BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 25, 2011

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

ORDER REFLECTING HEARING OFFICER'S RULING WITH RESPECT TO CITY OF CHATTANOOGA'S THIRD MOTION TO COMPEL

This matter is before the Hearing Officer upon the filing of *The City of Chattanooga's Third Motion to Compel Tennessee American Water Company to Respond to Discovery Requests* ("*Third Motion to Compel*"). The City of Chattanooga (the "City") filed the *Third Motion to Compel* on January 7, 2011. Tennessee American Water Company ("TAWC") responded to the *Third Motion to Compel* on January 14, 2011. The City filed a Reply on January 18, 2011, and oral argument was heard on the *Third Motion to Compel* during the Status Conference on January 24, 2011.

I. CITY'S THIRD MOTION TO COMPEL DISCOVERY

A. Relevant Background

Following the responses of the parties to the first round of discovery, the City, on November 18, 2010, filed its motion to compel TAWC to respond to certain discovery requests.[1] In its *First Motion to Compel*, the City asserted that TAWC, in violation of Tenn. R. Civ. P. 26.02(5), refused to produce a log identifying the documents or information that TAWC had

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[1] *The City of Chattanooga's Motion to Compel Tennessee American Water Company to Respond to Discovery Requests ("First Motion to Compel")*, pp. 3-4, § B (November 18, 2010) (contending that a privilege log is required under the Tennessee Rules of Civil Procedure at Rule 26.02(5)).

withheld from discovery under a claim of privilege or protection, and asked that the Hearing Officer compel TAWC's compliance.[2]

On December 23, 2010, the Hearing Officer issued an *Order on First Round Discovery*. Therein, the Hearing Officer found that Tenn. R. Civ. P. 26.02(5) contains no provision that makes the production of a "privilege log" mandatory. Rather, the use of a log might be an acceptable mechanism for a party's compliance with the rule. Thus, balancing the benefits against the burdens, the Hearing Officer did not require the parties to prepare "privilege logs." Instead, concluding that it is reasonable to expect a party upon claiming privilege or protection from discovery to provide specific information about the items withheld and its reasons for doing so, the Hearing Officer ordered the parties to comply with the rule, as stated:

> [T]he parties shall comply with the language of the rule [Tenn. R. Civ. P. 26.02(5)] itself. Thus, whenever a party withholds discoverable material based upon a claim of privilege or 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 the Authority to assess the applicability of the privilege protection* (internal citation omitted) *(emphasis added)*.[3]

Accordingly, the Hearing Officer ordered the parties to identify any information and/or documents withheld from discovery on grounds of privilege or protection, state the privilege or protection claimed, and describe the withheld materials with specificity sufficient to enable the Authority to evaluate "the applicability of the claimed privilege or protection."

Thereafter, in response to the Hearing Officer's ruling on discovery, TAWC filed its response entitled *Privilege Log Document ("Privilege Log")* on December 30, 2010. The *Privilege Log* charts ninety-six (96) written communications and materials, which TAWC has evaluated and determined to be responsive to discovery requests, but for the applicability of a

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[2] A subsequent motion to compel, *The City of Chattanooga's Second Motion to Compel Tennessee American Water Company to Respond to Discovery Requests,* was filed on December 6, 2010. The second motion, however, involved other objections to discovery asserted by the City, and did not relate to production of a privilege log.

[3] *Order on First Round Discovery,* p. 19 (December 23, 2010).

privilege or protection. All of the communications and materials relate in some respect to the management audit ordered by the TRA. TAWC acknowledges that it has withheld from discovery these communications and materials, variously classified as internal e-mail, chains of internal e-mail exchanges, documents, and attachments, on the grounds of attorney-client privilege, work product, or both.

On January 7, 2011, the City filed its *Third Motion to Compel* with the Authority. In its *Third Motion to Compel,* the City asserts that TAWC's privilege log fails to comply with the *Order on First Round Discovery* because it does not describe the withheld materials in a manner that enables the parties or the TRA to assess the factual basis of the TAWC's claims of attorney-client privilege and/or work product protection. The City states that mere conclusory statements are not sufficient for a party to meet its burden of substantiating its assertion of privilege or protection. To justify nonproduction, a party must provide facts demonstrating how and why a particular document satisfies each of the elements required for qualification under the asserted privilege or protection. The City contends that TAWC has failed to provide in its privilege log factual details sufficient to assess the applicability of TAWC's invocation of privilege. As a result, items listed 2 through 96 in TAWC's privilege log should be produced.

On January 14, 2011, the *Tennessee American Water Company's Response to the City of Chattanooga's Third Motion to Compel ("Response")* was filed in the docket file. In its *Response,* TAWC contends that it has properly asserted its claims of attorney-client privilege and work product as to each item listed in its privilege log. Further, TAWC asserts that it has gone beyond the requirements of the Hearing Officer's ruling on discovery by producing a privilege log that names the sender of the communication and its recipients, provides the date, general subject matter, and privilege or protection asserted as grounds for nonproduction of each item.

TAWC contends that the information in its privilege log complies with and exceeds the requirements of the *Order on First Round Discovery.*

Further, recounting its perspective of the procedural timeline and process that established the requirements and parameters of TAWC's management Request for Proposal ("RFP") and audit, TAWC asserts that the City's *Third Motion to Compel* cannot succeed because it fails to rebut TAWC's claims of work product protection and is unpersuasive in its opposition to TAWC's assertion of attorney-client privilege. TAWC asserts that all of the materials not produced consist of documents or written descriptions of communications exchanged internally between TAWC employees, or between TAWC employees and TAWC's parent company, AWWC,[4] its affiliated service company AWWSC,[5] state affiliate companies, or legal counsel. Further, TAWC asserts that these internal email communications and documents all relate to some aspect of the management audit, were intended to be confidential, and were created in the course of ongoing or in reasonable anticipation of litigation. TAWC further asserts that it has provided the parties with all discoverable, unprivileged, communications exchanged between TAWC and the auditor, Schumaker & Co.

TAWC states that the sole purpose of the audit is to confirm or reject the reasonableness of the management fees sought by TAWC in contested litigation, and that any business-related purpose is incidental and ancillary. TAWC further emphasized, in its *Response* and in oral argument during the January 24, 2011 Status Conference, that each item listed on its privilege log represents internal communication "about the TRA management audit, an audit that has little, if any, commercial or business purpose for the Company outside these contested rate cases."[6] Accordingly, TAWC asserts that, under the work product doctrine, all of TAWC's internal

[4] AWWC abbreviates the full name of TAWC's parent company, American Water Works Company.
[5] AWWSC abbreviates the full name of American Water Works Service Company, an affiliate company that provides contract services, such as accounting, administration, engineering, human resources, legal, etc, to TAWC.
[6] *Response,* p. 8 (January 14, 2011).

correspondence that relates to the Schumaker management audit is protected from discovery. Further, TAWC asserts that the documents it has withheld on grounds of attorney-client privilege are confidential communications with in-house legal counsel concerning the audit and are therefore exempt from disclosure.

