

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 25, 2011

IN RE:

**COMPLAINT BY WALDEN'S RIDGE UTILITY
DISTRICT AGAINST TENNESSEE AMERICAN
WATER COMPANY**

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**DOCKET NO.
10-00014**

ORDER RESOLVING COMPLAINT

This matter came before Chairman Mary W. Freeman, Director Kenneth C. Hill and Director Sara Kyle of the Tennessee Regulatory Authority ("TRA" or the "Authority"), the voting panel assigned to this Docket, at a regularly scheduled Authority Conference held on September 27, 2010 for consideration of the Complaint filed on January 7, 2010 by Walden's Ridge Utility District ("Walden's Ridge") against Tennessee American Water Company ("TAWC").

TRAVEL OF THE CASE

The Complaint being considered in this docket originated in a letter dated January 7, 2010 sent to the Consumer Services Division by the General Manager of Walden's Ridge Utility District ("Walden's Ridge"). Walden's Ridge complained that TAWC had arbitrarily imposed a rate increase on the water TAWC sells to Walden's Ridge and that the increase was imposed in violation of the Water Purchase Agreement ("Agreement") between TAWC and Walden's Ridge. On February 23, 2010, TAWC filed its Answer to the Complaint and raised several defenses to the allegations of breach of contract. The Consumer Advocate and Protection

Division of the Office of the Attorney General filed a *Petition to Intervene for Purposes of Notice and Service* on April 1, 2010.

The parties expressed a preference for filing a Joint Stipulation as to the factual issues and presenting oral argument on the merits to the Authority as the basis upon which the Authority could decide this case. The parties filed a Joint Stipulation on June 30, 2010 outlining the facts that were not in dispute and presented their oral arguments to the panel during the August 23, 2010 Conference.

POSITIONS OF THE PARTIES

The chief allegation in the Complaint of Walden's Ridge is that TAWC did not follow the procedure for a change of rate as set forth in the Agreement between TAWC and Walden's Ridge. Under the Contract, TAWC may change its rate for providing water to Walden's Ridge only after TAWC provides cost of service information to support the rate change and Walden's Ridge has an opportunity either to agree to the proposed rate change or to provide an alternative. Instead, TAWC sought to implement a 12.77% rate increase to Walden's Ridge based on the Authority's Order in Docket No. 08-00039 by notifying Walden's Ridge on June 1, 2009 of the rate increase effective on that date. Walden's Ridge does not consider the rate increase effective until August 25, 2009 when the Board of Walden's Ridge approved the new rate pursuant to the procedures under the Agreement. Before that approval, Walden's Ridge maintained payment for water service at the existing contract rate of \$1.25 per 1,000 gallons. Walden's Ridge also, prior to approval, requested and received from TAWC cost of service documentation which was not provided by TAWC with the original notice of increase on June 1, 2009. Walden's Ridge proceeded to pay TAWC the increased rate and the penalties assessed by TAWC after being threatened by TAWC that its water supply would be shut off. Walden's Ridge seeks

reimbursement from TAWC for the difference in the amount it paid to TAWC (\$1.41 per 1,000 gallons - \$1.25 per 1,000 gallons) from June 1, 2009 through August 25, 2009, together with any late penalties imposed on Walden's Ridge by TAWC.

In its Answer filed on February 23, 2010, TAWC expressly denied that the Agreement requires TAWC to provide Walden's Ridge with any specific information as to a proposed rate increase other than data and computations based on a cost of service methodology. TAWC asserts that any such requirement was met when such information was provided at the time TAWC filed its rate case in Docket No. 08-00039. TAWC also denied that the Agreement permits a rate change only after Walden's Ridge has the opportunity to agree or propose an alternative. TAWC further asserts that: the Authority Order in Docket No. 08-00039 set the new rate that TAWC put into place for Walden's Ridge; the Authority has the ultimate authority to determine the rate, notwithstanding Walden's Ridge's right to agree or suggest an alternative; and because TAWC had the authority to increase the rate pursuant to the Authority's Order, TAWC did not act arbitrarily in increasing the rate as of June 1, 2009, which was several months after the expiration of the term of the contract rate under the Agreement.

