

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

**NASHVILLE, TENNESSEE
September 23, 2015**

IN RE:)	
)	
PETITION OF LAUREL HILLS CONDOMINIUMS)	DOCKET NO.
PROPERTY OWNERS ASSOCIATION FOR A)	12-00077
CERTIFICATE OF PUBLIC CONVENIENCE AND)	
NECESSITY)	

ORDER DENYING REQUEST FOR STAY OF PROCEEDINGS

This matter came before Vice Chairman David F. Jones, Director Kenneth C. Hill, and Director James M. Allison of the Tennessee Regulatory Authority (“Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on August 17, 2015, to consider the *Request for Stay of Proceedings Pending Judicial Review* (“*Request for Stay*”) filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General (“Consumer Advocate”) on July 21, 2015.

RELEVANT BACKGROUND

On July 17, 2012, this docket was initiated upon entry of the Hearing Officer’s *Order Requiring Laurel Hills Condominiums Property Owners Association to Appear and Show Cause Why a Cease and Desist Order and Civil Penalties & Sanctions Should Not be Imposed Against It for Violations of State Law* (“*Show Cause Order*”), as directed by the Authority panel in TRA Docket No. 12-00030, after due consideration of the preliminary investigation and findings of the TRA Staff acting as a Party (“Party Staff”).¹ On December 8, 2014, the Consumer Advocate filed a *Petition to Intervene* seeking to intervene in the proceedings as a party under the

¹ *Show Cause Order* (July 17, 2012).

mandatory intervention standards of Tenn. Code Ann. § 4-5-310(a).² Party Staff and Respondent Laurel Hills Condominiums Property Owners' Association ("Laurel Hills") (collectively, the "Parties") each objected and filed separate responses in opposition to the *Petition to Intervene* on December 30, 2014 and January 2, 2015, respectively.³ The Consumer Advocate replied to the Parties' objections and opposition on January 22, 2015.⁴ On February 4, 2015, the Hearing Officer entered an *Order Denying Consumer Advocate's Petition to Intervene* ("Initial Order") denying the Consumer Advocate's request to intervene for its failure to establish facts sufficient to demonstrate an entitlement to participate as a party under Tenn. Code Ann. § 4-5-310(a), and further holding that discretionary intervention under Tenn. Code Ann. § 4-5-310(b)) was not appropriate.⁵

Pursuant to TRA Rule 1220-1-2-.06(6), the Consumer Advocate requested permission for interlocutory panel review of the *Initial Order* on February 26, 2015. Without objection by the Parties, the Hearing Officer granted the Consumer Advocate's request for interlocutory review on March 11, 2015.⁶ On April 9, 2015, the Consumer Advocate filed an *Appeal to the Authority to Grant the Petition to Intervene of the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General* ("Appeal to the Authority Panel"), to which it attached

² In its *Petition to Intervene*, the Consumer Advocate contended that the consumers of Laurel Hills' services have a direct interest in the proceeding, and that the violations of law alleged against Laurel Hills affected those interests and rights of Laurel Hills' customers, particularly with regard to charges involving unauthorized rates and withholding service. In addition, the Consumer Advocate asserted that if Party Staff and Laurel Hills reached a settlement and the Consumer Advocate believed that the settlement was adverse to consumers' interests, it would not be allowed to contest such a settlement agreement if it were not allowed to intervene as a party. Finally, the Consumer Advocate stated that "[o]nly by participating in this proceeding can the Consumer Advocate work adequately to protect the interests of consumers." *Petition to Intervene*, pp. 2 and 3-5 (December 8, 2014).

³ *Objection to Intervention Requests* (December 30, 2014) and *Respondent's Opposition to the Consumer Advocate's Division's Motion to Intervene* (January 2, 2015).

⁴ Consumer Advocate's Reply to the Party Staff's Objection to the Petition to Intervene (January 22, 2015) and Reply to Respondent Laurel Hills' Opposition to Petition to Intervene (January 22, 2015).

