

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 9, 2015

IN RE:)	
)	
PETITION OF TENNESSEE WASTEWATER)	
SYSTEMS, INC. TO AMEND THEIR CCN TO)	DOCKET NO.
EXPAND ITS SERVICE AREA TO INCLUDE A)	15-00025
PORTION OF WILLIAMSON COUNTY IN)	
TENNESSEE, KNOWN AS THE ENCLAVE AT)	
DOVE LAKE)	

ORDER DENYING MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL
DISCOVERY REQUEST

This matter is before the Hearing Officer of the Tennessee Regulatory Authority (“Authority” or “TRA”) for consideration of the *Motion for Leave to File Second Supplemental Discovery Request* (“CAPD Motion”) filed by the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate” or “CAPD”) on June 11, 2015. On June 17, 2015, Tennessee Wastewater Systems, Inc. (“TWSI”) filed its *Response to Motion of Consumer Advocate to File Second Supplemental Discovery Request* (“TWSI Response”) objecting to the motion. The CAPD filed *The Consumer Advocate’s Response to TWSI’s Objection to the Consumer Advocate’s Motion to File Second Supplemental Discovery Request* (“CAPD Response”) on June 23, 2015.

CAPD MOTION

In its motion, the CAPD seeks permission to issue a second supplemental discovery request to TWSI that involves “TWSI’s future trade or sale of capacity if the amendment to its CCN is

granted.”¹ The Consumer Advocate states that “[b]ecause TWSI’s dealings in capacity, especially among its affiliates, may generate profits that could lower rates, consumers and the Authority have an interest [in] ensuring the TWSI will only engage in capacity sales or trades that are approved by the TRA.”² The Consumer Advocate contends that “any revenue from the sale of capacity should be counted as revenue to TWSI. But if the capacity is being sold by an affiliate there is a possibility that without TRA oversight that revenue would not go to TWSI but to the unregulated affiliate.”³

TWSI RESPONSE

In its Response, TWSI objects to the discovery question because “the proposed question is not a proper discovery request. The question does not seek the discovery of any fact but asks TWSI to make a promise regarding hypothetical, future conduct.”⁴ TWSI argues that the purpose of discovery under Tenn.R.Civ.P. 26.02 is to prevent trial by ambush and the purpose of discovery is to allow litigants to prepare for trial free from surprise.⁵ According to TWSI, the discovery question the CAPD seeks to ask is not a question about a fact at all and is an improper discovery question and the *CAPD Motion* should be denied.⁶

CAPD RESPONSE

The Consumer Advocate maintains that its second supplemental discovery question should be allowed because it is relevant and no privilege has been asserted, and Tenn.R.Civ.P. 26.02 establishes that relevance and privilege are the standards for assessing the scope of discovery.⁷ The CAPD maintains that the discovery question is relevant because if TWSI will not rule out a diversion of revenue by selling capacity through an unregulated affiliate, then its petition to amend

¹ *CAPD Motion*, p. 1 (June 11, 2015).

² *Id.*

³ *Id.*

⁴ *TWSI Response*, p. 1 (June 17, 2015).

⁵ *Id.* at 1-2.

⁶ *Id.* at 3.

⁷ *CAPD Response*, pp. 1-2 (June 22, 2015).

its CCN should be denied.⁸ According to the Consumer Advocate, “[d]iscovery regarding future plans is not improper. Rule 26.02(1) states that discovery can relate to ‘any matter.’ This is not [to] say ‘any fact,’ and TWSI’s attempt to so limit the scope of discovery is misguided.”⁹ The Consumer Advocate states that “TWSI is attempting to make a “paradoxical and unworkable” distinction between matters that are ‘facts’ and matters that are ‘non-facts.’”¹⁰ According to the CAPD, asking the Authority to make a determination about what is a fact “contravenes the plain statement of Rule 26.06(1) (sic) that parties can ask discovery on ‘any matter.’”¹¹

FINDINGS AND CONCLUSIONS

The process of discovery in contested cases before the TRA is governed by the Tennessee Rules of Civil Procedure.¹² Tenn.R.Civ.P. 26.02(1) provides:

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.

Rule 26.02(1) permits discovery of information and facts that would assist in trial preparation. The purpose of discovery is to facilitate the mutual exchange of information, obtain knowledge of all relevant facts prior to trial or hearing, to do away with trial by ambush, and to generally rid trials of an element of surprise that often leads to results based not upon the merits but upon unexpected legal maneuvering.¹³

⁸ See *id.* at 2.

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² See Tenn. Comp. R. & Regs. 1220-1-2-.11(1).

¹³ See *Strickland v. Strickland*, 618 S.W.2d 496 (Tenn. App. 1981); see also *Pettus v. Hurst*, 882 S.W.2d 783 (Tenn. App. 1993).


The Consumer Advocate requests permission to file the following second supplemental discovery request:

If TWSI's proposed amendment to its CCN is granted for The Enclave at Dove Lake, will TWSI agree not to sell, market, or otherwise deal in capacity at The Enclave at Dove Lake—including all dealings directly or indirectly in capacity with affiliates—or allow or permit the sale, marketing or declining in capacity by an affiliate without TRA approval?

Upon due consideration of the pleadings of the parties, the Hearing Officer finds that the CAPD's second supplemental discovery question is not a proper discovery request. While the subject matter of the CAPD's discovery question may be relevant, the question itself falls outside of the reasoning for which Rule 26.02 permits discovery and falls outside the scope of discovery as defined by Rule 26.02(1). The Consumer Advocate is not seeking facts or information from TWSI, and the purpose of its discovery question is not to prevent "trial by ambush" or to "bring out the facts prior to trial so the parties will be better equipped to decide what is actually at issue."¹⁴ Instead, the CAPD seeks to illicit an agreement from TWSI regarding its future conduct should the TRA grant the amendment to its Certificate of Convenience and Necessity ("CCN"). The CAPD does not simply inquire about TWSI's future plans regarding the sale of capacity by TWSI's affiliates, but goes much further to ask TWSI not to engage in such activity if it's petition is granted. Seeking such an agreement in the guise of a discovery question is improper. For the foregoing reasons, the Hearing Officer concludes that the *CAPD Motion* should be denied.

IT IS THEREFORE ORDERED THAT:

The *Motion for Leave to File Second Supplemental Discovery Request* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General on June 11, 2015 is denied.


Monica Smith-Ashford, Hearing Officer

¹⁴ See *Ingram v. Phillips*, 684 S.W.2d 954, 958 (Tenn.Ct.App. 1984), *perm. app. denied* (Tenn. 1985).