

NASHVILLE, TENNESSEE

IN RE:

**JOINT PETITION OF TENNESSEE-AMERICAN WATER
COMPANY, THE CITY OF WHITWELL, TENNESSEE,
AND THE TOWN OF POWELLS CROSSROADS,
TENNESSEE, FOR APPROVAL OF A PURCHASE
AGREEMENT AND A WATER FRANCHISE
AGREEMENT AND FOR THE ISSUANCE OF A
CERTIFICATE OF CONVENIENCE AND NECESSITY**

DOCKET NO.
12-00157

**HEARING OFFICER'S ORDER
DENYING CONSUMER ADVOCATE'S MOTION TO COMPEL DISCOVERY
AND GRANTING, IN PART, & DENYING, IN PART, CONSUMER ADVOCATE'S
MOTION TO RECONSIDER PROCEDURAL SCHEDULE
AND ENTERING AMENDED PROCEDURAL SCHEDULE**

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (“Authority” or “TRA”) upon a *Motion to Compel Tennessee American Water Company to Answer Data Requests to Provide Itemized Detail of Due Diligence Costs Requested for Recovery* (“*Motion to Compel Discovery*”) and a *Motion to Reconsider the Authority’s Requirement of Consumer Advocate’s Filing Pre-Hearing Brief before Petitioner* (“*Motion to Reconsider Procedural Schedule*”) filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General (“Consumer Advocate”) on April 3, 2013 and April 5, 2013, respectively. The *Tennessee American Water Company’s Response to the Motion to Compel* filed by Consumer Advocate and Protection Division of the Office of the Attorney General (“*Response to Motion to Compel*”) was filed on April 5, 2013. The parties presented their positions on the motions during a status conference held on April 8, 2013.

APRIL 8, 2013 STATUS CONFERENCE

In accordance with the Procedural Schedule issued on February 28, 2013, and as noticed on April 5, 2013, a Status Conference was convened at approximately 2:30 p.m. CDT on April 8, 2013, in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee. The parties in attendance were as follows:

For TAWC:

Junaid A. Odubeko, Esq. and Melvin J. Malone, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC, 1200 One Nashville Place, 150 Fourth Avenue North, Nashville, Tennessee 37219; and

For Consumer Advocate:

Charlena S. Aumiller, Esq., Office of the Attorney General, Consumer Advocate and Protection Division, P.O. Box 20207, Nashville, Tennessee 37202.

During the Status Conference, the Consumer Advocate and Tennessee American Water Company ("TAWC") (collectively, the "Parties") each presented its positions on the Consumer Advocate's *Motion to Compel Discovery* and *Motion to Reconsider Procedural Schedule*. Upon conclusion of the parties' presentations and after each party had an opportunity to respond to questions, the Hearing Officer denied the *Motion to Compel Discovery*. In addition, following an extended discussion with the parties concerning the *Motion to Reconsider Procedural Schedule*, the Hearing Officer ruled in part, and postponed for further consideration the additional procedural matters raised in the motion.

I. Motion to Compel Discovery

Consumer Advocate's Request

In its *Motion to Compel Discovery*, the Consumer Advocate moves for an order compelling TAWC to respond more fully, with additional detail, to Data Request No. 16 in its *First Discovery Request of the Consumer Advocate and Protection Division to Tennessee*

American Water Company.¹ The Consumer Advocate notes that, in its response to Data Request No. 16, TAWC provided a summary of the acquisition and transaction review charges (“due-diligence costs”) incurred by TAWC to-date, and those costs that it estimates it will incur through the closing on its purchase of the Whitwell water system, but it has not provided the breakdown or itemized listing of these costs, for which it seeks recovery, as requested by the Consumer Advocate.²

The Consumer Advocate contends that fairness dictates that the TAWC produce a comprehensive itemization of its due-diligence costs, as such information is necessary for the Consumer Advocate’s evaluation of TAWC’s request to defer and recover such costs, and to verify that the costs are reasonable, necessary, and prudent.³ Moreover, the Consumer Advocate asserts that its request for an itemization of the costs now, in this docket, instead of later, in a future docket when the costs are being considered for recovery, is necessary to ensure that evidence is obtained while it is readily available and to avoid the possibility that such evidence will become stale or lost.⁴ In addition, the Consumer Advocate states that an itemized cost listing that provides a high level of detail will allow it to provide complete arguments in its pre-hearing brief as to whether the TRA should allow due-diligence costs to be deferred or included in any deferred accounting. Without specific detail of the due-diligence costs, the Consumer Advocate asserts that it may be handicapped in its arguments.⁵

