

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 16, 2006

IN RE:)	
)	
PETITION OF ON-SITE SYSTEMS, INC. TO)	DOCKET NO.
EXPAND ITS SERVICE AREA TO INCLUDE)	03-00329
AN AREA KNOWN AS SEVIER COUNTY)	
)	
PETITION OF TENNESSEE WASTEWATER)	DOCKET NO.
SYSTEMS, INC. TO EXPAND ITS SERVICE AREA)	04-00045
TO INCLUDE AN AREA KNOWN AS SEVIER COUNTY)	

**ORDER AFFIRMING HEARING OFFICER'S FINDINGS AND CONCLUSIONS
IN INITIAL ORDER ISSUED FEBRUARY 4, 2005**

This matter came before Chairman Ron Jones, Director Pat Miller and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on September 12, 2005 for consideration of the *Motion to Review Initial Order of Hearing Officer Issued on February 4, 2005* ("Motion to Review") filed on February 22, 2005.

BACKGROUND

On February 4, 2005, the Hearing Officer assigned to this docket issued an *Initial Order Approving in Part, and Denying in Part, Petition to Amend Certificate of Convenience and Necessity* ("Initial Order"). Through the *Initial Order*, the Hearing Officer granted to Tennessee Wastewater Systems, Inc. ("Tennessee Wastewater" or "TWS") authority to provide wastewater

service in a specific area but denied TWS's request for a county-wide certificate of public convenience and necessity ("CCN").¹

In rendering the decision on TWS's application to amend its CCN, the Hearing Officer identified the most significant issue as:

Whether the granting of a CCN to one public utility to provide wastewater treatment services in an identified service area operates as an exclusive grant of authority preventing other public utilities or non-utilities from providing wastewater treatment services in the same identified service area.²

Resolution of this issue, according to the Hearing Officer, required interpretation of specific statutes establishing "requirements for obtaining, and conditions for maintaining, authority to operate as a public utility in a specified territory."³

In the *Initial Order*, the Hearing Officer made several findings and conclusions regarding the interpretation and applicability of Tenn. Code Ann. § 6-51-301 (1998) and § 65-4-203 (2004) to the provision of wastewater service. Specifically, the *Initial Order* discussed interpretations of the term "utility water service" as set forth in Tenn. Code Ann. § 6-51-301 (1998) and addressed the issue of granting of a county-wide CCN to a single wastewater service provider in the context of considering the present and future public convenience and necessity.

No party filed a petition for reconsideration or an appeal of the *Initial Order*. On February 22, 2005, Director Ron Jones filed the *Motion to Review*, which specifically requested that the Authority address the following issues:

¹ The Hearing Officer provided a complete recitation of the history of Docket Nos. 03-00329 and 04-00045 as well as an extensive discussion of the underlying record in those dockets which support the decision.

² *Initial Order Approving in Part, and Denying in Part, Petition to Amend Certificate of Convenience and Necessity*, p. 27 (February 4, 2005) ("*Initial Order*").

³ *Id.*

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”?⁴
2. Did the Hearing Officer correctly determine that granting a CCN places “additional legal and administrative burdens on private companies who later seek to provide service in the area covered by the CCN”?

Through the *Motion to Review*, Director Jones requested that the panel examine a portion of the analysis in the *Initial Order* because, in interpreting certain language found in Tenn. Code Ann. § 6-51-301 (1998), the Hearing Officer reached a conclusion different from that expressed in Attorney General Opinion No. 04-134 and because of the potential precedential effect of the Hearing Officer’s conclusion regarding the applicability of Tenn. Code Ann. § 65-4-203 (2004).

