

**IN THE TENNESSEE PUBLIC UTILITY COMMISSION  
AT NASHVILLE, TENNESSEE**

<b>IN RE:</b>	)	
	)	
<b>JOINT PETITION OF</b>	)	
<b>TENNESSEE-AMERICAN WATER</b>	)	
<b>COMPANY, AND THUNDER AIR, INC.</b>	)	<b>Docket No. 20-00011</b>
<b>D/B/A JASPER HIGHLANDS</b>	)	
<b>DEVELOPMENT, INC. FOR APPROVAL OF</b>	)	
<b>AN ASSET PURCHASE AGREEMENT AND</b>	)	
<b>FOR THE ISSUANCE OF A CERTIFICATE</b>	)	
<b>OF CONVENIENCE AND NECESSITY</b>	)	

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**MOTION TO COMPEL DISCOVERY**

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Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate Unit in the Financial Division of the Office of the Attorney General (“Consumer Advocate” or “CA”), pursuant to Tenn. R. Civ. P. 37.01 and TPUC Rule 1220-1-2-.11(9), respectfully moves the Hearing Officer for an order requiring Tennessee-American Water Company (“TAWC”)<sup>1</sup> to provide complete and accurate responses to the *Consumer Advocate’s First Discovery Request to Tennessee-American Water Company and Thunder Air, Inc.*, specifically CA Request Nos. 1-1 and 1-4.<sup>2</sup>

TAWC failed to provide documents and/or other information in their original form maintained by the company to the Consumer Advocate and, after the Consumer Advocate made several good faith attempts to resolve this issue without the need for a motion to compel, nevertheless submitted incomplete responses alongside improper and unsubstantiated objections.

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<sup>1</sup> When referenced along with Thunder Air, Inc., this *Brief* will refer to the companies as the “Joint Petitioners.”

<sup>2</sup> Attached as **Exhibit 1** and **Exhibit 2**.

## BACKGROUND

To understand the Consumer Advocate's *Motion*, it is necessary to first review TPUC Docket No. 18-00099, the first acquisition petition of the Jasper Highlands development water system filed by the Joint Petitioners on September 7, 2018 and withdrawn on February 14, 2019. The substance of that Docket is essentially the same as the current one. Both dockets involve 1) the proposed acquisition by TAWC of the Jasper Highlands development water system from Thunder Air and 2) proposed regulatory treatment utilizing the full purchase price of the water system negotiated solely between TAWC and Thunder Air. After discovery, pre-filed direct testimony of the Consumer Advocate, and pre-filed rebuttal testimony by TAWC, the proceeding was initially set for hearing at the January 22, 2019 Commission Conference.<sup>3</sup>

During the parties' final preparations to litigate the case – and with only one week remaining before the Hearing – on January 15, 2019, TAWC contacted the Consumer Advocate about a potential issue concerning the company's discovery response to CA Request No. 3-13.<sup>4</sup> In essence, TAWC informed the Consumer Advocate that it did not produce documents in the original form as maintained by the company. In fact, TAWC edited the version submitted in its discovery response by redacting information, although the redaction was not obvious, and it was not possible to determine what or how much information was redacted. Rather, the document submitted by TAWC was submitted in a way that appears free of any editing or redaction.

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<sup>3</sup> *Order Establishing Procedural Schedule*, TPUC Docket No. 18-00099 (December 3, 2018). In fact, in an attempt to have the matter expedited, TAWC initially submitted to the Commission that the acquisition deal would fall through if it were not decided prior to the end of the 2018 calendar year. Even though the Procedural Schedule contemplated a January 2019 hearing, and after the discovery dispute in question caused that hearing date to be cancelled (*see Notice of Cancellation of Hearing*, January 17, 2019), the acquisition deal still did not fall through, and the *Petition* was later withdrawn by the Joint Petitioners for other reasons, which are discussed below.

<sup>4</sup> While this request was labelled as No. 3-13, the request was in fact only a part of the second round of discovery submitted by the Consumer Advocate. When working on a procedural schedule for Docket No. 18-00099, TAWC labelled a response to a letter filed by the Consumer Advocate on November 1, 2018 as a "first round" of discovery responses. Therefore, while it was only the second round of discovery issued in the matter, the Consumer Advocate changed its numerology to the three-series, including Item No. 3-13, for ease of reference.

