

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**IN RE:** )  
 )  
**PETITION OF TENNESSEE WASTEWATER )**  
**SYSTEMS, INC. TO AMEND ITS )** **DOCKET NO. 06-259**  
**CERTIFICATE OF CONVENIENCE AND )**  
**NECESSITY )**

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**SMOKY COVE LOG HOME RESORTS, LYNN HEDRICK'S and HP  
DEVELOPMENT'S POST-HEARING BRIEF**

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**I. INTRODUCTION**

This matter came to be heard before the Tennessee Regulatory Authority pursuant to the Petition of Tennessee Wastewater Systems, Inc. ("TWS") to Amend its Certificate of Convenience and Necessity. Specifically, TWS desired to modify its rate structure for what the company classified as "commercial resort properties" by reclassifying these properties from their current residential rate to that of a commercial rate. As grounds for the proposed tariff increase, TWS cited in its Petition that the usage of these so-called "commercial resort properties" is not "similar to the usage of a typical home occupied by a single family." The hearing was conducted before the Tennessee Regulatory Authority on July 9, 2007 and by election of the Parties, closing arguments were waived in favor of Post-Hearing Briefs.

Having reviewed the Transcript of Proceedings in preparation for drafting this Post-Hearing Brief, it became increasingly apparent that to a certain extent, the scope of the hearings became somewhat convoluted by the introduction of the settlement between Starr Crest and Tennessee Wastewater Systems. Specifically, the scope of TWS's original Petition, which requested a reclassification of specific properties from residential

to commercial, seemingly was increased to include considerable discussion of the equity of modifying the commercial rate from \$77.00/month to \$55.00/month. While this subject may certainly develop into one of importance to all involved, it is necessary to point out that the scope of this Petition and therefore, the scope of this Authority's decision should be focused not on the equity of the proposed rate but rather on the issue of whether Tennessee Wastewater has established sufficient evidence to justify the proposed reclassification.

In support of the arguments made before the Tennessee Regulatory Authority that TWS has failed to establish that a reclassification is justified, Lynn Hedrick, Smoky Cove Properties and HP Development submit the following Post-Hearing Brief in support of their argument that the Petition of TWS proposing a reclassification to commercial should be denied.

## II. NO PROOF PROVIDED FOR INCREASE OF RATE

The Petition filed by Tennessee Wastewater System was filed before the Tennessee Regulatory Authority on or about October 10, 2006. Despite having nearly nine (9) months to compile the necessary data, Tennessee Wastewater failed to offer even a scintilla of proof regarding the usage of *any* of the properties which tended to show that usage was other than that negotiated and contracted for by the Parties; actually, TWS failed to offer any evidence regarding the usage at all. When asked on cross-examination whether there was any proof that Smoky Cove's cabins had exceeded the design daily flow, Charles Pickney responded as follows:

“I – I can’t say that they have or haven’t. I – you know, I don’t have any data before me....” (Transcript of Proceedings, p. 39 ¶18-25)

In fact, the cross-examination testimony of Michael Hines establishes that TWS does not currently even maintain records of this nature. A review of this cross-examination of Michael Hines establishes the following:

Q: Do you have any proof to show the board that my client has exceeded the flow that was contemplated at the time that the maintenance agreement was entered into?

A: Not on the entire system. *And I have no data on individual cabins*, but we’re going to be collecting it.  
(See Transcript of Proceedings, p. 75 ¶15-21, emphasis added, all questions asked by Mr. Conner and answered by Mr. Hines)

When specifically asked if TWS had any data that would tend to show that any of the cabins in the Smoky Cove development had usage that met or came close to meeting the 300 gallon/day minimum usage for commercial properties, Michael Hines stated as follows, “I don’t know. I don’t have the data. I don’t know.” Mr. Hines even goes as far as admitting that nobody had even exceeded the design flow for the overall system as evidenced by the below excerpt from the proceeding:

Q: The Petition that was filed by Tennessee Wastewater Systems makes a claim that they were exceeding the design daily flow; is that correct?

A: *If* we had ever established a design daily flow for an individual house, some of them are exceeding what that would have been, yes. *But nobody has exceeded the design flow for the treatment disposal system, the treatment system for the whole development.*

( Transcript of Proceedings, p. 74 ¶7-14, emphasis added, question by Mr. Conner and answer by Mr. Hines)

Thus, from the record, TWS seems to have chosen to simply rely on the notion that the Regulatory Authority would take their word that this alleged increased usage had occurred without attempting to establish through the use of recorded data that this was truly the case.

