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January 20, 2021

VIA ELECTRONIC FILING

Hon. Kenneth C. Hill, Chairman
c/o Ectory Lawless, Docket Room Manager
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
TPUC.DocketRoom@tn.gov

RE: *Petition of Tennessee-American Water Company Regarding the 2021 Investment and Related Expenses Under the Qualified Infrastructure Investment Program Rider, the Economic Development Investment Rider and the Safety and Environmental Compliance Rider, TPUC Docket No. 20-00128*

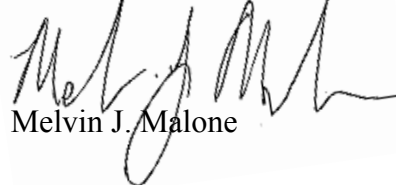
Dear Chairman Hill:

Please find attached for filing *Tennessee-American Water Company's Response to the Consumer Advocate's Motion to Terminate or Suspend Current Capital Riders Mechanism* in the above-captioned docket.

As required, one (1) hard copy will be mailed to your office. Should you have any questions concerning this filing, or require additional information, please do not hesitate to contact me.

Very truly yours,

BUTLER SNOW LLP



Melvin J. Malone

clw

Attachment

cc: Elaine Chambers, TAWC
Daniel P. Whitaker III, Consumer Advocate Unit
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**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE**

**PETITION OF TENNESSEE-
AMERICAN WATER COMPANY
REGARDING THE 2021
INVESTMENTS AND RELATED
EXPENSES UNDER THE QUALIFIED
INFRASTRUCTURE INVESTMENT
PROGRAM RIDER, THE ECONOMIC
DEVELOPMENT INVESTMENT
RIDER, AND THE SAFETY AND
ENVIRONMENTAL COMPLIANCE
RIDER**

DOCKET NO. 20-00128

**TENNESSEE-AMERICAN WATER COMPANY’S RESPONSE
TO THE CONSUMER ADVOCATE’S MOTION
TO TERMINATE OR SUSPEND CURRENT CAPITAL RIDERS MECHANISM**

Pursuant to Rule 1220-01-02-.06 (2) of the Tennessee Public Utility Commission’s Rules of Practice and Procedure, Tennessee-American Water Company (“Tennessee-American,” “TAWC” or the “Company”) respectfully submits this Response to the Consumer Advocate Unit in the Financial Division of the Office of the Attorney General’s Motion to Terminate or Suspend Current Capital Riders Mechanism (“*Motion*”). For the reasons set forth below, TAWC respectfully requests that the Commission deny the *Motion*.

I. INTRODUCTION

The gravamen of the *Motion* submitted by the Consumer Advocate Unit in the Financial Division of the Office of the Attorney General (“Consumer Advocate” or “CA”) rests on the Commission’s *Order Approving Petition As Amended* in TPUC Docket No. 18-00120 (Nov. 8, 2019) (the “*18-000120 Order*”). In its actions in Docket No. 18-00120, the Commission declined to adopt the positions submitted in evidence by the Consumer Advocate. Rather, upon a review of

the entire evidentiary record, the Commission found the Petition submitted by the Company, as amended, to be just and reasonable and in the public interest.

Moreover, the Commission, *sua sponte*, decided to open a separate inquiry to examine TAWC's Capital Recovery Riders ("CRRs") and to determine whether modifications would be appropriate to improve the CRRs. In opening this separate inquiry, TPUC Docket No. 19-00103, the Commission determined that a full review of the CRRs would be appropriate, including any issues previously raised by the Consumer Advocate, irrespective of whether the Commission had accepted or declined to accept the positions of the Consumer Advocate or the positions of TAWC with respect to any such contentions. One of the Commission's aims in establishing a separate inquiry to review the CRRs was that doing so outside of the CRRs annual process might allow for more public comment absent a tight procedural timeline.¹ As the Consumer Advocate concedes, the separate docket was opened to address a number of overarching objections the Consumer Advocate has to the CRRs mechanisms, not only the "excess rate base" issue that is the focus of this *Motion*.

