

**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 BRIEF IN OPPOSITION TO SUPERIOR
WASTEWATER SYSTEMS, LLC’S REQUEST FOR “DELAY COSTS”**

The Consumer Advocate Division of the Office of the Tennessee Attorney General (“Consumer Advocate”) submits this brief in opposition to the request for “delay costs” presented in 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* (“Proposed Recovery”)¹ filed April 12, 2023 by Superior Wastewater Systems, LLC (“Company”) and supported by *Superior Wastewater Systems, LLC’s Brief in Support of Request for Legal, Regulatory, Administrative and Delay Costs* (“Brief”)² filed June 6, 2023. For the reasons set forth herein, the Consumer Advocate respectfully requests that the Tennessee Public Utility Commission (“TPUC” or the “Commission”) deny recovery of the alleged delay costs.

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 *Superior Wastewater Systems, LLC’s Brief in Support of Request for Legal, Regulatory, Administrative and Delay Costs*, TPUC Docket No. 22-00087 (June 6, 2023).

I. 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 which 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 jointly by the parties.⁹ On January 11, 2023, the Joint

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

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

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).

Petitioners filed a *Motion for Approval of Deferral and Recovery of Rate Case Expense* (“Deferral Motion”),¹⁰ to which the Consumer Advocate responded 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 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.¹³ On April 13, 2023, the Company filed its Proposed Recovery, which, among other requests, included the novel request at issue of “delay costs” totaling \$29,951.¹⁴ The *Consumer Advocate’s Response to Superior Wastewater Systems, LLC’s Proposed Recovery* (“Response”)¹⁵ and *Party Staff’s Objection to Recovery of “Delay Costs” As Part of Rate Case Expense Recovery* (“Objection”)¹⁶ were filed on May 5, 2023 at the direction of the Hearing Officer. A status conference was held on May 16, 2023, at which time the Hearing Officer directed the parties to submit pre-filed testimony and legal

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).

¹² Transcript of February 27, 2023 Commission Conference at 131:13–25. On file with Mason Rush.

¹³ This was memorialized in the written *Order Approving Joint Petition*, 9, ¶ 6, TPUC Docket No. 22-00087 (May 1, 2023).

¹⁴ Proposed Recovery at 2.

¹⁵ *Consumer Advocate’s Response to Superior Wastewater Systems, LLC’s Proposed Recovery*, TPUC Docket No. 22-00087 (May 5, 2023).

¹⁶ *Party Staff’s Objection to Recovery of “Delay Costs” As Part of Rate Case Expense Recovery*, TPUC Docket No. 22-00087 (May 5, 2023).

briefs on the Proposed Recovery, particularly addressing the “delay costs.”¹⁷ The Company filed its proof of costs and Brief on June 6, 2023.

II. ARGUMENT

The Company readily admits that its request for delay costs is “unique.”¹⁸ However, this is understated, as the Company fails even to present a cognizable theory under which the Company might be entitled to recovery of these alleged costs. The Proposed Recovery, for instance, simply asserts that the Company is entitled to these costs resulting from the “delay”¹⁹ caused by the Consumer Advocate’s intervention.²⁰ Yet, despite the novelty of its request, the Proposed Recovery offers the Commission no legal, factual, or policy basis on which to award these “delay costs.” This is because the law, facts, and policy considerations are all contrary to the Company’s position, as previously explained in the Consumer Advocate’s Response and Party Staff’s Objection. Nonetheless, the Company presents additional arguments in its Brief intended to substantiate the Company’s request. These arguments are addressed in turn below, followed by further considerations of the Consumer Advocate more fully set out in its prior Response.

A. **The Consumer Advocate’s intervention does not prevent timely decisions under Tenn. Code Ann. § 65-5-103; Tenn. Code Ann. § 65-5-103 applies to staff-assisted rate cases.**

The Company presents two arguments related to Tenn. Code Ann. § 65-5-103. First, that the statute “is worded to advance rate changes expediently[,]”²¹ which purpose is undermined by

¹⁷ As noted in its Response to the Proposed Recovery, the Consumer Advocate is not contesting the Company’s recovery of rate case expenses, but only the so-called “delay costs.”

¹⁸ Proposed Recovery at 2.

¹⁹ As defined unilaterally and arbitrarily by the Company.

