

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

IN RE:)	
)	
JOINT PETITION OF SUPERIOR)	
WASTEWATER SYSTEMS, LLC, AND)	Docket No. 22-00087
TPUC STAFF (AS A PARTY) TO INCREASE)	
RATES AND CHARGES)	
)	

**CONSUMER ADVOCATE’S RESPONSE TO SUPERIOR WASTEWATER, LLC’S
PROPOSED RECOVERY OF COSTS**

The Consumer Advocate Division of the Office of the Tennessee Attorney General (“Consumer Advocate”) hereby submits this response to the *Proposed Recovery by Superior Wastewater Systems, LLC If [sic] Its Incurred Incremental Legal, Regulatory, Administrative and Delay Costs Associated with the Intervention of the Consumer Advocate in this Docket* (“Proposal”)¹ filed April 12, 2023 by Superior Wastewater Systems, LLC (“Company”), wherein the Company seeks recovery of alleged “Delay Costs”² supposedly attributable to the intervention of the Consumer Advocate. For the reasons set forth herein, the Consumer Advocate respectfully requests that the Tennessee Public Utility Commission (“TPUC” or the “Commission”) deny recovery of such costs.

PROCEDURAL HISTORY

The Company and Party Staff (“Joint Petitioners”) filed their *Joint Petition* on September 9, 2022.³ The Consumer Advocate filed its *Petition to Intervene* on October 25, 2022,⁴ and the

¹ *Proposed Recovery by Superior Wastewater Systems, LLC If (sic) Its Incurred Incremental Legal, Regulatory, Administrative and Delay Costs Associated with the Intervention of the Consumer Advocate in this Docket*, TPUC Docket No. 22-00087 (Apr. 12, 2023).

² *See id.* at 2.

³ *Joint Petition*, TPUC Docket No. 22-00087 (Sept. 9, 2022).

⁴ *Petition to Intervene*, TPUC Docket No. 22-00087 (Oct. 25, 2022).

same was granted by the Hearing Officer on November 21, 2022, pursuant to Tenn. Code Ann. §§ 4-5-310 and 65-4-118(b)(1).⁵ At that time, the Hearing Officer specifically noted the following:

Although it is not an automatic or absolute right to participate in proceedings before the Commission, Tenn. Code Ann. § 65-4-118(b)(1) provides a general basis for the qualification of the Consumer Advocate to be permitted to intervene as a party to represent the interests of Tennessee public utility consumers.⁶

In granting the Consumer Advocate's intervention in this docket, the Hearing Officer also made the following findings:

[T]he Consumer Advocate **qualifies under law as an intervenor** for the purpose of representing those consumer interests, **there is no opposition to its intervention**, and its *Petition to Intervene* was **timely-filed and should not impair the interests of justice or the orderly and prompt conduct of the proceedings**.⁷

All three parties to this docket (the Joint Petitioners and the Consumer Advocate) subsequently submitted a *Joint Filing of Proposed Procedural Schedule* on November 29, 2022.⁸ The Hearing Officer entered an *Order Establishing Procedural Schedule* on December 8, 2022, adopting the procedural schedule proposed by the parties.⁹ On January 11, 2023, the Joint Petitioners filed a *Motion for Approval of Deferral and Recovery of Rate Case Expense*,¹⁰ to which the Consumer Advocate filed a response on January 18, 2023.¹¹

A contested case hearing was held before the Commission on February 27, 2023, in accordance with the established procedural schedule agreed to and submitted by the parties. At

⁵ *Order Granting the Petition to Intervene Filed by the Consumer Advocate*, TPUC Docket No. 22-00087 (Nov. 21, 2022).

⁶ *Id.* at 3.

⁷ *Id.* (emphasis added in bold).

⁸ *Joint Filing of Proposed Procedural Schedule*, TPUC Docket No. 22-00087 (Nov. 29, 2022).

⁹ *Order Establishing Procedural Schedule*, TPUC Docket No. 22-00087 (Dec. 8, 2022).

¹⁰ *Motion for Approval of Deferral and Recovery of Rate Case Expense*, TPUC Docket No. 22-00087 (Jan. 11, 2023).

