BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF TENNESSEE-	)	**DOCKET NO.**
AMERICAN WATER COMPANY TO	)	**10-00189**
CHANGE AND INCREASE CERTAIN	)	
RATES AND CHARGES	)	

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

The Consumer Advocate and Protection Division ("Consumer Advocate"), respectfully moves the Tennessee Regulatory Authority ("TRA" or "Authority") to compel TAWC ("TAWC" or "Company") to fully and completely respond to the first discovery requests of the Consumer Advocate as set forth below:

INTRODUCTION

The Consumer Advocate received TAWC's responses to the Consumer Advocate's first round of discovery requests on Monday, November 15, 2010; accordingly, the Consumer Advocate has not had the opportunity to fully analyze all the data provided for completeness and responsiveness prior to the deadline for filing Motions to Compel on November 18, 2010, nor has the company provided answers to all of the discovery requests issued by the Consumer Advocate at this time. The purpose of this motion is to raise all discovery issues involving the Company's responses to the Consumer Advocate's requests that are currently known to the Consumer Advocate. The parties met and conferred on these discovery requests on Wednesday, November 17, 2010, but were unable to resolve the disputes to discovery requests 4, 5, 6, 7, 9, 35, 36, 37, 39, 40, 43, and 52-126, as provided more fully below.

DISCOVERY DISPUTES

I. RELEVANCE

TAWC has objected and refused to provide complete responses to Discovery Requests 4, 5, 6, 7, 36, 37, and 39 on the grounds of relevance. The Consumer Advocate disagrees with TAWC's assertion that these requests are irrelevant.

A. Standard for Discovery

The standard for discovery in the State of Tennessee is as follows:

> 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) (emphasis added). 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. (emphasis added). 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.

B. Former and Current Affiliated Company Data

TAWC has objected to the relevance of Consumer Advocate Discovery Requests 4, 5, 6, and 7, in part, because the requests ask for historical and forecasted information pertaining to RWE, a company of which American Water Works Company ("AWWC") has "fully divested its stock ownership," according to TAWC.[1] The Consumer Advocate does not dispute that any information pertaining to the time period after RWE sold its interest in AWWC is not relevant to these proceedings, but this office maintains the relevance of any information relating to the period before RWE's interest in AWWC was sold. In addition, TAWC has objected to the relevance of discovery requests 4 and 5 because they ask for information regarding the capital structure of "affiliate companies."[2]

This information is not irrelevant as is alleged by TAWC.[3] It is commonly accepted practice before the TRA, as evidenced by its consistent and recurring application of the double leveraging capital structure, to take into account a utility's complete financial picture when evaluating that utility's capital structure and overall cost of capital.[4] Any complete picture would necessarily include looking at parent, subsidiary and affiliate companies of the utility in question.

The *Direct Testimony of Michael A. Miller*, TAWC's chief witness in this matter, makes clear that the Company is opposed to the concept of "double-leveraging."[5] It would appear that TAWC would now prefer to simply dispense of this issue by declaring this material "totally

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[1] *Tennessee American Water Company's Responses to the First Discovery Request of the Consumer Advocate and Protection Division to Tennessee American Water Company*, TRA Docket 10-00189, p.18 (November 15, 2010).

[2] Id.

[3] Id.

[4] *Order*, TRA Docket 08-00039, p.49 (January 13, 2009).

[5] *Direct Testimony of Michael A. Miller*, pp. 8:18 – 9:5 (September 23, 2010).

irrelevant" and thereby tactically denying the Consumer Advocate the information necessary to present a proper cost of capital, employing the double leveraging model approved by the TRA. It is an unusual argument indeed when TAWC alleges the TRA's "decisions in the last rate order," specifically with regard to double-leveraging, materially affected its ability to earn a rate of return, but now that same issue is apparently "totally irrelevant" to the issues in this docket. The Consumer Advocate cannot agree. This information must be provided in order for the Consumer Advocate to calculate TAWC's proper rate of return under the methodology approved by the TRA in multiple rate cases. The question of whether or not "double leveraging" is the appropriate model for TAWC is a material one left to the panel of directors and not to be decided at the discovery phase of these proceedings.

