GREGORY T YOUNG
TEL (615) 742-7756
FAX (615) 742-0445
gyoung@bassberry com

BASS, BERRY & SIMS PLC

A PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

AMSOUTH CENTER
315 DEADERICK STREET, SUITE 2700
NASHVILLE, TN 37238-3001
(615) 742-6200

www bassberry.com

OTHER OFFICES

NASHVILLE MUSIC ROW
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MEMPHIS

March 28, 2005

VIA HAND DELIVERY

Mr Pat Miller, Chairman
Attn: Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: ***Petition of Tennessee Wastewater Systems, Inc. to Amend its Certificate of Convenience and Necessity*, Docket No. 03-00329**

Dear Chairman Miller:

Enclosed for filing in the above-referenced docket are the original and fourteen copies of the City of Pigeon Forge's Brief in Response to Director Jones' Motion to Review. Please return one copy stamped "filed" to our office via hand delivery.

Should you have any questions with respect to this filing, please do not hesitate to contact me at the number shown above. Thank you in advance for your assistance with this matter.

Sincerely,

Gregory T Young

GTY/kw
Enclosure

cc. Jim Gass, Esq. (w/enclosure)

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF ON-SITE SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY	)	**Docket No. 03-00329**
	)	
and	)	
	)	
PETITION OF TENNESSEE WASTEWATER SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY	)	**Docket No. 04-00045**

THE CITY OF PIGEON FORGE'S BRIEF
IN RESPONSE TO DIRECTOR JONES' MOTION TO REVIEW

INTRODUCTION & ISSUES

On February 4, 2005, Hearing Officer Randall L. Gilliam filed the *Initial Order Approving In Part, and Denying In Part, Petition to Amend Certificate of Convenience and Necessity* ("*Initial Order*") in this matter. On February 22, 2005, Director Jones moved that the Directors of the Tennessee Regulatory Authority (the "Authority") review two issues in the *Initial Order*. (See, *Motion to Review Initial Order of Hearing Officer Issued on February 4, 2005* (hereinafter "*Motion to Review*").) On March 14, 2005, the other Directors granted Director Jones' motion. Director Jones requested review of the following issues:

(1) Did the Hearing Officer correctly determine that "it is reasonable to construe the term 'utility water service,' as used in Tenn. Code Ann. § 6-51-301(a)(1998) as including sanitary sewer service"?

(2) Did the Hearing Officer correctly determine that granting a certificate of convenience and necessity ("CCN") places "additional legal and administrative burdens on private companies who later seek to provide service in the area covered by the CCN"?

BRIEF SUMMARY

Based on Director Jones' *Motion to Review* and its statutory basis (T.C.A. § 4-5-315(a)), the City of Pigeon Forge (the "City") understands that the Authority only seeks to review the two issues set forth in the *Motion to Review*, rather than reconsidering the entire *Initial Order* and its result. As instructed in the *Motion to Review*, the City has limited this Brief to the two specific issues raised by Director Jones.[1] The City concurs with the determinations of the Hearing Officer with respect to both issues raised in the *Motion to Review*.

As to the first issue, the Hearing Officer did not conclusively determined that utility water service includes sanitary sewer service in T.C.A. § 6-51-301(a). Instead, the Hearing Officer complied with the Authority's statutory obligations related to the public's interests pursuant to § 65-4-201(a) and found that the potential exclusivity created by a countywide CCN was contrary to public convenience and necessity. A determination that exclusivity is likely or possibly created under T.C.A. § 6-51-301(a), rather than attempting to make a final, binding determination as to the meaning of water utility service, is the Authority's appropriate consideration in this matter pursuant to § 65-4-201(a). Because the potential exclusivity is created under state annexation laws instead of the Authority's enabling act, only a court can make a final, binding determination regarding the meaning of utility water service. There is ample evidence in the record to support the Hearing Officer's determination that this potential exclusivity, along with numerous other risks, greatly outweighed any purported benefits of a countywide CCN.

