

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)	

MEMORANDUM OF LAW IN SUPPORT OF 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, pursuant to Tenn. Code Ann. § 65-4-118 and TPUC Rule 1220-01-02-.06, and respectfully submits this *Memorandum of Law in Support of Consumer Advocate’s Motion to Terminate or Suspend Current Capital Riders Mechanism* to the Tennessee Public Utility Commission (“TPUC” or “Commission”) in support of its contemporaneously filed *Motion to Terminate or Suspend Current Capital Riders Mechanism*. For the reasons set forth in the *Motion* and herein, the Consumer Advocate respectfully requests the Commission to terminate, or in the alternative to suspend, Tennessee-American Water Company’s (“TAWC” or “Company”) Capital Riders mechanism because of significant public interest and due process concerns. Specifically, due to the Commission’s opening of an investigation docket and the reservation of numerous proposed issues (including a structural change to the way the Capital Riders are calculated) for consideration within Docket No. 19-00103, the only means by which to remedy the situation is either to terminate or to suspend the Capital Riders until the investigation is resolved.

FACTS

Background of the TAWC Capital Riders

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 TRA¹ Docket No. 13-00130. The Company sought to utilize new legislation passed by the General Assembly², 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. The Consumer Advocate intervened in this proceeding and filed testimony requesting changes to TAWC's proposal.³ 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.⁴

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."⁵

On January 27, 2016, the TRA issued its *Order Approving Amended Petition* whereby the TRA approved QIIP, EDI, SEC, and PCOP riders⁶ as set forth in the parties' *Stipulation*. The TRA also noted that it "may consider whether an alternative regulatory method . . . remains in the

¹ The Tennessee Regulatory Authority, or TRA, was the predecessor agency to the Tennessee Public Utility Commission and served ultimately the same function as TPUC.

² See Tenn. Code Ann. § 65-5-103(b).

³ See *Direct Testimony of William H. Novak*, TRA Docket No. 13-00130 (December 12, 2020).

⁴ *Stipulation*, pp. 2-3, TRA Docket No. 13-00130 (January 10, 2014).

⁵ *Id.* at 3.

⁶ 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.

public interest taking into account any changed circumstances or conditions.”⁷ 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 ratepayers⁸ and is permitted to intervene and propose necessary changes to, or even the termination of, the Capital Riders if appropriate.

Since Docket No. 13-00130 and the establishment of the Capital Riders, TAWC has submitted two annual filings every year.⁹ First, TAWC is permitted on or before December 1 each year to file budget 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.

TPUC Docket No. 18-00120

Over time the Capital Riders have been modified.¹⁰ 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. 18-00120.¹¹ The Consumer Advocate’s witness, David Dittemore, filed direct testimony supporting a major change to the Capital Riders mechanism in order to properly serve the public interest, including a method to

⁷ *Order Approving Amended Petition*, pp. 8-9, TRA Docket No. 13-00130 (January 27, 2016).

⁸ *See* Tenn. Code Ann. § 65-4-118.

⁹ 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.

¹⁰ *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.”).

¹¹ This docket constituted TAWC’s “budget” filing for the upcoming 2019 period, filed by the Company on November 16, 2018.

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.¹²

Mr. Dittmore demonstrated that while TAWC, by its own admission, had invested into *actual* rate base approximately \$173.5 million,¹³ TAWC's proposal would force customers to compensate TAWC for a rate base of approximately \$194.9 million.¹⁴ 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 (who naturally have no other choice of water provider) of approximately \$21.4 million.¹⁵

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.¹⁶ Making such a change is more efficient and less burdensome on

¹² *Pre-filed Direct Testimony of David N. Dittmore*, p. 2, TPUC Docket No. 18-00120 (April 23, 2020).

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

¹⁴ *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.

¹⁵ 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 but not limited to 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 all other structural issues with the Capital Riders mechanism.

¹⁶ *Pre-filed Direct Testimony of David N. Dittmore*, pp. 9-11, TPUC Docket No. 18-00120 (April 23, 2019).

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.¹⁷

The parties litigated the issues included within Docket No. 18-00120 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.¹⁸

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

¹⁷ *Id.*

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

in the public interest. These issues are also reserved for the investigation docket, along with any other items that depart from TAWC's currently filed tariff. From the Consumer Advocate's perspective, ratepayers continue to pay an excessive rate base through a flawed mechanism without a determination by TPUC considering whether a change is in the public interest.