An examination of the record will further show that due to its inability to carry this burden, TWS attempted to change its rationale for the proposed tariff increase midstream and argue that their position was not that the design daily flow of these properties was in excess of a residential dwelling, as clearly articulated in the Petition filed on their behalf, but rather, that the issue was the transient nature of the renters of the units and the impact that misuse *might* have on the system (an issue that was raised for the first time in the Pre-filed testimony of Michael Hines). To that end, TWS again failed to provide any statistical data tending to show that maintenance of the system was more frequent or more costly for any part of the system which serviced these rental units. In fact, Michael Hines admitted during his own direct testimony that there was no evidence available to support the argument of TWS that maintenance on these resort properties was more costly or burdensome than that of typical residential properties when he testified as follows:

And we have done a lousy job from the beginning in tracking all of our expenses because we weren't basing a rate on the difference in expenses between our sub - - our residential subdivisions and our commercial subdivisions. We didn't track all of those costs. We're starting to do that. *But right now I can't tell you that it costs "x" dollars more to service a resort community as opposed to a*

*subdivision.* (Transcript of Proceedings, p. 62 ¶14-21)

Pursuant to Tennessee Code Annotated §65-2-109, “the burden of proof shall be on the party or parties asserting the affirmative of an issue.” T.C.A. §65-2-109 (2007). Thus, in the present matter, the burden is on Tennessee Wastewater to establish the affirmative which it has alleged in its Petition, namely. that the usage of rental cabins exceeds the design daily flow or that the usage is of such a nature that would overburden the system or create increased maintenance thereon. TWS has failed to carry this burden.

This proceeding represents the first attempt by Tennessee Wastewater Systems to Petition the Regulatory Authority to approve an increase to a tariff or a reclassification of a customer after having entered a contract with that party regarding the terms of usage. As such, the Tennessee Regulatory Authority is in a position to establish evidentiary precedence that requires a petitioning Public Utility to carry the burden of establishing through concrete data that a proposed rate increase of a current customer is both justifiable and necessary. Failure to establish this precedence would enable a Public Utility to adjust rates as it saw fit in order to increase profits at the expense of the rate payer. As the protector of the rate payer from these larger, more powerful Public Utility companies, the Tennessee Regulatory Authority should establish this precedence in furtherance of one of its main objectives, protection of the rate payer.

**III. THE BUSINESS INTERESTS OF LYNN HEDRICK AND OTHER  
SIMILARLY SITUATED DEVELOPERS WHO MATERIALLY RELIED  
UPON REPRESENTATIONS OF TWS WILL BE ADVERSELY EFFECTED  
BY RECLASSIFICATION**

As articulated by Mr. Hedrick before the Regulatory Authority during the hearing on this matter, Lynn Hedrick and other developers, were presented with a range of waste

water treatment options which were viable options for implementation in their respective developments. Based upon the representations of agents of TWS, including Michael Hines, that the rates could not go up “too much” based upon the Tennessee Regulatory Authority and the costs that were negotiated between Mr. Hedrick and TWS, Lynn Hedrick finally made the decision to utilize TWS for his development’s waste water needs. It is important to note that both the \$35.00/month price that was negotiated and the assurances that rates would not be increased drastically were crucial to Mr. Hedrick’s decision to utilize TWS as it was a cost-effective solution that fit the budgets of the demographic to whom Mr. Hedrick planned to market the cabins. In fact, when asked by potential homebuyers of the potential for these costs being increased by TWS, Mr. Hedrick has maintained the same position that was represented to him by Mr. Hines – namely, that costs could not be increased too much due to Tennessee Regulatory Authority monitoring. One could surely view a proposed increase of approximately sixty-six percent (66%) as being a substantial increase in conflict with the representations of Mr. Hines.

Lynn Hedrick and the property owners are without options to combat this proposed increase as the property is currently under a 99 year contract with TWS that prohibits them from acquiring wastewater services from cheaper providers. Further, in so deciding to implement the TWS system, Lynn Hedrick paid at a minimum an approximate cost of \$200,000.00 to implement the system based upon the plans provided by agents of TWS. Therefore, Lynn Hedrick would be in a difficult place financially to justify utilizing other options long term because of the capital costs already expended on the current system.

Despite the short-term effects of the proposed reclassification, the most major impact on the business interests of Lynn Hedrick is the potential short term effects. These short term effects range from potential litigation with current property owners who feel that misrepresentations were made to them to the very real possibility that potential lot/home purchasers will purchase from properties that utilize other waste water treatment services due to the increased costs and potential for future increases in costs at the whim of TWS. In testifying at the hearing, Mr. Hedrick stated as follows:

Q: Do you think it will impact your ability to sell the lots and/or the houses if this board approves the rate increase that was outlined in the letter?

A: Well, I think \$900 a year, people would find that excessive and maybe look someplace else for lots.

