

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

September 26, 2023

IN RE:)	
)	
JOINT PETITION OF SUPERIOR)	DOCKET NO.
WASTEWATER SYSTEMS, LLC AND)	22-00087
COMMISSION STAFF AS A PARTY TO)	
INCREASE RATES AND CHARGES)	

ORDER APPROVING RATE CASE EXPENSE AND DENYING DELAY COSTS

This matter came before Chairman Herbert H. Hilliard, Vice Chairman David F. Jones, Commissioner Robin L. Morrison, Commissioner Clay R. Good, and Commissioner John Hie of the Tennessee Public Utility Commission (the “Commission” or “TPUC”), the voting panel assigned to this docket, during a regularly scheduled Commission Conference held on August 14, 2023 for consideration of the *Proposed Recovery By Superior Wastewater Systems, LLC Of [sic] Its Incurred Incremental, Legal, Regulatory, Administrative and Delay Costs Associated with the Intervention of the Consumer Advocate In This Docket (“Recovery Motion”)* filed on April 12, 2023 by Superior Wastewater Systems, LLC (“Superior” or “Company”). In the *Recovery Motion*, Superior seeks Commission approval of a certain rate case expenses related to adjudication of the *Joint Petition* in this docket as well as recovery of delay costs, alleged to have resulted from the Consumer Advocate’s intervention in this matter.

BACKGROUND AND *RECOVERY MOTION*

On September 9, 2022, Superior and Party Staff filed a *Joint Petition* requesting an increase to Superior’s rates and charges, alleging that the Company’s revenues and revenue projections are not sufficient to allow Superior to recover its reasonable operating costs and a fair and reasonable net

operating income under the Company's current rates.¹ The Consumer Advocate Division in the Office of the Tennessee Attorney General ("Consumer Advocate") filed a *Petition to Intervene* on October 25, 2022. The Hearing Officer entered an *Order Granting the Petition to Intervene Filed by the Consumer Advocate* on November 21, 2022.

The Joint Parties filed a *Motion for Approval of Deferral and Recovery of Rate Case Expense* ("Motion for Deferral") on January 11, 2023. The *Motion for Deferral* requests that the Commission defer the issue of rate case expense and allow the Company to recover reasonable rate case expense in a rider to be determined at the conclusion of proceedings.² The Consumer Advocate filed a response arguing that the *Motion for Deferral* should be denied because the Company "mistakenly attributes any delay solely to the intervention of the Consumer Advocate" and because the Company failed to provide any evidence of an estimate of additional rate case expenses the Company will incur in the proceeding.³

The Commission heard the testimony and arguments of the parties during the regularly scheduled Commission Conference on February 27, 2023. Upon consideration of the testimony, arguments of counsel, and all evidence in the record, the hearing panel voted unanimously to: approve the tariffs filed by the Company on September 9, 2022, setting new rates based on the projected revenue deficiency; allow removal of the annual \$84 access fee from the Company's tariff and to disallow any imputation of access fees; and to allow deferral of rate case expense for future determination of the amount of recovery and period of recovery upon consideration of proof to be submitted by the parties.⁴

¹ *Joint Petition*, p. 3 (September 9, 2022). The Commission filed a Notice on September 6, 2022 designating the following TPUC Staff employees as Party Staff: Ryan McGehee, Senior Counsel; Cole McCormick, Utilities Consultant; Craig Cox, Financial Regulatory Analyst; Patsy Fulton, Utility Rate Specialist; Joe Shirley, Director, Utility Audit and Compliance Division; and David Foster, Director, Utilities Division. *Notice of Designation of Staff Participating as a Party* (September 6, 2022).

² *Motion for Approval of Deferral and Recovery of Rate Case Expense* (January 11, 2023).

³ *Consumer Advocate's Response to Motion for Approval of Deferral and Recovery of Rate Case Expense* (January 18, 2023).

⁴ *Order Approving Joint Petition*, pp. 6-9 (May 1, 2023).

