

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 02, 2015

IN RE:)
) **DOCKET NO.**
PETITION OF TENNESSEE WASTEWATER SYSTEMS,) **15-00025**
INC. TO AMEND THEIR CCN TO EXPAND ITS)
SERVICE AREA TO INCLUDE A PORTION OF)
WILLIAMSON COUNTY IN TENNESSEE, KNOW AS)
THE ENCLAVE AT DOVE LAKE)

ORDER GRANTING CONSUMER ADVOCATE’S PETITION TO INTERVENE

This matter is before the Hearing Officer of the Tennessee Regulatory Authority (“Authority” or “TRA”) on the *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General (“CAPD” or “Consumer Advocate”) on March 18, 2015.

BACKGROUND

On February 20, 2015, Tennessee Wastewater Systems, Inc. (“TWSI”) filed a *Petition of Tennessee Wastewater Systems, Inc. to Amend its Certificate of Convenience and Necessity* (“*Petition*”) seeking to amend its Certificate of Public Convenience and Necessity (“CCN”) to include a portion of Williamson County known as The Enclave at Dove Lake subdivision.

PETITION TO INTERVENE AND POSITIONS OF THE PARTIES

Consumer Advocate

The Consumer Advocate filed a *Petition to Intervene* on March 18, 2015 seeking to intervene in these proceedings pursuant to Tenn. Code Ann. § 65-4-118, which qualifies the

Consumer Advocate to intervene in proceedings before the Authority in order to represent the interests of Tennessee consumers of public utility services.¹ The Consumer Advocate requests that its intervention be granted because “the consumers’ interests, rights, duties or privileges may be determined or affected by the proceeding.”² According to the Consumer Advocate, it seeks to intervene in this docket to “request the TRA to determine whether it is appropriate at this time for Tennessee Wastewater Systems, Inc. (“TWSI”) to be permitted to amend its Certificate of Convenience and Necessity (“CCN”) in order to build a new wastewater system in light of environmental and/or design/construction/maintenance problems that have arisen with other systems it built and operates.”³ The Consumer Advocate asserts that:

[c]onsumers 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.⁴

The Consumer Advocate filed the *Consumer Advocate’s Response to Opposition of Tennessee Wastewater to Consumer Advocate’s Petition to Intervene* (“CAPD Response”) on April 6, 2015. The Consumer Advocate argues that existing customers receiving service from TWSI have an interest in this proceeding because “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 least four existing sites.”⁵ Further, the CAPD points out that Tenn. Code Ann. § 65-4-310(b) gives the TRA authority to grant an intervention in the

¹ Tenn. Code Ann. § 65-4-118(b)(1) states, “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.”

² *Petition to Intervene*, p. 1 (March 3, 2015).

³ *Id.*

⁴ *Id.* at 3.

⁵ *CAPD Response*, p. 2.

interests of justice even when the intervenor has no legal rights at issue.⁶ In addition, the CAPD avers that the amendment to the CCN involves setting of rates, which is “a clear legal interest of consumers.”⁷

TWSI

On March 25, 2015, TWSI filed its *Opposition of Tennessee Wastewater to Consumer Advocate’s Petition to Intervene* (“*TWSI Opposition*”) in which it argues that there are no consumers of public utilities who will be impacted by the Authority’s decisions because the subdivision has not yet been built.⁸ TWSI states that the Consumer Advocate has not discussed whether it has a legal right to intervene under § 4-5-310(a) but rather questions its managerial, technical, and financial capability to take on a new project. According to TWSI, the Consumer Advocate’s concerns regarding construction and design of the wastewater system are directed at the wrong state agency, and any concerns the TRA has about TWSI will be raised by the TRA.⁹ Because the Consumer Advocate has failed to show a legal interest, TWSI asserts that the *Petition to Intervene* should be denied.¹⁰

On May 13, 2015, TWSI filed a *Motion to File Reply and Affidavits and Reply to Consumer Advocate Regarding Petition to Intervene* (“*TWSI Reply*”). TWSI states that the *CAPD Response* raises issues that were not raised in the *Petition to Intervene*, and TWSI has not yet addressed these issues and requests permission to file a reply pursuant to TRA Rule 1220-1-2-.06.¹¹ In the *TWSI Reply*, TWSI asserts that the Consumer Advocate has argued that it has a statutory right to intervene pursuant to Tenn. Code Ann. § 65-4-118(b) in at least three other

⁶ *Id.* at 3.

⁷ *Id.* at 5.

⁸ *TWSI Opposition*, p. 2 (March 25, 2015).

⁹ *Id.* at 4-5.

