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June 2, 2008

VIA HAND-DELIVERY

Chairman Eddie Roberson, PhD
c/o Ms. Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

***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. 08-00039***

Dear Chairman Roberson:

Enclosed please find an original and sixteen (16) copies of Tennessee American Water Company's Motion to Compel the Consumer Advocate and Protection Division to Provide Complete Discovery Responses and to Exclude the Use of All Information Withheld Without Good Cause.

Please return three copies of this, 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

Very truly yours,



R. Dale Grimes

RDG/smb
Enclosures

Chairman Eddie Roberson, PhD

June 2, 2008

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cc: Hon. Ron Jones (*w/o enclosure*)
Hon. Sara Kyle (*w/o enclosure*)
Hon. Tre Hargett (*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*)
Timothy C. Phillips, Esq. (*w/enclosure*)
David C. Higney, Esq. (*w/enclosure*)
Henry M. Walker, Esq. (*w/enclosure*)
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Frederick L. Hitchcock, Esq., (*w/enclosure*)
Mr. John Watson (*w/o enclosure*)
Mr. Michael A. Miller (*w/o enclosure*)

6839113.1

**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 A FAIR AND ADEQUATE RATE
OF RETURN ON ITS PROPERTY USED
AND USEFUL IN FURNISHING WATER
SERVICE TO ITS CUSTOMERS**

Docket No. 08-00039

**TENNESSEE AMERICAN WATER COMPANY'S MOTION TO COMPEL
THE CONSUMER ADVOCATE AND PROTECTION DIVISION TO PROVIDE
COMPLETE DISCOVERY RESPONSES AND TO EXCLUDE THE USE OF ALL
INFORMATION WITHHELD WITHOUT GOOD CAUSE**

Tennessee American Water Company ("TAWC") served its discovery requests (the "Requests") upon the Office of the Attorney General, Consumer Advocate and Protection Division ("CAPD") on May 12, 2008. The CAPD responded to TAWC's requests on May 28, 2008 (the "Responses"). The CAPD's Responses are insufficient. Accordingly, pursuant to the Tennessee Regulatory Authority ("TRA") Rules and Rule 37.01 of the Tennessee Rules of Civil Procedure, TAWC respectfully moves the Hearing Officer to enter an order compelling production of all non-privileged information responsive to the TAWC Requests identified herein and barring the CAPD from using any information or documents withheld from TAWC without good cause.

I. Legal Standard of Discovery

Rule 37.01(2) of the Tennessee Rules of Civil Procedure provides that, when a party fails to fully answer interrogatories or fails to fully respond to requests for production of documents, the discovering party may move for an order compelling an answer and inspection in accordance

with the request. As set forth below, the CAPD has failed to fully and properly respond to TAWC's Discovery Requests, and TAWC now seeks an order compelling complete answers and the production of all responsive documents, barring the CAPD from using information or documents withheld without good cause, and granting any other relief under Rule 37 of the Tennessee Rules of Civil Procedure this Hearing Officer deems appropriate.

As a legal matter, Rule 26 of the Tennessee Rules of Civil Procedure is broad in scope, and allows parties "to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Tenn. R. Civ. P. 26.02(1). Thus, discovery under the Tennessee Rules of Civil Procedure "is allowed in an effort to do away with trial by ambush," and should be allowed "to achieve its desired effect." *Conger v. Gowder*, 2001 Tenn. App. LEXIS 205, at *14 (Tenn. Ct. App. Mar. 29, 2001).

Here, TAWC has propounded a limited number (13) of reasonable requests for relevant information and documents, which are reasonably calculated to lead to discovery of relevant information, and is entitled to receive adequate responses to those requests. The CAPD has a duty to respond to the maximum extent possible even where valid objections are made. Thus, the CAPD's failure to provide complete answers to TAWC's Requests is contrary to the "desired effect" sought by the Tennessee Rules of Civil Procedure and undermines the purpose of this Hearing Officer's Procedural Order in this matter.