¹ Consumer Advocate’s Data Request No. 16 states as follows:

Provide a breakdown of the costs listed in TAWC’s response to TRA Data Request #2, including the source, amount (actual if already incurred; estimated if anticipated), and specific purpose for the cost (e.g., title searches). (*See First Discovery Request of the Consumer Advocate and Protection Division to Tennessee American Water Company*, Data Request No. 16, p. 8 (March 12, 2013)).

² *Motion to Compel Discovery*, pp. 3-4 (April 3, 2013).

³ *Motion to Compel Discovery*, pp. 3-4 (April 3, 2013).

⁴ *Motion to Compel Discovery*, pp. 2 & 9 (April 3, 2013).

⁵ *Motion to Compel Discovery*, pp. 2 & 9 (April 3, 2013).

Further, the Consumer Advocate states that TAWC has refused to provide the itemization because such detail might reveal confidential information in violation of the attorney-client privilege.⁶ Opposing the invocation of privilege in these circumstances, the Consumer Advocate contends that its request is not only relevant to the material issue of whether attorney's fees are recoverable in rates, but also because TAWC is obligated to produce evidence to substantiate the reimbursement of the costs that it seeks, including attorney's fees, and must prove that such costs benefit ratepayers.⁷ Thus, the Consumer Advocate asserts that TAWC is barred from invoking privilege so as to shield disclosure of its itemized fee billing records, which provide evidence of the reasonableness of the fees that it seeks to recover from ratepayers.⁸ The attorney-client privilege is narrow and does not protect all communications, but only confidential communications that are specific to the client. As such, the Consumer Advocate asserts that several categories of costs in TAWC's summary appear to fall outside of the confidentiality parameters of the attorney-client privilege.⁹ Finally, to the extent that the records of attorney fees provide relevant evidence as to TAWC's request for recovery, the Consumer Advocate contends that such privilege is waived.¹⁰

During the Status Conference, the Consumer Advocate further asserted that TAWC's due-diligence costs are known and measurable at this time. As such, it should not be required to wait until TAWC has actually incurred all of its costs and requested recovery before obtaining discovery.¹¹ In the event that the motion is denied, the Consumer Advocate asked that the Hearing Officer require TAWC to proffer an example of the evidentiary proof that it anticipates

⁶ *Motion to Compel Discovery*, p. 3 (April 3, 2013).

⁷ *Motion to Compel Discovery*, pp. 4-6 (April 3, 2013).

⁸ *Motion to Compel Discovery*, p. 6 (April 3, 2013).

⁹ *Motion to Compel Discovery*, pp. 7-8 (April 3, 2013).

¹⁰ *Motion to Compel Discovery*, pp. 8-9 (April 3, 2013).

¹¹ Transcript of Proceedings, pp. 18-19 (April 8, 2013).

producing to substantiate its future request for recovery of due diligence costs, using approximately ten of its currently known costs, so as to demonstrate the level or degree of detail in which it intends to record and track the costs.¹² The Consumer Advocate contended that this limited relief was appropriate in order to preempt a possible future disagreement between the parties concerning the sufficiency of detail needed to be presented into evidence concerning due diligence costs.¹³ Finally, the Consumer Advocate asserted that whether the Authority should allow deferral of due diligence and legal fees for future consideration of recovery was a matter of first impression before the Authority.¹⁴

TAWC's Response

In its *Response to Motion to Compel*, TAWC states that in its response to the TRA Staff's Data Request No. 2, which requested that the costs it proposed to defer for possible future recovery be identified and itemized, it listed "due diligence," "title work," and "document preparation," as anticipated expenses and estimated \$55,000 in potential costs.¹⁵ Further, responding to the Consumer Advocate's Data Request No. 16, which requested a breakdown that gave additional detail of its anticipated costs, TAWC states that it provided more information of its anticipated costs, including the names of the vendors, a brief description of the work performed, and the cost of the work.¹⁶ Despite TAWC's response, the Consumer Advocate sought further detail and clarified its request, asking for even more detail, and as an example of

¹² Transcript of Proceedings, pp. 21-22 (April 8, 2013).