Q: Would you have made other plans or changed your development had you known of the potential rate increase that is the subject of the petition we're here on today?

A: Well, I - - I - - you know, I made my decision based on the information I had at the time. And, you know, I can't really - - I probably would have done something different....

(Transcript of Proceedings, p. 96-97)

Mr. Hedrick further testified that he was of the opinion that the rate increase would effect the number of lots that he was able to sell and that it was his belief that discussing the proposed increase had already cost him several opportunities to sell lots.

In summation, Mr. Hedrick explored his various options for waste water services when developing his subdivision. Based upon the representations of TWS agents regarding the initial costs and potential for future increases, Lynn Hedrick elected to implement a TWS system into this development that required out-of-pocket capital

expenses of \$200,000 that was paid solely by him. Mr. Hedrick provided access to all documents and resources requested by TWS in order to design and implement the appropriate system. Mr. Hedrick sold property based upon the representations of TWS agents including Michael Hines. Now, Mr. Hedrick is in a position where his future business earnings may be drastically decreased due to the proposed increase in costs for potential homebuyers and his potential for personal liability is increased due to representing material facts to potential homebuyers based upon the representations of TWS agents. Lynn Hedrick did everything in his power to make an informed business decision that was in the best interest of his company and his future home purchasers and as such, he should not be placed in a worse position due to the self-admitted mistakes of Tennessee Wastewater Systems.

#### IV. EAST SEVIER CHARGES \$35.00 PER MONTH AND IS PROFITABLE

Tennessee Wastewater Systems maintains that this rate increase is necessary to insure that TWS does not operate at a loss for these various properties. Despite this assertion and the failure of TWS to provide any financial information to suggest that these properties being classified as residential causes the company to operate at a loss in regards to these properties, East Sevier Utility Company (“East Sevier”), a TRA regulated Public Utility that performs the same services and operates in the same field as TWS, has established a residential classification for all similar rental unit properties. In maintaining this classification, East Sevier charges its rental-cabin customers a flat rate of \$35.00/month and does not make the property’s owner liable for capital costs in the event that the system needs to be upgraded. Despite this substantially reduced charge and the



inability of East Sevier to demand capital costs from its customers, East Sevier operates at a profit in regards to its rental-cabin units.

The above stated facts regarding East Sevier begs the question, how do two similar companies operate similar businesses in the same area and one company is able to do so with a rate that is nearly half that proposed by TWS? While there may be several reasons for this, it clearly suggests that the Petition and plea of TWS that this is necessary in order for the company not to lose money may not be as critical or necessary as TWS might tend to suggest. Without financial data to suggest that this is the case in regards to TWS, coupled with the fact that a similarly situated public utility does not have the same issue, the argument must be raised that TWS is not attempting to avoid operating at a loss but is rather attempting to increase its profits at the expense of a customer base with which it has contracted for a residential rate schedule.

In fact, the \$55.00/month base amount as proposed by TWS in its settlement with the other intervenor in this matter cannot even be justified by statistical data as evidenced by the below excerpt from the proceeding itself.

BY DIRECTOR JONES:

Q: Let's see. In your opinion, does the commercial rate you're proposing represent the cost of serving the particular home?

A: I honestly don't know, Director Jones. My wife will tell you that we're not eating real well off of what we're getting, and we've been subsidizing the utility, but I can't tell you how much. I know that the commercial rate - - the settlement that we've agreed to with one of the intervenors is more than we're getting now and it will help. ***But I don't have good figures and neither does***

***Tennessee Wastewater on what our actual costs are.***

(Transcript of Proceedings, pgs. 83-84)

It follows logically that if TWS cannot establish what it costs to operate these particular systems, then it is impossible for TWS to establish that the rates must be increased in order to cover these costs. Again, TWS seems to be asking for a rate increase just because it feels that it is entitled to one rather than that it is in a financial need of one. Thus, if the Regulatory Authority is considering granting the reclassification based upon an apparent “financial need” of TWS, Smoky Cove would respectfully request that the Regulatory Authority require full financial disclosure of TWS, a public utility company, in order to establish that a rate increase is financially necessary.

#### V. LETTER TO CLIENT

As discussed above, Tennessee Wastewater Systems filed its Petition with the Regulatory Authority on or about October 10, 2006. On or about March 1, 2007, Tennessee Wastewater Systems sent a letter to its customers regarding the rate increase. The letter, a copy of which is attached hereto as **Exhibit A**, states an effective date of the reclassification to a commercial rate of April 1, 2007. The letter in no way informs the customers of Tennessee Wastewater Systems that there is a process by which the customer may actually intervene into the matter and object to the “*proposed*” rate increase. Rather, the letter seems to suggest that the rate increase has already occurred and that the customer is without any forum to dissent or without options regarding the rate increase. As testified to by Mr. Hedrick, outside of having counsel on retainer, Lynn Hedrick would have been unable to determine that the rate increase had not been approved and that he could intervene in this matter.

