IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
INVESTIGATION AS TO WHETHER A SHOW CAUSE ORDER SHOULD BE ISSUED AGAINST BERRY'S CHAPEL UTILITY, INC. AND/OR LYNWOOD UTILITY CORPORATION FOR VIOLATION OF TRA RULE AND TENNESSEE STATUTES, INCLUDING BUT NOT LIMITED TO, TENN. CODE ANN. §§ 65-4-112, 65-4-113, AND 65-5-101.	)	**DOCKET NO. 11-00065**

MOTION TO COMPEL TRA PARTY STAFF TO ANSWER CONSUMER ADVOCATE AND PROTECTION DIVISION'S FIRST-ROUND DISCOVERY REQUEST NOS. 6, 7, 8, 9, 11 AND 13 AND TO PERMIT THE CONSUMER ADVOCATE AND PROTECTION DIVISION TO SUPPLEMENT ITS TESTIMONY AND INITIAL BRIEF WITHIN SEVEN DAYS AFTER THESE DISCOVERY REQUESTS ARE ANSWERED FULLY

Robert E. Cooper, Jr., Attorney General for the State of Tennessee, by and through the Consumer Advocate and Protection Division, respectfully moves the Hearing Officer for an order requiring the TRA Party Staff to provide full and complete answers to the Consumer Advocate's first-round discovery request nos. 6, 7, 8, 9, 11 and 13. The TRA Party Staff objected to each of these requests and, in doing so, did not provide a substantive answer to any of them. The grounds for this motion, as demonstrated below, are that the TRA Party Staff relies upon unfounded objections to which they are not entitled and, therefore, should be ordered to provide substantive responses consistent with Tennessee law favoring open discovery.

Since the Consumer Advocate's testimony and initial brief are due on July 29, 2013, the TRA Party Staff's answers will not be received in sufficient time to incorporate them into the

presentation of the Consumer Advocate's case. Thus, if this motion to compel is granted in full or in part, the Consumer Advocate requests that it be permitted to supplement its testimony and initial brief, if necessary, within seven days after receiving full and complete answers to its discovery requests from the TRA Party Staff.

STANDARDS FOR DISCOVERY

Relevancy Objections. The TRA Party Staff objected to the Consumer Advocate's first-round discovery request nos. 6, 7 and 11 on the ground that the information sought is not relevant and is not calculated to lead to the discovery of relevant information. But, as set forth in Tenn. R. Civ. P. 26.02(1), the scope of discovery under Tennessee law is very broad:

> 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 electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, 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.

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." *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Int'l, Inc.*, 2002 WL 1389615, *3 (Tenn. Ct. App. June 27, 2002). Further, discovery is not limited to the issues raised by the pleadings. *Id.*, *see also Shipley v. Tenn. Farmers Mut. Ins. Co.*, 1991 WL 77540, *7-*8 (Tenn. Ct. App. May 15, 1991).

Under Tennessee's lenient discovery standards, a party may also use discovery to: define and clarify the issues; formulate and interject additional issues into the case; determine additional causes of actions or claims against a party or a third-party; or probe a variety of fact-oriented

issues unrelated to the merits of the case. *Shipley,* 1991 WL 77540 at *7-8. Because of this broad policy favoring discovery, limitations on discovery should not be ordered unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the requested discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. *Duncan v. Duncan,* 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). Accordingly, a party objecting to any discovery request must state the reasons for the objection. *Id.; see also Kuehne & Nagel, Inc.,* 2002 WL 1389615 at *4. As a general matter, the rules favor the production of the requested information in all cases where the request is reasonable. *Id.*

Attorney Work Product Objections. The TRA Party Staff objected to the Consumer Advocate's first-round discovery request nos. 8, 9 and 13 on the ground that the requested responses are "privileged" under the work product doctrine. The work product doctrine is not a privilege. *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust,* 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006). The work product rule is codified in Tenn. R. Civ. P. 26.02(3):

> Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The protections of the work product doctrine are both qualified and equitable and, therefore, may be overcome upon a proper showing. *Arnold v. City of Chattanooga,* 19 S.W.3d 779, 787 (Tenn. Ct. App. 1999). These protections permit an attorney to assemble information,

sift through and separate relevant facts from irrelevant facts, prepare legal theories, and plan litigation strategies without undue and needless interference from the opposing party. *Flowers,* 209 S.W.3d at 617-18. To successfully invoke the qualified protections afforded by the work product rule, the party asserting the doctrine must establish that: (1) the materials sought are documents or tangible things; (2) the documents were prepared in anticipation of litigation; and (3) the documents were prepared by or for another party or by or for that other party's representative. *Id.*