The Consumer Advocate maintains in its *Motion* that the Commission did not reach *any* determinations in Docket No. 18-00120 on the issues raised by the Consumer Advocate and rebutted by the Company, but rather deferred the consideration of such issues to Docket No. 19-00103. According to the Consumer Advocate, the impact of the alleged deferral of these issues in Docket No. 18-00120, coupled with the Commission's prohibition restricting the Consumer Advocate's ability to raise issues similar to or the same as those it raised in Docket No. 18-00120 in any CRRs docket except for Docket No. 19-00103, violates basic tenets of fairness and unlawfully encroaches upon the Consumer Advocate's due process rights. This is an incorrect

¹ See 18-00120 Order at 21.

interpretation of the *18-00120 Order*, as well as an incorrect statement regarding the Consumer Advocate's ability to participate in the relevant proceedings and/or appeal decisions it views as legally incorrect.

The *Motion* should be denied for the following reasons:

1. THE CA'S CONTENTION THAT THE COMMISSION DID NOT ACT UPON A FULL REVIEW OF THE EVIDENTIARY RECORD IN DOCKET NO. 18-00120 IS IN ERROR.
2. THE CA'S FAILURE TO PURSUE ITS ADMINISTRATIVE AND JUDICIAL REMEDIES RENDERS THE MOTION WITHOUT MERIT.
3. THE CA'S ASSERTION THAT THE COMMISSION'S *18-00120 ORDER* UNLAWFULLY PROHIBITS THE CA FROM RAISING CERTAIN ISSUES WITH RESPECT TO THE CRRS OUTSIDE OF TPUC DOCKET NO. 19-00103 IS WITHOUT MERIT.

As demonstrated below, this *Motion* may be more about the Consumer Advocate's expectations with respect to the timing and speed of TPUC Docket No. 19-00103 than it is about any alleged infirmity in the actions of the Commission in TPUC Docket No. 18-00120. Tennessee-American respectfully requests the Commission to deny the Consumer Advocate's *Motion*.

II. PROCEDURAL HISTORY

In 2013, the Tennessee General Assembly passed House Bill 191, which revised Tenn. Code Ann. § 65-5-103 to allow alternative regulatory methods and mechanisms that recover certain costs without convening a general rate case, as long as specific criteria are satisfied, including, but not limited to, the Commission making a finding, prior to approval, that such alternative methods and mechanisms are in the public interest.

On October 4, 2013, Tennessee-American submitted a Petition (the "*October 2013 Petition*") seeking approval of four (4) proposed alternative regulatory methods and mechanisms as permitted under Tenn. Code Ann. § 65-5-103 *et seq.* More specifically, the Company sought

approval for a Qualified Infrastructure Investment Program Rider (“QIIP”),² an Economic Development Investment Rider (“EDI”),³ a Safety and Environmental Compliant Rider (“SEC”) ⁴ – and a Pass-Through mechanism for Fuel, Purchased Power, Chemicals, Purchased Water, Wheeling Water Costs, Waste Disposal and TPUC Inspection Fee (“PCOP”).⁵ One of the primary regulatory concepts underlying the then-proposed Capital Recovery Riders⁶ and PCOP was to allow, with the requisite safeguards to serve the public interest, smaller, gradual increases in rates and thereby lessen the occurrence of “rate shock.” One of the many benefits of this new, more streamlined recovery approach would be the likelihood of less frequent rate case filings.

On January 10, 2014, the Company and the Consumer Advocate submitted a Stipulation in TPUC Docket No. 13-00130 (the “*Stipulation*”), resolving the contested issues presented and offering the *Stipulation* to the Commission for its review, consideration and approval. The Company’s revised tariff sheets setting forth the Capital Recovery Riders, the PCOP, and the regulatory safeguards related thereto, were submitted in TPUC Docket No. 13-00130 on March 25,

² The QIIP Rider is designed, in part, to mitigate regulatory lag, to accelerate the timeframe of essential infrastructure upgrades and replacements, and to produce a safer and more reliable water distribution and production system for ratepayers. Additionally, this mechanism has many other customer benefits and protections, including the lessening of the occurrence of “rate shock” associated with Base Rate increases.

