

April 16, 2007

VIA EMAIL AND USPS

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

filed electronically in docket office on 04/16/07

Re: Docket No. 06-00290

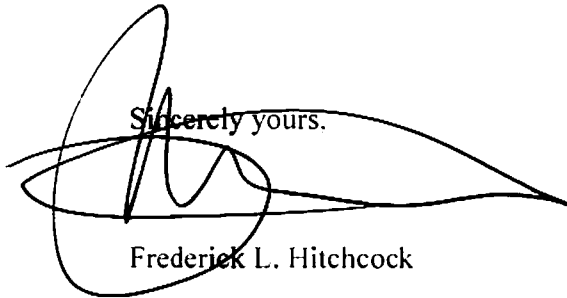
Dear Chairman Kyle:

I have enclosed the original and six (6) copies of the City of Chattanooga's Response to Tennessee American Water Company's Motions in Limine. A copy has also been sent via email to everyone listed on the Certificate of Service.

If there are any questions, please do not hesitate to call me.

With best regards, I am

Sincerely yours,



Frederick L. Hitchcock

FLH/cil

Enclosures

cc: The Honorable Sara Kyle, Chairman
Mr. J. Richard Collier
Mr. Jerry Kettles
Mr. R. Dale Grimes
Mr. J. Davidson French
Mr. Robert E. Cooper, Jr.
Mr. Vance L. Broemel
Mr. Stephen R. Butler
Mr. David C. Higney
Mr. Henry W. Walker
Mr. Michael A. McMahan
Mr. Harold L. North

**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 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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**CITY OF CHATTANOOGA'S RESPONSE
TO TAWC'S MOTIONS RELATING TO IDENTIFICATION AND USE OF
DOCUMENTS DESIGNATED BY TAWC AS "HIGHLY CONFIDENTIAL
INFORMATION"**

Intervenor, The City of Chattanooga ("Chattanooga"), by and through counsel, hereby files this response to the Tennessee American Water Company's ("TAWC's") "Motion In Limine to Exclude As Inadmissible Evidence Related to the Initial Public Offering of American Water Works Company" ("IPO Motion") and "Motion in Limine to Exclude As Inadmissible All Highly Confidential RWE Presidium and Supervisory Board Minutes," ("Minutes Motion") both dated April 11, 2007. This response is filed in advance of the hearing as instructed by the Hearing Officer following discussion in the Conference held Thursday, April 12, 2007.

Chattanooga assured the Hearing Officer in the April 12 Conference that it would not use documents designated by TAWC as "highly confidential information" ("HCI") as part of its case in chief, but intended to use HCI to cross examine witnesses offered by TAWC and, potentially, witnesses offered by other Intervenors.¹ TAWC mischaracterizes the scope of Chattanooga's intended use of the documents in question. *E.g.* IPO Motion at 5.

The clear purpose of TAWC is to require Intervenors' counsel to disclose their plans and

¹ Chattanooga advised the Hearing Officer and the other parties of its intent to use HCI in cross examination of TAWC and other intervenors' witnesses in its designation filed April 9, 2007, as called for in Section 6 of the Supplemental Protective Order entered by the Hearing Officer.

strategies for cross examination of TAWC witnesses by (1) demanding identification, page by page, of the HCI that Intervenor's counsel plans to use in that cross examination and (2) effectively demanding the identification of those plans through its motions in limine. Each of these purposes is improper and should be rejected.

A. There is No Requirement that Counsel for Chattanooga Disclose Their Cross Examination Strategy. TAWC demands that the Supplemental Protective Order be interpreted and applied to require disclosure of the core work product of counsel for Chattanooga and the other Intervenor's. Application of the Supplemental Protective Order to require disclosure of the "mental impressions, conclusions, opinions, or legal theories" of the Intervenor's counsel would directly violate Rule 26.02, Tenn.R.Civ.P. That Rule provides strong protection for work product generally and virtually absolute protection for the plans and theories of attorneys. Even if a movant can carry the heavy burden provided under the rule for access to normal work product, the rule specifies that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney" Rule 26.02(3), Tenn.R.Civ.P. (emphasis supplied).

The Tennessee Rule providing mandatory protection against required disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney is consistent with the rationale for the work product protection articulated by the United States Supreme Court in its seminal decision in *Hickman v. Taylor*:

In performing his various duties, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondences, briefs, mental impressions, personal belief, and countless other tangible and intangible ways--aptly though roughly

termed . . . as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

Hickman v. Taylor, 329 U.S. 495, 510-11, 91 L. Ed. 451, 67 S. Ct. 385 (1947)

The result sought by TAWC, requiring that counsel for Intervenors identify their current plans to cross examine TAWC's witnesses, would clearly and prejudicially violate the work product protection and would specifically violate Rule 26.02(3), Tenn.R.Civ.P. The doctrine and the Rule were established to prevent such "inefficiency, unfairness and sharp practices."

B. **The Potential Relevance of the IPO Documents and RWE Aktiengesellschaft Minutes Was Recognized In the March 1st Order Compelling Their Production.** TAWC initially refused to provide any of the requested information concerning the planned sale of TAWC by its German parent. In response to Chattanooga's motion to compel, TAWC was ordered on March 1, 2007, to produce virtually all of the requested information.

