

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**December 23, 2010**

<b>IN RE:</b>	)	
	)	
<b>PETITION OF TENNESSEE AMERICAN WATER</b>	)	<b>DOCKET NO.</b>
<b>COMPANY FOR A GENERAL RATE INCREASE</b>	)	<b>10-00189</b>
	)	

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**ORDER ON FIRST ROUND DISCOVERY DISPUTES**

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This matter is before the Hearing Officer to address certain first round discovery matters, including various motions and objections that were filed with the Tennessee Regulatory Authority (“TRA” or the “Authority”) by the Tennessee American Water Company (“TAWC” or the “Company”) and the intervening parties, including the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”), City of Chattanooga, Tennessee (the “City”), Chattanooga Regional Manufacturers Association (“CRMA”),<sup>1</sup> and Utility Workers Union of America AFL-CIO and UWUA Local 121 (“UWUA”).

**RELEVANT PROCEDURAL BACKGROUND**

In accordance with the Procedural Schedule established by the Hearing Officer, the parties commenced the first round of formal discovery on November 1, 2010.<sup>2</sup> TAWC served its first discovery requests upon the intervening parties: the Consumer Advocate, the City, CRMA, UWUA, Walden’s Ridge Utility District (“Walden’s Ridge”), and the Town of Signal Mountain,

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<sup>1</sup> On November 15, 2010, the Chattanooga Manufacturers Association notified the Authority that its name had changed to the Chattanooga Regional Manufacturers Association and further requested that future documents reflect this change. *See* Notice of Name Change (November 15, 2010).

<sup>2</sup> During the Status Conference held on October 18, 2010, the Hearing Officer granted permission for the Consumer Advocate to serve its initial eighty discovery questions upon TAWC on Wednesday, October 20, 2010. Thereafter, the Consumer Advocate filed with the Authority its *First Discovery Requests of the Consumer Advocate to TAWC* on the specified date. *See* Transcript of Proceedings, pp. 62-64 (October 18, 2010).

Tennessee (“Signal Mountain”).<sup>3</sup> Likewise, the City, CRMA, and UWUA each filed first discovery requests to TAWC on November 1, 2010.<sup>4</sup> With their discovery, the City and UWUA each contemporaneously filed pleadings requesting permission to serve discovery in excess of the initial forty questions allotted in TRA Rule 1220-1-2-.11(5)(a).<sup>5</sup> The Consumer Advocate also proffered supplemental discovery with the required pleadings asking for permission to serve its proposed supplemental requests, which exceeded the eighty requests initially granted by the Hearing Officer.<sup>6</sup>

On November 9, 2010, TAWC filed responses opposing the Intervenor’s requests for permission to serve discovery exceeding the prescribed limits.<sup>7</sup> Thereafter, the UWUA on November 10, 2010, and the Consumer Advocate and City on November 12, 2010, each filed for permission to reply to TAWC’s opposition to additional discovery, and proffered a statement in

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<sup>3</sup> See *Tennessee American Water Company's First Discovery Requests to Consumer Advocate and Protection Division of the Attorney General for the State of Tennessee* (November 1, 2010), *Tennessee American Water Company's First Discovery Requests to City of Chattanooga* (November 1, 2010), *Tennessee American Water Company's Discovery Requests to Chattanooga Manufacturer's Association* (November 1, 2010), *Tennessee American Water Company's Discovery Requests to Walden's Ridge Utility District* (November 1, 2010), *Tennessee American Water Company's First Discovery Requests to Utility Workers Union Of America, AFL-CIO and UWUA Local 121* (November 1, 2010), and *Tennessee American Water Company's Discovery Requests to Town of Signal Mountain, Tennessee* (November 1, 2010).

<sup>4</sup> See *City of Chattanooga's First Discovery Requests to Petitioner Tennessee American Water Company* (November 1, 2010), *Chattanooga Manufacturers Association's First Set of Data Requests to Tennessee American Water Company* (November 1, 2010), and *First Discovery Request of the Utility Workers Union Of America, AFL-CIO and UWUA Local 121 to Tennessee American Water Company* (November 1, 2010).

<sup>5</sup> See *The City of Chattanooga's Motion for Permission to Propound Additional Discovery Requests* (November 1, 2010) and *Motion of UWUA Intervenor for Leave to Serve More Than Forty (40) Discovery Requests on the Tennessee American Water Company* (November 1, 2010) and *Memorandum of UWUA Intervenor in Support of Motion for Leave to Serve More Than Forty (40) Discovery Requests on the Tennessee American Water Company* (November 1, 2010).

<sup>6</sup> *Motion for Leave to Issue More Than Eighty Requests* (November 1, 2010), *Memorandum in Support of the Consumer Advocate's Motion for Leave to Issue More Than Eighty Discovery Requests* (November 1, 2010), and *Supplemental Discovery Request of the Consumer Advocate and Protection Division to Tennessee American Water Company* (November 1, 2010).

<sup>7</sup> See *Tennessee American Water Company's Response in Opposition to the Consumer Advocate's Motion for Leave to Issue More Than Eighty Discovery Requests* (November 9, 2010), *Tennessee American Water Company's Response in Opposition to UWUA Intervenor's Motion for Leave to Serve More Than Forty Discovery Requests* (November 9, 2010), and *Tennessee American Water Company's Response in Opposition to the City of Chattanooga's Motion for Permission to Propound Additional Discovery Requests* (November 9, 2010).

reply.<sup>8</sup> TAWC filed responses opposing the Intervenor's requests for permission to reply on October 18, 2010.<sup>9</sup>

On November 15, 2010, a Notice of Status Conference was issued setting a Status Conference for Monday, November 22, 2010. The Notice stated that items for discussion during the Status Conference included discovery disputes of the parties and other pre-hearing matters. Also on November 15, 2010, the Consumer Advocate, CRMA, City, UWUA, and TAWC filed initial responses to the first round of discovery, some of which also included objections to particular requests.<sup>10</sup> Walden's Ridge and Signal Mountain each filed responses to discovery on November 18, 2010.<sup>11</sup>

On November 18, 2010, the Consumer Advocate, City, CRMA, and TAWC, each filed

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<sup>8</sup> See *Motion of UWUA Intervenor for Leave to Submit Brief Reply, and Reply to Tennessee American Water Company's Response in Opposition to UWUA Intervenor's Motion for Leave to Serve More Than Forty) Discovery Requests* (November 10, 2010), *Motion by the City of Chattanooga for Leave to File a Reply in Support of Its Motion for Permission to Propound Additional Discovery Requests* (November 12, 2010), and *Motion of the Consumer Advocate for Leave to File a Reply to TAWC's Opposition to Additional Discovery Beyond Eighty Questions* (November 12, 2010) and *Reply of the Consumer Advocate and Protection Division to TAWC's Opposition to the Motion for Leave to Issue More Than Eighty Discovery Requests* (November 12, 2010).

<sup>9</sup> *Tennessee American Water Company's Response in Opposition to the Consumer Advocate and Protection Division's Motion for Leave to File a Reply to TAWC's Opposition to Additional Discovery Beyond Eighty Questions* (November 18, 2010), *Tennessee American Water Company's Response in Opposition to the City of Chattanooga's Motion for Leave to File a Reply in Support of Its Motion for Permission to Propound Additional Discovery Requests* (November 18, 2010), *Tennessee American Water Company's Response in Opposition to the UWUA Intervenor's Motion for Leave to File a Reply in Support of Its Motion for Leave to Serve More Than Forty Discovery Requests* (November 18, 2010).