³ The EDI Rider is designed, in part, to promote the public interest by supporting and enhancing Tennessee American’s ability to serve both growing and new businesses and by permitting the Company to prudently promote economic development, growth and expansion in its service area.

⁴ Generally, the SEC Rider supports the Company’s ability to serve the public interest by providing safe and reliable drinking water. The current regulatory environment, coupled with aging infrastructure, will require a larger investment in safety and environmental compliance not previously recognized in the Company’s rates. Hence, one of the benefits of this rider is avoiding “rate shock” by permitting smaller, more gradual rate increases over time.

⁵ The PCOP is designed to streamline the recovery process by permitting Tennessee American to recovery the largest non-labor related component of the Company’s operations and maintenance expenses in a more timely manner, as increases in these essential and non-discretionary expenses (such as chemicals and power) are outside the control of the Company’s management.

⁶ For ease of reference, the QIIP, the EDI and the SEC are commonly referred to as the “Capital Recovery Riders.”

2014, and approved, along with the *Stipulation*, by the Commission as part of the Amended Petition on April 14, 2014 (hereinafter referred to as the “*Approved Tariffs*”).⁷

In its April 14, 2014, deliberations in TPUC Docket No. 13-00130, the Commission determined, after a review of the evidentiary record, including the *Stipulation* and the *Approved Tariffs*, that the proposed Capital Recovery Riders and the PCOP were reasonable and that the *Approved Tariffs* met the requirements of Tenn. Code Ann. § 65-5-103 *et seq.*⁸ As set forth in the *Approved Tariffs*, the Commission noted that the Capital Recovery Riders and the PCOP would not only accommodate a more timely recovery process for necessary costs and expenses, but also that these methods and mechanisms would further avoid the delay and expense commonly associated with full blown rate case proceedings.⁹ Finally, the Commission found the Amended Petition to be reasonable and in the public interest.¹⁰

Under the *Approved Tariffs*, on or before December 1 the Company submits projections for the upcoming calendar year in the manner, and with the accompanying support, required by the *Approved Tariffs* and the Commission. The *Approved Tariffs* contemplate that the CRR projections for the upcoming year will become effective January 1 and will be applied as an adjustment to Customers’ bills for the remainder of the calendar year. The year following said forecast year, the Company submits a reconciliation filing on or before March 1 to “true-up” the results of the previous year (match the forecast to actuals).

Pursuant to the *Approved Tariffs*, as amended, Tennessee-American submitted its Petition of Tennessee-American Water Regarding the 2019 Investments and Related Expenses Under the

⁷ *Transcript of Proceedings, In the Matter of Tennessee Public Utility Commission Conference*, TPUC Docket No. 13-00130, pp. 14-16 (April 14, 2014) (excerpt) (hereinafter “*Hearing Tr.*”).

⁸ *Hearing Tr.* at 14-16.

⁹ *Id.* at 15.

¹⁰ *Id.* See also *Order Approving Amended Petition*, TPUC Docket No. 13-00130 (Jan. 27, 2016) (hereinafter the “*2016 Order*”).

Qualified Infrastructure Investment Program Rider, the Economic Development Investment Rider and the Safety and Environmental Compliance Rider in TPUC Docket 18-00120 on November 16, 2018. In its Petition, the Company submitted that the Petition, and its accompanying support documentation, were consistent with Tenn. Code Ann. § 65-5-103 *et seq.*, consistent with the action of the Commission on the Amended Petition in TPUC Docket No. 13-00130 and subsequent CRR cases and consistent with and serve the public interest.

