

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**August 29, 2008**

<b>IN RE:</b>	)	
	)	
<b>PETITION OF TENNESSEE AMERICAN WATER</b>	)	<b>DOCKET NO.</b>
<b>COMPANY TO CHARGE AND INCREASE CERTAIN</b>	)	<b>08-00039</b>
<b>RATES AND CHARGES AS TO PERMIT IT TO EARN</b>	)	
<b>A FAIR AND ADEQUATE RATE OF RETURN ON ITS</b>	)	
<b>PROPERTY USED AND USEFUL IN FURNISHING</b>	)	
<b>WATER SERVICE TO ITS CUSTOMERS</b>	)	

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**ORDER ON AUGUST 15, 2008 PRE-HEARING CONFERENCE**

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This matter came before the Hearing Officer for a Pre-Hearing Conference held on August 15, 2008 at which time the Hearing Officer considered procedural matters related to the Hearing scheduled to begin on August 18, 2008 and the following motions:

1. *City of Chattanooga's Motion to Strike and Exclude the Testimony of Mark Manner ("City's Motion to Strike");*
2. *Tennessee American Water Company's First Motion in Limine Regarding the Testimony Offered by Michael Majoros ("TAWC's Motion in Limine"); and*
3. *Chattanooga Manufacturers Association's Motion to Strike from the Record and/or to Exclude as Evidence the Supplemental Testimony of Tennessee American Water Company Witnesses, Including but not Limited to John Watson, Shelia Miller and Michael Miller, Related to Alleged Increased Expenses ("CMA's Motion to Strike").*

Notice of the Pre-Hearing Conference was provided through the *Notice of Hearing* filed in the docket on July 31, 2008. The date of the Pre-Hearing Conference was established in the Second Amended Procedural Schedule issued on July 11, 2008.

The Hearing Officer convened the Pre-Hearing Conference on August 15, 2008 in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority ("Authority") at 460

James Robertson Parkway, Nashville, Tennessee. The following Parties and representatives were in attendance:

**Tennessee American Water Company (“TAWC”)** – Ross I. Booher, Esq., Bass, Berry & Sims, PLC, 315 Deaderick Street, Suite 2700, Nashville, TN 37238-3001;

**Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter (“Consumer Advocate”)** – Timothy Phillips, Esq. and Ryan McGehee, Esq., Office of the Attorney General, Consumer Advocate and Protection Division, 425 5<sup>th</sup> Ave. N, John Sevier Building, P.O. Box 20207, Nashville, TN 37243;

**The City of Chattanooga (“City”)** – Frederick L. Hitchcock, Esq., Chambliss, Bahner, & Stophel, P.C., 1000 Tallan Building, Two Union Square, Chattanooga, TN 37402 and Michael A. McMahan, Esq., Office of the City Attorney, 801 Broad Street, Suite 400, Chattanooga, TN 37402; and

**Chattanooga Manufacturers Association (“CMA”)** – Henry M. Walker, Esq., Boulton, Cummings, Conners & Berry, PLC, 1600 Division Street, Suite 700, Nashville, Tennessee 37203 and David C. Higney, Esq. (By Telephone), Grant, Konvalinka & Harrison, P.C., Ninth Floor, Republic Centre, 633 Chestnut Street, Chattanooga, Tennessee 37450-0900.

## **I. PROCEDURAL HEARING MATTERS**

### **A. Opening Statements**

The parties agree that TAWC will have up to forty (40) minutes to present its opening statement. The City will have up to twenty (20) minutes to present its opening statement. Finally, the Consumer Advocate and CMA will each have up to fifteen (15) minutes to present their opening statements. The Consumer Advocate and the City state that their opening statements will not be duplicative.

### **B. Order of Witnesses and Extended Hearing Dates**

During the discussion of the order of witnesses, TAWC noted its concern that the Authority may not be able to hear all of the testimony by the anticipated conclusion date of the Hearing – Friday, August 22, 2008. In light of this concern, the Hearing Officer stated that the Hearing will proceed as scheduled; however, in the event that the Hearing is not completed by

Friday, August 22, 2008, the proceedings will resume in Nashville at the offices of the Authority beginning on Tuesday, August 26, 2008.