CA Request No. 3-13 was a follow-up request to information sought by Commission Staff in its November 9, 2018 *Data Requests* to TAWC. Staff's Item No. 16 required the following:

Provide TAWC's budgeted financial statements, including balance sheets, income statements and statements of cash flows, for the first three years of operation for the water system being transferred to TAWC. Please describe in detail all budget assumptions utilized to support these calculations.

On November 27, 2018, TAWC submitted a response, along with a two-page attachment, to this Staff Request.

After reviewing TAWC's responses to Staff, the Consumer Advocate issued follow-up discovery. As the Company's Response to Staff's Item No. 16 referenced but failed to include underlying information, the Consumer Advocate issued Request No. 3-13 in order to review the source and support for data referenced in the response to TPUC Staff along with "documentation for all assumptions used in developing this forecast." CA Request No. 3-13 entailed the following:

Refer to the spreadsheet included as an attachment to Item 16 of the Tennessee Public Utility Commission's first data request regarding budgeted financial statements for 2019, 2020 and 2021. It appears that the formulas included in this spreadsheet refer to other data not included with the response. Provide the source and support for all data referenced in this spreadsheet. Include documentation for all assumptions used in developing this forecast with your response.

TAWC submitted an initial response to this request on December 14, 2018. On December 20, 2018, TAWC supplemented this response. It is noteworthy that neither response included an objection by TAWC. Nor did the Company indicate that the submitted information had been altered from its original form. Rather, the Company unilaterally made the determination to withhold the information without any objection or disclosure until it contacted the Consumer Advocate near the eve of Hearing.

The parties in Docket No. 18-00099 had several discussions concerning the discovery dispute. The parties, however, eventually reached an impasse. The Consumer Advocate informed TAWC that it would file a motion to compel full and complete responses to discovery to obtain the original versions of the documents and underlying information maintained by the company. Facing a motion to compel, however, TAWC informed the Consumer Advocate during the discussion that it would withdraw its *Petition* the following day, thereby abandoning its attempt to acquire the Jasper Highlands development water system from Thunder Air.<sup>5</sup>

On February 3, 2020, the Joint Petitioners refiled their *Petition*. TAWC again seeks TPUC's authorization to acquire the Jasper Highlands development water system from Thunder Air and to utilize the full purchase price for all future regulatory treatment. In order to fully examine the *Petition* and its underlying support, the Consumer Advocate included two items in its first discovery requests, CA Request Nos. 1-1 and 1-4. Those Requests read as follows:

- 1-1. Refer to the Company's February 14, 2019 voluntary withdrawal of the *Joint Petition* in Docket No. 18-00099 and provide the following information:
  - a. Provide a comprehensive explanation of the Company's voluntary withdrawal in Docket No. 18-00099; and
  - b. Provide an explanation of how the reasons for the Company's voluntary withdrawal in Docket No. 18-00099 are no longer relevant in this Docket No. 20-00011.
- ...
- 1-4. Provide annual pro forma budgeted financial statements (income statements, balance sheets and projected monthly customer counts by tariff rate) for the first ten years (2020 – 2029) of operations for the water system being acquired by TAWC. Please describe in detail all budget assumptions and documents utilized to support these calculations.

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<sup>5</sup> See *Tennessee-American Water and Thunder Air Inc. Voluntary Withdrawal of Joint Petition for a CCN*, TPUC Docket No. 18-00099 (February 14, 2019).

This time, TAWC has provided unsubstantiated objections and initial and supplemental responses to these items. In response to Request No. 1-1, TAWC stated in relevant part, “TAWC objects to this request on the grounds that the request is irrelevant and constitutes a fishing expedition seeking information that is not relevant and is not limited to this matter.” And in response to Request No. 1-4, TAWC stated in relevant part, “TAWC objects to this request on the grounds that it is overly broad and unduly burdensome.”

The company has represented to the Consumer Advocate that, despite the Consumer Advocate’s requests seeking the same information as in the original acquisition docket, the original form of the documents maintained by TAWC since Docket No. 18-00099 have not been provided in either the initial responses or supplements, and TAWC will not provide these documents absent an order compelling it to do so. Moreover, as it did in the previous Docket, TAWC continues to refuse to provide a description of the withheld documents, the subject matter to which the documents relate, or the scope of the redactions.

