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Reply to:
Consumer Advocate and Protection Division
Post Office Box 20207
Nashville, TN 37202

September 5, 2003

Honorable Deborah Taylor Tate
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

IN RE: APPLICATION OF NASHVILLE GAS COMPANY, A DIVISION OF PIEDMONT NATURAL GAS COMPANY, INC. FOR AN ADJUSTMENT OF ITS RATES AND CHARGES, FOR APPROVAL OF REVISED TARIFFS AND APPROVAL OF REVISED SERVICE REGULATIONS.

DOCKET NO. 03-00313

Dear Chairman Tate:

Enclosed is an original and thirteen copies of Consumer Advocate and Protection Division's Motion for a New Scheduling Order, or in the Alternative to Strike and Exclude the Testimony of Ronald A. Johnson, Ronald B. Edelstein, and David J. Dzuricky. Kindly file same in this docket. Copies are being sent to all parties of record. If you have any questions, kindly contact me at (615) 532-2590. Thank you.

Sincerely,

TIMOTHY C. PHILLIPS
Assistant Attorney General

cc: All Parties of Record

#66649

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
APPLICATION OF NASHVILLE GAS	)	
COMPANY, A DIVISION OF PIEDMONT	)	
NATURAL GAS COMPANY, INC., FOR	)	
AN ADJUSTMENT OF ITS RATES AND	)	
CHARGES, THE APPROVAL OF	)	**DOCKET NO. 03-00313**
REVISED TARIFFS AND APPROVAL OF	)	
REVISED SERVICE REGULATIONS	)	

CONSUMER ADVOCATE'S MOTION FOR A NEW SCHEDULING ORDER, OR IN THE ALTERNATIVE TO STRIKE AND EXCLUDE THE TESTIMONY OF RONALD A. JOHNSON, RONALD B. EDELSTEIN, DAVID J. DZURICKY

Comes Paul G. Summers, the Attorney General and Reporter, through the Consumer Advocate and Protection Division of the Office of Attorney General (hereinafter "Consumer Advocate") and hereby moves The Tennessee Regulatory Authority ("TRA") for entry of a new scheduling order, or in the alternative an order striking and excluding the proposed testimony of Ronald A. Johnson, Ronald B. Edelstein and David J. Dzuricky offered by Nashville Gas Company ("Nashville Gas"). As grounds for this motion the Consumer Advocate would state that the names of Ronald A. Johnson, Ronald B. Edelstein and David J. Dzuricky and the nature of their testimony were never disclosed to the Consumer Advocate despite a discovery request for such information which has been pending since July 8, 2003. Thus, the testimony of Ronald A. Johnson, Ronald B. Edelstein and David J. Dzuricky is a violation of Nashville Gas' obligation to timely file discovery responses. The use of this testimony, without proper discovery and the opportunity to rebut, will deprive the Consumer Advocate and the thousands of Nashville-area consumers who are facing a multi-million dollar rate increase of the right to a fair

hearing because the Consumer Advocate has not had an opportunity to adequately prepare its presentation regarding this testimony.

ARGUMENT

In Discovery Request No. 1 of its First Discovery Request to Nashville Gas filed July 8, 2003, the Consumer Advocate specifically asked for the name, background and nature of the testimony for each expert witness to be called by Nashville Gas:

DISCOVERY REQUEST NO. 1:

Identify each person whom you expect to call as an expert witness at any hearing in this docket, and for each such expert witness:

(a) identify the field in which the witness is to be offered as an expert;

(b) provide complete background information, including the expert's current employer as well as his or her educational, professional and employment history, and qualifications within the field in which the witness is expected to testify, and identify all publications written or presentations presented in whole or in part by the witness;

(c) provide the grounds (including without limitation any factual basis) for the opinions to which the witness is expected to testify, and provide a summary of the grounds for each such opinion;

(d) identify any matter in which the expert has testified (through deposition or otherwise) by specifying the name, docket number and forum of each case, the dates of the prior testimony and the subject of the prior testimony, and identify the transcripts of any such testimony;

