

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 20, 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 DENYING CONSUMER ADVOCATE'S SECOND MOTION TO COMPEL
RESPONSES TO ITS FIRST DISCOVERY REQUEST NOS. 9 & 13**

This matter is before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") upon the *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 ("Second 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 August 15, 2013. The TRA staff participating as a party ("Party Staff") filed its *Objection to the CAD's Second Motion to Compel ("Objection to Second Motion to Compel")* on August 16, 2013.

RELEVANT BACKGROUND

Following the parties' oral arguments on the Consumer Advocate's (first) motion to compel answers to its *First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff ("First Discovery Request")*, which were held on August 12, 2013, the Hearing Officer ruled that due to the type of information

sought in Request Nos. 8, 9, and 13, Party Staff did not need respond until after it had filed its responsive brief in accordance with the schedule set forth in the Amended Procedural Schedule issued on July 18, 2013.¹ The Hearing Officer further directed that, after its responsive brief was filed, Party Staff must supplement its responses to these requests no later than August 13, 2013.² On August 12, 2013, Party Staff filed its *Initial Brief in Support of the Settlement Agreement* (“*Initial Brief*”). And, as ordered, the *Party Staff’s Third Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff* (“*Third Responses*”) were filed on August 13, 2013.

Second Motion to Compel

In its *Second Motion to Compel*, the Consumer Advocate states that, in its *Third Responses* supplementing Request Nos. 9 & 13, Party Staff refers the Consumer Advocate to its *Initial Brief*. The Consumer Advocate contends that insofar as Party Staff’s *Initial Brief* “contains no material responsive to the requests,” Party Staff has refused to respond.³ In addition, the Consumer Advocate states that the Hearing Officer “ruled that the TRA Party Staff should file a separate response rather than merely relying on a reference to its Brief,” and therefore, contends that Party Staff’s response violates this ruling.⁴ Further, as its requests inquire as to Party Staff’s rights or interests in “flood damage costs” and “odor control,” and as to its “authority” to include recovery of attorney’s fees for such costs in the Settlement Agreement, the Consumer Advocate asserts that the absence of, or failure to refer to these

¹ *Order Granting In Part and Denying In Part Consumer Advocate’s Motion to Compel Responses to Its First Discovery Request*, pp. 10-11 and 13-14 (August 15, 2013).

² *Id.*

³ *Second Motion to Compel*, p. 2.

⁴ *Id.* at 3 and 5.

specific words in the *Initial Brief* constitutes an answer by Party Staff that is non-response or a failure to answer definitively.⁵

The Consumer Advocate asserts that in order to narrow the issues for hearing and prevent Party Staff from changing its positions on these matters, the Hearing Officer should require Party Staff to give “direct” and “proper” answers.⁶ Finally, in the event that Party Staff’s additional answers are not provided before the deadline for its Reply Brief, the Consumer Advocate requests to supplement its Reply Brief, if necessary, within three days of its receipt of such answers.⁷

Objection to Second Motion to Compel

In its *Objection to Second Motion to Compel*, the Party Staff states that it referenced paragraphs 12 through 30 of its *Initial Brief* in its supplemental responses to the Consumer Advocate’s Request Nos. 9 and 13, in order to provide the Consumer Advocate with the most complete and concise response possible concerning its legal positions related to the areas of inquiry.⁸ Further, Party Staff contends that the Consumer Advocate attempts to dictate the nature of the issues and how the issues should be argued by the parties. While the parties cannot come to agreement as to the nature of the issues, or each other’s respective legal positions on those issues, Party Staff asserts that it has responded as completely as possible to the questions posed by the Consumer Advocate.⁹

FINDINGS AND CONCLUSIONS

In *Duncan v. Duncan*, the Tennessee Court of Appeals provided guidance as to the factors to be considered when determining whether to limit discovery:

⁵ *Id.* at 3 and 6.

⁶ *Id.* at 4 and 6.

⁷ *Id.* at 6-7.

⁸ *Objection to Second Motion to Compel*, p. 1.

