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March 22, 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 sixteen (16) copies of Tennessee American Water Company's Emergency Motion for Stay of Any Order Materially Altering the Supplemental Protective Order or, in the Alternative, for Emergency Interlocutory Review by the Tennessee Regulatory Authority.

Please return three copies of this document, 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.

Sincerely,

Ross Booher

RB/cw
Enclosures

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 EMERGENCY MOTION FOR STAY OF ANY ORDER MATERIALLY ALTERING THE SUPPLEMENTAL PROTECTIVE ORDER OR, IN THE ALTERNATIVE FOR EMERGENCY INTERLOCUTORY REVIEW BY THE TENNESSEE REGULATORY AUTHORITY

The Tennessee American Water Company ("TAWC") has produced and filed a number of extremely sensitive and confidential documents (the "highly confidential documents") in compliance with an Order compelling production of certain information relating to an upcoming initial public offering ("IPO Order") and under the protections of the Supplemental Protective Order ("SPO"). Shortly after TAWC produced these highly confidential documents, the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD") filed a Motion to Reconsider the Supplemental Protective Order (the "Motion to Reconsider the SPO"), calling into question the entire framework under which TAWC was compelled to produce highly confidential information. Given the potentially dire consequences of the disclosure of any of the highly confidential documents to the public, if the Hearing Officer or Tennessee Regulatory Authority ("TRA") overturns or materially weakens the SPO in response to the Motion to Reconsider the SPO, TAWC respectfully moves for an emergency stay of any

such decision until TAWC has exhausted its opportunities to appeal any such decision and/or the IPO Order.

Chronology of Events

The IPO Order, which was entered by the Hearing Officer on March 1, 2007, compelled production by TAWC of certain highly confidential information, including information related to an upcoming initial public offering ("IPO") of the stock of TAWC's parent company and valuations of various business entities associated with TAWC. For both business and legal reasons, this information is extremely sensitive and highly confidential. Recognizing the sensitivity of this information, the Hearing Officer entered the IPO Order only in tandem with the SPO. The SPO, among other things, protects documents designated as highly confidential from disclosure to any individuals who have not fully executed a nondisclosure statement. With the protections of the SPO in place, TAWC filed under seal a number of highly confidential documents in the docket room of the TRA, as required by the IPO Order, on March 8, 2007 and March 9, 2007.

On Friday, March 9, 2007, the CAPD filed and electronically served its Motion to Reconsider the SPO, which, if granted, would materially weaken or annul the protections under which TAWC filed the highly confidential documents. The City of Chattanooga ("City") joined the Motion to Reconsider the SPO on March 14, 2007. The following week, TAWC produced the highly confidential documents to lead counsel for the City and the Chattanooga Manufacturers Association ("CMA") after securing the agreement of these counsel that the documents would be returned to TAWC if the protections of the SPO are disturbed. In a further attempt to prevent any dissemination of the highly confidential documents in the event the SPO

is materially altered, TAWC filed an emergency motion to stay the IPO Order on March 15, 2007.

The Necessity of This Emergency Stay if the SPO is Overturned or Modified

As TAWC has consistently demonstrated, the disclosure to the public of the highly confidential documents produced by TAWC in compliance with the IPO Order could result in substantial harm to TAWC, its parent company American Water Works Company ("AWWC"), and its ultimate parent company RWE. A stay is appropriate where there are doubtful issues and there is a real danger of irreparable harm from the denial of a stay. *See Combined Commc'ns, Inc. v. Solid Waste Region Bd.*, 1993 WL 476668, at *1 (Tenn. Ct. App. Nov. 17, 1993) (Attached as Exhibit A). In the present case, the highly confidential documents contain extremely sensitive proprietary and commercial information which, if made publicly available, could harm the commercial interests of TAWC. Further, the highly confidential documents contain information related to the proposed IPO of shares of AWWC. Public disclosure of this IPO-related information could result in violations of the federal securities laws, potentially leading to extremely negative consequences for the IPO such as enforcement actions by the Securities and Exchange Commission ("SEC"), which could result in forced postponement of the effectiveness of the registration statement of the IPO to cure an alleged violation of the anti-gun jumping provisions of the federal securities laws, and/or potential liability for unauthorized disclosures. The period of time leading up to the registration is highly critical and subject to close scrutiny by the SEC, and therefore the need is great for extra caution to prevent even an inadvertent disclosure of potentially prohibited information. These consequences, which led the Hearing Officer to enter the SPO in the first place, weigh strongly in favor of staying the effectiveness of any decision to overturn or materially weaken the SPO until the exhaustion of

appellate review by TAWC.[1]

