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May 21, 2020

**VIA ELECTRONIC FILING**

[TPUC.DocketRoom@tn.gov](mailto:TPUC.DocketRoom@tn.gov)

Hon. Robin L. Morrison, Chairman  
c/o Ectory Lawless, Docket Room Manager  
Tennessee Public Utility Commission  
502 Deaderick Street, 4<sup>th</sup> Floor  
Nashville, TN 37243

**RE: *Joint Petition of Tennessee-American Water Company and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc. for the Approval of an Asset Purchase Agreement and for the Issuance of a Certification of Convenience and Necessity;***  
**Docket No. 20-00011**

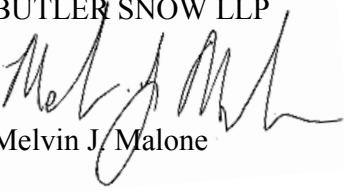
Dear Chairman Morrison:

Attached for filing please find *Tennessee American Water Company's Response to the Consumer Advocate's Motion to Compel* in the above-captioned matter.

As required, one (1) hard copy will follow. Should you have any questions concerning this filing, or require additional information, please do not hesitate to contact me.

Very truly yours,

BUTLER SNOW LLP



Melvin J. Malone

clw

Attachments

cc: Elaine Chambers, TAWC

Daniel P. Whitaker III, Assistant Attorney General, Financial Division, Consumer Advocate Unit

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION  
NASHVILLE, TENNESSEE**

**JOINT PETITION OF TENNESSEE-  
AMERICAN WATER COMPANY, AND  
THUNDER AIR, INC. D/B/A JASPER  
HIGHLANDS DEVELOPMENT, INC.  
FOR APPROVAL OF AN ASSET  
PURCHASE AGREEMENT AND FOR  
THE ISSUANCE OF A CERTIFICATE  
OF CONVENIENCE AND NECESSITY**

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**DOCKET NO. 20-00011**

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**TENNESSEE-AMERICAN WATER COMPANY’S RESPONSE  
TO THE CONSUMER ADVOCATE’S  
MOTION TO COMPEL**

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Pursuant to Rule 1220-01-02-.06 (2) of the Tennessee Public Utility Commission’s Rules of Practice and Procedure, Tennessee-American Water Company (“Tennessee-American,” “TAWC” or the “Company”) respectfully submits this Response to the Consumer Advocate Unit in the Financial Division of the Office of the Attorney General’s Motion to Compel (“*Motion*” or “*Motion to Compel*”). For the reasons set forth below, TAWC respectfully requests that the Commission deny the *Motion*.

TAWC respectfully requests oral argument on this *Motion*, pursuant to Rule 1220-01-02-.06 (4).

**I. INTRODUCTION**

The gravamen of the *Motion to Compel* submitted by the Consumer Advocate Unit in the Financial Division of the Office of the Attorney General (“Consumer Advocate” or “CA”) rests on a single spreadsheet produced in native format by Tennessee-American in response to a Tennessee Public Utility Commission (“TPUC” or “Commission”) Data Request in TPUC Docket No. 18-00099. Because that spreadsheet populated certain cells using links to data or formulas

located in a broader financial spreadsheet not responsive to the Commission Data Request, the Consumer Advocate argues it is entitled to examine this broader spreadsheet, which has no bearing on the subject matter of the Joint Petition in this case, TPUC Docket No. 20-00011. Moreover, these linked data or formulas sought by the Consumer Advocate in its *Motion* were also not relevant to the prior Joint Petition in TPUC Docket No. 18-00099. As discussed further below, the *Motion* should be denied for the following reasons:

1. THE CONSUMER ADVOCATE HAS NOT REQUESTED THE DATA AND/OR FORMULAS SOUGHT IN ITS *MOTION*.
2. THE CONSUMER ADVOCATE HAS FAILED TO DEMONSTRATE – AND CANNOT DEMONSTRATE – THE RELEVANCY OF THE DATA AND/OR FORMULAS TO THE PENDING JOINT PETITION.
3. TAWC PROPERLY OBJECTED TO THE CONSUMER ADVOCATE’S REQUESTS.

More specifically, it is TAWC’s position that declining to provide the spreadsheet containing the data and/or formulas sought by the Consumer Advocate is appropriate, as all relevant data contained in that spreadsheet has been produced. Not only would the spreadsheet not support a correct answer to the Consumer Advocate’s discovery requests in this proceeding, but the information contained in the linked data and/or formulas in the broader spreadsheet can additionally be categorized as one or more of the following: (a) information that is purely duplicative to information submitted in Docket No. 18-00099 (e.g., same information or calculations previously produced); (b) irrelevant information that did not support the calculations requested by the Commission in Docket No. 18-00099; (c) irrelevant information that pertains to other TAWC affiliates, not regulated by the TPUC; and (d) irrelevant and material non-public consolidated financial information, including projections of TAWC’s affiliates. In addition, some of the linked data included references to financial information outside the dates sought by the discovery request in Docket No. 18-00099.

Importantly, TAWC did not decline to produce any otherwise relevant, non-duplicative information contained in the linked formulas or data based upon any objection. Despite the Consumer Advocate's insistence to the contrary, the broader financial spreadsheet, linked to a discovery response in Docket No. 18-00099 and sought by the Consumer Advocate here would not be responsive to the Commission's Data Request No. 1-16. This *Motion* is about the *way* Tennessee-American assembled the financial information in a previous docket, not about whether the financial information provided was sufficient.

For these reasons, Tennessee-American respectfully requests the Commission to deny the Consumer Advocate's *Motion*.

