FARRIS MATHEWS BRANAN
BOBANGO HELLEN & DUNLAP PLC

ATTORNEYS AT LAW

MEMPHIS DOWNTOWN
One Commerce Square, Suite 2000
Memphis, Tennessee 38103
Telephone 901-259-7100
Facsimile 901-259-7150

HISTORIC CASTNER-KNOTT BUILDING
618 CHURCH STREET, SUITE 300
NASHVILLE, TN 37219

(615) 726-1200 telephone
(615) 726-1776 facsimile

MEMPHIS EAST
1100 Ridgeway Loop Road, Suite 400
Memphis, Tennessee 38120
Telephone 901-259-7120
Facsimile 901-259-7180

Charles B. Welch, Jr
cwelch@farrismathews.com

Reply to
Nashville Office

March 28, 2005

Chairman Pat Miller
Attn: Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

RE: PETITION OF ON-SITE SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY
Docket No. 003-00329 and 04-00045

Dear Chairman Miller:

Please find enclosed an original and 14 copies of the above referenced brief. Please date and stamp a copy for our records

Thank you for your assistance regarding this matter. If you have any questions, or if I may be of further assistance, please do not hesitate to contact me.

Very truly yours,

FARRIS MATHEWS BRANAN
BOBANGO HELLEN & DUNLAP, PLC

Charles B. Welch, Jr.

CBW/jmj

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: PETITION OF ON-SITE SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY

Docket Nos. 03-00329 and 04-00045 (consolidated)

BRIEF IN COMPLIANCE WITH MOTION TO REVIEW INITIAL ORDER OF HEARING OFFICER ISSUED ON FEBRUARY 4, 2005

Comes now East Sevier County Utility District ("District"), by and through counsel, and, in compliance with the motion filed by Director Ron Jones styled "Motion to Review Initial Order of Hearing Officer Issued on February 4, 2005" ("Motion to Review"), tenders the following:

Director Jones, in his Motion to Review filed on February 22, 2005, requested review of two issues, together with briefs and oral arguments on both. Those issues are stated in the Motion to Review as follows:

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"?; and

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"?

On Monday, March 14, 2005, the Tennessee Regulatory Authority ("Authority"), unanimously granted the Motion to Review.

I. Standard of Review.

Pursuant to Tennessee Code Annotated Section 4-5-315(a)(2)(A), "The agency upon the agency's own motion may . . . review an initial order, except to the extent that . . . [t]he agency in the exercise of discretion conferred by statute or rule of the agency . . . determines to review some but not all issues . . .." Tenn. Code Ann. §4-5-315(a)(2)(A).

Pursuant to the language of Director Jones' Motion to Review, and the subsequent action taken by the Authority on March 14, and pursuant to Tennessee Code Annotated section 4-5-315(a)(2)(A), the Authority has elected to review some, but not all, of the issues in the Initial Order, rather than reconsider the entire Initial Order and the ultimate holding set forth therein.

Therefore, the District limits its discussion to the two specific issues under review, the remaining issues, together with the findings and conclusions set forth in the Initial Order, having become final on February 22, 2005.

II. Other than for internal decision-making purposes, the Authority should refrain from attempting to decide whether wastewater services are subsumed within the term "utility water service" as used in Tennessee Code Annotated section 6-51-301(a).

At the outset, the District suggests that while the first issue, regarding what is subsumed within the term "utility water service," may have relevance to the Authority, the ultimate resolution of that issue is not within the Authority's purview.

While the Authority may wish to take a position on this issue, and with all due respect to the Authority, the District suggests that while the Authority may wish to consider this issue, and a position on this issue, in the context of granting a Certificate of Convenience and Necessity ("CCN"), the Authority's decision will not have a binding effect. At first blush, it may seem that the Authority's position on the issue should have an effect on private utilities, and in one respect it may. To the extent the Authority considers this issue in the context of an application for a CCN dealing with site-specific wastewater treatment systems, and the potential harm to municipalities arising under §6-5-301, it is absolutely a valid factor (although more appropriately addressed in connection with Issue No. 2 below). However, by definition, and by the plain language of the statute, while the statute may address private utilities, it applies only to municipalities. Because the Authority has no jurisdiction over the operations of municipal utilities, whatever position the Authority takes with respect to the meaning of the term "utility water service" cannot and will not be binding on municipalities or on a court of competent jurisdiction construing the language of the statute.

