

IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:)
)
PETITION OF KINGSFORT POWER)
COMPANY d/b/a AEP APPALACHIAN) DOCKET NO. 16-00001
POWER GENERAL RATE CASE AND)
MOTION FOR PROTECTIVE ORDER)

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

The Consumer Protection and Advocate 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 Kingsport Power Company d/b/a AEP Appalachian Power ("Company" or "KgPCo"). For good cause, the Consumer Advocate would show as follows:

RULES GOVERNING DISCOVERY BEFORE THE TRA

Section 1220-1-2-.11 of the Tennessee Regulatory Authority ("TRA" or "Authority") Rules, entitled *Discovery*, states in part, "Any party to a contested case may petition for discovery.... [D]iscovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure." And the Uniform Administrative Procedures Act provides the implementing mechanism: "[t]he 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." Tenn. Code Ann. § 4-5-311(a).

Tenn. R. Civ. P. 26.02 allows for broad discovery. Specifically, the rule 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, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, 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.

(Emphasis added). Perhaps the most important underlying policy of discovery is “that discovery should enable the parties and the courts to seek the truth so that disputes will be decided by facts rather than by legal maneuvering.” *White v. Vanderbilt Univ.*, 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.” *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 356 (Tenn. Ct. App. 1985) (internal citations omitted), *superseded on other grounds by statute*, Tenn. R. Civ. P. 26.02(4)(B), *as recognized in West v. Schofield*, 460 S.W.3d 113, 125 (Tenn. 2015). 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. Tenn. Trucking Ass’n Self Ins. Grp. Tr.*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006) (internal citations omitted).

Under the Tennessee Rules of Civil Procedure, though, discovery may be limited in three narrow circumstances. Specifically, the Rules provide that:

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.

Tenn. R. Civ. P. 26.02(1). The narrowness of these exceptions is supported by the fundamental principle of “*expressio unius est exclusio alterius*,” which translates as “the expression of one thing implies the exclusion of ... things not expressly mentioned.” *See Wells v. Tenn. Bd. of Regents*, 231 S.W.3d 912, 917 (Tenn. 2007) (applying the *expressio unius* principle to a state statute). Thus, a court may not limit discovery if the requests do not fall into one of these three categories. *See id.*

In the context of the exceptions noted above, the Authority’s Rules require that a party obtain leave from the Authority before serving more than forty (40) discovery requests. TRA Rule 1220-1-2-.11(5)(a). Leave is obtained by filing a motion and an accompanying “memorandum establishing good cause” for additional discovery. *Id.* The Authority is granted the power to create such a rule under Tenn. Code Ann. § 4-5-311(c): “The agency may promulgate rules to further prevent abuse and oppression in discovery.” However, this ability is constrained by the requirement that the Authority comply with the Tennessee Rules of Civil Procedure, as directed by the Authority’s own Rule 1220-1-2-.11, as well as Tenn. Code Ann. § 4-5-311(a). Consequently, it follows that “abuse or oppression in discovery” is defined as one of the three permissible reasons for limiting discovery as specifically described in Tenn. R. Civ. P. 26.02(1).

Thus, when the TRA Rules are read in conjunction with the Tennessee Code Annotated and the Tennessee Rules of Civil Procedure, it becomes clear that a motion for additional discovery may not be denied unless the additional discovery requests violate one of the three provisions contained in Tenn. R. Civ. P. 26.02(1).

THE CONSUMER ADVOCATE HAS GOOD CAUSE TO ISSUE MORE THAN FORTY DISCOVERY REQUESTS

The Consumer Advocate’s *Motion for Leave to Issue More Than Forty Discovery Requests* is made with good cause, as required by TRA Rule 1220-1-2-.11. This memorandum demonstrates that

the Consumer Advocate's discovery requests meet this standard.

As background, 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 petition, 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. It should be noted that the discovery process is the principal procedural vehicle available to the Consumer Advocate to gather evidence and conduct analysis prior to the hearing in this matter.

In the context of this TRA Docket 16-00001, it is worth noting that KgPCo has not had a general rate case in over twenty years¹ – and it is undeniable (from even a superficial glance at the *Petition of Kingsport Power Company d/b/a AEP Appalachian Power General Rate Case and Motion for Protective Order* ("Petition") and the testimony of its many witnesses) that a great deal has changed in the electric utility industry and related regulation in that time period. Furthermore, the magnitude of the rate increase that KgPCo is requesting and the complexity of the issues in the general rate case (described in KgPCo's *Petition* and in the testimony of its many witnesses) justify substantial discovery by the Consumer Advocate. On those bases alone, the Consumer Advocate's requests are reasonable and meet the "good cause" standard.