## **II. PROCEDURAL HISTORY**

TAWC and Thunder Air, Inc. submitted a Joint Petition to the Commission in Docket No. 18-00099 on September 7, 2018, for the transfer of the water system operated by Thunder Air, Inc. (the "System") to TAWC. TAWC voluntarily withdrew the Joint Petition in Docket No. 18-00099 for a variety of reasons, including the delay in the establishment of a joint procedural schedule, the contentions raised by the Consumer Advocate and the continued growth of the development community that the System serves.

TAWC and Thunder Air, Inc. filed the Joint Petition in this case on February 3, 2020, and the Joint Petition in Docket No. 20-00011 differs from Docket No. 18-00099 in several substantive respects, including the acquisition price and the number of customers. Hence, the pending Joint Petition is new and separate from the previous, voluntarily withdrawn Joint Petition in Docket No. 18-00099.

As part of the earlier Joint Petition in Docket No. 18-00099, the Commission Staff and the Consumer Advocate requested information and documents from both TAWC and Thunder Air, Inc. The Commission Staff's First Data Request No. 16 requested the following from TAWC:

“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.”

TAWC responded to this Request on November 27, 2018 and provided the requested financial information with descriptions of TAWC’s assumptions used in creating the budgets. The Company provided the Commission with a native Excel spreadsheet reflecting the requested forecasted financial statements.

This spreadsheet was created, in part, by populating cells with information specific to TAWC that had been retrieved using linked formulas from a broader financial spreadsheet that included non-responsive information as outlined above. Because the data relevant to TAWC and the Joint Petition in Docket No. 18-00099 was assembled directly using this broader spreadsheet, the spreadsheet produced to the Commission in its native format appeared to the Consumer Advocate to be “missing” linked formulas or data for certain cells. Despite this appearance, TAWC produced the acquisition-specific data, as well as the support for the calculations; the spreadsheet produced merely had “missing” or “dead” links to duplicative and/or irrelevant data housed in this broader financial spreadsheet.

In Docket No. 18-00099, following TAWC’s response to Commission Staff’s First Data Request No. 16, the Consumer Advocate submitted its Third Discovery Requests. Request No. 3-13 read as follows:

“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 its original response to Consumer Advocate Request No. 3-13 on December 14, 2018. In this response, TAWC provided a narrative explanation of the data provided in response to Commission Staff’s First Data Request No. 16 and clarified the specific sources of information referenced or used to support the budget assumptions and calculations. This additional narrative provided the source and support for the financial figures submitted by TAWC in its original response to Commission Staff’s Data Request No. 16.

Thereafter, the Consumer Advocate specifically requested that TAWC provide the background data and/or formulas purportedly requested in Consumer Advocate Request No. 3-13. In the spirit of cooperation, TAWC submitted its supplemental response to Consumer Advocate Request No. 3-13, under seal, on December 21, 2018. This supplemental response assembled the relevant assumptions, formulas, and background data that supported the forecasted financial statements provided in response to Commission Staff’s First Data Request No. 16. It included explicit calculations of revenues, operating expenses, taxes, utility plant balances and other balance sheet items in spreadsheet format. The spreadsheet did not include all the irrelevant, duplicative, non-responsive information, including information about other TAWC affiliates, that was contained in the broader financial document. While TAWC did not so specify at the time it submitted its supplemental response on December 21, 2018 that the spreadsheet provided isolated only the relevant data and calculations used to support the forecasted financial statements, TAWC later disclosed in good faith to the Consumer Advocate that the spreadsheet had been redacted,

eliminating the non-responsive information housed in the broader financial spreadsheet.<sup>1</sup> TAWC voluntarily withdrew the Joint Petition in Docket No. 18-00099 on February 14, 2019.

In the current case, the Consumer Advocate has requested TAWC “[p]rovide a comprehensive explanation of the Company's voluntary withdrawal in Docket No. 18-00099; [p]rovide 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.” *See* Consumer Advocate’s First Discovery Request 1-1, TPUC Docket No. 20-00011 (Feb. 28, 2020). TAWC responded to this request on March 13, 2020 as follows:

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.

The Consumer Advocate also requested TAWC “[p]rovide 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” and “describe in detail all budget assumptions and documents utilized to support these

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<sup>1</sup> The Consumer Advocate maintains that “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.” *Motion to Compel* at 5, TPUC Docket No. 20-00011 (May 11, 2020). Recognizing that parties may have varying interpretations of words like “description” and “scope” and phrases like “subject matter,” TAWC will merely note here that it did disclose to the Consumer Advocate its bases, reasonings and rationale for declining to provide the information that is the subject of the *Motion*, which included, among other things, a sufficient characterization of the information.

calculations.” *See* Consumer Advocate’s First Discovery Request 1-4. TAWC responded as follows:

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**.

As indicated, TAWC produced, under seal, an Excel spreadsheet reflecting the five-year projections and assumptions underlying the acquisition. This document also included notes and source data for the assumptions.

At the request of the Consumer Advocate, and in the spirit of cooperation, on April 13, 2020, TAWC provided the following supplemental response to Request 1-4:

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**.

TAWC produced an Excel spreadsheet, as indicated, which included a five-year balance sheet. As indicated, this balance sheet was not a part of TAWC’s purchase analysis and was created after the submission of the Joint Petition in Docket No. 20-00011.



### III. ARGUMENT

#### A. THE *MOTION* SHOULD BE DENIED BECAUSE THE CONSUMER ADVOCATE HAS NOT REQUESTED THE INFORMATION THAT IS THE SUBJECT OF THE *MOTION*.

The Consumer Advocate's arguments apparently assume that Request Nos. 1-1 and 1-4 in Docket No. 20-00011 request the same information the Consumer Advocate sought in Docket No. 18-00099.<sup>2</sup> This is simply not the case. While the Consumer Advocate conflates the two Joint Petitions in an attempt to demonstrate that irrelevant information is somehow relevant, the Consumer Advocate's Requests in Docket No. 20-00011 do not encompass the formulas or data from the prior Joint Petition in Docket No. 18-00099.

