

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 15, 2013

IN RE:)	
)	DOCKET NO.
INVESTIGATION AS TO WHETHER A SHOW CAUSE)	11-00065
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.)	
SECTIONS 65-4-112, 65-4-113, 65-4-201, AND 65-5-101)	

**ORDER GRANTING IN PART & DENYING IN PART CONSUMER ADVOCATE'S
MOTION TO COMPEL RESPONSES TO ITS FIRST DISCOVERY REQUEST**

This matter is before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") upon the *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* ("Motion to Compel") filed by the Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee ("Consumer Advocate") on July 24, 2013. The TRA staff participating as a party ("Party Staff") filed its *Objection to the CAD's Motion to Compel* ("Objections") on July 30, 2013. On August 12, 2013, the parties presented oral argument on the *Motion to Compel*.

RELEVANT BACKGROUND

Although discovery was not included in the *Order Setting Procedural Schedule*, on July 11, 2013, the Consumer Advocate, without petitioning the Hearing Officer, propounded approximately thirteen interrogatories to Party Staff in its *First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff* ("*First Discovery Request*"). Upon the parties' joint request to amend the procedural schedule to extend certain deadlines and permit additional filings,¹ the Hearing Officer adopted the Amended Procedural Schedule proposed by the parties, which imposed a deadline by which Party Staff was required to respond to the Consumer Advocate's *First Discovery Request*.² In accordance with the Amended Procedural Schedule, Party Staff filed its discovery responses in the docket file on July 19, 2013.³

In its *Motion to Compel*, the Consumer Advocate states that the Party Staff, in its *Responses to First Discovery Request*, fails to provide substantive answers to its Request Nos. 6, 7, 8, 9, 11, and 13. The Consumer Advocate asserts that the Party Staff's objections to its requests on the grounds of relevancy and attorney work product are improper and made without sufficient foundation. As such, the Consumer Advocate asks for an order compelling the Party Staff to answer and for permission to supplement its Initial Brief following receipt of such answers. In its *Objections*, as discussed below, the Party Staff stands by its original objections and asks that the Consumer Advocate's motion be denied.

¹ *Joint Motion to Amend the Procedural Schedule* (July 17, 2013).

² *Order Granting Joint Motion to Amend the Procedural Schedule* (July 18, 2013).

³ *Party Staff's Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff* ("*Responses to First Discovery Request*")

LEGAL STANDARDS OF DISCOVERY

Pursuant to Authority Rule 1220-1-2-.11, when informal discovery is not practicable, any party to a contested case may petition for discovery and, upon such petition, discovery shall be effected in accordance with the Tennessee Rules of Civil Procedure (“TRCP”).⁴ The TRCP permits discovery to be obtained by one or more of the following methods: oral or written depositions, written interrogatories, production of documents or things, physical inspection, and requests for admission.⁵ TRCP 26.02(1) provides the general scope of discovery 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 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.⁶

That is, discovery is the disclosure of facts, documents, or other things within the knowledge or possession of one party that are not privileged, admissible, or reasonably calculated to lead to relevant and admissible evidence (i.e., facts that tend to prove or disprove a claim). The requirement of relevancy is broadly construed to include any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case issues.⁷ Thus, it follows that a party’s “ability to obtain relevant information presumes a proper inquiry,” and its requests for discovery must be carefully tailored.⁸

⁴ Tenn. Comp. R. & Regs. 1220-1-2-.11 (2000).

⁵ Tenn. R. Civ. P. 26.01.

⁶ Tenn. R. Civ. P. 26.02(1).

⁷ *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006), citing *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 935 (Tenn. Ct. App. 1984).

⁸ *Id.*, citing *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Intern., Inc.*, 2002 WL 1389615, at *3 (Tenn. Ct. App. June 27, 2002); see also *Reid v. State*, 9 S.W.3d 788, 792-793 (1999).

Consistent with the policy favoring discovery, a party opposing discovery must demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”⁹ A trial court should decline to limit discovery if the party opposing discovery cannot produce specific facts to support its objection or request to limit discovery.¹⁰ In *Duncan v. Duncan*, the Tennessee Court of Appeals stated that determining the propriety of a discovery request requires a balancing of considerations:

A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).¹¹

Upon its own initiative, or pursuant to a motion, the trial court, in this case the Authority, may limit discovery sought in a particular case if it determines, *inter alia*, that “the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive,” or that “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.”¹² Ultimately, the scope of discovery lies within the Authority’s sound discretion, and a decision concerning discovery will only be reversed based on evidence of a clear abuse of discretion.¹³

⁹ Tenn. R. Civ. P. 26.03; *Loveall v. American Honda Motor Co.*, 694 S.W.2d 937, 939 (Tenn.1985).

