

**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. 10-00189

**REPLY OF THE CONSUMER ADVOCATE AND PROTECTION DIVISION TO
TAWC'S OPPOSITION TO THE MOTION FOR LEAVE TO ISSUE MORE THAN
EIGHTY DISCOVERY REQUESTS**

Pursuant to TRA Rule 1220-1-2-.06(3), the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter ("Consumer Advocate") submits this Reply to Tennessee American Water Company's ("TAWC", "Company") Opposition to the Consumer Advocate's Motion for Leave to Issue More Than Eighty Discovery Requests. A motion for leave to file this reply has been filed contemporaneously.

I. The Consumer Advocate Respectfully Submits It Has Established "Good Cause" Under the Rules of the Authority and the Tennessee Rules of Civil Procedure to Issue Additional Discovery Requests

TRA Rule 1220-1-2-.11(5)(a) provides that a party need only show "good cause" in order to ask additional discovery requests. The term "good cause" is broad and rather subjective. TRA Rule 1220-1-2-.11 further provides that discovery shall be effectuated under the Tennessee Rules of Civil Procedure. Thus, the Consumer Advocate has utilized Rule 26 of the Tennessee Rules of Civil Procedure as a framework for establishing good cause in requesting additional

discovery. Rule 26 of Tennessee Rules of Civil Procedure provides the situations in which discovery may be limited by the presiding judge or hearing officer:

The frequency or extent of use of the discovery methods set forth in subdivision 26.01 and this subdivision shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Tenn. R. Civ. P. 26.02(1) (Emphasis added). The Consumer Advocate explicitly and at great length established the foundation for additional discovery as prescribed by each element under Rule 26 of the Tennessee Rules of Civil Procedure in the *Memorandum*.¹

The Company submits the Consumer Advocate has failed to establish good cause to request additional discovery because the Consumer Advocate has not provided an individual analysis of each and every discovery request. The Consumer Advocate is unaware of any requirement under Tennessee law, TRA rule or custom which requires a party to provide an analysis of each and every individual discovery request. Moreover, the Company's argument runs counter to statements made by TAWC on the record in this proceeding. While TAWC avers that this is "just a rate case" rather than a formal trial proceeding, the Company seeks to saddle the Consumer Advocate, the intervening parties and the Authority with a quibbling practice unheard of for administrative agencies and that neither federal nor state trial courts

¹ See pages 2-13 of the *Memorandum in Support of the Consumer Advocate's Motion for Leave to Issue More Than Eighty Discovery Requests* (November 1, 2010).

embrace. In fact, the standard TAWC seeks to impose here is not a process the Company's affiliates attempt to subject intervening parties to in rate cases in other states.

II. The Consumer Advocate Respectfully Submits the Company's Additional Arguments in Opposition Are Without Merit

The Consumer Advocate submits the additional arguments made by TAWC are equally without merit under the law and in some instances simply factually incorrect. In order to insure the record is accurate, the Consumer Advocate has provided the following brief response to several claims made by the Company.

A. The Consumer Advocate Has Not Issued "303 Discovery Requests"

Contrary to TAWC's claim, the 126 numbered discovery requests of the Consumer Advocate contain a total of 11 sub-parts rather than the apparent 177 subparts counted by TAWC. Similarly, the Consumer Advocate believes TAWC's claim the interveners have collectively served a total of 614 discovery requests is vastly overstated. However, assuming *arguendo* the intervening parties are serving TAWC with 614 discovery requests, including sub-parts, the Company is still responding to fewer discovery requests here than in Kentucky or West Virginia.

In Kentucky, the Consumer Advocate alone has asked 602 numbered questions that include an additional 714 sub-parts for a total of 1316 discovery requests in Kentucky American Water's current rate case.² In West Virginia, the Consumer Advocate alone has asked 353 numbered discovery requests that include an additional 399 sub-parts for a total of 752 discovery

² Kentucky Public Service Commission, Case No. 2010-00036, First and Second Requests for Information by the Attorney General filed in Kentucky American Water Company's on-going rate case.

requests in West Virginia American Water Company's current rate case.³ Again, these totals do not include the number of discovery requests by other intervening parties in Kentucky and West Virginia. Yet, despite having to respond to far more discovery than that submitted here, TAWC's affiliates in Kentucky and West Virginia are requesting rate case expense far less than that sought in Tennessee as explained in the Consumer Advocate's *Memorandum*.

B. Whether the Company Raises an Issue or Not, Parties Are Entitled to Discovery

Whether the Company brought up the decoupling issue or not is beside the point. The Authority, the regulator and decision maker in this case, has sought information on the issue through TRA Data Requests 109-111. The Company does not control or dictate the issues to be considered by the TRA. Neither the Company nor the Consumer Advocate can ignore the TRA Staff when it seeks information that may raise a new issue. To argue the Consumer Advocate has no right to discovery on the issue because the Company didn't bring decoupling up in its initial petition provides the Hearing Officer with absolutely no constructive input in resolving the matter at hand. Moreover, the TRA Staff has issued data requests to the Consumer Advocate and other intervening parties on this issue.