(e) identify for each such expert, any person whom the expert consulted or otherwise communicated with in connection with his expected testimony;

(f) identify the terms of the retention or engagement of each expert including but not limited to the terms of any retention or engagement letters or agreements relating to his/her engagement,

testimony and opinions as well as the compensation to be paid for the testimony and opinions;

(g) identify all documents or things shown to, delivered to, received from, relied upon, or prepared by any expert witness, which are related to the witness(es)' expected testimony in this case, whether or not such documents are supportive of such testimony, including without limitation all documents or things provided to that expert for review in connection with testimony and opinions; and

(h) identify any exhibits to be used as a summary of or support for the testimony or opinions provided by the expert.

On July 22, 2003, Nashville Gas filed its response to the Consumer Advocate's discovery request. The names of Ronald A. Johnson, Ronald B. Edelstein and David J. Dzuricky are not mentioned anywhere in that response.[1]

On August 18, 2003, the Consumer Advocate filed with the TRA and served on Nashville Gas the direct testimony of Dr. Steve Brown, Dan McCormac, Mike Chrysler and Mark Crocker. On August 15, 2003, the Consumer Advocate provided legal counsel for Nashville Gas an electronic version of a draft of Dr. Brown's testimony.

On September 3, 2003, Nashville Gas filed and served upon the Consumer Advocate the testimony of Ronald A. Johnson, Ronald B. Edelstein and David J. Dzuricky.

As of the day of the filing of this Motion, Nashville Gas has not supplemented discovery with respect to the witnesses Ronald A. Johnson, Ronald B. Edelstein and David J. Dzuricky.

The failure to timely provide responses to expert interrogatories prevents the Consumer Advocate from properly preparing for this case. This case is on an extremely tight procedural

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[1]There is an agreement between the parties regarding the responses of Nashville gas to this request. However, the agreement does not impact the discussion here. A copy of the agreement is attached.

schedule with a hearing date set for September 8, 2003. Rebuttal testimony from Nashville Gas filed on September 3, 2003, includes the testimony of four (4) additional witnesses. The Consumer Advocate anticipated a busy week. The rebuttal testimony from Donald A. Murry, Bill R. Morris, Chuck W. Fleenor and David R. Carpenter was expected. However, now the Consumer Advocate is faced with three (3) surprise witnesses who were not disclosed in responses to interrogatories even though Rule 26.05(1)(B) of the Tennessee Rules of Civil Procedure clearly requires that all parties timely supplement their discovery responses as information becomes available as to: "the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of that testimony." These surprise witnesses undermine the ability of the Consumer Advocate to properly prepare for the hearing and denies the Consumer Advocate the right to a fair hearing and results in prejudice to the interests of consumers.

Each surprise witness offers unanticipated testimony. The relevance of the testimony remains to be tested. The substance of the testimony requires that the Consumer Advocate be able to seek proper discovery and have the opportunity to rebut the new testimony presented through these three (3) surprise witnesses. A full investigation into this testimony, and any prior testimony or papers on similar topics, is particularly necessary. Given the tight schedule of the hearing and the lack of full disclosure by Nashville Gas, such investigation and preparation is now impossible. Accordingly, the hearing schedule should be altered, or in the alternative the proposed testimony of Ronald A. Johnson, Ronald B. Edelstein and David J. Dzuricky should be stricken and excluded. Strickland v. Strickland, 618 S.W.2d 496 (Tenn. Ct. App. 1981); Pegram v. Bridges, 1994 WL 592101 at page 1 (Tenn. Ct. App. 1994) (upholding exclusion of

expert witness who was not disclosed despite recovery requests) (copy attached).