¹³ Transcript of Proceedings, pp. 21-22 (April 8, 2013).

¹⁴ Transcript of Proceedings, pp. 25-26 (April 8, 2013).

¹⁵ *Response to Motion to Compel*, p. 3 (April 5, 2013); see also *TAWC Responses to the TRA's January 22, 2013 Data Requests*, Request No. 2, p. 28 of 47 (January 28, 2013).

¹⁶ *Response to Motion to Compel*, p. 3 (April 5, 2013); see also *TAWC's First Responses to Data Requests by Consumer Advocate*, Data Request No. 16, p. 18 (March 13, 2013).

what it wants TAWC to produce, attached a billing record that contained a detailed, line-by-line narrative description of legal services rendered in an unrelated docket (Docket No. 12-00030).¹⁷

TAWC contends that it responded to the previous requests in an effort to cooperate, but the Consumer Advocate's continued insistence that TAWC produce a comprehensive and detailed itemization of its due-diligence costs on its acquisition of the Whitwell water system is premature and not relevant to the accounting and rate-base treatment sought by TAWC in its petition in this docket.¹⁸ Specifically, TAWC contends that its *Expedited Joint Petition* seeks approval of a certain regulatory treatment of its due-diligence costs, but does not seek a rate change or a determination on the actual recovery of such costs.¹⁹ Further, the information concerning TAWC's due-diligence costs is incomplete and will remain so until after the closing on the purchase transaction. When, in its next rate case, TAWC seeks recovery of the costs, it acknowledges that the onus of producing evidence sufficient to support a potential recovery of these costs will be upon TAWC, and reasons that this burden incentivizes TAWC to preserve and maintain as much evidence of its costs as possible.²⁰

In addition, TAWC asserts that, as set forth in its proposed issues list, the Consumer Advocate's challenge of whether due-diligence costs are properly included as a regulatory expense is purely a legal issue. As such, an extensive and detailed factual itemization of costs is not needed in order for the Consumer Advocate to prepare and complete its arguments for its pre-hearing legal brief.²¹ For these reasons, TAWC contends that the Consumer Advocate's request is premature and not relevant to the matters under consideration in this docket, and, thus,

¹⁷ *Response to Motion to Compel*, pp. 3-4 (April 5, 2013).

¹⁸ *Response to Motion to Compel*, pp. 1-2 (April 5, 2013).

¹⁹ *Response to Motion to Compel*, pp. 2 & 4-6 (April 5, 2013); see also *Expedited Joint Petition of Tennessee American Water Company, the City of Whitwell, Tennessee, and the Town of Powells Crossroads, Tennessee for Approval of a Purchase Agreement and a Water Franchise Agreement and for Issuance of a Certificate of Convenience and Necessity* (December 27, 2012) ("*Expedited Joint Petition*").

²⁰ *Response to Motion to Compel*, p. 5 (April 5, 2013).

²¹ *Response to Motion to Compel*, pp. 5-6 (April 5, 2013).

should be denied. In the alternative, TAWC asserts that the attorney-client privilege may indeed protect much of the information requested by the Consumer Advocate. Therefore, TAWC requests to reserve its right to argue, in a future docket or proceeding wherein it requests recovery of attorney's fees as part of due-diligence costs, whether the privilege applies to such information.²²

During the Status Conference, TAWC affirmed that it was not requesting reimbursement of due-diligence costs that it incurs as a result of the acquisition of the Whitwell water system in this docket. TAWC stated that it was, however, asking the Authority to permit it to treat those costs as a regulatory asset for accounting purposes, to track and accumulate them in a capital account and defer consideration on the appropriateness of the Company's recovery or reimbursement of the costs to a future rate case proceeding.²³ Further, responding to the Consumer Advocate's alternative request for a proffer of proof on the evidentiary detail of its due-diligence costs, TAWC stated that if the Hearing Officer were to consider such a request, it would like an opportunity to fashion a remedy to protect the information, as some may be protected under privilege.²⁴

Law - General Discovery Principles

Pursuant to Authority Rule 1220-1-2-.11, when informal discovery is not practicable, 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.²⁵ Through these instruments, a party "may obtain discovery regarding any matter, not privileged, which is

²² *Response to Motion to Compel*, pp. 6-7 (April 5, 2013).

