

STATE OF TENNESSEE

Office of the Attorney General



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January 6, 2021

VIA ELECTRONIC FILING

Kenneth Hill, Chairman
c/o Ectory Lawless
Tennessee Public Utility Commission
502 Deaderick Street, Fourth Floor
Nashville, TN 37243
tpuc.docketroom@tn.gov

Re: TPUC Docket No. 20-00128, Consumer Advocate's Motion to Terminate or Suspend Current Capital Riders Mechanism

Dear Chairman Hill:

Please find attached for filing and for the Commission's consideration the *Consumer Advocate's Motion to Terminate or Suspend Current Capital Riders Mechanism* along with a *Memorandum* supporting the *Motion*. While the Consumer Advocate filed a *Petition to Intervene* in this matter on December 21, 2020, which has not yet been granted, the Consumer Advocate submits this filing prior to a decision on intervention in order to avoid any unnecessary delays.

Thank you for your time.

Sincerely,

Daniel P. Whitaker, III
Assistant Attorney General

cc: Melvin J. Malone, Esq.
Elaine K. Chambers
Kelly Cashman Grams, Esq.
Monica Smith-Ashford, Esq.

David Foster
Joe Shirley
Ryan McGehee

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

IN RE:)	
)	
PETITION OF TENNESSEE AMERICAN)	
WATER COMPANY REGARDING THE)	
2021 INVESTMENT AND RELATED)	
EXPENSES UNDER THE QUALIFIED)	Docket No. 20-00128
INFRASTRUCTURE INVESTMENT)	
PROGRAM RIDER, THE ECONOMIC)	
DEVELOPMENT INVESTMENT RIDER,)	
AND THE SAFETY AND ENVIRONMENTAL)	
COMPLIANCE RIDER)	

**CONSUMER ADVOCATE’S MOTION TO TERMINATE OR SUSPEND CURRENT
CAPITAL RIDERS MECHANISM**

Comes now the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General (“Consumer Advocate”)¹, pursuant to Tenn. Code Ann. § 65-4-118 and TPUC Rule 1220-01-02-.06, and respectfully petitions the Tennessee Public Utility Commission (“TPUC” or “Commission”) to terminate or, in the alternative, to suspend the Capital Riders submission filed in this Docket by Tennessee American Water Company (“TAWC” or “Company”) on November 24, 2020. For cause, the Consumer Advocate would show as follows:

1. On October 4, 2013, TAWC submitted its *Petition of Tennessee-American Water Company for Approval of a Qualified Infrastructure Investment Program, an Economic Development Investment Rider, a Safety and Environmental Compliance Rider, and Pass-Throughs for Purchased Power, Chemicals, Purchased Water, Wheeling Water Costs, Waste Disposal, and TRA Inspection Fee* in TRA² Docket No. 13-00130. The Company sought to utilize

¹ The Consumer Advocate filed a pending *Petition to Intervene* on December 21, 2020, and is submitting this filing prior to a decision from the Commission in order to avoid any unnecessary delays to the Commission’s review.

² The Tennessee Regulatory Authority, or TRA, was the predecessor agency to the Tennessee Public Utility Commission and served ultimately the same function as TPUC.

new legislation passed by the General Assembly³, often referred to as alternative regulation or alt-reg, that would allow it to recover certain approved investments and other costs without filing a general rate case.

2. The Consumer Advocate intervened in that matter and filed testimony requesting changes to TAWC’s proposal.⁴ Then on January 10, 2014, the parties entered into a *Stipulation* that included:

if Tennessee American’s tariff riders for the QIIP, EDI, SEC, and PCOP contain the stipulated provisions set forth in Attachments A, B, C, and D . . . then the Consumer Advocate [would] not oppose Tennessee American’s Petition seeking approval of the Tariffs as amended by this Stipulation.⁵

Importantly, the *Stipulation* also included that “[t]he Consumer Advocate’s agreement to not oppose Tennessee American’s Petition and Tariffs as amended . . . should not be construed as a finding by the Consumer Advocate that these tariffs are in the public interest.”⁶

3. On January 27, 2016, the TRA issued its *Order Approving Amended Petition* whereby the TRA approved QIIP, EDI, SEC, and PCOP riders⁷ as set forth in the parties’ *Stipulation*. The TRA also noted that it “may consider whether an alternative regulatory method . . . remains in the public interest taking into account any changed circumstances or conditions.”⁸ Therefore, the TRA, and now TPUC, retains the ability to modify, terminate, or suspend the Capital Riders mechanism, *inter alia*, if it determines that the public interest requires doing so. The Consumer Advocate retains its statutory duty to represent ratepayers⁹ and is permitted to intervene and propose necessary changes to, or even the termination of, the Capital Riders if appropriate.

