pending before the Authority for some time, and the procedural schedule has been adjusted and reset several times, the parties should note that, barring the occurrence of extraordinarily exceptional circumstances, no further extensions of time will be granted.

II. Chattanooga Gas Company's Motion to Strike and Objections to Portions of Dr. Brown's Direct and Rebuttal Testimony

Pursuant to the agreement of the parties, the only issue that remains for the determination of the Hearing Officer involves the hearsay objections as to portions of Dr. Brown's testimony raised in CGC's *Motion to Strike Testimony*. During the Status Conference, CGC and the Consumer Advocate each presented oral argument limited to this issue.

During its oral argument, the CGC reiterated many of the arguments it had set forth in its *Motion to Strike Testimony* and its *Reply to Consumer Advocate's Response to Motion to Strike Testimony*. The CGC began by first acknowledging the Consumer Advocate's ability and authority to hire and present witnesses of its choosing; and noted that in this case, it has chosen Dr. Brown.[34] Next, CGC stated that "the burden of proof in establishing the proper foundation for their evidence rests with them [the Consumer Advocate], not with Chattanooga Gas Company."[35] Finally, the CGC asserts that the pre-filed testimonies of Dr. Brown do not meet the standards required for either a lay witness or an expert witness.[36]

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[34] *Id.* at 14-15.
[35] *Id.* at 15.
[36] *Id.* at 15.

The CGC then contended that the "strung-together excerpts of hearsay that comprise [Dr. Brown's] testimony" do not meet even the more lenient evidentiary standards permitted under Tenn. Code Ann. § 65-2-109 because the excerpts as presented would not be accepted by a reasonably prudent person in the conduct of their affairs.[37] Next, CGC stated that although it disputed Dr. Brown's qualification as an expert in the field of gas supply planning, capacity planning, and asset management, even if he were such an expert, the Consumer Advocate still must demonstrate that Dr. Brown's testimony would substantially assist the trier of fact, that the facts and information used by Dr. Brown are of a type reasonably relied upon by experts in the particular field, and that it is trustworthy.[38] The CGC asserted that the testimony of Dr. Brown fails to meet these criterions.

Next, the CGC contended that the testimony does not assist the trier of fact in the resolution of the issues presented in the docket because it does not contain "the kind of analysis done by any expert in the field of gas supply, capacity planning, or asset management," as such experts would conduct independent analysis using raw data:[39]

> In fact, when you look at the type of – if it's gas supply planning or capacity planning or asset management, you are going to see normally independent analysis. You are going to see regression analysis looking at what the sensitivity is on heating degree days versus load. You are going to look at a load profile to determine what is the duration of the cold weather versus load, so that helps you determine what the mix is.[40]

In contrast, CGC stated that Dr. Brown's testimony lacks the independent analysis which would be performed by an expert, "His whole analysis is just a series of speculation strung together

[37] *Id.* at 16.
[38] *Id.* at 16.
[39] *Id.* at 16.
[40] *Id.* at 18-19.

with excerpts of hearsay testimony in various jurisdictions, or partial hearsay documents or partial orders."[41]

Although CGC conceded that hearsay may at times be used to form the basis of an expert's opinion under state and federal rules of evidence, it further asserted that "the expert can't merely be a conduit for hearsay information. They have got to provide an analysis and a basis for opinion."[42] When hearsay is allowed in expert testimony, it is not asserted as substantive evidence, and cannot be utilized as such by the trier of fact.[43] Further, the CGC contended that the type of hearsay information used by Dr. Brown is not of the kind that would be relied upon to form the basis of opinions by gas supply, capacity planning, or asset management experts:

> Typically you see experts in this field and others quoting treatises, which would typically not be allowed, or you see them quoting orders of other jurisdictions or commissions, or you see them quoting tariffs that have been approved in another jurisdiction for whatever they are worth.[44]

Finally, the CGC contended that the Authority is in no position to determine the trustworthiness of the hearsay utilized by Dr. Brown because neither the full documents, nor the record of proceedings related to the hearsay materials, have been submitted to the Authority for review. Therefore, as only the excerpts of the hearsay materials located within Dr. Brown's testimony have been provided to the Authority, the CGC argued that the Consumer Advocate has failed to establish the trustworthiness of the hearsay testimony.[45]

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[41] *Id.* at 19.
[42] *Id.* at 19.
[43] *Id.* at 19.
[44] *Id.* at 20.
[45] *Id.* at 17, 25.

