BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 10, 2008

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**

ORDER ON PROTECTIVE ORDER AMENDMENTS

This matter came before the Hearing Officer for the consideration of disputes raised during the June 19, 2008 Status Conference concerning the *Protective Order* filed on May 23, 2008 and the proposed supplemental protective order filed by Tennessee American Water Company ("TAWC") and the Chattanooga Manufacturers Association ("CMA") on June 13, 2008.

I. Relevant Procedural History

The dispute began initially as a result of the filing of a proposed supplemental protective order agreed to by TAWC and CMA. According to the filing, the purpose of the proposed order was "to allow CMA to have access to certain information requested by CMA (interrogatory no 11)."[1] During the Status Conference on June 19, 2008, however, TAWC clarified that it was its intention that the proposed supplemental protective order would apply to all parties seeking

[1] Letter dated June 13, 2008 to Richard Collier, Hearing Officer, from Henry Walker, counsel to the Chattanooga Manufacturers Association (filed June 13, 2008).

access to the information protected there under.[2] TAWC explained that the proposed supplemental protective order must be applicable to all intervenors in order to avoid application of a federal regulation that would require disclosure of confidential information to the public-at-large and that could result in the assessment of civil penalties.[3] According to TAWC, paragraph 27 as written in the *Protective Order* entered on May 23, 2008, creates a "gaping hole" that could be construed to permit the disclosure by the public intervenors of protected confidential information.[4] Specifically, TAWC refers to the phrase "may elect" in paragraph 27 of the May 23, 2008 *Protective Order* and argues that the language allows the public intervenors to choose "whether or not to honor the Public Records Act request."[5] This ability to choose, contends TAWC, leaves the *Protective Order* with an opening that could result in federal regulations requiring TAWC to disclose to the public-at-large information provided pursuant to the *Protective Order*.[6] The City of Chattanooga ("City") responded that a supplemental protective order is not necessary, but requested the right to propose alternate language in the event such an order is to be entered.[7] The Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD") asserted that the *Protective Order* operates to create an exemption to the Public Records Act and that there is nothing additional needed.[8] As to the "may elect" phrase, the CAPD argues that the language simply permits the public intervenor to provide the producing party a more lengthy notification period.[9] Generally, the CAPD contends that the phrase is clear, but if the Hearing Officer determines after an independent review that revisions

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[2] Transcript of Proceedings, p. 11 (Status Conference) (June 19, 2008).
[3] *Id.* at 14.
[4] *Id.* at 15-16, 20
[5] *Id.* at 34.
[6] *Id.* at 33-35.
[7] *Id.* at 12-13.
[8] *Id.* at 25.
[9] *Id.* at 38.

are necessary then the parties could look at redrafting the language.[10] Overall, the CAPD objects to creating any additional layers of protection that increase the difficulty of obtaining information.[11]

TAWC also noted during the June 19, 2008 Status Conference that its proposed supplemental protective order agreed to by TAWC and CMA was different from the *Protective Order* in one other respect. Specifically, TAWC noted that is supplemental protective order provides for notice to the producing party in the event a party intends to provide to any person information protected pursuant to the proposed supplemental protective order.[12]

As a result of the discussion during the June 19, 2008 Status Conference, the Hearing Officer provided a draft of an amended protective order to parties when the Status Conference resumed on June 20, 2008. In the proposed amended protective order paragraphs 5 and 27 of the *Protective Order* are deleted in their entirety and new language is inserted for paragraphs 5 and 27. During the June 20, 2008 Status Conference, the City asked to provide written comments to specifically address the application of Rule 26.02(4)(B) of the Tennessee Rules of Civil Procedure and the City's duties under the Public Records Act.[13] TAWC noted its concern with the manner in which the definition of "producing party" in paragraph 1 functions in conjunction with the newly drafted paragraph 27 and the use of the term "party" in paragraph 27.[14]

The parties filed initial comments on June 23 and 24, 2008, TAWC filed responsive comments on June 26, 2008, and the CAPD filed responsive comments on June 30, 2008. In the comments, the parties raise concerns with the amended language of paragraphs 5 and 27 as well

[10] *Id.* at 39.
[11] *Id.* at 26.
[12] *Id.* at 18-19.
[13] Transcript of Proceedings, p. 88 (Status Conference) (June 20, 2008).
[14] *Id.* at 89-90.

as the definitions of "producing party" and "confidential information" contained in paragraph 1. Each of these concerns is addressed separately below.