The Consumer Advocate intervened in Docket No. 18-00120, as it is permitted to do, and opposed the Company's Petition on several grounds. After the discovery phase of the case and the submission of pre-filed testimony by both the Consumer Advocate and TAWC, the matter was set for a hearing on the merits. After being afforded the opportunity to submit pre-filed testimony, both the Consumer Advocate and the Company were also granted the opportunity to submit their respective positions to the Commission during the hearing, subject to cross-examination. Following the hearing in TPUC Docket No. 18-00120, the Commission deliberated on the case and approved the Petition as amended by the Company. Moreover, the Commission, *sua sponte*, decided to open a separate inquiry to examine and review TAWC's Capital Recovery Riders and to determine whether any potential modifications would be appropriate to improve the CRRs.

The Commission memorialized its August 12, 2019, deliberations in Docket No. 18-00120 in the *18-00120 Order*. The *18-00120 Order* also delineated the administrative and judicial remedies available to any aggrieved person. Neither the Consumer Advocate nor the Company pursued the administrative or judicial remedies.

III. ARGUMENT

A. THE CA'S CONTENTION THAT THE COMMISSION DID NOT ACT UPON A FULL REVIEW OF THE EVIDENTIARY RECORD IN DOCKET NO. 18-00120 IS IN ERROR.

In its *Motion*, the Consumer Advocate maintains that “the Commission acknowledged, but did not deliberate or rule on the merits of the Consumer Advocate’s issues concerning structural changes”¹¹ in Docket No. 18-00120. Further, the Consumer Advocate asserts that the *18-00120 Order* “did not address other concerns of the Consumer Advocate, including whether a single, historic-looking annual filing is more administratively efficient or whether setting rates based on a Company’s spending projections is in the public interest.”¹² According to the Consumer Advocate, these issues were “reserved” by the Commission for the separate matter the Commission opened to conduct a review of the CRRs, namely Docket No. 19-00103.¹³

Although there is language in the *18-00120 Order* that can be read to suggest that the Commission did not address certain issues raised by the Consumer Advocate, such a reading ignores the gravamen of the order. Viewed as a whole, the *18-00120 Order* can only be reasonably interpreted to conclude that the Commission reviewed all evidence submitted in Docket No. 18-00120 and decided, on the record before it, to resolve only those issues that it had a sufficient evidentiary record to resolve. The Commission declined to adopt the positions of one or both parties on the other issues, leaving the opportunity for such other issues to be fully reviewed in Docket No. 19-00103 and/or other future contested proceedings involving the CRRs.

¹¹ *Memorandum of Law in Support of the Consumer Advocate’s Motion to Terminate or Suspend Current Capital Riders Mechanism*, p. 5, TPUC Docket No. 20-00128 (Jan. 6, 2021) (hereinafter “*CA Memorandum*”).

¹² *Id.*

¹³ *Id.* at 6.

As evidenced by the *18-00120 Order*, the Commission’s findings and conclusions were based upon a review of the “entire evidentiary record,”¹⁴ which includes the positions and testimony of the Consumer Advocate, as well as TAWC’s positions and testimony. The Commission found the Petition as amended to be compliant with the *Approved Tariffs* and “reasonable”¹⁵ and also determined that the CRRs “continue to benefit both consumers and the Company.”¹⁶ With respect to the contentions submitted in Docket No. 18-00120 by the Consumer Advocate regarding the structure of the CRRs, and rebutted by the Company, the Commission determined that “the modifications proposed by the Consumer Advocate to the Capital Rider tariff represent a departure from the manner in which the tariff has been administered and approved in all previous Capital Rider filings with this Commission.”¹⁷ While the Commission will certainly be the ultimate interpreter of its own *18-00120 Order*, the language directly above from the *18-00120 Order* reveals that the agency, upon a review of the entire evidentiary record, including TAWC’s rebuttal of the Consumer Advocate’s contentions, declined to accept the positions proffered by the Consumer Advocate.