²³ Transcript of Proceedings, pp. 22-27 (April 8, 2013).

²⁴ Transcript of Proceedings, pp. 27-28 (April 8, 2013).

²⁵ Tenn. R. Civ. P. 26.01.

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.”²⁶ The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.²⁷ 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 that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”²⁸

Further, parties may learn of information related to books, documents or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.²⁹ However, Tennessee’s rules do provide some limitations. Rule 26.02 permits a court to limit discovery under certain circumstances, such as undue burden, and Rule 26.03 permits a court to issue protective orders as justice requires.³⁰ 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).³¹

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.³² Finally, the Court of Appeals has held, “decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”³³

²⁶ *Id.* at 26.02(1).

²⁷ *Id.*

²⁸ *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)).

²⁹ Tenn. R. Civ. P. 26.02(1).

³⁰ *Id.* at 26.02 & .03.

³¹ *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

³² *Id.* at 37.01(2).

Findings & Conclusions

In its *Expedited Joint Petition*, TAWC requests that the Authority allow it to treat its due-diligence costs as a regulatory asset for accounting purposes:

Approve *accounting and rate base treatments* that reflect the full purchase price, plus the acquisition and transaction costs in TAWC's net original cost rate base or other guidance that shows that future rate base determinations will be consistent with the value of the full purchase price plus acquisition and transactions costs (*emphasis added*).³⁴

In the pre-filed testimony of Mr. Daniel Bickerton, Director of Business Development for American Water Works Service Company, filed by TAWC in support of its *Expedited Joint Petition*, TAWC amends or clarifies its request when it states that it seeks authorization to track and defer its due-diligence expenses, and acknowledges that recovery or reimbursement of its costs should be considered in a future rate case proceeding:

TAWC is seeking authorization for future recovery of various expenses necessary to conduct due diligence and promulgate the closing of this transaction estimated to total \$55,000. TAWC is proposing that these expenses be deferred until closing and upon closing be accounted for as a regulatory asset to be amortized over the remaining life of the Whitwell assets. *TAWC recognizes that the [TRA's] authorization would not be an approval of the costs themselves, which [such approval] would be necessary after review in TAWC's next rate case (emphasis added).*³⁵

When asked during the Status Conference to clarify the extent of its request for due-diligence expenses, TAWC affirmed that, in this docket, it seeks only permission to track, defer, and treat those costs as a regulatory asset for accounting purposes. TAWC further asserted that, as recovery of costs is an appropriate consideration in the context of a rate case proceeding. As such, it intends to raise the issue of reimbursement of its due-diligence expenses in its next rate

³³ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

³⁴ *Expedited Joint Petition*, p. 9 (December 27, 2012).

³⁵ Pre-filed Direct Testimony of Daniel P. Bickerton, p. 3, lines 84-95, filed as an attachment to the *Expedited Joint Petition* (December 27, 2012).

case, and its request in this docket is limited and does not extend to such a determination on the actual costs themselves.

After due consideration of the filings and the arguments of the parties during the Status Conference, the Hearing Officer found that TAWC has not requested in this docket reimbursement or recovery of the costs that it has incurred, or will incur, as a result of performing due-diligence in acquiring the Whitwell water system. In addition, the costs are only preliminary at this time, and will not be complete or final until closing of the purchase transaction. Though discovery is liberally construed, the actual amounts of the costs incurred by the Company for due-diligence are not at issue in this docket.

Furthermore, the Company has responded to the discovery requests of both the TRA Staff and the Consumer Advocate and produced information concerning the types and estimated amounts of costs it anticipates incurring as a result of its purchase of the water system. Although the Consumer Advocate seeks even greater detail than that which TAWC has already produced, its renewed and further clarified request for a breakdown of expenses in the form of a comprehensively itemized listing with descriptive narratives is not relevant, nor reasonably calculated to lead to admissible evidence in this docket. Thus, the Hearing Officer denied the Consumer Advocate's request to require TAWC to produce additional information or a more comprehensive, itemized breakdown of its current and anticipated due-diligence costs.