At a regularly scheduled Authority Conference held on March 14, 2005, the panel considered the *Motion to Review*. After hearing comments from Director Jones, the panel voted unanimously to review the Hearing Officer’s *Initial Order* and adopted the procedural schedule

⁴ Tenn. Code Ann. § 6-51-301(a)(1) provides:

Notwithstanding any other law, public or private, to the contrary, 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 or other similar orders of the Tennessee regulatory authority or other appropriate regulatory agency outstanding in favor of any person, firm or corporation authorized to render such utility water service. If and to the extent that a municipality chooses to render utility water service to be consumed within its municipal boundaries when all or part of such area is included within the scope of a certificate or certificates of convenience and necessity or other similar orders of the Tennessee regulatory authority or other appropriate regulatory agency outstanding in favor of any person, firm or corporation authorized to render such utility water service, then the municipality and such person, firm or corporation shall attempt to reach agreement in writing for allocation and conveyance to the municipality of any or all public utility functions, rights, duties, property, assets, and liabilities of such person, firm or corporation so affected that justice and reason may require. If, within a reasonable time, the parties cannot agree in writing on allocation and conveyance, then either party may petition the chancery court of the district in which such area is located for a determination of value and damages suffered by such person, firm or corporation as a result of such municipal choice.

for briefs and oral argument by the parties as set forth in the *Motion to Review*.⁵ Pursuant to the procedural schedule, the parties submitted briefs on March 28, 2005, and the panel heard oral argument at the April 4, 2005 Authority Conference.

POSITIONS OF THE PARTIES

Tennessee Wastewater

In its brief addressing Issue No. 1, TWS took issue with the Hearing Officer's statutory construction of Tenn. Code Ann. § 6-51-301 (1998) and reiterated the arguments put forth in its post-hearing brief.⁶ In support of its position, TWS resorted to a rule of statutory construction, which applies the ordinary and plain meaning to words in the statute. Because § 6-51-301(a) (1998) uses the term "utility water service," TWS argued that the statute only applies to water utilities, not sewer utilities. TWS also supported the Attorney General Opinion No. 04-134 which asserted that "a court is likely to conclude that the term 'utility water service' as used in Tenn. Code Ann. § 6-51-301(a) does not include a sanitary sewer."⁷

Regarding Issue No. 2, TWS did not deny that "additional legal and administrative burdens" exist but argued that such burdens are not the result of the CCN process. Specifically, TWS stated:

The language of T.C.A. § 65-4-203 contemplates that a public utility be granted a CCN to serve an area larger than the area the utility may initially be able to serve upon the grant of the CCN. An existing public utility is given the opportunity to provide service within its certificated service area before a competing utility is permitted to serve within the certificated service area. Therefore, to the extent a public utility desires to compete with an existing public utility within its certificated service area, such "additional legal and administrative burdens" have been placed upon the public utility seeking to compete by the legislature not by the original grant of a CCN by the Authority.⁸

⁵ See *Order Granting Motion to Review Initial Order of Hearing Officer Issued on February 4, 2005* (July 12, 2005). Even though the parties to this docket did not seek reconsideration of or an appeal from the *Initial Order*, the *Motion to Review* included a procedural schedule for the parties to brief and/or present oral arguments regarding the two above-mentioned issues.

⁶ *Response of Tennessee Wastewater Systems, Inc. to Director Jones' Motion to Review Initial Order*, p. 2 (March 28, 2005).

⁷ Tenn. Op. Atty. Gen. No. 04-134, 2004 WL 2077452, *2 (August 20, 2004).

⁸ *Id.* at 3.

From this, TWS concluded that once the Authority grants a CCN for a specific geographic area, unless the existing utility fails or refuses or is unable to provide the service, another certificate for the same area could not be granted. TWS then asserted,

[i]f the grant of a CCN to the Company does not impose additional legal and administrative burdens on future private companies desiring to provide sewer service within the Company's certificated service area not contemplated by the legislature, then the Company's Petitions in this consolidated docket should be granted.⁹

East Sevier Utility District

East Sevier Utility District ("East Sevier") argued in its brief, as to Issue No. 1, that the ultimate resolution of what is subsumed within the term "utility water service" is not within the Authority's purview because the Authority has no jurisdiction over the operations of municipal utilities. Nevertheless, East Sevier suggested that:

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."¹⁰

Concerning Issue No. 2, East Sevier pointed out that the site-specific nature of wastewater systems is not consistent with the concept of a geographic-based CCN – a distinction that was recognized by the Hearing Officer in the *Initial Order*. East Sevier stated, "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" because "[t]he second applicant 'shall not' receive a certificate without satisfying the additional requirements imposed by Tenn. Code Ann. § 65-4-203(a)."¹¹ In supporting the Hearing Officer's determination as to Issue No. 2, East Sevier commented,

⁹ *Id.* at 4.