The CGC discussed two particular examples of the use of hearsay within Dr. Brown's testimony in detail to illustrate its contentions.[46] Additionally, CGC stated that the Authority should consider addressing the practice by some witnesses of incorporating images and excerpts, which would typically be proffered separately as exhibits, into substantive testimony. Recommending against allowing such practices to occur, CGC asserted that requiring exhibits to be proffered separately from testimony will facilitate greater efficiency in the conduct of the case and ultimate perfection of the record.[47] In closing, CGC urged the Hearing Officer to protect the record by striking the hearsay portions of Dr. Brown's testimony, and further by disallowing witnesses to incorporate images and excerpts, which would typically be proffered separately as exhibits, into substantive testimony.

During its argument, the Consumer Advocate stated that it objected to the procedurally improper filing of CGC's *Reply to Consumer Advocate's Response to Motion to Strike Testimony.*[48] Further, it stated affirmatively that Dr. Brown is and has been proffered as an expert, and that his pre-filed testimony has been submitted as expert testimony in this docket.[49] Declining to specifically address the application of the rules of law to the use of hearsay in Dr. Brown's testimony, the Consumer Advocate instead asserted that while CGC may object to the inclusion of references to third parties, it does not disagree with the premises set forth in Dr. Brown's testimony.[50]

The Consumer Advocate asserted that Dr. Brown is qualified as an expert on issues involving natural gas marketing, "He has testified [before][sic] this Agency on a number of

[46] *Id.* at 21-24.
[47] *Id.* at 25-26.
[48] *Id.* at 27.
[49] *Id.* at 27.
[50] *Id.* at 28.

occasions, and has been accepted as knowledgeable in the field of natural gas marketing."[51] Further, the Consumer Advocate indicated that the purpose of an expert in appearing before the Authority, which has expertise in the subject matters involved in this docket, is to assist the Authority in reaching a decision.[52] In so doing, the Consumer Advocate contended that courts have recognized "that a person who is knowledgeable in the field and presents information that in itself is straightforward, that that information is fine, even though it is hearsay."[53] [54] Further, the Consumer Advocate asserted that the issues involved in this docket are not limited to the sufficiency of CGC's gas supply plan, but are broad in scope:

> . . . it is whether or not this gas supply plan and the way Chattanooga Gas is managing these assets, handing them off to Sequent and oversubscribing, whether or not that's appropriate. It's the end result that we are looking at.[55]

Thus, the Consumer Advocate asserted that considering Dr. Brown's background and experience within the overall context of the issues involved in this docket, he is qualified as an expert and capable of offering opinions in this matter.[56]

Additionally, the Consumer Advocate contended that most of the portions of Dr. Brown's pre-filed testimony that are objected to by CGC are derived from sworn statements – affidavits – filed in federal and state proceedings, and that this type of information is generally considered trustworthy.[57] Furthermore, in making a decision on the issues, the TRA is knowledgeable and capable of assessing the proper weight of the evidence before it.[58] The Consumer Advocate disputed the CGC's characterization of Dr. Brown's testimony and allegation that he "put

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[51] *Id.* at 28.
[52] *Id.* at 29.
[53] *Id.* at 29.
[54] The Consumer Advocate did not provide any legal authority, or identifying reference, to support this generalized statement of law.
[55] Transcript of Proceedings, p. 32 (February 9, 2009).
[56] *Id.* at 32.
[57] *Id.* at 30.
[58] *Id.* at 31.

together a conclusion based on piecemeal information."[59] Further, Consumer Advocate emphasized its belief that as in any presentation, rather than relying on just one source, it is better to rely on multiple sources of information to support a particular conclusion.[60]

The Consumer Advocate stated that the CGC's demand for copies of the entire record of the docket from which the excerpted statements and materials were obtained is burdensome, expensive, and would result in a massive docket file.[61] Further, the rule of completeness is not applicable in this proceeding as "it is to be used with juries."[62] The Consumer Advocate contends that it is unreasonable for CGC to suggest that in order to make use of "a small portion [of a single document] and use it in presenting testimony here, we have to submit the entire docket."[63]

