

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

February 25, 2011

IN RE:

**PETITION OF TENNESSEE AMERICAN WATER
COMPANY FOR A GENERAL RATE INCREASE**

)
) **DOCKET NO.**
) **10-00189**
)
)

**ORDER DENYING THE UWUA'S MOTION TO SUBSTITUTE AFFIANT AND
GRANTING TAWC'S MOTION IN LIMINE TO STRIKE THE STATEMENT
OF JERRY HADDOCK, STRIKE CERTAIN TESTIMONY OF JAMES LEWIS, AND
TO EXCLUDE THE TESTIMONY OF MARTIN BLEVINS**

These matters came before the Hearing Officer upon the filing with the Tennessee Regulatory Authority ("Authority" or "TRA") of the *Motion to Substitute Affiant* ("*Motion to Substitute*") filed by the Utility Workers Union of America, AFL-CIO and UWUA Local 121 (collectively, "UWUA") on February 7, 2011 and *Tennessee American Water Company's Motion In Limine to Strike the Statement of Jerry Haddock, Strike Certain Testimony of James Lewis, and to Exclude the Testimony of Marvin Blevins* ("*Motion to Strike*") filed on February 14, 2010.

1. UWUA's *Motion to Substitute Affiant*

In its *Motion to Substitute*, UWUA requests permission to substitute Martin R. Blevins for Affiant Jerry Haddock, whose statement is Exhibit UWUA-11 to the pre-filed testimony of UWUA witness James Lewis. In addition, UWUA requests permission for Mr. Blevins to be available at the hearing for examination purposes and that his testimony be included in the record. UWUA states that it makes this request because Mr. Haddock's current employment situation makes it difficult for him to be available to testify at trial.

According to UWUA, Mr. Blevins is familiar with the specifics of Tennessee American Water Company ("TAWC" or "Company") valve maintenance program, has reviewed Mr. Haddock's statement and can attest (with limited exceptions, as indicated therein) to the accuracy of the circumstances and events described in Mr. Haddock's statement.¹ In addition, UWUA asserts that no party is prejudiced by the proposed substitution because Mr. Blevins is simply adopting Mr. Haddock's statement, on which portions of Mr. Lewis's testimony relies. UWUA states that it only recently became aware of Mr. Blevins' availability to provide testimony in this case, and thus, it has acted in as timely a manner as possible in obtaining his sworn statement.

TAWC's Response in Opposition to the Utility Workers Union of America, AFL-CIO and UWUA Local 121's Motion to Substitute Affiant ("Response to Motion to Substitute") was filed with the Authority on February 14, 2011. In its *Response to Motion to Substitute*, TAWC contends that UWUA's *Motion to Substitute* is improper and has no basis under the Tennessee Rules of Civil Procedure, Tennessee Rules of Evidence, or the TRA's Rules and Procedural Order. Therefore, UWUA's *Motion to Substitute Affiant* should be denied.

In addition, TAWC asserts that, as the intervenors' pre-filed testimony was required to be filed by January 5, 2011, the proposed statement and testimony of Mr. Blevins is untimely under the procedural schedule entered in this docket. The only pre-filed testimony filed by UWUA was that of Mr. James Lewis, which includes a statement signed by Mr. Haddock in support of certain portions of Lewis's testimony. Mr. Haddock never submitted pre-filed testimony, and UWUA never stated that Mr. Haddock would be a witness or would be providing testimony. In fact, TAWC asserts that in UWUA Supplemental Discovery Response to TAWC Request No. 3,

¹ Marvin R. Blevins statement states in ¶4, that he can attest to the accuracy of the circumstances and events described in Mr. Haddock's Statement filed with the Commission as an attachment to the Testimony of James Lewis on January 5, 2011, however, in ¶5 he corrects Mr. Haddock and states that the Company has 20,000 smaller valves, not 10,000 as stated by Mr. Haddock and also goes on to correct the date the leak repair job was conducted on Lakeview Drive from January 2009 to January 2010.

UWUA stated that they did not intend to call Mr. Haddock as a fact witness, but, if necessary, could seek to make him available.

Further, TAWC asserts that now, less than three weeks before the hearing, UWUA has offered Marvin Blevins to provide testimony by adopting the statement of Mr. Haddock. In its *Response to Motion to Substitute*, TAWC asserts that there is no legal basis under the rules of procedure or the rules of evidence that permit a witness to “adopt the affidavit” of another individual. TAWC further contends that such adoption constitutes hearsay on three levels: (1) Mr. Lewis recites his conversation with Mr. Haddock; (2) Mr. Blevins will attest to Mr. Haddock’s statement; and (3) Mr. Haddock’s unsworn statement is an out of court statement inadmissible as hearsay.

