

IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

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IN RE: PETITION FOR A GENERAL RATE)
INCREASE, IMPLEMENTATION OF A)
DISTRIBUTION SYSTEM INFRASTRUCTURE)
CHARGE AND THE ESTABLISHMENT OF)
TRACKING MECHANISMS FOR PURCHASED)
POWER, PENSIONS AND CHEMICAL EXPENSES)

DOCKET NO. 12-00049

MEMORANDUM IN SUPPORT OF THE CONSUMER ADVOCATE'S MOTION FOR
LEAVE TO ISSUE MORE THAN FORTY DISCOVERY REQUESTS

The Consumer Advocate and Protection Division ("Consumer Advocate"), pursuant to TRA Rule 1220-1-2-.11(5)(a), hereby submits this memorandum in support of its *Motion for Leave to Issue More Than Forty Discovery Requests* to Tennessee American Water Company. ("TAWC" or "Company"). For good cause, the Consumer Advocate would show as follows:

RULES GOVERNING DISCOVERY BEFORE THE TRA

Section 1220-1-2-.11 of the Rules of the Tennessee Regulatory Authority ("R. TRA"), entitled *Discovery*, states in part, that "any party to a contested case may petition for discovery...discovery shall be *sought and effectuated* in accordance with the Tennessee Rules of Civil Procedure". Furthermore, Tennessee Code Annotated § 4-5-311(a) states that "the administrative judge or hearing officer, at the request of any party, shall issue subpoenas, effect discovery, and issue protective orders, in accordance with the Tennessee Rules of Civil Procedure" Rule 26.02 of the Tennessee Rules of Civil Procedure, governing discovery, provides that:

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.

Tenn. R. Civ. Pro. 26.02, *Discovery Scope and Limits* (Emphasis added). Perhaps the most important policy of discovery is that discovery should enable the parties and the court to seek the truth so that disputes will be decided by facts rather than legal maneuvering, *White v. Vanderbilt University*, 21 S.W. 3d 215, 223 (Tenn. Ct. App. 1999). Discovery should allow both the court and the parties to have an intelligent grasp of the issues to be litigated and knowledge of the facts underlying them. *Vythoulikas v. Vanderbilt University Hospital*, 693 S.W. 2d 350, 356 (Tenn. Ct. App. 1985). Further, discovery is not confined to the issues raised in the pleadings, for discovery itself may be used to clarify and define the issues in controversy. *Id.* at 359. Accordingly, a party seeking discovery is entitled to obtain information about any matter, not privileged, which is relevant to the subject matter involved, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. *State ex. Rel. Flowers v. Tennessee Trucking Assoc. Self Insurance Group Trust*, 209 S.W. 3d 602, 615 (Tenn. Ct. App. 2006).

The Tennessee Rules of Civil Procedure go on to specify the situations in which discovery may be limited by the presiding judge or hearing officer:

the frequency or extent of use of the discovery methods set forth in subdivision 26.01 and this subdivision **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.

Id. (Emphasis added). Applying the fundamental principal of “*expressio unius est exclusio alterius*,” which translates as “the expression of one thing implies the exclusion of ... things not expressly mentioned,” a court may not limit discovery if the requests do not fall into one of these three categories, *Wells v. Tennessee Board of Regents*, 231 S.W.3d 912, 917 (Tenn. 2007).

The Rules of the Tennessee Regulatory Authority have the additional requirement that a party obtain leave from the Authority before serving more than forty (40) discovery requests, R. TRA § 1220-1-2-.11. Leave is obtained by filing a Motion and accompanying “memorandum establishing good cause” for additional discovery. *Id.* The Authority is granted the power to create such a rule under T.C.A. § 4-5-311(c), “the agency may promulgate rules to further prevent abuse and oppression in discovery.” However, it should be noted that this ability is still governed by the requirement that the Authority comply with the Tennessee Rules of Civil Procedure as directed by the Authority’s own Rules of Practice and Procedure, § 1220-1-2-.11, as well as T.C.A. § 4-5-311(a); therefore, “abuse or oppression in discovery” is defined under one of the three permissible reasons for limiting discovery detailed in Tenn. R. Civ. Pro. 26.02 above.

