IN 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	)	**DOCKET NO. 08-00039**
PERMIT IT TO EARN A FAIR AND	)	
ADEQUATE RATE OF RETURN ON	)	
ITS PROPERTY USED AND USEFUL IN	)	
FURNISHING WATER SERVICE TO	)	
ITS CUSTOMERS	)	

RESPONSE TO TAWC'S MOTION FOR ENTRY OF CONFIDENTIAL PROTECTIVE ORDERS

INTRODUCTION

The Consumer Advocate objects to the proposed protective orders offered by Tennessee American Water Company ("TAWC"). Instead, the Consumer Advocate requests that the hearing officer enter the proposed protective order filed by the Intervenors, on May 6, 2008. This objection and request is grounded in the fact that statutory and case law call for a different handling of confidential information as a public record by the Tennessee Regulatory Authority ("TRA"), than present and past protective orders provide. Moreover, the protective orders offered by TAWC violate the Tennessee Rules of Civil Procedure. Additionally, TAWC's proposed protective orders require the destruction of public records and attempt to shift the burden of establishing what should be confidential information. While these provisions in the protective orders may seem innocuous, it is to the benefit of TAWC to restrict discovery, thus, as it did in Docket 06-00290, effectively

disabling the Intervenors case presentation in the pleadings phase.

The company retains too much discretion in determining whether every document it produces is confidential. The burden is placed solely upon the Intervenors to prove that a document is not confidential, requiring a written appeal to the hearing officer for relief and a hearing. This is contrary to both Tennessee law and the spirit of Tennessee Public Records Act.

I. PROTECTIVE ORDERS AS EXEMPTIONS UNDER THE TENNESSEE PUBLIC RECORDS ACT

The company is a privately owned public utility providing an essential service to the consumers of Tennessee. In seeking a rate increase, TAWC bears the burden of proving the proposed rates are in the course of a contested case. Contested cases are matters of public record. The TRA is subject to the requirements of the Tennessee Public Records Act.

The General Assembly has directed that the Tennessee Public Records Act be "broadly construed so as to give the fullest possible public access to public records". Tenn. Code Ann § 10-7-505 (d). Tennessee courts have recognized the clear mandate in favor of disclosure of public records. *The Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 305 (Tenn.1998). There is a statutory provision for valid exceptions to Tennessee Public Records Act provided by "State law". Tenn. Code Ann § 10-7-503 (a).

The *Tennessee Rules of Civil Procedure* are considered "State law". *Tennessee Department of Human Services v. Vaughn*, 595 S.W. 2d 62, 63 (Tenn.1980). Protective orders, granted under the authority of Rule 26 of the *Tennessee Rules of Procedure*, have the effect of "State law" and serve as an exception to the Public Records Act. *Ballard v. Herzke*, 924 S.W. 2d 652, 662

(Tenn.1996). Thus, for a protective order to have legal effect and serve as a valid exception of the Public Records Act, the moving party seeking protection must meet and comply with the requirements under Rule 26, including a showing of good cause.

II. THE PROPOSED PROTECTIVE ORDERS OF TAWC SHOULD BE DENIED

When a party seeks a protective order, Tennessee law places the burden of justifying the confidentiality of *each and every document* sought to be covered by a protective order upon the party seeking the order. *Id.*, 658. Tennessee law does not provide ready acceptance of labels of confidentiality, but rather looks beyond the label to the specific facts underlying a claim for confidentiality.

> Trade secrets and other confidential information enjoy no privilege from disclosure, although courts may choose to protect such information for good cause shown. ... To show good cause under Rule 26(c), the moving party must demonstrate specific examples of harm and not mere conclusory allegations. ... When confidential commercial information is involved, this standard requires a showing that disclosure will result in a clearly defined and very serious injury to the company's business, ... or, stated differently, great competitive disadvantage and irreparable harm. *Loveall v. American Honda Motor Company*, 694 S.W.2d 937, 939 (Tenn. 1985) (internal citations omitted).

