IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF KINGSPORT POWER	)	
COMPANY d/b/a AEP APPALACHIAN	)	**DOCKET NO. 21-00107**
POWER COMPANY FOR A GENERAL	)	
RATE INCREASE	)	
	)	
	)	

CONSUMER ADVOCATE'S MOTION FOR LEAVE TO ISSUE MORE THAN FORTY DISCOVERY REQUESTS

The Consumer Advocate Unit in the Financial Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to TPUC Rule 1220-1-2-.11(5)(a), hereby submits this Motion requesting permission to issue more than forty discovery requests to Kingsport Power Company d/b/a AEP Appalachian Power Company ("Kingsport" or the "Company"). Pursuant to TPUC Rule 1220-1-2-.11(5)(a), the Consumer Advocate seeks leave of the Hearing Officer by motion and has filed a memorandum establishing good cause for service of the additional discovery requests and the discovery requests themselves. A copy of the proposed discovery is filed herewith.

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RESPECTFULLY SUBMITTED,

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This the 4th day of January, 2022.

Vance L. Broemel

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

The Consumer Advocate Unit in the Financial Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to TPUC Rule 1220-01-02-.11(5)(a), hereby submits this Memorandum in Support of its Motion for Leave to Issue More Than Forty Discovery Requests ("Motion") to Kingsport Power Company d/b/a AEP Appalachian Power Company ("Kingsport" or the "Company"). For good cause, the Consumer Advocate would show as follows:

I. RULES GOVERNING DISCOVERY BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

Section 1220-1-2-.11 of the Tennessee Public Utility Commission ("TPUC" or the "Commission") Rules, titled 'Discovery,' states in part, "[a]ny party to a contested case may petition for discovery…. [D]iscovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure." The Uniform Administrative Procedures Act provides the implementing mechanism: "[t]he administrative judge or hearing officer, at the request of any

party, shall issue subpoenas, effect discovery, and issue protective orders, in accordance with the Tennessee Rules of Civil Procedure."[1]

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

> **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 grounds 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 parties and courts to seek truth so that disputes will be decided by facts, rather than by legal maneuvering."[2] Discovery should allow both the court and the parties to "have an intelligent grasp of the issues to be litigated and knowledge of the facts underlying them."[3] Accordingly, "[a] party seeking discovery is entitled to obtain information about any matter, not privileged, which is relevant to the subject matter involved, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."[4]

Under the Tennessee Rules of Civil Procedure, however, 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

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1 Tenn. Code Ann. § 4-5-311(a).

2 *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

3 *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 356 (Tenn. Ct. App. 1985) (internal citations omitted), superseded on other grounds by statute, Tenn. R. Civ. P. 26.02(4)(B), as recognized in *West v. Schofield*, 460 S.W.3d 113, 125 (Tenn. 2015).

4 *State ex. rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Tr.*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006) (internal citations omitted).

> if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.[5]

The narrowness of these exceptions is supported by the fundamental principle of "*expressio unius est exclusio alterius*," which translates as "the expression of one thing implies the exclusion of … things not expressly mentioned."[6] Thus, a court may not limit discovery if the requests do not fall into one of these three categories.[7]

In the context of the exceptions noted above, the Commission's Rules require that a party obtain leave from the Commission before serving more than forty discovery requests.[8] Leave is obtained by filing a motion and an accompanying "memorandum establishing good cause" for additional discovery.[9] The Commission is granted the power to create such a rule under Tenn. Code Ann. § 4-5-311(c): "The agency may promulgate rules to further prevent abuse and oppression in discovery." However, this ability is constrained by the requirement that the Commission comply with the Tennessee Rules of Civil Procedure, as directed by the Commission's own Rule 1220-01-02-.11, as well as Tenn. Code Ann. § 4-5-311(a). Consequently, it follows that "abuse or oppression in discovery" is defined as one of the three permissible reasons for limiting discovery as specifically described in Tenn. R. Civ. P. 26.02(1).

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5 Tenn. R. Civ. P. 26.02(1).

6 *See Wells v. Tenn. Bd. of Regents*, 231 S.W.3d 912, 917 (Tenn. 2007) (applying the *expressio unius* principle to a state statute).

7 *Id.*

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

9 *Id*.

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

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

The Consumer Advocate's *Motion* is made with good cause, as required by TPUC Rule 1220-01-02-.11. This Memorandum demonstrates that the Consumer Advocate's discovery requests meet this standard.