¹⁰ *Brief in Compliance with Motion to Review Initial Order of Hearing Officer Issues on February 4, 2005*, pp. 7-8 (March 28, 2005).

¹¹ *Id.* at 9.

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.”¹²

City of Pigeon Forge

In its brief, the City of Pigeon Forge (the “City”) recognized that the Hearing Officer did not make a conclusive determination that utility water service includes sanitary sewer service for the purposes of Tenn. Code Ann. § 6-51-301(a) (1998). The City stated further,

[t]he 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).¹³

The City considered it proper for the Hearing Officer to acknowledge the potential exclusive effect of § 6-51-301(a) (1998) 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. . . . In so doing, the Hearing Officer has already correctly determined in the *Initial Order* that the county-wide CCN at issue was not required by public convenience and necessity.”¹⁴

Regarding Issue No. 2, although classified as a non-utility under Tenn. Code Ann. § 65-4-101 (2004), the City supported the Hearing Officer’s analysis and interpretations of Tenn. Code Ann. §§ 65-4-201 and 203 (2004). The City stated in its *Response*:

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 statutes. Contrary to public convenience and necessity, the countywide CCN sought here was an apparent attempt by the Petitioner to “lock

¹² *Id.* at 10 (emphasis in original).

¹³ *The City of Pigeon Forge’s Brief in Response to Director Jones’ Motion to Review*, p. 4 (March 28, 2005) (“*Response*”).

¹⁴ *Id.* at 6.

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.¹⁵

The City identified numerous significant risks associated with the granting of a countywide CCN and stated that these risks not only “contradict public convenience and necessity under § 65-4-201” but also “outweigh any benefit that might result from a countywide CCN.”¹⁶

In addition, the City asserted

[n]on-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.¹⁷

FINDINGS AND CONCLUSIONS

Based on a review of the record, the *Initial Order* and the filings and oral argument of the parties as to the *Motion to Review*, the panel made the following findings and conclusions as to the respective issues:

Issue No. 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”?

Initial Order

In reaching the conclusion regarding Tenn. Code Ann. § 6-51-301(a) (1998), the Hearing Officer directly addressed the Attorney General’s Opinion which had asserted that “a court is likely to conclude that the term ‘utility water service’ as used in Tenn. Code Ann. § 6-51-301(a)

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 11.

(1998) does not include a sanitary sewer system.”¹⁸ The Hearing Officer applied a different analysis and reached a different conclusion, stating that it would be just as reasonable to interpret the term “utility water service” as including sanitary sewer service. Based upon this interpretation, the Hearing Officer concluded,

[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 service into areas covered by the CCN of a private company.¹⁹

The Hearing Officer approached an interpretation of the statute focusing on a perspective different from that of the Attorney General’s Office. The specific question posed to and answered by the Attorney General in the Opinion was: “Does a city’s provision of sewer service come within the meaning of “utility water service” under [Tenn. Code Ann. § 6-51-301(a)(1) (1998)] in light of *Lynnwood Utility Company v. Franklin* (citation omitted)?”²⁰ The Attorney General Opinion answered that question stating,

In *Lynnwood*, the Court of Appeals expressly declined to hold that the term “utility water service” as used in the statute included sewer service. This case, therefore, does not provide binding legal authority for including sewer service within that term. Because Tennessee statutes generally list water and sewer service as separate services, a court is likely to conclude that the term “utility water service” as used in Tenn. Code Ann. § 6-51-301(a) does not include a sanitary sewer system. But other statutes, including Tenn. Code Ann. § 7-51-401(c) and Tenn. Code Ann. § 7-82-301(a), could also prohibit a city from extending sewer service beyond its city boundaries.²¹

Rather than providing an interpretation of the term “utility water service” in the context of Section 6-51-301(a)(1), the Attorney General Opinion merely stated a likelihood of how a court might interpret that term. The Hearing Officer, likewise, did not specifically interpret the term. The Hearing Officer reasoned that, based on a review of other Tennessee statutes, an

¹⁸ Tenn. Op. Atty. Gen. No. 04-134, 2004 WL 2077452, *2 (August 20, 2004).