When the Authority’s Rules of Practice and Procedure are read in conjunction with the T.C.A. and the Tennessee Rules of Civil Procedure, it becomes clear that, unless otherwise ordered, a party is limited to forty (40) discovery requests unless that party files a motion and memorandum establishing good cause for additional discovery. However, that Motion may not be denied unless the requesting party’s discovery request violates one of the three provisions contained in Tenn. R. Civ. Pro. 26.02.

**THE CONSUMER ADVOCATE RESPECTFULLY SUBMITS IT HAS GOOD CAUSE
TO REQUEST MORE THAN FORTY DISCOVERY REQUESTS**

The Consumer Advocate's *Motion for Leave to Issue More Than Forty Discovery Requests* is certainly backed by "Good Cause" as required by the Authority, R. TRA § 1220-1-2-.11. The Consumer Advocate's additional discovery requests meet this standard.

In this matter, TAWC is requesting a \$10.6 million increase annually, representing a 25% increase in the rates paid by the households and businesses of Chattanooga and the surrounding areas. The process of utility rate-making is complex and involves numerous and often contested issues. *Tennessee Pub. Serv. Comm'n v. Nashville Gas Co.*, 551 S.W.2d 315, 318 (Tenn. 1977). The issues raised in the Petition and testimony filed by TAWC in this docket cover a multitude of complex issues including determination of the proper test year, the Company's proposed revenue normalization adjustment, management fees, double leveraging, return on equity, rate case expense, production costs, infrastructure replacement, various single issue tracking mechanisms and operating and maintenance expenses, just to name a select few. This list does not even attempt to identify all of the major issues in this case, and most of these issues have multiple sub-issues which may prove contentious.

When the Consumer Advocate intervenes in a rate case its aim is to present a complete case to the TRA. By "complete case" the Consumer Advocate means a case that not merely opposes selected parts of a company's case, but one that presents a virtually parallel case that sets forth an alternative number for every number presented by the company.

By presenting a complete case the Consumer Advocate believes it is not only representing consumers to the fullest extent possible but also providing a useful framework for the TRA as it works to decide the case. In every TAWC rate case in the last decade, the Authority has utilized or adopted many of the Consumer Advocate's proposals and analysis in

the agency's final decisions. It should be noted that pre-filed testimony is the only procedural vehicle available to the Consumer Advocate to provide evidence and analysis prior to the hearing in this matter. Without additional discovery, the Consumer Advocate will be hampered in representing the interests of Chattanooga's households and businesses. Without sufficient discovery, the Consumer Advocate cannot test the veracity of TAWC's proposed rate increase and may not have fully prepared positions until after the filing of pre-filed testimony. Discovery and pre-filed testimony presents the only opportunity for consumers to receive due process with a representative and evidentiary voice regarding the rates charged them by TAWC prior to the hearing. Moreover, additional discovery is necessary in order for the Consumer Advocate to take informed positions in representing consumers in any potential settlement negotiations.

The Consumer Advocate works diligently to put forth a complete case based on a factual record in order to adequately represent the interests of consumers. In summary, we believe a forty question or even an eighty question limit in this docket will diminish the Consumer Advocate's ability to present the best case it can, as well its ability to provide material we believe is vital to the TRA for the protection of Tennessee consumers. Finally, in the event of a dispute over a discovery request, the Consumer Advocate is willing to make available the consultants it employs to work informally with the Company's responding witnesses in order to resolve any dispute as it has in other dockets.

ABUSE OR OPRESSION IN DISCOVERY

After a party has established good cause under the Authority's rules and Tennessee law, these additional discovery requests should only be denied if they are found to abusive or oppressive to TAWC, Tenn. Code Ann. § 4-5-311(c). As discussed more fully above, the "abusive or oppressive" standard must be defined in accordance with the Tennessee Rules of

Civil Procedure; therefore, in order for these discovery requests to be “abusive or oppressive” they must violate one of the three situations specified in Tenn. R. Civ. Pro. 26.02.

A. Unreasonably Cumulative or Duplicative

Under the first prong of Tenn. R. Civ. Pro. 26.02, the Authority may limit discovery if “the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive.” The Consumer Advocate has taken every precaution to ensure that its discovery is not cumulative or duplicative, and to obtain the information from other sources when possible.

The Consumer Advocate has reviewed the information filed by TAWC of the Authority and attempted to avoid asking any questions for which the information is readily available. Furthermore, to the extent possible, the Consumer Advocate has informed the City of Chattanooga in an effort to avoid overlapping with the information requested by those parties. In short, our office has taken all reasonable steps to ensure that its questions are not duplicative or cumulative.