The Investigation into the Capital Riders

In issuing its *Order* in Docket No. 18-00120, the Commission determined that an investigation into TAWC's Capital Riders mechanism – which would include issues advocated by the Consumer Advocate along with other topics related to the Capital Riders – should be opened. This 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.

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 along with other proposed structural changes as these issues were explicitly transferred to the investigation docket. In Docket No. 19-00105, TAWC's "budget" filing for the 2020 year, Mr. Dittemore – 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. The Commission noted:

[Mr. Dittemore] 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. Dittemore 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.¹⁹

The Commission's holding in Docket No. 19-00031, however, did not address the excess rate base issue or the investigation docket, nor did it require any related changes to TAWC's Capital Riders

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

mechanism. TAWC's rates, as calculated under the old mechanism about which the Consumer Advocate remains concerned, went into effect yet again without a determination by the Commission of whether the issues have merit. 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.

While the Commission's orders since Docket No. 18-00120 have referred to the excess rate base issue, there has never been a ruling from TPUC concerning whether this issue has merit or whether a change should be made to the Capital Riders mechanism to protect consumers from overcompensating the Company. It is clear that consumers must wait for a conclusion in the investigation docket to see appropriate changes to the structure of the Capital Riders mechanism. Simply put, allowing yet another Capital Riders semi-annual filing to go into effect, and new rates to be implemented by the Company, would serve only to benefit TAWC and is a detriment to consumers and to the public interest. Therefore, the Capital Riders must be either terminated or suspended to allow the parties in the investigation docket to either reach an amicable resolution or to have their day in court.

ANALYSIS

I. Termination or Suspension of the Capital Riders Is in the Public Interest.

The largest factor to consider in establishing and setting rates under an alternative regulatory scheme is that any mechanism must be in the "public interest." Indeed, within Tenn. Code Ann. § 65-5-103(d), the term public interest is found ten times. And while public interest is

not a defined term in Tennessee law²⁰, this Commission’s orders over time have tended to analyze whether a decision is in the public interest by weighing opposing parties’ arguments and determining the appropriate outcome based on the evidentiary record and proposed conclusions of law.²¹ From the inception of alternative ratemaking, it has been the task of this Commission to ensure alternative ratemaking procedures are proper. As former TRA Chair James Allison stated during a hearing on the proposed legislation before the Tennessee General Assembly, “alternative ratemaking procedures, all of them, are permissive and require a finding of the public interest like the Leader [Gerald McCormick] stated.”²²

Tennessee’s balancing approach, while undefined, is not outside of the norm. As noted by public utility expert and author Scott Hempling, “[r]arely do statutes, commissions or applicants define the term [public interest].”²³ Ultimately, again consistent with decisions found in this Commission’s history, Mr. Hempling proposes a balancing of five goals – “economic efficiency, alignment of shareholder and ratepayer interests, replication of competitive outcomes, respect for legitimate expectations, and diversity among each utility’s employees.”²⁴ The first four listed goals, described as “entirely conventional, rooted in the elementary economic principles and longstanding regulatory practice”²⁵, discuss a replication by regulatory commissions of the

²⁰ Black’s Law Dictionary does provide two definitions, including “[t]he general welfare of a populace considered as warranting recognition and protection” and “[s]omething in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.” BLACK’S LAW DICTIONARY (11th ed. 2019).

²¹ See, e.g., *Order Denying Petition*, TPUC Docket No. 15-00037 (September 23, 2015) (“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).”).

²² House Finance, Ways & Means Subcommittee at Time 9:54 – 10:28, HB0191 (March 13, 2013) (the video is publicly available at http://tnga.granicus.com/MediaPlayer.php?view_id=269&clip_id=7407).

²³ THE “PUBLIC INTEREST”: WHO HAS A DEFINITION?, SCOTT HEMPLING, Scott Hempling Attorney at Law (September 2017) (*publicly available at* <https://www.scotthemplinglaw.com/essays/the-public-interest-who-has-a-definition>).

²⁴ *Id.*

²⁵ *Id.*

appropriate outcome as if the market were a competitive one. Consumers and companies alike hope to see a balanced, fair process with regulatory decisions made to ensure the correct result.