¹⁹ *Initial Order*, p. 32 (citation omitted).

²⁰ Tenn. Op. Atty. Gen. No. 04-134, 2004 WL 2077452, *1.

²¹ *Id.*

interpretation of “utility water service” as including sewer service is just as reasonable and supportable. Moreover, notwithstanding the different conclusions regarding an interpretation of the term, the Attorney General Opinion and the Hearing Officer reached the same conclusion regarding the application of Tenn. Code Ann. § 6-51-301(a) (1998), namely that a city would be prohibited “from extending sewer service beyond its city boundaries.”

The Hearing Officer analyzed several Tennessee statutes in concluding that sewer service could be included in “utility services” because it was not specifically excluded.

A reasonable construction of the term “utility services” based on a plain reading of subsection (d) [which excludes only two types of utility service from the term “utility services” (i.e., gas and telephone service)] would be that the term includes all other types of utility services, including sewer services, that were not specifically excluded by the plain language of the subsection. When the Legislature enumerates specific exceptions to a general law, such specific exceptions are construed to exclude all other exceptions. The Hearing Officer concludes that the term “utility services” under Tenn. Code Ann. § 6-51-301(d) (1998) includes wastewater treatment services because, as the Company has pointed out, if the Legislature had intended to exclude wastewater treatment services from the definition of “utility services” it could have expressly done so just as it did with gas and telephone service.²²

After establishing the reasonableness of including sewer service within Tenn. Code Ann. § 6-51-301 (1998), the Hearing Officer concluded that statute would operate prospectively as to municipalities and prevent such municipalities establishing water utility service after a certain date “from providing utility water service in any area outside the boundaries of such municipalities when such area is included within the scope of a CCN granted by the Authority.”²³

The Hearing Officer also pointed out an inconsistency in the Attorney General Opinion which served to support the Hearing Officer’s conclusion.

²² *Initial Order*, p. 28 (citing *In re A-1 Liquor Distributors*, 269 S.W.2d 785, 788 (Tenn. Ct. App. 1954) citing *Hamilton National Bank v. McCanless*, 144 S.W.2d 768 (Tenn. 1940); *Burns v. City of Nashville*, 178 S.W. 1053 (Tenn. 1915)).

²³ *Initial Order*, p. 29.

The Attorney General's Opinion demonstrates that the Legislature has clearly distinguished water service and sewer service in certain statutes. The Opinion, however, does not explain why the Legislature did not make separate references to water service and sewer service in Tenn. Code Ann. § 6-51-301 (1998). The Opinion's discussion of the various statutes that separately refer to potable water service and sewer service demonstrates that the Legislature can and will clearly distinguish between the two when such is the Legislature's intent.²⁴

The Hearing Officer went on to find that:

[B]ased 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 service into areas covered by the CCN of a private company.²⁵

Issue No. 2: Did the Hearing Officer correctly determine that granting a CCN places additional legal and administrative burdens on private companies who later seek to provide service in the area covered by the CCN?

Initial Order

As to Issue No. 2, the Hearing Officer made specific findings as the basis for concluding that a wastewater treatment company should not be able to obtain a CCN for an entire county (or substantial area) where that requesting company did not intend to provide service to the entire county or area. Specifically, the Hearing Officer determined

the grant of a countywide CCN would result in a bypass of an important regulatory requirement for the Company [TWS] and at the same time automatically impose additional statutory and administrative requirements on other public utilities seeking to offer service in Sevier County. Any public utility seeking a certificate to offer service in the Company's [TWS's] proposed service area would arguably be in competition with the Company's [TWS's] system. The effect of granting a countywide CCN would be that all subsequent applicants for certificates in Sevier County would be required to meet the burden of proof set forth in Tenn. Code Ann. § 65-4-201 (2004), as discussed above, and the additional burden of proof required by Tenn. Code Ann. § 65-4-203(a) (2004)

²⁴ *Id.* at 31.

