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 CHATTANOOGA GAS COMPANY'S MOTION TO EXCLUDE DR. STEVEN BROWN'S TESTIMONY

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate"), respectfully responds to the Motion of Chattanooga Gas Company ("CGC") to Exclude Dr. Stephen Brown's Testimony for Failure to Meet Expert Witness Qualifications and Reliability Standards ("Motion"), as set forth below.

INTRODUCTION AND EVIDENTIARY STANDARD

Prior to discussing the controlling case law on the admission of expert testimony in the State of Tennessee, it is important to note that the Tennessee Rules of Evidence and related case law are not controlling in Docket 07-00224 before the Tennessee Regulatory Authority ("T.R.A."). CGC is wrong in its assertion that "Tennessee Rules of Evidence 702 and 703 govern the admissibility of expert testimony," *CGC's Motion to Exclude,* p. 3 (June 22, 2009). The *T.R.A.'s Rules of Practice and Procedure* 1220-1-2-.16 state that "the admissibility of evidence is governed by T.C.A. §§ 65-2-109 and 4-5-313." T.C.A. § 65-2-109(1), specifically holds that "the authority shall not be bound by the rules of evidence applicable in court, but it may admit and give probative effect to any evidence which possess such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs." Therefore, the T.R.A. is

not bound by the rules of evidence which typically govern the admissibility of expert witnesses. However, T.C.A. § 4-5-313(1), states that:

> the agency shall admit and give probative effect to evidence admissible in a court and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs…

This passage makes clear that while all evidence which would be admissible under the Tennessee Rules of Evidence will also be admissible under the T.R.A.'s rules, additional evidence will also be admissible, subject to particular statutory objections, if it is "accepted by reasonably prudent" persons. Id. The Consumer Advocate will show that Dr. Brown's proffered testimony is admissible under the standards set forth in the Tennessee Rules of Evidence, and is, therefore, certainly admissible under the more relaxed evidentiary standard in effect before the T.R.A.

QUALIFICATIONS AND EXPERTISE

In its Motion, CGC states that "[the Consumer Advocate] appears to offer Dr. Brown as an expert witness for the issues in this proceeding of capacity supply planning and gas supply planning," *CGC's Motion to Exclude*, p. 2 (June 22, 2009). CGC further states that "[the Consumer Advocate] never formally identified and proffered Dr. Brown as an expert on gas supply or capacity supply issues," and that Dr. Brown's analysis "is not the type of an analysis conducted for capacity supply and gas supply issues by experts in the field." Id.

First, it is true that the Consumer Advocate has not explicitly offered Dr. Brown as an expert in his previously filed testimony, but there is no requirement that they do so. *Tenn. R. Civ. Pro.* 43.01 states specifically that "the testimony of witnesses shall be taken pursuant to the Tennessee Rules of Evidence," and before the T.R.A., "the admissibility of evidence is governed by T.C.A. §§ 65-2-109 and 4-5-313," *T.R.A. Rules of Practice and Procedure* 1220-1-2-.16(1).

Therefore, there is no requirement that a proposed expert be tendered as such at any particular time during his testimony under the rules governing the admission of evidence before the T.R.A. Id. CGC is apparently aware of this fact given that it has similarly failed to "formally identify" Mr. Sherwood as an expert in any particular field during his testimony. In fact, CGC's first acknowledgement that it expected to call Mr. Sherwood as an expert was on May 12, 2009, in response to the Consumer Advocate's Motion to Compel Discovery. Furthermore, the Consumer Advocate would state that despite the absence of a formal declaration from Mr. Sherwood or Dr. Brown as to their respective expertise, neither CGC nor the Consumer Advocate had any reasonable doubt that these men would be offered as experts in this case. However, given that counsel for CGC has raised this issue in its Motion to Exclude, the Consumer Advocate will provide evidence of Dr. Brown's qualifications and reliability at this time.

