

November 12, 2010

Via E-Mail and USPS

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Chairman Mary Freeman
c/o Ms. Sharla Dillon
Tennessee Regulatory Authority
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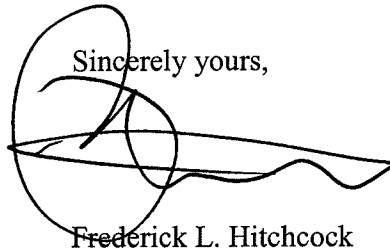
Re: Petition of Tennessee American Water Company
Docket No. 10-00189

Dear Chairman Freeman:

Enclosed please find an original and five (5) copies of The City of Chattanooga's Motion for Leave to File a Reply in Support of its Motion for Permission to Propound Additional Discovery Requests. I would appreciate you stamping the extra copy of each document as "filed," and returning it to me in the enclosed, self-addressed and stamped envelope.

With best regards, I am

Sincerely yours,



Frederick L. Hitchcock

FLH:kwr
Enclosures

Chairman Mary Freeman
c/o Ms. Sharla Dillon
November 12, 2010
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cc: Mr. Vance L. Broemel (w/encl.)
Mr. T. Jay Warner
Mr. Ryan L. McGehee
Ms. Mary L. White
Mr. David C. Higney (w/encl.)
Mr. Henry M. Walker (w/encl.)
Mr. Michael A. McMahan (w/enc.)
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Mr. R. Dale Grimes (w/encl.)
Mr. Mark Brooks (w/encl.)
Mr. Scott H. Strauss (w/encl.)
Ms. Katharine M. Mapes

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

IN RE:)	
)	
PETITION OF TENNESSEE AMERICAN)	
WATER COMPANY TO CHANGE AND)	Docket No. 10-00189
INCREASE CERTAIN RATES AND)	
CHARGES.)	

**MOTION BY THE CITY OF CHATTANOOGA FOR LEAVE TO FILE A REPLY
IN SUPPORT OF ITS MOTION FOR PERMISSION TO PROPOUND
ADDITIONAL DISCOVERY REQUESTS**

Pursuant to TRA Rule 1220-1-2-.06(3), the City of Chattanooga ("City"), by and through counsel, hereby respectfully requests leave to submit a brief reply to the Response of Tennessee American Water Company ("TAWC") in Opposition to the City's Motion for Permission to Propound Additional Discovery Requests. The City asserts that leave should be granted so that it can correct misstatements made by TAWC concerning aspects of both the City's Motion and the substance of its discovery requests. The City submits that granting leave to file this reply will ensure a complete and accurate record before the Regulatory Authority with respect to the relief requested in the City's original motion.

REPLY

TAWC's opposition seeks to unfairly restrict the ability of the City and its citizens to participate meaningfully in this Authority's consideration of TAWC's unprecedented request for a 28 percent rate increase, filed barely 18 months after TAWC was granted its last rate increase. TAWC has submitted more than 4,000 pages of testimony, reports, exhibits, and schedules. TAWC will undoubtedly file hundreds or thousands of additional pages in response to the second data request submitted by the TRA staff on October 26, 2010. In response to this massive submission by TAWC, Chattanooga has submitted only 86 discovery requests in the first round,

or about one discovery request for every 50 pages of testimony, reports, schedules, and exhibits so far submitted by TAWC.¹

TAWC's unprecedented 28% rate increase request was filed barely eighteen (18) months after the Authority entered its Order in TAWC's last rate request, Docket No. 08-00039. The latest request was filed while there continues to be pending before the Tennessee Court of Appeals TAWC's appeal of the Order in Case No. 08-00039. As the Authority is aware, TAWC raised a number of issues in that appeal that have not yet been resolved and that require inquiry in this proceeding. Furthermore, as the Court of Appeals has noted, issues raised in the 2006 case are also to be reviewed in this proceeding. In its Opinion dismissing the 2006 appeal as moot because of TAWC's rapid filing of the 2008 case, the Court of Appeals explained that issues raised in the 2006 case were not "capable of repetition yet evading review" because they could be raised in subsequent rate cases. *City of Chattanooga v. Tennessee Regulatory Authority*, No. M2008-01733-COA-R12-CV (July 21, 2010), at p. 7.

