

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

IN RE:)	
)	
PETITION OF PIEDMONT NATURAL)	
GAS COMPANY, INC. FOR APPROVAL)	DOCKET NO. 23-00035
OF ITS 2023 ANNUAL REVIEW OF)	
RATES MECHANISM PURSUANT TO)	
TENN. CODE ANN. §65-5-103(d)(6))	

**CONSUMER ADVOCATE’S MOTION TO ISSUE MORE THAN
FORTY DISCOVERY REQUESTS**

The Consumer Advocate Division of the Office of the Tennessee 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 12-1-2-.11(5)(a), the Consumer Advocate seeks leave of the Hearing Officer by motion and has contemporaneously filed a memorandum establishing good cause for service of the additional discovery requests as well as the discovery requests themselves.

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RESPECTFULLY SUBMITTED,



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In Re: TPUC Docket No. 23-00035

Consumer Advocate's Motion to Issue More Than Forty Requests

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S.

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This the 5th day of June 2023.



VICTORIA B. GLOVER
Assistant Attorney General

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

IN RE:)	
)	
PETITION OF PIEDMONT NATURAL GAS)	
COMPANY, INC. FOR APPROVAL OF ITS)	DOCKET NO. 23-00035
2023 ANNUAL REVIEW OF RATES)	
MECHANISM PURSUANT TO TENN. CODE)	
ANN. § 65-5-103(d)(6))	

**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 Piedmont Natural Gas Company, Inc. (“Piedmont” 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

¹ 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.”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 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

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

³ *Vythoukaskas 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).

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).

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).

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. 1220-01-02-.11(5)(a) (April 2018).

⁹ *Id.*

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 current Docket, the Company is petitioning for the Commission's approval of its 2023 Annual Rate Review Filing ("*Petition*") pursuant to its Annual Review Mechanism ("ARM") approved in TPUC Docket No. 21-00135.¹⁰

In this Docket, the Company seeks a rate increase to recover (1) Historic Base Period ("HBP") Revenue Requirement Deficiency of approximately \$11.7 million, and (2) Annual Rate Base Reset Revenue Requirement Deficiency of approximately \$29.9 million.¹¹ With such a large rate adjustment that will affect customers not only this year, but in future years, it is vitally important for the Consumer Advocate to have sufficient information to adequately analyze the

¹⁰ *Petition of Piedmont Natural Gas Company, Inc. to Adopt an Annual Review of Rates Mechanism Pursuant to Tenn. Code Ann. § 65-5-103(d)(6)*, TPUC Docket No. 21-00135 (Nov. 05, 2021).

¹¹ *Direct Testimony of Pia Powers*, at 5, TPUC Docket No. 23-00035 (May 19, 2023).

Petition. Therefore, the Consumer Advocate having more than 40 questions in its initial round of discovery is reasonable and meets 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 2023 ARM Filing. Therefore, the Consumer Advocate would not have the ability to develop fully prepared positions on the myriad of issues presented in the *Petition* and its accompanying direct testimonies. 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 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

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

¹² Tenn. Code Ann. § 4-5-311(c).

¹³ The Consumer Advocate and technical staff at Piedmont, along with counsel for the same, met online to discuss preliminary questions prior to issuing the first round of discovery requests. Consumer Advocate also utilized outside sources for public information that include the Company’s webpage, TPUC’s Docket Page, PACER, and other state and federal court sites.

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 Consumer Advocate appreciates the Company setting an introductory meeting prior to the filing of its *Petition* and allowing its financial staff to interact freely with the financial staff of the Consumer Advocate. However, it has been only 16 days since the Company’s filing of its *Petition* and accompanying testimonies, and that is only 16 days for the Consumer Advocate 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.

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. Although the Company has provided a substantial amount of documentation to support its *Petition*, the Company is the party that has control of the information and data that is vital to the Consumer Advocate’s review and analysis of the *Petition*. 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.¹⁵

Nevertheless, some brief analysis of each aspect of this potential limitation merits consideration. The first aspect relates to the “needs of the case.”¹⁶ Because this Docket requires

¹⁴ Tenn. R. Civ. Pro. 26.02(1).

¹⁵ Tenn. R. Civ. Pro. 26.02(1).

¹⁶ *Id.*

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.¹⁷ 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 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."¹⁸ As discussed above, the Company has petitioned the Commission to approve an ARM filing, and this will be the Company's first filing since it first opted into an ARM in 2021. The Company is seeking a total rate adjustment of approximately \$41.6 million.¹⁹ Therefore the amount in controversy necessitates 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." Piedmont has a large and sophisticated corporate system and its resources are vast. Piedmont has access to 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

¹⁷ Tenn. Code Ann. § 65-5-103(d)(6)(C).

¹⁸ Tenn. R. Civ. Pro. 26.02(1).

¹⁹ See *Direct Testimony of Pia Powers*, at 5, TPUC Docket No. 23-00035 (May 19, 2023).

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,”²⁰ and “has routinely allowed additional discovery requests in rate cases due to the extraordinary amount of information necessary to evaluate a . . . petition.”²¹ 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*.

²⁰ *Order Granting Consumer Advocate's Motion for Leave to Issue More than Forty Discovery Requests*, TPUC Docket No. 21-00135 (Jan. 20, 2022). *See also* *Order Granting Consumer Advocate's Motion for Leave to Issue More than Forty Discovery Requests*, TPUC Docket No. 19-00062 (Mar. 10, 2020); *Order Granting Consumer Advocate's Motion for Leave to Issue More than Forty Discovery Requests*, TPUC Docket No. 21-00107 (Jan. 11, 2022); and *Order Granting Consumer Advocate's Motion for Leave to Issue More than Forty Discovery Requests*, TPUC Docket No. 23-00008 (Apr. 12, 2023).

²¹ *Order Granting the Consumer Advocate's Motion for Leave to Issue More Than Forty Discovery Requests*, TPUC Docket No. 19-00057 (Nov. 5, 2019).

RESPECTFULLY SUBMITTED,



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TPUC Docket No. 23-00035

Consumer Advocate's Memorandum for Leave to Issue More Than Forty Discovery Requests

CERTIFICATE OF SERVICE

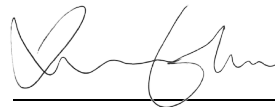
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This the 5th day of June, 2023.



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