

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

IN RE:)	
)	
PETITION OF PIEDMONT NATURAL)	
GAS COMPANY, INC. TO ADOPT AN)	DOCKET NO. 21-00135
ANNUAL REVIEW OF RATES)	
MECHANISM PURSUANT TO TENN.)	
CODE ANN. § 65-5-103(D)(6))	
)	

**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 Piedmont Natural Gas Company, Inc. 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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TPUC Docket No. 21-001035

Motion for Leave over 40 Questions

CERTIFICATE OF SERVICE

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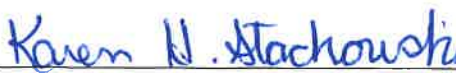
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This the 19th day of November, 2021.



KAREN H. STACHOWSKI
Senior Assistant Attorney General

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 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.”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, 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

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).

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 See *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 may 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, Piedmont petitioned for the Commission's approval to implement an alternative form of rate regulation. Specifically, Piedmont seeks to opt into an Annual Review Mechanism (ARM) pursuant to Tenn. Code Ann. § 65-5-103(d). Piedmont states that having a comprehensive annual mechanism, such as an ARM, eliminates the need for separate riders such as its Integrity Management Rider (IMR).¹⁰ Also, Piedmont states that an ARM "will

¹⁰ Direct Testimony of Pia Powers at 8:13-17.

effectively delay, if not eliminate completely, the need for Piedmont to refresh its rates through periodic general rate case filings.”¹¹ Therefore, substantial discovery by the Consumer Advocate is justified due to the possible implementation of ARM which will result in “rate increases to customers that arise from ongoing capital investment by incrementally adjusting rates on an annual basis instead of having substantially large increase that can result from general rate cases.”¹² 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 Piedmont’s proposed ARM. 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 Piedmonts’ 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 sale of the water/wastewater systems 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

¹¹ Direct Testimony of Pia Powers at 5:13-15.

¹² Direct Testimony of Pia Powers at 5:18-21.

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 Advocate is willing to make available the consultants it employs to work informally with Piedmont'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.¹³ 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 Piedmont 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

¹³ Tenn. Code Ann. § 4-5-311(c).

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 sources¹⁴ if possible.

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.¹⁵ 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.”¹⁶ Piedmont filed their Petition in this Docket on November 5, 2021. Therefore, the Consumer Advocate has only been able to view the public information Piedmont submitted alongside its *Petition*. 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 Piedmont, taking into account the needs of this Docket. As discussed above, Piedmont has petitioned the Commission to opt into an ARM. 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.¹⁷

¹⁴ Consumer Advocate’s Records Request, TPUC Docket No. 21-000135 (November 12, 2021).

¹⁵ In an email, Piedmont’s counsel requested that the Consumer Advocate not serve discovery until the Consumer Advocate filed its petition for intervention. Email from James H. Jeffries IV, Piedmont Counsel, to Karen H. Stachowski, Senior Assistant Attorney General (November 9, 2021) (on file with Karen H. Stachowski).

¹⁶ Tenn. R. Civ. Pro. 26.02(1).

¹⁷ 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.”¹⁸ Because this Docket requires the analysis by the Consumer Advocate of the potential implementation of an ARM, Piedmont’s initial filing is voluminous, especially in light of the statutory deadline of 120-days for consideration by the Commission.¹⁹ The case requires substantial review and analysis. In the course of this Docket, the Consumer Advocate will review 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.”²⁰ Although the Company is not seeking a rate increase in this Docket but instead the approval to implement an ARM, rate increases will occur under Piedmont’s ARM if approved by the Commission. Currently, Piedmont files an annual IMR resulting in a rate increase. For example, Piedmont’s 2019 annual IMR filing proposed a \$21.6 million rate increase for its customers.²¹ With the potential for similar rate increases in future ARM filings, it is crucial that the information provided through discovery illustrates a comprehensive picture to ensure just and reasonable rates under Piedmont’s ARM, if approved by the Commission.

¹⁸ *Id.*

¹⁹ Tenn. Code Ann. § 65-5-103(d)(6)(C).

²⁰ Tenn. R. Civ. Pro. 26.02(1).


²¹ Revised Direct Testimony of Pia Powers at 7:19-21 TPUC Docket No. 19-00107 (December 11, 2019).

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

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*.

RESPECTFULLY SUBMITTED,


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This the 19th day of November, 2021.



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