

Kelly Grams

From: Shiva Bozarth
Sent: Friday, September 06, 2013 1:09 PM
To: 'Walker, Henry'; Kelly Grams; 'Charlena Aumiller'
Cc: Vance Broemel; Jean A. Stone
Subject: RE: CAPD Proposed Hearing Exhibits 11-00065

My efforts to negotiate a resolution were unsuccessful.

From: Walker, Henry [mailto:HWALKER@babco.com]
Sent: Friday, September 06, 2013 11:11 AM
To: Kelly Grams; 'Charlena Aumiller'
Cc: Shiva Bozarth; Vance Broemel; Jean A. Stone
Subject: RE: CAPD Proposed Hearing Exhibits 11-00065

I got this email just as I was sending my response to the CAD. Shiva is going to call Charlena per your suggestion.

From: Kelly Grams [mailto:Kelly.Grams@tn.gov]
Sent: Friday, September 06, 2013 10:36 AM
To: 'Charlena Aumiller'; Walker, Henry
Cc: Shiva Bozarth; Vance Broemel; Jean A. Stone
Subject: RE: CAPD Proposed Hearing Exhibits 11-00065

Counsel -

I would like the parties to continue to discuss this matter to see what, if anything, can be worked out. Are there any alternatives? In particular, how can the questioning of witnesses proceed in a manner that is as succinct and efficient as possible.

Generally, in practice before the agency, the exchange of exhibits between parties has referred to any evidence (document, piece of witness testimony, etc) that is already in the record that any party intends to reference, use, or specifically discuss during witness questioning or the hearing. As you all know, the Authority is not strictly bound by the Rules of Evidence (see TCA 65-2-109 and 4-5-313, and TRA Rule 1220-1-2-.16). Nevertheless, anything that is offered as evidence, whether demonstrative evidence, factual evidence, etc., should be reliable and helpful to the Authority in making its determination. Further, any visual aid, whether offered as evidence or not, must be an accurate representation of what it purports to be and otherwise helpful to the panel.

In the event the parties can come to no compromise –

Charlena – you will need to file a motion (with complete and appropriately marked supporting documents/not simply one page taken out of an otherwise unmarked/unidentifiable document) that sets forth your position. No replies will be permitted.

Henry and/or Shiva (separate or joint, as you see fit)– please your response/objections to the Consumer Advocate's proposed exhibits, including explanation and legal analysis file in the docket

All filings must be made today. Should a ruling be required, unless the panel prefers it be done at a different time, I will take up the motion following Public Comment. Each side/party may have 5 minutes to summarize its position concerning the use and admissibility of the proposed exhibits. Thereafter, I will rule on the motion and the Hearing will proceed with Opening Statements and witness testimony.

Please provide me with an electronic copy of anything filed in the docket. Also, if the parties have other questions, suggestions, etc., and feel it appropriate to include me in the exchange, please do so.

Kelly Cashman-Grams

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From: Charlena Aumiller [<mailto:Charlena.Aumiller@ag.tn.gov>]
Sent: Friday, September 06, 2013 9:42 AM
To: Walker, Henry; Kelly Grams
Cc: Shiva Bozarth; Vance Broemel; Jean A. Stone
Subject: RE: CAPD Proposed Hearing Exhibits 11-00065

Your Honor:

The Consumer Advocate came to the idea of this chart when it was preparing its cross examination questions. There are 24 numbers just from orders alone that are presented on the Proposed Exhibit. Assuming 3-5 questions to establish each of those numbers, and the time necessary for cross examination lengthens significantly. Neither the Party Staff nor Berry's Chapel has objected that the numbers are inaccurate or otherwise inadmissible. Therefore, it is just whether it will take 10 minutes to get them in with the chart, or much, much longer by going through each individual order and number. The Consumer Advocate proposed the chart as a convenience to everyone since long, tedious cross examinations are not only painful for the attorneys and witnesses, but also the directors who are on very limited time.

Contrary to Berry's Chapel's suggestion below, no where in Rule 1006 does it state that such chart must be subject to cross examination.