II. Paragraph 27

A. Arguments of the Parties

As a general position, Intervenors[15] argue that there is no need to alter the existing *Protective Order*. In the comments, the parties reinforced this position. For example, the CMA asserts that the *Protective Order* is sufficient and that "TAWC has not demonstrated how the entry of an amended order will eliminate the supposed 'implication' of the security laws that allegedly is not addressed by the initial order."[16]

Despite their general position, Intervenors raise some specific concerns with the amended language of paragraph 27. Specifically, the CAPD contends that 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."[17] The CAPD contends that paragraph 27, part (ii) is not clear in this regard. Similarly, the City argues that the proposed amended protective order "would require the City and the CAPD in every case to resist a Public Records Act request, even if it was well-taken" and that such contradicts the provisions of the Public Records Act as amended.[18] While the City argues that paragraph 27 should remain as written in the *Protective Order*, it further argues that:

> if any change is to be made that purports to impose a requirement that the City of Chattanooga withhold documents that the City Attorney determines are, or are likely to be, public records that should be released, TAWC ought to be required to reimburse all costs, expenses, and fees incurred by the City of Chattanooga in

[15] The term "Intervenors" is used to collectively refer to the City, CMA and the CAPD.
[16] *Chattanooga Manufacturers Association's Opposition to Entry of an Amended Protective Order*, p. 1 (June 24, 2008).
[17] *Notice of Objection and Concerns with the Hearing Officer's Draft of a Proposed Protective Order*, p. 2 (June 24, 2008).
[18] Letter to Richard Collier, Hearing Officer, from Fredrick L. Hitchcock, counsel to the City of Chattanooga dated June 23, 2008, p. 2 (filed June 24, 2008).

> seeking relief from the Protective Order from the TRA, in filing a declaratory judgment action, in defending the lawsuit brought under T.C.A. § 10-7-505 (including any award of attorneys' fees and expenses under §505(g)), or in any other administrative or judicial proceeding arising out of the City's compliance with any requirement that it withhold public records from public release.[19]

In its responsive comments, TAWC argues in opposition to the City's and the CAPD's request for language concerning the defense of and payment of costs associated with lawsuits that current law makes it such that "no valid lawsuit can be brought against the City for refusing disclosure."[20] In its response, the CAPD asserts that "the fact that a public records lawsuit may be unlikely does not alleviate the need to enter a proper Protective Order on this point."[21]

TAWC raises a single concern with regard to paragraph 27. Specifically, TAWC argues that the word "party" contained in the second line of paragraph 27 should be deleted and in its place substituted the phrase "any person or entity subject to this Protective Order."[22] According to TAWC, "[t]his proposed change would make it clear that this paragraph covers witnesses, consultants and all other persons or entities subject to the Order, not just the named parties to the action."[23]

B. Findings and Conclusions

After having reviewed the language of paragraph 27 in the *Protective Order* and the arguments of the parties, it is the opinion of the Hearing Officer that paragraph 27 contains certain language which may be subject to multiple interpretations and certain language which may be superfluous. Therefore, the Hearing Officer finds that, regardless of the implications of

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[19] *Id.*
[20] Letter to Richard Collier, Hearing Officer, from Ross I. Booher, counsel to Tennessee American Water Company dated June 25, 2008, p. 1 (filed June 26, 2008).
[21] *Response to TAWC's Reply to the Comments of the Consumer Advocate of June 23, 2008*, p. 3 (June 30, 2008).
[22] Letter to Richard Collier, Hearing Officer, from Ross Booher, counsel to Tennessee American Water Company dated June 23, 2008, p. 2 (filed June 23, 2008).
[23] *Id.*

the federal regulations referenced by TAWC, there is an apparent need to modify the language to provide clarity.

Having determined that revisions are necessary, the focus shifts to the specific arguments set forth by the parties. First, there is sufficient justification for finding that the producing party should be responsible under certain circumstances for the costs arising from a lawsuit brought against a public intervenor that has denied a public records request based on the public intervenor's obligation to protect information pursuant to a protective order. The *Protective Order* entered in this case, like many others entered in dockets of the Tennessee Regulatory Authority, permits the producing party to designate materials as confidential. Although the protective orders provide for a proceeding in which the designation may be contested, such proceedings are initiated after the designation has been made. Thus, the producing party is able to designate information as confidential without the need for a proceeding to justify such designation on the frontend. In the course of any litigation arising out of a denial of a public records request, it is likely that a determination will need to be made as to whether the information sought is actually confidential under the terms of the protective order. In the event that it is determined that the subject information is not in fact confidential information subject to protection, the party that designated the information as confidential should bear the expense of the suit, including any costs awarded pursuant to Tenn. Code Ann. § 10-7-505(g).

