

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

IN RE:)	
)	
PIEDMONT NATURAL GAS COMPANY, INC. PETITION FOR AN ADJUSTMENT OF RATES, CHARGES, AND TARIFFS APPLICABLE TO SERVICE IN TENNESSEE)))))	Docket No. 20-00086

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

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 Tennessee Attorney General (“Consumer Advocate”), pursuant to TPUC Rule 1220-1-2-.11(5)(a), hereby submits this memorandum in support of its *Second Motion for Leave to Issue More Than Forty Discovery Requests* to Piedmont Natural Gas Company, Inc. (“Piedmont” or “Company”), which has been filed contemporaneously along with the additional discovery requests sought by the Consumer Advocate.

RULES GOVERNING DISCOVERY BEFORE THE TPUC

Section 1220-1-2-.11 of the Tennessee Public Utility Commission (“TPUC” or “Commission”) Rules, entitled *Discovery*, states in part, “Any party to a contested case may petition for discovery.... [D]iscovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure.” The Uniform Administrative Procedures Act provides the implementing mechanism: “[t]he administrative judge or hearing officer, at the request of any party, shall issue subpoenas, effect discovery, and issue protective orders, in accordance with the Tennessee Rules of Civil Procedure.” Tenn. Code Ann. § 4-5-311(a).

Tenn. R. Civ. P. 26.02 allows for broad discovery. Specifically, the rule provides that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(Emphasis added). Perhaps the most important underlying policy of discovery is “that discovery should enable the parties and the courts to seek the truth so that disputes will be decided by facts rather than by legal maneuvering.” *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). 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.” *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). 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.” *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).

Under the Tennessee Rules of Civil Procedure, though, discovery may be limited in three narrow circumstances. Specifically, the Rules provide that:

The frequency or extent of use of the discovery methods set forth in subdivision 26.01 and this subdivision shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action

to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Tenn. R. Civ. P. 26.02(1). The narrowness of these exceptions is supported by the fundamental principle of "*expressio unius est exclusio alterius*," which translates as "the expression of one thing implies the exclusion of ... things not expressly mentioned." See *Wells v. Tenn. Bd. of Regents*, 231 S.W.3d 912, 917 (Tenn. 2007) (applying the *expressio unius* principle to a state statute). Thus, a court, or in this matter an administrative agency, may not limit discovery if the requests do not fall into one of these three categories. See *id.*

In the context of the exceptions noted above, the Commission's Rules require that a party obtain leave from the Commission before serving more than forty (40) discovery requests. TPUC Rule 1220-1-2-.11(5)(a). Leave is obtained by filing a motion and an accompanying "memorandum establishing good cause" for additional discovery. *Id.* The Commission is granted the power to create such a rule under Tenn. Code Ann. § 4-5-311(c): "The agency may promulgate rules to further prevent abuse and oppression in discovery." However, this ability is constrained by the requirement that the Commission comply with the Tennessee Rules of Civil Procedure, as directed by the Commission's own Rule 1220-1-2-.11, as well as Tenn. Code Ann. § 4-5-311(a). Consequently, it follows that "abuse or oppression in discovery" is defined as one of the three permissible reasons for limiting discovery as specifically described in Tenn. R. Civ. P. 26.02(1).

Thus, when the TPUC Rules are read in conjunction with the Tennessee Code Annotated and the Tennessee Rules of Civil Procedure, it becomes clear that a motion for additional discovery may not be denied unless the additional discovery requests violate one of the three provisions contained in Tenn. R. Civ. P. 26.02(1).

THE CONSUMER ADVOCATE HAS GOOD CAUSE TO ISSUE MORE THAN FORTY DISCOVERY REQUESTS

The Consumer Advocate's *Second Motion for Leave to Issue More Than Forty Discovery Requests* is made with good cause, as required by TPUC Rule 1220-1-2-.11. This memorandum demonstrates that the Consumer Advocate's discovery requests meet this standard.