I. **CHATTANOOGA'S REQUESTS**

Chattanooga's discovery requests are focused on critical issues that are essential to the proper and fair evaluation of TAWC's request. Chattanooga has attached as Exhibit 1 a table summarizing the subject of each of Chattanooga's 86 requests. These subjects are discussed in turn.

¹ Without any explanation of how it arrived at the number, TAWC asserts that Chattanooga propounded one hundred thirty-three (133) requests, including subparts. TAWC apparently arrives at this inaccurate exaggeration by counting as separate questions Chattanooga's request that some data be formatted in tables.

A. Capital Expenditures.

TAWC has captioned its petition as one that seeks rate increases "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*" (emphasis supplied). As TAWC has consistently acknowledged, and as this Authority has found, Tennessee law places the burden upon the utility to establish that expenses that it seeks to recover in its rates are reasonable and are necessary in purpose. Tenn. Code Ann. 65-5-103(a). Chattanooga is entitled to inquire into the nature of the capital expenditures for which TAWC seeks a rate of return, recovery of depreciation expense, and recovery of taxes. Among the requests that Chattanooga has posed are requests that seek to determine whether capital expenditures for which TAWC seeks "to earn a fair and adequate rate of return" were reasonable, were necessary, and whether capital expenses claimed in the 2006 and 2008 cases were in fact incurred as represented. Ten (10) of Chattanooga's discovery requests address this subject.

B. Management Fees.

The bulk of the remaining discovery requests deal with several important issues concerning the huge increase in management fees being sought by TAWC. Of course, management fees have been a central focus of the last two rate cases, and they will be a central focus of this rate case. The consumer price index has increased three and one-half percent (3½%) during the period January, 2009, through August, 2010. Yet, TAWC claims that it is entitled to an increase in management fees of forty-eight percent (48%), or nearly 14 times the increase that has occurred in consumer prices since this Authority last determined and awarded an appropriate level of management fees.

Chattanooga's first discovery requests include twenty-four (24) discovery requests that address the amount, the reasonableness, and the necessity of management fees charged or projected to be charged to TAWC by its parents and affiliates. Five (5) requests seek information concerning management fees related to the call center operations for which TAWC ratepayers are proposed to be charged. Eleven (11) requests seek information concerning the management audit that this Authority ordered TAWC to complete and which was first filed a week before the current rate case was initiated. Fifteen (15) requests seek information concerning the testimony and report submitted by TAWC's witness, Mr. Baryenbruch. Finally, eighteen (18) of the requests address practices of TAWC's parent and affiliates concerning expense allocations to other regulated and non-regulated companies affiliated with TAWC's parent. These affiliate transactions have been the subject of inquiry by other regulatory commissions, which have found improper allocations and subsidies.

C. General Questions.

Chattanooga has only posed three (3) general information requests seeking the identification of the individuals responsible for completing responses to the discovery requests, seeking identification of published studies and treatises upon which TAWC expert witnesses have relied, and seeking documents that TAWC intends to put into evidence.

II.
FAILURE TO PERMIT ADEQUATE DISCOVERY WOULD DEPRIVE
CHATTANOOGA AND ITS CITIZENS OF DUE PROCESS

In *Martin v. Sizemore*, 78 S.W.3d 249 (Tenn. Ct. App. 2001), the Court of Appeals recognized that procedural due process applies in contested cases under the APA:

While due process does not dictate particular procedures that must be used in every instance, *Estrin v. Moss*, 221 Tenn. 657, 676, 430 S.W.2d 345, 353 (1968), at a minimum, administrative proceedings must afford affected parties (1) adequate notice, *McClellan v. Board of Regents*, 921 S.W.2d 684, 688 (Tenn. 1996); (2) ***an opportunity for a hearing at a meaningful time and in a meaningful manner***, *Haywood v. State Bd. of Educ.*, 874 S.W.2d 67, 72 (Tenn. Ct. App. 1993); *Mid-South Indoor Horse Racing, Inc. v. Tennessee State Racing Comm'n*, 798 S.W.2d 531, 540 (Tenn. Ct. App. 1990); and (3) an opportunity to obtain judicial review of the board's or agency's decision. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84, 56 S.Ct. 720, 740, 80 L.Ed. 1033 (1936); *Public Serv. Comm'n v. General Tel. Co.*, 555 S.W.2d 395, 402 (Tenn. 1977); Bernard Schwartz, *Administrative Law Cases During 1996*, 49 Admin. L. Rev. 519, 536-37 (1997).

