

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 23, 2015

IN RE:

PETITION OF KINGS CHAPEL CAPACITY, LLC
FOR APPROVAL OF A LEGAL & REGULATORY
EXPENSE RECOVERY RIDER

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DOCKET NO.
15-00037

ORDER DENYING *PETITION*

This matter came before Vice Chairman David F. Jones, Director Kenneth C. Hill, and Director Robin Bennett of the Tennessee Regulatory Authority (“Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on June 29, 2015 for consideration of the *Petition* filed by Kings Chapel Capacity, LLC (“Kings Chapel” or “KCC”) on March 19, 2015.

BACKGROUND AND *PETITION*

King’s Chapel is a public utility providing wastewater service to approximately 100 residential customers in Williamson County, Tennessee. On March 19, 2015, Kings Chapel filed a *Petition*, under Tenn. Code Ann. § 65-5-103(7) and TRA Rule 1220-04-01-.04, seeking Authority approval to implement a proposed tariff rider for recovery of certain legal and regulatory expenses related to or incurred as a result of the show cause proceeding initiated in TRA Docket No. 14-00007.¹ On that same date, KCC also filed in support of the *Petition* the direct testimony of John Powell, Owner and General Manager of KCC, as well as a proposed tariff to implement the rider.

In its *Petition*, KCC states that “[b]ecause of its small size (approximately 100 customers) KCC has never operated profitably. As a result, the owners of KCC have been required to subsidize

¹ *Petition*, p. 2 (March 19, 2015).

the operating costs of the utility until such time as a sustainable customer body can be established.”² KCC also states it is “currently defending itself against the TRA Party Staff regarding alleged violations of wastewater rules in TRA Docket No. 14-00007.”³ According to KCC, it “has no ability on its own to fund the legal and regulatory costs to defend itself against the TRA Party Staff.”⁴ Kings Chapel requests approval of a proposed Legal & Regulatory Expense Recovery Rider (“L&RERR” or “Rider”) in order to recover certain legal and regulatory expenses.

At the Authority Conference held on April 20, 2015, the voting panel assigned to this docket voted unanimously to convene a contested case, appoint a hearing officer to prepare the matter for hearing, and suspend the proposed tariff for 60 days.⁵ On May 6, 2015, the Consumer Advocate and Protection Division of the Office of the Attorney General (“CAPD” or “Consumer Advocate”), filed a petition to intervene, which was granted by order of the Hearing Officer entered on May 21, 2015.⁶ On May 29, 2015, the Consumer Advocate filed a brief setting forth the basis for its opposition to the proposed L&RERR.

POSITIONS OF THE PARTIES

KINGS CHAPEL

William H. Novak, adopting the testimony of KCC witness, John Powell, testifies that KCC must bear substantial legal costs defending itself against TRA Party Staff regarding alleged

² *Id.*

³ *Id.* TRA Docket No. 14-00007 is a show-cause action involving TRA Party Staff’s allegations of KCC’s failure to file proof of financial security since July 1, 2009; failure to request any alternative form of financial security during that time; failure to file a tariff to true-up the flow through of costs related to its last financial security that expired on December 2, 2008; failure to cease charging customers for the flow through of costs related to its last financial security; and failure to respond to the Authority’s investigatory data requests, all of which allegedly violate state law and Authority rules. *See In re: Show Cause Proceeding Against King’s Chapel Capacity, LLC, for Alleged Violations of Wastewater Utility Laws and TRA Rules*, Docket No. 14-00007, *Order Requiring King’s Chapel Capacity, LLC to Appear and Show Cause Why the TRA Should Not Take Action Against It for Violation of State Law and TRA Rules* (October 13, 2014).

⁴ *Id.*

⁵ *Order Convening a Contested Case, Suspending Tariff for Sixty (60) Days, and Appointing a Hearing Officer*, Docket No. 15-00037 (May 5, 2015).

⁶ *Order Granting Consumer Advocate’s Petition to Intervene*, Docket No. 15-00037, p. 6 (May 21, 2015).

violations of wastewater rules in TRA Docket No. 14-00007.⁷ In the pre-filed testimony, Mr. Powell states that he has instructed counsel to file on KCC's behalf an appeal of the Authority's decision to deny KCC's request for alternative financial security in TRA Docket No. 13-00141 and to file a declaratory judgment action in Williamson County Chancery Court.⁸ Mr. Novak testifies that KCC's current rates do not provide for the legal and regulatory costs associated with Docket No. 14-00007.⁹ According to the pre-filed testimony, Kings Chapel has no ability on its own to defend itself against the TRA Party Staff in that docket, and he proposes to fund KCC's defense through the Rider mechanism.¹⁰ Kings Chapel further proposes to file its aggregate legal and regulatory costs by July 1 of each year and recover those costs from customers through a monthly surcharge, not exceeding \$20.00, which will continue until all of KCC's legal and regulatory costs have been recovered.¹¹ The Company's proposed tariff institutes a monthly L&RERR surcharge of \$20.00.¹²

CONSUMER ADVOCATE

The Consumer Advocate opposes the L&RERR and maintains that it is premature to consider the propriety of the legal costs at issue since Docket No. 14-00007 is still ongoing.¹³ The Consumer Advocate argues that whether the L&RERR is in the "public interest" as required by Tenn. Code Ann. § 65-5-103(d) will depend on the findings of fact and conclusions of law in that docket.¹⁴ The Consumer Advocate asserts that premature approval of the L&RERR could create a

⁷ John Powell, Pre-filed Direct Testimony, p. 2 (March 19, 2015). *See In re: Show Cause Proceeding Against King's Chapel Capacity, LLC, for Alleged Violations of Wastewater Utility Laws and TRA Rules*, Docket No. 14-00007, *Order Requiring King's Chapel Capacity, LLC to Appear and Show Cause Why the TRA Should Not Take Action Against It for Violation of State Law and TRA Rules* (October 13, 2014).

