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August 15, 2008

VIA E-MAIL AND HAND DELIVERY

Chairman Tre Hargett
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 Charge 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 Hargett:

Enclosed please find an original and seven (7) sets of copies of Tennessee American Water Company's Response to the City of Chattanooga Motion to Strike and Exclude the Testimony of Mark Manner.

Please return three (3) copies of this Rebuttal Testimony to me by way of our courier, which I would appreciate your stamping as "filed."

Should you have any questions concerning any of the enclosed, please do not hesitate to contact me.

Sincerely

Erin M. Everitt

Erin M. Everitt

Enclosures

cc: Hon. Mary W. Freeman (*w/o enclosure*)
Hon. Sara Kyle (*w/o enclosure*)
Hon. Eddie Roberson, PhD (*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*)
Michael A. McMahan, Esq. (*w/enclosure*)
Frederick L. Hitchcock, Esq. (*w/enclosure*)
Mr. John Watson (*w/o enclosure*)
Mr. Michael A. Miller (*w/o enclosure*)

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 TO THE CITY OF CHATTANOOGA'S MOTION TO STRIKE AND EXCLUDE THE TESTIMONY OF MARK MANNER

Tennessee American Water Company ("TAWC") hereby provides its response (the "Response") to the *Motion to Strike and Exclude the Testimony of Mark Manner* (the "Motion") filed by the City of Chattanooga ("City").

Despite TAWC having filed Mr. Manner's rebuttal testimony in compliance with the August 13 rebuttal testimony deadline ordered by the Hearing Officer and agreed to by all Intervenors, the City now seeks to strike Mark Manner's testimony by claiming that its timing is "grossly prejudicial" to the City. (*See* Motion at p. 4). As demonstrated below, the City's entire motion is based on a patently incorrect reading of Mr. Manner's testimony and, Tennessee law makes it clear that Mr. Manner's testimony is appropriately filed (and, indeed, *necessary*) rebuttal testimony.

I. The City Has Based Its Entire Motion On A Completely Incorrect Reading Of Mr. Manner's Testimony.

The City claims in its Motion that Mr. Manner contends in his testimony that:

- "...the TRA did not mean what it said in May, 2007, when it ordered that TAWC complete a management audit in compliance with the Sarbanes-Oxley Act..." (Motion at p. 1).

- "...there are no Sarbanes-Oxley requirements that are applicable to American Water Works Company..." (Motion at p. 2).

- "...the TRA had no authority to require that the audit be performed in compliance with Sarbanes-Oxley requirements. . . ." (Motion at p. 2).

The City's descriptions of Mr. Manner's testimony are either misrepresentations or gross error. In fact, Mr. Manner testifies that the BAH management audit filed by TAWC was conducted in compliance with the requirements of Sarbanes-Oxley and that American Water Works is subject to and compliant with Sarbanes-Oxley. The following passages provide a mere sampling of Mr. Manner's testimony on these subjects:

- "First, contrary to the testimony offered by the City of Chattanooga and the Consumer Advocate Division, my testimony will show that the audit submitted by [TAWC] was, in fact, a 'management audit performed in compliance with Sarbanes-Oxley'. . . ." (Manner Rebuttal at p. 3, lines 17-20) (emphasis added).

- "My analysis follows beginning first with a brief description of Sarbanes-Oxley and then continues with a description of the manner in which Tennessee American met the TRA requirement." (Manner Rebuttal at p. 6, lines 4-6) (emphasis added).

- "[T]he management audit filed in this case pursuant to the TRA Order is based on financial information underlying the financial statements of AWWC that were prepared and audited in compliance with applicable Sarbanes-Oxley provisions, and was from a company that was in compliance with applicable Sarbanes-Oxley provisions." (Manner Rebuttal at p. 15, lines 1-6) (emphasis added).

- "...it is clear that American Water Works is compliant with Sarbanes-Oxley . . . ." (Manner Rebuttal at p. 24, lines 6-7) (emphasis added).

- "More importantly, there is no basis in law or equity for concluding, whether directly or by implication, that AWWC is not in compliance with Sarbanes-Oxley or is a less attractive investment." (Manner Rebuttal at p. 27, lines 15-17) (emphasis added).

- "The management audit submitted by Tennessee American was performed in compliance with Sarbanes-Oxley, as directed by the Tennessee Regulatory Authority." (Manner Rebuttal at p. 28, lines 13-14) (emphasis added).