In order to ensure correct outcomes, the regulatory process has been created – and commissions like this one have been established throughout the country – to serve as a substitution for the free market while achieving free-market results. As Mr. Hempling states concerning his first proposed public interest goal:

Economic efficiency means biggest bang for the buck. It means no waste. Investors seek the highest return for a given level of risk. Consumers seek the lowest price for a given quality of product. Business managers seek the highest possible output for a given level of input. As long as all bear the costs they cause, these rational actions lead to these results: benefits go to benefit-creators, costs are borne by cost-causers, and rewards repay risks. Each action makes someone better off and no one worse off; no benefit-creating opportunity is foregone.²⁶

Therefore, the regulatory process is a balancing act, and regulators must carefully weigh the interests of various parties to achieve not simply *an* outcome but rather the *right* outcome.

In Docket No. 18-00120, the Consumer Advocate proposed changes to TAWC's Capital Riders to ensure that the Company's mechanism for setting new customer rates on a semi-annual basis remains in the public interest. The Consumer Advocate's expert witness, Mr. Dittmore, proposed a significant alteration to the structure of the Capital Riders to achieve several goals, including 1) putting a halt to customers overcompensating the Company through an excess rate base, 2) establishing a more administratively efficient single annual filing, 3) bringing TAWC's Capital Riders more in line with other Tennessee public utilities' alternative ratemaking schemes, and 4) eliminating a process that allows TAWC to set customers' rates based on projected spending. And while the Company filed testimony against any changes, the Commission did not issue a decision on the merits of these issues, holding:

²⁶ *Id.*

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.²⁷

Thus, TPUC's decision established that any structural changes to the Capital Riders, including but not limited to the issues argued by the Consumer Advocate in Docket No. 18-00120, must be examined, and if necessary litigated, in the investigation docket specifically established by this Commission for such purpose – TPUC Docket No. 19-00103. In other words, review of whether the Capital Riders mechanism remains in the public interest in light of the Consumer Advocate's arguments is to take place in the investigation docket rather than the ongoing semi-annual filings.

The Commission opened this investigation during its oral ruling in September of 2019, over fifteen months ago. Since that time, TAWC has filed four petitions seeking approval of new Capital Rider rates under its old mechanism. While the Consumer Advocate has raised concerns in subsequent dockets, it is clear from the Commission's orders in Docket Nos. 18-00120 and 19-00031 that structural issues are to be addressed in the investigation docket alone.

Allowing TAWC to continue filing petitions to set new rates under the old mechanism is simply not in the public interest. If issues – particularly issues involving whether the Company's mechanism *remains in the public interest* – are to be addressed in the investigation docket, then it is incorrect to allow the mechanism to continue until the Commission has made a determination in that investigation. It would be entirely improper, therefore, to allow the existing Capital Riders mechanism to continue when substantial concerns have been raised concerning the public interest while public interest arguments have been reserved for a separate docket. The only fair outcome is to terminate, or in the alternative to suspend, the existing mechanism until the investigation can

²⁷ *Order Approving Petition as Amended*, pp. 21-22, TPUC Docket No. 18-00120 (November 8, 2019).

be completed, the parties can provide their proposals, and the Commission can adequately address whether changes should be made to preserve the public interest.

TAWC not only benefits from this limbo, it does so despite bearing 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* seeking the change in rates.”²⁸ 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 the mechanics of 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.²⁹ Deference to alternative ratemaking schemes undisciplined by the application of the burden of proof cannot be consistent with the public interest. Such deference is instead solely focused on TAWC’s strategic aims concerning revenue collection.

Further, members of the utility community are bound by the regulatory compact. The compact does far more than secure the exchange of utility services between buyer and seller. It requires utilities to “to satisfy the regulator’s standards for performance at ‘lowest feasible cost,’ to use ‘all available cost savings opportunities’; and to pursue its customers’ legitimate interests free of conflicting business objectives.”³⁰ If the Consumer Advocate’s unresolved contentions in

²⁸ *Tenn. Am. Water Co. v. Tenn. Reg. Auth.*, 2011 WL 334678 at *15 (Tenn. Ct. App. January 29, 2011) (emphasis added).

²⁹ 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.”)