Lastly, the Hearing Officer finds that TAWC's request with regard to the word "party" in paragraph 27 is well-taken. Therefore, the word "party" shall be deleted and the appropriate wording substituted.

To effectuate these findings and conclusions, paragraph 27 of the proposed amended protective order shall be revised as follows:

> 27. CONFIDENTIAL INFORMATION is subject to this Amended Protective Order, which is entered pursuant to the Tennessee Rules of Civil Procedure. If any person or entity subject to this Amended Protective Order ~~a party~~, other than the Producing Party, receives a request or subpoena seeking the disclosure or production of CONFIDENTIAL INFORMATION, such person or entity ~~party~~ shall give prompt written notice to the TRA Hearing Officer and the Producing Party within not more than five (5) days of receiving such a request, subpoena or order and: (i) shall respond to the request, subpoena or order, in writing, stating that the CONFIDENTIAL INFORMATION is protected pursuant to this Amended Protective Order ~~and the Protective Order~~; and (ii) shall not disclose or produce such CONFIDENTIAL INFORMATION unless and until subsequently ordered to do so by a court of competent jurisdiction. This Amended Protective Order shall operate as an exception to the Tennessee Public Records Act, as set forth in the language of Tenn. Code Ann. § 10-7-503(a) ". . . unless otherwise provided by state law." (See, e.g., Ballard v. Herzke, 924 S.W.2d 652 (Tenn. 1996); Arnold v. City of Chattanooga, 19 S.W.3d 779 (Tenn. Ct. App. 1999) (holding that "state law" includes the Tennessee Rules of Civil Procedure)). Because this Amended Protective Order is issued pursuant to the Tennessee Rules of Civil Procedure, this Order creates an exception to any obligations of the Attorney General and the City of Chattanooga, including attorneys and members of their staffs, as to the Public Records Act and other open records statutes as to CONFIDENTIAL INFORMATION. In the event that any court of competent jurisdiction determines in the course of a lawsuit brought as a result of a person's or entity's fulfillment of the obligations contained in this paragraph that information designated as "CONFIDENTIAL INFORMATION" by a party is not CONFIDENTIAL INFORMATION as defined in paragraph 1 of this Amended Protective Order, then the party designating the information as "CONFIDENTIAL INFORMATION" shall be responsible for all costs associated with or assessed in the lawsuit. This Amended Protective Order acknowledges the role and responsibilities of the Attorney General and the Attorney General's staff, as set forth in Title 8, Chapter 6 of the Tennessee Statutes, beyond the duties associated with the Consumer Advocate and Protection Division, as prescribed in Tenn. Code Ann. § 65-4-118. This Amended Protective Order is not intended to conflict with the Attorney General's role and responsibilities, especially the investigative functions, as set forth in Title 8, Chapter 6. For there to be compliance with this Amended Protective Order, any CONFIDENTIAL INFORMATION shared outside of the Consumer Advocate and Protection Division must be provided the full and complete protection afforded other confidential or protected information in the control and custody of the Attorney General.

III. Paragraph 5

A. Arguments of the Parties

Paragraph 3 of the *Protective Order* permits a party to disclose confidential information to outside consultants and expert witnesses.[24] In the event that a consultant or expert is expected to testify on a party's behalf, Paragraph 3 requires the party to provide the producing party five days written notice of the intention to disclose confidential information.[25] Paragraph 5 of the *Protective Order* requires all outside consultants or expert witnesses to execute, prior to the disclosure of confidential information, a Nondisclosure Statement and requires the party retaining the outside consultant or expert witness to provide the producing party with copies of all Nondisclosure Statements regardless of whether the outside consultant or expert witness is expected to testify.[26] Paragraph 5 of the *Protective Order* does not contain a deadline for providing the Nondisclosure Statements.