Next, it is true that the Consumer Advocate has not offered Dr. Brown as an expert in capacity supply planning and gas supply planning, but that is because this is not the area of expertise on which Dr. Brown has based his testimony in this Docket. While the Consumer Advocate believes that Dr. Brown has experience in relation to the regulation of natural gas, we offer him as an expert in the area of Regulatory Economics, and his experience, knowledge, skill, training and education demonstrate that expertise. The Consumer Advocate agrees with CGC that Tenn. R. Evid. 702, traditionally governs the necessary qualifications of an expert witness. Rule 702 states in part that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of opinion or otherwise." Id. The only published case law cited by CGC in this regard was from the case of Freeman v. Blue Ridge Paper Products, Inc., 229 S.W.3d 694, 708 (Tenn. App. 2007); *citing* Brown v. Crown Equip. Corp., 181 S.W.2d 268 (Tenn. 20005). Specifically, CGC cites the Appellate Court's warning that the trial court

> 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...

Id.

The Consumer Advocate agrees that an expert's testimony should preferably be based upon actual application of the expertise that is cited as a basis for his qualification. A simple review of Dr. Brown's past experience in the area of Regulatory Economics will show that he is far more than "marginally-qualified" and that his education and experience leave no doubt as to his qualifications to testify as an expert in Regulatory Economics. Dr. Brown received a Master of Science Degree in Regulatory Economics from the University of Wyoming as well as a Master of Arts and Ph.D. in International Relations with a specialty in International Economics from the University of Denver. In addition to his work with the Consumer Advocate, over the last thirty years Dr. Brown has worked as a Power Requirements Supervisor, Rate Specialist, Rate Analyst, and Supervisor of Rate Design for various utility providers throughout the United States, as Chief of the Bureau of Energy Efficiency, Auditing and Research for the Iowa Utilities Board, and as the State of Iowa Liaison Officer to the U.S. Nuclear Regulatory Commission. In his capacity as a Regulatory Economist, Dr. Brown has published various articles and provided testimony in a multitude of hearings, actions, inquiries, and/or proceedings, including twenty dockets before the T.R.A. alone. Dr. Brown's "knowledge, skill, experience, training, [and/or] education," have been sufficient to qualify him as an expert in Regulatory Economics in each and every one of these dockets, *Tenn. R. Evid.* 702. The past thirty years of Dr. Brown's professional career have been dedicated to Regulatory Economics. This brief summary of Dr. Brown's education and experience leaves little doubt that Dr. Brown is a "highly credentialed expert who has devoted [his] life's work to the actual exercise of the methodology upon which [his] testimony is based."

Id. It is precisely this expertise in Regulatory Economics which allows Dr. Brown to analyze and provide comment on the data provided by CGC, its witness Mr. Tim Sherwood, and the other publicly available regulatory data cited in Dr. Brown's testimony.

RELIABILITY

I. Reliability Under the Tennessee Rules of Evidence

The Supreme Court of the State of Tennessee best articulated the rule governing the admissibility of expert testimony in Brown v. Crown Equip. Corp., 181 S.W.3d 268 (Tenn. 2005). In that case, the Court stated that the presiding body "must determine that the expert testimony is reliable in that the evidence will substantially assist the trier of fact to determine a fact in issue and that the underlying facts and data appear to be trustworthy." Id. at 274. Given that Dr. Brown relies upon "underlying facts and data" provided by CGC, Mr. Sherwood, and a variety of publicly available sources, most commonly the Federal Energy Regulatory Commission ("FERC"), and that CGC has not challenged the data underlying Dr. Brown's opinions, it appears that CGC is arguing that Dr. Brown's testimony will not "substantially assist the trier of fact." Id. However, a review of the existing case law will show that Dr. Brown's testimony does assist the T.R.A. in this Docket and is admissible under the applicable law governing expert testimony.