²⁰ See Proposed Recovery at 2. The Company subsequently suggested that the costs it seeks constitute “damages,” as if the Company seeks a legal remedy from the Commission on a tort claim against the Consumer Advocate. See *Email Correspondence Between Monica Smith-Ashford, Hearing Officer And Attorney Phillip Byron Jones, Of Evans Jones & Reynolds, P.C. Re Appearance As Counsel For Superior Wastewater Systems, LLC*, TPUC Docket No. 22-00087 (May 24, 2023).

²¹ Brief at 2.

the Consumer Advocate’s intervention. Second, and in contradiction of the first, that the statutory time periods *do not apply* to the present matter because it is a staff-assisted rate case as opposed to a “*traditional* rate increase” case.²² Both arguments are meritless.

i. The Consumer Advocate’s intervention does not prevent timely decisions by the Commission.

As noted above, the Company relies on Tenn. Code Ann. § 65-5-103 for the proposition that the legislature intended “to advance rate changes expediently”²³ through the procedure outlined in the statute. The Company implies that the Consumer Advocate’s intervention is somehow contrary to or undermines this end. Even assuming the Company’s interpretation of the legislature’s intent, the Company’s position remains untenable.

The same legislature that enacted Tenn. Code Ann. § 65-5-103 also created the Consumer Advocate Division by Tenn. Code Ann. § 65-4-118(a) and gave the Consumer Advocate Division authority under subsection (b)(1) to “participate or intervene as a party *in any matter or proceeding before the [C]ommission[.]*”²⁴ This must necessarily include matters contemplated by Tenn. Code Ann. § 65-5-103. The legislature, then, did not assume that the Consumer Advocate’s intervention in proceedings subject to Tenn. Code Ann. § 65-5-103 would cause unnecessary delay in such proceedings, and it certainly made no provision for the recovery of “delay costs” resulting from intervention by the Consumer Advocate.²⁵

Moreover, the Company itself notes the specific time parameters set out in Tenn. Code Ann. § 65-5-103 within which the Commission must render a decision on a rate increase, and these

²² Brief at 3.

²³ *Id.* Note that the term “expedient” is the Company’s.

²⁴ TENN. CODE ANN. § 65-4-118(b)(1) (emphasis added). The Consumer Advocate’s intervention is, of course, subject to the permission of the Hearing Officer.

²⁵ As noted in the Procedural History section above, the Hearing Officer determined at the outset of this matter that the Consumer Advocate’s intervention would not “impair the interests of justice or the orderly and prompt conduct of the proceedings.” *See Order Granting the Petition to Intervene Filed by the Consumer Advocate*, 3, TPUC Docket No. 22-00087 (Nov. 21, 2022).

contradict the Company’s position.²⁶ The Company correctly recognizes that the Commission “shall decide the matter as speedily as possible”²⁷ but fails to note that the legislature defines this phrase in the same sentence to mean “not later than nine (9) months after the filing of the increase, change or alteration.”²⁸ As acknowledged by the Company,²⁹ the rate increase in this docket was approved in *less than six months*.³⁰ Hence, any reliance by the Company on Tenn. Code Ann. § 65-5-103 to demonstrate a “delay” caused by the Consumer Advocate contrary to the intent of the statute is wholly misguided, as the matter was decided timely under the terms of the statute.

ii. The time periods prescribed in Tenn. Code Ann. § 65-5-103 apply in this staff-assisted rate cases.

The Company argues that the time periods prescribed in the statute do not apply to this docket because it is a staff-assisted rate case.³¹ This assertion lacks any meaningful rationale. The statute applies to rate changes broadly and does not carve out an exception for staff-assisted rate cases. Rate increases, proposed with or without the assistance of Party Staff, fall under the statute. This appears to be Party Staff’s own understanding set forth in its Objection, arguing the applicability of the statute to *this very docket*: “The General Assembly has been very specific about when a proposed rate increase may go into effect. The Commission has up to nine months to complete its investigation of a proposed rate increase.”³²

Selectively relieving itself of certain statutory parameters, the Company seems to conclude that it is entitled to an increase effective at whatever date it proposes—in this instance, October

²⁶ Brief at 2.

²⁷ *Id.*; TENN. CODE ANN. § 65-5-103(a).

²⁸ TENN. CODE ANN. § 65-5-103(a).

²⁹ Brief at 4.

³⁰ Approximately 171 days passed between the September 9, 2022 initial filing and the February 27, 2023, hearing before the Commission.

³¹ Brief at 3.

³² Objection at 4.

