IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF TENNESSEE	)	
WASTEWATER SYSTEMS, INC. TO	)	**DOCKET NO. 15-00025**
AMEND ITS CERTIFICATE OF	)	
CONVENIENCE AND NECESSITY	)	

THE CONSUMER ADVOCATE'S RESPONSE TO
TWSI'S OBJECTION TO THE CONSUMER ADVOCATE'S
MOTION TO FILE SECOND SUPPLEMENTAL DISCOVERY REQUEST

The Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed its *Proposed Second Supplemental Discovery Request* in this Docket 15-00025 on June 11, 2015, requesting permission from the Tennessee Regulatory Authority ("TRA" or "Authority") to ask the following discovery of Tennessee Wastewater Systems, Inc. ("TWSI"):

> 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?

On June 17, 2015, TWSI filed its *Response to Motion of Consumer Advocate to File Second Supplemental Discovery Request* ("*Response*"), objecting to this discovery request because it "does not seek the discovery of any fact." TWSI applied the incorrect discovery standard in its *Response*, and for the reasons discussed below, the Consumer Advocate's question is proper under Tenn. R. Civ. Pro. 26.02.

Rule 26.02(1) establishes that relevance and privilege are the standards for assessing the scope of discovery: "Parties may obtain discovery regarding *any matter*, not privileged, which is

relevant to the subject matter involved in the pending action . . ." (emphasis added). "The relevancy requirement is broadly construed to include any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case's issues." *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006). This standard is even more "loosely construed" during the discovery phase. *Boyd v. Comdata Network, Inc.*, 88 S.W. 203, 220 n.25 (Tenn. Ct. App. 2002). Accordingly, since neither party contends that the discovery is privileged, the only issue to be determined is whether it is relevant.

The discovery is relevant because TWSI's future plans to deal in capacity with unregulated affiliates bear heavily on whether TWSI should be granted an amended certificate of convenience and necessity ("CCN") at The Enclave at Dove Lake ("The Enclave"). If TWSI does plan to sell capacity through an unregulated affiliate, that would amount to a diversion of revenue from the regulated entity, TWSI. If TWSI will not rule out such a diversion of revenue, then that is grounds to deny its petition to amend the CCN.

The sale of capacity is a crucial element in this Docket. When a regulated entity obtains a CCN to serve a particular geographic area and receives from the developer a facility to serve that area, there is an understanding that the facility is intended to serve the customers of the regulated entity. Thus, if TWSI is granted a CCN for The Enclave, then the wastewater facility at The Enclave should serve TWSI's customers. TWSI's customers will pay for the maintenance, management, and repairs to The Enclave facility through their rates, so revenues generated from dealings in capacity at The Enclave facility should directly benefit TWSI and its customers. If, however, a portion of the revenue generated from the facility accrues to an unregulated affiliate, then the rates collected from TWSI's customers will have to increase to make up for the diverted

revenue. Thus, TWSI's future plans regarding dealings in capacity are clearly a matter that bears on the crux of this Docket, thereby satisfying the relevancy requirement.

Discovery regarding future plans is not improper. Rule 26.02(1) states that discovery can relate to "any matter." This is not say "any fact," and TWSI's attempt to so limit the scope of discovery is misguided. TWSI's interpretation creates a paradoxical and unworkable distinction between matters that are "facts" and matters that are "non-facts." Here, for example, TWSI contends the discovery question is not a fact-based inquiry, yet the answer that the Consumer Advocate seeks—whether TWSI will agree not to deal in capacity at The Enclave—is most certainly an objective fact: either TWSI will agree, or TWSI will not agree. To ask the TRA or any judicial body to engage in a line-drawing exercise about what constitutes a fact is an inexact science that contravenes the plain statement of Rule 26.06(1) that parties can ask discovery on "any matter."

Because the discovery meets the clearly established criteria of being relevant and not privileged, the TRA should allow the Consumer Advocate to ask the question at issue.

RESPECTFULLY SUBMITTED,

ERIN MERRICK (BPR #033883)
Assistant Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-8722
(615) 741-1026-FAX

CERTIFICATE OF SERVICE

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

Henry Walker, Esq.
Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203
615-252-2363

This the 22 day of June, 2015.

Erin Merrick

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