

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

April 29, 2009

IN RE:	)	
	)	
PETITION OF TENNESSEE WASTEWATER	)	DOCKET NO.
SYSTEMS, INC. FOR APPROVAL TO AMEND	)	08-00202
ITS RATES AND CHARGES	)	

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ORDER GRANTING MOTION TO WITHDRAW AND DENYING MOTION TO  
REVIEW HEARING OFFICER'S INITIAL ORDER

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This matter came before Chairman Eddie Roberson, Director Sara Kyle and Director Mary W. Freeman of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on February 23, 2009 for consideration of the *Motion of TRA Staff to Withdraw as a Party or in the Alternative to Seek Clarification of Role* filed on January 27, 2009 and *King's Chapel Capacity Motion for Expedited TRA Review of Hearing Officer's Initial Order* filed January 28, 2009.

**BACKGROUND**

On October 20, 2008, Tennessee Wastewater Systems, Inc. ("TWS") filed with the Authority an incomplete *Petition of Tennessee Wastewater Systems, Inc. To Change and Increase Certain Rates and Charges* ("Rate Petition").<sup>1</sup> The *Petition To Intervene of King's Chapel Capacity* ("KCC's Petition to Intervene") was filed on October 24, 2008. On November 3, 2008, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed its *Petition to Intervene* ("Consumer Advocate's Petition to Intervene"). On November 4, 2008, the *Opposition of Tennessee Wastewater Systems, Inc. to the*

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<sup>1</sup> On October 28, 2008, TWS filed a replacement Rate Petition.

*Petition to Intervene of King's Chapel* ("TWS' Opposition") was filed. On December 8, 2008, a memorandum to the docket file from Rebecca S. Montgomery, Assistant General Counsel of the TRA, explained that the Authority, in Docket No. 06-00259, "directed TRA Staff to participate as a party in [TWS'] rate case,"<sup>2</sup> and that she and Ginger Collier, Utilities Division of the TRA, were being designated "to participate, along with the Consumer Advocate, in discussions with [TWS] concerning the impending rate filing."<sup>3</sup>

At a regularly scheduled Authority Conference held on November 10, 2008, the voting panel of the Authority assigned to consider the proposed rate increase and revised tariff filing in this docket, suspended the tariff for ninety days, until March 1, 2009. A contested case was convened and a hearing officer appointed with authority to rule on petitions to intervene.<sup>4</sup>

At a Status Conference held on December 8, 2008, the Hearing Officer granted the interventions of the Consumer Advocate and TRA Staff, noting that the Consumer Advocate has a statutory right to intervene<sup>5</sup> and the TRA Staff was previously directed to participate as a party by the Authority<sup>6</sup> and that TWS raised no objection to such interventions.

TWS objected to KCC's Petition to Intervene, arguing that because KCC "does not have a protectable legal interest which could be determined in this proceeding, the Petitioner [KCC] does not meet the legal requirements for intervention as a matter of right under T.C.A. § 4-5-310(a)."<sup>7</sup> At the Status Conference, counsel for TWS raised several objections in opposition to KCC's petition, specifically the following: (1) "legally the outcome of this case has no effect on Mr. Powell;" (2) Powell and KCC are not customers of Tennessee Wastewater, nor are they

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<sup>2</sup> Memorandum to the docket file from Rebecca S. Montgomery (December 8, 2008).

<sup>3</sup> *Id.*

<sup>4</sup> See *Order Suspending Tariff for Ninety Days, Convening a Contested Case and Appointing a Hearing Officer* (November 25, 2008).

<sup>5</sup> See Tenn. Code Ann. § 65-4-118.

<sup>6</sup> See footnotes 3 and 4, *supra*.

<sup>7</sup> *Opposition of Tennessee Wastewater Systems, Inc. to the Petition to Intervene of King's Chapel*, p. 3 (November 4, 2008).

direct competitors of Tennessee Wastewater; and (3) what happens in this rate case does not affect KCC's one service area in Williamson County. TWS concluded that Powell and KCC had no legal right to intervene.<sup>8</sup>

During the Status Conference, the Hearing Officer discussed KCC's Petition to Intervene with Mr. Powell. As a reason for KCC's intervention request, the Petition stated that KCC's existing and present rates are based upon the existing and present rates of TWS and reasoned that a decision by the TRA in this docket which changed the rates could affect future filings by KCC to change its rates.<sup>9</sup> Mr. Powell explained that the cost of plant and infrastructures should be accounted for in a rate case and stated "we need to be involved in this rate case, to understand, first of all, what they're asking to do and how it can affect us as a utility and as a competitor in the future to TWS."<sup>10</sup>

Regarding the merits of KCC's Petition to Intervene, the Consumer Advocate argued that King's Chapel did not have the standing to participate.<sup>11</sup> The TRA Staff argued that "there does not appear to be a legally protected interest that would require the intervention of Mr. Powell."<sup>12</sup> The Hearing Officer proceeded to grant KCC's Petition to Intervene, not as a matter of right but as a matter of discretion as provided in Tenn. Code Ann. § 4-5-310(b).

### **MOTION TO WITHDRAW**

On January 27, 2009, the TRA Staff filed its *Motion of TRA Staff to Withdraw as a Party or in the Alternative to Seek Clarification of Role* ("Motion to Withdraw"). In its *Motion to Withdraw*, TRA Staff states:

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<sup>8</sup> Transcript of Status Conference, p. 7 (December 8, 2008).

<sup>9</sup> *Petition to Intervene of King's Chapel Capacity*, p.1 (October 24, 2008).

<sup>10</sup> Transcript of Status Conference, p. 6 (December 8, 2008).

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.* at 12-13.

Staff understood that the Authority directed Staff to participate as a party in this matter because the Company was having difficulty putting a rate case together.<sup>13</sup> TRA Staff participated in fruitful and productive discussions with the Consumer Advocate and the Company and believed settlement was near at the time the rate case was filed on October 20, 2008. However . . . it is TRA's Staff position that the complexion of the case has now changed significantly. The role it was directed to play in participating in discussions regarding the rate case has been completed. While it is possible that this case may still be resolved by a settlement agreement, it is uncertain when or how that may come about.<sup>14</sup>

Prior to the Authority's actions designating TRA Staff to participate, the Company, which has no previous rate case experience, had for several months been working exclusively with the Consumer Advocate in preparing a rate filing, and despite this, no firm timeline for filing a petition had yet been determined.<sup>15</sup> The Authority directed TRA Staff to participate in the rate filing discussions that were ongoing between the Company and the Consumer Advocate, and to participate as a party in the rate case and any proposed settlement agreement, primarily to ensure that the process of preparing the initial filing of the rate case proceeded efficiently, and in the event a settlement agreement resulted, to facilitate the presentation of an agreement that may be satisfactory to the Authority.<sup>16</sup>

The primary purposes for the designation of TRA Staff as a party in this docket, as enunciated by the Authority panel during the April 7, 2008 Authority Conference, appear to have been fulfilled. The initial rate filing has been filed in accordance with the requirements of the Authority, and until recently, settlement discussions between the Company, Consumer Advocate and TRA Staff were progressing well and agreement was anticipated. However, at this time settlement discussions seem to have stalled and it is unclear whether the docket may be resolved

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<sup>13</sup> *Motion to Withdraw*, p. 4, fn. 11 (January 29, 2009), (The Company was asked for an update on the status of its impending rate case at the April 7, 2008 Authority Conference. Counsel for the Company stated: "This Company has never had a rate case. The rates that are in effect now are the rates that were basically set through discussions with the TRA Staff. And, frankly, they don't have the in-house expertise to pull together the rate case of the quality that this agency typically demands." Authority Conference Transcript, p. 48. (April 7, 2008).)

<sup>14</sup> *Motion to Withdraw*, p. 4 (January 29, 2009).

<sup>15</sup> Authority Conference Transcript, pp. 47-50 (April 7, 2008).

<sup>16</sup> *Id.*, pp. 50-52 (April 7, 2008).

through an agreement of the parties. Therefore, in light of the substantial and unexpected shift that has occurred in the docket since the filing of the Rate Petition and intervention of additional parties, the panel voted unanimously to grant the *Motion to Withdraw*.

### **KCC'S MOTION FOR REVIEW AND TWS' RESPONSE**

#### **Positions of the Parties**

On January 28, 2009, John Powell, on behalf of KCC, filed *Kings' Chapel Capacity's Motion for Expedited TRA Review of Hearing Officer's Order* ("KCC Motion"). Mr. Powell set forth arguments applying the interpretation of statutes and rules in the *KCC Motion* asking the Authority to reconsider and reject portions of the Initial Order. Specifically, Powell argued that the Initial Order "unfairly" prohibited his ability to review proprietary information and to issue documents without the services of a lawyer and that KCC's limited intervention denied KCC certain rights, duties and interests. Powell also asked the Authority to reject the Hearing Officer's recommendation that a new docket be opened and the affiliate issues raised in this case be separated and considered in that new docket.

On February 10, 2009, TWS filed its *Motion to Dismiss "Appeal" Filed by King's Chapel* ("Motion to Dismiss"). TWS' *Motion to Dismiss* correctly describes KCC's motion as "an appeal" of the Hearing Officer's Initial Order because KCC is asking the panel to review and reverse basically all parts of the Hearing Officer's decision. In response, TWS requests that the "Motion for Expedited Review" be dismissed. Initially, TWS asserts that KCC's appeal is illegal because "[i]t 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."<sup>17</sup>

In addition to reiterating the Hearing Officer's extensive discussion of statute and rules governing the conduct of nonlawyers in administrative proceedings, TWS provides the following case analysis:

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<sup>17</sup> *Motion to Dismiss "Appeal" Filed by King's Chapel*, p. 1 (February 10, 2009).

The case law in this area is very clear. In two recent opinions, the Tennessee Court of Appeals, Middle Section, 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.<sup>18</sup>

### **FINDINGS AND CONCLUSIONS**

In the decisions referenced by TWS, the Court set forth the standard for determining whether to permit a nonlawyer to appear in a representative capacity in a contested case proceeding:

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.<sup>19</sup>

From the Court of Appeals decisions, a crucial factor in determining whether a nonlawyer can participate in an administrative proceeding in a representative capacity is the level of

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<sup>18</sup> *Motion to Dismiss “Appeal” Filed by King’s Chapel*, p. 2 (February 10, 2009).

