

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

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BRIEF IN SUPPORT OF PARTY STAFF'S OBJECTION TO RECOVERY OF "DELAY  
COSTS" AS PART OF RATE CASE EXPENSE RECOVERY

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Pursuant to discussions with the parties and the hearing officer in this docket, the Party Staff of the Tennessee Public Utility Commission ("Party Staff") herein, submits this brief in support of the objection to a portion of expenses and costs that Superior Wastewater Systems, LLC ("SWS" or "Company") seeks to recover as "rate case expense." The Party Staff opposes recovery of \$29,951 in "delay costs." In summary, the Company's request for delay costs has no statutory basis and exceeds the Commission's *Order Approving Joint Petition* in that the Company seeks to recovery "costs" beyond rate case expense.

**Procedural History**

On September 9, 2022, the Company and the Party Staff filed the *Joint Petition* ("*Joint Petition*") in this Docket for 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 rates and charges into effect through a revised tariff. Specifically, the Party Staff determined that SWS was projected to experience a net operating loss of \$57,150 for the Twelve-Month Attrition Period Ending December 31, 2022, and that a rate increase of \$78,086

was needed to eliminate this revenue deficiency. The *Joint Petition* requested a hearing date of October 10, 2022.<sup>1</sup>

This is a staff-assisted rate case in which some staff members of the Commission are walled off as a party and perform an analysis of the Company's finances, records, and operations. The resulting rate study is used by the Party Staff to determine whether a rate increase is necessary, establishes a revenue requirement, and proposes what it considers as just and reasonable rates using traditional rate-making methodologies. Staff-assisted cases are undertaken, when resources are available, to prevent small utilities from going decades without updating their rates, but also to reduce the regulatory and rate case costs on the customers of small public utilities.<sup>2</sup> One of the policy motivations behind staff assisted cases is to have little to no rate case expense to burden small customer bases. As such, the Party Staff's analysis and proposed revenue requirement did not include *any* rate case expense in the *Joint Petition*.<sup>3</sup>

On October 25, 2022, the Consumer Advocate Division of the Office of the Tennessee Attorney General (the "Consumer Advocate") intervened in this Docket. In what has become a standard custom in staff assisted rate cases, Party Staff conferred with the Consumer Advocate both prior to the filing of the *Joint Petition* and afterwards to share information and supporting workpapers and answer questions. In the past, the Consumer Advocate has not intervened in staff assisted rate cases. While the Consumer Advocate's intervention in a staff assisted rate case was not expected, Party Staff had no objection.

As the docket proceeded, the filings in the record show that aspects of the *Joint Petition*, the rate of development of lots in the Company's service area, and the audit of the Company's

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<sup>1</sup> *Joint Petition*, p. 3 (September 9, 2022).

<sup>2</sup> Joe Shirley, Pre-Filed Rebuttal Testimony, pp. 5-6 (January 30, 2023).

<sup>3</sup> *Id.* at 6.

escrow account in Docket No. 21-00086, were explored and subject to discovery and litigation. The Company incurred expense for legal representation, responding to discovery, preparing responsive pre-filed testimony and, ultimately, a contested hearing for which the revenue requirement in the *Joint Petition* did not contemplate. The Joint Parties submitted the *Motion for Approval of Deferral and Recovery of Rate Case Expense* (“*Motion for Deferral*”) on January 11, 2023, in an effort to authorize recovery of reasonable rate case expense. The Consumer Advocate opposed the *Motion for Deferral*.<sup>4</sup>

Following a hearing on February 27, 2023, the Commission approved the *Joint Petition* as filed. Pursuant to the Commission’s rate case order, the Commission found that the revenue requirement did not include recovery of expenses associated with responding to data requests from or litigating with any intervening party.<sup>5</sup> The Commission deferred ruling on the amount of rate case expense until additional evidence could be taken.

On April 12, 2023, the Company filed *Proposed Recovery By Superior Wastewater Systems, LLC Of Its Incurred Incremental Legal, Regulatory, Administrative and Delay Costs Associated with the Intervention of the Consumer Advocate in this Docket* (“*SWS’s Proposed Rate Case Expense*”) listing a total cost of \$67,789.00. The Company seeks to recover this amount over a period of eighteen (18) months at a monthly amount of \$10.76 per customer.<sup>6</sup> Both Party Staff and the Consumer Advocate filed objections to the recovery of \$29,951 in “delay costs.”<sup>7</sup>

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<sup>4</sup> *Consumer Advocate’s Response to Motion for Approval of Deferral and Recovery of Rate Case Expense*, (January 18, 2023).