¹⁰ *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

¹¹ *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

¹² Tenn. R. Civ. P. 26.02(1) (2011); *Reid v. State*, 9 S.W.3d 788, 792-793 (1999).

¹³ See *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 935 (1984).

ORAL ARGUMENT ON *MOTION TO COMPEL*

In accordance with a request made by Party Staff in its *Objections*, on August 2, 2013, the Hearing Officer issued a *Notice of Oral Argument* setting oral argument on the *Motion to Compel* for August 12, 2013. Thereafter, the Hearing Officer convened the parties for Oral Argument at approximately 2:00 p.m. CDT on August 12, 2013, in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee. The parties were represented as follows:

For the Consumer Advocate:

Vance Broemel, Esq., and Charlena Aumiller, Esq., Office of the Attorney General, Consumer Advocate and Protection Division, 425 5th Ave. N, John Sevier Building, P.O. Box 20207, Nashville, TN 37243;

For Party Staff:

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

For Berry's Chapel Utility Inc.:

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

Before beginning Oral Argument, the Hearing Officer inquired as to whether the parties had an opportunity previously to confer on the discovery requests in dispute, and, in the event the parties believed it might be helpful, offered to take a brief recess to allow them time to engage in such discussions. Declining the offer, the parties stated that they had attempted to resolve their disputes and did not believe that additional time would be helpful. Thereafter, the parties having indicated that they were prepared to proceed, the Hearing Officer commenced with Oral Argument.

DISCOVERY REQUESTS & RESPONSES AT ISSUE

Nos. 6 & 7

Re Party Staff's contact/s with consumers:

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).

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.

Party Staff responses to Discovery Request Nos. 6 & 7 (identical):

RESPONSE:

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

The Consumer Advocate contends that Party Staff, in responding that it objects to these requests on the grounds that the information sought is irrelevant and unlikely to lead to relevant evidence, has made a conclusory statement that fails to lay a proper foundation for its opposition. The Consumer Advocate further asserts that because the proposed Settlement Agreement includes setoffs for odor control costs and other business expenses incurred by Berry's Chapel Utility, Inc. ("Berry's Chapel" or the "Utility"), information regarding Party Staff's contact with consumers as to the status of odor problems at the treatment plant and any concerns that might exist concerning a reduction of consumer refunds due to the setoffs is relevant to the matters under consideration.

Specifically, as to odor control, the Consumer Advocate states that information concerning Party Staff's contact with consumers and any feedback obtained from such contacts, is valuable in evaluating the effectiveness of the Utility's efforts to control odor and, thus,

relevant to whether the costs associated with those efforts should be recovered.¹⁴ Concerning the refund of charges, the Consumer Advocate contends that “since consumers paid the illegal charges collected by [Berry’s Chapel],” the details of Party Staff’s contacts with consumers inquiring about concerns related to the reduction of payment refunds for Utility business expenses are relevant because, if approved, the Settlement Agreement would authorize recovery of the expenses “without the procedural safeguards of a ratemaking process [sic].”¹⁵ Further, the Consumer Advocate asserts that these interrogatories go to the identification of who represents consumers in the Settlement Agreement, which is an issue that has been raised by the Consumer Advocate.

In response, Party Staff contends that its objections to the requests for information concerning Party Staff’s contact with consumers, based on relevance, or lack thereof, are appropriate. First, concerning No. 6, the Party Staff contends that whether an “odor problem” *currently* exists is not relevant to the issues, nor does it fall within the time period, under consideration in this proceeding, and neither is such information likely to lead to the discovery of any relevant information.¹⁶ Further, as to No. 7, the Party Staff asserts that whether the Settlement Agreement constitutes an adequate recovery is a matter for the determination of the Directors, and the nature of any polling or inquiry of consumers by Party Staff is neither relevant nor likely to lead to the discovery of information relevant to the Directors in their deliberations on the proposed Settlement Agreement.¹⁷ Finally, Party Staff states that, on behalf of the public good, it represents the TRA investigative staff, not individual consumers. As such, it has not

¹⁴ *Motion to Compel*, p. 6.

¹⁵ *Motion to Compel*, p. 7.

¹⁶ *Objections*, p. 1.

¹⁷ *Objections*, p. 2.

contacted consumers concerning odor or the terms of settlement agreement, and suggests that a better source of such information might be the TRA advisory staff or Berry's Chapel itself.

