

IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE

IN RE:

PETITION OF INTEGRA WATER
TENNESSEE, LLC FOR A CCN AND
AUTHORITY TO CHARGE RATES
IN CASEY COVE SUBDIVISIONS
LOCATED IN DEKALB COUNTY,
TENNESSEE

DOCKET NO. 17-00014

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 TPUC 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 (Motion)* to Integra Water Tennessee, LLC (Integra Water). For good cause, the Consumer Advocate would show as follows:

**RULES GOVERNING DISCOVERY BEFORE THE
TENNESSEE PUBLIC UTILITY COMMISSION**

Section 1220-1-2-.11 of the Tennessee Public Utility Commission (TPUC) Rules, entitled *Discovery*, states in part, “[a]ny 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.”¹

¹Tenn. 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.”² 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.”³ 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.”⁴

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

² *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

³ *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).

⁴ *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).

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.⁵

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.”⁶ Thus, a court may not limit discovery if the requests do not fall into one of these three categories.⁷

In the context of the exceptions noted above, the Commission's Rules require that a party obtain leave from the Commission before serving more than forty discovery requests.⁸ Leave is obtained by filing a motion and an accompanying “memorandum establishing good cause” for additional discovery.⁹ The Commission is granted the power to create such a rule under Tenn. Code Ann. § 4-5-311(c): “[t]he agency may promulgate rules to further prevent abuse and oppression in discovery.” However, this ability is constrained by the requirement that the Commission comply with the Tennessee Rules of Civil Procedure, as directed by the Commission'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 TPUC Rules are read in conjunction with Tennessee statutes and the Tennessee Rules of Civil Procedure, it becomes clear that a motion for additional discovery may not be denied

⁵ Tenn. R. Civ. P. 26.02(1).

⁶ See *Wells v. Tenn. Bd. of Regents*, 231 S.W.3d 912, 917 (Tenn. 2007) (applying the *expressio unius* principle to a state statute).

⁷ See *Id.*

⁸ TPUC Rule 1220-1-2-.11(5)(a).

⁹ *Id.*

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* is made with good cause, as required by TPUC 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 TPUC. 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 TPUC 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 TPUC Docket No. 17-00014 (this Docket), this is Integra Waters' first petition for a Certificate of Convenience and Necessity (CCN) and establishment of rates in Tennessee. The Consumer Advocate, Integra Water and members of the TPUC staff did not meet and exchange information prior to the filing of the *Initial Petition* in this Docket.¹⁰ On April 7,

¹⁰ On February 8, 2017, Integra Water filed *Petition of Integra Water, LLC for a Certificate of Public Convenience and Necessity and Authority to Charge Rates in Casey Cove Subdivision Located in DeKalb County, Tennessee*. However in its response to TPUC's Data Request Number 28, it states "[t]he Petition is incorrect. Integra Water is applying for a \$90 flat rate per connection. We will modify the petition and resubmit."

2017, TPUC issued its First Data Request to Integra Water.¹¹ Pursuant to the established procedural schedule, the Consumer Advocate issued its First Discovery Request on May 9, 2017.¹² On May 18, 2017, Integra Water filed its first *Amendment to Petition for Certificate of Public Convenience and Necessity by Integra Water Tennessee, LLC (First Amended Petition)*. In its *First Amended Petition*, Integra Water changed the proposed flat monthly rate of \$60.00 per residential unit to \$90.00 per residential unit. The Hearing Officer suspended the Procedural Schedule on June 30, 2017. On September 27, 2017, Integra Water filed *Integra Water Tennessee, LLC's Notice of Filing Amended Tariff (Amended Tariff)* along its second *Amendment to Petition for Certificate of Public Convenience and Necessity by Integra Water Tennessee, LLC (Second Amended Petition)*. The Hearing Officer issued an *Order Establishing an Amended Procedural Schedule* on October 5, 2017.

Integra Water is part of a large and sophisticated corporate system operating in both North Carolina and Alabama.¹³ As can be seen from Integra Water's responses to TPUC's and the Consumer Advocate's first Data Requests, Integra Water, LLC is the parent company of Integra Water Tennessee, LLC; Integra Water Vinemont, LLC; Integra Water Lee, LLC; Integra Water Baldwin, LLC; Integra Water Creola, LLC; and Integra Water Madison and is affiliated with Old North State Water company, LLC and South Carolina Water Company.¹⁴ This subsidiary/affiliate, multi-state structure and operations requires more extensive discovery than would ordinarily

¹¹ Although responses not formally filed until June 6, 2017, Integra Water provided responses informally on May 1, 2017.

¹² Although responses not formally filed until June 6, 2017, Integra Water provided timely responses informally on May 23, 2017.

¹³ Integra Water, LLC has served the "Southeastern United States water market since 2004" and with its affiliates, it "services over 30,000 customer accounts across the state of North Carolina and Alabama." See *Integra Water, Technical, Managerial and Financial Capabilities* document provided in response to TPUC Data Request Number 5 at page 10 Section 1.1. Financial Capability.

