

**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 CROSSROADS, TENNESSEE, FOR)	
APPROVAL OF A PURCHASE AGREEMENT AND)	
WATER FRANCHISE AGREEMENT AND FOR)	
THE ISSUANCE OF A CERTIFICATE OF)	
CONVENIENCE AND NECESSITY)	

**MOTION TO COMPEL TENNESSEE AMERICAN WATER COMPANY TO ANSWER
DATA REQUESTS TO PROVIDE ITEMIZED DETAIL OF DUE DILIGENCE COSTS
REQUESTED FOR RECOVERY**

The Consumer Advocate and Protection Division ("Consumer Advocate") respectfully moves the Tennessee Regulatory Authority ("TRA" or "Authority") to compel Tennessee American Water Company ("TAWC") to respond to the Consumer Advocate's Data Request No. 16 and maintain and provide itemized detail of due diligence costs requested for recovery in its *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* ("Petition"). Although some discovery responses still remain outstanding, Data Request No. 16 *First Discovery Request of the CAD to TAWC*, filed on March 12, 2013, is the only request that the parties have come to an impasse of the requisite information to determine the reasonable, necessary, and prudent fees recoverable in rates.

INTRODUCTION

As discussed below, the Consumer Advocate requests the TRA to compel TAWC to produce itemized charges for what TAWC seeks in reimbursement for due diligence, including any legal fees, and if such detail is not produced, the Consumer Advocate requests the TRA to deny recovery of unsupported costs. According to the summaries of charges provided by TAWC, not all of the charges appear to be communication with an attorney, and consequently, would not be covered by the attorney-client privilege. For costs typically covered by the attorney-client privilege, TAWC waives this privilege by putting the attorney fees at issue when it seeks recovery of such fees.¹

The Consumer Advocate requests the itemization of charges now to enable it to provide complete arguments for its pre-hearing brief in this Docket, specifically the argument that due diligence costs incurred for the interests of shareholders should not be permitted in a deferred accounting. The identification of whether certain types of cost should be deferred and potentially recovered in later dockets like rate cases is best determined while the evidence is readily available and before it becomes stale or lost in the normal course of business. Without the itemization of charges, the Consumer Advocate may be handicapped in making its arguments.

RELEVANT PROCEDURAL BACKGROUND

The Consumer Advocate's *Petition to Intervene* was approved by the Hearing Officer in the March 11, 2013 Status Conference. Prior to official intervention, the Consumer Advocate provided TAWC its data requests informally on March 6, 2013 to help ensure the case could be

¹ The Consumer Advocate does not object to minor redactions so long as it has sufficient information to determine whether the fees benefitted ratepayers and were reasonable, necessary, and prudent fees in conducting the acquisition.

heard in the expedited manner requested by TAWC in its *Petition*. The Consumer Advocate filed its data request formally on March 12, 2013, the day after it officially intervened. TAWC provided some of its responses to the first data request on March 13, and more on March 21, 2013 and March 26, 2013. The Consumer Advocate provided TAWC additional data requests periodically from March 29-April 2, 2013, as the requests became available to minimize delays resulting from the state holiday on March 29, 2013.

Throughout this period, Data Request No. 16 from the *First Discovery Request of the CAD to TAWC*, filed on March 12, 2013, to the due date for motions to compel on April 3, 2013 per the procedural schedule filed on March 28, 2013, TAWC provided a summary of charges but did not provide itemized charges of the due diligence costs it seeks to recover according to its *Petition*. After requesting this data several times, TAWC eventually informed the Consumer Advocate that it would not provide the itemization of the charges for the reason of invoking its attorney-client privilege. The Consumer Advocate informed TAWC that it respects its decision but that it intended to file this *Motion to Compel* to obtain the level of detail necessary to evaluate the charges to determine whether they are reasonable, necessary and prudent and in the interest of ratepayers.

