

BASS

BERRY • SIMS_{PLC}

150 Third Avenue South, Suite 2800
Nashville, TN 37201
(615) 742-6200

David Killion
PHONE: (615) 742-7718
FAX: (615) 742-0414
E-MAIL: dkillion@bassberry.com

November 18, 2010

Via Hand-Delivery

filed electronically in docket office on 11/18/10

Chairman Mary W. Freeman
c/o 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 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. 10-00189*

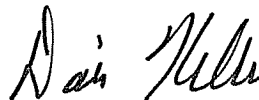
Dear Chairman Freeman:

Enclosed please find the original and five (5) copies of Tennessee American Water Company's Motion to Compel the Utility Workers Union of America, AFL-CIO and UWUA Local 121 to Provide Complete Discovery Responses. This document also is being filed today by way of email to the Tennessee Regulatory Authority Docket Manager, Sharla Dillon.

Please file the original and four copies of this material and stamp the additional copy as "filed". Then please return the stamped copies to me by way of our courier.

Should you have any questions concerning this matter, please do not hesitate to contact me at the email address or telephone number listed above.

Sincerely,



David Killion

CDK:smb
Enclosures

cc: Hon. Sara Kyle (w/o enclosure)
Hon. Eddie Roberson (w/o enclosure)
Mr. David Foster, 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)
T. Jay Warner, Esq. (w/enclosure)

Ryan McGehee, Esq. (w/enclosure)
Mary L. White, Esq. (w/enclosure)
David C. Higney, Esq. (w/enclosure)
Henry M. Walker, Esq. (w/enclosure)
Michael A. McMahan, Esq. (w/enclosure)
Valerie L. Malueg, Esq. (w/enclosure)
Frederick L. Hitchcock, Esq. (w/enclosure)
Harold L. North, Jr., Esq. (w/enclosure)
Mark Brooks, Esq. (w/enclosure)
Scott H. Strauss, Esq. (w/enclosure)
Katharine M. Mapes, Esq. (w/enclosure)
Donald L. Scholes, Esq. (w/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 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. 10-00189

**TENNESSEE AMERICAN WATER COMPANY’S MOTION TO COMPEL
THE UTILITY WORKERS UNION OF AMERICA, AFL-CIO AND UWUA LOCAL 121
TO PROVIDE COMPLETE DISCOVERY RESPONSES**

Tennessee American Water Company (“TAWC”) served its discovery requests (the “Requests”) upon the Utilities Workers Union of America, AFL-CIO and UWUA Local 121 (the “UWUA Intervenors”) on November 1, 2010. The UWUA Intervenors responded to TAWC’s requests on November 15, 2010 (the “Responses”). The parties conducted a good faith meet and confer conference on November 17, 2010 but there still remain deficiencies in the UWUA Intervenors’ Responses. Accordingly, pursuant to the Tennessee Regulatory Authority (“TRA”) Rules and Rule 37.01 of the Tennessee Rules of Civil Procedure, TAWC respectfully moves the Hearing Officer to enter an order compelling responses to these requests and requiring the UWUA Intervenors, on a rolling basis, to supplement their responses as they become aware of responsive documents and information rather than waiting until the day they file their witnesses’ testimony.

I. Legal Standard of Discovery

As a legal matter, Rule 26.02 of the Tennessee Rules of Civil Procedure is broad in scope, and allows parties “to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” Tenn. R. Civ. P. 26.02(1). Discovery under the Tennessee Rules of Civil Procedure “is allowed in an effort to do away with trial by ambush,” and should be allowed “to achieve its desired effect.” *Conger v. Gowder*, 2001 Tenn. App. LEXIS 205, at *14 (Tenn. Ct. App. Mar. 29, 2001); *see also* Tenn. R. Civ. P. 26.02(1). When a party fails to fully answer interrogatories or respond to requests for production of documents, the discovering party may move for an order compelling an answer and inspection in accordance with the request. Tenn. R. Civ. P. 37.01(2).

Here, TAWC has propounded a limited number (15) of reasonable requests for relevant information and documents, which are reasonably calculated to lead to discovery of relevant information, and is entitled to receive adequate responses to those requests. The UWUA Intervenor has a duty to respond to each of TAWC’s requests to the maximum extent possible even when valid objections are asserted – the UWUA Intervenor cannot assert a single basis to object and then withhold all materials not covered by that objection. Notwithstanding this duty, the UWUA Intervenor refuses to completely answer a single request by TAWC, in direct contravention of the “desired effect” sought by Rule 26 and the purpose of this Hearing Officer’s discovery deadlines in the Procedural Order.

