

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 3, 2007

IN RE:

**PETITION OF LYNWOOD UTILITY
CORPORATION TO CHANGE AND
INCREASE RATES AND CHARGES**

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**DOCKET NO.
07-00007**

**ORDER SETTING MATTER FOR HEARING ON AUGUST 20, 2007 AND
RESUSPENDING TARIFF THROUGH SEPTEMBER 10, 2007**

This matter is before the Hearing Officer for the purpose of preparing this matter for hearing, handling preliminary matters and establishing a procedural schedule to completion, including the setting of a hearing date.

TRAVEL OF THE CASE

On January 4, 2007, Lynwood Utility Corporation (“Lynwood” or the “Company”) filed its *Petition* in which the Company seeks approval by the Tennessee Regulatory Authority (“Authority” or “TRA”) of proposed increased rates. In the *Petition*, Lynwood requests that the Authority “[s]chedule a hearing upon proper notice for the presentation of evidence as to the rates necessary to provide adequate sewer service to its customers and a fair rate of return the Company.”¹ Along with the *Petition*, Lynwood filed a revised tariff containing the effective date of February 3, 2007.

On February 2, 2007, the Hearing Officer entered an *Order Suspending Tariff, Granting Petition to Intervene and Setting a Status Conference* in which intervention was granted to the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer

¹ *Petition*, p. 4 (January 4, 2007).

Advocate”) and the effective date of the proposed tariff was suspended until May 3, 2007. A Status Conference was held on February 16, 2007 and thereafter, on March 9, 2007, an *Order Establishing Procedural Schedule* was entered which set dates for the completion of discovery and the submission of pre-filed testimony, along with tentative hearing dates for May 17-18 or May 21-22, 2007.

On March 23, 2007, Lynwood published in *The Tennessean* its public notice summarizing “the proposed rate change and the predicted impact of the proposed change on the average residential and business customers served by the company.”² As required by TRA Rule 1220-4-1-.05(2), the public notice also provided information regarding the hearing on the Company’s *Petition*, stating that the hearing would be set in May of 2007.

On April 10, 2007, the Consumer Advocate filed an *Agreed Motion to Stay the Procedural Schedule* (“*Agreed Motion*”). In the *Agreed Motion*, the parties stated that they were working together to resolve certain discovery issues and the Company required additional time to produce the information requested by the Consumer Advocate. As a result, the Consumer Advocate was unable to file Direct Testimony on the date specified in the procedural schedule without first reviewing the additional discovery material that the Company was to provide to the Consumer Advocate.

On April 25, 2007, the Hearing Officer entered an *Order Granting Agreed Motion to Stay Procedural Schedule and Setting Status Conference*. In that Order, the Hearing Officer stated that new dates for discovery and the filing of testimony must be incorporated in a revised procedural schedule because certain deadlines in the existing procedural schedule had passed without the filing of discovery responses and testimony. In addition, the suspension of the procedural schedule resulted in the Authority not being able to complete the hearing and

² Letter of Donald L. Scholes, Esq. to Chairman Sara Kyle (May 24, 2007), providing copy of public notice published on March 23, 2007.

determination of Lynwood's proposed increase, change or alteration in its tariff by the dates originally proposed. For these reasons, the Hearing Officer set a Status Conference for May 7, 2007 for the purpose of revising the procedural schedule and establishing a new hearing date, and entered an Order on May 2, 2007 which re-suspended the effectiveness of the tariff filed with the *Petition* for a period of an additional three months through August 3, 2007.

During the Status Conference held on May 7, 2007, the parties reported to the Hearing Officer that they were not in a position to discuss modifying the procedural schedule because they were continuing to meet in an effort to resolve certain issues and discovery matters. The parties stated that they would contact the Hearing Officer at such time as they were ready to proceed with the establishment of a revised procedural schedule.

