

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 25, 2013

IN RE:

**PETITION OF LAUREL HILLS CONDOMINIUMS
PROPERTY OWNERS ASSOCIATION FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY**

**DOCKET NO.
12-00030**

ORDER ON NOVEMBER 7, 2012 STATUS CONFERENCE

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (“Authority” or “TRA”) during a Status Conference held on November 7, 2012, to consider the motions to compel filed by Gary Haiser *et al.* (“Customer Intervenors”) on October 3, 2012 and November 1, 2012, the *Motion for Order Allowing for Additional Discovery Requests by Customer Intervenors* (“*Motion for Additional Discovery*”) filed on November 1, 2012, and the motion to compel filed by Laurel Hills Condominiums Property Owners Association (“Laurel Hills”) on November 2, 2012.¹

November 7, 2012 Status Conference

The Status Conference was held on November 7, 2012 and began at 11:30 a.m. as noticed.² All parties had representatives participating. The parties in attendance were as follows:

For Laurel Hills:

Ben Gastel-Branstetter, Stranch & Jennings, PLLC, 227 Second Avenue North Nashville, TN 37201-1631.

For the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”):

John Baroni and Charlena Aumiller-425 5th Avenue North, 4th Floor Nashville, TN 37201-

¹ Prior to the issuance of this Order, the Hearing Officer’s rulings on the issues presented at the November 7, 2012 Status Conference were communicated to the Parties in an email from the Hearing Officer dated November 14, 2012.

² See *Notice of Status Conference* (November 2, 2012).

1631.

Participating by phone were:

For the Customer Intervenors: Melanie Davis-Kizer & Black, PLLC 329 Cates Street Maryville, TN 37801.

For TRA Party Staff: Shiva Bozarth-460 James Robertson Parkway Nashville, TN 37243-0505.

Motion for Additional Discovery

On November 1, 2012, the Customer Intervenors filed a *Motion for Additional Discovery*. In its motion, the Customer Intervenors requested permission to submit 106 discovery requests.³ At the Status Conference, Laurel Hills and the Customer Intervenors stated they had agreed that the Customer Intervenors would file twenty additional discovery requests, and Laurel Hills reserved the right to object to any of the twenty additional questions chosen by the Customer Intervenors.

TRA Rule 1220-1-2-.11(5)(a) prohibits a party from serving more than forty discovery requests, including subparts, without authorization from the Authority or Hearing Officer. To serve additional requests, a party must file a motion with the Authority or a Hearing Officer accompanied by the additional requests and a motion for good cause. Based on the arguments put forth by the Customer Intervenors and the pleadings in this docket, the Hearing Officer finds that the facts in this docket are complex and call for granting the request for additional discovery requests. In addition, the parties have reached an agreement regarding additional discovery requests. Based on these findings, the Hearing Officer grants, in part and denies, in part the Customer Intervenors' *Motion for Additional Discovery*. The Hearing Officer will allow the Customer Intervenors to serve twenty additional discovery requests on Laurel Hills. Any additional discovery requests are denied. The additional requests should be filed by November 13, 2012 and Laurel Hills shall respond to the additional requests by November 20, 2012.⁴

Customer Intervenors' First Motion To Compel

The Customer Intervenors filed a *Motion to Compel Responses of Laurel Hills Condominiums Property Owners Association To First Discovery Requests Of the Customer*

³ See *Motion for Additional Discovery*, p. 1 (November 1, 2012).

⁴ The Hearing Officer ruled on this motion at the November 7, 2012 Status Conference.

Intervenors Or, Alternatively, Request For Subpoena Duces Tecum For Moy Toy, LLC (“*Intervenors’ First Motion to Compel*”) on October 3, 2012 and the Parties argued the motion at the Status Conference. The Customer Intervenors asked the Authority to compel Laurel Hills to answer Discovery Requests 7 and 8 in the Customer Intervenors’ First Discovery Request. In the alternative, the Customer Intervenors request a subpoena duces tecum for Moy Toy, LLC. The discovery requests in the *Intervenors’ First Motion to Compel* deal with the handling of a \$400,000 promissory note to Moy Toy, LLC.⁵ Specifically, in Discovery Request Number 7 the Customer Intervenors seek to discover how Moy Toy posted and accounted for the \$400,000 promissory note in its ledger.⁶ Discovery Request Number 8 requests a copy of Moy Toy’s 2011 federal tax return to determine if it reflects the proper asset reporting of the \$400,000 promissory note.