<sup>5</sup> *Order Approving Joint Petition*, p. 8 (May 1, 2023).

<sup>6</sup> *SWS Proposed Rate Case Expense*, p. 2 (April 12, 2023).

<sup>7</sup> *Party Staff’s Objection to Recovery of “Delay Costs” As Part of Rate Case Expense Recovery*, (May 5, 2023); *Consumer Advocate’s Response To Superior Wastewater, LLC’s Proposed Recovery of Costs*, (May 5, 2023).

In a status conference, the Hearing Officer determined additional briefing and testimony was necessary. On June 6, 2023, the Company submitted additional documents and a brief in support of its request.

**There Is Not A Statutory Basis to Award “Delay Costs” In This Docket**

The Company seeks recovery of revenues from a prior period based on proposed rates that were not yet approved by the Commission. In other words, the “delay costs” sought here are nothing more than an attempt to retroactively approve rates. The Company seeks such relief based on the presumption the *Joint Petition* should have been approved on October 10, 2022, rather than until February 27, 2023, due to the Consumer Advocate’s intervention.<sup>8</sup> Plain and simple, the *Joint Petition* and the proposed rates were not approved by the Commission until February 27, 2023. Party Staff submits there is no basis in Tennessee law to retroactively approve the *Joint Petition* back to October 10, 2022, or otherwise allow recovery of the Company’s request of “delay costs.”

In a rate case, rates are set on a prospective, or going forward basis.<sup>9</sup> Tennessee courts have concluded that the legislature never intended to extend retroactive rate-making authority in rate cases to the Commission other than what has been expressly stated in the statute.<sup>10</sup> The General Assembly has been very specific about when a proposed rate increase may go into effect during rate cases. As such, there are only two instances that can be drawn from Tenn. Code Ann. §65-5-103(b) in which rates can be put into effect prior to a Commission’s final decision in a rate case:

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<sup>8</sup> *Superior Wastewater Systems, LLC’s Brief in Support of Request for Legal, Regulatory, Administrative and Delay Costs*, p. 3 (June 6, 2023).

<sup>9</sup> *Tennessee American Water Company v. Tennessee Regulatory Authority*, 2011 WL 334678\*15 (Tenn.Ct.App.2011) citing *Association of American Retired Persons v. Tennessee Public Utility Commission*, 896 S.W. 2d 127, 133 (Tenn.Ct.App.1995).

<sup>10</sup> *South Central Bell Telephone Company v. Tennessee Public Service Commission*, 675 S.W. 2d 718, 719 (Tenn.Ct.App.1984).

1. Tenn. Code Ann. §65-5-103(b)(1) allows that when the Commission has not yet ruled six months after the filing of a petition, a public utility could place the proposed rates into effect with specific statutory conditions to facilitate a refund of any proposed rate increase that is subsequently not allowed by the Commission.<sup>11</sup>
2. Tenn. Code Ann. §65-5-103(b)(2) allows that in the event the Commission finds, at any time during the initial three months, that an emergency exists or the utility's credit or operations will be materially impaired or damaged by a failure to place some or all of the proposed rate increase into effect, proposed rates may go into effect.<sup>12</sup>

In both instances, the Commission may require a bond and the keeping of records to facilitate refunds for any portion of the rate increase that is not ultimately approved.<sup>13</sup> Here, neither statutory pre-condition exists.

Tenn. Code Ann. §65-5-103(b)(1) could not serve as a basis of recovery as the rate case was completed within six months. In any event, the Company's request is to authorize recovery as if new rates went into effect a month after the filing of the *Joint Petition* rather than six months. The record further reflects that Tenn. Code Ann. §65-5-103(b)(2) could not serve a basis for recovery as the Commission did not have a finding during the first three months of the case that an emergency existed that would have authorized all or a portion of the proposed rates to go into effect. The Company's position that it is entitled to collect revenue from customers as if new rates were approved on October 10, 2022, rather than February 27, 2023, has no statutory basis.

