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Reply to
Nashville Office

June 15, 2004

Chairman Deborah Taylor Tate
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

VIA HAND DELIVERY

RE: Petition of On-Site Systems, Inc to Expand its Service Area to include an Area Known as Sevier County
Dockets 03-00329 & 04-00045 (consolidated)

Dear Chairman Tate:

Please find enclosed one (1) original and fourteen (14) copies of East Sevier County Utility District's Memorandum of Law and response to the Motion by Tennessee Wastewater Systems, Inc. to dismiss East Sevier County Utility District as an Intervenor in the above referenced matter. 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/ale

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)

MEMORANDUM OF LAW AND RESPONSE TO THE MOTION BY TENNESSEE WASTEWATER SYSTEMS, INC. TO DISMISS EAST SEVIER COUNTY UTILITY DISTRICT AS AN INTERVENOR

Comes now East Sevier County Utility District ("District"), by and through counsel and, in opposition to the Motion filed by Tennessee Wastewater Systems, Inc. ("Tennessee Wastewater") to dismiss the District as an intervenor ("Motion to Dismiss") as well as in response to the Supplemental Memorandum of Law in Support of Motion to Dismiss East Sevier County Utility District as an Intervenor, states as follows:

The District is an active, viable utility district, having been created in 1973 and continuing in existence in perpetuity pursuant to the laws of the State of Tennessee. As such, it cannot be dismissed from this proceeding.

The above statement is true and correct for a number of reasons:

1. By law, the Tennessee Regulatory Authority ("TRA") is without the authority to make a decision as to the valid creation and continued existence of the District.

2. The holding in the case cited by Tennessee Wastewater is specifically predicated on a statute inapplicable to the District, and therefore, is not appropriately used to question the valid creation and continued existence of the District.

3. Tennessee Wastewater has no standing to raise the issue of the valid creation and continued existence of the District.

4 Even if Tennessee Wastewater had the requisite standing to raise the issue, which is specifically denied, this is not the appropriate forum for the resolution of this issue.

FACTUAL BACKGROUND

The District was created by order of Ray L. Reagan, County Judge for Sevier County, Tennessee, on June 7, 1973. On February 15, 1974, County Judge Reagan amended the original order creating the District, the effect of which was to extend the District's territorial boundaries into certain portions of Cocke County, Tennessee

The District issued bonds in the principal amount of $3 2 million, a portion of the proceeds of which were used to acquire and build its infrastructure, and the balance of which was used for a period of time to service the obligations represented by the bonds.

The District has continuously operated both within and without its chartered territory since 1973.

The District has been recognized as a valid utility district by the Tennessee Supreme Court on at least two occasions. See, East Sevier County Utility Dist. of Sevier County v. Wachovia Bank & Trust Co., 570 S.W.2d 850 (Tenn. 1978) and East Sevier County Utility Dist v. Wachovia Bank and Trust Co., 655 S.W.2d 924 (Tenn. 1983). Both cases were cases arising out of litigation in Sevier County, Tennessee, that found their way through the Court of Appeals and to the Tennessee Supreme Court.

Additionally, the District has always been recognized as a viable utility district by the Utility Management Review Board, an agency of the State of Tennessee.

Finally, the District was recognized as a viable utility district by the United States Bankruptcy Court for the Eastern District of Tennessee when the District reorganized itself in the mid-90s under the protection of Chapter 9 of the United States Bankruptcy Code.

Since that reorganization, the District has consistently operated "in the black" and has well served its customers both within and outside of its chartered territory.

LAW AND ARGUMENT

I. The Tennessee Regulatory Authority does not have the legal authority to make a determination as to the valid creation and continued existence of the District.

Since the enactment of the Utility District Law of 1937 ("1937 Act"), it has been the law of this State that neither the public utility regulatory authorities, currently the Tennessee Regulatory Authority, nor any other board or commission of like character, has any jurisdiction over utility districts, unless otherwise specifically set forth in the 1937 Act. There is no provision in the 1937 Act granting the Tennessee Regulatory Authority the legal authority to determine the valid creation and/or continued existence of the District.