In the City's *Reply*,[7] filed on January 18, 2011, the City asserts that TAWC has failed to meet its burden to demonstrate a factual basis for its nonproduction of the email communications and documents at issue, and that it can neither shift nor meet its burden with mere conclusory statements. In addition, the City refers the Hearing Officer to and discusses the holdings of two cases cited in TAWC's *Response*.[8]

On January 24, 2011, to provide evidentiary support for its previously filed privilege log and to bolster its assertions of the attorney-client privilege and work product protection, TAWC filed the Affidavit of Michael Miller. In addition, the parties presented extensive oral argument before the Hearing Officer on the City's *Third Motion to Compel* during the Status Conference held on January 24, 2011.

II. Legal Standard of Discovery

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 ("Rules"). The Rules permit discovery of relevant, non-privileged information through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.[9] Citing its earlier decision in *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Intern., Inc.,* the Tennessee Court of Appeals in the case of *State ex rel. Flowers v. Tennessee*

[7] With its *Reply*, the City filed a Motion for leave to file a reply in accordance with TRA Rule 1220-1-2.06(3) which was granted by the Hearing Officer during the Status Conference on January 24, 2011.
[8] *Reply* (January 18, 2011).
[9] Tenn. R. Civ. P. 26.01.

Trucking Ass'n Self Ins. Group Trust, made a pointed observation concerning requests for discovery:

> The courts understand that "there is a far greater cost in complying with a discovery request than in making the discovery request. As a result there [can be] a strong temptation to inflict harm on one's adversary by seeking additional information for which the adversary will have to incur the cost (internal citations omitted)."[10]

The Rules favor discovery and disclosure. In discovery, the requirement of relevancy is broadly construed to include any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case issues.[11] Privilege, on the other hand, is construed narrowly, since it conceals relevant information from the trier of fact. "Because it is an "obstacle to the investigation of the truth," privilege must be "strictly confined within the narrowest possible limits consistent with the logic of its principle."[12] Tenn R. Civ. P. 26.02(5), states, in pertinent part, as follows:

> **(5) 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.[13]

The burden of proof in establishing the existence of the privilege rests upon the claimant.[14] Further, the privilege must be established on a document-by-document basis; a blanket claim failing to specify what information is protected will not suffice.[15] Thus, the party opposing

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[10] *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust,* 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006), *citing Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Intern.,* Inc., 2002 WL 1389615, at *3 (Tenn. Ct. App. 2002).

[11] *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust,* 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006), *citing Price v. Mercury Supply Co.,* 682 S.W.2d 924, 935 (Tenn. Ct. App. 1984).

[12] *In re: Southern Indus. Banking Corp.* 35 B.R. 643, 647 (E.D. Tenn. 1983).

[13] Tenn. R. Civ. P. 26.02(5) (2009).

[14] *In re: Southern Indus. Banking Corp.* 35 B.R. 643, 647 (E.D. Tenn. 1983).

[15] *In re: General Instrument Corp. Securities Litigation,* 190 F.R.D. 527, 529 (N.D. Ill. 2000), *citing United States v. White,* 970 F.2d 328, 334 (7th Cir. 1992).

discovery must demonstrate with more than generalizations and conclusory statements that the discovery limitations, privileges, or protections it seeks are necessary and justified.

III. Privilege and Protection from Discovery

A. Attorney-Client Privilege

The oldest privilege recognized in Tennessee both at common law and by statute is the attorney-client privilege.[16] This privilege serves the administration of justice by encouraging full and frank communication between clients and their attorneys by sheltering these communications from compulsory disclosure.[17] Questions pertaining to the validity of an asserted attorney-client privilege must be resolved on a case-by-case basis.[18] To successfully invoke the attorney-client privilege, a party must establish that the communication was made pursuant to the attorney-client relationship, involves the subject matter of the representation, was intended to be kept confidential, and has not been waived.[19]

Moreover, the attorney-client privilege is not absolute and does not encompass all communications between the client and the attorney.[20] The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.[21] In the case of a corporate client, the involvement of an attorney in the commercial endeavors of a corporation does not *per se* vitiate the attorney-client privilege. Nevertheless, the participation of general counsel in the business of a corporation likewise does not automatically cloak the business activity with the protection of the attorney-

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[16] *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002).
[17] *Id.*
[18] *In re: Southern Indus. Banking Corp.*, 35 B.R. 643, 648 (E.D. Tenn. 1983); *See Upjohn Co. v. United States,* 449 U.S. 383 (1981).
[19] *See State ex rel. Flowers v. Tennessee Trucking Assn Self Ins. Group Trust,* 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006); *see also Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002) and, *Smith County Educ. Ass'n v. Anderson,* 676 S.W.2d 328, 333 (Tenn. 1984).
[20] *Id., citing Bryan v. State,* 848 S.W.2d 72, 80 (Tenn. Cr. App. 1992).
[21] *Upjohn Co. v. U.S.*, 449 U.S. 383, 685-686, *citing Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831; *see also, Diversified Ind. v. Meredith,* 572 F. 2d 596 (8th Cir. 1978)(en banc); *State ex. rel. Dudek v. Circuit Court,* 150 N.W. 2d 387, 399 (Wis. Sup. Ct. 1967).

client privilege.[22] Merely copying counsel on an e-mail will not render a communication to counsel privileged; rather, a party must demonstrate that the primary purpose of the communication was to seek legal advice.[23] An affidavit of an attorney is an appropriate and common way to provide the evidence needed to support a claim of privilege.[24] In any event, whether or not the attorney-client privilege applies to any particular communication is necessarily question, topic and case specific.[25]

B. Work Product Doctrine

Originally established by the U.S. Supreme Court in *Hickman v. Taylor,*[26] the work product doctrine is now broadly construed to embody the public policy that attorneys, doing the sort of work that attorneys do to prepare a case for trial, should be allowed a certain degree of privacy and, therefore, the mental impressions, conclusions, opinions, or legal theories of an attorney in the litigation should, upon a proper showing, be shielded from discovery.[27] The premise of the doctrine is that lawyers, preparing for litigation, be permitted to assemble information, to separate the relevant facts from the irrelevant, and to use the relevant facts to plan and prepare their strategy without undue and needless interference.[28]

Codified at Tenn. R. Civ. P. 26.02(3), the work product doctrine is not a privilege and it does not provide absolute protection. Rather, it is a qualified immunity from discovery,

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[22] *In re: Southern Indus. Banking Corp.* 35 B.R. 643, 648 (E.D.Tenn.,1983); *See In re Grand Jury Subpoena,* 599 F.2d 504, 511 (2d Cir.1979); *Valente v. Pepsico, Inc.,* 68 F.R.D. 361, 367 (D.Del.1975).

