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Hon. David Jones, 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 2025 Production Costs and Other Pass-Throughs Rider*, TPUC Docket No. 25-00002

Dear Chairman Jones:

Attached for filing please find *Tennessee-American Water Company's Response to Consumer Advocate's Motion for Summary Judgment on the Issue of Non-Revenue Water* in the above-captioned matter.

As required, copies 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: Bob Lane, TAWC

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

PETITION OF TENNESSEE-)	
AMERICAN WATER COMPANY)	
REGARDING THE 2025 PRODUCTION)	DOCKET NO. 25-00002
COSTS AND OTHER PASS-)	
THROUGHS RIDER)	

**TENNESSEE-AMERICAN WATER COMPANY’S RESPONSE
TO CONSUMER ADVOCATE’S MOTION FOR SUMMARY JUDGMENT
ON THE ISSUE OF NON-REVENUE WATER**

Tennessee-American Water Company (“Tennessee-American,” “TAWC” or “Company”) hereby respectfully submits its Response to the Consumer Advocate Division of the Attorney General’s Office’s Motion for Summary Judgment on the Issue of Non-Revenue Water (the “*Motion*”). For the reasons set forth below, Tennessee-American respectfully requests that the Tennessee Public Utility Commission (“Commission” or “TPUC”) deny the *Motion*.

I.

BACKGROUND

Pursuant to Tenn. Code Ann. § 65-5-103, *et seq.*, and the decisions of the Tennessee Public Utility Commission in TPUC Docket No. 13-00130, on January 15, 2025, TAWC filed the Petition of Tennessee-American Regarding The 2025 Production Costs and Other Pass-Throughs Rider (the “*Petition*”), along with sworn testimony, workpapers, exhibits and proposed tariffs. In the *Petition* and supporting documentation, among other things, the Company requested that the Commission apply the limitation factor on unaccounted for water first adopted by it in TPUC Docket No. 08-00039.¹ The Consumer Advocate Division of the Attorney General’s Office’s (“the

¹ *Pre-filed Direct Testimony of TAWC Witness Robert C. Lane*, pp. 8-9, TPUC Docket No. 25-00002 (Jan. 15, 2025).

Consumer Advocate” or “CAD”), which was granted intervention in this case, thereafter submitted the Pre-filed Testimony of CAD Witness William H. Novak on April 2, 2025. As to the issue of the limitation factor, the CAD noted as follows:

“TAWC is also asking the Commission to modify the existing PCOP calculation methodology for the Non-Revenue Water Percentage.... TAWC is proposing instead to base this adjustment on the Unaccounted-For Water Percentage.”²

On April 21, 2025, the Commission submitted its *Order Setting Utility Rates* in TPUC Docket No. 24-00032 (hereinafter the “2025 Rate Case Order”). In its *2025 Rate Case Order*, the Commission declared that “the Commission is not implementing a new standard, but rather is continuing to apply the 15% standard for lost and unaccounted for water first adopted in the 2008 rate case[.]”³

On April 22, 2025, the Company submitted the Pre-filed Rebuttal Testimony of TAWC’s Witness Robert C. Lane. Among other things, in its rebuttal testimony, TAWC reasserted its position that the Commission’s limitation factor was never intended to include, and should not include, Non-Revenue Water for which a utility can account, such as water used for firefighting, testing fire hydrants, flushing pipes, or performing flow tests.⁴ On April 28, 2025, the Consumer Advocate filed the *Motion*, contending that “the Commission should deny the Company’s claim on Non-Revenue Water that is based on deliberate disagreement and defiance with the Commission Order.”⁵ Tennessee-American respectfully submits its response to the *Motion*.

² *Pre-filed Testimony of CAD Witness William H. Novak*, p. 5, TPUC Docket No. 25-00002 (April 2, 2025).

³ *Order Setting Utility Rates*, p. 21, TPUC Docket No. 24-00032 (April 21, 2025).

⁴ *Pre-filed Rebuttal Testimony of TAWC Witness Robert C. Lane*, p. 5, TPUC Docket No. 25-00002 (Jan. 22, 2025) (hereinafter “*Rebuttal Testimony of Robert Lane*”).

⁵ *Consumer Advocate Division of the Attorney General’s Office’s Motion for Summary Judgment on the Issue of Non-Revenue Water*, p. 2, TPUC Docket No. 25-00002 (April 28, 2025).

II.