³⁰ WHAT REGULATORY COMPACT?, SCOTT HEMPLING, Scott Hempling Attorney at Law (March 2015) (publicly available at <https://www.scotthemplinglaw.com/essays/what-regulatory-compact>) (citing *Potomac Electric Power Co. v. Public Service Commission*, 661 A.2d 131, 137 (D.C. 1995); *Midwestern Gas Transmission Co. v. East. Tenn. Natural Gas Co.*, 36 FPC 61, *28 (1966), *aff’d sub nom. Midwestern Gas Transmission Co. v. Federal Power Commission*, 388 F.2d 444 (7th Cir. 1968)). In this article, the author questions the way the term “regulatory compact” is interpreted and advocates for broader, more substantive regulatory enforcement rather than cursory reviews under a limited interpretation of the term.

matters since Docket No. 18-00120 are correct, TAWC will have failed to meet these standards. The regulatory compact between public utility and consumer will be in breach, and TAWC will have benefited to the detriment of its customers rather than customers enjoying the symbiotic relationship with their utility envisioned by the regulators.

The public interest is best served by termination or suspension of TAWC's Capital Riders. If the appropriate vessel for examining whether changes are in the public interest is the investigation docket, it stands to reason that the investigation docket should be a priority and should proceed ahead of further Capital Riders dockets. Further, it is inappropriate to allow a mechanism to continue whose very structure is under such scrutiny. Upon completion of the investigation, the parties will have a definitive ruling from TPUC, and the mechanism can either be restarted, the suspension can be lifted, or the parties will have achieved a new mechanism that can be placed into effect. In any event, TAWC will not be significantly or unfairly impacted. It will be able to continue to recover funds under an alternative ratemaking mechanism at an appropriate time, and it will not lose out on any investments. Even if TAWC were to emerge from the investigation docket without any form of rider, the Company still has the ability to file a general rate case to secure recovery of approved investments. But consumers – who have raised serious, unaddressed concerns with TAWC's ratemaking scheme – have only the investigation docket to advocate for change.

If the current mechanism continues pending the investigation and the Commission ultimately agrees with the Consumer Advocate that the old mechanism is flawed, TAWC will have benefitted from a mechanism that is not in the public interest as required by law, resulting in the collection – without means of remediation – of unjust and unreasonable rates. Such an outcome is certainly not in the public interest; it would be well outside of Mr. Hempling's discussion of and

this Commission's history with balancing the interests of all parties to achieve the appropriate result.

II. Termination or Suspension of the Capital Riders Is Necessary to Afford the Consumer Advocate Its Due Process Rights and to Ensure Fundamental Fairness.

The Consumer Advocate's positions must be heard and given a ruling by TPUC prior to new rates taking effect. To date, the Consumer Advocate has been granted intervention and argued positions that seriously call into question TAWC's Capital Riders. The Consumer Advocate has further contended that due to these serious errors, the existing Capital Riders structure is no longer in the public interest. Moreover, the Consumer Advocate has proposed a new mechanism that will allow the Company to continue benefitting from alternative regulation while simultaneously safeguarding the interests of consumers and ensuring that rates are not unjust and unreasonable. The Commission, however, has explicitly reserved these issues – and essentially all other issues not yet known but that deviate from the current calculation of the Capital Riders – for the investigation docket that has been pending since September of last year. Thus, the only setting in which the Consumer Advocate's positions can be heard is Docket No. 19-00103. Meanwhile, TAWC's Capital Riders continue under an existing system and consumers see new approved rates in dockets without a determination on the merits of their arguments.

A. The Law Affords the Consumer Advocate the Right to Advocate Its Positions and Receive a Final Determination from TPUC.

To deny consumers the opportunity to have their concerns regarding the public interest of a ratemaking scheme and collection of utility rates within dockets established to implement such a mechanism while simultaneously allowing a public utility to set new rates raises significant due process concerns as well as violates principles of fundamental fairness. Specifically, the Consumer Advocate should be afforded these rights alongside a fair process prior to the implementation of

new rates and the continuance of an alternative regulatory method that is required by law to be in the public interest.³¹ The Constitution guarantees “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”³² Moreover, as opined in his leading article concerning the subject, *Some Kind of Hearing*, Judge Friendly of the U.S. Second Circuit lists the factors that must be afforded under procedural due process, including:

- (a) An unbiased tribunal;
- (b) Notice of the proposed action and the grounds asserted for it;
- (c) The opportunity to present reasons for the proposed action not to be taken;
- (d) The right to present evidence, including the right to call witnesses;
- (e) The right to know the opposing evidence;
- (f) The right to cross-examine adverse witnesses;
- (g) A decision based only on the evidence presented;
- (h) Opportunity to be represented by counsel;
- (i) A requirement that the tribunal prepare a record of the evidence presented; and
- (j) A requirement that the tribunal prepare written findings of fact and the reasons for its decision.³³

Importantly, factors (g) and (j) contemplate the right not only to be heard but the right to a decision on the merits. Case law supports this notion, including the decision in *Shakhnes v. Berlin* where that Court definitively held “the statutory right to an opportunity for a ‘fair hearing’ includes the right to a decision.”³⁴ Moreover, the *Shakhnes* Court further determined that “[i]mplicit in the right to a decision is that the decision must be issued within some period of time.”³⁵ It is therefore clear that the Consumer Advocate – which has advocated positions concerning statutory provisions requiring that a mechanism be in the public interest and that rates be just and reasonable – must receive a decision on these issues prior to that mechanism being reapproved and new rates going into effect.

³¹ See U.S. Const. 5th Amend., 14th Amend.; Tenn. Const. Art. I, Sec. 8.

³² *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394, (1914).

³³ SOME KIND OF HEARING, JUDGE HENRY FRIENDLY, Penn. Law Review Vol. 123 (1975) (publicly available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5317&context=penn_law_review).

³⁴ 689 F.3d 244, 256 (U.S. 2nd Cir. Aug. 13, 2012).

³⁵ *Id.*

Tennessee’s statutory framework supports the proposition that a decision is due before a utility may implement new rates. The law requires rulings on contested issues before TPUC. “Every final decision or order rendered by the commission in a contested case shall be in writing, or stated in the record, and *shall contain a statement of the findings of fact and conclusions of law* upon which the decision of the commission is based.”³⁶ While the Commission’s *Order* in Docket No. 18-00120 did state that structural issues with the Capital Riders were to be reserved for a separate investigation docket, the Commission explicitly stated that “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.”³⁷ But if the Consumer Advocate’s contentions are correct, the existing mechanism should either be halted prior to new rates being approved for TAWC or a new mechanism – one that is in the public interest and results in just and reasonable rates – should be implemented in its place. Anything else involves the effectuation of new rates on behalf of the Company without a ruling on the Consumer Advocate’s points, thereby denying the Consumer Advocate due process and a fair proceeding.

B. The D.C. Circuit Recently Ruled on an Analogous Case that Supports the Consumer Advocate’s Right to Meaningful and Fair Review.

Recently, the D.C. Circuit issued a ruling that is clearly analogous to this matter. In *Allegheny Defense Project v. FERC*, a nearly unanimous decision by the DC Circuit sitting *en banc* held that the federal Natural Gas Act does not permit tolling orders on rehearing applications regarding pipeline construction requests that serve only to buy the Federal Energy Regulatory Commission time to act upon the rehearing request.³⁸ The Court further found that FERC’s tolling

³⁶ Tenn. Code Ann. § 65-2-112 (emphasis added).

³⁷ *Order Approving Petition as Amended*, pp. 21-22, TPUC Docket No. 18-00120 (November 8, 2019).

³⁸ 964 F.3d 1 (U.S. D.C. Circuit, June 30, 2020). While the Court held that the issues concerning rehearing and the tolling order should be overturned, and that the petitioners were denied an opportunity to be heard and to

orders under the Natural Gas Act thwarted statutory language that deems a rehearing application denied if not acted upon within 30 days.

Parties appearing before FERC are required under the Natural Gas Act, in the event of an adverse opinion, to file a petition for rehearing.³⁹ If the petition is denied or if FERC fails to offer a decision concerning rehearing within 30 days, the petitioner is then allowed to seek review of the Commission's decision. In *Allegheny*, in the wake of the grant of a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Company for construction and operation of a natural gas pipeline along the Atlantic Coast, homeowners along with an assortment of environmental groups ("petitioners") who were parties to the application sought rehearing. With the deadline to issue a decision concerning rehearing fast-approaching, FERC issued a tolling order "for the limited purpose of further consideration."⁴⁰ The petitioners were therefore unable to seek federal review of FERC's decision. Nine months later, FERC denied the petition for rehearing and the petitioners filed an appeal – after FERC approved a request by Transcontinental to begin construction of the pipeline. Therefore, by the time the petitioners were able to seek review, the harm they sought to prevent – the construction of the pipeline – had occurred. In other words, they were effectively denied an opportunity to receive a final decision prior to the company being allowed to act on the subject of its application.