The relief sought by the Consumer Advocate is a rescheduling order to allow it to properly present its case in the interest of the ratepayers of Nashville Gas. The Consumer Advocate seeks in the alternative to have the testimony stricken and excluded as an alternative to the issuance of a new scheduling order. Clearly, Nashville Gas has failed to properly supplement the subject discovery responses. As to the omissions of Nashville Gas, this matter is indistinguishable from the situation faced in the recent rate case filed by Tennessee American Water Company, wherein the minimal expectations of a party litigant were not met.[2] Sitting as Hearing Officer, Director Jones correctly concluded:

> "It is reasonable to expect that TAWC would have, at the very latest point in time, supplemented its response at the time it filed Dr. Klein's pre-filed rebuttal testimony and certainly before the failure to do so was raised in the CAPD's motion to strike."[3]

The Consumer Advocate in the present matter, as it was in the Tennessee American Water Company docket, has been denied a reasonable opportunity to prepare in this matter.

The case law as reviewed in the Tennessee American Water Order sets out at page 4, four (4) factors to be considered in determining the appropriate sanctions in the present matter: "1) the explanation given for the failure to name the witness; 2) the importance of the testimony of the witness; 3) the need for time to prepare to meet the testimony; and 4) the possibility of a continuance." The first and third criteria are the same as was the case in the Tennessee American

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[2] Order Granting Motion To Strike (June 27, 2003), TRA Docket No. 03-00118. *Petition of Tennessee American water company to change and increase certain rates* A copy of the order is attached.

[3] *Id.* p. 3.

Water docket. The Consumer Advocate does not have any reason to believe that Nashville Gas has intentionally concealed the fact that it would file the testimony of three (3) surprise witnesses business days before the scheduled hearing of this matter.

The second and fourth criteria present some differences and suggests that a continuance rather than exclusion of the testimony would be more appropriate. Of paramount importance is the fact that the Consumer Advocate considers the new testimony to be important. Each witness offers additional opinions regarding the matter in this docket. The new testimony is important in that it represents a desperate move by Nashville Gas in this matter. Evidence of this conclusion permeates the testimony and is crystallized in the personal attacks thrown toward the Consumer Advocate. Moreover, the inconsistencies with prior testimony offered by Nashville Gas make it imperative that the Consumer Advocate be given adequate time to investigate and rebut the testimony offered. As a consequence, the schedule in the matter should be reset in the following manner:

September 11, 2003 - Nashville Gas supplements its discovery responses.

September 19, 2003 - Consumer Advocate files its rebuttal testimony.

September 30 and October 1, 2003 - Hearing on the merits.

October 4, 2003 - Transcript of hearing available.

October 11, 2003 - Post hearing briefs filed with the TRA and served on the parties.

October 20, 2003 - Authority conference for consideration by the Panel.

Nashville Gas filed its proposed rate increase on April 29, 2003. The six-month period expires on October 29, 2003. The nine-month period expires on January 29, 2004. There is time available for the suggested adjustments to the schedule.

CONCLUSION

The foregoing considered, the Consumer Advocate's motion to reset the schedule in this matter should be granted. In the alternative, the testimony of the surprise witnesses should be stricken and excluded.

RESPECTFULLY SUBMITTED,

Timothy C. Phillips B.P.R. # 12751
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
(615) 741-3533

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served via facsimile and first-class U.S. mail, postage prepaid, this 5th day of September, 2003, on the following:

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Assistant Attorney General

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RALEIGH, NORTH CAROLINA
WINSTON-SALEM, NORTH CAROLINA

August 25, 2003

VIA FACSIMILE AND OVERNIGHT DELIVERY

The Honorable Pat Miller
Director
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: Application of Nashville Gas Company, a Division of Piedmont Natural Gas Company, Inc. for an Adjustment of its Rates and Charges, the Approval of Revised Tariffs and the Approval of Revised Service Regulations
Docket No. 03-00313.

Dear Director Miller:

I am writing on behalf of Nashville Gas Company ("Nashville Gas"), applicant in the above-captioned docket, to request a two-day extension of the time in which Nashville Gas may respond to the most recent set of data requests served on Nashville Gas by the TRA Staff. These requests were delivered to Nashville Gas on Thursday, August 21, 2003 with a requested response date of Tuesday, August 26, 2003.

