



City of Tacoma
Hearing Examiner

September 28, 2017

Eivor Donahue
Reidar Ilvedson
Superlon Plastics
2116 Taylor Way
Tacoma, WA 98421-4302
(First Class & Electronic Mail Delivery)

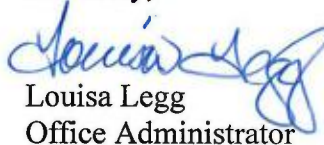
Jessica Ludwig, Sr. Account Executive
Jennifer Collins Ramos CS Supervisor
Tacoma Public Utilities
3628 S. 35th Street
Tacoma, WA 98409-3192
(Interoffice & Electronic Mail Delivery)

Re: *Superlon Plastics Co., Inc. v. Tacoma Public Utilities*
File No. HEX 2017-019 (CA #100229357)

Dear Parties,

In regard to the above referenced matter please find enclosed a copy of the Hearing Examiner's Findings of Fact, Conclusions of Law, and Decision entered on September 28, 2017.

Sincerely,



Louisa Legg
Office Administrator

Enclosure (1) – Findings, Conclusions, and Decision

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through City of Tacoma Mail Services to the parties or attorneys of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED September 28, 2017 at Tacoma, WA.



1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **SUPERLON PLASTICS CO., INC.,**
4 a Washington corporation,

5 **Appellant,**

6 **v.**

7 **TACOMA PUBLIC UTILITIES,**

8 **Respondent.**

HEX NO. 2017-019
(CA # 100229357)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION

9
10 **THIS MATTER** came on for hearing before JEFF H. CAPELL, Hearing Examiner
11 for the City of Tacoma, Washington (the “City”), on September 7, 2017. At the hearing,
12 Appellant Superlon Plastics Co., Inc., a Washington corporation (“Superlon” or “Appellant”) appeared, *pro se* through its representatives Eivor Donahue, Secretary/Treasurer, and Reidar
13 Ilvedson, President. Tacoma Public Utilities (“TPU”) was represented by Jennifer Collins
14 Ramos, Customer Service Supervisor, and Jessica Ludwig, Senior Account Executive.

15
16 Witnesses were placed under oath and testified. Exhibits were admitted and reviewed,
17 and both parties presented opening statements. Superlon gave a closing argument as well.

18 At the conclusion of the hearing, the Hearing Examiner left the evidentiary record
19 open until close of business on September 15, 2017, to allow the Appellant to submit the
20 specific dollar amounts that it disputes for the invoiced billing of both “fire service penalties”
21

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

ORIGINAL

1 and demand charges.¹ At the close of business on September 15, 2017, the record closed
2 without any additional submissions from Superlon.

3 Based upon the evidence submitted, the Hearing Examiner makes the following:

4 **FINDINGS OF FACT**

5 1. Superlon started its operations in Tacoma making non-toxic, plastic pipe in
6 1962, using just one machine. *Donahue Testimony.*

7 2. Starting in 2006, Superlon added another, more powerful machine to its
8 operation that required significantly more electric power to operate. *Donahue Testimony.*
9 Superlon made certain upgrades to its electrical system in order to accommodate the new
10 machine's electrical needs, including, among other things, a new "box" at its own expense.
11 *Donahue Testimony.*

12 3. As an industrial power user, Superlon is assessed a demand charge in addition to
13 being charged for its actual electricity usage/consumption. *Donahue Testimony, Ilvedson*
14 *Testimony, Collins Ramos Testimony; Exhibit A-1, Exhibit R-9, Exhibit R-12—Tacoma*
15 *Municipal Code ("TMC") 12.06.215, Exhibit R-16.*

16 4. TPU defines "demand" as "an average electrical load over a specific time
17 interval; ...expressed in kilowatts ("kW") of power." *Exhibit R-16.* "Tacoma Power charges
18 its larger commercial and industrial customers for the highest 'peak' power used each month."
19 *Exhibit R-16.* Demand charges are calculated using "Rate Schedule G" found at *TMC*
20 12.06.215.
21

¹ "Demand charges" are also referred to as "delivery charges" at various places in the record. *See e.g., Exhibit R-16, p.1, Exhibit A-1.*

1 5. Demand charges calculated using “Rate Schedule G” are imposed on customers
2 whose peak usage exceeds 50 kW hours (“KWh”) in any given month during the previous two
3 year period. *Collins Ramos Testimony; TMC 12.06.215*. TPU explained, through testimony,
4 that demand (or delivery) charges are based on TPU’s long range planning in order to be able
5 to deliver electric power to all customers, even on the highest demand day of any given year.
6 *Ludwig Testimony; Exhibit R-16*.

