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February 23, 2007

VIA HAND-DELIVERY

Chairman Sara Kyle
c/o Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: Petition Of Tennessee American Water Company 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 Service To Its Customers; Docket No. 06-00290

Dear Chairman Kyle:

Enclosed please find an original and seventeen (17) copies of Petitioner Tennessee American Water Company's Reply Memorandum in Support of Motion for Entry of Proposed Protective Order No. 2 for the Protection of Highly Confidential Information.

Please return three copies of the Response, which I would appreciate your stamping as "filed," and returning to me by way of our courier.

Should you have any questions concerning any of the enclosed, please do not hesitate to contact me.

With kindest regards, I remain

Yours very truly,



R. Dale Grimes

RDG/ms
Enclosures

Chairman Sara Kyle
February 23, 2007
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cc: Hon. Pat Miller (*w/o enclosure*)
Hon. Ron Jones (*w/o enclosure*)
Hon. Eddie Roberson (*w/o enclosure*)
Ms. Darlene Standley, Chief of Utilities Division (*w/o enclosure*)
Richard Collier, Esq. (*w/o enclosure*)
Mr. Jerry Kettles, Chief of Economic Analysis & Policy Division (*w/o enclosure*)
Ms. Pat Murphy (*w/o enclosure*)
Michael A. McMahon, Esq. (*w/enclosure*)
Frederick L. Hitchcock, Esq. (*w/enclosure*)
Vance Broemel, Esq. (*w/enclosure*)
Henry Walker, Esq. (*w/enclosure*)
David Higney, Esq. (*w/enclosure*)
Mr. John Watson (*w/o enclosure*)
Mr. Michael A. Miller (*w/o enclosure*)

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

**PETITION OF TENNESSEE AMERICAN
WATER COMPANY 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
SERVICE TO ITS CUSTOMERS**

Docket No. 06-00290

**TENNESSEE AMERICAN WATER COMPANY'S REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR ENTRY OF PROPOSED PROTECTIVE ORDER NO. 2
FOR THE PROTECTION OF HIGHLY CONFIDENTIAL INFORMATION**

The responses filed by the City of Chattanooga ("City") and the Consumer Advocate and Protection Division ("CAPD") to Tennessee American's Motion for the Entry of Proposed Protective Order No. 2 ("Proposed Order") cite the following reasons for their opposition to the Proposed Order: (1) the Public Records Act; (2) opposition to being subject to jurisdiction in Nashville; (3) concerns about sovereign immunity; and (4) the order is unnecessary. These reasons are without merit as set forth below.

1. The Public Records Act Does Not Apply to Information Placed Under a Protective Order.

Relying upon four unreported cases, the City asserts in its Response the uncontested proposition that "a government cannot enter into a *confidentiality agreement* with a private party that prevents the disclosure of 'public records.'" (Emphasis added.) This is a significant change from its previous correspondence on the issue which inaccurately claimed that the unreported Contemporary Media case stood for the principle that "a refusal of a public agency to disclose a public record based on the existence of a ... *protective order* would constitute a knowing and willful violation of the Public Records Act." See Letter From Mr. McMahan dated February 13,

2007 (emphasis added). This latter claim is completely at odds with the reported Ballard and Arnold decisions discussed in Tennessee American’s opening brief, but ignored by the responses filed by the City and CAPD.¹ However, the City’s unreported authority and new reasoning for its opposition to the Proposed Order are completely irrelevant to the motion at issue. The motion does not seek a *confidentiality agreement* between private parties. Instead, it seeks a *protective order* of the TRA that binds the parties and requires certain protections for Highly Confidential Information, including that such information be sealed. As Tennessee American has demonstrated with binding precedent, including a decision from the Tennessee Supreme Court, the Public Records Act does not apply to information placed under seal pursuant to a protective order. Ballard v. Herzke, 924 S.W.2d 652 (Tenn. 1996); Arnold v. City of Chattanooga, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999). As a result, all of the Public Records Act “concerns” or “implications” raised by the City and the CAPD are unfounded.

2. If Parties and Experts Violate the TRA’s Order They Should be Subject to Suit Where the TRA May Be Found.

Language in the Affidavit of the Proposed Order subjects those who receive access to Highly Confidential Information to suit in any jurisdiction “where the Tennessee Regulatory Authority may be found” for violations of the Proposed Order. The City effectively concedes the need for such a provision by acknowledging that, absent such a provision, the parties may not be subject to suit where the TRA is found because venue may not otherwise be proper as to some parties. The City opposes this aspect of the Proposed Order solely because it claims “[i]f TAWC should have a cause of action against any of us, it knows where to find us.” If one or more parties – or out-of-state experts – violate the Proposed Order, it is not reasonable for Tennessee

¹ The City and at least one of its current counsel were directly involved in the Arnold v. City of Chattanooga case, which is not discussed in the City’s response. Arnold is directly on point and extensively quotes the Ballard holding, which fully supports Tennessee American’s position.

American to have to file multiple suits in multiple jurisdictions. There is also no good reason in this case for TRA witnesses to have to travel to other (or multiple) jurisdictions if a dispute arises related to a party's or expert's violation of the Proposed Order. It is very reasonable for all parties to be subject to jurisdiction and venue together in at least one jurisdiction and venue for the sake of convenience of the Authority. Because this case has federal securities law implications and involves issues that are outside the normal purview of the TRA or the state courts, it is also important that parties who violate the TRA's order be subject to suit in federal court. Finally, it is appropriate that all of the parties be subject to such a suit "where the TRA may be found" since this matter is pending before the TRA, and all the parties have already availed and submitted themselves to its venue and jurisdiction.

3. There is No Valid Sovereign Immunity Issue.

The CAPD opposes the motion "to the extent that [Tennessee American] seeks waiver of sovereign immunity... because sovereign immunity cannot be waived." This concern is baseless because the Proposed Order does not seek such a waiver and, even if it did, the CAPD's Response recognizes that no such waiver exists.

4. The Proposed Order Is Necessary Because It Offers Protections Not Included in the Existing Protective Order.

Both the City and CAPD contend that the Proposed Order is duplicative of the existing Protective Order already entered in the docket. This contention is, however, undermined by the City's and CAPD's own Responses. If the Proposed Order is duplicative then why do the CAPD and City oppose it for so many reasons? If the existing Order is sufficient, why has the City proposed in its Response an entirely new labeling scheme and manner of treatment for Highly Confidential Information – a scheme that is not mentioned or authorized by the existing order? Tennessee American's motion identified in detail multiple protections the Proposed Order offers

that are obviously not contained in the existing Protective Order – and why such protections are needed. The City's and CAPD's claim that Proposed Order is duplicative is without merit.

CONCLUSION

For all the foregoing reasons and those set forth in its earlier motion, Tennessee American Water respectfully requests that the Proposed Order be entered.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Dale Grimes", written over a horizontal line.

R. Dale Grimes (#6223)

J. Davidson French (#15442)

Ross I. Booher (#019304)

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Counsel for Petitioner

Tennessee American Water Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via the method(s) indicated, on this the 23 day of February, 2007, upon the following:

| | |
|---|--|
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