

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE**

**PETITION OF TENNESSEE-)
AMERICAN WATER COMPANY TO)
MODIFY TARIFF, CHANGE AND) DOCKET NO. 24-00032
INCREASE CHARGES, FEES, AND)
RATES, AND FOR APPROVAL OF A)
GENERAL RATE INCREASE)**

**CONSUMER ADVOCATE’S MEMORANDUM IN SUPPORT OF ITS RESPONSE TO
TENNESSEE-AMERICAN WATER COMPANY’S MOTION REGARDING THE
COMMISSION’S JANUARY 8, 2026 DATA REQUESTS**

IN-PERSON ORAL ARGUMENT REQUESTED

Pursuant to Rule 1220-01-02-.6(2) of the Tennessee Public Utility Commission (“TPUC” or “Commission”), the Consumer Advocate Division of the Tennessee Office of the Attorney General (“Consumer Advocate” or “CAD”) respectfully submits its *Memorandum in Support of its Response to Tennessee American Water Company’s Motion Regarding the Commission’s January 8, 2026 Data Requests* (“Memorandum”). The Consumer Advocate respectfully requests the Commission deny TAWC’s request for submission of *unredacted* legal invoices to the Commission or Hearing Officer for *in camera* review because it will not allow the Consumer Advocate to effectively and fully participate in this proceeding and denies the Intervenors due process in this phase of the docket.

I. BACKGROUND

Pursuant to the Commission’s *Order Setting Utility Rates* (“Order”) concerning rate case expense in this Docket, the Commission stated:¹

Rate case expense is a necessary expenditure in the provision of utility service and, if reasonable, is generally recovered from ratepayers. Ratepayers benefit because the Company receives

¹ *Order Setting Utility Rates*, p. 34, TPUC Docket No. 24-00032 (April 21, 2025).

additional revenues to make necessary facility repairs and upgrades so that the system remains safe and reliable, and to cover reasonable operating expenses to help ensure efficiency of operations. Stockholders also benefit from the increased revenues, which generally result in higher equity returns and, ultimately, increased stock prices. Yet, regulators must be circumspect and consider whether too little review or a complete lack of consequences for management and stockholders could embolden a public utility to take unreasonable positions in furtherance of driving up the revenue requirement sought in a rate case. In this case, the Company submitted an estimate of \$1.554 million in rate case expense, covering legal, internal costs, and outside consultants, for a rate case that ultimately ended with a relatively modest rate increase of \$1,073,930. Traditionally, rate case expense has been incorporated into base rates to be recovered by ratepayers often based on little more than a line-item estimate provided by a public utility. A rate case proceeding carries with it a great deal of complexity over a host of issues and rarely permits the time for the parties or the Commission to deeply examine any rate case expense issue. As such, the estimate would generally be accepted, amortized over a three-year period (i.e., calculated for recovery over a three-year period) and built into base rates. Under the facts and circumstances in this docket, a separate proceeding will allow a review and a determination of the reasonableness of known and measurable costs. The panel voted unanimously to exclude the Company's rate case costs from establishing its base service rates and in turn, established a separate proceeding to determine the actual amount of regulatory costs, the time period for recovery, and the mechanism for allowing TAWC to recover these costs. The amount of regulatory costs to be recovered for the rate case, however, shall not exceed the \$1,554,000 amount requested by TAWC.

On November 7, 2025, TAWC submitted its *Petition for Recovery of Rate Case Expenses* ("Rate Case Expense Petition"). The Consumer Advocate and the City of Chattanooga both filed Motions for Limited Discovery, which were granted by the Administrative Judge on January 14, and January 20, 2026, respectively. On January 8, 2026, the Commission issued a data request to TAWC requesting, in pertinent part, "non-redacted invoices supporting the requested total rate case expenses."² On January 22, TAWC filed *Motion and Memorandum in Support of Motion Regarding the Commission's January 8, 2026 Data Requests*.

It should be noted that during the discovery phase of the rate case the Consumer Advocate requested copies of all unredacted legal invoices in this Docket, well before all rate case expenses had been incurred and billed.³ The Company responded and objected to the requests based on attorney-client

² Commission Data Request to Attorney Melvin J. Malone, Butler Snow LLP. (January 8, 2026).

³ CAD DR No. 3-6, TPUC Docket No. 24-00032 (August 14, 2025).

privilege and work product protections.⁴ TAWC simultaneously provided redacted invoices with the description of legal services and redacted costs claiming it did so to preserve the attorney-client privilege and work product protections confidentially.⁵ The Company also submitted a privilege log with limited descriptions and no cost information for each entry and failed to fully provide sufficient description of the services performed. Additionally, TAWC has also indicated that there are remaining redacted invoices supporting its Rate Case Expense Petition and an associated privilege log; however, those still have not been provided to the Consumer Advocate.