¹¹ *Consumer Advocate's Response to Motion for Approval of Deferral and Recovery of Rate Case Expense*, TPUC Docket No. 22-00087 (Jan. 18, 2023).

the conclusion of the hearing, Chairman Hilliard gave the following verbal ruling on the deferral motion:

With regard to the motion for approval of deferred [sic] and recovery of rate case expense filed by the joint petitioners on January 11, I move that the motion be granted in part. I find that it is reasonable to defer consideration of rate case expense in order for the parties to fully present evidence of such expense. Because additional evidence is required to determine the total amount of rate case expense incurred due to the procedural progression of this matter, the amount to be recovered and the period of recovery will be determined upon consideration of proof to be filed by the parties.¹²

The Commission immediately voted in approval of the Chairman's motion. On April 13, 2023, the Company filed its Proposal,¹³ which, among other requests, includes the novel request at issue of Delay Costs totaling \$29,951.¹⁴ The Consumer Advocate subsequently filed a motion to amend the procedural schedule to allow this response, as the existing procedural schedule ended with the February hearing date. The parties discussed the same motion with the hearing officer by telephone conference on April 28, 2023, at which time the Hearing Officer directed the Consumer Advocate to file this response by May 5, 2023.

ARGUMENT

The Company's request to recover deferred costs consists of two broad categories: (1) Delay Costs and (2) Rate Case Expense.

I. Delay Costs

There are several plain reasons for the Commission to deny the requests for Delay Costs. Notably, the Company is not entirely clear on the duration of supposed "delay," and no basis exists for either of the alleged delay periods. The Proposal, for instance, states that the Consumer Advocate's intervention "lengthened the rate review period beyond the 180-day period in a

¹² See the excerpt from the hearing transcript attached hereto as "Exhibit A."

¹³ *Proposal*, *supra* note 1.

¹⁴ *Id.* at 2.

traditional rate case.”¹⁵ Not only is this assertion made without citation to any authority,¹⁶ but it also creates a chronological conundrum, as the period from the September 9, 2022, *Joint Petition* filing to the February 27, 2023, hearing before the Commission is only 171 days.

An alternative (i.e., inconsistent) delay period of 140 days is presented in the confidential exhibit to the Proposal and is calculated with reference to an “original” hearing date of October 10, 2022.¹⁷ However, this assertion of a 140-day delay period is likewise unfounded. Although the Company filed a Notice¹⁸ informing its customers of an October 10, 2022, hearing date simultaneously with the *Joint Petition* filing, the only hearing date set in this docket is that contained in the procedural schedule the Company agreed to and filed jointly with the Consumer Advocate and Party Staff, setting the hearing for February 27, 2023.¹⁹

Thus, the Consumer Advocate’s intervention in this docket has caused no “delay” in any meaningful sense relevant to proceedings before this Commission. Moreover, the Company’s failure to formally oppose the Consumer Advocate’s intervention,²⁰ its engaging in discovery with the Consumer Advocate, and its submitting a joint procedural schedule with the Consumer Advocate demonstrate the Company’s acquiescence to the Consumer Advocate’s participation as a party in this docket.²¹ The Company has no grounds to complain of delay caused by such participation, particularly not after the matter has been heard by the Commission.

¹⁵ *Id.*

¹⁶ Perhaps a reference to Tenn. Code Ann. § 65-5-103(b)(1).

¹⁷ See pdf. page 8 of the “Confidential Exhibit A” filed by the Company.

¹⁸ *Customer Notice Affidavit of John Powell*, TPUC Docket No. 22-00087 (Sept. 9, 2022).

¹⁹ *See Order Establishing Procedural Schedule*, *supra* note 9.

²⁰ *See Order Granting the Petition to Intervene*, *supra* note 5, at 5.

²¹ An imperfect analogy can be made to common law doctrines of estoppel, such as where “an estoppel may arise by reason of a failure to assert a claim during the course of litigation in which the opportunity to do so is presented.” 31 C.J.S. *Estoppel and Waiver* § 175 (2023). *See also Keith v. Jackson*, No. E2012-01056-COA-R3CV, 2013 WL 672491, at *5 (Tenn. Ct. App. Feb. 22, 2013) (defining “acquiescence” as a “tacit or passive acceptance, or an implied consent[.]”).

Apart from the complete lack of factual basis for the Delay Costs, policy considerations also preclude this creative request. Most importantly, the Company is asking the Commission to engage in retroactive ratemaking by granting the Delay Costs, which consist of the revenue the Company would have liked to have collected had the new rates gone into effect at the time the Company desired. Under the Company's Proposal, its customers would "pay for past use," which is the essence of retroactive ratemaking."²² However, "the Commission has no statutory authority to fix rates retroactively . . . except in very limited circumstances."²³ Rather, "[r]ates are set for the future."²⁴ This is a universally acknowledged principle of utility regulation and is essential to effect just and reasonable rates. Rate case expenses, or recoverable regulatory costs, cannot include lost revenues (if they may be called "lost") that a utility would have liked to have collected had its petition been expedited and every aspect thereof unopposed. Therefore, the Company's request for retroactive ratemaking through the award of Delay Costs must be rejected.