In addition, the Hearing Officer found no merit in the Consumer Advocate's arguments that, in the alternative, TAWC should be required to maintain a certain minimum level of detail in its records related to the due-diligence costs that it incurs due to the acquisition. In exercising its statutory duty to fix just and reasonable rates, the TRA is required to make determinations regarding whether certain expenses incurred by the public utility are reasonable and prudent and

should be recoverable. Nevertheless, in such a proceeding, wherein TAWC seeks reimbursement of costs, whether for due-diligence or other expenses, the burden rests firmly upon TAWC to sufficiently demonstrate and prove that its costs are reasonable, necessary and prudent, and should be included for recovery in rates. Should TAWC fail to carry its burden, then its request for costs recovery would be properly denied. Regardless, a determination on the sufficiency of the evidence and the appropriateness of recovery of the requested costs is best made at the time, and in the particular proceeding, when those costs are at issue.

Thus, during the Status Conference, the Hearing Officer denied the Consumer Advocate's alternative request to require that TAWC proffer an example of the level or degree of detail in which it intends to record and track its due-diligence costs, so as to demonstrate the sufficiency of the evidentiary proof that it might produce in order to substantiate a future request for recovery of those costs. The Hearing Officer also declined the Consumer Advocate's request that the Hearing Officer specify or otherwise elaborate on what the level of detail might constitute evidence sufficient to satisfy the Company's burden of proof concerning such costs.

For the foregoing reasons, the Hearing Officer concluded that the information sought by the Consumer Advocate is neither relevant to the issues under review in the pending action, nor reasonably calculated to lead to admissible evidence in this docket and, therefore, denied the *Motion to Compel*.

II. Motion to Reconsider Procedural Schedule

Consumer Advocate's Request

In its *Motion to Reconsider Procedural Schedule*, the Consumer Advocate asserts that the current procedural schedule, which provides for the filing of legal briefs in advance of the hearing on the merits (characterized as "pre-hearing briefs" by the Consumer Advocate), gives

an unfair advantage to TAWC in the presentation of its case.³⁶ First, the Consumer Advocate contends that the timing of the parties' filings in the procedural schedule, which calls for the Consumer Advocate's pre-filed direct testimony and/or legal brief to be filed before TAWC files its Rebuttal Pre-Filed Testimony, is unduly prejudicial because it thwarts the Consumer Advocate's access and opportunity to review and consider all of the evidence that will be pre-filed in the record.³⁷ Next, the Consumer Advocate contends that it is disadvantaged by the requirement that legal briefs be filed in consecutive order, instead of simultaneously; with the Consumer Advocate filing the initial brief, followed by TAWC's reply legal brief.³⁸

According to the Consumer Advocate, the timing and order of the procedural schedule improperly forces it to reveal work product, which TAWC may utilize in the formulation of its arguments and brief.³⁹ In addition, the consecutive filing of briefs provides TAWC an opportunity to respond in writing to the arguments presented in the Consumer Advocate's legal brief, but fails to afford the Consumer Advocate a chance to file a written counter-response, thereby compounding the prejudice inflicted upon the Consumer Advocate.⁴⁰ Conceding that inequity may be unavoidable during oral arguments or the filing of testimony, the Consumer Advocate asserts that the simultaneous filing of briefs is implicitly fair:

When making oral arguments, both parties cannot make arguments at the same time because the tribunal can only hear one person at a time. The same is not true for written briefs. The brief is different than filing testimony. Testimony inserts new facts in the record. The briefs are the work product of attorneys' legal analysis of applying law to facts in the record. Indeed, same-day filing of post-hearing briefs for all parties is acceptable because all facts are already on the

³⁶ *Motion to Reconsider Procedural Schedule*, p. 1 (April 5, 2013).

³⁷ *Motion to Reconsider Procedural Schedule*, pp. 2-3 (April 5, 2013).

³⁸ *Motion to Reconsider Procedural Schedule*, p. 3 (April 5, 2013).

³⁹ *Motion to Reconsider Procedural Schedule*, pp. 2-3 (April 5, 2013).