The Consumer Advocate does not dispute that the list of factors expressed by the Tennessee Supreme Court in McDaniel v. CSX Transport, Inc., ***may*** be helpful in assessing the reliability of an expert's testimony, 955 S.W.2d 257 (Tenn. 1997). However, the Supreme Court has never stood by the proposition that these factors should be adhered to when they do not provide a valuable assessment of the expert's reliability. The Court said that "questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the [presiding body]." Id. at 263; *citing* State v. Ballard, 855 S.W.2d 557, 562 (Tenn.

1993). Further, the Court did not state that all these factors must be used, only that:

> A Tennessee trial court **may** consider 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...

Id. (Emphasis added). The McDaniel Court went on to point out that "the court need not weigh or choose between two legitimate but conflicting scientific views," but that "once the evidence is admitted, it will thereafter be tested with the crucible of vigorous cross-examination and countervailing proof." Id. at 265.

The Supreme Court next addressed this issue in State v. Stevens, 78 S.W.3d 817 (Tenn. 2002). The Court states that:

> not all disciplines [of expertise] are amenable to empirical verification but may nevertheless substantially assist the trier of fact. Consequently, **we are reluctant to measure the reliability of expert testimony that is not based on scientific methodology under a rigid application of the McDaniel factors.** However, we are equally reluctant to admit nonscientific expert testimony based on an unchallenged acceptance of the expert's qualifications and an unquestioned reliance on the accuracy of the data supporting the expert's conclusions...

Id. at 833 (Emphasis added). The Stevens Court goes on to quote the United States Supreme Court's similar holding in Khumho Tire Co., also cited as relevant authority by CGC, as saying that the "factors identified in Daubert [and later in McDaniel] **may or may not** be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Id. at 833; *citing* Khumo Tire v. Carmichael, 526 U.S. 137, 150 (1999) (Emphasis and explanation added). The Stevens Court made clear the factors to be addressed in assessing an expert's reliability and created a basis upon which to test the reliability of an expert's testimony "not based on scientific methodology," Stevens, 78 S.W.3d at 835. Specifically, the

Court held that:

> when the expert's reliability is challenged, the court may consider the following nondefinitive factors: (1) **the McDaniel factors, when they are reasonable measures of the reliability of expert testimony**; (2) **the expert's qualifications** for testifying on the subject at issue; and (3) the **straightforward connection between the expert's knowledge and the basis for the opinion such that no "analytical gap" exists between the data and the opinion offered**. Subject to the trial court's discretion, **once the evidence is admitted, "it will thereafter be tested with the crucible of vigorous cross-examination and countervailing proof"...**

Id. at 835; *citing* McDaniel, 955 S.W.2d at 265 (Emphasis added). It is this "straightforward connection" that provides a basis for the reliability of expert testimony not based on scientific methodology. The Stevens Court held that "the court may make a finding of reliability if the expert's conclusions are sufficiently straightforward and supported by a 'rational explanation' which reasonable [persons] could accept as more correct than not." Id. at 835; *citing* Wood v. Stihl, 705 F.2d 1101, 1107-08 (9th Cir. 1983). The Tennessee Supreme Court then offers the following hypothetical example to emphasize this connection;

> if one wanted to prove that bumblebees always take off into the wind, **a beekeeper with no scientific training at all would be an acceptable expert witness** *if* a proper foundation were laid for his conclusions. The **foundation would not relate to his formal training, but to his firsthand observations**. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have...

Id.; *citing* Berry v. City of Detroit, 25 F.3d 1342, 1350 (6th Cir. 1994) (Emphasis added).