In the context of business records or trade secrets, a company must show that disclosure will result in a specific harm if not protected. *Loveall v. American Honda Motor Company, Inc.* 694 S.W. 2d 937, 939-940 (Tenn.1985). For example, in *Loveall*, the Tennessee Supreme Court ruled that a protective order should have been granted as the company, American Honda Motor Company, showed that it would be specifically harmed if competitors were allowed access to documents pertaining to the development of the company's new products. *Id.* The holding in *Loveall* is

particularly relevant as TAWC has no competitors.[1]

The company is seeking to avoid its obligation to justify a "confidential" label for "each and every document" it seeks to protect. *Ballard v. Herzke*, 924 S.W. 2d 652, 658 (Tenn.1996). Contrary to *Ballard*, TAWC's proposed protective order removes any burden of showing that disclosure of a document will cause specific harm. Specifically, the company's definition of "confidential information" is so broad as to invest TAWC with absolute discretion in designating documents as "confidential" at whim. TAWC has submitted the following definition of "confidential information" in a proposed protective order:

> 'CONFIDENTIAL INFORMATION' shall mean documents, testimony and ***information in whatever form which the producing party, in good faith, deems*** to contain or constitute trade secrets, confidential commercial information, confidential research, development, financial statements, confidential data of third parties or other commercially sensitive information, ***and which as been specifically designated by the producing party.*** (See Paragraph #1 - Emphasis added).

The definition, provided by TAWC, above makes it quite clear that TAWC makes the determination as to what is subject to the protective order. The definition is so broad as to suggest even the information regularly filed in surveillance reports with the TRA could be deemed "confidential" at the discretion of the company. Not only does TAWC's proposal relieve itself of the obligation to show that disclosure of a document will lead to specific harm, the burden is shifted and placed squarely upon the shoulders of the Intervenors to disprove any instance of baseless, arbitrary or bad faith labeling of documents by the company as "confidential". It gives the company

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[1] TAWC does not compete for residential customers and businesses within its service area. TAWC does not have to compete for water in a competitive market as it draws water from Tennessee's natural resources for no charge. No market exists from which TAWC's customers may choose an alternate source for such a basic necessity. The company is a monopoly subject to the control of the TRA.

unlimited discretion to deem any and all documents "confidential". Such discretion in the hands of a public utility that provides an essential service to Tennessee consumers is unjustified. In light of the broad construction of the Public Records Act in favor of disclosure and the "good cause" requirements of *Ballard*, broad protective orders restricting disclosure without a showing of specific harm by a producing party must be avoided. Further, it is critically important that the TRA recognize and note that a protective order does not recast a public record as anything more than a public record which is exempted from disclosure. This information remains a public document in terms of state government operations and therefore, destruction of such must follow the law. A court may not rewrite the law such that information which is public somehow is declared no longer a public record.

The Intervenors have proposed a protective order for use in this docket.[2] The *Proposed Protective Order* of the Intervenors provides ample protection for the company. While the burden of showing a document is "confidential" is rightfully placed upon the producing party, the *Proposed Protective Order* of the Intervenors is quite reasonable in its terms. It allows for the designation of "confidential information" upon any documents that require such designation by state or federal law or regulations and rules. Further, the *Proposed Protective Order* of the Intervenors allows the company to designate documents as "confidential" if they are "trade secrets" as defined in statutory law. Finally, the definition of "confidential information" in the *Proposed Protective Orde*r of the Intervenors contains an exception providing that the company need only receive an order granting permission from a court or regulatory authority to designate any other information as confidential. Given the requirements of Tennessee law, the proposal of the Intervenors is reasonable.

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[2] *Proposed Protective Order of the Intervenors*, (May 6, 2008).

The Terms of the Company's Protective Order are Prejudicial to the Intervenors

The shotgun approach of the company in terms of complete discretion in deeming information "confidential" in combination with the disclosure provisions provides a great strategic advantage for TAWC in terms of requiring the Intervenors to disclose what "confidential documents" they may use well in advance of the hearing in this matter. TAWC has argued that such advance disclosure extends to not only confidential documents used in direct testimony, but also to any confidential documents Intervenors may use in cross-examination and rebuttal.[3] Thus, the company unreasonably insist that the Intervenors must reveal work product, mental impressions and case preparation well in advance of the hearing. This is simply impractical and unjustified in the cannons of American law. Neither the *Tennessee Rules of Evidence*, the *Tennessee Rules of Civil Procedure* nor the dusty tenants of Queen Caroline's Rule require such extreme, impractical and prejudicial measures. Furthermore, a rate case hearing does not always resemble a well timed, rehearsed or choreographed event. It is during testimony that the parties can, for the first and only time, confront witnesses. New issues arise during cross-examination which must be explored. Similarly, parties must contend with these news issues during re-direct. There is no way for the parties to know in advance what will arise and what confidential information will need to be discussed.[4] This is a reality in the practice of law.