In its *2016 Order* approving the CRRs, the Commission specifically noted that its power and discretion “applies not only to the *initial* rate adjustment, but also to *all subsequent* rate adjustments made under an approved alternative rate mechanism.”¹⁸ Further, the Commission specified that the initial and subsequent adjustment reviews would include an evaluation of reasonableness and compliance with any approved mechanism, as well as whether any such

¹⁴ *18-00120 Order* at 20.

¹⁵ *Id.*

¹⁶ *Id.* at 21.

¹⁷ *Id.*

¹⁸ *2016 Order* at 8 (emphasis added).

mechanism “remains in the public interest.”¹⁹ Hence, as it declared it would do in the *2016 Order*, and as outlined in the *18-00120 Order*, the Commission reviewed the Petition in Docket No. 18-00120, and the entire evidentiary record, based upon the standards set forth in Tenn. Code Ann. § 65-5-103 *et. seq.* and its *2016 Order* and declined to accept the Consumer Advocate’s assertions that the *Approved Tariffs* were unreasonable and not in the public interest. Rather, the Commission found that the capital expenditures were reasonable and that the CRRs, which are set forth in the *Approved Tariffs*, *continue* to benefit consumers. As evidenced by the *2016 Order*, and the agency’s plenary authority, the Commission could have found that the Petition was compliant with the *Approved Tariffs* and nonetheless ordered changes to the CRRs.²⁰

In sum, having based its determinations in Docket No. 18-00120 on the entire evidentiary record, it follows that the Commission, at that time, and on the record before it, was simply not sufficiently persuaded on the merits of the Consumer Advocate’s contentions, as rebutted by the Company, regarding “the very structure and fundamental mechanics of a mechanism” that the Consumer Advocate participated in shaping.²¹ At the same time, and as recognized in the *2016 Order*, the Commission employed its discretion to open a separate review to conduct an examination of the CRRs to allow “debate and public comment” on any issues related to the CRRs, including the issues raised by the Consumer Advocate, and rebutted by TAWC, in Docket No. 18-

¹⁹ *Id.* at 8-9.

²⁰ *See, e.g., CA Memorandum* at 3 (“Over time the Capital Riders have been modified.”).

²¹ *18-00120 Order* at 21. As the Commission considered the entire evidentiary record in reaching its determinations in Docket No. 18-00120, and as the Commission conspicuously commented in the *18-00120 Order* upon the fact that the CA “contributed to and shaped” the CRRs, it is noteworthy, in light of the CA’s contentions here, that the Company’s testimony in Docket No. 18-00120 highlighted that many of the arguments made by the CA in Docket No. 18-00120 were also made by the CA in previous CRRs dockets, including, but not limited to, Docket No. 13-00130, and either resolved by agreement of TAWC and the CA or rejected by the Commission. *See 18-00120 Order* at 21. *See also Pre-filed Rebuttal Testimony of TAWC Witness Elaine K. Chambers*, TPUC Docket No. 18-00120 (June 28, 2019).

00120.²² While reasonable minds may interpret the *18-00120 Order* differently, the more reasonable interpretation is that the agency neither prohibited the Consumer Advocate from raising the same or similar issues later nor presupposed that the Consumer Advocate would not at some future time be able to produce more evidence in support of such positions. Nor did the agency presume that TAWC would be unable to sufficiently rebut any such evidence. Therefore, the Commission should deny the *Motion*.

B. THE CA’S FAILURE TO PURSUE ITS ADMINISTRATIVE AND JUDICIAL REMEDIES RENDERS THE MOTION WITHOUT MERIT.

In the ordering clause of the *18-00120 Order*, the Commission noted that any person aggrieved by its decision may file a Petition for Reconsideration with the Commission within fifteen (15) days from the date of the *18-00120 Order* and may file a Petition for Review in the Tennessee Court of Appeals within sixty (60) days from the date of the *18-00120 Order*. Neither party pursued either of these remedies.