Commission Rule 1220-01-02-.11 refers to the Tennessee Rules of Civil Procedure for more specific guidance on contested discovery matters. Tenn. R. Civ. P. 26.02(1) provides that parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Here, the information apparently sought by the Consumer Advocate in the *Motion* is irrelevant and/or duplicative to information already produced.

The Consumer Advocate apparently concludes that the underlying spreadsheet data it sought in the prior case, Docket No. 18-00099, should have been produced in this matter as responsive to the Consumer Advocate's current Request Nos. 1-1 or 1-4. Yet, even a generous reading of the Consumer Advocate's Request No. 1-1 would not suggest that the spreadsheet data from the 2018 matter is requested. Request No. 1-1 requests the reasons TAWC withdrew Docket

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<sup>2</sup> See *Motion to Compel* at 5 ("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[.]").

No. 18-00099, and TAWC responded to that request. TAWC has no obligation to produce documents or materials that are not actually requested.<sup>3</sup>

Respectfully, the Consumer Advocate makes significant logical leaps to argue that the spreadsheet data is somehow responsive to Request No. 1-1 – or, indeed, responsive at all in this proceeding. The Consumer Advocate apparently posits that TAWC withdrew the Joint Petition in Docket No. 18-00099 in an attempt to avoid additional discovery regarding the underlying spreadsheet data and, therefore, TAWC must now provide that underlying data in this case. As TAWC has explained in response to Consumer Advocate Request No. 1-1, TAWC voluntarily withdrew the Joint Petition in Docket No. 18-00099 for several reasons, including the additional growth of the Thunder Air, Inc. development. In fact, the positive growth of the development is evidenced by the pending Joint Petition and supporting documentation.

Similarly, the Consumer Advocate's Request No. 1-4 also does not seek the same information sought in Docket No. 18-00099. As requested in Request No. 1-4, TAWC provided pro forma forecasts for five (5) years<sup>4</sup> with the underlying data and assumptions for the System being acquired in Docket No. 20-00011. This is not the same as the information requested in the previous case, which included financial statements for the first three (3) years of operations.<sup>5</sup> A comparison between the responses provided demonstrates that the underlying financial information pertaining to this acquisition, such as assets, liabilities, and number of customers, and related projections has changed since the previous case. The information relied upon, and

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<sup>3</sup> See Tenn. R. Civ. P. 34.02 ("The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity."); and *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 601 (Tenn. Ct. App. 2007) ("Defendants were under no duty to relinquish materials which were not requested or which were not described with reasonable particularity.").

<sup>4</sup> TAWC understands that the Consumer Advocate is not seeking to compel an additional five (5) years of pro forma financial statements at this time.

<sup>5</sup> See *Commission Staff's First Data Request No. 16*, TPUC Docket No. 18-00099 (Nov. 9, 2018).

projections made, by TAWC with respect to the acquisition pending in Docket No. 20-00011 are different from the information relied upon, and projections made, by TAWC in Docket No. 18-00099. Notably, the Consumer Advocate has not – and cannot – demonstrate how TAWC’s response to Request No. 1-4 is deficient.

The Consumer Advocate attempts to shoehorn TAWC’s responses to different requests in Docket No. 18-00099 into this proceeding and suggest that TAWC has somehow wrongfully withheld data in *this* proceeding. Yet, the Consumer Advocate has not articulated exactly what relevant, responsive information requested in Consumer Advocate Request Nos. 1-1 and 1-4 in Docket No. 20-00011 that TAWC has failed to provide.

**B. THE *MOTION* SHOULD BE DENIED BECAUSE THE INFORMATION SOUGHT BY THE CONSUMER ADVOCATE IS NOT RELEVANT.**

Even assuming that the spreadsheet data and/or formulas purportedly sought by the Consumer Advocate in Docket No. 18-00099 are somehow encompassed in Request Nos. 1-1 or 1-4 in this action, which they are not, this data is no more relevant in the pending Joint Petition than in the 2018 Joint Petition. As noted above, the Consumer Advocate relies on TAWC’s allegedly deficient response to Commission Staff’s Data Request No. 16 in the prior action in an attempt to orchestrate that the Consumer Advocate is entitled to everything it asks for without regard to relevance. Still, the information sought, as far as TAWC understands the Consumer Advocate’s requests, is not relevant to either the pending Joint Petition or the previous Joint Petition.

First, TAWC is under no obligation to produce irrelevant information. *See* Tenn. R. Civ. P. 26.02(1). The data sought by the Consumer Advocate in the *Motion* is clearly irrelevant, including financial information outside relevant and/or responsive time periods requested by Commission Staff. The Excel spreadsheet produced, in native format, in response to the

Commission Staff's First Discovery Request No. 16 in Docket No. 18-00099 provided, as requested by the Commission, three (3) years of projected financials for the System. This financial data included links to another spreadsheet that contained financial information related to all TAWC affiliates' broader financial data and unrelated to this acquisition. Instead, the non-duplicative linked data includes information related to business conducted by TAWC affiliates outside Tennessee and unregulated by the State of Tennessee. The information produced by TAWC in response to Commission Staff's First Data Request No. 16 clearly provides the financial projections sought by the Commission Staff in Docket No. 18-00099 and appropriately did not include non-responsive information.