Tennessee Code Annotated §7-82-104 specifically states that, "neither the Tennessee regulatory authority [*sic*] nor any other board or commission of like character hereafter created shall have jurisdiction over the district in the management and control of any system. . .." Tenn. Code Ann. §7-82-104(a). A determination by the TRA that the District was not validly created would clearly be a violation of this statute as it would certainly go to the management and control of the District. In virtually every case found by counsel to the District, when the public utility regulatory authority (regardless of its name at the time) made some attempt to define or modify territorial boundaries or issue Certificates of Convenience and Necessity to public utilities to

operate within the territorial limits of a utility district, the appellate courts of this state have consistently held that the regulatory authority did not have such authority. See, discussion of West Wilson Utility District of Wilson County v. Atkins, 442 S.W.2d 612 (Tenn. 1969) in Section IV below for an example. Given the clear and unequivocal language of §7-82-104(a) of the Tennessee Code, the TRA is without the ability to make the determination sought by Tennessee Wastewater in its Motion to Dismiss

Given the recognition of the valid creation and continued existence of the utility district by the various courts of Sevier County, Tennessee, by the Tennessee Court of Appeals, and by the Tennessee Supreme Court, as well as by the United States Bankruptcy Court, and the Utility Management Review Board, to the extent there exists any defect in the organization of the District, which is specifically denied, such is without effect in this particular proceeding.

II. The authority cited by Tennessee Wastewater in its Motion to Dismiss does not, by law, apply to the District, and is without force or effect with respect to the valid creation and continued existence of the District.

In its initial Motion to Dismiss, Tennessee Wastewater asserted the blanket statement that "when a municipal corporation fails to follow statutory requirements for its creation, the creation of the municipal corporation is void." As authority for such statement, Tennessee Wastewater cites the 1899 case of Woodbury v Brown, 50 S W 743 (Tenn. 1899). For a number of reasons, the Woodbury case is inapposite, and citation thereto is inappropriate Tennessee Wastewater goes on to say that "the District is a municipal corporation."

With respect to the latter assertion, that the District is a municipal corporation, Tennessee Wastewater is correct in so far as the language in §7-82-301 of the Tennessee Code states that, "from and after the date of the making and filing of such order of incorporation, the District so

incorporated shall be a 'municipality' or public corporation in perpetuity. . .." Tenn. Code Ann. §7-82-301(a)(1) However, the term "municipality" and the characterization of a utility district as a "municipality or public corporation in perpetuity" cannot and does not impose legal consequences in such a broad and blanket manner as suggested by Tennessee Wastewater.

The consequences of the use of the term "municipality" in the Tennessee Code has eluded no less authority than the Tennessee Supreme Court for years.

In 1957, the Tennessee Supreme Court, in construing the use of the term "municipality" in the 1937 Act, found that the Fountain City Sanitary District was "nothing more than a utility district sometimes defined as a quasi-public corporation " Fountain City Sanitary District v. Knox County Election Commission, 308 S.W.2d 482, 484 (Tenn. 1957). The Supreme Court went on to conclude that the Fountain City Sanitary District was not a municipality for purposes of other sections of the Tennessee Code In a lengthy discussion of what constitutes a "city," "town," or "municipality," the court reached the conclusion that the Fountain City Sanitary District (previously determined by the court to be a utility district) was not a municipality, notwithstanding the use of the word "municipality" in the 1937 Act. 308 S.W.3d at 485.

The concept of "municipality" as used in the Tennessee Code was discussed in detail by the Tennessee Supreme Court in 1980. In what certainly was the most thorough analysis of the use of the term "municipality" in the Tennessee Code, the Supreme Court held

> we find it significant that the term municipality is defined differently in different parts of the Code. In some places the legislature's definition coincides with Webster's in that it is confined to cities or towns. (Citations omitted) In other parts of the Code "municipality" is defined so as to include counties as well (Citations omitted). As used in this statute, then, it cannot be said that the legislature intended one or the other of these definitions to apply. Even if we were to assume that there is an ordinary meaning of this term, it is clear that when used in our Code it means different things in different contexts.

