

**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:)
)
PETITION OF TENNESSEE) **DOCKET NO. 06-00290**
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)
)

**CONSUMER ADVOCATE’S REPLY TO THE COMPANY’S RESPONSE TO THE
MOTION TO RECONSIDER THE SUPPLEMENTAL PROTECTIVE ORDER, OR IN
THE ALTERNATIVE, FOR INTERLOCUTORY REVIEW BY THE TRA**

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of Attorney General (“Consumer Advocate”), respectfully submits this reply to Tennessee American Water Company’s (“the Company’s”) response to the Consumer Advocate’s motion to reconsider the supplemental protective order entered on March 1, 2007, or in the alternative, for interlocutory review of the supplemental protective order by the Tennessee Regulatory Authority.

The Company’s response oversimplifies and misconstrues the Consumer Advocate’s argument about why it is improper for the Tennessee Regulatory Authority (“TRA”) or its hearing officer to order the Tennessee Attorney General’s Office to take a particular position regarding the status of documents that the Tennessee Attorney General’s Office has never seen. The

Company argues, “As the decision maker in this case, the Tennessee Regulatory Authority has the express power to bind the CAPD, just like any other party in this case, with its decisions.” (Company’s response, p. 3). Of course, the TRA makes decisions that bind the Consumer Advocate. Here, however, we are dealing specifically with a highly unusual and irregular situation in which the TRA’s hearing officer has ordered the Tennessee Attorney General’s Office to take a particular position regarding the status of documents that the Tennessee Attorney General’s Office has never seen. The TRA can no more order a party to oppose disclosure of documents than it can order a party to *support* disclosure. If the Company’s interpretation of the law is correct, the TRA or its hearing officer would have the power to order the Company to support the disclosure of documents in the event of litigation regarding the Public Records Act, and that order would bind the Company. Likewise, if the Company’s interpretation of the law is correct, the TRA or its hearing officer would have the power to order the Company to support and defend a rate reduction in this case, and that order would bind the Company. Obviously, the Company’s attempt to oversimplify the issue is erroneous.

Furthermore, the Tennessee Attorney General’s Office is legally prohibited from functioning as the attorney for the Company in the event of a public records request, which is what the supplemental protective order effectively requires. The Tennessee Attorney General’s Office is barred from engaging in the private practice of law. Tenn. Code Ann. §§ 8-6-107 and 8-4-104. The Tennessee Attorney General’s Office cannot represent the Company’s interests in the courts of Tennessee. See Tenn. Code Ann. § 23-3-101(3). The supplemental protective order compels the Tennessee Attorney General’s Office to represent the Company’s interests in any potential litigation regarding a public records request that, in the judgment of the Company and

the hearing officer, covers so-called “highly confidential” information. This aspect of the order is unsupported by Tennessee law.

The Company’s response also oversimplifies and misconstrues Tennessee law regarding the role of the TRA or its hearing officer in determining what documents are subject to disclosure pursuant to the Public Records Act. The Company’s response says that Tennessee law places disputes about public records requests with the TRA or its hearing officer in this case. (Company’s response, p. 6). In fact the Public Records Act places jurisdiction for the determination of disputes about the Public Records Act in the chancery court. Tenn. Code Ann. § 10-7-505(b). See also *The Tennessean v. City of Lebanon*, 2004 WL 290705 (Tenn.Ct.App.), at *2. The supplemental protective order attempts to compel the Tennessee Attorney General’s Office to represent the Company’s interests in the chancery court. There is no basis in Tennessee law for such compulsion, and the Company’s response cited no such source of law.

Furthermore, Tennessee law provides no deference to a lower court’s determination of whether a particular public records request is valid. The Tennessee Supreme Court has stated, “Our determination whether the Tennessee Public Records Act applies to the records in Cherokee’s possession is a question of law. We review questions of law de novo with no presumption of correctness accorded to the findings of the court below.” *Memphis Publishing Company v. Cherokee Children & Family Services*, 87 S.W.3d 67, 74 (Tenn. 2002). Given this standard of review, the Company’s claim that the TRA’s hearing officer makes the final determination about what documents are subject to the Public Records Act is inaccurate.

Also, it is both informative and disturbing that the Company refuses to repudiate the possibility of using the required affidavit as a way of defeating or circumventing the rights or

defenses of individual state employees. (Company's response, pp. 7-8). Instead, the Company argues that its interests are more important than the rights and defenses of the individual state employees. (Company's response, p. 8). In essence, the Company has admitted that the Consumer Advocate's concerns in this regard are well founded.