II. The UWUA Intervenor's Should Be Compelled To Provide Complete Responses To TAWC's Discovery Requests.

A. The UWUA Intervenor's Fail to Recognize a Distinction Between Their Discovery Obligations Under the Procedural Order and Their Pre-Filed Testimony Obligations

The UWUA Intervenor's failure to provide any substantive responses undermines the most fundamental principles of discovery – allowing a party to prepare its case without surprise or ambush. Despite TAWC's small number of focused requests, the UWUA Intervenor's did not produce a single document or provide any substantive information. Instead, the UWUA Intervenor's state in the introduction to their Responses:

In particular, UWUA and Local 121 object to any alleged obligation on the part of the UWUA and Local 121 to 'supplement [their] answers . . . in advance . . . of . . . hearing' The UWUA and Local 121 need not decide upon the testimony and supporting evidence they intend to introduce as part of their case-in-chief until such time as they file that material with the Authority The Company can seek discovery concerning the UWUA and Local 121 case-in-chief *after* it is filed with the Authority in January.

Contrary to this global objection, the UWUA Intervenor's have a duty to respond to TAWC's Discovery Requests now to the extent responsive, non-privileged information presently exists in the UWUA Intervenor's custody or control. The UWUA Intervenor's objection is akin to a party stating: "You can find out my positions in this case if and when I testify." This is not the result intended by either the Procedural Order's discovery deadlines, or the Tennessee Rules of Civil Procedure. Rather, the UWUA Intervenor's have a duty to produce everything already in existence that is responsive to the request, regardless of whether it may later be included in the pre-filed testimony.¹

¹ The UWUA Intervenor's argument that filing discovery responses prior to pre-filed testimony would somehow violate the work product doctrine does not save their argument. TAWC's discovery requests are not seeking to

In the 2008 Rate Case (Docket No. 08-00039) the *UWUA Intervenors' same argument was considered and rejected*. In 2008, several of the intervenors, who are again intervenors in this proceeding, argued that they had no obligation to produce or supplement discovery responses until the filing of pre-filed testimony. The Hearing Officer rejected this argument and stated in the Order: "The Hearing Officer has determined that it is not 'a valid objection or reason not to answer a question that a party is anticipating filing prefiled testimony'... '[I]f a company or individual has an answer to a question, has the information and can provide it at the time the question is asked, then I think the question needs to be answered.'" See June 13, 2008 Order at 3 & 3, n.1 (Docket No. 08-00039).

As a practical matter, if no responses were due from Intervenors until January 5, 2011, it would render the discovery deadlines in the Procedural Order meaningless. Moreover, the universe of responsive information in discovery is necessarily larger than that submitted in the pre-filed testimony. That is the very essence and purpose of discovery. Consequently, the UWUA Intervenors have a duty to presently produce the non-privileged information and material in their possession that is responsive to TAWC's Requests.

B. The UWUA Intervenors Should Be Compelled to Supplement Their Responses Prior to Their Pre-Filed Testimony Deadline

In addition to the UWUA Intervenors' obligation to currently provide information and material in their possession is the obligation to supplement their responses as new material or information *comes into the UWUA Intervenors' knowledge or comes into existence*. The duty to supplement discovery responses is fundamental and expressly incorporated in both the

delve into the mental impressions of the UWUA Intervenors' lawyers, but rather, seek documents, facts and the identities of parties used to advance their position.

Tennessee Rules of Civil Procedure and in the Hearing Officer's Order in the 2008 Rate Case. *See* Tenn. R. Civ. P. 26.05; June 13, 2008 Order at 3, n.1 (Docket No. 08-00039).

Consistent with this obligation, the UWUA Intervenors should be required to provide TAWC with assurances of when, prior to the pre-filed testimony deadline, they will supplement their responses. At some point after the UWUA Intervenors filed their Petition to Intervene but *prior* to filing their pre-filed testimony, they will certainly know what facts, documents or witnesses they will utilize in presenting their opposition. It is inconceivable that a party would not know this information until the day, or even week before it files its pre-filed testimony. The UWUA Intervenors should be ordered to provide this information as soon as it becomes known or exists. This obligation is consistent with the fundamental purpose of discovery, which is to avoid surprises and provide the parties with adequate time to prepare their case. *See Conger*, 2001 Tenn. App. LEXIS 205, at *14.

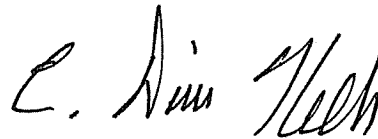
Because the case schedule provides for a very short time for TAWC to file rebuttal testimony after having received the six intervenors' witnesses' testimony, TAWC needs the information in its Requests as soon as it becomes available so that they can adequately respond. The prejudice of not receiving responses to these Requests until the day of, or even a few days ahead of, the pre-filed testimony can be seen by looking at the 2008 Rate Case. In that case, the City decided not to inform TAWC of its expert witnesses in advance of filing its pre-filed testimony, including witness Frank Impagliazzo. Mr. Impagliazzo was subject to a confidentiality agreement with TAWC at that time. Fortunately, another intervenor disclosed its intention to use Mr. Impagliazzo as an expert witness sufficiently prior to the pre-filed testimony deadline, which prevented TAWC from incurring irreparable harm. Had one of the other intervenors not made this advanced disclosure, TAWC would have been forced to litigate Mr.

