

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**April 4, 2007**

**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**

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**DOCKET NO.  
06-00290**

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**ORDER GRANTING, IN PART, TENNESSEE AMERICAN WATER COMPANY'S  
OBJECTIONS, PURSUANT TO THE SUPPLEMENTAL PROTECTIVE ORDER, TO  
DELIVERY OF HIGHLY CONFIDENTIAL INFORMATION TO DAN JOHNSON,  
MARLIN L. MOSBY, W. KEVIN THOMPSON AND/OR PFM**

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This matter came before the Hearing Officer upon the filing of *Tennessee American Water Company's Objections, Pursuant to the Supplemental Protective Order, to Delivery of Highly Confidential Information to Dan Johnson, Marlin L. Mosby, W. Kevin Thompson and/or PFM, and, in the Alternative, Motion to Stay Disclosure until the Status of the Supplemental Protective Order and March 1, 2007 Order Compelling Production are Finally Determined* (the "*Objections*") filed with the Tennessee Regulatory Authority ("TRA" or "Authority") immediately before the Status Conference on March 23, 2007. The *Objections* were addressed at the March 23, 2007 Status Conference and the parties argued their positions in more detail when the Status Conference reconvened on March 27, 2007.

Tennessee American Water Company ("TAWC" or the "Company") filed its *Objections* in accordance with the provisions set forth in the Supplemental Protective Order issued on

March 1, 2007. TAWC timely objected to the request of counsel for the City of Chattanooga (the “City”) to disclose Highly Confidential Information to Dan Johnson (“Mr. Johnson”), the Chief of Staff for Mayor Ron Littlefield, City of Chattanooga, and to Marlin L. Mosby (“Mr. Mosby”) and W. Kevin Thompson (“Mr. Thompson”) of Public Financial Management (“PFM”). The City was permitted to obtain the Highly Confidential Information through the *Order Granting Motions to Compel Discovery Relating to Initial Public Offering (IPO) Information and Materials* issued by the Hearing Officer on March 1, 2007 and was provided access to copies of the Highly Confidential Information after counsel for the City executed the Nondisclosure Statement pursuant to the Supplemental Protective Order, also issued on March 1, 2007.<sup>1</sup>

During the March 23, 2007 Status Conference, TAWC argued that Mr. Mosby and Mr. Thompson are not entitled to access to Highly Confidential Information because they have no present role in this rate case. They have not been employed or retained as experts by the City in this case and therefore, neither Mr. Mosby nor Mr. Thompson would qualify as a person authorized to receive protected information pursuant to the Supplemental Protective Order or the Protective Order.<sup>2</sup> TAWC asserted that this reason alone is sufficient to prevent these individuals from having access to Highly Confidential Information.

The major concern TAWC expressed was its contention that allowing Mr. Mosby and Mr. Thompson, or any other employee of PFM, access to the Highly Confidential Information would cause irreparable harm and unreasonable prejudice to TAWC’s business. According to TAWC, PFM was directly involved in assisting the City in an earlier attempt by the City to

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<sup>1</sup>Michael McMahan, counsel for the City, executed the Nondisclosure Statement on March 12, 2007 and was provided copies of the Highly Confidential Information by TAWC. Special Counsel for the City, Frederick Hitchcock, however declined to execute the Nondisclosure Statement and was not provided copies.

<sup>2</sup> Supplemental Protective Order ¶ 8(c) (March 1, 2007); Protective Order ¶ 3 (January 19, 2007).

exercise eminent domain to condemn TAWC, with the intent to acquire TAWC and convert it to a municipally-owned utility. TAWC argues that through involvement in the condemnation action, PFM and its employees have taken action that is a direct competitive threat to TAWC's business and therefore, it is unreasonable to require TAWC to deliver Highly Confidential Information to them.

TAWC argues Mr. Johnson's position of influence with the City is the reason he should not be permitted access to the Highly Confidential Information. TAWC contends that it is foreseeable that Mr. Johnson, whether consciously or subconsciously, could use the information he would glean from the Highly Confidential Information in a way that might prejudice TAWC in its future dealings with the City. In support of its position, TAWC relies upon the case of *Safe Flight Instrument Corp. v. Sundstrand Data Control, Inc.*,<sup>3</sup> for the proposition that denying party employees access to commercially sensitive information may be justified where it is foreseeable that abuse of the confidential information might occur. Specifically, the court in the *Safe Flight* case prevented the president of a corporate party access to commercially sensitive information because of the court's concern as to "his human ability during future years of research to separate the applications he has extrapolated from (the other party's) documents from those he develops from his own ideas."<sup>4</sup> For similar reasons, TAWC objects to the disclosure of Highly Confidential Information to Mr. Johnson.

Notwithstanding its *Objections*, during the March 23, 2007 Status Conference, TAWC agreed that Mr. Johnson may be permitted access to certain information contained within the Highly Confidential Information, such as the projected post-IPO capital structure of the Company. For this reason, the Hearing Officer directed the Company to review the Highly

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<sup>3</sup> *Safe Flight Instrument Corp. v. Sundstrand Data Control, Inc.*, 682 F. Supp. 20 (D.Del. 1988).