Furthermore, the Consumer Advocate has used publicly available data whenever possible, rather than requesting that information directly from TAWC. Second, where information is believed to be in the possession of the TRA, the Consumer Advocate is preparing a Records Requests to the Authority rather than discovery requests to the Company. Only after attempting to obtain all necessary information from other sources has the Consumer Advocate issued additional data requests to TAWC.

In the event that requested data has been produced in response to another question or is more readily available from some other source, the Consumer Advocate is certainly willing to

alter, amend or withdraw the offending discovery request to ensure that they are “not cumulative or duplicative, and to obtain the information from other sources when possible.” *Id.*

B. Ample Opportunity

The second circumstance under which a judge or hearing officer may limit discovery occurs when “the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought,” Tenn. R. Civ. Pro. 26.02. TRA Docket 10-00189 was only filed on June 1, 2012. Therefore, there has been no opportunity for discovery in this action whatsoever prior to the written discovery in question. Clearly, the Consumer Advocate has not had “ample opportunity” for discovery in this action prior to written discovery.

C. Unduly Burdensome or Expensive Taking Into Account the Needs of the Case

The final situation in which the Authority may deny the Consumer Advocate’s additional discovery requests exists “if 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,” Tenn. R. Civ. Pro. 26.02. Under this test, the determination of whether or not the Consumer Advocate’s discovery requests are unduly burdensome or expensive depends on the “needs of the case,” “amount in controversy,” “limitations on the parties’ resources,” and the “importance of the issues at stake.” *Id.*

First, we must analyze the discovery requests in question as they relate to the “needs of the case.” As with most large rate cases filed by public utilities, TAWC’s initial filing is voluminous. The Consumer Advocate is responsible for reviewing hundreds of pages of testimony, data, and other information filed by TAWC; our office is then charged with putting on a complete alternative rate case not only challenging any unreasonable figures presented by the Company, but also with presenting what the correct figures should be. The Consumer Advocate

has submitted a total of only 99 requests to date. In light of the Consumer Advocate's role in this matter, its pending discovery requests are certainly reasonable in relation to "the needs of the case."

Second, the Consumer Advocate's discovery requests must be evaluated in light of the "amount in controversy." *Id.* In this matter, TAWC has requested a rate increase of approximately \$10.6 million and additional tracking mechanisms that can increase future rates outside of this rate case. Certainly, there is little doubt a claim of \$10.6 million dollars in and of itself is a large amount in dispute. However, this amount is multiplied in a rate-making setting. This is not simply a matter of \$10.6 million, but rather TAWC is seeking an extra \$10.6 million *a year* from the households and businesses of Chattanooga through increased rates. The nearly \$10.6 million increase requested in this case is extremely large in light of the outcomes of the five rate cases previously filed by the Company since 2003.

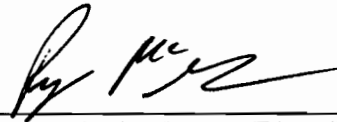
Next, the Consumer Advocate's discovery requests must be considered with regard to any "limitations on party resources." As a subsidiary of American Water Works, Inc., TAWC is part of a large and sophisticated corporate system. Service company employees serve as Treasurers of affiliates like TAWC and indeed service company employees provide the bulk of the expert testimony in rates case before the TRA and other jurisdictions. It is important to note the extensive discovery propounded on TAWC affiliates in rate cases in other jurisdictions in context with the Consumer Advocate's discovery requests. In Case 2010-000036, Kentucky American Water Company had few objections to responding to, excluding subparts, 602 discovery requests from the Kentucky Consumer Advocate and in excess of 100 from the Kentucky Commission. In a 2010 rate case in West Virginia in docket 10-0920-W-42T, West

Virginia American Water Company substantially answered more than 350 discovery requests (not including subparts) from the West Virginia Consumer Advocate.

CONCLUSION

For all of the foregoing reasons, the Consumer Advocate asks that the Authority grant its *Motion for Leave to Issue More Than Forty Discovery Requests*.

RESPECTFULLY SUBMITTED



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Dated: July 6, 2012.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition to Intervene was served via U.S. Mail or electronic mail upon:

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This the 6th day of July, 2012.



RYAN L. MCGEHEE