¹⁰ *Id.*

¹¹ *TWSI Reply*, p. 1 (May 13, 2015).

dockets and each time the argument has been rejected by the Authority.¹² TWSI states that “in light of the agency’s consistent rulings against the Advocate’s interpretation, there is no reason to debate this issue again.”¹³ TWSI also argues that no new rates will be set in this docket, and the “future customers who may someday reside in the Enclave at Dove Lake have no legally protected interest in the outcome of the application proceeding.”¹⁴ Therefore, TWSI argues, “[t]hese ‘future customers’ whom the Advocate claims to represent do not yet exist and, if the development fails, may never exist.”¹⁵ According to TWSI, “the Authority has held in several similar cases that a would-be intervenor who might be indirectly affected by a TRA proceeding but had no direct interest at stake is not entitled to intervene as a matter of right in those proceedings.”¹⁶ TWSI maintains that “the possibility that TWSI might become ‘overextended’ by the addition of new territory is hardly sufficient in light of the TRA’s prior rulings” to be considered a legal right or interest.¹⁷

TWSI also argues that the Consumer Advocate should not be allowed to intervene as a matter of agency discretion under Tenn. Code Ann. §4-5-310(b) because it would delay the prompt and orderly conduct of the proceedings.¹⁸ TWSI avers that “[b]ased on the Advocate’s experience at the Authority, it is reasonable to assume that the Advocate’s participation in this docket would delay the proceeding by several months and equally reasonable to assume that such delay would cause financial harm to the developer.”¹⁹ In support of its position, TWSI attached affidavits of the developer and the person who is selling the property to the developer. TWSI maintains that the affidavits explain that “the closing of the sale of the property is contingent

¹² *Id.* at 1-2.

¹³ *Id.* at 2.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.* at 6. Emphasis in original.

¹⁷ *Id.*

¹⁸ *Id.* at 7.

¹⁹ *Id.*

upon the developer having obtained, among other things, ‘the approval of wastewater services that are the subject of this proceeding.’”²⁰

MAY 14, 2015 STATUS CONFERENCE

A Status Conference was held in this matter before the Hearing Officer on May 14, 2015. The Status Conference was noticed on May 11, 2015, and both parties were represented by counsel. Participating in the hearing were the following parties and their respective counsel:

Tennessee Wastewater Systems Inc. – Henry W. Walker, Esq., Bradley Arant Boult Cummings, LLP, 1600 Division Street, Suite 700, Nashville, TN 37203.

Consumer Advocate – Vance Broemmel, Esq., Office of the Attorney General, 425 Fifth Avenue North, Fourth Floor, John Sevier Building, P.O. Box 20207, Nashville, TN 37202.

During the Status Conference, the Hearing Officer granted TWSI’s *Motion to File Reply*, and the parties presented oral argument on the CAPD’s *Petition to Intervene*.

FINDINGS & CONCLUSIONS

Tenn. Code Ann. § 4-5-310(a) sets forth the following criteria to be considered in reviewing a petition to intervene in Authority proceedings:

- (a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if;
 - (1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;
 - (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 the law; and
 - (3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.²¹

²⁰ *Id.* quoting Affidavit of Gary R. Sanford, p. 2 (May 13, 2015).

²¹ Tenn. Code Ann. § 4-5-310(a); *see also* Tenn. Code Ann. § 65-2-107: “All persons having a right under the provisions of the laws applicable to the authority to appear and be heard in contested cases as defined in this chapter

In addition, Tenn. Code Ann. § 4-5-310(b) provides:

The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.

This provision gives the TRA the discretion to grant a petition to intervene if it determines that granting the intervention is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.²²

TWSI has “at least four matters pending at TDEC [Tennessee Department of Environment and Conservation] which involve significant and costly environmental and/or design/construction/maintenance problems.”²³ The CAPD is seeking intervention to ask the TRA to determine whether it is appropriate to amend TWSI’s CCN to serve an additional area in light of the current TDEC issues. In addition, TWSI has filed for a rate increase to cover the expected cost of repairs to treatment facilities that were ordered by TDEC, which will impact consumers. Considering the TDEC issues and potential impact to consumers by granting TWSI’s *Petition*, the Hearing Officer finds that it is in the interests of justice that the Consumer Advocate be allowed to intervene.

Further, the Hearing Officer finds that this proceeding is in its early stages, and discovery has not formally commenced, nor has a hearing date been established; therefore, allowing the Consumer Advocate to intervene would not impair the orderly and prompt conduct of the proceedings. The Consumer Advocate has stated it has “no intention of delaying this and we’ll be glad to abide by any procedural schedule the TRA wishes.”²⁴

shall be deemed parties to such proceedings for the purposes of this chapter. In addition, the authority may upon motion allow any interested person to intervene and become a party to any contested case.”

²² Tenn. Code Ann. § 4-5-310(b).

²³ *Petition to Intervene*, p. 3 (March 18, 2015).

²⁴ Transcript of Proceedings, p. 9 (May 14, 2015).

THEREFORE, upon due consideration, the Hearing Officer concludes that the Consumer Advocate's *Petition to Intervene* should be granted because it is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

IT IS THEREFORE ORDERED THAT:

1. The *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General is granted.

2. The Consumer Advocate and Protection Division of the Office of the Attorney General may intervene and participate as a party in this proceeding and, as such, shall receive copies of any notices, orders, or other documents filed herein.


Monica Smith-Ashford, Hearing Officer