

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	February 12, 2013	)	
		)	
PETITION OF LAUREL HILLS CONDOMINIUMS		)	DOCKET NO.
PROPERTY OWNERS ASSOCIATION FOR A		)	12-00030
CERTIFICATE OF PUBLIC CONVENIENCE AND		)	
NECESSITY		)	

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ORDER ON LAUREL HILLS' MOTIONS IN LIMINE

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This matter is before the Hearing Officer on the First, Second and Third Motions in Limine filed by Laurel Hills Condominiums Property Owners Association ("Laurel Hills") on February 5, 2013. In accordance with the procedural schedule established in the Pre-Hearing Order, the parties responded to Laurel Hills' Motions in Limine by February 7, 2013.<sup>1</sup> On February 6, 2013, Tennessee Regulatory Authority ("Authority" or "TRA") Party Staff filed its *Response to Petitioners First and Third Motions in Limine*. The Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed responses to Laurel Hills' First and Second Motions in Limine on February 7, 2013. Gary Haïser *et al.* ("Customer Intervenors") filed its responses to Laurel Hills' First, Second and Third Motions in Limine on February 7, 2013.

**Petitioner's First Motion in Limine ("First Motion")**

In its *First Motion*, Laurel Hills seeks to exclude from the record, and during the hearing set for February 13, 2013, certain testimony by Everett Bolin that would "constitute expert

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<sup>1</sup> See Pre-Hearing Order (February 6, 2013).

opinion testimony under Tenn. R. Evid. 702.”<sup>2</sup> Specifically, Laurel Hills requests that the Hearing Officer “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.”<sup>3</sup>

Laurel Hills maintains that “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.”<sup>4</sup> According to Laurel Hills, Mr. Bolin is not qualified to provide expert testimony. Laurel Hills states in its *First Motion*:

[T]he 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].’<sup>5</sup>

TRA Party Staff responded to the *First Motion* stating that “an objection to Mr. Bolin’s expertise is unwarranted and fails to acknowledge that Mr. Bolin has significant experience and knowledge about the management of a water service on the Cumberland Plateau and,

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<sup>2</sup> *First Motion*, p. 1 (February 5, 2013).

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 3-4.

<sup>5</sup> *Id.* at 2-3.

specifically, in Cumberland County.”<sup>6</sup> TRA Party Staff asserts that the Authority is not bound by the Rules of Evidence and “Directors should be afforded the opportunity to weigh the evidence and determine its probative value for themselves without the constraints associated with the court system.”<sup>7</sup> Based on its arguments, TRA Party Staff maintains that “Tenn. R. Evidence 702 is not a valid basis upon which to exclude Mr. Bolin’s testimony” and suggests that cross-examination is the appropriate place for Laurel Hills to challenge the lack of evidentiary foundation for Mr. Bolin’s testimony.<sup>8</sup>

On February 7, 2013, the Consumer Advocate filed its *Response to the Petitioner’s First Motion in Limine* maintaining that “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...”<sup>9</sup> The Consumer Advocate argues that Laurel Hills is “wrong in its assertion that Tennessee Rules of Evidence 702 and 703 govern the admissibility of expert testimony in proceedings before the TRA.”<sup>10</sup> Instead, the admissibility of evidence before the TRA is governed by Tenn. Code Ann §§ 65-2-109 and 4-5-313 but the Authority may look to the Rules of Evidence and relevant caselaw as a guide.<sup>11</sup> The Consumer Advocate argues that Mr. Bolin’s testimony is admissible under the standards set forth in the Tennessee Rules of Evidence and is certainly admissible under the more flexible evidentiary standard that governs the admission of evidence before the TRA.<sup>12</sup> According to the Consumer Advocate, “Mr. Bolin’s vast experience qualifies him to provide expert opinions about

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<sup>6</sup> *Response to Petitioners First and Third Motions in Limine* (“Party Staff Response to First and Third Motions”), p. 1 (February 6, 2013).

<sup>7</sup> *Id.* at 1-2.

