

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:

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

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**DOCKET NO.
11-00199**

**INITIAL ORDER DECLINING TO ACCEPT OR TO SET
PETITION FOR DECLARATORY RULING FOR HEARING**

This matter is before the Hearing Officer upon the *Petition of Tennessee Wastewater Systems, Inc. for Declaratory Ruling* (“*Petition*”) filed on November 16, 2011 by Tennessee Wastewater Systems, Inc. (“TWSI”). TWSI is petitioning for a declaratory ruling, pursuant to Tenn. Code Ann. § 4-5-223, concerning the interpretation of Tenn. Code Ann. § 6-51-301 and its application to a dispute between TWSI and the Caryville-Jacksboro Utility Commission (“CJUC”) as to which entity can legally provide wastewater service to Villages at Norris Lake in Campbell County, Tennessee.¹ For the reasons set forth below, the Hearing Officer declines to accept the *Petition* or to set the *Petition* for a contested case hearing.

BACKGROUND

TWSI filed the *Petition* on November 16, 2011, seeking a declaratory ruling concerning the interpretation of Tenn. Code Ann. § 6-51-301. In the *Petition*, TWSI asks for a declaratory order from the Tennessee Regulatory Authority (“Authority” or “TRA”) finding:

That TWSI has a legally protected right to provide wastewater services to Villages at Norris Lake, subject to the TRA’s power to modify or revoke that

¹ *Petition of Tennessee Wastewater Systems, Inc. for Declaratory Ruling*, p. 1 (November 16, 2011).

right and that, absent such action by the TRA, CJUC is prohibited by state law from providing wastewater services to Villages at Norris Lake.²

TWSI requests an interpretation of Tenn. Code Ann. § 6-51-301(a)(1) , which provides, in part:

Notwithstanding any other law, public or private, to the contrary, no municipality may render utility water service to be consumed in any area outside its municipal boundaries when all of such area is included within the scope of a certificate or certificates of convenience and necessity or other similar orders of the Tennessee regulatory authority or other appropriate regulatory agency outstanding in favor of any person, firm or corporation authorized to render such utility water service. (Emphasis added).

TWSI asserts that, although Tenn. Code Ann. § 6-51-301 uses the term “utility water service”, “both the TRA ... and the Tennessee Attorney General ... have concluded that a court would likely interpret [that statute] as prohibiting a municipal utility from providing wastewater service to customers located outside the boundaries of the municipality and inside the service area of a certificate granted by the TRA.”³ In support of its contention, TWSI cites TRA Docket Nos. 03-00329/04-00045, and Attorney General Opinion 04-134.⁴

During the December 12, 2011 Authority Conference, the Authority voted to appoint Jean Stone of the Legal Division to act as the Hearing Officer in this matter to make a determination, prior to January 16, 2012, whether to accept the *Petition* and whether to set this matter for a contested case proceeding.⁵ On December 19, 2011, the Hearing Officer issued a Procedural Schedule to allow TWSI or any timely intervenor to file a brief no later than January 3, 2012, on the threshold issue of whether it is appropriate for the TRA to accept the *Petition for Declaratory Ruling* under the criteria set forth in Tenn. Code Ann. §§ 4-5-233 and 65-2-104 and TRA Rule 1220-1-2-.05(1). On December 20, 2011, Emerson Properties, LLC (“Emerson”) filed a Petition to Intervene, which was granted by the Hearing Officer by an order dated

² *Id.* at 3.

³ *Id.*

⁴ *Id.*

⁵ If the *Petition* is accepted, the Hearing Officer is authorized to resolve any preliminary matters, including the preparation of a Notice to the Secretary of State as required by Tenn. Code Ann. § 4-5-224, and to hear and consider the *Petition* on its merits. See *Order Appointing a Hearing Officer* (January 6, 2012).

December 21, 2011.

On January 3, 2012, TWSI filed a brief on the issue of the acceptance of the *Petition*, but Emerson did not. In a response to the Hearing Officer's email about its failure to file a brief, Emerson stated that "our positions in this matter relate to the merits and not the Agency's jurisdiction."⁶

CRITERIA FOR ACCEPTANCE OF PETITION

In making the determination as to whether to accept the *Petition* and to set it for a contested case hearing, the Hearing Officer is bound by the criteria set forth in Tenn. Code Ann. §§ 4-5-223 and 65-2-104 and TRA Rule 1220-1-2-.05(1). Tenn. Code Ann. § 65-2-104 provides that upon a petition filed by an interested party,

...the authority may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it or with respect to the meaning and scope of any order of the authority.

Tenn. Code Ann. § 4-5-223 provides, in part:

(a) Any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency....

TRA Rules also provide for the filing of requests for declaratory orders or rulings. Tenn. Comp. R. & Regs. 1220-1-2-.05(1) states:

Pursuant to T.C.A. §§ 4-5-223 and 65-2-104, any affected person may petition the Authority for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the Authority.