Conclusion

For the foregoing reasons, in the event the Hearing Officer or TRA enters any order materially altering the protections of the SPO, TAWC respectfully requests that any such order be immediately stayed so that TAWC may seek appellate review of such order and/or the IPO Order. In the event the Hearing Officer or TRA enters any order materially altering the protections of the SPO and denies this motion, TAWC requests immediate interlocutory review of this motion by the TRA.

Respectfully submitted,

R. Dale Grimes (#6223)
J. Davidson French (#15442)
Ross I. Booher (#019304)
BASS, BERRY & SIMS PLC
315 Deaderick Street, Suite 2700
Nashville, TN 37238-3001
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Counsel for Petitioner
Tennessee American Water Company

[1] Although the highly confidential documents filed by TAWC would still be protected as "confidential documents" under the January 19, 2007 Protective Order if the SPO were to be overturned or materially modified in response to the Motion to Reconsider, such protection is insufficient given the nature of the information and the potential consequences of its public disclosure. As TAWC set forth in its Motion for Entry of Proposed Protective Order No. 2 for the Protection of Highly Confidential Information, the provisions of the first Protective Order are not sufficient to protect the highly confidential information filed by TAWC.

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 22nd day of March, 2007, upon the following:

[ ] Hand	Michael A. McMahan
[ ] Mail	Special Counsel
[ ] Facsimile	City of Chattanooga (Hamilton County)
[x] Overnight	Office of the City Attorney
[x] Email	Suite 400
	801 Broad Street
	Chattanooga, TN 37402

[x] Hand	Timothy C. Phillips, Esq.
[ ] Mail	Vance L. Broemel, Esq.
[ ] Facsimile	Office of the Attorney General
[ ] Overnight	Consumer Advocate and Protection Division
[x] Email	425 5th Avenue North, 2nd Floor
	Nashville, TN 37243

[x] Hand	Henry M. Walker, Esq.
[ ] Mail	Boult, Cummings, Conners & Berry, PLC
[ ] Facsimile	Suite 700
[ ] Overnight	1600 Division Street
[x] Email	Nashville, TN 37203

[ ] Hand	David C. Higney, Esq.
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[ ] Facsimile	633 Chestnut Street, 9th Floor
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[ ] Hand	Frederick L. Hitchcock, Esq.
[ ] Mail	Chambliss, Bahner & Stophel, P.C.
[ ] Facsimile	1000 Tallan Building
[x] Overnight	Two Union Square
[x] Email	Chattanooga, TN 37402

H

Combined Communications, Inc. v. Solid Waste Region Bd.Tenn.App.,1993.Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Middle Section, at Nashville.

COMBINED COMMUNICATIONS, INC., d/b/a The Tennessean, and Anne Paine, Petitioners,

v.

The SOLID WASTE REGION BOARD, Respondent.

No. 01A01-9310-CH00441.

Nov. 17, 1993.

OPINION

RULE 7 MOTION FOR STAY AND RESPONSE THERETO

TODD, Presiding Judge.

***1** The petitioner, Combined Communications, Inc., filed this suit against the respondent, Solid Waste Region Board under the Tennessee Public Records Act, T.C.A. § § 10-7-503 *et seq.,* to compel the disclosure of a letter received by the Chairman of the Board from the Metropolitan Attorney of Metropolitan Nashville and Davidson County, Tennessee.

The Trial Court ordered disclosure, and the Board appealed to this Court. The Trial Court denied a stay pending appeal, and the Board has applied to this Court for stay pending appeal. Petitioner has responded in opposition to the application.

An appellate court has no lawful right to order a supersedeas to issue unless it is of the opinion from an inspection of the record that there is error in the judgment or decree to be superseded. *Sullivan v. Eason,* 5 Tenn.App. 137 (1927). However, a stay may be necessary and just where there are doubtful issues and there is real danger of **irreparable harm** from denial of a stay. T.R.C.P. Rule 62.08; 4-A C.J.S. Appeal & Error § 636, p. 452, n. 96.

