

**IN THE TENNESSEE PUBLIC UTILITY COMMISSION  
AT NASHVILLE, TENNESSEE**



**IN RE:** )  
)  
**PETITION OF TENNESSEE WATER** )  
**SERVICE, INC. FOR APPROVAL OF** )  
**AN INTERIM EMERGENCY** )  
**WILDFIRE RESTORATION** )  
**SURCHARGE, INTERIM EMERGENCY** )  
**WATER SERVICE AVAILABILITY** )  
**FEE, EMERGENCY MAKE-WHOLE** )  
**SURCHARGE AND AN INTERIM** )  
**EMERGENCY OPERATIONAL COST** )  
**PASS-THROUGH MECHANISM** )  
)

**DOCKET NO. 17-00108**

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**TENNESSEE WATER SERVICE, INC.’S RESPONSE TO THE CONSUMER  
PROTECTION AND ADVOCATE DIVISION’S BRIEF ON THE APPLICABILITY OF  
THE PROHIBITION OF RETROACTIVE RATEMAKING TO THE PROPOSED  
MAKE-WHOLE SURCHARGE**

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Tennessee Water Service, Inc. (“TWS”) respectfully submits this response to the Consumer Protection and Advocated Division’s (“Consumer Advocate”) Pre-Hearing Brief (“Brief”) on the issue of whether the Emergency Interim Make-Whole Surcharge (“Make-Whole Surcharge”) detailed in TWS’ Petition for Emergency Interim Relief (“Petition”) and proposed tariffs is barred by the prohibition on retroactive ratemaking. For the reasons discussed below, TWS requests that the Tennessee Public Utility Commission (“TPUC”) deny the Consumer Advocate’s request and find that the Make-Whole Surcharge does not violate the prohibition on retroactive ratemaking.

**OVERVIEW**

As a part of its Petition, TWS proposed a Make-Whole Surcharge, which was intended to recover operational and maintenance expenses that will not be met due to a revenue shortfall that is directly attributable to the deadly wildfires that spread rapidly on November 28, 2016 through

the City of Gatlinburg, Tennessee, and tragically destroyed many homes and businesses (the “2016 Wildfires”). The Make-Whole Surcharge was calculated by using actual and projected revenue shortfalls in 2017 to predict future losses and establish a mechanism by which to recover those projected losses.

The Consumer Advocate incorrectly asserts in its Brief that TWS is attempting to recover actual and forecasted losses for 2017. It bases this assertion on the idea that because actual and projected revenue shortfall information for 2017 was used to calculate the Make-Whole Surcharge amount, then TWS must only be intending to capture its past losses. This assertion ignores the fact that because of its loss of customers as a result of the 2016 Wildfires, TWS will continue to have revenue shortfalls, and the proposed Make-Whole Surcharge is only intended to recoup future losses. Although TWS agrees with the Consumer Advocate that there is a prohibition on retroactive ratemaking, the proposed Make-Whole Surcharge certainly does not represent an effort to engage in such prohibited activity.

### **LAW AND ARGUMENT**

The power to “fix just and reasonable” rates is one of TPUC’s primary responsibilities in governing utilities. *Consumer Advocate & Prot. Div. of Office of Atty. Gen. of Tenn. v. Tenn. Regulatory Auth.*, No. M2011-00028-COAR12CV, 2012 WL 1964593, at \*20 (Tenn. Ct. App. May 30, 2012). Furthermore, TPUC has long recognized that the Tennessee Legislature never intended to give it retroactive ratemaking powers. *See South Cent. Bell Telephone Co. v. Tenn. Pub. Serv. Comm’n*, 675 S.W.2d 718, 719 (Tenn. Ct. App. 1984). This prohibition on retroactive ratemaking serves a vital role in protecting future ratepayers from paying for past use, which is the “essence of retroactive ratemaking.” *Consumer Advocate Div. ex rel. Tenn. Consumers v. Tenn. Regulatory Auth.*, No. M199902151COAR12CV, 2000 WL 13794, at \*3 (Tenn. Ct. App.

Jan. 10, 2000) (citing *Porter v. South Carolina Public Service Comm'n*, 328 S.C. 222, 493 S.E.2d 92 (S.C.1997)).

