

**IN THE TENNESSEE REGULATORY AUTHORITY  
AT NASHVILLE, TENNESSEE**

<b>IN RE:</b>	)	
	)	
<b>PETITION OF TENNESSEE</b>	)	
<b>WASTEWATER SYSTEMS, INC. TO</b>	)	<b>DOCKET NO. 15-00025</b>
<b>AMEND ITS CERTIFICATE OF</b>	)	
<b>CONVENIENCE AND NECESSITY</b>	)	

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**CONSUMER ADVOCATE’S RESPONSE TO OPPOSITION OF TENNESSEE  
WASTEWATER TO CONSUMER ADVOCATE’S PETITION TO INTERVENE**

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The Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”) files this *Response* to the *Opposition of Tennessee Wastewater Systems, Inc.*, (“TWSI”) to the *Consumer Advocate’s Petition to Intervene*.

In the *Opposition of Tennessee Wastewater to Consumer Advocate’s Petition to Intervene*, TWSI seeks to bar the Consumer Advocate from participating and representing the interests of consumers in the proceeding at the Tennessee Regulatory Authority (“TRA”) convened to rule on TWSI’s request to amend its Certificate of Convenience and Necessity (“CCN”). TWSI is seeking to amend its CCN in order to add a new territory called The Enclave at Dove Lake in Williamson County.

TWSI asserts that the consumers represented by the Consumer Advocate have no legal interest in this proceeding because “[t]his is an application to provide service at a yet-to-be-built subdivision [and] [t]here are no ‘consumers of public utilities service’ who will be affected by the Authority’s decision.” *Opposition of Tennessee Wastewater to Consumer Advocate’s Petition to Intervene* (“*Opposition*”) at 2.

This argument by TWSI, however, is without merit. As will be shown, already existing consumers have an interest in this case because this is a proceeding to amend a CCN. The

existing consumers receiving service under this un-amended CCN have an interest in this proceeding because, as set forth in the Consumer Advocate's Petition to Intervene, these consumers' rates or quality of service could be affected by a decision to expand service at a time when TWSI's resources are already over-extended by failures and problems at at least four existing sites.

In demonstrating that current consumers have an interest in this CCN amendment proceeding, the Consumer Advocate is by no means conceding that its duty and authority to represent consumers is limited to existing consumers only. But since this is the main argument of TWSI, the Consumer Advocate is addressing it first.

It should also be noted that this Petition to amend a CCN involves the setting of rates, a matter of clear interest to consumers. The whole point of a CCN is to certify that a utility is legally allowed to serve the public. As a matter of course an order from the TRA will set forth the rates the utility is allowed to charge consumers. It is difficult to imagine a greater interest of consumers than the rates they are charged.

In addition, the Consumer Advocate maintains it has a clear right to intervene under Tenn. Code Ann. § 65-4-5-310(a)(1), which is part of the statute governing intervention in administrative proceedings, because that statute provides, *inter alia*, for intervention by any party that "qualifies as an intervenor under . . . [a] provision of law." As will be shown, the Consumer Advocate qualifies under Tenn. Code Ann. § 65-4-118(b) which provides as follows:

(b)(1) The consumer advocate division has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division may, with the approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the authority or any other administrative, legislative or judicial body and initiate such proceeding, in accordance with the Uniform Administrative

Procedures Act, compiled in title 4, chapter 5, and the rules of the authority.

Tenn. Code Ann. § 65-4-118(b).

Finally, Tenn. Code Ann. § 65-4-310(b) grants the TRA the authority to allow intervention “in the interests of justice” even if no legal rights of the intervenor are at issue. The Consumer Advocate maintains that the “interests of justice” clearly support its intervention.

