

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

IN RE:)	
PETITION OF LAUREL HILLS)	
CONDOMINIUMS PROPERTY OWNERS)	DOCKET NO. 12-00030
ASSOCIATION FOR A CERTIFICATE)	
OF PUBLIC CONVENIENCE AND)	
NECESSITY)	

RESPONSE TO PETITIONER'S FIRST MOTION IN LIMINE

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 Petitioner's First Motion in Limine seeking to exclude any testimony from Mr. Everett Bolin at the February 13, 2013 hearing that would constitute expert opinion testimony under Tenn. R. Evidence 702. Although Mr. Bolin is a witness for the Customer Intervenors, the Consumer Advocate responds to the Petitioner's First Motion in Limine because the inclusion of Mr. Bolin's testimony permits a more comprehensive record for the Directors to consider in their decision-making and, therefore, we oppose Petitioner's motion to exclude or otherwise limit Mr. Bolin's testimony.

INTRODUCTION

In its Motion, Laurel Hills ("Laurel Hills" or "LH") states that "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." *Petitioner's First Motion in Limine*, at 2 (Feb. 5, 2013). Laurel Hills argues that Mr. Bolin is not a qualified expert because he did not have specific knowledge about how Laurel Hills operates the water system during his deposition.

Id. at 2-3. Laurel Hills suggests that Mr. Bolin would have been able to find this information had he searched the docket, and since he did not find this information, he must not have an opinion about LH's costs to run the water system. *Id.* The Consumer Advocate agrees that the TRA Docket No. 12-00030 contains information about what Laurel Hills believes are the costs and means to operate and manage the water system, but disagrees with Laurel Hills that Mr. Bolin foregoes any opportunity to testify merely by not preparing in a way prescribed by Laurel Hills for a deposition he participated in under subpoena. The Consumer Advocate maintains Mr. Bolin's opinions are important about how a water system in that service area can, and arguably should be, managed because of the numerous allegations that Laurel Hills is mismanaging the company; the fact that LH's water bill has only been paid in full and on time one month since November 2011 despite Laurel Hills receiving rates that could ensure the water is paid (*Deposition of Everett Bolin*, Nov. 30, 2012, at 8-9, lines 22-25, 1-8 (filed in Docket No. 12-00030 on Dec. 17, 2012)); the fact that the RMCC had to take over responsibility for the electric bill to ensure electricity to the water pump in January 2012 (*Direct Testimony of John S. Moore*, at 12 (Oct. 1, 2012)); and the lack of any evidence that Laurel Hills has competitively bid any of the services it presently uses (*see Response of Laurel Hills to First Discovery Request of the CAD*, at 14-15, #24 (Sept. 25, 2012)), at least some of which appear to be owned or controlled by related parties to the board members of Laurel Hills, making the fair market value hard to determine based on information provided by Laurel Hills alone.¹

¹ There are many indications of related parties who are creditors for both debt and services. For example, both purported notes payable that Laurel Hills has are with related parties. *See Rebuttal Testimony of Michael McClung*, Ex. 2 (Jan. 14, 2013) (showing a \$50,000 note with Renegade Mountain Timeshares, LLC, of which Michael McClung is a managing member); *Petition*, Ex. 1, pg. 3 (Apr. 10, 2012) (showing a \$400,000 note with Moy Toy, LLC, of which Phillip Guettler is a managing member and Michael McClung was a managing member but now holds a minority interest according to his rebuttal testimony). Another example is the invoice Mr. McClung provides in Exhibit 1 of his Rebuttal Testimony for the meter installments that is signed by David Guettler. *Rebuttal Testimony of Michael McClung*, Ex. 1 (Jan. 14, 2013). It is possible that David Guettler is related to Phillip Guettler, who is managing member with Michael McClung for both Renegade Mountain Timeshares, LLC and Renegade Resources, LLC.

EVIDENTIARY STANDARD AND CASE LAW

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 12-00030 before the Tennessee Regulatory Authority (“TRA” or “Authority”). Petitioner Laurel Hills is wrong in its assertion that Tennessee Rules of Evidence 702 and 703 govern the admissibility of expert testimony in proceedings at the TRA. *Petitioner’s First Motion in Limine*, pg. 1 (Feb. 5, 2013). The *TRA’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 TRA is not bound by the rules of evidence that 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 that would be admissible under the Tennessee Rules of Evidence will also be admissible under the TRA’s rules, additional evidence will also be admissible, subject to particular statutory objections, if it is “accepted by reasonably prudent” persons. *Id.*

Although the TRA is not bound by the rules of evidence, it may look to the rules and relevant case law as a guide. The Consumer Advocate agrees with Laurel Hills 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.” TENN. R. EVID. 702. 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). 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).

As set forth in the following analysis, the Consumer Advocate asserts that Mr. Bolin's testimony is admissible under the standards set forth in the Tennessee Rules of Evidence, and is, therefore, certainly admissible under the more flexible evidentiary standard in effect before the TRA.

