

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

June 22, 2009

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

**CHATTANOOGA GAS COMPANY'S MOTION TO EXCLUDE DR. STEPHEN
BROWN'S TESTIMONY FOR FAILURE TO MEET EXPERT WITNESS
QUALIFICATIONS AND RELIABILITY STANDARDS**

Chattanooga Gas Company ("CGC" or "Company") hereby files this Motion to Exclude Dr. Stephen Brown's Testimony for Failure to Meet Expert Witness Qualifications and Reliability Standards.

I. PRELIMINARY STATEMENT

The Consumer Advocate and Protection Division ("CAPD") has submitted pre-filed testimony of Stephen Brown, Ph.D., for the issues of gas supply and capacity supply. Although never formally proffered as an expert, CAPD's pre-filed testimony appears in the guise of expert testimony, even though Dr. Brown fails to meet the qualifications for an expert on capacity supply and gas supply issues.

The Tennessee Regulatory Authority ("TRA") should exclude Dr. Brown as an "expert" witness in this proceeding, because he is not qualified and lacks sufficient knowledge, skill, experience, training or education to render expert opinions related to capacity supply and gas supply issues. Alternatively, even if the TRA determines that Dr. Brown is qualified to testify about the discreet issues of capacity supply and gas supply, the TRA also should exclude Dr. Brown's testimony because it is unreliable and does not substantially assist the trier of fact. His

testimony lacks the hallmarks of routinely conducted capacity supply and gas supply analyses performed by industry experts in the routine course of business. Accordingly, CGC respectfully requests that the TRA exclude Dr. Brown as an expert in this proceeding and, alternatively, exclude his testimony.

II. FACTUAL BACKGROUND

Through his pre-filed testimony, CAPD appears to offer Dr. Brown as an expert witness for the issues in this proceeding of capacity supply planning and gas supply planning. On May 30, 2008 and October 13, 2008, CAPD pre-filed direct and rebuttal testimony from Dr. Brown. On February 9, 2009, the Hearing Officer issued a verbal ruling, which was memorialized in an order dated March 2, 2009, striking Dr. Brown's testimony, and permitting Dr. Brown to re-submit testimony. On March 2, 2009, CAPD resubmitted pre-filed testimony of Dr. Brown. The CAPD never formally identified and proffered Dr. Brown as an expert on gas supply or capacity supply issues on any of these occasions. Dr. Brown is not an expert on gas supply or capacity supply issues. CAPD has had ample opportunity to identify and retain another witness with expertise in the issues of capacity supply and gas supply, but has chosen not to do so.

The TRA should exclude Dr. Brown as an expert, because he lacks the knowledge, skill, experience, training or education related to the discreet subjects in this proceeding for which he purports to be an expert. In addition, the TRA should exclude Dr. Brown's purported expert "analysis" because it is not reliable and is not the type of an analysis conducted for capacity supply and gas supply issues by experts in the field. Even though CAPD has had substantial time to identify an expert in the area of gas supply and capacity supply, the pre-filed testimony of Dr. Brown does not assist the TRA in understanding the evidence or determining a fact in issue in this case.

III. ANALYSIS AND CITATION TO AUTHORITIES

Tennessee Rules of Evidence 702 and 703 govern the admissibility of expert testimony. McDaniel v. CSX Transportation, Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997). Under these two rules, the trier of fact must determine that “(1) the witness qualifies as an expert, and (2) the expert's testimony is reliable in that the facts underlying the testimony are trustworthy and the testimony will substantially assist the trier of fact.” Mohr v. DaimlerChrysler Corp., 2008 WL 4613584, *16 (Tenn. App. Oct. 14, 2008) (citing Brown v. Crown Equip. Corp., 181 S.W.3d 268, 274 (Tenn. 2005)). “The objective of the trial court's gatekeeping function is to ensure that ‘an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.’” Mohr, 2008 WL at *16 (quoting Kumho Tire Co. V. Carmichael, 526 U.S. 137, 152 (1999)).

Here, Dr. Brown does not qualify as an expert, because he lacks the knowledge, skill, experience, training or education to testify as an expert regarding gas supply and capacity supply. Alternatively, the TRA should exclude Dr. Brown's testimony because it is not reliable and does not substantially assist the TRA.