³ See Tenn. Code Ann. § 65-5-103(b).

⁴ See *Direct Testimony of William H. Novak*, TRA Docket No. 13-00130 (December 12, 2020).

⁵ *Stipulation*, pp. 2-3, TRA Docket No. 13-00130 (January 10, 2014).

⁶ *Id.* at 3.

⁷ Collectively, the QIIP, EDI, and SEC riders are referred to as the “Capital Riders.” The PCOP is reviewed through a separate proceeding from the Capital Riders.

⁸ *Order Approving Amended Petition*, pp. 8-9, TRA Docket No. 13-00130 (January 27, 2016).

⁹ See Tenn. Code Ann. § 65-4-118.

4. Since Docket No. 13-00130 and the establishment of the Capital Riders, TAWC has submitted two annual filings every year.¹⁰ First, TAWC is permitted on or before December 1 each year to file projections for each of the Capital Riders for the upcoming calendar year in the manner set forth in those tariffs. Following this “budget” filing, TAWC submits its “reconciliation” filing before March 1 of the following year, where the actual costs incurred for the prior year are compared to the budgeted costs and an adjustment is made to “true up” results to what actually occurred in the prior period.

5. Over time the Capital Riders have been modified.¹¹ While dockets prior to 2018 included fairly modest changes to the calculations within TAWC’s Capital Riders proposals, the Consumer Advocate identified significant structural issues in TPUC Docket No. 18-00120.¹² The Consumer Advocate’s witness, David Dittmore, filed direct testimony supporting a major change to the Capital Riders mechanism in order to appropriately serve the public interest, including a method to protect customers from compensating the Company for a level of investment that does not in reality exist, summarized in his testimony as follows:

My testimony will explain how the current Capital Riders Tariffs produce rates that are clearly unjust and excessive primarily because the Tariffs produce a Rate Base that is higher than TAWC’s actual Rate Base. Thus, the Tariffs as currently constructed are not in the public interest. Therefore, I will offer restructured Tariffs that balance the interests of the Company and ratepayers in a rational manner and that will continue to incent TAWC to make infrastructure investments, while ensuring ratepayers pay rates on actual investment provided by TAWC’s shareholders. My proposal eliminates the return on excessive Rate Base which is currently occurring within the Capital Riders calculation.¹³

¹⁰ These filings have been submitted in Docket Nos. 14-00121, 15-00029, 15-00111, 16-00022, 16-00126, 17-00020, 17-00124, 18-00022, 18-00120, 19-00031, 19-00105, and 20-00028, along with the current Docket No. 20-00128.

¹¹ See e.g., *Order Granting Petition as Amended*, p. 14, TPUC Docket No. 18-00022 (March 6, 2019) (“Prospectively, however, the panel unanimously concluded that excluding 100% of incentive pay for Tennessee-American’s Services Support Company in subsequent earnings tests is in the public interest and also consistent with the Commission’s long-standing policy regarding incentive pay exclusion.”)

¹² This docket constituted TAWC’s “budget” filing for the upcoming 2019 period, filed by the Company on November 16, 2018.

¹³ *Pre-filed Direct Testimony of David N. Dittmore*, p. 2, TPUC Docket No. 18-00120 (April 23, 2020).

6. Specifically, Mr. Dittemore demonstrated that while TAWC, by its own admission, had invested into *actual* rate base approximately \$173.5 million,¹⁴ TAWC's proposal would force customers to compensate TAWC for a rate base of approximately \$194.9 million.¹⁵ Therefore, TAWC, which has a natural monopoly within its service territory, was overstating its rate base through the Capital Riders and receiving a recovery from captive consumers of approximately \$21.4 million.¹⁶

7. The excess rate base is not the only issue identified by the Consumer Advocate and reserved by the Commission for deliberation in the investigation docket. The Consumer Advocate also discussed administrative efficiencies brought about by changing from a semi-annual filing to a single, historic-looking filing.¹⁷ Making such a change is more efficient and less burdensome on all parties involved, including the Company, the Consumer Advocate, and this Commission. Further, the Consumer Advocate discussed issues with allowing a public utility to put rates into effect on a *prospective* basis and based on a company's budget for an upcoming period. The Consumer Advocate highlighted that this issue, along with being flawed, was inconsistent with the regulatory approach taken by other utilities under TPUC's jurisdiction.¹⁸

¹⁴ *Id.* at 7. This amount is not Mr. Dittemore's calculation but is rather the Company's own 13-month average Rate Base for 2018, found in the Company's 2018 Revised Reports.

