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November 19, 2010

Mary Freeman, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

filed electronically in docket office on 11/19/10

Attention: Sharla Dillon

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

Dear Chairman Freeman:

Enclosed please find for filing in the above-referenced proceeding the Utility Workers Union of America, AFL-CIO and UWUA Local 121's Response to the Tennessee American Water Company's Motion to Compel. The original and four copies will be sent via U.S. Mail.

Please feel free to contact me if you have any questions. Thank you for your attention to this matter.

Sincerely,



Scott H. Strauss
Katharine M. Mapes

Attorneys for UWUA Intervenors

Enclosures

**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

**RESPONSE OF THE UTILITY WORKERS UNION OF AMERICA, AFL-
CIO AND UWUA LOCAL 121 TO TENNESSEE AMERICAN WATER
COMPANY'S MOTION TO COMPEL**

Pursuant to TRA Rule 1220-1-2-.06(2), the Utility Workers Union of America, AFL-CIO ("UWUA") and UWUA Local 121 (collectively, "UWUA Intervenors") respectfully request that the Tennessee Regulatory Authority ("TRA" or "the Authority") deny the Motion of the Tennessee American Water Company ("TAWC" or "the Company") to compel UWUA Intervenors to provide further discovery responses.

As part of the "meet and confer" process, UWUA Intervenors stated to the Company (in writing) that they are willing to supplement their data responses, to the extent that responsive information exists and is not subject to an applicable privilege. The Company is entitled to nothing more, and the Motion to Compel should be denied.

In support of their position, UWUA Intervenors state:

The Company correctly notes that the parties conducted a good faith meet and confer conference on November 17, 2010. Motion at 1. As a follow-up to that conference, counsel for UWUA Intervenors wrote to Company counsel and suggested the following resolution to the Company's concern:

UWUA Intervenor Counsel acknowledge that we have a duty to supplement our data responses. To the extent we come into possession of responsive information that is not subject to work product or other applicable privileges, as set forth in our responses, we will honor that duty.

E-mail from UWUA Intervenor Counsel to TAWC Counsel (Nov. 18, 2010, 11:07 EST)

(attached as Ex. A).

Our expectation was that this representation would end any discovery dispute. Instead, the Company asks that UWUA Intervenor Counsel be compelled “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.” Motion at 1. This request, however, is unnecessary: but for the right of UWUA Intervenor Counsel to assert applicable privileges, of which the Company cannot compel waiver, UWUA Intervenor Counsel have already committed to this position.

The Company quotes a paragraph of UWUA Intervenor Counsel’s Responses to their First Set of Discovery Requests (“Responses”) that implies UWUA Intervenor Counsel’s objections to those Discovery Requests was based on a blanket objection to all discovery requests served in advance of pre-filed testimony. That is not the case. Rather, UWUA Intervenor Counsel objected primarily to those questions that appeared to be attempts to discover attorney work product, which the Company has no right to receive. The majority of the Company’s data requests, and each of the data responses that appear to be the subject of the Company’s Motion to Compel, sought ongoing information regarding the strategic litigation decisions made by counsel, including: all documents they had considered – but not decided on – using in litigation; all facts which could – but were not necessarily – relevant to their case, and; each potential witness that UWUA Intervenor Counsel might call but had made no final decision regarding. As UWUA Intervenor Counsel explained in their Responses:

“The central purpose of the work product doctrine is to protect an attorney's preparation for trial under the adversary system. The policy underlying the doctrine is that lawyers preparing for litigation should be permitted to assemble information, to separate the relevant facts from the irrelevant, and to use the relevant facts to plan and prepare their strategy without undue and needless interference.” *Swift. v. Campbell*, 159 S.W.3d 565, 572 (Tenn. Ct. App. 2004) (citing *Boyd v. Comdata Network, Inc.* 88 S.W.3d 203, 219-20 (Tenn. Ct. App. 2002)). “Thus, the doctrine protects parties from ‘learning of the adversary's mental impressions, conclusions, and legal theories of the case,’ *Memphis Publ'g Co. v. City of Memphis*, [871 S.W.2d 681, 689], and prevents a litigant ‘from taking a free ride on the research and thinking of his opponent's lawyer.’ *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999).” *Swift*, 159 S.W.3d at 572 (quoting cited cases).

Accordingly, UWUA Intervenors stated that they would “present [their] case-in-chief in accordance with the ordered schedule and the Company can seek proper and tailored discovery into those submissions at that time.”

That does not constitute a refusal to answer the Company's discovery requests at this time *if they are properly tailored* and insofar as UWUA Intervenors have non-privileged responsive information, which UWUA Intervenors have already stated a willingness to provide. However, the Company's service of a data request does not constitute a unilateral waiver by UWUA Intervenors of applicable privileges.¹ UWUA Intervenors have no obligation to provide the Company with their preliminary and strategic determinations as to what information it might potentially seek to use at hearing in this proceeding. The Company's statement that “the universe of responsive information in discovery is necessarily larger than that submitted in the pre-filed testimony” proves nothing. Motion at 4. While the Company is

¹ The Company cites to a passage in an Order issued by the Hearing Officer in a 2008 rate case stating that it is not “a valid objection or reason not to answer a question that a party is anticipating filing prefiled testimony.” Motion at 4 (quoting the June 13 Order at 3 & n.1, Docket No. 08-00039). The ruling does not state that the assertion of an applicable privilege is not a valid objection or reason not to answer a question.

entitled to some data from UWUA Intervenor prior to the submission of pre-filed testimony,² the Company is not entitled to a continuous running (or “rolling”) log of opposing parties’ current thinking and strategizing regarding their case.

As such, and for the reasons stated herein, UWUA Intervenor asserts that they have satisfied their obligations regarding the Company’s discovery requests and respectfully request that the Authority deny the Company’s Motion.

Respectfully submitted,

/s/ Mark Brooks

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/s/ Scott H. Strauss

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November 19, 2010

² For instance, the Company asked for a list of other state commission proceedings in which UWUA had intervened or filed testimony. While objecting to the question as overbroad, UWUA Intervenor provided a list of all state commission proceedings involving American Water companies in which it had, to its knowledge, intervened.

Exhibit A

Mapes, Katharine

From: Strauss, Scott H.
Sent: Thursday, November 18, 2010 11:07 AM
To: Grimes, Dale
Cc: Mapes, Katharine; markbrooks@uwua.net
Subject: Discovery Issues

Dale --

We appreciated the opportunity to confer with you and others last night concerning discovery issues.

As a follow-up to our discussion concerning the UWUA data responses, we suggest the following as a resolution to the concerns that have been raised:

UWUA Intervenors acknowledge that we have a duty to supplement our data responses. To the extent we come into possession of responsive information that is not subject to work product or other applicable privileges, as set forth in our responses, we will honor that duty.

Will that work?

Please let us know.

Thanks,

Scott/Katie

CERTIFICATE OF SERVICE

I, Scott H. Strauss, counsel for UWUA Intervenors, hereby certify that on the 19th day of November, 2010, caused a true and correct copy of the foregoing Response of the Utility Workers Union of America, AFL-CIO and UWUA Local 121 to Tennessee American Water Company's Motion to Compel to be served upon all parties of record via U.S. mail or facsimile.

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/s/ Scott H. Strauss

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