There is also the issue of practicability. The company's position is simply impractical for

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[3] TAWC's Response in Opposition to Intervenor's Proposed Protective Order, (May 9, 2008) p. 4.

[4] This is not to suggest that the Intervenors will not cooperate with TAWC and the Hearing Panel in coordinating when the hearing room should be cleared if the need arises during the hearing to discuss properly designated "confidential information". The Intervenors in Docket 06-00290 showed discipline in doing so during the hearing on the merits.

a public hearing. In tandem with the company's overly broad definition of "confidential information" in which any document could be so designated, the entire hearing could be closed to the public or subject to multiple halts to clear the hearing room.

III. THE MOTION FOR A SUPPLEMENTAL PROTECTIVE ORDER SHOULD BE DENIED

Rule 26.03 of the *Tennessee Rules of Civil Procedure* places the burden of showing good cause for justifying a protective order upon the party from whom discovery is sought. *Ballard v. Herzke*, 924 S.W. 2d 652, 658 (Tenn.1996). TAWC's motion is empty of any statutory, regulatory or practical purpose underlying the need for such duplicative and burdensome protections. No legal authority requiring an extraordinary or cautious approach or issue of great concern has been raised by the company in its motion justifying a supplemental protective order. The sole justification and condition precedent for employing a supplemental protective order in Docket 06-00290 is no longer present. The Initial Public Offering ("IPO") of American Water Works ("AWW") has taken place. Furthermore, the company has failed to express how the status and protections of the label "confidential" is somehow inferior to the label "highly confidential". Any IPO related materials subject to discovery will be fully protected under a protective order if they are properly deemed "confidential". The parties, lawyers, experts and TRA staffers privy to this proceeding are experienced in handling "confidential" materials, fully cognizant of what the term "confidential" entails, and competent enough to protect IPO related materials from public disclosure under a conventional protective order if they are properly designated as "confidential".[5]

[5] To the Consumer Advocate's knowledge, there have been no public disclosures of information protected by protective orders involving any parties in any matters before the TRA. This track record of prudence under much more conventional protective orders speaks for itself.

TAWC Has Not Shown Good Cause for a Supplemental Protective Order

The company has not meet the burden to show that a supplemental protective order of the kind employed in Docket 06-00290 is necessary in this proceeding. To establish good cause under Rule 26(c), the moving party must show that disclosure will result in a clearly defined injury to the party seeking closure. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not amount to a showing of good cause. *Ballard v. Herzke*, 924 S.W. 2d 652, 658 (Tenn.1996), citing *Cipollone v. Liggett Group, Inc.*, 785 F. 2d 1108, 1121 (3rd Cir.1986). Mere conclusory statements and allegations are insufficient. The burden of justifying the confidentiality of each and every document sought to be covered by a protective order is on the party seeking the order. *Id.*

In support of a supplemental protective order, TAWC simply stated that it was needed in the event that the parties seek "highly confidential"information.[6] No other reason is given. The *Motion* is vacuous of good cause, seemingly filed as if the company is entitled to a supplemental protective order by virtue of the one in place in Docket 06-00290, during which the IPO was still pending. In moving the hearing officer for a supplemental protective order in this proceeding, the company not only failed to cite an example of specific harm, the *Motion* itself is empty of even an allegation of specific harm. Furthermore, the company has not demonstrated how a conventional protective order can not protect the disclosure of information to the public. The company has not established "good cause" for another duplicative layer of protection. Nor has the company shown that either protective order it submitted meets the standards set under Tennessee law. TAWC's *Motion* for a supplemental

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[6] TAWC's *Motion for Entry of Confidential Protective Order*, Docket 06-00290 (May 6, 2008), p. 2.

protective order must fail.