<sup>10</sup> See *Consumer Advocate and Protection Division's Responses to Tennessee American Water Company's First Discovery Requests* (November 15, 2010), *Chattanooga Regional Manufacturers Association's Responses and Objections to Tennessee American Water Company's First Set of Data Requests* (November 15, 2010), *The City of Chattanooga's Responses and Objections to Discovery Requests of Tennessee American Water Company* (November 15, 2010), *Responses and Objections of the Utility Workers Union of America, AFL-CIO and UWUA Local 121 to Tennessee American Water Company's First Set of Discovery Requests* (November 15, 2010), *Tennessee American Water Company's Responses to the First Discovery Request of the Consumer Advocate and Protection Division to Tennessee American Water Company* (November 15, 2010), *Tennessee American Water Company's Responses to the Chattanooga Manufacturers Association's First Set of Data Requests to Tennessee American Water Company* (November 15, 2010), *Tennessee American Water Company's Responses to the City of Chattanooga's First Discovery Requests to Petitioner Tennessee American Water Company* (November 15, 2010), *Tennessee American Water Company's Responses to the First Discovery Request of the Utility Workers Union of America, AFL-CIO and UWUA Local 121 to Tennessee American Water Company* (November 15, 2010).

<sup>11</sup> See *Walden's Ridge Utility District's Responses to Discovery Requests of Tennessee American Water Company* (November 18, 2010) and *The Town of Signal Mountain's Responses to Discovery Requests of Tennessee American Water Company* (November 18, 2010).

motions to compel responses to particular discovery requests propounded in the first round.<sup>12</sup> On November 19, 2010, pursuant to the provisions of the Protective Order and subsequent Amendment to Protective Order,<sup>13</sup> TAWC filed responses to certain discovery requests of the Intervenor that it deemed confidential and proprietary, and therefore subject to protection.<sup>14</sup> Also on November 19, 2010, UWUA filed its response to TAWC's motion to compel, and the TAWC filed its responses to motions to compel discovery filed against it by the Consumer Advocate and CRMA.<sup>15</sup> On November 22, 2010, TAWC filed its response to the City's motion to compel, and the Consumer Advocate filed an amendment to its motion, notifying the Authority that certain disputed responses to discovery had been resolved.<sup>16</sup>

The parties continued to file supplemental responses to a myriad of first round discovery requests, on a rolling basis, during the weeks following the November 22, 2010 Status

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<sup>12</sup> See *Motion to Compel Tennessee American Water Company to Answer the Second Round of Discovery Requests of the Consumer Advocate and Protection Division* (November 18, 2010), *The City of Chattanooga's Motion to Compel Tennessee American Water Company to Respond to Discovery Requests* (November 18, 2010), *Chattanooga Regional Manufacturers Association's Motion to Compel Tennessee American Water Company to Provide Appropriate & Complete Responses to CRMA's First Set of Data Requests and, in the Alternative, to Allow CRMA's Entire First Set of Data Requests if Those are Construed to Exceed Forty (40) Requests* (November 18, 2010), *Tennessee American Water Company's Motion to Compel the Chattanooga Regional Manufacturers Association to Provide Complete Discovery Responses* (November 18, 2010), *Tennessee American Water Company's Motion to Compel the Consumer Advocate and Protection Division to Provide Complete Discovery Responses* (November 18, 2010), *Tennessee American Water Company's Motion to Compel the City of Chattanooga to Provide Complete Discovery Responses* (November 18, 2010), *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* (November 18, 2010).

<sup>13</sup> See *Protective Order* (November 15, 2010) and *Amendment to Protective Order* (November 19, 2010).

<sup>14</sup> *Notice of Filing of Confidential and Proprietary Responses of Tennessee American Water Company to the First Discovery Requests of the Consumer Advocate and Protection Division* (November 19, 2010), *Notice of Filing of Confidential and Proprietary Responses of Tennessee American Water Company to the City of Chattanooga's First Discovery Requests* (November 19, 2010), and *Notice of Filing of Confidential and Proprietary Responses of Tennessee American Water Company to the Chattanooga Regional Manufacturers Association's First Set of Data Requests* (November 19, 2010).

<sup>15</sup> See *Response of the Utility Workers Union of America, AFL-CIO and UWUA Local 121 to Tennessee American Water Company's Motion to Compel* (November 19, 2010), *Tennessee American Water Company's Response to the Consumer Advocate and Protection Division's Motion to Compel* (November 19, 2010), and *Tennessee American Water Company's Response to the Chattanooga Regional Manufacturers Association's Motion to Compel* (November 19, 2010).

<sup>16</sup> See *Amendment to the Consumer Advocate's Motion to Compel Tennessee American Water Company to Provide Responses to the Discovery Requests of the Consumer Advocate* (November 22, 2010).

Conference.<sup>17</sup> On December 6, 2010, the City filed a second motion to compel against TAWC, renewing its objections concerning certain requests included in its first motion and raising additional issues for the determination of the Hearing Officer.<sup>18</sup> TAWC filed its response to the City's second motion on December 9, 2010. In addition, on December 9, 2010, a Notice of Status Conference was issued setting a Status Conference for Monday, December 13, 2010. The Notice stated that the purposes of the Status Conference were discussion of the posture of the case and outstanding motions, and provided for party participation by telephone if so desired.<sup>19</sup>

#### **I. STATUS CONFERENCE ON NOVEMBER 22, 2010**

On November 22, 2010, the Hearing Officer convened a Status Conference following the regularly scheduled Authority Conference, as noticed on November 15, 2010. In attendance at the Status Conference were the following parties represented by counsel:

Tennessee American Water Company – **R. Dale Grimes, Esq.** and **David Killion, Esq.**,  
Bass, Berry & Sims, PLC, 150 Third Avenue South, Suite 2800, Nashville, TN 37201.

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<sup>17</sup> See *Consumer Advocate and Protection Division's Supplemental Responses to Tennessee American Water Company's First Discovery Requests* (November 29, 2010), *Tennessee American Water Company's First Supplemental Responses to the Chattanooga Regional Manufacturers Association's Data Requests # 2, 3, 5, 6, 10, 13, 19 and 21* (December 2, 2010), *Tennessee American Water Company's First Supplemental Responses to the Chattanooga Regional Manufacturers Association's First Set of Data Requests to Tennessee American Water Company*, Questions 25 through 34 (December 2, 2010), *Tennessee American Water Company's First Supplemental Responses to the City of Chattanooga's Data Requests # 3 through 6, 8, 9, 19 and 21* (December 2, 2010), *Tennessee American Water Company's First Supplemental Responses to the City of Chattanooga's First Discovery Requests to Petitioner Tennessee American Water Company*, Questions 32 through 86 (December 2, 2010), *Tennessee American Water Company's First Supplemental Responses to the First Discovery Request and First Responses to the Supplemental Discovery Request of the Consumer Advocate and Protection Division to Tennessee American Water Company*, Questions 53 through 126 (December 2, 2010), *Tennessee American Water Company's First Supplemental Responses to the Consumer Advocate and Protection Division's Data Requests # 9, 10, 35, 37 and 43* (December 2, 2010), *Tennessee American Water Company's First Supplemental Responses to the First Discovery Request of the Utility Workers Union of America, AFL-CIO and UWUA Local 121 to Tennessee American Water Company* (December 2, 2010), *Tennessee American Water Company's December 8<sup>th</sup> Supplemental Responses to the First Discovery Request and Supplemental Discovery Request of the Consumer Advocate* (December 8, 2010), *Tennessee American Water Company's December 8<sup>th</sup> Supplemental Responses to the City of Chattanooga's First Discovery Requests* (December 8, 2010), *Tennessee American Water Company's December 8<sup>th</sup> Supplemental Responses to the First Discovery Request of the Utility Workers Union of America, AFL-CIO and UWUA Local 121* (December 8, 2010), *Tennessee American Water Company's December 8<sup>th</sup> Supplemental Responses to the Chattanooga Regional Manufacturers Association's First Discovery Requests* (December 8, 2010).

