

IN THE TENNESSEE PUBLIC UTILITY COMMISSION  
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF TENNESSEE WATER	)	
SERVICE, INC. FOR APPROVAL OF	)	DOCKET NO. 17-00108
AN INTERIM EMERGENCY	)	
WILDFIRE RESTORATION	)	
SURCHARGE, INTERIM EMERGENCY	)	
WATER SERVICE AVAILABILITY	)	
FEE, EMERGENCY MAKE-WHOLE	)	
SURCHARGE AND AN INTERIM	)	
EMERGENCY OPERATIONAL COST	)	
PASS-THROUGH MECHANISM	)	
	)	

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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 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 Tennessee Water Service, Inc. (TWS). 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, "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.”<sup>1</sup>

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.”<sup>2</sup> 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.”<sup>3</sup> 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.”<sup>4</sup>

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

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<sup>1</sup> Tenn. Code Ann. § 4-5-311(a).

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

<sup>3</sup> *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).

<sup>4</sup> *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).

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.<sup>5</sup>

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

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.<sup>8</sup> Leave is obtained by filing a motion and an accompanying “memorandum establishing good cause” for additional discovery.<sup>9</sup> The Commission 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 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).

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<sup>5</sup> Tenn. R. Civ. P. 26.02(1).

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

<sup>7</sup> See *id.*

<sup>8</sup> TPUC Rule 1220-1-2-.11(5)(a).

<sup>9</sup> *Id.*

Thus, when TPUC 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* 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. 17-00108, this is an emergency rate case with a target hearing date of October 23, 2017. TWS filed its *Petition of Tennessee Water Service for Approval of an Interim Emergency Wildfire Restoration Surcharge, Interim Emergency Water Service Availability Fee, Interim Emergency Make-Whole Surcharge and an Interim Emergency Operational Cost Pass-Through Mechanism (Emergency Rate)* on September 25, 2017.

Additionally, TWS has not had a general rate case since Docket No 09-00017.<sup>10</sup> Finally, TWS is part of a large and sophisticated corporate system. Specifically, TWS is a wholly-owned subsidiary of Utilities, Inc. which “serves primarily residential customers across 15 states and is one of the largest privately owned water and wastewater utilities in the United States.”<sup>11</sup> Utilities Inc. is a wholly-owned subsidiary of Corix Utilities, which delivers “safe, cost-effective and sustainable water, wastewater, and energy utility infrastructure solutions to communities in 27 states and six provinces across North America.”<sup>12</sup>

The consequences of the denial of the additional discovery requested would include the inability of the Consumer Advocate to test the merits of TWS’s proposed establishment of emergency rates and to evaluate the impact on consumers and related policy issues presented in the TWS’s *Emergency 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 *Emergency 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 that constitute TWS’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 TWS 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.

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<sup>10</sup> *Order Approving Settlement Agreement In Re: Petition of Tennessee Water Service, Inc. to Change and Increase Certain Rates and Charges*, Docket No. 09-000017 (September 15, 2009).

<sup>11</sup> See <http://www.corix.com/corix-companies/utilities-inc/>. See [www.uiwater.com](http://www.uiwater.com) which identifies the following 15 states: Alabama, Arizona, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Nevada, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee and Virginia.

<sup>12</sup> See <http://www.corix.com/about-corix/where-we-operate>.

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.<sup>13</sup> 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

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<sup>13</sup> Tenn. Code Ann. § 4-5-311(c).



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 TWS. It should be noted that at this time, there are no data requests by TPUC staff available on the TPUC 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 TWS 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 formal discovery in this Docket.<sup>14</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). TWS’s *Emergency Petition* in this TPUC Docket No. 17-00108 was filed on September 25, 2017, and it requested a target hearing date of October 23, 2017. The Consumer Advocate filed its Petition to Intervene on September 28, 2017. It is apparent that, in this Docket, there has been no opportunity for formal discovery by the Consumer Advocate prior to the discovery that is being requested today, October 5, 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

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<sup>14</sup> The Consumer Advocate issued informal discovery requests on August 15, 2017; September 1, 2017 and September 28, 2017. On August 22, 2017, TWS has provided very limited responses to the Consumer Advocate’s requests. Specifically on August 22, 2017, TWS provided 2 spreadsheets which included financial statements, general ledger details and surcharge workpapers.

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 TWS, taking into account the needs of this Docket. As discussed above, TWS has not had a general rate case since Docket No 09-00017.<sup>15</sup> Additionally, this is an emergency rate case which was just filed on September 25, 2017 and TWS is requesting a target hearing date on October 23, 2017. Further, it should be noted that TWS 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.<sup>16</sup>

Nevertheless, some brief analysis of each aspect of this potential limitation merits consideration. The first aspect relates to the “needs of the case.”<sup>17</sup> As explained above, there has been very limited information submitted to the Consumer Advocate’s informal discovery requests and limited information submitted with the *Emergency Petition*. Without such information and documentation, 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. Again, the Consumer Advocate has submitted no discovery request to

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<sup>15</sup> *Order Approving Settlement Agreement In Re: Petition of Tennessee Water Service, Inc. to Change and Increase Certain Rates and Charges*, Docket No. 09-000017 (September 15, 2009).

<sup>16</sup> Tenn. R. Civ. Pro. 26.02(1).

<sup>17</sup> *Id.*



date in this TPUC Docket No. 17-00108. 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."<sup>18</sup> In this matter, TWS's *Emergency Petition* requested the assessment of two surcharges amounting to \$10.55 per month for active customers and the assessment of three surcharges amounting to \$24.81 per month for inactive customers.<sup>19</sup>

The final aspect requires that discovery requests must be considered with regard to any "limitations on the parties' resources." TWS is part of a large and sophisticated corporate system. Thus, while it may take time and effort for TWS 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*.

RESPECTFULLY SUBMITTED,

  
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<sup>18</sup> *Id.*

<sup>19</sup> *Emergency Petition* at pages 4-7, paragraphs 16a-c. TWS proposes to assess both active and inactive the Interim Emergency Wildfire Restoration Surcharge and Interim Emergency Water Service Availability Surcharge. Inactive customers will be assessed a separate, third surcharge—Interim Emergency Make-Whole Surcharge. .

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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 5<sup>th</sup> day of October 2017.

Karen H Stachowski  
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