The Customer Intervenors stated “[w]hen Laurel Hills purchased part of the water system from Moy Toy, the purchase was recorded by crediting notes payable and debiting owner equity. Normally, when an asset is purchased, the fair market value of the asset is recorded as a debit to fixed assets and any excess is recorded as good will. The fixed assets are depreciated over the useful life and good will is amortized over a period of fifteen years.”⁷ Further, the Customer Intervenors asserted that “[f]rom the way Laurel Hills recorded the purchase of the water system, it appears that Laurel Hills was either fully aware that there was no value related to the assets purchased or that the purchase had no economic value.”⁸ The Customer Intervenors stated that Moy Toy and Laurel Hills are related entities and that Mr. Guettler and Mr. McClung, who are officers of Laurel Hills, are also in control of Moy Toy and have the tax returns in their possession, custody and control.⁹

At the Status Conference, Counsel for the Customer Intervenors reiterated arguments set forth in the *Intervenors’ First Motion to Compel*. Ms. Davis asserted that “[s]ome of the principals in Laurel Hills are also principals in Moy Toy, and we’re trying to determine whether this was a legitimate arm’s-length transaction or not...”¹⁰ Ms. Davis argued that the Moy Toy tax returns are discoverable and offered to enter into a protective order to protect any sensitive

⁵ *Customer Intervenors’ First Motion to Compel*, p. 2 (October 3, 2012).

⁶ *Id.* at 1.

⁷ *Id.* at 2.

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ Transcript of Proceedings, p. 6 (November 7, 2012).

information.¹¹

Laurel Hills objected to the *Intervenors' First Motion to Compel* and argued that Moy Toy is a distinct and separate entity from Laurel Hills and there has not been a showing that Laurel Hills has a legal right to obtain the documents.¹² Laurel Hills maintained that the information is beyond its possession, custody, or control and it is improper for the Customer Intervenors to request the information.¹³ Laurel Hills also argued that the Customer Intervenors were trying to use the TRA proceeding to obtain information that could not be obtained in a separate, but related lawsuit. In addition, Laurel Hills argued that the information sought by the Customer Intervenors was not relevant to the proceedings before the TRA.¹⁴

During the Status Conference, the Consumer Advocate asserted that under Tenn. Code Ann. § 65-5-103 the utility seeking the rate increase has the burden of proof to show that such increase is just and reasonable.¹⁵ The Consumer Advocate stated that there have been several issues that have been troubling in Laurel Hills' filings.¹⁶ According to the Consumer Advocate, its expert, Dr. Chris Klein, "was unable to come up with the proper rate base for these assets because there are documents out there that question whether or not those are arm's-length transactions. So, from that point of view we think that some of this information should be and is relevant."¹⁷ Further, the Consumer Advocate stated "from our analysis of the discovery that has been filed, there appears to be several interested parties and this is causing us to [have] issues with our analysis of the increase that Laurel Hills is proposing at this time."¹⁸

TRA Party Staff agreed it would be difficult to determine whether the \$400,000 promissory note should be included in rates without first determining whether the debt is valid. Mr. Bozarth also asserted that since the information is needed by the Consumer Advocate to make its assessment, it might be in everyone's best interest to get the data released.¹⁹

Findings And Conclusions on *Intervenors' First Motion to Compel*

Pursuant to Authority Rule 1220-1-2-.11, when informal discovery is not practicable,

¹¹ *Id.*

¹² *Id.* at 8.

¹³ *Id.*

¹⁴ *Id.* at 8-9.

¹⁵ *Id.* at 12.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 13.

¹⁹ *Id.*

discovery shall be effectuated in accordance with the Tennessee Rules of Civil Procedure. The Rules of Civil Procedure permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission. The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence. According to Tenn. R. Civ. P. Rule 26.02(1):

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.

Further, the Tennessee Court of Appeals has commented on relevancy as follows:

Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase “relevant to the subject matter involved in the pending action” has been construed “broadly to encompass any matter that bears on or reasonably could lead to any other matter that could bear on, any issue that is or may be in the case.”²⁰

Upon review and consideration of the Parties’ positions set forth in their pleadings and arguments at the Status Conference, the Hearing Officer finds and concludes as follows on the *Intervenors’ First Motion to Compel*. The Hearing Officer finds that the information requested by the Customer Intervenors regarding the \$400,000 promissory note is relevant to these proceedings. The Hearing Officer is persuaded by arguments made by the Customer Intervenors that the requested information is relevant because the information is necessary to determine if the execution of the \$400,000 promissory note from Laurel Hills to Moy Toy was an arm’s length transaction. In addition, the Consumer Advocate and TRA Party Staff have also made compelling arguments that information regarding the circumstances surrounding issuance of the

