

**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)	DOCKET NO. 11-00065
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.)	

**CONSUMER ADVOCATE'S SECOND MOTION TO COMPEL TRA PARTY STAFF
TO ANSWER CONSUMER ADVOCATE AND PROTECTION DIVISION'S FIRST-
ROUND DISCOVERY REQUEST NOS. 9 AND 13**

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. 9 and 13. These discovery responses were the subject of the Consumer Advocate's first Motion to Compel. At the hearing of that Motion to Compel on August 12, 2013, the Hearing Officer denied the Consumer Advocate's Motion to Compel on Nos. 9 and 13 insofar as it called for responses before the date of the Consumer Advocate's Initial Brief but granted the Motion insofar as the TRA Party Staff is required to supplement its response pursuant to Rule 33.02 of the Tennessee Rules of Civil Procedure rather than relying on a reference to its Initial Brief. Following is the relevant portion of the hearing Officer's ruling:

In regard to Request Nos. 8, 9, and 13, the Party Staff acknowledged the information that the Consumer Advocate seeks in these requests goes to the heart of the issues raised by the Consumer Advocate. Further, as such information bears on the issues, Party Staff indicated it intended to address the issues in its reply brief, which will be filed today. Therefore, consistent with Rule 33.02 of the Tennessee Rules of Civil Procedure, I find that while these interrogatories seek information that is discoverable, they need not be answered at the time they were requested. It's appropriate to wait for the brief and to -- that supplemental responses to these requests be timely filed following the brief, whatever that would consist of. And, therefore, as to those 2 Requests 8, 9, and 13, the motion is denied.

Transcript of Proceedings, August 12, 2013 at 22-23, TRA Docket No. 11-00065; see also *Order Granting In Part & Denying In Part Consumer Advocate's Motion to Compel Responses to Its First Discovery Request* at 11.

In its "Third Response", however, the TRA Party Staff has merely referred to its entire Initial Brief (excluding only the Statement of Facts); furthermore, the Initial Brief contains no material responsive to the requests. The TRA Party Staff has thus refused to respond to the requests.

Accordingly, the Consumer Advocate hereby moves for an order compelling the TRA Party Staff to respond to the discovery requests rather than merely referring to its entire Initial Brief which contains no material responsive to the requests.

MOTION TO COMPEL

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.

FIRST 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.

OBJECTION TO THE CAD'S MOTION TO COMPEL: Party Staff does not purport to represent the interests of TRA Staff and cannot answer for them. Therefore, Party

Staff assumed that the CAD was requesting information about the Party Staffs positions. If however, the CAD was requesting information about TRA Staff then Party Staff cannot answer for lack of knowledge. Party Staff objected that this request seeks the “attorney’s mental impressions and trial strategy” and stands by its original objection. The CAD’s request presumes that the Party Staff asserts any rights, interests, and/or claims in flood damage cost and odor control costs. It then requests that Party Staff should divulge the legal theory upon which it claims those rights. The CAD has clearly placed this issue in dispute in this matter and it is obviously an issue that will be determined in this matter. **As such the Party Staff is under no obligation to reveal its legal strategy in this regard until such time as it files its brief. The CAD will have ample opportunity to respond to the brief in its reply brief.** (Emphasis added.)

THIRD RESPONSE: See paragraphs 12 through 30 of the Party Staff’s *Initial Brief in Support of the Settlement Agreement*.

MOTION TO COMPEL: In its Objection to the Consumer Advocate’s Motion to Compel, the TRA Party Staff stated that it would respond to this request in its Initial Brief. The Hearing Officer, however, ruled that the TRA Party Staff should file a separate response rather than merely relying on a reference to its Brief. The “Third Response”, however, simply refers to the Initial Brief rather than responding to the request.

Request No. 9 asked the TRA Party Staff to “identify and explain the TRA Staff’s rights, interest, and/or claims in the flood damage costs and odor control costs.” The Initial Brief, paragraphs 12-30, does not refer to either “flood damage costs” or “odor control”. The response is, therefore, completely non-responsive in addition to being a repetition of the very thing that brought on the need for the first Motion to Compel, *i.e.*, mere reference to the Initial Brief.

The information sought in Request No. 9 is critical to this case. If the TRA Party Staff cannot identify its “rights, interests and/or claims in the flood damage costs and odor control costs” it has no right to settle such matters. If the TRA Party Staff has no right to settle flood damage costs and odor control costs it has no right to sign the proposed Settlement Agreement which allows recovery of such costs, which means that Settlement Agreement must fail.

One purpose of discovery is to narrow issues for trial. The TRA Party Staff apparently had no hesitation in attempting to settle away consumers’ interests by agreeing that consumers should pay over \$70,000 in new rates or charges for flood damage and odor control. But now, even after filing its Initial Brief, the TRA Party Staff still cannot tell this tribunal what interests or rights it has in the recovery of costs it allegedly authorizes in the Settlement Agreement.