The brief supporting the application for stay states that the Board intends to raise the following issues on appeal:

a. Whether the Solid Waste Region Board has the capacity to sue or to be sued.

b. Whether the separation of powers provisions of the Tennessee Constitution require that the document herein sought to be accessed be exempted from the provisions of the Public Records Act.

c. Even if the above constitutional standard is not met, whether the provision of T.C.A. § 10-7-503, as amended by Public Acts 1991, Chapter 369, Section 7, exempt attorney client communications from the disclosure requirements of the Act, as being privileged under state law.

d. Whether requiring disclosure under the Public Records Act of written legal analyses and discussions of government attorneys for their clients violates public policy.

e. Whether an award of attorney's fees in this case was proper.

Said brief discusses only issues relating to attorney-client privilege and award of attorney's fees.

T.C.A. § 10-7-503(a) provides:

Records open to public inspection-Exceptions.-(a) All state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with § 10-7-404, shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, *unless otherwise provided by state law.* (Emphasis supplied.)

The Board insists correctly that the expression "state law" is broader than "statute." "State law" comprehends statutes, court rules and court decisions.

T.R.E. Rule 501 reads as follows:

Privileges recognized only as provided.-Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to:
***2** (1) Refuse to be a witness;
(2) Refuse to disclose any matter;
(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

T.C.A. § 23-3-105 provides:
Privileged communications.-No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted him professionally, to disclose any communication made to him as such by such person, during the pendency of the suit, before or afterwards, to his injury....

This section embodies the common law principle. *Scales v. Kelley*, 70 Tenn. 706 (1879).

The above code provision does not exclude all communications between an attorney and his client. *Humphreys, Hutcherson & Moseley v. Donovan, M.D.*, Tenn.1983, 568 F.Supp. 161, aff'd. 6th Cir.1985, 755 F.2d 1211.

Supreme Court Rule 8, D.R. 4-101(B)(1) reads as follows:
Except when permitted under DR 4-101(C), a lawyer shall not knowingly: Reveal a confidence or secret of his client....

In *McMannus v. State,* 39 Tenn. (2 Head), 214 (1858), the Supreme Court reversed a trial court ruling excluding testimony of an attorney as to a conversation with the accused and said:
Sound public policy seems to have required the establishment of the rule that facts communicated by a client to his counsel are under the seal of confidence, and cannot be disclosed in proof. It is a rule of protection to the client, more than a privilege to the attorney. The latter is not allowed, if he would, to break this seal of secrecy and confidence. It is supposed to be necessary to the administration of justice, and the prosecution and defence of rights, that the communications between client and their attorneys should be free and unembarrassed by any apprehensions of disclosure, or betrayal. The object of the rule is, that the professional intercourse between attorney and client should be protected by profound secrecy. It is not necessary to the application of this rule, as was held in some of the old cases, now overruled, that a suit should be pending or anticipated, (I Greenl. on Ev. 240, note), nor that there should be a regular retainer or the payment of fees. I Greenl. on Ev. sec. 241. But he must be applied to for advice or aid in his professional character, and that in relation to some act past, or right, or interest in existence. The rule has no reference to cases like the one before us, where abstract legal opinions are sought and obtained on general questions of law, either civil or criminal. In such cases no facts are or need be disclosed implicating the party; and so there is nothing to conceal, of a confidential nature.
If the defendants had perpetrated an act, and applied for legal counsel and advice in relation to it, secrecy would be imposed; but where no act had been done, or if done, not disclosed, and only a general opinion on a question of law was asked, there would be no professional confidence. It would be monstrous to hold, that if counsel was asked and obtained, in reference to a contemplated crime, that the lips of the attorney would be sealed, when the fact might become important to the ends of justice in the prosecution of crime. In such a case the relation cannot be taken to exist. Public policy would forbid it. We presume the rule has never been extended so far, nor will it be.

***3** 39 Tenn. pp. 216-217

In *Johnson v. Patterson*, 81 Tenn. (13 Lea.), 626 (1884), the Supreme Court said:
... Our Code, section 4784 [4748] (new Code,) has embodied but the common law principle in this language: "No attorney or counsel shall be permitted, in giving testimony against a client, or person who consulted him professionally, to disclose any communication made to him as attorney by such person, during the pendency of the suit, before or afterwards, to his injury."
This language excludes all communications, and all facts that come to the attorney in the confidence of the relationship. But there are many transactions between attorney and client, that have no element of confidence in them, of which he is competent to testify. For instance, he may prove his client's handwriting; may prove what money was collected by him, when paid over, and to whom paid: Weeks on Attorney, 277: Greenl. vol. 1, sec. 246.