The Consumer Advocate even concedes that the information it seeks "may not relate to the purchase price of the system" but claims that the Consumer Advocate is nevertheless entitled to examine anything it wants simply because the Consumer Advocate demands it.<sup>6</sup> By any reasonable measure, this is far outside the bounds of discovery. Under well-settled Tennessee law, "[t]he scope of discovery, while broad, is not unlimited."<sup>7</sup>

Notably, TAWC *has* explained the source for the calculated projections, both in the current Joint Petition and in Docket No. 18-00099. In fact, TAWC provided significant explanation for the projections in response to the Consumer Advocate's Request No. 3-13, including the assumptions and actual calculations underlying those projections. The Consumer Advocate argues that it wants to examine the *specific* sources of the projections in *this* spreadsheet – in other words, there is no indication that TAWC has not provided appropriate support for the calculated

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<sup>6</sup> *Motion to Compel* at 11 ("Even if information sought by the Consumer Advocate may not relate to the purchase price of the system, the information must still be submitted.").

<sup>7</sup> *Steinkerchner v. Provident Life & Acc. Ins. Co.*, No. 01A01-9910-CH-00039, 1999 WL 734545, at \*2 (Tenn. Ct. App. Sept. 22, 1999) (In addition, "[c]onclusory claims of bad faith may not be the bases for conducting marginally relevant discovery which is by its nature burdensome. Such discovery requests amount to nothing more than an out and out fishing expedition.") (attached hereto).

projections. TAWC has clarified to the Consumer Advocate that the linked formulas and/or data are either irrelevant to the requests or duplicative of financial information already provided.

Second, the Consumer Advocate's *Motion* is focused entirely on electronically stored information ("ESI"). TAWC did not produce the information sought by the Consumer Advocate in this *Motion* – assuming solely for the sake of argument that it was actually requested in this proceeding – because it was entirely irrelevant, duplicative, and/or non-responsive. As described above, the information contained in the linked formulas or data is categorized as either (a) information that is purely duplicative to information submitted in Docket No. 18-00099 (e.g., same information or calculations previously produced); (b) irrelevant information that did not support the calculations requested by the Commission; (c) irrelevant information that pertains to TAWC affiliates in other states; or (d) irrelevant consolidated financial information of TAWC's affiliates. Disclosing that this *Motion* is ultimately simply a fishing expedition, the Consumer Advocate is requesting this information only because an Excel spreadsheet was produced in native format in a prior proceeding, and the Consumer Advocate identified links pointing to another spreadsheet non-responsive to Commission Staff's Data Request No. 16.

Tenn. R. Civ. P. 37.06(1) offers guidance in situations where a party seeks to obtain electronically stored information that was not produced in discovery. The Rule notes that the first inquiry is "whether the material sought is subject to production under the applicable standard of discovery," and, following that determination, the judge "should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party," considering a number of factors. These factors include "the availability of the information from other sources" and "the need to protect privilege, proprietary, or confidential information, including trade secrets." Applying this guidance and these factors here leads to a determination

that disclosure of the specific spreadsheet data and formulas sought, which are irrelevant, duplicative, and/or non-responsive, as well as irrelevant proprietary and confidential information belonging to TAWC affiliates, is simply not required. TAWC provided the relevant information in response to Commission Staff's Data Request No. 16 in Docket 18-00099, and disclosing information related to TAWC's affiliates is well outside the parameters of this acquisition case.

Finally, the *Motion* does not adequately describe the information the Consumer Advocate believes TAWC has failed to provide. The Consumer Advocate is imprecise in describing both the information sought *and* why it is relevant to its case. Respectfully, the fact that TAWC utilized Excel tools to populate cells in a spreadsheet to evaluate its purchase of the System is not evidence of a nefarious plot. Like many businesses, TAWC creates financial information at different company levels and for different purposes. In Docket No. 18-00099, the information TAWC assembled to assess a purchase price and create financial projections was assembled using the relevant information from a broader financial spreadsheet. In essence, the Consumer Advocate's objection is not to the data produced, but rather to the way a spreadsheet was populated in Docket No. 18-00099. For example, had TAWC copied a number from one spreadsheet to another – which is the function the links provided – the Consumer Advocate could certainly inquire as to the source of the number, and TAWC could explain how it arrived at this calculation, as it has already done. The fact that TAWC employed ESI technology to appropriately respond to Commission Staff's Data Request No. 16 in a prior proceeding and failed to show that non-responsive, duplicative, and irrelevant information was not included in its December 21, 2018, supplemental response to Consumer Advocate Request No. 3-13 in Docket No. 18-00099 – a failure that TAWC voluntarily disclosed in good faith – does not result, as the Consumer Advocate claims, in a *de facto* conclusion that TAWC declined to produce relevant information. And, it certainly does not have any bearing

on whether TAWC sufficiently responded to a request for forecasted financial statements in the present case, Docket No. 20-00011. Simply put, TAWC has not declined to produce *any* substantive, relevant information requested, either in this case or in Docket No. 18-00099.

**C. THE *MOTION* SHOULD BE DENIED BECAUSE TAWC HAS NOT WAIVED OBJECTIONS.**

The Consumer Advocate claims that TAWC has somehow waived its objections to the document requests, and therefore must produce the requested documents. This argument is without merit. As noted above, the information requested by the Consumer Advocate pursuant to Requests No. 1-1 and 1-4 has been provided, and TAWC's objections *to those Requests* have been identified with sufficient specificity for the Consumer Advocate to understand whether relevant information has been withheld on the basis of the objections. *See* 2020 TENNESSEE COURT ORDER 0001 (C.O. 0001) (clarifying the Advisory Commission comment to Tenn. R. Civ. P. 34.02 and noting the producing party's obligation to "alert and inform parties" which types of otherwise relevant documents are being withheld, if any) (attached hereto).

Further, it is evident from TAWC's response to Request No. 1-4 that the "overly broad and unduly burdensome" objection is based on the number of years of information sought. TAWC's Supplemental Response to Request No. 1-4 indicates that the Consumer Advocate was also seeking information that was not, in fact, used by TAWC in evaluating the acquisition of the System. Certainly, TAWC's objections and responses were sufficient to inform the Consumer Advocate that relevant and/or responsive information was withheld on the bases of the objections – namely, an additional five (5) years of data and balance sheets. In good faith, and in the spirit of cooperation, TAWC voluntarily produced balance sheets that were not utilized in the acquisition decision and were created solely at the Consumer Advocate's request.