The D.C. Circuit, in vacating the panel's decision, stated that "use of these tolling orders has real-world consequences. In practice, they can prevent aggrieved parties from obtaining timely judicial review of the Commission's decision." Moreover, the Court opined:

[o]n top of that, the Commission and private certificate holders use its tolling orders to split the atom of finality. They are not final enough for aggrieved parties to seek

receive a final decision prior to the beginning of construction, the Court also ruled against the merits of the petitioners' legal arguments on other, unrelated grounds.

³⁹ 15 USC §§ 717–717z.

⁴⁰ *Allegheny*, at 6.

relief in court, but they are final enough for private pipeline companies to go to court and take private property by eminent domain. And they are final enough for the Commission to greenlight construction and even operation of the pipelines. Tolling orders, in other words, render Commission decisions akin to Schrödinger's cat: both final and not final at the same time.⁴¹

While the *Allegheny* Court ultimately determined that FERC lacked the authority to issue tolling orders in this manner under the Natural Gas Act based on the statutory language, the outcome decided by the Court is essentially identical to the outcome the Consumer Advocate seeks in this matter. Parties appearing before FERC, just like parties appearing before this Commission, have a right to a final decision prior to the litigated issue being allowed to take effect. TAWC seeks to implement another annual filing under the old Capital Riders mechanism prior to this Commission rendering a decision on the merits of the Consumer Advocate's positions regarding 1) the public interest of the mechanism (a finding required by statute) given the flaws in the calculation and 2) whether the flaws in the mechanism result in unjust and unreasonable rates. And because the Commission determined that these issues "and other potential issues relative to the Capital Rider mechanisms" must be considered within the confines of the investigation docket, any structural changes to the mechanism, even those that may not yet be known, are thereby reserved for Docket No. 19-00103. If the Consumer Advocate is cut off from advocating for these changes within semi-annual filings, in order for the Consumer Advocate to have its day in court and to receive a decision from TPUC on issues prior to new surcharges going into effect and consumers seeing new rates embedded within their bills, the semi-annual filings must be terminated or suspended, and the investigation docket must proceed as a priority.

That the *Allegheny* Court's decision was based on the statutory language of the Natural Gas Act does not render this decision distinguishable. The Court ruled against FERC because the

⁴¹ *Allegheny*, at 10.

petitioners were entitled to seek federal review within 30 days if the FERC panel denied or failed to rule on the petition for rehearing – they were entitled to a final decision prior to Transcontinental beginning the construction that was the basis of the litigation. The Consumer Advocate is likewise entitled to a final decision in this matter before TPUC approves new rates from becoming effective and before the Capital Riders mechanism is allowed to continue. But unlike the petitioners in *Allegheny*, the Consumer Advocate does not even have an initial decision at the Commission level. Such is a requirement if the Capital Riders are to continue in any form, and the appropriate setting for resolution is the investigation docket per the Commission’s order.

C. The Capital Riders Must Be Terminated or Suspended Because Remedy of Current Harm Determined in the Future is Uncertain.

An added layer to the Consumer Advocate’s predicament stems from two regulatory doctrines: the Filed Rate Doctrine and the prohibition on retroactive ratemaking. If this docket were to proceed, the Capital Riders were to be again approved, and new rates were to become effective prior to a resolution of these issues – and if the Commission determines at a later stage that the Consumer Advocate’s arguments are meritorious – then the structure of the mechanism that has been criticized for the past two years will have *not* been in the public interest and new rates that have been implemented in four subsequent semi-annual filings will have been unjust and unreasonable. But uncertainty exists concerning whether consumers may recover any amounts during this period to which they should be entitled. 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.⁴² Therefore, as long as the current Capital Riders tariff remains in effect, consumers

⁴² 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 judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other

are likely 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, TAWC may argue that consumers cannot 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.⁴³ 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 arguable cannot be returned to customers retroactively, a factor in this situation benefitting the Company to the detriment of all other interested parties, including the Commission which is tasked with safeguarding the public interest.

