

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

IN RE:)	
)	
PETITION OF TENNESSEE WASTEWATER)	
SYSTEMS, INC. TO CHANGE AND)	
INCREASE CERTAIN RATES AND)	DOCKET NO. 08-00202
CHARGES SO AS TO PERMIT IT TO)	
RECOVER COSTS ASSOCIATED WITH)	
FURNISHING WASTEWATER SERVICE TO)	
ITS CUSTOMERS)	

MOTION TO DISMISS "APPEAL" FILED BY KING'S CHAPEL

On January 28, 2009, Mr. John Powell, acting as the representative for King's Chapel Capacity, LLC ("King's Chapel"), filed a "Motion for Expedited Review" of the Initial Order issued by the Hearing Officer on January 22, 2009. The Motion is actually an appeal of the Initial Order. It asks the Tennessee Regulatory Authority ("TRA") to overturn virtually every aspect of the Hearing Officer's decision. In response, Tennessee Wastewater Systems, Inc. ("TWS") moves that the "Motion for Expedited Review" be dismissed. The filing of this appeal is illegal. It constitutes the unauthorized practice of law, which is both a criminal and civil offense. The proper remedy is for the TRA to dismiss the appeal and give it no consideration.

Discussion

As explained by the Hearing Officer in the Initial Order, state law and the TRA rules allow a non-attorney who is a "duly authorized representative" of a corporation to represent that corporation in proceedings before the agency only as long as the corporate representative does not engage in activities which require "the professional judgment of a lawyer." Initial Order at 5, quoting In re Burson, 909 S.W.2d 768 (Tenn. 1995). See also Opinion No. 04-160 of the Attorney General (issued November 10, 2004) holding that state law and prior rulings of the

Tennessee Supreme Court "prohibit a nonlawyer or office acting on behalf of a corporation in a contested case hearing."

The case law in this area is very clear. In two recent opinions, the Tennessee Court of Appeals, Middle Seciton, held that the Executive Director of the Tennessee Environmental Council, Inc., a non-attorney, could not represent the Council in a contested case proceeding before the Water Quality Control Board. Tennessee Environmental Council v. Water Quality Control Board, 2007 WL 2827470 (Tenn. Ct. App. 2007) and Tennessee Environmental Council v. Water Quality Control Board, 254 S.W.3d 396 (Tenn. Ct. App. 2007), referred to here as "TEC I" and "TEC II." In these opinions, Judge Frank Clement, Jr., writing for the Court, describes at length the kind of "informal, information gathering proceeding" in which a non-attorney may represent corporate party as opposed to "formal adversarial proceedings as in a contested case proceeding" in which a non-attorney may not represent a corporate party. TEC II, 254 S.W.3d at 407. As the Court wrote, it is illegal for a non-attorney to appear on behalf of a corporation in "adversarial proceedings, wherein the rule of evidence may be enforced, adversarial pleadings may be filed, or direct and cross examination of witnesses may be involved." TEC II, 254 S.W.3d at 409.

In language which is repeated in both decisions, the Court described its holding in more detail:

If the hearing is informal, e.g. rules of procedure or evidence are not followed and there is no direct or cross-examination of witnesses, and the hearing is essentially a non-adversarial, informal gathering sessions wherein information is merely shared, then no legal training, skill, or judgment is required, and thus, a law license is not required. *See Burson*, 909 S.W.2d at 771. If, however, the proceeding is more formal, e.g. a party expects to engage in direct or cross-examination of witnesses and rules of evidence are expected to be followed, then the matter is not an informal gathering session wherein information is merely shared, and

therefore, legal training, skill, or judgment is essential. *Id.* at 776. (holding that the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.) In such proceedings, if a non-lawyer were to participate as the representative of a corporation, he or she would be engaged in the unauthorized practice of law.

TEC II, 254 S.W.3d at 407, quoting from TEC I, 2007 WL 2827470, at 8.

This rate case is, of course, a formal, contested case proceeding and encompasses all the elements of a "formal, adversarial proceeding" as described by the Court.¹ The "Motion for Expedited Review" itself is a legal pleading and, as the Hearing Officer expressly warned Mr. Powell, the filing of "an appeal of any order of the Hearing Officer" without the signature of a licensed Tennessee attorney constitutes the unauthorized practice of law and is a criminal offense in this state. See T.C.A. § 23-3-101(3).