Finally, the Consumer Advocate suggested that the current objections of the CGC were another example of the CGC, its parent company, and its sister company Sequent, attempting to avoid the TRA's review and evaluation of the issues in this docket.[64] The Consumer Advocate asserted that it has tried to cooperate with CGC, but that its efforts have been rebuffed.[65] Further, Dr. Brown appeared and was present during the Status Conference in order to make him available to the CGC should it wish to conduct *voir dire* as to his qualifications as an expert.[66] In conclusion, the Consumer Advocate stated that if common ground exists between the parties as to the conclusions of Dr. Brown's testimony, then there is no reason that such testimony should be re-filed and the case should proceed forward.[67]

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[59] *Id.* at 31.
[60] *Id.* at 31.
[61] *Id.* at 32.
[62] *Id.* at 33.
[63] *Id.* at 33.
[64] *Id.* at 33-34.
[65] *Id.* at 34.
[66] *Id.* at 35.
[67] *Id.* at 35-36.

During its rebuttal, the CGC reasserted its position that the hearsay portions of Dr. Brown's pre-filed testimony fail to comply with the minimum standards of law required of expert opinion testimony, and therefore, should be stricken from the record.[68] Additionally, concerning Dr. Brown's qualifications as an expert in this docket, it asserted:

> As it relates to the issues list, each of those issues to be addressed, you do have to be an expert in gas supply planning, capacity supply planning, and asset management. If you look at his credentials on Page 79 and 80 of his testimony, there is no basis to determine that he is an expert on any one of those fields, and you have to be to address the issues list.[69]

Despite these assertions, the CGC stated that it would be premature to raise an objection to Dr. Brown's designation as an expert at this time because, in accordance with the agreed procedural schedule, Dr. Brown has an opportunity "to refile testimony that would be more in keeping with an expert in this field . . . there is still a potential for Dr. Brown to show some analyses that an expert in this field would use; thus far he has not."[70]

Further, the CGC denied the Consumer Advocate's insinuation that it was attempting to avoid a review of the issues presented in the docket, and pointed out that it has agreed to a "fairly elaborate schedule" in this matter.[71] Further, it strenuously denied that it has conceded any of the conclusions presented by Dr. Brown. In response to the Consumer Advocate, it would agree to one point: the statement that it is widely known that a utility's firm customers are considered in gas supply planning.[72] Nevertheless, CGC thereafter indicated that even in Dr. Brown's discussion of that one point, he fails to utilize the proper resources and authority that experts in the field would use.[73]

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[68] *Id.* at 36, 39-41.
[69] *Id.* at 37.
[70] *Id.* at 38-39.
[71] *Id.* at 39-40.
[72] *Id.* at 39, 41-42.
[73] *Id.* at 42.

During the Status Conference, the Hearing Officer made the following statements upon conclusion of the parties' oral argument:

> . . . to begin, the TRA, as you know, is not strictly bound by the rules of evidence. Regardless, I agree that [to] reduce confusion and to assist the TRA in appropriately assessing the relevance and application of such material, the material of the underlying facts and data, specifically, the sworn statements, public filings, the quotations, and other materials relied upon by Dr. Brown in his testimony, as well as to facilitate a complete record in the case, I will order that the pre-filed direct and rebuttal testimony of Consumer Advocate's witness, Dr. Brown, filed on May 30, 2008 and October 13, 2008, should be stricken from the record.
>
> The Consumer Advocate is further directed to reformat such testimony to remove the objected-to quotations, documents and materials embedded within Dr. Brown's substantive testimony, and replace them with complete and proper citations to those quotations, documents, and materials so referenced. All re-formatted testimony shall be identical to the original testimony in every way except for the reference citations, which replace all omitted material. Once reformatted, the Consumer Advocate shall re-file the testimony in the docket. Additionally, the Consumer Advocate shall attach & file complete copies of the documents from which Dr. Brown has extracted his quoted materials as objected to by Chattanooga.
>
> Further, while I disagree that each and every document that's a part of a FERC docket referenced by Dr. Brown is necessary, I am ordering that the Consumer Advocate file copies of any FERC orders associated with those dockets, which discuss the quoted witness, that witness's testimony or premises, therein.
>
> These filings, the complete copies of all referenced and cited documents and FERC orders as specified, shall be made as follows: One hard copy of all documents and orders and one electronic copy in PDF format, with an additional copy in Word format whenever possible.[74]