<sup>18</sup> See *The City of Chattanooga's Second Motion to Compel Tennessee American Water Company to Respond to Discovery Requests* (December 6, 2010).

<sup>19</sup> See Notice of Status Conference (December 9, 2010).

Consumer Advocate and Protection Division – **T. Jay Warner, Esq., Mary White, Esq., and Vance Broemel, Esq.**, Office of the Attorney General, 425 5<sup>th</sup> Ave. N, John Sevier Building, P.O. Box 20207, Nashville, TN 37202.

City of Chattanooga, Tennessee – **Frederick Hitchcock, Esq.**, Chambliss, Bahner & Stophel, P.C., 1000 Tallan Building, Two Union Square, Chattanooga, TN 37402.

Chattanooga Regional Manufacturers Association – **Henry M. Walker, Esq.**, Bradley, Arant, Boulton, Cummings, LLP, 1600 Division Street, Suite 700, P.O. Box 340025, Nashville, TN 37203; and **David C. Higney, Esq.**, Grant, Konvalinka & Harrison, P.C., 9<sup>th</sup> Floor, Republic Centre, 633 Chestnut Street, Chattanooga, TN 37450-0900.

Utility Workers Union of America AFL-CIO and UWUA Local 121 – **Mark Brooks, Esq.**, 521 Central Ave., Nashville, TN 37211.

**A. DISCOVERY MOTIONS CONSIDERED NOVEMBER 22, 2010**

**1) *Motions for Leave to Serve Additional Discovery & Motions for Leave to File a Reply to TAWC's Opposition to Additional Discovery***

As an initial matter, the Hearing Officer considered the Intervenor's requests for permission to serve discovery requests exceeding the initial limits prescribed by the Hearing Officer during the October 18, 2010 Status Conference and TRA Rule 1220-1-2-.11(5)(a),<sup>20</sup> and to file a written reply to TAWC's opposition of their requests. Having considered the pleadings filed by the parties, including the motions filed by the Consumer Advocate, City, and UWUA, responses filed by TAWC opposing the motions, and the replies filed in support of the motions, the Hearing Officer granted the motions of the Intervenor, thereby allowing the discovery requests that had been served with the motions.

Further, to facilitate the timing for filing of responses and potential objections to the additional discovery served by the Intervenor upon TAWC, the Hearing Officer delegated

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<sup>20</sup> During the October 18, 2010 Status Conference, the Hearing Officer ruled, "the Consumer Advocate could propound eighty questions in the first round of discovery. The other parties were allowed the forty requests by rule. Any party may file a request for additional discovery. As to the filing of motions to compel discovery, any such motion must include a statement that the parties have met to discuss the objections and were not able to resolve those objections before filing the motion to compel." *Order Granting Petitions to Intervene, Reflecting Action Taken at Status Conference, and Establishing a Procedural Schedule*, p. 6 (November 12, 2010).

authority to General Counsel, Richard Collier, as a special hearing officer for the purposes of meeting with the parties, developing a procedural schedule for the filing of responses and objections, and to hear and rule on such objections, should any arise.

## ***2) Motions to Compel Responses to First Round Discovery***

Prior to filing motions to compel responses to discovery propounded in the first round, the parties were required by the Hearing Officer to engage in discussions intended to, as much as possible, resolve any disputes and objections concerning specific discovery requests. In the event that certain disputes were unable to be resolved following these meetings between the parties, then a motion to compel could be filed with the Authority. During the Status Conference, TAWC informed the Hearing Officer that it had participated in a telephone conference with each opposing party in an attempt to resolve disputed requests and issues before the filing of motions to compel. The parties explained that such party conferences occurred on December 17, 2010, the day before the deadline for filing of motions to compel discovery set forth in the Procedural Schedule. After having met as required, the Consumer Advocate, City, CRMA, and TAWC, each filed a motion to compel discovery asserting that certain first round discovery disputes remained unresolved and necessitated the intervention of the Hearing Officer. Motions to compel discovery were not filed by the UWUA, Signal Mountain, or Walden's Ridge.

During the Status Conference, the Hearing Officer provided the parties an additional opportunity to further discuss and informally resolve their remaining points of contention on the discovery requests identified in their motions to compel. Following a brief recess, the parties provided the Hearing Officer with an updated listing of the first round discovery requests left to be resolved. At that time, the parties presented their positions on each request that remained in

dispute. Upon conclusion, the parties agreed that all disputed requests as set forth in their motions to compel had been resolved, EXCEPT as follows:

- Consumer Advocate Requests 35, 36, 37, 39, 40, and 43.<sup>21</sup>
- The City's items B, D (in part), G, I, K, L, and M.
- TAWC requests relating to 1) Intervenor objections based on the timing of TAWC requests as premature, and 2) disclosure/affirmation of intervenor positions taken in TAWC's 2006 and 2008 rate cases on rate requirement.

The Hearing Officer informed the parties that the pleadings and arguments set forth during the Status Conference on outstanding discovery would be taken under advisement, and rulings thereon would be issued by Order on a future date.

## **B. ADDITIONAL FIRST ROUND DISCOVERY**

### **1) Preliminary Meeting & Procedural Schedule on Additional Discovery**

On November 22, 2010, immediately upon conclusion of the Status Conference, General Counsel met with the parties to set a procedural schedule for the filing of responses to the additional discovery permitted by the Hearing Officer and objections thereto. Thereafter and upon agreement of the parties, General Counsel set, and later confirmed by email correspondence on November 24, 2010, the following expedited schedule:

- |                           |                                                                                                                     |
|---------------------------|---------------------------------------------------------------------------------------------------------------------|
| <b>November 30, 2010:</b> | • TAWC objections & responses to additional discovery<br>( <i>without</i> requirement of responsive documentation). |
| <b>December 1, 2010:</b>  | • Responsive documentation due to parties.                                                                          |
| <b>December 2, 2010:</b>  | • Responsive documentation filed in docket by 10:00<br>a.m. CST.                                                    |

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<sup>21</sup> In addition, concerning request number 10, the Consumer Advocate stated that TAWC had agreed to investigate whether its expert could provide the data requested. Therefore, request number 10 would be considered resolved subject to the Company's production of the information and its review by the Consumer Advocate. If unresolved thereafter, the issue would be raised in the next round of discovery. *See* Transcript of Proceedings, p. 14 (November 22, 2010).