¹⁵ *Id.* The compensated rate base is calculated by combining TAWC's results from its last rate case in Docket No. 12-00049 (these rates are current and will remain in effect until the Company initiates another general rate case) along with the rates effectuated through the Company's Capital Riders surcharge.

¹⁶ For purposes of this *Motion*, the Consumer Advocate will refer to this issue as "excess rate base." And while excess rate base is a major issue brought forth for consideration by the Consumer Advocate and illustrative of flaws within the current structure of the Capital Riders mechanism, it is by no means the only issue that will be discussed in the investigation docket. Rather, the Commission ordered that other issues – including whether a single, historic-looking annual filing is in the public interest and whether TAWC should be able to recover rates based on its budget – should be considered in the investigation docket as well, and thus the Consumer Advocate is further required to wait for that docket to address other structural issues with the Capital Riders mechanism that it identifies.

¹⁷ *Pre-filed Direct Testimony of David N. Dittemore*, pp. 9-11, TPUC Docket No. 18-00120 (April 23, 2019).

¹⁸ *Id.*

8. The parties litigated these issues before TPUC at the August 12, 2019 Commission Conference. In its November 8, 2019 *Order Approving Petition as Amended*, the Commission acknowledged, but did not deliberate or rule on, the merits of the Consumer Advocate's issues concerning structural changes, opining:

The Consumer Advocate has not alleged that the Company has failed to materially follow the tariff in this matter, but rather has contested the very structure and fundamental mechanics of a mechanism that the parties have both contributed to and shaped since it was first implemented. The Commission's approval of the Company's filing in this docket is not a rejection of the proposals made by the Consumer Advocate that would change the Capital Rider tariff. Rather, the panel concluded that the modifications proposed by the Consumer Advocate to the Capital Rider tariff represent a departure from the manner in which the tariff has been administered and approved in all previous Capital Rider filings with this Commission.

Instead of considering these issues in this docket for resolution, and in order to allow more time for the Commission and the parties to fully examine and analyze these issues without a hard and fast deadline clipping debate or public comment, the hearing panel voted unanimously to open a separate docket to address these issues and other potential issues relative to the Capital Rider mechanisms in an effort to improve and implement a more streamlined and transparent review.¹⁹

9. Therefore, the Commission's *Order* allowed the rates, including charges related to the excess rate base, to go into effect. Further, the *Order* did not address other concerns of the Consumer Advocate, including whether a single, historic-looking annual filing is more administratively efficient or whether setting rates based on a Company's spending projections is in the public interest. From the Consumer Advocate's perspective, ratepayers continue to pay an excessive rate base without a determination by TPUC considering whether a change is in the public interest. In issuing its *Order* in Docket No. 18-00120, the Commission provided that an investigation into TAWC's Capital Riders mechanism – which would include issues advocated by the Consumer Advocate along with other relevant items that may arise – should be opened. This

¹⁹ *Order Approving Petition as Amended*, pp. 21-22, TPUC Docket No. 18-00120 (November 8, 2019).

proceeding has been opened as Docket No. 19-00103, and while negotiations have been ongoing, there is no resolution or even a procedural schedule to expedite resolution.

10. Since the conclusion of Docket No. 18-00120, the Company has been able to file Capital Riders surcharge dockets under the old structure four times, and the excess rate base issue remains unaddressed as it was explicitly transferred to the investigation docket. Specifically, in Docket No. 19-00105, TAWC's "budget" filing for the 2020 year, Mr. Dittmore – in the wake of the Commission's order requiring these issues be addressed in the investigation docket – testified on behalf of the Consumer Advocate again concerning the need to address the excess rate base, and the Commission noted:

[Mr. Dittmore] specifically asserts the rate base used to determine consumer rates exceeds the Company's actual rate base which results in Capital surcharge rates which are not just and reasonable. To alleviate this error, Mr. Dittmore urges the Commission to expeditiously proceed with Docket No. 19-00103, a docket opened by the Commission to investigate and consider changes to the Company's Capital Riders.²⁰

The Commission's actual ruling in this subsequent proceeding, however, did not address the rate base issue or the investigation docket, nor did it require any related changes to TAWC's Capital Riders mechanism. TAWC's rates, as calculated under the old mechanism and without consideration of the Consumer Advocate's previous concerns, went into effect yet again. And now the Company has filed an additional budget filing – the current Docket – seeking to implement rates under the existing Capital Riders mechanism with no modifications that would address the Consumer Advocate's recurring concerns.