11, 2022.³³ Nonetheless, attempting to support its October 11 date, the Company states that “Superior initially started work with TPUC’s staff in early 2022. Formal filings were not made until the fall of 2022, *only because of push back and countless inquiries by the Consumer Advocate*.”³⁴ The Consumer Advocate is surprised to learn that it was able to delay the Company’s filing from the beginning of 2022 until the fall of 2022 by “push back and countless inquiries” when the Consumer Advocate was first made aware of the matter by the Joint Petitioners mere *days* before the September 9, 2022 filing. Thus, the Company is again mistaken in its understanding of the applicable legal authority as well as the procedural and factual background of this case.

B. The Consumer Advocate is not responsible for the Company’s management failures and operational losses.

The January 11, 2023, Deferral Motion states that “the Company is currently operating at a loss” and was “forced . . . to seek additional financing in order to continue funding wastewater operations.”³⁵ The Company states again in its Brief that “equity investments had to be made into Superior simply to sustain it.”³⁶ Unfortunate as this may be, it is the fault of the Company alone, first in its failure to initiate a rate case at such an earlier time as would prevent it from operating at a loss, and again in its failure to utilize the existing statutory mechanism designed to address this problem once a rate case has begun. The Consumer Advocate cannot reasonably be deemed responsible for the Company’s poor financial state.

³³ Brief at 3 (“Superior was entitled to its rate relief on October 11, 2022.”). Never mind that no order was entered in the docket file setting the matter for an October 2022 hearing date, much less approving the rates for an effective date of October 11, 2022.

³⁴ Brief at 3 (emphasis added).

³⁵ Deferral Motion at 2.

³⁶ Brief at 3.

In its Brief, the Company makes reference to Tenn. Code Ann. § 65-5-103(b)(2), which provides in part that “the [C]ommission may permit all or a portion of the increase, change or alteration to become effective” before a hearing or final decision if “an emergency exists or . . . the utility’s credit or operations will be materially impaired or damaged by the failure to permit the rates to become effective[.]”³⁷ Yet, at no point did the Company or Party Staff request early implementation of the rate increase under this provision, nor did the Commission make any finding that the same was necessary for the continued operation of the Company. Despite its evident familiarity with this provision, the Company insists that “the continuation of its losses”³⁸ is solely attributable to the Consumer Advocate’s participation in this docket. The reality is that the Company allowed itself to incur these burdens by its failure to petition the Commission for a rate increase at an early date, and then made no effort to utilize the statutory mechanism designed to address the very issue. Thus, the Company is left to blame the Consumer Advocate for properly exercising its statutory authority to intervene and complains when a decision is issued by the Commission well within the statutory period.

C. The Consumer Advocate’s intervention in this rate case is not precluded by its decision not to intervene in other staff-assisted rate cases.

The Company states that “Superior’s case is the only staff assisted case that was contested by the Consumer Advocate. Thus, it was the unprecedented actions of the Consumer Advocate that caused this non-traditional (staff-assisted) case to be delayed.”³⁹ The Company then gives its opinion that “it should have been an uncontested hearing” and chastises the Consumer Advocate for “contesting a staff-assisted case for a small utility.”⁴⁰ The Company is suggesting that the

³⁷ Brief at 2; TENN. CODE ANN. § 65-5-103(b)(2).

³⁸ Brief at 3.

³⁹ Brief at 3.

⁴⁰ *Id.* at 4.

Consumer Advocate either has no right to intervene in staff-assisted rate cases or that, as a matter of policy, “delay costs” should be approved as a deterrent to the Consumer Advocate’s intervention in future staff-assisted rate cases.⁴¹

As previously noted, Tenn. Code Ann. § 65-4-118(b)(1) allows the Consumer Advocate to generally “participate or intervene as a party in any matter or proceeding before the [C]ommission,”⁴² including staff-assisted rate cases. The Consumer Advocate’s participation in rate cases is often essential to its “duty and authority to represent the interests of Tennessee consumers of public utilities services.”⁴³ Though the Consumer Advocate frequently determines that its intervention is not necessary in staff-assisted rate cases, this does not preclude its intervention in staff-assisted rate cases.⁴⁴ If the Consumer Advocate determines that it must represent the interests of Tennessee consumers with respect to an issue in a staff-assisted rate case, it is its duty to intervene as in any other matter.

That a utility’s rate case is staff-assisted is no guarantee that there will be no disputed issues whatsoever. In this case, only a *single* issue was disputed at the hearing. The dispute centered on a significant policy disagreement arising out of the Company’s refusal to assess access fees under its tariff, where the owner of this “small utility” is also the developer and owner of lots in the utility’s service area. The Company’s position that the Consumer Advocate had no basis to intervene indicates a failure by the Company to properly distinguish between the roles of the Consumer Advocate, the Commission, and regulated utilities.