If it is established that a portion of the documents requested in discovery are work product, the burden then shifts back to the party requesting discovery to establish that it is nonetheless entitled to the material. *Id.* The nature and extent of the burden regarding discovery of work product depends upon whether the requested material is ordinary or fact work product or opinion work product. *Id.* "Ordinary or fact work product" consists of documents that are prepared in anticipation of litigation and that do not contain the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative party; "opinion work product" includes documents containing an attorney's mental impressions, conclusions, opinions, or legal theories regarding the pending litigation. *Id.* To obtain ordinary work product, the requesting party must establish that it (1) has a substantial need for the materials and (2) is unable to obtain the materials or their substantial equivalent by other means without undue hardship. *Id.* To obtain opinion work product, the showing of necessity and unavailability by other means is far stronger. *Boyd v. Comdata Network, Inc.,* 88 S.W.3d 203, 222 (Tenn. Ct. App. 2002).

Because Tennessee law favors open discovery, mere conclusory statements, without more, are inadequate to justify a protective order restricting the discovery of work product. *See Flowers,* 209 S.W.3d at 618 (vacating a trial court's protective order that was justified only by a

party's conlcusory statements that work product was among the materials requested and would be unduly burdensome to produce). Further, in keeping with the equitable principles underlying the work product rule, a party cannot use the protections afforded by the doctrine as both "a sword and a shield." *Arnold*, 19 S.W.3d at 787-88. Accordingly, a party asserting the doctrine to preclude discovery of work product cannot later reveal the protected materials to its advantage in the litigation. *Id.*

MOTION TO COMPEL

REQUEST NO. 6: Please provide details of all consumers contacted determining that there is no longer an odor problem (*i.e.*, please provide details including but not limited to who was contacted along with the person's contact information, when the contact occurred, what the consumer was asked about odor problems, and what the consumer said about odor problems).

RESPONSE: OBJECTION – A response to this Interrogatory is irrelevant and unlikely to lead to the discovery of relevant information.

MOTION TO COMPEL: The TRA Party Staff's objection to this discovery request should be overruled because it is not made properly. As discussed above, the party objecting to discovery must demonstrate with more than conclusory statements and generalizations that limitations on discovery are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. The TRA Party Staff objects to providing the details of all consumers contacted determining that there is no longer an odor problem on the ground that the information sought is irrelevant and unlikely to lead to the discovery of relevant information. But the TRA Party Staff's conclusory statement that the information sought is irrelevant obviously does not lay a proper foundation for their objection under Tennessee law.

Further, the TRA Party Staff's contention that the information sought by the Consumer Advocate is irrelevant is wrong. Indeed, the odor control issue stemmed from the many complaints of consumers regarding the foul odor surrounding the utility's wastewater treatment plant. Berry's Chapel Utility, Inc. ("BCUI") and its predecessor were authorized to recover and, in fact, did recover from consumers many thousands of dollars to abate its odor control problem. And undeniably, BCUI continued to recover charges for odor control from consumers long after its authority to collect such charges had expired. Further, the proposed Settlement Agreement at the center of this litigation would authorize BCUI to recover many thousands of additional dollars from consumers for odor control. The status of the odor control issue is therefore relevant. Since consumers have already paid many thousands, and since the proposed Settlement Agreement would have them pay many thousands more, information regarding contacts with consumers to determine whether the odor control charges have served their purpose of addressing consumers' complaints about the foul-smelling treatment plant is clearly pertinent to this litigation. Further, information regarding consumers' feedback about the odor problem is valuable in evaluating the effectiveness of BCUI's odor control efforts. Such an evaluation is relevant to the matters in this case, particularly since the parties to the proposed Settlement Agreement are asking consumers to pay more for odor control.

For these reasons, the TRA Party Staff's objection to this request is without merit.

REQUEST NO 7: Please provide details of all consumers contacted inquiring if they have any issues with receiving less than 100% recovery of illegal and unauthorized charges from the utility.

RESPONSE: OBJECTION – A response to this Interrogatory is irrelevant and unlikely to lead to the discovery of relevant information.