⁹ *Id.*

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).¹⁰

The Authority may limit discovery 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.”¹¹ Nevertheless, 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.¹²

In the *Order Granting in Part and Denying in Part Consumer Advocate’s Motion to Compel Discovery*, entered on August 15, 2013, the Hearing Officer found that the information sought by the Consumer Advocate as to Party Staff’s positions concerning its role, rights or claims, and the authority it has to engage in negotiations and to execute a settlement agreement in resolution of the issues presented in this docket was discoverable. Further, in light of the type of information sought, the Hearing Officer concluded that under Rule 33.02 of the Tennessee Rules of Civil Procedure, Party Staff need not answer the interrogatories until it had filed its responsive brief. Thereafter, Party Staff was directed to supplement its responses to these requests.¹³ Contrary to the assertion of the Consumer Advocate, beyond requiring Party Staff to respond and then designating a particular time frame for such response, the Hearing Officer neither prescribed, nor precluded, the content or form of Party Staff’s supplemental response.

In its *Second Motion to Compel*, the Consumer Advocate asks that Party Staff be further compelled to respond and provide additional information to Request Nos. 9 and 13, because it is

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

¹¹ Tenn. R. Civ. P. 26.02(1) (2011); *Reid v. State*, 9 S.W.3d 788, 792-793 (1999).

¹² See *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 935 (1984).

¹³ *Order Granting In Part and Denying In Part Consumer Advocate’s Motion to Compel Responses to Its First Discovery Request*, pp. 10-11 and 13-14 (August 15, 2013).

dissatisfied with the supplemental responses that Party Staff has provided; which, rather than in the form of a separately written answer, direct the Consumer Advocate to specific paragraphs within the Party Staff's *Initial Brief*. Further, the Consumer Advocate contends that the Party Staff's *Initial Brief* fails to address Party Staff's position as to its rights, claims, or authority to act in this docket. Hence, Consumer Advocate's asserts that its discovery requests have not been answered. Conversely, Party Staff contends that it has responded to Consumer Advocate's discovery requests, as directed by the Hearing Officer. And, in referring the Consumer Advocate to substantive paragraphs of its *Initial Brief*, Party Staff affirms that it has provided as complete and concise a response as possible concerning its official positions on the inquired matters.

Upon review and due consideration, the Hearing Officer finds that Party Staff's response, as ultimately found in its *Initial Brief*, does answer or, otherwise, sufficiently provides the information sought in the questions posed by the Consumer Advocate. It is true that Party Staff's response to these interrogatories, which, to obtain the information it seeks, directs the Consumer Advocate to a portion of Party Staff's *Initial Brief*, does not constitute a simple yes-no, either-or, answer and, thus, might not be easily distilled to a sound-bite. Nevertheless, the referenced portions of the *Initial Brief* disclose the Party Staff's positions as to its involvement and authority to act in this proceeding.

Party Staff's response, as set forth in its *Initial Brief*, does not refer to "flood damage costs" or "odor control." It does, however, state the type of proceeding that is convened (i.e., an enforcement action), its task and charge as delegated by the Authority, and further explains that there are no individual "claims" in enforcement actions. Likewise, Party Staff's response does not refer to specific "authority" to include attorney's fees for "flood damage costs" or "odor control." Yet, it discusses Party Staff's designated role in this proceeding, and the basis of the agency's authority to consider the terms of the proposed Settlement Agreement and to resolve

the matters presented in this proceeding. Consequently, the Hearing Officer finds that the Party Staff has supplemented its response to the Consumer Advocate's Request Nos. 9 and 13, as previously ordered. Further, Party Staff's response, as found in its *Initial Brief*, sets forth its official positions relative to its "rights, interests, and/or claims" in the docket and its "authority" to negotiate the terms of the proposed Settlement Agreement in resolution of the matters therein, which is the primary matter currently before the Authority in the docket, and is therefore sufficient.

Accordingly, the Hearing Officer concludes that the Consumer Advocate has had ample opportunity to discover the facts, and Party Staff's positions on the issues, that are relevant or likely to lead to information that is relevant concerning the proposed Settlement Agreement, and has presented its own positions on the issues through written briefs filed in the docket file. Thus, this proceeding is well positioned to proceed as set forth in the Amended Procedural Schedule, and, upon completion of the briefing, for setting and finalization of the Hearing. As the presentation of witnesses and arguments of counsel are anticipated during the Hearing, each party will have additional opportunity in this proceeding to examine and present the issues under consideration by the Authority. Therefore, the Hearing Officer further concludes that the Consumer Advocate's *Second Motion to Compel* should be denied.

IT IS THEREFORE ORDERED THAT:

The *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* is DENIED.


Kelly Cashman-Grams, Hearing Officer