In *Stewart*, 205 S.W. 444, 445 (Tenn. 1918), the Court stated the report being provided was "quite a book itself, is very long, very minute, and very exact, embracing thousands of figures." It cannot reasonably be disputed that this chart is very simple to determine the accuracy by looking at the underlying data. The Court also stated: "When the facts sought to be proved are of such a character, and the papers are so voluminous or numerous, that the examination thereof during the trial would consume much time, and it would be difficult for the jury" (and we may add for the court) "to understand and reach the necessary result, the rule requiring the production of the papers themselves is so relaxed that the court may, in its discretion, permit a competent witness, who has examined the papers with reference to the points sought to be established, to testify to the result of such examination." *Id.* at 445-46 (citing 2 Encyc. Ev. p. 284, citing cases from California, Connecticut, Iowa, Louisiana, Maryland, Minnesota, Missouri, Nebraska, and Texas.) (emphasis added). Ms. Underwood has testified that she looked at the dockets cited in the chart in her testimony on pages 1-2. Moreover, Ms. Underwood asserts that she has examined the dockets to determine whether the expenditures were "never presented to the Authority." Testimony of Tiffany Underwood, page 3. Since Ms. Underwood's pre-filed testimony states that she has examined the dockets, she is a competent witness who can establish the costs in the chart. If Ms. Underwood has not looked at the cost in the chart, then that is an entirely different argument.

There are no assumptions made in the chart. It is just showing the numbers from the prior orders. Moreover, where a jury may need protection, the TRA as an administrative agency is believed to be sophisticated enough to weigh evidence accordingly. The evidence is not conclusive. It is merely competent evidence that can be weighed for what it is worth.

As for Berry's Chapel's third objection below, the statement that costs from one docket are not comparable to another does not seem accurate. If a company recovers Chemical expense in 2009 and recovers Chemical expense in 2011, they are all chemical expense. One presentation item that did change from 2007 to 2009 was the break out of accounting and legal expenses. Since the accounting and legal expenses were included in Contractual Services, and not broken out, the Consumer Advocate did not put a number in the chart. But it is also misleading to say that the company received no

accounting and legal when it had received in, just in a different form, which is why there is a note indicating this information.

There are no arguments in the chart. It contains only data and references to where the data came from. There is no judgment or opinion.

Both Party Staff and Berry's Chapel indicate that we can get the information in. As stated at the outset, the only question is how long it will take to get the information in the record. The chart can save a significant amount of time in a compressed schedule. And all the underlying documents will be provided to all members who get the chart so accuracy could be tested (which has already been done when providing the chart).

The Consumer Advocate's request for the proposed chart is merely trying to get to the substance of the issues at the hearing in as efficient procedure as possible.

The Consumer Advocate is also prepared to file its responses to the objections of the Party Staff and Berry's Chapel in a motion, if the Hearing Officer so wishes.

Charlena

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From: Walker, Henry [<mailto:HWALKER@babco.com>]
Sent: Friday, September 06, 2013 8:44 AM
To: 'Kelly Grams'; Charlena Aumiller
Cc: 'Shiva Bozarth'; Vance Broemel; 'Jean A. Stone'
Subject: RE: CAPD Proposed Hearing Exhibits 11-00065

Kelly---If you would like me to re-submit this email as a filing, please let me know. I can do it this morning.

From: Walker, Henry
Sent: Thursday, September 05, 2013 6:33 PM
To: 'Kelly Grams'; 'Charlena Aumiller'
Cc: Shiva Bozarth; Vance Broemel; Jean A. Stone
Subject: RE: CAPD Proposed Hearing Exhibits 11-00065

Shiva and I were presented with this proposed exhibit late yesterday and then, after we objected, presented with a revised version about 3 pm today. I will let Shiva speak for the Party Staff. I have three objections and, in the short time available, have done some legal research which is presented below. At a hearing, I will be prepared to discuss this case law in more detail.

1. The purpose of rule 1006 is to make summaries of factual materials that are too voluminous to be examined individually. See Stewart v. Follis, discussed below. It is not the purpose of the rule to allow an exhibit that is merely an illustration of a lawyer's argument. Here, the proposed summary purports to

be an exhibit of undisputed facts. It is not. It is a chart that mixes together expenses from several different dockets in an effort to make it appear that all the expenses are comparable. As such, the exhibit is misleading and reflects a misunderstanding of what the figures actually represent. In her last email, the Advocate admitted that the chart was created to support the Advocate's position that the invoices for flood recovery and odor control at issue in this settlement should not be paid because those expenses have already been addressed by the Authority in other dockets. This is simply wrong, as both Mr. Buckner and Ms. Underwood will testify. But whether one agrees with that argument or not, the Advocate acknowledges that this chart was created to illustrate the Advocate's argument. It is not an exhibit of facts, and certainly not an exhibit of undisputed facts. It therefore is not covered by the rule. I will be happy to discuss this further at the hearing.