ARGUMENT

It is not fair to force ratepayers to pay rates that include charges that cannot be verified as to the reasonableness, necessity and prudence of the expenditure and as to whether the costs incurred were in the ratepayers' interest. Therefore, consumers have a right to verify that costs being recovered in rates are reasonable, necessary, and prudent and reflect charges incurred in their interest. A summary of the fees is insufficient to perform the requisite review and analysis to determine whether charges were reasonable, necessary, and prudent and whether the fees

incurred were in the ratepayers' interest. To enable the Consumer Advocate to adequately review the costs TAWC seeks to recover and make a recommendation for recovery, if any, the Consumer Advocate requests the itemization of due diligence fees as follows: (a) identify the purpose of the charge (*i.e.*, provide sufficient detail for a reviewer to determine whether the costs were incurred to minimize a specifically identified risk through due diligence, petition the TRA for the CCN, or petition the TRA for accounting and ratemaking treatment, such as requesting approval of rate base, or any other specified purpose of the charge); (b) provide the source of the charge (vendor name, attorney's name, employee's name and title, etc.); (c) identify what the cost is for (*e.g.*, survey costs, preparing CCN petition, preparing acquisition agreement, reviewing titles, etc.); (d) indicate the amount of fee; (e) provide the date the fee was incurred or expected timeframe of incurrence for estimated fees.²

In addition to notions of fairness, the Consumer Advocate's request is consistent with the rules of evidence and case law analyzing attorneys' fees. Under the Tennessee Rules of Evidence, the itemization of charges is not only relevant to determine the material issue of whether fees are recoverable in rates in accordance with Rule 401, but it is admissible under Rule 402 and, as discussed in the following Sections 1 and 2, not protected by privilege. Indeed, the Authority has recently indicated how liberal it is on the relevance of evidence.³ Moreover, the itemization of charges including nature of the fee and for what purpose the costs were incurred is consistent with the itemized charges that the Sixth Circuit recently reviewed to reduce

² For ease of reading, the Consumer Advocate does not repeat the level of detail it requests as itemization of fees. It should be noted, however, that when the Consumer Advocate requests itemization of fees throughout this motion, it intends for the itemization to include the detail listed in (a) through (e). The Consumer Advocate provided TAWC with this same request for detail in its earlier requests. Additionally, the Consumer Advocate requested TAWC to review the attorneys' fees submitted by Laurel Hills in response to Staff's January 31, 2013 Data Request in Docket No. 12-00030, filed on February 8, 2013 by Laurel Hills' attorneys Branstetter, Stranch and Jennings as an example of the level of detail requested.

³ *Transcript of Proceeding*, Docket No. 12-00030, p. 345 (Feb. 13, 2013).

attorneys' fees and remand with instruction to further review fees when inadequate supporting documentation was provided.⁴

It is axiomatic that a party making a claim to any tribunal must substantiate its claim with sufficient facts. Thus, if a party claims it is entitled to recover due diligence fees, it must provide sufficient evidence of such fees for the fact-finder to determine whether to award the claim. Moreover, in many cases, and as in this case, only reasonable, necessary, and prudent fees are allowed.

Sufficient evidence is required to determine the reasonableness, necessity, and prudence of attorneys' fees. Indeed, the Supreme Court has ruled on the evidence required to support claims of attorneys' fees:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.⁵

The Tennessee courts and the TRA have echoed the Supreme Court's ruling by consistently requiring documentation for evaluating the reasonableness of regulatory fees.⁶ Indeed, the

⁴ See, e.g., *Binta v. Gordon*, ___ F.3d ___, 2013 WL 2013 WL 1136544, at *20 (Mar. 20, 2013) (showing review by the court of detailed fees to identify the purpose of such attorney's fees as indicated in its analysis and exemplified by citations such as "Weitzner Decl., entry 485 ('conference w/ co-counsel re. Daniels violation: terminating former SSI recipient's TennCare')").

⁵ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (evaluating the reasonableness of a claim for attorneys' fees under a fee-shifting statute permitting prevailing parties awards of attorneys' fees for civil rights claims under U.S.C. § 1988); see also *Liberty Legal Foundation v. Democratic National Committee*, 2012 WL 6026856 (W.D. Tenn. 2012) (explaining evidence required to evaluate the reasonableness of attorney fees pursuant to Rule 11 sanctions and denying part of the attorney fee award based on the evidence provided).

⁶ *Tennessee Public Service Commission v. Nashville Gas Co.*, 551 S.W.2d 315, 322 (1977) (indicating that the regulatory expenses sought for recovery should have more explanation or supporting testimony prior to recovery); *Tennessee American Water Co. v. Tennessee Regulatory Authority*, 2011 WL 334678, at *27 (Tenn. Ct. App. 2011) (indicating that close examination of the costs to determine the portion to be borne by the shareholders was a finding of fact required to be in the record); *Initial Order of Hearing Officer Relating to Proof on Rate Case Expenses and the Joint Motion Filed by the Parties*, Docket No. 10-00189, pg. 3 (Mar. 22, 2011) (showing a director expressing

Authority has recently reiterated that a utility must provide information that fees were incurred by the utility for the benefit of rate payers for the Authority to consider the fees for reimbursement.⁷