⁴⁰ *Motion to Reconsider Procedural Schedule*, On this point, the Consumer Advocate recounts its understanding of the parties' discussion with the Hearing Officer concerning the procedural schedule that occurred during the unrecorded telephone conference on March 21, 2013, and asserts that, the Hearing Officer in declining to set a deadline for the filing of a reply legal brief, indicated that, "the Consumer Advocate can raise any replies during its oral arguments before the directors."

record and the attorneys have access to all the same law. . . . As for access to the law, both parties have the same access to or opportunity to research the law so there is no reason to require the Consumer Advocate to file its brief before TAWC's brief. In this case, the Consumer Advocate has already narrowed the issues by filing the Proposed Issues List. In addition to this proposed issues list, the Consumer Advocate has communicated its concerns with TAWC's request for accounting and ratemaking treatment and the deferred accounting numerous times. Thus, TAWC cannot claim it is unaware of the Consumer Advocate's concerns. Rather, TAWC just disagrees with the Consumer Advocate.⁴¹

Without an opportunity to file a reply, the Consumer Advocate contends that TAWC is likely to raise new arguments that it did not previously communicate or reveal to the Consumer Advocate. The Consumer Advocate asserts that in such instance its only recourse is to respond to TAWC's new arguments during oral arguments, and bemoans the inherent lack of fairness in such a procedural process.⁴²

During the Status Conference, the Consumer Advocate renewed its objections to the Procedural Schedule and reiterated its contentions that the schedule was unfair and that the sequential filing of legal briefs would have a prejudicial effect on its case.⁴³ Further, although uncertain during the initial status conference held on March 11, 2013, the Consumer Advocate clarified for the record that it now intended to file both pre-filed testimony and a legal brief.⁴⁴ In addition, the Consumer Advocate indicated that in its legal brief it anticipated presenting arguments that could overlap both factual and legal issues.⁴⁵

TAWC's Response

Due to the late timing of the filing of the *Motion to Reconsider Procedural Schedule*, TAWC did not file a written response in the docket file, but indicated its readiness to address the

⁴¹ *Motion to Reconsider Procedural Schedule*, pp. 3-4 (April 5, 2013).

⁴² *Motion to Reconsider Procedural Schedule*, pp. 4-5 (April 5, 2013).

⁴³ Transcript of Proceedings, pp. 34-36 (April 8, 2013).

⁴⁴ Transcript of Proceedings, p. 51 (April 8, 2013).

⁴⁵ Transcript of Proceedings, pp. 44-50 (April 8, 2013).

motion during the Status Conference.⁴⁶ In opposing the motion, TAWC asserted that it had set forth the substance of its entire case in its initial filings, and through discovery had supplied even more information concerning its requests.⁴⁷ TAWC reminded the Hearing Officer that legal briefs were provided in the Procedural Schedule, prior to the Hearing, because during the initial status conference the Consumer Advocate was uncertain whether or not it would file testimony or preferred to file briefs as to the issues it intends to raise for consideration.⁴⁸ As such, TAWC contended that, while the Consumer Advocate filed an issues list describing the issues it intends to raise during the course of the proceedings, the information provided in the issues list, alone, is insufficient notice from which to file a response.⁴⁹

TAWC asserted that because the Consumer Advocate's legal brief would set forth in a more comprehensive manner its position on the legal issues it will raise in the docket, fairness and logic require that the Consumer Advocate file the initial legal brief and TAWC file a response.⁵⁰ In addition, TAWC stated that the issues list arguably contains issues of both law and fact, and, to the extent that the Consumer Advocate's legal brief contains argument that intertwines factual matters, TAWC should be permitted to provide rebuttal.⁵¹ As the petitioner, and thus, the ultimate proponent in the proceeding, TAWC noted its concern that it should be permitted to have the final say in presenting arguments before the panel.⁵²

Findings & Conclusions

Following the extensive discussion of the concerns of the Consumer Advocate as set forth in its *Motion to Reconsider Procedural Schedule* during the Status Conference, the Hearing

⁴⁶ Transcript of Proceedings, p. 31 (April 8, 2013).

⁴⁷ Transcript of Proceedings, p. 33 (April 8, 2013).

⁴⁸ Transcript of Proceedings, p. 33 (April 8, 2013).

⁴⁹ Transcript of Proceedings, p. 33-34 (April 8, 2013).

