

# BASS

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November 19, 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 11/19/10

**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 Response to the Consumer Advocate and Protection Division's Motion to Compel. 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.

With kindest regards, I remain

Very truly yours,



R. Dale Grimes

RDG:smb  
Enclosures

Chairman Mary Freeman

November 19, 2010

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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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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**

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**TENNESSEE AMERICAN WATER COMPANY'S RESPONSE TO THE CONSUMER  
ADVOCATE AND PROTECTION DIVISION'S MOTION TO COMPEL**

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To date, Tennessee American Water Company ("TAWC") has produced thousands of pages of information in this case. Specifically, in response to the Consumer Advocate and Protection Division's ("CAPD") Discovery Requests, TAWC has produced hundreds of pages of responsive material.

In spite of the massive volume of TAWC's Responses, and TAWC's good faith explanations during the meet and confer conference regarding why additional documentation does not exist or cannot be produced, the CAPD now claims that eleven TAWC Responses are insufficient. The CAPD also objects because TAWC did not voluntarily answer the 135 discovery requests that the CAPD propounded in excess of the 80 discovery requests authorized by the Hearing Officer. Not only did TAWC sufficiently respond to the eleven Requests identified by the CAPD as allegedly deficient, but TAWC also has no obligation to answer more than the 80 discovery requests (including subparts) authorized by the Hearing Officer. Accordingly, as set forth in more detail, the CAPD's Motion should be denied.

**I. TAWC Has No Access to RWE Information**

The CAPD objects to the TAWC's responses to Requests 4, 5, 6 and 7 because TAWC did not provide information related to RWE AG an entity that was formerly the ultimate parent of American Water Works Company, Inc. ("AWWC"). As clearly set forth in its responses and confirmed during the meet and confer with counsel, RWE AG began divesting its ownership interest in April 2009 and no longer has any ownership interest in TAWC. The ultimate fact is that TAWC does not have the requested information in its possession, custody or control. Accordingly, even if such information were relevant, which it is not, TAWC cannot produce the requested information.

**II. Affiliate Company Information is Not Relevant**

The CAPD also objects to TAWC's responses to Requests 4 and 5 wherein the CAPD demands that TAWC produce financial information related to any "subsidiary or affiliate companies." This is a rate case involving only TAWC. Further, the "double leveraging" issue raised by the CAPD is a red herring. The "double leveraging" calculation has been calculated in the past by the TRA and the intervenors based on TAWC and its parent, AWWC.

**III. TAWC Has Provided Complete Responses to Requests Nos. 36, 37, and 39**

The CAPD argues that TAWC's objections to Requests Nos. 36, 37 and 39 on the ground of relevancy and burden are inappropriate and therefore TAWC should be required to respond more fully. While the CAPD tries to present TAWC's relevancy and unduly burdensome objections as two completely separate issues for these requests, the issues are interrelated due to the nature of the requests. For example, in Request No. 36, the CAPD has demanded the total amount of charges subject to allocation or direct charge to all affiliates from American Water Works Service Company ("AWWSC"), but for an entirely different test year than contained in TAWC's direct testimony. The information sought by the CAPD does not exist in the format

requested. As TAWC stated in its responses, it would be unduly burdensome and extremely costly to create. The Tennessee Rules of Civil Procedure related to discovery do not require a party to create documents that do not exist out of whole cloth.

As TAWC also noted, however, the raw data from which the CAPD could determine the requested information has already been produced. For example, TAWC's response to the CRMA's Request No. 4 provides the breakdown by subsidiary for TAWC's test year. TAWC has provided reasonable and responsive information related to this request, and breaking the costs down by affiliated entity as requested would be superfluous and extremely burdensome because the breakdown would require TAWC to create from whole cloth twenty or more pages of calculations for each affiliated entity. The discovery rules do not require a party to do the other party's work. If the CAPD wishes to use a different test year, which TAWC submits is inappropriate and unnecessary, the CAPD needs to run the calculations it desires rather than requiring the Company to essentially redo its filing for a different period.

#### **IV. Information From 2004 and Earlier Is Unduly Burdensome To Access**

In response to numerous questions for AWWSC information from 2004 and earlier, TAWC explains that the requested information is not readily available due to it being stored on backup tapes, and that because of "a modification in the accounting system that took place in 2005, 2004 Service Company charges are not readily available. To recreate the records and present them in a comparable fashion . . . would be extremely labor intensive if it could be done at all." The CAPD apparently questions TAWC's sworn responses on the difficulty involved in accessing information on backup tapes from a prior accounting system and instead has moved to compel this information. The CAPD also lays out a conspiracy theory that fixates on the "odd coincidence" that 2004 is a "critical benchmark year."

The simple fact is that TAWC has presented sworn testimony stating the significant difficulties associated with accessing the requested information. Furthermore, TAWC has either produced information and documents or explained why it is unable to in response to Requests Nos. 35 and 43. Under the Tennessee Rules of Civil Procedure, it is the CAPD's burden to establish good cause that outweighs this significant burden of production. *See* Tenn. R. Civ. P. 26.02, Advisory Comment. Instead of showing good cause, the CAPD instead argues that the cost of producing the information is not high because TAWC's affiliates have had to respond to numerous discovery requests in other cases. However, as repeatedly pointed out in prior filings, the CAPD still makes no effort to explain how the cited proceedings in other jurisdictions are in any way an "apples to apples" comparison to the Authority and its rate case process. The referenced jurisdictions do not have discovery limits. Because the CAPD has failed to show good cause, their motion to compel the production of information contained on an old accounting system's backup tapes should be denied.

**V. Disclosure of AWWC Projections Would Violate SEC Regulations**

The CAPD has moved to compel all non-public financial projections from AWWC, which is a publicly traded company. As explained in TAWC's responses, such disclosure would clearly violate the U.S. Securities and Exchange Commission's fair disclosure rules. Moreover, the consolidated financial information requested does not exist.<sup>1</sup> The CAPD's suggestion that these projections may not qualify as confidential information evidences a serious misunderstanding of the Federal securities laws. Further, the CAPD fails to show why the

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<sup>1</sup> In the budgeting process, each subsidiary of AWWC prepares a plan or budget for each subsidiary. However, nowhere in that process is a capital structure prepared on a consolidated basis. TAWC and AWWC do not have the requested information for 2011 responsive to this type of question, and neither TAWC nor AWWC generate such documents as part of the budgeting process.

budgeted or forecasted information it seeks regarding AWWC is relevant. Again, this rate case involves TAWC.

The CAPD argues that “the parties in this case are not . . . the kind of persons to whom the SEC rules are directed.” First, the parties to this case are in fact members of the general investing public and are therefore the “kind of persons to whom the SEC rules are directed.” Second, even if the fair disclosure rules are more focused on market professionals and those that hold the publicly traded company’s securities, the rules still apply to AWWC. The fact remains that if the Hearing Officer forced TAWC to produce AWWC’s non-public financial projections in this matter there would be no way for TAWC to ensure that AWWC’s non-public projections would not be provided to market professionals or holders of AWWC’s securities.

In addition, the CAPD fails to make a showing as to why forecasts of AWWC are even relevant. Therefore, if forced to create and produce the non-public financial projections of AWWC, the Hearing Officer would at least have to enter a new protective order requiring that such statements could only be released to any individual that has issued a sworn statement affirming that they are not a market professional, holder of AWWC securities, or any other party prohibited from receiving non-public financial projections under the SEC fair disclosure rules. The CAPD has failed to show good cause for the required information that rises to the level of necessitating the implementation of such burdensome added protections.

#### **VI. The CAPD’s Request for “Not Yet Completed” Budgets is Unduly Burdensome**

With respect to Requests Nos. 35 and 37, TAWC responded in part that the requested forecast information and budgets were not yet completed. The CAPD now moves to compel every piece of “forecasted” or “budgeted” data “in whatever form it presently exists.” Providing bits and pieces of forecasts that have not been completed is simply not relevant and will only serve to confuse the issues regarding budgeting and forecasting. Moreover, it would be unduly

burdensome to require TAWC to gather each and every piece of information that could be considered a “forecast” or “budget” of any kind. TAWC has given its assurances that it will provide such budgets and forecasts upon completion and the CAPD has made no showing of any particularized need for partial, uncompleted budget forecasts.

**VII. The Requested Morningstar Book is Publicly Available**

In response to Request No. 9, TAWC provided information concerning the 20 year risk premium of common stocks as referenced in the testimony of its witness Dr. Vander Wide. The CAPD has now moved to compel TAWC to provide additional information not referred to or relied upon by Dr. Vander Wide. The CAPD alleges that such information is contained in Morningstar’s *Stocks, Bonds, Bills and Inflation* book, but that the book is not publicly available because the CAPD would be forced to purchase the book to obtain the information. This simply is not the case. Had the CAPD checked the local library before preparing and filing a motion to compel, the CAPD would have learned that this book is readily available at call no. 332.632 S865v in the downtown branch of the Nashville Public Library. TAWC’s expert did not use or rely on the requested information. If the CAPD wants the information, they can obtain it the same way TAWC would obtain it. Common sense dictates that the CAPD has just as easy access to this material as does TAWC and therefore this objection is without merit.

**VIII. The CAPD Propounded More Discovery Requests Than Is Permitted By TRA Rule 1220-1-2-.11(5)(a).**

On October 18, 2010, the Hearing Officer granted the CAPD twice the discovery requests ordinarily permitted under the TRA’s Rules. *See* TRA Rule 1220-1-2-.11(5)(a). Notwithstanding this generous expansion of discovery, the CAPD proceeded to propound 215 plus discovery requests upon TAWC on October 20 and November 1. TAWC answered the first



80 discovery requests as required and was under no obligation to respond to the 135 additional requests propounded.

TRA Rule 1220-1-2-.11(5)(a) is clear:

No party shall serve on any other party more than forty (40) discovery requests, *including subparts* without first having obtained leave of the Authority or Hearing Officer . . . If a party is served with more than forty (40) discovery requests without an order authorizing the same, such party need only respond to the first forty (40) requests.

TRA Rule 1220-1-2-.11(5)(a) (emphasis added): Such limitations, including the counting of subparts as separate requests, on the initial number of discovery requests are a routine, necessary, well-accepted, and well-understood mechanism to balance and facilitate the exchange of information and the progress of the proceeding.<sup>2</sup>

The CAPD has filed a motion for leave to propound more than 80 discovery requests. TAWC has filed its opposition to that motion and incorporates its response here. As set forth in the Company's response, the CAPD has not shown the required good cause to exceed the 80 discovery requests authorized by the TRA.

It is undisputed that TAWC only had a duty to respond to the 80 requests permitted by the Hearing Officer as it did in this case. Consequently, the CAPD has no basis to compel further responses by TAWC and its motion should be denied for all of the foregoing reasons, and for those reasons to be further discussed at the status conference scheduled for Monday, November 22, 2010.

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<sup>2</sup> Other forums have similar rules that are equally clear, for instance, the Local Rules of the United States District Court for the Middle District of Tennessee provide that "subparts of a question shall be counted as additional questions for purposes of the overall number." Local Rule 33.01(b).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Dale Grimes", written over a horizontal line.

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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 19th day of November, 2010, upon the following:

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