

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE**

**IN RE: JOINT PETITION OF SUPERIOR
WASTEWATER SYSTEMS, LLC, AND
TPUC STAFF (AS A PARTY) TO INCREASE
RATES AND CHARGES**

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Docket No. 22-00087

MOTION IN LIMINE

On December 2, 2022 the Consumer Advocate propounded a second set of discovery request, mainly focused on Superior Wastewater Systems, LLC's (the "Company") escrow accounts. The Company raised objections on the grounds that the escrow account information sought by the Consumer Advocate was irrelevant in this Docket. Subsequently, the Consumer Advocate filed a motion to compel the Company to answer certain discovery request pertaining to information regarding the escrow accounts. The Company filed a Response to the Motion to Compel on the grounds that any discovery regarding the escrow account was irrelevant and immaterial in this Docket. Ultimately, the Hearing Officer denied the Consumer Advocate's Motion to Compel. The Order of the Hearing Officer is attached hereto, as **Exhibit A**.

During the process of the parties filing motions and responses, the Consumer Advocate filed the direct testimony of David N. Dittmore. Mr. Dittmore's testimony focuses on two issues: the escrow account and collection of access fees from owners of undeveloped lots without access to installed collection lines. These two issues are the only issues in dispute and the reason for the Consumer Advocate's intervention.

I. The Escrow Account

In the Order denying the Consumer Advocate's Motion to Compel the Hearing Officer found "[t]he information (regarding the escrow accounts) sought by the Consumer Advocate is not relevant to these proceedings. Thus, any reference to the escrow accounts should be removed from the record and the Consumer Advocate should be prohibited from addressing the escrow account issue at the hearing either via testimony or argument.

II. Collection of Access Fees

With regard to the access fees, the Consumer Advocate filed a letter dated February 8, 2023, to the Commission in which access fees are identified as the only remaining issue subject to dispute. The Consumer Advocate states "This is a matter of policy and presents an occasion for the Commission, as the policy maker, to provide needed clarity." The letter is attached as **Exhibit B**.

The Company submits that this Docket is an improper vehicle for the Consumer Advocate to seek a significant policy change. Under current Commission policy access fees are not assessed to lot owners of undeveloped lots until collection lines are installed to the lot. The Consumer Advocate challenges this longstanding policy and requests it be changed or modified.

The Company nor its ratepayers, whom the Consumer Advocate represents, should bear the cost of the Consumer Advocate's position that a change to a longstanding Commission policy is now appropriate. It is extremely unfair to expect the Company or its ratepayers to potentially take on such an expense. This policy change would affect more entities than the Company in the current docket and they deserve opportunity of notice and the opportunity to be heard concerning the proposed change. This docket is not the proper forum for such discussion.

III. Conclusion

Wherefore, based on the forgoing, the Company respectfully requests the Commission to remove each reference of escrow accounts in Mr. Dittimore's testimony from the record and prohibit the Consumer Advocate from any reference of same at the hearing through testimony or argument. Further, the Company requests that the Commission limit the issues at the hearing to those related to the findings of the staff in the rate design process which has been conducted for the sole purpose of establishing the Company's base rates. Any and all reference to a significant policy change should be deferred to another docket.

Dated this 10th day of February, 2023.

Respectfully Submitted,

By:  _____

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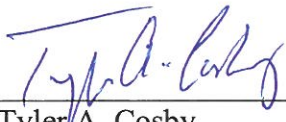
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail,
upon:

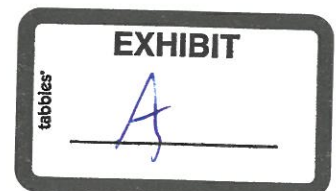
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This the 10th day of February, 2023.



Tyler A. Cosby



to the requests and stated the issues are currently being considered in Docket No. 21-00086.² The Consumer Advocate points out that Superior has objected to the *Petition to Intervene* filed by the Consumer Advocate in Docket No. 21-00086.³ The Consumer Advocate argues that Tennessee encourages broad discovery and its discovery requests are relevant and reasonably calculated to lead to discoverable information. According to the Consumer Advocate, because its requests “concern the use and management of funds paid into the escrow account by consumers whose rates will be decided in this docket.”⁴ The Consumer Advocate maintains that “the mere existence of Docket 21-00086 and the relevance of escrow activities to *that* docket in no way negates the relevance of the escrow activities in *this* docket.”⁵ With regard to DR 2-20, the Consumer Advocate asserts “the agreements sought could lead to relevant information concerning the treatment of access fees and other fees by the Company while lots are held by developers or builders. Thus, the request is calculated to lead to discoverable information.”⁶ The Consumer Advocate asks that the Company be ordered to fully respond to DR 2-7 through 2-12 and DR 2-20, or in the alternative, Superior should be deemed to have admitted those requests in accordance with Tenn. R. Civ. P. 36.01 because Superior failed to comply with that rule.

