

August 10, 2011

filed electronically in docket office on 08/10/11

**Via E-Mail and USPS**

Chairman Eddie Roberson, Ph.D.  
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 Roberson:

Enclosed please find an original and five (5) copies of the City of Chattanooga's Response and Objections to Award of Additional Rate Case Expenses. 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  
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cc: Mr. Jon Wike (w/encl.)  
Mr. R. Dale Grimes (w/encl.)  
Mr. Vance L. Broemel (w/encl.)  
Mr. Ryan L. McGehee  
Ms. Mary L. White  
Mr. David C. Higney (w/encl.)  
Mr. Henry M. Walker (w/encl.)  
Mr. Michael A. McMahan (w/enc.)  
Ms. Valerie L. Malueg  
Mr. Mark Brooks (w/encl.)  
Mr. Scott H. Strauss (w/encl.)  
Ms. Katharine M. Mapes  
Mr. Donald L. Scholes (w/encl.)  
Ms. Kelly Cashman-Grams (via email)  
Ms. Monica Smith-Ashford (via email)  
Ms. Shilina Chatterjee Brown (via email)

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

<b>IN RE:</b>	)	
	)	
<b>PETITION OF TENNESSEE AMERICAN</b>	)	
<b>WATER COMPANY TO CHANGE AND</b>	)	<b>Docket No. 10-00189</b>
<b>INCREASE CERTAIN RATES AND</b>	)	
<b>CHARGES.</b>	)	

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**RESPONSE AND OBJECTIONS OF CITY OF CHATTANOOGA  
TO AWARD OF ADDITIONAL RATE CASE EXPENSES**

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The City of Chattanooga ("City"), by and through counsel, hereby submits the following response and objection to the Notice of Filing and Deliberations dated August 3, 2011. For the reasons discussed below, the City:

- (i) respectfully objects to the award to Tennessee American Water Company ("TAWC") in Docket No. 10-00189 of any amounts for rate case expenses in Docket 08-00039, because
  - no such amounts were requested by TAWC's petition in that proceeding,
  - the mandate issued by the Court of Appeals in the 2008 Docket has no relevance to Docket No. 10-00189, and
  - the TRA excluded from Docket 10-00189 evidence relating to rate case expenses in the 2008 Docket; and
- (ii) respectfully objects to any award in Docket 08-00039 of additional rate case expenses from the 2008 case, because the tariffs approved in that case cannot be amended, since they have been superseded by the tariffs in Docket 10-00189.

In addition, the City reiterates its positions that controlling Tennessee statutes and the TRA's own regulations preclude the award to TAWC of attorney fees and that no evidence exists in the records of either Docket No. 08-00039 or 10-00189 showing the amount, the reasonableness, or the necessity of claimed rate case expenses.

## I

### **RATE CASE EXPENSES CANNOT BE AWARDED IN DOCKET NO. 10-00189**

In Docket No. 10-00189, TAWC filed a petition that did not include any request for recovery of rate case expenses denied in TRA Docket No. 08-00039. On January 28, 2011, the Tennessee Court of Appeals issued its Opinion affirming the decisions of the TRA in Docket No. 08-00039,<sup>1</sup> except as to a single issue. The Court of Appeals reversed the TRA's decision to mathematically reduce by one-half (1/2) TAWC's claimed rate case expenses. The Court of Appeals' reversal was based upon its conclusion that there was no evidence in the record to support the mathematical reduction, and, therefore, the TRA's decision was arbitrary.

TAWC never sought to amend its petition in Docket No. 10-00189 to seek recovery of the one-half (1/2) of claimed rate case expenses that the TRA denied in Docket No. 08-00039. Instead, on February 8, 2011—less than three weeks before the scheduled hearing—TAWC filed *rebuttal* testimony on behalf of Michael A. Miller in which he asserted that the \$275,000 denied in the 2008 case should be recovered in the 2010 rate case and to which he appended a rebuttal exhibit, MAM-11, which added the \$275,000 amount to the rate case expenses sought in Docket No. 10-00189.

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<sup>1</sup>

See Case No. M2009-00553-COA-R12-CV, 2011 WL 334678.

On February 24, 2011, the City filed its Motion in Limine to exclude “all evidence pertaining to, and all consideration of, any claim of Tennessee American Water Company for regulatory expenses requested in Docket No. 08-00039.” *See* City of Chattanooga First Motion in Limine, February 24, 2011. The Hearing Officer granted the City’s First Motion in Limine in the status conference on February 25, and, in response to TAWC’s appeal, the panel unanimously affirmed the Hearing Officer’s ruling on the first day of hearing, February 28, 2011. *See* Transcript of February 25, 2011 Status Conference at pp. 48 – 51; Transcript IA, February 28, 2011 at pp. 30 – 49 (appended as Exhibits A and B).

The record in Docket No. 10-00189 contained no request for rate case expenses relating to Docket No. 08-00039, and all evidence concerning the 2008 rate case expense was excluded from the record in Docket No. 10-00189 and from consideration by the TRA panel. Were the Authority to award to TAWC in Docket No. 10-00189 rate case expenses associated with Docket No. 08-00039 on a record that is devoid of any evidence, it would clearly be acting in an arbitrary manner, just as the Court of Appeals concluded that the TRA did when it mathematically reduced TAWC’s rate case request without citing evidence in the record to support that decision. The Court of Appeals stated:

The record and Final Order do not explain what specific expenses the TRA deemed unnecessary, improvident, or improper or that the Authority closely examined the costs associated with the rate case to determine the portion to be recovered from rate payers and the portion to be born by the shareholders. Such an examination should have taken place and its results included in the record and Final Order. Based on the lack of such findings, the TRA’s decision to only include one half of the cost of the rate case in the rate was arbitrary.

*Tennessee American Water Company v. Tennessee Regulatory Authority*, 2011 WL 334678, \*27, No. M2009-00553-COA-R12-CV (Tenn. Ct. App. 2011), *App. Perm. App. Den’d* (May 25, 2011).

The Notice of Filing and Deliberations reports that the mandate in Docket No. 08-00039 was received and filed by the TRA on June 7, 2011. Although the filing of the mandate reinstituted jurisdiction in the TRA in Docket No. 08-00039, *it had no effect, whatsoever, upon Docket No. 10-00189*. Consequently, because TAWC has not requested the 2008 rate case expenses in this 2010 Docket—and any such proof has been excluded in this Docket—and because the mandate issued in the 2008 Docket has no relevance to this 2010 Docket, the 2008 rate case expenses cannot be recovered in this Docket.

## II

### **RATE CASE EXPENSES CANNOT BE AWARDED IN DOCKET NO. 08-00039**

In *City of Chattanooga v. Tennessee Regulatory Authority*, 2010 WL 2867128, No. M2009-01733-COA-R12-CV (Tenn. Ct. App. 2010), TAWC argued, and the Court of Appeals agreed, that all issues concerning the rate case filed by TAWC in 2006, Docket No. 06-00290, became moot when tariffs approved in the 2008 rate case were filed by TAWC, Docket No. 08-00039, had been put into effect.<sup>2</sup>

Similarly, in this Docket, TAWC has again taken the position that all issues concerning Docket No. 08-00039 became moot and effectively ceased to exist when the new tariffs approved in Docket No. 10-00189 were placed into effect. Mr. Grimes candidly acknowledged and summarized this situation in his argument on February 28, 2011, concerning the City's Motion in Limine in Docket No. 10-00189:

And remember this, once new tariffs are filed in this case after you have made your decision, the 2008 tariffs that went into effect in

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<sup>2</sup> The City has consistently taken the position that filing of tariffs in a subsequent rate case does not necessarily render moot issues raised in a prior rate case. However, in the City's appeal of the 2006 Rate Case, the Court of Appeals ruled otherwise.

October, 2008 will no longer be effective. *So there will be nothing we can do at that point about the \$275,000 in the 2008 case*, to my knowledge.

Transcript, Vol. IA, February 28, 2011, at pp. 31 – 32 (emphasis supplied).

Consequently, according to TAWC and the decision of the Court of Appeals in the 2006 Rate Case, all issues relating to Docket No. 08-00039 were rendered moot when TAWC followed its typical pattern of hurriedly filing another rate case in 2010, as to which a ruling was issued by the TRA before the mandate in Docket No. 08-00039 was issued to, and received by, the TRA. Therefore, under precedent established at the urging of TAWC, there exists no docket in which additional rate case expenses or any other issue that arose in Docket No. 08-00039 may be addressed by the TRA (or, indeed, by any appellate court).

Whatever difficulty this poses for TAWC, it is a situation of TAWC's own making, the inevitable result of its propensity to rapidly file back-to-back rate cases and its strategic decision to promote a legal principle that pretermits appellate review of those rapid-fire rate cases.

### III

#### **TAWC MAY NOT RECOVER ANY ATTORNEYS FEES THAT IT INCURS IN CASES BEFORE THE TRA**

Under the procedures established by the General Assembly for contested cases under the Uniform Administrative Procedures Act, ("UAPA"), Tenn. Code Ann. § 4-5-305(b) specifically requires each party to bear the expenses of its own counsel: "Whether or not participating in person, any party may be advised and represented *at the party's own expense by counsel* or, unless prohibited by any provision of law, other representative." (emphasis added).

In a different context, the Supreme Court has recognized that a party is not entitled to an award of attorneys' fees in proceedings under the UAPA, although such fees may be awarded if

authorized by another statute. *See Wimley v. Rudolph*, 931 S.W.2d 513, 516 (Tenn. 1996) (in an action where plaintiff joined a claim for attorney's fees under 42 U.S.C. § 1983 with her appeal under the UAPA, the Court awarded plaintiff fees under § 1983, but also recognizing that the remedy that is "not available under the Uniform Administrative Procedures Act."). Consequently, while TAWC could not have been refused the representation of counsel in proceedings before the TRA, *cf. Simmons v. Traughber*, 791 S.W.2d 21, 24 (Tenn. 1990), the plain and unambiguous language of section 4-5-303(b) could not be more clear that it is TAWC alone that bears the expense of its counsel.

A virtually identical provision is found in the regulations governing practice before the TRA. Section 1220-01-02-.04 of the Tennessee Compiled Rules and Regulations governing contested also requires parties to bear the expenses of their own counsel: "Any party to a contested case may be advised and represented, *at the party's own expense*, by a licensed attorney or attorneys." (emphasis added). Consistent with the provisions of the UAPA set forth in Tenn. Code Ann. § 4-5-305(b), the TRA's own regulations unambiguously allow for a party to be represented in a contested case, but only at that party's own expense.

### III

### CONCLUSION

For the reasons set forth herein, the City respectfully requests that the TRA award to TAWC no additional rate case expenses claimed to be associated with the 2008 Rate Case, TRA Docket No. 08-00039.



Respectfully Submitted,

OFFICE OF THE CITY ATTORNEY

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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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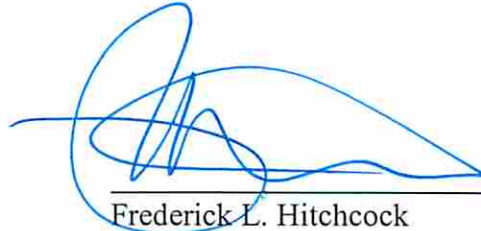
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This 10<sup>th</sup> day of August, 2011.



Frederick L. Hitchcock

## **EXHIBIT A**

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1 (The aforementioned status conference  
2 came on to be heard on Friday, February 25, 2011,  
3 beginning at approximately 10:26 a.m., before Chairman  
4 Mary W. Freeman, when the following proceedings were  
5 had, to-wit:)  
6 CHAIRMAN FREEMAN: Good morning. I'm  
7 Mary Freeman, chairman of the Tennessee Regulatory  
8 Authority. We are here today for a prehearing  
9 conference in TRA Docket No. 10-00189. This is a  
10 petition of Tennessee American Water Company for a  
11 general rate increase. The prehearing conference was  
12 noticed on January 31st, 2011, and is being conducted  
13 in accordance with the Tennessee Code Annotated  
14 Section 4-5-306.  
15 At this time I would like the parties  
16 to introduce themselves for the record, and I will  
17 start on my right.  
18 MR. GRIMES: Good morning, Your Honor.  
19 Dale Grimes on behalf of Tennessee American Water  
20 Company, and with me is Mr. Steele Clayton and  
21 Mr. David Killion. On the telephone is Mr. Michael  
22 Miller.  
23 CHAIRMAN FREEMAN: Thank you.  
24 MR. MCGEEHEE: Ryan McGehee on behalf  
25 of the Consumer Advocate and the Attorney General's

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1 some day, he is available, but otherwise we all agree  
2 that he is scheduled on Thursday. But he is a local  
3 person who could be moved up.  
4 The Thursday lineup, expect for  
5 Mr. Baryenbruch, are all intervenor witnesses. This is  
6 where we've tried to accommodate the intervenors who  
7 said they needed to have their witnesses during the  
8 week in Chattanooga.  
9 CHAIRMAN FREEMAN: I want to have all  
10 the witnesses in Chattanooga. That's my desire and my  
11 hope.  
12 MR. WALKER: I think the schedule  
13 is -- it may be realistic. I think it's a little bit  
14 pessimistic, but when -- I've talked to Mr. Grimes.  
15 There's not going to be any downtime. If we get  
16 through these witnesses, we're just going to call the  
17 next witness. We're going -- there's not going to be  
18 any time when it's going to be 4:00 and we're going to  
19 say, well, we're through for the day. There's going to  
20 be another witness put on the stand.  
21 So we're going to stay late. We will  
22 substitute people as we can, and we're all committed to  
23 doing this -- if we can do it in one week, we're  
24 certainly going to try.  
25 CHAIRMAN FREEMAN: Mr. Grimes?