As to the second issue, the plain language of T.C.A. §§ 65-4-201 and 203 support the Hearing Officer's interpretation of the legal and administrative burdens associated with those

[1] The City refers the Authority to the City's *Post-Hearing Brief* (filed 8/13/04) and *Post Hearing Reply Brief* (filed 8/27/04) in support of its positions as to other issues in this matter

statutes. Contrary to public convenience and necessity, the countywide CCN sought here was an apparent attempt by the Petitioner to "lock up" territory so that future applicants must face the additional burdens under § 203(a). By denying the countywide CCN, the Authority preserves a level playing field between decentralized sewer utilities, allows the public to choose the best on-site sewer system for its needs, and ensures that each project specific system is in best interests of the public.

DISCUSSION

I. Standard of Review.

A. The Authority only seeks to review the two issues raised by Director Jones.

Director Jones' *Motion to Review* was submitted pursuant to section 315(a) of the Tennessee Uniform Administrative Procedures Act (T.C.A. § 4-5-315(a)).[2] (*Motion to Review*, p.1.) It is the City's understanding that the Authority is limiting its review of the *Initial Order* to the two specific issues raised by Director Jones pursuant to § 4-5-315(a)(2)(A), rather than attempting to reconsider the entire *Initial Order* and its result. Section 315(a)(2)(A) provides:

> (a) The agency upon the agency's motion may, and where provided by federal law or upon appeal by any party shall, review an initial order, except to the extent that:
>
> (2) The agency in the exercise of discretion conferred by statute or rule of the agency:
>
> (A) Determines to review some but not all issues, or not to exercise any review.

(emphasis added)

The Authority clearly possesses the discretion required under § 315(a)(2), and the *Motion to Review* clearly requests that the Authority review some, but not all, issues associated with this matter: "For the foregoing reasons, I move that the panel review the two issues set forth above."

[2] The City notes that it may be questionable whether Director Jones' *Motion to Review* constitutes an "agency" motion as required by § 315(a), and whether the other Directors' grant of such motion was timely under the 15-day time constraint of the *Initial Order* and the Tennessee Uniform Administrative Procedures Act.

(*Motion to Review*, p. 2.) The *Motion to Review* does not request reconsideration of the entire *Initial Order* and its result. Nor has any party to this matter requested such reconsideration. Therefore, the City understands that the Authority's review is limited to the two specific issues raised by Director Jones' *Motion to Review*.

II. The Hearing Officer's determinations as to the meaning of "utility water service" within T.C.A. § 6-51-301 were appropriate and consistent with the Authority's statutory obligations under T.C.A. § 65-4-201.

A. The Hearing Officer and Attorney General conducted separate and distinct analyses with respect to T.C.A. § 6-51-301.

The Hearing Officer and the Attorney General each conducted different analyses as to section 301(a). The utility water service question was posed to the Attorney General for a yes or no answer. The Attorney General analyzed the utility water service issue in "black and white", "all or nothing" fashion. The Hearing Officer, however, analyzed the utility water service issue within the framework of the Authority's certificate of convenience and necessity statute (T.C.A. § 65-4-201), and, therefore, the Hearing Officer's analysis was limited to whether it might be reasonable for a court to construe utility water service as including sanitary sewer service. Unlike the Attorney General, it was not necessary for the Hearing Officer to conclusively determine the meaning of utility water service with a yes or no answer. The Hearing Officer's task was to determine whether the potential exclusivity of § 301(a) benefited or burdened public convenience and necessity with respect to the countywide CCN sought by the Petitioner. The different analysis of the Attorney General and the Hearing Officer explain how different conclusions could arise as to the meaning of utility water service within § 6-51-301(a).

B. It is not necessary for the Authority to attempt to make a final, binding determination as to the meaning of "utility water service" within § 301(a). Only a Tennessee court has jurisdiction to make a final, binding determination as to § 301(a).

