

IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE: JOINT PETITION OF TENNESSEE)
AMERICAN WATER COMPANY, THE CITY OF)
WHITWELL, TENNESSEE AND TOWN OF) DOCKET NO. 12-00157
POWELL CROSS ROADS, TENNESSEE, FOR)
APPROVAL OF A PURCHASE AGREEMENT AND)
WATER FRANCHISE AGREEMENT AND FOR)
THE ISSUANCE OF A CERTIFICATE OF)
CONVENIENCE AND NECESSITY)

CONSUMER ADVOCATE AND PROTECTION DIVISION'S PROPOSED ISSUES LIST

The Office of the Tennessee Attorney General, Division of the Consumer Advocate and Protection Division ("Consumer Advocate") does not oppose the acquisition and franchise agreement requested for approval by the Tennessee Regulatory Authority ("TRA" or "Authority") in the *Joint Petition of Tennessee-American Water company, the City of Whitwell, Tennessee, and the Town of Powells Crossroads, Tennessee, for Approval of a Purchase Agreement and a Water Franchise Agreement and for the Issuance of a Certificate of Convenience and Necessity*, Docket No. 12-00157, filed Thursday, December 27, 2012 at 3:06 pm ("*Petition*").

The Consumer Advocate, however, has concerns with aspects of the *Petition* other than the request for approval of the acquisition. As requested by the Hearing Officer, the Consumer Advocate provides the following issues list:

- 1) Whether the TRA has sufficient information to determine the proper amount to put into rate base for the value of the acquisition; and whether the TRA has the authority to approve a purchase price;
- 2) Whether the rates for current Whitwell customers should remain in effect;
- 3) Whether deferred income taxes and credits should be transferred with the sale;
- 4) Whether due diligence costs should be included in regulatory expenses of applying for a CCN or whether these costs instead primarily benefit investors; and

- 5) Whether there is sufficient information to determine whether the legal costs to petition for a CCN are just and reasonable.

Following is a more detailed explanation of each of these issues:

- 1) *Whether the TRA currently has sufficient information to determine the proper amount to put into rate base for the value of the acquisition; and whether the TRA has the authority to approve a purchase price:* The Consumer Advocate objects to the petitioners' request for the Authority to approve rate base as a contingency of the acquisition because:

- a. The information needed to value rate base is not available or has not been verified. Tennessee American Water Company ("TAWC" or "Company") determined the purchase price by relying on Whitwell's financial statements, records and reports.¹ The audit reports of Whitwell show numerous audit exceptions, including but not limited to issues with accounting, reporting, and controls over financial reporting (since 2007), bidding and procurement (since 2002), and lack of supporting documentation for disbursements (since 2009) that go back many years.² TAWC plans to perform a survey of the utility plant in service in the first year of ownership.³ Given the uncertainty of the reliability of the seller's purchasing process, accounting records, and financial statements, approval of rate base before this survey is completed could result in a higher rate base valuation than the utility plant in service. If the Company found less utility plant in service than what it recorded as a result of the purchase, it would have to write off the difference to ensure the accuracy of its financial statements. Without this information, any hearing on rate base at this time cannot be meaningful and, therefore, due process cannot be served.⁴ To have a hearing before the necessary information becomes available would violate the requirement for a hearing at a meaningful time in a meaningful manner.⁵ The best time to have a hearing on the valuation of rate base is after the survey is complete.

¹ *Direct Testimony of Daniel P. Bickerton*, Docket No. 12-00157, p. 3, Dec. 27, 2012 (filed as an attachment to the Petition).

² *Tennessee American Water Company's First Responses to Data Requests by Consumer Advocate and Protection Division of the Office of the Attorney General*, Docket No. 12-00157, DR 1, p. 228-40, (Mar. 12, 2013).

³ *Tennessee American Water Company's Responses to the TRA's January 22, 2013 Data Requests*, Docket No. 12-00157, DR 5, (Jan. 22, 2013) (responding that TAWC will not know how much work needs to be done until it knows the current status of the system). Indeed, TAWC even has a general objection that its data responses to the Consumer Advocate may change if the information changes, indicating just how uncertain the data related to the purchase price is currently. *Tennessee American Water Company's First Responses to Data Requests by Consumer Advocate and Protection Division of the Office of the Attorney General*, Docket No. 12-00157, p. 1, (Mar. 12, 2013).

⁴ *Martin v. Sizemore*, 78 S.W.3d 249, 267 (Tenn. Ct. App. 2001) ("While due process does not dictate particular procedures that must be used in every instance, . . . , at a minimum, administrative proceedings must afford affected parties (1) adequate notice, . . . ; (2) an opportunity for a hearing at a meaningful time and in a meaningful manner, . . . ; and (3) an opportunity to obtain judicial review of the board's or agency's decision. (citations omitted)).