Following opening statements, TAWC will present its witnesses. TAWC states that it expects to call its witnesses in the following order: John S. Watson, Michael J. Vilbert, Edward L. Spitznagel, Jr., Robert A. Shiltz, Sheila A. Miller, John J. Spanos, Paul R. Herbert, Joe Van den Berg, Mark Manner, and Michael A. Miller. TAWC explains that certain company witnesses may appear at different times in order to accommodate the flight times of out-of-town witnesses.

The Consumer Advocate will be the first Intervenor to present testimony. The Consumer Advocate states that it expects to call its witnesses in the following order: Terry Buckner, Dr. Steve Brown, and Charles W. King. The City will present the testimony of Glynn L. Stoffel followed by the testimony of Michael J. Majoros, Jr. CMA will present its witness, Michael Gorman.

**C. Confidential Information**

With regard to the disclosure of confidential information during the Hearing, the parties were instructed to focus on pooling questions of a particular witness that involve confidential information so that the panel can limit the times the panel would have to either clear the courtroom or take special measures. The City states that it may raise confidential information when presenting the testimony of Mr. Stoffel, and TAWC states that the presentation of the testimony of Mr. Miller and Mr. Vilbert may involve confidential information. The parties were reminded to file all non-disclosure statements as soon as possible.

**D. Demonstrative Exhibits and Other Exhibits**

The parties agree that demonstrative exhibits related to a witness's pre-filed testimony will be exchanged among the parties before a witness appears on the stand. The parties were

directed to bring sufficient copies of all exhibits such that the party is able to provide a copy of an exhibit to the court reporter, each Director, each Senior Policy Advisor, and each Authority Division Chief. Twenty (20) copies of each exhibit would be sufficient. Further, the parties should have available at the Hearing copies of all exhibits including those appended to pre-filed testimony.

**E. Cross-Examination**

Generally, the order of the Intervenors' cross-examination will be the Consumer Advocate, the City, and CMA. However, the Intervenors may alter this order depending on the witness. The Consumer Advocate requested that the presiding panel member look to the Consumer Advocate to set forth the order of cross examination for each witness. The Intervenors agree that multiple counsel of the same Intervenor will not engage in cross-examination of the same witness.

During the Pre-Hearing Conference, TAWC raised an oral motion requesting that the Hearing Officer prohibit the Intervenors from asking leading questions of Intervenors' witnesses that are not hostile. TAWC relies on Tenn. Code Ann. § 4-5-310(c) and argues that the restriction is necessary to prevent the possible effect of hearing the direct testimony of the Intervenors' witnesses multiple times. The Intervenors respond that in Tennessee cross-examination is unlimited, but they recognized that they should not ask duplicative or redundant questions in an attempt to rehabilitate an Intervenor witness. As to the statute, the Intervenors argue that Tenn. Code Ann. § 4-5-310(c) does not address the point raised by TAWC. Intervenors also argue that they should not be constrained or limited in the preparation of their case at this late date.

After hearing the arguments of the parties, the Hearing Officer denied TAWC's motion. To the extent that the Intervenors ask repeat questions or questions that are unfair or prejudicial,

TAWC can raise an objection at the time the question is asked. Further, Tenn. Code Ann. § 4-5-310(c) does not address with any specificity the type of question that is to be asked under cross-examination. The statute addresses the general conduct of the proceedings, particularly when there are multiple intervenors or an intervenor seeking recognition late in the course of the proceedings. Based on these findings, the motion was denied and TAWC was directed to object to the question(s) as it sees fit during the live testimony.

**F. Discovery and Authority Data Request Responses**

The parties agree that all responses to discovery and Authority data requests should be made a part of the Hearing record.

