

**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**

filed electronically 8/4/08

DOCKET NO. 08-00039

**MOTION TO COMPEL TENNESSEE AMERICAN WATER COMPANY TO ANSWER
THE SECOND ROUND OF DISCOVERY REQUESTS OF THE CONSUMER
ADVOCATE AND PROTECTION DIVISION**

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division (“Consumer Advocate” or “CAPD”), hereby requests the Hearing Officer to compel Tennessee American Water Company (“TAWC” or “Company”) to fully and completely respond to the second discovery requests of the Consumer Advocate for the reasons set forth below.

INTRODUCTION

The Consumer Advocate received TAWC’s responses to the Consumer Advocate’s second round of discovery requests on Friday, August 1, 2008; accordingly, the Consumer Advocate has not had the opportunity to fully analyze the responses and discuss the discovery issues raised herein with the Company prior to the status conference scheduled for Monday, August 4, 2008. The purpose of this motion is to raise all discovery issues involving the Company’s responses to the Consumer Advocate’s second discovery requests that are known to the Consumer Advocate at this time. The

Consumer Advocate will work with the Company to attempt to resolve these discovery issues by agreement.

STANDARD FOR DISCOVERY

Tennessee has a broad policy which favors the discovery of any relevant information:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Tenn. R. Civ. P. 26.02(1). Thus, evidence does not have to be admissible to be discoverable as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Today, it is through discovery rather than pleadings that the parties attempt “to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment.” *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615 at *3 (Tenn. Ct. App. 2002) (*quoting* Irving Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1962)). Accordingly, a party seeking discovery is entitled to obtain any information that is relevant to the case and not privileged. *See Id.* Consistent with Tennessee’s open discovery policy, the relevancy requirement is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case’s issues.” *Id.* Discovery therefore is not limited to the issues raised by the pleadings. *See Id.*, *see also Shipley v. Tennessee Farmers Mutual Ins. Co.*, 1991 WL 77540 at *7-8 (Tenn. Ct. App. 1991). A party may

also use discovery to: define and clarify the issues; probe a variety of fact-oriented issues that are not related to the merits of the case; formulate and interject additional issues into the case which relate to the subject matter of the pleadings; and determine additional causes of actions or claims which need to be or can be asserted against a party or against third parties. *See Shipley*, 1991 WL 77540 at *7-8 (*quoting Vythoulkas v. Vanderbilt University Hospital*, 693 S.W.2d 350, 359 (Tenn. Ct. App. 1985)).

It is nonetheless recognized that the trial court may limit discovery under appropriate circumstances. Because of the broad policy favoring discovery, the trial court should not order limitations on discovery unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. *See Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). The trial court should decline to limit discovery if the party opposing discovery cannot produce specific facts to support the requested limitations. *See Id.* Moreover, given the liberal construction of discovery rules, the trial court should approach any request for limitations with common sense rather than with narrow legalisms, basing the reasonableness of any ordered limitations on the character of the information sought, the issues involved, and the procedural posture of the case. *See Id.* Rather than denying discovery outright, it is appropriate for the trial court to fashion remedies to discovery issues by balancing the competing interests and hardships of the parties and by considering whether there are less burdensome means for acquiring the requested information. *See Id.*

I. TAWC’S RESPONSES FAIL TO RECOGNIZE A DISTINCTION BETWEEN ITS DISCOVERY OBLIGATIONS AND ITS PRE-FILED REBUTTAL TESTIMONY OBLIGATIONS.¹

To the extent TAWC withholds information or documentation until its August 13, 2008, pre-filed rebuttal testimony is due, TAWC misconstrues its obligations under the procedural order and the difference between discovery and pre-filed testimony. *See* TAWC Responses To CAPD Second Discovery Request Nos. 1, 5, 6, 9, 11, 12, and 13. Under the law of this case, the Hearing Officer has ruled that a party may not simply defer the production of discovery because it intends to submit that responsive information or material at a later point in time or to testify regarding such information.² Accordingly, TAWC has a duty to respond to the Consumer Advocate’s discovery requests now. It is wrongful for TAWC to withhold responsive, non-privileged information or documentation currently available to TAWC until its August 13, 2008 pre-hearing testimony is due. TAWC expressly ignores its duty, however, to answer requests now and produce all responsive information that presently exists.