MOTION TO COMPEL: The TRA Party Staff's objection to this discovery request should be overruled because it is not made properly. As discussed above, the party objecting to discovery must demonstrate with more than conclusory statements and generalizations that limitations on discovery are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. The TRA Party Staff objects to providing details of all consumers contacted inquiring if they have any issues with receiving less than 100% recovery of illegal and unauthorized charges from the utility on the ground that the information sought is irrelevant and unlikely to lead to the discovery of relevant information. But the TRA Party Staff's conclusory statement that the information sought is irrelevant obviously does not lay a proper foundation for their objection under Tennessee law.

Further, the TRA Party Staff's contention that the information sought by the Consumer Advocate is irrelevant is wrong. This Show-Cause Docket was opened to determine whether the TRA should issue an order requiring BCUI to show why it should not refund to consumers a $20 monthly charge collected from consumers without TRA authorization and to determine whether the utility violated any laws. The proposed Settlement Agreement would substantially reduce the refunds of these illegal charges due to consumers by allowing the use of set-offs based on increased recovery by BCUI from consumers for alleged attorney's fees and alleged charges for odor control. Since consumers paid the illegal charges collected by BCUI, any information regarding contacts with consumers about their concerns of reducing their refunds based on the proposed set-offs for alleged business expenses is particularly relevant, especially since the Settlement Agreement would authorize BCUI to recover these alleged expenses from consumers without the procedural safeguards of a ratemakingprocess.

For these reasons, the TRA Party Staff's objection to this request is without merit.

REQUEST NO. 8: Please identify the party to the settlement who is representing consumers and/or other ratepayers.

RESPONSE: OBJECTION – The response to this Interrogatory constitutes the attorney's mental impressions and trial strategy. Therefore, it is subject to the work product doctrine and is privileged.

MOTION TO COMPEL: The TRA Party Staff's objection to this discovery request should be overruled because it is not made properly. As discussed above, to invoke the protections of the work product doctrine a party must show by more than conclusory statements alone that: (1) the materials sought are documents or tangible things; (2) the documents were prepared in anticipation of litigation; and (3) the documents were prepared by or for another party or by or for that other party's representative. The TRA Party Staff's conclusory statement that the response to this interrogatory constitutes work product regarding the attorney's mental impressions and trial strategy is unfounded and does not satisfy these threshold requirements for invoking the work product rule. Indeed, the TRA Party Staff cannot lay a proper foundation for a work product objection in this instance because the Consumer Advocate did not request the production of any document or tangible thing at all, regardless of whether or not such was prepared in anticipation of litigation. Rather, as the TRA Party Staff correctly notes in their response, this request is an interrogatory, which of course "may relate to any matters which can be inquired into under Rule 26.02." Tenn. R. Civ. P. 33.02. As set forth above, Tennessee courts broadly construe Tennessee's policy authorizing "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." Tenn. R. Civ. P. 26.02(1).

In this case, it cannot reasonably be disputed that the proposed Settlement Agreement between the TRA Party Staff and BCUI affects the rights and claims of consumers. In particular, it seeks to reduce the amount of refunds due to consumers by use of set-offs based on increased recovery by BCUI from consumers for alleged attorney's fees and alleged charges for odor control. Since the proposed Settlement Agreement requests to make a settlement of consumers' claims, nothing could be more relevant than determining which party has the right to represent consumers or is in fact representing consumers in this Settlement Agreement. The Consumer Advocate maintains that it is the party who has the authority to represent consumers in this matter, not the TRA Party Staff. Tenn. Code Ann. § 65-4-118. The Consumer Advocate, therefore, has taken the position that the TRA Party Staff has no authority to sign the Settlement Agreement on behalf of consumers over the objections of the Consumer Advocate. By signing a Settlement Agreement that affects the rights and claims of consumers, it is the TRA Party Staff who has put the issue of who represents consumers in play. Since the hearing in this case is a hearing on the Settlement Agreement, no issue could be more relevant or important than whether consumers are represented and whether the TRA Party Staff can settle consumer claims over the objections of the Consumer Advocate.

