

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

IN RE:)	
)	
ATMOS ENERGY CORPORATION)	
FOR APPROVAL OF ITS 2023 ANNUAL RATE)	DOCKET NO. 23-00008
REVIEW FILING 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 Division of the Office of the Attorney General (“Consumer Advocate”), pursuant to Tennessee Public Utilities Commission (“TPUC” or the “Commission”) Rule 1220-01-02-.11(5)(a), hereby submits this Motion requesting permission to issue more than forty (40) discovery requests to Atmos Energy Corp. Pursuant to TPUC Rule 1220-01-02-.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.

Accordingly, the Consumer Advocate respectfully requests the Commission to grant this Motion for Leave to Issue More than Forty Discovery Requests.

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RESPECTFULLY SUBMITTED,



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TPUC Docket No. 23-00008

CA's Motion for Issuing more than 40 Discovery Requests

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail, with
a courtesy copy by electronic mail, provided upon:

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This the 13th day of March, 2023.



VICTORIA B. GLOVER
Assistant Attorney General

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AT NASHVILLE, TENNESSEE**

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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 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 Atmos Energy Corp. (“Atmos” or the “Company”). For good cause, the Consumer Advocate would show as follows:

**I. RULES GOVERNING DISCOVERY BEFORE THE TENNESSEE PUBLIC
UTILITY COMMISSION**

Section 1220-01-02-.11 of the Tennessee Public Utility Commission (“TPUC” or the “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.”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 *Vythoukas 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 fully representing consumers, 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, the Company is petitioning for the Commission's approval to implement an Annual Review Mechanism ("ARM"), an alternative form of rate regulation, pursuant to Tenn. Code Ann. § 65-5-103(d). In the Company's Stipulation and Settlement Agreement during the proceedings in the original docket that implemented the Company's ARM filing, the Company agreed that "[n]othing herein shall limit the TRA staff or Consumer Advocate from requesting additional data and/or documents after each annual ARM

Filing...”¹⁰ Therefore, additional discovery by the Consumer Advocate is justified not only because the ARM results 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, but also because the Company specifically agreed to provide additional discovery to the Consumer Advocate in the *Settlement Agreement*.¹¹ 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 Atmos’ 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 the Company’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 recovery of costs that affect rates 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 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

¹⁰ *Petition of Atmos Energy Corporation for a General Rate Increase Under T.C.A. 65-5-103(a) and Adoption of an Annual Rate Review Mechanism under T.C.A. 65-5-103(d)(6)*, TPUC Docket No. 14-00146 (April 29, 2015), Stipulation and Settlement Agreement, at 5, ¶13(a)(iii).

¹¹ *Id.*

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 the Company’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.

If the 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 the Company 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 if possible.¹³

¹² Tenn. Code Ann. § 4-5-311(c).

¹³ The Consumer Advocate and technical staff at Atmos, along with counsel for the same, met online to discuss preliminary questions prior to issuing first round of discovery requests. Consumer Advocate also utilized

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

The Consumer Advocate has not had ample 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 The Company filed their Petition in this Docket on January 31, 2023. As stated in the Company’s original petition to implement an ARM filing, the filings “include a voluminous set of information comparable to what has been provided in [rate cases], [and] should be more than sufficient to allow the CAPD,¹⁵ Authority Staff¹⁶ and any intervening party the opportunity to assess the Company’s accounts and its compliance...”¹⁷ Accordingly, the Consumer Advocate has had merely three weeks to review thousands of pages of testimony, data, and other information. Having asked its first set of discovery requests under such hurried time constraints and subsequently being prompted by the responses to those discovery requests to dig further into the calculations, the Consumer Advocate, thus, cannot be said to have had “ample opportunity” for the extensive discovery in this Docket.

outside sources for public information that includes the Company’s webpage, TPUC’s Docket Page, PACER, and other state and federal court sites.

¹⁴ Tenn. R. Civ. Pro. 26.02(1).

¹⁵ Consumer Advocate and Protection Division, or “CAPD,” is the former divisional name of the Consumer Advocate within the Office of the Attorney General. The Division has since moved out of the Consumer Protection Division and is now housed within the Financial Division of the Office of the Attorney General. While the nomenclature has changed, the scope and function of the division has remained entirely the same.