The proposed amended protective order requires in paragraph 5 that copies of executed Nondisclosure Statements be provided to the producing party prior to any person being granted access to confidential information. However, unlike the *Protective Order*, the proposed amended protective order also contains a provision preventing a party from providing an outside consultant confidential information until two business days after the producing party has been notified that the outside consultant is to be provided access.

Intervenors raise concerns with paragraph 5 and its relation to paragraph 3 in their comments. The CAPD asserts that Rule 26.02(4)(B) does not require that consulting experts be identified, yet the requirement of paragraph 5 to provide signed Nondisclosure Statements of consulting experts to the producing party would result in disclosing the identity of the consulting

[24] *Protective Order*, para. 3(e) (May 23, 2008).
[25] *Id.*
[26] *Id.* at para. 5.

experts. The CAPD asserts that the retaining parties should be required to maintain possession of Nondisclosure Statements in their files or, at most, be required to provide statements to the Hearing Officer.[27] The City argues that paragraph 5 of the proposed amended protective order contradicts paragraph 3 with regard to deadlines and that amended paragraph 5 requires counsel and law firm staff to sign Nondisclosure Statements unlike paragraph 5 of the *Protective Order*. The City also contends that amended paragraph 5 requires notification of the names of consulting experts, which is contrary to Rule 26.02(4)(B) of the Tennessee Rules of Civil Procedure, and that the current *Protective Order* paragraph 5 does not require disclosure of identities.[28] The CMA simply reserves its objections to language that extends beyond the scope of Rule 26 of the Tennessee Rules of Civil Procedure.[29]

B. Findings and Conclusions

The issue of the greatest importance with regard to Paragraph 5 is whether the *Protective Order* and/or the proposed amended protective order properly permit the disclosure of the identities of consulted experts that are not to be called as witnesses. Rule 26.02(4)(B) operates to prevent discovery of "the identity of, facts known by, or opinions held by an expert who has been consulted by another party in anticipation of litigation or preparation for trial and who is not to be called as a witness at trial . . . ."[30] However, Rule 26.03 permits a court upon good cause shown to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following . . . (7) that a trade secret or other confidential research not be disclosed or be disclosed only in a

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[27] *Notice of Objection and Concerns with the Hearing Officer's Draft of a Proposed Protective Order*, p. 1-2 (June 24, 2008); *see Response to TAWC's Reply to the Comments of the Consumer Advocate of June 23, 2008*, p. 1 (June 30, 2008).

[28] Letter to Richard Collier, Hearing Officer, from Fredrick L. Hitchcock, counsel to the City of Chattanooga dated June 23, 2008, p. 2 (filed June 24, 2008).

[29] *Chattanooga Manufacturers Association's Opposition to Entry of an Amended Protective Order*, p. 2 n.1 (June 24, 2008).

[30] Tenn. R. Civ. P. 26.02(4)(B) (vol. 1 2007).

designated way . . . ."[31] The protection afforded by Rule 26.02(4)(B) derives from and is part of the work product doctrine, the public policy against permitting unwarranted inquiries into counsel's mental impressions and files. However, the protection is not absolute and "can be overcome upon a proper showing." [32] In this case there is such a showing.

By insisting on exercising the protection afforded by Rule 26.02(4)(B), Intervenors are afforded the opportunity to provide confidential information to a person or entity that is unknown to the producing party. It is axiomatic that it is impossible for a producing party to monitor compliance with a protective order or to contest the receipt of protected information by a particular individual when it has no knowledge of who is receiving confidential information. It is possible that a consulting expert would have a bias or conflict of interest of such magnitude as to justify preventing any confidential information from being revealed to the consulting expert.[33] In fact, a similar set of facts presented itself in another TAWC rate case.

In Docket No. 06-00290, the City provided notice of its intention to provide highly confidential information to persons that had not yet been retained. The City provided the notice pursuant to paragraph 8(c) of the *Supplemental Protective Order*, a paragraph that is very similar to paragraph 5 of the proposed amended protective order. As a result of the filing of objections by TAWC, the Hearing Officer denied access to the highly confidential information by two of the intended recipients after concluding that "a potential conflict of interest exists that could

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[31] *Id.* at 26.03.