Once again, the Consumer Advocate does not deny that the McDaniel factors may be helpful in some cases, however, these factors are not helpful in the present case. Dr. Brown's testimony is based upon economic and mathematical methodology rather than strictly scientific methodology. This methodology does not follow the scientific method, and, therefore, the McDaniel factors are not helpful or applicable in determining Dr. Brown's reliability. Given that

Dr. Brown's qualifications were fully addressed in the preceding section, we are left with the question of whether a "straightforward connection" exists between Dr. Brown's testimony and the subject at issue. A thorough reading of the Court's holding in Stevens and Dr. Brown's *Curriculum Vitae* will show that Dr. Brown's testimony is at least equivalent to that of the beekeeper in the example above. While the Consumer Advocate does not offer Dr. Brown as an expert in Capacity Supply or Gas Supply Planning, just as the beekeeper is not offered as an expert in flight principles, the Consumer Advocate would aver that Dr. Brown is an expert in Regulatory Economics for all of the reasons previously stated, including his extensive education, work experience, and prior testimony in this area. As a result of his extensive background "observing" regulated entities and analyzing data submitted by them, Dr. Brown's testimony is related to an analysis of the testimony and data of CGC and is helpful to the T.R.A. in that it draws upon Dr. Brown's extensive experience in this area. Therefore, just as a beekeeper is able to testify about the flight patterns of bees because he has "seen a lot more bumblebees," Dr. Brown is able to offer meaningful testimony regarding the assertions and data provided by CGC because he has thirty years experience as a regulatory economist analyzing data provided by regulatory entities.

Just this year, the Tennessee Supreme Court revisited the issue of reliability in expert testimony in State v. Scott, 275 S.W.3d 395 (Tenn. 2009). In this case, the Court stated that:

> while a trial court's role as a gatekeeper is critical, it is not unconstrained. When making an admissibility determination, **trial courts are not empowered to choose between legitimate competing expert theories by excluding the lesser of the two.** To the contrary, that task must be left to the trier of fact. **The party proffering expert testimony need not establish that the expert testimony is correct, only that the expert testimony "rests upon 'good grounds'".** Where such a foundation exists, even if the trial court is of the view that there are better grounds for an alternative conclusion, the proffered expert testimony "**should be tested by the adversary process -- competing expert testimony and active cross-examination -- rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies**"...

Id. at 404; *citing* State v. Farner, 66 S.W.3d 188, 207-08 (Tenn. 2001); McDaniel v. CSX Transp., Inc., 955 S.W.2d at 265; Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.; 161 F.3d 77, 85 (1st Cir. 1998) (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)); In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994); and Burley v. Kytec Innovative Sports Equip., Inc., 2007 SD 82, 737 N.W.2d 397, 406 (S.D. 2007) (Emphasis added). The Court goes on to define that the "good grounds" described above consist of qualifications and reliability. Id. With regard to the test of reliability, the Scott Court states that "trial courts should disallow expert testimony "if the underlying facts or data indicate lack of trustworthiness." Id.; *citing* Tenn. R. Evid. § 703. As previously discussed, the data underlying Dr. Brown's testimony was provided by CGC, its witness Mr. Sherwood, and publicly available records from trustworthy sources, most commonly FERC. Therefore, Dr. Brown's testimony is admissible under this, and every other, holding of the Supreme Court with regard to the issue of expert testimony.

II. Reliability Under T.C.A. §§ 65-2-109(1) and 4-5-313(1)

In the previous section of this Response, the Consumer Advocate showed that Dr. Brown's testimony is admissible under the Supreme Court's interpretation of the Tennessee Rules of Evidence. However, even if the T.R.A. was not persuaded by this argument, this testimony is still admissible under T.C.A. § 65-2-109(1) and 4-5-313(1). These statutes allow for the admission of evidence by the T.R.A. that would not ordinarily be allowed under the traditional rules of evidence. This loosened evidentiary standard exists for good reason; the T.R.A. Directors consist of learned and knowledgeable persons with the education and experience necessary to hear and appropriately weigh all evidence presented to them in a way that a jury cannot.