The Consumer Advocate's argument ignores that TAWC has not declined to produce materials otherwise relevant to Requests No. 1-1 and 1-4. TAWC has declined to produce materials that are irrelevant and/or duplicative. TAWC is not required to "produce the same electronically stored information in more than one form." Tenn. R. Civ. P. 34.02(4). Simply put, TAWC has provided the financial data sought that is relevant in this acquisition case in the form in which it is maintained by TAWC.<sup>8</sup>

To the extent the Consumer Advocate claims TAWC failed to object to the Commission Staff's Data Request No. 16 or to the Consumer Advocate's Request No. 3-13 in Docket No. 18-00099, this argument is also without merit. TAWC provided general objections to both requests, which were incorporated into TAWC's responses. Fundamentally, however, TAWC responded to the Requests and did not decline to produce information based upon objections made; rather, TAWC fully provided the responsive, relevant information to the Requests. *See* Tenn. R. Civ. P. 34.02. *See also* Tenn. R. Civ. P. 26.02(1). It is axiomatic that the Consumer Advocate's objections to the format of these responses is not material to determining the adequacy of TAWC's response.

Finally, the Consumer Advocate appears to claim that TAWC improperly redacted otherwise relevant and responsive information in this Joint Petition. This is simply not accurate. TAWC has provided the relevant information requested by the Consumer Advocate and objected where appropriate.

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<sup>8</sup> Again, the Consumer Advocate apparently attempts to rely on TAWC's lack of objection to Request No. 3-13 in the prior Joint Petition as evidence of waiver in this Joint Petition. TAWC appropriately provided information relevant to the Commission's original Request and appropriately explained the "missing" information in response to Request No. 3-13. The lack of an objection by TAWC does not make the information sought by the Consumer Advocate relevant; TAWC did not decline to produce relevant and responsive information based on any objection in response to Request No. 3-13.



#### IV. CONCLUSION

Contrary to the assertions made by the Consumer Advocate in its *Motion*, TAWC, as outlined above, is not seeking to provide inaccurate information or to impede regulatory access to relevant information. Rather, TAWC has provided accurate information, responded to discovery, cooperatively produced information in this proceeding that did not exist before being requested by the Consumer Advocate and complied with both the Commission rules and Tennessee law. While the Consumer Advocate may prefer, as set forth in its *Motion*, unfettered access to non-responsive, duplicative, irrelevant and/or confidential and proprietary information, the established requirements and obligations of discovery do not support such a preference. In the end, TAWC provided all relevant information to the Commission Staff's Data Request No. 16 in Docket 18-00099. And, in reference to the current case, TAWC has already provided complete responses to CA Request Nos. 1-1 and 1-4.

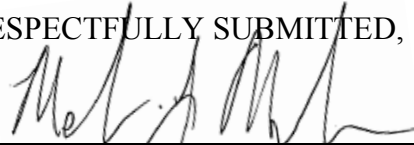
As petitioners before the Commission in this case, the burden is on the Joint Petitioners, Tennessee-American and Thunder Air, Inc., to demonstrate that the proposed acquisition of the System, including the purchase price and the requested regulatory treatment, are in the public interest. The Joint Petitioners remain steadfast that the Joint Petition and the accompany supporting documentation serve the public interest. Thunder Air, Inc., has made it clear that its goal is to build the best living community in the State of Tennessee, including excellent utility services at affordable rates. The transfer of the System, as outlined in the Joint Petition, helps further that goal and is in the public interest.

For the foregoing reasons, TAWC respectfully requests the Commission deny the Consumer Advocate's *Motion to Compel*. While the scope of discovery is broad, it is not without limits, and the information apparently sought by the Consumer Advocate is just simply not

relevant. The Consumer Advocate may not conduct an unbridled “fishing expedition” into TAWC’s or its affiliates’ records, particularly where he has failed to identify how TAWC’s response is deficient to its discovery requests in this proceeding.

This the 21<sup>st</sup> day of May, 2020.

RESPECTFULLY SUBMITTED,



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Attorneys for Tennessee-American Water Company

Dated: May 21, 2020



1999 WL 734545

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Raymond E. STEINKERCHNER, Plaintiff/Appellee,

v.

PROVIDENT LIFE & ACCIDENT  
INSURANCE CO., Defendant/Appellant.

No. 01-A-01-9910-CH-00039.

|  
Sept. 22, 1999.

Appeal from the Chancery Court for Davidson County, No. 98-530-III; Ellen Hobbes Lyle, Presiding.

#### Attorneys and Law Firms

Michael E. Evans, and John F. Floyd, Evans, Todd & Floyd, Nashville, TN, for Plaintiff/Appellee.

Steven A. Riley, W. Travis Parham, and Beth A. Walla, Bowen, Riley, Warnock & Jacobson, Nashville, TN, for Defendant/Appellant.

#### OPINION

COTTRELL.

\*1 This is an extraordinary appeal pursuant to [Tenn.R.App.P. 10](#) arising from a discovery dispute. For the following reasons, we reverse.

Appellee Dr. Raymond Steinkerchner, a self-employed clinical psychologist, submitted a claim for disability insurance to his insurer, Appellant Provident Life & Accident Insurance Co. ("Provident"), based on angina and [coronary artery disease](#). When Provident denied the claim, Dr. Steinkerchner commenced this action, alleging breach of the disability insurance policy, bad faith denial of the claim, and violation of the Tennessee Consumer Protection Act, [Tenn. Code Ann. § 47-18-101](#), *et seq.*

The underlying discovery dispute arose after Dr. Steinkerchner propounded the following interrogatory:

Identify by name, address, telephone number and policy number each and every Tennessee resident to whom Provident Life and Accident Insurance Company had issued a job disability policy, upon which a claim for disability benefits has been made and subsequently denied in whole or in part by the Defendant Provident Life and Accident Insurance Company during the period of time after January 1, 1996.