This very issue was discussed in the Westland case wherein the Tennessee Court of Appeals held that, in the context of an order issued by the Public Service Commission, the "Commission has no jurisdiction over KUB nor does it have any enforcement powers over Timbers West or other customers of Westland." Westland Drive Service Co., Inc. v. Citizens & Southern Realty Investors, 558 S.W.2d 439, 440 (Tenn. Ct. App. 1977).

Because actions under Tennessee Code Annotated section 6-51-301 would necessarily involve a municipality attempting to render utility water service, and because the Authority (in Westland, the Public Service Commission) has no authority over municipalities, the effect of whether wastewater service is subsumed within "utility water service" it is not a matter capable of being decided, with any binding effect, by the Authority.

While it may be an issue to be construed, as stated above, for policy purposes, and for internal procedures of the Tennessee Regulatory Authority with respect to that level of public convenience and necessity required for the issuance of a CCN, the Authority's position on this issue will be, as described by the Court of Appeals in Westland, "merely persuasive evidence" in any action arising under §6-51-301. Westland, 558 S.W.2d. at 441.

Given that the Authority's position on this issue would be merely persuasive in the context of an action under the statue, and given that the only two authorities to address the issue, the Tennessee Court of Appeals and the Tennessee Attorney General, appear to have taken positions diametrically opposite each other, the District would urge this body to defer a decision on this issue as, in the context of these dockets, the issue is not ripe for determination and there is no justiciable controversy pending in a forum with the authority to construe the statute in a meaningful manner. Any "holding" by the Authority

on this issue would serve only to muddy the already murky waters circulating around the meaning of "utility water service" as used in §6-51-301(a).

That said, the District offers the following substantive discussion with respect to Issue No. 1:

The only case construing the language of Tennessee Code Annotated §6-51-301(a) in the context of wastewater treatment services is an unreported decision of the Middle Section of the Tennessee Court of Appeals, Lynnwood Utility Co. v. City of Franklin, 990 WL 38358 (Tenn. Ct. App. 1990). A copy of the decision is already a part of the record in these dockets.

At issue in Lynnwood was an annexation by the City of Franklin, which included territory encompassed by a CCN issued to Lynnwood Utility Company, a privately-owned public utility, by the Tennessee Public Service Commission. The CCN was issued to provide utility sewer service. Lynnwood was providing sewer service to a portion of the area encompassed by its CCN, but had not extended its system to certain undeveloped areas of its designated service district. It had never refused to do so; at the same time, there had never been a request for service in the undeveloped area.

As a result of the pending development of a large tract of land, part of which was within the area contemplated by Lynnwood's CCN, the City of Franklin annexed the area and agreed to provide water and sewer service to the development. Lynnwood demanded compensation for the City's "taking" of its right to provide sewer service in the portion of

the annexed area covered by Lynnwood's CCN. After the trial court found in favor of the City on the City's Motion for Summary Judgment, Lynnwood appealed arguing that the phrase "utility water service" included sewer service, and that Lynnwood was entitled to compensation for the City's "taking" of its intangible right to provide that service, notwithstanding that Lynnwood had never constructed any physical facilities within the area annexed.

In a carefully worded decision, the Middle Section refused to hold that the phrase "utility water service" included sewer service, and ultimately held that

> While an intangible right to provide sewer services might have some value in the context of the "law of eminent domain" (citations omitted), damages under Tenn. Code Ann. §6-51-301(a)(2) are limited to replacement costs. There is no replacement cost as contemplated by Tenn. Code Ann. §6-51-301(a)(2) for an intangible right to provide sewer services.