In its Motion, TAWC claims that the unredacted narrative descriptions of legal services include confidential communications between TAWC and its counsel, legal advice, counsel's mental impressions, and strategy. TAWC suggests that disclosure of those narratives to the Intervenors, even confidentially or under seal, would risk waiver of the attorney-client privilege and/or work product protections and would severely prejudice the Company. Therefore, TAWC has requested that the Commission solely review these legal invoices and seeks an *in camera* review to allow the Commission (and/or the Hearing Officer) to review the unredacted invoices for the purpose of evaluating the reasonableness and appropriateness of the requested rate case expenses, without disclosing same to the Intervenors thereby denying the Intervenors the ability to conduct a meaningful review of the legal invoices and severely limiting the Intervenors ability to issue discovery concerning the unredacted legal invoices and participate in this phase of the docket.

II. ARGUMENTS

The Commission has authority to control the course of proceedings and to issue protective relief as necessary to ensure the fair and orderly disposition of contested cases. The Commission's contested

⁵ TAWC Response to CAD DR No. 3-6, TPUC Docket No. 24-00032 (August 27, 2024).

case procedures incorporate discovery practice under the Tennessee Rules of Civil Procedure.

1. **TAWC Is Subverting CAD’s Ability to Review and Present Its Case Concerning Rate Case Expenses By Submitting a Motion Requesting the Commission to Review Its Unredacted Legal Invoices In Camera to Determine the Reasonableness and Appropriateness of Those Expenses Under the Pretext That the Legal Invoices Fall Under Attorney-Client Privilege and the Work Product Doctrine**

A. **The Attorney-Client Privilege**

Tennessee law protects confidential communications between attorney and client.⁶ The attorney-client privilege is the recognized privilege under common law and statute in Tennessee.⁷ This privilege allows for “full and frank communication between attorney and client by sheltering these communications from disclosure.”⁸ More specifically, the purpose is “to shelter the confidences a client shares with his or her attorney when seeking legal advice, in the interest of protecting a relationship that is a mainstay of our system of justice.”⁹ The attorney-client privilege is not absolute, nor does it cover all communications between a client and his or her attorney. Thus, the purpose of the privilege is to shelter the confidence a client shares with his or her attorney when seeking legal advice, in the interest of protecting a relationship that is a mainstay of our system of justice.¹⁰

Tennessee’s attorney-client privilege is codified in Tenn. Code Ann. § 23-3-105, which protects communications “made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward”¹¹ However, Tennessee courts have consistently held that attorney billing records and invoices are fundamentally different from privileged communications.

While the Tennessee Rules of Civil Procedure recognize there could be an attorney-client privilege

⁶ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁷ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002).

⁸ *Dialysis Clinic Inc. v. Medley*, 567 S.W.3d, 314, 318 (Tenn. 2019) citing *State ex rel. Flowers v. Tenn. Trucking Ass’n Self Ins. Group Trust, Inc.*, 209 S.W.3d 602, 615–16 (Tenn. Ct. App. 2006)(citing Tenn. Code Ann. § 23-3-105); *Federal Ins. Co. v. Arthur Anderson & Co.*, 816 S.W.2d 328, 330 (Tenn. 1991)).

⁹ *Bryan v. State*, 848 S.W.2d, 72, 79 (Tenn. Crim. App. 1992).

¹⁰ *Id.*

¹¹ TENN. CODE. ANN. § 23-3-105.

in some cases, but not in all cases where an attorney produces a billing communication to its client. TAWC is attempting to have the Commission determine *in camera* that the unredacted legal invoices are protected under attorney-client privilege and work product doctrine, and have the Commission review legal invoices *in camera* to determine the reasonableness and appropriateness of those expenses. This will bar the Intervenor from reviewing all legal costs incurred by TAWC in the rate case and reviewing if the rate case expenses incurred by TAWC are reasonable and prudent.

In *Saroff v. Cohen*, the Tennessee Court of Appeals established that “the invoices are property of the law firm” and determined that “invoices were accounts receivable records generated for the purpose of memorializing the cost to the client of legal services rendered and were maintained in the general course of business.”¹² The Court specifically found that “the invoices did not become part of the client file simply because they were placed in the client’s file” and concluded that “the invoices are not considered work product because they were not prepared for the benefit of the client; rather the invoices were generated for the benefit of the firm to ensure payment of legal services rendered.” This analysis demonstrates that Tennessee law does not automatically extend attorney-client privilege or work product protection to billing records, as they serve the attorney’s business purposes rather than facilitating legal representation or trial preparation. Tenn. Code Ann. § 23-3-105 protects professional “communications,” but does not specifically address billing records.

