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 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 RESPONSE IN OPPOSITION TO THE JOINT MOTION OF THE INTERVENORS TO EXPAND THE TIME TO SUBMIT THEIR PRE-FILED DIRECT TESTIMONY TO JULY 21, 2008

The Intervenors have moved the Hearing Officer to alter his proposed procedural schedule and extend the time allotted for the Intervenors to submit their pre-filed testimony in this docket. *See* Intervenors' Joint Motion filed June 25, 2008 ("Joint Motion"). The current schedule provides the Intervenors with more than adequate time to prepare their pre-filed testimony; any challenges the Intervenors face maintaining the pace in this case have been self-inflicted. Moreover, despite the Intervenors' delaying tactics, TAWC stands ready to comply with the current proposed procedural order despite operating under the same schedule and facing three separate adversaries. This rate making proceeding should move forward within the six-month period provided in Tenn. Code Ann. 65-5-103(b). Accordingly, the Intervenors' Joint Motion should be denied.

I. The Intervenors Have Received More Than Enough Time and Company Information To Prepare Their Pre-filed Testimony.

The Intervenors assert that they will need until July 21, 2008 — nearly an additional month — to complete their pre-filed testimony. The current proposed schedule, however, provides ample time. Moreover, the Intervenors have been in possession of TAWC's case in chief and numerous discovery submissions for months. For instance, the Intervenors have had TAWC's Petition, direct testimony and exhibits since March 14, 2008 and voluminous documents filed in response to TRA data requests since April 11, 2008. Furthermore, TAWC has produced substantial discovery responses to the Intervenors, most of which the Intervenors have had since late-May. To the extent the Intervenors must incorporate the supplemental responses that TAWC has provided, such responses are highly focused and miniscule in comparison to the overall universe of information provided long ago to the Intervenors. Without doubt, the Intervenors' counsel and experts have been actively preparing their case during the past several months, and their protests regarding the difficulty of preparing their pre-filed testimony within the time afforded by the proposed procedural schedule are unreasonable and should be rejected.

II. Intervenors Claims Of Unfair Prejudice Are Unfounded.

The Intervenors assert that they have suffered unfair prejudice in this action in the form of "delay and distraction," which they claim makes it more challenging to complete their pre-filed testimony in a timely fashion. Even if their claims were reasonable — which TAWC disputes — the Intervenors should not now be rewarded for their unsound strategy and tactics by further extending the procedural schedule. Instead, the Hearing Officer's proposed procedural schedule, which is both fair and reasonable, should be entered.

A. The Intervenors Chose To Exceed The Hearing Officer's Discovery Limits.

In the Order entered May 9, 2008, this Hearing Officer generously granted the CAPD 80 discovery requests, and the City and CMA 40 requests each. The Intervenors chose not to abide by the Hearing Officer's ruling. Instead, each Intervenor chose to exceed their respective limitations for a collective total of 303 discovery requests.[1] In accordance with the TRA Rule 1220-1-2-.11(5)(a), TAWC initially responded only to those requests within the limits established by the Hearing Officer. In an effort to expedite the case, TAWC subsequently voluntarily agreed to respond to the Intervenors' excess requests. Had the Intervenors simply obeyed the Hearing Officer's May 9 discovery limitations, the first round of discovery would have been almost entirely complete in May.[2]

Notwithstanding TAWC's good-faith and timely discovery efforts, the Intervenors now complain that they do not have adequate time to review TAWC's discovery responses. Conspicuously omitted from the Joint Motion is the fact that Intervenors knowingly assumed the burden of additional discovery by grossly exceeding the Hearing Officer's generous discovery limits. If Intervenors now labor under a large volume of data, it is purely a consequence of their own discovery strategy, and certainly does not constitute an unfair prejudice against them.

Moreover, Intervenors fail to acknowledge that they have had the majority of TAWC's substantive discovery for weeks and should have been — and likely have been — preparing their pre-filed testimony throughout that time. As a result, their claims of unfair prejudice ring hollow.