Subsequently, on February 17, 2009, in conjunction with the email response pertaining to the setting of a hearing date, the Hearing Officer provided the parties with the following clarification to the verbal ruling made during the Status Conference concerning the Consumer Advocate's pre-filed testimony:

> . . . to clarify the verbal ruling made during the Status Conference, the pre-filed Direct and Rebuttal Testimony of Dr. Brown is stricken from the record. The

[74] *Id.* at 42-44.

> Consumer Advocate is directed to reformat the pre-filed Direct and Rebuttal Testimony of Dr. Brown to remove the objected-to quotations, documents and materials embedded within Dr. Brown's substantive testimony, replacing them with complete and proper citations to quotations, documents, and materials referenced, and re-file the Direct and Rebuttal Testimony of Dr. Brown. Additionally, the Consumer Advocate shall attach and file as Exhibits complete copies of the documents from which Dr. Brown has extracted his quoted materials, as well as all Orders, whether of FERC, a court of record, a commission, or an administrative agency, entered in or associated with the witness quoted by Dr. Brown that addresses that witness's testimony or premises therein.
>
> All re-formatted testimony shall 1) be identical to the original testimony in every way except for the reference to citations (including Exhibit designations), and 2) include only such additional testimony as is necessary to establish the proper evidentiary foundation for an expert opinion in accordance with the Rules of Evidence. Any deviation in the substance of the testimony or opinions given by Dr. Brown in the re-filed testimony may be raised as grounds for disqualification of the witness as an expert, and the striking of his testimony from the record. **The Consumer Advocate shall have until March 2, 2009 to file conforming testimony in the docket file.**[75] (Emphasis in original)

FINDINGS AND CONCLUSIONS

The question before the Hearing Officer, as understood by the Hearing Officer in the light of the procedural agreement reached between the parties, is limited to the use of hearsay within the pre-filed testimony of the Consumer Advocate's witness, Dr. Brown. The scope of some of the arguments advanced by the parties in their written pleadings and oral arguments extend beyond the particular question currently before the Hearing Officer, and will not be ruled upon or addressed with specificity herein.

Pursuant to Rule 702 of the Tennessee Rules of Evidence, to be admissible, expert opinion testimony must substantially assist the trier of fact to understand the evidence or determine a fact in issue in the case.[76] Of course, evidence must also be relevant before it is

[75] See Exhibit A attached hereto; Email from Hearing Officer to the parties (February 17, 2009).
[76] Tenn. R. Evid. 702.

admissible;[77] additionally, it may be presumed that only relevant evidence would substantially assist a trier of fact. Further, in accordance with Rule 703 of the Tennessee Rules of Evidence,[78] an expert may base [his] opinions on facts not in evidence when the requisite foundations have first been laid: (1) the facts [not in evidence] must be "reasonably relied upon by experts in the particular field" and (2) the facts [not in evidence] must be trustworthy. Once such foundations have been established by the proponent of the testimony, inadmissible hearsay could be used to support an admissible expert opinion.[79]

In the workers' compensation case of *New Jersey Zinc Co. v Cole,*[80] in which a doctor presented expert opinion testimony on his determination of the Plaintiff-patient's medical diagnosis and cause thereof following an analysis of medical reports of the patient that were prepared by other doctors (hearsay) and his own examination(s) of the patient, the Tennessee Supreme Court affirmed the holding of the trial court that:

> . . . [t]he diagnosis and/or expert opinion of an attending physician is admissible, although based *in part* upon reports of other doctors or hospital technicians who are not called as witnesses *if* said reports are used in the diagnosis or treatment of the patient. *(Emphasis added)*[81]

Further, in denying the New Jersey Zinc Company's petition for rehearing, the Court clarified the factual issue before it as "involving an attending physician who obtains reports of other doctors or hospital technicians and uses them in the diagnosis and/or treatment of his patient and

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[77] See *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257, 264 fn.8 (Tenn. 1997); see also Tenn. R. Evid. 401.

[78] Tenn. R. Evid. 703 states:

> 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 lack of trustworthiness.