Impagliazzo's disqualification in the few weeks that remained before the hearing, which would have seriously impaired its ability to prepare its case. To prevent similar unfair prejudice in this matter, the UWUA Intervenors (as well as all intervenors) should be required to supplement their discovery responses on a rolling basis and at a time sufficiently prior to the date of their pre-filed testimony.

Conclusion

For the reasons stated herein, the UWUA Intervenors have failed to adequately respond to TAWC's discovery requests. Pursuant to Tennessee Rule of Civil Procedure 37, TAWC respectfully requests that the Hearing Officer issue an order compelling the immediate production of material responsive to TAWC's requests. TAWC also requests that the Hearing Officer enter an Order compelling the UWUA Intervenors to provide assurances that they will fulfill their duty to supplement their responses as soon as they identify documents or learn of responsive answers, and to produce such answers on a rolling basis, rather than supplementing on January 5, 2010. TAWC also requests any additional relief under Rule 37 of the Tennessee Rules of Civil Procedure deemed appropriate.

Respectfully submitted,



R. Dale Grimes (#006223)
E. Steele Clayton (#017298)
C. David Killion (#026412)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
(615) 742-6200

*Attorneys for Petitioner
Tennessee American Water Company*

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 18th day of November, 2010, upon the following:

<input type="checkbox"/> Hand-Delivery	T. Jay Warner, Esq.
<input checked="" type="checkbox"/> U.S. Mail	Ryan McGehee, Esq.
<input type="checkbox"/> Facsimile	Mary L. White, Esq.
<input type="checkbox"/> Overnight	Counsel for the Consumer Advocate and Protection Division
<input checked="" type="checkbox"/> Email	Office of the Attorney General
	P.O. Box 20207
	Nashville, TN 37202

<input type="checkbox"/> Hand-Delivery	David C. Higney, Esq.
<input checked="" type="checkbox"/> U.S. Mail	Counsel for Chattanooga Manufacturers Association
<input type="checkbox"/> Facsimile	Grant, Konvalinka & Harrison, P.C.
<input type="checkbox"/> Overnight	633 Chestnut Street, 9th Floor
<input checked="" type="checkbox"/> Email	Chattanooga, TN 37450

<input type="checkbox"/> Hand-Delivery	Henry M. Walker, Esq.
<input checked="" type="checkbox"/> U.S. Mail	Counsel for Chattanooga Manufacturers Association
<input type="checkbox"/> Facsimile	Boult, Cummings, Conners & Berry, PLC
<input type="checkbox"/> Overnight	1600 Division Street, Suite 700
<input checked="" type="checkbox"/> Email	Nashville, TN 37203

<input type="checkbox"/> Hand-Delivery	Michael A. McMahan, Esq.
<input checked="" type="checkbox"/> U.S. Mail	Valerie L. Malueg, Esq.
<input type="checkbox"/> Facsimile	Special Counsel
<input type="checkbox"/> Overnight	City of Chattanooga (Hamilton County)
<input checked="" type="checkbox"/> Email	Office of the City Attorney
	100 East 11 th Street, Suite 200
	Chattanooga, TN 37402

<input type="checkbox"/> Hand-Delivery	Frederick L. Hitchcock, Esq.
<input checked="" type="checkbox"/> U.S. Mail	Harold L. North, Jr., Esq.
<input type="checkbox"/> Facsimile	Counsel for City of Chattanooga
<input type="checkbox"/> Overnight	Chambliss, Bahner & Stophel, P.C.
<input checked="" type="checkbox"/> Email	1000 Tallan Building
	Two Union Square
	Chattanooga, TN 37402

☐ Hand-Delivery
☒ U.S. Mail
☐ Facsimile
☐ Overnight
☒ Email

Mark Brooks
Counsel for Utility Workers Union of America,
AFL-CIO and UWUA Local 121
521 Central Avenue
Nashville, TN 37211

☐ Hand-Delivery
☒ U.S. Mail
☐ Facsimile
☐ Overnight
☒ Email

Scott H. Strauss
Katharine M. Mapes
Counsel for UWUA, AFL-CIO and UWUA Local 121
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

☐ Hand-Delivery
☒ U.S. Mail
☐ Facsimile
☐ Overnight
☒ Email

Donald L. Scholes
Counsel for Walden's Ridge Utility District and Signal Mountain
Branstetter, Stranch & Jennings PLLC
227 Second Avenue North
Fourth Floor
Nashville, TN 37201