#### **There is No Legal Distinction Between "Traditional" and Staff-Assisted Rate Cases**

The Company has claimed that the 6-month provisions in Tenn. Code Ann. §65-5-103 "concern traditional rate case."<sup>14</sup> The Company asserts it was "entitled to its rate relief on October 11, 2022" because this docket was a staff assisted case rather than a "traditional" rate case.<sup>15</sup> This

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<sup>11</sup> Tenn. Code Ann. § 65-5-103(b)(1).

<sup>12</sup> Tenn. Code Ann. § 65-5-103(b)(2).

<sup>13</sup> *Id.*

<sup>14</sup> *Superior Wastewater Systems, LLC's Brief in Support of Request for Legal, Regulatory, Administrative and Delay Costs*, p. 3 (June 6, 2023).

<sup>15</sup> *Id.*

is a false distinction that attempts to rewrite the Commission's enabling statutes. Tenn. Code Ann. §65-5-103 makes no distinction between a "traditional" rate case and a party staff assisted rate case.

In the majority of rate cases, it is the employees and consultants of the public utility that perform the analytical and accounting work to present its rate case and carry the burden of proof. The only distinction with respect to a staff assisted case is that members of the Commission party staff carry out the analytical and accounting work on behalf of a small utility and share the burden of proof with the utility. This is a factual rather than a legal distinction and it does not surpass or suspend any of the substantive or procedural requirements within the Commission's enabling statutes or the Uniform Administrative Procedures Act ("U.A.P.A."). A staff assisted rate case carries no more or no less privileges, rights, and obligations than any other rate case.

**Intervention by the Consumer Advocate Is Not A Legal or Factual Basis For "Delay Costs"**

While this is the first staff assisted rate case in which the Consumer Advocate has intervened in, this fact has no bearing on whether the Company is entitled to "delay costs." The Consumer Advocate's intervention in this docket, in of itself, does not create the legal authority to retroactively place rates into effect several months before rates were actually approved by the Commission. As discussed previously, Tennessee law makes no distinctions nor authorizes different treatment for "traditional" and staff assisted rate cases. The General Assembly has mandated that all rate cases are contested cases.<sup>16</sup> All contested cases before administrative agencies in Tennessee are subject to the U.A.P.A. and the Consumer Advocate had the standing

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<sup>16</sup> Tenn. Code Ann. §65-2-101(2): "...the fixing of rates shall be deemed a contested case rather than a rule-making proceeding;..."

and statutory basis to intervene.<sup>17</sup> Party Staff's participation in a rate case does not preclude intervention by the Consumer Advocate.

### **The Company's Request for "Delay Costs" Is Beyond The Scope of the Commission's Order**

The Consumer Advocate's intervention did force the Company to incur rate case expense and one of the policy goals for a staff assisted rate case, namely the avoidance of rate case expense, will not be achieved in this docket. The Commission's *Order Approving the Joint Petition* authorizes a proceeding to consider recovery of rate case expense, the bulk of which is not contested by either the Party Staff or Consumer Advocate. However, the Company seeks recovery of costs that go beyond rate case expense and the Commission's order in this docket.

The Commission's *Order Approving Joint Petition* made the following finding with respect to the *Motion to Defer* filed by the Company and Party Staff:

With regard to the Joint Petitioner's Motion to Defer, the panel found that the revenue deficiency included certain rate case expense that did not include recovery of expenses associated with responding to data requests from or litigating issues with any intervening party. As such, the panel found that it is reasonable to defer consideration of rate case expense so that the parties may fully present evidence concerning such expense. Therefore, the voting panel voted unanimously to defer consideration on the recovery of rate case expense. Because additional evidence is required to determine the total amount of rate case expense, the panel voted unanimously to determine the amount of recovery and period of recovery upon consideration of proof to be submitted by the parties.<sup>18</sup> (emphasis added).

The Commission's order was specific in characterizing rate case expense as expenses associated with responding to data requests or litigating issues with any intervening party. This is in line with how the term "rate case expense" has been defined, namely as costs incurred by a utility to prepare and present a rate case.<sup>19</sup> The Commission's finding does not authorize deferral of any other extraneous expense beyond what can be reasonably classified as rate case expense. This was

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<sup>17</sup> Tenn. Code Ann. §65-4-118(b)(1)

<sup>18</sup> *Order Approving Joint Petition*, p. 8, (May 1, 2023).