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1 office. I have with me Mary White and Scott Jackson.  
2 MR. WALKER: Henry Walker and  
3 Dave Higney on behalf of the Chattanooga Regional  
4 Manufacturers Association.  
5 MR. MCMAHAN: Mike McMahan and  
6 Rick Hitchcock on behalf of the City of Chattanooga.  
7 MR. STRAUSS: Scott Strauss for the  
8 Utility Workers Union of America and Local 121 UWUA.  
9 Good morning.  
10 CHAIRMAN FREEMAN: Good morning to  
11 you-all. I understand that you-all have reached an  
12 agreement on a witness list?  
13 MR. GRIMES: That is correct. And  
14 it's one that we provided copies to Ms. Chatterjee  
15 Brown for you-all. Do you have a copy? I have extras.  
16 CHAIRMAN FREEMAN: I think we have it.  
17 Thank you. Just let me review for a second.  
18 There are a couple of questions that  
19 come to mind regarding the witness list. You have  
20 Warren, Spitznagel, and Herbert. Are either of those  
21 three -- can we hear either of those three on Monday  
22 or on Tuesday afternoon, I guess, after Schumaker?  
23 MR. GRIMES: Yes, we've got Schumaker  
24 and then Dismukes on Tuesday. We anticipate that  
25 that's going to take quite some time, but we could -- I

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1 MR. GRIMES: It would be great to do  
2 it in one week. This schedule is based on -- this  
3 schedule is based on looking back at the transcript of  
4 the last case and how long some of the same witnesses  
5 were on the witness stand, and they were on for lengthy  
6 periods of time.  
7 So we've made it as realistic as we  
8 can. We have -- a lot of our witnesses are from out of  
9 town. There is an expense involved in having them  
10 sitting around waiting to see how quickly they need to  
11 be called, and so it's just a juggling act and we'll do  
12 the best we can on it. And that's all I can -- it's  
13 all I can say.  
14 You know, I think that the other thing  
15 is that we want to -- we want to have a fair hearing.  
16 He want to have everybody have a chance to say what  
17 they need to say. And, you know, unfortunately, there  
18 are a lot of issues in this case. We tried to settle  
19 an issue that would have eliminated a couple of  
20 witnesses, and that was unsuccessful.  
21 So, you know, we have to put on our  
22 case. We have a -- we have an adversary who likes to  
23 remind us that we have the burden of proof, and so we  
24 intend to fully carry that burden of proof. We think  
25 we already have by the prefilled testimony, but in any

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1 think if we needed to, we could possibly put  
2 Dr. Spitznagel on on Tuesday afternoon. Mr. Warren, I  
3 believe, has to be on Wednesday afternoon.  
4 CHAIRMAN FREEMAN: And what about  
5 Mr. Herbert?  
6 MR. GRIMES: Mr. Herbert could be.  
7 There's a question right now whether he will be  
8 required to testify, but that's not been settled  
9 between the parties. The good news is that there's one  
10 witness that may fall.  
11 CHAIRMAN FREEMAN: That's exciting.  
12 MR. GRIMES: Well, I'm glad there's  
13 something to be excited about.  
14 CHAIRMAN FREEMAN: And then on  
15 Thursday -- would either of those witnesses be able to  
16 move up on Wednesday?  
17 MR. STRAUSS: Madam Chair, I would  
18 note that the Union's witnesses, Mr. Louis and  
19 Mr. Blevins if he is available, would certainly be able  
20 to be moved up in the schedule.  
21 CHAIRMAN FREEMAN: Okay. Thank you.  
22 MR. GRIMES: What we've talked about  
23 on that, Chairman Freeman, is that the union -- one of  
24 the Union's witnesses resides in Chattanooga and he is  
25 basically available. If we run out of witnesses on

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1 event, we have that burden and we have somebody who  
2 wants to make an issue of it. So if we can't finish in  
3 a week -- you know, I would love to finish in a week,  
4 but we've got 18 witnesses.  
5 CHAIRMAN FREEMAN: And I want all the  
6 witnesses to be heard and all the information to be  
7 brought out as well. But if by some chance that we  
8 move at a pace that allows us to finish witness  
9 testimonies, I just want the next day's witnesses to be  
10 prepared, just in case. So the Monday witnesses and  
11 the Tuesday witnesses, I would want them to be prepared  
12 to go on Thursday or Friday, if possible.  
13 MR. GRIMES: Oh, the next week's  
14 Monday and Tuesday.  
15 CHAIRMAN FREEMAN: Yes.  
16 MR. GRIMES: I'm sorry. I'm not  
17 running as fast as you are this morning.  
18 That's fine. The only problem that I  
19 do want to say that we do know we have is that  
20 Dr. Vander Weide, our witness on return on equity, is  
21 engaged in another hearing in another jurisdiction next  
22 week. That was already set by the time our hearing was  
23 scheduled. So that's unavoidable. But he has told us  
24 now he thinks that he can be in Chattanooga on Friday.  
25 If he can't, unfortunately, he has a medical procedure

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1 on Monday that he cannot change, and so it would be the  
2 next day.

3 CHAIRMAN FREEMAN: Okay. Thank you.  
4 Have the parties had an opportunity to discuss other  
5 issues, the issues of admissibility of documents?

6 MR. GRIMES: Madam Chairman, we have  
7 not discussed that. I believe that other than the  
8 motions that have been filed with respect to evidence  
9 that are pending before you, I don't think that there  
10 are any objections to any of the prefiled exhibits.  
11 I'm not aware of any.

12 CHAIRMAN FREEMAN: I'm not hearing  
13 any.

14 At this time I would like to discuss  
15 some procedural issues related to the hearing. As I  
16 stated, I would like to complete the hearing during the  
17 week we are in Chattanooga. To facilitate that, I'm  
18 going to request opening statements of 20 minutes for  
19 Tennessee American, and each of the intervenors will  
20 have 10 minutes for opening statements. I'm also going  
21 to limit the summary of each witness's testimony to 10  
22 minutes.

23 I know at other times PowerPoint  
24 presentations have been used, and I'm not sure how  
25 useful those presentations are and they tend to

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1 are going to put forward.

2 CHAIRMAN FREEMAN: I think that's a  
3 reasonable request for 30 minutes for your witness.

4 MR. HITCHCOCK: All right. Thank you.

5 MR. MCGHEE: Chairman, we won't  
6 need -- none of our witnesses will need 30 minutes, but  
7 it could be that Mr. Buckner may need a little bit more  
8 than 10. So we would ask for just a little bit of  
9 leniency on the 10 minutes for Mr. Buckner.

10 CHAIRMAN FREEMAN: Thank you.

11 MR. WALKER: Typically when a witness  
12 gets on the stand, we ask him to summarize his prefiled  
13 testimony. And sometimes he will go ahead and respond  
14 to what the company has said in rebuttal. Other times  
15 we ask a follow-up question. Well, that's your prefiled  
16 testimony, have you read what the company has filed in  
17 rebuttal? Yes. How would you respond to that?

18 Does that count in the 10 minutes?

19 CHAIRMAN FREEMAN: It does not.

20 MR. WALKER: Okay. Then 10 minutes is  
21 fine with us.

22 CHAIRMAN FREEMAN: Thank you.

23 Mr. Strauss?

24 MR. STRAUSS: No issue, Your Honor.

25 We will hit the target.

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1 increase the length of the testimony. So if you choose  
2 to use a PowerPoint presentation, the 10 minutes  
3 allotted will include the time to set up and distribute  
4 the PowerPoint materials.

5 MR. GRIMES: Madam Chair?

6 CHAIRMAN FREEMAN: Yes, Mr. Grimes.

7 MR. GRIMES: We have two witnesses --

8 I think the 10 minutes work fine for most of our  
9 witnesses, and I think in the past they have stayed  
10 within that for the most part. But we have two  
11 witnesses who cover a lot of territory, and that's  
12 Mr. Watson and Mr. Miller. Mr. Miller's testimony  
13 covers 20 topics, and, you know, we could have multiple  
14 witnesses but we don't. And I guess if we had multiple  
15 witnesses, we would have multiple 10 minutes.

16 So we would respectfully request that  
17 Mr. Miller have additional time. And I would say if he  
18 could have 30 minutes and Mr. Watson could have 30  
19 minutes, because, again, he is the president of the  
20 company. He has got to -- he has a number of things  
21 that he has to cover as well that we think are  
22 important to bring to the directors' attention. So  
23 that would be our request.

24 CHAIRMAN FREEMAN: So you believe  
25 30 minutes -- could 20 minutes work?

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1 CHAIRMAN FREEMAN: Thank you. You are  
2 so cooperative.

3 MR. STRAUSS: I try.

4 MR. GRIMES: Madam Chair, I'm not sure

5 I understand Mr. Walker's point. You're saying there's  
6 a 10-minute summary and then they can respond to the  
7 company's testimony that they have not put in their  
8 prefiled testimony?

9 MR. WALKER: Rebuttal, because they  
10 will have not had an opportunity to respond to rebuttal  
11 in their prefiled testimony. So we say, Mr. Gorman,  
12 have you read the company's rebuttal which they say  
13 various things about your testimony? Yes, I have.  
14 Would you like to respond to that, please? Here's my  
15 response.

16 MR. GRIMES: Well, that hasn't been  
17 prefiled.

18 MR. WALKER: It never is because it  
19 can't be.

20 MR. GRIMES: Right, but that seems to  
21 be getting beyond the scope of --

22 MR. WALKER: How else can the witness  
23 respond to the company's rebuttal unless we ask them.

24 MR. GRIMES: But, I mean, that can go  
25 on forever.

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1 MR. GRIMES: I would really request

2 30.

3 CHAIRMAN FREEMAN: You want to start  
4 out with 30?

5 MR. GRIMES: Yes, ma'am, if we could.

6 CHAIRMAN FREEMAN: Are there any

7 objections to Mr. Miller and Mr. Watson having  
8 30 minutes instead of 10?

9 MR. HITCHCOCK: Well, Your Honor, I  
10 guess we could make a similar request. We only have  
11 one witness, Ms. Dismukes, and she is covering issues  
12 that are very important on management fees, and I'm  
13 sure that that could probably be done by others.

14 It seems to me that Mr. Miller and  
15 Mr. Watson have prefiled all of their testimony. They  
16 have -- it's very extensive, both in direct and  
17 rebuttal, as well as extensive -- extensive exhibits.  
18 So I think that it probably starts a chain reaction if  
19 we start picking which witness deserves a longer period  
20 of time to summarize.

21 So I think your suggestion of limiting  
22 the time to 10 minutes per witness is a good one and we  
23 are -- that's certainly acceptable to us, but we would  
24 like to have the same amount of time for our one  
25 witness as they are asking for whatever witnesses they

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1 MR. WALKER: Agreed. And --

2 MR. GRIMES: And then our witness will  
3 need to come back on the stand and respond to what they  
4 say. That's what we would request. If they rebut --  
5 if they respond to rebuttal and we have a further  
6 response to their rebuttal, then we would request the  
7 opportunity to re-call witnesses to make that response.

8 CHAIRMAN FREEMAN: Okay. We're moving  
9 on. Just to kind of go over the schedule for Monday.

10 We will begin at 9:00 a.m. Eastern on Monday, February  
11 the 28th, with a public comment period. After the  
12 public comment, the parties should be prepared to  
13 proceed with opening statements and then begin to call  
14 witnesses. Beginning at 6:30 p.m. Monday evening, we  
15 will have another public comment period.

16 On Tuesday, March the 1st at 8:00 a.m.

17 Eastern, we will begin with Pat Schumaker's testimony  
18 regardless of where we left off on Monday.

19 MR. HITCHCOCK: That's 8:00 a.m.?

20 CHAIRMAN FREEMAN: 8:00 a.m.

21 MR. GRIMES: I think Ms. Schumaker was  
22 told 9:00, but Mr. Collier had conversations --

23 MR. COLLIER: I don't know that a  
24 time --

25 MR. GRIMES: You don't think a time

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1 mattered to her?  
2 MR. COLLIER: I believe she is coming  
3 in Monday night. She was told to be available first  
4 thing Tuesday morning.  
5 MR. GRIMES: Somebody will have to  
6 tell her.  
7 MR. COLLIER: Okay. I will be glad  
8 to.  
9 CHAIRMAN FREEMAN: Following  
10 Ms. Schumaker's testimony, we will assume the regular  
11 order of witnesses as previously discussed.  
12 Please note that on Wednesday,  
13 March 2nd we will not begin until 1:00 p.m. because the  
14 hearing room will be in use that morning. So be  
15 prepared to stay late that evening.  
16 Regarding confidential information. I  
17 would request that you-all pool questions of witnesses  
18 that involve confidential information so we can limit  
19 the time necessary to clear the courtroom. Please make  
20 sure that all parties have filed the necessary  
21 disclosure statements in the docket file.  
22 Regarding demonstrative exhibits and  
23 other exhibits, do the parties agree that demonstrative  
24 exhibits related to a witness's prefiled testimony will  
25 be exchanged among the parties prior to a witness

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1 MR. GRIMES: No, Your Honor.  
2 CHAIRMAN FREEMAN: Regarding discovery  
3 and Authority data request responses, do the parties  
4 have any objection to all discovery responses and  
5 Authority data requests being made a part of the  
6 hearing record? Mr. Grimes?  
7 MR. GRIMES: I know that's what we  
8 normally do and we normally do it in the course of the  
9 proceeding, and I think that we are fine with that with  
10 the exception of the motion that we have filed last  
11 night or this morning. But, yes, I -- can I -- I  
12 need --  
13 CHAIRMAN FREEMAN: You need a moment?  
14 MR. GRIMES: Yes. I need to confer  
15 with my client. He is on the phone. Let me step away  
16 for a second.  
17 CHAIRMAN FREEMAN: Mr. Hitchcock.  
18 MR. HITCHCOCK: The City of  
19 Chattanooga is fine with that, subject to the motion in  
20 limine that we filed. In other words, except for the  
21 items, if that motion is granted, that are covered by  
22 that motion.  
23 CHAIRMAN FREEMAN: Thank you.  
24 (Off the record.)  
25 CHAIRMAN FREEMAN: We are back on the

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1 appearing on the stand?  
2 MR. GRIMES: That's fine.  
3 MR. WALKER: Yes.  
4 MR. HITCHCOCK: Yes, Your Honor.  
5 MR. STRAUSS: Yes.  
6 CHAIRMAN FREEMAN: Also the parties  
7 will need to bring enough copies of all the exhibits so  
8 the court reporter, each director, each senior policy  
9 advisor, and each Authority division chief will have a  
10 copy. I think 25 copies of each exhibit will be  
11 sufficient. The parties should bring copies of all  
12 exhibits, including those appended to prefiled  
13 testimony and be prepared to distribute those copies at  
14 the hearing.  
15 MR. HITCHCOCK: Could we clarify that  
16 last one? You want us to bring 25 more copies of each  
17 of the exhibits that are attached to the prefiled  
18 testimony?  
19 CHAIRMAN FREEMAN: That's correct.  
20 MR. HITCHCOCK: Okay.  
21 MR. GRIMES: Do you want copies of the  
22 prefiled testimony too?  
23 CHAIRMAN FREEMAN: I don't think so.  
24 MR. GRIMES: Just the exhibits.  
25 CHAIRMAN FREEMAN: Just the exhibits.