11. While the Commission's orders have referred to the excess rate base issue, there has never been a definitive ruling on the issue, and consumers must wait for a conclusion in the

²⁰ Order Approving Petition as Amended, p. 5, TPUC Docket No. 19-00105 (August 5, 2020).

investigation in order to see any appropriate changes to the structure of the Capital Riders mechanism.

12. The Consumer Advocate appreciates the Commission's opening of the investigation docket. It is clear that the Commission, like the Consumer Advocate, wants to address issues in order to make the Capital Riders a mechanism that works in the public interest, not simply a mechanism that works to TAWC's benefit year after year. The Commission has even designated TPUC Party Staff as an active participant in the investigation.²¹

13. While the Consumer Advocate remains hopeful that the investigation docket yields results, the fact remains that because these issues have been reserved for the investigation docket, each ongoing Capital Riders semi-annual filing represents another docket *in which new rates are set* and consumers' concerns cannot be addressed. Simply put, consumers have been denied the opportunity to advocate for and effectuate just and reasonable rates in dockets where they see the establishment of new rates. And while negotiations in the investigation docket have been ongoing, the Company candidly has no reason to push for a conclusion to the investigation docket. It can – and has – simply continued to file new Capital Riders docket *a total now of four times* under the old Capital Riders structure and during the pendency of the investigation.

14. The plight of consumers is even more arduous given regulatory constraints. When the Commission approves rates – even rates that in hindsight included an excess rate base – return of any excess to consumers is uncertain, and in fact can be impossible. Due to the Filed Rate Doctrine, rates are assumed to be just and reasonable if they comply with a current tariff on file with the Commission.²² Therefore, as long as the current Capital Riders tariff remains in effect,

²¹ *Designation of Staff Participating as a Party*, TPUC Docket No. 19-00103 (March 31, 2020).

²² See e.g., *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951) (“Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's

consumers are on the hook for those rates until the Commission issues a definitive order changing the tariff. And moreover, due to the prohibition on retroactive ratemaking, once TAWC achieves an order from the Commission allowing it to put new rates into effect, consumers may not request a return of any excessive rates in a future proceeding *even if those rates were wrong* so long as they complied with the tariff existing at the time.²³ In other words, even if the Commission determines in the investigation docket that the rates charged to consumers in the past were unjust or unreasonable, previously-overpaid funds cannot be returned to customers retroactively, a factor in this situation benefitting the Company to the detriment of all other interested parties.

15. Therefore, because this Commission explicitly ordered that this issue, along with other structural issues concerning the Company's current tariff, are reserved for the investigation docket at which time TPUC will make a determination, consumers are effectively barred from advocating for these changes in the Capital Riders semi-annual filings that actually result in new rates. And in the event consumers prevail on this issue, consumers will be unable to advocate for the return of the excessive rates. While the door is shut on consumers until the conclusion of the investigation into TAWC, the Company remains the only beneficiary of the status quo. Certainly consumers – along with the public interest – suffer.

16. TAWC not only benefits from this purgatory, but it does so despite the fact that it bears the burden of proof to demonstrate that the rates it seeks are fair. “In ratemaking proceedings, the burden of showing the proposed rates are just and reasonable rests *with the utility*

judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.”).

²³ See e.g., *In Re: Review of Nashville Gas Company's Incentive Plan Account Relating to Asset Management Fees*, 2008 WL 9907289, Tenn. Pub. Serv. Comm'n (June 30, 2008); See also, *T.R. Miller Mill Co. v. Louisville & N.R. Co.*, 92 So. 797 (Al. Sup. Ct., November 10, 1921) (“But, even if it were conceded that the Commission intended its order to be retroactive, it is clear that our statutes give the Commission no such power.”).

seeking the change in rates.”²⁴ In the current scenario, consumers are left with unaddressed concerns while the Company proceeds with annual filing after annual filing, all while essentially bearing no burden other than to prove that its filing complies with previous years’ submissions rather than its requirement to prove that the new rates are just and reasonable in light of the issues brought by the Consumer Advocate.²⁵