As noted above, in the *18-00120 Order*, the Commission plainly and conspicuously expressed that the purpose of opening the separate inquiry in Docket No. 19-00103 is to provide the opportunity for a review and examination of the CRRs, including public comment, absent the constraints of a procedural timeline.²³ Therefore, the Consumer Advocate was well aware of the possibility that the inquiry in Docket No. 19-00103 may not be concluded in the same manner and along the same timeline as in an annual CRR or other Commission docket. With this knowledge, if the Consumer Advocate thought it critical for the separate inquiry envisioned by the Commission in Docket No. 19-00103 to be administered in a manner differently than as determined by the

²² *18-00120 Order* at 21. See also *Order Granting the Petition to Intervene Filed by the City of Chattanooga*, TPUC Docket No. 19-00103 (Oct. 1, 2020) (“In Docket No. 18-00120, the Commission ordered that a new docket be opened ‘to address potential issues and proposed modifications to improve, make more transparent, or streamline the collective Capital Riders,’ including the contested proposals presented in that docket by the [CA].”).

²³ *18-00120 Order* at 21.

Commission, it was incumbent upon the Consumer Advocate to timely pursue its administrative and judicial remedies. It did not. Thus, it is inappropriate and improper for the Consumer Advocate to now attempt to employ the *Motion* in place of, and as a substantive substitute for, the remedies that it choose earlier to forego.

The Consumer Advocate maintains that the Commission's *18-00120 Order* has prevented the Consumer Advocate from being heard on the issues it raised in Docket No. 18-00120 and that the Commission's failure to issue a ruling on those issues violates the Consumer Advocate's due process and fairness rights.²⁴ First, and as outlined earlier herein, the Commission based its determinations in Docket No. 18-00120 on the entire evidentiary record, and concluded, following a hearing, that on the record before it there was not sufficient evidence on the issues presented by the Consumer Advocate, and as rebutted by the Company, to support "a departure from the manner in which the tariff has been administered and approved in all previous Capital Rider filings with this Commission."²⁵ Second, if the Consumer Advocate believed, as it now asserts, that it had in fact been denied a right to be heard and a right to a decision, then the Consumer Advocate could have and should have timely availed itself of the administrative and judicial remedies then available. Again, it did not. The Commission should refrain from curing the Consumer Advocate's failure to pursue its administrative and judicial remedies by granting the *Motion*.²⁶

²⁴ *CA Memorandum* at 13-18 and 20.

²⁵ *18-00120 Order* at 21.

²⁶ *In re Chattanooga Gas Co.*, Docket No. 04-00034, 2005 WL 3091723 (Tenn. R.A. Nov. 1, 2005) (noting that panel refused to consider issues raised by Consumer Advocate in its response to company's Petition for Reconsideration where Consumer Advocate failed to file its own petition for reconsideration within the timeframe required by statute).

C. THE CA’S ASSERTION THAT THE COMMISSION’S 18-00120 ORDER UNLAWFULLY PROHIBITS THE CA FROM RAISING CERTAIN ISSUES WITH RESPECT TO THE CRRS OUTSIDE OF TPUC DOCKET NO. 19-00103 IS WITHOUT MERIT.

In its *Motion*, the Consumer Advocate states that the “Commission . . . has explicitly reserved these issues – and essentially all other issues not yet known but that deviate from the current calculation of the Capital Riders – for the investigation docket[.] Thus, the only setting in which the Consumer Advocate’s positions can be heard is Docket No.19-00103.”²⁷ Further, the Consumer Advocate states that “[t]o deny consumers the opportunity to have their concerns regarding the public interest of a ratemaking scheme and collection of utility rates within dockets established to implement such a mechanism while simultaneously allowing a public utility to set new rates raises significant due process concerns as well as violates principles of fundamental fairness.”²⁸ Finally, the Consumer Advocate contends that it has a right to be heard on the issues raised in Docket No. 18-00120, coupled with a right to a decision, and has been afforded neither.²⁹

Even assuming for the sake of argument that the Commission fully deferred consideration of the issues raised by the Consumer Advocate in Docket No. 18-00120, the Commission neither prohibited the Consumer Advocate from making the same or substantially similar arguments made in Docket No. 18-00120 in future CRRs matters nor restricted the Consumer Advocate to only presenting such issues in Docket No. 19-00103.³⁰ There is absolutely nothing in the *18-00120 Order* that credibly supports such a conclusion. Therefore, the Consumer Advocate’s claims of an

²⁷ *CA Memorandum* at 13.