²⁰ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).

promissory note is necessary for their experts to analyze Laurel Hills' rate request. In order to determine a reasonable rate for Laurel Hills to charge its customers, it is necessary for the experts to analyze the components that go into setting a rate, including the rate base. If Laurel Hills is requesting that an item be included in its rate base, the experts must have adequate information to evaluate the legitimacy of including the item. Based on these findings, the Hearing Officer grants the *Intervenors' First Motion to Compel* to the extent that Laurel Hills can respond to the request and can obtain the information. If Laurel Hills is unable to provide the information requested, the \$400,000 promissory note will not be included in determining its rate base.

Laurel Hills' Motion to Compel

On November 2, 2012, Laurel Hills filed its *Laurel Hills Condominiums Property Owners Association Motion to Compel* ("Laurel Hills' Motion to Compel") "seeking supplementation of the Customer Intervenors Responses to Laurel Hills' First Discovery Request."²¹ Laurel Hills seeks the following information from each Customer Intervenor, other than Cumberland Point:

...full legal name, social security number, street address for service, billing address if different from service address, phone number for service and phone number for billing, whether the Customer Intervenor owns or rents the service address, and the number of weeks per year, on average, the Customer Intervenor occupies the service address.²²

Laurel Hills asks Cumberland Point to identify:

...the name and billing address for every unit where Cumberland Point sends its request for membership dues, the name and unit number for any full-time residents, and for all other units not occupied on a full time basis, the average number of weeks per year each unit is occupied.²³

At the Status Conference, Laurel Hills stated that prior to Laurel Hills becoming involved

²¹ *Laurel Hills' Motion to Compel* (November 2, 2012).

²² *Id.* at 1.

²³ *Id.* at 2.

with running the system, the records were not properly maintained and the requested information would help it identify the customers of Laurel Hills and have the ability to contact them if necessary.²⁴ Laurel Hills maintained that this information is the type provided to most utilities by their customers and it is a routine request from a utility to its customer base.”²⁵ Mr. Gastel clarified that Laurel Hills does not “necessarily want a calendar breakdown of when customers intend to be at the residences, but the unique nature of our customer base is not all of our residents are full-time residents. There are a lot of vacation homes and there are a lot of people who are only there for short periods of the year.” Laurel Hills asserted that the information was “relevant to the crafting of an appropriate reconnection fee in this case.”²⁶

The Customer Intervenors objected to the requests for social security numbers stating that considering the contentious relationship between the parties, “[t]he last thing my clients want is that type of highly privileged information in the hands of Laurel Hills, given the history between the parties.”²⁷ Ms. Davis also asserted that her clients represent only a portion of Laurel Hills’ customers, thus it is not a very good way to get the information Laurel Hills claims it needs.²⁸ In addition, Ms. Davis argued that the TRA proceeding is an improper method to obtain the information and further, the information does not lead to any relevant information for rate setting.²⁹ Ms. Davis also cited safety concerns regarding providing information about when her clients would be at their residences and asserted that this is a “privacy issue” and the Customer Intervenors should not have to provide this type of information to receive water service.³⁰

The Consumer Advocate expressed concerns about requiring the Customer Intervenors to provide social security numbers in a public document. However, the Consumer Advocate stated that the public record could be redacted or submitted under a protective order if the Hearing Officer determined it was relevant.³¹ TRA Party Staff also objected to the Customer Intervenors providing social security numbers and the number of days a person may be at the residence.³²

Findings And Conclusions on Laurel Hills’ Motion to Compel

²⁴ Transcript of Proceedings, p. 29 (November 7, 2012).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 32.

²⁸ *Id.*

²⁹ *Id.* at 32-33.

³⁰ *Id.* at 34-35.

³¹ *Id.* at 35-36.

³² *Id.* at 36.

Tennessee has a broad policy favoring the discovery of any relevant information; however, the rules governing discovery also provide limitations and protections to guard against a misuse or abuse of the discovery process which may result from, among other things, a lack of diligence or unreasonable demands of the parties. Specifically, Tenn. R. Civ. P. 26.02(1) provides:

The frequency or extent of use of the discovery methods set forth in subdivision 26.01 shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) 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.