[32] *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 357 (Tenn. Ct. App. 1985); *see In re: Welding Fume Products Liability Litigation*, 534 F.Supp.2d 761, 768-69 (N.D. Ohio 2008) (finding that simple fairness required the disclosure of information that would result in revealing the identities of consulting experts); *In re: Neubauer*, 173 B.R. 505, 507-508 (S.D.Md. 1994) (finding that the purpose of federal rule 26(b)(4) was not jeopardized by the bankruptcy court's use of a protective order).

[33] *See Biovail Corp. International v. Hoechst Aktiengesellschaft*, 1999 WL 33454801, *8, 45 Fed.R.Serv.3d 1056, (D.N.J. 1999) (finding that it was necessary to require the disclosure of the identities of consulting experts to protect the confidentiality of documents); *In re: Neubauer*, 173 B.R. 505, 507-508 (S.D.Md. 1994) (finding that the bankruptcy court did not abuse its discretion when it issued a protective order requiring the disclosure of the identities of consulting experts receiving access to confidential information)

result in irreparable business harm to TAWC if Highly Confidential Information is shared as requested by the City." [34] Had paragraph 8(c) of the *Supplemental Protective Order* entered in Docket No. 06-00290 not required that recipients be revealed, it is possible that TAWC never would have known that the highly confidential information may have been shared with persons who have a potential conflict of interest. Rule 26.02(4)(B) should not be permitted to trump the protection afforded a party by a properly entered protective order.

Moreover, it is worth noting that this decision does not abrogate the protection afforded by Rule 26.02(4)(B). Instead, it offers the Intervenors options. The Intervenors are free to consult with whomever they choose without identifying the names of those consulted as long as Intervenors do not provide the consultants confidential information. However, if Intervenors choose to provide the consultants with confidential information, they must identify the consultants. Another option available to Intervenors is to challenge the designation of the information as confidential. If Intervenors prevail on such a challenge, then they are free to provide the information to a consultant without disclosing the identity of the consultant.

The only remaining arguments to address are those of the City that the amended paragraph 5 conflicts with paragraph 3 of the *Protective Order* with regard to deadlines and that amended paragraph 5 requires counsel and law firm staff to sign Nondisclosure Statements unlike the current version of paragraph 5 in the *Protective Order*. The Hearing Officer finds that the proposed amended protective order could be clearer and more consistent with regard to the deadlines for filings notices of intent to disclose confidential information. Therefore, it is appropriate to further amend paragraphs 3 and 5 to achieve such clarity. Also, the Hearing

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[34] *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, *Order Granting, in Part, Tennessee American Water Company's Objections, Pursuant to the Supplemental Protective Order, to Delivery of Highly Confidential Information to Dan Johnson, Marlin L. Mosby, W, Kevin Thompson and/or PFM*, pp. 7-8 (Apr. 4, 2007).

Officer concludes that the requirements with regard to counsel and law firm staff should not have been altered by the proposed amended protective order and that the requirements for these individuals should remain as they currently exist in the *Protective Order*.[35]

To effectuate these findings and conclusions, paragraphs 3(e) and 5 of the proposed amended protective order shall be revised as follows:

> 3. CONFIDENTIAL INFORMATION shall be used only for the purposes of this proceeding, and shall be expressly limited and disclosed only to the following persons:
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> . . . .
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> (e) Outside consultants and expert witnesses (and their Staff) employed or retained by the parties of their counsel, who need access to CONFIDENTIAL INFORMATION solely for evaluation, testing, testimony, preparation for trial or other services related to this docket, provided that to the extent that any party seeks to disclose CONFIDENTIAL INFORMATION to any outside consultant or expert witness ~~who is expected to testify on that party's behalf~~, the party shall give five (5) days written notice to the Producing Party of intention to disclose CONFIDENTIAL INFORMATION. During such notice period, the Producing Party may move to prevent or limit disclosure for cause, in which case no disclosure shall be made until the TRA or the Hearing Officer rules on the motion. Any such motion shall be filed within three (3) days after service of the notice. Any response shall be filed within three (3) days after service of the Motion. A Pre-hearing conference may be called to confer with the parties on the Motions to Limit Disclosure. All service shall be by hand delivery, facsimile or email. All filings by email in this docket shall be followed up by delivering a hard copy of the filing to the Dockets Manager of the TRA.
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> . . . .
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> 5. (a) Prior to disclosure of CONFIDENTIAL INFORMATION to any employee or associate counsel for a party, the counsel representing the party who is to receive the CONFIDENTIAL INFORMATION shall provide a copy of this Order to the recipient employee or associate counsel, who shall be bound by the terms of this Order. Prior to disclosure of CONFIDENTIAL INFORMATION to any outside consultant or expert witness employed or retained by a party, counsel shall provide a copy of this Order to such outside consultant or expert witness, who shall sign the Nondisclosure Statement in the