B. The Work Product Doctrine

Tennessee has adopted the Work Product Doctrine and it has been incorporated within the Tennessee Rules of Civil Procedure.¹³ The work product doctrine protects materials prepared by or for an attorney in anticipation of litigation (including mental impressions and legal strategy) from disclosure

¹² *Saroff v. Cohen*, 2009 WL 482498, *7 (Tenn. Ct. App. 2009).

¹³ Tenn. R. Civ. P. 26.02(3).

to an adversary, absent a showing of substantial need and undue hardship.¹⁴ The Commission applies the Tennessee Rules of Civil Procedure for discovery in contested cases.¹⁵ The legal invoices were prepared by attorneys to bill their client and were not prepared in anticipation of litigation.

The work product doctrine is qualified and may be overcome upon a showing that the requesting party “has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” In this case, the Intervenor are unable to effectively participate in determining the reasonableness and prudence of the legal fees incurred in this docket that ultimately will be paid for by customers of TAWC. The Intervenor will experience undue hardship and will be unable to obtain the substantial equivalent of the billing records by any other means.

Rule 26.02(3) governs the discovery of “Trial Preparation: Materials.” It protects documents prepared in anticipation of litigation by another party or their representative from discovery unless the requesting party shows substantial need and undue hardship. The work product doctrine under Tenn. R. Civ. P. 26.02(3) may protect billing records prepared in anticipation of litigation, but only upon when there has been specific factual justification and it is subject to substantial need and undue hardship exceptions.¹⁶ Tennessee applies rigorous standards for asserting work product protection over billing records. The Court rejected “conclusory statements that privileged information and work product are among the requested documents and that it would be unduly burdensome to identify and/or separate them from documents that are discoverable.”¹⁷

Like the attorney-client privilege, the burden of proof is on the party asserting the work product

¹⁴ *Hickman v. Taylor*, 329 U.S. 495 (1947).

¹⁵ TENN. COMP. R. & REGS. 1220-01-02-.11(1).

¹⁶ *In State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006).

¹⁷ *Id.* at 618-619.

doctrine to establish that the writings or documents were prepared in anticipation of litigation.¹⁸ The *Flowers* decision established that Tennessee courts must conduct proper burden-shifting analysis and cannot issue blanket protective orders without considering less restrictive alternatives.¹⁹ The Court emphasized that the burden was on the party opposing discovery, “to demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary to protect it from undue burden or expense.”

To successfully invoke work product protection under Tennessee law, the asserting party must establish three essential elements: (1) that the materials sought are documents or tangible things, (2) that the documents were prepared in anticipation of litigation or for trial, and (3) that the documents were prepared by or for another party or by or for that other party’s representative.²⁰ The burden of proof rests on the party asserting the work product doctrine to establish that the writings or documents were prepared in anticipation of litigation.²¹ Here, TAWC has failed to establish elements (2) and (3) above in order to invoke work product protection under Tennessee law.

The Tennessee Court of Appeals has emphasized that the policy underlying the work product doctrine is to permit attorneys preparing for litigation to assemble information, separate relevant from irrelevant facts, and plan their strategy without undue and needless interference.²² Clearly, the purpose or policy in Tennessee is not to limit parties to litigation from reviewing unredacted legal invoices that are not protected by the work product doctrine and certainly not to prohibit them from assessing the reasonableness and prudence in the rate case expense portion of a docket.

¹⁸ *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Grp. Tr.*, 209 S.W.3d 602, 617 (Tenn. Ct. App. 2006) citing *Guardsmark, Inc. v. Blue Cross and Blue Shield of Tennessee*, 206 F.R.D. 202, 207 (W.D.Tenn.2002).

¹⁹ *Id.*

²⁰ *Id.* at 617.

²¹ *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 615 (Tenn. 2006).

²² *Id.* at 616.