7 6. Superlon testified that it understands the reason for demand charges, but feels the
8 application of demand charges to Superlon at present is unfair given Superlon’s low level of
9 actual power usage. *Ilvedson Testimony, Donahue Testimony*. Superlon’s recent demand
10 charges have, in some cases, far exceeded its actual use charges. *Ilvedson Testimony, Donahue*
11 *Testimony; Exhibit A-1*. TPU testified that, at present, the only way for Superlon to be moved
12 out of “Rate Schedule G” to “Rate Schedule B” (*TMC 12.06.170*) would be for Superlon to
13 not exceed 50 kWh of usage in any given month for at least a one year period. *Collins Ramos*
14 *Testimony, Ludwig Testimony*.

15 7. Superlon does not claim that there is any malfunction with its meter or its
16 electrical system generally. *Donahue Testimony*. Superlon admitted that when its operation is
17 fired up, the resulting electric power usage probably elevates it into the “Rate Schedule G”
18 category of customer, thereby requiring demand charges be applied, even if that level of
19 operation only occurs approximately once a month at present. *Donahue Testimony, Ilvedson*
20 *Testimony*.

21 8. Over the course of the last two years, environmental remediation at Superlon’s

1 site has severely hampered its operations. *Donahue Testimony, Ilvedson Testimony.* Superlon
2 has suffered losses of access, the departure of its two best sales staff, and loss of use of
3 approximately half of its total site, including storage area, among others. *Donahue Testimony,*
4 *Ilvedson Testimony.* Superlon testified that it is typically not making pipe more than one day a
5 month, and that the business is on the verge of closing. *Donahue Testimony, Ilvedson*
6 *Testimony.* Superlon also testified that the environmental remediation is not related to
7 Superlon's use of the property, but rather relates to a prior owner and its use of the property.
8 *Donahue Testimony, Ilvedson Testimony.*

9 9. As a result of its limited operation and level of actual power usage, Superlon
10 believes it is unfair to place it in "Rate Schedule G" and assess demand charges. *Donahue*
11 *Testimony, Ilvedson Testimony.* Superlon testified that there should be another category
12 besides "Rate Schedule G" and "Rate Schedule B," that would be more applicable to
13 Superlon's particular situation, i.e. infrequent operation with low, overall monthly actual
14 usage, coupled with high spikes in kWh usage when in operation. *Donahue Testimony,*
15 *Ilvedson Testimony.*

16 10. In addition to its contention that its demand charges are unfair, Superlon also
17 testified briefly regarding "fire service penalties" that were assessed in connection with water
18 usage at its site. *Donahue Testimony.* Superlon's contention was that because no leaks were
19 ever confirmed in Superlon's water system, the fire service penalties assessed were

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1 unfounded, presumably in their entirety.² Neither Superlon, nor TPU had a total figure for fire
2 service penalties at the hearing; although TPU testified that it “waived” just over \$13,000 in
3 fire service penalties as a result of no leak being found.³ Superlon did not refute the amount of
4 the waiver, but instead contended that it thought there were fire service penalties assessed in
5 excess of the amount already credited back. TPU’s testimony was that, because no leak was
6 found on the Superlon property, the fire service penalties should be credited back to Superlon.
7 There was no testimony that some other category of fire service penalty was assessed here,
8 although TPU did speculate about that being a possibility. TPU did testify that after no leak
9 was found, it assumed that the usage error was due to TPU equipment somehow, and that
10 Tacoma Water (a division of TPU) had given direction that the fire service penalties be
11 credited back. *Collins Ramos Testimony; Exhibit R-1, Exhibit R-14.*

12 11. TPU testified that contact with Superlon regarding demand charges and fire
13 penalty charges began in February of 2017. *Collins Ramos Testimony; Exhibit R-2, Exhibit R-*
14 *3.* Those communications culminated in TPU suggesting that Superlon request “Demand
15 Ratchet Relief.” *Collins Ramos Testimony; Exhibit R-2.* Tacoma Power Staff Procedure B-5
16 outlines the procedures for “Demand Ratchet Relief” as well as the criteria for granting the
17 same. *Collins Ramos Testimony; Exhibit R-6.* After going through the “Demand Ratchet
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19

20 ² The Examiner requested that Superlon review its interaction with TPU regarding the “fire service penalties” and
21 submit an exact dollar figure for its requested relief from the “fire service penalties” assessed. The Examiner left
the record open for Superlon to do so. No submission was received prior to the agreed deadline of September 15,
2017.