<sup>8</sup> *Id.*

<sup>9</sup> *Consumer Advocate’s Response to First Motion*, p. 2 (February 7, 2013).

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 3-4.

<sup>12</sup> *Id.* at 5.

the cost to manage a water system in Crab Orchard Utility District's service area, and Laurel is in this service area."<sup>13</sup>

The Customer Intervenor filed a response to the *First Motion* on February 7, 2012 asserting that Mr. Bolin "has information that will substantially assist the trier of facts regarding water systems in general and the costs of operating a water system and related services in Cumberland County. He can speak [to] the reasonableness of various costs and to the alternative that Crab Orchard Utility District offers in providing water to the customers at issue."<sup>14</sup> The Customer Intervenor aver that while Mr. Bolin does not necessarily know the specifics of Laurel Hills, he has general knowledge that would be helpful in looking at the costs and expenses Laurel Hills is claiming as part of its rate structure.<sup>15</sup> The Customer Intervenor request that the *First Motion* be denied and that "Mr. Bolin's testimony should be heard and determined at the time he testifies."<sup>16</sup>

### **Findings and Conclusions on *First Motion***

The Hearing Officer finds that based on his many years of experience as General Manager of Crab Orchard Utility District, Mr. Bolin may possess significant knowledge and experience about the management of a water system in Cumberland County. However, this knowledge and expertise does not extend to the specifics of the operations of Laurel Hills' water system. The Hearing Officer is persuaded by Laurel Hills' arguments insofar as it concerns Mr. Bolin's lack of specific data or specialized knowledge relative to the operations of the Laurel Hills' water system. Even the Customer Intervenor admit that "[h]e does not necessarily know the specifics of Laurel Hills..."<sup>17</sup>

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<sup>13</sup> *Id.* at 5.

<sup>14</sup> See *Customer Intervenor's Response to First Motion in Limine*, p. 1 (February 7, 2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.*

When it is clear, as admitted by the Customer Intervenors, that Mr. Bolin is not qualified to present expert testimony regarding the operations of the Laurel Hills' water system, such evidence should not be admitted because it would cause confusion and would in no way assist the Authority in determining the facts at issue in this docket. Therefore, Mr. Bolin may testify concerning his general knowledge of water systems in Cumberland County and his experience as General Manager of Crab Orchard Utility District. However, testimony and evidence specific to Laurel Hills, other than information regarding Laurel Hills' payment history to Crab Orchard, is excluded and should be avoided.

Based on the record and these findings, Laurel Hills' *First Motion* is **GRANTED** and Mr. Bolin may not testify or present evidence relating to:

1. The reasonableness of the costs associate 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.

**Petitioner's Second Motion in Limine ("Second Motion")**

Laurel Hills' *Second Motion* seeks to exclude certain testimony of John Moore because it violates Tenn. R. of Evid. 1002-1003 and is hearsay.<sup>18</sup> Laurel Hills takes issue with the following statements made by Mr. Moore in his direct testimony:

**Legal Ownership:** Initially the water system was constructed, owned and operated by the developer and was at some point turned over or sold to the RMCC which operated, and presumably owned the water system until it was transferred or sold back to the developer in 2000 (Exhibit 1, Line 1 or Attachment #1). Although individuals and legal counsel have petitioned the RMCC's former BOD to review these and other records as allowed by the By-Laws and Tennessee Non Profit Corporation Statutes multiple times (Exhibit 1, Lines 9, 18 and 21), all requests to date have been unanswered or denied.

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<sup>18</sup> *Second Motion*, p. 1 (February 5, 2013).