Lynnwood, 1990 WL 38358, at 4.

The Lynnwood court clearly left open the issue of whether "utility water service" included sewer service. While it addressed the issue, it did so by providing, "For the purposes of this opinion we assume, without holding, that the term 'utility water service' in the statute includes sewer service and that the sewer service provided by Lynnwood comes within the statute." Lynnwood, 1990 WL 38358, at 3.

The court held, as the basis of its ultimate decision, that the term "facilities," as used in the statute means physical facilities, not a right to construct physical facilities and not a right to serve an area. Further, the court stated that Lynwood had not cited any

authority, nor had the court found any authority, to the effect that a right to serve the annexed area is a "facility" which would be compensable under the statute. Lynnwood, 1990 WL 38358, at 3.

In the Initial Order, the Hearing Officer, in wording obviously as carefully chosen as the wording in the Lynnwood case, did not hold, find, or conclude that the term "utility water service" included wastewater services, but merely provided that "it is reasonable to construe the term 'utility water service' . . . as including sanitary sewer service." (Initial Order p. 32).

Given that the Authority is without the authority to construe Tennessee Code Annotated section 6-51-301 in a manner that is binding on either Pigeon Forge or on East Sevier County Utility District, and given that there is no existing construction of that statute by a forum capable of binding the municipalities, the doctrine of judicial restraint would suggest this issue be left to the context of a justiciable controversy in which the litigants have a sufficient stake in the matter to provide the court the benefit of a full analysis of the matter, as opposed to a hypothetical scenario, as is presented here.

The Tennessee Attorney General, in Opinion No. 04-134, and for the reasons set forth therein, reached a different conclusion from that of the Middle Section of the Tennessee Court of Appeals (dicta though it may be) in the Lynnwood case. Given the discrepant results of the only two authorities who have construed this language, and given the "merely persuasive" effect of any decision by the Authority, the District suggests the

Authority defer to the carefully chosen wording employed by the Hearing Officer, and find that it is reasonable to conclude that the term "utility water service" may include sewer service, without actually producing such a "holding."

III. There are additional legal and administrative burdens on private companies who later seek to provide service in the area covered by a CCN issued to another private company.

The second issue to be reviewed pursuant to Director Jones' motion is "did the Hearing Officer correctly determine that granting a Certificate of Convenience and Necessity ("CNN") places 'additional legal and administrative burdens on private companies to later seek to provide service in the area covered by the CCN'?"

Director Jones indicated that this issue should be reviewed to avoid any confusion as to the future application of Tennessee Code Annotated section 65-4-203. Director Jones further stated that

> Specifically it could be argued that the Hearing Officer's initial order stands for the proposition that Tenn. Code Ann. §65-4-203 applies when a public utility attempts to obtain a Certificate of Convenience and Necessity for an area that is included within the certificated area of another public utility regardless of whether the facilities of the public utilities would be in competition with each other. The panel should determine whether this is the correct precedent to be established by the resolution of these dockets.

The plain language of Tennessee Code Annotated section 65-4-203, the section entitled "Basis for Granting Certificate," specifically provides that

> The Authority shall not grant a Certificate for a proposed route, plant, line, or system, or extension thereof, which will be in competition with any other route, plant, line, or system, unless it shall determine that the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the

> public, or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions as may reasonably be required under the provisions of this part.

Tenn. Code Ann. §65-4-203(a).

In the specific context of these dockets, wherein a public utility in the business of constructing site-specific wastewater treatment systems has requested a CCN for the entire county, the grant of such a CCN would clearly impose additional legal and administrative burdens not only on private companies who later seek to provide site-specific services in the area covered by the CCN, but also, given the potential effect of Tennessee Code Annotated section 6-51-301(a), on municipalities (including utility districts) which also seek to provide services within that area.

The critical issue here arises as a result of the site-specific nature of the wastewater systems, in the context of a geographic-based CCN. The two are incompatible, and that distinction was recognized by the Hearing Officer in his Initial Order.