C. Fact Work Product Versus Opinion Work Product

Tennessee courts have also established a clear distinction between two categories of work product with markedly different levels of protection. Fact work product consists of documents prepared in anticipation of litigation or for trial that do not contain the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party in the litigation.²³ Opinion work product includes documents containing an attorney's mental impressions, conclusions, opinions, or legal theories regarding the pending litigation.²⁴

The standards for overcoming these two types of protections differ significantly. To obtain ordinary or fact work product, the requesting party must establish that it has a substantial need for the materials and that it is unable to obtain these materials or their substantial equivalent by other means without undue hardship.²⁵ The basis for the claim of substantial need must be articulated with specificity, and as a general matter, the party seeking discovery must establish that the facts in the requested documents are essential elements of its prima facie case.²⁶ The Consumer Advocate has a substantial need to view the legal billings of TAWC in order to establish a case about the reasonableness and prudence of the legal fees incurred by TAWC and such legal fees that the customers of TAWC will ultimately be paying through their rates. The Intervenors are unable to obtain these materials or their substantial equivalent by any other means.

Opinion work product receives substantially stronger protection. The burden of establishing a need for opinion work product is more onerous than that for ordinary or fact work product.²⁷ Tennessee courts have recognized that opinion work product “enjoys a nearly absolute immunity from disclosure”

²³ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 221 (Tenn. 2002).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 (Tenn. 2002).

²⁷ *Id.*

and “is subject to discovery only in rare, extraordinary circumstances.”²⁸ Parties seeking opinion work product must make a “far stronger showing of necessity and unavailability by other means” than is required when seeking ordinary or fact work product.²⁹

Courts have stated that the materials must be produced “if the party seeking the limitations cannot produce specific facts to support its request.”³⁰ “[M]ere conclusory statements” are not sufficient to justify application of the attorney-client privilege or work product protection.³¹ The applicability of the attorney-client privilege cannot be established simply by the fact that an attorney was a recipient or the author of a communication. It is not enough to assert simply that an attorney was involved in communication. TAWC has the burden to show that communication was made in confidence for the purpose of seeking legal advice, as opposed to other advice such as advice dealing with economic or business matters. “[T]he purpose of the privilege is to shelter the confidences a client shares with his or her attorney when seeking legal advice.”³² Moreover, we are talking about a communication produced by the attorneys for its client to present its billings in the rate case and collect the fees that are due from the client. TAWC has the burden of showing that the communication would directly or indirectly reveal the substance of confidential communications from a client.³³ As the *Bryan* Court recognized, the privilege is not absolute nor does it encompass all communications between the client and the attorney. That is, not only must the communication have occurred pursuant to the attorney-client relationship, but it must also have been made with the intention of confidentiality. Legal invoices are not created with the intention of confidentiality.

²⁸ *Id.* at 221.

²⁹ *Id.* at 222.

³⁰ *In State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 618 (Tenn. Ct. App. 2006).

³¹ *Id.*

³² *Bryan v. State*, 848 S.W.2d 72,79 (Tenn. Ct. App. 1992), perm. app. den'd. *See also Edwards v. Whitaker*, 868 F. Supp 226,228 (M.D. Tenn. 1994) (“the [attorney-client] privilege only applies if the lawyer is providing legal advice or services, and it will not protect disclosure of non-legal communications where the attorney acts as a business or economic advisor.”).

³³ *Id.* at 80.

The Commission does have prior precedent to support that it can conduct an *in camera* review, but it is for a limited purpose. In TRA Docket 10-00189, the Administrative Judge granted the City’s motion to compel stating there was “detailed information concerning particular documents, information, and materials that TAWC has withheld from discovery.”³⁴ The Tennessee Regulatory Authority’s (“TRA’s”), a predecessor agency to the TPUC, required TAWC to “describe the nature of the information not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties and this Authority to assess the applicability of the privilege protection.”³⁵ The purpose of the *in camera* review was to determine the contents of the documents. Mere recitation that a communication was sent to or received from an attorney does not meet TAWC’s burden.³⁶ TAWC’s broad, unsubstantiated claims of privilege and work product protection together with the motion recently filed by TAWC in this docket shows that it is TAWC’s design is to foreclose meaningful consideration of rate case expenses by the Intervenors.

The *in camera* process suggested by TAWC does not allow for a full and meaningful review of the rate case expenses by the Intervenors. As a practical matter, the Consumer Advocate has a statutory duty to represent the utility customers’ interests which includes determining the impact the \$1,554,000 in rate case expenses being sought by TAWC is reasonable and prudent.³⁷ If the Administrative Judge grants TAWC’s motion, the Consumer Advocate cannot meet its statutory obligation because the CAD would not have access to the unredacted legal invoices for a prudency review and analysis..

2. TAWC Already Has Sufficient Protections Concerning the Unredacted Legal Billing Invoices and *In Camera* Review Is Unnecessary

There are already sufficient and adequate protections available to TAWC to allow for the

³⁴ *Order of First Round Discovery Disputes*, p. 19, TPUC Docket 10-00189 (December 23, 2010).

