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February 28, 2011

VIA EMAIL

filed electronically in docket office on 02/28/11

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

Re: Docket No. 10-00189: *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*

Dear Chairman Freeman:

Enclosed please find Tennessee American Water Company's Petition for Appeal of the Hearing Officer's Initial Order Granting the City of Chattanooga's Third Motion to Compel.

Due to all parties having relocated to Chattanooga for the Hearing on the Merits this week, an original and four copies will be filed with the TRA Dockets and Records Manager, Sharla Dillon, on March 7th.

Should you have any questions concerning this matter, please do not hesitate to contact me at the email address or telephone number listed above.

Sincerely,



David Killion

Enclosure

cc: Mr. Richard Collier, Esq. (w/enclosure)
Ryan McGehee, Esq. (w/ enclosure)
Mary L. White, Esq. (w/ enclosure)
David C. Higney, Esq. (w/ enclosure)

Henry M. Walker, Esq. (w/ enclosure)
Michael A. McMahan, Esq. (w/ enclosure)
Valerie L. Malueg, Esq. (w/ enclosure)
Frederick L. Hitchcock, Esq. (w/ enclosure)
Harold L. North, Jr., Esq. (w/ enclosure)
Mark Brooks, Esq. (w/ enclosure)
Scott H. Strauss, Esq. (w/ enclosure)
Katharine M. Mapes, Esq. (w/ enclosure)
Donald L. Scholes, Esq. (w/ enclosure)

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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 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. 10-00189

**TENNESSEE AMERICAN WATER COMPANY'S PETITION FOR APPEAL OF THE
HEARING OFFICER'S INITIAL ORDER GRANTING THE CITY OF
CHATTANOOGA'S THIRD MOTION TO COMPEL**

Pursuant to T.C.A. § 4-5-315(b), Tennessee American Water Company ("TAWC"), by and through counsel, respectfully petition for appeal of an Initial Order of the Hearing Officer in the above-captioned docket. TAWC appeals the Hearing Officer's February 25, 2011 ruling on 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") sought to compel TAWC to produce items 2 through 96 on TAWC's privilege log, asserting that the privilege log failed to describe the withheld materials in a manner that enables the parties or the Tennessee Regulatory Authority ("TRA") to assess the factual basis of the TAWC's claims of attorney-client privilege and/or work product protection. In response to the Third Motion to Compel, TAWC contends that it has properly asserted its claims of attorney-client privilege and work product and has sufficiently described each item on its privilege log.

The Hearing Officer ordered TAWC to produce items 2 through 96 on its privilege log to General Counsel and a member of the Legal Division on February 27, 2011, for an *in camera* review to determine whether TAWC's claims of attorney-client privilege and/or the work

product protection should be sustained for each item. Although TAWC has complied with the order by submitting such documents for an *in camera* review, TAWC hereby appeals the Hearing Officer's ruling to the full panel of the TRA.

In ruling on the Third Motion to Compel, the Hearing Officer relied on Pacific Gas and Electric Co. v. United States in stating that “documents created in preparation for a filing to set rates in the ordinary course of business or pursuant to regulatory requirements” would not be entitled to work product protection, whereas “‘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” would be protected from disclosure. February 25, 2011 Order at 12 (citing Pacific Gas and Elec. Co. v. U.S., 69 Fed. Cl. 784, 806 (Fed. Cl. 2006)).

Pacific Gas cited several cases, including Biddison v. Chicago, in discussing whether documents were created in anticipation of litigation for purposes of work product protection. “[D]ocuments prepared in connection with ***routine administrative filings*** under the securities, tax and other regulatory laws are generally held not to be covered by the work product exemption.” Biddison v. Chicago, No. 85 C 10295, 1989 U.S. Dist. LEXIS 3991 at *2 (N.D. Ill. Feb. 3, 1989) (emphasis added). In Biddison, the plaintiff sought to compel the production of certain documents that were created in the course of preparing an environmental impact statement (“EIS”), which the city had been ordered to prepare in a prior action. The Biddison court held that attorney work product relating to the preparation of the EIS was in fact created in anticipation of litigation and should be given work product protection. Id. at *8. In reaching this conclusion, the Biddison court relied upon the history of the case, which showed that the preparation of the EIS was “inextricably bound up with defendants’ defense of a seamless web of

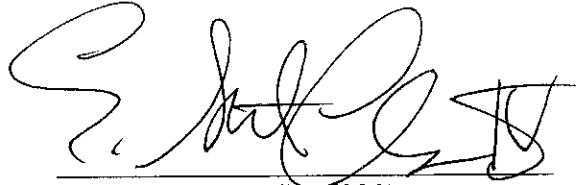
litigation” related to expansion plans of O’Hare Airport. Id. at *3. The court found that “litigation relating to the information contained in the EIS was a virtual certainty.” Id. at *7.

Similarly, the items in dispute in this case relate to the Management Audit that TAWC was ordered to conduct in the 2008 Rate Case—an adversarial proceeding that is part of a history of litigation related to TAWC’s petitions to change and increase rates. Items 2 through 96 are documents or communications exchanged internally between TAWC employees, or between TAWC employees and TAWC’s parent company, AWWC, its affiliated service company AWWSC, state affiliate companies, or legal counsel. These items were intended to be confidential and were created in the course of *ongoing litigation* and in reasonable anticipation of future adversarial litigation. The Management Audit ordered by the authority was not a “routine administrative filing” but was an unusual order that was entered as part of the 2008 contested rate case, and not in the normal course of TAWC’s regulatory business.

The Management Audit arose out of an adversarial proceeding and TAWC believed that litigation relating to the Management Audit was a virtual certainty. Mr. Miller’s affidavit and TAWC’s descriptions of the items in its privilege log clearly establishes that these items were created “in anticipation of litigation” and are entitled to work product protection.

TAWC respectfully requests that argument be heard by the full panel of the TRA on Monday, February 28, 2011 prior to the commencement of the hearing in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "R. Dale Grimes", written over a horizontal line.

R. Dale Grimes (#006223)

E. Steele Clayton IV (#017298)

C. David Killion (#026412)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by way of the method(s) indicated on this the 28th day of February, 2011, upon the following:

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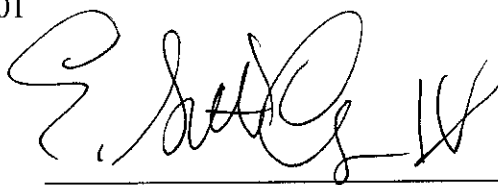
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