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1 record. Mr. Grimes?  
2 MR. GRIMES: Thank you very much. We  
3 have no objection, subject to our motion to exclude.  
4 CHAIRMAN FREEMAN: With regards to  
5 redirect and Authority staff questions, I will allow  
6 redirect examination of a witness; however, the  
7 questions must be limited to matters brought out on  
8 cross-examination that require clarification. Redirect  
9 examination should not raise any new issues. Recross  
10 examination will only be allowed if a new issue is  
11 raised during redirect examination of the witness.  
12 Authority staff should be allowed to ask any questions  
13 they may have following cross-examination and prior to  
14 redirect. Directors will ask questions following  
15 cross-examination as well but may ask questions of a  
16 witness at any time during their testimony.  
17 I see that there was a motion filed  
18 this morning by Tennessee American Water to strike  
19 Mr. Buckner's rebuttal testimony. Are there any other  
20 motions or issues that need to be addressed?  
21 MR. HITCHCOCK: Your Honor, the City  
22 of Chattanooga has also filed a motion in limine.  
23 CHAIRMAN FREEMAN: Right. I'm sorry.  
24 We have that.  
25 MR. STRAUSS: We have a motion to

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1 For clarification, just the pages that are being  
2 referred to during the testimony.  
3 Okay. I see the eyes.  
4 MR. STRAUSS: That could be anything.  
5 MR. HITCHCOCK: We were doing  
6 nonverbal communication across. Sorry.  
7 MR. STRAUSS: Would a better way --  
8 would a different way to do that --  
9 CHAIRMAN FREEMAN: Could you speak  
10 into your microphone.  
11 MR. STRAUSS: Sorry. Would another  
12 way to do that if you're going to cross a witness and  
13 ask a question about an exhibit that that witness has  
14 prefiled, that the questioner will be required to bring  
15 25 copies of the exhibit? Will that work?  
16 CHAIRMAN FREEMAN: That's correct.  
17 (Off the record.)  
18 CHAIRMAN FREEMAN: We are back on the  
19 record. Regarding cross-examination, generally we  
20 proceed with cross-examination as follows: The  
21 Consumer Advocate, the City of Chattanooga, the  
22 Chattanooga Regional Manufacturers Association; and the  
23 Utility Workers Union. Any objections to that order?  
24 (No response.)  
25 CHAIRMAN FREEMAN: Seeing none.

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1 substitute Mr. Blevins for Mr. Haddock, and Mr. Grimes  
2 has filed a motion with respect to that issue as well.  
3 CHAIRMAN FREEMAN: Thank you. I'm not  
4 seeing any other issues.  
5 Mr. Grimes, would you like to present  
6 your motion?  
7 MR. GRIMES: Yes, I would be happy to,  
8 but first there is a question, at least in our minds,  
9 as to Ms. Schumaker's testimony and how that will be  
10 presented. Since she is the -- probably the most  
11 extraordinary -- she has received the most  
12 extraordinary treatment I have ever seen of a witness  
13 in my life -- she is an independent party -- an  
14 independent witness pursuant to the contract, and  
15 somehow or another she has got to put on her testimony.  
16 And what I would propose is that we establish an order  
17 for the parties to question her, and the questioning, I  
18 think, cannot be limited to 10 minutes. She is -- you  
19 know, this is a very important witness, and I would --  
20 you can establish whatever time parameters you think  
21 are appropriate, but I would just suggest that we would  
22 question her first and then follow with the Consumer  
23 Advocate and the City and the CRMA and the Union.  
24 But she -- I don't know how she is  
25 going to give a summary is what I'm saying. I don't

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1 know -- I just don't think that works. I think we are  
2 going to have to do a traditional questioning of her.  
3 CHAIRMAN FREEMAN: I think I agree  
4 with you.  
5 MR. GRIMES: Okay. Our motion to  
6 exclude has to do with Mr. Buckner's rebuttal testimony  
7 which covers a New Jersey audit as well as some tax  
8 issues. Now, the order that was entered on rebuttal  
9 testimony stated that the rebuttal could be based on  
10 anything that was brought out at the deposition. It  
11 could respond to anything brought out at the  
12 deposition. I believe the term exactly in the order  
13 was any witness who seeks to respond to Ms. Schumaker's  
14 testimony as provided in the deposition will submit  
15 that response in writing prior to the evidentiary  
16 hearing, and then we established a date for that which  
17 was yesterday.  
18 So we received Mr. Buckner's testimony  
19 which talks about a preliminary, nonfinal, nonapproved  
20 management audit in the state of New Jersey of New  
21 Jersey American and then these tax issues.  
22 Ms. Schumaker certainly did not address tax issues, nor  
23 did she address the New Jersey American management  
24 audit.  
25 So this is entirely inappropriate just

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1 So this is -- my point is this -- not  
2 only is this hearsay, but it's not probative at this  
3 point because it's preliminary. It is not the action  
4 of -- it has not been approved by the New Jersey  
5 commission and will be months before it will be.  
6 So we respectfully submit that to  
7 bring in something like this as if it were some sort of  
8 gospel, and Mr. Buckner says, you know, you should  
9 consider Ms. Schumaker in light of this -- in light of  
10 all the evidence. Well, evidence of what? It's the  
11 evidence of somebody else's opinion that they have  
12 submitted to another commission that's subject to  
13 change. And this -- for this Authority to base any  
14 kind of decision on a preliminary audit finding that  
15 may be rejected by the commission in New Jersey, may be  
16 disapproved, may be disagreed with would be highly  
17 inappropriate.  
18 So we respectfully submit that that  
19 should not be allowed in this case. You know, I don't  
20 know how long the Consumer Advocate has known about  
21 that document, but we -- you know, it's being filed two  
22 days -- two business days before the start of the  
23 case -- the trial.  
24 But be that as it may, our main  
25 objections are that it's hearsay, that it's not

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1 under the terms of your order. That's number one.  
2 Our second objection to this being put  
3 in the record of this case is that it is rank hearsay.  
4 It is an out-of-court statement of someone -- someone  
5 who happened to be a person who bid on being the  
6 management auditor in this case of our company but  
7 which the Authority chose not to select but chose  
8 Mrs. Schumaker.  
9 And there -- it's just -- it's just  
10 hearsay, and, you know, I know the rules are a little  
11 loose here as far as evidentiary matters, and I  
12 understand that, but hearsay of this type -- the reason  
13 we have the hearsay rule is to prevent this very kind  
14 of thing, an out-of-court statement being come in --  
15 brought into the record without any opportunity to  
16 examine the witness who did that, who made the  
17 statement. It's just highly inappropriate and that's  
18 the reason we have the hearsay rules to prevent  
19 prejudicial things like this happening.  
20 Now, there are other things that we  
21 ought to talk about. This management audit -- the  
22 procedure in New Jersey is apparently different from  
23 the procedures here in Tennessee. In New Jersey, the  
24 New Jersey commission ordered an audit. It's a  
25 standard thing. It's done every decade, I think. The

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1 responsive to your order. It goes well beyond what  
2 your order authorized for surrebuttal. Again, an  
3 unusual procedure to allow rebuttal and rebuttal and  
4 surrebuttal all the way up to the day before the  
5 hearing, but we agreed to it because we thought, yes,  
6 it's appropriate if Ms. Schumaker said -- everybody has  
7 had her audit for months.  
8 It was just the deposition that was  
9 the new thing, and if she said something in her  
10 deposition that the parties needed to respond to, that  
11 was the point of allowing the rebuttal. This does not  
12 respond to that. It does not respond.  
13 As we cite in our motion, Mr. McGehee  
14 asked her, Are you familiar with an audit that has  
15 taken place for New Jersey American Water, and she  
16 said, I'm aware of it. I don't know any specifics of  
17 it. Well, that certainly did not open the door for the  
18 New Jersey audit to come in here. She didn't open the  
19 door. She said I don't know anything about it. I  
20 don't know the specifics. I know something is going  
21 on.  
22 So I guess that's -- those are our  
23 grounds and we respectfully submit that it should not  
24 be allowed and the same applies to the tax testimony.  
25 That -- she didn't talk about taxes.

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1 audit -- the auditor was selected. The auditor  
2 prepared the report, and then it was made public.  
3 As we attached to our motion a letter  
4 from the New Jersey Board, which is what they call it  
5 there, submitted a letter to the Division of Rate  
6 Counsel, which I think is the analogue to the Consumer  
7 Advocate in New Jersey, and to the president of New  
8 Jersey American Water Company and said you have until  
9 March 11th to file comments.  
10 So the comments have not been filed,  
11 and there will be comments. There will be comments  
12 from the company that will disagree with the  
13 conclusions and the findings that have been made by  
14 North Star. After that there will be discussions -- I  
15 believe discussions with the staff and with rate  
16 counsel to discuss the management audit and what things  
17 they can agree to and what things they cannot agree to.  
18 Then all of that is submitted to the  
19 staff of the New Jersey -- the New Jersey Board. The  
20 staff reviews all of it. They present a report to the  
21 New Jersey Board and then the New Jersey Board is going  
22 to review all of that, and they are going to decide  
23 whether they approve findings and conclusions and  
24 recommendations, whether they reject them, whether they  
25 want to modify them.

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1 CHAIRMAN FREEMAN: Mr. McGehee.  
2 MR. MCGEHEE: Thank you. We've been  
3 talking about other states, what they've been doing way  
4 back in our direct testimony. At page 37 of Terry  
5 Buckner's testimony, his direct, he points out that New  
6 Jersey is conducting an audit. We didn't have it  
7 available. It was apparently finished -- the final  
8 report was finished on December 22nd but the New Jersey  
9 commission did not authorize it to be released until  
10 February 10th, and even then we had trouble getting it  
11 because we had to actually call the commission to ask  
12 for it, because if you look at their Web site, they do  
13 not compare as far as the electronic docket with the  
14 TRA where you can easily access things. There's  
15 nothing like that.  
16 So it took us considerable time just  
17 to get the document once we found out it had been  
18 released to the public. We brought it up in the direct  
19 testimony.  
20 Now, as far as the deposition or  
21 opening the door, so to speak, Mr. Collier made it  
22 clear that this was a discovery deposition. It was not  
23 in lieu of any kind of prefiled rebuttal testimony.  
24 Now, on pages 90 and 91 of the  
25 deposition we asked Ms. Schumaker whether this audit

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1 was conducted -- whether this was conducted from a  
2 business perspective or a ratemaking perspective, and  
3 she answered that it was from a business perspective,  
4 not from a ratemaking perspective. She didn't have an  
5 opinion on the attrition year, nor the management fees,  
6 or anything like that. The reason we are bringing this  
7 audit into evidence is simply to show that an  
8 independent auditor can take a different perspective  
9 and look at the same affiliate charges to another  
10 company and come to very different conclusions.  
11 Now, there are some similar  
12 conclusions, and there are conclusions with  
13 Ms. Schumaker we do agree with. But two different  
14 auditors doing two different audits with the same  
15 affiliate transactions -- service company, cost  
16 allocation, these kind of things -- they can come to  
17 two different results, and that's simply why we're  
18 bringing this for the TRA to consider.  
19 Now, the TRA has not approved the  
20 Schumaker audit. I assume that's going to be done --  
21 it's going to be considered, whether it's adopted,  
22 recommended, or rejected in this rate case, and I think  
23 the New Jersey audit is an appropriate aspect for the  
24 TRA to consider and in making a comparison of  
25 whether -- you know, how useful this audit is in this

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1 rate case for setting the attrition year for the  
2 management fees.  
3 Now, as far as hearsay, we're not  
4 offering to prove the truth of the matter. We're  
5 simply offering it as comparison to show the TRA there  
6 is more than one way to conduct a management audit.  
7 There's more than one perspective.  
8 Now, the TRA is not strictly bound by  
9 the Tennessee Rules of Evidence. TCA 65-2-109 makes  
10 that clear. You have the reasonable person statute.  
11 Is it reasonably reliable? Is it trustworthy? And I  
12 will leave that to your discretion.  
13 It is not approved -- the New Jersey  
14 audit is not approved. I agree with Mr. Grimes on  
15 that. But this is the auditor's final report. It's  
16 the same thing that Ms. Schumaker submitted to us as  
17 this is her final report that has not been approved by  
18 the TRA.  
19 With regard to the tax issues, for  
20 this I have to somewhat apologize for the procedural  
21 way it was handled. We just didn't have time to do a  
22 separate testimony docket and for me to file a motion.  
23 The tax issue is basically coming in -- the rebuttal on  
24 the tax issue is coming in because the direct  
25 testimony -- basically the company has changed their

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1 position since they filed this case on the tax issues.  
2 If you look at page 58 of Mike  
3 Miller's direct, his tax calculations are based on a  
4 non-SFAS 109 approach. Their approach, I guess, is  
5 comparable to APB 11, a non-SFAS 109 approach.  
6 Now, Mr. Buckner filed his rebuttal  
7 and his direct and then filed revised direct on  
8 January 28th. Following that, Mike Miller and  
9 Mr. Warren filed rebuttal, and they -- Mike Miller on  
10 page 43 of his rebuttal begins to take -- he shifts  
11 away from the non-SFAS 109 approach and goes to an  
12 SFAS 109 approach. The Mr. Warren rebuttal -- a new  
13 witness coming out of the blue -- he also talks at  
14 length about SFAS 109 and flow-through tax accounting.  
15 Now, since that change, the taxes have  
16 increased -- the company's change in their approach has  
17 caused their tax figure to increase by more than  
18 \$600,000. So this is the reason -- given the company  
19 has changed their methodology and brought in their new  
20 witness and with the remaining time before the hearing  
21 starts, we felt it was appropriate Mr. Buckner was  
22 going to change the opinion. We felt it was  
23 appropriate to just go ahead and use the procedural  
24 vehicle, the rebuttal testimony from Ms. Schumaker, to  
25 go ahead and combine them and get it before the

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1 Authority instead of him having to correct it on the  
2 stand, whenever he takes the stand, next week or  
3 whether it be in Nashville the week following.  
4 So that's why we have done it that  
5 way, and I apologize for not filing a motion or a  
6 separate document. With settlement discussions and  
7 various things trying to get through to prepare for the  
8 hearing, I just didn't have time to follow through with  
9 that.  
10 CHAIRMAN FREEMAN: Mr. Hitchcock?  
11 MR. HITCHCOCK: I would just like to  
12 add one point -- one point in support -- in opposition  
13 to the motion in support of the CAD's position. We are  
14 talking about experts here, and experts rely on  
15 documents all the time that are outside the realm of  
16 their individual personal preparation.  
17 And Mr. Buckner has clearly indicated  
18 in his original testimony that the New Jersey audit was  
19 something upon which -- a document which he felt was  
20 important. He has indicated in this rebuttal testimony  
21 to Ms. Schumaker's comments that the New Jersey audit  
22 is something that is important from an expert to rely  
23 upon. The question was asked of her about her  
24 knowledge of it and whether or not it was something  
25 that she was aware was underway, and she indicated that