Under Tenn. Code Ann. § 6-51-301(a)(1), "no municipality may render utility water service to be consumed in any area outside its municipal boundaries when all of such area is included within the scope of a certificate or certificates of convenience and necessity . . . in favor of any person, firm or corporation authorized to render such utility water service." "Utility water service" is not defined in the statute. In the only court decision to address the meaning of utility water service in § 301(a), the Tennessee Court of Appeals assumed that the term "utility water service" includes sewer service within the scope of the § 301. Lynnwood Utility Corp. v. City of Franklin, No. 89-360-II, 1990 WL 38358, at *3 (Tenn. Ct. App. Apr. 6, 1990). In an earlier decision, the Court of Appeals held that § 301(a) only applies prospectively. Westland Drive Service Co. v. Citizens & Southern Realty Investors, 558 S.W.2d 439 (Tenn. Ct. App. 1977).

The Authority does not have jurisdiction to limit Lynnwood or Westland or to make a final, binding determination regarding the meaning of utility water service in § 301 – only a court can take such action. The Westland decision is particularly instructive on this point. In that case, Westland brought a lawsuit pursuant to T.C.A. § 6-51-301(a)(1) (then, § 6-319) seeking to enjoin the Knoxville Utilities Board ("KUB") from furnishing water to an apartment complex outside the Knoxville city limits and within Westland's certificated area. Westland, 558 S.W.2d 439, 440. Westland had previously filed a complaint with the Public Service Commission, which affirmed Westland's exclusive franchise, but refused to restrain KUB because it had no jurisdiction. Westland, at 440. The Court of Appeals noted that the case was not a review of the Commission's order, but rather an independent action in which the apartment complex and KUB were charged with

violating § 301(a). Id. at 441. The Court thus held the Commission's order had "no binding effect" on a court, and that the order was, at most, "merely persuasive evidence." Id.

While the City takes some comfort in the Attorney General's opinion[3] that "utility water service" does not include sewer service, Attorney General opinions are not binding upon Tennessee courts either. See, State v. Blanchard, 100 S.W.3d 226, 230 (Tenn. Ct. Crim App. 2002) ("We note first that opinions of the state attorney general are merely advisory and do not constitute legal authority binding on this Court."), citing, Washington County Bd. of Education v. MarketAmerica, Inc., 693 S.W.2d 344, 348 (Tenn. 1985).

There is no controlling authority to contradict Lynnwood's assumption that utility water service includes sewer service under § 301(a) and Westland's holding that § 301(a) applies prospectively. In the present matter, it is neither necessary nor definitive for the Authority to attempt to determine whether or not "utility water service" includes sewer service. The Authority's role is to recognize the potential exclusive effect of § 301(a) and, along with other factors, consider whether the potential exclusivity that would result from a countywide CCN is in the interests of public convenience and necessity pursuant to T.C.A. § 65-4-201(a). In so doing, the Hearing Officer has already correctly determined in the *Initial Order* that the countywide CCN at issue was not required by public convenience and necessity.

C. The *Initial Order* does not make a final, binding determination.

Rather than attempting to make a final determination as to § 301(a), the Hearing Officer recognized the potential exclusive effect of § 301(a) and, along with numerous other factors,

[3] Tenn Op. Atty. Gen No 04-134

determined that public convenience and necessity did not require the countywide CCN at issue.

(See, *Initial Order*, pp. 27-40.) With regard to § 301(a), the *Initial Order* states:

> The Hearing Officer finds that based on the treatment of the term "utility water service" by the courts to date, and based on the Legislature's ability to distinguish between potable water service and sanitary sewer service when it so chooses, it is reasonable to construe the term "utility water service," as used in Tenn. Code Ann. § 6-51-301(a) (1998) as including sanitary sewer service. Therefore, the Hearing Officer concludes that a court is likely to find that Tenn. Code Ann. § 6-51-301 (1998) operates to exclude municipalities (and utility districts to the extent that they are deemed "municipalities") from extending into service areas covered by the CCN of a private company.
>
> * * *
>
> The Hearing Officer finds that the present or future public convenience and necessity properly considered under Tenn. Code Ann. § 65-4-201 (2004) includes the present or future public convenience of persons physically located near the present borders of the City and the Utility District and that the legal consequences of the decision rendered in this Docket as to such persons is among the appropriate factors to consider in reaching a decision in this docket.
>
> The Hearing Officer concludes that the Company has not demonstrated that the present or future public convenience and necessity require or will require a CCN inclusive of most of Sevier County.
>
> * * *
>
> The Hearing Officer finds further that granting a countywide CCN may have the undesirable effect of precluding the Utility District or the City from extending service to customers who desire such service. Given that the Hearing Officer has already determined that the present and future public convenience does not require the grant of a countywide CCN in this case, the Hearing Officer finds further that there is no need to create a potential legal impediment to the City and the Utility District which may operate to prevent them from providing service to persons they are presently able to legally serve and who may want their services.