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

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

In the context of the current Docket, Kingsport petitioned for the Commission's approval to increase rates. Specifically, Kingsport seeks an increase of approximately $14.4 million to its base rates. Kingsport is also proposing to reset its Targeted Reliability Plan & Major Storm Rider rates to $0, making the net increase to customers approximately $6.9 million.[10] Also, Kingsport requests the Commission to establish a Procedural Schedule designed to effectuate a result

[10] Petition, p.2, ¶2.

allowing the Company to implement these requested changes by July 1, 2022.[11] Therefore, substantial discovery by the Consumer Advocate is justified due to the possible implementation of a rate increase. Accordingly, the Consumer Advocate's requests are reasonable and meet the "good cause" standard alone.

The consequences of the denial of the additional discovery requested would include the inability of the Consumer Advocate to test the merits of Kingsport's proposed rates. Therefore, the Consumer Advocate would not have the ability to develop fully prepared positions on the myriad of issues presented in the Petition. Without the requested discovery – and without receiving discovery responses in the format requested – the Consumer Advocate will be severely constrained in representing the interests of households that constitute Kingsport's consumers. Discovery and resulting pre-filed testimony present the only opportunities for consumers to receive due process with a representative and evidentiary voice regarding the proposed rate increase prior to the hearing. Moreover, discovery is necessary for the Consumer Advocate to take informed positions in representing consumers in any potential settlement negotiations.

In summary, the Consumer Advocate works diligently to put forth a complete case based on a factual record in order to adequately represent the interests of consumers. To enable the Consumer Advocate to put forth that case, the Consumer Advocate's requests meet the "good cause" standard. The limitation of discovery to forty questions in this Docket would severely limit the Consumer Advocate's ability to analyze and present a complete case and would severely limit the Consumer Advocate's ability to provide that analysis and additional information that is vital to the Commission for the protection of Tennessee consumers. Further, the Consumer Advocate respectfully notes that, in the event of a dispute over a specific discovery request, the Consumer

[11] *Id.* at p. 4, ¶10.

Advocate is willing to make available the consultants it employs to work informally with Kingsport's responding witnesses to resolve any such dispute, as it has in other dockets.

III. 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.[12] 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.

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 Kingsport to clarify, alter, amend, or (if necessary) withdraw a discovery request that is unreasonably cumulative or duplicative.

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[13] if possible. Some thirty questions are in regard to filings in this Docket that have hard-coded data in spreadsheets and/or the need for the native format of PDFs filed.

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[12] Tenn. Code Ann. § 4-5-311(c).

[13] Consumer Advocate's Records Request, TPUC Docket No. 21-000107 (December 7, 2021).

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

The Consumer Advocate has had no opportunity to conduct discovery in this Docket. 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."[14] Kingsport filed their Petition in this Docket on November 17, 2021. Therefore, the Consumer Advocate has only been able to view the public information Kingsport submitted alongside its Petition.[15] This is the first set of discovery by the Consumer Advocate; thus, it cannot be said that the Consumer Advocate has had "ample opportunity" for discovery in this action.

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

The discovery sought would not be unduly burdensome or expensive to Kingsport, taking into account the needs of this Docket. As discussed above, Kingsport has petitioned the Commission to increase rates. 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" – would not limit discovery in this docket.[16]

Nevertheless, some brief analysis of each aspect of this potential limitation merits consideration. The first aspect relates to the "needs of the case."[17] Kingsport's initial filing is voluminous. This Docket requires substantial review and analysis by the Consumer Advocate of

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[14] Tenn. R. Civ. Pro. 26.02(1).

[15] In an email, Kingsport's counsel stated that they normally grant access to confidential docs when the petition is granted. This was in response to the Consumer Advocate requesting the confidential filings after filing its Petition to Intervene. Email from William C. Bovender, Kingsport Counsel, to Vance L. Broemel, Senior Assistant Attorney General (December 1, 2021) (on file with Vance L. Broemel).

[16] Tenn. R. Civ. Pro. 26.02(1).

[17] *Id.*

the potential amount of rate increase. In the course of this Docket, the Consumer Advocate will review thousands of pages of testimony, data, and other information filed by Kingsport. 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."[18] In this Docket, Kingsport is requesting a rate increase in base rates of approximately $14.4 million. Considering this request, it is crucial 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 American Electric Power ("AEP"), a major investor-owned electric utility group in the United States, Kingsport is part of a large and sophisticated corporate system, and as such its resources are vast. Kingsport has access to not only its own experts, analysts, and regulatory staff but also that of AEP and affiliates. Thus, while it may take time and effort for Kingsport 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

For all of the foregoing reasons, the Consumer Advocate respectfully requests that the Commission grant its *Motion for Leave to Issue More Than Forty Discovery Requests*.

[18] Tenn. R. Civ. Pro. 26.02(1).

RESPECTFULLY SUBMITTED,

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This the 4th day of January, 2022.

Vance L. Broemel

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