On the issue of odor, Berry's Chapel advised that it is in the process of reviewing its records to determine whether it has received any concerns from consumers and offered to provide such information, if there is any, to the Consumer Advocate. Further, Berry's Chapel asserts that it has been open and cooperative with the Consumer Advocate and will so continue.

Findings and Conclusions

As it is the mission of the TRA to promote the public interest by balancing the interests of utilities and consumers, the Hearing Officer does not agree that the information sought by the Consumer Advocate in these requests is irrelevant. While it may be true that the information sought in these requests might not be determinative of the issues for decision, the Hearing Officer finds that any concerns or feedback that affected consumers may have as to odor or the proposed settlement agreement are appropriate considerations for the Directors in this matter. Therefore, to the extent that the interrogatories seek information as to Party Staff's contact with, and feedback obtained from, consumers concerning odor or the terms of the proposed settlement agreement, the Hearing Officer concludes that as to Request Nos. 6 & 7, the motion to compel should be GRANTED.

Nos. 8, 9 & 13

Re representation, specific rights, interests, and/or claims related to costs, and authority:

8. Please identify the party to the settlement who is representing consumers and/or other ratepayers.
9. Please identify and explain the TRA Staff's rights, interest, and/or claims in the flood damage costs and odor control costs.

13. When the TRA Directors opened Docket No. 11-00005, 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).

Party Staff responses to Discovery Request Nos. 8, 9, & 13 (identical):

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.

The Consumer Advocate asserts that Party Staff’s objections to these interrogatories on the grounds that the information sought constitutes the mental impressions and trial strategy of counsel and is therefore protected under the work product doctrine, is a conclusory statement that fails to satisfy the threshold requirements of the work product doctrine.¹⁸ As its requests do not ask for the production of any document or tangible thing, the Consumer Advocate contends that Party Staff’s refusal to respond based on the work product doctrine are misplaced. Further, the Consumer Advocate asserts that, under the TRCP, it may request and is entitled to obtain discovery as to any relevant matter that relates to the claim or defense of any party. Because the interrogatories seek information related to certain issues it has raised in this proceeding, the Consumer Advocate contends that the requests are relevant and discoverable.

In response, Party Staff contends that its objections are proper and should be sustained. While it acknowledges that the Consumer Advocate has placed the issues of who represents rate payers, particular rights and claims as to certain costs, and Party Staff’s authority to include attorney’s fees in the proposed settlement agreement, into contention in this proceeding, Party

¹⁸ *Motion to Compel*, p. 8, 10, and 15; and pp. 3-5 (Party asserting work product doctrine must establish: 1) the materials sought are documents or tangible things; 2) prepared in anticipation of litigation; and 3) prepared by or for another party or that party’s representative) citing *State ex rel. Flowers v. Tennessee Trucking Ass’n Self Ins. Group Trust*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006).

Staff asserts that the Consumer Advocate's interrogatory requests, which require responses in advance of the Party Staff's filing of its responsive brief, are improper attempts to obtain the mental impressions, conclusions, opinions, or legal theories of the attorney for Party Staff concerning the matters at issue in this case.¹⁹ Party Staff contends that its responses to these requests are not factual, but instead constitute the mental impressions and legal theories of its counsel concerning the legal issues raised by the Consumer Advocate. As such, Party Staff states that it should not be compelled to divulge such information prior to the filing of its responsive brief, the deadline for which is set in the Amended Procedural Schedule, and to which the Consumer Advocate has an opportunity to respond in its reply brief.

Findings and Conclusions

In the Amended Procedural Schedule issued on July 18, 2013, the Hearing Officer established a briefing schedule for the purpose of allowing the parties an opportunity to clarify their positions on the material issues in this matter before it proceeds to a hearing. Party Staff has acknowledged that the information sought by the Consumer Advocate in Request Nos. 8, 9, and 13, is material and, in fact, goes to the heart of the issues that have been raised by the Consumer Advocate in this docket. Furthermore, as such information bears on the issues that will be presented for the consideration of the Directors, Party Staff has stated that it has addressed these matters in its responsive brief, which will be filed on August 12, 2013.

Therefore, the Hearing Officer finds that these interrogatories seek information that is not privileged and relates to material issues that have been raised in this matter. Thus, the information sought is discoverable. Nevertheless, consistent with TRCP Rule 33.02, the Hearing Officer further finds that it is appropriate that these interrogatories not be answered until after the

¹⁹ *Objections*, p. 2-3, and 4.

filing of Party Staff's responsive brief. Therefore, to the extent that the Consumer Advocate's motion to compel Request Nos. 8, 9, and 13, seeks to compel answers before Party Staff files its responsive brief, such request is DENIED. Nevertheless, insofar as the Hearing Officer concludes that Party Staff should timely supplement its responses to these requests after filing its responsive brief, the motion is GRANTED.