ARGUMENT

First, Mr. Bolin's vast experience qualifies him to provide expert opinions about the cost to manage a water system in Crab Orchard Utility District's ("Crab Orchard") service area, and Laurel Hills is in this service area. As Laurel Hills alleges on pages 2 to 3 of *Petitioner's First Motion in Limine*, it is true that Mr. Bolin may not have expertise about the Laurel Hills water system as it is currently being managed, but he does have nearly ten years of experience managing a water utility district that serves 7800 customers, including providing water to Laurel Hills. *Deposition of Everett Bolin*, Nov. 30, 2012, at 5, lines 16-20 (filed in Docket No. 12-00030 on Dec. 17, 2012). Prior to becoming the General Manager of Crab Orchard Utility District, Mr. Bolin worked in many roles, including management, at General Telephone for thirty years. *Deposition of Everett Bolin*, Nov. 30, 2012, at 5, lines 2-8 (filed in Docket No. 12-00030 on Dec. 17, 2012). Because there are many allegations of mismanagement of the Laurel Hills water system, Mr. Bolin's testimony can provide evidence as to tried and true methods of

managing water systems in the area, including the cost of labor. Indeed, Mr. Bolin may be the only source in this case to provide a benchmark of certain costs in the area since Laurel Hills has not provided competitive bids for its current expenses, including but not limited to engineering, maintenance, other labor, and accounting (including accountants who know how to use the Uniform Systems of Accounts). *See Response of Laurel Hills to First Discovery Request of the CAD*, at 14-15, #24 (Sept. 25, 2012).

Clearly, any expert testimony offered by Mr. Bolin would be based upon his experience of actually applying his expertise. Thus, the basis for Mr. Bolin's qualification is his nearly ten years of experience as a general manager of a water utility district and forty years of experience in regulated companies.

Another reason Laurel Hills suggests Mr. Bolin is not an expert is that "had Mr. Bolin wanted to give competent testimony on the costs incurred by Laurel Hills in running the system, which was publicly available to Mr. Bolin prior to him giving his deposition, but he did not avail himself of that opportunity." *Petitioner's First Motion in Limine*, at 3. This argument seems to suggest that Mr. Bolin is unable to provide reliable testimony.

The Consumer Advocate respectfully disagrees that Mr. Bolin's testimony is unreliable. The Consumer Advocate contends that Mr. Bolin's testimony at the hearing will be considered reliable under the Tennessee Rules of Evidence and under the TRA, and it is certainly admissible under the more flexible applicable standards set forth in T.C.A. § 65-2-109(1) and 4-5-313(1).

First, it should be clarified that Mr. Bolin is not a paid expert by any party. His deposition was provided under subpoena. It is not unreasonable for an unpaid expert witness to avoid spending time to prepare for a deposition provided under subpoena. Moreover, lack of preparation for a deposition does not necessarily mean lack of preparation for the hearing. Thus,

the lack of preparation for a deposition performed under subpoena is an insufficient reason to exclude Mr. Bolin's testimony as an expert. Laurel Hills will have the opportunity to challenge Mr. Bolin's expertise at the hearing during cross examination. If Mr. Bolin is unprepared to answer questions about the water system or the reasonableness of the costs associated to run water systems, then his testimony at the hearing will reflect that and the Directors can consider the lack of preparedness in determining the weight of Mr. Bolin's testimony as an expert.

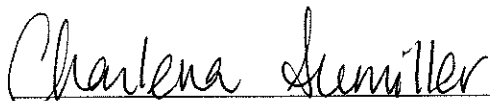
The Consumer Advocate contends that Mr. Bolin's testimony will be reliable under the Tennessee Rules of Evidence. The Supreme Court of the State of Tennessee best articulated the rule governing the admissibility of expert testimony in *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268 (Tenn. 2005). In that 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. Mr. Bolin's testimony about managing water systems will be based on his forty years of experience in regulated entities, ten of which were spent as General Manager of Crab Orchard, the water provider servicing Laurel Hills as part of its 7800 customers. Any additional "underlying facts and data" that would assist Mr. Bolin in his testimony would be data specific to Laurel Hills available publicly on the TRA Docket, much of which is provided directly from Laurel Hills. If Laurel Hills cannot challenge the data that Mr. Bolin reviews to base his opinions on, it appears that Laurel Hills would have to argue that Mr. Bolin's testimony will not "substantially assist the trier of fact." *Id.* However, Laurel Hills has not raised this as a reason to exclude Mr. Bolin's testimony, and the Consumer Advocate asserts that Mr. Bolin's testimony can substantially assist the Directors in determining what costs are fair and reasonable for recovery from customers.

Laurel Hills is not without a remedy. If Laurel Hills truly believes that Mr. Bolin is basing his opinions on unreliable information, they may raise those issues at the scheduled hearing on February 13, 2013, at which time they will enjoy the opportunity to rigorously cross-examine Mr. Bolin on any subject related to this Docket. However, the mere fact that Laurel Hills does not agree with Mr. Bolin's opinion or cost-management style is not a sufficient reason to exclude his testimony or disqualify him as an expert.

CONCLUSION

Mr. Bolin is an expert in the field of managing water systems, and his testimony is admissible under the current law in the state of Tennessee as well as the less restrictive evidentiary standards of the TRA. Therefore, Mr. Bolin's testimony must be admitted and put to the consideration of the Directors of the TRA at the final hearing in Docket 12-00030.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

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This the 7th day of February, 2013.


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