**Sale of Water System:** It is clear through the master plan and other documents that the and original developer's intent was that the water system be constructed for the benefit of the developer to sell lots and therefore remain under the developer's control. With respect of the Renegade legal Restrictions, there remains an interpretation of whether the developer even had the right to sell the water system to anyone other than the RMCC and also after selling it to the RMCC, could it then be resold back to the developer.<sup>19</sup>

Laurel Hills argues that "Mr. Moore has provided hearsay and unsupported evidence in an attempt to put into issue the ownership of the water system owned and operated by Laurel Hills."<sup>20</sup> According to Laurel Hills, "the only testimony we have that any of these documents exists is the unsupported testimony of Mr. Moore. This is a clear violation of the Best Evidence Rule, which requires a witness to produce an original or, at least a duplicate of a document, if the witness is going to provide testimony as to what the document contains."<sup>21</sup> Laurel Hills maintains that none of the exceptions in Tenn. R. Evid. 1004 apply.<sup>22</sup> Laurel Hills also seeks to exclude Mr. Moore's statements on the basis that they are impermissible hearsay. In the *Second Motion*, Laurel Hills argues that "Mr. Moore has admitted that he does not know that the RMCC owned the community club based on his own personal knowledge, and therefore, must have learned of the fact based on statements told to him by other or based on documents he has reviewed. Either way, the statements clearly constitute hearsay and must be excluded."<sup>23</sup>

On February 7, 2013, the Consumer Advocate and the Customer Intervenors responded to the *Second Motion*. The Consumer Advocate maintained that "[o]ne of the salient issues in this case is whether the purported transfers of the water system and the related \$400,000 note were arms' length transactions between the myriad of related entities involved. Mr. Moore's

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<sup>19</sup> See *Second Motion*, pp. 1-5 (February 5, 2013) (quoting Pre-Filed Direct Testimony of John S. Moore, p. 9 (October 1, 2012)).

<sup>20</sup> *Id.* at 1.

<sup>21</sup> *Id.* at 3 (citing Tenn. R. Evid. 1002 and 1003).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 5.

testimony is relevant and may assist the TRA in its determination of the facts surrounding that issue and its impact on Laurel Hills' rate base and ratepayers."<sup>24</sup>

The Customer Intervenors maintain that Mr. Moore provided a check that shows payment in 2000 to the Cumberland Gardens Community Club. The Customer Intervenors contend that "the language in the restrictions for the community which are public record and not in dispute discuss the water system and only mention sale or transfer to the Renegade Mountain Community Club... Mr. Moore wishes to testify to this fact."<sup>25</sup> According to the Customer Intervenors, Mr. Moore "simply raises questions regarding whether the Laurel Hills entity could properly own the water system under the circumstances."<sup>26</sup> The Customer Intervenors assert that the Renegade Mountain Community Club's prior directors, including Mr. McClung, are being sued in Cumberland County Chancery Court, and the Customer Intervenors have asked for corporate historical documents related to the Renegade Mountain Community Club from Mr. McClung and others, but such documents have not been produced.<sup>27</sup> The Customer Intervenors maintain that "it is within the bounds of [ ] the Authority to consider this testimony and to at least take this testimony under consideration."<sup>28</sup>

### **Findings and Conclusions on Second Motion**

According to Tenn. Code Ann. § 65-2-109(1), the TRA is not required to follow the Rules of Evidence applicable to a court of law but may look to the Rules as guidance. As an administrative agency, the TRA conducts contested case hearings according to its rules and the Tennessee Uniform Administrative Procedures Act ("UAPA") (Tenn. Code Ann. § 4-5-301 *et seq.*). Tenn. Code Ann. § 65-2-109(1) states,

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<sup>24</sup> See *Consumer Advocate's Response to Laurel Hills' Second Motion in Limine*, p. 1 (February 7, 2013).

<sup>25</sup> See *Customer Intervenors' Response to Second Motion in Limine*, p. 1 (February 7, 2013).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1-2.

<sup>28</sup> *Id.* at 2.

The authority shall not be bound by the rules of evidence applicable in a court *but it may admit and give probative effect to any evidence* which possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs; provided, that the authority shall give effect to the rules of privilege recognized by law; and provided further, that the authority may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence (emphasis added).<sup>29</sup>

Generally, the Authority shall evaluate the admission of evidence as “reasonably prudent persons in the conduct of their affairs.”