No. 11

Re Testimony of Ms. Underwood, Witness for Party Staff:

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"?

Party Staff's response to Discovery Request No. 11:

RESPONSE:

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

As to Request No. 11, the Consumer Advocate asserts that insofar as Party Staff sets forth only a conclusory statement that the information sought is irrelevant, Party Staff has failed to properly set forth its objection to this request. Further, because the proposed Settlement Agreement includes recovery, by way of setoffs, for the utility's attorney's fees and odor control expenses, the Consumer Advocate asserts that whether these setoffs constitute a utility rate increase is an issue directly relevant to these proceedings.²⁰ As it has raised and asserted the affirmative of this issue, the Consumer Advocate contends that its interrogatory, which calls for Party Staff's witness to state how her analysis and testimony would have differed in a ratemaking context or had she employed a utility ratemaking perspective in this case, is relevant and appropriate.

²⁰ *Motion to Compel*, p. 13-14.

Party Staff responds that its objection to the Consumer Advocate's request for an alternative analysis of the expenses at issue in this docket on the grounds that such analysis is not relevant is appropriate and should be sustained. Party Staff points out that the Directors are not asked to determine what rate(s) are appropriate for Berry's Chapel consumers in this docket. As it is the proposed Settlement Agreement that is under review, the Party Staff has not performed an analysis using a "rate making mindset," as is requested by the Consumer Advocate. As the analysis does not exist, and Berry's Chapel rates are not under review in this docket, Party Staff asserts that there is no basis for compelling it to conduct a different analysis of the evidence, or produce alternative testimony, that is not relevant in this matter.²¹

Findings and Conclusions

As both the Party Staff and Consumer Advocate have acknowledged, this docket is a contested case show-cause proceeding. And although the Consumer Advocate asserts that the structure of the proposed Settlement Agreement in effect amounts to a rate increase for consumers, there is no dispute and, in fact, all parties agree, that this is not a "rate case."²² Therefore, the Hearing Officer finds that an analysis of the discrete expenses at issue in this docket using a "rate making mindset," as if the docket was a rate case, would be purely speculative and is not relevant, nor likely to lead to relevant evidence. In addition, as the alternative analysis specified by the Consumer Advocate does not exist, the Hearing Officer further finds that it is not reasonable, and would be unduly burdensome, to require Party Staff to perform such an analysis – assuming such could be performed in this docket - in order to determine how, or even whether, it differed from the testimony filed by Party Staff's witness in

²¹ *Objections*, p. 3.

²² *Motion to Compel*, p. 7 (Asserting the purposes of "this Show-Cause Docket" and further contending that approval of the proposed Settlement Agreement would allow recovery of expenses "without the procedural safeguards of a ratemaking process."); and *see Objections*, p. 3 ("the Directors of the Tennessee Regulatory Authority are not being asked to determine what rates are appropriate for Berry's Chapel customers.")

support of the proposed Settlement Agreement. Therefore, the Consumer Advocate's motion to compel a response to Request No. 11 is DENIED.

IT IS THEREFORE ORDERED THAT:

1) The *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* is ruled as follows:

- a. As to Request Nos. 6 and 7: to the extent that these interrogatories seek information concerning TRA staff participating as a party's contact with, and feedback obtained from, consumers concerning odor or the terms of the proposed settlement agreement, the motion to compel is GRANTED.
- b. As to Request Nos. 8, 9, and 13:
 - i. To the extent that the Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee seeks to compel answers to its requests before TRA staff participating as a party files its responsive brief, the motion to compel is DENIED.
 - ii. Nevertheless, TRA staff participating as a party is directed to timely supplement its responses to these requests after filing its responsive brief in accordance with the deadline set forth below. Therefore, insofar as noted in this subpart, the motion is GRANTED.
- c. As to Request No. 11: the motion is DENIED.

2) Consistent with the rulings rendered above, TRA staff participating as a party shall supplement its responses to Request Nos. 6, 7, 8, 9, and 13, in the *First Discovery Request*

of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff no later than August 13, 2013.

3) Insofar as Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee moves that it be allowed to supplement its Initial Brief to incorporate TRA staff participating as a party's supplemental responses to discovery, the motion is DENIED. The Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee may incorporate the supplemental responses provided by TRA staff participating as a party into its Reply Brief, which as provided in the Amended Procedural Schedule and agreed by the parties, is due on **August 19, 2013**.


Kelly Cashman-Grams, Hearing Officer