C. The Company's as Yet Unfiled Cost Allocation Study Is Subject to Discovery

In testimony filed with the Virginia State Corporation Commission on October 4, 2010, Mr. Mike Miller stated a study would be filed in a "few weeks" with the TRA in this proceeding.⁴ To date no study has been filed. TAWC's argument that the Consumer Advocate is

³ West Virginia Public Service Commission, Case No. 10-0920-WT, Consumer Advocate's First, Second, Third and Fourth Requests for Information filed in West Virginia American Water Company's on-going rate case.

⁴ Rebuttal Testimony of Mike Miller on behalf of Virginia American Water Company, p. 47, Docket PUE 2010-0001 filed with the Virginia State Corporation Commission, October 4, 2010.

not entitled to discovery of the study because it has not been filed has no merit or underlying legal authority. It is precisely because the Consumer Advocate has not reviewed the study or its methodology and workpapers that discovery is necessary. Obviously if the study is not complete, TAWC can later supplement the discovery responses as is its duty under the law. However, to require the Consumer Advocate to wait until an as yet unscheduled second round of discovery, after the filing of the Consumer Advocate's pre-filed testimony, in order to obtain information regarding the study is simply unreasonable.

D. Consumer Advocate Discovery Request #120 is Not Duplicative

The Company cites one discovery request of the Consumer Advocate as duplicative in claiming the Consumer Advocate already has the information which has been requested. TAWC is correct in arguing the Consumer Advocate has Dr. Spitznagel's WNA workpapers. However, TAWC is incorrect in claiming Consumer Advocate Discovery Request #120 requests information it already has. A casual reading of the request itself makes clear the Consumer Advocate has reviewed Dr. Spitznagel's workpapers:

120. *In order to ascertain the development of the calculations* in Dr. Spitznagel's exhibits and work papers on the Company's proposed weather normalization adjustment, please provide a copy of Dr. Spitznagel's work papers **that include a properly documented and footnoted audit trail to all calculations and source documents.**

(emphasis added). The request seeks an audit trail of the workpapers in order to comprehend and test the veracity of Dr. Spitznagel's calculations. In the simplest of terms, the Consumer Advocate believes the underlying calculations and workpaper inputs have no discernable basis. The copies of Dr. Spitznagel's workpapers that have been provided have no such information. Thus, the request seeks information the Consumer Advocate does not possess.

E. The Claim the Consumer Advocate Is Acting Without Statutory Authority Is Without Merit

TAWC claims the Consumer Advocate is somehow acting beyond the statutory authority granted by the legislature of this state by seeking to present to the TRA an alternative rate. The Company's analysis of Tenn. Code Ann. § 65-4-118 would appear to preclude any substantive activity on behalf of consumers in rate cases. TAWC asserts that in "representing" the interest of consumers, the Consumer Advocate cannot propose specific recommendations, backed by evidence, concerning TAWC's capital structure, rate of return, revenues and expenses for the TRA to consider in setting just and reasonable rates. This rather novel argument is completely without merit and provides absolutely no aid to the Hearing Officer in disposing of the dispute at hand.

Finally, the Company's argument suggests the Consumer Advocate should simply delegate its statutory duty to other intervening parties. This proposition is void of any reasonable, logical or legal basis. The Consumer Advocate cannot simply delegate its statutory duties to the United Workers of America Union, whom is representing the Company employees, or CMA whom is representing the interest of industrial manufacturers, or Walden's Ridge Utility District whom has not filed a single discovery request. While the City clearly represents all but a small fraction of the Company's consumers, historically the City has focused on specific issues in rate cases rather than a complete analysis of all aspects of the Company's rate filing. It is the Consumer Advocate, with its specific statutory grant and in-house expertise, that strives to provide a complete analysis and recommend just and reasonable rates to the benefit all of a utility's consumers as a whole.

CONCLUSION

One can understand the motive of the Company in seeking to limit and diminish the role of the Consumer Advocate in this proceeding. The Authority, through its own independent judgment, investigation, analysis and assessment of just and reasonable rates, has utilized or adopted many of the Consumer Advocate's recommendations and settlement agreements in rate cases for not only TAWC, but for public utilities both small and large. Historically, the adopted recommendations of the Consumer Advocate have contributed to rates set by the Authority for TAWC which have been well below the inflated rate increases sought by the Company. It is only through discovery that the Consumer Advocate can solicit the information necessary to test the veracity of the Company's requested rate increase and present informed recommendations, backed by evidence, in representing the interest of Tennessee consumers in both settlement discussions and hearings on the merits. For the reasons herein, the Consumer Advocate requests the Motion to Issue More Than Eighty Discovery Requests be granted.

RESPECTFULLY SUBMITTED,



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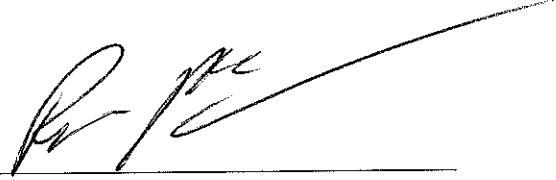
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