The Hearing Officer's findings that Mr. Powell is engaged in the illegal practice of law are not challenged in the "Motion for Expedited Review." Mr. Powell does not address the issue of whether he is illegally practicing law but says only that it is "unfair" to require King's Chapel to hire an attorney "at this time" and that the Hearing Officer's ruling "unfairly prohibits intervention by interested parties to this case by imposing a financial burden on intervenors." Motion, at 3.

Mr. Powell's complaint that the law is "unfair" should be addressed to the Tennessee courts and the legislature, not the TRA. The legislature has made the unauthorized practice of law a civil and criminal offense. The courts have declared that only a licensed attorney may represent a corporation in a contested case proceeding before an administrative agency. Despite the warning of the Hearing Officer, Mr. Powell has knowingly violated state law by filing this

¹ The January 13, 2009 letters from TRA Chairman Tre Hargett to State Rep. Susan Lynn and State Sen. Mae Beavers, both filed in this docket, discuss at length why this rate case is, by law, a "contested case" proceeding.

appeal on behalf of King's Chapel. Now that the issue of Mr. Powell's participation has been raised and laid before the Authority, the agency has no choice -- given the clear nature of the violation -- but to dismiss the "Motion for Expedited Review" and give it no consideration.²

The other issues raised in Mr. Powell's "Motion for Review" merit little discussion.

First, Mr. Powell claims that King's Chapel is entitled to intervene in this proceeding as a matter of right under T.C.A. § 4-5-310(a). The Hearing Officer, however, correctly concluded that since King's Chapel is not a customer nor a direct competitor of TWS, King's Chapel has no recognizable legal interest in the outcome of this rate case and therefore no legal right to intervene under Section 310(a).³ Mr. Powell's "Motion for Review" makes no coherent argument to the contrary. King's Chapel was, in fact, allowed to intervene pursuant to Section 310(b), which gives the agency the discretion to grant intervention to parties who do not qualify under Section 310(a). Mr. Powell's claim that he is entitled to intervene under Section 310(a) appears to be a moot issue.

Second, Mr. Powell complains that the Hearing Officer unlawfully imposed certain conditions upon Mr. Powell's participation in the case. Mr. Powell seems to be under the impression that the Hearing Officer may impose conditions upon a party's participation only if intervention is granted as a matter of agency discretion under Section 310(b). That is incorrect. The statute on intervention makes no such distinction. The Uniform Administration Procedures Act, T.C.A. § 4-5-310(c), allows the agency to impose conditions upon a party whether or not

² As the Court of Appeals held in TEC II, 254 S.W.3d at 410-411, the proper remedy in this situation is for the Administrative Judge or, in this case, the presiding Director, to rule on this Motion to Dismiss as a "procedural question of law." If the Motion to dismiss is granted, there is no valid appeal before the agency and no need for further action. The Initial Order would be affirmed, since no valid appeal was filed within the fifteen-day statutory period.

³ All three of the other parties in this case, TWS, the TRA Staff, and the Consumer Advocate Division, agreed that King's Chapel has no right to intervene under Section 310(a).

the party is granted permission to intervene as a matter of right under Section 310(a) or as a matter of agency discretion under Section 310(b).

Mr. Powell specifically objects to one of the conditions imposed by the Hearing Officer who held that any confidential financial information concerning TWS may be shared with counsel for King's Chapel but not with Mr. Powell himself.

Since Mr. Powell cannot file discovery or other legal pleadings in this case until he hires an attorney, this issue is also essentially moot. If King's Chapel retains counsel, the attorney will be provided the requested information subject to the entry of a protective order. As the Hearing Officer has ruled, however, the protective order will state that the attorney for King's Chapel may not share any confidential information about TWS with Mr. Powell. In other words, King's Chapel is not being denied access to any confidential information; only Mr. Powell is being denied such access.

Mr. Powell's "Motion for Expedited Review" does not articulate any reason why he, as opposed to his attorney, should have access to confidential information regarding TWS. Mr. Powell does not dispute that he competes indirectly with TWS. In fact, he stated during the status conference on December 8, 2008, that he had been contacted by other developers who wanted to discuss hiring King's Chapel rather than Tennessee Wastewater to provide sewer service. Furthermore, Mr. Powell does not dispute that he has a history of acrimonious litigation with Tennessee Wastewater (see TRA dockets 04-00335, 05-00016, and 05-00062, and other dockets referenced therein). Given that history and Mr. Powell's status as an indirect competitor of TWS, the Hearing Officer ruled that Mr. Powell himself would not be allowed access to

confidential financial information of TWS. Such restrictions are common in TRA protective orders involving competitively sensitive information.⁴