A. The Consumer Advocate seeks to provide a complete case to the Commission for its consideration.

As background, when the Consumer Advocate intervenes in a case, its aim is to present a complete case to the TPUC. By "complete case," the Consumer Advocate means a case that not merely opposes selected parts of a company's petition, but one that presents a virtually parallel case that sets forth an alternative number for every number presented by the company.

By presenting a complete case the Consumer Advocate believes it is not only representing consumers to the fullest extent possible, but also providing a useful framework for the TPUC as it works to decide the case. It should be noted that the discovery process is the principal procedural vehicle available to the Consumer Advocate to gather evidence and conduct analysis prior to the hearing in this matter.

The consequences of the denial of the additional discovery requested would include the inability of the Consumer Advocate to test the merits of Piedmont's proposed rate increase and to evaluate the impact on consumers and related policy issues presented in the Company's *Petition*. And this would mean that the Consumer Advocate would not have the ability to develop fully prepared positions on the myriad of issues presented in the *Petition*. Without the additional requested discovery – and without receiving discovery responses in the format requested – the Consumer Advocate will be severely constrained in representing the interests of households and businesses in Piedmont's service territory, some 191,000 residential, commercial, and industrial

customers. Discovery and resulting pre-filed testimony present the only opportunities for consumers to receive due process with a representative and evidentiary voice regarding the rates charged to them by Piedmont prior to the hearing. Moreover, additional discovery is necessary in order for the Consumer Advocate to take informed positions in representing consumers in any potential settlement negotiations.

B. The Consumer Advocate's discovery is necessary due to the filings submitted by Piedmont.

In drafting these discovery requests, the Consumer Advocate has based nearly all items on information submitted by Piedmont. For instance, included within this discovery are 56 requests for source and support for hard-coded numbers contained within the Company's information previously submitted in this case. Reviewing the source and support is vital to understanding Piedmont's position. Indeed, without the underlying data or calculations, the Consumer Advocate's review of these documents would be little more than cursory in nature. And while the Consumer Advocate must be able to analyze this information for its testimony, Commission Staff must also have access to the information in order to garner its own understanding of the case.

A second example of the Consumer Advocate's need to issue this discovery stems from the Consumer Advocate's need for historical data. Within its rate case, Piedmont utilizes a future test period. While the Company has provided some information along with its proposal, the Consumer Advocate must quickly review related and relevant information. Therefore, in order to examine the projects which are inherent within constructing a future test period, the Consumer Advocate must review historical information. Doing so is imperative, both for the Consumer Advocate's preparation for developing its positions and writing testimony as well as the Commission's review of relevant information as it prepares to render a ruling on Piedmont's request to increase its rates by nearly \$30,000,000.00.

In summary, the Consumer Advocate works diligently to put forth a complete case based on a factual record in order to adequately represent the interests of consumers. To enable the Consumer Advocate to put forth that case, the Consumer Advocate's requests meet the "good cause" standard. The limitation of discovery to forty questions in this Docket would severely limit the Consumer Advocate's ability to analyze and present a complete case, and would severely limit the Consumer Advocate's ability to provide that analysis and additional information that is vital to the TPUC for the protection of Tennessee consumers. Further, the Consumer Advocate respectfully notes that, in the event of a dispute over a specific discovery request, the Consumer Advocate is willing to make available the consultants it employs to work informally with the Company's responding witnesses in order to resolve any such dispute, as it has in other dockets.

**THE CONSUMER ADVOCATE'S DISCOVERY REQUESTS
ARE NOT ABUSIVE OR OPPRESSIVE**

After a party has established good cause under the Commission's rules and Tennessee law, these additional discovery requests should only be denied if they are found to be abusive or oppressive. Tenn. Code Ann. § 4-5-311(c). As discussed above, the "abusive or oppressive" standard should be understood in terms of the Tennessee Rules of Civil Procedure – therefore, for discovery requests to be abusive or oppressive, they must violate one of the three situations specified in Tenn. R. Civ. Pro. 26.02.