[79] See Advisory Commission Comments to Tenn. R. Evid. 703; following the rendition of the rule for use of hearsay as a basis for expert opinion, the Advisory Commission Comments further reference the case of *New Jersey Zinc Co. v Cole,* 532 S.W.2d 246 (Tenn. 1975).

[80] *New Jersey Zinc Co. v Cole,* 532 S.W.2d 246 (Tenn. 1975).

[81] *Id.* at 250.

predicates his expert opinion on such hearsay reports and his own examination (emphasis added)."[82] Thereafter, the Court reaffirmed, without modification, its statement of the rule concerning the use of hearsay in expert opinion testimony, noted above, and further stated:

> We are of the opinion that courts are justified in admitting evidence, to be given such probative value as the trier of fact deems appropriate, those hearsay reports that a treating physician obtains in aid of his own treatment and diagnosis and by the use of which he necessarily places at stake, the well-being of his patient and his own professional liability and reputation.[83]

Thus, the Court's holding in *New Jersey Zinc Co.* may be understood to allow the use of hearsay in the formation of an expert's opinion when used in conjunction with the expert's own examination and analysis of the subject at issue. While not central in the Court's discussion of its decision of the issue, it may be reasonably assumed that the requisite foundations for such use of such hearsay, as articulated above, had been established by the proponent of the expert testimony.

While the above discussion as well as the parties' extensive arguments on the use of hearsay under the Tennessee Rules of Evidence may provide some guidance, Tenn. Code Ann. §65-2-109 sets forth the applicable evidentiary standard in contested case proceedings before the Authority, and states in pertinent part:

> (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.)*

As purposely articulated by the General Assembly for use in proceedings like the instant case before the Authority, the above statute specifically excludes any requirement that the TRA must

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[82] *Id.* at 253.
[83] *Id.* at 254.

apply the rules of evidence applicable in a court. Instead the statute institutes, with certain conditions, a "reasonably prudent persons in the conduct of their affairs" standard for the admission and valuation of evidence.

Despite the leeway granted to the Authority in admitting and valuing certain evidence, the purpose of pre-filed testimony, expert or otherwise, presented for the consideration of the Authority remains constant: to substantially assist the Authority in understanding the evidence or determining a fact in issue in the case. Such testimony must contain and set forth a proper foundation for admissibility as evidence and furnish the Authority a basis upon which an evaluation and assessment of its probative value may be achieved. Regardless of the knowledge or expertise of the Authority, which may aid its understanding and evaluation of the complexities of technical evidence, a party is required to carry its own burden of proof and is thus required to present relevant and reliable evidence sufficient to support its assertions.[84]

Further, the Hearing Officer agrees and is persuaded that the efficiency of the proceedings and preservation of the record is facilitated by requiring that the substantive testimony of a witness appearing before the Authority be separated from any exhibits proffered in support thereof. Exhibits are subject to challenge by an opposing party. In the event an evidentiary challenge to a particular exhibit is sustained, whether that exhibit is thereafter excluded from the record altogether or included for a specific purpose, the ability of the Authority to effectively exclude or specially designate an exhibit that is embedded within substantive testimony is severely hindered if not rendered impossible.

Therefore, the Hearing Officer finds that the pre-filed testimony of Dr. Brown has been proffered as expert opinion testimony by the Consumer Advocate and contains hearsay interspersed throughout via statements, testimony and materials, of third parties. Further, Dr.

[84] See Tenn. Code Ann. §65-2-109(5); see also Tenn. Comp. R. & Regs. §1220-1-2-.16(2).

Brown's testimony fails to contain the proper foundation for its admission as evidence and for its use of hearsay as a basis of opinion under either the Tennessee Rules of Evidence or Tenn. Code Ann. §65-2-109. In the opinion of the Hearing Officer, Dr. Brown's testimony, in its present state, does not assist the Authority in understanding the evidence or determining a fact in issue in this case.

