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November 18, 2010

Via Hand-Delivery

Chairman Mary W. Freeman
c/o Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

filed electronically in docket office on 11/18/10

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*

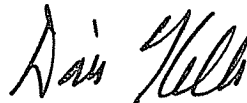
Dear Chairman Freeman:

Enclosed please find the original and five (5) copies of Tennessee American Water Company's Motion to Compel the City of Chattanooga 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)
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Chairman Mary W. Freeman

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**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 CITY OF CHATTANOOGA TO PROVIDE
COMPLETE DISCOVERY RESPONSES**

Tennessee American Water Company ("TAWC") served its discovery requests (the "Requests") upon the City of Chattanooga ("City") on November 1, 2010. The City responded to TAWC's requests on November 15, 2010 (the "Responses"). The City did not produce any documents or provide any substantive information in response to TAWC's requests. TAWC scheduled a meet and confer conference with the City to explore both its issues and TAWC's issues, but due to time constraints associated with having to conduct four meet and confer conferences in the short time frame provided to review discovery responses and file any motions to compel, the conference was cut short and the parties were therefore unable to resolve these issues. 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 City, on a rolling basis, to supplement its responses as it becomes aware of responsive documents and information rather than waiting until the day it files its 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 (14) 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 City has a duty to respond to each of TAWC’s requests to the maximum extent possible even when valid objections are asserted. Notwithstanding this duty, the City refuses to completely answer the majority of TAWC’s simple requests, 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 City Should Be Compelled To Provide Complete Responses To TAWC’s Discovery Request

A. The City Fails To Recognize A Distinction Between Its Discovery Obligations Under The Procedural Order And Its Pre-Filed Testimony Obligations

The City’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.

Incredibly, the City's Response does not contain substantive responses to the vast majority of requests posed by TAWC. Despite TAWC's small number of focused requests, the City did not produce a single document or provide any substantive information in response to TAWC's Requests. Instead, the City repeatedly states that it has "not yet developed" or has "not yet identified" the facts, documents or witnesses in its case, but that it will supplement its responses. *See, e.g.*, City's Responses to Requests Nos. 1, 3, 4, 5, 6, 7.

Pursuant to its discovery obligations under the Procedural Order, the City has a duty to respond to TAWC's Discovery Requests now to the extent responsive, non-privileged information presently exists in the City's custody or control. It is wrongful for the City to withhold such information or documentation currently available to the City until its January 5, 2011 pre-filed testimony is due. As a practical matter, if no responses were due from the intervenors until January 5, 2011, it would render the discovery deadlines in the Procedural Order meaningless. For example, if the City is aware of *any* documents that support its opposition to the relief requested by TAWC, these documents should be identified at this time. The Hearing Officer held as such in the previous rate case filing. *See* June 13, 2008 Order at 3, n.1 (Docket No. 08-00039) ("...[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."). Accordingly, the City certainly has a duty to produce everything already in existence that is responsive to the Requests, regardless of whether it may later be included in the pre-filed testimony.

B. The City Should Be Compelled to Supplement its Responses Prior to its Pre-Filed Testimony Deadline

Consistent with its duty under the Tennessee Rules of Procedure to supplement its discovery responses as new material or information *comes into its knowledge or existence*, the

City should be required to provide TAWC with assurances of when, prior to the pre-filed testimony deadline, it will supplement its responses. The duty to supplement discovery responses is fundamental and expressly incorporated in both the 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).

At some point after the City filed its Petition to Intervene but *prior* to filing its pre-filed testimony, it will certainly know what facts, documents or witnesses it will utilize in presenting its opposition. It is inconceivable that any party would not know this information until the day, or even a week before, it files its pre-filed testimony. Accordingly, the City 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 City (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.

C. TAWC Seeks Complete Responses To Requests Nos. 9, 10 and 14.

In Request No. 9, TAWC requests for the City to identify and detail any admission or statement against interest that it alleges TAWC made in contradiction to its requested relief. The City did not answer the question, but rather stated "Without waiving its objections, following receipt of TAWC's complete discovery responses, City will finish its review and will supplement its response." This answer is non-responsive. To comply with this simple Request, the City must either provide any responsive statements or state that it is unaware of any statements. The City should be required to answer this question.

In Request No. 10, TAWC requests that the City state its position as to the amount of the revenue requirement to which TAWC was entitled in Docket Nos. 08-00039 and 06-00290, and the amount actually awarded by the Tennessee Regulatory Authority in those cases. The City responds by objecting on relevance grounds and stating that this information is obtainable from public sources, which they allege are more convenient, less burdensome and less expense.

Once again, this is a simple question that merits a simple answer. The City took a position with respect to the amount of revenue requirement TAWC should have been awarded in the 2008 and 2006 rate cases – an amount substantially less than what the TRA deemed appropriate. TAWC is simply asking the City to state what that position was. Such a request is not unduly burdensome and the City's past history of revenue requirement proposals is directly relevant to this proceeding and, as such, should be produced.

Finally, in Request No. 14, TAWC requests production of all documents identified or specified in the City's answers or responses to the Requests. The City objected on the ground that TAWC already has in its possession all of the documents and information identified therein. The City, however, did not produce any documents in response to TAWC's requests. Moreover, this response contains no commitment to supplement the response as information becomes available. Accordingly, TAWC seeks the City to provide a complete response to this request.

Conclusion

For the reasons stated herein, the City of Chattanooga has failed to adequately respond to all of 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 City to provide assurances that it will fulfill its duty to supplement its Responses as soon as it identifies or learns of responsive documents on a rolling basis, rather than supplementing its responses on January 5, 2011, and requests any additional relief under Rule 37 of the Tennessee Rules of Civil Procedure deemed appropriate.

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

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