Nashville Gas is currently heavily engaged in the preparation of rebuttal testimony in both this docket and in a general rate case proceeding now pending before the North Carolina Utilities Commission. As a result of this fact, and the fact that the TRA staff data request only allowed for two working days to provide responses, Nashville Gas is in need of a slight delay in the time in which it is permitted to submit its responses to these data requests to and including Thursday, August 28, 2003 (the same date responses to the Second Round of Discovery are due under the procedural orders in this docket).

The undersigned counsel attempted to contact counsel for the TRA on Friday, August 22, 2003 by telephone to discuss this request but was unable to reach such counsel. Under the totality of the circumstances, Nashville Gas respectfully submits that the two-day extension of time requested herein is reasonable and should not prejudice the TRA Staff's ability to prepare for the hearing of this matter.

If there are any questions about this request, I may be reached at the number shown above. Thank you for your consideration of this matter.

Sincerely,

James H. Jeffries IV

JHJ/srl

c: Mr. Timothy Phillips (via fax)
Mr. George H. Godwin, Jr. (via fax)
Mr. R. Dale Grimes (via fax)

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Terry K. PEGRAM, Jr., by next friend, Judy PEGRAM, Plaintiff/Appellant
v.
David BRIDGES, M.D., Defendant/Appellee.

Oct. 26, 1994.

Davidson Circuit, No. 01A01-9401-CV-00013.

Helen Loftin Cornell, Nashville, for appellant.

Daniel Berexa, Nashville, for appellee.

OPINION

WILLIAM H. INMAN, Senior Judge.

I

*1 The jury returned a verdict for the defendant in this malpractice action involving an eleven-months infant who swallowed a foreign object. The issues presented for review are:

I. Whether the trial court erred in submitting Plaintiff's exhibit to the jury *after* the defendant held the marked exhibit in his possession overnight.

II. Whether the credibility of the Defendant is at issue and whether his testimony is contradicted by real evidence.

III. Whether the exclusion of Plaintiff's expert **witness** and the exclusion of Plaintiff's exhibits was prejudicial error.

IV. Whether the court erred in conducting trial under intemperate courtroom conditions.

V. Whether the verdict is contrary to the weight of evidence; and whether the trial court erred in denying Plaintiff's Motion for New Trial and Plaintiff's Motion for Judgment in Accordance with Plaintiff's Motion for Directed Verdict.

II

Terry Pegram was choking on an object and his mother rushed him to a local fire station, where first aid was administered successfully. He was then taken to the emergency room at West Side Hospital and examined by Dr. Bridges, who was made aware that Terry had swallowed a foreign object. He examined Terry's mouth with an otoscope, and determined that there was no obstruction and that his vital signs were normal. An x-ray examination revealed a round, symmetrical object in his stomach, probably a ball of rolled-up paper, which in course was passed as predicted. Terry was teething, and thus was uncomfortable and drooling.

Terry was fretting the following morning, and he was taken to his pediatrician, Dr. Bishop, who discovered a metallic object in his mouth, lodged between the gums and the cheek. This object was removed, and Terry suffered no ill effects.

III

This action was filed on behalf of Terry by his mother, who alleged that Dr. Bridges failed to comply with the applicable standard of care. Testifying for the plaintiff was Dr. Bishop, who stated that the standard of care for emergency room medicine required a careful examination of Terry's mouth while he was prone and restrained and that Terry suffered no injury, temporary or permanent. Recovery of medical expenses was not sought.

Parenthetically, at this juncture, we observe that in view of the expert testimony respecting injury, the plaintiff at best could have recovered only nominal damages. The indignation felt by Terry's mother cannot be the basis of damages.

IV

A photocopy of the Emergency Room records was made an exhibit, which was inadvertently mingled with Dr. Bridges' personal documents and left in his automobile overnight. The appellant argues that Dr. Bridges thus had the opportunity to alter this photocopy to his advantage--not that he did so, but that he had the opportunity, which taints the evidentiary nature of the exhibit to the prejudice of the plaintiff. This issue is frivolous.