[35] It is worthy of note here that TAWC did not respond to the City's argument with regard to the execution of Nondisclosure Statements by counsel and law firm staff and did not rely on the need for the execution of Nondisclosure Statements as a basis for its argument that there is a "gaping hole" in the *Protective Order* that could expose TAWC to certain federal regulations.

form of that attached to this Order attesting that he or she has read a copy of this Order, that he or she understands and agrees to be bound by the terms of this Order, and that he or she understands that unauthorized disclosure of documents labeled "CONFIDENTIAL" constitutes a violation of this Order. The Nondisclosure Statement shall be signed in the presence of and be notarized by a notary public. Counsel of record for each party shall provide the Producing Party a copy of each such Nondisclosure Statement and shall keep the Nondisclosure Statements executed by the parties' experts or consultants on file in their respective offices.~~Absent an order of the TRA or other court of competent jurisdiction, only those identified herein who require access to such CONFIDENTIAL INFORMATION for this proceeding and have fully executed a copy of the Nondisclosure Statement, attached hereto, may receive access to CONFIDENTIAL INFORMATION. A copy of the executed Nondisclosure Statement shall be provided to the Producing Party prior to any person being granted access to the CONFIDENTIAL INFORMATION.~~

~~(b) Absent an order of the TRA or other court of competent jurisdiction OR prior written consent from the Producing Party, no person, other than counsel of record for the parties, expert witnesses, the Hearing Officer, TRA Directors and members of the staff of the TRA, may receive access to CONFIDENTIAL INFORMATION until at least 2 business days after the Producing Party has been given written notice that said person is to be provided with access to CONFIDENTIAL INFORMATION. Such notice shall include the person's full name, address, employer and the category of authorized person.~~

~~(c) If the Producing Party objects to a person, other than a counsel of record for a party, the Hearing Officer, TRA Directors and members of the staff of the TRA, receiving access to CONFIDENTIAL INFORMATION, the Producing Party may, within 2 business days of receiving notice that an individual is to receive access to CONFIDENTIAL INFORMATION, file a written objection with the Hearing Officer setting forth the basis for the objection. Until any such objection is resolved by the Hearing Officer, the individual in question shall not be provided access to CONFIDENTIAL INFORMATION.~~

(b~~d~~) ~~No other d~~Disclosure of CONFIDENTIAL INFORMATION other than as provided for in this Amended Protective Order shall not be made to any person or entity except with the express written consent of the Producing Party or upon further order of the TRA or of any court of competent jurisdiction~~, including those which may review these matters~~.

~~(e) Notwithstanding any provisions in this Protective Order to the contrary, this Paragraph No. 5, together with its subparts (a) – (f), and the terms of this Protective Order shall apply to members of the Consumer Advocate and Protection Division of the Office of the Attorney General, including attorneys and staff, and advisory staff members of the Tennessee Regulatory Authority.~~

~~(f) This Paragraph No. 5, together with its subparts (a) – (f), shall not apply to TRA Directors and their immediate staff, the Tennessee Attorney General, the Chief Deputy Attorney General, the Associate Chief Deputy~~

~~Attorney General, or the Tennessee Solicitor General and their immediate staff and the Deputy of the Consumer Advocate and Protection Division.~~

IV. Paragraph 1

Two issues are raised with regard to paragraph 1 of the proposed amended protective order. First, TAWC argues that the definition of "Producing Party" in paragraph 1 "has the effect of nullifying Paragraph 27 by having Paragraph 27 not apply to parties receiving confidential information in response to discovery requests."[36] TAWC argues in favor of the following definition: "the party creating the confidential information or the party for whom the confidential information was created."[37] In response, the CAPD argues in opposition to the proposed definition by asserting that the effect of adoption of the definition is to allow TAWC "to reach into the production of discovery responses by Intervenors and designate information as 'confidential' upon an allegation of [TAWC] that it was the original source of the information."[38]