**I. ALREADY EXISTING CONSUMERS HAVE AN INTEREST IN THIS PROCEEDING TO AMEND A CCN**

The argument by TWSI that there are as yet no consumers and therefore no legal interest at stake fails to recognize that this is a proceeding to amend a CCN which does in fact cover hundreds if not thousands of already existing consumers. The *Petition* at issue in this proceeding is entitled “*Petition of Tennessee Wastewater Systems, Inc. to amend its Certificate of Convenience and Necessity*”. The *Petition* to amend the CCN was prepared and filed by the Operations Manager of TWSI, while the pleading in opposition to the Consumer Advocate was prepared by another person. In preparing the pleading in opposition, however, TWSI should have been aware of the nature of the filing made to initiate this proceeding, which is a proceeding to amend rather than grant a new CCN.

It is the practice of TWSI to have one “master” CCN that it amends each time it seeks to expand into a new service territory. The *Petition* to amend its CCN in this case provides as follows:

Tennessee Wastewater Systems, Inc. (“TWSI”) petitions the Tennessee Regulatory Authority (“TRA”) to amend TWSI’s Certificate of Convenience and Necessity to expand its service area to include a portion of Williamson County known as The Enclave at Dove Lake subdivision.

*Petition of Tennessee Wastewater Systems, Inc. To amend its Certificate of Convenience and Necessity* at 1 (emphasis added).

The pleading in opposition to the Consumer Advocate's intervention mistakenly asserts that "[i]n this docket, TWSI seeks a certificate of convenience and necessity to provide service at a new development in Williamson County called "The Enclave at Dove Lake," which is designed for approximately 165 homes." *Opposition* at 1. Based on the filing that initiated this proceeding, however, there is no doubt that this is a proceeding to amend a CCN, not grant a new one as the pleading in opposition to the Consumer Advocate's *Petition to Intervene* seems to imply.

The Consumer Advocate's *Petition to Intervene* explicitly referred to the fact that already existing consumers have an interest in the CCN proceeding to amend the CCN:

Consumers have an interest in this proceeding because it is consumers who are being asked or will be asked by TWSI to pay for the correction of environmental and/or design/construction/maintenance problems. If the new project is not within TWSI's resources at this time or will result in further environmental and/or design/construction/maintenance problems, this would be an additional financial burden on consumers.

*Petition to Intervene* at 3.

In its *Petition to Intervene*, the Consumer Advocate sets out with great specificity the facts that support its contention that failures and problems at at least four sites currently run by TWSI are having or will have a financial impact on consumers, a situation that could be exacerbated by expanding into a new territory at this time:

4. At the time TWSI is seeking to expand its service area to include the Enclave at Dove Lake, TWSI has at least four matters pending at TDEC which involve significant and costly environmental and/or design/construction/maintenance problems. The significance of these environmental and/or design/construction/maintenance problems is demonstrated by the

fact that TWSI has had to file a special request for a rate increase of over \$1 million at the TRA in Docket No. 14-00136 to cover the expected cost of fixing these problems.

5. In its *Petition of Tennessee Wastewater Systems, Inc. for Approval of Capital Improvement Surcharges and Financing Arrangements*, TRA Docket No. 14-00136, attached as **Exhibit A** (exhibits omitted), TWSI lists the four facilities for which it holds CCNs and for which it is seeking special funding of over \$1 million to address significant environmental and/or design/construction/maintenance problems: (1) Summit View Resort; (2) Maple Green; (3) Cedar Hill; and (4) Smoky Village. *Id.* at 2-5.

*Petition to Intervene* at 3-4.

Finally, this amendment to a CCN involves, by necessity, a settling of rates, a clear legal interest of consumers. When the TRA approves a CCN or an amendment to a CCN it is telling the public that a public utility is now allowed to offer service to the public. A vital part of service to the public is the rate for that service. Accordingly, when a CCN is granted or amended, the order granting that CCN or amendment invariably sets forth the rate at which the service is offered. Thus, when TWSI was allowed to amend its CCN in a case involving The Villages at Norris Lake the order provided as follows:

2. The Petitioner's rates for wastewater service shall be as listed in the Tariff and rate schedules filed in this docket on November 9, 2006.