In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

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).³³

Upon review and consideration of the Parties' positions set forth in their pleadings and arguments, the Hearing Officer finds that the sensitive information Laurel Hills requested of the Customer Intervenors is not relevant to these proceedings. Further, the Hearing Officer finds that the information requested by Laurel Hills does not accomplish its goal of identifying its customers because the customer information Laurel Hills requested is only targeted at the customers who are parties to this proceeding. The Hearing Officer finds that the interests of Laurel Hills in obtaining the personal information requested of the Customer Intervenors does not outweigh the potential harm to the Customer Intervenors in releasing the information. Therefore, *Laurel Hills' Motion to Compel* is denied.

³³ *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

Customer Intervenors' Second Motion to Compel

On November 1, 2012, the Customer Intervenors filed its *Motion to Compel Laurel Hills Condominiums Property Owners Association ("Laurel Hills") to Respond to Second Discovery Requests of Customer Intervenors ("Intervenors' Second Motion to Compel")* stating Laurel Hills objected to and did not respond to all discovery requests over forty and Laurel Hills has not provided adequate responses to Numbers 5, 6, 7, 8, and 9. At the Status Conference, Laurel Hills asserted that the portion of the *Intervenors' Second Motion to Compel* dealing with Laurel Hills' objection to those requests exceeding forty is moot due to the Hearing Officer's ruling on the *Motion for Additional Discovery*. None of the parties objected to this assertion.³⁴

Regarding Questions 5-9, Laurel Hills stated that it had prepared substantive responses to those questions, but apparently, it must have made an error when filing the responses with the TRA because the responses were not in the TRA docket file, nor had any of the parties received a copy of the responses.³⁵ Due to the filing error, the Customer Intervenors' reserved the right to object to the responses after viewing them.³⁶

At the Status Conference, the Customer Intervenors raised issues regarding responses to Questions 11, 24, and 25. According to the Customer Intervenors, Laurel Hills stated it would respond to Question 11 at a later date, and the Customer Intervenors wanted to know when it would receive the response. And, according to the Customer Intervenors, Laurel Hills responded to Questions 24 and 25 with a statement that the responses were attached, yet there were not any documents attached.³⁷ Laurel Hills stated that it would provide the insurance policies requested in Question 11 when it received them from the carrier. And, Laurel Hills agreed to supplement its responses to Questions 24 and 25.³⁸

Revised Procedural Schedule

The Parties submitted a Revised Procedural Schedule to the Hearing Officer on November 9, 2012. The Hearing Officer approves the modification in the Procedural Schedule and the Revised Procedural Schedule is as follows:

December 18, 2012

Pre-filed Direct Testimony of the Intervenors

³⁴ *Id.* at 23-24.

³⁵ *Id.* at 23-26.

³⁶ *Id.* at 24.

³⁷ *Id.* at 27-28.

³⁸ *Id.*

January 14, 2012

Petitioner's Rebuttal Testimony

January 29, 2013

Prehearing Conference

February 13, 2013

Hearing on the Merits

TBD after the Hearing

Post Hearing Briefs


All filings are required to be submitted to the Authority no later than **2:00 p.m.** on the date they are due. Requests for extensions of time shall be made by written motion and shall state the grounds for the request.

IT IS THEREFORE ORDERED THAT:

1. The *Motion for Order Allowing for Additional Discovery Requests by Customer Interveners* is granted, in part and denied, in part. The Customer Interveners are allowed to submit twenty additional discovery requests. The additional requests shall be submitted by November 13, 2012 and Laurel Hills shall file a response by November 20, 2012. Any discovery requests beyond the twenty additional questions is denied.
2. The *Motion to Compel Responses of Laurel Hills Condominiums Property Owners Association To First Discovery Requests Of the Customer Interveners Or, Alternatively, Request For Subpoena Duces Tecum For Moy Toy, LLC* is granted to the extent that Laurel Hills is able to respond to the request and can obtain the requested information. If Laurel Hills is unable to provide the information requested, the \$400,000 promissory note will not be included in determining its rate base.
3. The *Motion to Compel Laurel Hills Condominiums Property Owners Association ("Laurel Hills") to Respond to Second Discovery Requests of Customer Interveners* is moot due to the Hearing Officer's ruling on the *Motion for Order Allowing for*

Additional Discovery Requests by Customer Interveners and responses subsequently submitted by Laurel Hills.

4. Laurel Hills' Motion to Compel is denied.
5. The revised procedural schedule for this matter is established as set forth herein.


Monica Smith-Ashford
Hearing Officer