The Supplemental Protective Order in Docket 06-00290 is not Applicable to this Proceeding

In Docket 06-00290, the company argued that due to anti-gun jumping provisions of federal law and regulations of the Securities and Exchange Commission ("SEC"), any information related to an impending Initial Public Offering ("IPO") of stock that was deemed discoverable must be subject to enhanced protections.[7]

> It'll have to be under a protective order, because we're dealing with very sensitive information right now with respect to any forward-looking projections about the new company that's going to be -- have an initial public offering.
>
> The Securities and Exchange Commission has very strict rules about that kind of thing, and it's called "gun jumping," and we don't want to be guilty of that, none of us.
>
> So it will have to be very carefully protected, and we would propose that there needs to be an enhancement to the current protective order, perhaps just another protective order that would have some additional protections to make sure that we all are cognizant of how serious that is. But we're prepared to do that.

Transcript of Proceedings: Status Conference - Docket 06-00290 (February 9, 2007), p.41-42, lines 19-25, lines 1-9 respectively. The company was concerned that any public disclosure of IPO materials would result in delay in the IPO and/or subjecting AWW to liability for violating federal

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[7] Transcript of Proceedings: Status Conference - Docket 06-00290 (February 9, 2007), p.42-43; *TAWC's Motion for Entry of Proposed Protective Order No. 2 for the Protection of Highly Confidential Information*, Docket 06-00290 (February 16, 2007); Transcript of Pre-Hearing Conference - Docket 06-00290 (April 12, 2007), p. 102, lines 16-23;

law and unspecified securities regulations.[8] The company described the period leading up to registration with the SEC as a cautious one. The fear of "jumping the gun" through public disclosure of materials related to the then impending IPO was the sole justification of the company in seeking enhanced protection through a supplemental protective order.[9] In essence, the condition precedent for the enhanced protection was solely the impending IPO. The company offered no other supporting arguments in their pursuit of enhanced protection. To this end, the hearing officer issued a Supplemental Protective Order on March 1, 2007 and later an Amended Supplemental Protective Order ("A.S.P. Order") on March 30, 2007.

In doing so, under the specific circumstances present in Docket 06-00290, the hearing officer did not create an easy standard readily available to TAWC in future proceedings or any other party before the TRA. The hearing officer made it clear that the designation of "highly confidential" documents and the extra protections entailed in the A.S.P. Order were an exception, not the rule.

> I want to make it clear, though, that this is a rare situation. As I mentioned before, I cannot recall where we've had this type of documentation that's been asked for and produced in the context of any type of docket that we've had here.
>
> So -- and I'm not ruling that a supplemental protective order is required in every case. It's going to be a case-by-case situation. Any type of designation of a highly confidential information or documentation classification is going to be on a case-by-case basis. I don't want this to have any type of precedential value in any other case, rate case that we have that automatically we're going to be jumping into supplemental protective orders for highly confidential information.

Transcript of Proceeding: Status Conference - Docket 06-00290 (March 23, 2007), p. 67, lines 6-20. The circumstances in Docket 06-00290 and this proceeding are quite different. The then

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[8] *Id.*

[9] *Id.*

impending IPO, the sole justification for the company's arguments for enhanced protection, is no longer pending. The IPO is a reality. On March 31, 2008, AWW publicly announced the terms of the IPO. Since April 23, 2008, the stock of AWW has been listed on the New York Stock Exchange and traded under the ticker symbol "AWK". As of May 13, 10:14 A.M. Central time, the stock was valued at $21.50 per share on the New York Stock Exchange. The company is registered with the SEC. It's voluminous registration is open for public inspection. There is no possibility of violating anti-gun jumping provisions. The gun has sounded. The stock is in play within the public arena. Thus, the justification, underlying rationale and purpose of the enhanced protections afforded to the company in Docket 06-00290 has no application in this docket. That is because such circumstances no longer exist. In the present proceeding, the company has offered no credible justification for the enhanced protections contemplated in Docket 06-00290.

One has to consider whether IPO related documents, introduced into evidence during a rate case, and subject to protections of a protective order, can reasonably be classified as a communication intended to condition the market. Although open to the public, a rate case before the TRA in which a complicated accounting document is introduced into evidence hardly qualifies as a willful act of the company to encourage or condition potential investors. In said scenario, the complicated accounting document would still be subject to protections from public disclosure by a protective order, thus alleviating the company's concerns and the need for enhanced protection sought.