Almost every case presented by either the Consumer Advocate or CGC agrees with the

McDaniel Court's warning that "the court need not weigh or choose between two legitimate but conflicting scientific views," and that "once the evidence is admitted, it will thereafter be tested with the crucible of vigorous cross-examination and countervailing proof," McDaniel, 955 S.W.2d at 265. The Supreme Court reiterated this exact terminology regarding the testing of testimony at trial in Stevens, 78 S.W.3d at 835. In Brown v. Crown Equip. Corp., the Supreme Court reiterated this point and went on to hold that "the weight of the theories and the resolution of legitimate but competing expert opinions are matters entrusted to the trier of fact," 181 S.W.3d 268, 281; *citing* McDaniel, 955 S.W.2d at 265. In Johnson v. John Hancock Funds et al., the Supreme Court once again held that a party "should not be denied the opportunity to have the trier of fact determine both the credibility of their version of the facts and the appropriate weight to be given to their expert's testimony," 217 S.W.3d 414, 426-427; *citing* McDaniel, 955 S.W.2d at 265. Finally, and most recently, the Court's ruling in Scott leaves little doubt as to the Supreme Court's position in allowing expert testimony;

> While a trial court's role as a gatekeeper is critical, it is not unconstrained. When making an admissibility determination, **trial courts are not empowered to choose between legitimate competing expert theories by excluding the lesser of the two.** To the contrary, that task must be left to the trier of fact. **The party proffering expert testimony need not establish that the expert testimony is correct, only that the expert testimony "rests upon 'good grounds,'"...**

Scott 275 S.W.3d at 404; *citing* State v. Farner, 66 S.W.3d 188, 207-08 (Tenn. 2001); McDaniel v. CSX Transp., Inc., 955 S.W.2d at 265; Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998) (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)); In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994); and Burley v. Kytec Innovative Sports Equip., Inc., 2007 SD 82, 737 N.W.2d 397, 406 (S.D. 2007) (Emphasis added).

As shown above, the case law makes clear that whenever possible, and most importantly in

close cases, the expert testimony in question should be put to the trier of fact for a determination of the reliability of expert testimony. *See supra.* This is especially true in cases before the T.R.A. where the evidentiary standards are less strict than those cited above and the Directors are better situated, due to their education, experience and resources, to listen to all testimony and make their own determinations about the extent to which a particular expert's testimony may be relied upon. Furthermore, this testimony is precisely the type "commonly relied upon" by Regulatory Analysts, and is thus admissible under T.C.A. §§ 4-5-313(1) and 65-2-109(1). Therefore, while the Consumer Advocate would aver that Dr. Brown is an expert witness entitled to present his testimony to the T.R.A. regardless of the standard employed, Dr. Brown's testimony must be allowed before the full panel of Directors under the evidentiary standards mandated before the T.R.A. in *T.R.A. Rules of Practice & Procedure* § 1220-1-2-.16(1). Furthermore, CGC is not without a remedy. If CGC truly believes that Dr. Brown has not employed appropriate methodology in this case, they may raise those issues at the scheduled hearing on July 13, 2009, at which time they will enjoy the opportunity to rigorously cross-examine Dr. Brown on any subject related to this Docket. However, the mere fact that CGC does not agree with Dr. Brown's opinion or methodology is not a sufficient reason to exclude his testimony or disqualify him as an expert.

CONCLUSION

Dr. Brown is an expert in the field of Regulatory Economics, and his testimony is admissible under the current law in the state of Tennessee as well as the less restrictive evidentiary standards of the T.R.A. Therefore, Dr. Brown's testimony must be admitted and put to the consideration of the Directors of the T.R.A. at the final hearing in Docket 07-00224.

Respectfully submitted,

T. JAY WARNER, B.P.R. # 026649
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-7629

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, or electronic mail upon:

J.W. Luna, Esq.
Jennifer Brundige, Esq.
Farmer & Luna
333 Union Street
Suite 300
Nashville, TN 37201

L. Craig Dowdy, Esq.
McKenna Long & Aldridge LLP
303 Peachtree Street
Suite 5300
Atlanta, GA 30308

Kelly Cashman-Grams
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

This the 25th day of June, 2009.

T. Jay Warner
Assistant Attorney General