V

The appellant next complains that the trial court erred in excluding the testimony of Dr. Margrette Johnston, who had performed some tests on Terry. The **exclusion** was based on the **non-disclosure** of Dr. Johnston until three days before trial, notwithstanding discovery requests were served more than one year before trial. A resolution of the defendant's objection was largely

within the discretion of the trial judge, and thus undisturbable on appeal unless an abuse of discretion is shown. *Strickland v. Strickland,* 618 S.W.2d 496 (TennApp1981). We find no abuse of discretion.

VII

*2 The appellant complains that the courtroom was hot, which doubtless impelled the jury to conclude its deliberations quickly. This issue is without merit.

VIII

Finally, the appellant argues that the verdict is contrary to the weight of the evidence. This is not a justiciable issue on appeal and is beyond our reach. *Cary v. Arrowsmith,* 777 S.W.2d 8 (TennApp1989); Tenn.R.App.P. Rule 13(d) succinctly provides that "findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." Once the verdict is approved by the judge, appellate review is limited to a consideration of whether there is material evidence to support it. *Poole v. Kroger Co.,* 604 S.W.2d 52 (Tenn.1980). We cannot find that there is no material evidence to support the verdict.

The appellee's motion that we find this appeal frivolous is denied.

Affirmed, with costs assessed to the appellant, and remanded.

TODD, P.J., and CANTRELL, J., concur.

1994 WL 592101 (Tenn.Ct.App.)

END OF DOCUMENT

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 27, 2003

IN RE:	)	
	)	
PETITION OF TENNESSEE AMERICAN	)	**DOCKET NO.**
WATER COMPANY TO CHANGE AND	)	**03-00118**
INCREASE CERTAIN RATES AND	)	
CHARGES SO AS TO PERMIT IT TO	)	
EARN A FAIR AND ADEQUATE RATE	)	
OF RETURN ON ITS PROPERTY USED	)	
AND USEFUL IN FURNISHING WATER	)	
SERVICE TO ITS CUSTOMERS	)	

ORDER GRANTING MOTION TO STRIKE

This docket came before the Hearing Officer for consideration of the *Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein* filed on June 24, 2003 by the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD").

On June 23, 2003, Tennessee American Water Company ("TAWC") filed its pre-filed rebuttal testimony. Included in this filing was the rebuttal testimony of Christopher C. Klein, Ph.D. On June 24, 2003, the CAPD filed its motion to strike the testimony of Dr. Klein. The CAPD argued that the panel should not consider the testimony because TAWC failed to disclose Dr. Klein's name and the nature of his testimony in its response to a discovery request issued by the CAPD on April 30, 2003. Given that Dr. Klein is a former employee of the Tennessee Regulatory Authority, the CAPD asserts that a full investigation of his previous expert assertions

is necessary and that the proximity of the hearing and lack of disclosure has rendered such an investigation "impossible."[1]

On June 25, 2003, Chattanooga Manufacturers Association ("CMA") filed a response to the motion to strike. CMA did not take a position on the merits of the motion, but requested if the motion were denied that TAWC provide by noon June 27, 2003 copies of Dr. Klein's previous testimony in any docket involving TAWC.

On June 26, 2003,[2] TAWC filed its response to the motion to strike and a supplement to its response to the CAPD's April 30th discovery request. In its response to the motion to strike, TAWC asserts that it had previously disclosed to the CAPD Dr. Klein's name as a possible rebuttal witness and that it has timely supplemented its discovery response. Also on June 26, 2003, the CAPD filed a reply to TAWC's response to the motion to strike.