If change to the mechanism is to occur, it must occur pursuant to the Commission's order within the investigation docket, and if parties are to advocate for structural changes to the Capital Riders, the arguments must likewise occur within that proceeding. Clearly, the investigation docket proceeding prior to any additional Capital Riders filings is necessary to protect the Consumer Advocate's rights to advocate for the public interest and for just and reasonable rates. While the Consumer Advocate is thereby prohibited from advocating for such changes during the semi-annual filings TAWC currently submits, the Company does not suffer from similar risks. If this Commission grants the relief requested by the Consumer Advocate in this *Motion* and the Capital Riders under the current method are terminated, the Company will still be able to recover investments under a new mechanism should the Commission approve one in the investigation

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.”).

⁴³ 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.”).

docket. And even if the Commission were to deny a new mechanism to TAWC and the Company were to emerge from the investigation with no alternative ratemaking scheme, the Company still has two options: 1) it can petition TPUC for a new mechanism as it did in Docket No. 13-00130; or 2) it can file a general rate case, the traditional manner in which public utilities advocate for and obtain a new tariff. Or if this Commission elects not to terminate the existing Capital Riders but rather suspends them pending the investigation docket, this Commission will be able to lift the suspension after the investigation concludes depending on its ruling in Docket No. 19-00103. Therefore, while consumers will be left without recourse if the Commission allows this matter to proceed, there are multiple ways for TAWC to receive an appropriate return on its investment and to recover prudently incurred costs. Simply put, there is no risk for the Company if the Commission grants the Consumer Advocate's requested relief. While the Consumer Advocate has clear concerns related to due process and fundamental fairness in the event this docket is allowed to continue, if the Commission grants the Consumer Advocate's *Motion*, the Company has multiple avenues for rate recovery within a reasonable timeframe.

D. Denying the Consumer Advocate a Fair Process Would Result in Reversible Error.

The Consumer Advocate is authorized by statute to intervene in matters concerning the interests of ratepayers. In fact, the Consumer Advocate "has the duty and authority to represent the interests of Tennessee consumers of public utilities services."⁴⁴ Once the Consumer Advocate has either filed a complaint or been granted intervention as a party, it must be afforded a fair opportunity to carry out this statutory duty, and if a fair process is denied, an appellate court will overturn a lower court or tribunal's decision.

⁴⁴ Tenn. Code Ann. § 65-4-118(b)(1).

In *Tennessee Consumer Advocate v. Tennessee Regulatory Authority*, the TRA granted this Office’s intervention in a matter involving United Cities Gas Company’s “application for approval of a scheme of variable rates.”⁴⁵ The Court determined that the TRA did not give the Consumer Advocate an opportunity to participate and offer arguments in a fair hearing, to have access to materials relied upon by the TRA, or engage in cross-examination. The Court then held that “the Commission committed a violation of basic principles of fairness in failing to afford the Consumer Advocate reasonable access to the materials to be considered and reasonable opportunity to cross-examine or otherwise impeach the origin of such materials.”⁴⁶ It overturned the TRA’s decision because of the TRA’s failure to ensure a fair process.

If the Company’s Capital Riders petition is allowed to proceed, the Consumer Advocate’s review of materials and ability to advocate on behalf of consumers will be unlawfully impaired because of the reservation of structural issues – ones that both impact the public interest of the Capital Riders and the reasonableness of rates – to the investigation docket. Consumers will be instead limited to advocating only for whether calculations appropriately conform with the Commission’s Order in Docket No. 13-00130 and subsequent semi-annual filings. The Consumer Advocate will thus be disallowed from seeking discovery from the Company concerning whether structural changes should be made as well as from filing expert testimony and legal arguments on the subject. Therefore, the investigation docket must be concluded – and TPUC must be able to adequately consider the merits of consumers’ arguments and reach a final decision – before the Company is allowed to implement new Capital Riders surcharges.

WHEREFORE, the Consumer Advocate respectfully requests that this Commission enter an order either terminating the current TAWC Capital Riders tariff or, in the alternative,

⁴⁵ No. 01A01-9606-BC-00286, 1997 Tenn. App. LEXIS 148, at *1 (Tenn. Ct. App. March 5, 1997).

⁴⁶ *Id.* at *10. The decision was unanimous.

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.

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.



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