In addition, TAWC states that Mr. Haddock’s written statement is not an affidavit, but rather, is an unsworn statement. TAWC contends that Mr. Blevins is adopting Mr. Haddock’s statement, and thereby, attesting to the accuracy of the circumstances and events therein. Nonetheless, Mr. Blevins directly contradicts and points out several inaccuracies within Mr. Haddock’s statement and, further, offers new, allegedly correct, information.

As a threshold matter, the Hearing Officer finds that UWUA Exhibit-11 is an unsworn statement and not an affidavit. According to Black’s Law Dictionary² an “affidavit” is defined as:

A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

Mr. Haddock’s statement was not confirmed by oath or affirmation, nor was it taken before a person having authority to administer such oath or affirmation. Mr. Haddock merely provided a

² BLACK’S LAW DICTIONARY 58 (6TH ed. 1990).

signed statement, which it attached as an exhibit to the pre-filed testimony of Mr. James Lewis.

Next, Mr. Haddock has not been designated as a witness in this proceeding and more importantly, he has not filed any pre-filed testimony in this proceeding. Therefore, it is not possible for Mr. Blevins to adopt the statement of Mr. Haddock as his own testimony and then provide live testimony in this matter, for the simple reason that Mr. Haddock did not submit pre-filed testimony in this proceeding. Further, for Mr. Blevins to adopt the statement of Mr. Haddock, yet make significant changes to amounts and dates within that statement, while continuing to assert that he adopts the statements of Mr. Haddock as his own, is improper and not a substitution. The UWUA's request that Mr. Blevins provide witness testimony three weeks prior to the hearing is prejudicial because TAWC has not been made aware that Mr. Blevins was a possible witness and he has not filed any pre-filed testimony. Further, UWUA has failed to request or obtain the necessary permission to file additional testimony. For the foregoing reasons, UWUA's *Motion to Substitute Affiant* is hereby denied.

2. TAWC'S *Motion to Strike*

On February 14, 2010, Tennessee American Water Company filed its *Motion to Strike*. In its *Motion to Strike*, TAWC requests that the Authority strike the unsworn statement of Jerry Haddock, included as Exhibit UWUA-11 to the Pre-Filed Testimony of James Lewis, and strike the portions of Mr. Lewis' testimony concerning the Company's valve operations and maintenance, as they rely and are based on Mr. Haddock's statement. Additionally, TAWC moves to exclude the testimony of Marvin R. Blevins.

TAWC asserts that Mr. Lewis' testimony on the TAWC's valve operations and maintenance is predicated solely on the statements of Mr. Haddock, is inadmissible because it is made without personal knowledge, and that these statements constitute hearsay. Further, TAWC

contends that Mr. Haddock submitted an unsworn statement, which is not pre-filed testimony and not subject to cross-examination in this matter. TAWC also asserts that Mr. Blevins's testimony should be excluded because his entire testimony is hearsay, is not based on personal knowledge, and Mr. Blevins failed to file pre-filed testimony in accordance with the procedural schedule entered in this docket. TAWC states that according to the Procedural Order in this docket, the Intervenor was required to submit testimony by January 5, 2011. On January 5, 2011, UWUA filed only the testimony of James Lewis. Mr. Haddock's statement was filed as an attachment to Mr. Lewis' testimony and is an unsworn statement.

In its *Motion to Strike*, TAWC asserts that Mr. Lewis's testimony on valve operations and maintenance is a recounting of a conversation he had with Mr. Haddock. Mr. Lewis then attached a Mr. Haddock's statement to corroborate and/or support the discussion. TAWC contends that this is inadmissible as evidence because it constitutes hearsay under the Tennessee Rules of Evidence.³ Further, TAWC states that Mr. Haddock's "affidavit" is an unsworn statement and not an affidavit. TAWC asserts that the substitution of Marvin Blevins for Mr. Haddock should not be permitted. Mr. Blevins testimony would be nothing more than an adoption of the hearsay statement of Mr. Haddock, as Mr. Haddock did not offer testimony and Mr. Lewis is simply recounting facts obtained in a conversation he had with Mr. Haddock. TAWC contends that this constitutes inadmissible hearsay. Therefore, Mr. Blevins's testimony would also be hearsay.