⁵⁰ Transcript of Proceedings, p. 33-34 (April 8, 2013).

⁵¹ Transcript of Proceedings, p. 40 (April 8, 2013).

⁵² Transcript of Proceedings, pp. 40-42 (April 8, 2013).

Officer rendered a partial initial ruling and took the matter under advisement. Reflecting upon that discussion, the Hearing Officer finds that the flexibility incorporated into the procedural schedule in an effort to give the Consumer Advocate time to determine whether it would file pre-filed testimony or not is now longer needed.⁵³ During the Status Conference, the Consumer Advocate confirmed that it will file pre-filed testimony.⁵⁴ It also seems apparent to the Hearing Officer that the briefs that the Consumer Advocate wishes to file are not in the nature of legal briefs, exclusively, but are more akin to post-hearing briefs, in which it is appropriate to include both factual and legal arguments on the evidence. Therefore, in light of these developments, the Hearing Officer concludes these proceedings are better served by eliminating the Legal Briefs from the Procedural Schedule. Instead, the parties should be given the opportunity to simultaneously file initial and reply post-hearing briefs.

For the foregoing reasons, the Hearing Officer affirms the earlier ruling granting, in part, and denying, in part, the *Motion to Reconsider Procedural Schedule*, rendered during the Status Conference, and further, modifies the Procedural Schedule and enters an *Amended Procedural Schedule* that reflects the changes discussed herein above.⁵⁵

IT IS THEREFORE ORDERED THAT:

1. The *Motion to Compel Tennessee American Water Company to Answer Data Requests to Provide Itemized Detail of Due Diligence Costs Requested for Recovery* filed on April 3, 2013, by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney

⁵³ During the initial Status Conference held on March 11, 2013, the Consumer Advocate was uncertain whether it would file pre-filed testimony in the docket file, and stated that it was “possible that [the Consumer Advocate] wouldn’t need to [file testimony] and . . . it might just be legal arguments before the directors. . .” In attempting to establish a procedural schedule that would accommodate the Company’s request for expedited consideration of its petition due to the time-sensitive nature of the transactions and permit the Consumer Advocate to prepare its case as it deemed appropriate, the Hearing Officer included some flexibility in the schedule by providing the Consumer Advocate the opportunity to “pre-filed testimony and/or an initial legal brief.”


⁵⁴ Transcript of Proceedings, p. 51 (April 8, 2013).

⁵⁵ On April 9, 2013, the parties were provided via email the *Amended Procedural Schedule*, herein Exhibit A, and have been proceeding according to the deadlines set forth therein.

General is DENIED.

2. The *Motion to Reconsider the Authority's Requirement of Consumer Advocate's Filing Pre-Hearing Brief before Petitioner* filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General on April 5, 2013, insofar as it seeks the filing of pre-filed testimony before the filing of briefs is GRANTED, and as to its request for the simultaneous filing of *pre-hearing* briefs is DENIED.

3. The Procedural Schedule is modified as set forth in the *Amended Procedural Schedule* attached to this Order as **Exhibit A**, and is hereby adopted in full force and effect.


Kelly Cashman-Grams, Hearing Officer

Amended Procedural Schedule – Docket No. 12-00157

(Sent to parties in advance of the Hearing Officer's Order on April 9, 2013)

Due Date	Filing/Action
April 12, 2013	Pre-Filed Direct Testimony of Consumer Advocate*
April 19, 2013	Pre-Filed Rebuttal Testimony of Utility Petitioner*
April 24, 2013	Pre-Hearing Motions**
April 26, 2013	Responses to Pre-Hearing Motions**
April 30, 2013	Pre-Hearing Conference @ 1:00 p.m. (CDT)
May 6, 2013	Hearing on the Merits (start time TBD)
10 days after receipt of Hearing Transcript	Initial Post-Hearing Briefs of the Parties*
5 days after Initial Post-Hearing Briefs or May 31, 2013 (whichever occurs sooner)	Reply Post-Hearing Briefs of the Parties* (LIMITED to 15 pages)

* To be filed in the docket file **no later than 4:00 p.m. CST** on the designated due date.

** Must be filed in the docket file **by 2:00 p.m. CST** on the designated due date.

Exhibit A