81 Tenn. pp. 649,650

In *Jackson v. State*, 155 Tenn. 371, 293 S.W. 539 (1926), the Supreme Court held that advice of an attorney in response to an inquiry about the duties of a postmaster to forward complaints against a mail carrier was not privileged.

In *Bryan v. State*, Tenn.Cr.App.1992, 848 S.W.2d 72, the appellate court reversed a trial court judgment granting a blanket privilege to all communications between an attorney and client and said:
The attorney's communications or advice to the client, although not specifically addressed in T.C.A. § 23-3-105, are necessarily included in the privilege, as indicated by *McMannus,* for the client's protection. However, the privilege would apply in this manner only to the extent that the attorney's communications to a client were specifically based upon a client's confidential communication or would otherwise, if disclosed, directly or indirectly reveal the substance or tenor of a confidential communication. *See In re Sealed Case*, 737 F.2d 94, 101-102 (D.C.Cir.1984); 8 Wigmore, *Evidence* (McNaughton Rev.1961) § 2320, pp. 628-629. For example, the privilege does not extend to communications from an attorney to a client when they contain advice solely based upon public information rather than confidential information. *See Congoleum Industries, Inc., v. G.A.F. Corp.*, 49 F.R.D. 82, 85-86 (E.D.Pa.1969), *aff'd.*, 478 F.2d 1398 (3rd Cir.1973). Similarly, if the advice rendered by the attorney was clearly not intended to relate to client confidentiality, such as advice respecting a trial date or the client's presence at trial, the privilege would not apply. *See United States v. Gray*, 876 F.2d 1411 (9th Cir.1989); *United States v. Innella*, 821 F.2d 1566 (11th Cir.1987). Likewise, advice given on general questions of law, when no facts are or need be disclosed or inferred which would implicate the client, would not ordinarily be covered by the privilege. *See McMannus v. State, supra; Jackson v. State*, 155 Tenn. 371, 293 S.W. 539, 540 (1927). In this vein, the substance of an attorney's advice to a client of various aspects of the criminal trial process, including the client's constitutional rights, would not necessarily be covered by the privilege. It would depend upon the circumstances.

***4** 848 S.W.2d at 80

From the foregoing, this Court concludes that the law of this State does not recognize as privileged a communication from an attorney to his client which does not disclose or suggest the content of any confidential communication from the client to the attorney.

The appellant has filed the subject communication with this Court under seal. An examination of the communication discloses that it is a response to a request for information in the abstract, without any stated set of facts, and that the letter does not in any way disclose any fact communicated by the inquirer, except the desire of the inquirer for the abstract information.

Under these circumstances, the communication from the Metropolitan Attorney to the Board is not privileged or exempt from the provisions of the Public Records Act.

It is not seriously contended that the subject letter is not a public record. Surely, advice received by a public agency from its official legal adviser and preserved for its guidance in performing its public duties, cannot be hidden as private.

The opinions of the Attorney General of the State are regularly published for public information and guidance. It is no less important for opinions upon abstract questions of law by a municipal attorney to municipal agencies, be available to the public.

No argument is made that the advice relates to any pending or anticipated litigation; or that the Board would be in any way prejudiced or hampered in the rightful pursuit of its duties, or that any public interest would be prejudiced by the disclosure of the contents of the subject letter.

At this stage of the appeal, this Court is not of the opinion that there is error in the judgment of the Trial Court, or that irreparable injury or prejudice would result from a denial of stay. Therefore, it would not be proper for this Court to stay the judgment pending appeal.

The final judgment of this Court upon the merits of the appeal, including all issues listed above, is reserved pending receipt and consideration of briefs and oral argument, if requested.

The application for stay is respectfully denied.

LEWIS and CANTRELL, JJ., concur.
Tenn.App.,1993.
Combined Communications, Inc. v. Solid Waste Region Bd.
Not Reported in S.W.2d, 1993 WL 476668 (Tenn.Ct.App.)

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