Finally, Mr. Powell objects to the Hearing Officer's decision to exclude from this docket issues concerning the relationship between TWS and its affiliate companies. In his "Issues List," Mr. Powell alleges that TWS uses affiliates "to shield regulated operations and revenues from the TRA's jurisdiction."⁵ Issues List, at 2. The Hearing Officer found that "while this issue raises a valid concern, it is not an issue that belongs in the instant rate case." Initial Order, at 9. He recommended that the TRA "open a new docket" to investigate the use of affiliates both by TWS and by "the entire wastewater industry." *Id.* The Hearing Officer noted that some affiliates of regulated wastewater companies may be involved in the construction of wastewater systems without first obtaining a certificate from the Authority and suggested that the TRA look at this issue in the new docket. He also suggested that the new docket would give Mr. Powell an opportunity to articulate his concerns "better" than he has done in the current proceeding. *Id.*, at footnote 40.

As TWS has previously noted, Mr. Powell's allegations about the utility's use of affiliates are incorrect. The "regulated operations and revenues" of TWS are not "shielded" from the TRA. To the contrary, all of the expenses and revenues associated with the regulated operations of TWS, including payments to affiliates, are fully set forth in the company's rate case and in data responses provided to the TRA Staff and the Consumer Advocate Division. Nevertheless,

⁴ The TRA has proposed similar restrictions in other cases involving the disclosure of competitively sensitive information. See, for example, the protective order entered on January 24, 2009, in Docket 08-00192, Section 3(f), prohibiting the disclosure of confidential financial information "with anyone associated with the marketing of services in competition with" the party producing the confidential information. Such language is now a standard requirement in TRA protective orders. See Docket 08-00197, proposed protective order filed October 15, 2008, Section 3(f).

⁵ The Hearing Officer wrote that, other than the affiliate issue, Mr. Powell's "Issues List" filed in December was "simply a rehash" of his Petition to intervene and did not include specific issues "as directed" in the Initial Order. Initial Order at 8-9.

TWS has raised no objection to the Hearing Officer's proposal that the TRA open a docket to investigate the use of affiliates by wastewater companies.⁶

The only objection raised by King's Chapel to the Hearing Officer's proposal is that any findings in the other docket "cannot be immediately reflected in rates charged to customers." Motion, at 4-5. That is not correct. As the Hearing Officer noted, the "conclusions from this new docket could have a future impact on rates." Initial Order, at fn. 40. Such adjustments may be made whenever the TRA determines that a utility has incorrectly reported its regulated expenses or revenues.

As the Hearing Officer correctly ruled, however, the larger issue of the use of affiliates -- a common practice among regulated utilities -- is not part of this rate case and can be best handled in another docket. To the extent that transactions between TWS and its affiliates may impact TWS's rates, those costs have been reviewed by the Consumer Advocate Division and the TRA Staff and will be thoroughly addressed in this rate case. To the extent TWS and other utilities chose to set up affiliated entities to perform non-regulated functions, those matters can and should be addressed in a separate proceeding.

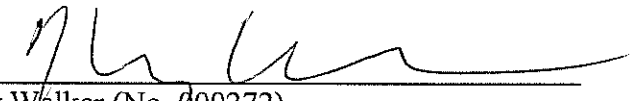
Conclusion

In sum, none of the arguments raised by Mr. Powell has any merit. His "Motion for Expedited Review" should be dismissed because it was illegally filed. In the alternative, the Motion should be summarily denied without further delay.

⁶ Regulated wastewater utilities such as TWS and Cartwright Creek both partner with affiliated entities who, for example, may be hired by a developer to construct wastewater collection and treatment systems. Such construction, it should be noted, generally occurs after the utility has obtained a TRA certificate to serve that location.

Respectfully submitted,

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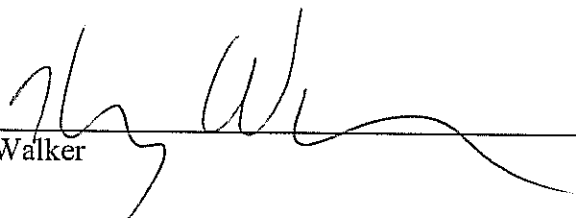
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by placing it in the U.S. Mail, First Class, postage prepaid, on the following counsel of record, this the 10th day of February, 2009.

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