STANDARD AND LAW

As the party seeking summary judgment, the Consumer Advocate bears the initial burden of demonstrating the absence of a genuine issue of material fact and that it is entitled to a judgment as a matter of law.⁶ The Tennessee Supreme Court emphasizes that moving parties, like CAD, can prevail on motions for summary judgment “*only* if the ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is *no* genuine issue as to any *material fact* and that the moving party is entitled to judgment as a matter of law.’”⁷ Further, “Tennessee Rule 56.03 requires the moving party to support its motion with ‘a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial.’”⁸ A fact in a case is material “if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.”⁹

“The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed issues of fact.”¹⁰ The moving party must aver true facts as “a party’s ‘reliance on its own argument ... does not satisfy the demands of Rule 56.04 or create a genuine issue of material fact that would preclude summary judgment.’”¹¹

When the moving party does not bear the burden of proof at trial, like the Consumer Advocate, the moving party may satisfy the burden of production in two ways: “(1) by affirmatively negating an essential element of the nonmoving party’s claim or (2) by demonstrating

⁶ *Martin v. Norfolk S. Ry. Corp.*, 271 S.W.3d 76, 83 (Tenn. 2008); *see also* Tenn. R. Civ. P. 56.04.

⁷ *Id.* at 84 (emphasis added).

⁸ *Rye v. Women’s Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015) (citing Tenn. R. Civ. P. 56.03)

⁹ *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993).

¹⁰ *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 337 (Tenn. 2005).

¹¹ *White v. Bradley Cnty. Gov’t*, 639 S.W.3d 568, 577 (Tenn. Ct. App. 2021) (quoting *Clarksville Towers, LLC v. John Straussberger, et al.*, 639 S.W.3d 586, 596 n. 2 (Tenn. Ct. App. 2021)).

that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense."¹² The rule is well-settled that, "a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis."¹³ The court must also "take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence."¹⁴

For the nonmoving party to prevail, it must "demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party."¹⁵ The nonmoving party may satisfy its burden of production by:

(1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.¹⁶

Most importantly, the nonmoving party's "evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of" the nonmoving party.¹⁷

While not directly addressed by the CAD in its vaguely concise *Motion*, the issue of collateral estoppel appears to have been raised. "To prevail with a collateral estoppel claim, the party asserting it must demonstrate (1) that the issue to be precluded is *identical* to an issue decided

¹² *Rye*, 744 S.W.3d at 264.

¹³ *Id.*

¹⁴ *In re Estate of Huff*, No. M2023-00474-COA-R3-CV, 2025 WL 289526, at *2 (Tenn. Ct. App. 2025) (citing *Byrd*, 847 S.W.2d at 211).

¹⁵ *Id.* at 265 (emphasis added).

¹⁶ *McCarley v. West Quality Food Service*, 960 S.W.2d 585, 588 (Tenn. 1998); accord *Byrd*, 847 S.W.2d at 215 n. 6.

¹⁷ *Martin*, 271 S.W.3d at 834.

in an earlier proceeding, (2) that the issue to be precluded was *actually* raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding has become *final*, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a *full and fair opportunity* in the earlier proceeding to contest the issue now sought to be precluded.”¹⁸

Here, the CAD has failed to meet its burden. The Consumer Advocate has not negated an essential element of TAWC’s claims because it has failed to accurately identify TAWC’s claims at all. The Consumer Advocate further failed to demonstrate that TAWC’s evidence is insufficient to establish its claims and has not even identified the material facts at issue before the Commission. Further, and to the extent raised by the CAD, collateral estoppel is not appropriate in this case for several reasons, including because the issues raised by TAWC in the *Petition* are different and distinct from the issues addressed in TAWC’s 2024 rate case, and the issues raised in TAWC’s pre-filed testimony in this proceeding were not “actually raised, litigated, and decided on the merits” in the 2024 rate case.¹⁹

III.

DISCUSSION AND ARGUMENT

The Consumer Advocate incorrectly argues in its *Motion* that Tennessee-American’s actions are in deliberate defiance of the Commission’s *2025 Rate Case Order*.²⁰ This is simply not true. Tennessee-American is merely respectfully requesting in Docket No. 25-00002 that the Commission either apply its 2008 rate case decision²¹ as reflected in the *2008 Rate Case Order*,

¹⁸ *Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009).

¹⁹ *Id.*

²⁰ *CAD’s Motion for Summary Judgment on the Issue of Non-Revenue Water* at 2.

²¹ *Order*, p. 15, TPUC Docket No. 08-00039 (Jan. 13, 2009) (hereinafter “*2008 Rate Case Order*”).

or in the alternative, determine that this is an appropriate time to re-evaluate a seventeen (17) year old limitation factor in light of evolving and current industry and regulatory standards. Among other things, this allows the Commission to consider advancements in technology, evolving industry norms, and changes in standards recognized by the State of Tennessee and other jurisdictions.