- Parties to meet with General Counsel at 1:00 p.m. in the Hearing Room of the TRA. Dates for supplemental responses to discovery, if any, to be established.<sup>22</sup>

Thereafter, at the suggestion of TAWC and without objection by the other parties, the time for production of items responsive to first round discovery requests, which TAWC had voluntarily agreed to supplement because of discussions that occurred during the Status Conference, General Counsel set a filing deadline of 10:00 a.m. on December 2, 2010.<sup>23</sup>

## **2) Follow-up Meeting of Parties Facilitated by General Counsel**

On December 2, 2010, the parties met in the TRA Hearing Room for a discussion of responses and objections to the additional first round discovery. This meeting, facilitated by General Counsel, was informal and proceeded without a Court Reporter or other method of recordation. During the meeting, the parties were diligent in their efforts to come to agreement on items remaining in dispute, both as to the additional discovery requests and on the initial first round discovery requests. Upon conclusion of this meeting, the parties informed General Counsel that the first round discovery requests that remained ripe for decision by the Hearing Officer had been revised and narrowed as follows: Consumer Advocate's requests numbered 9, 10, and 36, and the City's items G and K. Counsel for the City also stated that, inasmuch as the City had received TAWC's discovery responses shortly before leaving Chattanooga to come to the meeting, the City would subsequently review those responses and determine whether an additional motion to compel should be filed.

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<sup>22</sup> See Hearing Officer's Summary of the Resolution of Parties Respective Objections/Motions to Compel (November 29, 2010), consisting of an email from General Counsel to the parties dated November 24, 2010.

<sup>23</sup> See Email from TAWC to Hearing Officer Requesting Additional Time to Prepare Supplemental Responses to First Round Discovery (November 29, 2010), Email from Hearing Officer to Parties Granting Additional Time to File Supplemental Responses (November 29, 2010), and Email from the City to the Hearing Officer Stating No Objection to Additional Time Granted to TAWC for Supplemental Responses (November 29, 2010).

### **3) *City of Chattanooga's Second Motion to Compel Tennessee American Water Company to Respond to Discovery Requests***

Following the parties' meeting with General Counsel, the City filed a second motion to compel discovery responses from TAWC on December 6, 2010.<sup>24</sup> In its second motion, the City renews its first motion to compel responses to items B, G, K, and L, and seeks to compel responses to certain additional discovery requests served upon TAWC, as permitted by the Hearing Officer on November 22, 2010. For continuity, the City alphanumerically itemized its newly compelled requests as follows: O, P, Q, R, S, T, U, V, and W. On December 9, 2010, TAWC filed its response to the City's second motion.<sup>25</sup> The parties presented their positions concerning the additional requests in dispute, as set forth in the second motion, during the December 13, 2010 Status Conference.

### **III. STATUS CONFERENCE ON DECEMBER 13, 2010**

On December 13, 2010, the Hearing Officer convened a Status Conference following the regularly scheduled Authority Conference, as noticed on December 9, 2010. In attendance at the Status Conference were the following parties represented by counsel:

Tennessee American Water Company – **R. Dale Grimes, Esq.** and **David Killion, Esq., Steele Clayton, Esq., Chad Jarboe, Esq.**, Bass, Berry & Sims, PLC, 150 Third Avenue South, Suite 2800, Nashville, TN 37201; and participating by telephone, **Michael Miller**, Director of Rates, Eastern Division, Tennessee American Water Company, 1600 Pennsylvania Avenue, Charleston, WV.

Consumer Advocate and Protection Division – **Ryan McGehee, Esq.** and **Scott Jackson, Esq.**, Office of the Attorney General, 425 5<sup>th</sup> Ave. N, John Sevier Building, P.O. Box 20207, Nashville, TN 37202.

City of Chattanooga, Tennessee – **Frederick Hitchcock, Esq.**, Chambliss, Bahner & Stophel, P.C., 1000 Tallan Building, Two Union Square, Chattanooga, TN 37402; **Mike McMahan, Esq.**, 100 East 11th Street, Suite 200, Chattanooga, TN 37402.

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<sup>24</sup> See *The City of Chattanooga's Second Motion to Compel Tennessee American Water Company to Respond to Discovery Requests* (December 6, 2010).

<sup>25</sup> See *Tennessee American Water Company's Response to the City of Chattanooga's Second Motion to Compel* (December 9, 2010).

Chattanooga Regional Manufacturers Association – **Henry M. Walker, Esq.**, Bradley, Arant, Boult, Cummings, LLP, 1600 Division Street, Suite 700, P.O. Box 340025, Nashville, TN 37203; and participating by telephone, **David C. Higney, Esq.**, Grant, Konvalinka & Harrison, P.C., 9<sup>th</sup> Floor, Republic Centre, 633 Chestnut Street, Chattanooga, TN 37450-0900.

Utility Workers Union of America AFL-CIO and UWUA Local 121 – participating by telephone, **Scott H. Strauss, Esq.**, Spiegel & McDiarmid, LLP, 1333 New Hampshire Ave., N.W., Washington, DC 20036.

Following commencement of the Status Conference, the Hearing Officer promptly recessed the proceedings in order to allow the parties an opportunity to resolve their outstanding disputes. Upon reconvening the Status Conference, the parties updated the Hearing Officer concerning first round discovery requests, advising of the following requests still in dispute:

- Consumer Advocate Requests 9, 10, and 36;<sup>26</sup>
- The City’s items B, P, and S; and,
- TAWC issues and requests as follows:
  - 1) Requests that the intervenors be required to supplement their responses to TAWC’s discovery requests prior to the deadline for filing pre-filed testimony. The Intervenors have objected based on the timing of TAWC’s first round discovery requests, and generally asserted that TAWC’s requests are premature and/or impermissibly intruding upon attorney-work product; and
  - 2) Requests that the Intervenors disclose and/or affirm their positions concerning the amount of revenue requirement to which TAWC was entitled, and the actual amount granted by TRA, in TAWC’s previous rate case dockets 08-00039 and 06-00290.
- The CRMA and UWUA have no disputed requests outstanding.

Thereafter, the City and TAWC each presented oral argument explaining their positions concerning the City’s items P and S. The City stated that it would rely upon its statements as to Item B set forth during the November 22, 2010 Status Conference. The Hearing Officer

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<sup>26</sup> The Consumer Advocate indicated that Requests 9 and 10 might be resolved through additional responses anticipated from TAWC.

informed the parties that their comments would be taken under advisement and that an Order on the issues remaining for resolution would be forthcoming.

#### **IV. RESOLUTION OF DISPUTED FIRST ROUND DISCOVERY REQUESTS**

##### **A. Legal Standard**

Pursuant to Authority Rule 1220-1-2-.11, when informal discovery is not practicable, discovery shall be effectuated in accordance with the Tennessee Rules of Civil Procedure. The Rules of Civil Procedure permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.<sup>27</sup> Through these instruments, a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”<sup>28</sup> The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.<sup>29</sup> The Tennessee Court of Appeals has commented on relevancy as follows:

Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase “relevant to the subject matter involved in the pending action” has been construed “broadly to encompass any matter that bears on or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”<sup>30</sup>

Further, parties may learn of information related to books, documents or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.<sup>31</sup> However, Tennessee’s rules do provide some limitations. Rule 26.02 permits a court to limit discovery under certain circumstances, such as undue burden, and Rule 26.03 permits a

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<sup>27</sup> Tenn. R. Civ. P. 26.01.

<sup>28</sup> *Id.* at 26.02(1).

<sup>29</sup> *Id.*

<sup>30</sup> *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).

