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February 5, 2013

* ALSO ADMITTED IN GA
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*** ONLY ADMITTED IN OH

Ms. Sharla Dillon
Docket Room Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Via Hand Delivery

Re: Petition of Laurel Hills Condominiums Property Owners Association for a
Certificate of Public Convenience and Necessity
Docket No. 12-00030

Dear Sharla:

I have enclosed an original and five copies of the three Motions in Limine filed by
Petitioner's in the above-identified docket.

These documents and this cover letter are being filed electronically by electronic mail
this same date. Please return the additional copy of the Testimony stamp filed to me.

Thank you for your assistance.

Sincerely yours,



BENJAMIN A. GASTEL

Enclosure

c: Shiva Bozarth
John J. Baroni
Melanie Davis
Robert Schwerer
Michael McClung

**IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

IN RE:

PETITION OF LAUREL HILLS

CONDOMINIUMS PROPERTY OWNERS

ASSOCIATION FOR A CERTIFICATE

OF PUBLIC CONVENIENCE AND

NECESSITY

DOCKET NO. 12-00030

PETITIONER'S FIRST MOTION IN LIMINE

Petitioner files this first Motion in Limine seeking to exclude any testimony at the February 13, 2013 hearing concerning certain testimony of Mr. Everret Bolin ("Mr. Bolin"), manager of the Crab Orchard Utility District (the "COUD"). Specifically, this motion seeks to exclude any testimony by Mr. Bolin that would constitute expert opinion testimony under Tenn. R. Evidence 702.

"The admissibility of evidence pursuant to Rule 702 of the Tennessee Rules of Evidence is more stringent than its federal counterpart." *Howell v. State*, 185 S.W.3d 319, 337 (Tenn. 2006). For instance, Tenn. R. Evid. 702 requires that the scientific evidence "substantially assist the trier of fact," while its federal counterpart requires only that the evidence "assist the trier of fact." Fed. R. Evid. 702. This distinction indicates that the probative force of the testimony must be stronger before it is admitted in Tennessee.

Similarly, Tenn. R. Evid. 703 states that "the court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." There is no similar restriction in the federal rule. Fed. R. Evid. 703. Thus, as one court has observed, "the additional language . . . [in the Tennessee rule] is obviously designed to encourage trial courts to take a more active role in evaluating the reasonableness of the expert's reliance upon the

particular basis for his or her testimony.” *McDaniel v. CSX Transp.*, 955 S.W.2d 257, 264-65 (Tenn. 1997) (citations omitted).

Tennessee courts use a similar set of factors as federal courts to evaluate the reliability of expert testimony, but they have also emphasized the need for flexibility.

Although we do not expressly adopt Daubert, the non-exclusive list of factors to determine reliability are useful in applying our Rules 702 and 703. 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. at 265. To these *McDaniel* factors, the Tennessee Supreme Court has added two more: (1) the expert’s qualifications for testifying on the subject at issue and (2) 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. *State v. Stevens*, 78 S.W.3d 817, 834-35 (Tenn. 2002).

The foregoing factors apply to both scientific and non-scientific expert testimony. See *id.* When an expert bases his analysis on practical experience, the importance of the *McDaniel* factors decreases, and the importance of the *Stevens* factors increases. See *Freeman v. Blue Ridge Paper Prods.*, 229 S.W.3d 694, 709 (Tenn. App. 2007); see also *Brown.*, 181 S.W.3d at 274-75.

Here, the Customer Intervenors appear to want to use Mr. Bolin as an expert witness on technical aspects of running the water system and on the prudent costs to operate that system. However, Mr. Bolin admitted in his deposition that he did not know which entity was responsible for operating the water system, that he did not know how many employees the

operator had, what the operator's monthly labor cost is, what the operator's monthly insurance cost is, what the operator's depreciation expenses are, and admitted that he "had no idea how [the operator] operate[s the system], who they have as employees or what their expenses might be in relation to [running the water system]." (Bolin Depo. at 62-63.) In other words, Mr. Bolin admitted he had no data point from which he could derive any opinion on the prudent management of the water system.

Mr. Bolin also admitted that despite the large amount of information already made available through its public filings in this docket and Mr. Bolin's familiarity with the Tennessee Regulatory Authority's electronic filing system, Mr. Bolin reviewed only one document prior to being deposed in this case. Mr. Bolin could not recall with specificity the single document he did review. (Bolin Depo. at 50-51.) In other words, had Mr. Bolin wanted to give competent testimony on the costs incurred by Laurel Hills in running the system, which was publically available to Mr. Bolin prior to him giving his deposition, but he did not avail himself of that opportunity.

Under the clear directives of *Stevens*, Mr. Bolin then cannot provide Rule 702 expert testimony because there is no "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." 78 S.W.3d at 834-35. Indeed, Mr. Bolin has openly admitted that there is not connection of his knowledge and the basis of his expert opinions and, therefore, there is not only a gap that "exists between the data and the opinion offered", there is the greatest possible cavern between his data set (which he admits there is none whatsoever) and any opinion offered. *Id.* Any expert opinion offered by Mr. Bolin should be excluded on this basis alone.

Accordingly, specifically Petitioner seeks to exclude any evidence from Mr. Bolin that covers the following topics:


1. The reasonableness of the costs associated to run the water system;
2. The manner in which Laurel Hills operates the water system;
3. The reasonableness of the rates charged by Laurel Hills; and
4. The rates Crab Orchard Utility District could charge if it operated the water system.

Mr. Bolin has already acknowledged that he has no data or specialized knowledge that would relate to these topics and therefore any expert testimony by Mr. Bolin must be excluded on these topics. *Stevens*, 78 S.W.3d 817, 834-35 (upholding exclusion of expert testimony, in part, because data relied upon by expert was not trustworthy); *State v. Ballard*, 855 S.W.2d 557, 561 (Tenn. 1993) (rejecting as unreliable expert testimony concerning personality profiles of sexually abused children); *Biscan v. Brown*, Case NO. M2001-02766-COA-R3-CV, 2003 Tenn. App. LEXIS 875 (Tenn. Ct. App.) (upholding exclusion of expert testimony where expert could not demonstrate expert opinion was reliable).

For the reasons outlined above, Mr. Bolin does not qualify as an expert under *McDaniel* and *Stevens* and therefore should be excluded.

DATED: February 5, 2013

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was served upon
the following via United States Mail:

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This the 5th day of February, 2013



Benjamin A. Gastel