²⁸ *Id.*

²⁹ *Id.* at 13-18 and 20.

³⁰ *See, e.g., In re: Interstate Power and Light Co.*, 287 P.U.R. 4th 201, 2011 WL 121159 (Jan. 10, 2011) (Court approved Board’s opening a separate inquiry for certain issues raised by the Consumer Advocate in a rate proceeding due to an incomplete record and the restrictive procedural schedule).

infringement upon due process and fairness ring hollow.³¹ While the Consumer Advocate *now* takes issue with the Commission’s approval of the petition, as amended, in Docket No. 19-00105 (approval of the 2020 CRRs petition), and finds it convenient to attempt to cast the blame upon the Commission’s actions in Docket No. 18-00120,³² the actual record in Docket No. 19-00105 reflects that the Consumer Advocate voluntarily chose not to contest that petition after extensive discovery, the submission of pre-filed testimony and cooperative discussions between the parties.³³ In fact, TAWC and the Consumer Advocate, absent any direction or involvement whatsoever from the Commission, jointly and voluntarily represented to the Commission that “other issues” highlighted in pre-filed testimony “may be addressed in Docket No. 19-00103[.]” and voluntarily withdrew such issues from consideration in Docket No. 19-00105.³⁴ As the “other issues” issues referenced above included the issues raised by the Consumer Advocate in Docket No. 18-00120,³⁵ this representation to the Commission undermines, if not discredits altogether, any late-bloomed assertion by the Consumer Advocate that it was somehow prohibited by the Commission from raising such issues in Docket No. 19-00105.

³¹ Moreover, if the Consumer Advocate believed, as it contends, that the *18-00120 Order* infringed upon its due process and fairness rights by restricting any consideration of the issues raised by the Consumer Advocate in Docket 18-00120 to only further consideration in Docket No. 19-00103, then the Consumer Advocate should have timely pursued the administrative and judicial remedies available. *See Mires v. Clay*, 3 S.W.3d 463, 468 (Tenn. Ct. App. 1999) (“Failure to file either [a motion for a new trial or a motion for judgment notwithstanding the verdict] denies the trial judge the opportunity to consider or reconsider alleged errors committed during the course of trial and precludes appellate review of that issue.” (internal quotations omitted)).

³² *See CA Memorandum* at 6 (After quoting the Pre-filed Testimony of CA Witness Mr. Dittmore in Docket No. 19-00105, the CA noted that “The Commission’s holding in Docket No. 19-00031, however, did not address the excess rate base issue or the investigation docket, nor did it require any related changes to TAWC’s Capital Riders mechanism.”).

³³ *See April 10, 2019, Letter to Chairperson Morrison*, TPUC Docket No. 19-00105 (expressing the joint positions of the parties).

³⁴ *Id.*

³⁵ *See Pre-filed Testimony of CA Witness David N. Dittmore*, TPUC Docket No. 19-00105 (Mar. 5, 2020). *See also Consumer Advocate’s Motion to Terminate or Suspend Current Capital Riders Mechanism* at ¶ 10 (Jan. 6, 2021) (Citing Pre-filed Testimony of CA Witness Dittmore in Docket No. 19-00105).