¹ It also should be noted that KgPCo initiated a general rate case in TRA Docket 15-00093, on September 28, 2015, by filing a *Petition of Kingsport Power Company d/b/a AEP Appalachian Power General Rate Case*. That petition for a general rate case was withdrawn by KgPCo on December 11, 2015, by KgPCo's *Motion to Withdraw Petition Initiating a General Rate Case*. KgPCo's *Motion to Withdraw* was granted on December 15, 2015. In that TRA Docket, KgPCo submitted the testimony of its witnesses and responded to TRA Staff data requests, but did not substantively respond to the discovery requests made by the Consumer Advocate in its First Discovery Request of the Consumer Protection and Advocate Division to Kingsport Power Company d/b/a AEP Appalachian Power, as filed on December 1, 2015.

The consequences of the denial of the additional discovery requested would include the inability of the Consumer Advocate to test the merits of KgPCo's proposed rate increase and to evaluate the general rate case and related policy issues presented in the Company's *Petition*. And this would mean that the Consumer Advocate would not have the ability to develop fully prepared positions on the myriad of issues presented in the *Petition*. Without the additional requested discovery – and without receiving discovery responses in the format requested – the Consumer Advocate will be severely constrained in representing the interests of households and businesses in KgPCo's service territory, some 47,000 customers. Discovery and resulting pre-filed testimony present the only opportunities for consumers to receive due process with a representative and evidentiary voice regarding the rates charged to them by KgPCo 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.

In summary, 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. To enable the Consumer Advocate to put forth that case, and in view of the substantial period of time since KgPCo's last general rate case and the breadth and complexity of the issues presented in KgPCo's general rate case (as set out in the *Petition* and in the testimony of its many witnesses), the Consumer Advocate's requests meet the "good cause" standard. The limitation of discovery to forty questions in this Docket would severely limit the Consumer Advocate's ability to analyze and present a complete case, and would severely limit the Consumer Advocate's ability to provide that analysis and additional information that is vital to the TRA for the protection of Tennessee consumers. Further, the Consumer Advocate respectfully notes that, in the event of a dispute over a specific 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 such dispute, as it has in other dockets.

THE CONSUMER ADVOCATE'S DISCOVERY REQUESTS ARE NOT ABUSIVE OR OPPRESSIVE

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 be abusive or oppressive. Tenn. Code Ann. § 4-5-311(c). As discussed above, the "abusive or oppressive" standard should be understood in terms of the Tennessee Rules of Civil Procedure – therefore, for discovery requests to be abusive or oppressive, they must violate one of the three situations specified in Tenn. R. Civ. Pro. 26.02.

A. The Discovery Sought Is Not Unreasonably Cumulative or Duplicative

Under the first prong of Tenn. R. Civ. Pro. 26.02(1), 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." In this Docket, the Consumer Advocate has made reasonable efforts to ensure that its discovery is not cumulative or duplicative, and has sought to obtain the information from other sources when possible. Where possible, the Consumer Advocate has attempted to use publicly available data, rather than requesting that information directly from KgPCo. The Consumer Advocate also has sought to avoid duplicative requests from those already made by the TRA staff, though some of the Consumer Advocate's requests necessarily follow up on and request clarification, amplification, or additional information based on the Company's responses to the TRA's data requests. The reality of this Docket—especially in view of the time period since KgPCo's last general rate case, the changes in the electric utility industry, and the complexity of issues presented in KgPCo's general rate case—is that only KgPCo has most of the information that is needed to analyze and develop information with respect to this Docket.

In the event that requested data appears to have been produced in response to another question or may be more readily available from some other source, the Consumer Advocate is willing to discuss and work with KgPCo to clarify, alter, amend or (if necessary) withdraw a discovery request that is unreasonably cumulative or duplicative.

B. The Consumer Advocate Has Not Had Ample Opportunity by Discovery to Obtain the Information Sought

The Consumer Advocate has not had “ample opportunity by discovery in the action to obtain the information sought”² for two reasons: (1) the delays and denials by the Company in providing discovery responses; and (2) the nature of a complex rate case requires substantial information, which means that even if information is timely supplied, that information may necessarily lead to other questions that may be almost as significant as the initial questions in a rate case.