The TRA Party Staff objects to identifying the party who is representing consumers and/or other ratepayers on the basis that the response would reveal the attorney's mental impressions and trial strategy. The TRA Party Staff has cited no authority for its objection, other than a conclusory and incorrect reference to the work product "privilege." But the Consumer Advocate does not wish to know the TRA Party Staff's attorney's mental impressions or trial strategy, nor does it wish to know how the TRA Party Staff came to their position on identifying the party representing consumers in this matter. Moreover, identifying who in this matter is

representing consumers cannot be a matter of trial strategy – such an argument presumes the TRA Party Staff will wait until trial to reveal its answer, a truly inefficient and unsupportable position. Indeed, the purpose of Tennessee's broad policy favoring discovery, outlined above, is to prevent trial by ambush and to rid trials of the element of surprise. *Pettus v. Hurst*, 882 S.W.2d 783, 786 (Tenn. Ct. App. 1993). Parties, therefore, are entitled to discover the basis of any claim or defense of any party involved in the litigation. *Id.; see also* Tenn. R. Civ. P. 26.02(1). And, as set forth above, a party cannot rely on the work product rule to preclude discovery of information and then later reveal the protected information at trial in support of its case. *Arnold*, 19 S.W.3d at 787-88. If the TRA Party Staff cannot unequivocally state that it alone represents consumers in this matter and has that authority, those portions of the Settlement Agreement that purport to settle the claims of consumers must necessarily fail.

For these reasons, the TRA Party Staff's objection to this request is without merit.

REQUEST NO. 9: Please identify and explain the TRA Staff's rights, interest, and/or claims in the flood damage costs and odor control costs.

RESPONSE: OBJECTION – The response to this Interrogatory constitutes the attorney's mental impressions and trial strategy. Therefore, it is subject to the work product doctrine and is privileged.

MOTION TO COMPEL: The TRA Party Staff's objection to this discovery request should be overruled because it is not made properly. As discussed above, to invoke the protections of the work product doctrine a party must show by more than conclusory statements alone that: (1) the materials sought are documents or tangible things; (2) the documents were prepared in anticipation of litigation; and (3) the documents were prepared by or for another party or by or for that other party's representative. The TRA Party Staff's conclusory statement

that the response to this interrogatory constitutes work product regarding the attorney's mental impressions and trial strategy is unfounded and does not satisfy these threshold requirements for invoking the work product rule. Indeed, the TRA Party Staff cannot lay a proper foundation for a work product objection in this instance because the Consumer Advocate did not request the production of any document or tangible thing at all, regardless of whether or not such was prepared in anticipation of litigation. Rather, as the TRA Party Staff correctly notes in their response, this request is an interrogatory, which of course "may relate to any matters which can be inquired into under Rule 26.02." Tenn. R. Civ. P. 33.02. As set forth above, Tennessee courts broadly construe Tennessee's policy authorizing "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." Tenn. R. Civ. P. 26.02(1).

In this case, it cannot reasonably be disputed that the proposed Settlement Agreement between the TRA Party Staff and BCUI affects the rights and claims of consumers. In particular, it seeks to reduce the amount of refunds due to consumers by use of set-offs based on increased recovery by BCUI from consumers for alleged attorney's fees related to flood damage and alleged costs for odor control. Since the proposed Settlement Agreement seeks to recover charges from consumers for alleged attorney's fees related to flood damage and alleged costs for odor control, nothing could be more relevant than determining whether the TRA Party Staff has any "rights, interest, and/or claims in the flood damage costs and odor control costs." The Consumer Advocate maintains that the TRA Party Staff has no rights, interest, or claims in flood damage costs and odor control charges.

The TRA Party Staff objects to identifying and explaining the TRA Staff's rights, interest and/or claims in the flood damage costs and odor control costs on the basis that the response constitutes work product that would reveal the "attorney's mental impressions and trial strategy." The TRA Party Staff has cited no authority for its objection, other than a conclusory and incorrect reference to the work product "privilege." But the Consumer Advocate does not wish to know the TRA Party Staff's attorney's mental impressions or trial strategy, nor does it wish to know how the TRA Party Staff came to their position on identifying the TRA Party Staff's rights, interest, and/or claims in the flood damage costs and odor control costs. The Consumer Advocate, however, has a right to know the basis of such rights, interest and/or claims. Indeed, the minimum notice and due process requirements of the Uniform Administrative Procedures Act requires that the legal authority and jurisdiction under which a contested case hearing is held be identified, that the nature of the hearing be stated, and that a plain statement of the matters asserted be made. *Liberty Mut. Ins. Co. v. Tenn. Dep't of Labor and Workforce Devel.,* 2012 WL 11739, *5 (Tenn. Ct. App. Jan. 3, 2012); Tenn. Code Ann. § 4-5-307.

