

Thunder Air Inc., CA Request Nos. 1-1 and 1-4.¹ The Consumer Advocate’s 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.

CA Request 1-1 refers to a previous petition filed by the Joint Petitioners in Docket No. 18-00099 regarding the same transfer that was withdrawn by TAWC less than a week before the hearing. For both discovery requests, the Consumer Advocate maintains TAWC refuses to give complete responses to the discovery request, and TAWC’s conclusory responses constitute waiver.² The Consumer Advocate maintains that Tennessee law encourages broad discovery.³ According to the Consumer Advocate, TAWC must provide the requested documents in their original form, not the redacted version of those documents.⁴ The Consumer Advocate cites the advisory comments to Tenn. R. Civ. P. 34.01 which state the Rule is broad enough to include all current types of computer-based, electronically stored information and is broad enough to allow for future technological developments.⁵ The Consumer Advocate argues that “[t]he Rules of Civil

¹*Motion to Compel*, p. 1 (May 11, 2020).

²*Id.* at 5-7.

³ *Id.* at 8-10.

⁴ *Id.* at 14.

⁵ *Id.* at 14-15.

Procedure, therefore, do not allow any alterations to or redactions of the document or electronically stored information being produced.”⁶

TAWC’S RESPONSE

TAWC filed its *TAWC’s Response* on May 21, 2020 asking that the *Motion to Compel* be denied. According to TAWC, the basis of the *Motion to Compel* centers around a spreadsheet that has links to a broader spreadsheet that is not responsive to the Consumer Advocate’s Request and which is not relevant to this docket or Docket No. 18-00099.⁷ In addition, TAWC argues the Consumer Advocate has not requested the information it seeks in its *Motion to Compel* because the information the Consumer Advocate requested in Docket No. 18-00099 is not the same information it seeks in the current docket.⁸ TAWC maintains it has responded to CA Request 1-1 and the spreadsheet the Consumer Advocates seeks is not responsive to CA Request 1-1, and the Company is not obligated to produced documents not actually requested.⁹

TAWC argues that Tenn. R. Civ. P. 26.02(1) generally provides that parties may obtain discovery on any matter that is relevant to the subject matter and not privileged.¹⁰ According to TAWC, the *Motion to Compel* should be denied because the Consumer Advocate’s Requests are not relevant. TAWC states it “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.”¹¹ Further, TAWC asserts it has not declined to produce any relevant information, and the Consumer Advocate’s *Motion to Compel* “does not adequately describe the information the Consumer Advocate believes TAWC has failed to provide.”¹² TAWC maintains it has produced

⁶ *Id.*

⁷ *TAWC’s Response*, pp. 1-2 (May 21, 2020).

⁸ *Id.* at 8.

⁹ *Id.* at 8-9.

¹⁰ *Id.*

¹¹ *Id.* at 11-12.

¹² *Id.* at 13-14.

the information requested by the Consumer Advocate in CA Request 1-1 and 1-4, and its 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.”¹³ TAWC states its “overly broad and unduly burdensome” objection to CA Request 1-4 is based on the number of years of information sought, but TAWC “voluntarily produced balance sheets that were not utilized in the acquisition decision and were created solely at the Consumer Advocate’s request.”¹⁴ TAWC asks that the *Motion to Compel* be denied because the information sought by the Consumer Advocate is not relevant and TAWC asserts that while the scope of discovery is broad, the Consumer Advocate may not go on a “fishing expedition.”¹⁵

STATUS CONFERENCE

A Status Conference was held with the parties on May 29, 2020, where the parties argued their respective motions. The Consumer Advocate pointed out that the facts are no different between Docket Nos. 18-00099 and 20-00011, except for a more expensive purchase price in the current docket. The Consumer Advocate argued that TAWC has the burden of proof to provide the information in its original form unless a privilege applies. According to the Consumer Advocate, it is not even evident from the information provided the scope of the redaction or where it was redacted. The Consumer Advocate asserted that TAWC’s argument that the Request is overburdensome fails because it is harder to redact information than to provide the original. In addition, the Consumer Advocate maintained it has done the best it can in framing its discovery request because it cannot ask for what it doesn’t know.

TAWC argued it has provided what it has been asked for, and the Consumer Advocate has

¹³ *Id.* at 14.

¹⁴ *Id.* at 14-15.

¹⁵ *Id.* at 16-17.

not requested the data that's the subject of the *Motion to Compel*. TAWC maintained that even if the information had not been redacted, it would not have been provided because the data was not responsive to the Consumer Advocate's Request. TAWC stated it provided five years of information requested to the Consumer Advocate and provided the balance sheets for the additional years requested.

FINDINGS AND CONCLUSIONS

I. GENERAL DISCOVERY PRINCIPLES

Pursuant to Commission Rule 1220-1-2-.11, when informal discovery is not practicable, any party to a contested case proceeding may petition for a discovery schedule and, thereafter, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure. The Rules of Civil Procedure permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.¹⁶ Through these instruments, a party "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."¹⁷ The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.¹⁸ The Tennessee Court of Appeals has commented on relevancy as follows:

Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase "relevant to the subject matter involved in the pending action" has been construed "broadly to encompass any matter that bears on or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."¹⁹

¹⁶ Tenn. R. Civ. P. 26.01.

¹⁷ *Id.* at 26.02(1).

¹⁸ *Id.*

¹⁹ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).

Further, parties may learn of information related to books, documents or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.²⁰ However, Tennessee's rules do provide some limitations. Rule 26.02 permits a court to limit discovery under certain circumstances, such as undue burden, and Rule 26.03 permits a court to issue protective orders as justice requires.²¹ In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).²²

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.²³ “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”²⁴

After the Status Conference, the Hearing Officer communicated the ruling to the parties via email dated June 15, 2020, which would be memorialized later in a written order. Based on the record and the arguments of the parties, the Hearing Officer finds that TAWC sufficiently responded to CA Request 1-1. Therefore, the *Motion to Compel* is denied with respect to CA Discovery Request 1-1. Regarding CA Request 1-4, the Hearing Officer finds certain information, as unilaterally determined to be irrelevant by TAWC, should not be redacted by TAWC prior to providing it to the Consumer Advocate. Redacting the information prevents the Consumer

²⁰ Tenn. R. Civ. P. 26.02(1).

²¹ *Id.* at 26.02 & .03.

²² *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

²³ Tenn. R. Civ. P. 37.01(2).

²⁴ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

Advocate from determining the potential impact of the information on the docket. Further, the Hearing Officer finds that providing the information is not overburdensome as it requires an additional process to redact the information rather than providing unredacted information. Therefore, the Hearing Officer concludes CA Request 1-4 should be granted for five years of annual pro forma budgeted financial statements (income statements, balance sheets, and projected monthly customer counts by tariff rate) of operations for the water system being acquired by TAWC. These financial statements should be provided in the original form maintained by the Company and include the source data.

IT IS THEREFORE ORDERED THAT:

The *Motion to Compel Discovery* filed by the Consumer Advocate Unit in the Financial Division of the Office of the Attorney General is granted, in part, and denied, in part, as follows:

CA Request 1-1 is DENIED; and

CA Request 1-4 is GRANTED for five years of annual pro forma budgeted financial statements (income statements, balance sheets, and projected monthly customer counts by tariff rate) of operations for the water system being acquired by TAWC. These financial statements should be provided in the original form maintained by the Company and include the source data.

A handwritten signature in black ink, reading "Monica Smith-Ashford". The signature is written in a cursive, flowing style.

Monica Smith-Ashford, Hearing Officer