Provident objected on the grounds that the interrogatory was overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant evidence.

Dr. Steinkerchner successfully moved to compel, arguing that the information sought was needed to show a pattern of improper denial of claims, fraudulent marketing, and bad faith refusal to pay. The purpose of the interrogatory was to obtain information which would allow Dr. Steinkerchner's counsel to contact other policyholders whose claims had been denied. Dr. Steinkerchner has, in his pleadings, claimed that Provident has entered in a course of conduct to deny claims by others with similar policies, but has identified no such others and has not sought class certification.

The trial court granted the motion to compel. The order directed Provident to comply with the discovery request:

to the extent that the defendant is required to create a computerized query for claims submitted to Provident by Tennessee residents on or after January 1, 1996, using the last claim status field. The resulting list shall include name, address, and policy numbers, and where available on the computer, telephone numbers.

Shortly thereafter, the trial court decided to hold the above-mentioned order in abeyance until Provident filed a memorandum addressing "whether it is [a] breach of

someone's privacy to reveal to third parties that they have filed a claim for disability benefits.”

On December 22, 1998, the trial court determined that Dr. Steinkerchner sought no confidential information. It ordered Provident to (1) comply with its previous order regarding the names, addresses, policy numbers and telephone numbers of its insured who filed claims on or after January 1, 1996; (2) file the resulting list with the court under seal; and (3) send the following notice to the individuals included on the list:

\*2 Dear [Policy Holder]:

Presently pending in the Chancery Court for Davidson County, Tennessee is a lawsuit filed by a Provident Life and Accident Insurance Company policyholder, Raymond E. Steinkerchner, against Provident concerning a dispute about payments pursuant to the terms and provisions of a job disability policy.

Relative to the issues in that lawsuit, the names and identities of individual Tennessee residents who have been issued a job disability policy by Provident and have made a claim for disability benefits which has been denied in whole or in part during the period of time after January 1, 1996, have been filed under seal with the Court. By filing the information under seal, only the judge and attorneys may view the information. Additionally, however, you may be contacted by the attorneys for the policyholder or Provident in an attempt to obtain evidence for the lawsuit ...

Please be advised that you are not required to respond to this letter in any manner, and you certainly are not required to talk to or respond to calls or communications received from any of the attorneys in this lawsuit. (emphasis in original).

Provident filed a second unsuccessful motion for interlocutory appeal and then filed its successful [Tenn.R.App.P. 10](#) application for extraordinary appeal in this court.

Provident maintains that the trial court erred by ordering it to produce confidential information relating to non-parties which was not relevant or calculated to lead to the discovery of admissible evidence.

Rule 26 of the Rules of Civil Procedure sets the basic parameters of permissible discovery. It states:

IN GENERAL. 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 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.


The scope of discovery, while broad, is not unlimited. *See* [Miller v. Doctor's General Hosp.](#), 76 F.R.D. 136, 139 (W.D.Okla.1977).

Mere incantations that an opponent has acted in bad faith will not convert a simple contract lawsuit into a license to burden or harass one's adversary. Conclusory claims of bad faith may not be the bases for conducting marginally relevant discovery which is by its nature burdensome. Such discovery requests amount to nothing more than an out and out fishing expedition.

[Marker v. Union Fidelity Life Ins. Co.](#), 125 F.R.D. 121, 125 (M.D.N.C.1989).

\*3 The issues in this case are limited to Provident's handling of Dr. Steinkerchner's claim for employment disability insurance benefits and to the adequacy of Provident's reasons for denying the claim. Provident's conduct regarding the unique insurance claims of others is not relevant to whether

it properly handled the claim at issue. Dr. Steinkerchner may determine the reasons for Provident's conduct by deposing its employees and others who were involved in the decision

to terminate his benefits. See  *Moses v. State Farm Mut. Auto. Ins. Co.*, 104 F.R.D. 55, 57 (N.D.Ga.1984). Having discovered those reasons, Dr. Steinkerchner will then be in a position to produce evidence to challenge that decision. See *id.*

Although the complaint makes vague allegations that the denial of benefits was part of a course of conduct, at his deposition Dr. Steinkerchner admitted that he had no information about other policyholders' dissatisfaction with Provident. Dr. Steinkerchner's speculative accusations about a course of conduct do not suffice to demonstrate the relevance of Provident's handling of other claims. He has been unable to identify the particular course of conduct he alleges exists,

merely itemizing actions taken in handling of his claim. Thus, we find that the requested information is unlikely to lead to relevant evidence.

Under these circumstances, we must reverse the trial court's decision to permit the requested discovery. In light of this finding, we need not reach the remaining issues asserted by Provident. This case is remanded to the trial court for proceedings consistent with this opinion and such further proceedings as may be necessary. Costs of this appeal are to be taxed to Dr. Steinkerchner.

CANTRELL, P.J., and CAIN, J., concur.

#### All Citations

Not Reported in S.W.2d, 1999 WL 734545

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2020 TENNESSEE COURT ORDER 0001 (C.O. 0001)

COURT RULES

NOTICE: Rules and related materials supplied by the courts are included in this database. Because all changes may not have been supplied, the court clerk should be consulted to determine current rules. Stricken material is indicated by ~~Text~~.