³⁵ *Id.* at 19.

³⁶ *Bryant v. State*, 848 S.W.2d 72, 79 (Tenn. Ct. App.), perm. app. den’d.

³⁷ TENN. CODE ANN. § 65-4-118.

unredacted legal invoices to be reviewed by the Intervenors. The Commission’s general filing procedures provide mechanisms for submitting confidential or proprietary materials under protective conditions, including by sealed submission or separate clearly marked submission to prevent public disclosure, subject to Commission determination regarding the appropriateness of protection.³⁸ There is no need for an *in camera* review of the unredacted legal invoices by the Commission, let alone *in camera* review for the Commission to determine the reasonableness and appropriateness of the legal invoices.

TAWC cited *United States v. Keystone Sanitation*, a case stemming from Pennsylvania which references that that some legal invoices only disclose ‘the amount of time spent, the amount billed, and the type of fee arrangement between attorney and client are fully subject to discovery.’³⁹ *United States v. Keystone Sanitation*, involved CERCLA litigation involving asset transfer discovery. The Keystone Defendants moved to dispose of assets to avoid environmental liability. Court analyzed attorney-client privilege protection for billing statements and waiver through the inadvertent disclosure of attorney emails.

In that case the Court held: (1) attorney billing statements privileged only to extent they reveal litigation strategy/nature of services; (2) applied 5-factor test for inadvertent waiver; (3) found waiver occurred due to unreasonable precautions and interests of justice favoring disclosure in CERCLA context; (4) ordered production of unredacted billing statements related to asset transfers only.

The facts of that case are distinguishable from the facts presented in this docket before the Commission. The Consumer Advocate has no information to determine if TAWC’s legal billing entries have detailed narratives and reveal litigation strategy. Finally, this case is merely persuasive authority and is not the law in Tennessee and non-binding in Tennessee.

³⁸ TENN. COMP. R. & REGS. 1220-01-01-.03(5) (November 2025).
³⁹ *United States v. Keystone Sanitation Co.*, 885 F. Supp. 672, 675 (M.D. Pa. 1994).

TAWC also cites *Hewes v. Langston*,⁴⁰ a Mississippi case which established a precedent in Mississippi for protecting detailed attorney billing records and time entries under the work product doctrine. The case arose from tobacco litigation where the defendant's attorney sought discovery of detailed billing records and DayTimer entries from opposing counsel George Hewes, who represented tobacco companies in the underlying *Butler v. Phillip Morris* litigation. The *Hewes v. Langston* decision addresses the discoverability of attorney billing records in the context of both attorney-client privilege and work product doctrine protections. The Mississippi Supreme Court held that billing statements containing an "hour-by-hour rendition of work performed for a client over a three-year period" that detailed the name, people the plaintiff spoke with and the topics they discussed, and also described the subjects that the Plaintiff researched and the papers reviewed and as such were protected by the work product doctrine because "these descriptions necessarily reveal strategies, confidential communications, and the thought processes behind the representation."⁴¹ In the instant matter, the CAD seeks the unredacted legal invoices to make a determination about the reasonableness and prudence of the attorney fees billed to TAWC. The circumstances of that case differ materially from the instant docket. Further, this is Mississippi law and not Tennessee law and is merely persuasive authority.

Also, while Mississippi and Tennessee laws may be similar in that both protect confidential communications for legal advice, Tennessee's attorney-client privilege is based on common law and is codified at Tenn. Code Ann. § 23-3-105. Mississippi's attorney-client privilege is codified in the Mississippi Rules of Evidence, specifically Rule 502. Also, Mississippi law applies the privilege broadly, stating it covers all information received by the attorney in their professional capacity, including communications from attorney to client.

⁴⁰ 853 So. 2d 1237, 1248 (Miss. 2003).

⁴¹ *Id.* at 1250.

Tennessee case law on whether attorney invoices and billing statements fall within attorney-client privilege protection, especially when related to decisions addressing disclosure requirements in fee reasonableness determinations, indicates that Tennessee cases recognize that attorney billing records are admissible in fee disputes.⁴² Courts have even allowed examination of billing statements in professional responsibility cases⁴³ even when those documents were not originally provided to clients.

3. The Intervenors Are Being Denied Due Process if the Commission Conducts an *In Camera* Review of TAWC’s Legal Invoices and Determines the Reasonableness and Appropriateness of the Legal Invoices.