The letter was also deficient in that it failed to inform the customer that along with the proposed reclassification came the possibility that customers could be forced to pay the capital costs to upgrade the system. Only upon reviewing the Petition of Tennessee Wastewater Systems and the attachments thereto was one able to learn that liability for capital costs was an element of Tennessee Wastewater's commercial classification. As such, there are likely numerous customers of Tennessee Wastewater, specifically, each property owner of the property developments which are a party to this suit, who are without notice that a) there were any options in order to object to this rate increase and b) that the terms of the reclassification make those property owners potentially liable for the costs of capital upgrades to the system at the whim of Tennessee Wastewater Systems, Inc. It follows logically, that had the letter of Michael Hines not been misleading and purposefully void of material information that at a minimum, all property owners who are subject to this rate increase could have been informed of their options and the possible consequences of the proposal by Tennessee Wastewater Systems, Inc. Assuming *arguendo* that the Regulatory Authority is contemplating approving the rate increase requested by TWS even without any evidence of its necessity, before approval thereof, Lynn Hedrick, Smokey Cove, and HP development would respectfully request that the TRA require TWS to send notice to each and every customer that may be affected by this proposal – not merely to the developers of the property.

#### VI. RATES ALL GO UP, NOT DOWN

Time and time again during the proceedings before the Regulatory Authority, TWS and its representatives attempted to articulate that the proposed tariff was actually a rate reduction. It is important to note several key points on this issue. At no time prior to

the introduction of the proposed settlement between TWS and Starr Crest was there a petition or request to modify the current commercial tariff. In fact, a modification of the tariff was not even a part of the Petition; rather, the Petition was drafted and submitted to reclassify each property involved in this matter from a residential classification paying approximately \$35/month to a commercial classification paying \$77.00/month. The introduction of the proposed settlement simply shifted the minimum fee from \$77.00/month to \$55.00/month. Thus, there is no way of looking at this reclassification from paying \$35.00/month to paying \$55.00/month as anything other than a rate increase for each of the properties involved in this dispute despite the representations made by agents and representatives of TWS.

As admitted by Michael Hines during his cross-examination, there is no party to this current matter who would be the subject of a rate reduction. Therefore, any discussion or argument that suggests that the proposed tariff modification, which was not a matter originally before the Regulatory Authority, should not be taken into consideration in this matter as that is a material misrepresentation of the consequences and impact of reclassifying each of these properties – the only issue that is before the Regulatory Authority at this point.

## VII. CONCLUSION

Tennessee Wastewater Systems, Inc. has failed to carry its burden of establishing that its proposed reclassification of specific properties from residential to commercial is justified. TWS has failed, despite adequate time to do so, to produce any data which tends to show that the usage of any property is in excess of the design daily flow which was negotiated and agreed upon by the parties when developing the wastewater system.

TWS has failed to produce any evidence which tends to establish that maintenance costs for rental properties are increased due to misuse or otherwise. When directly asked by Director Jones the costs of servicing a particular home, TWS was unable to establish what the costs were. In fact, TWS has not produced any evidence other than the fact that they want a rate increase and feel that they should have it. Further, TWS has been unable to explain why or how another company who operates in the same area in the same line of work can operate at a profit and still only charge rental properties \$35.00/month.

Lynn Hedrick has established that he had options for which wastewater system to implement in his development. He relied on the representations of TWS agents that the costs would be as established by the parties at the beginning and that the costs were not likely to increase substantially. In so relying, Lynn Hedrick paid approximately \$200,000 of his own money to implement the system proposed by TWS to service the specific development that Mr. Hedrick proposed. Mr. Hedrick has established that he provided all information that was requested by TWS and that TWS was informed of all development plans. Lynn Hedrick has established that he sold properties to the general public with the understanding that the representations of Michael Hines could be relied upon. He has established before this Authority that his business interests have already begun to be effected due to no fault of his own and due solely to the mistakes of TWS.

Based upon the foregoing, Lynn Hedrick would respectfully request that this Regulatory Authority exercise its ability to deny this reclassification due to its being unsupported by any evidence which tends to establish its necessity. In so denying this Petition, the Tennessee Regulatory Authority can establish necessary and important

precedence regarding the evidentiary requirements for public utilities that propos reclassifications for any property who is currently under contract. Such a precedence will effectively promote the public good and protect the people who the Regulatory Authority is in place to protect - the rate payers.

Respectfully submitted this 30<sup>th</sup> day of July, 2007.

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