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[1] Tellingly, all three Intervenors failed to properly seek advance leave for permission to exceed the permitted discovery limitations ordered by the Hearing Officer on May 9, 2008. Instead, the CAPD chose to wait until the deadline for the first round of discovery to properly move for leave, the City waited until days later, and the CMA never bothered to move for leave at all.

[2] CAPD, for example, only questioned TAWC's response to one of the 80 requests CAPD served within the Hearing Officer's limitation. *See* CAPD Mot. to Compel, dated June 2, 2008 (requesting supplemental information to CAPD Part II, Request No. 7).

B. The Intervenors Employed A Consultant Whose Relationship With AWWSC Created An Obvious And Avoidable Dispute.

The City and the CAPD knowingly retained a consulting firm, Snavely King Mojoros O'Connor & Bedell, Inc. ("Snavely"), one of whose consultants was a former senior American Water Works Service Company ("AWWSC") employee, Frank Impagliazzo. These Intervenors' choice to employ Mr. Impagliazzo and the firm with which he is associated created an obvious conflict of interest issue in this case. *See, e.g.*, *Wang Laboratories, Inc. v. CFR Associates, Inc.*, 125 F.R.D. 10 (D. Mass. 1989) (finding a former employee attempting "to use confidential information he obtained during the course of his employment" against his former employer to be a conflict of interest meriting the former employee's disqualification as a witness).

As soon as the Intervenors received Mr. Impagliazzo's resume, if not before, they were on inquiry notice that he was aware of confidential AWWSC information and that he, Snavely, and any counsel receiving information from him were at risk of disqualification. *See, e.g.*, *Bristol-Myers Squib v. Rhone-Poulenc Rorer, Inc.*, No. 95 CIV, 8833(RFP), 2000 WL 42202 (S.D.N.Y. June 19, 2000), (disqualifying a consultant who sought to testify regarding former employer); *Alien v. Intermec, Inc.*, No. 3:06-CV-51, 2007 WL 4261972 (D.N.D. Nov. 30, 2007), (disqualifying a former senior employee from testifying against his former employer); *In re Bell Helicopter Textron,* 87 S.W.3d 139 (Tex. App. 2002) (disqualifying counsel who engaged former employee in a lawsuit against the former employer). The consequences of this type of conflict of interest can be dire because those who communicate with a tainted witness can easily become tainted themselves. *See, e.g.*, *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 580 (D.N.J. 1994) ("Although [the expert] and defense counsel deny that [the expert] ever divulged [confidential information] to his new employer, their protestations are unavailing. To believe

[the expert] did not and will not remember and ultimately use that information, even 'subliminally,'. . . defies common sense and human nature.").

Parties to litigation have a duty to inquire of opposing parties when they become aware that one or more of their witnesses or consultants is a former employee of the opposing party and may have had access to the former employer's confidential information. *See, e.g.*, *Cordy*, 156 F.R.D. at 584 (D.N.J. 1994) (disqualifying an expert witness and noting: "At the very least, defense counsel should have contacted Plaintiff's counsel to find out what their relationship was with the ex-employee before offering him a consulting contract"). Unquestionably, the CAPD had notice of Mr. Impagliazzo's disqualifying history before May 28, because on that date the CAPD produced his detailed resume in this docket. Thereafter, all parties were on actual notice of this conflict of interest issue. Notwithstanding this duty, the Intervenors who had retained Snavely and Mr. Impagliazzo did not immediately contact TAWC's counsel to disclose and investigate the issue. Instead, even after TAWC placed all parties on notice, the CAPD and City did not immediately remedy the conflict.[3] While the CAPD and the City are entitled to select their own litigation strategies, they should not now complain of the natural consequences of their gambit.

Ultimately, the fact that Mr. Impagliazzo's retention consumed additional time and distracted from the central issues of this case was an inevitability that the CAPD and the City knowingly risked upon becoming aware of his prior work with AWWSC.[4] Notably, TAWC was

[3] TAWC announced its concern over the conflict of interest issue at the June 4, 2008 status conference. Even after a copy of Mr. Impagliazzo's Severance Agreement, which contains express confidentiality and non-disparagement provisions, was provided by TAWC to the CAPD on June 5, this issue was still not immediately resolved. The Severance Agreement further confirmed what was already obvious — Mr. Impagliazzo had a clear-cut conflict of interest.