⁸ *Id.* *See In re: Petition of Kings Chapel Capacity for Exemption from Financial Security Required by the TRA's Wastewater Regulations - Request To Continue Exemption*, Docket No. 13-00141, *Order Denying Request for Alternative Financial Security* (January 12, 2015).

⁹ Transcript of Authority Conference, p. 9 (June 29, 2015).

¹⁰ John Powell, Pre-filed Direct Testimony, p. 2.

¹¹ *Id.* at 3.

¹² *Id.* *See* Exhibit JP-1.

¹³ *Position of the Consumer Advocate*, p. 1 (May 29, 2015).

¹⁴ *Id.*

“moral hazard,” allowing Kings Chapel to recover from customers legal expenses associated with alleged violations of law, without any added public benefit or improvement.¹⁵ The Consumer Advocate argues further that Tenn. Code Ann. § 65-5-103(d) “does not support the assertion that a public utility may petition the TRA for the recovery of expenses that may broadly result in any public benefit.” Further, the CAPD maintains that Tenn. Code Ann. § 65-5-103 (d)(5), which KCC uses to justify its L&RERR, applies only to “operational expenses and capital costs that are related to other programs that are in the public interest.”¹⁶ According to the Consumer Advocate, it would be improper to interpret the “public interest” to include payment of KCC’s private legal defense bills.¹⁷ The Consumer Advocate claims that its construction of the statute is buttressed by other sections that specifically enumerate programs that underscore the “public interest” contemplated in the statute, such as those relating to safety requirements, reliability of utility plant, and promotion of economic development.¹⁸

JUNE 29, 2015 AUTHORITY CONFERENCE

A hearing in this matter was held during the regularly scheduled Authority Conference on June 29, 2015. Participating in the hearing were the following parties and their respective counsel:

KCC – Michele McGill, Esq., Barney, Boylan & McGill, PLLC, 109 Holiday Court, Suite B-6, Franklin, TN 37067.¹⁹

Consumer Advocate – Erin Merrick, Esq. and Vance Broemel, Esq., Office of the Attorney General, 425 Fifth Avenue North, Fourth Floor, John Sevier Building, P.O. Box 20207, Nashville, TN 37202.

William H. Novak, WHN Consulting, appeared as a witness for KCC and adopted the pre-filed testimony of John Powell. The witness was subject to cross-examination by the Consumer Advocate and questions from the panel. The Consumer Advocate did not present any witnesses. In

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 2 (quoting Tenn. Code Ann. § 65-5-103(d)(5)).

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 3 (citing Tenn. Code Ann. § 65-5-103(d)(2) – (d)(4)).

¹⁹ At the Hearing, Jeremy Durham, Esq. of the Williamson County Bar also represented KCC.

addition, at the end of the Hearing, members of the public were given an opportunity to present comments to the panel, but no one came forward seeking recognition to comment. Following the Hearing, the panel deliberated this matter.

FINDINGS & CONCLUSIONS

KCC's *Petition* requests approval of the proposed L&RERR pursuant to Tenn. Code Ann. § 65-5-103(d)(5), which provides:

(A) A public utility may request and the authority may authorize a mechanism to recover the operational expenses, capital costs or both related to other programs that are in the public interest.

(B) A utility may request and the authority may authorize a mechanism to allow for and permit a more timely adjustment of rates resulting from changes in essential, nondiscretionary expenses, such as fuel and power and chemical expenses.

(C) Upon a finding that such programs are in the public interest, the authority shall grant recovery and shall authorize a separate recovery mechanism or adjust rates to recover operational expenses, capital costs or both associated with the investment in other programs, including the rate of return approved by the authority at the public utility's most recent general rate case pursuant to § 65-5-101 and subsection (a).

Based on the evidentiary record, pleadings and argument of counsel, as well as applicable law, the panel made the following findings and conclusions:

First, KCC's request to recover legal expenses associated with the show-cause proceeding currently pending in Docket No. 14-00007 is premature. The show-cause docket is presently ongoing, and the issue of whether the Company's associated legal expenses may be recovered from ratepayers must be determined in light of the findings and conclusions reached in that docket.

Second, KCC's request to recover legal expenses associated with the other specific cases mentioned in the record is unsupported by sufficient proof that such expenses are necessary and reasonable or that such expenses are related to a program that would benefit the KCC's ratepayers or the general public.

Based on these findings, the panel concluded that KCC's proposed L&RERR is not just and reasonable, does not constitute a program that advances the interests of ratepayers or the general public, and is therefore not in the "public interest" within the meaning of Tenn. Code Ann. § 65-5-103(d). Thereafter, the panel voted unanimously that KCC's *Petition* be denied. However, the panel noted that its decision to deny this *Petition* does not preclude KCC from requesting recovery of reasonable and necessary legal expenses in future filings or from refiling its request to recover legal expenses associated with the show-cause proceeding after a decision in that docket is reached.

IT IS THEREFORE ORDERED THAT:

King's Chapel Capacity, LLC's *Petition* filed on March 19, 2015 is denied.

Vice Chairman David F. Jones, Director Kenneth C. Hill, and Director Robin Bennett concur.

ATTEST:



Earl R. Taylor, Executive Director