

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 27, 2017

IN RE:

PETITION OF TENNESSEE-AMERICAN
WATER COMPANY REGARDING THE 2016
INVESTMENT AND RELATED EXPENSES
UNDER THE QUALIFIED INFRASTRUCTURE
INVESTMENT PROGRAM RIDER, THE
ECONOMIC DEVELOPMENT INVESTMENT
RIDER AND THE SAFETY AND
ENVIRONMENTAL COMPLIANCE RIDER

DOCKET NO.
16-00126

ORDER DENYING MOTION TO COMPEL AND GRANTING, IN PART, MOTION
FOR EXTENSION OF TIME TO FILE CONSUMER ADVOCATE'S PRE-FILED
TESTIMONY

This matter came before the Hearing Officer upon the *Consumer Advocate's Motion to Compel* ("Motion to Compel") and the *Motion for Extension of Time to File Consumer Advocate's Pre-filed Testimony* ("Motion for Extension") filed by the Consumer Protection and Advocate Division of the Office of the Attorney General ("Consumer Advocate" or "CPAD") on January 24, 2017.

Relevant Background

Tennessee-American Water Company ("TAWC", "Tennessee-American", or the "Company") is a public utility providing residential, commercial, industrial and municipal water service to approximately 78,000 customers in Tennessee. Pursuant to the Stipulation and Capital Riders approved in TRA Docket No. 13-00130¹, TAWC filed a *Petition of Tennessee-American*

¹ See *In Re: Petition of Tennessee-American Water Company for Approval of a Qualified Infrastructure Investment Program, an Economic Development Investment Rider, a Safety And Environmental Compliance Rider and Pass-Throughs for Purchased Power, Chemicals, Purchased Water, Wheeling Water Costs, Waste Disposal, and TRA Inspection Fee*, Docket No. 13-00130, Order Approving Amended Petition (January 27, 2016).

Water Company Regarding the 2016 Investment and Related Expenses under the Qualified Infrastructure Investment Program Rider, the Economic Development Investment Rider, and the Safety and Environmental Compliance Rider (“Petition”) along with the proposed tariffs on November 4, 2016.

CONSUMER ADVOCATE’S *MOTION TO COMPEL*

In its *Motion to Compel*, the Consumer Advocate seeks an order requiring TAWC to comply with the tariff established in TRA Docket No. 13-00130 and to provide complete answers to the *Supplemental Discovery Request of the Consumer Protection and Advocate Division to Tennessee American Water Company (“Supplemental Discovery Request”)* filed on January 9, 2017. The Consumer Advocate states TAWC failed to file with its *Petition* the required verification by a Company officer of the Capital Riders and the underlying accounting submitted to the TRA for consideration in this docket in violation of the tariff approved by the Authority in TRA Docket No. 13-00130.

The Consumer Advocate also maintains that TAWC’s objections to its *Supplemental Discovery Request* Nos. 1, 5, 4d, 19d, and 20 and TAWC’s general objections on the basis that the information sought is overly broad, not relevant, and not calculated to lead to the discovery of relevant information “do not properly apply Tennessee law, lack foundation, and contradict the letter and purpose of discovery”² The Consumer Advocate argues that Tennessee’s discovery rules favor broad discovery and the complexity of the issues and the need for the Consumer Advocate to present a “complete case” justify the substantial discovery.³ According to the Consumer Advocate, “[d]enying the discovery requested would prevent the Consumer

² *Motion to Compel*, p. 6 (January 24, 2017).

³ *Id.* at 6-9.

Advocate from testing the merits of TAWC's proposed rate increase and to evaluate the increased tariffs and related policy issues presented in the Company's *Petition*."

MOTION FOR EXTENSION

In an effort to allow time for the *Motion to Compel* to be resolved and to review any additional discovery prior to the deadline for filing its pre-filed testimony, the Consumer Advocate also filed a *Motion for Extension* on January 24, 2017. The Consumer Advocate argues "[b]ecause TAWC has still not provided the Consumer Advocate with adequate responses to its discovery, the Consumer Advocate will be severely disadvantaged and will be unable to file complete and informed testimony by the due date, January 30, 2017."⁴ In its *Motion for Extension*, the Consumer Advocate requests that the Hearing Officer extend the January 30, 2017 due date for its pre-filed testimony "until after TAWC has provided full and complete responses and the Consumer Advocate has had sufficient time to review the discovery that has already been filed alongside any supplemental discovery responses received under the Motion to Compel which has been contemporaneously filed today."⁵

TAWC RESPONSE

On January 26, 2017, TAWC filed *Tennessee-American Water Company's Response to the Consumer Advocate's Motion to Compel and to the Consumer Advocate's Motion for Extension of Time to File Pre-filed Testimony* ("TAWC Response"). In the *TAWC Response*, Tennessee-American states it is "supplementing certain of its responses to CPAD's discovery requests simultaneously with the submission of this Response and has also filed the verification required by the Capital Rider Recovery Tariffs approved in TRA Docket No. 13-00130."⁶ TAWC maintains that the Consumer Advocate's other objections are without merit and should

⁴ *Motion for Extension*, p. 2 (January 24, 2017).

⁵ *Id.* at 2-3.