Chapman v. Sullivan County, 608 S.W 2d 580, 582 (Tenn. 1980)

Thus, the Supreme Court has held that there is no ordinary meaning of the term "municipality." Additionally, the term is so frequently used in the Tennessee Code that it is not capable of a single definition, and therefore, it is not capable of a single application as sought by Tennessee Wastewater in its Motion to Dismiss. Simply couching the District as a "municipality" does not, therefore, subject it to all liabilities an consequences associated with other entities so defined.

Even if there were a single definition of the term "municipality," the application sought by Tennessee Wastewater and its motion to dismiss is incapable of being imposed on the District in this context. The Woodbury holding is based not on a general principal of law, but on a specific provision of the statute being construed, the statute on which the creation of the town was based. Language set forth in the statute set forth the consequences of failing to meet the conditions precedent to the creation of the town.

At issue in Woodbury was compliance with eight criteria specifically set forth in Shannon's Code regarding the incorporation of towns. The Act itself specifically stated that n municipal charter can be of any legal force or effect whatever unless three prerequisites there mentioned have been observed. Because the Town of Woodbury had not satisfied those prerequisites, by the language of the statute itself, the court was left with no choice but to that the town was not validly incorporated.

This case can have no effect on the District

First of all, there is no language in the 1937 Act similar to the language in Shar Code on which the Woodbury decision was based.

Additionally, the provisions of Shannon's Code in Woodbury cannot apply to the District. Tennessee Code Annotated §7-82-107 specifically states that

> This chapter is complete in itself and shall be controlling. The provisions of any other law, general, special or local, except as provided in this chapter, shall not apply to a district incorporated hereunder; provided, that nothing in this chapter shall be construed as impairing the powers and duties of the Department of Environment and Conservation.

Tenn Code Ann. §7-82-107.

Therefore, not only is the law cited by Tennessee Wastewater inapposite as the District is not a "municipality" for all purposes of Tennessee law, the 1937 Act specifically exempts the District from the provisions of other statutes, such as the one referenced in the Woodbury case.

The holding in Woodbury does not apply to the District.

III. Tennessee Wastewater has no standing to raise the issue of the valid creation and continued existence of the District.

Standing is always a fundamental prerequisite to not only commencing an action but raising an issue in the course of an action Tennessee Wastewater does not have standing, under Tennessee law, to raise the issue of the valid creation and continued existence of the District.

Whether the context is that of a private corporation, or a municipality or a "public corporation," the District is not subject to attack by a private party when the issue is the valid creation of the corporation. This was the issue raised by private citizens in 1961 with respect to the City of Fairview, Tennessee. The statutes regarding incorporation at that time included several conditions precedent to formation, and the allegation was made by a group of private citizens and others that certain of those particulars were omitted in the creation of the City of Fairview. As the Supreme Court summarized, "In substance the bill alleges the procedures followed in this incorporation are in such violation and disregard of statutory requirements, that

the charter is absolutely void and of no legal effect." City of Fairview v. Spears, 359 S.W.2d, 824, 825 (Tenn. 1962).

The citizens in Fairview contended that, in their private capacity as residents, citizens, and taxpayers of the municipality they could attack its corporate existence and maintain an action for that purpose. Following a lengthy analysis of the issue, and significant quotations from AmJur, CJS, and McQuillin on Municipal Corporations, the Tennessee Supreme Court held:

> Municipal corporations are, like other corporations, subject to actions at law, and so, in a proper case, may be proceeded against by quo warranto. They are deligated agencies of the state government and their existence as such should not be subject to indirect attack at the caprice of private interests, but should be open to question only in a direct proceeding in the interest of the public. For such purpose the appropriate remedy is quo warranto, and it will lie at the instance of the state to challenge the corporate existence of a municipal or other public corporation which is in de facto exercise of corporate life.