17. For these reasons, and especially because substantial issues brought by the Consumer Advocate have been reserved for a separate investigation docket, the Capital Riders mechanism must be terminated or suspended until the Commission can deliberate and issue a ruling on these positions. While TAWC may respond that its tariff *requires* a Capital Riders filing by a certain date, this does nothing to alleviate the substantial public interest and due process concerns faced by consumers. In fact, the Company has various avenues that will allow it to ensure no prospective investment is lost. For instance, the investigation docket, when concluded, can yield a new Capital Riders mechanism, and TAWC can recover appropriate rates from customers through this vehicle. Moreover, the Company has the ability to file a general rate case to secure a return on all appropriate investments since its last rate case, including investments made by the Company after this Commission terminates or suspends the existing Capital Riders. Therefore, while consumers may be required to pay excessive rates without any hope of a return in the absence of this relief, the Company will be able to recover for its investments in the future through at least two types of proceedings. If the Company does argue that it is required by its current tariff to submit a filing each December, it is only additional proof that the current mechanism must be

²⁴ (Emphasis added). *Tenn. American Water Co. v. Tenn. Reg. Auth.*, 2011 WL 334678 at *15 (Tenn. Ct. App. January 29, 2011).

²⁵ See e.g., *Order Approving Petition as Amended*, pp. 8-9, TPUC Docket No. 19-00031 (February 25, 2020) (“After the Hearing and upon consideration of the pleadings, testimony, and the entire administrative record, the panel found the Petition complies with the Company’s tariff, including the on or before March 1 filing requirement whereby the Company shall submit to the Commission the calculation of the QIIP, EDI, and SEC percentage rates for the following calendar year.”)

either terminated or suspended. And while the Company may be under an obligation to submit its filing on or before December 1 each year, the Commission is by no means required to grant the Company's requests. Rather, the Commission is tasked with setting just and reasonable rates and guarding the public interest.

18. Due to the factors discussed above as well as the analysis within the contemporaneously filed *Memorandum in Support for Consumer Advocate's Motion to Terminate or Suspend Current Capital Riders Mechanism*, the Consumer Advocate's motion must be granted for two reasons. First, the public interest requires it. And second, the Commission should ensure that due process rights are protected under both the Fifth Amendment and Fourteenth Amendment of the U.S. Constitution as well as Article I, Section 8 of the Tennessee Constitution and hearings are conducted in a fundamentally fair manner. Specifically, because the issue of excess rate base along with all issues regarding structural changes to the Capital Riders mechanism have been argued by consumers without any findings by TPUC or a resolution of the issues, and because these items have been explicitly transferred to an investigation docket – thereby barring the possibility of a determination in an active docket that will be used to set new rates – the only opportunity for consumers to seek relief stems from the investigation docket.

19. Also as discussed in the contemporaneously filed *Memorandum*, the Consumer Advocate is afforded the right to due process as it engages in its statutory “duty and authority to represent the interests of Tennessee consumers of public utilities services.”²⁶ Specifically, in its role, the Consumer Advocate is entitled to procedural due process rights along with principles of fundamental fairness, including but not limited to the right to a decision after an opportunity to be

²⁶ Tenn. Code Ann. § 65-4-118.

heard “at a meaningful time *and in a meaningful manner.*”²⁷ Moreover, because the Consumer Advocate stands in the shoes of all consumers before the Commission, the procedural due process rights of consumers themselves likewise are implicated.

20. In order to serve the public interest and to preserve the Consumer Advocate’s due process rights and to ensure fundamental fairness, the current Capital Riders mechanism must be terminated or, in the alternative, suspended pending resolution of the investigation docket, at which time the Commission may determine and issue a final ruling on what constitutes just and reasonable rates as well as what changes should or should not be made to preserve the public interest of TAWC’s Capital Riders.

WHEREFORE, the Consumer Advocate respectfully requests that this Commission enter an order either terminating the current TAWC Capital Riders tariff or, in the alternative, suspending the Capital Riders tariff until such time as the investigation currently pending in Docket No. 19-00103 is resolved and related issues can be addressed.

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²⁷ *Fuentes v. Shevin*, 407 U.S. 67, 79 (1972); *Tennessee Consumer Advocate v. Tennessee Regulatory Auth.*, No. 01A01-9606-BC-00286, 1997 Tenn. App. LEXIS 148 (Tenn. Ct. App. March 5, 1997).

RESPECTFULLY SUBMITTED,

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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 6th day of January, 2021.



DANIEL P. WHITAKER III
Assistant Attorney General