<sup>31</sup> Tenn. R. Civ. P. 26.02(1).

court to issue protective orders, as justice requires.<sup>32</sup> In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).<sup>33</sup>

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.<sup>34</sup> “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”<sup>35</sup>

## **B. SPECIFIC DISCOVERY DISPUTES OF THE PARTIES**

Following further discussion of the issues and presentations of the parties’ positions, and further considering the multitude of filings, pleadings, and arguments previously offered on these matters in conjunction with applicable law, the Hearing Officer rules as follows:

### **I. Consumer Advocate’s Motion to Compel TAWC, limited to Requests 9, 10, and 36**

#### **1) Request Number 9**

**Provide the historical risk premium of common stocks (S&P 500) over one-year, five-year, ten-year, and twenty-year Treasury Bonds or Bills as reported in Morningstar’s *Stocks, Bonds, Bills and Inflation, 2010 Valuation Yearbook* referenced by Dr. Vander Weide in his Direct Testimony of pages 36, 38, and 39.**

The Consumer Advocate asserts that the information requested above is sought in the interest of full disclosure of information listed in a publication referenced in the testimony of TAWC’s witness, Dr. Vander Weide. Further, the Consumer Advocate contends that the

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<sup>32</sup> *Id.* at 26.02 & .03.

<sup>33</sup> *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

<sup>34</sup> *Id.* at 37.01(2).

<sup>35</sup> *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, \*5 n.4 (Tenn. Ct. App. June 27, 2002).

information it requests may be utilized to assess and challenge the usefulness and credibility of Dr. Vander Weide's testimony. The Consumer Advocate has stated that it has attempted to obtain the information independently, but that the copyrighted database publication is accessible by subscription only and is not publicly available.

TAWC provided the historical risk premium of common stocks over twenty-year Treasury Bonds and claims that this measure is the only one referenced by Dr. Vander Weide, and therefore relevant. In a supplemental response, TAWC asserts that Dr. Vander Weide does not reference the historical risk premium of common stocks (S&P 500) over one-year, five-year, ten-year Treasury bonds or bills and that such material is copyrighted, and therefore unable to be produced by TAWC.

The Hearing Officer finds that the Consumer Advocate's request seeks information that is relevant to the subject matter of Dr. Vander Weide's testimony and was utilized and/or relied upon in the preparation of such testimony. In addition, the request is narrowly tailored and reasonably calculated to lead to the discovery of admissible evidence. Thus, the Hearing Officer finds that TAWC shall respond fully to the request and produce all materials and information requested therein. Therefore, the Consumer Advocate's motion to compel TAWC to respond and produce information, documents, and materials to Request No. 9 is GRANTED.

***2) Request Number 10***

**Provide a copy of and a citation for the source document for Dr. Vander Weide's I/B/E/S growth rates.**

The Consumer Advocate seeks documents and information that are relied upon by Dr. Vander Weide in the preparation and presentation of his testimony in this case. Specifically, the Consumer Advocate asserts that the information requested above is necessary to confirm the growth rate calculations provided by Dr. Vander Weide and to test the overall variability of the

rates. In response, TAWC asserts that because the I/B/E/S growth rates utilized by Dr. Vander Weide in his testimony are electronically downloaded from a copyrighted database, no “source document” exists that may be produced.

The Hearing Officer finds that the Consumer Advocate’s request seeks information that is relevant to the subject matter of Dr. Vander Weide’s testimony and was utilized and/or relied upon in the preparation of such testimony. This request falls squarely within the bounds of discoverable material, is narrowly tailored, and reasonably calculated to lead to admissible evidence. The Hearing Officer finds that TAWC shall respond fully to the request and produce all materials and information requested therein. Therefore, the Consumer Advocate’s motion to compel TAWC to respond and produce information, copies documents or materials, and related citations to Request No. 10 is GRANTED.

### ***3) Request Number 36***

**In the format of TRA01-Q042-ATTACHMENT, for the 18 months ended September 2010, provide the “total amount of charges subject to allocation or direct charge to all affiliates” from AWWSC by month, by affiliated entity, as well as the “total amount of direct charges and allocated charges to each affiliate” from AWWSC by month for the 18 months ended September 2010 by month, by direct amount, by allocated amount, by affiliated entity.**

In the above request, the Consumer Advocate seeks information concerning the amount of charges and allocations from American Water Works Service Company (“AWWSC”) to TAWC and its affiliates and other subsidiaries of American Water Works Company (“AWWC”). The Consumer Advocate asserts that its request is relevant and properly within the scope of discovery. Further, such information is needed to determine whether “the charges allocated to TAWC by AWWSC are proper based on the services provided, or if TAWC is bearing a disproportionate share of the expense,” and the level of management fees requested by TAWC “is proper in light of the shifting of services from local TAWC employees to its affiliate

AWWSC in 2004.”<sup>36</sup> In summary, the Consumer Advocate contends that it has crafted this request to ensure that consumers of TAWC are being charged an appropriate level of AWWSC expense based on the services provided to them and that outsourced services are properly accounted for in the calculation of management fees.

TAWC has objected to this request and asserts that the information sought is not relevant or likely to lead to information relevant to the case, is unduly burden and exceedingly costly to obtain, and finally, that it has already provided information responsive to this request in CRMA Request No. 4. TAWC asserts that it has produced information pertinent to this request, by subsidiary, through March 31, 2010, but the Consumer Advocate has asked for information through September 2010, an entirely different test year.

TAWC contends that the information sought by the Consumer Advocate does not exist in the format requested, and that producing the information would require TAWC to create new documents constituting twenty or more pages of calculations for each affiliated entity. Under the Rules of Civil Procedure, and referencing a ruling made by General Counsel acting as Hearing Officer in the 2008 rate case, TAWC asserts that it is not required to “manipulate raw data that will come out in a particular result in response to Intervenor’s discovery requests. It requires the parties to engage in a process where the intervenors would be able to obtain the raw data but not require the company to manipulate the data in some fashion.”<sup>37</sup> TAWC further contends that the charges it incurs from AWWSC have been examined in conjunction with the management audit ordered by the Authority, and the auditor found the charges to be reasonable. As such, TAWC should not have to submit to burdensome discovery requests of the Intervenor’s that ask for

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<sup>36</sup> See *Motion to Compel Tennessee American Water Company to Answer the Second Round of Discovery Requests of the Consumer Advocate and Protection Division*, pp. 5-6 (November 18, 2010).

<sup>37</sup> See *Transcript of Proceedings* p. 66-71 (November 22, 2010); see also, *Agreed Order Regarding Discovery and Disposing of Certain Outstanding Motions Following June 4, 2008 Status Conference (Amended by Hearing Officer)*, p. 3-4 ¶ 8 (June 13, 2008).



information that was already deemed reasonable in the management audit report.

Upon review, the Hearing Officer finds that the Consumer Advocate's request seeks information that is relevant to substantive matters at issue in this case and, as described below, is not unduly burdensome. During the November 22, 2010 Status Conference, TAWC stated that its response, including attachments, to CRMA Q4 was also responsive through March 2010 to the Consumer Advocate's Request No. 36. The Consumer Advocate's request seeking the most currently available data is not unreasonable nor a violation of ratemaking standards or practices. Therefore, the Hearing Officer finds that TAWC should produce the information requested through September 2010 in the format provided previously in answer to CRMA Q4. Nevertheless, TAWC is not required to manipulate data to create a particular result beyond that which it has already undertaken in its response to CRMA Q4, but shall be required to provide information in the same format as provided previously in answer to CRMA Q4 from the period of April 2010 to September 2010. Thus, to the extent set forth herein, the Consumer Advocate's motion to compel TAWC's response to its Request No. 36 is GRANTED.

