

IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE

IN RE:

JOINT APPLICATION OF AQUA
UTILITIES COMPANY, LLC, AND
LIMESTONE WATER UTILITY
OPERAITNG COMPANY FOR
AUTHORITY TO SELL OR TRANSFER
TITLE TO THE ASSETS, PROPERTY
AND REAL ESTATE OF A PUBLIC
UTILITY AND FOR A CERTIFICATE
OF CONVENIENCE AND NECESSITY

DOCKET NO. 19-00062

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

The Consumer Advocate Unit in the Financial Division of the Office of the Attorney General (Consumer Advocate), pursuant to TPUC Rule 1220-01-02-.11(5)(a), hereby submits this Memorandum in Support of its *Motion for Leave to Issue More Than Forty Discovery Requests (Motion)* to Limestone Water Utility Operating Company, LLC (Limestone Water), Central States Water, Inc. (CSWR Inc.) and Aqua Utilities Company, LLC (Aqua Utilities). 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.”¹

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

¹ Tenn. Code Ann. § 4-5-311(a).

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).

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.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): “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 1220-01-02-.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).

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 *Tenn. Comp. R. & Regs Rule 1220-01-02-.11(5)(a)* (April 2018).

⁹ *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 1220-01-02-.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 Commission. 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 Commission 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 the current Docket, this is Limestone Water's second petition regarding an acquisition of a water/wastewater utility in Tennessee.¹⁰ However, the first petition was

¹⁰ The first acquisition application by Limestone water in TPUC Docket No. 19-000035. *Joint Application of Cartwright Creek, LLC, and Limestone Water Utility Operating Company, LLC, for Authority to Sell or Transfer Title to the Assets, Property and Real Estate of a Public Utility and for a Certificate of Public Convenience and Necessity*, TPUC Docket No. 19-00035 (March 14, 2019).

withdrawn prior to responses to discovery being filed.¹¹ Therefore, neither the Consumer Advocate nor the Commission has had the opportunity to learn about or develop in-depth knowledge of the proposed purchaser, Limestone Water, which is important in determining whether Limestone Water has the technical, financial and managerial abilities to own and operate Aqua Utilities water/wastewater systems.

On August 28, 2019, after the filing of the *Initial Joint Application*¹², the Consumer Advocate sent correspondence to counsel of record regarding compliance with the Commission's Minimum Filing Requirements (MFR) which are set out in TPUC Rule 1220-04-13-.17.¹³ Aqua Utilities and Limestone Water filed their *Amended Joint Application* on December 13, 2019, which addressed some, but not all, of the compliance issues raised in the Consumer Advocate's MFR Review Letter.¹⁴

Furthermore, Aqua Utilities and Limestone Water have not provided any detailed analysis and explanation as to how the purchase price was determined, including all relevant studies and analysis and any materials relied upon. Nor has Limestone Water provided cost estimates for identified upgrades and repairs to the water/wastewater systems. Such information is important in determining the appropriateness of the purchase price and proposed costs of upgrades and repairs, and in determining the potential impact to consumers.¹⁵

¹¹ *Withdrawal of Joint Application*, TPUC Docket No. 19-00035 (October 4, 2019).

¹² *Joint Application of Aqua Utilities Company, Inc. and Limestone Water Utility Operating Company, LLC, for Authority to Sell or Transfer Title to the Assets, Property and Real Estate of a Public Utility and for a Certificate of Public Convenience and Necessity*, TPUC Docket No. 19-00062 (July 26, 2019).

¹³ *Consumer Advocate MFR Review Letter* (August 28, 2019).

¹⁴ *Amended and Restated Joint Application of Aqua Utilities Company, Inc. and Limestone Water Utility Operating Company, LLC for Authority to Sell or Transfer Title to the Assets, Property, and Real Estate of a Public Utility and for a Certificate Of Public Convenience and Necessity*, TPUC Docket No. 19-00062 (December 13, 2019).

¹⁵ Limestone Water states that it intends to adopt Aqua Utilities existing tariff, at least initially. However, Limestone Water expects that additional capital investment may cause it to petition to increase rates in the future. *Amended Joint Application* at. Exhibit 9, p. 12.