The Hearing Officer finds that TAWC's argument with regard to the effect of the definition of "Producing Party" on the terms of paragraph 27 is well taken, but that the proposed alternative definition should not be adopted. Instead, the Hearing Officer finds that the following further amendments to the second sentence of paragraph 27, indicated by double strikethrough and underline, should be adopted:

> 27. CONFIDENTIAL INFORMATION is subject to this Amended Protective Order, which is entered pursuant to the Tennessee Rules of Civil Procedure. If any person or entity subject to this Amended Protective Order ~~a party, other than the Producing Party,~~ receives a request or subpoena seeking the disclosure or production of information labeled as "CONFIDENTIAL INFORMATION" by a party~~CONFIDENTIAL INFORMATION~~, such person or entity ~~party~~ shall give prompt written notice to the TRA Hearing Officer and the

[36] Letter to Richard Collier, Hearing Officer, from Ross Booher, counsel to Tennessee American Water Company dated June 23, 2008, p. 2 (filed June 23, 2008).
[37] *Id.*
[38] *Notice of Objection and Concerns with the Hearing Officer's Draft of a Proposed Protective Order*, p. 1-2 (June 24, 2008).

~~Producing P~~party within not more than five (5) days of receiving such a request, subpoena or order and: (i) shall respond to the request, subpoena or order, in writing, stating that the CONFIDENTIAL INFORMATION is protected pursuant to this Amended Protective Order ~~and the Protective Order~~; and (ii) shall not disclose or produce such CONFIDENTIAL INFORMATION unless and until subsequently ordered to do so by a court of competent jurisdiction.

The CAPD raised the second issue with regard to paragraph 1 of the proposed amended protective order. The CAPD argues that the definition of "Confidential Information" encompasses a broad range of materials and places the burden upon Intervenors to show that a document has been labeled as confidential in bad faith.[39] As a solution, the CAPD argues that the definition should be changed to that which Intervenors proposed in their May 6, 2008 proposed protective order.

The Hearing Officer finds that to date a voluminous amount of information has been labeled as confidential and that amending the definition at this time could have a detrimental effect on the continued progress of this docket. Nevertheless, the Hearing Officer recognizes that for reasons similar to those explained in Section II of this order, that a non-designating party should not bear the burden of establishing that information designated as confidential is not, in fact, confidential. The Hearing Officer finds that this oversight can be corrected by a simple amendment to paragraph 12 of the *Protective Order*. Therefore, the Hearing Officer finds that paragraph 12 of the *Protective Order* shall be amended as follows:

12. Any party may contest the designation of any document or information as CONFIDENTIAL or PROTECTED SECURITY MATERIALS by filing a Motion with the TRA or Hearing Officer as appropriate, for a ruling that the documents, information or testimony should not be so treated. Upon the filing of such a motion, the designating party shall bear the burden of supporting its designation of the documents or information at issue as CONFIDENTIAL INFORMATION. All documents, information and testimony designated as CONFIDENTIAL or PROTECTED SECURITY MATERIALS, however, shall be maintained as such until the TRA or the Hearing Officer orders otherwise. A

[39] *Notice of Objection and Concerns with the Hearing Officer's Draft of a Proposed Protective Order*, p. 4 (June 24, 2008).

Motion to contest must be filed not later than fifteen (15) days prior to the Hearing on the Merits. Any Reply ~~from the Company~~ seeking to protect the status of ~~their~~ CONFIDENTIAL INFORMATION or PROTECTED SECURITY MATERIALS must be received not later than ten (10) days prior to the Hearing on the Merits and shall be presented to the Authority at the Hearing on the Merits for a ruling.

IT IS THEREFORE ORDERED THAT:

1. The *Protective Order* and proposed amended protective order provided to the parties during a Status Conference on June 20, 2008 shall be modified as provided in this Order.

2. A stand-alone *Amended Protective Order* shall be issued following the entry of this Order. The provisions of the *Amended Protective Order* shall supersede in all respects the provisions of the *Protective Order* issued on May 23, 2008.

3. Any person that has previously executed a Nondisclosure Statement in accordance with the *Protective Order* shall not be required to execute a second Nondisclosure Statement as a result of the entry of the *Amended Protective Order*, but shall be given a copy of the *Amended Protective Order* and informed of its requirements.

4. All persons that have received confidential information, but that were not required to execute a Nondisclosure Statement, shall be given a copy of the *Amended Protective Order* and informed of its requirements.

J. Richard Collier

J. Richard Collier
Hearing Officer