In support of its argument, the Consumer Advocate attempts to rely on *Allegheny Defense Project v. Fed. Energy Reg. Comm.*, 964 F.3d 1 (D.C. Cir. 2020). This case, however, differs substantially from *Allegheny*. In *Allegheny*, a group of homeowners and environmental organizations opposed the construction of a natural gas pipeline expansion, which would use eminent domain to condemn the homeowners' properties. The homeowners and environmental groups were essentially appealing a decision, and the FERC used tolling agreements that precluded judicial review *and* authorized the utility to move forward with the eminent domain proceedings. As the Court noted, in practice, the tolling orders "can prevent aggrieved parties from obtaining timely judicial review of the Commission's decision." *Allegheny Defense Project*, 964 F.3d at 10.³⁶ That is not the case here, where the Consumer Advocate is authorized to fully and completely participate in each CRR docket, and in fact did participate in both Docket Nos. 18-00120 and 19-00105. Moreover, as noted above, nothing in the generic docket (No. 19-00103) precluded the Consumer Advocate from seeking reconsideration or appealing the Commission's decision in Docket No. 18-00120.³⁷

For the same reasons as presented directly above, the Consumer Advocate's baseless contention that the *18-00120 Order* somehow prohibits it "from seeking discovery from the Company concerning whether structural changes should be made as well as from filing expert testimony and legal arguments on the subject"³⁸ is equally without any support. Again, there is

³⁶ As the Consumer Advocate mentions in passing, the Court ultimately determined that, while the FERC's use of tolling orders essentially denied the homeowners' and environmental groups' applications, the applications themselves lacked merit and were appropriately denied. The Court's holding was limited to overruling the Court's prior orders that upheld the use of tolling orders to prevent a deemed denial or otherwise alter the jurisdictional consequences of an agency's inaction. *Id.* at 19. Contrary to the Consumer Advocate's assertion on page 18 of the *CA's Memorandum*, the Court in *Allegheny* did not hold that the petitioners were entitled to a final decision prior to Transcontinental beginning the construction.

³⁷ See *Davis v. Tennessee Dept. of Emp't Sec.*, 23 S.W.3d 304, 307-08 (Tenn. Ct. App. 1999) ("A party's failure to file a petition for review on or before the statutory deadline [under Tenn. Code Ann. § 4-5-322(b)(1)] prevents the courts from exercising their jurisdiction to review the agency's decision.").

³⁸ See *CA Memorandum* at 21.

nothing in the *18-00020* Order remotely supporting this argument. The Consumer Advocate submitted pre-filed testimony in Docket No. 19-00105 substantially similar to the issues it presented in Docket No. 18-00120, and the Commission did not take any action to prohibit the presentation of this testimony. Hence, not only is there nothing in the *18-00120 Order* that supports the Consumer Advocate's contentions here, the Commission has taken no action since the issuance of that order that would support the Consumer Advocate's meritless claims. It follows that the holding in *Tennessee Consumer Advocate v. Tennessee Regulatory Authority*, cited by the Consumer Advocate in support of the *Motion*, has no bearing on the resolution of the *Motion*.

IV. CONCLUSION

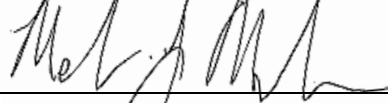
Although Tennessee-American will not here disclose any confidential discussions occurring within Docket No. 19-00103, it will note, given certain assertions set forth in the *Motion*, that that all parties in that case, including TAWC, are and remain in good faith, cooperative and ongoing discussions.³⁹ As such, Tennessee-American does not foresee the submission of a 2022 CRRs petition before the conclusion of Docket No. 19-00103.

For the foregoing reasons, Tennessee-American respectfully requests the Commission deny the Consumer Advocate's *Motion*.

³⁹ See *CA Memorandum* at 6 (noting that the negotiations in Docket No. 19-00103 are ongoing).

This the 20th day of January, 2021.

RESPECTFULLY SUBMITTED,



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Dated: January 20, 2021

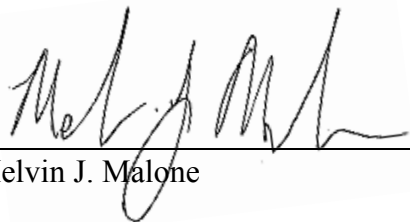
CERTIFICATE OF SERVICE

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 20th day of January, 2021.



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