On April 12, 2023, Superior submitted its *Recovery Motion* seeking recovery of \$67,789 in incremental Legal, Regulatory, Administrative, and delay costs associated with the rate case. Of the total amount requested for recovery, \$29,951 is allocated to delay costs.⁵ Upon motion of the Consumer Advocate, the Hearing Officer issued an *Order Establishing Procedural Schedule for Hearing on Rate Case Expense* which set deadlines for the filing of testimony and required legal briefs from the parties on the issue of delay costs.⁶

POSITION OF THE PARTIES

Position of Superior

Superior seeks recovery of \$67,789 consisting of \$37,838 in legal, regulatory, and administrative costs and an additional \$29,951 for delay costs. The Company submitted documentation itemizing the time and hourly costs for the legal, regulatory, and administrative expenses.⁷ Superior also submitted a brief in support of the award of delay costs, advancing five arguments in support of its position: 1.) Tenn. Code Ann. § 65-5-103 is crafted to “advance rate changes expediently;” 2.) the increase in rates was necessary to stop the Company’s continuation of losses; 3.) the time frames and deadlines established in Tenn. Code Ann. § 65-5-103 are applicable for “traditional” rate cases rather than staff-assisted rate cases; 4.) the Consumer Advocate’s intervention in a staff-assisted rate case was unprecedented and caused delay; and 5.) the rate case should have been an uncontested hearing but was instead delayed by the Consumer Advocate.⁸

Position of Party Staff

Party Staff expressed no opposition to the legal, regulatory, and administrative portions of Superior’s proposed recovery. However, Party Staff objected to the proposed recovery of delay costs

⁵ *Recovery Motion*, p. 2 (April 12, 2023).

⁶ *Order Establishing Procedural Schedule for Hearing on Rate Case Expense* (July 5, 2023). See also *The Consumer Advocate’s Motion to Amend Procedural Schedule* (April 17, 2023).

⁷ *Superior Wastewater Systems, LLC Proof of Legal, Regulatory, Administrative and Delay Costs* (June 6, 2023).

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

by Superior, stating that such recovery has no basis in the law.⁹ In its brief concerning delay costs, Party Staff addressed each of arguments asserted by Superior. Party Staff avers the Company is seeking to recover revenues for a prior period based on proposed rates that were not yet approved by the Commission which is effectively retroactive ratemaking. Party Staff explains that Tenn. Code Ann. § 65-5-103 authorizes the Commission up to nine months to complete its investigation of a proposed rate increase and provides mechanisms to place proposed rates into effect prior to the Commission’s final ruling in certain circumstances.¹⁰ Party Staff states that neither of the mechanisms to place proposed rates into effect prior to adjudication are applicable and that the Commission ruled on the *Joint Petition* within six (6) months of its filing. In addition, Party Staff argues that the statute provides no distinction between a “traditional” rate case and a “party staff assisted” rate case.¹¹ Party Staff’s brief further asserts that the intervention of the Consumer Advocate produces neither a legal nor factual justification for awarding delay costs as requested by the Company. In addition, Party Staff asserts that the Commission’s previous finding allowed deferral of rate case expense for future consideration but does not authorize deferral of any other extraneous expense such as delay costs.¹²

Position of the Consumer Advocate

The Consumer Advocate submitted testimony indicating that it does not object to the proposed rate increase for recovery of legal, regulatory, and administrative costs.¹³ In its brief on delay costs, the Consumer Advocate counters each of Superior’s arguments for delay costs. First, the Consumer Advocate states that the number of days from the date of filing of the *Joint Petition*, September 9, 2022, until and the Commission hearing and ruling on the *Joint Petition*, February 27, 2023, is only 171 days. The Consumer Advocate argues that since the General Assembly defines

⁹ *Party Staff’s Objection to Recovery of “Delay Costs” as Part of Rate Case Expense Recovery*, p. 4 (May 5, 2023).

¹⁰ *Brief in Support of Party Staff’s Objection to Recovery of “Delay Costs” as Part of Rate Case Expense Recovery*, pp. 4-5 (June 30, 2023).

¹¹ *Id.* at 5-6.

¹² *Id.* at 6-8.