²⁵ *Id.* at 31-32.

which contemplates the presence of an existing system. The Hearing Officer concludes that the reasonable needs of the public are better served where the first public utility to be authorized by the TRA to extend its service area to a particular location has a present and actual intent to provide service to that location, rather than an apparent desire to “lock up” an area or to otherwise remove the area from further regulatory oversight.²⁶

Regarding the petitions filed by TWS that were being considered, the Hearing Officer explained that the record supported not approving a county-wide CCN.

The Company [TWS] has argued that filing petitions to expand its service area on a project-by-project basis precludes the long term planning and construction of larger, regional facilities thereby preventing the public from receiving the benefit of the lower rates associated with larger systems. Nevertheless, the Company [TWS] offered no evidence in support of this position. To the contrary, the record shows that the Company [TWS] has, over the last several years, been able to plan and establish approximately forty-eight (48) decentralized wastewater treatment systems statewide under its current rate structure and on a project-by-project basis.²⁷

The Hearing Officer explained the protection provided a holder of a CCN notwithstanding the non-exclusive nature of the CCN.

The holder of a CCN for the provision of wastewater treatment services does not enjoy an exclusive right to provide such services within the certificated area. Nevertheless, the holder of a CCN does enjoy the protection of Tenn. Code Ann. § 65-4-201 (2004) and § 65-4-203 (2004) which exclude other applicants from providing such services to areas served by a holder of a CCN unless the Authority first determines that the present or future public convenience and necessity require or will require granting the applicant’s petition for such a CCN and that the holder’s existing facilities are inadequate to meet the reasonable needs of the public or that the holder of the CCN has refused, neglected, or is unable to make necessary additions and extensions.²⁸

The burdens imposed by granting a county-wide CCN rather than a CCN based on a project by project showing were specifically described by the Hearing Officer.

The Hearing Officer concludes that granting a CCN inclusive of most of Sevier County would have the effect of removing the opportunity for the present and future developers and property owners who will be most directly affected by the installation of facilities in or near their properties to comment on the issue of who should be granted the initial certificate authorizing a public utility to provide

²⁶ *Id.* at 35-36 (footnote omitted).

²⁷ *Id.* at 37 (footnote omitted).

²⁸ *Id.* at 38.

wastewater treatment service to their properties. A desirable trait of decentralized wastewater treatment systems is that such systems may be scaled to fit the individual needs of particular developers. Granting a CCN inclusive of most of Sevier County may also have the undesirable effect of requiring persons seeking decentralized wastewater treatment services to contract with a single operator and unnecessarily remove their ability to make independent decisions about the least costly and best system for their purposes. Further, Tenn. Code Ann. § 65-4-207(a) (2004) specifically provides:

The provisions of this part do not apply where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or 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 service. The Hearing Officer holds 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.²⁹

September 12, 2005 Authority Conference

At a regularly scheduled Authority Conference held on September 12, 2005, the panel addressed the two issues raised in the *Motion to Review*. The panel found that the Hearing Officer articulated a sound review of the Attorney General's Opinion and case law associated therewith and provided a thorough explanation for arriving at a different conclusion based on statutory construction. Moreover, the Hearing Officer's conclusions were not in a vacuum, rather they were directly applicable to the ultimate determination not to approve TWS's request for a county-wide CCN.

As the parties pointed out in their briefs, whether the term sanitary sewer service is conclusively contained within the statutory language "utility water service" is not the definitive point of the Hearing Officer's discussion. Instead, the discussion focuses on the likelihood that

²⁹ *Id.* at 39-40.