**G. Redirect and Authority Staff Questions**

Redirect examination of a witness may be permitted; however, the parties are cautioned that redirect examination should be limited to the matters elicited during cross-examination that require clarification. Redirect examination should not raise any new issues. Recross examination will be permitted only if a new issue is raised during redirect examination. Further, the Authority's Staff will ask their questions following the completion of cross-examination and before any redirect examination. The Directors will ask questions following cross-examination, but may interject questions to the witnesses at any time during their testimony.

**II. PENDING MOTIONS**

**A. CITY'S MOTION TO STRIKE**

The City filed the *City's Motion to Strike* electronically on August 14, 2008. In its motion, the City requests an order striking and excluding the testimony of Mark Manner offered by TAWC. The City asserts that the identity of the witness and nature of his testimony were not timely disclosed by the Company and that there is no justifiable reason for the delay in disclosing the information. The City concludes that the use of Mr. Manner's testimony would deprive the

City of a fair hearing as it has not had adequate time to prepare for Mr. Manner's testimony.<sup>1</sup> The City affirmed its arguments during the Pre-Hearing Conference by stressing the timing issue, unfairness, and potential violation of due process rights.<sup>2</sup>

TAWC filed its response to the *City's Motion to Strike* electronically on August 15, 2008. TAWC contends that it filed Mr. Manner's testimony in accordance with the procedural schedule. TAWC further asserts that the City has misread Mr. Manner's testimony.<sup>3</sup> TAWC contends that it was unaware of the Intervenor's theories with regard to TAWC's compliance with the requirements of the Sarbanes-Oxley Act until the filing of Intervenor's pre-filed testimony on July 18, 2008. Thereafter, TAWC contends that it worked to identify and consult with a Sarbanes-Oxley expert. TAWC states that it retained Mr. Manner as a consultant on August 6, 2008 and decided to use him as a witness on the evening of August 11, 2008. TAWC notes that it disclosed Mr. Manner as a rebuttal witness on August 12, 2008 in a supplemental response to discovery.<sup>4</sup>

It appears from the record that the first instance of notice to TAWC that there would be a witness from the Intervenor to testify regarding Sarbanes-Oxley compliance came with the third supplemental response to discovery filed on July 10, 2008. The City followed that response with the filing of the testimony of Mr. Majoros on July 18, 2008. Testimony regarding Sarbanes-Oxley was also offered by the Consumer Advocate through the Pre-filed Testimony of Dr. Steve Brown filed on July 18, 2008.

The procedural schedule was revised several times during these proceedings, the last time being July 11, 2008. At that time, the procedural schedule was extended to allow additional time

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<sup>1</sup> *City of Chattanooga's Motion to Strike and Exclude the Testimony of Mark Manner*, pp. 1-2 (August 14, 2008)

<sup>2</sup> Transcript of Prehearing Conference, p. 58 (August 15, 2008).

<sup>3</sup> *Tennessee American Water Company's Response to the City of Chattanooga's Motion to Strike and Exclude the Testimony of Mark Manner*, p. 1 (August 15, 2008).

<sup>4</sup> *Id.* at 5.

for the Intervenor to file their direct testimony. As a result of the schedule modification, the filing of discovery and the filing of rebuttal testimony was moved so that TAWC's rebuttal testimony was due to be filed on August 13, 2008.

Rebuttal testimony responds to direct testimony. In this instance, the direct testimony of the Intervenor was filed on July 18, 2008. The pre-filed rebuttal testimony of Mr. Manner was filed in accordance with the procedural schedule that was agreed to by the parties and as reflected in the Amended Procedural Schedule issued on July 11, 2008. Further, TAWC acted reasonably when obtaining an expert and notifying the Intervenor of TAWC's intention to use Mr. Manner as an expert in this proceeding. After reviewing the testimony of Mr. Manner, the Hearing Officer found that the testimony of Mr. Manner does not inject new substantive issues into the proceeding. For these reasons, allowing the testimony of Mr. Manner does not result in unfairness or a violation of due process rights as claimed by the City. Any Intervenor, including the City, will have the opportunity to cross-examine Mr. Manner with regard to his competence or ability to testify regarding specific issues, including Sarbanes-Oxley, or cross-examine him in those areas where his testimony contradicts that of another witness.