¹³ David N. Dittmore, Pre-Filed Supplemental Testimony, p. 2 (June 30, 2023).

deciding a rate case as “speedily as possible” as being “not later than nine (9) months after the filing of the increase, change or alteration,” that the *Joint Petition* adjudication was not delayed. In addition, the Consumer Advocate notes that the Company did not seek to apply an emergency application of the proposed rate as permitted by statute.¹⁴

Further, the Consumer Advocate asserts the only hearing date set in this docket was February 27, 2023, as listed in the procedural schedule jointly filed by all parties. Additionally, the Company did not formally oppose the Consumer Advocate’s intervention and discovery and the filing of a joint procedural schedule demonstrates the Company’s acceptance of the Consumer Advocate’s participation in this docket. The Company, therefore, has no grounds to complain of a delay caused by such participation.¹⁵

Finally, the Consumer Advocate asserts the request of the Company to recover delay cost is effectively retroactive ratemaking in that it would allow the Company to recover revenue the Company would have liked to have collected had the new rates gone into effect at the time the Company desired. The Consumer Advocate avers that if delay costs are granted, customers would “‘pay for past use,’ which is the essence of retroactive ratemaking.”¹⁶ Further, the Consumer Advocate states an award of delay costs would set a harmful precedent for future rate cases and the functions of the Consumer Advocate.¹⁷

THE HEARING

The Hearing on the *Recovery Motion* was held before the voting panel of Commissioners during the regularly scheduled Commission Conference on August 14, 2023, as noticed by the Commission on August 3, 2023. Participating in the Hearing were the following parties and their

¹⁴ *Consumer Advocate’s Response Brief in Opposition to Superior Wastewater Systems, LLC’s Request for “Delay Costs”*, pp. 5-8 (June 30, 2023).

¹⁵ *Id.* at 8-10.

¹⁶ *Id.* at 10 (citing *Consumer Advoc. Div. ex re. Tennessee Consumers v. Tennessee Regul. Auth.*, No. M199902151COAR12CV, 2000 WL 13794, at *3 (Tenn. Ct. App. Jan. 10, 2000).

¹⁷ *Id.* at 10-11.

respective counsel:

Superior Wastewater Systems, LLC – Phillip Byron Jones, Esq., Evans, Jones & Reynolds, 401 Commerce Street, Suite 710, Nashville, TN 37219.

Consumer Advocate Division in the Attorney General's Office – Mason Rush, Esq. and Vance Broemel, Esq., Office of the Tennessee Attorney General, P.O. Box 20207, Nashville, Tennessee 37202-0207.

Tennessee Public Utility Commission Party Staff – Ryan McGehee, Esq., Tennessee Public Utility Commission, 502 Deaderick Street, 4th Floor, Nashville, Tennessee 37243.

The panel heard the arguments of counsel on behalf of the parties. The panel solicited comments from the public, but no member of the public sought to be heard.¹⁸

FINDINGS AND CONCLUSIONS

Upon consideration of the pleadings, briefs, Pre-Filed Testimony, the entire administrative record, and the presentations of counsel of the parties at the Hearing, the panel found that there is no objection to the legal, regulatory, and administrative expenses submitted by Superior. The panel found that the documentation provided by Superior was sufficient to prove legal costs in the amount of \$19,378, regulatory costs in the amount of \$13,400, and administrative costs in the amount of \$5,060. Therefore, the voting panel unanimously approved Superior's recovery of \$37,838 over an 18-month period for a monthly charge of \$6.01 per customer.

Further, the Commission considered the Company's request for delay costs. Superior asserts that delay costs are appropriate in this docket because statutory authority requires the rate case to advance expediently, the rate increase was necessary to stop the Company's continued losses, statutory deadlines are intended for traditional rate cases rather than staff-assisted rate cases, the intervention of the Consumer Advocate was unprecedented and caused delay, and the rate case should have proceeded as an uncontested hearing but was delayed by the Consumer Advocate. The voting panel found these arguments to be without merit.

¹⁸ Transcript of Hearing, pp. 10-32 (August 14, 2023).

First, with regard to matters increasing, altering, or changing rates and charges, Tenn. Code Ann. § 65-5-103 provides, “the commission shall give the investigation preference over other matters pending before it and shall decide the matter as speedily as possible, and in any event, *not later than nine (9) months after the filing of the increase, charge or alteration.*” The *Joint Petition* was filed on September 9, 2022. The Commission heard the parties’ proof and arguments on the *Joint Petition*, deliberated, and delivered its decision during the Commission Conference on February 27, 2023, less than six (6) months subsequent to the date the *Joint Petition* was filed. Therefore, the Commission’s decision was well within the established statutory deadline.