A. **Dr. Brown Lacks the Knowledge, Skill, Experience, Training, or Education to Testify as an Expert Regarding Gas Supply and Capacity Supply.**

Tennessee Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

As the clear language of Tenn. R. Evid. 702 states, the witness must be “qualified as an expert by knowledge, skill, experience, training, or education” before he can provide opinions. Id. In

determining whether a purported expert is qualified in the relevant field, the trier of fact “should determine whether the expert is a ‘highly credentialed expert who has devoted her life’s work to the actual exercise of the methodology upon which her testimony is based’ or merely a ‘marginally-qualified full-time expert witness who is testifying about a methodology that she has not employed in real life.’” Freeman v. Blue Ridge Paper Products, Inc., 229 S.W.3d 694, 708 (Tenn. App. 2007) (quoting Brown, 181 S.W.2d at 274). The “determinative factor is whether the witness’s qualifications authorize him or her to give an informed opinion on the *subject at issue*.” State v. Dunham, 2005 WL 491494, *14 (Mar. 1, 2005 Tenn. App. 2005) (emphasis in original) (quoting State v. Stevens, 78 S.W.3d 817, 834 (Tenn. 2002)).

Here, Dr. Brown lacks the qualifications to be considered an expert on the specific issues of capacity supply and gas supply. Critically, Dr. Brown has absolutely no background in natural gas. His pre-filed direct testimony provides no reference to any professional or educational experience in the natural gas industry, which would be imperative for providing relevant testimony about natural gas capacity and supply issues. Similarly, he provides no testimony about professional or educational experience in capacity and supply issues, regardless of the type of utility. Rather, Dr. Brown’s listed experience is limited to testimony on behalf of the CAPD, and employment with the Iowa Utilities Board and various electric companies. According to his direct testimony, this professional experience is limited to cost of service studies, rate design issues, telecommunications issues, and matters related to the disposal of nuclear waste. See 3/2/09 Direct Testimony of S. Brown at 57-58. Dr. Brown has no experience in gas commodity purchase contract negotiations, pipeline contract and tariff interpretation, gas supply purchasing, natural gas scheduling, or pipeline pathing and nominating -- all components essential to providing opinions concerning capacity supply and gas supply in the natural gas

industry. He also has no background or experience with peaking facility operations and gas distribution operations and control. Dr. Brown also has no publications related to capacity supply and gas supply issues, and does not reference any prior testimony concerning capacity supply and gas supply issues.

While Dr. Brown may have an educational and professional background in economics, he simply does not have qualifications that would authorize him to testify as an expert about the discreet subject at issue in this proceeding -- natural gas capacity and supply capacity. Nothing has prevented CAPD from retaining and proffering an expert in the area of gas and supply capacity. Indeed, CAPD has had substantial time to identify such an expert, especially considering the fact that CAPD filed a Petition to Intervene on December 27, 2007 -- nearly a year and a half ago. Due to Dr. Brown's lack of qualifications as an expert in the field of gas supply and capacity supply, Dr. Brown should be excluded as an expert witness in this proceeding.

B. Dr. Brown's Testimony is Unreliable and Does not Substantially Assist the TRA.

Alternatively, even if Dr. Brown is considered an expert on the specific issues of gas supply and capacity supply, which he is not, the TRA should exclude Dr. Brown's testimony because it is unreliable and does not substantially assist the TRA. Under Tennessee law, even if a witness is qualified as an expert, Tenn. R. Evid. 702 requires the fact finder to exclude expert testimony if the testimony does not "substantially assist the trier of fact." Tenn. R. Evid. 702; McDaniel, 955 S.W.2d at 264-65. Unlike Federal Rule of Evidence 702 which merely requires the expert testimony to "assist the trier of fact," Tenn. R. Evid. 702 mandates that the evidence "substantially assist the trier of fact. Id. (emphasis added). Accordingly, the Tennessee Supreme

Court held that the “probative force of the testimony must be stronger [than required by the Federal Rule of Evidence] before it is admitted in Tennessee.” McDaniel, 955 S.W.2d at 264.

In conjunction with the “substantial assistance” requirement found in Tenn. R. Evid. 702, Tenn. R. Evid. 703 requires the expert testimony to be reliable. McDaniel, 955 S.W.2d at 264-65. 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.

In synthesizing Rule 702’s substantial assistance requirement, and Rule 703’s reliability requirement, the Tennessee Supreme Court in McDaniel stated:

The rules together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy . . .

McDaniel, 995 S.W.2d at 265 (emphasis added).