⁵ *See id.*

- b. To permit a hearing before this survey is completed would unnecessarily create litigation costs since, if the company finds that some of the utility plant in service does not exist or otherwise has no value, such recorded assets would need to be written off to ensure accurate financial statements. Moreover, to force ratepayers to pay for assets that are later found to be non-existent or impaired would be unfair.
- c. Requesting the Authority to approve the purchase price before the finalization of the acquisition asks the Authority to do something that is not part of their statutory authority (approving a purchase price is the board of directors' responsibility).⁶

2) ***Whether the rates for current Whitwell customers should remain in effect:*** Acknowledging that the Whitwell customers will become the Consumer Advocate's clients if the acquisition is approved, the Consumer Advocate has concerns with TAWC charging the current rates to customers indefinitely without providing a cost of service schedule and with no timeline of providing one in the future, as indicated in Paragraph 10 of the *Petition*. According to TAWC's TRA Data Response #10, the City determines its revenue requirements on a cash flow basis rather than the rate base rate of return methodology. This difference could have impacted how the City calculated rates. Moreover, the auditors found an audit exception for the recording of receipts for the water system.⁷ This calculation of rates is not an authorized method of rates under the Authority's jurisdiction. Such "blackbox" rates that do not have an underlying cost of service are generally disfavored in Tennessee.

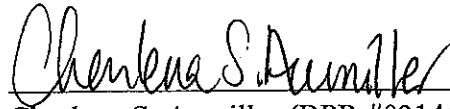
⁶ See *Tennessee Eastern Electric Co. v. Hannah*, 12 S.W.2d 372, 375 (Tenn. 1928) (holding the commission did not have the power under statute to set conditions on the CCN that required a utility to "commit itself irretrievably" to rate base in advance and without a hearing). In this case, the utility applied for a CCN during construction. The commission required the utility to commit itself to a rate base at the time of the CCN. The utility challenged the commission's requirements. The Tennessee Supreme Court held, "It will be borne in mind that these rules require, as a condition precedent to the consideration by the commission of an application for a certificate of necessity and convenience, that the applicant agree *in advance*, (c) to the fixing of a basis for future determination of values and rates involving valuable rights; By this requirement of an advance or preliminary agreement by the applicant against its interest, and waiving or conceding its valuable rights, the applicant was deprived of all opportunity for a hearing before the commission, or otherwise, or elsewhere, of its day in that or any other court." It is equally unfair to deprive ratepayers of the opportunity to have a meaningful hearing, with the sufficient information necessary, before committing the ratepayers irretrievably to paying rates for uncertain rate base items.

⁷ *Tennessee American Water Company's First Responses to Data Requests by Consumer Advocate and Protection Division of the Office of the Attorney General*, Docket No. 12-00157, DR 1, p. 230, (Mar. 12, 2013) (showing the absence of controls over the processing of water bills is still an issue as of June 30, 2012).

- 3) *Whether deferred income taxes and credits should be transferred with the sale:* Per Paragraph 9 of the *Petition*, any accumulated deferred income taxes and accumulated deferred investment tax credits will not transfer with the water system. Such tax credits often off-set rate base. The elimination of such credits may unnecessarily be detrimental to Whitwell's ratepayers.
- 4) *Whether due diligence costs should be included in regulatory expenses of applying for a CCN or whether these costs instead primarily benefit investors:* As a preliminary issue, the Consumer Advocate distinguishes due diligence costs from the regulatory expense of applying for a CCN. Investors incur due diligence costs for the purpose of determining whether the investment will benefit *investors*. It is not fair for ratepayers to pay costs incurred to serve the shareholders' interests. This approach is consistent with the recent settlement with Navitas and the disallowance of \$180,000 in organizational costs (that included due diligence and bankruptcy court fees), in the settlement ordered in Docket No. 12-00068 on February 13, 2013.
- 5) *Whether there is sufficient information to determine whether the legal costs to petition for a CCN are just and reasonable:* The Consumer Advocate has concerns that the level of detail necessary to ensure only reasonable and prudent costs is included in the recovery of rates has not been provided and is merely mixed in with the Due Diligence costs. The Consumer Advocate is concerned about the rising costs of litigation for TRA proceedings. In accordance with the Court of Appeals decision regarding analyzing legal fees,⁸ the Consumer Advocate requests sufficient detail of the costs incurred for the CCN petition to help ensure ratepayers pay only for those costs that are reasonable and prudent.

⁸ *Tennessee American Water Co. v. Tennessee Regulatory Authority*, 2011 WL 334678, *1, *26-27 (Tenn. Ct. App. 2011).

RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script, reading "Charlena S. Aumiller", written over a horizontal line.

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CERTIFICATE OF SERVICE

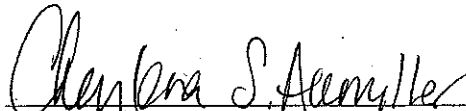
I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

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This the 19th day of March, 2013.


Charlena S. Aumiller