1. The Company’s Delays and Denials of Information Have Not Afforded the Consumer Advocate the Information It Needs by the Discovery Process

Having the opportunity to ask questions does not by itself constitute the ample opportunity to obtain the information sought. To provide an ample opportunity, adequate responses must be provided in a timely manner in the discovery process. In this Docket, the Consumer Advocate is being denied facts and information that are needed to evaluate the proposals in the Company’s rate case and to put forth a complete case based on a factual record. And the reason that the Consumer Advocate is being denied the needed facts and information – and thus has been denied ample opportunity by discovery to obtain that information – is simply because the Company has delayed the discovery process and denied information to the Consumer Advocate.

The *Second Discovery Request* demonstrates that a substantial amount of information is still

² As described above, a second circumstance under which a judge or hearing officer may limit discovery would only occur if “the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.” Tenn. R. Civ. Pro. 26.02(1).

needed by the Consumer Advocate – and the breadth of that missing information is remarkable at this stage of a rate case. For example, many of the requests in the *Second Discovery Request* specifically ask questions that result from the compelled responses that were only received a few days ago. And those questions are still requesting basic information about the Company’s books and records – such as the source and support for various items – that in most rate cases would have been provided with the Company’s initial filing or shortly thereafter. And, further, those compelled responses are important not only to provide basic information needed in the rate case, but also to serve as a starting point for the development of additional information that is needed to evaluate fully the Company’s case and develop and put together the Consumer Advocate’s case. The Consumer Advocate has barely been able to scratch the surface in the development of that additional information. The *Second Discovery Request* shows the substantial gaps in the information needed by the Consumer Advocate’s experts. With the amount of information still needed by the Consumer Advocate, it is not reasonable to conclude that the Consumer Advocate has obtained by discovery adequate information in this Docket.

The chronology of this Docket shows that the Consumer Advocate has not had ample opportunity to obtain the information that it needs. On February 2, 2016, the Consumer Advocate filed and served KgPCo with a *First Discovery Request*. In its late response to that *First Discovery Request*,³ the Company failed to file complete responses and claimed that certain information was not available in the requested format. So, the Consumer Advocate had to file a *Motion to Compel* to require the Company to provide complete responses and to provide all of the requested information. On March 17, the Hearing Officer ordered the Company to provide complete responses to a number of the Consumer Advocate’s requests in the format requested. Then the Company failed to provide

³ The Company failed to file all of its responses to that *First Discovery Request* by the due date set by the Hearing Officer in this Docket, with the last such response being filed by the Company on February 25, 2016.

the compelled responses on the date that they were due. The ordered responses were received by the Consumer Advocate on March 24, only seven calendar days before the *Second Discovery Request* was due.⁴ Interestingly, the Company was able to produce the responses that it had previously claimed were unavailable. The Company's assertion of unavailable information, when such information was available and should have been produced on February 23, has cost the Consumer Advocate substantial time and resources that could have been spent more efficiently. The Company's delays and denials of information – even to the point of claiming that information was unavailable when the information was available – demonstrate why the Consumer Advocate's opportunity to obtain the information it needs by discovery has been inadequate in this Docket.

Even to this day, there are open issues with respect to the compelled discovery responses. For example, the Company has produced redacted board meeting minutes and a privilege log that, on its face, appears to reflect an unreasonably broad definition of privilege. That withholding of unredacted documents and broad claims of privilege will require even more time and the expenditure of resources by the Consumer Advocate on a discovery matter that should have been resolved much earlier in the process.⁵ And even when the compelled responses were produced, confusion and delay were created when the Company provided overlapping “balance sheets” that, unfortunately, did not match up with respect to the overlapping periods. That problem was explained, but it took half a day to resolve (of the already few days the experts had to prepare requests for the *Second Discovery*

⁴ Effectively, the Consumer Advocate's experts only had six (6) days (over the Good Friday / Easter holiday weekend) to review the compelled discovery responses, because the discovery package was received from the Company seven days before the *Second Discovery Request* was due, with the package being sent on that day to the Consumer Advocate's experts, and then it took another day for the experts to receive the package.

⁵ In a moot response to the Consumer Advocate's request for an extension of time to file its *Second Discovery Request*, the Company focuses on this narrow area and ignores the major concern raised by the Consumer Advocate that the compelled discovery had been provided with only a few days for its experts to review it and assist in preparing a meaningful *Second Discovery Request* – and those few days had been shortened even further by the Company's delay in sending the compelled responses.

Request) – with the Consumer Advocate’s experts unable to focus on that critical part of the rate case during that delay. The Company is still engaged in delay and denial.

