

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

April 16, 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)*

Docket No. 06-00290

**CHATTANOOGA MANUFACTURERS ASSOCIATION'S REPLY TO
PETITIONER'S RESPONSE CONCERNING NOTICE AS TO MATERIALS
DESIGNATED BY PETITIONER AS HIGHLY CONFIDENTIAL INFORMATION
AND CMA'S RESPONSE TO PETITIONER'S MOTION IN LIMINE SEEKING TO
EXCLUDE ALL BUT THE MATERIALS DESIGNATED AS HIGHLY CONFIDENTIAL
THAT PETITIONER DEEMS TO BE RELEVANT FOR THIS HEARING**

Chattanooga Manufacturers Association ("CMA"), by and through its attorneys, submits this as its reply to Tennessee American Water Company's (the "Petitioner" or "Company") response relative to CMA's notice concerning materials previously designated by Petitioner as "Highly Confidential." CMA also responds and opposes the Company's position that such Highly Confidential materials, save for a handful of items Petitioner intends to rely upon, are not relevant or appropriate for use in this hearing.

The Company's apparent strategy is to hide behind its local subsidiaries while asking the TRA to ignore the fact that the parent Company owns and controls Tennessee American and it is the parent Company, not TAWC, that has pressed for this premature rate increase only months from the pending sale of TAWC. In this context, TAWC asks the Authority to order all the parties to essentially ignore the proposed sale of TWAC and to disclose to TAWC in advance any questions CMA may wish to ask about the pending sale.

I. CMA Complied With The Express Provisions of the Order.

The “High ly Confidential” proprietary Order states that the parties “shall set forth the specific Highly Confidential Information that the requesting party wishes to use and when the requesting party requests to use such information.” (*Amended Supplemental Protective Order*, March 30, 2007, at Paragraph 6.) CMA has complied with the terms of the Order. (CMA Designation and Notice; April 9, 2007.)

The Company now claims CMA “completely fail[s]” to identify the “specific Highly Confidential Documents” intended to be used and, further, that CMA “completely fail[s]” to specify “**when**” it intends to use them. (*See* Petitioner’s April 10, 2007, Response to CMA’s Notice, at 2)(Emphasis in original.) First, it is undisputed that CMA identified from the time of the filing of its Notice “when” it intends to use information from the materials that Petitioner has designated, justifiably or not, as Highly Confidential. CMA specifically stated it intends to use such information during “cross-examination of witnesses (including the Company’s witnesses or those of other Parties) and/or, depending upon the nature of testimony submitted or presented, during rebuttal.” (CMA’s Designation; April 9, 2007.) There is nothing in the Order requiring CMA to specify a particular witness whom CMA intends to ask about the materials. In fact, as discussed below, such a requirement would be illegal for numerous reasons.

The Company also complains that CMA’s notice fails to provide “specific references” to the page numbers (Bates stamps) of documents that may be referred to during the hearing. CMA specified that it intends to use information from the sphere of materials Petitioner designated as Highly Confidential. The Order does not expressly require that CMA designate page numbers. Indeed, none of the parties specified page numbers. Such a requirement would improperly force the

parties to reveal mental impressions, conclusions and strategies about the parties' cross-examination strategy.

Furthermore, reasonable alternatives exist for dealing with the use of such materials, and tribunals routinely implement them. For example, assuming the Company continues to insist that all information it has designated as "Highly Confidential" should, in fact, be afforded such deference, cross-examination (if any) on such topics for each witness can be reserved until the end of the examination of that witness.

II. Granting The Company's Motions Would Violate Due Process, The Contested Case Statute And The Attorney Work Product Doctrine, Resulting In Reversible Error.

CMA reasonably responded to the provisions of the Order. CMA has the right to use that information during cross-examination of TAWC witnesses without providing the information ahead of time to TAWC. To disallow such use would effectively deny CMA its right of cross-examination.