In TAWC's pre-filed testimony in this case, it presented the *2008 Rate Case Order* and the underlying evidentiary record in Docket No. 08-00039 for review and consideration by the Commission.²² The evidentiary record in TPUC Docket No. 08-00039, which was expressly relied upon by the Commission in establishing the 15% limitation factor for TAWC, is consistent with the request set forth in the *Petition*.²³ More specifically, the non-revenue water standard proposed by the Consumer Advocate in this case, and applied by the Commission in Docket No. 24-00032 ((Water Produced) - (Water Sold) / (Water Produced) = Water Loss Percent)) is factually and legally not the same as the limitation factor expressly adopted by the Commission in Docket No. 08-00039 ((Distributed Water) – (Volume Billed + Authorized Water Use) / Distributed water) = Water Loss Percent)).²⁴ While the Consumer Advocate may disagree with the Company at this stage of the proceedings, such disagreement, as shown above, does not negate the presence of inextricably intertwined genuine issues of material fact and law in this case. The Commission clearly has the discretion to hear this case in the entirety and ultimately reject the Company's

²² *Rebuttal Testimony of Robert Lane* at 5-6.

²³ *Id.* at 6 (“On page 136 of the AWWA’s document entitled “Benchmarking Performance 9 Indicators or Water and Waste Water Utilities: Survey Data and Analysis Report,” upon 10 which CMA’s witness Mr. Gorman relied for his recommendation, and cited by the Commission as the basis for its unaccounted-for water loss limitation of 15%,⁵ 11 defines 12 unaccounted-for water as: (Distributed water – (volume billed + authorized water use)) / Distributed water) (citing *Rebuttal Testimony of TAWC Witness Mr. Michael A. Miller*, pp. 69-73, Exhibit MAM-9, TPUC Docket No. 08- 00039 (Aug. 13, 2008)).

²⁴ See *2025 Rate Case Order* at 21-22 and *2008 Rate Case Order* at 13-16. See also *2025 Rate Case Order* at 21 (“To be clear, the Commission is not implementing a new standard, but rather is continuing to apply the 15% standard for lost and unaccounted for water first adopted in the 2008 rate case[.]”).

assertions in part or in full later. Under the circumstances presented, namely the intertwined genuine issues of material fact and law, such a determination should only be made after a contested hearing on the merits of this case. At this stage, the CAD is not entitled to summary judgment as a matter of law.²⁵

In its pre-filed testimony in Docket No. 25-00002, Tennessee-American outlined and submitted current approaches to water loss limitation factors in Tennessee and other states.²⁶ The Company further identified and presented additional sources that should be considered by the Commission to establish a reasonable limitation factor for TAWC going forward. Presenting new, modified, or alternative proposals to the Commission that differ from previous positions adopted by the Commission is not new or novel and is undertaken by parties, including the Consumer Advocate, often in Commission proceedings, particularly with respect to Commission directives that have been in place for decades. In such instances, the Commission has not viewed these efforts as a disregard of previous Commission orders. By presenting current or new approaches to water loss limitation factors in this case, TAWC is not disregarding previous Commission orders. Instead, the Company is presenting an opportunity for the parties in this case and the Commission to thoughtfully consider and weigh whether evolving industry knowledge and standards,²⁷ coupled

²⁵ Commission Rule 1220-01-02-.22(1) provides that the Commission may only grant a motion for summary judgment if it determines that there is no genuine issue as to any material fact.

²⁶ *Rebuttal Testimony of Robert Lane* at 8–14.

²⁷ The American Water Works Association (AWWA) has significantly shaped the approach to water loss as a performance metric for water utilities, transitioning from outdated measures to standardized, data-driven methodologies between 2000 and 2025. AWWA has recommended moving from previous standards (both NRW and UFW) in favor of more granular metrics to improve water loss management. AWWA Position on Water Loss as a Performance Metric for Water Utilities (2000–2025) (AWWA M36, 2016).

AWWA has moved away from a single percentage-based number recognizing that the complex issue of water loss cannot be boiled down to a single metric or Key Performance Indicator, but rather is best served by a more granular approach that looks at individual causes and sources of water loss. AWWA also recognizes that water loss KPI's must account for the operating characteristics and challenges faced by individual utilities.

