

**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)	

**NOTICE OF OBJECTION AND CONCERNS WITH THE HEARING OFFICER'S
DRAFT OF A PROPOSED PROTECTIVE ORDER**

In order to resolve the renewed concerns of Tennessee American Water Company ("TAWC" or "Company") raised at the June 12-13, 2008 status conferences, the Hearing Officer circulated a draft proposed amended protective order. The Consumer Advocate has reviewed the proposed amended protective order and has the following objections and concerns:

I. Paragraph 5 Would In Practice Require The Intervenors To Reveal The Identity Of Consulting Experts To The Company, Which Is Inconsistent With The Tennessee Rules of Civil Procedure.

Paragraph 5 requires that the nondisclosure statements signed by consultants that review "confidential" materials on behalf of the Intervenors be provided to the "Producing Party." The practical result of such action would disclose the identity of consulting experts to TAWC. Such experts are not required to be disclosed to producing parties under the Tennessee Rules of Civil Procedure. Tenn.R.Civ.P. 26.02(4)(B). The Consumer Advocate submits that it is sufficient for the Intervenors to maintain such nondisclosure statements in their files. If a question arises about a

party's compliance with the protective order or if the TRA wants to check a party's compliance with the protective order, the Intervenor should at most be required to submit such nondisclosure statements under seal to the Hearing Officer so that the Hearing Officer could determine compliance without revealing the identity of consulting experts to the Company.

II. Paragraph 27, Part (ii), Should Be Clarified To Indicate That The Party Receiving A Public Records Request Is Not Required Under The Terms Of The Protective Order To Become A Named Defendant In A Lawsuit Seeking Disclosure Of "Confidential Information."

The Consumer has concerns with this particular section in that it is not clear that the party that receives a public records request (e.g., the Office of the Attorney General or the City of Chattanooga) does not have to defend in litigation against a public records request seeking disclosure of "confidential information" in court. Upon receiving a public records request, the Consumer Advocate understands its obligation to not disclose "confidential information" shielded from disclosure by the protective order unless ordered to do so by a court of competent jurisdiction; however, the Consumer Advocate does not believe that it has an obligation under the protective order to become a named defendant in a lawsuit that seeks disclosure of such information. The obligation to defend against the disclosure of "confidential information" in any such lawsuit should fall to the party that designated such information as confidential.

III. The Definition of "Producing Party" Need Not Be Reconsidered

At the June 13 status conference, counsel for the Company indicated that the definition of "Producing Party" should be broadened to incorporate anyone that was the original source of the information. The practical effect of this change would be to allow the Company to reach into the production of discovery responses by the Intervenor and designate information as "confidential"

upon an allegation by the Company that it was the original source of the information. The Company should not be given the ability to designate portions of the Intervenor's discovery responses as "confidential information." If the Company believes that a party has disclosed confidential information either inadvertently or in violation of the protective order, it can file a motion requesting removal of such information from the public domain; it does not need a free hand to unilaterally designate portions of the Intervenor's discovery responses as "confidential information."

IV. The Definition Of "Confidential Information" Contained In Paragraph 1 Allows The Company Broad Discretion To Designate As "Confidential" Anything As It Sees Fit

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. *Ballard v. Herzke*, 924 S.W. 2d 652, 658 (Tenn.1996). 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 definition in the Hearing Officer's Proposed Protective Order allows the company to designate a very broad range materials as "confidential". Considering that protective orders function as exceptions to the Public Records Act, TAWC can now determine what documents are public record and what is confidential. While the company is held to a good faith standard in doing so, the burden is placed upon the Intervenors to show that a document that has been labeled "confidential" has in fact be labeled "confidential" in bad faith. The shifting of the burden as to whether a document should be exempt from the Public Records Act or not is placed squarely on the shoulders of the Consumer Advocate rather than the producing party.

The Intervenors have proposed a definition of "confidential information" in proposed 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

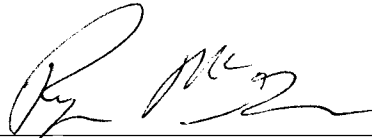
¹ TAWC does not compete for residential customers and businesses within its service area. TAWC does not have to compete for water in a competitive market as it draws water from Tennessee's natural resources for no charge. No market exists from which TAWC's customers may choose an alternate source for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

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

“confidential” if they are “trade secrets” as defined in statutory law. Finally, the definition of “confidential information” in the *Proposed Protective Order* of the Intervenor 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 Intervenor is reasonable.

For the foregoing reasons, the Consumer Advocate requests the Hearing Officer to take these concerns into consideration as he addresses the protective order issue.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read 'R. McGehee', is written over a horizontal line.

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Dated: June 23, 2008.

CERTIFICATE OF SERVICE

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This the 23 day of June, 2008.



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