Similarly, TAWC has objected to Consumer Advocate Discovery Requests 36, 37, and 39 on the grounds of relevancy. These questions specifically ask for information regarding charges to TAWC and its affiliates by the American Water Works Service Company ("AWWSC"), to the AWWC subsidiary providing services to TAWC and to other affiliates that were previously performed locally by TAWC employees. The Consumer Advocate has asked for this information for several reasons, all of which are relevant to this matter: 1) to determine if the charges allocated to TAWC by AWWSC are proper based on the services provided, or if TAWC is bearing a disproportionate share of the expense of AWWSC at the expense of its rate payers; and 2) to determine if the level of management fees requested by TAWC is proper in light of the shifting of services from local TAWC employees to its affiliate AWWSC in 2004.

The Consumer Advocate is certain that TAWC would not argue that the alleged expense of providing service to its customers is irrelevant to this docket, and, in light of Michael A. Miller's testimony on behalf of TAWC, there can be little doubt TAWC's request for a significant increase in management fees is a material issue in this docket.[6] In seeking the

[6] Id. at 40:3 – 47:3.

information in Requests 36, 37, and 39, the Consumer Advocate only wishes to ensure that consumers are being charged an appropriate level of expense from AWWSC based on the services provided to them, and that the services outsourced to AWWSC are taken into account in calculating management fees. Once again, the merits of this argument are not to be debated in the discovery phase of litigation, as the standard for discovery allows requests on "**any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case's issues.**" *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)) (emphasis added). Thus, these requests clearly meet the threshold of discovery in the State of Tennessee; the substantive issues of the case should be decided at the hearing on the merits, not in the discovery phase of this docket.

C. Requests Dating Back to 2004

TAWC appears to argue that Consumer Advocate Discovery Requests 4, 5, 6, 7, 35, and 43 are irrelevant because these items request historical information going back, in some cases, to 2004. This is a deeply inconsisten argument. TAWC's own witnesses use information going back to 2001 in the testimony and exhibits filed with the Company's Petition in this matter.[7] It would appear that the Company's argument is that the Consumer Advocate's request for historical data is irrelevant or, as will be discussed below, unduly burdensome; however, TAWC freely uses historical dating back farther than the information requested by the Consumer Advocate in its own direct testimony. Clearly, TAWC's allegations of irrelevance pertaining to information dating back to 2004, and even 2001 for that matter, is wholly without merit.

Finally, the Consumer Advocate cannot help but note the odd coincidence that it is data from the year 2004 that would be so "labor intensive" to provide. 2004, of course, is the year

[7] Id. at Exhibits MAM-1, 11, and 12.

that TAWC incurred significant increases in management fees due to a reorganization wherein the service company began providing substantially more services which had previously been supplied by local Chattanoogans.[8] Hence, 2004 is a critical benchmark year, and it is more than a little strange that this is the one year that is too difficult to retrieve data for.

For all of these reasons, the Consumer Advocate asks that the Authority compel TAWC to provide full and complete answers to the discovery requests outlined above.

II. UNDULY BURDENSOME

TAWC has objected to Consumer Advocate Discovery Requests 4, 5, 6, 35, 36, 37, 39, 40, and 43. As was addressed earlier, the standards for discovery are quite clear, as they regard "unduly burdensome" discovery requests; 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) (emphasis added). In the present case, TAWC has provided no such demonstration that their requested discovery limitations are necessary.

First, with regard to Requests 4, 5, 6, 35, 36, 37, 39, and 43, TAWC alleges that because TAWC is not in direct possession of information relating to its affiliates, including its service company AWWSC, it would be unduly burdensome for the company to produce this information. This argument is wholly without merit. Again, the argument that the information is not in the possession of TAWC is not sufficient to overcome the standard for discovery in Tennessee. Tennessee Rule of Civil Procedure 26.02 states that "on motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the

[8] *Direct Testimony of Michael A. Miller*, TRA Docket No. 04-00288, pp. 11-16 (September 10, 2004).

information **is not reasonably accessible because of undue burden and cost.**" The mere allegation by TAWC that the information is not currently in its possession does not meet this burden. Furthermore, given that these requests ask only for information that pertains to the costs charged by AWWSC to TAWC and affiliates, all wholly owned by AWWC, TAWC is most certainly capable of producing this information.

Second, in response to Consumer Advocate Requests 4, 5, 6, 35, and 43, TAWC argues that it does not have the data in the format requested. Once again, this argument is without merit. Discovery Requests 4, 5, and 6 do not ask for the information requested in any specific format, only that TAWC provide the specified information. Therefore, since the Consumer Advocate has not asked for the information in any specific format, there can be no undue burden on this point.