TAWC asserts that Mr. Lewis attached an unsworn statement of another person to his pre-filed testimony and Mr. Haddock's statement does not become pre-filed testimony merely because it was attached to the testimony of the Pre-filed Testimony of Mr. Lewis. Further Mr.

³ TAWC defines hearsay as a statement from a person other than the person testifying at the hearing that is offered in evidence to prove the truth of the matter asserted (*citing* Tenn. R. Evid. 801-802).

Blevins does not appear to have personal knowledge of Mr. Haddock's observations. Finally, Mr. Blevins did not file pre-filed testimony in this matter by January 5, 2011, the deadline set for filing of Intervenor's witnesses' pre-filed testimony. Finally, TAWC contends that Mr. Lewis does not have personal knowledge of valve operations and maintenance, and merely relies on a conversation he had with Mr. Haddock in order to testify on the subject.

Under Tenn. R. of Evid. Rule 602, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. In this case, Mr. Lewis has no personal knowledge and cannot provide testimony on this issue. Further, the statement attached to Mr. Lewis' pre-filed testimony recounts a conversation he had with Mr. Haddock on TAWC valve maintenance and operations. Tenn. R. Evid. Rule 801(c) provides:

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Mr. Lewis' testimony discusses his conversation with Mr. Haddock on valve maintenance and operation and relies on that in his testimony as evidence to prove the truth of the matter asserted. Further, Tenn R. Evid. Rule 802 states that hearsay is inadmissible unless otherwise provided by law:

Rule 802. Hearsay rule. —Hearsay is not admissible except as provided by these rules or otherwise by law.

The hearsay described herein does not fall under any of the exceptions listed in Rules 803 and 804. For these reasons, the Hearing Officer finds that Mr. Lewis's statements with respect to his conversations with Mr. Haddock constitute hearsay and are not admissible evidence.

Therefore, the testimony of Mr. Lewis recounting his discussion with Mr. Jerry Haddock

as memorialized on page 16, lines 14 to page 17, line 20, concerning valve operations and maintenance at TAWC shall be stricken from his testimony. Furthermore, Mr. Lewis will not be permitted to testify concerning this conversation at hearing. Finally, the Hearing Officer strikes Mr. Haddock's statement attached as Exhibit UWUA-11 to Mr. Lewis' pre-filed testimony.

This is not a situation where one witness is merely adopting the pre-filed testimony of another as his own. Mr. Haddock did not provide a sworn statement and has not provided pre-filed testimony in this docket. Mr. Haddock has not been identified as a witness. Mr. Haddock does not have any testimony filed in this docket. Mr. Blevins will not be permitted to adopt the statement of Mr. Haddock. Mr. Blevins's statement does not merely adopt Mr. Haddock's statements as asserted by UWUA. Rather, Mr. Blevins states that he "can attest to the accuracy of the circumstances and events described in Mr. Haddock's Statement." Nevertheless, in the subsequent paragraph, he points out various inaccuracies within those statements and offers new, corrected, information on the number of smaller valves from 10,000 to 20,000 valves and on the date of a leak repair job from January 2009 to January 2010. Mr. Blevins modifies the statements of Mr. Haddock and makes substantive corrections.

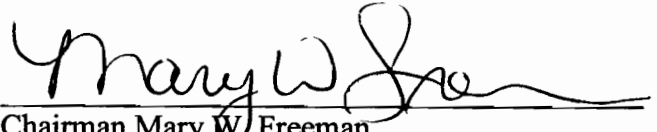
Lastly, Mr. Blevins may not provide testimony because he has not been identified as a witness and has not filed pre-filed testimony in this proceeding. UWUA has not previously filed a request or otherwise obtain permission for Mr. Blevins to appear as a witness to provide testimony in this proceeding. For these reasons, the *Motion to Strike* is GRANTED

IT IS THEREFORE ORDERED THAT:

1. The Utility Workers Union of America, AFL-CIO and UWUA Local 121's *Motion to Substitute Affiant* is DENIED.

2. *Tennessee American Water Company's Motion in Limine to Strike the Statement*

of Jerry Haddock, Strike Certain Testimony of James Lewis, and to Exclude the Testimony of Marvin Blevins is GRANTED.

A handwritten signature in cursive script, appearing to read "Mary W. Freeman", written over a horizontal line.

Chairman Mary W. Freeman
Hearing Officer