The threshold set forth in Tennessee Code Annotated section 65-4-201 is simply "that the present or future public convenience necessity require or will require such construction . . .." However, once a CCN has been granted for a particular area, when a second public utility makes application for a CCN within the same area, the standard changes radically.

The second applicant "shall not" receive a certificate without satisfying the additional requirements imposed by Tenn. Code Ann. §65-4-203(a). That is, the second

utility must demonstrate that the existing system is inadequate to meet the reasonable needs of the public or that the current holder of the CCN refuses or neglects or is unable or has refused or has neglected to make such additions and extensions as may reasonably be required to provide the requested service.

Certainly in the context of site-specific wastewater treatment systems it cannot be said, and the hearing officer so found, that the present or future Public Convenience and Necessity requires the issuance of a geographic-based CCN. The requirement that the applicant for a second CCN satisfy the additional elements set forth in §65-4-203 is clearly "additional legal and administrative burden on a private company seeking to provide service in an area covered by a CCN."

Additionally, and outside the context of a private company seeking to provide service in an area already covered by a CCN, the effect of §6-51-301(a) would also impose a significant legal and/or administrative burden on a municipality (including a utility district) as demonstrated by the Westland and Lynnwood cases. Litigation is very expensive. Given the definition of the term "utility water service" has not been decided, it is reasonable to believe that to the extent this issue arises in the future, litigation may again commence, thereby imposing a significant "additional legal and administrative burden" not only on private companies which later seek to provide service in the area covered by the CCN, but also on municipalities as a result of the potential effect of the ultimate resolution of Issue No. 1, above. A geographic-based CCN, subsuming an area

greater than the area contemplated by the site-specific wastewater treatment system, is nothing more than, as the Hearing Officer found, an attempt to "lock up" an area, or "otherwise remove the area from further regulatory oversight." (Initial Order p. 36).

IV. Procedural Note

The District offers one final note regarding procedural matters. The District would like to draw the Authority's attention to the language of Tennessee Code Annotated sections 4-5-315(a) and 4-5-315(b), with respect to filings in this cause subsequent to the entry of the Initial Order. On February 22, 2004, fifteen days following the entry of the Initial Order, Director Jones filed his Motion to Review. The District notes that sections (a) and (b) of 4-5-315 both contemplate "the agency's motion." What was timely filed here was simply a motion by a sole director. Not until March 14, 2005, more than fifteen days following the entry of the Initial Order, did the Authority take action, at which time the Authority unanimously granted Director Jones' Motion to Review.

However,

(a) given that Tennessee Code Annotated §4-5-315(b) specifically states, "If the agency on its own motion decides to review an initial order, the agency shall give written notice of its intention to review the initial order within fifteen (15) days after its entry," and

(b) given that the Authority's action on March 14 (the formal agency action required pursuant to §4-5-315(b)) occurred more than fifteen (15) days from the date of entry of the initial order,

by the language of Tennessee Code Annotated sections 4-5-315 (a) and (b), the Authority is not timely in evidencing its intention to review a portion of the initial order, and review is not appropriate.

The District reserves the right to object that the motion and subsequent Authority action were neither appropriately nor timely made.

Respectfully submitted this 28th day of March, 2005.

Mark Jendrek / with permission CSW

Mark Jendrek, #12993
MARK JENDREK, P.C.
P.O. Box 549
Knoxville, Tennessee 37901
865/824-1900

Charles S Welch Jr.

Charles B. Welch, Jr., #21747
FARRIS, MATTHEWS, BRANAN,
BOBANGO & HELLEN, PLLC
618 Church Street, Suite 300
Nashville, Tennessee 37219
615/726-1200
Attorneys for East Sevier County Utility District

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served upon the following persons by hand delivery or by United States Mail, with proper postage thereon.

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

G. Scott Thomas
Bass, Berry & Sims
AmSouth Center
315 Deaderick Street, Suite 2700
Nashville, Tennessee 37238-3001

This 28th day of March, 2005.

Charles B. Welch, Jr.