Under the law of this case, a party’s discovery obligations are distinct from those involving

¹ For purposes of this argument, the Consumer Advocate adopts the argument of TAWC set forth on pages 4-5 of Tennessee American Water Company’s Motion to Compel the Consumer Advocate and Protection Division to Provide Complete Discovery Responses and to Exclude the Use of All Information Withheld Without Good Cause, filed in this docket on June 2, 2008.

² At the status conference held in this docket on June 4, 2008, the Hearing Officer stated: “I don’t find it to be a valid objection or reason not to answer a question that a party is anticipating filing prefiled testimony. The question is asked at a particular point in time, and if the party has an answer to that question, if they know who a witness is going to be and they know what the substance of the testimony is going to be, I think the question needs to be answered. The response that you can find out when we file our prefiled testimony is not satisfactory.” Transcript at 53:5-14 (June 4, 2008). This ruling was made with regard to discovery requests made by TAWC to the Consumer Advocate. The present discovery requests essentially mirror the requests made by TAWC, so it is only fair that TAWC be held to the same standard as the Consumer Advocate.

the pre-filed testimony.³ As a practical matter, if no responses were due from TAWC until August 13, 2008, it would render the procedural order's discovery deadline meaningless against TAWC - a result certainly not intended. Moreover, the universe of responsive information in discovery is necessarily larger than that submitted in the pre-filed testimony, as mandated by the broad edict of Rule 26 of the Tennessee Rules of Civil Procedure. In contrast, pre-filed testimony is a more focused submission narrowly prepared by TAWC to advance TAWC's specific positions at the hearing.

Consequently, TAWC's effort to defer a large portion of its discovery responses by merging everything into its pre-filed rebuttal testimony should fail. TAWC's failure to distinguish its obligations pursuant to discovery requests versus its obligations to file pre-hearing testimony in no way diminishes its obligations - TAWC has a duty to produce all presently existing information and material that is responsive to the Consumer Advocate's requests, and should be compelled to do so by the Hearing Officer.

II. THE RESPONSES TO CAPD DISCOVERY REQUESTS 24-27 ARE INADEQUATE.

The Consumer Advocate incorporates herein the grounds to compel discovery responses for Part III Discovery Requests 7, 8, 9, and 10 (collectively "Part III Requests 7-10") filed in the first round of discovery on May 12, 2008.⁴ Furthermore, the Consumer Advocate incorporates the arguments made at the June 20, 2008, status conference. The information sought in these discovery

³ *Ibid.*

⁴ *See* Second Motion to Compel TAWC to Answer First Round of Discovery Requests of the CAPD, pp. 16-19 (with incorporating reference to pp. 6-9) filed in this docket on June 17, 2008.

requests is relevant.⁵ To date, no responsive information has been provided for Part III Requests 7-10. Both at the June 20, 2008, status conference and in subsequent supplemental responses, the Company has stated clearly that TAWC does not have possession of responsive information. However, the supplemental responses of the company to Part III Requests 7-10 have avoided indicating whether American Water Works (“AWW”) has possession, custody, control or access to the requested information. As of this filing there has been no resolution in regard to the Part III Requests 7-10 discovery dispute.⁶

In the second round of discovery, the Consumer Advocate submitted requests 24, 25, 26, and 27 (collectively “Second Round Requests 24-27”) which in substance are duplicative of Part III Requests 7-10. However, the Second Round Requests 24-27 have been specifically tailored to elicit whether AWW has possession, custody, control or access to the requested information.⁷ Again, the Company has not provided responsive information or indicated whether AWW has custody, control, access or possession to the requested information.

A. DISCOVERY REQUEST NO. 24:

In its S-1 Registration statement filed May 6, 2008 with the SEC, American Water Works (“AWW”) stated: “RWE intends to fully divest its ownership of American Water through the consummation of one or more public offerings of common stock of American Water as soon as

⁵ *Order on Discovery Disputes Argued During the June 20, 2008 Status Conference*, July 18, 2008, p. 8.