[23] *Royal Surplus Lines Ins. v. Sofarmor Danek group,* 190 F.R.D. 463, 475 (W.D. Tenn. 1999); *Yurick ex. rel. Yurick v. Liberty Mutual Ins. Co.,* 201 F.R.D. 465 (D. Ariz. 2001) (citing *Cont'l Ill. Nat'l Bank and Trust Co. of Chicago v. Indemnity Ins. Co. of N. Am.,* 1989 WL 135203 at *3 (N.D. Ill. Nov. 1, 1989) (a letter that merely assigned a carbon copy to an attorney fell beyond the scope of the attorney-client privilege because it was "not primarily directed to an attorney," did not seek legal advice, and merely served to keep the attorney informed of the contents of the letter.)

[24] *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 215 (Tenn. Ct. App. 2002), *citing State v. Bobo,* 724 S.W.2d 760, 765 (Tenn. Crim. App. 1981) (attorney-client privilege); *Arnold v. City of Chattanooga,* 19 S.W.3d 779, 784 (Tenn. Ct. App. 1999) (work product doctrine).

[25] *Bryan v. State,* 848 S.W.2d 72, 80 (Tenn. Cr. App. 1992).

[26] *Hickman v. Taylor,* 329 U.S. 495 (1947).

[27] *See* Tenn. R. Civ. P. 26.(3); *see also, Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203 (Tenn. Ct. App. 2002).

[28] *Boyd v. Comdata Network, Inc.,* 88 S.W.3d 203, 219-220 (Tenn. Ct. App. 2002) (internal citations omitted).

equitable in nature, which, a party may overcome upon a proper showing.[29] In pertinent part, Tenn. R. Civ. P. 26.02(3) states as follows:

> **(3) Trial Preparation: Materials.** Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) *only* upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation *(emphasis added).*[30]

Acknowledging that the burden rests on the party opposing production, the Tennessee Court of Appeals in *State ex. rel. Flowers v. Tenn. Trucking Assoc. Self Insurance Group Trust, et al.,* stated in part as follows:

> The work product doctrine extends beyond confidential communications between the attorney and client to any document prepared in anticipation of litigation by or for the attorney. Like the attorney-client privilege, the burden of proof is on the party asserting the work product doctrine to establish that the writings or documents were prepared in anticipation of litigation. The standards and procedures for addressing this type of a discovery dispute are found in Tenn. R. Civ. P. 26.02(3). To resolve issues pertaining to the discovery of an adversary's claim of work product or privilege, the trial court and the parties are to follow sequential steps, which entail shifting burdens of proof.[31]

In moving to compel production of discovery, a party seeking discovery must first show that the material being sought is (1) relevant to the subject matter involved in the pending action, (2) not otherwise privileged, and (3) consists of documents or other tangible things.[32] Once the party seeking discovery has established a prima facie showing that the materials it seeks are

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[29] *Arnold v. City of Chattanooga,* 19 S.W.3d 779, 787 (Tenn. Ct. App. 1999).
[30] Tenn. R. Civ. P. 26.02(3) (2009).
[31] *State ex. rel. Flowers v. Tenn. Trucking Assoc. Self Insurance Group Trust, et al.,* 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006).
[32] *Id.* at 617, *citing Boyd* at 220 (additional internal citations omitted).

discoverable, the burden shifts to the party opposing discovery to show that the materials were either privileged or work product protected by Tenn. R. Civ. P. 26.02(3).[33]

In order to successfully invoke the qualified protection afforded by the work product doctrine, the party opposing discovery must establish (1) that the materials sought are documents or tangible things, (2) that were prepared in anticipation of litigation or for trial, and (3) prepared by or for it or by or for its representative.[34] In addition, the party asserting the doctrine must also demonstrate that it has not waived protection with regard to the documents being sought.[35]

To be protected under work product, a party must prove that the item was "prepared or obtained *because of* the prospect of litigation."[36] Whether a document has been prepared "in anticipation of litigation," and thus, is protected work product, the Sixth Circuit Court of Appeals has instructed courts to consider two questions: (1) whether the document was prepared "because of" a party's subjective anticipation of litigation, as contrasted with ordinary business purpose; and (2) whether that subjective anticipation was objectively reasonable.[37] Items prepared in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for non-litigation purposes, are not protected work product.[38] Hence, if the item would have been prepared in substantially the same manner, regardless of the anticipated litigation, the doctrine would not apply.[39] Still, "[i]f a document is prepared in anticipation of litigation, the fact that it also serves an ordinary business purpose does not deprive it of protection, but the burden is on

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[33] *Id., citing Boyd* at 220-221 (additional citation omitted).
[34] *Flowers* at 617, *citing* Tenn. R. Civ. P. 26.02(3); *see also, Boyd* at 221.
[35] *Boyd* at 221, *citing Amgen, Inc. v. Hoechst Marion Roussel, Inc.,* 190 F.R.D. 287, 289 (D. Mass. 2000).
[36] *Cooley v. Strickland,* 269 F.R.D. 643, 647 (S.D. Ohio 2010), *citing U.S. v. Roxworthy,* 457 F.3d 590, 593-594 (6th Cir. 2006).
[37] *Leazure v. Apria Healthcare, Inc.,* 2010 WL 3895727, at *3 (E.D. Tenn.), *citing In re Professionals Direct Ins. Co.,* 578 F.3d 432 (6th Cir. 2009) (quoting *U.S. v. Roxworthy,* 457 F.3d 590, 594 (6th Cir. 2006)).
[38] *Cooley v. Strickland,* 269 F.R.D. 643, 647 (S.D. Ohio 2010), *citing U.S. v. Roxworthy,* 457 F.3d 590, 593-594 (6th Cir. 2006).
[39] *Id.*

the party claiming protection to show that anticipated litigation was the "driving force behind the preparation of each requested document."[40]

In *Pacific Gas and Electric Co. v. United States,* the Federal Claims Court considered the purpose and inherent nature of public utility rate case proceedings held before a public service commission in contrast to "litigation" before the courts:

> In order to attempt to achieve its "ultimate objective [of] obtaining a damages recovery" here, plaintiff had to file a complaint *against* the United States Government, the opponent from which it seeks to obtain a damages recovery. The "ultimate objective" of this litigation, therefore, is adversarial – to win damages from an opposing party against whom plaintiff has served a complaint. By contrast, in a license or permit application proceeding or a public utilities rate case, the "ultimate objective" is not adversarial – rather, it is to set rates with or obtain a license or permit from a regulatory body in order to advance the applicant's business or comply with regulations. In a license or permit filing, plaintiff does not file a complaint *against* an opponent, but rather files an application *for* the license or permit with a neutral regulatory commission. Therefore, the court disagrees that filings before these administrative proceedings "are akin to complaints in litigation before this [c]ourt."[41]

Further, the *Pacific Gas* court found that while the purpose of rate case proceedings "is to establish revenue requirements, [which is] a necessary part of the ordinary business of a public utility company, [by] working with its regulator to establish accurate rates and revenues," and not inherently adversarial, it acknowledged that proceedings before a public service commission can, in some circumstances, resemble "litigation."[42] Continuing its analysis, the court held that only "the truly adversarial aspects" of proceedings before a public service commission may constitute "litigation" for purposes of applying the work product doctrine:[43]

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[40] *Leazure v. Apria Healthcare, Inc.,* 2010 WL 3895727, at *3 (E.D. Tenn.) *citing In re Professionals Direct Ins. Co.,* 578 F.3d 432 (6th Cir. 2009) (quoting *Roxworthy,* 457 F.3d 590, 595, 598-99, and *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co.,* 967 F.2d 980, 984 (4th Cir. 1992)).

[41] *Pacific Gas and Elec. Co. v. U.S.,* 69 Fed. Cl. 784, 800 (Fed. Cl. 2006).

[42] *Id.* at 801.

[43] *Id.* at 800-801 (quoting the Restatement (Third) of the Law Governing Lawyers, the court notes, "In general, a proceeding is adversarial [and thus constitutes 'litigation' under the work product doctrine] when evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues." (Restatement) § 87 cmt. h (2000)).

> "Adversarial aspects" . . . refers to aspects of these proceedings in which an *adverse* party or intervenors cross-examined, challenged, or otherwise opposed plaintiff in these proceedings. The parties should be clear that "adversarial aspects" does *not* refer to aspects of these proceedings which were entirely *ex parte,* or in which the examining agency, rather than any opponent, questioned, challenged, or otherwise required information from plaintiff.[44]
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> The court emphasized,
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> The fundamental inquiry that must be made is 'the purpose for which a party created a document.' Indeed, even when opposition or intervening adversarial parties have become involved in these proceedings, 'a court must still undertake an examination of *why* a document was produced.'[45]

The *Pacific Gas* court distinguished the nature of documents created in preparation for a filing to set rates in the ordinary course of business or pursuant to regulatory requirements, which would not be entitled to protection,[46] and "strategy" documents created "because of," or with a "primary motivating purpose" to assist in the adversarial aspects of an administrative proceeding, or to "litigate" *against* a known adversary, which would typically be protected.[47] "In-house" documents created in preparation to file for or submit accurate information during administrative proceedings are not work product . . ."[48]

Once the party opposing discovery establishes that the requested material is protected work product, the burden shifts then back to the requesting party to establish that it is

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[44] *Id.* at 805 fn. 11.

[45] *Id.* at 805, *citing Harper v. Auto-Owners Ins. Co.,* 138 F.R.D. 655, 661 (S.D. Ind. 1991).

[46] "Documents created in preparation for a *filing,* not for "litigation," are not protected work product. Such preparatory documents are not created in anticipation of "initiat[ing] an adversarial action *against"* another party or agency, but rather are created in anticipation of filing to apply *for* a license or to set rates in the ordinary course of business or pursuant to regulatory requirements or *ex parte* requests from an agency, irrespective of any adversarial aspects of the proceedings that may potentially arise. These documents cannot be described as those whose "litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." Their preparation was not "inextricably bound up with ... a seamless web of litigation, beginning before the[ir] preparation ... and still going on *(emphasis in original).*" *Pacific Gas,* 69 Fed. Cl. 784 at 806.

[47] *Pacific Gas and Elec. Co. v. U.S.,* 69 Fed. Cl. 784, 806 (Fed. Cl. 2006).

[48] *Id.* at 807, *citing Allen v. Chicago Transit Auth.,* 198 F.R.D. 495, 500 (N.D. Ill. 2001) ("the mere fact that a discovery opponent anticipates litigation does not qualify an 'in-house' document as work product."); The *Pacific Gas* court herein refers specifically to Rule 26(b)(3) of the United States Court of Federal Claims. Nonetheless, RCFC 26(b)(3) mirrors FRCP 26(b)(3), which Tennessee courts have held to be analogous to the discovery standards set forth in TRCP 26.02(3).

nonetheless entitled to the material.[49] The nature and extent of this burden depends upon whether the material is "ordinary" or "fact" work product or "opinion" work product. Ordinary or fact work product consists of documents prepared in anticipation of litigation or for trial that do not contain the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party in the litigation.[50] Opinion work product includes documents containing an attorney's mental impressions, conclusions, opinions, or legal theories regarding the pending litigation.[51]

To obtain ordinary or fact work product, the requesting party must then establish (1) that it has a substantial need for the materials and (2) that it is unable to obtain these materials or their substantial equivalent by other means without undue hardship.[52] The basis for the claim of "substantial need" must be articulated with specificity. As a general matter, the party seeking discovery must establish that the facts in the requested documents are essential elements of its prima facie case.[53] The *Boyd* Court further stated that the burden of establishing a need for opinion work product is more onerous than that required for fact work product:

> The United States Supreme Court has emphasized that the essential purpose of the work product doctrine is to protect an attorney's mental processes, and that work product revealing an attorney's mental processes is "deserving of special protection." While the Court has, thus far, declined to hold that opinion work product is never discoverable, it has held that parties seeking opinion work product must make a "far stronger showing of necessity and unavailability by other means" than is required when seeking ordinary or fact work product. In fact, the courts have not defined precisely when revealing opinion work product is warranted. A majority of courts have pointed out that it enjoys a nearly absolute immunity from disclosure, and that it is subject to discovery only in rare, extraordinary circumstances. These circumstances include those in which the litigation itself or one of the litigants puts the attorney's work product at issue by

[49] *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 221 (Tenn. Ct. App. 2002); *see also, Flowers,* 209 S.W.2d 602 at 618.
[50] *Id.*
[51] *Id.* at 221-222.
[52] Tenn. R. Civ. P. 26.02(3).
[53] *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 221-222 (Tenn. Ct. App. 2002) (citations omitted).