<sup>4</sup> *Id.* at 22.

Confidential Information and submit a letter to the City detailing the exact pages of any materials to which Mr. Johnson could have access. However, the Company maintained its objection as to any disclosure to Mr. Mosby, Mr. Thompson and any employees of PFM. The Hearing Officer suspended further argument on the *Objections* to allow time for the Company to provide a letter to the City and for the City to respond to the *Objections*.

On March 26, 2007, TAWC provided a letter to the City, in which TAWC maintained its objection to Mr. Johnson having access to Highly Confidential Information. TAWC agreed to the disclosure of a specific document, TAWC-HC-00571-00572, referenced in TAWC's Second Supplemental Response to the Consumer Advocate and Protection Division's First Discovery Request No. 8. TAWC stated that this production should not be considered a waiver of "protections of the Supplemental Protective Order with respect to this document."<sup>5</sup>

On March 27, 2007, the City filed its *Response to TAWC's Objections, Pursuant to the Supplemental Protective Order, to Delivery of Highly Confidential Information to Dan Johnson, Marlin L. Mosby, W. Kevin Thompson and/or PFM, and, in the Alternative, Motion to Stay Disclosure until the Status of the Supplemental Protective Order and March 1, 2007 Order Compelling Production are Finally Determined* ("Response to Objections"). In its *Response to Objections*, the City addressed TAWC's concern that Mr. Mosby or Mr. Thompson "might use the information to the material prejudice of TAWC in other matters in the future."<sup>6</sup> The City first stated "TAWC inaccurately claimed that Thompson and Mosby had participated in the condemnation case involving the City and TAWC which occurred a number of years ago."<sup>7</sup> The City further asserted, "Factually, neither Thompson nor Mosby participated in the condemnation

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<sup>5</sup> Letter from Ross Booher, Esq. to Michael A. McMahan, Esq. (March 26, 2007).

<sup>6</sup> *Response to TAWC's Objections, Pursuant to the Supplemental Protective Order, to Delivery of Highly Confidential Information to Dan Johnson, Marlin L. Mosby, W. Kevin Thompson and/or PFM, and, in the Alternative, Motion to Stay Disclosure until the Status of the Supplemental Protective Order and March 1, 2007 Order Compelling Production are Finally Determined*, p. 1 (March 27, 2007).

<sup>7</sup> *Id.*, p. 2.

action involving the City and TAWC.”<sup>8</sup> The City pointed out that these individuals had prepared or provided expert testimony for the City in TAWC’s 2003 rate case proceeding before the TRA. According to the City, “no known conflict of interest” exist between Mr. Thompson or Mr. Mosby and TAWC.<sup>9</sup> The City asserts that, inasmuch as expert witnesses come within the purview of the protective order providing for access to documents in this case, TAWC has a heavy burden in preventing such disclosures.

As to Mr. Johnson, the City argues that he is the second highest-ranking administrative official of the City and that both Mr. Johnson and the Mayor of Chattanooga are the “clients” supervising this case on behalf of the City. As a result, consultation with Mr. Johnson, who is an experienced Certified Public Accountant, is crucial to the City’s determination of whether to hire PFM to analyze data in the preparation of its case. For these reasons, the City argues that Mr. Johnson should be permitted access to the Highly Confidential Information.

The City cites the case of *Standard Space Platforms Corporation v. United States*,<sup>10</sup> in support of its position that a movant seeking to limit the disclosure of relevant documents must show that the disclosure will result in a “clearly defined and serious injury to its business,”<sup>11</sup> and that “the requisite showing must be made from specific facts, not mere conclusory allegations of confidentiality or business harm.”<sup>12</sup> The City asserts that TAWC has not demonstrated a sufficient basis for denying disclosure to the City’s client representative and expert witnesses, and that to deny access would constitute a denial of due process to the City in this case.

During the Status Conference, reconvened on March 27, 2007, the parties presented additional arguments to support their respective positions on the Company’s *Objections*. Ross

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Standard Space Platforms Corporation v. United States*, 35 Fed.Cl. 505 (1996).

<sup>11</sup> *Id.* at 507, citing *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) (quoting *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)).

<sup>12</sup> *Id.* at 508, referencing *Wall Indus., Inc. v. United States*, 5 Cl.Ct. 485, 487 (1984).

Booher, Esq., argued the *Objections* on behalf of TAWC. Michael McMahan, Esq., argued the City's position.

During its argument, TAWC presented documentation to refute the City's arguments that Mr. Mosby did not participate in the condemnation action brought by the City against TAWC. The Company provided copies of the reported case of *Arnold v. City of Chattanooga*,<sup>12</sup> and a deposition given by Mr. Mosby in that case. TAWC pointed out that in the *Arnold* case, as part of its findings, the Court referred specifically to Mosby's involvement:

Third, the Trial Judge stated that the witnesses (Decosimo, Adams, and *Mosby*) testified that they were not told they were being hired as experts in anticipation of litigation. However, what the parties were told is not completely dispositive. Whether an expert was consulted in anticipation of litigation must be determined from the intent of the party and its attorneys. The Mayor specifically stated in his deposition that at the time the experts were consulted, he was anticipating an eminent domain action. He testified:

It was clear to me that in order for the City to acquire the water company we would have to initiate a condemnation action and I asked [special counsel] [Frederick Hitchcock] to make sure that we could follow through on that on the ability to acquire the company through eminent domain.

