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April 11, 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 Motion in Limine to Exclude as Inadmissible Evidence Related to The Initial Public Offering of American Water Works Company.

Please return three copies of the Motion, 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,

 /ms  
R. Dale Grimes

RDG/ms  
Enclosures

Chairman Sara Kyle  
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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/enclosure*)  
Mr. Michael A. Miller (*w/enclosure*)

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

**IN RE:**

<b>PETITION OF TENNESSEE AMERICAN</b>	)	
<b>WATER COMPANY TO CHANGE AND</b>	)	
<b>INCREASE CERTAIN RATES AND</b>	)	
<b>CHARGES SO AS TO PERMIT IT TO</b>	)	<b>Docket No. 06-00290</b>
<b>EARN A FAIR AND ADEQUATE RATE</b>	)	
<b>OF RETURN ON ITS PROPERTY USED</b>	)	
<b>AND USEFUL IN FURNISHING WATER</b>	)	
<b>SERVICE TO ITS CUSTOMERS</b>	)	

**TENNESSEE AMERICAN WATER COMPANY’S MOTION *IN LIMINE* TO EXCLUDE  
AS INADMISSIBLE EVIDENCE RELATED TO THE INITIAL PUBLIC OFFERING OF  
AMERICAN WATER WORKS COMPANY**

During discovery in this rate case, Tennessee American Water Company (“TAWC”) was required to provide information and documents related to the Initial Public Offering (“IPO”) of its parent, the American Water Works Company (“AWWC”). By their notices filed on April 9, 2007, all of the intervenors have indicated that they intend to use some or all of these Highly Confidential materials during the Hearing of this rate case. TAWC submits that, with the exception of the AWWC “pro-forma capital structure” (TAWC-HC-00571-00572), all of the materials related to the AWWC IPO are inadmissible because they are not relevant to this rate case and because their probative value is substantially outweighed by the unfair prejudice TAWC would suffer by the admission of these materials as evidence. TAWC also submits that all Highly Confidential materials, other than the pro-forma capital structure, should be excluded as evidence in the Hearing and on the record of this rate case because of the waste of the parties’ and TRA’s time that will result from the use of such materials: all of the intervenors failed to comply with the notice requirements contained in paragraph 6 of the Amended Supplemental Protective Order (“ASPO”), which is intended to facilitate the use of Highly Confidential

materials during the Hearing.<sup>1</sup> For these reasons and those stated herein, TAWC respectfully requests that the Hearing Officer exclude as inadmissible from the Hearing and the record of this rate case all evidence related to the IPO other than the pro-forma capital structure.

### **ARGUMENT**

#### **1. The Highly Confidential IPO Materials, Other Than the Pro-Forma Capital Structure, are Not Relevant to this Rate Case.**

Under the Tennessee Rules of Evidence,<sup>2</sup> evidence which is not relevant is not admissible. Tenn. R. Evid. 402 (2007). Evidence is only relevant if it tends to make the existence of any fact that is *of consequence to the determination of the action* more or less probable. Tenn. R. Evid. 401.

In the March 1, 2007, Order Granting Motions to Compel Discovery Relating to Initial Public Offering Information and Materials (“IPO Order”), the Hearing Officer required TAWC to produce certain documents related to the IPO under the protections of the Supplemental Protective Order. In the IPO Order, the Hearing Officer found that the discovery of information related to the IPO was permissible, but specifically noted that, under Rule 26.02, “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” (IPO Order, 11); Tenn. R. Civ. P. 26.02 (2007).

In fact, the Highly Confidential IPO-related materials that were produced by TAWC, other than the pro-forma capital structure, are not relevant to this case. TAWC restates its

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<sup>1</sup> The sufficiency of the intervenors’ Requests to use Highly Confidential materials during the Hearing of this rate case is discussed in Tennessee American Water Company’s Response, Pursuant to the Amended Supplemental Protective Order, to the Requests to Use Highly Confidential Information During the Hearing of and as Part of the Record of this Case Filed by the City of Chattanooga, the Consumer Advocate and Protection Division and the Chattanooga Manufacturers’ Association, filed on April 10, 2007.

<sup>2</sup> While the Hearing Officer is not strictly bound by the Tennessee Rules of Evidence under Section 65-2-109(1) of the Tennessee Code, the Tennessee Rules of Evidence do provide persuasive guidance concerning determinations of admissibility. See Tenn. Code Ann. 65-2-109(1) (2007); Tenn. Code Ann. 4-5-313(1) (2007).

contention previously made in the February 9, 2007 Status Conference that the information relating to the IPO is irrelevant to this rate case and that admitting IPO-related information as evidence is contrary to the Tennessee Rules of Evidence. (*See* Transcript of February 9, 2007 Status Conference, pp. 39-50.) This proceeding is a rate case, not a change of control review or a condemnation proceeding. The change of control has already been approved by the Tennessee Regulatory Authority. Furthermore, the IPO and the related transactions will not affect Chattanooga ratepayers or the quality of service in any way. As counsel for TAWC stated during the February 9 status conference, the only IPO-related evidence that is arguably relevant to this rate case is the pro-forma capital structure, which is arguably relevant to the method of calculating TAWC's capital structure. (*See Id.* at 42.) Consequently, documents related to the anticipated IPO, aside from the pro-forma capital structure, are not relevant to this case and should be excluded from the record and the Hearing.