See id. at 267 (emphasis added). *Martin, supra*, recognizes the right to a meaningful hearing, a right that would be denied to Chattanooga if it does not have the opportunity to obtain information necessary to test the testimony and submissions of TAWC. This information is uniquely in the possession of TAWC, its affiliates, and its retained experts. *See* Tenn. Code Ann. § 4-5-312(b).

Other states agree that a party must have the opportunity to take adequate discovery in order to meaningfully participate in an administrative proceeding. For example, New Mexico has a line of cases recognizing that discovery must be permitted in rate cases as a matter of due process. *See New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 725 P.2d 244, 247 (N.M. 1986) ("NMIEC contends that express denial of the right to conduct discovery results in a denial of procedural due process of law This is a correct statement of the law.").

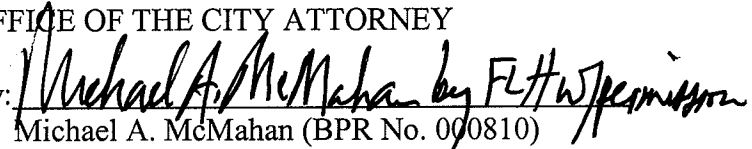
TAWC has requested the rejection of any discovery requests beyond the forty (40) requests that the Authority permits as a matter of course in routine cases. This is far from a routine case. TAWC has made no showing that any of Chattanooga's requests are inappropriate or unnecessary. TAWC simply does not want to disclose information that could be used to challenge its extraordinary and unprecedented rate request.

Chattanooga respectfully requests that its Motion for Permission to Propound Additional Discovery Requests be granted so that it may meaningfully participate in this proceeding. If TAWC has objections to specific requests, it may assert and explain the reasons for any such objections in the response due next Monday.

Respectfully Submitted,

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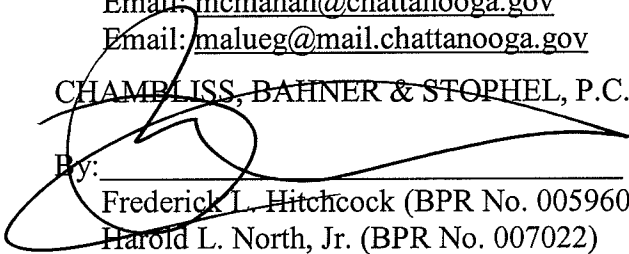
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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing pleading was emailed and was served upon the following person(s) via ☐ hand delivery or ☒ United States first class mail with proper postage applied thereon to ensure prompt delivery:

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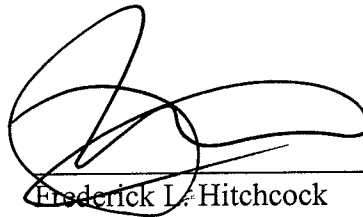
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This 12th day of November, 2010.



Frederick L. Hitchcock

EXHIBIT 1
COC FIRST DISCOVERY REQUESTS SUBJECTS

Request	Subject Category	Sub-Category
3	CAPITAL	
4	CAPITAL	
5	CAPITAL	
6	CAPITAL	
7	CAPITAL	
8	CAPITAL	
9	CAPITAL	
10	CAPITAL	
17	CAPITAL	
1	GENERAL	
83	GENERAL	
84	GENERAL	
38	MGMT FEES	AFFILIATE TRANSACTIONS
39	MGMT FEES	AFFILIATE TRANSACTIONS
40	MGMT FEES	AFFILIATE TRANSACTIONS
41	MGMT FEES	AFFILIATE TRANSACTIONS
42	MGMT FEES	AFFILIATE TRANSACTIONS
54	MGMT FEES	AFFILIATE TRANSACTIONS
55	MGMT FEES	AFFILIATE TRANSACTIONS
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26	MGMT FEES	AUDIT
27	MGMT FEES	AUDIT

77	MGMT FEES	AUDIT
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