Thus, the Company’s delays and denials have not afforded the Consumer Advocate an adequate opportunity to obtain the information that it needs by the discovery process. Consequently, it cannot be said that the Consumer Advocate has had “ample opportunity” to obtain needed information by discovery in this action.

2. The Nature and Complexity of a Rate Case Requires Substantial Information, Which of Necessity Leads to More Extensive Discovery

Even if information is timely supplied, the nature of a complex rate case means that information may necessarily lead to extensive discovery – for example, more extensive questions that could be almost as numerous as the initial questions in a rate case. As noted above, KgPCo has not had a general rate case in over twenty years – and even a superficial glance at the *Petition* and the testimony of KgPCo’s many witnesses shows that a great deal has changed in the electric utility industry and related regulation in that time period. Furthermore, the magnitude of the rate increase that KgPCo is requesting and the complexity of the issues in this general rate case justify substantial discovery by the Consumer Advocate. In a case such as this, it cannot be denied that substantial information is required by the Consumer Advocate. And to that end, extensive discovery is similarly required. The *Second Discovery Request* demonstrates the level of additional extensive discovery that is required by the Consumer Advocate in this Docket. Here, by the very nature of the case, the Consumer Advocate has not had an adequate opportunity to obtain the information that it needs by the discovery process. This has necessitated the additional discovery inquiries included in the *Second Discovery Request*.

C. The Discovery Sought Is Not Unduly Burdensome or Expensive, Taking Into Account the Needs of the Case

The discovery sought would not be unduly burdensome or expensive to KgPCo, taking into account the needs of this Docket. As discussed above, the reality of this Docket is that KgPCo has not had a general rate case in over twenty years, the electric utility industry has changed significantly in that time period, and the issues presented in KgPCo's general rate case are broad and highly complex. Further, it should be noted at the outset that KgPCo is a part of one of the largest public electric utilities in the United States and effectively is the only source for most of the information that is needed to analyze and develop information with respect to this Docket – in other words, KgPCo's resources far exceed those of the Consumer Advocate. With that context, the final circumstance in which discovery may be limited – that is, “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” – would not limit discovery in this Docket. Tenn. R. Civ. Pro. 26.02(1).

Nevertheless, some brief analysis of each aspect of this potential limitation merits consideration. The first aspect relates to the “needs of the case.” *Id.* As with most large rate cases filed by public utilities, KgPCo's initial filing is voluminous. The case requires substantial review and analysis. In the course of this Docket, the Consumer Advocate has been and will be reviewing thousands of pages of testimony, data, and other information filed by KgPCo. As noted above, after that review and analysis, the Consumer Advocate's experts will then put together a complete alternative rate case that not only challenges any unreasonable amounts and policies presented by the Company, but also presents its position on what the correct figures and policies should be. 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."

The second aspect requires that discovery requests be evaluated in light of the "amount in controversy." *Id.* In this matter, KgPCo has requested a rate increase of approximately \$12.1 million. There can be no doubt that a claim for a rate increase of \$12.1 million dollars in and of itself is a large amount in dispute. However, it should be noted that this amount is multiplied in a rate-making setting – this is not simply a matter of \$12.1 million, but rather KgPCo is seeking an extra \$12.1 million *per year* from the 47,000 households and businesses in its service territory through increased rates.

The final aspect requires that discovery requests must be considered with regard to any "limitations on the parties' resources." As a subsidiary of American Electric Power, one the largest public electric utilities in the United States, KgPCo is part of a large and sophisticated corporate system, and as such its resources are vast. And employees of affiliated companies of American Electric Power appear to have provided the bulk of the expert testimony in this TRA Docket 16-00001 and in similar rate case in other jurisdictions. Thus, while it may take time and effort for KgPCo to respond to the Consumer Advocate's requests, these discovery requests amount to a simple part of doing business for a company backed by American Electric Power's vast resources.⁶

CONCLUSION

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

⁶ The apparent experience of regulated affiliates of KgPCo in rate cases in other jurisdictions also indicates that the Consumer Advocate discovery requests are comparable to – and in some cases substantially less than – the requests made in other jurisdictions. *See Affidavit of Ralph Smith, CPA*, filed in TRA Docket 15-00093 on December 8, 2015. Thus, the Consumer Advocate's requests are not unduly burdensome or expensive in comparison with requests made in those jurisdictions.

RESPECTFULLY SUBMITTED,



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This the 31st day of March, 2016.



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