Similarly, the UAPA authorizes the Authority, in the evaluation of evidence, to consider evidence admissible in a court of law, as well as evidence that might be considered inadmissible, under some circumstances. The Authority shall exclude evidence that it determines is irrelevant and immaterial. Tenn. Code Ann. § 4-5-313 provides:

In contested cases:

(1) 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. The agency shall give effect to the rules of privilege recognized by law and to agency statutes protecting the confidentiality of certain records, and shall exclude evidence which in its judgment is irrelevant, immaterial or unduly repetitious.

Relevant evidence is defined by Tenn. R. Evid. 401 as “having any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence (emphasis added).”

This docket is before the Authority for consideration of the petition for a certificate of convenience and necessity (“CCN”) filed by Laurel Hills. The Hearing Officer finds that any issue that might exist regarding the ownership of the water system is not properly before the Authority. Mr. Moore’s testimony regarding the propriety of Laurel Hills’ ownership of the water system is not a question to be resolved by the TRA and not material to the determination of

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<sup>29</sup> Tenn. Code Ann. § 65-2-109(1).



whether a CCN should be approved. This case involves a complex set of facts and numerous issues are under litigation. Other issues pertaining to the Laurel Hills' water system, including its transfer and ownership, are currently being litigated by the parties in the Chancery Court of Cumberland County. The Hearing Officer finds that Mr. Moore's testimony regarding the ownership of the water system is irrelevant and immaterial to the Authority's considerations in this CCN proceeding. Based on these findings, Laurel Hills' *Second Motion* is **GRANTED**.

**Petitioner's Third Motion in Limine ("Third Motion")**

Laurel Hills' *Third Motion* seeks to limit the Customer Intervenors use of certain exhibits, which it asserts were not previously produced as part of the Customer Intervenors' direct testimony.<sup>30</sup> Laurel Hills asserts that the use of these particular exhibits should be limited, if allowed at all, to rebut testimony or evidence otherwise presented at the hearing.<sup>31</sup>

On February 6, 2013, TRA Party Staff filed its *Party Staff Response to First and Third Motions* asserting that "there is no requirement in law or a prior order in this matter that materials to be used as evidence in this matter must be filed along with pre-filed testimony or as pre-filed testimony."<sup>32</sup> Regarding the exhibits at issue, TRA Party Staff also maintains that "Laurel Hills has had access to all of them and in fact generated many of them. While they may not have been presented in this case the Petitioner can hardly claim surprise regarding documents in its possession whether or not it has shared them with its counsel."<sup>33</sup>

The Customer Intervenors filed its *Customer Intervenors' Response to Third Motion in Limine* arguing that there is no requirement that materials to be used as evidence be provided with pre-trial testimony. The Customer Intervenors assert that all of the exhibits were available

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<sup>30</sup> Attached to its *Third Motion*, Laurel Hills included a list of exhibits provided by the Customer Intervenors and designated a portion of the list marked "Other documents not of public record" as objectionable.

<sup>31</sup> See *Third Motion*, p. 1 (February 5, 2013).

<sup>32</sup> *Party Staff Response to First and Third Motions*, p. 2 (February 6, 2013).

<sup>33</sup> *Id.*

to the Petitioner and “the Petitioner has no basis to exclude these documents from evidence and has had equal opportunity to obtain these document and/or review these documents so it can claim no surprise.”<sup>34</sup>

**Findings and Conclusions on *Third Motion***

The Hearing Officer finds that Laurel Hills has failed to provide any authority to justify its request that the Customer Intervenors’ use of exhibits designated “Other documents not of public record” be limited to rebut testimony or evidence presented at the hearing. Therefore, Laurel Hills’ *Third Motion* is **DENIED**.

**IT IS THEREFORE ORDERED THAT:**

1. The *Petitioner’s First Motion in Limine* is **GRANTED**.
2. The *Petitioner’s Second Motion in Limine* is **GRANTED**.
3. The *Petitioner’s Third Motion in Limine* is **DENIED**.
4. Permission for interlocutory review of this Order is granted.

  
Monica Smith-Ashford, Hearing Officer

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<sup>34</sup> *Customer Intervenors’ Response to Third Motion in Limine* (February 7, 2013).