Consumer Advocate Discovery Requests 35 and 43 both ask for information referenced in the format of the "Schumaker & Company" Audit Report, the company's own audit report. This report specifically states that:

> Starting November 2009 these reports provided a summary of the AWWSC charges billed to TAWC by AWWSC business unit (functional area), comparing the actual charges to the monthly, year-to-date, and latest reforecast budget numbers. **The reports now permit a further drill down into those charges by each AWWSC employee to TAWC** as a means to determine the number of hours charged to each subsidiary (including TAWC), the manner those hours were charged (i.e. direct charge or formula), and the percentage charged to TAWC of each employees total billed hours.[9]

Therefore, the Company clearly has at least some of this data in the format requested by the Consumer Advocate. Even if the Company did not have this data in the format requested, that is irrelevant without evidence of that fact; Rule 26 of the Tennessee Rules of Civil Procedure states

[9] Schumaker & Company Audit Report, Exhibit p..20 (August 2010) (emphasis added).

that the burden is on TAWC to prove that the data "is not reasonably accessible because of undue burden and cost," and they must do this by "**more than conclusory statements and generalizations.**"[10] TAWC's objection does not satisfy this burden.

Similarly, TAWC has stated that they are not able to produce the information in Consumer Advocate Data Request 40 because "the Company cannot determine the cost of the workload previously provided by AWWSC now performed by the Finance Manager and the Government Affairs Specialist."[11] However, the above cited quotation from the "Schumaker & Company" audit report indicates that the Company is able to "drill down into those charges by each AWWSC employee to TAWC."[12] Therefore, unless the Company's own audit report is inaccurate, TAWC is, in fact, able to provide this information.

Finally, with regard to the costs of producing the information requested by the Consumer Advocate, TAWC cannot reasonably make the argument that these discovery requests are too numerous to respond to within the confines of this docket. As the Consumer pointed out in its *Memorandum in Support of Consumer Advocate's Motion for Leave to Issue More than Eighty Discovery Requests*:

> In Case 2010-000036, **Kentucky American Water Company** ("KAWC") had few objections to responding to, excluding subparts, **602 discovery requests from the Kentucky Consumer Advocate** and in excess of 100 from the Kentucky Commission. Mike Miller, Shelia Miller, Dr. Vander Weide, Paul Herbert, Dr. Spitznagel and Patrick Baryenbruch are testifying on behalf of KAWC and here on behalf of TAWC. In an on-going rate case in West Virginia in docket 10-0920-W-42T, **West Virginia American Water Company** ("WVAWC") has thus far substantially answered most of the more than **350 discovery requests (not including subparts) from the West Virginia**

[10] *Duncan v. Duncan,* 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991) (emphasis added).

[11] *Tennessee American Water Company's Responses to the First Discovery Request of the Consumer Advocate and Protection Division to Tennessee American Water Company*, TRA Docket 10-00189, p.533 (November 15, 2010).

[12] Schumaker & Company Audit Report, Exhibit p..20 (August 2010).

> **Consumer Advocate.**[13] Mike Miller, Dr. Vander Weide, Paul Herbert and Patrick Baryenbruch are testifying on behalf of WVAWC and here on behalf TAWC. Surely, TAWC and nearly the exact same service company personnel and outside expert witnesses in Kentucky and West Virginia have the resources to provide responses to the 126 requests proposed here by the Consumer Advocate.[14]

As the above makes clear, the cost of producing the requested data is not unduly burdensome in light of the amount in controversy, the resources of TAWC, and the amount of rate case expense requested by TAWC in this matter.[15]

For all of these reasons, the Consumer Advocate asks that the Authority compel TAWC to provide full and complete answers to these discovery requests.

III. PRIVILEGED INFORMATION

TAWC has objected to Consumer Advocate Discovery Requests 4 and 5 on the grounds that AWWC is "now a publicly traded company subject to fair disclosure requirements of the U.S. Securities and Exchange Commission."[16] Based on this objection, TAWC asserts that this information is privileged and should not be disclosed.

The Consumer Advocate humbly avers that the protection of privileged information is precisely the point of issuing a Protective Order in TRA Dockets. The Protective Order in this case strictly secures any information provided under that Order and provides more than adequate security for the information in question. Therefore, the Consumer Advocate asks that the Authority order TAWC to disclose the forecasted information requested under seal of the

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[13] It should be noted the West Virginia Staff is conducting an on-site audit of the utility rather than issuing data requests.

[14] *Memorandum in Support of Consumer Advocate's Motion for Leave to Issue More than Eighty Discovery Requests*, pp. 11-13 (November 12, 2010) (emphasis added).