This pivotal shift in approach, detailed in the AWWA M36 manual (Water Audits and Loss Control Programs), emphasizes the International Water Association (IWA)/AWWA Water Audit Method, introduced in the early 2000s and refined through multiple editions (AWWA M36, Water Audits and Loss Control Programs, 4th ed., 2016). The

with the approaches applied for other water providers in Tennessee,²⁸ warrant further analysis and a different approach as concerning water loss.

The CAD has presented no bases whatsoever for a determination by the Commission that the proposed current or new approaches for a reasonable and appropriate water loss limitation factor for TAWC going forward are ripe for summary judgment as a matter of law. Summary judgment is simply not appropriate where a petitioner is proposing new, revised, or alternative approaches to regulation for consideration by the Commission.²⁹ The new, revised, or alternative approaches to water loss limitation and the proposed modification of public policy submitted by Tennessee-American in this case were not litigated in Docket No. 24-00032.³⁰ The Commission should hear the evidence of the parties and thereafter determine whether to accept or reject such new, revised, or alternative proposals. At all times, the discretion remains with the Commission. The Commission has the authority, as well as the duty, to change its directives as warranted by public policy and industry changes.³¹ The Commission should consider all the evidence submitted

method provides a standardized water balance to categorize losses and calculate key performance indicators (KPIs), such as gallons lost per connection per day, to guide utilities in cost-effective loss control.

To support this methodology, AWWA released the Free Water Audit Software in 2006, with version 6.0 launched in 2020, becoming the industry standard for conducting annual water audits. The software enables utilities to quantify NRW components, assess data validity, and prioritize strategies to cost effectively reduce water loss. The AWWA Water Audit Compiler further facilitates benchmarking by allowing utilities to compare data across multiple systems or years, enhancing performance tracking. The 2014 Water Research Foundation Project 4372a introduced the Leakage Component Analysis Model, complementing the audit software by analyzing real loss components to set economic leakage control strategies. (<https://www.awwa.org/resource/water-loss-control/>)(<https://www.awwa.org/resource/water-loss-control/>)(<https://www.awwa.org/resource/water-loss-control/>). See also North American Water Loss - American Water Works Association - [www.awwa.org\]\(https://www.awwa.org/event/north-american-water-loss/\)](https://www.awwa.org/event/north-american-water-loss/); Water Loss Control - American Water Works Association - [www.awwa.org\]\(https://www.awwa.org/resource/water-loss-control/\)](https://www.awwa.org/resource/water-loss-control/); Water Loss Performance Standards: Where Should the States be Headed? - [www.nrdc.org\]\(https://www.nrdc.org/bio/ed-osann/water-loss-performance-standards-where-should-states-be-headed/\)](https://www.nrdc.org/bio/ed-osann/water-loss-performance-standards-where-should-states-be-headed/); and Technical Reports - American Water Works Association - [www.awwa.org\]\(https://www.awwa.org/technical-reports/\)](https://www.awwa.org/technical-reports/).

²⁸ *Rebuttal Testimony of Robert Lane* at 9–11.

²⁹ *United Cities Gas Co.*, 789 S.W.2d at 259.

³⁰ *Mullin*, 294 S.W.3d at 535.

³¹ *Id.*

by the Company as presenting true issues of material facts.³² Taking the view of the actual evidence presented by TAWC in its pre-filed testimony “in favor of” TAWC, there are clearly unresolved material facts as to the underlying dispute and, therefore, summary judgment is not appropriate.³³

Tennessee-American concedes that the Commission’s orders must be adhered to and be complied with by the regulated community unless and until they are changed. This does not mean, however, that regulated utilities in the State of Tennessee are forever foreclosed and precluded from respectfully asking the Commission to evaluate fresh, different, and supported alternatives from time to time. Quite the opposite, TAWC, just as any other regulated utility, the CAD, and other interested parties, are not foreclosed from proposing modifications or updates to previous rulings or decisions, including those warranted by evolving industry standards or otherwise justified by the evidence presented, which is precisely the case here. In providing the opportunity for the presentation and consideration of new and evolving information, the Commission is neither bound nor obligated to modify previous rulings or directives.

III.

CONCLUSION

Under Tennessee law, TAWC’s evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact must be resolved in favor of the Company.³⁴ For the foregoing reasons, Tennessee-American requests that the Commission deny


³² *Martin*, 271 S.W.3d at 834.

³³ *In re Estate of Huff*, 2025 WL 289526, at *2.

³⁴ *Martin*, 271 S.W.3d at 834.

the Consumer Advocate Division's Motion for Summary Judgment on the Issue of Non-Revenue Water.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE


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

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This the 5th day of May 2025.



Melvin J. Malone