While TAWC claims to have complied with the requirement under Tenn, R. C. P. 26.02(5) to make the claim of privilege or work product, has described the nature of the withheld documents and has provided a privilege log for the redactions, this would not allow the CAD to determine the reasonableness and prudence of the legal fees incurred in this rate case.²² The Consumer Advocate would be barred from meaningfully participating in this phase of this Docket if the Commission grants TAWC’s motion.

TAWC seeks *in camera* review of all the unredacted invoices that TAWC claims fall under the attorney client privilege and work product doctrine and has also asked for the Commission or the Hearing Officer to determine the reasonableness and appropriateness of the unredacted legal invoices without allowing the Intervenors to review the unredacted documents. This would be unprecedented to seek *in camera* review without allowing the Intervenors to review the all rate case expenses in this phase of the docket.

A. Tennessee’s Approach to *In Camera* Review

Tennessee courts maintain discretionary authority over *in camera* review procedures, but with significant limitations on their scope and purpose. In *Culbertson v. Culbertson*, the Tennessee Court of

⁴² *Alexander v. Inman*, 903 S.W.2d 686 (Tenn. App 1995).

⁴³ *Sallee v. Tennessee BPR*, 469 S.W.3d 18 (Tenn. 2015).

Appeals clarified that while trial courts may “perform an *in camera* review of the documents deemed to be within the limited waiver for the purpose of screening out any that are not relevant to the issues or unduly prejudicial,” courts cannot conduct substantive review for decision-making purposes without providing parties access to the documents.⁴⁴

The Court specifically noted that “we find no authority for allowing the trial court to consider the substance of privileged documents *in camera* for the purpose of making a parenting decision, without giving both parties access to the documents.”⁴⁵ This principle extends beyond family law contexts to establish that *in camera* review serves primarily an evidentiary screening function rather than a mechanism for complete denial of access to other parties involved in the litigation.

Boyd v. Comdata Network further established that “the decision whether to conduct an *in camera* review of documents claimed to be work product is discretionary” and that “a court does not abuse its discretion by declining to review documents *in camera* when other evidence is sufficient to provide a basis for the court’s decision.”⁴⁶

In *Castillo v. Rex*, the Tennessee Supreme Court reaffirmed that “Tennessee rules of discovery and evidence favor the discoverability of all relevant, non-privileged information in the search for truth”⁴⁷ while recognizing that “privileges present obstacles to the search for truth” but protect “interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of the availability of evidence relevant to the administration of justice.”⁴⁸ This suggests courts will continue to apply case-by-case balancing rather than adopting broad privilege protections for billing

⁴⁴ *Culbertson v. Culbertson*, 455 S.W.3d 107,156 (Tenn. Ct. App. 2014).

⁴⁵ *Id.* at 156, FN 39.

⁴⁶ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 226 FN 34 (Tenn. Ct. App. 2002) quoting *United States v. Zolin*, 491 U.S. 554, 572, 109 S. Ct. 2619, 2631, 105 L.Ed.2d 469 (1989); *In re Colorado v. Martinez*, 970 P.2d 469, 477 (Colo.1998); *State v. Vinson*, 70 Ohio App.3d 391, 591 N.E.2d 337, 343 (1990).

⁴⁷ *Castillo v. Rex*, 715 S.W.3d 321, 332 (2025).

⁴⁸ *Id.*

records.

Tennessee courts also recognize that complete denial of access to relevant materials can violate due process rights, particularly when alternative discovery methods are inadequate. The balancing test established in *Ballard v. Herzke* identifies factors weighing against a finding of good cause for a protective order, including: “(1) the party benefitting from the protective order is a public entity or official; (2) the information sought to be sealed relates to a matter of public concern; and (3) the information sought to be sealed is relevant to other litigation and sharing it would promote fairness and efficiency.”⁴⁹

When billing records contain information relevant to an intervening party’s presentation of its case, complete denial of access through privilege assertions and limited *in camera* review would likely fail this balancing test. Tennessee law provides several procedural safeguards that courts can employ to protect legitimate interests while ensuring due process compliance:

First, courts can issue modified protective orders that permit limited disclosure with confidentiality restrictions. Second, courts can conduct *in camera* review specifically to screen out irrelevant or unduly prejudicial information while requiring disclosure of relevant materials. Third, courts can require detailed privilege logs that enable meaningful assessment of privilege claims.

The Tennessee Court of Appeals emphasized in *Davidson v. Bredesen* that “Tennessee’s discovery rules favor discovery of all relevant, non-privileged information”⁵⁰ and that “while statutory privileges should be fairly construed according to their plain meaning, they need not be broadly construed.”⁵¹ This approach suggests that courts will scrutinize privilege claims over billing records and require specific justification for withholding relevant information from intervening parties.