The Tennessee Rules of Civil Procedure address the discovery of expert information.[3] Rule 26.02(4)(A)(i) provides:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.[4]

A party must seasonably supplement any responses to such interrogatories.[5]

The crux of the CAPD's argument is that TAWC failed to seasonably supplement its response to the CAPD's April 30th discovery request asking TAWC to identify any person it expected to call as an expert witness in the docket and to provide certain information regarding

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[1] *Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein*, 5 (Jun. 24, 2003).
[2] On June 24, 2003, the Hearing Officer issued a *Notice of Filing* directing that all responses be filed by noon June 26, 2003.
[3] Pursuant to the Authority's rules, discovery in contested cases is effectuated in accordance with the Tennessee Rules of Civil Procedure. Tenn. R. & Regs. 1220-1-2-.11(1) (Rev. Mar. 2002).
[4] Tenn. R. Civ. P. 26.02(4)(A)(i) (Vol. 1 2003); *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 698 (Tenn. 1998).
[5] Tenn. R. Civ. P. 26.05(1) (Vol. 1 2003); *Lyle*, 746 S.W.2d at 698.

the expert's credentials and opinions. TAWC asserts that it timely notified the CAPD that it would call Dr. Klein as a witness through the following three actions: 1) advising a member of the CAPD's staff that it may call Dr. Klein as a rebuttal witness depending on the contents of the Intervenors' pre-filed direct testimony; 2) filing the pre-filed rebuttal testimony of Dr. Klein on the date it was due; and 3) supplementing its response to the CAPD's April 30th discovery request on June 26, 2003.[6]

The Hearing Officer finds that under the circumstances of this case TAWC did not seasonably supplement its discovery response. Regardless of what TAWC may have told an unnamed member of the CAPD's staff,[7] TAWC did not properly supplement its discovery until June 26, 2003, four calendar days prior to the hearing and three calendar days following the filing of Dr. Klein's pre-filed rebuttal testimony.[8] It is reasonable to expect that TAWC would have, at the very latest point in time, supplemented its response at the time it filed Dr. Klein's pre-filed rebuttal testimony and certainly before the failure to do so was raised in the CAPD's motion to strike.

Moreover, TAWC did not contact Dr. Klein until two weeks after the filing of Intervenors' pre-filed direct testimony and did not decide to call Dr. Klein as a witness until June 19 or 20, 2003[9] even though it had received Intervenors' direct testimony on May 30, 2003 and

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[6] *Tennessee American Water Company's Response to Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein*, 2-3 (Jun. 26, 2003).

[7] The rules of the Tennessee Regulatory Authority require that responses to interrogatories be signed under oath and that the original be served on the requesting party and copies served on other parties. Tenn. R. & Regs. 1220-1-2-.11(5)(b), (6) (Rev. Mar. 2002).

[8] *See Miller v. Nashboro Record Co.*, 1989 WL 45789, *4 (Tenn. Ct. App. May 3, 1989) (finding that under the circumstances of the case, a supplement made five days prior to the hearing was not timely). The completeness of TAWC's supplement is also of concern. The CAPD asked that TAWC "identify **any** matter in which the expert has testified (through deposition or otherwise)." TAWC's Supplement to Discovery Responses, 1 (Jun. 26, 2003). TAWC responded by listing one docket involving TAWC and stating that Dr. Klein did not have a list of any others. *Id.* at 2.

[9] *Tennessee American Water Company's Response to Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein*, 2 (Jun. 26, 2003).

rebuttal testimony was due June 23, 2003. As will be described further below, the procedural schedule in this case was designed to resolve this docket within approximately six months of the filing of TAWC's tariff; therefore, the dates set forth in the schedule, particularly the hearing dates, are difficult to alter. Given the constrained procedural schedule, it is unseasonable for TAWC to notify the CAPD of TAWC's expected expert witness four days before the hearing. Moreover, this action seems even more egregious when one realizes that two-thirds of the time for filing rebuttal testimony had passed before TAWC asked Dr. Klein to prepare rebuttal testimony for TAWC's consideration.