## **II. City's *First Motion to Compel TAWC, limited to Item B***

### **1) *Item B: TAWC's Failure to Provide a Privilege Log***

The City asserts that TAWC, in violation of Tenn. R. Civ. P. 26.02(5), refuses to provide a log of documents or information that it has withheld based upon claims of attorney-client privilege and work product protection. The City states that, under the rule, the log should identify the document or piece of information being withheld and the producing party's basis for withholding such document or information, such that the other parties and court may assess the applicability and propriety of the privilege being asserted. According to the City, TAWC has neither produced a log in compliance with Tenn. R. Civ. P. 26.02(5) nor otherwise identified its

basis for withholding certain documents and information for which it has claimed are protected from discovery on the basis of privilege.

In response, TAWC has asserted that requiring all parties to produce a privilege log would be unnecessarily costly, burdensome, time-consuming, and unlikely to be beneficial to the ratemaking process. When questioned, other intervening parties, although not opposing the production of privilege logs, indicated a desire for a sufficient explanation of another party's claims of privilege while maintaining reasonable litigation costs.

Tenn. R. Civ. P. 26.02(5), in pertinent part, states as follows:

CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION MATERIALS. When a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection.<sup>38</sup>

The language of the rule itself contains no provision for privilege logs.<sup>39</sup> Nonetheless, the use of privilege logs as an acceptable mechanism became available to state courts upon the adoption of the federal language in 2000, as noted in the *Advisory Commission Comment to 2000 Amendment*. In 2009, the rule was further amended in order to expand the scope of the rule to include electronically stored information.<sup>40</sup>

The Hearing Officer finds that while the use of a privilege log may have certain benefits, for the purposes of this proceeding, the burdens in time and expense upon the parties outweigh

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<sup>38</sup> Tenn. R. Civ. P. 26.02(5) (2009).

<sup>39</sup> See, *Hawkins v. Superior Motors, Inc.*, 999 S.W.2d 769, 772-73 (Tenn. 1999) *opinion vacated in part on denial of reh'g*, 01S01-9811-CV-00199, 1999 WL 669269 (Tenn. Aug. 30, 1999) (overturned on other grounds) ("The Tennessee Rules of Civil Procedure do not have a discovery provision requiring privilege logs similar to that contained in Fed. R. Civ. P. 26(b)(5). Under our current rules of discovery, documents or material withheld pursuant to a claim of privilege or work product protection may be submitted to the trial judge for *in camera* inspection. (Internal citations omitted.) We hold that adoption of a policy similar to that contained in Fed. R. Civ. P. 26(b)(5) should come in the form of an amendment to the Tennessee Rules of Civil Procedure and be promulgated through the normal process for such amendments.")

<sup>40</sup> Tenn. R. Civ. P. 26.02(5), *Advisory Commission Comment to 2000 Amendment*.

any such corresponding benefit. Nevertheless, the Hearing Officer further finds that the parties shall comply with the language of the rule itself.<sup>41</sup> Thus, whenever a party withholds discoverable material based upon a claim of privilege or other protection, that party shall state such privilege or protection expressly, and describe the nature of the information not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties and this Authority to assess the applicability of the privilege protection. Therefore, insofar as is stated herein, the City's motion to compel detailed information concerning particular documents, information, and materials, that TAWC has withheld from discovery is GRANTED.

### **III. City's *Second* Motion to Compel TAWC - Items P and S**

#### **1) *Item P* (corresponds to Request No. 38):**

**Identify and provide copies of all *Documents* constituting, referring to, or relating to billing contracts referred to in the testimony of John S. Young, Jr. before the Public Utilities Commission of the State of California**

The City's request seeks identification and copies of all third-party billing and collection agreements referenced in testimony of John S. Young, Jr., President of AWWSC, in proceedings conducted before the California Public Utilities Commission ("CPUC"). The City asserts that the issue of "allocation of expenses to regulated and non-regulated subsidiaries" is relevant to the rate case currently before the Authority.<sup>42</sup> Further, the City contends that in testimony presented to the CPUC, Mr. Young addressed the issue of billing contracts relevant to the allocation of

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<sup>41</sup> See, *State ex rel. Little People's Child Dev. Ctr., Inc. v. Little People's Child Dev. Ctr., Inc.*, M200700345COAR3CV, 2009 WL 103509 (Tenn. Ct. App. Jan. 9, 2009) ("Tenn. R. Civ. P. 26.02(5) requires the party make the claim of privilege expressly and "shall describe the nature of the documents, communications, or things not produced or disclosed ..." so that the other party may assess the privilege protection.")

<sup>42</sup> *The City of Chattanooga's Second Motion to Compel Tennessee American Water Company to Respond to Discovery Requests*, p. 4 (December 6, 2010).

expenses between regulated and non-regulated subsidiaries of AWWC. The City seeks production of the billing contracts referred to by Mr. Young in his CPUC testimony.

TAWC objects to the City's request and asserts that Mr. Young's testimony concerning California third-party billing and collections agreements and the "billing contracts" to which he referred have no relevance to this proceeding. TAWC explained "third party billing and collection contracts" as agreements executed between utilities for the inclusion of line item charges issued by one entity to be included on the other entity's customer bill (e.g., charges for sewer services by the local municipal service provider to be included on TAWC's customer bill). Specifically, TAWC states that California American Water Company ("CAWC") does not provide third-party billing services, whereas TAWC does provide such services. Thus, the operations of CAWC and TAWC differ greatly in this regard. As a result, Mr. Young's testimony concerning the billing operations of CAWC offers no comparative insights on the billing and collection agreements of TAWC. In addition, TAWC states that it directed the City to the section of the Schumaker Management Audit that discusses the third party billing services provided by TAWC.

Considering the filings and oral arguments of the parties, the Hearing Officer finds that information and testimony of Mr. Young before the CPUC that relates to or references the specific operations of CAWC is not relevant to these proceedings and exceeds the scope of discovery. Nonetheless, to the extent that any information, documents, or testimony presented to the CPUC in the testimony of Mr. Young specifically relates or refers to TAWC, such is discoverable and shall be produced by TAWC. Therefore, except as is demonstrated to specifically relate to or reference TAWC, the City's motion to compel TAWC to provide additional responses to its Item P/Request No. 38 is DENIED.

**2) Item S (correlating to Request No. 50):**

**Please provide for each year and quarter since January 1, 2006 and as projected for 2010, 2011, and 2012, the complete audited financial statements (including income statement and balance sheet) for AWWSC and AWWC and each subsidiary or affiliate of AWWC affiliate. If audited financial statements are not available, provide unaudited financial statements (including income statement and balance sheet) for such periods.**

The City asserts that its request properly seeks financial information concerning the regulated and non-regulated subsidiaries of AWWC needed to evaluate the “significant issues [involved in this rate case] concerning proper allocation of AWWSC expenses and other common expenses among regulated and non-regulated subsidiaries of AWWC.”<sup>43</sup> Further, the City contends that in order to understand the equity, fairness, and appropriateness of the allocation methods used by AWWSC and amounts charged to its various subsidiaries, a review of the financial records of the subsidiaries and affiliates is necessary. The City states that without the relevant financial information, which it has requested in its Request No. 50, it cannot accurately assess or understand how the allocations relate to each entity’s financial situation. In light of the approximately 48% increase in management fees being requested by the Company in this rate case, as compared to the amount approved in Docket No. 08-00039, this issue is of significance and deserving of closer inspection. The City requires the requested financial information in order to determine the proportion of management fees to the overall expenses of AWWC’s other subsidiary companies, such that it may then assess whether allocations to TAWC are contextually fair and equitable.