In this Docket No. 12-00157, TAWC seeks to recover fees but argues that privilege protects it from providing itemized information about the charges. A utility cannot affirmatively seek recovery of due diligence or attorneys' fees while invoking privilege to shield disclosure of the itemized billing records that provide the evidence of the reasonableness of the claimed fees. The metaphor of invoking a privilege as both a sword and a shield is common in case law; the idea being that one cannot seek affirmative relief from the courts while invoking a privilege to shield from disclosure information that might undermine that claim for relief. Moreover, TAWC knows or should know that the determination of just and reasonable rates requires substantive evidence to support the reasonableness, necessity and prudence of the fees sought for recovery.⁸

In addition to the above argument for evidence to support the claim to recover due diligence fees, there are two more reasons the TRA should compel TAWC to maintain and provide an itemization of the charges it seeks for recovery: (1) attorney-client privilege does not apply to costs not resulting from attorney-client interaction; and (2) a client waives its attorney-client privilege when it seeks attorneys' fees at least to the extent to provide evidence to substantiate the number of hours, hourly rate, and nature of the work to determine the reasonableness and prudence of the attorneys' fees sought for recovery.

concern as to whether there was a sufficient evidentiary record upon which the TRA could decide the issue of rate case expense).

⁷ *Transcript of Proceeding*, Docket No. 12-00030, p. 172 (Feb. 13, 2013).

⁸ See *Tennessee American Water Co. v. Tennessee Regulatory Authority*, 2011 WL 334678, at *20 (Tenn. Ct. App. 2011) (affirming the TRA's finding that "there was no substantive evidence before the TRA to support the reasonableness, necessity and prudence of the increase in management fees sought by TAWC").

1. Attorney-client privilege does not apply to all interactions with an attorney and certainly does not protect client activities when the attorney is not involved.

It is well settled that communications between attorneys and third parties who are not agents of either the attorney or the client are not protected by the privilege.⁹ Similarly, communication between agents of the client on the subject about which the client was seeking legal advice is not privileged simply because of that consultation.¹⁰

Moreover, not all communication between a client and an attorney is privileged. Tennessee courts have long construed the privilege narrowly and hold that the privilege protects the confidential information the client communicated to its attorney while limiting the extent of protection of the attorney's communication to his client.¹¹ "The privilege applies only to the extent that the attorney's communications to a client were specifically based upon a client's confidential communication or would otherwise, if disclosed, directly or indirectly reveal the substance or tenor of a confidential communication."¹² Indeed, "advice given on general questions of law, when no facts are or need be disclosed or inferred which would implicate the client, would not ordinarily be covered by the privilege."¹³

In reviewing the summary TAWC provided for Data Response No. 16 thus far, as provided for in Exhibit A, several costs do not appear to be covered by the attorney client privilege, including but not limited to Tennessee Valley Surveying (\$2,100 for title work); TAWC (\$13.70 for records search); and American Water Works Service Company (\$16,155.02 incurred for document prep, due diligence, and TRA filing; and estimated \$10,000 for document review, due diligence, and TRA filing).

⁹ *Henry v. Nubert*, 35 S.W. 444, 448 (Tenn. Ch. App. 1895).

¹⁰ *Royal Suplus Lines Ins. Co. v. Sofamor Danek Group*, 190 F.R.D. 505, 517 (W.D. Tenn. 1999).

¹¹ *State v. Buford*, 216 S.W.3d 323, 326 (Tenn. 2007).

¹² *Burke v. Tennessee Walking Horse Breeders' & Exhibitors' Assoc.*, 1997 WL 277999 (Tenn. Ct. App. 1997); see also *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992) *Sid Mike 99*, *L.L.C. v. Suntrust Bank*, 2009 WL 3255209, at *2 (W.D. Tenn. 2009).

¹³ *Id.* (citing *Jackson v. State*, 155 Tenn. 371, 293 S.W. 539, 540 (1927)).