SUPERIOR’S RESPONSE

On January 6, 2023, Superior filed *Superior Wastewater, LLC’s Response to Consumer Advocate’s Motion to Compel* (“*Superior’s Response*”). Superior argues that while Tennessee encourages broad discovery, the scope of this docket is very narrow, and the Consumer

² See *In re: Staff Compliance Audit of Superior Wastewater Systems, LLC’s Compliance with Commission Rules 1220-04-13-.07 and 1220-04-13-.08 Regarding Financial Security and Rule 1220-04-13-.16 Regarding Affiliate Transactions*, Docket No. 21-00086, *Superior Wastewater Systems, LLC’s Objection to Consumer Advocate Divisions Motion to Intervene* (December 9, 2022).

³ On January 12, 2023, the Hearing Officer issued the *Order Granting the Petition to Intervene Filed by the Consumer Advocate* in Docket No. 21-00086.

⁴ *Motion to Compel*, p. 5 (December 21, 2022).

⁵ *Id.*

⁶ *Id.* at 6.

Advocate seeks information outside the scope of the docket.⁷ According to Superior, the only purpose of this docket is to establish base rates, and the treatment of the escrow accounts are not being addressed in this docket. Superior argues the information requested by the Consumer Advocate in the discovery requests at issue seek information regarding the escrow accounts and that issue is being addressed in Docket No. 21-00086, a staff-initiated compliance audit.⁸ Since there will not be a determination made on the treatment of the escrow accounts, Superior asserts that the Consumer Advocate's discovery questions are irrelevant, cannot lead to any information relevant to this docket and seeking such discovery in this docket is "unduly burdensome-designed only for the purpose of unnecessary delay."⁹

GENERAL DISCOVERY PRINCIPLES

Pursuant to Commission Rule 1220-1-2-.11, when informal discovery is not practicable, discovery shall be effectuated in accordance with the Tennessee Rules of Civil Procedure. The Rules of Civil Procedure permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.¹⁰ Through these instruments, a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."¹¹ The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.¹² The Tennessee Court of Appeals has commented on relevancy as follows:

Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase "relevant to the

⁷ *Superior's Response*, p. 1 (January 6, 2023).

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ Tenn. R. Civ. P. 26.01.

¹¹ *Id.* at 26.02(1).

¹² *Id.*

subject matter involved in the pending action” has been construed “broadly to encompass any matter that bears on or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”¹³

Further, parties may learn of information related to books, documents or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.¹⁴ However, Tennessee’s rules provide some limitations. Rule 26.02 permits a court to limit discovery under certain circumstances, such as undue burden, and Rule 26.03 permits a court to issue protective orders as justice requires.¹⁵ In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).¹⁶

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.¹⁷ “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”¹⁸

FINDINGS & CONCLUSIONS

The current docket is a staff assisted rate case initiated seeking an “increase to Superior Wastewater’s rates and charges for the purpose of recovering the Company’s costs of providing wastewater services to its customers and for authority to place such rate and charges into effect

¹³ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).

¹⁴ Tenn. R. Civ. P. 26.02(1).

¹⁵ *Id.* at 26.02 & .03.

¹⁶ *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

¹⁷ *Id.* at 37.01(2).

¹⁸ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

through a revised tariff.”¹⁹ According to the *Joint Petition*, Superior’s current rates and charges are not sufficient to allow the Company “a fair opportunity to recover its reasonable operating costs and to provide a fair and reasonable net operating income.”²⁰ Party Staff witness, Joe Shirley, testifies “[i]t should be noted that the Company’s existing escrow charges of \$10.13 per month remain unchanged. The proposed rate design, therefore, maintains the currently approved escrow charges that the Company is required to earmark and hold in reserve for future use in accordance with the Commission’s financial security rules, see TPUC Rule 1220-4-13-.07.”²¹ Therefore, the Hearing Officer finds that the purpose of this docket is to establish base rates for the Company going forward and while an escrow fee is included as a line item in the proposed tariffs, there was no new analysis of the escrow fee. The escrow fee is the same amount that was established for Superior in Docket No. 04-00335.²² In contrast, the Compliance Audit docket was opened as Docket No. 21-00086 for “Staff to review and report on Superior Wastewater Systems, LLC’s compliance with Commission rules related to financial security and affiliate transactions.”²³ The Hearing Officer finds that any issues regarding Superior’s compliance with Commission rules are being addressed in the Compliance Audit docket, Docket No. 21-00086.²⁴ The Hearing Officer has granted the Consumer Advocate’s intervention in Docket No. 21-00086, and the Consumer Advocate will have an opportunity to conduct discovery and participate as a party in the docket that was opened to examine the use of escrow funds, among other issues.

While ratemaking is a complicated process and other issues may be considered in the context of a rate case, in the current docket, the sole purpose of the docket is to establish base rates.

¹⁹ *Joint Petition*, p. 1 (September 9, 2022).

²⁰ *Id.*

²¹ *Id.* at 7.

²² Joe Shirley, Pre-filed Testimony, pp. 7-8 (September 9, 2022).

²³ *Order Opening Compliance Audit Review Docket*, p. 1 (September 15, 2021).