> asserting claims or defenses based on the "advice of counsel," by calling an attorney as an expert witness, or another circumstance in which an attorney's conduct is a central issue in a case.[54]

It is true that the party seeking information proven protected under the work product doctrine, must demonstrate, to a varying degree depending on the type of work product at issue, substantial need or undue hardship. Even so, the burden of demonstrating that an item sought in discovery first qualifies as either fact or opinion work product remains firmly upon the party opposing its production.

C. Privilege Logs

The use of privilege logs and affidavits are common ways of invoking privilege or protection from discovery. Used most often to comply with FRPC 26(b)(5), privilege logs have been found an acceptable, but not mandatory, method of satisfying Tenn. R. Civ. P. 26.02(5).[55] For a privilege log to successfully meet the burden imposed upon the nonproducing party, "[t]he information provided [in a privilege log] must be sufficient to enable the court to determine whether *each element* of the asserted privilege or protection is satisfied."[56] Courts typically require that the following components be included in privilege logs:

> 1. A description of the document explaining whether the document is a memorandum, letter, e-mail, etc.;
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> 2. The date upon which the document was prepared;
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> 3. The date of the document (if different from # 2);
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> 4. The identity of the person(s) who prepared the document;
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> 5. The identity of the person(s) for whom the document was prepared, as well as the identities of those to whom the document and copies of the document were directed, *"including* an evidentiary showing based on competent evidence supporting any assertion that the document was created under the supervision of an attorney;"

[54] *Id.* at 222.
[55] *See* Tenn. R. Civ. Pro. 26.02(5), *Advisory note* (2000).
[56] *Cooley v. Strickland,* 269 F.R.D. 643, 649 (S.D. Ohio 2010), *citing In re Universal Service Fund Tel. Billing Practices Litig.,* 232 F.R.D. 669, 673 (D. Kan. 2005).

> 6. The purpose of preparing the document, *including* an evidentiary showing, based on competent evidence, "supporting any assertion that the document was prepared in the course of adversarial litigation or in anticipation of a threat of adversarial litigation that was real and imminent;" a similar evidentiary showing that the subject of communications within the document relates to seeking or giving legal advice; and a showing, again based on competent evidence, "that the documents do not contain or incorporate non-privileged underlying facts;"
>
> 7. The number of pages of the document;
>
> 8. The party's basis "for withholding discovery of the document (i.e., the specific privilege or protection being asserted); and
>
> 9. Any other pertinent information necessary to establish the elements of each asserted privilege.[57]

Furthermore, a party's failure to provide sufficient details demonstrating that the withheld items fulfill all elements necessary for the application of the privilege may constitute a waiver of the privilege.[58] Therefore, to ensure satisfaction of the Rules, it is of the utmost importance that a party:

> [D]escribes the document's subject matter, purpose for its production, and a specific explanation of why the document is privileged or immune from discovery. These categories, especially this last category, must be sufficiently detailed to allow the court to determine whether the discovery opponent has discharged its burden of establishing the requirements expounded upon in the foregoing discussion. Accordingly, descriptions such as "letter re claim," "analysis of claim," or "report in anticipation of litigation" - with which we have grown all too familiar - will be insufficient. This may be burdensome, but it will provide a more accurate evaluation of a discovery opponent's claims and takes into consideration the fact that there are no presumptions operating in the discovery opponent's favor.[59]

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[57] *Id. (emphasis added.)*

[58] *See Bowling v. Scott County, Tenn.*, 2006 WL 2336333, *3 (E.D. Tenn. 2006); *See also Cooey v. Strickland,* 269 F.R.D. 643, 649 (S.D. Ohio 2010) *citing United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) ("if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of the legal requirements for application of the privilege, his claim will be rejected") (quoting *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 471 (S.D. N.Y. 1993)).

[59] *Allendale Mut. Ins. Co. v. Bull Data Systems,* 145 F.R.D. 84, 88 (N.D. Ill. 1992)

III. FINDINGS AND CONCLUSIONS

Although not required by the Hearing Officer, nor mandatory for compliance under Tenn. R. Civ. P. 26.02(5), TAWC produced a privilege log in support of its decision to withhold approximately ninety-six (96) otherwise discoverable written communications and materials, or sets thereof, based on an invocation of attorney-client privilege and for work product protection. TAWC's *Privilege Log* is comprised of six columns listed in order as follows: "No.,[60] Author, Recipients, Date, Description, and Grounds for Withholding."[61] Provided contemporaneously with its *Privilege Log*, TAWC produced a chart that catalogs each name it identified in the privilege log with that person's job title and entity affiliation (company/organization). Accounting for the City's withdrawal of its challenge concerning Item No. 1, the remaining ninety-five (95) items as described in the privilege log have been considered, along with the Affidavit of Michael Miller, within the context of the particular facts and circumstances of this case, the case law, statutes, and rules as discussed extensively herein, and the relevant portions of the Hearing Officer's prior ruling issued in the *Order on First Round Discovery.*

As to each item identified in its *Privilege Log*, TAWC claims work product protection and, on forty-two (42) items, the Company also invokes the attorney-client privilege.[62] Considering first, the forty-two (42) items on which TAWC's claims attorney-client privilege, it is important to reiterate that, as the party seeking to withhold relevant and otherwise discoverable communication and materials, TAWC must bear the burden of demonstrating that each communication or document was made pursuant to the attorney-client relationship for the

[60] "No." is an abbreviation for "Number;" this column simply provides an enumeration of each tangible thing, communication, information, or group thereof, listed on the *Privilege Log* and does not correspond to any specific data or discovery request propounded by either the Authority or any party.

[61] *See Privilege Log* (December 30, 2010).