The City raised as a precedent for disallowing Mr. Manner's testimony, the Hearing Officer's ruling in Docket No. 06-00290 wherein supplemental direct testimony of Terry Buckner was partially stricken. The Hearing Officer found that the issue presented in this docket with the filing of Mr. Manner's testimony is clearly distinguishable from the issue presented in Docket No. 06-00290. In Docket No. 06-00290, Mr. Buckner's supplemental direct testimony was filed by the Consumer Advocate outside of the procedural schedule, without first seeking or obtaining permission and injected a new substantive issue into the proceeding.<sup>5</sup> The Hearing

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<sup>5</sup> *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, pp. 16-17 (June 10, 2008).

Officer in Docket No. 06-00290 permitted the consideration of a portion of the testimony and because of the new issue permitted the petitioner, TAWC, to provide additional rebuttal testimony as to the new issue.<sup>6</sup>

Under the circumstances of this docket, it would be appropriate for the City or the other Intervenor to ask questions of Mr. Manner and in addition to ask questions of or present testimony through their witnesses, Mr. Majoros and Dr. Brown, on the stand. Any additional testimony by Mr. Majoros and Dr. Brown would be subject to cross-examination by TAWC. Moreover, given that the Hearing may continue into a second week, the Intervenor will be provided an ample opportunity to prepare their witnesses to provide any necessary additional testimony. Based on the foregoing findings and conclusions, the *City's Motion to Strike* was denied.

***B. TAWC'S MOTION IN LIMINE***

TAWC filed *TAWC's Motion in Limine* electronically on August 14, 2008. In its motion, TAWC requests that the Hearing Officer exclude portions of the testimony of Michael J. Majoros because Mr. Majoros is not unqualified to testify as an expert with regard to the interpretation and application of the Sarbanes-Oxley Act. TAWC relies on Rule 702 of the Tennessee Rules of Evidence in support of the requested relief.<sup>7</sup> In response, the City argues that the motion is untimely under the rules of the Authority and the Uniform Administrative Procedures Act. Additionally, the City argues that, as in Docket No. 06-00290, expert credibility is evaluated through cross-examination. The City asserts that testing the expertise of all witnesses in advance of the Hearing would result in a major delay and thereby create an impediment to the efficient conduct of this proceeding.

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<sup>6</sup> *Id.* at 16. The Hearing Officer struck that part of Mr. Buckner's Supplemental Direct Testimony which improperly and inaccurately expressed a legal interpretation of an Indiana Utility Regulatory Commission decision.

<sup>7</sup> *Tennessee American Water Company's Motion in Limine Regarding the Testimony Offered by Michael Majoros*, p. 1 (August 14, 2008).



Issues involving a witness's qualifications or credibility can be raised and presented through cross-examination. This approach to testing the qualifications of a witness is preferable in this instance given the close proximity of the scheduled start of the Hearing to the filing of the *Motion in Limine*. For these reasons, the Hearing Officer denied the *Motion in Limine*. The Hearing Officer also noted that the issue involving compliance with the requirements of Sarbanes-Oxley may require the panel to determine legal questions that would be more appropriately addressed in post-hearing briefs.

**C. CMA'S MOTION TO STRIKE**

CMA filed *CMA's Motion to Strike* electronically on August 14, 2008. In its motion, CMA seeks to exclude rebuttal testimony that selectively includes expenses "designed to bolster the Company's initially-requested revenue requirement."<sup>8</sup> Specifically, CMA points to additional expense projections contained in TAWC's rebuttal testimony such as those for 2009 chemical expenses and electric rate increases.<sup>9</sup>

CMA argues that TAWC should not be permitted, through rebuttal testimony filed five months after the filing of the Petition, to adjust an expense that has increased since the filing of the Petition. CMA states that at the time of the filing of this case the revenues, expenses, cost of capital, and rate base were established as a whole picture and the Company should not be able to select certain expense items and adjust only those expenses without making additional adjustments for changes in other components of the case. CMA contends that the use of these expenses should not be condoned because the use is "undertaken without performance of a complete and adequate case-package analysis examining the entire rate base revenue/expense

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<sup>8</sup> *Chattanooga Manufacturers Association's Motion to Strike from the Record and/or to Exclude as Evidence the Supplemental Testimony of Tennessee American Water Company Witnesses, Including but not Limited to John Watson, Shelia Miller and Michael Miller, Related to Alleged Increased Expenses*, p. 2 (August 14, 2008).

