

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

IN RE:

**PETITION OF TENNESSEE AMERICAN
WATER COMPANY TO CHANGE AND
INCREASE CERTAIN RATES AND
CHARGES SO AS TO PERMIT IT TO
EARN A FAIR AND ADEQUATE RATE
OF RETURN ON ITS PROPERTY USED
AND USEFUL IN FURNISHING WATER
SERVICE TO ITS CUSTOMERS**

DOCKET NO. 08-00039

**MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE THE PROCEDURAL
SCHEDULE AND EXTEND THE DATE OF THE FINAL HEARING ON THE MERITS
OR IN THE ALTERNATE GRANT LEAVE TO SEEK EMERGENCY RELIEF FROM
THE HEARING PANEL**

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”), comes before the Tennessee Regulatory (“TRA”) and moves the Hearing Officer to set aside the procedural schedule and to extend the date of hearing on the merits in this matter pursuant to Tenn. Code Ann. § 65-5-103 (a). In the alternate, the Consumer Advocate requests leave to seek emergency relief of the same nature from the Hearing Panel assigned to this docket. The Consumer Advocate respectfully requests the Hearing Officer to expedite a determination for this motion in the event this request is denied so that the Consumer Advocate could be heard by the Hearing Panel at the earliest date possible.

Introduction

On May 12, 2008, the Consumer Advocate filed 181 discovery requests while simultaneously filing its *Motion to Ask Additional Discovery Questions* and its *Memorandum in Support of the Motion to Ask Additional Discovery Questions* as required by TRA Rule 1220-1-2-.11.¹ To date, no ruling has been made on the Consumer Advocate's request. On May 28, 2008, TAWC responded to the first 53 discovery requests of the Consumer Advocate. TAWC maintains that it has no obligation to answer more than 53, which according to the company amounts to 80 questions including subparts. In excess of 100 of the Consumer Advocate's discovery requests have not been answered.

The pre-filed direct testimony of the Consumer Advocate, which is the only scheduled vehicle for the Consumer Advocate to offer analysis and publicly test the justness and reasonableness of TAWC's rate increase request prior to the hearing on the merits, is due on June 23, 2008. Given the outstanding discovery issues yet to be resolved, it is impossible for the Consumer Advocate to submit effective and substantive pre-filed direct testimony by the June 23, 2008 deadline.

Under the circumstances, the current procedural schedule in place is prejudicial to the Consumer Advocate's preparation for pre-filed direct testimony and ability to fully participate in this proceeding. The TRA has the authority to extend this rate case from a six month period from the date the petition is filed up to a nine month period under Tenn. Code Ann. § 65-5-103 (a). The Consumer Advocate requests the Hearing Officer, or in the alternate, the Hearing Panel, to set aside

¹ Pursuant to the Hearing Officer's order issued on the afternoon of May 9, 2008, the Intervening parties made attempts during the weekend of May 9-11, 2008, to coordinate and compare discovery. However, "pooling" and limiting all three parties to a collective total of 120 discovery requests proved to be impossible given the amount of time, the complexity of the issues, the information the individual parties wished to discover and the fact the compiling of discovery questions by experts and consultants was on-going through the morning of May 12, 2008, the deadline for submission of the first round of discovery.

the current procedural schedule and to extend the date of the final hearing to allow the Consumer Advocate sufficient time to discover information relevant to this case, perform analysis and to prepare pre-filed direct testimony.

The Prejudicial Nature of the Delay in Obtaining Discovery

Prior to the filing of the Consumer Advocate's direct testimony, there is only one round of discovery. With an impending deadline for direct testimony on June 23, 2008, timely responses to discovery are essential for the Consumer Advocate to have sufficient time to investigate, perform analysis and form relevant and substantive opinions to advance the interest of consumers.² The first round of discovery responses were due on May 28, 2008. The company responded to only 53 of the 181 discovery requests.³ The outstanding discovery requests of the Consumer Advocate were met with a blanket objection.⁴

On May 12, 2008, the Consumer Advocate filed its *Motion to Ask Additional Discovery Questions* and its *Memorandum in Support of the Motion to Ask Additional Discovery Questions* as required by TRA Rule 1220-1-2-.11. If the hearing officer grants the *Motion to Ask Additional Discovery Questions*, the company will need sufficient time to respond in addition to the month needed by the Consumer Advocate to study complete responses, perform analysis, form opinions and

² The Intervenor jointly filed a *Motion to Modify Procedural Schedule* on May 6, 2008. No ruling has been issued. Due to the outstanding discovery the Consumer Advocate needs and the shrinking time period the Consumer Advocate has to prepare direct testimony, the relief the Intervenor sought in that motion is no longer sufficient.

³ In answering 53 discovery requests, the company included all subparts for TAWC total of 80 responses.

⁴ TAWC did not object on a basis of relevance, claim of burdensomeness or that such information was not available. Rather the company simply determined that the Consumer Advocate was not entitled to the information due to the eighty question limit imposed by the hearing officer while reserving the right to file specific objections at a later date.

file direct testimony.