II. The CAPD's Objections Undermine Discovery Principles And Misconstrue Its Obligations Under The Procedural Order.

In General Objection No. 7, the CAPD issues a blanket refusal to produce "any document prepared by it subsequent to the filing of this litigation or contested case." CAPD Responses,

General Objection No. 7. Additionally, the CAPD similarly objects to a majority of the Requests with a specific objection that the requested responsive information or materials “will be supplied or referenced at the time the witness(es) submit pre-filed direct testimony. *See* CAPD Responses to Requests No. 1, 3, 7, 8, 11, 12, 13. Both of these objections are unsupported as a matter of law and the CAPD should be compelled to provide responsive information and materials to the extent it presently exists.

A. The CAPD’s General Objection No. 7 Violates Discovery Principles By Setting An Arbitrary Temporal Restriction On Its Production.

Pursuant to its discovery obligations under the Procedural Order, the CAPD has a duty to produce everything *already in existence* and answer the questions posed by TAWC. For instance, if the CAPD is aware of a basis upon which it opposed TAWC’s petition, it must state that basis or state that it has yet to identify any basis to oppose. If the CAPD is aware of a non-privileged, responsive document at this time, the CAPD must produce such document if it is in the CAPD’s custody or control. Consequently, the CAPD’s General Objection to producing “any document prepared by it subsequent to the filing of this litigation or contested case” is inappropriate. CAPD Responses, General Objection No. 7. The fact that a document came into existence after the filing of this matter is no defense to its production and the CAPD should be compelled to produce all such presently existing, responsive, non-privileged documents at this time.

To hold otherwise would undermine the fundamental purpose of discovery, which is to avoid surprises and provide the parties with adequate time to prepare their case. *See Conger*, 2001 Tenn. App. LEXIS 205, at *14. This is why there is a duty on all parties to litigation to supplement their discovery responses as new material or information *comes into knowledge or*

existence. Thus, at the very least, the CAPD must provide an answer to each request that is complete and accurate to the present date – not a blanket deferral to some later production.

B. The CAPD's General Objection No. 3 Should Be Denied.

In General Objection No. 3, the CAPD contends that TAWC's interrogatories "seek information relating to matters not at issue in this litigation" or are not reasonably calculated to lead to admissible evidence. Both assertions are incorrect. Unlike the CAPD, TAWC narrowly tailored its requests to focus on the issues central to this proceeding. For instance, TAWC's Requests Nos. 1-3, and 11-13 are specifically focused on positions taken by the CAPD in its motions filed to date in this proceedings. Requests Nos. 4, and 6 through 9, deal exclusively with matters and materials that will be potentially utilized in the upcoming hearing. Requests Nos. 5 and 10 seek the identity and roles of individuals actively participating in contesting TAWC's rate increase.

As all of these requests are focused on the CAPD's arguments or beliefs that it has already asserted or will advance at the hearing, it cannot be credibly argued that such narrow requests are not reasonably calculated to lead to admissible evidence in this matter. Accordingly, to the extent any information or material was withheld from any response on this basis, the CAPD should be compelled to immediately produce that information or material.

C. The CAPD's Specific Objections Fail To Recognize A Distinction Between Its Discovery Obligations And Its Pre-Filed Testimony Obligations.

Similarly, to the extent the CAPD withholds information or documentation until its June 23, 2008, pre-hearing testimony is due, the CAPD misconstrues its obligations under the Procedural Order and the difference between discovery and pre-filed testimony. *See* CAPD

Responses to TAWC Requests Nos. 1, 3, 7, 8, 9, 11, 12, 13.¹ A party may not simply defer the production of discovery because it intends to submit that responsive information or material at a later point in time or to testify regarding such information. The CAPD has a duty to respond to TAWC's Discovery Requests now. It is wrongful for the CAPD to withhold responsive, non-privileged information or documentation currently available to the CAPD until its June 23, 2008 pre-hearing testimony is due. The CAPD expressly ignores its duty, however, to answer requests now and produce all responsive information that presently exists.