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1 she did.  
2 I think that the other comments that  
3 Mr. McGehee has made are quite correct. I would just  
4 add one more or emphasize one, and that is the  
5 objections that Mr. Grimes has asserted don't appear to  
6 deal at all with the testimony that is on pages 1 and  
7 2 -- the top of page 2 of Mr. Buckner's rebuttal  
8 testimony. Particularly the question relating to his  
9 conclusion about the usefulness of Ms. Schumaker's work  
10 and the fact that she indicated that she has not  
11 undertaken this audit to establish what would be an  
12 appropriate attrition year management fee, but instead  
13 has undertaken this audit only from, as she put it --  
14 from a, quote, business perspective, rather than a  
15 ratemaking perspective.  
16 That testimony is not subject -- even  
17 if there was merit in the motion in limine arguments,  
18 that is not subject to those. That is clear rebuttal  
19 of Ms. Schumaker's offering of her testimony and making  
20 clear that she has limited, by her own testimony, its  
21 usefulness and appropriateness for your consideration  
22 in this docket. That's all I have. Thank you.  
23 CHAIRMAN FREEMAN: Mr. Walker or  
24 Mr. Strauss?  
25 MR. WALKER: Just very briefly. It is

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1 common practice whenever this agency has an issue  
2 before it to look to see how other states are  
3 addressing the same issue. Sometimes it might be a  
4 commission decision from another state. Sometimes it  
5 might be a recommendation from a hearing officer.  
6 Sometimes it might even be a staff recommendation in  
7 another state that gets filed and made a part of the  
8 record in that state. So those developments in other  
9 states -- they'll be filed with you right up until the  
10 day you make a final decision.  
11 You know, if New Jersey did something  
12 that was relevant to what's going on here, I'm sure one  
13 of the parties would bring it to your attention, again,  
14 up until the day you decide this case, because it's  
15 always relevant what other states are doing.  
16 So with the caveat that this is just,  
17 you know, an initial audit which makes -- you know,  
18 makes it less, I suppose, persuasive than a final  
19 decision by the commission, of course -- of course you  
20 would want to look at the preliminary conclusion of an  
21 auditor in another state who is looking at the same  
22 issues.  
23 You know, once again, the Consumer  
24 Advocate seems to get in trouble for going overboard to  
25 do things that really in the long run help us. They



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1 could have just waited and held this out and  
2 cross-examined Ms. Schumaker about it at the hearing.  
3 You know, Well, New Jersey said this. How come you  
4 disagree? But they didn't. They actually filed it in  
5 the record. They could have waited and just attached  
6 it to their brief and said here's what New Jersey did.  
7 You know, we think you should look at this too.  
8 There's no question that it's  
9 admissible what another state does on the same issue,  
10 and here they've gone to the trouble to actually file  
11 it in the record so everybody can see it ahead of time.  
12 I probably would have held it out and just filed it  
13 with my brief.  
14 But there's no question that it's  
15 something you ought to look at, and if other states  
16 address this issue between now and the next month, I'm  
17 sure you will look at that too.  
18 CHAIRMAN FREEMAN: Mr. Strauss.  
19 MR. STRAUSS: I would -- the only  
20 thing I would add is that we would join in the comments  
21 that have been made thus far that the motion should be  
22 denied. I think there are lots of good reasons that  
23 have been stated for that, and I won't take the time to  
24 repeat them.  
25 MR. GRIMES: Well, I'm always -- it's

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1 always entertaining when Mr. Walker gets into a  
2 stemwinder, but there's one problem with what he just  
3 said. New Jersey ain't done nothing yet. So all this  
4 about what -- you want to see what New Jersey has  
5 done -- well, New Jersey ordered an audit as a standard  
6 practice, and now New Jersey is going to consider that  
7 audit and it's going to be months from now before they  
8 issue a decision on it. So you can't know what New  
9 Jersey is going to do about it. It's a preliminary  
10 audit. And here's another thing, it's not attested.  
11 North Star is not a CPA. This Authority selected  
12 Ms. Schumaker to do an audit.  
13 Now, is it appropriate to say, Okay,  
14 we did this. We, the Authority, structured this audit  
15 very carefully. The RFP was mandated by this  
16 Authority. The selection of the auditor was mandated  
17 by this Authority. The contract was approved and  
18 amended by the Authority to include specific language  
19 to make certain attestations that are nowhere in the  
20 New Jersey audit.  
21 The New Jersey audit is an audit of  
22 New Jersey American Water Company. It's very broad.  
23 It goes into all kinds of things, human resources and  
24 all kinds of -- customer service and system operations.  
25 And, you know, it's a broad audit of New Jersey

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1 American Water Company. That's not what this Authority  
2 ordered.  
3 This Authority specifically wanted to  
4 know about the American Water Service Company and its  
5 charges to Tennessee American and whether its --  
6 whether its charges and whether its decisions were  
7 prudent.  
8 You set it up so Ms. Schumaker was to  
9 look at systems. She was to look at internal controls.  
10 She was to look at procedures at American Water Works  
11 Company and how it interacts with Tennessee American  
12 and whether there was duplication, and that's what she  
13 looked at. That's not what New Jersey American looked  
14 at. That's not what that audit looks at.  
15 So, again, it is preliminary. It's  
16 not attested like ours is. It's not done by a CPA.  
17 And it's just -- it's hearsay. Just it's hearsay and  
18 it's somebody else's opinion about -- you know, do we  
19 know what they're trying to do? Do we know what this  
20 North Star -- the intervenors in this case said they  
21 couldn't tell what Ms. Schumaker's testimony was going  
22 to be in this case based just on her audit report; they  
23 had to have a deposition. But now we can just go and  
24 just pull something off the Internet and fling it into  
25 the record here and say, You've got to consider this.

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1 I -- I'm very sorry, but I think this  
2 is highly inappropriate. You may want to know what  
3 authorities are doing, but you don't know what the  
4 New Jersey commission is doing because they haven't  
5 done anything. So that's -- that's a totally  
6 irrelevant consideration.  
7 Now, you know, Mr. Hitchcock says --  
8 about experts. Well, I wasn't aware that Mr. Buckner  
9 was holding himself out as an expert on management  
10 audits. I don't think he has expressed any particular  
11 opinions on management audits. He has said in his  
12 direct testimony that Ms. Schumaker -- that he didn't  
13 really disagree with what she had to say.  
14 So you know -- but what opinions did  
15 he offer in his rebuttal testimony? Did he offer the  
16 opinion that New Jersey American's audit was better  
17 than hers? He says, It's different. They find -- made  
18 conclusions on things that she didn't address,  
19 according to him. And he simply says the Authority  
20 should consider it. Well, what kind of opinion is  
21 that? So I don't think that argument holds any water  
22 at all.  
23 Mr. McGehee says he is not offering it  
24 for the truth. He is just offering it, I guess, so you  
25 can see somebody else can come up with a different

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1 conclusion. Well, would that be the way to do this?  
2 Would it be appropriate to say, We have ordered an  
3 audit and we have very carefully managed it and we have  
4 carefully selected an auditor and we didn't choose  
5 North Star, but you chose Ms. Schumaker. She has done  
6 her audit.  
7 Now, is the procedure here then to be,  
8 well, let's go and find another auditor and have them  
9 come audit and see what they might think, and then  
10 let's hire another auditor and have them come in and  
11 see what they might think because it might be  
12 different?  
13 I respectfully submit that that is not  
14 an appropriate process, and we think that we have done  
15 a management audit that you ordered and the way you  
16 wanted it very carefully. I say we've done it, one was  
17 done. And we submit that that ought to be considered.  
18 It ought to have weight with this Authority because of  
19 the way you managed the process and because of the  
20 obvious independence of this witness. And that it  
21 should be accepted as the proof in this case.  
22 Mr. Hitchcock can examine  
23 Ms. Schumaker and ask her questions. Mr. McGehee can,  
24 of course. But to bring in another audit for all the  
25 reasons that I've stated would be highly improper, and

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1 we object and ask you to exclude it.  
2 CHAIRMAN FREEMAN: Thank you  
3 Mr. McGehee, you have the last word.  
4 MR. MCGEHEE: Yes, ma'am. And I will  
5 be brief and just so -- I thought I had been clear, but  
6 let me be very clear. We are not asking the TRA to  
7 adopt this audit in lieu of Ms. Schumaker's audit.  
8 As we discussed in the deposition, we  
9 asked her about the perspective she took when she  
10 undertook the audit work. She has a business  
11 perspective, not a ratemaking perspective. We are  
12 simply introducing this to show that an independent  
13 auditor that takes a different perspective like she  
14 can, can come up with a very different result, and that  
15 is the only reason we are bringing this in.  
16 CHAIRMAN FREEMAN: Okay. Thank you.  
17 At this time we are going to take about a 10-minute  
18 break, I believe, and we'll be back.  
19 (Lunch recess taken from  
20 11:22 a.m. to 1:12 p.m.)  
21 CHAIRMAN FREEMAN: We are back on the  
22 record. I hope you-all enjoyed your lunch.  
23 At this time I'm ready to rule on some  
24 of the outstanding motions. Regarding Tennessee  
25 American's motion to strike rebuttal testimony of

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1 Terry Buckner, I find the New Jersey audit should not  
2 be considered as evidence; therefore, Mr. Buckner's  
3 rebuttal testimony regarding the New Jersey audit and  
4 the audit itself should not be filed as part of the  
5 record. The audit may be used during cross-examination  
6 but may not be filed as evidence.

7 Therefore, I will grant in part  
8 Tennessee American's motion in limine and strike  
9 information related to the New Jersey audit. So I will  
10 strike Mr. Buckner's rebuttal testimony from page 2,  
11 line 3 to page 5, line 20. I will allow the tax  
12 information because it is relevant and may be brought  
13 out at the hearing anyway.

14 I will ask the Consumer Advocate to  
15 refile Mr. Buckner's rebuttal testimony with from  
16 page 2 line 3 to page 5, line 20 omitted.

17 I will now address the City of  
18 Chattanooga's third motion to compel Tennessee American  
19 Water Company to respond to discovery requests. I find  
20 that the privilege log and affidavit of Michael Miller  
21 do not provide sufficiently detailed information on  
22 grounds upon which the hearing officer can determine  
23 that the documents and communications at issue qualify  
24 as work product. The fact that the communication may  
25 relate to the audit or the process undertaken to

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1 That has got to happen this weekend. We have not  
2 already done it. And I respectfully submit that this  
3 is an unreasonable order at this time. I think that my  
4 client will consider appealing it to the full Authority  
5 if this order stands, and so we would respectfully not  
6 provide that documentation at this time.

7 CHAIRMAN FREEMAN: Thank you.

8 MR. HITCHCOCK: Your Honor, the  
9 position that Tennessee American has just asserted has  
10 a significant impact on our ability to cross-examine  
11 Ms. Schumaker Tuesday. I'm not sure how to resolve  
12 that situation except perhaps to request that we have  
13 the opportunity to re-call her, if necessary, after  
14 she --

15 (Interruption by office  
16 staff. Off the record.)

17 MR. HITCHCOCK: -- re-call her after  
18 Tuesday, if that's necessary, but I would also point  
19 out that this Authority has authority under the rules  
20 to impose sanctions upon a party for failure to follow  
21 its orders -- discovery orders, and that's what is  
22 involved in this situation. You have the right -- the  
23 Authority, under Rule 45 -- to impose sanctions that  
24 can include the dismissal of parts of a party's claim  
25 if they will not cooperate in the process that you --

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1 complete the audit and that the audit was likely to be  
2 submitted in a subsequent rate case does not  
3 automatically render the communication privileged or  
4 protected.

5 It is undisputed that the audit was  
6 performed pursuant to regulatory requirement as ordered  
7 by the Authority. Unless communication related to the  
8 audit qualifies for the imposition of a privilege or  
9 protection based on some other grounds, communication  
10 surrounding the audit process, or the resulting report  
11 is not privileged or protected.

12 The privilege log contains no  
13 information to demonstrate or even suggest that the  
14 communication listed therein would qualify as  
15 privileged or protected based on grounds other than  
16 their connection to the audit.

17 Based on the foregoing, I find that  
18 Tennessee American Water Company has not carried its  
19 burden on these issues. In addition, Tennessee  
20 American Water Company's failure to set forth  
21 sufficient factual detail describing the context and  
22 circumstances surrounding the items renders the hearing  
23 officer unable to conclude that such items are covered  
24 by the attorney-client privilege.

25 For these reasons I have determined

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1 as you ordered them to do.

2 So I'm -- I must say that I've seldom  
3 participated in a proceeding in which a party has  
4 refused to comply with an order.

5 MR. GRIMES: If I could just say,  
6 Madam Chairman, what I said is that I didn't think that  
7 we could do it and that we would -- if that -- if what  
8 is necessary is to preserve this and to avoid not  
9 complying with an order, then I respectfully submit  
10 that we are appealing this order -- this ruling to the  
11 full panel.

12 MR. HITCHCOCK: Just one final point,  
13 and I will be quiet. It seems to me that whether or  
14 not the appeal is made to the full panel, the issue to  
15 be appealed would be whether the documents are made  
16 available to us. There would be no prejudice to  
17 Tennessee American if they were required to immediately  
18 turn these documents over to Mr. Collier and to  
19 Ms. Grams in order to permit their evaluation of them  
20 in a timely way. If there is going to be an appeal to  
21 the entire panel, then that could -- the disclosure to  
22 us of any that are found not to be privileged or  
23 protected could await the resolution of that appeal.

24 I'm not sure what Mr. Grimes' position  
25 is right now. I think the record will show he earlier

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1 that the communications and documentation must be  
2 reviewed in camera by the Authority to determine  
3 whether a privilege or protection should attach. I am  
4 ordering that the documentation be turned over to  
5 Richard Collier and Kelly Grams at the TRA's legal  
6 division to review and advise on these issues in  
7 advance of the hearing.

8 My specific findings and  
9 determinations will be reflected in an order to be  
10 issued later today.

11 And, Mr. Grimes, how soon do you think  
12 Tennessee American Water Company can turn over this  
13 documentation?

14 MR. GRIMES: Madam Chair, I don't  
15 know. And, frankly, I think my response is that we  
16 cannot before the hearing begins. This is -- I'm sorry  
17 to say, but this is the Friday afternoon before the  
18 hearing, a hearing which you have made quite clear you  
19 want to run as quickly as possible requiring us to do  
20 considerable preparation to make sure that witnesses  
21 are going to be available and that they are properly  
22 ready to go on the witness stand. And I, frankly,  
23 don't see how we can do this at all before Monday.