Having determined that TAWC failed to seasonably supplement its response to the CAPD's April 30th discovery request, the controversy now centers on the ramifications of that failure. The Tennessee Supreme Court has held that trial judges may take corrective action when a party fails to seasonably supplement a discovery request.[10] The Court has held that such corrective action may include excluding the testimony or, when the failure is not knowing or deliberate, other sanctions may be appropriate.[11] "In determining the appropriate sanction the trial judge should consider:

1. The explanation given for the failure to name the witness.
2. The importance of the testimony of the witness;
3. The need for time to prepare to meet the testimony; and
4. The possibility of a continuance."[12]

In this case, the CAPD did not explicitly allege that TAWC knowingly or deliberately failed to seasonably supplement its discovery response; therefore, the Hearing Officer will

[10] *Lyle*, 746 S.W.2d at 699 (citing *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981)).
[11] *Id.* Other sanctions include excluding the testimony as well as permitting the witness to testify or granting a continuance. *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981).
[12] *Id.*

consider the four factors listed above.[13] Given its assertion that the supplement was timely, TAWC does not specifically provide an explanation for failing to timely notify CAPD of the expert testimony. TAWC does, however, when asserting the timeliness of its supplementation, assert that it did not decide to use Dr. Klein as an expert witness until either June 19 or 20, 2003.[14] This explanation is insufficient to explain why TAWC did not properly supplement its response prior to the filing of the testimony or before June 26, 2003.

As described by TAWC, Dr. Klein "will address the rates to be charged to the City of Chattanooga for fire hydrants and public fire protection."[15] This same issue is addressed by TAWC in the pre-filed direct testimony of Michael A. Miller,[16] the pre-filed direct and rebuttal testimony of Paul R. Herbert,[17] and the rebuttal testimony of Paul R. Moul.[18] TAWC fails to explain in its response why the testimony of Dr. Klein is necessary when it already has available to it three other witnesses on the subject, the names of which have been timely provided to the CAPD. TAWC did not even mention in its response the case of *Strickland v. Strickland*, which the CAPD cited and which lists the importance of the testimony as a consideration when determining sanctions for failing to timely supplement discovery.[19]

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[13] *See Galligan v. Galligan*, 2002 WL 773059, *9 (Tenn. Ct. App. Oct. 21, 2002) (finding that the trial court should have applied the four factors from *Lyle* when the movant did not suggest a knowing or deliberate failure to supplement).

[14] *Tennessee American Water Company's Response to Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein*, 2 (Jun. 26, 2003).

[15] TAWC's Supplement to Discovery Responses, 1 (Jun. 26, 2003).

[16] Michael A. Miller, Pre-Filed Direct Testimony, pp. 3-15 (Feb. 7, 2003), Pre-Filed Rebuttal Testimony, pp. 2-28 (Jun. 23, 2003). Mr. Miller is the Vice President and Treasurer/Comptroller of TAWC. Michael A. Miller, Pre-Filed Direct Testimony, p. 1 (Feb. 7, 2003).

[17] Paul R. Herbert, Pre-Filed Direct Testimony, p. 11 and Cost of Service Allocation Study (Feb. 7, 2003), Pre-Filed Rebuttal Testimony, pp. 1-3 (Jun. 23, 2003). TAWC describes Mr. Herbert as an "Expert in the areas of Cost of Service Allocation and Customer Rate Design." TAWC's Responses to CAPD's 2nd Round of Discovery, Tab 1 (May 9, 2003).

[18] Paul R. Moul, Pre-Filed Rebuttal Testimony, pp. 25-26 (Jun. 23, 2003). TAWC describes Mr. Moul as an "Expert in the area of Cost of Equity." TAWC's Responses to CAPD's 2nd Round of Discovery, Tab 1 (May 9, 2003).

[19] *Strickland*, 618 S.W.2d at 501 (cited by the Tennessee Supreme Court at *Lyle*, 746 S.W.2d at 699).

CAPD explains that a full investigation into Dr. Klein's previous expert assertions is necessary, particularly in light of Dr. Klein's past employment with the Tennessee Regulatory Authority.[20] CAPD further asserts that use of the testimony would deprive it of the right to a fair hearing.[21] Additionally, although CMA did not take a position on the motion, it did mention that the other parties would need to prepare to cross-examine Dr. Klein.[22] Certainly, parties should be afforded a reasonable opportunity to investigate the opinions of an expert before being required to cross-examine the expert. The CAPD asserts that it will not be afforded such an opportunity if the testimony is considered at the hearing scheduled to begin June 30, 2003. Based on the facts presented here, the Hearing Officer finds that the CAPD's assertion is accurate. This finding is a natural result of the determination that the supplement was not seasonable as well as the fact that the information provided in the supplement is inadequate.[23]