Moreover, the TRA Party Staff's identifying and explaining their rights, interest, and/or claims in the flood damage costs and odor control costs cannot be a matter of trial strategy – such an argument presumes the TRA Party Staff will wait until trial to reveal its answer, a truly inefficient and unsupportable position. Indeed, the purpose of Tennessee's broad policy favoring discovery, outlined above, is to prevent trial by ambush and to rid trials of the element of surprise. *Pettus v. Hurst*, 882 S.W.2d 783, 786 (Tenn. Ct. App. 1993). Parties, therefore, are entitled to discover the basis of any claim or defense of any party involved in the litigation. *Id.; see also* Tenn. R. Civ. P. 26.02(1). And, as set forth above, a party cannot rely on the work product rule to preclude discovery of information and then later reveal the protected information

at trial in support of its case. *Arnold*, 19 S.W.3d at 787-88. If the TRA Party Staff does not have any rights, interest, and/or claims in the flood damage costs and odor control costs, those portions of the Settlement Agreement that purport to settle such rights, interest, and/or claims must necessarily fail.

For these reasons, the TRA Party Staff's objection to this request is without merit.

REQUEST NO. 11: Refer to the Direct Testimony of Tiffany Underwood, p. 3, lines 9-10. How would Ms. Underwood's analysis and testimony have differed if she had used a "rate making mindset"?

RESPONSE: OBJECTION – A response to this Interrogatory is irrelevant and unlikely to lead to the discovery of relevant information.

MOTION TO COMPEL: The TRA Party Staff's objection to this discovery request should be overruled because it is not made properly. As discussed above, the party objecting to discovery must demonstrate with more than conclusory statements and generalizations that limitations on discovery are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. The TRA Party Staff objects to answering how Ms. Underwood's analysis and testimony would have differed if she had used a "rate making mindset" on the ground that the information sought is irrelevant and unlikely to lead to the discovery of relevant information. But the TRA Party Staff's conclusory statement that the information sought is irrelevant obviously does not lay a proper foundation for their objection under Tennessee law.

Further, the TRA Party Staff's contention that the information sought by the Consumer Advocate is irrelevant is wrong. The proposed Settlement Agreement at issue in this docket would authorize BCUI to recover from consumers alleged expenses for attorney's fees and odor

control. Thus, a legitimate issue in this docket is whether BCUI's increased recovery of these alleged expenses from consumers constitutes a utility rate increase. Accordingly, information regarding how the TRA Party Staff's computations and analysis of BCUI's alleged expenses would have differed in a ratemaking context is directly relevant to this case. It is one thing to make a simple tabulation and verification of expenses that were allegedly incurred by a utility, but it is quite another thing to apply utility ratemaking principles to determine whether those expenses are recoverable from consumers in the form of rates for the provisioning of utility services. The Consumer Advocate, therefore, has every right to explore the nature and extent of the TRA Party Staff's analysis of BCUI's alleged expenses from a utility ratemaking perspective since the parties to the proposed Settlement Agreement are asking consumers to pay BCUI for these expenses and since the only known relationship existing between BCUI and consumers is the utility-customer relationship.

For these reasons, the TRA Party Staff's objection to this request is without merit.

REQUEST NO. 13: When the TRA Directors opened Docket No. 11-00065, Director Hill Stated the docket was to "address the ramifications of the decision in 11-00005." Please explain by what authority the TRA Party Staff has included in the Settlement Agreement the recovery of attorney's fees for flood damage (Settlement Agreement, ¶¶ 12-13) and odor control expenses (Settlement Agreement, ¶¶ 11, 13).

RESPONSE: OBJECTION – The response to this Interrogatory constitutes the attorney's mental impressions and trial strategy. Therefore, it is subject to the work product doctrine and is privileged.

MOTION TO COMPEL: The TRA Party Staff's objection to this discovery request should be overruled because it is not made properly. As discussed above, to invoke the

protections of the work product doctrine a party must show by more than conclusory statements alone that: (1) the materials sought are documents or tangible things; (2) the documents were prepared in anticipation of litigation; and (3) the documents were prepared by or for another party or by or for that other party's representative. The TRA Party Staff's conclusory statement that the response to this interrogatory constitutes work product regarding the attorney's mental impressions and trial strategy is unfounded and does not satisfy these threshold requirements for invoking the work product rule. Indeed, the TRA Party Staff cannot lay a proper foundation for a work product objection in this instance because the Consumer Advocate did not request the production of any document or tangible thing at all, regardless of whether or not such was prepared in anticipation of litigation. Rather, as the TRA Party Staff correctly notes in their response, this request is an interrogatory, which of course "may relate to any matters which can be inquired into under Rule 26.02." Tenn. R. Civ. P. 33.02. As set forth above, Tennessee courts broadly construe Tennessee's policy authorizing "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." Tenn. R. Civ. P. 26.02(1).