In their Joint Stipulation as to facts, filed on June 30, 2010, the parties agreed to the following material facts:

The Water Purchase Contract ("Contract") entered into between the parties was dated July 14, 2003 and approved by the Authority as a special contract in Docket No. 03-00452.

Pursuant to the Contract, Walden's Ridge agreed to purchase water from the Company for \$1.25 per 1,000 gallons for the first three years beginning on February 1, 2006. Although the three year term expired on February 1, 2009, TAWC billed Walden's Ridge for water purchased under the Contract at the rate of \$1.25 per 1,000 gallons until June 1, 2009.

Section III (A) of the Contract sets forth the procedure to be followed with respect to rate changes for water purchased by Walden's Ridge as follows:

Any proposed change in the rate after this initial period will be accompanied by supporting data and computations, which will be based on industry accepted cost of service methodology. Walden's Ridge has the right to agree to this rate or to propose an alternative rate with the understanding that the TRA will be the ultimate authority in determining the rate.

Even though the Petition filed by TAWC in Docket No. 08-00039 did not seek an increase in the rate for water sold to Walden's Ridge under the Contract, the parties agree that requirements pertaining to notice to customers were met in connection with TAWC's Petition in Docket No. 08-00039. Further, a cost of service study was filed by TAWC in connection with its 2008 rate case filing.

The written Order in Docket No. 08-00039 issued on January 13, 2009 directed TAWC to implement such new rates to address its revenue deficiency by increasing revenues in each class, including a 12.77% increase to the rates for Walden's Ridge "at the earliest date allowed by the contract."

TAWC does not file tariffs with the Authority for special contracts, and consistent with this practice, TAWC has never filed tariffs with the Authority which included the rate charged by TAWC to Walden's Ridge.

In the rate cases filed by TAWC, it has never sought an increase in the rate charged to Walden's Ridge under the Contract.

Walden's Ridge was notified by TAWC by letter dated June 1, 2009 that beginning June 1, 2009 the rate for water would increase to \$1.41 per 1,000 gallons, pursuant to the January 13, 2009 Order of the TRA in Docket No. 08-00039. TAWC provided this same type and time of notice to all other special contract customers similar to Walden's Ridge in the "sale for resale" customer classification.

Walden's Ridge continued to pay for water purchased from TAWC after June 1, 2009 at the rate of \$1.25 per 1,000 gallons.

By a letter dated July 1, 2009, Walden's Ridge acknowledged that the TRA was the ultimate authority in determining the rate under the Contract but expressed disagreement with TAWC as to TAWC's position for charging the \$1.41 per 1,000 gallons rate to Walden's Ridge effective June 1, 2009.

TAWC sent a Final Notice Prior to Disconnection to Walden's Ridge dated July 29, 2009 demanding payment of the balance of \$4,134.25 on its overdue bill or TAWC would shut off water service to Walden's Ridge on August 12, 2009.

On August 14, 2009, TAWC sent a letter to counsel for Walden's Ridge as a follow-up to Walden's Ridge's letter of July 1, 2009 and subsequent conversations reiterating

TAWC's position that it was required by Tenn. Code Ann. § 65-5-101 to charge the rate set forth in the Authority's Order of January 13, 2009.

On August 25, 2009, the Board for Walden's Ridge agreed to accept the \$1.41 per 1,000 gallons rate imposed by TAWC.

The parties agree that should the Authority conclude that Walden's Ridge should have been billed at the \$1.25 per 1,000 gallons rate and not the higher \$1.41 per 1,000 gallons rate from June 1, 2009 through August 25, 2009, Walden's Ridge's account with TAWC should be credited for \$22,647.23. The Joint Stipulation includes the Water Purchase Agreement and correspondence between the parties as Exhibits thereto.

The parties presented oral argument before the panel on August 23, 2010. Counsel for Walden's Ridge acknowledged that the TRA has the ultimate authority to determine the rate that will be set in the special contract between Walden's Ridge and TAWC. Further, counsel pointed out that the Authority's Final Order in Docket No. 08-00039 stated that TAWC could impose the rate increase of 12.77% for Walden's Ridge at the earliest time that could occur under the Agreement. Walden's Ridge contends that by the Authority's order recognizing the Agreement between the parties, the terms of the Agreement dictated the timing that the rate increase would be put into effect. Therefore, Walden's Ridge argued that even though the rate was increased by action of the TRA, there was nothing in the Authority's order that would obviate the need for the Agreement's procedure to be followed in establishing a new rate under the Agreement.