Both City Attorney Randall Nelson and Special Counsel Frederick Hitchcock swore in their affidavits that they contacted Decosimo and PFM in anticipation of litigation with the Water Company. (Emphasis added)<sup>13</sup>

Next, TAWC referred to deposition testimony of Mr. Mosby filed in the Hamilton County Chancery Court action of the *Arnold v. City of Chattanooga* case. Counsel for TAWC, quoted from Mr. Mosby's testimony as follows:

. . . we [PFM] found out that the mayor actually was considering the acquisition of the utility company. And we went back to the City and said, "Oh, by the way, do you know we have some expertise in this area?" . . . But at that point a team was basically

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<sup>12</sup> *Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn. Ct. App. 1999), *perm app denied* (2000).

<sup>13</sup> *Id.* at 784.

put together and that team included the city attorney, us, and the finance director's office.<sup>14</sup>

The deposition transcript revealed that Mr. Mosby was represented in the deposition by Frederick Hitchcock, special counsel for the City in this matter. As to Mr. Johnson, TAWC reiterated its argument as to the prejudice that might result from disclosure to Mr. Johnson.

Counsel for the City, Mr. McMahan, responded to the documentation presented by TAWC, asserting that he had conducted inquiries, including reviewing pay vouchers issued by the City in the condemnation case, and he personally did not find evidence suggesting that Mr. Mosby had been involved or had participated in the condemnation action.<sup>15</sup> Additionally, counsel stated that he had checked with the City Attorney in the *Arnold* case, and that the City Attorney advised him that he was unaware of any involvement by PFM in the *Arnold* matter.<sup>16</sup>

Turning to the objection as to Mr. Johnson, the City argued that the seminal issue is the relative ratio of debt to equity in the post-IPO TAWC.<sup>17</sup> It is this information contained within the Highly Confidential Information that the City requests that Mr. Johnson, a person with financial expertise, have access.<sup>18</sup> TAWC responded in agreement with the City that the capital structure of TAWC is the central issue and stated that it had already offered to provide such information to the parties. TAWC offered to discuss with the City the scope of documents contained within the Highly Confidential Information that by agreement may be viewed by Mr. Johnson. The City agreed to communicate with the Company in an attempt resolve this issue.

Based on the arguments of the parties and the information provided, the Hearing Officer determined that Mr. Mosby and Mr. Thompson should not be provided access to Highly

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<sup>14</sup> Transcript of Status Conference, pg. 56 (March 27, 2007); *Arnold v. City of Chattanooga*, Deposition of Marlin L. Mosby, pg. 54 (March 5, 1999).

<sup>15</sup> *Id.* at pg. 58, ln. 18-24.

<sup>16</sup> *Id.* at pg 58, ln. 25 to pg. 59, ln. 5.

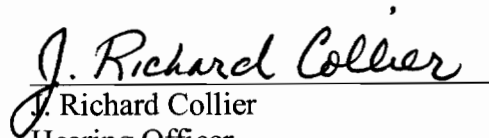
<sup>17</sup> *Id.* at pg. 59, ln. 20 to pg. 60, ln. 1.

<sup>18</sup> *Id.* at pg. 60, ln. 1-5.

Confidential Information. The Hearing Officer found that Mr. Mosby and Mr. Thompson have not been retained by the City as experts in this case and that TAWC had sufficiently demonstrated that as to PFM and its employees, including Mr. Mosby and Mr. Thompson, a potential conflict of interest exists that could result in irreparable business harm to TAWC if Highly Confidential Information is shared as requested by the City. Additionally, the parties have agreed to discuss the extent of the Highly Confidential Information to which Mr. Johnson will be permitted access. Therefore, the Hearing Officer directed the parties to work together in an attempt to reach an agreement as to the documentation that can be disclosed to Mr. Johnson.

**IT IS THEREFORE ORDERED THAT:**

1. Tennessee American Water Company's *Objections* as to Public Financial Management (PFM) and its employees, including specifically, Marlin L. Mosby and W. Kevin Thompson, receiving Highly Confidential Information in this case is **granted** and such Highly Confidential Information shall not be disclosed to PFM, Mr. Mosby or Mr. Thompson.
2. The parties shall discuss the extent of the Highly Confidential Information that will be available to Mr. Johnson and shall report to the Hearing Officer as soon as possible if an agreement cannot be reached.<sup>19</sup>

  
J. Richard Collier  
Hearing Officer

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<sup>19</sup> On April 2, 2007, the parties filed a *Joint Notice of Agreement Between Tennessee American Water Company and The City of Chattanooga Regarding Access to Highly Confidential Information to Dan Johnson*, evidencing their agreement as to the disclosure of Highly Confidential Information to Mr. Johnson and specifying those documents that would be made available to him for review.