TN ORDER 0001

C.O. 0001

COURT RULES

Effective: January 16, 2020 to January 16, 2020

STATE OF TENNESSEE

TENNESSEE RULES OF CIVIL PROCEDURE

January 16, 2020

Effective July 1, 2020

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

**IN RE AMENDMENTS TO THE TENNESSEE  
RULES OF CIVIL PROCEDURE**

**No. ADM2019-01444**

**ORDER**

The Court adopts the attached amendments effective July 1, 2020, subject to approval by resolution of the General Assembly. The rules amended are as follows:

RULE 5	SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS;
RULE 5B	ELECTRONIC FILING, SIGNING, VERIFICATION AND SERVICE;
RULE 33	INTERROGATORIES TO PARTIES;
RULE 34	PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

The text of each amendment is set out in the attached Appendix.

IT IS SO ORDERED.

FOR THE COURT: JEFF S. BIVINSCHIEF JUSTICE



***APPENDIX******AMENDMENTS TO THE RULES OF CIVIL PROCEDURE***

[Deleted text is indicated by overstriking, and new text is indicated by underlining.]

## TENNESSEE RULES OF CIVIL PROCEDURE

## RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

[Revise the text of subsection 5.02 and add the new Advisory Commission Comment (2020 Amendment) set out below. Additions are underlined and deleted text is stricken.]

<< TN R RCP Rule 5.02 >>

Rule 5.02. Service—how made

**Service shall be made pursuant to one of the methods set forth in (1), (2), or (3).** Whenever under these rules service is required or permitted to be made on a party represented by an attorney, the service shall be made ~~upon~~ **on** the attorney unless service ~~upon~~ **on** the party is ordered by the court. ~~Service shall be made pursuant to the methods set forth in (1) or (2).~~ If an attorney has filed a notice of limited scope representation or a notice of limited appearance for an otherwise self-represented person, pursuant to Rule 11.01(b), service shall be made on the self-represented person and on the attorney until such time as a notice of completion of limited scope representation has been filed. After notice of completion of limited scope representation has been filed, service ~~upon~~ **on** the attorney previously providing limited scope representation shall no longer be necessary.

(1) Service ~~upon~~ **on** the attorney or ~~upon~~ **on** a party shall **may** be made by delivering to ~~him or her~~ **the attorney** a copy of the document to be served, or by mailing it to such person's last known address, or if no address is known, by leaving the copy with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at such person's office with a clerk or other person in charge thereof; or, if there is none in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. ~~Items~~ **Documents** which may be filed by facsimile transmission pursuant to Rule 5A may be served by facsimile transmission.

(2)(a) Service ~~upon~~ **on** any attorney may also be made by sending **emailing** ~~him or her~~ **the attorney** the document in Adobe PDF ~~format~~ to the attorney's email address, which shall be promptly furnished on request. The sender shall include language in the subject line designed to alert the recipient that a document is being served under this rule. On the date that a document served under this rule is electronically sent to an attorney, the sender shall send by mail, facsimile or hand-delivery a certificate that advises that a document has been transmitted electronically. The certificate shall state the caption of the action; the trial court file number; the title of the transmitted document; the number of pages of the transmitted document (including all exhibits thereto); the sender's name, address, telephone number and electronic mail address; the electronic mail address of each recipient; and the date and time of the transmission. The certificate shall also include words to this effect: “**If you did not receive this document, please contact the sender immediately to receive an electronic or physical copy of this document.**” **.”** The certificate shall be sent to all counsel of record.

(b) ~~An attorney~~ **A sender** who sends **emails** a document ~~to another attorney electronically~~ and who is notified that it was not received must promptly furnish a copy of the document to the attorney who did not receive it.

(c) A document transmitted electronically **by email** shall be treated as a document that was mailed for purposes of computation of time under Rule 6.

(d) For good cause shown, an attorney may obtain a court order prohibiting service of documents on that attorney by electronic mail and requiring that all documents be served under subsection (1) ~~or~~ **(3)**.

**(3)(a) Service required by these rules also may be made on any registered user of a court's E-filing system by filing any document that may be E-served with that court's E-filing system. E-service shall constitute effective service under these rules and no other service on such registered users is required, unless otherwise ordered by the court.**

**(b) Any attorney or any self-represented party who is not a registered user of an E-filing system, or known by the E-filer not to have been E-served, must be served by a means authorized in subsection (1) or (2) of this rule.**

**(c) Unless ordered otherwise by the court, a court or court clerk may, through such court's E-filing system, transmit to registered users all notices, orders, opinions, or judgments filed by the court or court clerk, which transmission shall constitute proper service and shall satisfy the notice requirements of Tenn. R. Civ. P. 58 or any other applicable rules of procedure.**

**(d) Any court has the discretion, for good cause shown, to order that a means of service authorized in these rules other than E-service be required in a particular case.**

**(e) A document that is E-served shall be treated as a document that was mailed for purposes of computation of time under Rule 6.**

**(f) For purposes of E-service under Rule 5, the definitions in Rule 5B shall apply.**

#### Advisory Commission Comment [2020 Amendment]

**Advisory Commission Comments [2020]. Rule 5.02(3) has been added to provide for electronic service through a court's E-Filing system, provided that such a system has been authorized by such court pursuant to Rule 5B of these rules. The amended rule authorizes E-service through a court's electronic transmission facilities as to any registered user of such facilities. An attorney or party who chooses to become a registered user of a court's E-filing system shall be required to accept service through the court's electronic facilities unless otherwise ordered by the court in that particular case. As a result of this amendment, service may be effectuated under these rules by any of three means: the conventional means of service authorized in Rule 5.02(1), by electronic transmission or email as authorized in Rule 5.02(2), or by E-service pursuant to Rule 5.02(3) in those courts that have adopted an E-filing system that complies with Rule 5B and the technological standards promulgated by the Tennessee Supreme Court.**

#### TENNESSEE RULES OF CIVIL PROCEDURE

#### << TN R RCP Rule 5B >>

Rule 5B. Electronic filing, signing, verification and service

[Add the text below to Rule 5B and add the new Advisory Commission Comment (2020 Amendment) set out below. Additions are underlined and deleted text is stricken.]