<sup>9</sup> *Id.*

relationship inherent in proper rate-making relative to both the test year and attrition year.”<sup>10</sup>

CMA also argues that rates supported by increases separately filed may not be placed into effect until the expiration of six months.<sup>11</sup>

TAWC filed its response electronically on August 15, 2008. TAWC argues in its response that it is not seeking to recover additional expenses and continues to seek a revenue increase of 7.645 million dollars.<sup>12</sup> TAWC contends that it did not selectively include the items, but merely disclosed the information in response to Authority data requests. Lastly, TAWC argues that the evidence of additional expenses is relevant.<sup>13</sup>

CMA argues that this rebuttal testimony should be stricken where it is used to adjust the components of the filing by increasing certain expenses where other expenses have been reduced. TAWC asserts that such testimony should be allowed to show that expenses have increased since the filing of the case without seeking to increase the request in the Petition.

The issue raised by CMA involves consideration of ratemaking theory. CMA argues that the theory that operates to exclude consideration of newly filed expense information is the theory that rates should not be set without consideration of the “case-package.” This is one theory. However, other regulatory theories and related case law require regulators when setting rates to take into consideration reasonably expected expenses and investments<sup>14</sup> and to set rates that are fair to both the utility and the consumer.<sup>15</sup> The evaluation of these theories and the further

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Tennessee American Water Company's Response to Chattanooga Manufacturers Association's Motion to Strike from the Record and/or to Exclude as Evidence the Supplemental Testimony of Tennessee American Water Company Witnesses, Including but not Limited to John Watson, Shelia Miller and Michael Miller, Related to Alleged Increased Expenses*, p. 1 (August 15, 2008).

<sup>13</sup> *Id.* at 2.

<sup>14</sup> See *South Cent. Bell Tel. Co. v. Tennessee Pub. Serv. Comm'n*, 579 S.W.2d 429, 435 (Tenn. Ct. App. 1979); *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W. 2d 151, 160 (Tenn. Ct. App. 1992).

<sup>15</sup> See *Southern Bell Tel. & Tel. Co. v. Tennessee Pub. Serv. Comm'n*, 304 S.W.2d 640, 643 (Tenn. 1957); *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W. 2d 151, 159 (Tenn. Ct. App. 1992).

determination of the appropriate application of the theories to the facts of this docket are actions that should be performed by the Panel. Therefore, *CMA's Motion to Strike* is denied. However, this ruling is made without prejudice and CMA may raise the motion at the time of the presentation of relevant testimony to the Panel.

**IT IS THEREFORE ORDERED:**

1. The Hearing scheduled to commence in Chattanooga, Tennessee on August 18, 2008 shall proceed in accordance with this Order unless otherwise ordered by the Panel or the presiding Director.

2. The *City of Chattanooga's Motion to Strike and Exclude the Testimony of Mark Manner* is denied.

3. *Tennessee American Water Company's First Motion in Limine Regarding the Testimony Offered by Michael Majoros* is denied.

4. *Chattanooga Manufacturers Association's Motion to Strike from the Record and/or to Exclude as Evidence the Supplemental Testimony of Tennessee American Water Company Witnesses, Including but not Limited to John Watson, Shelia Miller and Michael Miller, Related to Alleged Increased Expenses* is denied without prejudice. The Chattanooga Manufacturers Association may raise the motion at the time of the presentation of relevant testimony to the panel.

  
J. Richard Collier, Hearing Officer