(*Initial Order*, pp. 31-32, 39, 40 (note omitted) (emphasis added).)

As you can see, the Hearing Officer never attempted to conclusively determine the meaning of "utility water service." Instead, the *Initial Order* uses words and phrases like "reasonable to

construe," "likely to find," "may have the undesirable effect," and "potential legal impediment" when discussing § 301(a).

The fact that the *Initial Order* contradicts the opinion of the Attorney General is of no consequence since neither is final, binding authority. The important distinction between the Attorney General opinion and the *Initial Order* is that the *Initial Order* analyzes the "utility water service" issue in terms of what is in the interests of public convenience and necessity under T.C.A. § 65-4-201. The Attorney General opinion makes no such considerations. For these reasons, the rationale and non-binding conclusions of the *Initial Order* with respect to the potential exclusivity of § 301(a) are correct and should be approved by the Authority.

D. The risks of the exclusive effects of § 301(a) along with the other concerns in the Initial Order outweigh any benefits from a countywide CCN.

The risks associated with the exclusive effects of § 301(a) are well documented throughout the record in this matter. Hearing Officer Gilliam recognized these risks at the hearing on July 13, 2004. (See, *Transcript*, p 67.) The City's previously filed briefs and pre-filed testimony also provide the real life example of a county school just beyond the City's limits with failing septic tanks and needing immediate City sewer service because the City's sewer system is best situated to service that school. (See, *Pigeon Forge Exhibit 1*, pp. 15-16.) The City, however, could be forced to deny service to the school because it cannot afford to annex the entire area as required under § 301 just so the school can have sewer service. Under § 301, there is a real possibility that a countywide CCN could exclude the City from providing sewer service to facilities like the school within the City's urban growth area.

Additional questions and concerns arise for the City regarding a countywide CCN. What would happen to the current sewer service being provided in the urban growth area outside of the

City boundaries? Should the City cease, or could the City be required to cease such operations? What impacts would the exclusion have on the City's ability to efficiently and cost-effectively extend sewer service into the urban growth area as its utility infrastructure is expanded?

There are numerous other significant risks associated with the proposed countywide CCN:

- Removing the City's ability to object to future individual decentralized sewer projects within its urban growth area; (*Initial Order* at 37)
- Removing the opportunity for comment by present and future developers and property owners directly affected by decentralized sewer systems in Sevier County; (Id. at 39)
- Requiring persons who seek decentralized sewer services to contract with a single operator and removing their ability to independently choose the least costly and best system for their purposes; (Id. at 39-40)
- Hindering the Authority's ability to individually consider and examine the impact of the installation of decentralized sewer systems within the county; (Id. at 35, 40)
- Bypassing an important regulatory requirement for the Petitioner and imposing additional statutory and administrative requirements on other public utilities seeking to offer service in Sevier County; (Id. at 35-36) and,
- Requiring subsequent CCN applicants to not only satisfy the burden in T.C.A. § 65-4-201 but also the additional burden of proof in § 65-4-203(a) since an existing system would be in place. (Id. at 36.)

Such risks contradict public convenience and necessity under § 65-4-201 and outweigh any benefit that might result from a countywide CCN. Even without conclusively determining the meaning of utility water service, the Authority can and should recognize that the potential risks

associated with a countywide CCN outweigh any benefits. The *Initial Order* currently reflects this analysis and the Authority should approve it as such.