For these reasons, and additionally considering that the parties have agreed to a procedural schedule that provides an opportunity for Dr. Brown to rehabilitate his pre-filed testimony in this docket, the Hearing Officer concludes and hereby orders, consistent with the previous statements made by the Hearing Officer during the Status Conference and later clarified by email correspondence to the parties, that:

(1) The pre-filed direct and rebuttal testimonies of Dr. Brown are stricken from the record;

(2) The Consumer Advocate is directed to reformat the pre-filed direct and rebuttal testimonies of Dr. Brown to remove the objected-to quotations, documents and materials embedded within Dr. Brown's substantive testimony, replacing them with complete and proper citations to quotations, documents, and materials referenced, and re-file the direct and rebuttal testimonies of Dr. Brown;

(3) The Consumer Advocate shall attach and file as Exhibits complete copies of the documents from which Dr. Brown has extracted his quoted materials, as well as all Orders, whether of FERC, a court of record, a commission, or an administrative agency, entered in or associated with the witness quoted by Dr. Brown that addresses that witness's testimony or premises therein;

(4) All re-formatted testimony shall 1) be identical to the original testimony in every way except for the reference to citations (including Exhibit designations), and 2) include only such additional testimony as is necessary to establish the proper evidentiary foundation for an expert opinion in accordance with the rules of evidence. Any deviation in the substance of the testimony or opinions given by Dr. Brown in the re-filed testimony may be raised as grounds for disqualification of the witness as an expert, and the striking of his testimony from the record; and

(5) The Consumer Advocate shall have until March 2, 2009 to file testimony conforming in the docket file.

IT IS THEREFORE ORDERED THAT:

1. The *Third Amended Procedural Schedule*, attached to this Order as Exhibit B, is adopted and is in full force and effect. No requests to alter or extend the time deadlines set forth therein will be granted, barring extraordinarily exceptional circumstances.

2. The pre-filed direct and rebuttal testimonies of Dr. Stephen Brown, witness for the Consumer Advocate and Protection Division of the Office of the Attorney General, filed in the docket file on May 30, 2008 and on October 13, 2008, respectively, are hereby stricken from the record in this case.

3. The Consumer Advocate and Protection Division of the Office of the Attorney General is directed to reform and/or revise the pre-filed direct and rebuttal testimonies of Dr. Stephen Brown in accordance with the parameters stated by the Hearing Officer during, and subsequent to, the Status Conference, as well as incorporated herein, and re-file testimony in conformance therewith in the docket file no later than **March 2, 2009**.

Kelly Cashman-Grams

Kelly Cashman-Grams, Hearing Officer

Exhibit A

to

Order on February 9, 2009 Status Conference
Filed in Docket No. 07-00224
(March 2, 2009)

Kelly Grams - RE: CGC 07-00224

From: Kelly Grams
To: Brundige, Jennifer Atty.; Dowdy, Craig; Luna, J W.; Phillips, Timothy; White, Mary
Date: 2/17/2009 10:11 AM
Subject: RE: CGC 07-00224
CC: ChatterjeeBrown, Shilina; Hickerson, Archie; Pierce, Shannon

Counsels of Record,

This email is in response to the various emails exchanged between the parties and Authority Staff on Friday. First, I appreciate the parties' cooperative efforts in proposing a procedural schedule aimed at resolving certain evidentiary disputes. The outcome of the parties' agreement allows for a fourth round of discovery to occur, resulting in a third round of questions propounded by the Consumer Advocate, as well as additional pre-filed testimony to be filed by each party. Further, I understand the parties' preference for working toward a date-certain hearing date. However, this docket has been proceeding for over a year already and date-certain hearing dates have been set three separate times. All three hearings have been postponed at the request of one or both of the parties.

As you are aware, at this time, the Authority is not able to schedule a firm hearing date in May. In spite of this I have been advised that, as we get closer in time to concluding the preliminary matters in this docket, there is a possibility - although no guarantee - that certain May hearing dates may become available. The Authority is available in June; however, Chattanooga Gas is not. It is in the interests of the Authority, the citizens of the state of Tennessee, the parties participating in this docket as well as in other dockets pending before the Authority, to avoid unnecessary delays in the resolution of the issues presented in this docket.