<sup>19</sup> *Madigan v. Illinois Commerce Commission*, 964 N.E. 2d 510, 517 (ILL.App.2011)

certainly the Party Staff's position in joining in support of the *Motion to Defer* to allow the opportunity to recover reasonable expenses associated with litigation and discovery.

#### **Objection to Company's Confidential Designation of "Proof of Delay Costs" Calculation**

For the record, the Party Staff objects to the Company's designation of "confidential" or "non-public" for the "Proof of Delay Costs."<sup>20</sup> There is no protective order in this docket. Party Staff has no objection to a protective order being issued for designating legal bills and other supporting documents as confidential.<sup>21</sup> Nevertheless, if a protective order is issued, Party Staff can see no basis for designating the Company's calculation of "delay costs" as confidential or proprietary. Further, the Company openly discusses the calculation on page four of its brief. Such costs are readily determinable by prorating the amount of authorized revenue increase over the purported delay period.

#### **The Commission Should Disregard the Company's Misquotation of the Party Staff**

In lieu of a motion to strike or formal objection, Party Staff will simply note for the record that the Company has misquoted the Party Staff. In asserting that there are two different types of rate cases with different legal standards, "traditional" and staff-assisted rate cases, the Company "quoted" the Party Staff's opening statement at the hearing on February 27, 2023 as following:

...And the reason for [staff-assisted] cases is to save small utilities and their customers the expense of a [traditional] rate case because rate cases are very expensive for small utilities, especially one with a small customer base.<sup>22</sup>

The actual quote from the transcript reads:

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<sup>20</sup> See "Non-Public" version of Company's *Proof of Legal, Regulatory, Administrative and Delay Costs*, (June 6, 2023).

<sup>21</sup> On June 29, 2023, Party Staff provided a draft protective order to the Company for use in the docket.

<sup>22</sup> *Superior Wastewater Systems, LLC's Brief in Support of Request for Legal, Regulatory, Administrative and Delay Costs*, p. 3 (June 6, 2023).



...And the reason for *that* is to save small utilities and their customers the expense of a rate case because rate cases can be very expensive for small utilities, especially one with a small customer base.<sup>23</sup> (emphasis added).


The opening statement of the Party Staff was, in part, an explanation to the Commissioners and any members of the public that were present as to why members of the Commission's staff were advocating on behalf of a utility. Party Staff does not begrudge the use of brackets in a quotation where appropriate or paraphrasing in argument, but "quotations" attributed to a transcript should be verbatim and not change words or terms.

### Conclusion

The Party Staff opposes recovery of \$29,951 in "delay costs" in this docket. Furthermore, Party Staff submits, should the Company not prevail, the expense for litigation costs associated with "delay costs" should be borne by the owner rather than ratepayers. Thus, any costs associated with litigating this case incurred after April 12, 2023 (the date on which the Company first for "delay costs") should not be booked to regulated operations or paid from utility funds.

Dated this 30<sup>th</sup> day of June, 2023.

Respectfully Submitted,

By:   
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Ryan L. McGehee (#025559)  
Party Staff  
Tennessee Public Utility Commission  
502 Deaderick St.  
Nashville, TN 37243  
ryan.mcgehee@tn.gov  
*Attorney for TPUC Staff*

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<sup>23</sup> Transcript of Hearing, p. 74, lines 8-12 (February 27, 2023).

**CERTIFICATE OF SERVICE**

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

Mason C. Rush  
Assistant Attorney General  
Karen H. Stachowski  
Senior Assistant Attorney General  
Office of the Tennessee Attorney General  
Consumer Advocate Division  
P.O. Box 20207  
Nashville, TN 37202  
[Mason.rush@ag.tn.gov](mailto:Mason.rush@ag.tn.gov)  
[Karen.stachowski@ag.tn.gov](mailto:Karen.stachowski@ag.tn.gov)

Phillip Byron Jones, Esq.  
Evans, Jones & Reynolds  
401 Commerce Street, Suite 710  
Nashville, Tennessee 37219  
[PJones@ejrlaw.com](mailto:PJones@ejrlaw.com)

This the 30<sup>th</sup> day of June, 2023.



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Ryan L. McGehee