Tennessee has not expressly adopted the test found in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) governing expert testimony in federal cases, but has held that the Daubert non-exclusive list of factors to determine reliability are “useful in applying our Rules 702 and 703.” Id. Accordingly, a trier of fact may consider the following Daubert factors in determining reliability:

(1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by Frye, the evidence is generally accepted in the

scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.

McDaniel, 955 S.W.2d at 265. Following the Tennessee Supreme Court's ruling in McDaniel, Tennessee courts have expanded this list of non-exclusive reliability factors to include two additional factors. As already discussed above, one additional factor "is the expert's qualifications for testifying on the subject at issue." This factor is "important when the expert's personal experience is an essential part of his or her methodology or analysis." Johnson v. John Hancock Funds, 217 S.W.3d 414, 427 (Tenn. App. 2006) (citing Brown, 181 S.W.3d at 274). A second additional factor "is the connection between the expert's knowledge and the basis for the expert's opinion." Id. This factor allows courts to ensure "that no analytical gap exists between the expert's knowledge and the basis for his or her opinion." Id.

As part of the reliability analysis, Tenn. R. Evid. 703 specifically requires that the underlying data be "reasonably relied upon" by the expert. Commentators state:

The underlying data must be such that experts in that field reasonably rely on them in forming the same kinds of opinions or inferences that the expert in [the] case did. *The word "reasonably" suggests that the underlying data must be more than actually used by this expert, they must be reasonably used.* Moreover, the standard asks whether experts in the field use these kinds of data. It does not ask only whether this particular expert used these data. The wording of this standard implies that some data actually used by experts are insufficiently reliable to satisfy Rule 703.

Donald Paine, et al., Tennessee Law of Evidence, § 7.03[5][a] (2005) (emphasis added). Accordingly, not only must the expert use this data, but other experts must rely on such data and reasonably use such data.

When considering reliability, the Tennessee Supreme Court in McDaniel also emphasized that the trier of fact must analyze the science and not merely the qualifications, demeanor or conclusions of the experts. McDaniel, 955 S.W.2d at 265. Additionally, the trier of

fact must assure itself “that the opinions are based on relevant scientific methods, processes, data, and not upon an expert’s mere speculation.” Id.

In the present case, it is clear that Dr. Brown’s testimony regarding capacity supply and gas supply does not substantially assist the TRA and is not reliable. As discussed above, Dr. Brown is not qualified in capacity supply and gas supply issues. In addition, his assessment is not the type of routine, accurate analysis regularly conducted for capacity supply or gas supply issues by recognized experts in this field. Indeed, his testimony is devoid of any independent gas supply or capacity supply analysis.

An expert in this field would normally perform, among other things, a regression analysis of load in relationship to temperatures or other potentially correlated independent variables. Dr. Brown does not appear to have performed his own independent regression analysis, or any other analysis. Rather, it appears that Dr. Brown merely performed a simplistic comparison of other system design day loads per customer to CGC, which failed to take into account weather or customer mixes. This comparison is not an independent analysis, and certainly is not the type of analysis that is reliable and would substantially assist the TRA.

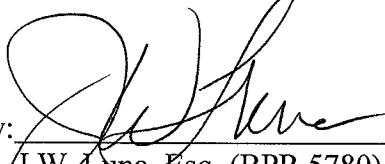
Dr. Brown’s comparison has not been subject to peer review, has not been the subject of any publications, has not been tested, and is not generally accepted by gas utility experts who regularly analyze capacity and supply issues. Such a simplistic comparison fails to *substantially* assist the TRA and is not reliable. Accordingly, Dr. Brown’s testimony should be excluded.

IV. CONCLUSION

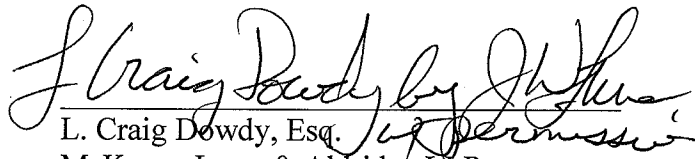
Based on the foregoing, CGC respectfully requests that Dr. Brown be excluded as an "expert" in supply capacity and gas capacity issues, and that Dr. Brown's "analysis" on these issues be excluded.

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 22nd day of June, 2009, to the following:

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A handwritten signature in black ink, appearing to read "T. Jay Warner", is written over a horizontal line.