### **ANALYSIS**

In response to the Consumer Advocate’s Request Nos. 1-1 and 1-4, TAWC made conclusory objections that the requests were irrelevant, unduly burdensome, or a fishing expedition. These general, conclusory objections are improper, especially when applied to requested information that is likely to lead to admissible, and perhaps material, information or documents. TAWC should withdraw these objections to the extent they have not been waived and produce the requested documents and information in the form maintained by the company.

#### **I. TAWC’S CONCLUSORY OBJECTIONS CONSTITUTE WAIVER.**

While TAWC partially objected to the requests in this Docket, deficiencies in the objections result in TAWC’s waiver of any objections. Tennessee R. Civ. P. 34.02 provides in

relation to objections to document requests:

The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for objection. If objection is made to part of an item or category, the part shall be specified.<sup>6</sup>

TPUC's rules concerning discovery likewise require that "[a]ll objections to discovery requests shall be presented in the manner set forth in the Tennessee Rules of Civil Procedure."<sup>7</sup> It is the duty of "the party opposing discovery [to] demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary to protect it from, among other things, oppression or undue burden or expense."<sup>8</sup>

When served with discovery, the "party on whom a request for discovery has been served must serve a written response," and "[i]f that party objects to any request, the reasons for objection must be stated."<sup>9</sup> There is a broad policy in Tennessee favoring open discovery, and "the party opposing discovery must demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'"<sup>10</sup> Courts must decline a party's objection to discovery if "the party seeking the limitations cannot produce

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<sup>6</sup> This rule subsequently allows that "[t]he party submitting the request may move for an order under Rule 37.01 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested." Tenn. R. Civ. P. 34.02. And TPUC rules expand on this requirement for protective orders, requiring that the party provide copies of the discovery request, state with reasonable specificity the factual and legal grounds for the motion, and include an affidavit or other evidence showing the need for the order. TPUC Rule 1220-01-02-.11(10). TAWC did not move for such a protective order.

<sup>7</sup> TPUC Rule 1220-01-02-.11(7).

<sup>8</sup> *State ex. rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006).

<sup>9</sup> *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Intern., Inc.*, 2002 WL 1389615, at \*4 (Tenn. Ct. App. June 27, 2002) (citing Tenn. R. Civ. Pro. 34.02).

<sup>10</sup> *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990) (citing Tenn. R. Civ. P. § 26.03; *Loveall v. American Honda Motor Co.*, 694 S.W.2d 937, 939 (Tenn.1985)).

specific facts to support its request.”<sup>11</sup>

When TAWC provided its response to the Consumer Advocate’s request, it failed to state any specific objection. The company’s responses contained superficial objections with no justification as to how the objections apply to the requested information. The Consumer Advocate must assume that the company would prefer the Consumer Advocate and the Commission review surreptitiously redacted documents without knowing what the information may represent and in what ways the production could be deficient. But Tennessee law requires parties seeking to limit discovery to provide specific facts as to why discovery should be so limited. By failing to properly object in its responses, TAWC has waived any objection it may have had and may not withhold the requested information.

## **II. THE CONSUMER ADVOCATE’S REQUESTS ARE PROPER, AND EVEN IF TAWC’S OBJECTIONS WERE NOT WAIVED, THEY LACK MERIT.**

Even if TAWC had provided underlying facts to substantiate its objections, the company is still required to produce the information. The Consumer Advocate’s requests are proper, supported by Tennessee law, and reasonably calculated to lead to the discovery of admissible evidence, as demonstrated by TPUC Staff’s initial attempts to receive the information and by the limited, albeit altered, documents produced thus far by TAWC.

After discussions and numerous good faith attempts by the Consumer Advocate to receive this relevant information, TAWC continues to refuse to provide complete responses. Further, TAWC’s responses fail to consider the needs of the case stemming from the company’s status as a regulated utility, the Consumer Advocate’s statutory duty to represent Tennessee consumers, and the Commission’s authority over the public utilities it regulates.