⁴⁹ *Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996).

⁵⁰ *Davidson v. Bredesen*, 2013 *3 WL 5872286 (Tenn. Ct. App. 2013) citing *Culbertson*, 393 S.W.3d at 683 (quoting *Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 504 (Tenn.2010)).

⁵¹ *Id.*

Courts routinely employ *in camera* review to independently assess the applicability of these protections, particularly when privilege claims are contested and Tennessee law mirrors these principles, requiring claimants to establish privilege applicability, and authorizes *in camera* review as a procedural mechanism to resolve disputes.⁵² Tennessee courts balance the need to preserve confidentiality with fairness in discovery, preventing undue prejudice to opposing or intervening parties. Due process concerns may arise if privilege determinations deprive parties of meaningful access to relevant evidence, thus courts scrutinize privilege assertions, often requiring particularized showings and judicial review under protective orders to safeguard the process.

While the use of privilege logs are common ways to assert privilege or protect documents from discovery, the party asserting the attorney-client privilege must make a minimal showing that a communication contained legal matters, and this can be satisfied by a statement in a privilege log explaining the nature of the legal issue for which advice was sought; however, merely conclusory statements may not be enough to satisfy this minimal standard.

The privilege log must be detailed enough to prove that the communications in question were in fact confidential communications relating to legal advice.⁵³ The party asserting the privilege must make “at least a minimal showing that the communication contained legal matters,” but that showing need not be “onerous and may be satisfied by as little as a statement in the privilege log explaining the nature of the legal issue for which advice was sought.”⁵⁴ The law is well-settled that, if a party fails to make the required showing, by not producing a privilege log or by providing an inadequate one, the court may deem the privilege waived.⁵⁵ TAWC has not met its burden to show that the materials were privileged or work

⁵² Id. at (*emphasis added*).

⁵³ *In re Search Warrant Executed at Law Offices of Stephen Garea*, No. 97-4112, 1999 WL 137499, at *2, 1999 U.S.App. LEXIS 3861, at *7 (6th Cir. Mar. 5, 1999).

⁵⁴ Id. at *2.

⁵⁵ *In re Universal Serv. Fund Tel. Billing Pracs. Litig.*, 232 F.R.D. 669, 671 (D. Kan. 2005).

product protected pursuant to Tenn. R. Civ. P.26.02(3).

Attorney-client privilege and work product designations combined with requests for only *in camera* review of legal invoices and a determination of the reasonableness of the legal fees would effectively deprive an intervening party of due process rights. Since attorney billing records are generally considered the property of the law firm rather than privileged communications, and Tennessee law favors disclosure when access can be granted without harming legitimate privacy interests, courts would likely require some form of disclosure to intervening parties with adequate procedural safeguards rather than complete denial

Tennessee’s due process protections under Article I, Section 8 of the Tennessee Constitution are “essentially the same” with the Fourteenth Amendment’s Due Process Clause.⁵⁶ Tennessee courts have established that when privilege claims conflict with constitutional rights, courts must apply a balancing test that considers competing interests rather than automatically favoring privilege protections.

The Tennessee Supreme Court in *Ballard v. Herzke* established the framework for resolving these conflicts, holding that “in determining whether good cause has been established for a protective order, it is important that trial courts balance one party’s need for information against the injury that would allegedly result if disclosure is compelled.”⁵⁷ The Court further emphasized that “if access to protected materials can be granted without causing harm to legitimate privacy interests, access should be granted.”⁵⁸

This balancing approach recognizes that Tennessee’s discovery rules “favor the discoverability of all relevant, non-privileged information”⁵⁹ while acknowledging that privileges “protect interests

⁵⁶ *Dotson v. State*, 673 S.W.3d 204, 216 (Tenn. 2023).

⁵⁷ *Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996).

⁵⁸ *Id.*

⁵⁹ *Castillo v. Rex*, 715 S.W.3d 321, 332 (Tenn. 2025).

and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of the availability of evidence relevant to the administration of justice.”⁶⁰

III. CONCLUSION

For the foregoing reasons, the Consumer Advocate respectfully requests that the Commission deny TAWC’s motion and enter an order directing the Company to submit unredacted attorneys’ fees invoices supporting its Rate Case Expense Petition to the Commission and to all Intervenors submitted as Confidential under the Protective Order.

RESPECTFULLY SUBMITTED,



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Dated: February 2, 2026

⁶⁰

Id.