A party's discovery obligations are distinct from those involving the pre-filed testimony. As a practical matter, if no responses were due from Intervenor until June 23, 2008, it would render the Procedural Order's discovery deadline meaningless against the Intervenor – a result certainly not intended. Moreover, the universe of responsive information in discovery is necessarily larger than that submitted in the pre-filed testimony, as mandated by the broad edict of Rule 26 of the Tennessee Rules of Civil Procedure. In contrast, pre-filed testimony is a more focused submission narrowly prepared by the CAPD to advance the CAPD's specific positions at the hearing.

Consequently, the CAPD's effort to defer a large portion of its discovery responses by merging everything into its pre-filed testimony submission should fail. The CAPD's failure to distinguish its obligations pursuant to discovery requests versus its obligations to file pre-hearing testimony in no way diminishes its obligations – the CAPD has a duty to produce all presently existing information and material that is responsive to TAWC's Requests, and should be compelled to do so by this Hearing Officer.

¹ By reference to Request No. 1, TAWC also seeks to compel information and material responsive to Request No. 2, which cross-references Request No. 1.

D. The CAPD's Specific Objection To Request No. 10 Is Incomplete.

The CAPD has produced incomplete information in response to Request 10. Although the CAPD provided the identities of individuals who participated in preparing the responses to TAWC's Requests and which responses they participated in preparing, the CAPD failed to provide a description of the information provided. TAWC seeks a full response to this request and for the reasons stated above, seeks immediate disclosure of such non-privileged information that it is presently available to the CAPD.

E. The CAPD's Specific Objections to Requests Nos. 11 through 13 Are Unjustifiably Incomplete.

In addition to the arguments above regarding the CAPD's refusal to produce information before its pre-filed testimony is due, TAWC further objects to the CAPD's responses to Requests Nos. 11-13, to which the CAPD objects to producing *any* response, in part based on attorney-client privilege and attorney work-product doctrine.² It is incongruous that the CAPD could assert those statements in its Joint Objection of the Intervenor's to Discovery Question Limits for the Initial Round of Discovery, and yet would have absolutely no responsive, non-privileged information to support those statements, or even related to those assertions. If, as it seems there should be, non-privileged responsive information and material exists, the CAPD cannot in good faith withhold all information where only some is covered by the objection. Accordingly, TAWC requests that the CAPD be ordered to produce all such non-privileged material in response to TAWC's Requests.

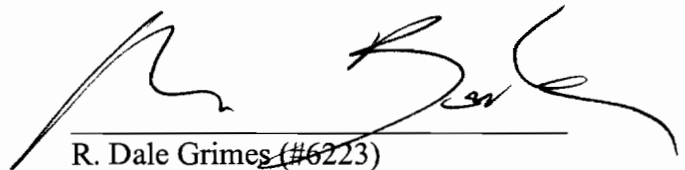
Conclusion

For the reasons stated herein, the CAPD has failed to adequately respond to all of TAWC's discovery requests. Pursuant to Tennessee Rule of Civil Procedure 37, TAWC

² To the extent this argument is applicable to the CAPD's refusal to produce a more complete response to Request No. 4, TAWC incorporates this argument to that Request as well.

respectfully requests that the Hearing Officer issue an order compelling the immediate production of material responsive to TAWC's requests and barring the CAPD from using, for any purpose in this proceeding, any information or documents withheld without good cause. TAWC also requests any additional relief under Rule 37 of the Tennessee Rules of Civil Procedure this Hearing Officer deems appropriate.

Respectfully submitted,

Two handwritten signatures are present. The first signature, on the left, is a stylized 'R' followed by a horizontal line. The second signature, on the right, is a more complex, cursive signature that also ends with a horizontal line.

R. Dale Grimes (#6223)

Ross I. Booher (#019304)

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Attorneys 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 2nd day of June, 2007, upon the following:

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