In a well-considered Order, the Hearing Officer noted that Chattanooga had explained the rationale for the relevance of the requested documents:

Chattanooga responds to TAWC's objections by categorizing its questions related to the possible impact or effects of the IPO on these issues into the following three sections: 1) RWE analysis and valuation of AWWC and its subsidiaries; 2) planned changes in the operations and finances of the subsidiaries of AWWC; and 3) the structure of the IPO itself as a vehicle to maximize the return on sale to RWE. Chattanooga counters TAWC's objections by asserting that the discovery requests related to the IPO are reasonably calculated to discover whether the cost of capital and cost of equity of TAWC are being adversely affected or impacted by the IPO. Further, Chattanooga's questions are designed to obtain information directly relevant to the accuracy and credibility of arguments made by TAWC and its witnesses. Chattanooga contends that RWE's view of the value of TAWC, and other elements of the AWWC system, as well as RWE's conclusions regarding rates of return, are relevant to the subject matter of this proceeding because RWE is the ultimate parent of TAWC and its opinions may affect its subsidiary.

March 1, 2007 Order at pp. 5-6.

The Hearing Officer noted that TAWC had represented to the TRA that its proposed sale by RWE Aktiengesellschaft through the IPO “will not adversely impact the Petitioner’s rates or its policies with respect to service to customers, employees, operations, financing, or other matters affecting the public interest or utility operations.” March 1, 2007, Order at. p. 10. The Hearing Officer found that “information concerning transactions occurring at the parent level or between a parent and its subsidiary may be relevant to the subject matter of a rate case proceeding.” *Id.* The Order also noted that TAWC had agreed that issues raised in a second docket related to the IPO, in which TAWC sought approval for borrowings required by the anticipated sale, may be related to the rate increase sought in this proceeding. *Id.* at p. 11.

The Hearing Officer noted the potential relevance of the documents he ordered to be produced. Their review has shown that Chattanooga’s prediction of relevance was correct. That relevance and their admissibility will be evident when Chattanooga’s counsel offers documents relating to the IPO or portions of RWE Aktiengesellschaft minutes in the cross examination of TAWC witnesses.

C. **Denial of TAWC’s Motions Will Not Prejudice TAWC.** The denial of the motions in limine will not in any way prejudice TAWC, which may assert whatever objections it may have when any IPO documents, including portions of RWE Aktiengesellschaft minutes, are offered for cross examination purposes. TAWC has already gone to great lengths to obtain protections that will ensure that the plans for its sale by its German owners will be protected from public disclosure. At TAWC’s insistence, the Hearing Officer has ordered that the hearing room be cleared whenever HCI is offered or discussed. The Intervenors have agreed to coordinate their cross examination to alert the Hearing Officer of the need to use documents designated as HCI.

TAWC argues that use of IPO documents, including the minutes of RWE Aktiengesellschaft will be “unfairly and unduly prejudicial” and would “promote confusion”. The truth may not be pleasant for TAWC, but the truth is never prejudicial. The suggestion that the effective cross-examination of TAWC witnesses will be “confusing” to the Hearing Officer or the Panel certainly underestimates their abilities. This is not a jury matter, and the Supplemental Protective Order procedures will prevent public disclosure.

Resolution of any objections at the hearing will permit a full discussion of the rationale for admissibility of proffered documents without requiring disclosure of the plans and mental impressions of Intervenor’s counsel. Resolution during the hearing of any objections will permit the considered exercise of discretion on these important issues of admissibility.

D. TAWC’s Hearsay Objection to Minutes of Its Parent Is Disingenuous.

Remarkably, TAWC has argued that minutes of its parent, RWE Aktiengesellschaft, are “unauthenticated”, in spite of admitting that the highly redacted minutes were prepared by its parents or affiliated companies and “provided to numerous Regulatory Commissions during the Divestiture proceedings.” TAWC Response to Chattanooga Second Discovery Request No. 13. Representing to this Authority that the source of the highly redacted minutes is unknown or unreliable is, charitably, disingenuous.

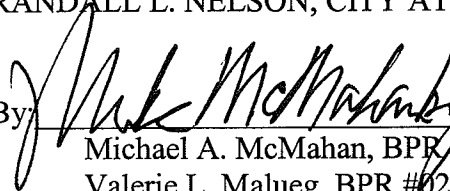
Whether any document constitutes hearsay cannot be determined until the context of its proffer is known. Without the context in which portions of the RWE Aktiengesellschaft minutes may be used in the cross examination of TAWC witnesses, it is impossible to determine whether there may be any hearsay issue, at all.

WHEREFORE, Chattanooga respectfully requests that the Motions in Limine filed by
TAWC be denied.

Respectfully submitted,

CITY OF CHATTANOOGA, TENNESSEE
RANDALL L. NELSON, CITY ATTORNEY

By

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a true and correct copy of the foregoing pleading by electronic mail and by depositing same in the United States mail, postage prepaid, and addressed to the following:

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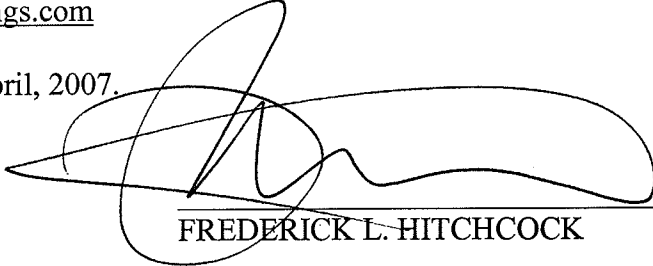
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This the 16th day of April, 2007.



FREDERICK L. HITCHCOCK