[15] Id.

[16] *Tennessee American Water Company's Responses to the First Discovery Request of the Consumer Advocate and Protection Division to Tennessee American Water Company*, TRA Docket 10-00189, p.18 (November 15, 2010).

Protective Order, assuming, of course, that the information qualifies for a "Confidential" designation.

It is anticipated that TAWC will argue that the Securities and Exchange Commission ("SEC") rules prohibit the disclosure of the information requested. However, the parties in this case are not investors and, therefore, not the kind of persons to whom the SEC rules are directed.

IV. FORECASTED/BUDGETED INFORMATION

The Company has objected to providing the "forecasted" or "budgeted" information requested in Consumer Advocate Discovery Requests 35 and 37 on the grounds that 2011 forecasts and/or budgets are "not yet completed" or "finalized."[17] The Consumer Advocate would simply ask that the Authority compel TAWC to provide the requested "forecasted" or "budgeted" data in whatever form it presently exists and later supplement their response as that information substantially changes or becomes finalized. Given that there are only forty-three days left in 2010, it is very likely that the 2011 forecast/budget information is substantially complete at this time and that it would be materially helpful in its present form.

V. DISCOVERY REQUEST NO. 9

In Consumer Advocate Discovery Request No. 9, this office requested that TAWC provide "the risk premium of common stocks (S&P 500) over one-year, five-year, ten-year, and twenty-year Treasury Bonds or Bills as reported in Morningstar's *Stocks, Bonds, Bills, and Inflation, 2010 Valuation Yearbook*." This Request was based on Dr. Vander Weide's reference to the publication in question in his direct testimony filed on behalf of TAWC.[18] TAWC refused to provide this information in its response; stating instead that "Dr. Vander Weide does not reference the historical risk premium of commons stocks (S&P 500) over one-year, five-year, or

[17] Id. at 523, 529.

[18] *Direct Testimony of James H. Vander Weide*, p.36, 38-39 (September 23, 2010).

ten-year Treasury bonds or bills in his testimony."[19] TAWC is essentially saying that it refuses to provide this information because Dr. Vander Weide only references the twenty-year bonds in his testimony. However, as explained more fully above, the standard of discovery in Tennessee 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." *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)). Amongst other reasons, this information is necessary in the interest of full disclosure, and precisely because Dr. Vander Weide may not have considered the risk premium for bonds or bills of varying durations. As this information could allow the Consumer Advocate to challenge Dr. Vander Weide's testimony on this issue, this Request certainly meets the discovery standard in Tennessee.

TAWC will likely argue that this information is publicly available to the Consumer Advocate and should, therefore, not be produced; it should be noted, however, that TAWC made no such objection in its response to the *First Discovery Request of the Consumer Advocate*. Further, Morningstar's *Stocks, Bonds, Bills, and Inflation, 2010 Valuation Yearbook* is a publication that is only made available for purchase by the public. Given that the Consumer Advocate's request is narrowly tailored to only ask for five, very specific pieces of information from a publication that is relied upon and likely in the possession of TAWC's witness, it is certainly not unreasonable that TAWC provide this data rather than require the Consumer Advocate to separately purchase this publication solely for the purpose of obtaining data that is already in the possession of the Company. Thus, the Consumer Advocate asks the Authority to compel TAWC to respond to this discovery request.

VI. REQUESTS 52 - 126

[19] *Tennessee American Water Company's Responses to the First Discovery Request of the Consumer Advocate and Protection Division to Tennessee American Water Company*, TRA Docket 10-00189, p.44 (November 15, 2010).

The Consumer Advocate maintains that it has met the necessary requirements of the Tennessee Rules of Civil Procedure and the Rules of the Tennessee Regulatory Authority in its *Motion for Leave to Issue More Than Eighty Discovery Requests*, and the accompanying *Memorandum in Support of the Consumer Advocate's Motion for Leave to Issue More Than Eighty Discovery Requests*. The Consumer Advocate now incorporates herein both its Motion and Memorandum in this *Motion to Compel*. in these documents, the Consumer Advocate has shown the necessary "Good Cause," met all necessary requirements to issue more than eighty discovery requests, and now asks that the Authority grant that Motion and require TAWC to respond to the remaining discovery requests of the Consumer Advocate.

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 November 29, 2008, or within such other time as the Hearing Officer may deem reasonable.

RESPECTFULLY SUBMITTED,

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