TRA Docket No. 06-00277, *Order Approving Petition to Amend Certificate of Public Convenience and Necessity* (April 11, 2005) at 4.

Similarly, when TWSI's CCN was last amended the order provided as follows:

3) The rates for wastewater service shall be as listed in the Tariff and rate schedules filed in this docket on January 22, 2014.

TRA Docket No. 14-00006, *Order Approving Petition to Amend Certificate of Public Convenience and Necessity* (Sept. 3, 2014) at 8.

Therefore, the current consumers of TWSI who are served under the CCN TWSI is seeking to amend have a legal interest in this proceeding. Accordingly, the Consumer Advocate's *Petition to Intervene* should be granted.

**II. THE CONSUMER ADVOCATE QUALIFIES AS AN INTERVENOR UNDER THE UNIFORM ADMINISTRATIVE PROCEDURES ACT AND ITS OWN STATUTE**

The Uniform Administrative Procedures Act ("UAPA") at Tenn. Code Ann. § 4-5-310 governs intervention in administrative proceedings. § 4-5-310(a)(2) of the UAPA provides as follows:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

.....

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law;

Tenn. Code Ann. § 4-5-310(a)(2).

In its opposition to the Consumer Advocate's *Petition to Intervene*, TWSI refers to Tenn. Code Ann. § 4-5-310(a)(2) but does not quote the entire provision:

The CAPD is statutorily authorized to represent "the interests of Tennessee consumers of public utilities service." T.C.A. § 65-4-118(b). In order to intervene as a matter of right in this proceeding, the Advocate must "set forth with particularity those facts that demonstrate" that "the legal rights, duties, privileges, immunities or other legal interests" of those consumers "may be determined in the proceeding." TRA Rule 1220-1-2-.08(2); T.C.A. § 4-5-310(a)(2).

*Opposition* at 2 (emphasis added).

TWSI omitted the phrase "or that the petitioner qualifies as an intervenor under any provision of law" from its citation of Tenn. Code Ann. § 4-5-310(a)(2). This omission is crucial

because under the provision of law in Tenn. Code Ann. § 65-4-118(b) the Consumer Advocate is given the “duty and authority” to represent the interest of Tennessee consumers of public utilities services:

(b)(1) The consumer advocate division has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division may, with the approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the authority or any other administrative, legislative or judicial body and initiate such proceeding, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and the rules of the authority.

Tenn. Code Ann. § 65-4-118(b)(1) (emphasis added). Significantly, Tenn. Code Ann. § 4-5-310(a)(2) explicitly refers to the “duties” as one of the bases for intervention.

The Consumer Advocate’s enabling statute places no limit on the definition of “consumers.” Granted, the statute does not say “consumers, past present, and future,” but any interpretation that does not include past, present, and future consumers would lead to absurd results, and the Legislature is presumed to pass laws such as the enabling statute in such a way that avoids absurd results. *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010).

For example, if the definition of consumers included only existing consumers, under TWSI’s argument the Consumer Advocate would be unable to represent any consumer who was wrongfully terminated by a utility, or who discontinued service with a utility and was owed a refund, because such a consumer would not at the present moment be a consumer of utility services.

Similarly, under TWSI’s argument, the Consumer Advocate would never be able to participate in any CCN hearing because by their very nature CCNs are required before a public utility can offer any service to any consumer. So if a utility with a bad record for financial

mismanagement and customer overcharges in another state sought to do business in Tennessee, the Consumer Advocate, under TWSI's logic, would be prohibited from presenting the fact of that record in a CCN proceeding because as of the moment of the CCN application the would-be utility would have only would-be consumers.