In addition, the Consumer Advocate has moved to compel the outstanding responses as of June 2, 2008 as provided by the procedural schedule in place. If the Consumer Advocate is successful in obtaining the outstanding discovery responses through a *Motion to Compel*, the company would have until June 9, 2008 to file them according to the current procedural schedule. Under the best case scenario, the Consumer Advocate would have only ten working days to investigate, perform analysis and to form positions and opinions based on the information it needs. This assumes TAWC's supplemental responses are adequate and not incomplete on June 9, 2008. If the company has specific objections to responding to a discovery request(s) or the response(s) are incomplete and inadequate, additional time would be required to sort through such new discovery disputes, which would further eat into what little time the Consumer Advocate would have remaining under the current procedural schedule if the relief herein is not granted. This is a distinct possibility considering there are over one hundred outstanding discovery responses and TAWC's stated reservation to file more specific objections at a later date.⁵ Thus, more time will be needed for the Consumer Advocate to compile information, investigate, form opinions and file direct testimony. Furthermore, the company will need adequate time to fully respond to the outstanding discovery requests.

If the Hearing Officer does not grant the Consumer Advocate's *Motion to Ask Additional Discovery Questions* filed on May 12, 2008, or the Consumer Advocate's *Motion to Compel* filed on June 2, 2008, the Consumer Advocate will need additional time to subpoena TAWC's witnesses for depositions, time for the company to comply with subpoenas for production of documents and

⁵ TAWC's Response to the CAPD's First Discovery Request, (May 12, 2008), p. 2.

the necessary time for the Consumer Advocate's experts to perform analysis of the information it needs and form opinions prior to the filing of pre-filed direct testimony. Thus, the relief the Consumer Advocate seeks in this motion is not dependent upon the Hearing Officer's ruling either in granting or denying the *Motion to Ask Additional Discovery Questions* filed on May 12, 2008 or the Consumer Advocate's *Motion to Compel* filed on June 2, 2008.

Under any of these circumstances, the current procedural schedule unreasonably compresses the time the Consumer Advocate has to obtain information, perform analysis and file substantive pre-filed testimony in this docket. This is unfairly prejudicial and damaging to the interest of consumers while providing the company with an unfair advantage. Given the circumstances, the current procedural schedule unreasonably compresses the time the Consumer Advocate has to investigate and perform analysis of specific information relevant to this setting of just and reasonable rates in this proceeding. Thus, the current procedural schedule should be set aside and the Consumer Advocate should be granted additional time to receive outstanding discovery responses, perform analysis of the information it needs, form opinions and to file direct testimony.

The Significance of Pre-Filed Direct Testimony

Pre-filed direct testimony is the best method available by which the Consumer Advocate can communicate and present to the Hearing Panel and the TRA Staff its position prior to the hearing on the merits. It is the only way the Consumer Advocate can present evidence and expert opinions testing the just and reasonableness of the rates Tennessee consumers shoulder prior to live testimony. This is a significant fact. If the present course of this docket holds true, on June 23, 2008 the Consumer Advocate's ability to file such testimony will be compromised.

The Complexity of this Rate Case Demands More Time and Information

This is not a dog bite case. Rate cases are highly complex endeavors for all parties. There is neither a magic formula or litmus test from which may be employed to arrive at just and reasonable rates. *CF Industries v. Tennessee Public Service Commission*, 599 S.W. 2d 536, 543 (Tenn.1980) As stated by the former Tennessee Public Service Commission:

Rate-making is an extremely complex process which involves much more than inputting cost figures into a computer and waiting for the results of the machine's mathematical functions. We must consider all aspects surrounding the determination of just and reasonable rates.

Id., 538-539 (Tenn.1980). In other words, these types of proceeding do not involve simple and common analysis. This proceeding requires voluminous, but specific information for experts to form their opinions and a sufficient factual platform from which a party may present a case. Indeed, the record indicates a vast array of complex issues requiring detailed data that must be examined. Although the Consumer Advocate has not determined all of the issues that it may investigate or litigate in this docket, its preliminary review of the case has revealed a substantial number of issues that are material to TAWC's petition. The Consumer Advocate has already spelled out numerous issues, as well as the pertinent data involved in the analysis of those issues on pages 2-6 of its *Memorandum in Support of Motion to Ask Additional Discovery Questions* filed on May 12, 2008.

Significantly, some of these issues are new to this docket. For example, the Company has included a depreciation study in this case, and the Consumer Advocate has retained an independent expert at great expense to analyze this study. Currently, the Consumer Advocate is without sufficient information to perform analysis of these material issues, primarily because most of the information

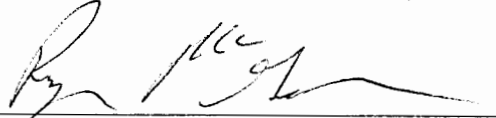
that is pertinent to such analysis is in the hands of the Company. Accordingly, the Consumer Advocate needs the information and time to analyze the information it has requested but that has not been provided.

The Consumer Advocate has a statutory right to investigate the reasonableness of the Company's request for a \$7.6 million per year increase in customers' water bills. Tenn. Code Ann. § 65-4-118. While the TRA serves to balance the interests of consumers and that of the industry, it is the Consumer Advocate's role to advocate for consumers. It is only through investigation, the ability to obtain information and time for a thorough analysis that the Consumer Advocate can serve its purpose as directed by the General Assembly.

Conclusion

For the reasons stated herein, the Consumer Advocate requests the Hearing Officer to set aside the procedural schedule and extend the date of the hearing on the merits in this docket to allow the Consumer Advocate sufficient time to obtain the specific information it seeks, for a sufficient analysis to take place and to form expert opinions which may be provided in pre-filed direct testimony. In the alternative, the Consumer Advocate seeks leave to petition the Hearing Panel for relief of the same nature requested herein.

RESPECTFULLY SUBMITTED,



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Dated: May __, 2008

CERTIFICATE OF SERVICE

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This the 21 day of June, 2008.



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