[62] Subsequent to the filing of its *Third Motion to Compel,* the City clarified its motion and withdrew its challenge to the privilege claimed by TAWC on item No. 1. Therefore, the tally of forty-two (42) assertions of attorney-client privilege does **not** include the "Numerous written communications between TAWC representatives and Bass, Berry & Sims" listed as item No. 1 on the *Privilege Log.*

purpose of seeking legal advice, involves the subject matter of the representation, was intended to be kept confidential, and has not been waived. The items TAWC has excluded based on attorney-client privilege are as follows:

> Nos. 2, 16, 26, 30, and 36, described as documents, internal e-mail, and/or attachments "regarding management **audit.**"
>
> Nos. 4, 5, 22, 23, 24, 32, 41, 42, 43, 45, 52, and 89, described as internal e-mail or e-mail chain discussing or regarding "management **audit report.**"
>
> No. 25 is described as internal e-mail regarding "management **audit report and meeting** with Schumaker and Company."
>
> Nos. 6, 35, 48, 49, 50, 51, 55, 56, 81, and 90, described as internal e-mail and attachment discussing or regarding "management **audit document requests**."
>
> Nos. 62 and 87, described as "internal e-mail chain and attachment(s) regarding management **audit document.**"
>
> Nos. 8, 9, 10, 11, 12, 13, 14, 19, 27, 28, 59, and 91, described as internal e-mail(s), e-mail chains, attachment or document regarding or discussing "management **audit interviews"** requested by Schumaker and Company.

On each of the above numbered items, TAWC asserts that its decision to withhold these otherwise discoverable communications and documents from the intervening parties and thereby from the Authority, as the trier of fact, is justified under the attorney-client privilege.

TAWC further contends that the fifty-three (53) items remaining on its *Privilege Log* are encompassed solely within the sphere of protection provided under the work product doctrine, and as such, are entitled to remain concealed in this case. Again, as the party opposing production of otherwise discoverable materials, TAWC must prove that the documents it has withheld qualify as work product. Not only must TAWC demonstrate that each of these items was made or created by or for its legal counsel specifically in anticipation of the prospect of litigation, but also that the items were not, and would not have been, created or developed in the ordinary and regular course of TAWC's business or pursuant to a public or regulatory duty. The remaining items listed are as follows:

> Nos. 3, 7, 34, 37, 38, 39, 40, 47, 51, 57, 58, 67, 68, 69, 70, 71, 72, 73, 75, 79, 80, 81, 82, 83, 84, and 85, described as internal e-mail, e-mail chain, attachments and/or related document regarding or discussing "management **audit information request**" or "management **audit document request(s)**" or "management **audit data request(s)**" [from Schumaker and Company].
>
> Nos. 17, 20, 33, 92, 93, 94, 95, and 96, described as document and/or internal e-mail or e-mail chain regarding or discussing "management **audit interviews.**"
>
> Nos. 18, 29, and 3, described as internal e-mail chain discussing or regarding "management **audit.**"
>
> Nos. 60, 61, 63, 64, 65, 66, 74, 76, 77, 78, 86, and 88, described as "internal e-mail chain and attachment(s) regarding management **audit document.**"
>
> Nos. 44, 46, 53, and 54, described as internal e-mail, e-mail chain, and/or attachment regarding "management **audit report**" and/or "management **audit report and related documents.**"

TAWC contends that all items it has listed in its *Privilege Log* constitute work product, but that the items listed immediately above qualify exclusively as work product. Thus, on this basis, TAWC claims that it is entitled to avoid the production of any of these materials in discovery.

As the party seeking to restrict the discovery of relevant materials, the burden is on TAWC to demonstrate that the items it is withholding are, in fact, shielded by the privilege or protection it asserts. Affidavits are a form of proof commonly accepted in order to produce evidence in support of the factual context and circumstances of privileged materials. TAWC filed the Affidavit of Michael Miller, nearly a month after filing its *Privilege Log,* and subsequent to the filing of the City's *Third Motion to Compel,* TAWC's *Response,* and the City's *Reply,* in an effort to clarify the contents of its *Privilege Log* and *Response.*

In his Affidavit, Mr. Miller, identified only in his role of Treasurer/Comptroller for TAWC,[63] affirms and states that during the Company's 2008 rate case, the TRA ordered TAWC to conduct an independent management audit to determine whether management fees it incurred

[63] Mr. Miller is also the Director of Rates for the Eastern Division of American Water Works Service Company ("AWWSC"), an affiliate company of TAWC. *Direct Testimony of Michael Miller,* p. 1 (September 23, 2011).

were reasonable and prudent. Mr. Miller explains that the allocation of management fees could be re-visited if the audit found them to be prudent.[64] Mr. Miller asserts that, "After a thorough and deliberate process, the Authority *selected* Schumaker & Company as *its* independent management auditor on December 14, 2009."[65] Attesting that "Company Personnel"[66] discussed, prepared, and transmitted documents internally in response to information requests from the auditor and in response to the audit generally, Mr. Miller avers further that, at all times relating to the management audit, such actions were performed anticipating that the audit would be the subject of litigation.[67] Finally, Mr. Miller states, "items listed on the Company log of documents withheld from production were prepared in connection with the Schumaker & Company audit and in anticipation of litigation."[68]

As the party asserting work product protection, TAWC must set forth objective facts to support its claim of privilege; a mere conclusory statement that the work product documents were created in anticipation of litigation is not sufficient to support the claim. In order that the Hearing Officer may evaluate the applicability of TAWC's claim of privilege or protection, TAWC must provide sufficiently descriptive information relating the facts and circumstances surrounding each of the items withheld so that the Hearing Officer is able to make an informed judgment as to whether all elements of the asserted privilege or protection have been satisfied. In doing so, TAWC is not required to disclose the confidential or protected content. Thus, based upon competent evidence, a sufficiently detailed factual description of the nature of each item not produced should include an explanation of the purpose of the communication including why

[64] Affidavit of Michael Miller, ¶¶ 1 & 2 (January 24, 2011).
[65] *Id.* at ¶ 3 (January 24, 2011). (Emphasis added.) The Hearing Officer notes that this is Mr. Miller's characterization of the selective process and not the Authority's description.
[66] "Company Personnel" is denoted in Mr. Miller's Affidavit as "Employees of the Company and their agents, as well as personnel of American Water Works, American Water Works Service Company and their agents." Affidavit of Michael Miller, ¶ 4 (January 24, 2011)
[67] Affidavit of Michael Miller, ¶¶ 4 & 5 (January 24, 2011).
[68] *Id.* at ¶ 6 (January 24, 2011) (Emphasis added).

the item or document was prepared or created. A description sufficient to enable an evaluation of privilege necessarily consists of more than a perfunctory generic label, such as "audit" and/or "in anticipation of litigation." Absent this showing, TAWC fails to carry its burden.

