



City of Chattanooga

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February 13, 2007

VIA E-MAIL AND USPS

Ross Booher, Esq.
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315 Deaderick Street, Suite 2700
Nashville, TN 37238-3001

filed electronically in docket office on 02/14/07

RE: *Tennessee American Water Company, Petition to Change and 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 Services to its Customers*
TRA Docket No. 06-00290

Dear Ross:

Rick Hitchcock and I have reviewed your proposed new protective order, focusing upon provisions that address the requirements of the Tennessee Public Records Act. It is our opinion that the provisions of the proposed Order purport to impose upon the City of Chattanooga and the State of Tennessee, along with their attorneys, obligations that are inconsistent with the Act.

We believe that Tennessee law is clear that a refusal of a public agency to disclose a public record based on the existence of a confidentiality agreement or protective order would constitute a knowing and willful violation of the Public Records Act. This issue was directly addressed in the case of *Contemporary Media, Inc. v. The City of Memphis*, 1999 Tenn. App. LEXIS 298 (Tenn. App. 1999). In that case, the Court of Appeals found that the City of Memphis could not legally enter into a confidentiality agreement and was guilty of a knowing and willful violation of the Act when it refused to provide documents covered by the agreement. It is significant to note that the agreement in question was sanctioned by a Federal Court order that had been filed under seal. The Court of Appeals relied, among other authorities, upon a 1996 Attorney General Opinion, Tenn. Att. Gen. Op. No. 96-144 (December 3, 1996), in which the Attorney General stated that an agreement to withhold public records as to which no statutory exemption is available was against public policy and unenforceable.

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Beyond the terms of the agreement, the draft "affidavit" that you suggested is unacceptable. We cannot recommend to our clients that they enter into some sort of agreement subjecting them to suit for actions that comply with the law.

We recommend that the existing protective order, which effectively recognizes Tennessee law concerning public records, continue to be utilized for any documents that are identified as confidential.

We have focused upon the unacceptable provisions of the draft order as they relate to the Public Records Act, because resolution of those issues is essential before we can proceed with consideration of other provisions of the draft. Accordingly, should you wish to propose an alternate order that resolves the Public Record Act and "affidavit" issues that we have raised, we will be happy to consider and offer our comments concerning other aspects of any alternative draft.

Please call me if you would like to discuss any aspect of this.

Sincerely yours,


MICHAEL A. McMAHAN
Special Counsel

MAM/mms

cc: Honorable Sara Kyle (via email and USPS)
Mr. J. Richard Collier (via email and USPS)
Mr. Vance L. Broemel (via email and USPS)
Mr. Stephen R. Butler (via email and USPS)
Mr. Robert E. Cooper, Jr. (via email and USPS)
Mr. J. Davidson French (via email and USPS)
Ms. Catherine Giannasi (via email and USPS)
Mr. R. Dale Grimes (via email and USPS)
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