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<sup>11</sup> *Id.* (The husband in a divorce proceeding filed for a protective that “contained no specific facts, or even conclusory allegations, pointing to the need for a protective order . . . .”)

**A. Tennessee’s discovery rules and cases permit and even encourage broad discovery.**

Tennessee R. Civ. P. 26.02 allows for broad discovery. Specifically, the Rule provides:

**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.<sup>12</sup>

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>13</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>14</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>15</sup>

Consistent with Tennessee’s open discovery policy, the relevancy requirement is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other

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<sup>12</sup> Tenn. R. Civ. P. § 26.02 (emphasis added).

<sup>13</sup> *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

<sup>14</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>15</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).

matters that could bear on any of the case's issues.”<sup>16</sup> Further, discovery is not limited to the issues raised by the pleadings.<sup>17</sup>

Under Tennessee's lenient discovery standards, a party may also use discovery to: define and clarify the issues; formulate and interject additional issues into the case; determine additional causes of actions or claims against a party or a third-party; or probe a variety of fact-oriented issues unrelated to the merits of the case.<sup>18</sup> Because of this broad policy favoring discovery, limitations on discovery should not be ordered unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the requested discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense.<sup>19</sup> Accordingly, a party objecting to any discovery request must state the reasons for the objection.<sup>20</sup> As a general matter, the rules favor the production of the requested information in all cases where the request is reasonable.<sup>21</sup>

Therefore, Tennessee law favors the Consumer Advocate's ability to obtain this information in discovery. Both the Consumer Advocate and Staff have attempted to review this information in order to study TAWC's request to purchase this water system. Moreover, TAWC bears the burden of proving it has a valid objection that should allow it to withhold the information, which the company cannot do because it has failed to provide proper objections or substantive information supporting its position. As discussed above, Tennessee law requires TAWC to provide accurate and complete responses or state a proper objection at the time

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<sup>16</sup> *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Int'l, Inc.*, 2002 WL 1389615, at \*3 (Tenn. Ct. App. June 27, 2002) (internal citations omitted).

<sup>17</sup> *Id.*; see also *Shipley v. Tenn. Farmers Mut. Ins. Co.*, 1991 WL 77540, at \*7-\*8 (Tenn. Ct. App. May 15, 1991).

<sup>18</sup> *Shipley*, 1991 WL 77540 at \*7-8.

<sup>19</sup> *Duncan*, 789 S.W.2d at 561.

<sup>20</sup> *Id.*; see also *Kuehne & Nagel, Inc.*, 2002 WL 1389615 at \*4.

<sup>21</sup> *Kuehne & Nagel, Inc.*, 2002 WL 1389615 at \*4.

responses are due, and TAWC cannot evade this requirement or rely on its response to this *Motion* to cure the deficiencies.

**B. The Consumer Advocate's discovery requests are reasonably calculated to lead to the discovery of admissible – and potentially material – evidence.**

In the context of this TPUC Docket No. 20-00011, TAWC seeks both a Certificate of Public Convenience and Necessity to operate the Jasper Highlands development water system as well as regulatory treatment. This is not only an acquisition docket but also a rate-setting one. Therefore, the issues presented here are of the highest importance to the customers TAWC hopes to serve. Additionally, as TAWC proposes regulatory treatment concerning the full purchase price that would reverse longstanding Commission precedent, adequate responses to discovery requests are even more crucial to the Consumer Advocate, the Commission, and Commission Staff.

When filing expert testimony, especially of positions involving the establishment of rates, the Consumer Advocate is careful to provide enough background and information to allow the Commission to fully analyze the consumers' position. By presenting a detailed position describing what the Consumer Advocate reviewed and how it arrived at its position, 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 outcome of the matter. 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.

Further, TAWC seeks to utilize the full purchase price it negotiated with the unregulated property developer currently operating the system as a means of setting rates. The Consumer Advocate's discovery requests reflect the need for a substantial amount of information to analyze and consider the substantial and complex requests made by the company. While TAWC avers

that the full purchase price is appropriate for setting rates, the Consumer Advocate must review the documents maintained by the company, in their original form, to adequately analyze whether such treatment is appropriate. Because TAWC's proposal would constitute a change in precedent in Tennessee, additional care must be taken by both the Consumer Advocate and Commission Staff because this Docket could have ramifications in future acquisition dockets.

Even if information sought by the Consumer Advocate may not relate to the purchase price of the system, the information must still be submitted. In regulatory dockets before this Commission, the parties operating a business and filing requests are typically the ones with all pertinent information. Commission Staff and intervenors rely on the discovery process to analyze public utilities' requests. It would be an impossible burden to require a party to identify all issues before obtaining and evaluating information. Instead, a party must view the information and then determine whether there are underlying issues or other concerns. "It is through discovery that parties openly mine 'to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment.'"<sup>22</sup> Here, the Consumer Advocate must view TAWC's documents in their original and unaltered form prior to submitting testimony about the Joint Petitioners' request. Any other process would not only thwart meaningful review but would also violate due process protections.

**C. The Consumer Advocate's discovery requests are not unduly burdensome or expensive, especially taking into account the complexity and magnitude of the case.**

TAWC has objected to the requests on the grounds that the Consumer Advocate's requests are irrelevant, overly broad, unduly burdensome, or constitute a "fishing expedition." Regardless of how TAWC's objections are formulated or combined, though, the Consumer

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<sup>22</sup> *Kuehne & Nagel, Inc.*, 2002 WL 1389615 at \*3 (citing Irving Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1962)).

Advocate's requests are not unduly burdensome or expensive to TAWC and its parent company. In fact, TAWC undertook additional work on the responses by redacting certain information. As TAWC did not substantiate its objections, it is unnecessary to provide extensive detail into each objection separately. Some matters, however, stand out.

TAWC is a part of one of the largest public utility conglomerates in the United States – American Water Works, Inc. – and effectively is the only source for most of the information that is needed to analyze and develop information with respect to this Docket. The reality of the case today is that TAWC has had years to analyze this acquisition and prepare its case. It has done so in two separate dockets before this Commission. Allowing the Consumer Advocate to review the company's documents in the short time afforded to it prior to the submission of pre-filed direct testimony is not unfair to the company. If the Consumer Advocate's experts are denied discovery simply by the unfounded claim that providing that discovery would constitute a hardship for one of the largest utility conglomerates in the country, then the Commission would be denied the valuable recommendations of the Consumer Advocate's experts and consumers would be denied perhaps the only means of obtaining due process with respect to the rates the company hopes to impose on them.

Moreover, the notion that producing this information constitutes a burden is difficult to fathom. While TAWC has offered virtually no information about the contents of the information it has withheld, the one known factor is that the information *already exists*. The Consumer Advocate is asking TAWC to produce documents or other information in the form maintained by the company. Taking the time to alter the documents prior to submission as the company did here constitutes a greater burden than producing the information in its original form as required by law. Additionally, TAWC elected to not seek a protective order from the Hearing Officer

over the information, which would have been the appropriate way to respond to discovery with redacted documents.

TAWC appears before the Commission with a complex and potentially precedent-setting matter. The case is presented by two sophisticated enterprises and with numerous expert witnesses. TAWC seeks to deny the Consumer Advocate the data and information needed to offer the consumers' position for TPUC's consideration. That denial takes the form of the unsubstantiated objections put forward by the company and its legal counsel.

The consequences of the denial of the discovery requested would include the inability of the Consumer Advocate to test the merits of the acquisition and TAWC's proposed ratemaking treatment as well as to evaluate the policy issues presented in the *Joint Petition*. This could cause the Consumer Advocate to be unable to develop a fully prepared position, which the company may attempt to use against the Consumer Advocate in rebuttal testimony.

But there is even more at stake as the Commission considers this *Motion*. Public utilities are regulated by this Commission, in part, because they are natural monopolies. While public utilities enjoy many advantages regarding this status, including the ability to operate without competition, certain obligations also arise. TAWC, as a public utility, must provide accurate information in proceedings before TPUC and allow the Consumer Advocate and TPUC to have access to its documents. These documents must be unaltered and in their original form to allow the Consumer Advocate to make its case for the customers who have no other choice than to receive these essential services from the company and the Commission to make an appropriate determination concerning the public interest.

Setting a precedent that would provide a public utility with full discretion over the information that it submits for the Consumer Advocate's and Commission Staff's review – and

the ability to unilaterally refuse to submit information – is a dangerous prospect. If the company were allowed such power, it would call into question the legitimacy of information provided by this company and other regulated public utilities in every future docket. Without the benefit of robust discovery, the Consumer Advocate could not effectively represent consumers' interests.

**III. TAWC must provide the requested documents in their original form, including electronically stored information.**

The limited documentation TAWC provided in Docket No. 18-00099, and which remains discoverable in this Docket, was improperly redacted without explanation. That condition remains true in the current Docket. Even if TAWC had not waived its opportunity to object to the Consumer Advocate's requests, the law still requires production of the documents in their original form and unaltered. Tennessee R. Civ. P. 34.01 states:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requesting party's behalf, to inspect, copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, phono-records, and other data and data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the respondent into a reasonably usable form), or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26.02 and which are in the possession, custody or control of the party upon whom the request is served . . . .

The advisory comments to the rule provide more insight into electronic materials such as those sought from TAWC:

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34.01 show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. **Rule 34.01 is expansive and includes any type of information that is stored electronically.** A common example often sought in discovery is electronic communications, such as email. The rule covers -- either as documents or as electronically stored information -- information

“stored in any medium,” to encompass future developments in computer technology. **Rule 34.01 is intended to be broad enough to cover all current types of computer-based information**, and flexible enough to encompass future changes and developments.<sup>23</sup>

The Rules of Civil Procedure, therefore, do not allow any alterations to or redactions of the document or electronically stored information being produced. Rather, parties seeking discovery must be permitted to obtain documents in the form in which the producing party maintains them.<sup>24</sup> TAWC’s attempts to evade this requirement cannot be upheld by TPUC; thus, the Consumer Advocates requests that TPUC order TAWC to produce unredacted responsive documents in their original form.

### **CONCLUSION**

TAWC waived its objections to the Consumer Advocate’s discovery by providing conclusory, unsubstantiated objections with its responses. Even if TAWC had properly supported its objections, the Consumer Advocate’s requests are appropriate and conform with Tennessee’s law favoring the broad provision of information. And because TAWC is a regulated public utility, the factors favoring the review of this information are all the more overwhelming.

Therefore, the Consumer Advocate respectfully requests that the Hearing Officer grant this *Motion to Compel Discovery* and order TAWC withdraw any surviving objection and to provide original, unredacted documents and information described above in response to CA Request Nos. 1-1 and 1-4.

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<sup>23</sup> 2009 Advisory Commission Comment, Tenn. R. Civ. P. § 34.01 (emphasis added).

<sup>24</sup> Analogous to statutory and TPUC rules over discovery, subpoenas for documents require verification that the documents and electronically stored information produced by a responding party are authentic. “When appearance is not required, such a subpoena shall also require the person to whom it is directed to swear or affirm that the books, papers, documents, electronically stored information, or tangible things are authentic to the best of that person’s knowledge, information, and belief and to state whether or not all books, papers, documents, electronically stored information or tangible things responsive to the subpoena have been produced for copying, inspection, testing, or sampling.” Tenn. R. Civ. P. § 45.02.

RESPECTFULLY SUBMITTED,

**HERBERT H. SLATERY III**

Attorney General and Reporter  
State of Tennessee



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**DANIEL P. WHITAKER, III**

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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 11<sup>th</sup> day of May, 2020.

  
\_\_\_\_\_  
**DANIEL P. WHITAKER III**  
Assistant Attorney General

## **EXHIBIT 1**

**TENNESSEE AMERICAN WATER COMPANY  
DOCKET NO. 20-00011  
FIRST DISCOVERY REQUEST OF THE  
CONSUMER ADVOCATE AND PROTECTION DIVISION**

**Responsible Witness:** Grady Stout, TAWC

**Question:**

1-1. Refer to the Company's February 14, 2019 voluntary withdrawal of the *Joint Petition* in Docket No. 18-00099 and provide the following information:

- a. Provide a comprehensive explanation of the Company's voluntary withdrawal in Docket No. 18-00099; and
- b. Provide an explanation of how the reasons for the Company's voluntary withdrawal in Docket No. 18-00099 are no longer relevant in this Docket No. 20-00011.