Despite the existence of a prohibition on retroactive ratemaking, the proposed Make-Whole Surcharge is appropriately calculated and presented for consideration to TPUC. The purpose of the Make-Whole Surcharge is to recover a revenue shortfall that is the result of a loss of customer base, and corresponding revenue, due to the 2016 Wildfires and operating expenses that remain largely unchanged from prior years. Prior to the 2016 Wildfires, TWS had 565 customers in its Chalet Village service area. After the wildfires, only 57 customers remained. Since that time, customers have worked to rebuild and return to their homes. The number of active customer has now risen to nearly 140. Despite these efforts, this small customer base has resulted in a significant drop in revenue for TWS. In order to propose a mechanism for recovering the ongoing revenue shortfall, TWS needed to calculate a projected shortfall amount. The basis for this calculation is provided in the exhibits to Richard Linneman's pre-filed direct testimony which show the actual and forecasted loss numbers that were used. Based on the projected loss for 2017, TWS proposed the Make-Whole Surcharge as a mechanism to be applied to future bills for a period of no longer than 18 months to recover projected revenue shortfalls that will continue after the date of the order on this Petition.

The Consumer Advocate has incorrectly characterized the Make-Whole Surcharge as an attempt to recover past losses and neglects to recognize that there are future losses that will be incurred because of the ongoing nature of the problem at hand. Although some customers have reconnected to TWS' water system, there are still less than 25% of the amount of customers who were connected prior to the 2016 Wildfires. The Make-Whole Surcharge is appropriately aimed at recouping future losses that can reasonably be expected and predicted based on the low

number of active customers. The effect of the Make-Whole Surcharge was always intended to be on future losses, and TWS accordingly requested in its Petition that the Make-Whole Surcharge only be applicable after the date of approval by TPUC.

Using historical information to calculate future recovery is a method which TPUC has approved in the past. *See Tenn. Regulatory Auth.* 2000 WL 13794, at \*3. In 1995, BellSouth applied for a price regulation plan with TPUC.<sup>1</sup> After years of litigation, TPUC eventually approved the application for a price regulation plan with one major adjustment, the rate changes under TPUC's December 1998 Order would only take effect on December 1, 1998, which rendered them prospective in nature. *Id.* In response, the Consumer Advocate Division asserted that TPUC had engaged in retroactive ratemaking because it approved the price regulation plan based on the 1995 rates. *Id.* The Court disagreed. Specifically, the Court noted that "[b]y making the order prospective only, the Authority [TPUC] avoided the charge that future ratepayers would 'pay for past use.'" *Id.* The basis of TPUC decision is consistent with the request made by TWS in its Petition.

TWS has only requested prospective-facing relief from TPUC. Although it has used a combination of actual and projected losses for 2017 to calculate the Make-Whole Surcharge, TWS is only seeking the recovery of future losses that it anticipates based on the ongoing nature of this problem. Customers are not going to suddenly reappear with fully-built homes and active water use in the next month. Instead, this will be a long-term process as customers rebuild and sort through how they will address the destruction of their homes. And while a customer may take whatever time he or she needs to decide his or her path, TWS must still be able to provide safe and reliable drinking water for those customers who are actively using its water system and for those customers, current and potentially future, who will reconnect to the water system. This

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<sup>1</sup> Known as the Tennessee Regulatory Authority at the time, but referred to here as TPUC.

means that operational and maintenance expense will remain despite anticipated low revenues. Prospective relief is needed and can be appropriately given through the mechanism TWS has proposed in its Make-Whole Surcharge. The surcharge would only be applied to future bills and would only recoup future losses.

### **CONCLUSION**

TWS has only requested relief for anticipated future losses based on its predictions that utilize actual and forecasted loss information from 2017. In its Petition, TWS has requested the Make-Whole Surcharge as a method to recoup these future losses. The Consumer Advocate appears to ignore the fact that future losses will occur when it suggests that TWS is simply trying to recover past losses. Because the Make-Whole Surcharge only applies prospectively to account for future losses, it does not violate the prohibition on retroactive ratemaking. Accordingly, TWS respectfully requests that TPUC deny the Consumer Advocate's request and find that the Make-Whole Surcharge does not violate the prohibition on retroactive ratemaking.

RESPECTFULLY SUBMITTED,

s/ Ryan Freeman

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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 15th day of November, 2017.

s/Ryan Freeman  
Ryan Freeman, Esq.