The Tennessee Administrative Procedures Act specifically grants the right of cross-examination "to the extent necessary to develop and obtain **full** disclosure of all relevant facts and issues." *See* Tenn. Code Ann. § 4-5-312(b) (emphasis added). Indeed, Tennessee courts allow cross-examination to be "wide-open" -- more unfettered and broader in scope than in many other states and tribunals. *See* Tennessee Rule of Evid. 611(b) (part (b) retains the English Rule permitting wide-open scope of cross examination traditionally and historically favored in Tennessee). *See also* Tenn. Code Ann. §65-2-109(3) (Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence); *Tennessee Consumer Advocate v. Tennessee Regulatory Authority*, ___ S.W.2d ___, 1997 WL 92079 (Tenn. Ct. App. March 5, 1997).

Additionally, interpreting the order in accord with the Company's position is inconsistent with the Tennessee Rules of Civil Procedure and the attorney work product doctrine. "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney" as such "contravenes public policy underlying the orderly prosecution and defense of legal claims." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). In summary, the *Hickman* Supreme Court concluded that an attorney's mental processes must be protected from invasion by and disclosure to the opposing side. This is so because an attorney's thinking, theories, analysis, mental impressions, conclusions, beliefs and strategy, are at the heart of the adversary system.

Implying that absolute protection is to be accorded in this regard, Rule 26.02(3) of the Tennessee Rules of Civil Procedure (2006) states that a court "**shall protect against disclosure** of the mental impressions, conclusions, opinions, and legal theories of an attorney . . . concerning the litigation." (Emphasis added). Petitioner has failed to demonstrate an appropriate rationale warranting its request for this Authority to disregard the inviolate privilege that protects the opinion work product of the intervening parties' attorneys.

III. Conclusion.

CMA will effectively be denied its due process and statutory rights if CMA's counsel is ordered to disclose its cross-examination strategy in advance of the hearing or denied the ability to discuss the proposed sale of TAWC. CMA complied with the express terms of the Order and provided requisite notice of CMA's intent to use material generated by Petitioner in cross-examination and/or rebuttal.

Respectfully submitted,

GRANT, KONVALINKA & HARRISON, P.C.

By: _____


DAVID C. HIGNEY (BPR #14888)

Ninth Floor, Republic Centre

633 Chestnut Street

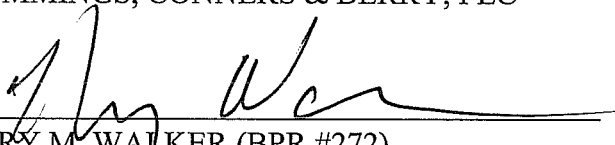
Chattanooga, Tennessee 37450

423.756.8400

- and -

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____


HENRY M. WALKER (BPR #272)

1600 Division Street, Suite 700

P.O. Box 340025

Nashville, Tennessee 37203

615.252.2363

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2007, the foregoing pleading of the Chattanooga Manufacturers Association was served either by fax, overnight delivery service or first class mail, postage prepaid, to all parties of record at their addresses shown below:

Hon. Sara Kyle Chairman Tennessee Regulatory Authority 460 James Robertson Parkway Nashville, Tennessee 37243	R. Dale Grimes, Esq. Bass, Berry & Sims, PLC AmSouth Center 315 Deaderick Street, Suite 2700 Nashville, Tennessee 37238
Timothy C. Phillips, Esq. Vance L. Broemel, Esq. Office of the Attorney General Consumer Advocate and Protection Division P.O. Box 20207 Nashville, TN 37202	Richard Collier, Esq. General Counsel Tennessee Regulatory Authority 460 James Robertson Parkway Nashville, Tennessee 37243-0505
Michael A. McMahan, Esq. Valerie L. Malueg, Esq. Office of the City Attorney City of Chattanooga 801 Broad Street, Suite 400 Chattanooga, TN 37402	Frederick L. Hitchcock, Esq. Chambliss, Bahner & Stophel, P.C. 1000 Tallan Building Two Union Square Chattanooga, TN 37402

BY: _____

For CMA