⁴¹ This issue is addressed further below as well as in the Consumer Advocate’s Response referenced above.

⁴² TENN. CODE ANN. § 65-4-118(b)(1).

⁴³ *Id.*

⁴⁴ For example, the Consumer Advocate was granted intervention in TPUC Docket No. 20-00009, a staff-assisted rate case for Tennessee Wastewater Systems, Inc. *See Order Granting the Petition to Intervene filed by the Consumer Advocate*, TPUC Docket No. 20-00009 (Mar. 13, 2020). The Consumer Advocate’s concerns in that docket were ultimately addressed through supplemental testimony filed by Party Staff. *See Letter to Chairperson Morrison From Karen H. Stachowski, Consumer Advocate*, TPUC Docket No. 20-00009 (May 15, 2020).

D. The Company acquiesced in the participation of the Consumer Advocate in this docket.

As discussed in the Consumer Advocate’s Response to the Proposed Recovery, the Company never formally opposed the Consumer Advocate’s intervention—a fact also noted in the Hearing Officer’s *Order Granting the Petition to Intervene Filed by the Consumer Advocate*.⁴⁵ The Company instead regularly engaged in discovery with the Consumer Advocate, gave the Consumer Advocate and Party Staff a tour of a community served by the Company, and submitted and abided by a joint procedural schedule with the Consumer Advocate and Party Staff. Any argument against the Consumer Advocate’s intervention would have been properly (though likely unsuccessfully) brought and heard at the time the Consumer Advocate sought intervention. The Company has no grounds now, at the conclusion of the case, to complain of “delay.”

E. The Company’s request for delay costs is a request for impermissible retroactive ratemaking.

The Consumer Advocate would reiterate that the Company is asking the Commission to engage in retroactive ratemaking by granting the “delay costs.” As demonstrated again in its Brief, the Company calculates its delay costs by attempting to retroactively apply the approved revenue deficiency to a period before the Commission approved that deficiency.⁴⁶ In other words, the delay costs represent 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 Proposed Recovery, its customers would “‘pay for past use,’ which is the essence of retroactive ratemaking.”⁴⁷ However, “the Commission has no statutory authority to fix rates retroactively . . . except in very limited

⁴⁵ *Order Granting the Petition to Intervene Filed by the Consumer Advocate*, 3, TPUC Docket No. 22-00087 (Nov. 21, 2022).

⁴⁶ Brief at 4.

⁴⁷ *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)).

circumstances.”⁴⁸ Indeed, “[r]ates are set for the future.”⁴⁹ 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 delay costs must be rejected as such an award would constitute retroactive ratemaking.

F. An award of delay costs would set a harmful precedent for future rate cases.

If the Company is awarded delay costs due to the Consumer Advocate’s intervention, this would set an alarming and problematic precedent 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. The possibility of “delay costs” would function to deter the Consumer Advocate’s intervention in future rate cases, staff-assisted or otherwise, as consumers would be penalized in instances where the Commission disagrees with the Consumer Advocate on a given issue. Far from the Consumer Advocate’s intervention undermining the purpose of any statute, an award of delay costs would render meaningless the time periods prescribed in Tenn. Code Ann. § 65-5-103 and would directly contradict the purposes of the legislature in creating the Consumer Advocate Division by Tenn. Code Ann. § 65-4-118.

III. CONCLUSION

The Company’s request for delay costs should be denied. This is a rare occasion where no legitimate argument can be raised in favor of the relief requested. Both the Consumer Advocate and Party Staff have shown that no legal, factual, or policy basis exists for an award of delay costs.

⁴⁸ *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).

⁴⁹ *Tennessee Am. Water Co. v. Tennessee Regul. Auth.*, No. M2009-00553-COAR12CV, 2011 WL 334678, at *15 (Tenn. Ct. App. Jan. 28, 2011).

Rather, every consideration weighs against such award. For the reasons stated herein, the Consumer Advocate respectfully requests that the Commission deny the \$29,951 delay cost portion of the Company's Proposed Recovery.

RESPECTFULLY SUBMITTED,



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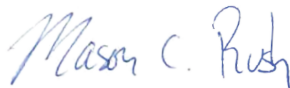
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail,
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On this the 30th day of June 2023.



MASON C. RUSH
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