The final consideration is the possibility of a continuance. Rate cases such as this are governed by Tennessee Code Annotated Section 65-5-203. This section directs the Authority to complete its investigation within nine months of the filing of the rate increase, but permits the company seeking a rate increase to place the rates into effect if the investigation has not been concluded at the end of six months.[24] Although the Authority may require the company to file a bond if it chooses to place the rate increase into effect, the preference is that the case be concluded within six months to avoid the possibility of multiple adjustments to rates. In this

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[20] *Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein*, 5 (Jun. 24, 2003).
[21] *Id.* at 1.
[22] *Chattanooga Manufacturers Association Response to the Attorney General's Motion to Strike*, 1 (Jun. 25, 2003).
[23] *See supra* note 8. The CAPD asked that TAWC "identify **all** publications written or presentations presented in whole or in part by the witness." TAWC's Supplement to Discovery Responses, 1 (Jun. 26, 2003). TAWC responded by referring to Dr. Klein's rebuttal testimony. *Id.* at 2. In his rebuttal testimony, Dr. Klein states: "More than 30 of my articles have appeared in in [sic] professional or academic journals and I have made more than 50 presentations at professional meetings." Christopher C. Klein, Pre-Filed Rebuttal Testimony, p. 2 (Jun. 23, 2003). No further citations were provided.
[24] Tenn. Code Ann. § 65-5-203(a), (b) (Supp. 2002).

case, the proposed rate increase was filed on February 7, 2003; therefore, the six-month period expires on August 7, 2003. Given that the panel members may wish to receive post-hearing briefs, require a certain amount of time to prepare for deliberations, and conduct other calendared activities, moving the hearing date at this time, is likely to extend deliberations well beyond August 7, 2003 and possibly beyond the nine-month deadline of November 7, 2003.[25]

Based on the above discussion of the four factors set forth by the Tennessee Supreme Court, the Hearing Officer concludes that the most appropriate sanction under the circumstances of this case is to grant the motion to strike the testimony of Dr. Klein.[26]

IT IS THEREFORE ORDERED THAT:

1) The *Attorney General's Motion to Strike and Exclude the Testimony of Chris Klein* filed on June 24, 2003 by the Consumer Advocate and Protection Division of the Office of the Attorney General is granted. The testimony of Christopher C. Klein shall be stricken from the record and shall not be considered in the deliberations of the issues in this docket.

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[25] The constraints imposed by Section 65-5-203 were previously recognized in an order entered in this docket that stated:

> The Pre-Hearing Officer finds that the above procedural schedule should be slightly modified for the following reasons. . . . Second, the hearing dates of July 8 and 9, 2003 conflict with potential organizational commitments of the Authority and its directors insofar as those dates inhibit sufficient opportunity by the panel assigned to this docket to consult with advisory staff and deliberate the merits of all issues without unnecessarily extending adjudication of this proceeding beyond the six month time frame.

Order on March 12, 2003 Status Conference, 3-4 (Mar. 17, 2003).

[26] In the event this order is appealed to the panel, the Hearing Officer notes that if this decision is not supported by a majority of the panel, it seems that basic fairness would require the Authority to: 1) continue the hearing to permit the CAPD and other intervenors a reasonable opportunity to prepare for the cross-examination of Dr. Klein and 2) obtain TAWC's agreement to not place the rate increase into effect until the Authority enters a final order in this docket.

2) Any appeal of this *Order Granting Motion to Strike* shall be considered by the panel assigned to this docket immediately preceding the opening remarks of the parties.

Ron Jones, Director
Hearing Officer[27]

[27] *See Order Suspending Increase in Rates for Ninety Days and Appointing a Pre-Hearing Officer*, 2 (Mar. 31, 2003) (appointing Director Jones to "hear preliminary matters prior to the Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion").