

**IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

IN RE:)	
)	
PETITION OF TENNESSEE)	
WASTEWATER SYSTEMS, INC.,)	DOCKET NO. 16-00139
FOR APPROVAL OF ADJUSTMENT)	
OF ITS RATES AND NEW TARIFF)	

**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 Tennessee Wastewater Systems, Inc. ("Company" or "TWSI"). 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.

In the context of this TRA Docket 16-00139, it is worth noting that TWSI has not had a general rate case since Docket 08-00202.¹ Unlike Docket 08-00202, the Consumer Advocate, TWSI and members of the TRA staff did not meet and exchange information prior to the filing of the Petition in this Docket 16-00139.² Additionally unlike Docket 08-00202, TWSI did not file any confidential records such as income statements, balance sheets, general ledgers or other such accounting documents with its Petition in this TRA Docket 16-00139.³ Finally, as can be seen

¹ TWSI initiated a general rate case in TRA Docket 08-00202 on October 20, 2008, by filing a *Petition of Tennessee Wastewater Systems, Inc. for Approval to Amend its Rates and Charges*. TWSI subsequently amended its *Petition* on October 28, 2008. On July 8, 2009, the TRA issued an *Order Approving the Revised Settlement Agreement*.

² Consumer Advocate's *Petition to Intervene*, Docket 08-00202, paragraph 4.

³ *Petition of Tennessee Wastewater Systems, Inc. for Approval to Amend its Rates and Charges*, TRA Docket 08-00202.

from TWSI's Petition and the Consumer Advocate's proposed discovery filed, herewith, TWSI is a "wholly-owned subsidiary of Adenus Group LLC which also owns Alabama Wastewater Systems, Inc. (AL), Commonwealth Wastewater Systems, Inc. (KY), and Ohio Wastewater Systems, Inc. (OH)."⁴ This subsidiary/affiliate, multi-state structure and operations requires more extensive discovery than would ordinarily occur. Accordingly, the magnitude of the rate increase TWSI is requesting, the complexity of the issues in the general rate case, and the need for documentation from TWSI justifying the proposed rate increase and new tariff justify substantial discovery by the Consumer Advocate. On these bases alone, the Consumer Advocate's requests are reasonable and meet the "good cause" standard alone.

The consequences of the denial of the additional discovery requested would include the inability of the Consumer Advocate to test the merits of TWSI's proposed adjustment in rates and new tariff and to evaluate the impact on consumers and related policy issues presented in the Company's *Petition*. 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 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 that constitute TWSI's 2,800 customers located in dozens of separate sites in over 23 counties.⁵ 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 TWSI prior to the hearing. Moreover, discovery is necessary in order for the Consumer Advocate to take informed positions in representing consumers in any potential settlement negotiations.

⁴ *Petition* at paragraph 2.

⁵ *Petition*, page 1, paragraph 3.

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 TWSI. It should be noted that at this time, there are no data requests by TRA staff available on the TRA Docket webpage for the Consumer Advocate to compare for duplicative 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 TWSI 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 had no opportunity to conduct discovery in this Docket. 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). TWSI’s *Petition* in this TRA Docket 16-00139 was filed on November 29, 2016, and the hearing officer granted the Consumer Advocate’s *Petition to Intervene* on December 21, 2016. It is apparent that, in this Docket, there has been no opportunity for discovery by the Consumer Advocate prior to the discovery that is being requested today, January 13, 2017, to which this *Memorandum* and the associated *Motion* relate. Thus, it cannot be said that the Consumer Advocate has had “ample opportunity” for discovery in this action.

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 TWSI, taking into account the needs of this Docket. As discussed above, TWSI has not had a general rate case since TRA Docket 08-00202, there were no discussions between TWSI and the Consumer Advocate prior to the filing of the Petition in this Docket, and the issues presented in TWSI's general rate case is complex. Further, it should be noted that TWSI is effectively the only source for most of the information that is needed to analyze and develop information with respect to this Docket. 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 explained above, there has been no submittal by TWSI of records such as income statements, balance sheets, general ledgers or other such accounting documents. Without such information and documentation, the Consumer Advocate cannot review, analyze and develop a complete case to the TRA in its efforts to represent consumers and provide a useful framework to the TRA for its decision-making process. Additionally, in its review of the Petition of this Docket, the Consumer Advocate reviewed the status of TWSI's permits with the Tennessee Department of Environment and Conservation (“TDEC”) regarding TWSI's service areas listed in its tariff.⁶ Multiple TDEC permits indicate a status of “inactive” in the Dataviewer and show a permit termination date that

⁶ The Consumer Advocate reviewed TDEC permits through TDEC's Dataviewers webpage located at <https://www.tn.gov/environment/article/tdec-dataviewers>. TDEC has a water resources permit Dataviewer that allows searches for water-related permits.

has passed. In light of this information, the Consumer Advocate has a multitude of questions regarding these TWSI projects and service areas and the impact on the proposed rate adjustment and new tariff. Again, the Consumer Advocate has submitted no discovery request to date in this TRA Docket 16-00139. 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, TWSI is proposing a rate increase to produce additional revenues of \$492,815.18 or 24%. There can be no doubt that a claim for such an increase in and of itself is a large amount in dispute. Additionally, TWSI is also seeking to eliminate the Residential and Commercial Cabin distinctions and replace it with an overall Cabin category. This consolidation into one Cabin category needs to be reviewed carefully by the Consumer Advocate to determine the impact on the existing two categories of Cabin customers.

The final aspect requires that discovery requests must be considered with regard to any "limitations on the parties' resources." TWSI is a "wholly-owned subsidiary of Adenus Group LLC which also owns Alabama Wastewater Systems, Inc. (AL), Commonwealth Wastewater Systems, Inc. (KY), and Ohio Wastewater Systems, Inc. (OH)."⁷ TWSI is part of a large and sophisticated corporate system. Thus, while it may take time and effort for TWSI to respond to the Consumer Advocate's requests, these discovery requests amount to a simple part of doing business for a company which is a part of a larger corporate system operating in multiple states and very experienced in the subject area of this Docket.

⁷ *Petition* at paragraph 2.

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

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This the 13 day of January, 2017.

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