Counsel for TAWC presented essentially two major points to contest the assertions of Walden's Ridge. First, while the Agreement sets forth a procedure to be followed when a rate increase is proposed, TAWC did not propose this rate increase for Walden's Ridge. Instead, the rate increase was set by the TRA in the absence of a request by TAWC for a specific increase for Walden's Ridge. Therefore, because there was no "proposed change," the Agreement procedure did not come into play. Second, recognizing that the TRA had the ultimate authority to set the rate for the special contract, TAWC argued that the TRA's actions and order in Docket No. 08-

00039 superseded the procedures in the Agreement. Further, TAWC argued that since the rate had already been set by the TRA, to go through the procedures in the Agreement would be superfluous and futile.

Both parties acknowledged that Walden's Ridge is essentially seeking a refund of payments it made to TAWC which Walden's Ridge considered in excess of the proper rate under the Agreement from June 1, 2009 to August 25, 2009. There was no real dispute that the rate increase could become effective sometime after the expiration of the three year restriction on a rate increase in the Agreement in February 2009. Counsel for TAWC called the Complaint a collateral attack on the rate imposed by the TRA and stated that Walden's Ridge waived its ability to contest that rate by failing to intervene in the rate case or seek reconsideration of the TRA's order or appeal the order as an aggrieved person adversely affected by the Authority's Final Order. Other than stating that it could have put the rate increase into effect at an earlier date, TAWC did not really explain why it waited until June 1, 2009 to send the letter to Walden's Ridge imposing the rate increase effective as of the date of the letter. Counsel for TAWC stated that the rate increase was not imposed earlier than June 1, 2009 due to administrative oversight on the part of TAWC.

FINDINGS AND CONCLUSIONS

The panel found that, pursuant to the Authority's Final Order in Docket No. 08-00039 entered on January 13, 2009, the rate of \$1.41 per 1,000 gallons was set by the Authority to take effect pursuant to the new term of the Agreement. Because the rate design ordered by the authority in Docket No. 08-00039 included the rate increase in the Agreement, the increase would not be unfairly imposed upon the expiration of the term of the Agreement. Therefore, TAWC was entitled to put the rate into effect on June 1, 2009. Nevertheless, because of the

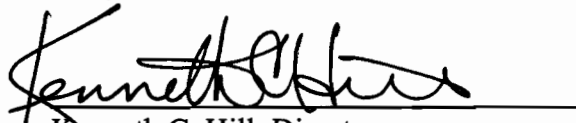
manner in which TAWC notified Walden's Ridge and its failure to provide Walden's Ridge the opportunity to explore the viability of using the procedural protocol in the Agreement for a rate increase, the panel further found that Walden's Ridge should not be assessed late fees or penalties for not paying the amount of the increase upon demand where there was a dispute over the increased charges and Walden's Ridge made timely payment of the undisputed amount of the charges. Exhibit No. 7 to the Joint Stipulation of the parties demonstrated that Walden's Ridge paid \$7,167.57 in late fees to TAWC. Based on the record and the findings in this docket, the panel voted unanimously that Walden's Ridge be reimbursed for the late fees or penalties it paid to TAWC and that its account with TAWC be credited in the amount of \$7,167.57.

IT IS THEREFORE ORDERED THAT:

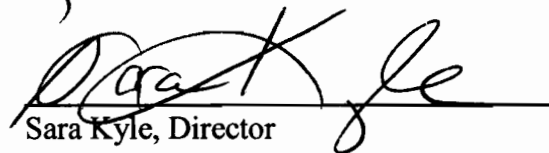
Walden's Ridge Utility District shall be reimbursed for the late fees or penalties it paid to Tennessee American Water Company and its account shall be credited in the amount of \$7,167.57.



Mary W. Freeman, Chairman



Kenneth C. Hill, Director



Sara Kyle, Director