- "AWWC is compliant with applicable SEC, stock exchange, and Sarbanes-Oxley requirements." (Manner Rebuttal at p. 28, lines 22-23) (emphasis added).

In light of these expert opinions so clearly expressed in Mr. Manner's rebuttal testimony, it is perplexing why the City claims that Mr. Manner's testimony states the opposite in furtherance of "an effort to avoid the mandate of the TRA." (Motion at p. 3). The entire premise of the City's Motion is simply baseless.

II. Mr. Manner's Testimony Is Properly Offered As Timely-Filed Rebuttal Testimony.

In addition to mischaracterizing Mr. Manner's pre-filed rebuttal testimony, the City complains that Mr. Manner's rebuttal testimony was filed by TAWC the week before trial. Yet, this is the very schedule for the filing of rebuttal testimony that was agreed to by all Intervenors – including the City. July 11, 2008 Order at p. 2 ("The parties agreed to the entry of this Order with the schedule as set forth herein.").

In addition to ignoring its own scheduling agreement, the City's argument ignores the very nature of rebuttal testimony.

> Rebutting evidence is that which is given to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. Such evidence includes not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but also, evidence in denial of any affirmative fact which the answering party has endeavoured *[sic]* to prove.

29 Am. Jur. 2d *Evidence* § 250 (quoted with approval by *State ex rel. Commissioner of Dept. of Transp. v. Williams*, 828 S.W.2d 397, 401 (Tenn. Ct. App. 1991)). Even a cursory reading of Mr. Manner's testimony reveals that it directly rebuts the highly unusual claims advanced by Dr. Brown and Mr. Majoros. For example:

- "My testimony is that American Water Works did not 'opt out,' and that Dr. Brown's claim that AWWC's financial statements are 'suspect' suggests a lack of understanding of Sarbanes-Oxley and current SEC rules and regulations as well as United States equity markets in general." (Manner Rebuttal at p. 4, lines 13-16).

- "The Majoros Testimony confuses a management audit with a financial statement audit and misconstrues and misapplies Sarbanes-Oxley." (Manner Rebuttal at p. 4, lines 3-7).

- "Dr. Brown incorrectly characterizes AWWC's Sarbanes-Oxley compliance status by asserting that American Water Works 'opted out" of Section 404 compliance. In fact, American Water Works currently is in compliance with applicable Sarbanes-Oxley reporting requirements, including the Section 302 and 906 certification requirements." (Manner Rebuttal at p. 20, line 20 – p. 21, line 2).

- "Although Mr. Majoros's firm claims expertise in providing management audits, he was unable to produce a management audit work product from any source that complies with his Sarbanes-Oxley standard." (Manner Rebuttal at p. 19, lines 20-22).

Mr. Manner's testimony closely analyzes Dr. Brown's and Mr. Majoros' claims and rebuts them in detail.

It is unreasonable for the City to argue that Mr. Manner could or should have addressed Intervenors' unusual arguments before even the City's counsel claims he was aware of them. Rebuttal testimony must necessarily follow the opposing party's case in chief. In fact, rebuttal testimony is often not disclosed until a trial is underway. Such was the case in *Coates v. Thompson*, 666 S.W.2d 69 (Tenn. Ct. App. 1983). In *Coates*, the Tennessee Court of Appeals was asked to review the exclusion of rebuttal evidence offered by plaintiff to contradict expert evidence offered by defendant regarding the alleged forgery of a will. While noting that "plaintiff could have offered this evidence in his case in chief" because she had notice that the will was suspicious, the Court of Appeals nonetheless found the exclusion of the rebuttal evidence to be reversible error. *Id.* at 76. The *Coates* court noted: "Initially plaintiff had the burden of offering proof from which the jury could find the will valid. This she did. At that point plaintiff was under no obligation to explain away 'suspicions' not yet raised. However, once the [alleged forgery was] brought squarely into issue by defendant's expert, Mr. Godown, it was not only permissible but probably necessary." *Id.*

Prior to the filing of Mr. Majoros' and Dr. Brown's testimony on July 18, 2008 – and unlike the situation in the *Coates* case – TAWC had no way of knowing that the Intervenors

would attempt to completely redefine and misapply the requirements of Sarbanes-Oxley. Despite numerous discovery requests filed by TAWC on May 12, 2008 that required the City to disclose the identity of its expert witnesses and the nature of their testimony, the City repeatedly assured TAWC that the City had not determined the identity of its experts or the substance of their pre-filed testimony. *See* City of Chattanooga Discovery Responses to TAWC and first and second supplements thereto, dated May 28, June 9 and June 13, respectively. TAWC took the City at its word. Not until July 10 did the City reveal for the first time that the City anticipated retaining an expert to opine on whether the management audit complied with the requirements of Sarbanes-Oxley. *See* City's Third Supplemental Discovery Responses to TAWC. The Intervenors' actual theories, however, were still not revealed until they filed their pre-filed testimony on July 18, 2008.