DISCUSSION

TWSI asserts in its *Petitioner's Brief on Acceptance of Petition* that the Authority should issue a declaratory ruling 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

⁶ Email from Mark Troutman to Henry Walker and Jean A. Stone dated January 4, 2012 (January 11, 2012).

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.⁷

Although TWSI is correct in its assertion that the Authority has primary jurisdiction over the authorization, alteration or revocation of a *public utility’s* service area, that jurisdiction is derived from Tenn. Code Ann. § 65-4-201, and not Tenn. Code Ann. § 6-51-301(a). Tenn. Code Ann. § 6-51-301(a) concerns the service area of a *municipality* and, although it references a Certificate of Convenience and Necessity (“CCN”) issued by the Authority pursuant to Tenn. Code Ann. § 65-4-201, the statute concerning municipalities is neither enforceable by the Authority nor within the primary jurisdiction of this agency. Simply put, § 65-4-201 authorizes where a public utility may provide service; § 6-51-301(a) tells a municipality where it may not provide service.⁸ The former is within the primary jurisdiction of, and enforceable by, the Authority; the latter is not. Therefore, the Authority is without jurisdiction to issue a declaratory ruling interpreting Tenn. Code Ann. § 6-51-301(a).

The Hearing Officer acknowledges that the Authority has previously interpreted Tenn. Code Ann. § 6-51-301(a) and concluded that it applies to both potable water service and wastewater service in TRA Docket Nos. 03-00329/04-00045.⁹ However, those dockets were procedurally different from this case in that they did not involve petitions for declaratory ruling

⁷ *Petitioner’s Brief on Acceptance of Petition*, pp. 1-2 (January 3, 2012).

⁸ Indeed, TWSI requests the Authority to issue a declaratory ruling that CJUC is prohibited by state law from providing wastewater services to Villages at Norris Lake.

⁹ TWSI argues that the courts give “great weight” to the Authority’s interpretation of applicable statutes. The Hearing Officer notes that the courts are certainly free to weigh the Authority’s interpretation of Tenn. Code Ann. § 6-51-301(a) made in previous dockets.

and the Hearing Officer's and Authority's analyses were done in the context of an application for a CCN pursuant to Tenn. Code Ann. § 65-4-201.¹⁰ Thus, the Authority was not in that instance limited by the statutory criteria for acceptance of a Petition for Declaratory Ruling when making that determination, as discussed above.

For these reasons, the Hearing Officer finds that because Tenn. Code Ann. § 6-51-301(a) is not within the primary jurisdiction of, or enforceable, by the Authority, it would be inappropriate to accept the *Petition* and set it for a contested case hearing under the criteria set forth in Tenn. Code Ann. §§ 4-5-223 and 65-2-104 and TRA Rule 1220-1-2-.05(1). Pursuant to Tenn. Code Ann. § 4-5-223(c), if an agency does not set a petition for declaratory order for a contested case hearing within sixty days after receipt of the petition, the agency is deemed to have denied the petition.

IT IS THEREFORE ORDERED THAT:

1. The Hearing Officer declines to accept the *Petition of Tennessee Wastewater Systems, Inc. for Declaratory Ruling* or to set the *Petition* for a contested case hearing.
2. Any party aggrieved by the Hearing Officer's decision in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days from the date of this Initial Order.

¹⁰ In consolidated Docket Nos. 03-00329/04-00045, TWSI sought a county-wide CCN for Sevier County, Tennessee. In denying the request for a county-wide CCN, the Hearing Officer made several findings and conclusions regarding the interpretation and applicability of relevant state statutes. The Panel of Directors affirmed the Hearing Officer's conclusion that a court was likely to find that "utility water service", as used in subsection Tenn. Code Ann. § 6-51-301(a), included sanitary sewer service. *See In Re: Petition of On-Site Systems, Inc. to Expand Its Service Area to Include an Area Known as Sevier County*, Docket No. 03-00329, *Order Affirming Hearing Officer's Findings and Conclusions in Initial Order Issued February 4, 2005*, p. 13 (May 16, 2006). The Hearing Officer and the Panel analyzed Attorney General Opinion 04-134, which had reached a different result. The Attorney General opined that a court was likely to conclude that "utility water service" as used in Tenn. Code Ann. § 6-51-301(a) does not include a sanitary sewer system. However, the Attorney General concluded that other statutes, such as Tenn. Code Ann. § 7-51-401(c) and Tenn. Code Ann. § 7-82-301(a), could prohibit a city from extending sewer service beyond its boundaries. *See Tenn. Op. Att. Gen. No. 04-134* (August 20, 2004).

3. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Initial Order.



Jean A. Stone, Hearing Officer