⁶ The Consumer Advocate maintains its position that responsive information must be provided to Discovery Requests 7-10 of Part III with regard to TAWC, AWW and RWE.

⁷ Second Round Requests 24-27 are the same as Part III Requests 7-10 but have been modified to clearly indicate that the requests seek information “in possession of AWW”.

reasonably practicable, subject to market conditions.” Provide any study, document, emails and written material in possession of AWW and/or TAWC where RWE or RWE Aqua Holdings GmbH considered or considers what circumstances, financial or otherwise, constitute market conditions that “are reasonably practicable” for the public offerings of common stock.

RESPONSE:

The Company objects to this questions on the grounds that it is duplicative of discovery request CAPD-1-part III-Q7. Please see the responses and supplemental responses previously supplied to CAPD-1-part III-Q7.

MOTION TO COMPEL:

The Company’s supplemental response to CAPD-part-III-Q7 clearly indicates that TAWC does not have possession, custody or control of responsive documents. However, the supplemental response is silent as to whether AWW has possession, custody, control or access to responsive documents.

B. DISCOVERY REQUEST NO. 25:

Please provide any study, document, emails and written material in possession of AWW and/or TAWC where RWE, RWE Aqua Holdings GmbH, or American Water Works has performed or caused to be performed a study of American Water Works' expected market value between now and 2010.

RESPONSE:

The Company objects to this questions on the grounds that it is duplicative of discovery request CAPD-1-part III-Q8. Please see the responses and supplemental responses previously supplied to CAPD-1-part III-Q8.

MOTION TO COMPEL:

The Company's supplemental response to CAPD-part-III-Q8 clearly indicates that TAWC does not have possession, custody or control of responsive documents. However, the supplemental response is silent as to whether AWW has possession, custody, control or access to responsive documents.

C. DISCOVERY REQUEST NO. 26:

Please provide any study, document, emails and written material in possession of AWW and/or TAWC where RWE, RWE Aqua Holdings GmbH, or American Water Works has performed or caused to be performed a study involving the issuance of a second class of stock or a proposal for a second class of stock.

RESPONSE:

The Company objects to this questions on the grounds that it is duplicative of discovery request CAPD-1-part III-Q9. Please see the responses and supplemental responses previously supplied to CAPD-1-part III-Q9.

MOTION TO COMPEL:

The Company's supplemental response to CAPD-part-III-Q9 clearly indicates that TAWC does not have possession, custody or control of responsive documents. However, the supplemental response is silent as to whether AWW has possession, custody, control or access to responsive documents.

D. DISCOVERY REQUEST NO. 27:

Please provide any study, document, emails and written material in possession of AWW and/or TAWC where RWE, RWE Aqua Holdings GmbH, or American Water Works has performed

or caused to be performed a study involving the issuance of dividends to AWW shareholders, whether actual or proposed.

RESPONSE:

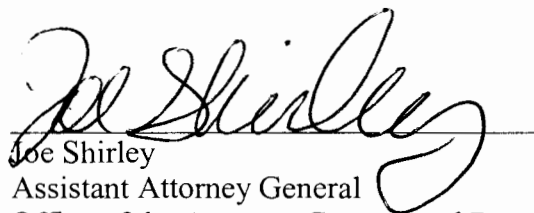
The Company objects to this questions on the grounds that it is duplicative of discovery request CAPD-1-part III-Q10. Please see the responses and supplemental responses previously supplied to CAPD-1-part III-Q10.

MOTION TO COMPEL:

The Company's supplemental response to CAPD-part-III-Q10 clearly indicates that TAWC does not have possession, custody or control of responsive documents. However, the supplemental response is silent as to whether AWW has possession, custody, control or access to responsive documents.

WHEREFORE, the Consumer Advocate requests the Hearing Officer to enter an order compelling TAWC to produce full and complete answers to the Consumer Advocate's discovery requests, as outlined above, on or before August 6, 2008, or within such other time as the Hearing Officer may deem reasonable.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "Joe Shirley", is written over a horizontal line.

Joe Shirley
Assistant Attorney General
Office of the Attorney General and Reporter
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Dated: August 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail, to:

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on this the 4th day of August, 2008.



Joe Shirley

#121972