On July 11, 2007, the parties submitted a Proposed Settlement Agreement in which the parties stated that they had agreed to certain adjustments reducing Lynwood's requested revenue increase and modifying specific components of Lynwood's requested rate increase. The Proposed Settlement Agreement did not set forth a date for a hearing but did propose that the modified rate increases become "[e]ffective August 1, 2007, or at a later date determined by the TRA."³ On July 27, 2007, counsel for Lynwood filed a letter with the TRA requesting that the Proposed Settlement Agreement be placed on an August 13, 2007 Authority Conference for consideration. In that letter, counsel for Lynwood states:

The rates proposed by Lynwood upon the filing of the *Petition* have been suspended until August 3, 2007, which is the end of the six months period referenced in T.C.A. § 65-5-103(b) for the Authority to review Lynwood's rate increase request. Lynwood is willing to waive its statutory right under T.C.A. § 65-5-103(b) to put the proposed rate increase into effect for ten (10) days until August 13, 2007, provided the above captioned *Petition* is heard at the August 13, 2007, Authority Conference and that the rate increase approved by the Authority is allowed to go into effect immediately.⁴

³ Proposed Settlement Agreement, p. 2 (July 11, 2007).

⁴ Letter of Donald L. Scholes, Esq. to Chairman Eddie Roberson (July 27, 2007).

FINDINGS AND CONCLUSIONS

The correct posture of this matter requires that the procedural protections afforded the parties and the public under Tennessee statutes be clearly identified and articulated. It is without question that the TRA must hold a contested case hearing to consider Lynwood's request for a rate increase.

Tenn. Code Ann. § 65-2-101(2) defines a "contested case" as "all proceedings before the authority in which the legal rights, duties or privileges of specific parties are determined after a hearing before the authority; provided, that the fixing of rates shall be deemed a contested case rather than a rule-making proceeding . . ." Tenn. Code Ann. § 65-5-101 vests the TRA with the authority and duty to set just and reasonable rates for public utilities.

(a) The Tennessee regulatory authority has the power *after hearing upon notice*, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-4-101, whenever the authority shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established. In fixing such rates, joint rates, tolls, fares, charges or schedules, or commutation, mileage or other special rates, *the authority shall take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility.* [Emphasis supplied.]

Tenn. Code Ann. § 65-5-103 governs the procedure to be followed by the TRA upon a public utility requesting an increase in rates.

(a) When any public utility shall increase any existing individual rates, joint rates, tolls, fares, charges, or schedules thereof, or change or alter any existing classification, the authority shall have power either upon written complaint, or upon its own initiative, to hear and determine whether the increase, change or alteration is just and reasonable. The burden of proof to show that the increase, change, or alteration is just and reasonable shall be upon the public utility making the same. In determining whether such increase, change or alteration is just and reasonable, the authority shall take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility. *The authority shall have authority pending such hearing and determination to*

order the suspension, not exceeding three (3) months from the date of the increase, change, or alteration until the authority shall have approved the increase, change, or alteration; provided, that if the investigation cannot be completed within three (3) months, the authority shall have authority to extend the period of suspension for such further period as will reasonably enable it to complete its investigation of any such increase, change or alteration; and provided further, that the authority shall give the investigation preference over other matters pending before it and shall decide the matter as speedily as possible, and in any event not later than nine (9) months after the filing of the increase, change or alteration. It shall be the duty of the authority to approve any such increase, change or alteration upon being satisfied after full hearing that the same is just and reasonable. [Emphasis supplied.]

This matter has not been set or noticed for hearing due to the stay entered by the Hearing Officer at the request of the parties. Instead, a settlement agreement has been presented by the parties, and the Company unilaterally has asked the Authority to consider that proposed agreement during an Authority Conference. Specifically, the Company requests that this matter be placed on the agenda for an August 13, 2007 Conference for determination by the Authority.⁵ In its *Petition*, Lynwood recognized that “a hearing upon proper notice” must be conducted before consideration of the Company’s request for a rate increase. Nevertheless, there has been no request or indication from the parties that the Hearing Officer or the Authority set a public hearing in connection with consideration of the Proposed Settlement Agreement or that the Company has published a new public notice informing the public of a hearing in this matter.

Based upon the record in this docket, including comments submitted by consumers and the filings of the parties relating to the Proposed Settlement Agreement, the Hearing Officer finds that this docket must be set for public hearing with adequate and proper notice to allow consumers the opportunity to participate and comment regarding Lynwood’s proposed rate increase.

⁵ The next Authority Conference will be held on August 20, 2007. There will not be a Conference held on August 13, 2007.