**Response:**

TAWC objects to this request on the grounds that the request is irrelevant and overly broad and constitutes a fishing expedition seeking information that is not relevant and is not limited to this matter. Subject to and without waiving this objection, TAWC responds as follows:

- (a) The *Joint Petition* in TPUC Docket No. 18-00099 was voluntarily withdrawn for a number of reasons, such as the delay in the establishment of a joint procedural schedule, contentions raised by the Consumer Advocate's Office, and the ongoing growth of the development.
- (b) The *Joint Petition* in TPUC Docket No. 20-00011 is a new, separate and different petition than was submitted in Docket No. 18-00099. Moreover, the parties have agreed upon a joint procedural schedule in Docket No. 20-00011 and the ongoing growth of the development is reflected in the *Joint Petition* and supporting documentation. Further, the *Joint Petition* and the supporting documentation support Commission approval, and the Joint Petitioners are hopeful that any intervenors will agree.

**Supplemental Response:**

TAWC objects to this request on the grounds that the request is irrelevant and overly broad and constitutes a fishing expedition seeking information that is not relevant and is not limited to this matter. Subject to and without waiving this objection, TAWC supplements this response as follows:

- (a) Based upon the totality of the circumstances, TAWC voluntarily withdrew the Joint Petition.
- (b) TAWC voluntarily withdrew the Joint Petition in Docket No. 18-00099 based upon the totality of the circumstances. As the Thunder Air, Inc. development has continued its growth, both TAWC and Thunder Air, Inc. believe that the acquisition outlined in Docket No. 20-00011 is in the best interests of the customers served by Thunder Air, Inc. In Docket No. 20-00011, the Company has produced, in addition to the supporting documentation accompanying the Joint Petition, the information requested by the Consumer Advocate in CA DR 1-4. The Company's original response to CA DR 1-4 contains information actually employed by TAWC in relation to the acquisition that is the subject matter of the Joint Petition in Docket No. 20-00011. Further, in the spirit of cooperation with the Consumer Advocate, the information produced in the Company's supplemental response to CA DR 1-4 contains balance sheets requested by the Consumer Advocate. TAWC voluntarily produced such balance sheets although they did not exist prior to the CA's request for them and thus were not used by TAWC with respect to the acquisition and Joint Petition.

## **EXHIBIT 2**

**TENNESSEE AMERICAN WATER COMPANY  
DOCKET NO. 20-00011  
FIRST DISCOVERY REQUEST OF THE  
CONSUMER ADVOCATE AND PROTECTION DIVISION**

**Responsible Witness:** Elaine K. Chambers, TAWC

**Question:**

1-4. Provide annual pro forma budgeted financial statements (income statements, balance sheets and projected monthly customer counts by tariff rate) for the first ten years (2020 - 2029) of operations for the water system being acquired by TAWC. Please describe in detail all budget assumptions and documents utilized to support these calculations.

**Response:**

TAWC objects to this request on the grounds that it is overly broad and unduly burdensome. Subject to and without waiving this objection, TAWC responds as follows: Attached is the analysis prepared by TAWC in making its acquisition determination, which is being submitted **UNDER SEAL as CONFIDENTIAL and PROPRIETARY.**

**Supplemental Response:**

TAWC objects to this request on the grounds that it is overly broad and unduly burdensome. Subject to and without waiving this objection, TAWC responds as follows: Attached is the analysis prepared by TAWC at the request of the Consumer Advocate's Office, which is being submitted **UNDER SEAL as CONFIDENTIAL and PROPRIETARY.**

The Balance Sheet was produced per the request of the Consumer Advocate. The Balance Sheet was not part of the original purchase analysis and did not exist when DR 4 was submitted by the Consumer Advocate's Office. Therefore, the Balance Sheet was not relied upon when making the decision to purchase Jasper Highlands. To be cooperative, we produced a balance sheet after the fact. After producing this Balance Sheet, we updated the P/L. Nothing significant changed between the original and updated P/L. In addition to syncing up the Balance Sheet and the P/L, one formula in cell H15 was corrected in the P&L tab. Please see the updated attachment, which is being submitted **UNDER SEAL as CONFIDENTIAL and PROPRIETARY.**

**PUBLIC VERSION**

**SUPPLEMENTAL ATTACHMENT TO 1-4**