359 S.W.2d at 826.

The Supreme Court after reviewing the other authorities on the matter, referenced a 1885 case also from the Tennessee Supreme Court, Hooper v. Rhea

> We agree with the reasoning in Hooper v. Rhea, supra, that if Appellees can maintain this action the corporate life of any municipality may be brought into question at any time. Municipal corporations are delegated agencies of the state and their very existence should not be subject to attack by private interest.

359 S.W.2d at 827.

Because Tennessee Wastewater is nothing more than a private citizen, a for-profit corporation, it lacks standing necessary to challenge the valid creation and continued existence of the District.

Finally, the Supreme Court has further embraced this concept in stating:

> The general rule, supported by an almost unanimous consensus of judicial opinion and sometimes expressly declared by statute, is that the legality of the existence of a de facto

> corporation can be questioned only by the state in a direct proceeding, cannot be collaterally attacked or litigated in actions or proceedings between private individuals or other corporations or between them and the alleged corporation itself.
>
> The doctrine in relation to de facto corporations is based upon the principal that the state, which alone has the power to incorporate, may waive irregularities in the organization of corporations, and so long as the state remains inactive in the premises others must acquiesce.

Reed v. Appleby, et al. 262 S.W. 35, 36 (Tenn. 1924).

Tennessee Wastewater simply does not have standing to raise this issue.

IV. To the extent a remedy may exist for the issue raised by Tennessee Wastewater, the sole forum potentially available to Tennessee Wastewater would be the Circuit Court for Sevier County, Tennessee.

Notwithstanding the discussion above regarding quo warranto actions as the basis for challenging the valid creation and continued existence of a municipal corporation, to the extent a remedy may be available other than a quo warranto action, it would be that set forth in Tennessee Code Annotated §7-82-202(g). That Code section reads as follows:

> Any party having an interest in the subject matter or aggrieved or prejudiced by the finding and adjudication may pray and obtain an appeal therefrom to the Circuit Court of the county in the manner provided by law for appeals to the Court of General Sessions, upon the execution of appeal bond as provided by law.

Tenn Code Ann., §7-82-202(g).

Because §7-82-107 of the Tennessee Code (discussed above) contemplates the 1937 Act as controlling of all matters with respect to utility districts, and because subsection (g) quoted above provides a remedy to an aggrieved party with respect to formation issues, the Supreme court has held, more than once, that "the only method by which this franchise can be altered or modified in any way is by a petition filed in the county court . . . for that purpose." West Wilson Utility District of Wilson County, v. Atkins, 442 S.W.2d 612, 614 (Tenn. 1969).

The Atkins case is actually a case that grew out of the dispute between a utility district and a public utility. The Supreme Court ultimately held that the then Public Service Commission lacked jurisdiction to issue to a public utility a CCN to operate a water system in an area where utility district had previously been granted authority by order of the county court. Reference is made to a prior case by the Tennessee Supreme Court and other cases, with the ultimate holding being that quoted above: The only method by which the franchise could be altered or modified is by way of a petition to the county court

The District specifically is not asserting this as a substitute for the quo warranto actions described above. However, the District feels compelled to point out what appears to be relevant law on the subject.

CONCLUSION

WHEREFORE, because the Tennessee Regulatory Authority does not have the legal ability to make a determination as to the valid creation and continued existence of East Sevier County Utility District, and because Tennessee Wastewater does not have standing to raise the issue, and because the law cited by Tennessee Wastewater in its Motion to Dismiss does not apply to East Sevier County Utility District, the District respectfully requests that Tennessee Wastewater's Motion to Dismiss be denied.

Respectfully submitted this 15th day of June, 2004

w/ permission CBW

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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.

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This 15th day of June, 2004

Charles B. Welch, Jr.