²⁴ A Compliance Audit docket was opened for “Staff to review and report on Superior Wastewater Systems, LLC’s compliance with Commission rules related to financial security and affiliate transactions.”

The information sought by the Consumer Advocate is not relevant to these proceedings, however, the Consumer Advocate is a party in another docket where such issues will be considered. The Consumer Advocate is not being barred from pursuing the information it seeks, but it must make the request in the appropriate docket where the requests are relevant to the issues being considered. Therefore, the Hearing Officer concludes that the Consumer Advocate's *Motion to Compel* should be denied.

IT IS THEREFORE ORDERED THAT:

The *Motion to Compel* filed by the Consumer Advocate Division of the Office of the Tennessee Attorney General on December 21, 2022 is **DENIED**.


Monica Smith-Ashford, Hearing Officer

STATE OF TENNESSEE

Office of the Attorney General



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February 8, 2023

Herbert H. Hilliard
Chairman
c/o Tory Lawless – Docket Manager
Tennessee Public Utility Commission
502 Deaderick Street
Nashville, TN 37243

Re: *Joint Petition of Superior Wastewater Systems, LLC and TPUC Staff (As A Party)
to Increase Rates and Charges (TPUC Docket No. 22-00087)*

Dear Chairman Hilliard:

The Consumer Advocate Division of the Office of the Tennessee Attorney General ("Consumer Advocate") was granted intervention in this docket by order of the Hearing Officer on November 21, 2022.¹ The purpose of the Consumer Advocate's intervention is to address two issues pertaining to the interest of consumers served by Superior Wastewater Systems, LLC ("Company"). The issues are (1) whether the Company misused escrow funds in violation of Commission Rule 1220-04-13-.07,² and (2) whether the Company failed to assess an "access fee" against undeveloped lots in accordance with its current tariff and the proposed elimination of the access fee from the Company's tariff.³

The Company's escrow activities are currently being audited and reviewed by TPUC Staff in Docket No. 21-00086.⁴ The Company strongly opposed the Consumer Advocate's intervention in Docket No. 21-00086 while also refusing to respond to discovery requests in Docket No. 22-00087 related to the escrow account.⁵ This resulted in a Motion to Compel by the Consumer

¹ *Order Granting the Petition to Intervene Filed by the Consumer Advocate*, TPUC Docket No. 22-00087 (Nov. 21, 2022).

² TENN. COMP. R. & REGS. 1220-04-13-.07.

³ *Direct Testimony of John Powell on Behalf of Superior Wastewater Systems, LLC*, TPUC Docket No. 22-00087 (Sept. 9, 2022). The Consumer Advocate's position is that the access fee should remain in the tariff.

⁴ *Order Opening Compliance Audit Review Docket*, TPUC Docket No. 21-00086 (Sept. 15, 2021).

⁵ See *Superior Wastewater Systems, LLC's Objection to Consumer Advocate Division's Motion to Intervene*, TPUC Docket No. 21-00086 (Dec. 9, 2022); *Superior Wastewater Systems, LLC's Response to Second Discovery Request of the Consumer Advocate*, TPUC Docket No. 22-00087 (Dec. 9, 2022). The "objection" and discovery responses were filed on the same day.

EXHIBIT

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Advocate,⁶ which ultimately became moot when the Consumer Advocate was granted intervention in Docket No. 21-00086 by order of the Hearing Officer on January 12, 2023.⁷

As a result of its intervention being granted in the audit docket, the Consumer Advocate gained access to all filings concerning the Company's escrow account. Accordingly, the Hearing Officer denied the Motion to Compel on February 6, 2023, finding as follows:

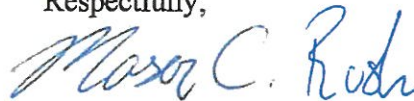
The Hearing Officer has granted the Consumer Advocate's intervention in Docket No. 21-00086, and the Consumer Advocate will have an opportunity to conduct discovery and participate as a party in the docket that was opened to examine the use of escrow funds, among other issues. [...] The information sought by the Consumer Advocate is not relevant to these proceedings, however, the Consumer Advocate is a party in another docket where such issues will be considered.⁸

Considering its progress in Docket No. 21-00086, and in light of the above finding by the Hearing Officer, the Consumer Advocate believes it will be able to fully represent the consumer interest related to the escrow concerns through its participation in Docket No. 21-00086. The matter will not be further pursued by the Consumer Advocate in the present docket.

The sole remaining contested issue before the Commission in Docket No. 22-00087, then, is the access-fee dispute, which centers on the rationale underlying such fees. This is a matter of policy and presents an occasion for the Commission, as the policy maker, to provide needed clarity.

The positions of the parties are articulated in the docket filings.

Respectfully,



Mason C. Rush
Assistant Attorney General

cc: All Parties of Record

⁶ Consumer Advocate's Motion to Compel, TPUC Docket No. 22-00087 (Dec. 21, 2022).

⁷ Order Granting the Petition to Intervene filed by the Consumer Advocate, TPUC Docket No. 21-00086 (Jan. 12, 2023).

⁸ *Id.* at 5-6.