After finally receiving the testimony of Mr. Majoros and Dr. Brown, TAWC requested referrals for a corporate securities attorney who could serve as a Sarbanes-Oxley expert to rebut Mr. Majoros' and Dr. Brown's gross misinterpretation of the Sarbanes-Oxley statute and its application to the BAH management audit and American Water Works. Mark Manner was recommended to TAWC as one of the preeminent Sarbanes-Oxley experts in Tennessee. Unfortunately, Mr. Manner was out of the country until the late evening of July 30 and was unavailable until August 4. Mr. Manner was retained as a consultant on August 6 to consider Dr. Brown's and Mr. Majoros' Sarbanes-Oxley theories. TAWC decided to call Mr. Manner as an expert rebuttal witness on the evening of August 11. TAWC promptly disclosed Mr. Manner as a rebuttal witness in its Supplemental Responses to CAPD's Discovery Requests filed on August 12, 2008.

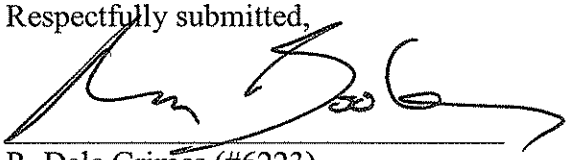
TAWC acted swiftly and diligently in identifying and disclosing its expert witness to rebut Mr. Majoros' and Dr. Brown's incorrect theories regarding Sarbanes-Oxley.[1] TAWC took action as soon as possible considering that the Intervenors' erroneous testimony concerning Sarbanes-Oxley was not and could not have been expected. In fact, TAWC filed Mr. Manner's testimony in compliance with the very schedule agreed to by the City. The City's insinuation that Mr. Manner could have, or should have, been disclosed in March 2008 is baffling. Certainly a petitioner before this Authority should not be expected to anticipate and pre-empt with expert testimony every conceivable intervenor's theory – much less the off-the-wall Sarbanes-Oxley arguments offered by Dr. Brown and Mr. Majoros.

Conclusion

Mr. Majoros and Dr. Brown misconstrue and misapply Sarbanes-Oxley in ways that reveal their lack of knowledge regarding this securities law statute. Mr. Manner, a prominent corporate securities attorney, is unquestionably a highly respected expert regarding the interpretation and application of Sarbanes-Oxley. Mr. Manner's testimony directly and clearly rebuts Mr. Majoros and Dr. Brown's erroneous claims. It is understandable that the City wishes to exclude Mr. Manner's testimony from this case as it would like to avoid comparing its supposed Sarbanes-Oxley "expert" with the real McCoy. However, Tennessee American has the right under Tennessee law to rebut and expose Dr. Brown's and Mr. Majoros' testimony for the error that it is. Accordingly, the City's Motion should be denied.

[1] Further, TAWC specifically reserved the right to supplement its responses with additional rebuttal witnesses. *See, e.g.,* TAWC's Responses to Second Set of Discovery Requests by the CAPD, Request No. 4 ("The Company reserves the right to call additional expert witnesses for rebuttal testimony.").

Respectfully submitted,



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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 15th day of August, 2008, upon the following:

[x] Hand-Delivery [ ] U.S. Mail [ ] Facsimile [ ] Overnight [x] Email	Timothy C. Phillips, Esq. Consumer Advocate and Protection Division Office of Attorney General 2nd Floor 425 5th Avenue North Nashville, TN 37243-0491
[ ] Hand-Delivery [ ] U.S. Mail [ ] Facsimile [x] Overnight [x] Email	David C. Higney, Esq. Counsel for Chattanooga Manufacturers Association Grant, Konvalinka & Harrison, P.C. 633 Chestnut Street, 9th Floor Chattanooga, TN 37450
[x] Hand-Delivery [ ] U.S. Mail [ ] Facsimile [ ] Overnight [x] Email	Henry M. Walker, Esq. Counsel for Chattanooga Manufacturers Association Boult, Cummings, Conners & Berry, PLC Suite 700 1600 Division Street Nashville, TN 37203
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