Because at least some due diligence costs may be for the benefit of the shareholders rather than ratepayers,¹⁴ and therefore not recoverable in rates, the Consumer Advocate respectfully requests the TRA to compel TAWC to maintain and provide the itemized detail of charges to the extent that TAWC wants to defer the accounting for later recovery of \$28,268.72 in costs resulting from activities that do not involve communication between TAWC and its attorneys.¹⁵

2. **Even when attorney-client privilege is available, TAWC waives this privilege when it seeks recovery of the attorneys' fees and due diligence fees that could otherwise be protected by the privilege.**

It is well settled that waiver of privilege may be proved by “express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was [the party’s] intention and purpose to waive.”¹⁶ As a utility that has operated in Tennessee for 125 years,¹⁷ TAWC knows or should know that the determination of just and reasonable rates requires substantive evidence to support the reasonableness, necessity and prudence of the fees sought for recovery.¹⁸ Since it is impossible for the Consumer Advocate to evaluate the reasonableness of the recovery of the due diligence fees in rates without an itemization of fees,¹⁹

¹⁴ See *In the Matter of the Application of Bella Vista Water Co., Inc. An Arizona Corporation to Determine the Fair Value of Its Properties for Rate making Purposes, to Fix a Just and Reasonable Rate of Return Thereon, and To Approve Rate Schedules and Tariffs Designed to Develop Such Return*, 2002 WL 32862770, at * 9-10 (Ariz. C.C. 2002).

¹⁵ The level of detail requested for these fees is discussed in, *supra*, footnote 2 and accompanying text.

¹⁶ *Kentucky Nat'l Insur. Co. v. Gardner*, 6 S.W.3d 493,499 (1999) (citations omitted); see also *Charleston, S.C., Mining & Mfg. Co. v. American Agricultural Chemical Co.*, 150 S.W. 1143, 1146 (1911).

¹⁷ *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, ¶ 17 (Dec. 27, 2013).

¹⁸ See *Tennessee American Water Co. v. Tennessee Regulatory Authority*, 2011 WL 334678, at *20 (Tenn. Ct. App. 2011) (affirming the TRA’s finding that “there was no substantive evidence before the TRA to support the reasonableness, necessity and prudence of the increase in management fees sought by TAWC”).

¹⁹ See *supra* nn. 2-6 and accompanying text.

then TAWC's persistence in requesting recovery of due diligence fees in rates is an act that manifests its intent to waive the protection of privilege to the extent to determine the reasonableness of fee recovery in rates. Alternatively, TAWC may express its intention to maintain privilege by withdrawing its request for recovery of due diligence fees from ratepayers.

CONCLUSION

For the reasons previously stated, the Consumer Advocate respectfully requests the TRA to compel TAWC to maintain and produce an itemization of the due diligence fees for which TAWC is seeking reimbursement, and if such detail is not produced, the Consumer Advocate requests the TRA to deny recovery of unsupported costs. According to the summaries of charges provided by TAWC, not all of the charges appear to be communication with an attorney, and consequently, would not be covered by the attorney-client privilege. For costs typically covered by the attorney-client privilege, TAWC waives this privilege to the extent necessary to substantiate whether the fees are reasonable, necessary, and prudent costs recoverable in rates. The itemization of charges is requested at this time as opposed to the time the deferred accounting would be reviewed to ensure the evidence is made available when it is readily available and to allow the Consumer Advocate to prepare complete arguments in its pre-hearing brief.

RESPECTFULLY SUBMITTED,

Robert E. Cooper, Jr. (BPR #010934)
Attorney General and Reporter
State of Tennessee

A handwritten signature in cursive script, reading "Charlena 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 Motion to Compel was served via U.S. Mail or electronic mail upon:

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This the 3 day of April, 2013.


Charlena S. Aumiller

EXHIBIT A

Exhibit A

**TENNESSEE AMERICAN WATER COMPANY
DOCKET NO. 12-00157
REQUEST FROM THE TENNESSEE REGULATORY AUTHORITY**

Responsible Witness: Dan Bickerton

16. Provide a breakdown of the costs listed in TAWC's response to TRA Data Request #2, including the source, amount (actual if already incurred; estimated if anticipated), and specific purpose for the cost (e.g., title searches).

RESPONSE:

The following costs have been incurred to date.

<u>Source & Purpose</u>	<u>Amount</u>
Tennessee Valley Surveying	
Title Work	\$ 2,100.00
TAWC	
Records Search	13.70
Baker, Donelson, Bearman & Caldwell	
Document Prep, Due Diligence, Advice, Title Work	33,356.40
American Water Works Service Co.	
Document Prep, Due Diligence, TRA Filing	<u>16,155.02</u>
Total	\$51,625.12

The following costs are estimated through the closing.

Baker, Donelson, Bearman & Caldwell	
Document Prep, Due Diligence, Advice, Title Work	5,000.00
American Water Works Service Co.	
Document Review, Due Diligence, TRA Filing	<u>10,000.00</u>
Total	\$15,000.00