¹⁴ The Company's Response to TPUC Data Request #5 for organizational chart of referenced entities and affiliated companies and the Company's Response to CPAD Discovery Request #5 for a complete list of affiliates.

occur. Accordingly, the amount of this initial rate Integra Water is requesting, the complexity of the issues in this CCN and rate case, and the need for documentation from Integra Water justifying the proposed initial rate 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 Integra Water's proposed establishment of a rate and to evaluate the impact on consumers and related policy issues presented in the Integra Water's *Initial 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 *Initial Petition*, *First Amended Petition*, *Second Amended Petition* and *Amended Tariff*. 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 that constitute Integra Water's consumers. 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 to be charged to them by Integra Water 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.

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 TPUC 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 Commission's rules and Tennessee law, these additional discovery requests should only be denied if they are found to be abusive or oppressive.¹⁵ 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 Commission 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 Integra Water. The Consumer Advocate has reviewed the TPUC data request and Integra Water's responses to compare for duplicative requests.

¹⁵ Tenn. Code Ann. § 4-5-311(c).

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 Integra Water 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 and TPUC have each conducted one set of 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.”¹⁶ Integra Water’s *Initial Petition* in this TPUC Docket No. 17-00014 was filed on February 8, 2017, and the hearing officer granted the Consumer Advocate’s *Petition to Intervene* on March 16, 2017. On May 18, 2017, Integra Water filed the *First Amended Petition*.¹⁷ On September 27, 2017, Integra Water filed an *Amended Tariff* and its *Second Amended Petition*. Integra Water filed its “proposed instructions and application materials” to provide service on October 3, 2017.¹⁸ Although the Consumer Advocate has issued and received responses to its First Discovery Request, it has not had an opportunity for discovery on the *Amended Tariff*, *Second Amended Petition*, the “proposed instructions and application materials” to provide service¹⁹ or to seek clarification on Integra Water’s responses to discovery and data requests. Thus, it cannot be said that the Consumer Advocate has had “ample opportunity” for discovery in this action.

¹⁶ Tenn. R. Civ. Pro. 26.02(1).

¹⁷ In its *Amended Petition*, Integra Water changed the proposed flat monthly rate of \$60.00 per residential unit to \$90.00 per residential unit.

¹⁸ See Exhibit A to *Notice of Filing Instructions*.

¹⁹ *Id.*

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 Integra Water, taking into account the needs of this Docket. As discussed above, this is Integra Water's first petition for a CCN and establishment of a rate, there were no discussions between Integra Water and the Consumer Advocate prior to the filing of the *Initial Petition* in this Docket, and the issues presented in Integra Water's case are complex. Further, it should be noted that Integra Water 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.²⁰

Nevertheless, some brief analysis of each aspect of this potential limitation merits consideration. The first aspect relates to the “needs of the case.”²¹ As explained above, Integra Water has submitted multiple filings since the Consumer Advocate's First Discovery Request. Without the opportunity to conduct discovery on these additional filings, the Consumer Advocate cannot review, analyze and develop a complete case to TPUC in its efforts to represent consumers and provide a useful framework to TPUC for its decision-making process. 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.”

²⁰ Tenn. R. Civ. Pro. 26.02(1).

²¹ *Id.*

The second aspect requires that discovery requests be evaluated in light of the “amount in controversy.”²² In this matter, Integra Water introduces new or revised fees through its *Second Amended Petition* and *Amended Tariff*.²³ Additionally on October 3, 2017, Integra Water filed its “proposed instructions and application materials”²⁴ which differs considerably from the Tennessee application that had been on Integra Water’s website.²⁵

The final aspect requires that discovery requests must be considered with regard to any “limitations on the parties’ resources.” Integra Water, LLC is the parent company of Integra Water Tennessee, LLC; Integra Water Vinemont, LLC; Integra Water Lee, LLC; Integra Water Baldwin, LLC; Integra Water Creola, LLC; and Integra Water Madison. Integra Water is part of a large and sophisticated corporate system located in North Carolina and Alabama. Thus, while it may take time and effort for Integra Water 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.

CONCLUSION

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

²² *Id.*

²³ Fees include a new \$100 Reconnection Charge; a Late Payment Penalty revised from 1% to 10%; and a Security Deposit of 1x the monthly wastewater service charge. See *Second Amended Petition* at pages 1-2 and the “Schedule of Rates and Charges” in the *Amended Tariff*.

²⁴ See Exhibit A to *Notice of Filing Instructions*.

²⁵ The request for service application for Tennessee customers previously on Integra’s website was the same as the current request for service application for Alabama customers. The Alabama application can be found at http://integrawater.com/DOCS/Fillable-Application/Fillable_Generic.Water.&.Sewer.Service.Application.pdf.

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 11th day of October, 2017.

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