24 We've got to move our office to  
25 Chattanooga, as I have explained to the Authority.

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1 said he wasn't going to comply with the order, but I  
2 think he ought to comply to the extent that they are  
3 made available to counsel for the Authority for the in  
4 camera review pending any appeal he wants to perfect.

5 CHAIRMAN FREEMAN: Mr. Grimes?

6 MR. GRIMES: Yes, ma'am. I guess the  
7 first thing I would like to do is get a clarification  
8 of your order -- or your ruling. Your ruling is that  
9 we provide the documents, which I think there are like  
10 a hundred or so -- maybe. I don't know if that's --  
11 it's a considerable number -- to general counsel for in  
12 camera review. And it's based on a ruling that we have  
13 not carried our burden of proof, and that's what I was  
14 not quite understanding is what -- what it is that we  
15 have not done here?

16 I mean, we have established work  
17 product in the sense that they are documents that are  
18 clearly -- we have described them as being clearly  
19 related to the management audit and having to do with  
20 the company's dealing with the management audit, that  
21 it was clearly in anticipation of litigation.

22 That's really all the burden of proof  
23 that we have to do. I'm not -- I don't see what it is  
24 that we have failed to provide. So that's -- if I  
25 could just get some clarification on that.

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1 You know, once we carry that burden,  
2 then the burden shifts to Mr. Hitchcock to show why --  
3 you know, why he must have these, and I -- it's not our  
4 burden to do that.  
5 (Off the record.)  
6 CHAIRMAN FREEMAN: Okay. Mr. Grimes,  
7 so we won't get into a back-and-forth debate. You-all  
8 will receive an order -- a more detailed order later  
9 today, and if you-all want to appeal it at that time,  
10 that's your right to do so.  
11 MR. GRIMES: Thank you. I understand.  
12 You know, it -- I guess I would just have to say that I  
13 am surprised by the ruling coming today, and so perhaps  
14 we could move forward a little bit, if I could have a  
15 few minutes to confer with my client.  
16 CHAIRMAN FREEMAN: Sure.  
17 MR. GRIMES: And make sure we're all  
18 on the same page.  
19 CHAIRMAN FREEMAN: Go right ahead.  
20 MR. GRIMES: Thank you.  
21 (Recess taken from 1:24 p.m.  
22 to 1:30 p.m.)  
23 CHAIRMAN FREEMAN: Mr. Grimes.  
24 MR. GRIMES: Just a couple of other  
25 clarifications. The in camera review -- what is the

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1 want to address the Union's motion to substitute  
2 affiant. I find that UWUA Exhibit 11 is an unsworn  
3 statement and not an affidavit. Mr. Haddock's  
4 statement is not a sworn statement. Mr. Haddock did  
5 not file prefiled testimony in this docket and has not  
6 been designated as a witness in this proceeding;  
7 therefore, Mr. Blevins cannot adopt the statements of  
8 Mr. Haddock because Mr. Haddock has not provided any  
9 prefiled testimony in this docket. Also, Mr. Blevins'  
10 testimony is outside the procedural schedule set forth  
11 in this docket.  
12 Therefore, UWUA's motion to substitute  
13 affiant is denied.  
14 In Tennessee American Water's motion  
15 in limine to strike the statement of Jerry Haddock,  
16 strike certain testimony of James Lewis, and exclude  
17 the testimony of Marvin Blevins. Mr. Lewis' testimony  
18 on valve operations and maintenance was presented  
19 through him recounting a conversation he had with  
20 Mr. Haddock and he attached a statement prepared by  
21 Mr. Haddock corroborating the discussion. This is  
22 hearsay and I find that it is inadmissible.  
23 Further, Mr. Blevins has not filed  
24 prefiled testimony in this matter by the date set for  
25 filing of intervenor witnesses prefiled testimony

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1 process that you-all will use for an in camera review?  
2 CHAIRMAN FREEMAN: Mr. Collier.  
3 MR. COLLIER: I would envision that  
4 the documents would be turned over to me and Ms. Grams  
5 and we would look at those. If you wish to be present,  
6 I think that's possible.  
7 MR. GRIMES: But other parties would  
8 not be present?  
9 MR. COLLIER: No.  
10 MR. GRIMES: Okay. All right. In  
11 what -- you know, I think the documents are going to  
12 have to be assembled. They will have to be numbered to  
13 coincide with the log so that you can make sense out of  
14 it. I mean, we are talking about a bunch of e-mails.  
15 MR. COLLIER: And I think we were  
16 assuming that because they had been cataloged the way  
17 they were in the log that they were already assembled  
18 in some fashion.  
19 MR. GRIMES: They're in a stack. I  
20 don't know what order they're in, but we'll have to --  
21 we'll have to do that if that's what we're going to do.  
22 You know, as far as how soon we could  
23 do it, again, I just to have point out the logistical  
24 challenges that we have over the course of the next two  
25 days. And so I think that given all that I would say

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1 deadline of January 5th, 2011.  
2 Therefore, I find that the testimony  
3 of Mr. Lewis recounting his discussion with Mr. Jerry  
4 Haddock as memorialized on page 16, line 14 to page 17,  
5 line 20 concerning valve operations and maintenance at  
6 Tennessee American Water Company shall be struck from  
7 his testimony. Mr. Lewis will not be permitted to  
8 testify concerning this conversation at the hearing.  
9 Further, the TRA strikes Mr. Haddock's  
10 statement attached as Exhibit UWUA 11 to Mr. Lewis'  
11 prefiled testimony.  
12 Tennessee American Water Company's  
13 motion in limine to strike the statement of Jerry  
14 Haddock, strike certain testimony of James Lewis, and  
15 to exclude the testimony of Marvin Blevins is hereby  
16 granted.  
17 And concerning the City of  
18 Chattanooga's first motion in limine filed February 24,  
19 2011, recently the Tennessee Court of Appeals issued  
20 its opinion on the appeal brought by Tennessee  
21 American Water Company of the TRA's decision in Docket  
22 No. 08-00039, the company's last rate case.  
23 In its opinion the Court affirmed the  
24 Authority's decision in all respects except the amount  
25 of regulatory expenses allowed for recovery by the

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1 if we could -- I think we can -- I think we can comply  
2 with the order is where I'm going. I think we can't  
3 comply with it until Sunday.  
4 MR. COLLIER: So would you turn them  
5 over in Chattanooga?  
6 MR. GRIMES: Yes. Will you be there?  
7 MR. COLLIER: I will.  
8 MR. GRIMES: We will.  
9 MR. COLLIER: Well, we can work out an  
10 arrangement in terms of getting them picked up.  
11 MR. GRIMES: Okay.  
12 MR. COLLIER: Do the parties have any  
13 objection to me working out a timing with Mr. Grimes to  
14 receive the documents?  
15 MR. HITCHCOCK: Absolutely not.  
16 Whatever is convenient for you.  
17 MR. GRIMES: Is that convenient with  
18 you?  
19 MR. COLLIER: I will be glad to do  
20 that. I appreciate that accommodation.  
21 MR. GRIMES: Thank you. So we will  
22 comply.  
23 CHAIRMAN FREEMAN: Thank you.  
24 (Off the record.)  
25 CHAIRMAN FREEMAN: Moving on. I now

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1 company. On that issue the Court reversed the  
2 Authority's decision and remanded the matter to the TRA  
3 for the company to recover the full amount of the rate  
4 case expenses it had claimed in that case.  
5 Following issuance of the Court's  
6 opinion, the company filed testimony and documents to  
7 include in this case the regulatory expenses that it  
8 was not permitted to recover in Docket No. 08-00039.  
9 Since the Appellate Court's judgment  
10 was entered on January 28, 2011 neither the mandate,  
11 nor the notice period have expired, thus the  
12 Authority's jurisdiction has not yet been reinstated  
13 and so may not proceed on the unrecovered regulatory  
14 expenses in Docket No. 08-00039.  
15 Upon review of the City's motion, its  
16 citations, and arguments therein, I find that the City  
17 of Chattanooga's first motion in limine is well founded  
18 and hereby grant the motion.  
19 MR. GRIMES: I know you are looking at  
20 me, and I -- you never argue with the Court when the  
21 ruling has been made, except we haven't even been  
22 heard. We didn't -- we haven't had a chance -- it got  
23 filed yesterday. We haven't filed a response. We  
24 thought we would have the opportunity just to argue it,  
25 and so I -- I do have a response to that.

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1 CHAIRMAN FREEMAN: Do you want to put  
2 that on the record?  
3 MR. GRIMES: If I could, please,  
4 ma'am.  
5 CHAIRMAN FREEMAN: Yes, sir.  
6 MR. GRIMES: The response is this,  
7 Mr. Hitchcock may be right about all of that, but this  
8 is a different case. We're not trying to get you to do  
9 something in that case that has not -- where  
10 jurisdiction has not returned to you. This is a  
11 totally different case. And in this case we're asking  
12 you to take judicial notice or administrative notice of  
13 the fact that the Court of Appeals has made that ruling  
14 and that we have a rate case before you at this time  
15 which is the appropriate place to make that adjustment.  
16 It would be imprudent to say you have  
17 to come back, Tennessee American, when that -- let's  
18 say no one appeals to the Supreme Court -- and I don't  
19 know if anybody is going to -- but if no one appeals to  
20 the Supreme Court, that means that that jurisdiction is  
21 going to return here at the end of March. Now, should  
22 we have to come back in in another regulatory  
23 proceeding to ask you to now adjust rates again to add  
24 that amount in? We'll never be able to recover it if  
25 we don't get it in our rates.

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1 And what we would suggest is that if  
2 that were to occur and if the Supreme Court were to say  
3 no reversal of this Court of Appeals, we disagree and  
4 they shouldn't recover that, then it can be tried up in  
5 the next rate case.  
6 So we respectfully submit that  
7 Mr. Hitchcock may be right, but it doesn't matter  
8 because this is a different case and all we're asking  
9 you to do is to be practical. The rule of practicality  
10 we think is what ought to be involved here.  
11 And there is no jurisdictional  
12 impediment because we are not asking you to change  
13 anything in the 2008 rate case. That's our argument.  
14 Thank you.  
15 CHAIRMAN FREEMAN: Mr. Grimes, thank  
16 you, and your comments will be noted for the record.  
17 MR. STRAUSS: Madam Chairman, if we  
18 could go back for a moment to the ruling on the Union's  
19 motion.  
20 CHAIRMAN FREEMAN: On which motion?  
21 MR. STRAUSS: The motion to substitute  
22 the affiant, Mr. Haddock. I just wanted to state for  
23 the record that the substance of the statement of  
24 Mr. Haddock was included, obviously, as Exhibit 11 to  
25 Mr. Lewis' testimony. It is a statement which ends

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1 with the statement I swear and affirm the statement to  
2 be true to the best of my knowledge and it is signed by  
3 Mr. Haddock. The testimony was in front of the company  
4 at the appropriate time. It was not submitted out of  
5 time or in an untimely fashion. The substance was  
6 there.  
7 I want to note that the substance of  
8 this testimony is an extremely important issue. The  
9 issue of the company's valve maintenance program is a  
10 very important question in this case. It goes directly  
11 to the quality of service that the company is providing  
12 to the customers in Chattanooga and to the services  
13 that the employees are expected to provide.  
14 What happened here was, just so the  
15 record is clear, Mr. Haddock came to us very late in  
16 the game. His comments were clearly important. He  
17 spoke with Mr. Lewis. Mr. Lewis recounts that  
18 conversation in his testimony. Mr. Lewis, as an expert  
19 witness, relied on that, and certainly expert witnesses  
20 from time to time rely on statements that they get from  
21 other people. They don't do all the research  
22 necessarily themselves and they're entitled to have  
23 some leeway.  
24 In this case, given where we were, we  
25 felt the best we could do was to at least provide the

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1 statement from Mr. Haddock as part of Mr. Lewis'  
2 testimony, and we did so. We were uncertain at that  
3 time whether Mr. Haddock could actually testify. He  
4 has another position that was -- we then determined  
5 that he could not.  
6 Mr. Blevins was Mr. Haddock's direct  
7 supervisor, and, therefore, was in a position to be  
8 able to attest to the statements. I fail to see the  
9 prejudice and wanted to note that for the record here.  
10 The substance of the testimony was given to the company  
11 in accordance with the procedural schedule. The  
12 company had the opportunity to ask discovery and did,  
13 in fact, ask discovery of the Union about valve issues.  
14 Mr. Watson subsequently in his rebuttal testimony at  
15 pages 27 and 28 addressed certain of Mr. Haddock's  
16 statement.  
17 So there's been a full opportunity for  
18 an airing here. Mr. Blevins, the supervisor, is simply  
19 going to adopt -- would have adopted and sworn to the  
20 same -- adopted in sworn fashion and attested to the  
21 same information. He was not trying to add information  
22 to the record, not trying to create a new set of  
23 information that would have been untimely. He is  
24 simply attesting to the same information. So I fail to  
25 see what prejudice to the company.

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1 Further, this is an issue of valve  
2 maintenance. This is not a case, for example, as was  
3 addressed earlier today, the New Jersey situation, in  
4 which some study done by someone who is not here, who  
5 can't be cross-examined on some other company and some  
6 other issue, the company is expected to address it. I  
7 understand that situation.  
8 This situation is different. It's the  
9 company's valve program. They either know the  
10 information or certainly should know the information.  
11 It's their company. And Mr. Blevins was part of it for  
12 18 years. He is not someone who fell off a truck  
13 yesterday and decided to attest to these issues.  
14 So I really would ask if you could  
15 reconsider the ruling and allow Mr. Blevins to speak  
16 certainly in light of what happened in Chattanooga this  
17 week -- the events of this week which I think do  
18 involve valve issues. These are terribly important  
19 questions. I think it would be very important for the  
20 Authority to hear testimony from Mr. Blevins. I don't  
21 see the prejudice, so I would ask you to reconsider.  
22 CHAIRMAN FREEMAN: Mr. Grimes, do you  
23 have any comments?  
24 MR. GRIMES: Mr. Clayton will speak to  
25 that.