[4] To the Intervenors' credit, the Intervenors worked with TAWC to craft a compromise, embodied in the parties' proposed Agreed Order Regarding Information Related to Frank Impagliazzo, filed June 24, 2008, thus avoiding what could have been a substantial investment of the parties' and the TRA's resources sorting this all out.

also affected by the CAPD's and City's injection of the Impagliazzo conflict of interest issue into this rate case, yet TAWC stands ready to present its case in the time allotted. There is no reason the Intervenors and their multiple attorneys cannot prepare their cases within the statutory six-month time frame.[5] Accordingly, the Hearing Officer should enter the proposed procedural schedule, which allows ample time to complete this case in a reasonable amount of time.

C. The Intervenors Refused To Agree To A Reasonable And Necessary Protective Order.

On May 6, 2008, TAWC moved for entry of the same protective orders entered in Docket No. 06-00290. Similar to that docket, this rate case involves TAWC's production of sensitive and confidential information. In light of the sensitivity of TAWC's highly confidential materials and the proven efficacy of the prior protective orders, TAWC proposed the parties proceed under the same protective regime. Had the Intervenors merely agreed to do so, TAWC could have provided Highly Confidential data to Intervenors weeks ago.

Instead, the Intervenors chose to propose an alternative protective order that was clearly insufficient to protect TAWC's established proprietary and legal interests, and failed to articulate a valid basis for objecting to the entry of TAWC's proposed protective orders (the entire purpose of which were to facilitate and expedite the discovery process). As expected, the Intervenors' efforts, which continue to this day, again resulted in more motion practice and status conferences that unnecessarily diverted the parties' time and resources from the central issues of this case.[6]

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[5] The Intervenors have filed of a "Certification" in which they appear to foreshadow the return of the Impagliazzo issue for future delays and distractions. *See* Intervenors' Joint Certification, dated June 26, 2008. By offering to sponsor themselves as witnesses as to the disputed fact of whether "confidential" information was or was not provided by Mr. Impagliazzo, Intervenors counsel risk causing these issues to resurface again and again throughout the remaining course of this case. If the Intervenors are interested in focusing on the actual rate case issues and avoiding delay going forward, the Intervenors' counsel and witnesses will stay well clear of using any information or presenting any testimony that could risk re-injecting the Impagliazzo issue into this proceeding.

[6] A classic example of the Intervenors' unnecessary filings is the CMA's recent pleading opposing the very protective order provisions to which the CMA had previously agreed. *See* "CMA's Opposition to Amended

Accordingly, the Intervenors should not be permitted to invoke their own intransigence as an excuse for their alleged inability to comply with the proposed procedural schedule.

D. The Intervenors Insist On Gathering More Information Than They Need.

The Intervenors' motion asserts that "discovery disputes have consumed a significant amount of time the Intervenors would have otherwise had to analyze the information sought in discovery." While discovery disputes have occurred, they have consumed relatively minimal time considering how long Intervenors have had to prepare their pre-filed testimony. Additionally, the time Intervenors have expended is largely attributable to the Intervenors' refusal to exercise self-restraint in seeking discovery. The Intervenors wildly exceeded the permitted number of discovery requests, but then protested when they received the tens of thousands of pages requested from TAWC. The Intervenors' decision to propound objectionable discovery requests, including requests of unreasonable breadth and depth, is no excuse for those same Intervenors' claimed inability to adequately prepare their testimony in a timely manner.

The CAPD, particularly, lacks any basis for complaint regarding the volume of TAWC's discovery responses. It appears from the substance of the CAPD's discovery requests that the CAPD has sought excessive discovery in an effort to construct and litigate an entirely different case than that filed by TAWC. This "parallel universe" approach to contesting rate cases has been rejected by this Authority[7] and is a waste of the parties' time and resources. CAPD should be cautioned to confine its inquiry to the relevant issues and time periods, so that it can better utilize its significant resources to prepare its case on schedule.

Protective Order," filed June 23, 2008; *Cf.*, "Proposed Highly Confidential Protective Order Agreed to by CMA and TAWC", filed June 13, 2008.