If the TRA Party Staff is not required to answer this question now there is every likelihood that their position will not be known until trial or even change between now and trial. This changing of positions makes a proper trial exceedingly difficult. The TRA Party Staff has already changed its position on whether the Settlement Agreement affects rates. In the testimony of Tiffany Underwood, the TRA Party Staff takes the position that the Settlement Agreement does not involve “any change to the rates charged by the company”. Underwood Testimony at 2:23-3:1-2. In the Initial Brief, however, the TRA Party Staff is now saying the Settlement Agreement, if accepted, will involve TRA “action affecting rates outside of a case affecting base rates.” Initial Brief at ¶ 17 (footnote omitted). So at this stage of the case, it is still not clear whether the TRA Party Staff maintains the Settlement Agreement “affects”, *i.e.*, changes, rates or not. Unfortunately, if the TRA Party Staff is not compelled to respond fully to Request No. 9 regarding whether it has any interests, rights and/or claims in matters it has settled, the same lack of certainty will prevail on this issue as well.

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).

FIRST 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.

OBJECTION TO THE CAD’S MOTION TO COMPEL: Party Staff objected that this request seeks the “attorney’s mental impressions and trial strategy” and stands by its original objection. Again the CAD has requested that Party Staff state its legal arguments and positions prior to the filing a brief. **It is not reasonable to expect Party Staff to reveal their trial strategies and theories prior to filing the brief. In this matter Party Staff will address this issue in its brief and the CAD will have the opportunity to respond in their reply brief.** (Emphasis added.)

THIRD RESPONSE: See paragraphs 12 through 30 of the Party Staff’s *Initial Brief in Support of the Settlement Agreement*.

MOTION TO COMPEL: In its Objection to the Consumer Advocate’s Motion to Compel, the TRA Party Staff stated that it would respond to this request in its Initial Brief. The Hearing Officer, however, ruled that the TRA Party Staff should file a separate response rather than merely relying on a reference to its Brief. The “Third Response”, however, simply refers to the Initial Brief rather than responding to the request.

Request No. 13 asked for the TRA Party Staff to “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).” The Initial Brief, paragraphs 12-30, does not refer to any “authority” for including either “flood damage costs” or “odor control” in this Docket No. 11-00065. The response is, therefore, completely non-responsive in addition to being a repetition of the very thing that brought on the need for the first Motion to Compel, mere reference to the Initial Brief.

Consumers, the public, and the process of the TRA all are entitled to a direct answer to a direct question. Requests Nos. 9 and 13 asked simple questions intended to narrow issues for hearing: (1) what, if any, rights or interests does the TRA Party Staff have in flood damage and odor control costs; and (2) by what authority has the TRA Party Staff included flood damage and odor control costs in this enforcement docket? The TRA Party Staff either has or doesn’t have such interest in claims, and either has or doesn’t have authority to authorize cost recovery to Berry’s Chapel in this Docket. An answer either way will narrow issues for the hearing rather than forcing the TRA Directors to be uncertain as to what the TRA Party Staff’s claims and positions are right up to the day of the hearing.

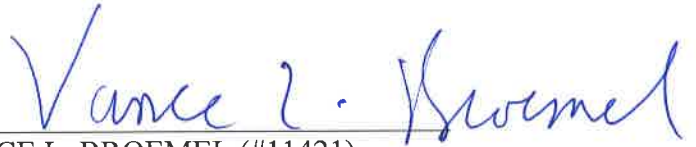
The TRA Party Staff, therefore, should be ordered to give proper answers and cease delaying the case since responses to these requests are needed before filing the Consumer Advocate’s Reply Brief. Under the procedural schedule, discovery responses were due before the filing of the Consumer Advocate’s Initial Brief and that date has long since passed. Pursuant to the Hearing Officer’s ruling at the hearing on August 12, 2013, the Consumer Advocate must include any further response in its Reply Brief rather than supplement its Initial Brief. Should a proper response not be made before the time the Consumer Advocate’s Reply Brief is due, the

Consumer Advocate requests three additional days from the TRA Party Staff's filing of the full and complete response to all discovery requests subject to this Motion to supplement its Reply Brief.

CONCLUSION

For the reasons stated, the Consumer Advocate's Second Motion to Compel should be granted and the Consumer Advocate should be permitted to supplement its testimony and Reply Brief, if necessary, within three days after the TRA Party Staff provides full and complete answers to the Consumer Advocate's discovery requests.

Respectfully submitted,



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Dated: _____


15 August, 2013

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 August 15, 2013, upon:

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