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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**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE**

**PETITION OF TENNESSEE-)
AMERICAN WATER COMPANY TO)
MODIFY TARIFF, CHANGE AND)
INCREASE CHARGES, FEES, AND)
RATES, AND FOR APPROVAL OF A)
GENERAL RATE INCREASE)**

DOCKET NO. 24-00032

**CONSUMER ADVOCATE’S RESPONSE TO
TENNESSEE-AMERICAN WATER COMPANY’S MOTION REGARDING
THE COMMISSION’S JANUARY 8, 2026 DATA REQUESTS**

IN-PERSON ORAL ARGUMENT REQUESTED

Pursuant to Rule 1220-01-02-.6(2) of the Tennessee Public Utility Commission (“TPUC” or “Commission”), the Consumer Advocate of the Attorney General’s Office (“Consumer Advocate” or “CAD”) respectfully submits its *Response and Memorandum to TAWC’s Motion Regarding the Commission’s January 8, 2026 Data Requests*. For the following reasons and as more fully set forth in the CAD’s memorandum in support hereof, the CAD respectfully requests that the Commission deny TAWC’s motion and enter an order requiring TAWC to provide the requested unredacted legal billing invoices to the Commission and the Intervenors. The Intervenors should be permitted to conduct a complete and thorough review of the unredacted legal invoices and other rate case expenses, propound discovery and determine the reasonableness and prudence of the rate case expenses in this phase of the docket. Additionally, to preserve the Intervenors right to due process it is necessary for the Intervenors be permitted to fully participate in this docket and not be limited in its review of

rate case expenses.

1. On April 21, 2025, the Commission entered *Order Setting Utility Rates* (“Order”) in this matter.

2. The Commission stated in the Order:

The estimated \$1,554,000 in rate case expenses sought by Tennessee-American Water Company is denied without prejudice. A separate docket shall be opened to determine the recoverable amount of rate case costs and the time period and mechanism for recovery. However, the amount of regulatory costs to be recovered shall not exceed the \$1,554,000 requested by Tennessee-American Water Company.

3. On November 7, 2025, the Company submitted its *Petition for Recovery of Rate Case Expenses* (“Rate Case Expense Petition”).

4. On December 23, 2025, the Consumer Advocate submitted its Motion and Memorandum in Support for Leave to File Limited Discovery in this phase of the docket.

5. On December 30, 2025, the City of Chattanooga submitted its Motion and Memorandum in Support for Leave to File Limited Discovery.

6. On January 8, 2026, the Commission issued a data request to TAWC requesting, in pertinent part, “non-redacted invoices supporting the requested total rate case expenses.”

7. Thereafter, on January 14, 2026 and January 20, 2026, respectively, the Administrative Judge issued an Order Granting Leave to File Limited Discovery to both the CAD and the City (collectively “Intervenors”).

8. Prior to the issuance of the staff data requests on January 8, 2026, the Consumer Advocate requested TAWC produce the unredacted legal fee invoices to the Intervenors. TAWC failed to produce the unredacted invoices to the Consumer Advocate both in the main rate case and thereafter, claiming attorney-client privilege and work product doctrine.

9. The CAD hereby objects to TAWC producing the legal invoices for *in camera* for review by the Commission and having the Commission or Hearing Officer to make a determination about the reasonableness and appropriateness of the legal invoices at this stage of this phase of the docket.

10. At this juncture, if the Commission allows such relief to TAWC, it will deprive the Intervenors due process and effectively prohibit the Intervenors from having the ability and the right to fully participate and present its case on rate case expenses in this phase of the docket.

11. While TAWC suggests the unredacted legal invoices contain detailed narrative time entries that reveal attorney-client privileged communications and contain opinion work product, and thus, TAWC seeks an *in camera* procedure for only the Commission (and/or the Hearing Officer) to review the unredacted invoices for the purpose of evaluating the reasonableness and appropriateness of the claimed rate case expenses and without compelling disclosure to the Intervenors restricts the Intervenors from determining if the unredacted legal invoice expenses were reasonable and prudently incurred.

12. The rate case expenses will ultimately be borne by TAWC customers and full disclosure of unredacted legal invoices is essential to ensure that the expenses are reasonable and prudent.

13. The Consumer Advocate respectfully requests the Commission deny TAWC's Motion to produce unredacted legal invoices to the Commission or Hearing Officer for *in camera* review and a determine if the legal invoices are reasonable and appropriate.

14. The Consumer Advocate requests the Commission direct the Company to submit

unredacted attorneys' fees invoices supporting its Rate Case Expense Petition to the Commission and to all Intervenors submitted as Confidential under the Protective Order. The CAD requests other relief the Commission deems just and reasonable.

Respectfully submitted,



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