Nevertheless, while not ideal, upon further consideration of the request of the parties in light of the current difficulties of scheduling a firm hearing date to occur within the first half of this year, I will consider a procedural schedule that concludes all preliminary matters in this docket by the end of June in anticipation of a July 13-14 hearing date. Such a schedule provides more than ample time in which to complete the additional discovery and pre-filed testimony requested by the parties. No further extensions of time will be granted, unless extraordinarily exceptional circumstances develop in the interim. **The parties shall submit an agreed proposed procedural schedule for the consideration of the Hearing Officer no later than Thursday, February 19, 2009.**

Additionally, to clarify the verbal ruling made during the Status Conference, the pre-filed Direct and Rebuttal Testimony of Dr. Brown is stricken from the record. The Consumer Advocate is directed to reformat the pre-filed Direct and Rebuttal Testimony of Dr. Brown to remove the objected-to quotations, documents and materials embedded within Dr. Brown's substantive testimony, replacing them with complete and proper citations to quotations, documents, and materials referenced, and re-file the Direct and Rebuttal Testimony of Dr. Brown. Additionally, the Consumer Advocate shall attach and file as Exhibits complete copies of the documents from which Dr. Brown has extracted his quoted materials, as well as all Orders, whether of FERC, a court of record, a commission, or an administrative agency, entered in or associated with the witness quoted by Dr. Brown that addresses that witness's testimony or premises therein. All re-formatted testimony shall 1) be identical to the original testimony in every way except for the reference to citations (including Exhibit designations), and 2) include only such additional testimony as is necessary to establish the proper evidentiary foundation for an expert opinion in accordance with the Rules of Evidence. Any deviation in the substance of the testimony or opinions given by Dr. Brown in the re-filed testimony may be raised as grounds for disqualification of the witness as an expert, and the striking of his testimony from the record. **The Consumer Advocate shall have until March 2, 2009 to file conforming testimony in the docket file.**

Kelly

Kelly Cashman-Grams
Hearing Officer
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505
(615) 741-2904 x168 (direct)
(615) 741-9934 (facsimile)
kelly.grams@state.tn.us

>>> "Dowdy, Craig" <cdowdy@mckennalong.com> 2/13/2009 2:42 PM >>>

Thank you. Have a nice weekend.

Craig

From: Shilina ChatterjeeBrown [mailto:Shilina.ChatterjeeBrown@state.tn.us]
Sent: Friday, February 13, 2009 3:41 PM
To: Timothy Phillips; Dowdy, Craig; Kelly Grams
Cc: Mary White; Archie Hickerson; Shannon Pierce; Jennifer Atty. Brundige; J W. Luna
Subject: RE: CGC 07-00224

Parties,

Based on Mr. Phillips request, please hold off submitting your proposed procedural schedule until Tuesday, February 17, 2009. Either the Hearing Officer or I will contact you on Tuesday concerning submission of your proposed procedural schedule.
Have a good weekend. Thank you.

Shilina

Shilina Chatterjee Brown
Legal Counsel
Tennessee Regulatory Authority
Legal Division

460 James Robertson Parkway
Nashville, TN 37243
(615) 741-2904 Ext. 154
shilina.chatterjeebrown@state.tn.us

>>> Timothy Phillips <Timothy.Phillips@ag.tn.gov> 2/13/2009 2 24 PM >>>

Shilina,

I request that we be able to expand the dates to fit the hearing date, so that we reduce the trouble created by a compressed schedule.

From: Shilina ChatterjeeBrown [mailto:Shilina.ChatterjeeBrown@state.tn.us]
Sent: Friday, February 13, 2009 2:19 PM
To: Craig Dowdy
Cc: Mary White; Timothy Phillips; Archie Hickerson; Shannon Pierce; Jennifer Atty. Brundige; J W. Luna
Subject: RE: CGC 07-00224

Please submit your proposed procedural schedule as requested by the Hearing Officer and just exclude the exclude the hearing dates of May 18 and 19th. You can present a schedule going into early May and ends at a Pre-Hearing Conference. I believe that would be most helpful to the Hearing Officer. Thank you.

Shilina

Shilina Chatterjee Brown

Legal Counsel
Tennessee Regulatory Authority
Legal Division
460 James Robertson Parkway
Nashville, TN 37243
(615) 741-2904 Ext. 154
shilina.chatterjeebrown@state.tn.us

>>> "Dowdy, Craig" <cdowdy@mckennalong.com> 2/13/2009 1:28 PM >>>

Shilina-

As to the procedural schedule that the Hearing Officer requested from the parties by today, we were working on a schedule that was consistent with the agreed to format but compressed for a May 18 and 19th hearing.