Finally, an alarming and problematic precedent would be set under the Company's Proposal with regard to the Consumer Advocate's ability to carry out its statutory duty to represent the interest of consumers in matters before the Commission.²⁵ Whether the Company intends it or not, the effect of granting the Delay Costs would be to deter the Consumer Advocate's intervention in future rate cases, Staff-assisted or otherwise. The Hearing Officer's regular consideration of the criteria for intervention contained in Tenn. Code Ann. § 4-5-310 would be purposeless. Furthermore, the Company's Proposal is wholly contrary to the intent of the Tennessee Legislature

²² *Consumer Advoc. Div. ex rel. Tennessee Consumers v. Tennessee Regul. Auth.*, No. M199902151COAR12CV, 2000 WL 13794, at *3 (Tenn. Ct. App. Jan. 10, 2000) (citing *Porter v. South Carolina Public Service Comm'n*, 328 S.C. 222, 493 S.E.2d 92 (S.C.1997)).

²³ *Am. Ass'n of Retired Persons v. Tennessee Pub. Serv. Comm'n*, 896 S.W.2d 127, 134 (Tenn. Ct. App. 1994) (citing Tenn. Code Ann. § 65-5-203, which was renumbered as § 65-5-103 in 2004).

²⁴ *Tennessee Am. Water Co. v. Tennessee Regul. Auth.*, No. M2009-00553-COAR12CV, 2011 WL 334678, at *15 (Tenn. Ct. App. Jan. 28, 2011).

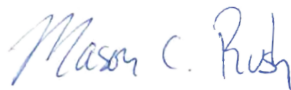
²⁵ See Tenn. Code Ann. § 65-4-118.

concerning both the time periods prescribed in Tenn. Code Ann. § 65-5-103 for such proceedings before the Commission as well as the Consumer Advocate's chartering statute, Tenn. Code Ann. § 65-4-118. If the Legislature passed a law allowing six months for a rate case, there cannot be argued that the case was delayed if it concludes within that six-month period.

II. Rate Case Expense

The Consumer Advocate's position²⁶ is that rate case expenses should, as a general rule, be shared 50/50 between the utility and the ratepayer which recognizes that "[t]he sharing of rate case expenses between ratepayers and shareholders 'is rooted in fundamental fairness, as both shareholders and ratepayers benefit from a rate case proceeding.'"²⁷ Without waiving this prior position, the Consumer Advocate is not contesting Superior Wastewater's proposed rate case expense minus the proposed delay costs which amounts to \$37,838.

RESPECTFULLY SUBMITTED,



MASON C. RUSH (BPR No. 039471)

Assistant Attorney General

KAREN H. STACHOWSKI (BPR No. 019607)

Senior Assistant Attorney General

Office of the Tennessee Attorney General

Consumer Advocate Division

P.O. Box 20207

Nashville, Tennessee 37202-0207

Phone: (615) 741-2357

Email: mason.rush@ag.tn.gov

Email: karen.stachowski@ag.tn.gov

²⁶ *Consumer Advocate's Post-Hearing Brief*, at 26–32, TPUC Docket No. 18-00017 (Sept. 10, 2018).

²⁷ *Id.* at 30 (quoting *Order Adopting Initial Decision with Modifications and Clarifications*, at 12, New Jersey Board of Public Utilities Docket No. WR1606510 (Oct. 20, 2017) (available at <https://www.state.nj.us/bpu/pdf/boardorders/2017/20171020/10-20-17-5D.pdf>)). See also *Initial Brief on Behalf of the Division of Rate Counsel*, at 21–22, New Jersey Board of Public Utilities Docket No. WR16060510 (Apr. 13, 2017) (available at https://www.state.nj.us/rpa/docs/PUC09261-2016%20Suez_Water_Arlington_Hills%20Rate_Counsel_Initial_Brief.pdf).

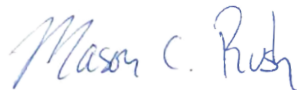
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail,
with a courtesy copy by electronic mail upon:

Ryan McGehee, Esq.
Tennessee Public Utility Commission
502 Deaderick St.
Nashville, TN 37243
(615) 770-1078
Ryan.McGehee@tn.gov
Attorney for TPUC Staff (As a Party)

Charles B. Welch, Jr., Esq.
Tyler A. Cosby, Esq.
Farris Bobango PLC
414 Union Street, Suite 1105
Nashville, TN 37219
(615) 726-1200
cwelch@farris-law.com
tcosby@farris-law.com
Attorneys for Superior Wastewater Systems, LLC

On this the 5th day of May 2023.



MASON C. RUSH
Assistant Attorney General