³ The total amount TPU “waived” appears to be \$13,370.83 from *Exhibit R-1* and *Exhibit R-14*. Although TPU
refers to this amount as having been waived, if the fire service penalties were baseless in that no leak was found on
the Superlon property, characterizing them as “rescinded” or “credited back” would be more proper. TPU does, in
fact, refer to the \$13,370.83 amount as a “credit” on the last page of *Exhibit R-1*.

1 Relief” process, Superlon was denied relief and this appeal followed. *Collins Ramos*
2 *Testimony; Exhibit R-7.*

3 12. As its requested relief Superlon requested that the City “take another look at the
4 50 kWh figure and adjust it to a more realistic figure,” and that the “figure needs to be
5 changed because it can be exceeded in one instance.” Both Superlon witnesses testified that,
6 “There needs to be another option.” *Ivedson Testimony, Donahue Testimony.*

7 13. Any Conclusion of Law deemed to be properly considered a Finding of Fact is
8 hereby adopted as such.

9 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the
10 following:

11 CONCLUSIONS OF LAW

12 1. Except where otherwise noted below, the Hearing Examiner has jurisdiction over
13 the parties and the subject matter of this case pursuant to *Tacoma Municipal Code (“TMC”)*
14 1.23.050 B.21.

15 2. The appellant in these proceedings bears the burden of proof to establish, by a
16 preponderance of the evidence, that the matter is consistent or inconsistent with applicable
17 legal standards and that the lower decision should be reversed.⁴ The Hearing Examiner’s
18 review of the matter is *de novo*.⁵

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⁴ *TMC* 1.23.070 C.

⁵ *TMC* 1.23.060.

1 3. TPU, as a municipal utility, is obligated by law to bill the cost of utility services
2 provided.⁶

3 4. Pursuant to RCW 35.63.130, the local “[l]egislative body may vest in a hearing
4 examiner the power to hear and decide those issues it believes should be reviewed and
5 decided by a hearing examiner, including but not limited to: ... (b) Appeals of administrative
6 decisions or determinations; ... The present matter is an appeal of an administrative decision
7 to impose and collect utility charges.

8 5. As evidenced by the foregoing, hearing examiners are creatures of statute and
9 have only the authority they are given by those same statutes. In the present matter, as stated
10 above, that authority comes from *TMC* 1.23.050 B.21, which states as follows:

11 B. In regard to the matters set forth below, the Examiner shall conduct
12 adjudicative proceedings, maintain a record thereof, and enter findings of fact,
conclusions of law, and a final decision or other order, as appropriate: ...

13 21. Appeals arising from the imposition of charges for service issued by the
14 Department of Public Utilities, as well as those arising from disputes
15 concerning utility service, use of watershed or other Department property, and
16 termination of any use; provided, that the Hearing Examiner shall not
adjudicate claims with respect to any rate set by the City Council in a rate
ordinance nor hear any challenge to the rate-making process (Chapters 12.06
and 12.10);

17 6. Superlon’s requests for relief in this matter are essentially as follows:

18 A. a request to waive the application of demand charges given Superlon’s
19 low level of actual usage under its current circumstances;

20 B. a request to re-categorize Superlon to something other than a “Rate
21 Schedule G” customer so that demand charges do not apply; and

⁶ See, e.g., RCW 35.92.010, 80.28.080-090; *TMC* 12.06.010, .040, .110, and .160. See also *Hous. Auth. of King v. Northeast Lake Wash. Sewer & Water Dist.*, 56 Wn. App. 589, 784 P.2d 1284 (1990) rev. denied 115 Wn.2d 1004 (1990).

1 C. to rescind the imposition of “fire service penalties” in excess of the
2 \$13,370.83 already credited back as unfounded because no leak was
found.