**2. The Highly Confidential IPO Materials, Other Than the Pro-Forma Capital Structure, Should be Excluded Under Tennessee Rule of Evidence 403.**

Under Tennessee Rule of Evidence 403, even relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion or by considerations of undue delay or waste of time. Tenn. R. Evid. 403. Even if the Hearing Officer determines that the Highly Confidential IPO-related materials other than the pro-forma capital structure are relevant under Rule 402, these materials should be excluded because their admission as evidence at the Hearing or on the record of this rate case would unfairly prejudice TAWC, insert confusion into the Hearing, and would lead to the undue waste of the parties' and the Tennessee Regulatory Authority's ("TRA") time.

A. The Admission of IPO-Related Materials, Other than the Pro-Forma Capital Structure, Would Promote Confusion and Would Unfairly Prejudice TAWC.

The probative value of the IPO-related materials, other than the pro-forma capital structure, is, at best, de minimis for the reasons stated above and the reasons stated by counsel for TAWC during the February 9 status conference. (*See* Transcript of February 9, 2007 Status Conference, pp. 39-50.) Since these materials are simply not relevant to this rate case, any use of them would promote confusion and would unfairly prejudice TAWC. The direct testimony filed by the City of Chattanooga (“City”) gives a strong indication that the intervenors will attempt to use the IPO-related materials to distract from the issues relevant to this case. (*See* Direct Testimony of Mayor Ron Littlefield, p. 2 (“[W]e question the motivation of TAWC in seeking such a large increase in the middle of its proposed Initial Public Offering (IPO).”).) Such use of the Highly Confidential IPO-related information would promote confusion and unfairly prejudice TAWC given the elements of proof at issue in this rate case – capital structure, rate base, and return on equity.

B. The Admission of IPO-Related Materials, Other than the Pro-Forma Capital Structure, Would Cause Undue Delay and Waste of the TRA’s Time.

The probative value of the IPO-related materials, other than the pro-forma capital structure, is substantially outweighed by the undue waste of the TRA’s time that would be caused by the admission of these materials as evidence at the Hearing or on the record of this rate case. Because the IPO-related materials are Highly Confidential and subject to the terms of the ASPO, the hearing room will have to be cleared each time a Highly Confidential document is discussed during the Hearing. (ASPO, pp. 4-5, ¶ 6.) Each portion of the record in which Highly Confidential materials are discussed will need to be kept under seal. (*Id.*) In short, the extensive use of Highly Confidential IPO-related materials will incur delays at the Hearing of this rate

case, which, at the City's request, is being held in Chattanooga. And while paragraph 6 of the ASPO sets forth procedures for minimizing the administrative burden associated with these essential protections of the ASPO, the intervenors have completely frustrated the purpose of this paragraph: in their April 9 Requests, the City and the Chattanooga Manufacturers Association ("CMA") have essentially stated that they may use any and all of the Highly Confidential materials at virtually any time. Similarly, in its April 9 notice, the Consumer Advocate and Protection Division ("CAPD") attempted to reserve the right to use any and all of the Highly Confidential materials.

Now, having failed to comply with the requirements of the ASPO in its original notice, the CAPD today filed an Amended Notice and Reply to TAWC's response. (*See* Consumer Advocate's Amended Notice of Use of Highly Confidential Materials and Reply to Company's Response to Notice of Use of Highly Confidential Materials ("Amended Notice").) In its Amended Notice, the CAPD asserts that it is not problematic for all of the intervenors to, at any point, select additional Highly Confidential materials to be used at the Hearing and on the record – in direct contravention of the explicit language of paragraph 6 of the ASPO. In essence, the CAPD is requesting that the Hearing Officer "relax" – *i.e.*, not enforce – the notice requirements of the ASPO.<sup>3</sup> The CAPD repeatedly asserts that there is no "real prejudice" to the Company if the notice requirements of paragraph 6 are undone. (*Id.*, 1, 2.) The CAPD does not explain why there is no "real prejudice" to TAWC and does not explain how a "relaxation" of the Hearing Officer's carefully timed notice requirement will not be an undue administrative burden on the

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<sup>3</sup> The CAPD's Amended Notice is only the latest effort by the CAPD to resist the protective orders issued by the Hearing Officer. The terms of the SPO and ASPO have been extensively litigated over the past month, primarily at the instigation of the CAPD. This new attempt by the CAPD to undo a key provision in the ASPO should not be countenanced – if the CAPD had a problem with the terms of paragraph 6 of the SPO, it had plenty of opportunities to raise that issue. Further, the CAPD's request to use additional pages of Highly Confidential materials at the Hearing in this rate case is untimely and should be denied.

TRA. The positions set forth in the CAPD's Amended Notice highlight the administrative burden and waste of the parties' and the TRA's time that will occur if the IPO-related Highly Confidential materials are not excluded.

### CONCLUSION

The Highly Confidential IPO-related materials, other than the pro-forma capital statement, produced by TAWC in this rate case are not admissible in this rate case. These materials are not relevant, and any probative value of these materials is substantially outweighed by the danger of confusion and unfair prejudice and by considerations of delay and the waste of the parties' and the TRA's time. Accordingly, TAWC respectfully requests that the Hearing Officer exclude the Highly Confidential IPO-related materials, other than the pro-forma capital statement (TAWC-HC-00571-00572), from the Hearing and the record of this rate case.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "R Dale Grimes", followed by a horizontal line and the initials "ims".

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 11th day of April, 2007, upon the following:

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