TAWC has objected to this request, and further asserts that due to the breadth of the request, as there are 52 separate subsidiaries for which multiple years of financial statements are requested, it should not be required to produce such information. Further, TAWC contends that,

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<sup>43</sup> *The City of Chattanooga’s Second Motion to Compel Tennessee American Water Company to Respond to Discovery Requests*, p. 5-6 (December 6, 2010).

apart from three subsidiary/affiliates (i.e., AWWSC, AWWC, and AWE), for which TAWC has provided information responsive to the City's request, financial information of the many other subsidiary/affiliates of AWWC have no relevance to this proceeding. In addition, TAWC contends that the financial information requested by the City will not show or include specific allocation of management fees. Thus, production of additional financial information on this request would not provide information on the appropriateness of the allocation methodology actually sought by the City, but would needlessly drive up expense. In addition, the management audit reviewed the allocation methodology applied and expenses charged to TAWC, and found them to be reasonable. TAWC further asserts that it has already provided extensive information on the subject matter of allocation, including a manual explaining the allocation methodology, the allocation formulas utilized and applied, and amounts charged to affiliate companies, and it should not be required to respond further with information that will have no bearing on this case.

Upon review and consideration of the filings and oral arguments of the parties, the Hearing Officer finds that the City's Request No. 50 does not seek to elicit information that is narrowly tailored and relevant to the specific matters for determination by this Authority, nor reasonably calculated to lead to the discovery of admissible evidence. Further, TAWC has provided substantial information in its responses to CRMA Q4 and TRA Staff Request Nos. 11, 14 and 50, as pertaining to the three specific subsidiary/affiliate companies directly related to TAWC. Therefore, the City's motion to compel TAWC to provide additional responses to its Item S/Request No. 50 is DENIED.

#### **IV. TAWC Motions to Compel Intervenors, Narrowed to Two Issues**

##### **1) *Issue 1: Timing of the Intervenors' supplemental responses to discovery***

In its motions to compel the responses of the intervening parties to its first discovery

requests issued on November 1, 2010, TAWC requests that the Hearing Officer require the intervenors to supplement their responses to discovery requests prior to the intervenors' deadline for filing pre-filed testimony set for January 5, 2011. TAWC asserts that under the Rules of Civil Procedure, the intervenors have a duty to supplement responses to discovery requests propounded upon them simultaneously as the new material or information comes into knowledge or existence. Effectively, TAWC contends that the intervening parties are under a legal obligation to provide all information that is in any way responsive to the generalized requests served upon them by TAWC, on a continuous and rolling basis, even before the intervening party itself has digested, sorted, analyzed, or otherwise incorporated such material into the parameters of the case.

Accordingly, the Intervenors have objected to TAWC's tactical approach to the discovery process and its purposes in this proceeding. As to particular requests, the Intervenors have asserted that TAWC's requests are premature and/or impermissibly intrude upon attorney-work product. Intervening parties have objected to certain requests, contending that they appear to seek, or are crafted to elicit, the strategic litigation decisions of counsel. Nevertheless, none of the Intervenors has refused to respond TAWC's discovery requests. Instead, all have acknowledged a duty to supplement discovery responses as they come into possession of responsive information that does not constitute work product or is subject to any other privilege or protection.

Previously, in Docket No. 08-00039, a similar discovery dispute arose between the parties when TAWC propounded a brief set of generalized discovery requests upon the intervening parties in the first round of discovery, and later insisted that the parties were obligated to produce all information forthwith, in advance of the compilation of the Intervenors'

case in chief. As referred to by TAWC in discussion of this issue before the Hearing Officer on November 22, 2010, in Docket No. 08-00039, General Counsel, as Hearing Officer, ruled:

. . . it is not “a valid objection or reason not to answer a question [propounded in discovery] that a party is anticipating filing prefiled testimony.”<sup>44</sup>

In addition, for clarification of his ruling, the Hearing Officer provided in a footnote:

. . . if 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.<sup>45</sup>

The ruling of the Hearing Officer in TAWC’s 2008 rate case, Docket No. 08-00039, remains effective and applicable to these proceedings.

Discovery rules and procedures have evolved primarily to promote justice and fairness in the litigation process and to encourage an efficient and prompt resolution of disputes through an open exchange of information and facts. While the process of discovery can be abused under the cloak of zealous advocacy, the Hearing Officer and this Authority will not allow any attempts to misuse, stifle, or otherwise thwart the worthy purposes and spirit of good faith upon which the discovery process is based. This Authority expects that the professional and capable counsel who appear before it will act in good faith and with proper decorum and will observe all rules applicable to these proceedings.

In accordance with the rules of the TRA and with Rule 26 of the Tennessee Rules of Civil Procedure, all parties participating in discovery shall respond fully to requests, objecting when necessary in good faith and with a reasonable legal basis, and shall, in a timely manner, supplement their responses that are, or have become, incomplete or incorrect because of newly discovered facts and information. During the Status Conference held on November 22, 2010, the

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<sup>44</sup> See *Agreed Order Regarding Discovery and Disposing of Certain Outstanding Motions Following June 4, 2008 Status Conference (Amended by Hearing Officer)*, p.3 ¶ 7 (June 13, 2008).

<sup>45</sup> *Id.* at footnote 1.



intervening parties all acknowledged their duty to supplement responses to discovery propounded by TAWC. Based on these acknowledgements, the Hearing Officer is satisfied that all parties have supplemented those discovery responses that required such and does not find it helpful or necessary to order compliance. Therefore, TAWC's motion, which asks the Hearing Officer to compel the Intervenors to supplement responses to its first round discovery prior to the Intervenors' deadline for filing pre-filed testimony, is DENIED.

**2) *Issue 2: Responses to requests that ask for disclosure and/or affirmation of Intervenors' positions on the amount of the revenue requirement to which TAWC was entitled, and the actual amount granted by TRA, in Docket Nos. 08-00039 and 06-00290.***

In its discovery requests to the Consumer Advocate, CRMA, and the City, TAWC asked that these intervening parties state their positions concerning the amount of the revenue requirement to which TAWC was entitled and as to the amount actually approved by the TRA in TAWC's two most recently concluded rate cases Docket Nos. 06-00290 and 08-00039. In effect, this discovery request asks the intervening parties, who also participated in Docket Nos. 06-00290 and 08-00039, to reiterate the positions that each took in the previous cases. TAWC contends that such requests seek to elicit information that it will use to show the level of reasonableness of its current request and of positions taken by the Intervenors.

The intervening parties assert that the information requested by TAWC is not relevant to this case, is publicly available, and is easily accessible to TAWC should it wish to obtain it. During the Status Conference held on November 22, 2010, the Consumer Advocate, City and CRMA, all provided responses to the question propounded by TAWC. Therefore, TAWC's motion, which asks the Hearing Officer to compel each Intervenor to supplement its response to TAWC's request to discover the position taken by each party in Docket Nos. 06-00290 and 08-00039, is DENIED.