Numerous federal court opinions discuss what constitutes the minimal showing in order to comply with FRCP 26(b)(5). These opinions, while not binding, provide ample guidance to a party endeavoring to frame a description that would likewise satisfy the mandates of TRCP 26.02(5) and, thereby, enable a trier of fact to adjudge an assertion of privilege concerning discovery. For example, a description sufficient to enable an adequate evaluation of privilege has been found to include 1) an evidentiary showing, based on competent evidence, supporting any assertion that it was prepared in the course of, or in anticipation of a threat of, adversarial litigation that was real and imminent; 2) a similar evidentiary showing that the subject of communications within the document relates to seeking or giving legal advice; 3) a showing, again based on competent evidence, that the documents do not contain or incorporate non-privileged underlying facts.[69] At the least, a recitation of the facts essential to establishing each element of the privilege or protection relied upon should accompany each item identified as having been withheld.

While TAWC's filing of the *Privilege Log* was not required by the Hearing Officer in the *Order on First Round Discovery* and provides certain information, it fails to satisfy the most vital component of the Hearing Officer's ruling: the provision of a description of the nature of the information not produced specific enough to enable the Authority to evaluate the applicability of the asserted privilege or protection. TAWC's descriptions of the materials withheld consist of little more than a general categorization of communications that were a part of the audit process. The document descriptions are noted in TAWC's *Privilege Log* as follows:

[69] *See Cooey v. Strickland* 269 F.R.D. 643, 649 (S.D. Ohio 2010); *see also, In re Universal Service Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 673 (D. Kan. 2005).

Internal e-mail, e-mail chain, document(s) and/or attachment(s) regarding or discussing . . .

". . . management audit;"

". . . management audit document requests;" or similarly,
". . . management audit information request," or,
". . . management audit data request(s);"

". . . management audit document;"

". . . management audit interviews."

". . . management audit report."

The descriptions contained within TAWC's *Privilege Log* do not provide a factual basis from which the Hearing Officer can determine the applicability of privilege. TAWC has the burden of demonstrating that the communication or document is covered by privilege or is otherwise protected. Application of privilege must be clearly shown, and the Hearing Officer is required to construe such application narrowly. For items in which the attorney-client privilege is raised, TAWC is required to establish with objective facts or competent evidence that the communication was made in order to seek or give legal advice, and not for a business or other purpose, was intended to be kept confidential, and was not waived.

Even in the instance where an item identifies a sender or recipient as an in-house counsel, the Hearing Officer may not conclude that the communication or document was created in connection with seeking legal advice. The privilege log, or if a log is not used, then the description of the nature of the items withheld, must be detailed enough to demonstrate that the communications in question were in fact confidential communications relating to legal advice. Several items for which TAWC asserts attorney-client privilege list multiple recipients, with no indication that such communication was directed specifically to legal counsel to obtain legal advice. As noted above, merely copying counsel on e-mail will not automatically render a

communication privileged. The Hearing Officer cannot conclude that the items for which TAWC asserts attorney-client privilege, in fact, qualify for such privilege based on the descriptions of subject matter.

The Hearing Officer arrives at the same conclusion as to the items for which TAWC asserts a work product protection. Reiterated throughout the log, the descriptions noted above are essentially identical, regardless of whether the attorney-client privilege or work product protection is raised. To claim work product protection, a party must clearly demonstrate that the item was prepared or obtained *because of* the prospect of litigation, not in the ordinary course of business or pursuant to requirements of a public governmental agency. As noted above, a document that is prepared in anticipation of litigation and also serves an ordinary business purpose is not automatically deprived of protection. Nevertheless, in such circumstance, the party claiming protection bears the burden of demonstrating that the anticipated litigation was the "driving force behind the preparation of each requested document."[70]

TAWC makes the blanket assertion that all communications and materials incorporated within its *Privilege Log* were made, prepared, or exchanged *internally* – meaning within and across the multiple entities and corporate levels comprising the American Water Company system – and in anticipation of litigation. During the January 24, 2011 Status Conference, counsel for TAWC asserted that certain communications listed in the *Privilege Log* should be protected work product because they were e-mail exchanges or discussions involving Huron Consulting, a consultant used by TAWC to advise it with respect to the management audit.[71] Counsel for TAWC further argued that the only communications or documents withheld as work

[70] *Leazure v. Apria Healthcare, Inc.,* 2010 WL 3895727, at *3 (E.D. Tenn.) *citing In re Professionals Direct Ins. Co.,* 578 F.3d 432 (6th Cir. 2009) (quoting *Roxworthy,* 457 F.3d 590, 595, 598-99, and *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co.,* 967 F.2d 980, 984 (4th Cir. 1992)).
[71] Transcript of Proceedings, pp. 25-26 (January 24, 2011).

product, other than those involving Huron Consulting, were "purely internal to the company."[72] This assertion, however, is not persuasive because it fails to substantiate the manner in which each withheld item distinctly corresponds to the requisite elements of either the attorney-client privilege or work product.

Further, TAWC's assertions appear to be premised on an assumption that because the items listed all relate in some respect to the management audit ordered by the Authority, the materials are automatically exempt from discovery because the management audit would necessarily involve litigation. For this reason, a brief summary of the background and the procedural development of the management audit is provided.

Upon the conclusion of TAWC's 2006 rate case, after thorough review and hearing, the Authority, on May 15, 2007, approved an amount for management fees slightly less than the amount requested by TAWC. Nevertheless, certain questions concerning the amount and prudency of the fees assessed by the affiliated service company remained unanswered. As a result, the Authority ordered TAWC to have a management audit performed, in accord with the mandates of Sarbanes-Oxley regulation, to determine 1) whether the costs incurred by TAWC were the result of prudent management decisions, and 2) to assess the reasonableness of the methodology utilized to allocate such costs to TAWC.[73] The Authority further ordered the results of the audit, or if not yet complete, a status report thereon, to be filed within one year.[74]

On March 14, 2008, along with a new petition for a rate increase, TAWC filed an audit report prepared by Booz Allen Hamilton ("BAH") in Docket No. 08-00039.[75] Following a

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[72] *Id.*, p. 35.

[73] *See In re: Petition of Tennessee American Water Company to Charge 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. 06-00290, *Order,* pp. 26-27 (June 10, 2008).

