

January 18, 2011

Via E-Mail and USPS

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

filed electronically in docket office on 01/18/11

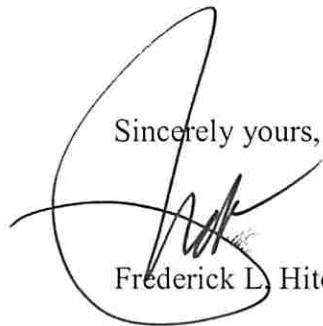
**Re: Petition of Tennessee American Water Company
Docket No. 10-00189**

Dear Chairman Freeman:

Enclosed please find an original and five (5) copies of The City of Chattanooga's Motion for Leave to File Reply in Support of its Third Motion to Compel. I would appreciate you stamping the extra copy of the document as "filed," and returning it to me in the enclosed, self-addressed, stamped envelope.

With best regards, I am

Sincerely yours,



Frederick L. Hitchcock

FLH:pgh
Enclosures

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c/o Ms. Sharla Dillon
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cc: Mr. J. Richard Collier (w/encl.)
Mr. R. Dale Grimes (w/encl.)
Mr. Robert E. Cooper, Jr., Attorney General (w/encl.)
Mr. Vance L. Broemel (w/encl.)
Mr. T. Jay Warner
Mr. Ryan L. McGehee
Ms. Mary L. White
Mr. David C. Higney (w/encl.)
Mr. Henry M. Walker (w/encl.)
Mr. Michael A. McMahan (w/enc.)
Ms. Valerie L. Maleug
Mr. Mark Brooks (w/encl.)
Mr. Scott H. Strauss (w/encl.)
Ms. Katharine M. Mapes
Mr. Donald L. Scholes (w/encl.)
Ms. Kelly Cashman-Grams (via email)
Ms. Monica Smith-Ashford (via email)
Ms. Shilina Chatterjee Brown (via email)

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

PETITION OF TENNESSEE AMERICAN
WATER COMPANY TO CHANGE AND
INCREASE CERTAIN RATES AND
CHARGES.

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Docket No. 10-00189

**CITY OF CHATTANOOGA'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT
OF ITS THIRD MOTION TO COMPEL**

Pursuant to TRA Rule 1220-1-2-.06(3), the City of Chattanooga ("Chattanooga"), by and through counsel, hereby respectfully requests leave to submit a brief reply to Tennessee American Water Company's ("TAWC's") Response to the City of Chattanooga's Third Motion to Compel. Chattanooga asserts that leave should be granted so that it can correct misstatements made by TAWC concerning aspects of Chattanooga's Motion. Chattanooga submits that granting leave to file this reply will ensure a complete and accurate record before the Regulatory Authority with respect to the relief requested in Chattanooga's original Motion.

REPLY

A. TAWC Has Failed to Meet Its Burden Under The Order And Rule 26.02 As to Any of the Documents Withheld. There is no basis for TAWC's extraordinary assertion that Chattanooga did not address TAWC's claims that it was entitled to withhold documents based on the work product protection. Citing *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group*, 209 S.W. 3d 602, 617 (Tenn. Ct. App. 205, 2006), *perm. app. den'd Id.*, Chattanooga noted that TAWC had the burden "to show that the materials were either privileged or work product protected by Tenn. R. Civ. P. 26.02(3)" Chattanooga Third Motion at 2-3. The Hearing Officer's Order recognized this burden and required TAWC to "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 access the applicability of the privilege protection." December 23, 2010 Order at 19. TAWC has ignored the Order's requirements and has failed to provide information that can fulfill its burden of showing that either the attorney-client privilege or the work product protection applies to the withheld materials. As Chattanooga clearly pointed out, TAWC failed to meet this burden as to *either* the attorney-client privilege or the work product protection. *E.g.* Chattanooga Third Motion at 2, 3, 5, n. 2.

B. TAWC Cannot Fulfill Its Burden by Simply Making Conclusory Assertions. As the Court of Appeals noted in *Flowers, supra*:

The burden was on the Liquidator, as the party opposing discovery, to demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary to protect it from undue burden or expense and the trial court "should decline to limit discovery if the party seeking the limitations could not produce specific facts to support its request."

209 S.W.3d 602, 618 (internal citations omitted).

The facts in *Flowers, supra*, bear some significant similarity to the facts in this case. In that case, a challenge was made to the reasonableness of the administrative fees charged by a liquidator of a workers compensation self-insured group trust. The party challenging the reasonableness of the administrative fees sought discovery concerning the basis for the fees, but the liquidator refused to provide the requested documents asserting that they contained privileged information and information protected by the work product protection. The trial court granted the liquidator's request for a protective order. On appeal, the Court of Appeals reversed, noting that the liquidator had failed to carry its burden of establishing the applicability of the privilege or protection. "The Liquidator's mere conclusory statements, without more, are inadequate to

justify a protective order that precludes [the party challenging the fees] from reviewing any of the documents that support the administrative fees requested by the Liquidator." *Flowers, supra*, 209 S.W.3d 618.