A. The Discovery Sought Is Not Unreasonably Cumulative or Duplicative.

Under the first prong of Tenn. R. Civ. Pro. 26.02(1), the Commission may limit discovery if "the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive." In this Docket, the Consumer Advocate has made reasonable efforts to ensure that its discovery is not cumulative or duplicative, and has sought to obtain the information from other sources when possible. Where

possible, the Consumer Advocate has attempted to use publicly available data rather than requesting that information directly from Piedmont.

In the event that requested data appears to have been produced in response to another question or may be more readily available from some other source, the Consumer Advocate is willing to discuss and work with Piedmont to clarify, alter, amend, or (if necessary) withdraw a discovery request that is unreasonably cumulative or duplicative.

B. The Consumer Advocate Has Not Had Ample Opportunity by Discovery to Obtain the Information Sought.

The Consumer Advocate has not had “ample opportunity by discovery in the action to obtain the information sought”¹ because this proceeding is still within the early stages of the discovery phase. At this time, the Consumer Advocate has only been able to view the information Piedmont submitted alongside its *Petition* as well as within the first round of discovery contemplated within the Hearing Officer’s *Order Establishing Procedural Schedule*. These early rounds of discovery allow the intervening parties and TPUC staff the ability to evaluate the merits of this case and to determine what information will be necessary going forward. They also allow the Consumer Advocate to draft meaningful testimony that both provides the ratepayer’s perspective and assists TPUC in its final determination rate-making determinations.

C. The Discovery Sought Is Not Unduly Burdensome or Expensive, Taking Into Account the Needs of the Case

The discovery sought would not be unduly burdensome or expensive to Piedmont taking into account the needs of this Docket. It should be noted at the outset that Piedmont is a part of one of the largest public utilities in the United States and effectively is the only source for most of

¹ As described above, a second circumstance under which a judge or hearing officer may limit discovery would only occur if “the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.” Tenn. R. Civ. Pro. 26.02(1).

the information that is needed to analyze and develop information with respect to this Docket – in other words, Piedmont’s resources far exceed those of the Consumer Advocate. With that context, the final circumstance in which discovery may be limited – that is, “if the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation” – should not limit discovery in this Docket. Tenn. R. Civ. Pro. 26.02(1).

Nevertheless, some brief analysis of each aspect of this potential limitation merits consideration. The first aspect relates to the “needs of the case.” *Id.* Because this Docket requires the analysis by the Consumer Advocate of an increase in general rates, Piedmont’s initial filing is voluminous. The case requires substantial review and analysis. In the course of this Docket, the Consumer Advocate will end up reviewing thousands of pages of testimony, data, and other information filed by Piedmont. As noted above, after that review and analysis, the Consumer Advocate’s experts will then put together a complete alternative projection that not only challenges any unreasonable amounts and policies presented by the Company but also presents its position on what the correct figures and policies should be. In light of the Consumer Advocate’s role in this matter, its pending discovery requests are certainly reasonable in relation to “the needs of the case.”

The second aspect requires that discovery requests be evaluated in light of the “amount in controversy.” *Id.* In this matter, Piedmont asserts a revenue deficiency of approximately \$30 million. As the rates achieved in this case will be in effect until Piedmont chooses to initiate its next rate case, it is crucial that the information provided through discovery illustrates a comprehensive picture to ensure just and reasonable rates.

The final aspect requires that discovery requests must be considered with regard to any “limitations on the parties’ resources.” As a subsidiary of Duke Energy Corporation, one the

largest public utility groups in the United States, Piedmont is part of a large and sophisticated corporate system, and as such its resources are vast. Piedmont has access to not only its own experts, analysts, and regulatory staff but also that of Duke Energy and an affiliated service company. Thus, while it may take time and effort for Piedmont to respond to the Consumer Advocate's requests, these discovery requests amount to a normal part of doing business for a company backed by the Company's vast resources.

CONCLUSION

This Docket is still at an early stage, and ample discovery is vital in allowing the Consumer Advocate to perform its statutory duties. Thus, the Consumer Advocate respectfully requests that the Commission grant its *Second Motion for Leave to Issue More Than Forty Discovery Requests*.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Petition to Intervene* was served via U.S. Mail or electronic mail upon:

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This the 23rd day of September, 2020.



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