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1 MR. CLAYTON: Madam Chairwoman, you  
2 got it right when you made your ruling. For all those  
3 reasons it should be denied. This has been fully  
4 argued. We argued it. You made your ruling, and I  
5 don't see now that it's proper to go back and rehash  
6 it.  
7 I will say that it's clearly hearsay.  
8 The problem is, as you have already acknowledged, that  
9 Mr. Blevins now wants to come in and adopt  
10 Mr. Haddock's statement, and all we can do is take  
11 Mr. Blevins' word for it that he knows what Mr. Haddock  
12 would say and that Mr. Haddock's statements are  
13 accurate.  
14 Further, I'm unaware that Mr. Lewis is  
15 an expert on valve maintenance. According to his  
16 affidavit, his current position is processing  
17 grievances, handling arbitrations, and negotiating  
18 union contracts. He may have worked in the wastewater  
19 system for 22 years, although based on his affidavit we  
20 don't know what experience he has with valves or  
21 doesn't, but he's certainly not offering expert  
22 testimony about valves here today.  
23 Okay. So it's clearly -- it's not one  
24 of these situations where he should be allowed to rely  
25 on hearsay because he's not giving us any opinion on

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1 valves.  
2 Number two, even if that were  
3 admissible, which it's not -- or even if that were  
4 permissible, which it's not, it's certainly not  
5 evidence that comes into the record. An expert cannot  
6 rely on hearsay and then take something that's hearsay  
7 and put it in as evidence.  
8 We believe you got it correct. We  
9 believe it's, frankly, unnecessary. It's going to  
10 lengthen the hearing that everyone wants to try to get  
11 done in a week, and it's improper. So it's very easy  
12 to eliminate, and it should be eliminated pursuant to  
13 the order that's already been rendered here today.  
14 CHAIRMAN FREEMAN: Mr. Strauss?  
15 MR. STRAUSS: The statements are not  
16 hearsay. Mr. Blevins will attest to them and testify  
17 to them, and the company will have the opportunity to  
18 cross-examine him. There's nothing hearsay about them.  
19 He's going to come in and explain the basis for them.  
20 He's in a position to do that, and the concern that  
21 somehow or another this is some sort of out-of-court  
22 statement that the company is not going to have the  
23 chance to test is simply incorrect.  
24 MR. CLAYTON: With all due respect,  
25 Mr. Haddock is not going to be here to be

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1 cross-examined. Mr. Blevins wants to tell you what  
2 Mr. Haddock thinks, what Mr. Haddock said is correct,  
3 and we don't have any way to know what Mr. Haddock  
4 said.  
5 In fact, even Mr. Blevins is confused.  
6 If you look at his affidavit that purportedly adopts  
7 Mr. Haddock's statement, in paragraph 5 he goes on to  
8 contradict Mr. Haddock's affidavit. And then he says,  
9 I think it was -- that what Mr. Haddock was referring  
10 to was likely conducted on Lakeview Drive during  
11 January 2010. He doesn't even know what Mr. Haddock is  
12 talking about.  
13 So clearly -- clearly we're not having  
14 an opportunity to cross-examine Mr. Haddock, and that's  
15 what they want to do. It's hearsay within hearsay.  
16 Mr. Blevins wants to tell you what Mr. Haddock would  
17 have said, who is not going to be here. Mr. Lewis then  
18 wants to rely on it, and it's improper.  
19 CHAIRMAN FREEMAN: Last comment,  
20 Mr. Strauss.  
21 MR. STRAUSS: Mr. Blevins was an  
22 employee of the company for 18 years. He explains he  
23 was a field operations supervisor with authority for  
24 valve maintenance issues for a period of time, and he  
25 was Mr. Haddock's direct supervisor. He has direct

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1 knowledge of these issues, and, again, I would explain  
2 the substance of the testimony was given to the company  
3 in a timely fashion. I will acknowledge it was done  
4 through an affidavit that was an attachment to  
5 Mr. Lewis' testimony, but that doesn't change the fact  
6 that the company had the testimony.  
7 There's been nothing improper done.  
8 There's been no attempt to not give them the  
9 information in a timely way. They had an opportunity  
10 to seek discovery on it. They addressed it in rebuttal  
11 testimony. It is absolutely -- it is absolutely  
12 perfectly reasonable to allow Mr. Blevins. By the way,  
13 it is not unheard of if a witness cannot become  
14 available for another witness with knowledge to adopt  
15 their testimony.  
16 MR. MCGEHEE: Chairman, if I may, just  
17 one comment on behalf of the Consumer Advocate.  
18 CHAIRMAN FREEMAN: One moment.  
19 (Off the record.)  
20 CHAIRMAN FREEMAN: Mr. Clayton, did  
21 you want to respond?  
22 MR. CLAYTON: I think Mr. McGehee said  
23 he had a comment. I may want to respond, if necessary.  
24 I would hope I don't need to.  
25 MR. MCGEHEE: I just want to point out

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1 that when utilities want to change their utility rates,  
2 one of the factors the Authority should look at to  
3 determine whether the increase or change or the  
4 alteration is just and reasonable is to take into  
5 account the safety, adequacy, efficiency, or lack  
6 thereof of the service or services furnished by the  
7 public utility.  
8 Now, I'm sure you're all aware that  
9 this week there was a line breach by one of Tennessee  
10 American Water's mains and there was considerable  
11 flooding and there was some trouble getting that pipe  
12 cut off. It may have something to do with the valves;  
13 it may not.  
14 As Mr. Blevins was in charge or  
15 supervised some of the valve operations, I think the  
16 Authority might want to consider hearing this.  
17 CHAIRMAN FREEMAN: Mr. Clayton?  
18 MR. CLAYTON: First of all, there's  
19 nothing in Mr. Blevins' statement that was filed on  
20 February the 7th when all prefiled testimony was due  
21 January the 5th of 2011 -- so well over a month later,  
22 two weeks before trial. There's nothing in there about  
23 this incident where a contractor for AT&T accidentally  
24 hit a water main in Downtown Chattanooga. There's  
25 nothing in here that says that Mr. Blevins has

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1 knowledge that would be relevant or even applicable to  
2 supposedly what happened in Chattanooga last or the  
3 last couple of days.  
4 You've ruled. If we're going to go  
5 back and reargue every motion, then there's a few we  
6 would like to argue as well. I think you've ruled and  
7 we need to go forward with what your ruling is, and I  
8 think you made the right ruling for the reasons you  
9 stated.  
10 CHAIRMAN FREEMAN: Thank you. I think  
11 we've heard enough on this issue, and we're going to  
12 move on.  
13 Mr. Collier.  
14 MR. COLLIER: I just wanted to clarify  
15 something that was said earlier in terms of calling  
16 rebuttal witnesses and rebuttal testimony at the  
17 hearing. As I heard you say, Mr. Grimes, that you  
18 might expect to put a witness back on the stand to  
19 rebut a statement that might have been made by an  
20 intervenor witness, I just want to make it clear that  
21 what we've done in the past and what we will do at this  
22 hearing is that if something new comes up in that  
23 testimony you would be entitled to put a witness back  
24 on. But if it's just to put somebody on to rebut  
25 what's already been rebutted through your rebuttal

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1 prefiled testimony, then we wouldn't be re-calling that  
2 witness.  
3 MR. GRIMES: I think I understand your  
4 ruling, but, you know, in the normal course testimony  
5 gets cut off at some point, and it usually gets cut off  
6 with the rebuttal testimony that's filed. Okay? So we  
7 file direct testimony. The opponents file their direct  
8 testimony, and then we rebut. And the difference here  
9 is Mr. Walker is talking about the ability to rebut the  
10 rebuttal, which I think is improper.  
11 It's improper if we're not given the  
12 opportunity to rebut it because we have the burden of  
13 proof and we should have the opportunity. Now, if  
14 we're going -- if we would play by rules where our  
15 rebuttal testimony stops the rebuttal -- stops further  
16 rebuttal, that's fine. That's the way it ought to be.  
17 If we brought up something new in our  
18 rebuttal testimony, under normal rules then they would  
19 get to rebut that, and probably we would be able to  
20 rebut that because it's something new. It's brought up  
21 for the first time in our rebuttal. Then they get to  
22 rebut and we get to rebut them, but we get the last  
23 word. That's the way it's supposed to work.  
24 Now, the way Mr. Walker was describing  
25 it, it seemed to me that it was just going to be kind

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1 of the standard kind of open-ended question, do you  
2 have any further comments on the rebuttal that was  
3 filed? Well, that's not proper unless we brought up  
4 something new. That's my point.  
5 MR. COLLIER: Mr. Walker, do you want  
6 to reply?  
7 MR. WALKER: I understand your ruling  
8 and your explanation. It's consistent with the way we  
9 do it in every case, and I have no -- we certainly  
10 intend to operate within those normal parameters.  
11 MR. GRIMES: What did you say the  
12 normal parameters were? I thought you were asking me a  
13 question.  
14 MR. COLLIER: Only if something new  
15 came up during the testimony of the intervenor  
16 witnesses would you put your witness back on the stand  
17 to counter that.  
18 MR. GRIMES: But they can rebut our  
19 rebuttal even if we didn't bring up something new in  
20 our rebuttal?  
21 MR. WALKER: That is correct. The  
22 normal standard is the witness can respond to anything  
23 said in the hearing prior to the time he gets on the  
24 witness stand. Otherwise, it would be absurd.  
25 Obviously, if in the course of the hearing something

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1 new and unexpected comes up, out of fairness a response  
2 can be given, and that's the way we do it every time  
3 and it always seems to work out.  
4 MR. COLLIER: In fact, in many  
5 hearings the witness will -- the witness for the  
6 company will summarize their direct testimony and the  
7 rebuttal testimony at the same time. They will be  
8 commenting on intervenor testimony before the  
9 intervenor ever testifies.  
10 MR. GRIMES: It's all based on  
11 prefiled testimony. I mean, we could do it the other  
12 way, but that's inefficient since we already all know  
13 what everybody is going to say except what they might  
14 say new.  
15 MR. COLLIER: Well, then if they say  
16 something new, then you can re-call your witness as  
17 your protection.  
18 MR. GRIMES: We understand.  
19 (Off the record.)  
20 CHAIRMAN FREEMAN: Mr. Collier?  
21 MR. COLLIER: I want to go back to the  
22 order of witnesses for a minute. And I don't know  
23 whether it's pessimism or optimism. You can look at  
24 the glass half empty or half full, but if we end up  
25 with additional time on Monday after Mr. Watson and

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1 Ms. Miller have testified, is there someone available  
2 to fill that time at the close of the day?  
3 MR. GRIMES: I don't think so, but I  
4 don't expect -- John Watson was on the witness stand  
5 for four and a half hours in the last case. We have  
6 got an hour for opening and we've got two public  
7 hearings and then we've got Sheila Miller. And I can't  
8 remember if I looked at how long she was on the stand  
9 last time, but even she was on a considerable period of  
10 time, as I recall. I think that's a day.  
11 MR. COLLIER: We would like to go to  
12 6:30 until the public comments start.  
13 MR. GRIMES: You're not even going to  
14 let us eat?  
15 MR. COLLIER: I think the restaurants  
16 are open after seven.  
17 MR. GRIMES: I think since  
18 Ms. Schumaker and Ms. Dismukes are going the next day,  
19 I'm afraid that we will bring somebody in -- they're  
20 all expert witnesses. They all charge for their time.  
21 We will bring somebody in and have them cool their  
22 heels until Wednesday is what I'm afraid of.  
23 MR. COLLIER: Do you have anyone with  
24 the company that is available to start on Monday?  
25 MR. GRIMES: Mr. Miller is the only

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1 other one, and he's -- we've got him later on in the  
2 case.  
3 MR. COLLIER: If he is available, can  
4 we put him on on Monday?  
5 MR. GRIMES: He won't be finished. Do  
6 you want to -- we can put him on for an hour and then  
7 bring him back at the end of the case. That's fine.  
8 MR. COLLIER: Can we put him on after  
9 Schumaker?  
10 MR. GRIMES: No, because Ms. Dismukes  
11 is after that.  
12 MR. COLLIER: How long do you  
13 anticipate Ms. Dismukes taking?  
14 MR. HITCHCOCK: She will take less  
15 than 30 minutes to summarize her testimony and then  
16 whatever time you cross-examine her.  
17 MR. GRIMES: I think the better  
18 question is how long with Ms. Schumaker?  
19 MR. COLLIER: I don't have that  
20 answer. I just want to be sure -- when you start off  
21 the starting gate, I think you ought to load up on the  
22 front end so you're not trailing at the back end. And  
23 I'm concerned about having only four witnesses through  
24 the first two days, with Tuesday being one of our  
25 heavier days. We're able to go from dawn to dusk, I

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1 would say.  
2 MR. GRIMES: Could you-all clarify  
3 just what the time schedule is just for our planning  
4 purposes? You say we're going to go till 6:30 on  
5 Monday. Then Tuesday we're going to start at 8:00 and  
6 go until when?  
7 MR. COLLIER: Well, if we can get a  
8 witness in where we think we can finish that witness,  
9 we'll finish that witness at the close of the day.  
10 MR. GRIMES: My question is what's the  
11 close of the day. I guess?  
12 MR. COLLIER: 6:00, 6:30, somewhere in  
13 there. This is part of why I sent the e-mail out. I  
14 want to be sure we pack in what we can, particularly on  
15 the front end.  
16 MR. STRAUSS: I had earlier proposed  
17 putting Mr. Lewis on on Tuesday. I am willing to do  
18 that if you think he will get on.  
19 MR. COLLIER: I was just considering  
20 that if there were witnesses that were already here,  
21 rather than trying to fly somebody in to fill the gap,  
22 if that were possible.  
23 MR. MILLER: Dale, this is Mike. Can  
24 I say something?  
25 CHAIRMAN FREEMAN: Yes, Mr. Miller.

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1 MR. GRIMES: It depends.  
2 MR. MILLER: It's possible to get  
3 Mr. Warren there Monday. If we bring Mr. Warren in, I  
4 would sure like to make sure he gets on the witness  
5 stand after Mr. Watson.  
6 MR. HITCHCOCK: We would have no  
7 problem in going with Watson and then Warren, and then  
8 Sheila Miller is with the company and could be a swing  
9 witness.  
10 MR. COLLIER: Is Sheila Miller  
11 available all week?  
12 MR. GRIMES: Yes. That's fine. If  
13 Mike is fine with Mr. Warren. He is the one that we  
14 had to sort of -- we need to fix a time for him to be  
15 there. But if Mr. Miller is fine with Monday, then I'm  
16 certainly fine with Monday. So we will get Warren in  
17 there and put him on.  
18 And what I would really like to do  
19 is -- if that's the way we're going to do it, is to  
20 hold Ms. Miller as a person who if we do wind up with a  
21 gap, that we could bring her in. How is that? And not  
22 insist on her going on Monday. If we have Mr. Watson  
23 and then Mr. Warren, and then if you --  
24 MR. COLLIER: Then we could use  
25 Ms. Miller to finish up.