Finally, Limestone Water is part of a large and sophisticated corporate system operating in Missouri, Arkansas, Kentucky, Louisiana and Texas.¹⁶ Limestone Water is part of a corporate structure that involves CSWR, LLC¹⁷ and Central States Water Resources, Inc. It is unclear if US Water Systems, LLC is still a part of the organization structure since it is not identified in the organization structure in the *Amended Joint Application*.¹⁸ This conflicting information in filings and the affiliate, multi-state structure and operations requires more extensive discovery than would ordinarily occur.

Therefore, substantial discovery by the Consumer Advocate is justified due to the purchase price Aqua Utilities is requesting, conflicting or missing information in the *Initial* and *Amended Joint Applications*, Limestone Water's first time ownership of a utility in Tennessee, and the complexity of the issues in this sale/acquisition docket. 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 Aqua Utilities' proposed sale to Limestone Water and to evaluate the impact on consumers and related policy issues presented in the *Initial* and *Amended Joint Applications*. 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* and *Amended Joint Applications*. Without the requested discovery – and without receiving discovery

¹⁶ *Amended Joint Application* at Exhibit 5.

¹⁷ In the organization chart from the *Initial Joint Application*, CSWR, LLC was called "First Round CSWR, LLC". The Consumer Advocate has sought clarification that First Round CSWR, LLC identified in its *Initial Petition* (Exhibit 4) is the same as CSWR, LLC in the *Amended Joint Application* (Exhibit 5). In addition, it appears that CSWR, LLC and Central States Water Resources, Inc. have swapped places in the organization structure when comparing the *Initial* and *Amended Joint Applications*. The Consumer Advocate's poses questions regarding the organization chart and these two entities. See *Consumer Advocate's First Discovery Request to Limestone Water Utility Operating Company, LLC*, TPUC Docket No. 19-00062, CA DR#1-4.

¹⁸ See *Consumer Advocate's First Discovery Request to Limestone Water Utility Operating Company, LLC*, TPUC Docket No. 19-00062, CA DR#1-3.

responses in the format requested – the Consumer Advocate will be severely constrained in representing the interests of households that constitute Aqua Utilities’ 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 sale of the water/wastewater systems 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 Commission 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 Aqua Utilities and Limestone Water’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.¹⁹ As discussed above, the “abusive or oppressive” standard should be understood in

¹⁹ Tenn. Code Ann. § 4-5-311(c).

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 if possible.²⁰ Where possible, the Consumer Advocate has attempted to use publicly available data, rather than requesting that information directly from Aqua Utilities or Limestone Water.²¹ Additionally, the Consumer Advocate reviewed the Commission’s data request in TPUC Docket No. 19-00035²² and incorporated Staff questions into the Consumer Advocate’s discovery request for this Docket, TPUC Docket No. 19-00062.

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 Aqua Utilities and Limestone Water to clarify, alter, amend or (if necessary) withdraw a discovery request that is unreasonably cumulative or duplicative.

²⁰ Sources for public information include the Tennessee Department of Environment and Conservation’s dataviewers, other state public service commissions, the Tennessee Secretary of State’s business services’ webpage, and TPUC’s Docket Page.

²¹ For Aqua Utilities, the Consumer Advocate reviewed the Commission’s Docket Page for previous dockets such as TPUC Docket Nos. 00-1105, 02-00388, 06-00187, 07-00059, and 15-00044. Although TPUC Docket No. 90-04334 exists on TPUC’s archived Docket Page, there is very limited information available. For Limestone Water and Central States Water Resources, Inc. (CSWR), the Consumer Advocate reviewed the previous sale/acquisition docket, TPUC Docket No. 19-00035, and reviewed cases with the Kentucky Public Service Commission – Case Nos. 2019-00104 and 2019-00360.

²² The Parties did not respond to the Staff’s data request in TPUC Docket No. 19-00035 prior to the withdrawal of that petition. As such, there is no previous responses for the Consumer Advocate to utilize. *Withdrawal of Joint Application*, TPUC Docket No. 19-00035 (October 4, 2019).