⁶ *TAWC Response*, p. 1 (January 26, 2017).

be summarily dismissed.⁷ TAWC states it has provided the information requested or sought to clarify information previously provided for *Supplemental Discovery Request* Nos. 1, 5, and 20, and it has filed the required verification by a Company officer. TAWC argues that *Supplemental Discovery Request* Nos. 4d and 19d in which the Consumer Advocate requests that an accountant or other representative from the Company's controller's office verify the numbers submitted by the Company is "duplicative, cumulative, unnecessary, and burdensome."⁸ TAWC maintains that it is clear from the numerous verifications it has already provided that the Company "stands behind the accounting and numbers asserted."⁹ TAWC argues that while Tenn. R. Civ. P. 26.02 generally allows discovery of any matter relevant to the pending action, the information sought must be in the party's possession, custody or control.¹⁰ According to TAWC, "[t]he CPAD seeks verifications that are not required by the Authority and therefore are not relevant and information that is not in Tennessee-American's possession, custody or control."¹¹ TAWC requests that the *Motion to Compel* be denied in its entirety.

In addition, TAWC states that the Consumer Advocate's *Motion for Extension* should be denied. However, TAWC states it would not object to a two-day extension for the Consumer Advocate to file its pre-filed testimony, coupled with a one-day extension of time for TAWC to file its rebuttal testimony, as long as the extension does not necessitate a change in the target hearing date.¹²

⁷ *Id.*

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.*

STATUS CONFERENCE

The Hearing Officer held a Status Conference by telephone with the parties on January 27, 2017 to hear arguments on the *Motion to Compel* and the *Motion for Extension*. In addition, on January 26, 2017, the Consumer Advocate filed its *Second Supplemental Discovery Request of the Consumer Protection and Advocate Division to Tennessee American Water Company* (“*Second Supplemental Discovery Request*”). TAWC objected to the *Second Supplemental Discovery Request* as improper. The parties also argued this issue at the Status Conference.

During the Status Conference, TAWC indicated that the Company Officer Verification had been filed and additional responses and clarifying information had been submitted by TAWC regarding *Supplemental Discovery Request* Nos. 1, 5, and 20. Therefore, the parties focused their arguments on the *Motion to Compel* on *Supplemental Discovery Request* Nos. 4d and 19d in which the Consumer Advocate requests that TAWC submit attestations from the Company controller that the numbers submitted in the *Petition* tie back to the Company’s general ledger. During the Status Conference, the parties further discussed the issues, presented their positions regarding *Supplemental Discovery Request* Nos. 4d and 19d and reiterated arguments made in the *Motion to Compel* and *TAWC Response*.

FINDINGS AND CONCLUSIONS

Pursuant to Authority Rule 1220-1-2-.11, when informal discovery is not practicable, any party to a contested case proceeding may petition for a discovery schedule and, thereafter, discovery shall be sought and 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.¹³ Through these instruments, a party “may obtain discovery regarding any matter, not privileged,

¹³ Tenn. R. Civ. P. 26.01.

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.”¹⁴

The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.¹⁵ 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.”¹⁶

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.¹⁷ 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.¹⁸ 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).¹⁹

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.²⁰ “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”²¹

¹⁴ *Id.* at 26.02(1).

¹⁵ *Id.*

¹⁶ *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)).

¹⁷ Tenn. R. Civ. P. 26.02(1).

¹⁸ *Id.* at 26.02 & .03.

¹⁹ *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

²⁰ Tenn. R. Civ. P. 37.01(2).

On January 27, 2017, the Hearing Officer communicated her ruling on the *Motion to Compel* and *Motion for Extension* to the parties via email and indicated that a written order would be issued at a later date. Based on the filings and discussions held during the Status Conference, the Hearing Officer determined there was no need to address the Company Officer Verification, which had been filed by TAWC or *Supplemental Discovery Request* Nos. 1, 5, 20 because additional responses had been filed. At the time the Status Conference was held, the Consumer Advocate was in the process of reviewing TAWC's additional responses to determine if they were sufficient.

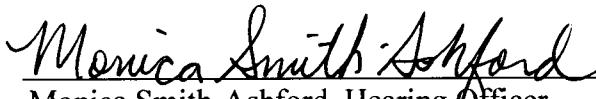
After considering the filings made by the parties along with their arguments made at the Status Conference, the Hearing Officer was persuaded by TAWC's arguments and found that the requested controller attestations were not documents within the possession, custody or control of TAWC; therefore, the *Motion to Compel* regarding *Supplemental Discovery Request* Nos. 4d and 19d should be denied. The Hearing Officer directed TAWC to respond to the *Second Supplemental Discovery Request* by February 1, 2017. The Hearing Officer also directed that any motion to compel regarding the *Second Supplemental Discovery Request* be filed by 2:00 p.m. on February 3, 2017. Further, the Hearing Officer granted the *Motion for Extension*, in part. The Hearing Officer gave the Consumer Advocate until February 1, 2017 to file its pre-filed testimony regarding all other issues in the docket other than the issue regarding the Company Officer Verification, which is the subject of the requests in the *Second Supplemental Discovery Request*. The Hearing Officer indicated that if necessary, she would allow the Consumer Advocate to file additional testimony on the Company Officer Verification issue. Based on the

²¹ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

Hearing Officer's ruling on the *Motion for Extension*, TAWC was given until February 13, 2017 to file its rebuttal testimony.

IT IS THEREFORE ORDERED THAT:

1. The *Consumer Advocate's Motion to Compel* is denied.
2. Tennessee-American Water Company shall respond to the *Second Supplemental Discovery Request of the Consumer Protection and Advocate Division to Tennessee American Water Company* by February 1, 2017.
3. The *Motion for Extension of Time to File Consumer Advocate's Pre-filed Testimony* is granted, in part. The Consumer Protection and Advocate Division of the Office of the Attorney General must file its pre-filed testimony by February 1, 2017 relative to issues in the docket other than those addressed in the *Second Supplemental Discovery Request of the Consumer Protection and Advocate Division to Tennessee American Water Company*. Tennessee-American Water Company will have until February 13, 2017 to file its rebuttal testimony.


Monica Smith-Ashford, Hearing Officer