**V. *Tennessee American Water Company's Motion to Designate Certain Documents as Confidential***

On November 30, 2010, TAWC filed its *Tennessee American Water Company's Motion to Designate Certain Documents as Confidential* ("Motion to Designate Documents Confidential") requesting retroactive designation of certain payroll documents it had filed on September 24, 2010, in conjunction with and as part of its "Responses to the TRA's Data Requests dated September 20, 2010." Specifically, TAWC asserts that the following documents should be designated confidential and removed from the public docket: (1) attachment provided in response to TRA Data Request No. 13, labeled "TRA-01-Q013-LABOR" (61 pages) and the electronic work paper provided in native format in the "Sheila Miller" folder, named "Labor 12 mos Ended March 2010.xls"; and (2) attachment provided in response to TRA Data Request No. 30, labeled "TRA-01-Q030-ATTACHMENT" (75 pages).

TAWC contends that the above-described documents are sensitive, and inadvertently were not labeled as confidential.<sup>46</sup> TAWC states that approximately twenty days after it had publicly filed the documents at issue, the UWUA motioned for and was granted intervention in this case. TAWC contends that the sensitive nature of these documents emanates from their containing certain payroll information inappropriate for dissemination among TAWC employees, and because they may provide a tactical advantage in prospective negotiations between TAWC and the UWUA, TAWC should be permitted now to designate them as confidential.

Upon review, and considering that the motion is unopposed,<sup>47</sup> it is the opinion of the Hearing Officer that TAWC has sufficiently demonstrated good cause due to the possibly of irreparable business harm in the event the described documents are disseminated among TAWC

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<sup>46</sup> See *Tennessee American Water Company's Motion to Designate Certain Documents as Confidential* (November 30, 2010).

<sup>47</sup> As of the date of this Order, no party had filed a response to TAWC's motion requesting retroactive designation of certain documents as confidential.

employees. Therefore, the Hearing Officer finds that the documents, as described and set forth in TAWC's motion, shall be designated as confidential. Accordingly, pursuant to Paragraph 7 of the Protective Order entered on November 15, 2010, and the Amendment to the Protective Order entered November 19, 2010, the Hearing Officer hereby orders that:

1) TAWC's "Responses to the TRA's Data Requests dated September 20, 2010"<sup>48</sup> shall be immediately removed from the electronic docket and replaced with the PDF file labeled the "Docket Manager Disk," enclosed with the *Motion to Designate Documents Confidential*.

2) The original and four copies of the replacement disk labeled the "Production Disk," enclosed with the *Motion to Designate Documents Confidential*, should be substituted for the disks currently included in the binders produced on September 24, 2010.

3) The Docket Manager shall take appropriate procedural precautions to ensure the filing and security of the original and four copies of the PDF disk containing only the above-referenced confidential documents, which is labeled "Confidential Disk" and enclosed with the *Motion to Designate Documents Confidential*.

4) The parties and TRA shall appropriately designate and/or segregate the hard copies of the documents now designated as confidential materials, in accordance with the terms of the Protective Order.

Therefore, as presented in TAWC's *Motion to Designate Documents Confidential* and as discussed herein, the Hearing Officer hereby GRANTS the request of TAWC for confidential designation of certain documents filed on September 24, 2010 as part of its Responses to the TRA's Data Requests dated September 20, 2010.

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<sup>48</sup> Tennessee American Water Company's Responses to the TRA's Data Requests dated September 20, 2010 (September 24, 2010).

**IT IS THEREFORE ORDERED THAT:**

1. *The City of Chattanooga's Motion for Permission to Propound Additional Discovery Requests* (November 1, 2010), *the Motion of UWUA Intervenors for Leave to Serve More Than Forty (40) Discovery Requests on the Tennessee American Water Company* (November 1, 2010), and *Consumer Advocate's Motion for Leave to Issue More Than Eighty Requests* (November 1, 2010) are GRANTED.

2. *The Motion of UWUA Intervenors for Leave to Submit Brief Reply to Tennessee American Water Company's Response in Opposition to UWUA Intervenors' Motion for Leave to Serve More Than Forty) Discovery Requests* (November 10, 2010), *Motion by the City of Chattanooga for Leave to File a Reply in Support of Its Motion for Permission to Propound Additional Discovery Requests* (November 12, 2010), and *Motion of the Consumer Advocate for Leave to File a Reply to TAWC's Opposition to Additional Discovery Beyond Eighty Questions* (November 12, 2010) are GRANTED.

3. *The Motion to Compel Tennessee American Water Company to Answer the Second Round of Discovery Requests of the Consumer Advocate and Protection Division* concerning Request No. 9 is GRANTED.<sup>49</sup>

4. *The Motion to Compel Tennessee American Water Company to Answer the Second Round of Discovery Requests of the Consumer Advocate and Protection Division and the Amendment to the Consumer Advocate's Motion to Compel Tennessee American Water Company to Provide Responses to the Discovery Requests of the Consumer Advocate* concerning Request No. 10 is GRANTED.<sup>50</sup>

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<sup>49</sup> On December 20, 2010, the Authority was notified by the Consumer Advocate that Request No. 9 was resolved through TAWC's most recent response.

<sup>50</sup> On December 20, 2010, the Authority was notified by the Consumer Advocate that Request No. 10 was resolved through TAWC's most recent response.

5. To the extent set forth herein, the *Motion to Compel Tennessee American Water Company to Answer the Second Round of Discovery Requests of the Consumer Advocate and Protection Division* concerning Request No. 36 is GRANTED.

6. Insofar as is stated herein, *The City of Chattanooga's Motion to Compel Tennessee American Water Company to Respond to Discovery Requests* as to requiring Tennessee American Water Company, and all parties, to clearly express claims or assertions of privilege and to provide detailed information about any documents, information, and materials withheld on claims of privilege or protection is GRANTED.

7. Except as may be demonstrated as specifically relating to or referencing TAWC, *The City of Chattanooga's Second Motion to Compel Tennessee American Water Company to Respond to Discovery Requests* as to its Item P/Request No. 38 is DENIED.


8. *The City of Chattanooga's Second Motion to Compel Tennessee American Water Company to Respond to Discovery Requests* as to its Item S/Request No. 50 is DENIED.

9. *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's Motion to Compel the City of Chattanooga to Provide Complete Discovery Responses, Tennessee American Water Company's Motion to Compel the Consumer Advocate and Protection Division to Provide Complete Discovery Responses, and Tennessee American Water Company's Motion to Compel the Chattanooga Regional Manufacturers Association to Provide Complete Discovery Responses*, insofar as they seek to compel intervening parties to supplement responses to first round discovery prior to the deadline for filing pre-filed testimony, is DENIED.

10. Specific discovery requests propounded within *Tennessee American Water Company's Motion to Compel the City of Chattanooga to Provide Complete Discovery Responses*, *Tennessee American Water Company's Motion to Compel the Consumer Advocate and Protection Division to Provide Complete Discovery Responses*, and *Tennessee American Water Company's Motion to Compel the Chattanooga Regional Manufacturers Association to Provide Complete Discovery Responses*, which seek to compel an intervening party to state its position on the revenue requirement requested or approved in Docket Nos. 06-00290 and 08-00039, is DENIED.

11. *Tennessee American Water Company's Motion to Designate Certain Documents as Confidential* filed on November 30, 2010, is GRANTED.

12. Tennessee American Water Company shall serve upon the parties and file in the docket file, information, materials, and documents responsive to the discovery requests granted above by **2:00 p.m. CST on December 30, 2010**.

  
Chairman Mary W. Freeman  
Hearing Officer