The Hearing Officer is compelled to address Lynwood's demand that the Proposed Settlement Agreement be approved on August 13, 2007 or the Company will put its original rate increase request into effect. Tenn. Code Ann. § 65-5-103 sets forth an orderly and equitable process by which the Authority can investigate a rate increase request and make a timely decision, balancing the interests of the company seeking a rate increase and of the consumers who would bear the cost of the rate increase. Lynwood relies on Section 65-5-103(b) in asserting the Authority has six months "to review Lynwood's rate increase request" and Lynwood has a "statutory right . . . to put the proposed rate increase in effect."

Tenn. Code Ann. § 65-5-103(b) permits a public utility to put the rates into effect after six months from the date of filing, but also prescribes certain conditions. That section states:

(b) (1) If the investigation has not been concluded and a final order made at the expiration of six (6) months from the date filed of any such increase, change or alteration, the utility may place the proposed increase, change or alteration, or any portion thereof, in effect at any time thereafter prior to the final authority decision thereon upon notifying the authority, in writing, of its intention so to do; provided, that the authority may require the utility to file with the authority a bond in an amount equal to the proposed annual increase conditioned upon making any refund ordered by the authority as provided in subdivision (b)(2).

(2) Where increased rates or charges are thus made effective, the interested utility shall maintain its records in such a manner as will enable it, or the authority, to determine the amounts to be refunded and to whom due, in the event a refund is subsequently ordered by the authority as provided in this subdivision (b)(2). Upon completion of the hearing and decision, the authority may order the utility to refund, to the persons in whose behalf such amounts were paid, such portion of such increase, change or alteration as shall have been collected under bond and subsequently disallowed by the authority. If the authority, at any time during the initial three (3) months' suspension period, finds that an emergency exists or that the utility's credit or operations will be materially impaired or damaged by the failure to permit the rates to become effective during the three-month period, the authority may permit all or a portion of the increase, change or alteration to become effective under such terms and conditions as the authority may by order prescribe. Any increase, change or alteration placed in effect under the provisions of this subsection (b) under bond may be continued in effect by the utility, pending final determination of the proceeding by final order of the authority or, if the matter be appealed, by final order of the appellate court. Should the final order of the authority be appealed while increased rates or charges are being collected

under bond, the court shall have power to order an increase or decrease in the amount of the bond as the court may determine to be proper. In the event that all or any portion of such rates or charges have not been placed into effect under bond before the authority, the court considering an appeal from an order of the authority shall have the power to permit the utility to place all or any part of the rates or charges into effect under bond.

The Hearing Officer is of the opinion that the six month provision in Tenn. Code Ann. § 65-5-103(b) was never intended by the General Assembly to be used by a public utility as a “club” to threaten the TRA to decide a rate case in favor of one party or another. Certainly this statute should not be permitted to be used in this docket to force the Authority to approve the Proposed Settlement Agreement or any rate increase request, especially in the instance where a public hearing has not been provided.

Further, the Hearing Officer is of the opinion that the statutory privilege of putting proposed rates into effect after six months has been waived, or, in the least, tolled by the Company. The Hearing Officer issued a procedural schedule, agreed to by the parties, which resulted in the completion of discovery and the submission of pre-filed testimony no later than May 11, 2007. The original procedural schedule established a hearing date in May, 2007, allowing sufficient time for the Authority to hear and deliberate the merits of the *Petition* well in advance of the six month period set forth in Tenn. Code Ann. § 65-5-103(b). On April 10, 2007, the parties asked the Hearing Officer to stay further action in this docket indefinitely. To assist the parties in keeping with a procedural schedule, the Hearing Officer set a Status Conference for May 7, 2007 expressly for the purposes of “revising the procedural schedule, establishing a hearing date and discussing pre-hearing matters, including any discovery issues.”⁶ At that Status Conference, the parties informed the Hearing Officer that they were not ready to discuss putting together a new procedural schedule and that they would notify the Hearing Officer when they

⁶ Notice of Status Conference (April 27, 2007).

were ready to move forward with a procedural schedule. The following discussion was held during the May 7, 2007 Status Conference:

MR. COLLIER: At this point, in terms of asking for the additional time, that's granted. And I'm assuming that the parties will come back to me either in some motion or request to pick back up with the status conference or just a proposed procedural schedule.