Tenn. Code Ann. § 6-51-301 (1998) includes sanitary sewer service in its restrictive language and, if so, its impact on the question of whether CCNs for wastewater service should be approved for an entire county or significant geographic area. In interpreting certain language found in Tenn. Code Ann. § 6-51-301 (1998), the Hearing Officer reached a different conclusion than that expressed in Attorney General Opinion No. 04-134 but did correctly determine that utility water service can reasonably be construed to include sanitary sewer service.

On Issue No. 1, the panel found that the *Initial Order* stands for the proposition that when reviewing requests for a CCN the Authority should consider the possibility that a court may determine that the phrase “utility water service,” as used in Tenn. Code Ann. § 6-51-301(a) (1998), includes sanitary sewer system. The panel voted unanimously to answer Issue No. 1 in the affirmative and affirm the Hearing Officer’s findings and conclusions related to that issue.

Regarding Issue No. 2, based on a review of the Hearing Officer’s *Initial Order* and the arguments of the parties regarding the *Motion to Review*, a majority of the panel found that the findings and conclusions of the Hearing Officer are sufficiently substantiated through appropriate analysis in the *Initial Order*. The *Initial Order* and the intervenors in their briefs pointed to specific legal and administrative burdens that would be experienced by a private company seeking to provide wastewater treatment service in an area where a utility holds a CCN for wastewater service. Those burdens could be avoided or lessened by approving a CCN to provide wastewater service on a project by project basis rather than on a geographic basis without regard for whether the CCN holder has an actual intent to serve the entire area within the scope of the request.

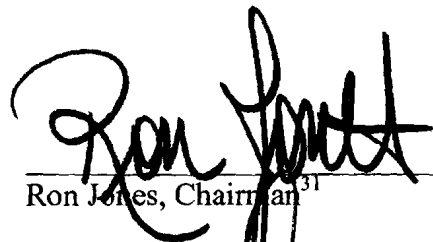
As to Issue No. 2, a majority of the panel found that the granting of a county-wide CCN would place additional legal and administrative burdens on entities that may seek to provide

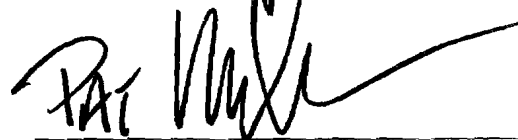
service in the area covered by the CCN.³⁰ A majority of the panel voted to answer Issue No. 2 in the affirmative and affirm the Hearing Officer's findings and conclusions related to that issue in the *Initial Order* issued on February 4, 2005.

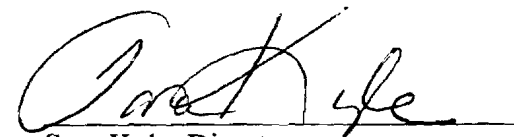
IT IS THEREFORE ORDERED THAT:

1. The Hearing Officer's *Initial Order Approving in Part, and Denying in Part, Petition to Amend Certificate of Convenience and Necessity* issued on February 4, 2005 is affirmed and the findings and conclusions contained therein are adopted.

2. Any party aggrieved by the Authority's decision as set forth in this Order has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.


Ron Jones, Chairman³¹


Pat Miller, Director


Sara Kyle, Director

³⁰ Chairman Jones did not vote with the majority on the second issue. He reasoned that the Hearing Officer's determination was overbroad and that Tenn. Code Ann. § 65-4-203 (2004) only applies where a CCN is sought for a "proposed route, plant, line or system or extension thereof which will be in competition with any other route, plant, line, or system." Chairman Jones stated that his rationale is consistent with the Authority's decision in Docket No. 04-00335 where a majority of the panel found that "[n]either entity proposed construction of a competing system or an extension of the existing incomplete system, either of which is a prerequisite for reliance on Tenn. Code Ann. § 65-4-203(a) (2004)." Chairman Jones reasoned that since Issue No. 2 was not the sole basis for the Hearing Officer's conclusion, the *Initial Order* should otherwise be affirmed.

³¹ Chairman Jones did not vote with the majority on Issue No. 2.