¹⁶ The Tennessee Regulatory Authority, or TRA, together with its Staff, is the predecessor agency to the TPUC, just as the Tennessee Public Service Commission predated the TRA. While the nomenclature has changed, the scope and function of these entities has remained essentially the same.

¹⁷ *Petition of Atmos Energy Corporation for a General Rate Increase Under T.C.A. 65-5-103(a) and Adoption of an Annual Rate Review Mechanism under T.C.A. 65-5-103(d)(6)*, TPUC Docket No. 14-00146 (April 27, 2015), Rebuttal Testimony of Patricia J. Childers on behalf of Atmos Energy Corporation, at 10, lines 2-5.

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

The discovery sought would not be unduly burdensome or expensive to the Company, considering the needs of this Docket. As discussed above, the Company has petitioned the Commission to approve an ARM filing, a process the Company has gone through since it first opted into an ARM in 2014.¹⁸ The Company has been producing similarly voluminous and complex discovery for nearly a decade, which has not been considered unduly burdensome or expensive. 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.¹⁹

Nevertheless, some brief analysis of each aspect of this potential limitation merits consideration. The first aspect relates to the “needs of the case.”²⁰ Because this Docket requires the analysis by the Consumer Advocate of an ARM, the Company’s initial filing is voluminous, especially considering the statutory deadline of 120-days for consideration by the Commission.²¹ The case requires substantial review and analysis. During this Docket, the Consumer Advocate will review thousands of pages of testimony, data, and other information filed by the Company. 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

¹⁸ *Petition of Atmos Energy Corporation for a General Rate Increase under T.C.A. 65-5-103(a) and Adoption of an Annual Rate Review Mechanism under T.C.A. 65-5-103(d)(6)*, TPUC Docket No. 14-00146 (November 25, 2014).

¹⁹ Tenn. R. Civ. Pro. 26.02(1).

²⁰ *Id.*

²¹ Tenn. Code Ann. § 65-5-103(d)(6)(C).

policies should be. Considering 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."²² Although the Company is seeking a rate increase of only \$26,834 in this Docket, the Company also disclosed multiple deviations from the approved methodologies. These deviations, along with associated costs related to the extreme weather events experience by the Company, necessitate the information provided through discovery illustrate a comprehensive picture to ensure just and reasonable rates under the Company's ARM, if approved by the Commission.

The final aspect requires that discovery requests must be considered with regard to any "limitations on the parties' resources." Atmos Energy Corp. is one of the largest public utilities in the United States, having a large and sophisticated corporate system, and as such its resources are vast. Atmos has access its own experts, analysts, and regulatory staff. Thus, while it may take time and effort for the Company 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.

D. The Commission Has a History of Flexibility in Permitting Supplemental Discovery

Although TPUC Rules allow a minimum of forty discovery requests to be served upon a party, the Commission, nevertheless, upon initial compliance with the TPUC Rules and a showing of good cause, "has been flexible in permitting supplemental discovery to occur,"²³ and "has

²² Tenn. R. Civ. Pro. 26.02(1).

²³ *Order Granting Consumer Advocate's Motion for Leave to Issue More than Forty Discovery Requests*, TPUC Docket No. 21-00135 (January 20, 2022); *see also Order Granting Consumer Advocate's Motion for Leave to Issue More than Forty Discovery Requests*, TPUC Docket No. 19-00062 (March 10, 2020); *Order Granting Consumer*

routinely allowed additional discovery requests in rate cases due to the extraordinary amount of information necessary to evaluate a [...] petition.”²⁴ Thus, as this Docket is complex and contains a number of transactions that require lengthy, technical evaluation, the Commission should not limit discovery in this Docket.

CONCLUSION

For all 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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Advocate's Motion for Leave to Issue More than Forty Discovery Requests, TPUC Docket No. 21-00107 (January 11, 2022).

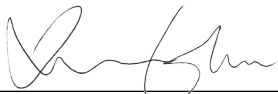
²⁴ *Order Granting the Consumer Advocate's Motion for Leave to Issue More Than Forty Discovery Requests*, TPUC Docket No. 19-00057 (November 5, 2019).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail, postage prepaid, with a courtesy copy by electronic mail:

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This the 13th day of March, 2023.



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