So would the parties come back to me to ask to further discuss a procedural schedule?

MR. SCHOLLES: Or hopefully we can reach one -- try to reach one to submit to you by agreement and if we can't come back to you saying we're having troubles.

MR. MCGEHEE: That sounds fine.

MR. COLLIER: And in light of the additional time that's being injected into the case here, I assume that the company has no desire to put the rates into effect until we get this worked out. Is that correct?

MR. SCHOLLES: At the moment, that's true.

MR. COLLIER: Anything else that we need to discuss at this time?

MR. MCGEHEE: No.

MR. SCHOLLES: Not for the company.⁷

The above noted discussion demonstrates not only that the parties would be notifying the Hearing Officer when they were ready to have the stay removed, but also that the Company would not seek to put the rates into effect because of the stay.

Lynwood's letter of July 27, 2007 states:

The rates proposed by Lynnwood upon the filing of the Petition have been suspended until August 3, 2007, which is the end of the six months period referenced in T.C.A. § 65-5-103(b) *for the Authority to review Lynwood's rate increase request.* [Emphasis supplied.]⁸

It is clear from Tenn. Code Ann. § 65-5-103(a) that the TRA can proceed with its investigation and decision beyond six months from the filing date of the *Petition*. Further, the suspension

⁷ Transcript of Status Conference, pp. 10-11 (May 7, 2007).

⁸ Letter of Donald L. Scholes, p. 1 (July 27, 2007).

through August 3, 2007 was necessitated by the parties' request to stay indefinitely the procedural schedule, including a hearing date. Lynwood's letter flies in the face of the reason for the suspension, which was based on the request of the parties to stay the docket. The issuance of an ultimatum at this time for an immediate decision by the Authority when the parties asked the Authority not to schedule a hearing borders on preposterous.

Further, Lynwood's letter of July 27, 2007 mixes putting the original rate request in effect with the Authority's consideration of new rates and charges being presented in the Proposed Settlement Agreement. In essence, Lynwood has two rate increase requests on the table and is asking the Authority to consider both. Certainly Tenn. Code Ann. § 65-5-103(b) does not contemplate this scenario.

By seeking an indefinite stay of the procedural schedule, by failing to notify the Hearing Officer of removing the stay and revising the procedural schedule, including setting a hearing date, and by submitting a proposed agreement for consideration by the Authority which is substantially different from the requests in the *Petition*, the Hearing Officer finds that Lynwood has effectively waived invoking Tenn. Code Ann. § 65-5-103(b) without making a specific request upon either the Hearing Officer or the Authority to put new rates into effect without the requirement of posting a bond.

IT IS THEREFORE ORDERED THAT:

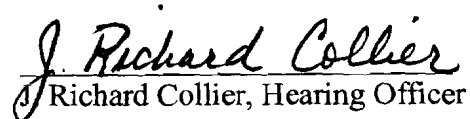
1. Lynwood's request to have the Proposed Settlement Agreement considered at an August 13, 2007 Authority Conference is denied.
2. The hearing on the merits of the *Petition* in this docket is hereby set for **Monday, August 20, 2007 at 2:00 p.m.** or immediately following the Authority Conference on that date, whichever is later.

3. The *Petition* and the effective date of the tariff filed with the *Petition* by Lynwood Utility Corporation are hereby re-suspended through **September 10, 2007** to allow sufficient time for the Authority to hold hearing upon proper notice to the public and consider the Proposed Settlement Agreement.

4. The parties will present and the Authority will consider the Proposed Settlement Agreement at the commencement of the public hearing on August 20, 2007. The public will be afforded the opportunity to comment on Lynwood's request for a rate increase including the Proposed Settlement Agreement during the hearing.

5. Lynwood shall publish its public notice no later than August 15, 2007, summarizing the *Petition* and the Proposed Settlement Agreement and informing the public of the place, date and time of the Hearing, in accordance with TRA Rule 1220-4-1-.05(2).

6. Prior to a final decision by the Authority, Lynwood shall not be permitted to put any proposed rates into effect without first posting a bond in accordance with Tenn. Code Ann. § 65-5-103(b) or petitioning and obtaining permission from the Authority to do so without having to post a bond.


Richard Collier, Hearing Officer