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FEB 25 2011

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February 24, 2011

Via E-Mail and USPS

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

**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 First Motion in Limine. Please file this electronically. 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

Chairman Mary Freeman
c/o Ms. Sharla Dillon
February 24, 2011
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cc: Mr. J. Richard Collier (w/encl.)
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Ms. Monica Smith-Ashford (via email)
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**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

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

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Docket No. 10-00189

CITY OF CHATTANOOGA'S FIRST MOTION IN LIMINE

The City of Chattanooga ("City"), by and through counsel, hereby moves the exclusion from this proceeding of all evidence pertaining to, and all consideration of, any claim of Tennessee American Water Company for regulatory expenses requested in Docket No. 08-00039.

On January 28, 2011, the Tennessee Court of Appeals filed its Opinion and Judgment in *Tennessee American Water Company v. The Tennessee Regulatory Authority*, No. M2009-00553-COA-R12-CV. The Court of Appeals specified in its Judgment that "the judgment of the Trial Court is affirmed in part and reversed in part, and the cause remanded." Of course, the Trial Court is this Authority.

The issue upon which the Court of Appeals reversed and remanded involved the Authority's reduction by fifty percent (50%), or some \$275,000, of Petitioner Tennessee American Water Company's (TAWC) claim in Docket No. 08-00039 for regulatory expenses. TAWC has recently filed exhibits and other documents requesting that the 2008 regulatory expenses be awarded to it in this docket. This motion seeks to exclude from this proceeding any consideration of claims for regulatory expenses in the 2008 docket that were addressed in the Court of Appeals decision, because this Authority has

no subject matter jurisdiction to consider matters relating to Docket No. 08-00239. The evidence to be excluded includes, without limitation, TAWC Deferred Rate Case Expense Revised, filed February 22, 2011; Rebuttal testimony of Mike Miller; and Rebuttal Exhibit MAM-11.

Rule 42(a), Tenn.R.App.P., specifies that the mandate of the Court of Appeals normally shall be transmitted to the Authority 64 days after entry of judgment. The issuance of the mandate may be delayed by the timely filing of a petition for rehearing or an application for permission to appeal pursuant to Rule 11, Tenn.R.App.P. Docket No. 08-00039 will not be reinstated in this Authority until the mandate has been received. Tenn. Code Ann. 21-1-810. The Authority cannot conduct further proceedings on Docket No. 08-00039 until after ten (10) days notice to the parties of the reinstatement of the matter on the docket following receipt of the mandate. Tenn.R.Civ.P. 43(c).

During the interim period, the Authority has no subject matter jurisdiction over Docket No. 08-00039. As the Court of Appeals explained in *First American Trust Co. v. Franklin-Murray Development Company, L.P.*, 59 S.W.3d 135 (Tenn. Ct. App. 2001), *perm. app. denied* (Oct. 8, 2001):

It should now be plain that once a party perfects an appeal from a trial court's final judgment, the trial court effectively loses its authority to act in the case without leave of the appellate court. Perfecting an appeal vests jurisdiction over the case in the appropriate appellate court. *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn.1996); *Suggs v. Suggs' Executors*, 1 Tenn. (1 Overt.) 2, 3 (1794); *Spann v. Abraham*, 36 S.W.3d 452, 461 (Tenn.Ct.App.1999). *An appellate court retains jurisdiction over a case until its mandate returns the case to the trial court. Raht v. Southern Ry. Co.*, 215 Tenn. 485, 498, 387 S.W.2d 781, 787 (1965) (holding that issuance of mandate by an appellate court reinvests the trial court with jurisdiction over a case); *Hall v. Pippin*, No. M2001-00387-COA-OT-CV, 2001 WL 196978, at *3 (Tenn.Ct.App. Feb.28, 2001) (No Tenn.R.App.P. 11 application filed).

59 S.W.3d at 141 (emphasis supplied). *See also Born Again Church & Christian Outreach Ministries, Inc. v. Myler Church Building Systems of the Midsouth, Inc.*, 266 S.W.3d 421, 425-26 (Tenn. Ct. App. 2007), *perm. app. denied* (June 13, 2008).


Were this Authority to issue an order addressing the regulatory expenses claimed by TAWC in the 2008 docket before the mandate had been returned, its order would be void. *First American Trust Co., supra*, at 141.

For these reasons, the City respectfully requests that its First Motion in Limine be granted and that all evidence concerning regulatory expenses claimed in Docket No. 08-00039 be stricken from the record and excluded from these proceedings.

Respectfully Submitted,

OFFICE OF THE CITY ATTORNEY

By:


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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:

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This 24th day of February, 2011.



Frederick L. Hitchcock