<sup>19</sup> *Tennessee Environmental Council* decision II, 254 S.W.3d at 407, quoting from *Tennessee Environmental Council* decision I, 2007 WL 2827470, at 8.

formality of the proceeding. For the purposes of this docket it is important to note at the outset that by statute a rate making proceeding is a contested case.

The term “contested case” is defined in two statutes which govern the practices and procedures of the TRA. In both instances, the definition of a contested case includes a ratemaking proceeding. Tenn. Code Ann. § 4-5-102(3), a section in the Tennessee Uniform Administrative Procedures Act (“UAPA”), provides the following definition:

(3) “Contested case” means a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing. Such proceeding may include *rate making*; price fixing; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; the granting or denial of licenses, permits or franchises where the licensing board is not required to grant the licenses, permits or franchises upon the payment of a fee or the finding of certain clearly defined criteria; and suspensions of, revocations of, and refusals to renew licenses. An agency may commence a contested case at any time with respect to a matter within the agency’s jurisdiction; (Emphasis provided.)

Title 65, which specifically addresses public utility regulation, contains a definition of contested case in Tenn. Code Ann. § 65-2-101(2) as follows:

(2) “Contested case” means all proceedings before the authority in which the legal rights, duties, or privileges of specific parties are determined after a hearing before the authority; *provided, that the fixing of rates shall be deemed a contested case rather than a rule-making proceeding*; (Emphasis provided.)

Through the convening of a contested case, certain rules of procedure become applicable to the proceeding. In such a matter, the procedural dictates and due process guarantees of statutes and rules immediately affix to the case. Contested case proceedings at the TRA are governed by the UAPA, found at Tenn. Code Ann. § 4-5-101 *et. seq.*

Under the UAPA, a “party” to a contested case proceeding is defined as “each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;” (Tenn. Code Ann. § 4-5-102(8)). Tenn. Code Ann. § 4-5-310 sets forth the criteria for granting petitions to intervene. In addition, under Tenn. Code Ann. § 65-2-107:

All persons having a right under the provisions of the laws applicable to the authority to appear and be heard in contested cases as defined in this chapter shall be deemed parties to such proceedings for the purposes of this chapter. In addition, the authority may upon motion allow any interested person to intervene and become a party to any contested case.

TRA Rule 1220-1-2-.08 provides that petition for interventions filed with the TRA “. . . shall be granted in accordance with [Tenn. Code Ann.] § 4-5-310 and [Tenn. Code Ann.] § 65-2-107” and “. . . shall be filed at least seven (7) days prior to the date of the contested case hearing.”

Recognizing that this docket has been convened as contested case proceeding, it is clear that the requirements of a formal proceeding as outlined by the Court of Appeals apply to this docket. For this reason, the panel agrees with the following analysis provided by TWS regarding the issue of the unauthorized practice of law by KCC in this docket.

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. 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 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.<sup>20</sup>

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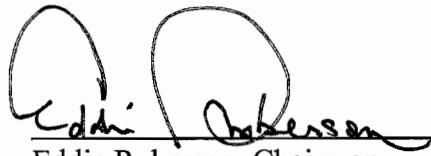
<sup>20</sup> *Motion to Dismiss “Appeal” Filed by King’s Chapel*, pp. 3-4 (February 10, 2009).



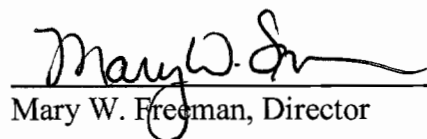
Therefore based upon the findings set out above, the panel voted unanimously to deny the *KCC Motion* on the grounds that the motion, as filed, is in violation of the Hearing Officer's Order and consideration of the merits of the *KCC Motion* could lead to suborning the unauthorized practice of law by John Powell. The panel further voted unanimously to accept the recommendations of the Hearing Officer and open a new docket to examine the use of affiliates by TWS and other wastewater utilities. The new docket should also address the application of Tenn. Code Ann. § 65-4-201 (the requirement of obtaining a CCN) to affiliates in the wastewater service industry. Finally, the panel declined to authorize the General Counsel to request from the Attorney General a formal opinion regarding what constitutes the practice of law before this agency, finding rather that the current state of the law is sufficiently clear on the matter.

**IT IS THEREFORE ORDERED THAT:**

1. The *Motion of TRA Staff to Withdraw as a Party or in the Alternative to Seek Clarification of Role* is hereby granted.
2. *King's Chapel Capacity Motion for Expedited TRA Review of Hearing Officer's Initial Order* is denied.
3. A new docket shall be opened to examine the use of affiliates by Tennessee Wastewater and other wastewater companies. The new docket should also address the application of Tenn. Code Ann. § 65-4-201 to affiliates in the wastewater service industry.

  
Eddie Roberson, Chairman

  
Sara Kyle, Director

  
Mary W. Freeman, Director