

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 3, 2012

IN RE:

**PETITION OF TENNESSEE
WASTEWATER SYSTEMS, INC.
FOR DECLARATORY RULING**

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**DOCKET NO.
11-00199**

PETITIONER'S BRIEF ON ACCEPTANCE OF PETITION

Pursuant to the procedural order issued by the Hearing Officer on December 19, 2011, Tennessee Wastewater Systems, Inc. ("TWSI") files this brief in support of its request that the Tennessee Regulatory Authority issue a declaratory order concerning a dispute between TWSI and the Caryville-Jacksboro Utility Commission ("CJUC") over the provision of wastewater service to the Villages at Norris Lake. The Villages at Norris Lake is a development located outside the municipal boundaries of Caryville and Jacksboro but within the service area of TWSI as authorized by the TRA in 2007.

The Authority should issue the declaratory order because (1) the Authority has primary jurisdiction over the authorization of a public utility's service area as well as the alteration or revocation of that service area if service has not been provided within two years after the date of authorization; (2) the Authority has previously considered the meaning of Tenn. Code Ann. § 6-51-301(a) and concluded that it applies to both potable water service and wastewater service; (3) the TRA has jurisdiction pursuant to TRA Rule 1220-4-13-.06 to amend or revoke the service

area of TWSI; and (4) the Tennessee courts give "great weight" to the TRA's interpretation of the statutes the agency enforces.

ARGUMENT

I. The TRA has jurisdiction over the "applicability of a statute, rule or order within the primary jurisdiction of the agency." Tenn. Code Ann. § 4-5-223(a). Among the Authority's statutory obligations is the duty to issue certificates of convenience and necessity authorizing utilities to provide service within a specified area. Tenn. Code Ann. § 65-4-201. The Authority may also place conditions upon those certificates and, in the case of wastewater services, may amend a utility's service area or revoke the utility's certificate to serve a particular area if service is not provided within two years. TRA Rule 1220-4-13-.06. The TRA, in sum, has primary jurisdiction over the designation, amendment, and revocation of the service territory of a public utility offering wastewater service in Tennessee.

II. In TRA Dockets 03-00329 and 04-00045, the Authority considered at length and in detail the meaning of Tenn. Code Ann. § 6-51-301(a) and its application to a municipal utility, such as CJUS, seeking to provide wastewater service to an area within the scope of a certificate issued by the Authority. On February 4, 2005, a TRA Hearing Officer issued an Initial Order concluding "it is reasonable to construe the term 'utility water service,' as used in Tenn. Code Ann. § 6-51-301(a) (1998) as including sanitary water service." Final Order, at 7. In a Final Order issued May 16, 2006, the TRA Directors unanimously "affirm[ed] the Hearing Officer's findings and conclusions related to that issue." Final Order, at 13. In other words, the Authority

unanimously held that the term "utility water service" as that term is used in Tenn. Code Ann. § 6-51-301(a) includes both potable water service and wastewater service.¹

III. Under Tenn. Code Ann. § 65-4-202, the Authority may alter or revoke a utility's certificate to offer service in a particular area. Pursuant to that statute and to Tenn. Code Ann. § 65-4-114, the TRA adopted rules 1220-4-13-.06(1)-(6) in 2006. The rules are designed to address, among other things, a situation where a wastewater utility is authorized to provide service to a particular development, usually at the request of the developer, but the building of the development and the initiation of wastewater service is delayed for two years or more. Under those circumstances, the Authority may require the certificate holder to "demonstrate that it intends to provide service in the area" and otherwise demonstrate that "based on the circumstances of a particular case," the Authority should not amend or revoke the utility's right to serve that development.

TWSI was granted a certificate in 2007 to provide wastewater service at the Villages at Norris Lake. Because of economic conditions, the building of the development has been delayed and, although TWSI has spent a significant amount of money in preparing to provide service to the development, TWSI has not yet begun providing wastewater service at that location. Whether in light of all the circumstances, the Authority should now amend or revoke TWSI's certificate to serve this development is a matter which only the Authority may address pursuant to Rule 1220-4-13-.06 and the criteria described in the rule. Were the Authority to amend or revoke TWSI's certificate to serve the Villages at Norris Lake (and TWSI will contend that the

¹ The TRA's conclusion is consistent with *Lynnwood Utility Co. v. The City of Franklin, Tennessee*, 1990 WL 38358 (Tenn. Ct. App. 1999) in which the Court assumed, though it did not directly hold, that the statute applied to both services and is also consistent with *Patterson v. City of Chattanooga*, 241 S.W.2d 291, 295 (Tenn. 1951) holding that water and sewer service are so interrelated that they "may be rightfully considered as one transaction."

Authority should not take such action) then Tenn. Code Ann. § 6-51-301 would no longer prevent CJUC from providing wastewater service to that development.

IV. The issues of determining the public need for utility service and how best to meet that need, the importance of protecting a utility's right to be the exclusive provider of service in a service area and the circumstances when that right should yield to other considerations are all matters committed to the primary jurisdiction of the TRA. In carryout out those statutory responsibilities, the TRA's interpretation of applicable statutes "is afforded great weight" by the courts. *Consumer Advocate Division v. Tennessee Regulatory Authority*, 2000 WL 1514324 (Tenn. Ct. App. 2000). That is appropriate given the agency's familiarity with terms of art and technical issues which may influence the interpretation and application of regulatory statutes.

Conclusion

The TRA should accept the Petition because the subject matter is within the primary jurisdiction of the agency, the petition involves statutes previously addressed by the agency, and the TRA's interpretation of applicable regulatory laws will be given great weight by Tennessee courts.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that a copy of this Brief has been sent by mail and by email to counsel for all parties in this docket. *January 3, 2012.*



HENRY WALKER