Second, Superior could have demonstrated to the Commission that emergency circumstances existed or that the Company’s credit or operations would be materially impaired or damaged in a request to immediately put the proposed rate into effect. However, Superior made no request of the Commission. The Commission has rendered its decision on the rate case. The time in which to assert that circumstances exist that require the application of a proposed rate while the *Joint Petition* was pending has passed.

Third, Tenn. Code Ann. § 65-5-103 does not characterize or define a “traditional” rate case, a “non-traditional” rate case, or a “staff-assisted” rate case. Hence, the time frames and deadlines set forth in the section, including those time frames which allow for the application of a proposed increase six (6) months after the filing of a rate case and the immediate application of a proposed increase in emergency circumstances during the initial three (3) months after the filing of a rate case, apply to all rate cases.

Superior’s fourth and fifth arguments are based upon the premise that the Consumer Advocate’s intervention in the rate case was unprecedented and unnecessary and was the sole reason that the Commission’s decision was not rendered on October 11, 2022. In essence, Superior now objects to the Consumer Advocate’s *Petition to Intervene*.¹⁹ Superior not only did not timely object

¹⁹ *Consumer Advocate Petition to Intervene* (October 25, 2022).

to the Consumer Advocate's intervention, but also submitted joint filings with the Consumer Advocate as well as Party Staff, filing a *Joint Filing of Proposed Procedural Schedule* on November 29, 2022. Superior's objection to the Consumer Advocate's intervention is untimely. Therefore, Superior is deemed to have waived any objection to the Consumer Advocate's intervention.

Finally, the award of delay costs as requested by Superior is against the legal and public policy principles of ratemaking. The Commission engages in ratemaking on a prospective basis and has "no statutory authority to fix rates retroactively ... except in very limited circumstances."²⁰ Superior seeks to apply proposed rates to a time period during which the *Joint Petition* had not been adjudicated and was still pending before the Commission. While statutory mechanisms do exist that would permit application of a proposed rate to such a time period, as discussed above, Superior did not timely seek to apply these permissible rate increases. Generally, to seek the application of an approved increased base rate to a time period prior to the Commission's decision to approve such increased rate is very clearly a request that the Commission fix a retroactive rate. Therefore, the voting panel found that any award of delay costs as requested by Superior would constitute prohibited retroactive ratemaking. As a result, the panel voted unanimously to deny any amount of recovery for delay costs.

IT IS THEREFORE ORDERED THAT:

1. The request of Superior Wastewater Systems, LLC for recovery of \$37,838 for rate case expense associated with legal, regulatory, and administrative costs is approved.
2. The request of Superior Wastewater Systems, LLC for recovery of \$29,951 for delay costs is denied.
3. Superior Wastewater Systems, LLC shall recover approved rate case expenses over an 18-month period through a monthly charge of \$6.01 per customer.

²⁰ *Am. Ass'n or Retired Persons v. Tenn. Pub. Serv. Comm'n*, 896 S.W.2d 127, 134 (Tenn. Ct. App. 1994). *See also* *Tenn. Am. Water Co. v. Tenn. Reg. Auth.*, 2011 WL 334678, 15 (Tenn. Ct. App. 2011); *South Central Bell Tel. Co. v. Tenn. Pub. Serv. Comm.*, 675 S.W.2d 718, 719 (Tenn. Ct. App. 1984).

4. Superior Wastewater Systems, LLC shall file a tariff reflecting the approved rate case expense monthly charge and the 18-month period for which such charge shall be effective.

5. Any person who is aggrieved by the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within fifteen (15) days from the date of this Order; and

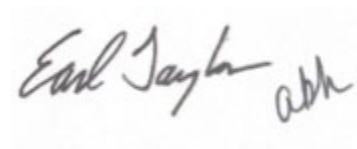
6. Any person who is aggrieved by the Commission's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty days from the date of this Order.

FOR THE TENNESSEE PUBLIC UTILITY COMMISSION:

**Chairman Herbert H. Hilliard,
Vice Chairman David F. Jones,
Commissioner Robin L. Morrison,
Commissioner Clay R. Good, and
Commissioner John Hie concurring.**

None dissenting.

ATTEST:

A handwritten signature in dark ink, appearing to read "Earl Taylor" followed by a stylized monogram "abh".

Earl R. Taylor, Executive Director