[74] *Id.*

[75] *See 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. 08-00039, *Petition* (March 14, 2008).

thorough review and hearing in that docket, the Authority found that the BAH report failed to adequately address the issue of whether the costs, which had increased significantly since implementation of the service company contract, were the result of prudent management decisions. Further, the Authority questioned the independence of BAH in preparing the report. As a result, the Authority concluded that the audit did not comply with the TRA's directive in the 2006 rate case. The Authority did not approve TAWC's requested amount of management fees and ordered TAWC to develop and submit for Authority approval a Request for Proposal ("RFP") for a comprehensive management audit.[76] In addition, setting forth detailed and specific considerations for inclusion in the RFP, the Authority directed that TAWC work closely with Authority Staff throughout the process.[77]

Later, following the *Notice of Filing of Tennessee American Water Company's Request for Proposal for a Management Audit ("Draft RFP"),* the Authority designated Docket No. 09-00086 as the docket in which to receive and review all filings related to the RFP.[78] Thereafter, Authority Staff worked with TAWC in the development of the RFP so that an independent audit firm would ultimately be selected to perform the management audit. There were no intervention requests during the time the docket progressed from the *Draft RFP* to the filing of the completed audit report in September, 2010. Throughout the time period in which the Authority oversaw the RFP development and selection of the auditor, as well as the completion and filing of the independent management audit, the docket was not a contested case and there existed no "adversarial" or "litigation" aspects to the proceedings.

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[76] *See 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. 08-00039, *Order,* pp.18-22 (January 13, 2009).

[77] *Id.*

[78] *See 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. 08-00039, *Order Moving Request for Proposal to New Docket* (July 16, 2009).

On September 10, 2010, a management audit report prepared by Schumaker and Company was filed by TAWC in Docket No. 09-00086. Thereafter, on September 13, 2010, TAWC filed its Motion for Entry of a Protective Order along with a proposed protective order, which the TRA modified and entered on September 23, 2010. In addition, as recommended by the auditor in the audit report, a cost allocation analysis was performed, and TAWC subsequently filed its Customer Based Cost Allocation Analysis in Docket No. 09-00086 on December 28, 2010.

TAWC filed this rate case in Docket No. 10-00189, in which it relies, in part, on the Schumaker audit report in support of its request for an increase in rates. Due to the consistent activity in the 09-00086 docket, and in light of the new rate case filed by TAWC in Docket No. 10-00189, the actual results and findings of the audit have not yet been evaluated and acted upon by the Authority. It was not until January 2011, when TAWC filed its motion to approve and adopt Schumaker and Company's affiliate audit report of TAWC in Docket No. 09-00086, that any party petitioned to intervene in Docket No. 09-00086.

As discussed above, documents created in preparation for an ordinary business purpose or pursuant to regulatory requirement, and not for "litigation," would not be protected as work product. This would include an administrative *filing* related to the setting of rates of a public utility regulated by the Authority. This conclusion is derived from the principle that such preparatory documents are not created in anticipation of "initiat[ing] an adversarial action *against"* another party or agency, but rather are created in anticipation of filing to set rates in the ordinary course of business or pursuant to regulatory requirements.[79] Therefore, the communications and documents prepared throughout the time and process of the audit, notwithstanding whether they were shared and exchanged between TAWC, its parent, affiliated

[79] *See Pacific Gas,* 69 Fed. Cl. 784 at 806.

service company, other affiliated state utility companies, and even with outside consultants in some instances, cannot be presumed to qualify as work product simply because they relate to some aspect of the audit - whether auditor requests, company responses to auditor requests, interviews, meetings, or the audit report itself – even if anticipated to be an adversarial aspect of a future proceeding. To be excluded from discovery as work product, TAWC has the burden of showing that litigation or trial was the "driving force" behind the creation of the communications and documents at issue.

In his Affidavit filed on January 24, 2011, Mr. Miller asserts that items related to the management audit are entitled to protection from discovery. Nevertheless, he admits that the materials at issue were "discussed, prepared, and transmitted . . . internally in response to information requests from the independent management auditor and in response to the management audit generally."[80] Moreover, Mr. Miller contends that the communications and documents were prepared "anticipating that the management audit would be the subject of litigation in Docket No. 09-00086, Docket No. 08-00039, or in a future rate case given the fact that the Company's management fees have been one of the primary contested issues in past rate cases . . ."[81] Regardless of the Company's anticipation that management fees would be a subject of litigation in a prior or current docket, or at some other point in time, it remains clear that the management audit was the result of a regulatory requirement imposed by the Authority in conjunction with reviewing and setting of TAWC's rates. Further, TAWC was required to undergo the audit before any revision or future setting of rates would occur. Whether or not anticipated to be an adversarial aspect of any future proceeding, the management RFP and audit was prepared, completed, and filed in Docket No. 09-00086, pursuant to a regulatory requirement ordered by the Authority, to facilitate the presentation of accurate information on

[80] Affidavit of Michael Miller, ¶ 4 (January 24, 2011).
[81] *Id.* at ¶ 5 (January 24, 2011).

TAWC's management costs during administrative proceedings for the consideration of the Authority.

Regardless, whether or not the management audit could rightly be considered to have been prepared in the ordinary course of business for a public utility, or pursuant to the regulatory mandate of the Authority, or in anticipation of litigation, the *Privilege Log* and Affidavit of Michael Miller do not provide sufficiently detailed information or grounds upon which the Hearing Officer can determine that the documents and communications at issue qualify as work product. The fact that the communication may relate to the audit or the process undertaken to complete the audit and that the audit was likely to be submitted in a subsequent rate case does not automatically render the communication privileged or protected. It is undisputed that the audit was performed pursuant to a regulatory requirement as ordered by the Authority. Unless communication related to the audit qualifies for the imposition of a privilege or protection based on some other grounds, communication surrounding the audit process or the resulting report is not privileged or protected. The privilege log contains no information to demonstrate or even suggest that the communication listed therein would qualify as privileged or protected based on grounds other than their connection to the audit. Based on the foregoing, the Hearing Officer finds that TAWC has not carried its burden on these issues. In addition, TAWC's failure to set forth sufficient factual detail describing the context and circumstances surrounding the items renders the Hearing Officer unable to conclude that such items are covered by the attorney-client privilege.

For the above stated reasons, the Hearing Officer determines that an *in camera* review of the communications and documentation listed in the Privilege Log must be undertaken to establish whether the attorney-client privilege or work product protection should attach to these materials. TAWC will provide Items 2 through 96 listed in its *Privilege Log* to TRA General

Counsel and a member of the TRA Legal Division who will conduct the *in camera* review. Thereafter a decision will be made with respect to the production of these materials.

The decision of the Hearing Officer in this matter was announced at the Pre-Hearing Conference held in this docket on February 25, 2011. Counsel for TAWC agreed to meet with and provide the materials to General Counsel on February 27, 2011.

IT IS THEREFORE ORDERED THAT:

Tennessee American Water Company shall produce the communications and documents listed in Items 2 through 96 of its Privilege Log Document to General Counsel and a member of the Legal Division on February 27, 2011, for an *in camera* review to determine whether the attorney-client privilege or the work product protection should attach to the respective materials.

Chairman Mary W. Freeman
Hearing Officer