Should the parties wait to see what the hearing date will be and then agree on the other dates in the procedural schedule prior to filing ?

Please advise.

Craig

From: Shilina ChatterjeeBrown [mailto:Shilina.ChatterjeeBrown@state.tn.us]
Sent: Friday, February 13, 2009 12:36 PM
To: Dowdy, Craig
Subject: RE: CGC 07-00224

Thank you for your response.

Shilina

Shilina Chatterjee Brown

Legal Counsel
Tennessee Regulatory Authority
Legal Division
460 James Robertson Parkway
Nashville, TN 37243
(615) 741-2904 Ext. 154
shilina.chatterjeebrown@state.tn.us

>>> "Dowdy, Craig" <cdowdy@mckennalong.com> 2/13/2009 11:13 AM >>>

Shilina,

We are sorry the May 18 and 19th dates did not work for the TRA.

As we stated at Status Conference on Monday, we have difficulty with a June date. Our witness is out of the country the second half of June and Jennifer Brundige who has been active in this case is out the first half of June related to her wedding.

That we being said if the TRA wants to hold the Hearing on June 15 and 16th we will make it work.

We also are still available on the July 29 and 30th dates that we previously agreed to with the CAPD and presented last Monday.

Thanks,

Craig

From: Timothy Phillips [mailto:Timothy.Phillips@ag.tn.gov]
Sent: Friday, February 13, 2009 10:26 AM
To: Shilina ChatterjeeBrown; Mary White; Jennifer Atty. Brundige; J W. Luna; Dowdy, Craig
Cc: Shannon Pierce
Subject: RE: CGC 07-00224

Shilina,

The June dates work for the Consumer Advocate.

Thanks.

From: Shilina ChatterjeeBrown [mailto:Shilina.ChatterjeeBrown@state.tn.us]

Sent: Thursday, February 12, 2009 10:28 AM
To: Mary White; Timothy Phillips; Jennifer Atty. Brundige; J W. Luna; Craig Dowdy
Cc: Shannon Pierce
Subject: CGC 07-00224

Parties,

Please be advised that we have just learned that the panel of Directors in this docket is not available for the hearing dates of May 18 and 19, 2009 that w

May 3 and 4, 2009;

June 15 and 16, 2009; or

June 29 and 30, 2009

Thank you.

Shilina

Shilina Chatterjee Brown

Legal Counsel
Tennessee Regulatory Authority
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shilina.chatterjeebrown@state.tn.us

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Exhibit B

to

Order on February 9, 2009 Status Conference
Filed in Docket No. 07-00224
(March 2, 2009)

Third Amended Procedural Schedule

(March 2, 2009)

Due Date	Filing
March 2, 2009	Reformatted and revised+ Pre-filed Direct & Rebuttal Testimony of Consumer Advocate witness, Dr. Brown, with complete copies of all supporting documents attached, as specified by the Hearing Officer and set forth in the *Order on February 9, 2009 Status Conference.*
April 1, 2009	Supplemental Testimony by Tim Sherwood Due - limited to new issues raised in Consumer Advocate's Pre-filed Rebuttal and to support CGC Hearing Exhibits 2-17 filed December 1, 2008.*
April 15, 2009	Consumer Advocate's Discovery Requests Due.
April 22, 2009	CGC's Discovery Objections Due.
May 4, 2009	Status Conference to convene at 1:00 p.m. or following the regularly scheduled Authority Conference (if necessary).
May 12, 2009	CGC's Discovery Responses Due
June 10, 2009	Consumer Advocate's Pre-filed Surrebuttal Testimony Due*
June 22, 2009	Deadline for filing Pre-Hearing Motions
June 25, 2009	Deadline for filing Responses to Pre-Hearing Motions
June 29, 2009	Pre-Hearing Conference to convene at 1:00 p.m. or following the regularly scheduled Authority Conference (if necessary)

+ "Revised" means only such additional testimony as is necessary to establish the proper evidentiary foundation for an expert opinion in accordance with the Rules of Evidence.

*** Testimony MUST contain clear and specific citations that cross-reference by part, page and line, the portions of the most recent previously-filed opposing testimony that is being responded to or rebutted in and throughout the testimony.**