The Terms of The Proposed Supplemental Protective Order Are Unfairly Prejudicial

The terms of TAWC's proposed supplemental protective order are unfairly prejudicial to the

Consumer Advocate and the other Intervenors to this matter. Any documents produced under the label "confidential" will be protected from public disclosure. However, the company insists on another layer of unjustified protection which affords the company more control of the flow of information to the parties that also acts as a weapon of intrusion and device of disclosure upon the hearing preparation of the Intervenors. Under Section 6 of the company's proposed supplemental protective order, any party wishing to use documents deemed "highly confidential" must provide written and advance notice to the company and the hearing officer and specify what documents a party wishes to use and specifically when they would be employed during a hearing. Counsel for TAWC equated this procedure to the exchanging of trial exhibits.[10] This procedure is quite different from simply exchanging exhibits. Such disclosure allows the company advance notice of mental impressions and hearing preparation, infringing upon the work product of the Intervenors. Section 6 makes no exception for use of "highly confidential" materials for purposes of impeachment. In order to strictly comply with Section 6, a party has to give advance notice and disclosure prior to the hearing of documents it may use for purposes of impeachment. As such, Section 6 violates the work product doctrine. Neither the *Tennessee Rules of Evidence*, the *Tennessee Rules of Civil Procedure* nor any doctrine of common law require advance notice of what documents may be used to impeach a company witness.

The Terms of the Supplemental Protective Order Are Burdensome To The Hearing Officer And The Parties

The company is left with the discretion to initially determine what document is highly

[10] Transcript of Pre-Hearing Conference - Docket 06-00290 (April 12, 2007), p.97-98.

confidential rather than simply "confidential". While the parties are allowed to object to the designation of a document as highly confidential, the process calls for a motion by a complaining party (an Intervenor) and a review by the hearing officer. The result is an additional and needlessly complicated burden upon the hearing officer and all of the parties, including the company. The prejudicial burden upon the Intervenors in this docket is compounded by the timing of service of "highly confidential" documents. In Docket 06-00290, there was belated service of "highly confidential" documents in the days before the hearing on the merits creating great difficulty for the parties to attempt to pursue procedural rights to over-turn a "highly confidential" designation under or to strictly comply with the notice terms of A.S.P. Order. The process and provisions of A.S.P. Order were a source of confusion, contention and was administratively burdensome upon all during the course of the proceeding.[11] As the circumstances that were present in Docket 06-00290 are no longer present, the hearing officer and the parties need not be subject to the additional burdensome and duplicative protections TAWC is calling upon. The hearing officer may wish to consider the time and resources of all parties that a supplemental protective order in this matter would waste. Furthermore, in light of the hearing panel's decision in Docket 06-00290 to consider and evaluate the consequences of the IPO in relation to the company's capital structure after the IPO was completed, the parties should be unfettered in preparation of their cases by the procedural hurdles

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[11] In one example of contention and confusion, in TAWC's Motion in Limine filed in Docket 06-00290 on April 11, 2007, the company described the Consumer Advocate as mounting a series of efforts to purposely resist the A.S.P. Order. The company specifically pointed to the Consumer Advocate's good faith attempt or alleged failure or incomplete attempt to identify highly confidential documents that may have been used at the hearing by the April 9 deadline when in fact the company was still serving the Consumer Advocate with "highly Confidential" documents as late as April 12, making strict compliance impossible. See coversheets of served "highly confidential" documents, dated April 12, 2007 contained in Exhibit 2 of the Consumer Advocate's *Response to TAWC's Motion in Limine to Exclude as Inadmissible Evidence Related to the Initial Public Offering of AWW*, (April 16, 2007) on file in Docket 06-00290.

present in the supplemental protective order which no longer serves a justifiable purpose considering that AWW's stock has already gone public.

CONCLUSION

For the reasons herein, the Consumer Advocate respectfully requests that the Proposed Protective Order filed by the Intervenors on May 6, 2008 be entered in this proceeding rather than the protective orders filed by TAWC.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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on this the 13 day of May, 2008.

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