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1 MR. GRIMES: Then or some other time.  
2 MR. MILLER: That's subject to me  
3 getting ahold of Mr. Warren here in a minute. He sent  
4 me a couple of e-mails wanting to know exactly when. I  
5 just don't want Mr. Warren there for Monday and not on  
6 till Wednesday. That would not be in my best interest.  
7 MR. COLLIER: I thought that when we  
8 talked last Friday that Mr. Warren was listed as one of  
9 three who might go on Monday, so I was kind of  
10 surprised to see him on Wednesday.  
11 MR. GRIMES: We've been juggling.  
12 MR. COLLIER: Okay.  
13 CHAIRMAN FREEMAN: That's very  
14 helpful. Are there any other issues that need to be  
15 addressed?  
16 MR. STRAUSS: Yes. I had a question.  
17 Will there be an order issued with respect to the UWUA  
18 motion to substitute the affiant? The reason being,  
19 I'm considering whether to appeal that to the panel.  
20 CHAIRMAN FREEMAN: Yes. That order  
21 should be done -- out today.  
22 MR. STRAUSS: Thank you.  
23 CHAIRMAN FREEMAN: You're welcome.  
24 MR. MILLER: I don't know -- this is  
25 Mike again. Did we get clear about Mr. Warren or not

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1 REPORTER'S CERTIFICATE  
2 I, Christina M. Rhodes, Licensed Court  
3 Reporter, Registered Professional Reporter, Certified  
4 Court Reporter, and Notary Public for the State of  
5 Tennessee, hereby certify that I reported the foregoing  
6 proceedings at the time and place set forth in the  
7 caption thereof; that the proceedings were  
8 stenographically reported by me; and that the foregoing  
9 proceedings constitute a true and correct transcript of  
10 said proceedings to the best of my ability.  
11 I FURTHER CERTIFY that I am not  
12 related to any of the parties named herein, nor their  
13 counsel, and have no interest, financial or otherwise,  
14 in the outcome or events of this action.  
15 IN WITNESS WHEREOF, I have hereunto  
16 affixed my official signature and seal of office this  
17 26th day of February, 2011.  
18  
19  
20  
21  
22 CHRISTINA M. RHODES, LCR, RPR, CCR  
23 AND NOTARY PUBLIC FOR THE STATE  
24 OF TENNESSEE  
25 LCR No. 166, Expires 6/30/2012  
Notary Commission Expires 11/4/13

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1 so I can give him a call?  
2 MR. GRIMES: Yes. Mike, call him and  
3 tell him to go on Monday, so he needs to come in.  
4 MR. MILLER: And we will get him on  
5 Tuesday if he doesn't finish regardless?  
6 MR. GRIMES: Yes.  
7 MR. WALKER: We will finish him.  
8 MR. GRIMES: That sounds ominous.  
9 CHAIRMAN FREEMAN: One more thing  
10 regarding the witness list. Has there been an  
11 agreement on Witness Mr. Herbert?  
12 MR. WALKER: No. But we're  
13 optimistic.  
14 CHAIRMAN FREEMAN: Okay. All right.  
15 MR. GRIMES: I have one housekeeping  
16 thing if I could just do it this way. Can I just tell  
17 you that we have one other person who may be added to  
18 the list of people who may be appearing at the hearing?  
19 Not as a witness but somebody who -- as I understood,  
20 we got an e-mail saying we had to disclose to you-all  
21 everybody who we knew was going to be coming to the  
22 Hamilton County Courthouse; right?  
23 MR. COLLIER: Is that in addition to  
24 the e-mail you sent this morning?  
25 MR. GRIMES: Yes. It's one I just

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1 found out about. If I can add the name Leah, L-E-A-H,  
2 Morrison.  
3 (Off the record.)  
4 CHAIRMAN FREEMAN: Okay. If there's  
5 nothing else, we are adjourned.  
6 MR. GRIMES: Thank you.  
7 MR. WALKER: Thank you.  
8 CHAIRMAN FREEMAN: Safe travels.  
9 (Proceedings concluded at  
10 2:06 p.m.)  
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25

## **EXHIBIT B**



1 Watson, who is the president of company, here sitting  
2 in the front row. Thank you very much.

3 CHAIRMAN FREEMAN: Thank you.

4 MS. WHITE: I'm Mary White on behalf  
5 of the Consumer Advocate & Protection Division of the  
6 Tennessee Attorney General's office. I have with me  
7 here Scott Jackson and Ryan McGehee.

8 MR. HITCHOCK: I'm Rick Hitchcock with  
9 the City of Chattanooga, joined today by Mr. McMahan,  
10 who is the City attorney, M-C-M-A-H-A-N; by my  
11 associate Willa Kalaidjian, K-A-L-A-I-D-J-I-A-N, and  
12 Valerie Maleug, M-A-L-E-U-G. Thank you.

13 MR. STRAUSS: Good morning, Directors.  
14 I'm Scott Strauss, S-T-R-A-U-S-S, from the Washington  
15 D.C. law firm of Spiegel & McDiarmid, LLP. I'm here  
16 this morning on behalf of the Utility Workers Union of  
17 America and UWUA Local 121, and I'm joined at counsel's  
18 table by Katharine Mapes, M-A-P-E-S, of the same firm.  
19 Thank you.

20 MR. HIGNEY: Good morning, Directors.  
21 I'm David Higney from Grant Konvalinka, here in  
22 Chattanooga, on behalf of the Chattanooga Regional  
23 Manufacturers Association. I'm joined at counsel table  
24 by cocounsel Henry Walker from the law firm of Bradley  
25 Arant Boult Cummings in Nashville, and Tim Spires,

1 president of the Chattanooga Regional Manufacturers  
2 Association.

3 CHAIRMAN FREEMAN: Thank you. Before  
4 we get started, there have been three petitions to  
5 appeal to the full panel, two filed by Tennessee  
6 American Water Company and one filed by the Union.

7 Mr. Grimes, would you please address  
8 your petitions at this time.

9 MR. GRIMES: Yes, Madam Chair. The --  
10 we spoke -- actually, we spoke with General Collier  
11 before the public comment session, and he suggested  
12 that we address the third motion to compel after lunch.  
13 He has been conducting a review in camera of those  
14 documents, and so with your permission we would like to  
15 do it that way, but we would like to go ahead and  
16 address the arguments on the City's motion in limine.

17 DIRECTOR KYLE: Can we hold on just a  
18 minute.

19 DIRECTOR ROBERSON: Also use your mic.  
20 Make sure it's on.

21 (Off the record.)

22 CHAIRMAN FREEMAN: Let's take a  
23 10-minute recess.

24 (Recess taken from 9:48 a.m.  
25 to 9:59 a.m.)

1 CHAIRMAN FREEMAN: We are back on the  
2 record. Mr. Grimes.

3 MR. GRIMES: Thank you, Madam Chair.  
4 I guess we're appealing to the full panel a ruling of  
5 the hearing officer with respect to the City of  
6 Chattanooga's motion to exclude or motion in limine.

7 The motion requested that the panel  
8 not consider any evidence of the regulatory expenses  
9 that were awarded by the Tennessee Court of Appeals in  
10 January of this year when they issued their order on  
11 our 2008 rate case where they affirmed a number of  
12 rulings of this Authority, but they did reverse the  
13 decision to allow only one-half of the regulatory  
14 expenses that were requested in that case. They  
15 reversed that as an arbitrary decision and remanded it  
16 for action to award that money to the company.

17 We have included in our case -- we  
18 filed some additional information. It was not in our  
19 original case, but we filed additional information  
20 requesting recovery of \$275,000 in this case.

21 The City has filed a motion in limine  
22 in which they have requested that none of that be  
23 considered in this case. And their reasoning is that  
24 under the Tennessee Rules of Appellate Procedure, the  
25 Court of Appeals mandate has not technically issued

1 back to this panel -- to the Authority and, therefore,  
2 you are without subject matter jurisdiction over the  
3 2008 appeal.

4 Our position on that is this. Even if  
5 that is a correct reading of the appellate rules -- and  
6 just as a side note, I would also say that it's my  
7 understanding that unless there is a further appeal by  
8 an application for permission to appeal to the  
9 Tennessee Supreme Court, the mandate will issue by the  
10 end of this coming month, March. So we're talking  
11 about, unless somebody takes an appeal, a very short  
12 period of time, but probably after a decision has been  
13 made in this case and certainly after this hearing is  
14 over.

15 But our position is that that doesn't  
16 matter in this case. We're in a separate case, totally  
17 different docket. This case is not on appeal. You  
18 clearly have jurisdiction in this case. And we submit  
19 that you can take judicial notice. You can  
20 certainly -- we can certainly present evidence in this  
21 case of that amount on the basis that the Court of  
22 Appeals has made that ruling.

23 And remember this, once new tariffs  
24 are filed in this case after you have made your  
25 decision, the 2008 tariffs that went into effect in

1   October of 2008 will no longer be effective. So there  
2   will be nothing we can do at that point about the  
3   \$275,000 in the 2008 case, to my knowledge.

4               Now, depending on your decision, we  
5   may have to figure out a way to do that, but my point  
6   is that you can do it now because this is a separate  
7   case. And then our second point on that is you ought  
8   to do it now. The Court of Appeals has said we were  
9   entitled to that money. We've had a rate case. We all  
10   know how involved and expensive rate cases are. When  
11   are we supposed to come back and recover that \$275,000?  
12   A separate proceeding? A new rate case? A new docket  
13   of some kind?

14              You know, we're not sure what the  
15   procedure would be, but we think the practical answer  
16   and the one that makes the most sense is to say we may  
17   not have jurisdiction to add the \$275,000 to the  
18   tariffs in the 2008 case, but that doesn't matter  
19   because we're going to have new tariffs, and so we  
20   ought to take into account what we know the Court of  
21   Appeals has said that ought to be included. That's our  
22   position.

23              Now, assume someone does appeal to the  
24   Supreme Court. I've not -- I don't know if anybody  
25   will, but if they do and the Supreme Court reverses

1 again and says, No, that \$275,000 should not be awarded  
2 to Tennessee American, then we can have a true up  
3 mechanism of some kind and deal with it that way. But  
4 we can't -- to continue to deny the \$275,000 is simply  
5 to continue to deny us recovery that we are entitled  
6 to. Thank you.

7 CHAIRMAN FREEMAN: Thank you.

8 Mr. Hitchcock.

9 MR. HITCHOCK: Thank you, Madam Chair,  
10 Directors. Good morning. I'm Rick Hitchcock with the  
11 City of Chattanooga.

12 I would like to address briefly the  
13 basis initially for the motion in limine and then  
14 address the arguments that Mr. Grimes has made.

15 As he summarized, the law in Tennessee  
16 is very clear and it is not contested by Tennessee  
17 American here, that this Authority does not have  
18 jurisdiction over the 2008 case until the mandate has  
19 been returned from the Court of Appeals, or from the  
20 Supreme Court if there were to be an appeal to the  
21 Supreme Court.

22 There is no question that that is the  
23 law. There is no question raised by Tennessee American  
24 that that is the law. It is a subject matter  
25 jurisdiction issue, and you correctly ruled last Friday

1 that you did not have jurisdiction and that there is no  
2 basis for acting on that particular aspect of the 2008  
3 appeal at this time.

4 Now, let me address a couple of  
5 issues. This argument that Mr. Grimes makes that in  
6 spite of no subject matter jurisdiction you can act  
7 anyway is a really unique argument, and sufficiently  
8 unique that he cites no authority for that, because  
9 there is no authority -- legal authority that this  
10 Authority or any other trial court, as you are  
11 considered to be in this context, can act in the  
12 absence of subject matter jurisdiction.

13 He acknowledges that there is another  
14 30 days left before the parties have to decide whether  
15 they would ask the Supreme Court to review the decision  
16 of the Court of Appeals. And he acknowledges that if  
17 they did -- if anyone did so and that review is  
18 granted, that they would not -- that there could be a  
19 reversal of the decision of the Court of Appeals on  
20 this particular issue.

21 If that occurred, he has stated  
22 something that I didn't think I would ever hear the  
23 water company say, and that is that a refund could be  
24 granted to pay back the ratepayers what they have been  
25 improperly charged for these legal fees. Now, the

1 Court of Appeals did not address the legal issue  
2 underlying the question of legal fees. We'll talk a  
3 little bit more about that later this morning in the  
4 context of our opening on the 2010 case.

5 What it held was that the decision to  
6 just permit half to be granted was without evidence in  
7 the record, and, therefore, the Court of Appeals felt  
8 that that wasn't justified. So the issue of the  
9 appropriateness of the water company recovering its  
10 attorney fees was not addressed directly by the Court  
11 of Appeals, and there may well be an appeal. I don't  
12 know whether that's going to be taken up with the  
13 Supreme Court.

14 But the idea that it's okay to charge  
15 the ratepayers \$275,000, and then the water company  
16 apparently is now reversing its position and saying  
17 that we can refund that -- you can refund that money  
18 somehow is truly an extraordinary change in their  
19 historic position that refunds could never be granted.

20 Now, we believe that the hearing  
21 officer acted quite appropriately in issuing her ruling  
22 on Friday. The citation of authority that we've  
23 included in our motion and was referenced in that order  
24 is very clear that this Authority has no jurisdiction  
25 to consider the 2008 case until the Court of Appeals



1 sends it back here. Right now it's in the Court of  
2 Appeals. And we would ask that you please affirm the  
3 hearing officer's decision and that we move on with the  
4 remainder of the case and consider matters that, in  
5 fact, are before you in the 2010 case.

6 DIRECTOR KYLE: I just want to ask,  
7 Mr. Grimes, in the law when is a case ripe to hear? In  
8 other words, they're in an appeal process. A court  
9 that's higher than me -- any court above another  
10 court -- any court above another court. We're still in  
11 the appeals process. How can I jump on that train  
12 going down the road?

13 MR. GRIMES: Well, I guess our  
14 position is this -- I don't guess it, I know our  
15 position is this, that Mr. Hitchcock has developed an  
16 ingenious argument here to try to direct everyone's  
17 attention to the question of subject matter  
18 jurisdiction, and yet that is not relevant here.

19 DIRECTOR KYLE: Let me just stay on  
20 the procedure just a minute. By law when another court  
21 has a case, has any law -- remind me -- you know, I  
22 think I was there that day in law school that -- and I  
23 stand to be corrected. Now, another court has this  
24 case.

25 MR. GRIMES: Has the 2008 case, that's

1 right, but they don't have this case. And our position  
2 that you can take judicial notice -- this motion in  
3 limine was a motion to exclude evidence. All right?  
4 And it's just based on the fact that you have no  
5 jurisdiction so you shouldn't hear this evidence.