Any court governed by these rules may, by local rule, allow papers **documents** to be filed, signed, or **and** verified by electronic means **registered users of an E-filing system. Any local rule** that ~~comply with technological standards promulgated by the Supreme Court.~~ **allows documents to be E-filed may also allow such documents to be E-served.** Pleadings and other papers **documents** filed **or served** electronically under **any** such local rules **rule** shall be considered the same as written papers. **documents filed or served by conventional means. The following definitions shall apply herein:**

(a) “E-file” or “E-filing” means the proper electronic transmission of original documents to and from the court for the purposes of E-filing using the court's E-filing system.

(b) “E-Filer” means a registered user who e-files a document.

(c) “E-Filing system” means a system adopted by local rule of any Circuit, Chancery, Criminal, Probate, Juvenile or General Sessions Court Clerk that allows for the E-filing of documents and is in compliance with the technological standards promulgated by the Tennessee Supreme Court.

(d) “E-service” or “E-served” means the automatically generated electronic transmission to all participants in a case who are registered users, by and through the E-filing system, of (i) a notice of the filing of a document with a copy of the document attached, (ii) a notice of the filing of a document with a hyperlink to the document, or (iii) a notice of the filing of a document and the document can be accessed by the registered user in the E-filing system.

(e) A “registered user” is a person who has properly registered with and has been authorized by a court system administrator to use an E-filing system for the E-filing of documents in accordance with the requirements of a local rule of court. A registered user is deemed to have consented to E-service and is responsible for maintaining a valid and current e-mail address in the E-filing system.

#### Advisory Commission Comment [2020 Amendment]

Advisory Commission Comments [2020]. Rule 5B is amended along with Rule 5.02 to provide for a means of service through a Court's e-filing system adopted in accordance with the first sentence of this rule. The existing Rule 5B provides for e-filing under applicable local rules, but does not provide for service to be made through an e-filing system. The 2020 amendment provides rules for service to be accomplished through an e-filing system. These definitions apply when service is made through an e-filing system under Rule 5.02

#### TENNESSEE RULES OF CIVIL PROCEDURE

#### RULE 33. INTERROGATORIES TO PARTIES

[Revise the text of the second paragraph of subsection 33.01 and add the new Advisory Commission Comment (2020 Amendment) set out below. Additions are underlined and deleted text is stricken.]

<< TN R RCP Rule 33.01 >>

Rule 33.01. Availability; procedures for use

\* \* \* \*

Each interrogatory shall be answered separately and fully in writing under oath, unless an objection is made to it **or to a portion thereof**, in which event the reasons **and grounds** for objection shall be stated **with specificity** in lieu of an answer **for that portion to which an objection is made. An objection must clearly indicate whether responsive information is being withheld on the basis of that objection.** The answers are to be signed by the person making them, and the objections signed by the attorney making them.

\* \* \* \*

#### Advisory Commission Comment [2020 Amendment]

Rule 33.01 is amended to require that objections to interrogatories be stated with specificity. The amendment is intended to make clear that vague, generalized, or “boilerplate” objections are improper. Instead, objections should be specific as to the grounds for the objection, describing the reason(s) in a manner that will reasonably inform the adverse party as to what aspect of the interrogatory the objection pertains, thereby facilitating the resolution of discovery disputes without the need for judicial intervention.

In addition, the rule is amended to require that any objection or response under Rule 33 make clear whether information is actually being withheld pursuant to that objection, if any. A responding party may object to part of a request, but a party should answer any part of an interrogatory for which no objection is made, making clear which part is being answered.

For example, a responding party may object to a Rule 33 interrogatory as overly broad on the grounds that the time period covered is too long, or that the breadth of sources from which documents are sought is unduly burdensome, providing the specific bases therefore, and further making clear whether the objection is being made in whole or in part. For any such objection or answer that covers only a part of the interrogatory, it should be clear from the objection or answer that the information contained in the answer is being limited to covering the specifically identified time period or sources for which the responding party has no objection.

This amendment should end the confusion that frequently arises when a responding party states several objections, but then still answers the interrogatory by providing information, leaving the requesting party uncertain whether and to what extent relevant and responsive information has been withheld on the basis of the objection. The producing party does not need to provide a detailed description or log of information withheld, but does need to respond in a manner that will alert and inform parties what information is being provided, and what categories or types of information have been withheld pursuant to objection, thereby facilitating an informed discussion of the objection.

#### TENNESSEE RULES OF CIVIL PROCEDURE

##### RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

[Revise Advisory Commission Comment (2019 Amendment) set out below:]

<< TN R RCP Rule 34.02 >>

#### Advisory Commission Comment [2019 Amendment]

...

This amendment should end the confusion that frequently arises when a producing party states several objections, but then still produces information, documents, and things, leaving the requesting party uncertain whether and to what extent relevant and responsive information has been withheld on the basis of the objection. The producing party does not need to provide a detailed description or log of all documents and things withheld, but does need to respond in a manner that will alert and inform parties what documents and things are being produced, and what categories or types of documents and things have **have** been withheld pursuant to objection, thereby facilitating an informed discussion of the objection.

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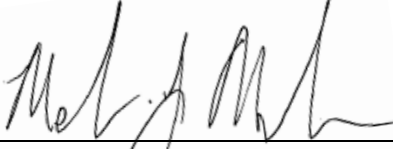
CERTIFICATE OF SERVICE

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 21<sup>st</sup> day of May, 2020.

  
\_\_\_\_\_  
Melvin J. Malone