Significantly, the TRA's own wastewater rules recognize that potential or prospective consumers have rights. Rule 1220-4-14 provides as follows:

- (1) No public wastewater utility shall deny or discontinue service to any customer without first providing adequate notice to the customer; provided, however, where an emergency exists or where fraudulent use is detected, or where a dangerous condition is found to exist on the customer's premises, the public wastewater utility may cut off water service without such notice by use of the cutoff valve or by agreement with the water provider. When a prospective customer is refused service, or an existing customer has service discontinued under the specific provisions included in the public wastewater utility's tariff approved by the Authority, the public wastewater utility shall notify the customer promptly of the reason. The customer notification shall include an explanation of the Authority's dispute resolution process found in Rule 1220-1-3. A copy of such notification or other documentation shall be sent within five (5) business days to the local county health department and the Authority. A customer who has had service denied or discontinued has the right to a contested case hearing.

Rule 1220-4-13-.14 ("Denying or Discontinuing Service")(emphasis added).

It should be noted that Rule 1220-4-13-.14 refers to "denying" service to a "customer" ("[n]o public utility shall deny or discontinue service to any customer . . ."). Under TWSI's hair-splitting logic, however, a utility brought before the TRA for improperly denying service to a "customer" would have the Alice in Wonderland defense that a person who was denied service could not be a "customer" because they were not yet receiving service! Surely such an absurd result should not be countenanced by the TRA because "customer" must mean more than a person presently receiving service.

TWSI cites three cases in support of its position that the Consumer Advocate should not be allowed to intervene “as a matter of right in this proceeding.” *Opposition* at 2-3. These three cases, however, are readily distinguishable from the present case.

First, TWSI cites TRA Docket 08-00202 in which a wastewater utility, King’s Chapel Capacity (“KCC”) sought to intervene in a rate case brought by TWSI. *Opposition* at 2. KCC argued that rates charged by TWSI would “potentially impact the other people in the wastewater industry,” i.e., other competitors. TRA Docket No. 08-00202, *Initial Order on Petitions for Reconsideration of the Discretionary Grant of Limited Intervention, and Report and Recommendation to Separate Corollary Issues into New Docket (“Initial Order”)* (Jan. 22, 2009) at 6-7.

While it is correct that the Hearing Officer found that KCC had not set forth a “legal right” as a basis to intervene under Tenn. Code Ann. § 4-5-310(a), he did find that KCC had shown that limited intervention was proper under Tenn. Code Ann. § 4-5-310(b) which provides that intervention may be allowed “at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of these proceedings.” *Initial Order* at 6-7. Curiously, TWSI’s pleading in opposition to the Consumer Advocate’s *Petition to Intervene* fails to mention in its discussion of the KCC case that KCC’s petition was actually granted, albeit in a “limited” manner.

Furthermore, the KCC case is distinguishable from the present case primarily because in the present case the Consumer Advocate has established that the legal rights of consumers are at issue. As previously stated, this is a proceeding to amend a CCN which applies to numerous existing consumers whose rates and quality of service could be affected by the proposed

expansion. Furthermore, as shown, CCNs by necessity involve rate setting and rates are always a consumer concern and right.

In addition, unlike in the KCC case, the Consumer Advocate is not intervening on behalf of “competitors.” That was the basis for KCC’s intervention, so that is another reason the KCC case is distinguishable from the present case.

The second case cited by TWSI is TRA Docket 11-00181, in which a telephone company applied for a certificate to offer service to inmates at jails and correctional facilities in Tennessee. *Opposition* at 2. A competing carrier sought intervention merely on the basis that it was a competitor of the CCN applicant. TRA Docket No. 11-00181, *Petition to Intervene* (April 20, 2012) at 1 (“As a competitor in the inmate telephone business, Pay-Tel’s legal rights, duties, privileges, immunities or other legal interests may be determined in this proceeding.”).

The Hearing Officer found that mere competitor status was not a sufficient basis for intervention, but did allow limited intervention under Tenn. Code Ann. § 4-5-310(b) (again, the pleading in opposition fails to note this fact in the discussion of this case). TRA Docket No. 11-00181 and 11-00182, *Initial Order of the Hearing Officer Granting Limited Intervention to Pay-Tel Communications, Inc.* (Aug. 9, 2012) at 15-19.