2. Even if this were an exhibit showing facts, or what the Advocate believes are facts, Rule 1006 requires that whoever compiled the summary must testify in order to introduce the exhibit into evidence and must be subject to cross-examination. In this case, the summary was prepared by attorneys in the Advocate's Office. There is no supporting witness to testify in support of the summary exhibit or be cross-examined about it.

Although there are many cases on the rule, one of the principle cases—and the only one cited in the commentary on the rule—is *Stewart v. Follis*, 205 S.W. 44 (Tenn. 1918). It states that the summary document, must be supported by "a competent witness who has examined the papers with reference to the points sought to be established to testify to the result of such examination." (at 446, emphasis added.) The witness must be available for cross-examination. *Id.* If there is no supporting witness, the exhibit must be excluded. In that case, the summary exhibit was produced by several experts, not all of whom were available to testify and it was unclear what parts of the report had been done by which witnesses. The Court concluded, "That being true, it leaves the whole matter fatally indefinite and the whole report must be excluded." *Id.* Other, more recent cases, also emphasize the importance of the opportunity to cross-examine the witness who compiled the summary. As one court explained, "Here defendants' attorneys conducted a thorough cross-examination of the witness responsible for preparing the chart and had an opportunity to demonstrate to the jury that the assumptions made from the chart were no more than mere assumptions." . *United States v. Means*, 695 F.2d 811 (1983); see also *United States v. Richardson*, 233 F.3d 1285 (2000) and *United States v. Norton*, 867 F.2d 1354 (1999).

3. Whether the proposed exhibit is an illustration of a legal argument or, as the Advocate believes, a fact exhibit, the time for filing briefs and evidence has passed. If the exhibit is an illustration of an argument (which it is), it could have been attached to one of the Advocate's pre-hearing briefs or, if one were permitted, the Advocate's post-hearing brief. If it were really a fact exhibit, It could and should have been attached to Mr. Novak's testimony. It was not. In sum, this is a lawyer-generated document that tries to compare costs in one docket with costs in another when they are not comparable, as cross-examination would show. But whether the summary is legal argument or a fact exhibit, the time for filing either has gone.

In conclusion, the Advocate is free to cross-examine Mr. Buckner and Ms. Underwood about the expenses described in the Settlement Agreement and whether or not those expenses were addressed by the Authority in another docket. The Advocate has already made that argument in her briefs. But the Advocate cannot introduce into evidence the "summary exhibit" in support of her argument. First, It is not a summary of facts as contemplated by the rule; second, if it were a fact summary, it cannot be admitted because the person who compiled it is not available to testify; and , third, whether it is a legal argument or a fact exhibit, it is too late to introduce it now.

From: Kelly Grams [<mailto:Kelly.Grams@tn.gov>]

Sent: Thursday, September 05, 2013 4:06 PM

To: 'Charlena Aumiller'

Cc: Shiva Bozarth; Walker, Henry; Vance Broemel; Jean A. Stone

Subject: RE: CAPD Proposed Hearing Exhibits 11-00065

What are the objections?

Kelly Cashman-Grams

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From: Charlena Aumiller [<mailto:Charlena.Aumiller@ag.tn.gov>]
Sent: Thursday, September 05, 2013 3:12 PM
To: Kelly Grams
Cc: Shiva Bozarth; 'Walker, Henry'; Vance Broemel
Subject:

Your Honor,

We have provided Berry's Chapel and the TRA Party Staff some exhibits. They have objections to them. If you have a chance, we respectfully request to have a conference tomorrow to discuss the objections before the hearing.

I have attached the exhibits and supporting documents. As indicated by the titles of the attachments, the Consumer Advocate would like to use the Proposed Demonstrative file as a demonstrative and the Proposed Exhibit Summarizing Prior Orders – Rule 1006 as evidence, under the Tennessee Rule of Evidence 1006, Summaries.

All parties are available at your convenience tomorrow.

Charlena

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