The Tennessee legislature passed the following statute: "State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain." Tenn. Code Ann. § 9-8-307(h). If the Company does not believe that the employees of the Tennessee Attorney General's Office should have this defense that was created by the Tennessee legislature, the Company's remedy would be to lobby the Tennessee legislature for repeal of the statute. The Company should not ask the TRA or its hearing officer to repudiate the judgment of the Tennessee legislature. Likewise, the TRA or its hearing officer should refrain from repudiating the judgment of the Tennessee legislature in establishing this defense for state employees.

Courts across the United States of America, including the courts of Tennessee, have sustained the following defense: "The defense of qualified immunity is available to public officials whose conduct conforms to a standard of objective legal reasonableness." *Cantrell v. DeKalb County*, 78 S.W.3d 902, 907 (Tenn. Ct. App. 2001). If the Company does not believe that the employees of the Tennessee Attorney General's Office should have this defense that has been sustained repeatedly in courts throughout the United States of America, the Company's remedy would be to attack the legitimacy of the defense directly in the court system. The Company should not ask the TRA or its hearing officer to repudiate the judgment of the courts throughout

the United States of America. Likewise, the TRA or its hearing officer should refrain from repudiating the judgment of the court systems throughout the United States of America, including the Tennessee court system, in sustaining this defense for public officials.

Moreover, the Consumer Advocate argued in its motion that the Company has failed to cite any specific source of law to support the provision in the supplemental protective order that requires the employees of the Tennessee Attorney General's Office to leave the hearing room during those times that so-called "highly confidential" information is merely being discussed. (Consumer Advocate's motion, p. 8). In its response the Company still has failed to support this provision with any specific source of law.

In fact the Company has not cited any specific source of law establishing the existence of "highly confidential" information that is in any significant way different from "confidential" information. The original protective order is sufficient, and the Company has failed to cite any specific source of law establishing the need for a supplemental protective order. The Company has relied on generalities and has failed to identify the specific source of law that requires the specific measures that the Company advocates for eliminating the rights and defenses of the employees of the Tennessee Attorney General's Office.

In support of the exemption from the supplemental protective order for the employees of the TRA, the Company cites Tenn. Comp. R. & Regs. 1220-1-1-.03(8). (Company's response, p. 9). Nonetheless, that very rule explicitly says, "The provisions of this rule shall not abridge the right of any other party to contest the proprietary status of such information." Clearly implicit in this rule is the ability of the parties to see the documents at issue. Otherwise, the right of a party to contest the proprietary status of the information is meaningless. The rule cited by the Company

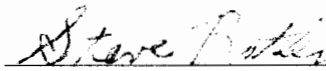
applies to confidential information that the parties are allowed to see and not to so-called “highly confidential” information that the Consumer Advocate has not been allowed to see in this case.

The Company argues, “TRA staff must have access to all information before the Hearing Officer, and ultimately the Directors comprising the TRA hearing panel, in order to make a proper, fully informed decision on the merits of the case.” (Company’s response, p. 9). Likewise, the Consumer Advocate needs access to the so-called “highly confidential” information in order to make a proper analysis of the case. The Company’s argument does not establish a reasonable basis for exempting the employees of the TRA from the supplemental protective order while simultaneously imposing the order on the employees of the Consumer Advocate.

Without conceding that there is any real justification for a separate category of “highly confidential” information, any such potential justification would be based on the nature of the information rather than on the identity of the recipients of the information. There is no reasonable basis for the hearing officer’s distinction between the employees of the TRA and the employees of the Tennessee Attorney General’s Office, and any exemption for the employees of the TRA should be extended to the employees of the Tennessee Attorney General’s Office.

There is no need for the supplemental protective order. The original protective order is sufficient and protects the Company’s interests in confidential information. Even in its response to the Consumer Advocate’s motion, the Company has cited no specific source of law that establishes the requirement for the supplemental protective order. The hearing officer should vacate the supplemental protective order. In the alternative, the TRA should vacate the supplemental protective order.

RESPECTFULLY SUBMITTED,

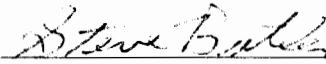


STEPHEN R. BUTLER B.P.R. #14772
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-8722

Dated: March 20, 2007

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or facsimile to the parties of record on March 20, 2007.



Stephen R. Butler
Assistant Attorney General

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