The facts relevant to determination of the applicability of the attorney-client privilege or the work product protection are uniquely and exclusively in possession of TAWC. As *Flowers, supra*, recognizes, mere conclusory statements are not sufficient to carry TAWC's burden.

C. Authorities Cited by TAWC Do Not Hold That the Attorney-Client Privilege Can Be Established By Merely Copying In-House Counsel. TAWC cites *Christie v. Alliance Imaging*, No. 5:06 CV 1430, 2007 WL 1974913 (N.D. Ohio July 3, 2007) in a manner that incorrectly suggests that the Ohio court held that documents can be made privileged by merely sending a copy to in-house counsel. *Christie, supra*, held no such thing. It did nothing more than impliedly recognize the rule that in-house counsel are among the legal professionals to whom the attorney-client privilege *can* apply, *if* the other elements of the privilege are present.

Another federal district court case cited by TAWC, *Curtis v. Alcoa*, 3:06-CV-448, 2009 WL 838232 (E.D. Tenn. 2009), describes the eight (8) elements that must be present to establish the attorney-client privilege:

In addressing the attorney-client privilege, the Sixth Circuit has established the following elements:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser, (8) except the protection be waived.

Curtis, supra, at *2 (copy appended).

Of course, TAWC has ignored the Order's requirement that it recite sufficient information to carry its burden of establishing that all of the elements of the privilege exist as to each document withheld on that basis.

D. TAWC May Not Shift or Avoid Its Burden. As has been the case in so many other contexts in this proceeding and in the previous two rate cases, TAWC seeks to shift the burden to Chattanooga to speculate or guess or somehow otherwise divine whether there is any basis for withholding 95 documents and sets of documents that deal with the management audit.

TAWC goes so far as to argue in the closing paragraphs of its memorandum that "the Company's internal communications about the management audit have no relevance or impact on the Authority's ability to set rates in this case, . . ." TAWC Response at 9. The relevance and discoverability of the 95 documents and sets of documents have been conceded by TAWC and affirmed by the Hearing Officer's Order. The only issue is whether TAWC has submitted information sufficient to carry its burden of showing that one or more of the 95 documents or sets of documents qualify for the attorney-client privilege or the work product protection. This is not Chattanooga's burden or the Authority's burden. Rule 26.02(5), Tennessee's appellate courts, and the Hearing Officer's Order make clear that this is TAWC's burden.

Chattanooga requests that TAWC be immediately ordered to produce the 95 documents or sets of documents listed as items 2 – 96 on TAWC's privilege log.

Respectfully Submitted,

OFFICE OF THE CITY ATTORNEY

By:

Michael McMahan by F.H. permission
Michael A. McMahan (BPR No. 000810)

Valerie L. Malueg (BPR No. 023763)

Special Counsel

100 East 11th Street, Suite 200

Chattanooga, TN 37402

(423) 643-8225

Email: mcmahan@chattanooga.gov

Email: malueg@mail.chattanooga.gov

~~CHAMBLISS, BAHNER & STOPHEL, P.C.~~

By:

[Signature]
Frederick D. Hitchcock (BPR No. 005960)

Harold L. North, Jr. (BPR No. 007022)

Tom Greenholtz (BPR No. 020105)

1000 Tallan Building

Two Union Square

Chattanooga, Tennessee 37402

(423) 757-0222 – Telephone

(423) 508-1222 – Facsimile

rhitchcock@cbslawfirm.com

hnorth@cbslawfirm.com

tgreenholtz@cbslawfirm.com

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing pleading was emailed and was served upon the following person(s) via ☐ hand delivery or ☒ United States first class mail with proper postage applied thereon to ensure prompt delivery:

Mr. J. Richard Collier
General Counsel
State of Tennessee
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Mr. Vance L. Broemel
Mr. T. Jay Warner
Mr. Ryan L. McGehee
Ms. Mary L. White
Office of the Attorney General
Consumer Advocate and Protection Division
Cordell Hull Building, Ground Floor
425 5th Avenue North
Nashville, TN 37243

Mr. R. Dale Grimes
Bass, Berry & Sims PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201

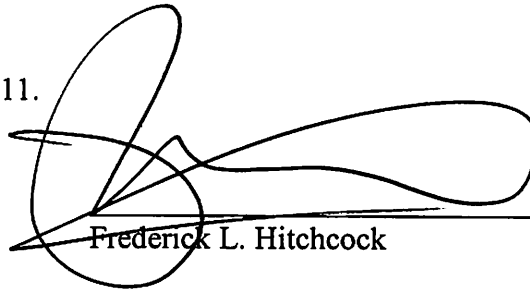
Mr. David C. Higney
Grant, Konvalinka & Harrison, P.C.
Ninth Floor, Republic Centre
633 Chestnut Street
Chattanooga, TN 37450-0900

Mr. Henry M. Walker
Boult, Cummings, Conners & Berry PLC
1600 Division Street, Suite 700
Nashville, Tennessee 37203

Mr. Mark Brooks
521 Central Avenue
Nashville, TN 37211-2226

Mr. Scott H. Strauss
Ms. Katharine M. Mapes
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

This 18th day of December, 2011.



Frederick L. Hitchcock