3 7. Waiver is an equitable remedy.⁷ Washington courts generally are in agreement
4 that hearing examiners do not have the discretion to grant equitable remedies unless the ability
5 to do so is expressly granted in authorizing legislation.⁸

6 8. RCW 35.63.130 and *TMC* 1.23, the Tacoma Hearing Examiner’s authorizing
7 legislation, do not grant the authority to fashion equitable remedies, but rather limit the
8 Hearing Examiner to applying the Tacoma Municipal Code and applicable Washington State
9 law only.

10 9. Similarly, the Hearing Examiner does not have the authority to exempt Superlon
11 from the application of *TMC* 12.06.215 and “Rate Schedule G,” nor does the Hearing
12 Examiner have the ability to create a different rate option for Superlon as it requested at
13 hearing. To do so would take legislative action that is outside the purview and authority of the
14 Hearing Examiner.

15 10. The Hearing Examiner does have the authority to decide “Appeals arising from
16 the imposition of charges for service issued by the Department of Public Utilities, as well as
17 those arising from disputes concerning utility service...”⁹ The dispute over fire service
18 penalties falls into this category. Evidence presented, and testimony at the hearing showed that

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20 ⁷ See e.g., *Go2Net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 254, 143 P.3d 590, 593 (2006).

21 ⁸ *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 638 689 P.2d 1084 (1984); see also *Bjarnson v. Kitsap County*, 78 Wn. App. 840, 843, 899 P.2d 1290, (1995) (*The scope and nature of an administrative appeal or review must be determined by the provisions of the statutes and ordinances which authorize them*). *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998) (*The power of an administrative tribunal to fashion a remedy is strictly limited by statute*).

⁹ *TMC* 1.23.050 B.21.

1 there was no basis, after investigation, for assessing the fire service penalties, and showed
2 further that TPU intended to credit back the fire service penalties. *Collins Ramos Testimony*.

3 11. Any Finding of Fact deemed to be properly considered a Conclusion of Law is
4 hereby adopted as such.

5 Based upon the foregoing Findings of Fact and Conclusions of Law the Hearing
6 Examiner makes the following:

7 **DECISION**

8 1. Superlon's request to waive the application of demand charges assessed on its
9 customer account is denied in that the Hearing Examiner does not have the authority to waive
10 application of these charges as enacted and applied under *Tacoma Municipal Code* section
11 12.06.215.

12 2. Superlon's request to re-categorize its customer account to something other
13 than "Rate Schedule G" so that demand charges do not apply is also denied due to the Hearing
14 Examiner's lack of authority over what is essentially a request for legislative relief.

15 3. Finally, to the extent that there are any outstanding fire service penalties in
16 excess of the \$13,370.83 already credited back to Superlon, arising from the suspected, but
17 unconfirmed leak, TPU shall credit that excess back to Superlon in its next, feasible billing
18 cycle.

19 **DATED** this 28th day of September, 2017.

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21 _____
JEFF H. CAPELL, Hearing Examiner

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION**

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

1 **NOTICE**

2 **RECONSIDERATION/APEAL OF EXAMINER'S DECISION**

3 **RECONSIDERATION:**

4 Any aggrieved person or entity having standing under the ordinance governing the matter, or
5 as otherwise provided by law, may file a motion with the Office of the Hearing Examiner
6 requesting reconsideration of a decision or recommendation entered by the Examiner. A
7 motion for reconsideration must be in writing and must set forth the alleged errors of
8 procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14
9 calendar days of the issuance of the Examiner's decision/recommendation, not counting the
10 day of issuance of the decision/recommendation. If the last day for filing the motion for
11 reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next
12 working day. The requirements set forth herein regarding the time limits for filing of motions
13 for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for
14 reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set
15 forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole
16 discretion of the Examiner to determine whether an opportunity shall be given to other parties
17 for response to a motion for reconsideration. The Examiner, after a review of the matter, shall
18 take such further action as he/she deems appropriate, which may include the issuance of a
19 revised decision/recommendation. (*Tacoma Municipal Code 1.23.140*).

11 **APEAL OF EXAMINER'S DECISION TO MUNICIPAL COURT:**

12 **NOTICE**

13 Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing
14 Examiner's decision is appealable to Tacoma Municipal Court. Any court action to set aside,
15 enjoin, review, or otherwise challenge the decision of the Hearing Examiner shall be
16 commenced within 21 days of the entering of the decision by the Examiner, unless otherwise
17 provided by statute.