

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

IN RE:	July 10, 2017)	
)	
PETITION OF TENNESSEE WASTEWATER)	DOCKET NO.
SYSTEMS, INC. FOR APPROVAL OF)	16-00139
ADJUSTMENT OF ITS RATES AND NEW TARIFF)	

ORDER DENYING CONSUMER ADVOCATE'S MOTION TO STRIKE

This matter is before the Hearing Officer of the Tennessee Public Utility Commission ("Commission" or "TPUC") on the *Consumer Advocate's Motion to Strike Portions of Rebuttal Testimony of Robert T. Buckner and Bar the Testimony of the Unnamed Representative from Dempsey Vantrease and Follis PLLC* ("Motion to Strike") filed by the Consumer Protection and Advocate Division of the Office of the Attorney General ("Consumer Advocate") on July 3, 2017. On July 6, 2017, Tennessee Wastewater Systems, Inc. ("TWSI") filed its *Response of Tennessee Wastewater Systems, Inc. ("TWSI") to the Consumer Advocate's Motion to Strike* ("TWSI's Response"), and the Hearing Officer held a Status Conference by telephone on July 7, 2017, regarding the *Motion to Strike*.

In its *Motion to Strike*, the Consumer Advocate seeks to strike portions of Robert T. Buckner's testimony pertaining to a report ("Report") from the accounting firm of Dempsey Vantrease and Follis PLLC ("DVF") because they violate the Rules of Evidence. According to the Consumer Advocate, "Mr. Buckner provides no statement that he prepared, reviewed or is even specifically familiar whittle draft report and thus fails to adequately sponsor it."¹ In addition, the Consumer Advocate argues that the accounting firm expresses that use of the Report should be

¹ *Motion to Strike*, p. 1 (July 3, 2017).

limited, yet TWSI is “attempting to utilize the Procedures Report, for a purpose which it was never intended to be used, as evidence in a contested case hearing before the Tennessee Public Utility Commission (TPUC), and doing so without even offering appropriate expert witness to introduce, substantiate and authenticate it.”² The Consumer Advocate also maintains that the Report should be stricken because “it does not rebut the Consumer Advocate’s very specific concern regarding revenue from commercial tariffs as set forth in the Direct Testimony of Hal Novak.”³ The Consumer Advocate requests that the Hearing Officer Strike Exhibit 2 and the sections of Mr. Buckner’s testimony addressing DVF’s Report; bar responses to the questions and any testimony by a representative from DVF; and continue the hearing in this matter until at least August 14, 2017, so that the Consumer Advocate could have time to conduct discovery regarding report done by DVF.

In *TWSI’s Response*, TWSI states that after Mr. Novak filed testimony questioning TWSI’s billing practices, TWSI asked DVF to conduct an analysis of its billings and related accounting systems. A copy of the Report was attached to the testimony of TWSI witness, Mr. Buckner.⁴ In addition, TWSI states that a member of DVF will be present at the hearing and available to answer any questions about the Report or about the firm’s experience with utility clients. TWSI argues that pursuant to Tenn. Code Ann. § 65-2-109(1) states the Commission shall not be bound by the rules of evidence. Further, TWSI maintains that Mr. Buckner is entitled to rely on the conclusions contained in the report, just as the Commission may rely on it. According to TWSI, the Consumer Advocate’s argument regarding whether the Report rebuts Mr. Novak’s testimony “goes to the

² *Id.* at 3-4.

³ *Id.* at 5.

⁴ A draft of the Report was filed with Mr. Buckner’s testimony, and the final draft was subsequently attached to *TWSI’s Response*.

weight of the evidence not its admissibility.”⁵ TWSI contends that the Report is “clearly relevant to the hearing and - by statute- admissible in a proceeding before the Commission.”⁶

FINDINGS & CONCLUSIONS

Tenn. Code Ann. §§ 4-5-313(1) and 65-2-109(1) govern the admission and probative effect of evidence in proceedings before the Commission. Tenn. Code Ann. § 65-2-109(1) provides that the Commission “shall not be bound by the rules of evidence applicable to a court but may admit and give probative effect to any evidence which possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs.” After considering the arguments made by the parties, the Hearing Officer is persuaded by TWSI’s arguments regarding the *Motion to Strike*. The Hearing Officer finds that the report conducted by DVF and attached to Mr. Buckner’s testimony is relevant and appropriate for consideration by the Commission.

Tenn. Code Ann. § 65-2-109 gives broad discretion in the admission of evidence and makes it very clear that the Commission is not bound by the rules of evidence; therefore, the Hearing Officer was not persuaded by the Consumer Advocate’s arguments for striking the Report. The Hearing Officer finds that this Report is of the type that would be accepted by a reasonably prudent person in the conduct of their affairs. However, the Hearing Officer recognizes that this method of rebuttal is out of the ordinary and that the filing of the Report so close to the hearing presents some difficulty for the Consumer Advocate in presenting its case. Accordingly, the Hearing Officer recommends that the Consumer Advocate be given wide latitude in its cross-examination relevant to the Report. The Hearing Officer’s determination on this issue has been made by considering the specific facts of this particular docket and should have little precedential effect on future dockets.

⁵ *TWSI’s Response*, p. 3 (July 6, 2017).

⁶ *Id.* at 4.

The Hearing Officer discourages actions that would result in hindering the ability of either party to conduct adequate discovery and prepare for the hearing on the merits.

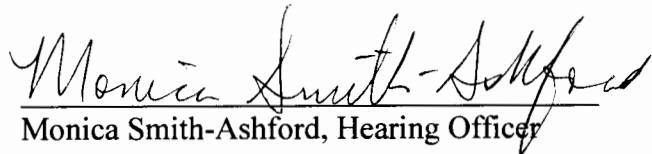
For the forgoing reasons, the Hearing Officer concludes that the Consumer Advocate's *Motion to Strike* should be denied, and the Report attached to Mr. Buckner's testimony should be admitted and an auditor who worked on the Report for DVF should be present at the hearing for questions. While the Hearing Officer finds the evidence should be admitted, the Commission will determine the appropriate weight to attribute to the evidence.

IT IS THEREFORE ORDERED THAT:

1. The *Consumer Advocate's Motion to Strike Portions of Rebuttal Testimony of Robert T. Buckner and Bar the Testimony of the Unnamed Representative from Dempsey Vantrease and Follis PLLC* is denied.

2. Tennessee Wastewater Systems, Inc. shall have a member of Dempsey Vantrease and Follis PLLC who worked on the Report of its billing and accounting systems present and available for questions at the hearing in this matter to be held July 10, 2017 at 9:00 a.m.

3. The Hearing Officer grants permission for a party to seek interlocutory review of this Order.


Monica Smith-Ashford, Hearing Officer