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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***

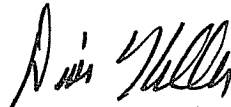
Dear Chairman Freeman:

Enclosed please find the original and five (5) copies of Tennessee American Water Company's Motion to Compel the Consumer Advocate and Protection Division 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)

Chairman Mary W. Freeman

November 18, 2010

Page 2

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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**

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**TENNESSEE AMERICAN WATER COMPANY'S MOTION TO COMPEL  
THE CONSUMER ADVOCATE AND PROTECTION DIVISION  
TO PROVIDE COMPLETE DISCOVERY RESPONSES**

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Tennessee American Water Company ("TAWC") served its discovery requests (the "Requests") upon the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD") on November 1, 2010. The CAPD 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 certain deficiencies in the CAPD's 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 CAPD, 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 CAPD 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 CAPD has not completely answered some of TAWC’s simple requests, in 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 CAPD Should Be Compelled To Provide Complete Responses To TAWC’s Discovery Requests**

### **A. The CAPD 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 CAPD should be required to provide TAWC with assurances of when, prior to the pre-filed testimony deadline, it will supplement its responses. At some point after the CAPD 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 a party would not know this information until the day, or even week before, it files its pre-filed testimony. The CAPD 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 CAPD (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.

**B. TAWC Seeks a Complete Response to Request 4.**

In Request No. 4 relating to the CAPD's expert witnesses, TAWC requests the CAPD to identify and produce "the subject matter of the witness' testimony, the substance and basis of the facts and opinions to be expressed, the data, documents, materials or other information shown to, relied upon, created by or considered by the witness as part of this case and/or as a basis in forming his or her opinions, any exhibits to be used as a summary of or support for each such opinion, the qualifications of the witness, including a full resume, a list of all publications authored by the witness, the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness has testified at trial, by deposition or submitted witness testimony." Although the CAPD responds with some of the requested information, it fails to produce any information regarding the compensation that is being paid to the various expert witnesses for their services. Contrary to any CAPD objections, the compensation of expert witnesses is universally recognized as relevant information and the same is true in this proceeding. Even if a final bill is not available, the CAPD can certainly provide the hourly rate being paid to these experts. Additionally, the CAPD produced documents relating to witness Hal Novak, but these documents do not contain any information on publications authored by this witness. If there are publications, the CAPD should provide this information; if no publications exist, the CAPD should state as such.<sup>1</sup> Accordingly, TAWC requests that the hearing officer compel a complete response to this Request.

**C. TAWC Seeks a Complete Response to Request 9.**

In Request No. 9, TAWC requests for the CAPD to identify and detail any admission or statement against interest it alleges TAWC made that contradicts the relief TAWC requests in

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<sup>1</sup> In the parties' meet and confer conference, the CAPD indicated that it was looking into this issue and several of the other issues identified in this Motion. TAWC, however, as of the filing deadline for motions to compel has not heard back from the CAPD.

this case. The CAPD objects on the grounds that this information is burdensome, vague, overly broad, seeks work product or privileged communications, seeks information that is publicly available and asks the CAPD's expert witnesses to draw legal conclusions. Thereafter, the CAPD responds by referring TAWC to its Responses to Requests Nos. 1, 6 and 7.

To comply with this Request, the CAPD need only provide any allegedly responsive statements or state that no statements currently exist. The CAPD's reference to Requests 1, 6 and 7 are not responsive because none of the CAPD's responses to those Requests detail any specific statements made by TAWC and certainly do not respond to the details surrounding these statements, as requested in subparts (a)-(e). Additionally, this information does not ask any non-legal expert to draw a legal conclusion; rather, the Request simply asks the CAPD to identify any TAWC statements that it alleges contradicts TAWC's requested rate increase. The CAPD's other boilerplate objections fail as these statements, if any do exist, would easily be known and would necessarily not involve any work product or privileged communications. Accordingly, TAWC moves to compel a complete response from the CAPD.

**D. TAWC Seeks a Complete Response to Request 10.**

In Request No. 10, TAWC requests that the CAPD 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 CAPD responds by objecting on the grounds that this information is unduly burdensome, seeks confidential work product and/or privileged communications and objects that this information is obtainable from public sources. The CAPD then responds with an evasive answer that is completely non-responsive to the Request, to wit: "In TRA Docket 08-00039, the Authority found a revenue deficiency of \$1,655,541; and [i]n TRA Docket 06-00290, the Authority found a revenue deficiency of \$4,079,965. While the Consumer Advocate argued that a lower revenue

requirement was warranted in both matters . . . the Consumer Advocate believes that TAWC is legally 'entitled' to whatever revenue requirement is ultimately ordered by the TRA or, if applicable, by any court having appellate jurisdiction in each docket."

The CAPD took a position with respect to the revenue requirement TAWC should have been awarded in the 2008 and 2006 rate cases. TAWC is simply asking the CAPD to state what that position was. Such a request is not unduly burdensome and the CAPD's past history of revenue requirement proposals is directly relevant to this proceeding and, as such, should be produced. Likewise, the CAPD cannot assert a colorable privilege objection to its positions asserted before the TRA in those cases. TAWC seeks to compel the CAPD to respond fully to this simple Request.

**E. TAWC Seeks a Complete Response to Request 14.**

In Request 14, TAWC simply seeks all documents identified or specified in the CAPD's responses to these Requests. TAWC objects, partially, on the grounds that this information is publically available. This objection is invalid because many of the documents cited in the CAPD's Responses, particularly the response to Request 1, are documents that are not readily accessible to TAWC. These documents include various obscure testimonies, reports and orders in four different states' regulatory dockets. If the CAPD intends to rely on these testimonies, opinions and other out-of-state materials, they must provide a copy of to TAWC so that it can adequately respond. It is not the requestor's duty to fish out the information sought in its requests, when that information is numerous and not readily accessible.

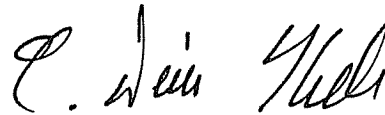
**Conclusion**

For the reasons stated herein, the CAPD 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 CAPD to provide assurances that it will fulfill its duty to supplement its responses as soon as it identifies documents or learns of responsive documents on a rolling basis, rather than supplementing 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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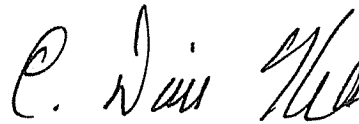
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