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.²³ 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.”²⁴ Aqua Utilities and Limestone Water’s *Amended Joint Application* in this Docket was filed on December 13, 2019. It is apparent that there has been no opportunity for discovery by the Consumer Advocate prior to the discovery that is being requested today 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 Aqua Utilities and Limestone Water, taking into account the sale price and the needs of this Docket. As discussed above, this will be Limestone Water’s first water/wastewater utility in Tennessee, if approved by the Commission. As such, this is the first opportunity for the Commission and the Consumer Advocate to develop in-depth knowledge of Limestone Water and its affiliates, and the issues presented in Limestone Water’s acquisition docket are complex. Further, it should be noted that Aqua Utilities and Limestone Water are effectively the only sources 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

²³ The Consumer Advocate does not consider its MFR Review Letter as a part of discovery process or to be treated as in lieu of discovery. Rather, the MFR Review Letter addressed information missing from the *Initial Joint Application* based up on review of the Commission’s rule on the minimum filing requirements for new and amended Certificates of Convenience and Necessity.

²⁴ Tenn. R. Civ. Pro. 26.02(1).

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.²⁵

Nevertheless, some brief analysis of each aspect of this potential limitation merits consideration. The first aspect relates to the "needs of the case."²⁶ As explained above, Aqua Utilities and Limestone Water have not provided any detailed analysis and explanation as to how the purchase price was determined, including all relevant studies and analysis and any materials relied upon. Without such information and documentation, the Consumer Advocate cannot review, analyze and develop a complete case to the Commission in its efforts to represent consumers and provide a useful framework to the Commission for its decision-making process. Again, this is the Consumer Advocate's first discovery request in this Docket. 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."²⁷ In this matter, the *Initial Joint Application* sets out a purchase price of [REDACTED].²⁸ Although Limestone Water proposes to initially adopt the tariffs currently in effect, it admits that it may petition the Commission to increase rates if additional capital investment is needed for upgrades and improvements.²⁹ The identified upgrades and improvements³⁰ along with

²⁵ Tenn. R. Civ. Pro. 26.02(1).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Amended Joint Application* at Confidential Exhibit 7, Article I, §1.02(a).

²⁹ *Amended Joint Application* at Exhibit 9, p. 12.

³⁰ *Amended Joint Application* at p. 6.

the proposed purchase price will have an impact on the customer base of “approximately 371 residential water customers and 301 residential wastewater customers.”³¹

The final aspect requires that discovery requests must be considered with regard to any “limitations on the parties’ resources.” Limestone Water is part of the Central States Water Resource Corporate family that operates in Missouri, Arkansas, Kentucky, Louisiana and Texas.³² As such, Limestone Water is part of a large and sophisticated corporate system whose business plan is described as follows:

to pursue the purchase and recapitalization of failing water and wastewater systems and to operate those systems as investor-owned regulated utilities. Many of those systems are not currently regulated, and of those that are regulated by state utility commissions, many if not most, are out of compliance with commission rules and with federal or state pollution and safety laws and regulations. Many of those companies do not even have the federal or state permits required to lawfully operate their systems. We also have found that many of the regulated companies have not increased their rates for a decade or more and, as a result, they don’t have the financial resources necessary to build, maintain, and replace assets used to provide or to bring their operations into compliance with rapidly-changing environmental and water quality regulations. Some of these companies are in receivership and, therefore, lack the ability to raise capital necessary to improve their systems. Because it has made the effort to find capital and investors who are willing to make investments and take risks necessary to bring small water and wastewater systems into compliance with current statutes, rules and regulations, CSWR, through its affiliates, has been able to acquire distressed systems, invest capital necessary to construct or repair physical facilities and operate those systems in a way that satisfies customers, regulators and investors alike.”³³

Thus, it appears that Limestone Water and its affiliates are set up for, and are experienced with, the acquisition of small water and wastewater system like Aqua Utilities. Thus, while it may take time and effort for Limestone 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

³¹ *Joint Petition of Aqua Utilities Company and TRA Staff (as a Party) to Increase Rates and Charges*, p. 1, ¶ 1, TPUC Docket No. 15-0004 (April 9, 2015).

³² *Amended Joint Application* at Exhibit 5.


³³ *Amended Joint Application* at Exhibit 9, pp. 4-5.

larger corporate system operating in multiple states and very experienced in the subject area of this Docket. As for the discovery requests for Aqua Utilities, the requests deal with facts and issues that should be readily available to the utility such as customer counts by development, maps, description of systems, confirmation of the licensed operators, and information required by the Tennessee Department of Environment and Conservation.

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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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 29th day of January, 2020.


KAREN H. STACHOWSKI