

IN THE TENNESSEE REGULATORY AUTHORITY  
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF TENNESSEE AMERICAN	)	
WATER COMPANY REGARDING THE	)	Docket No. 16-00126
2016 INVESTMENT AND RELATED	)	
EXPENSES UNDER THE QUALIFIED	)	
INFRASTRUCTURE INVESTMENT	)	
PROGRAM RIDER, THE ECONOMIC	)	
DEVELOPMENT INVESTMENT RIDER,	)	
AND THE SAFETY AND ENVIRONMENTAL	)	
COMPLIANCE RIDER	)	

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

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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 Tennessee American Water Company ("Company" or "TAWC"). 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." 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 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.

The consequences of the denial of the additional discovery requested would include the inability of the Consumer Advocate to test the merits of TAWC's proposed tariff increases (also known collectively as Capital Riders) and to evaluate the impact on consumers 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 TAWC's service territory, some 78,000

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 TAWC 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, 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 TAWC. 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.

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 TAWC 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”<sup>1</sup> because the Consumer Advocate is still relatively new to this proceeding and has only had the chance thus far to ask one set of discovery responses. This initial discovery laid the groundwork for the Consumer Advocate to better understand TAWC’s

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<sup>1</sup> 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).

spreadsheets, but these supplemental discovery requests will allow the Consumer Advocate to understand TAWC's methodologies and justifications for the dollar amounts represented, an important component to the Consumer Advocate's case because of its independent analysis of each of the tariffs.

**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 TAWC, taking into account the needs of this Docket. It should be noted at the outset that TAWC is a part of one of the largest public water utilities<sup>2</sup> 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, TAWC'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.* Because this Docket requires the analysis by the Consumer Advocate of three tariff mechanisms, TAWC's initial filing is voluminous. The case requires substantial review and analysis. In the course of this Docket, the Consumer Advocate will end up reviewing hundreds of pages of testimony, data, and other information filed by TAWC. As noted above, after that review and analysis, the Consumer Advocate's experts will then put together a complete alternative Capital Rider projection that not

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<sup>2</sup> According to its website, American Water serves an estimated 15 million people across 47 states and Ontario, Canada.

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, TAWC is proposing an annualized recovery of \$6,568,493, which is equivalent to a surcharge of 13.95%. This represents an increase of \$1,682,267 or, in percentage terms, 3.57%. The Company expects to invest, on a net basis after adjustments, \$51,573,813, to arrive at the total requested surcharges under the Capital Riders. There can be no doubt that a claim for such an increase from three tariff mechanisms in and of itself is a large amount in dispute. However, it should be noted that this amount is additionally important as TAWC seeks an annual review on the Capital Riders, and this amount has increased each year since its inception in TRA Docket 13-00130.

The final aspect requires that discovery requests must be considered with regard to any "limitations on the parties' resources." As a subsidiary of American Water, one the largest public water utilities in the United States, TAWC is part of a large and sophisticated corporate system, and as such its resources are vast. Employees of affiliated companies of American Water appear to have provided the bulk of the expert testimony in this TRA Docket 16-00126. Thus, while it may take time and effort for TAWC 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 Water's vast resources.



## 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*.

RESPECTFULLY SUBMITTED,



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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:

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This the 6 day of January, 2017.

  
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DANIEL P. WHITAKER III