For the reasons set forth in this Section II, the City concurs with the determinations of the Hearing Officer with respect to T.C.A. § 6-51-301. The Authority should approve the findings and conclusions within the *Initial Order* on this first issue.

III. The Hearing Officer correctly determined that "although the grant of a CCN is not exclusive, it does place additional legal and administrative burdens on private companies who later seek to provide service in the area covered by the CCN."

Although the City is a non-utility under T.C.A. § 65-4-101, the City concurs with the Hearing Officer's analysis and interpretations of T.C.A. §§ 65-4-201 and 203 based on the plain language of these statutes. (See, *Initial Order* at 36, 38, 40.) Section 201 requires that a public utility obtain a CCN prior to establishing a system within a municipality or any territory already receiving a like service from another public utility. T.C.A. § 65-4-201(a). If no other public utility is servicing the territory, then the burden an applicant must satisfy is that "the present or future public convenience and necessity require[s] or will require" establishment of the utility system. Id. If another public utility is servicing the territory, then T.C.A. § 65-4-203(a) adds an additional burden upon an applicant by requiring a determination from the Authority that the existing public utility's system is inadequate to meet the public's needs or that the existing utility refused, neglected or is unable to make the necessary additions or extensions. T.C.A. § 65-4-203(a).

In addition to the multiple reasons discussed in Section II above, a countywide CCN in the present case is contrary to public convenience and necessity because it is an apparent attempt by the Petitioner to "lock up" territory so that future applicants must face the additional burdens under § 65-4-203(a). (See, *Initial Order* at 36.) Because of the decentralized nature of these on-site sewer systems, a single utility company could almost always "make such additions and extensions as may

reasonably be required" under § 203(a). This fact makes it difficult, if not impossible, for another public utility to meet the additional burden under § 203(a). The public then suffers by not being able to independently choose the best on-site sewer system for its needs.

Non-utilities that provide similar or alternative services are regulated and controlled under other restrictions and limitations established by the General Assembly under state law. A countywide CCN would place the Authority in an awkward position of creating unintended adverse consequences because of the complex interplay of various state statutes. For example, one consequence of granting a countywide CCN could be to exclude the City from providing services in the certificated area.

By denying the countywide CCN, the Authority preserves a level playing field between decentralized sewer system public utilities, thereby allowing the public to choose the least costly and best system for its purposes. (See, *Initial Order* at 39-40.) The Authority also ensures that each decentralized sewer service provider is strong and able to serve when each individual project specific CCN is sought. There are multiple sources of sewer service available within the City's urban growth area, and it is counter-productive to reduce the competition for such services.

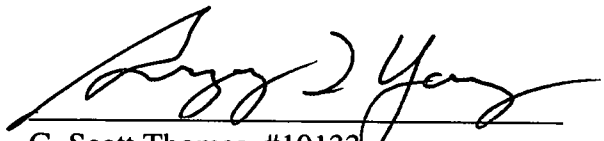
For the reasons set forth in this Section III, the City concurs with interpretations of the Hearing Officer with respect to T.C.A. §§ 65-4-201 and 203. The Authority should approve the findings and conclusions within the *Initial Order* on this second issue.

CONCLUSION

For the reasons stated herein, the City respectfully requests that the Authority affirm the Hearing Officer's determinations with respect to the two issues raised in the *Motion to Review*.

Dated this 28th day of March, 2005.

Respectfully submitted,



G. Scott Thomas #10133
Gregory T. Young #21775
Bass, Berry & Sims, PLC
315 Deaderick Street, Suite 2700
Nashville, TN 37238
615-742-6200
Attorneys for the City of Pigeon Forge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing is being served on the following, via U.S. Mail, postage prepaid, this the 28th day of March, 2005.

Mark Jendrek
Mark Jendrek P.C.
P.O. Box 549
Knoxville, TN 37901

Charles B. Welch, Jr.
Farris, Matthews, Branan, Bobango & Hellen, PLC
618 Church Street, Suite 300
Nashville, TN 37219

Donald L. Scholes
Branstetter, Kilgore, Stranch & Jennings
227 Second Avenue North, 4th Floor
Nashville, TN 37201-1631