In this case, it cannot reasonably be disputed that the proposed Settlement Agreement between the TRA Party Staff and BCUI affects the rights and claims of consumers. In particular, it seeks to reduce the amount of refunds due to consumers by use of set-offs based on increased recovery by BCUI from consumers for alleged attorney's fees related to flood damage and alleged costs for odor control. But this show-cause docket was opened to investigate the "ramifications" of BCUI's illegal $20 per month rate increase and other violations of state law. Since the proposed Settlement Agreement seeks to recover money from consumers for alleged

attorney's fees related to flood damage and alleged costs for odor control, nothing could be more relevant than determining "by what authority the TRA Party Staff has included in the Settlement Agreement the recovery of attorney's fees for flood damage (Settlement Agreement, ¶¶ 12-13) and odor control expenses (Settlement Agreement, ¶¶ 11, 13)." The Consumer Advocate maintains the TRA Party Staff operated outside the scope of its authority in this docket by entering into a proposed Settlement Agreement with BCUI allowing BCUI to recover money from consumers based on alleged costs related to flood damage and odor control.

The TRA Party Staff objects to explaining by what authority the TRA Party Staff has included in the proposed Settlement Agreement the recovery of alleged attorney's fees for flood damage and alleged odor control expenses on the basis that the response constitutes work product that would reveal the "attorney's mental impressions and trial strategy." The TRA Party Staff has cited no authority for its objection, other than a conclusory and incorrect reference to the work product "privilege." But the Consumer Advocate does not wish to know the TRA Party Staff's attorney's mental impressions or trial strategy, nor does it wish to know how the TRA Party Staff came to deciding the authority under which BCUI is allowed to recover the alleged attorney's fees and alleged odor control expenses through the proposed Settlement Agreement. The Consumer Advocate, however, has a right to know the authority under which the TRA Party Staff has included BCUI's recovery of these expenses in the proposed Settlement Agreement. Indeed, the minimum notice and due process requirements of the Uniform Administrative Procedures Act requires that the legal authority and jurisdiction under which a contested case hearing is held be identified, that the nature of the hearing be stated, and that a plain statement of the matters asserted be made. *Liberty Mut. Ins. Co.*, 2012 WL 11739 at *5; Tenn. Code Ann. § 4-5-307.

Moreover, the TRA Party Staff's identifying and explaining the authority supporting the TRA Party Staff's inclusion of BCUI's recovery of alleged attorney's fees related to flood damage and alleged odor control expenses in the proposed Settlement Agreement cannot be a matter of trial strategy – such an argument presumes the TRA Party Staff will wait until trial to reveal its answer, a truly inefficient and unsupportable position. Indeed, the purpose of Tennessee's broad policy favoring discovery, outlined above, is to prevent trial by ambush and to rid trials of the element of surprise. *Pettus v. Hurst*, 882 S.W.2d 783, 786 (Tenn. Ct. App. 1993). Parties, therefore, are entitled to discover the basis of any claim or defense of any party involved in the litigation. *Id.; see also* Tenn. R. Civ. P. 26.02(1). And, as set forth above, a party cannot rely on the work product rule to preclude discovery of information and then later reveal the protected information at trial in support of its case. *Arnold*, 19 S.W.3d at 787-88. The purpose and issues in this Docket set forth by the Directors seem inconsistent and remain unanswered by this Settlement Agreement.

For these reasons, the TRA Party Staff's objection to this request is without merit.

CONCLUSION

For the reasons stated, the Consumer Advocate's motion to compel should be granted and the Consumer Advocate should be permitted to supplement its testimony and initial brief, if necessary, within seven days after the TRA Party Staff provides full and complete answers to the Consumer Advocate's discovery requests.

Respectfully submitted,

Vance Broemel Signed w/ permission CSA

VANCE L. BROEMEL (#11421)
Senior Counsel
Office of the Attorney General and Reporter
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-8733

Dated: 7/24/13

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail on July 24, 2013, upon:

Shiva Bozarth, Esq.
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Henry Walker, Esq.
Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203

Vance Broemel Signed by permission
Vance L. Broemel CSA