6           You're quite correct that the Court of  
7 Appeals still has within its jurisdiction the 2008 rate  
8 case, but within a couple of weeks from now new tariffs  
9 will be entered that will supersede the 2008 tariffs  
10 and they will be gone.

11           And so as the Court of Appeals ruled  
12 in the 2006 case, when they're superceded by new  
13 tariffs, those old tariffs are moot. That case will be  
14 moot. The 275,000 is hanging out there, and the Court  
15 of Appeals said that you must give it to us. And all  
16 we're trying to say is there's a practical way to do  
17 that.

18           DIRECTOR KYLE: When did they throw  
19 that case back to me?

20           MR. GRIMES: The mandate in the 2008  
21 case hasn't come back. All I'm saying is by the time  
22 it does --

23           DIRECTOR KYLE: So how do I have  
24 jurisdiction before -- so you're not saying take  
25 jurisdiction --

1 MR. GRIMES: No, ma'am.

2 DIRECTOR KYLE: -- you're just saying  
3 take judicial notice.

4 MR. GRIMES: Yes, ma'am, of evidence.

5 DIRECTOR KYLE: Thank you. Thank you.

6 MR. GRIMES: May I say one other  
7 thing?

8 DIRECTOR KYLE: I'm sorry. I didn't  
9 mean to cut you off.

10 MR. GRIMES: No. I want to answer  
11 your questions.

12 Mr. Hitchcock has mischaracterized  
13 what I said. I did not say that the company said  
14 anything about a refund. I said a true up mechanism to  
15 be determined, and that's something that we can explore  
16 in this case if you decide to allow us to present  
17 evidence of the \$275,000.

18 Again, we're not asking you to take  
19 jurisdiction. We're just looking at the practicality  
20 of it, that by the time the mandate is issued, the  
21 tariffs will be superceded in the 2008 case. And so  
22 we're saying -- and maybe we're saying to you how would  
23 you-all suggest that we do that? Would you suggest  
24 that after this case is over that we bring a new case  
25 to get the \$275,000 that the Court of Appeals has said

1 we're entitled to?

2 It's hanging out there. That's the  
3 practicality of it and that's what we're appealing to  
4 you-all, to think about it in practical terms.

5 CHAIRMAN FREEMAN: Director Roberson.

6 DIRECTOR ROBERSON: Mr. Hitchcock,  
7 after the Court mandate returns to the TRA, is there  
8 required a hearing or a rate case for the Authority to  
9 implement the Court order?

10 MR. HITCHOCK: Under the law as it  
11 would -- as it's been applied in every other  
12 circumstance, you would be able to undertake new  
13 proceedings on the 2008 proceeding after ten days'  
14 notice to the parties, after the mandate returned --  
15 and that's what the rule requires, that ten days'  
16 notice be given and then you could have new proceedings  
17 on the 2008 case.

18 Now, Mr. Grimes says that that 2008  
19 case will go away. And, certainly, consistent with  
20 Tennessee American's position in the --

21 (Interruption by telephone.

22 Off the record.)

23 MR. HITCHOCK: Under the rules after  
24 the mandate returned, the TRA could initiate new  
25 proceedings in the 2008 case after ten days' notice to

1 the parties. Now, their position in the 2006 case was  
2 that, in fact, filing tariffs rendered completely moot  
3 the previous set of tariffs of the previous case, and  
4 the Court of Appeals upheld that position in that set  
5 of facts and circumstances. We disagreed with that,  
6 but that has been the Court of Appeals' decision.

7 Now, that is an -- in fact, if that is  
8 good law and good precedent, then Mr. Grimes may be  
9 right, that there won't be a proceeding in which action  
10 can be taken, but that is the position that they have  
11 chosen in the past to assert. That is the position  
12 that if they assert again, they would be, essentially,  
13 depriving or seeking to deprive this Authority of  
14 jurisdiction over the 2008 case by the time it got back  
15 here.

16 DIRECTOR ROBERSON: Would the City of  
17 Chattanooga attempt to do that?

18 MR. HITCHOCK: The City of  
19 Chattanooga's position was that the filing of new  
20 tariffs in a circumstance in which a -- an issue was  
21 capable of repetition yet evading review did not render  
22 the previous tariff moot. In other words, if there's a  
23 live issue that needs to be considered going forward,  
24 our assertion in the 2006 case was that that needs to  
25 be heard and considered. And I think we would take a

1 consistent position in any further appeal or further  
2 proceeding.

3 DIRECTOR ROBERSON: So you don't  
4 believe that a rate case would be -- would be required  
5 but that the Authority could resolve the issue. I  
6 guess the only question would be -- the dollar amount  
7 is not in question, but the only question would be rate  
8 design of how to recover that money that's been  
9 mandated back to the TRA?

10 MR. HITCHOCK: Well, I do think that  
11 there would be an issue concerning the appropriateness  
12 of the amount that should be addressed in a subsequent  
13 proceeding. Remember, the Court of Appeals didn't say  
14 go pay them \$275,000. The Court of Appeals said that  
15 your decision to cut in half -- just to split the baby  
16 right down the middle, that that was not supported by  
17 evidence in the record. The Court didn't say there's  
18 evidence in the record for 275,000.

19 And so I would think that upon remand  
20 that a further proceeding would properly address the  
21 question of whether they have met their burden of proof  
22 in showing that they were entitled to regulatory  
23 expense which included this matter. The Court of  
24 Appeals didn't address the underlying legal issue of  
25 whether they can get attorney's fees under Tennessee

1 law at all, and that could be properly addressed in a  
2 further proceeding before you.

3 So the City of Chattanooga has taken  
4 the consistent position that if an issue needs to be  
5 addressed and is going to be repeating itself over and  
6 over again in these proceedings, that mootness -- that  
7 mootness is not an issue, that mootness does not  
8 prevent that from happening, that there's an exception  
9 to the mootness doctrine that would apply, and that's  
10 the position that I think we would take in this case.

11 DIRECTOR ROBERSON: And, Mr. Grimes,  
12 there's nothing in the record to address the issues  
13 that Mr. Hitchcock has raised on that issue, are there,  
14 in this docket?

15 MR. GRIMES: On the issue of mootness?

16 DIRECTOR ROBERSON: Well, whether --  
17 how much the Court is mandating --

18 MR. GRIMES: Yes, Your Honor. If I  
19 could just read from the Court of Appeals decision --

20 DIRECTOR ROBERSON: I have read the  
21 decision, but I'm saying in this case is there  
22 anything -- are there any -- is there anything in the  
23 record that could help guide our decision on those  
24 issues that Mr. Hitchcock just raised?

25 MR. GRIMES: Rate design?

1                   DIRECTOR ROBERSON: Or the  
2     appropriateness of the amount.

3                   MR. GRIMES: The Court of Appeals,  
4     Director Roberson, said, Accordingly, we reverse the  
5     commission of the TRA on this issue and award Tennessee  
6     American the full amount of its proposed rate case  
7     expenses. There's no question about the amount.  
8     Mr. Hitchcock is quite incorrect on that.

9                   DIRECTOR ROBERSON: Okay. I'm ready  
10    for a motion, unless there's questions.

11                  DIRECTOR KYLE: Well, I'm not. Can we  
12    wait just a minute? Why did you not take that on up to  
13    the Supreme Court? I'm almost flattered you want to  
14    deal with it in our jurisdiction, but I don't  
15    understand. If you oppose this amount or question this  
16    amount, where were you going to challenge?

17                  MR. HITCHOCK: Well, the time for  
18    filing a petition for review has another 30 days to  
19    run.

20                  DIRECTOR KYLE: That's what I'm asking  
21    you. Are you?

22                  MR. HITCHOCK: Well, I'm not prepared  
23    to announce today. We need to consult with our client  
24    and so forth, but any party has until basically  
25    March 28th in order to file a petition for review, and



1 I'm certainly not prepared to say we're not going to.

2 DIRECTOR KYLE: Okay. Thank you.

3 Can I have just five minutes with the  
4 attorney.

5 (Recess taken from 10:19 a.m.  
6 to 10:23 a.m.)

7 MR. HITCHOCK: Madam Chair, can I add  
8 one thing? Madam Chair and Directors, if there's a  
9 problem here with this \$275,000, it is a problem that  
10 is caused by the rapid succession of sequential filings  
11 of rate case, after rate case, after rate case. And  
12 this is an issue -- this problem is one that we  
13 predicted would happen on the appeal of the 2006 case  
14 where, in fact, no appeal could ever be effectively  
15 pursued because of the rapid succession of filings by  
16 Tennessee American.

17 It just turns out that it kind of  
18 caught them, instead of what we thought would happen,  
19 is potentially being the disadvantage to the  
20 ratepayers. So the problem -- I would ask, as you  
21 consider whether to uphold the hearing officer, that  
22 you consider that if there's a problem here with this  
23 mootness situation, it is Tennessee American's creation  
24 by their filing of successive, rapid rate cases. Thank  
25 you.

1 CHAIRMAN FREEMAN: Mr. Grimes.

2 MR. GRIMES: Yes, ma'am. Thank you.

3 Of course, we could expect the City to say that, and we  
4 will be addressing that in the opening statement. We  
5 file rate cases when we're required to and when the  
6 circumstance require us to, and economic conditions and  
7 other factors have made it so that rate cases have to  
8 be filed.

9 But, you know, the situation here is  
10 that -- one other comment. I think Mr. Hitchcock has  
11 got to -- is overlooking the fact that we just had a  
12 complete and thorough airing of issues before the Court  
13 of Appeals in the 2008 case and there was no impediment  
14 to that. That got done. The Court of Appeals for this  
15 Eastern section here handled that quite -- with a great  
16 deal of speed and there was no problem with that.

17 Again, we're really talking about an  
18 evidentiary issue. Mr. Hitchcock is talking about a  
19 jurisdictional issue, and I think that's trying to get  
20 us off track. What we're saying is that the evidence  
21 of the Court of Appeals decision that we're entitled to  
22 \$275,000 -- and there's no question about the amount --  
23 is something that this Authority ought to take into  
24 consideration in your regulatory function.

25 You are quasi-legislative when you're

1 sitting as a ratemaker, and you should take into  
2 account all the evidence and all the factors. And the  
3 fact that the Court of Appeals has said that we're  
4 entitled to that money is something that you should  
5 take and can take into account by judicial notice, by  
6 whatever. We have put it into the record here.

7 And, you know, again, I appeal to you  
8 and your sense of practicality. I know this panel is a  
9 very practical panel, and that -- what else are we  
10 supposed to do? Do you want us to bring another rate  
11 case? Do you want us to bring another proceeding for  
12 the \$275,000? It seems to me that it makes sense for  
13 you to take consideration of it here and incorporate it  
14 into rates.

15 MR. HITCHOCK: Madam Chair, just one  
16 point to correct. As your order recited, the motion of  
17 the City of Chattanooga was to exclude all evidence and  
18 any consideration of the claims related to the 275,000.  
19 That was our motion. Your order recognized that and  
20 addressed that. It is a jurisdictional issue. It is  
21 not just an evidentiary issue. Thank you.

22 MR. GRIMES: May I just say one other  
23 thing and then -- this is a new point, not rehashing.  
24 But we didn't mention it in our motion, and that is  
25 that Mr. Hitchcock said we haven't cited any authority

1 and that kind of thing. I would simply say on our  
2 behalf, Mr. Hitchcock's motion was filed Thursday  
3 afternoon. We had a prehearing conference on Friday  
4 morning. We addressed it with you at that time and  
5 placed our comments on the record but had not had time  
6 to file a formal response, and, frankly, we've been  
7 doing a few things since Friday morning.

8 So I'm simply saying that I know that  
9 you can take judicial notice of what another court has  
10 done. That's -- or administrative notice. That's  
11 clear.

12 CHAIRMAN FREEMAN: Any other comments?

13 DIRECTOR KYLE: No.

14 DIRECTOR ROBERSON: Thank you,  
15 Counselors, for the arguments. I have read the order  
16 and all of the record in this issue. I have read the  
17 Court of Appeals' decision and am awaiting the Court  
18 mandate.

19 Mr. Grimes, you mentioned practical  
20 considerations, and I'm going to base mine on  
21 practical -- my decision on practical considerations.  
22 First of all, I believe that removing this issue from  
23 this rate case will promote judicial economy in this  
24 case. Second, I believe that removing this issue or  
25 upholding the chairman's order will also allow us to

1 move with expediency in addressing the Court mandate.

2 I can assure the company that as soon  
3 as we receive the Court mandate, I'm on the panel, and  
4 a proceeding will begin shortly thereafter. And it  
5 will not be a six-month rate case. We're going to move  
6 quickly. We are going to implement the Court mandate.  
7 I just think that it can be done quicker and with more  
8 economy getting it out of this case. And so with that,  
9 I make a motion to uphold the Chairman's motion -- or  
10 order.

11 DIRECTOR KYLE: Let me second that,  
12 and I'm going to base my vote on the rule of law as a  
13 lawyer. I know, and as many of you-all know -- have  
14 known me over the past 15 years, I'm a stickler for  
15 notice and jurisdiction. I'm going to take notice  
16 today that it may have -- we do have tornado warnings  
17 here. I'm going to take notice we have some of the  
18 finest lawyers that the state of Tennessee has to  
19 offer. All that -- I can take judicial notice of  
20 anything available, but I'm not going to get in the  
21 business of putting myself in the middle of another  
22 Court.

23 But the law is the law is the law, and  
24 I cannot do anything that I want, I have to be  
25 responsible to what is set out before me. Therefore, I

1 second and uphold the hearing officer's order by the  
2 motion given by Dr. Roberson.

3 CHAIRMAN FREEMAN: I vote aye. Thank  
4 you.

5 MR. GRIMES: Thank you for your  
6 consideration.

7 CHAIRMAN FREEMAN: Next we will take  
8 up the Union's petition. Mr. Strauss, would you like  
9 to present that at this time?

10 MR. STRAUSS: Yes, I will. Good  
11 morning.

12 CHAIRMAN FREEMAN: Good morning.

13 MR. STRAUSS: The UWUA is appealing to  
14 the full panel a ruling by the hearing officer denying  
15 our motion to substitute Affiant Haddock with  
16 Mr. Blevins, and granting the company's motion in  
17 limine, and striking testimony from our witness  
18 Mr. Lewis.

19 Let me spend a moment just setting the  
20 context for this fact pattern. We attached to the  
21 testimony of our witness Mr. Lewis a statement signed  
22 by Mr. Jerry Haddock, a former employee of Tennessee  
23 American Water Company. Mr. Lewis and Mr. Haddock had  
24 a conversation close to the time testimony was due in  
25 this case concerning valve maintenance issues.