[7] See Docket No. 06-00290, Order dated 6/10/2008, at p. 20 ("[t]he Panel rejected the multiple test periods utilized by the CAPD.")

E. The Intervenors' Experts Have Received Ample Time and Company Information To Prepare Their Pre-filed Testimony

The Intervenors state that "[t]here are now additional time constraints upon the outside consultants employed by the Intervenors to investigate this matter." The Intervenors provide no factual basis for this claim; they neither specify the affected consultants, nor the nature of the "time constraints." TAWC understands unanticipated scheduling conflicts are not unusual and has attempted to accommodate the Intervenors at every turn. TAWC remains willing to work with the Intervenors *within reason* to accommodate individual experts.[8] It is unreasonable, however, for the Intervenors to request a major change in their pre-filed testimony deadline when they have already received sufficient time and Company information to prepare their pre-filed testimony.[9]

III. TAWC And Its Customers Would Be Unfairly Prejudiced By Further Delay.

Unlike Intervenors, TAWC would suffer actual unfair prejudice if the procedural schedule is extended beyond the six-month statutory period. TAWC needs the requested rate increase for the reasons set forth in TAWC's Petition. If this case is not resolved by September 14, 2008, TAWC will have no choice other than to implement the requested rates under bond. *See* Tenn. Code Ann. §65-5-103(b) (2008). TAWC ratepayers should not have to wait beyond the six-month period to receive a TRA decision simply because the Intervenors' own strategy and tactics have made it tougher for the Intervenors to prepare their cases at their preferred pace.

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[8] For example, an expert's testimony may need to be taken out of order at the hearing. Indeed, one of TAWC's expert witnesses is currently unavailable to testify during the week of August 18.

[9] To the extent the Intervenors' complaint is from the City or the CAPD and relates to the Snavely firm, it is particularly unreasonable. If Snavely is both affected by a conflict of interest issue and lacks the time to participate in this docket, it begs the question why the City and the CAPD did not long ago retain one of the many other consultants available.

IV. TAWC Supports the Hearing Officer's Proposed Procedural Schedule.

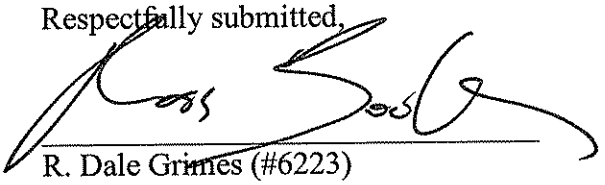
In the interest of resolving this matter within the statutorily-prescribed time, and with the goal of preventing unnecessary expenditure of the TRA's and the parties' resources, TAWC supports the Hearing Officer's proposed schedule. The Hearing Officer's proposed schedule does not impair the parties' ability to prepare their case, but will have the positive effect of giving the parties the incentive to focus on the relevant issues.

TAWC suggests, however, that in order to streamline the remaining proceedings, that the Hearing Officer prohibit second round discovery requests, except from TAWC. While TAWC has not yet seen the Intervenors' positions or testimony, the Intervenors have had TAWC's case-in-chief and been aware of TAWC's positions since March. The Intervenors have had ample opportunity to seek discovery regarding TAWC's case in the first round and, in fact, issued more than 300 requests. Eliminating second round discovery for Intervenors would not harm Intervenors and would provide the Intervenors the time they claim they need to prepare their cases.

Conclusion

For all of the foregoing reasons, the Intervenors do not need and should not be afforded extra time to complete their pre-filed testimony. The Hearing Officer's proposed procedural order is entirely acceptable and achieves the appropriate balance between the parties' preparation time and the Authority's time to review the evidence and arrive at its decision. If TAWC can present its case on schedule in the face of three adversaries' constant sniping, each of the Intervenors should be able to do so as well. Accordingly, TAWC respectfully submits that the Intervenors Joint Motion should be denied and that the Hearing Officer should enter his proposed schedule.

Respectfully submitted,



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I hereby certify that a true and correct copy of the foregoing has been served via the method(s) indicated, on this the 27th day of June, 2008, upon the following:

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