Thus, the Pay-Tel/Telemate case stands for nothing more than the proposition that a mere assertion of competitor status fails to state a legal right or interest at issue in a CCN case. Since the Consumer Advocate is not basing its intervention on competitor status, this case is inapplicable to the present case.

The third case cited by TWSI is TRA Docket No. 14-00041, a “show cause” proceeding initiated by the TRA against TWSI. The TRA did deny the Consumer Advocate’s *Petition to Intervene* in that docket. However, the basis of that denial was the fact that it was a “show cause”

proceeding and that the Consumer Advocate had no right to be a party in that particular form of proceeding. TRA Docket No. 14-00041, *Order Denying Petition to Appeal and Affirming the Initial Order of the Hearing Officer* (June 4, 2014) at 16. (“Nevertheless, while the TRA’s enforcement and application of its CCN statute and rules may be of interest to consumers generally, and the property owners of The Villages have shown over the course of Docket No. 13-00017 that they are interested in the outcome of this matter, in light of the purpose of these proceedings, the assertion that a legal right, duty, privilege, immunity or other legal interest held by an actual consumer of public wastewater utility service will be determined in this proceeding appears tenuous.”).<sup>1</sup>

The present case, however, is not a “show cause” proceeding. Accordingly, Docket No. 14-00041 is not a precedent for the present case.

In summary, the Consumer Advocate has established that it qualifies as an Intervenor under the UAPA and the Consumer Advocate statute, Tenn. Code Ann. § 65-4-118(b)(1). Accordingly, intervention should be granted.

### **III. INTERVENTION BY THE CONSUMER ADVOCATE IS IN THE INTERESTS OF JUSTICE**

Even if it is found that the Consumer Advocate has no “statutory right” to intervene under Tenn. Code Ann. § 4-5-310(a), intervention by the Consumer Advocate is clearly in the interests of justice. Accordingly, intervention should be granted.

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<sup>1</sup> The Consumer Advocate disagreed and continues to disagree with the position that “show cause” proceedings are unique contested cases that are an exception to the UAPA statute governing intervention. Thus, in the Consumer Advocate’s view, the position set forth by the Hearing Officer in TRA Docket Nos. 11-00181 and 11-00182 is still correct: “. . . the Hearing Officer finds that the requirements for intervention are the same regardless of type of utility, industry, or contested case proceeding at the TRA.” TRA Docket Nos. 11-00181 and 11-00182, *Initial Order of the Hearing Officer Granting Limited Intervention to Pay-Tel Communications, Inc.* (Aug. 9, 2012) at 18 (emphasis added).

**CONCLUSION**

For the foregoing reasons, the Consumer Advocate's *Petition to Intervene* should be granted.

RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script that reads "Vance L. Broemel". The signature is written in black ink and is positioned above a horizontal line.

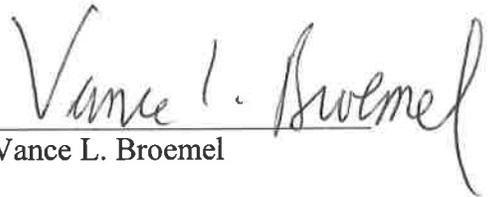
VANCE L. BROEMEL (BPR #11421)  
Senior Counsel  
Consumer Advocate and Protection Division  
P.O. Box 20207  
Nashville, Tennessee 37202-0207  
(615) 741-8733  
(615) 741-1026 FAX

CERTIFICATE OF SERVICE

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

Henry Walker, Esq.  
Bradley Arant Boult Cummings, LLP  
1600 Division Street, Suite 700  
Nashville, TN 37203  
615-252-2363

This the 6<sup>th</sup> day of April, 2015.

  
Vance L. Broemel