⁵ *Initial Order* (February 4, 2015). In addition, it should be noted that on February 2, 2015, the Hearing Officer entered an *Order Denying Petitions to Intervene* as to the intervention requests filed by Gary Haiser, *et al.*, and Eagles Nest, LLC, whom are actual and prospective customers of Laurel Hills, respectively. This Order was not appealed.

⁶ *Order Granting Interlocutory Review* (March 11, 2015).

several exhibits.⁷ Laurel Hills and the Party Staff each opposed the *Appeal to the Authority Panel*.⁸

During the regularly scheduled Authority Conference held on June 29, 2015, the Consumer Advocate and the Parties presented their respective positions on the Consumer Advocate's *Appeal to the Authority Panel*. Thereafter, finding that the *Initial Order* was well-researched and provides a comprehensive and thorough analysis of the issues presented in the Consumer Advocate's *Petition to Intervene* and the subsequent related filings, a majority of the panel voted to deny the *Appeal to the Authority Panel* and to affirm the Hearing Officer's *Initial Order*.

CONSUMER ADVOCATE'S REQUEST FOR STAY

On July 21, 2015, pursuant to Tenn. Code Ann § 4-5-322(c), the Consumer Advocate filed its *Request for Stay* in which it asks that the proceedings in this docket be stayed pending judicial review of the TRA's decision to deny the Consumer Advocate's *Petition to Intervene*.⁹ In its *Request for Stay*, the Consumer Advocate states that under Tenn. Code Ann. §4-5-322(a)(1), upon issuance of the TRA's final order affirming the Hearing Officer's denial of its *Petition to Intervene* it intends to seek judicial review in the Davidson County Chancery Court.¹⁰ Further, the Consumer Advocate contends that a stay is necessary to maintain the status quo and

⁷ *Appeal to the Authority Panel*, with Exhibits A-1 through D (including *Petition to Intervene*, the Party Staff's Objection and Laurel Hills' Opposition to its intervention, Replies to the Party Staff and Laurel Hills, the *Initial Order*, its Request for Permission for Interlocutory Review by the Panel, and the *Order Granting Interlocutory Review*) (April 9, 2015).

⁸ *Respondent's Opposition to Appeal to the Authority to Grant the Petition to Intervene of the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General* ("Opposition to Appeal") (April 17, 2015) and *Objection to Consumer Advocate's Appeal to the Authority to Grant Intervention* (April 21, 2015).

⁹ At the time that the *Request for Stay* was filed, the panel had heard the Consumer Advocate's appeal and rendered a decision denying the *Appeal to the Authority Panel* and affirming the denial of its *Petition to Intervene* set forth in the Hearing Officer's *Initial Order*, but a final order memorializing that decision had not yet been issued.

¹⁰ *Request for Stay*, p. 2 ¶ 5 (July 21, 2015).

preserve an opportunity for it to participate in this matter.¹¹ In summary, the Consumer Advocate states, “Given that the proceedings are scheduled to conclude on August 17, 2015, the Consumer Advocate requests an immediate stay of proceedings pending judicial review of the TRA’s decision.”¹²

Neither Party Staff nor Laurel Hills has filed a Response to the Consumer Advocate’s *Request for Stay*. However, private counsel for the customers of Laurel Hills, whose request to intervene in the instant docket was also denied and who participated as an intervening party in Docket No. 12-00030, filed a letter on August 12, 2015, opposing any further delays caused by the Consumer Advocate’s attempts to intervene in the docket, “While we appreciate the efforts of the Consumer Advocate, in this particular instance we assert that it is not in these customers’ best interests for there (sic) to be any further delay and we are not in favor [of] a stay being issued or in any further proceedings regarding the role of the Consumer Advocate in this case.”¹³

CONSUMER ADVOCATE’S COURT FILINGS

Nevertheless, before the next regularly scheduled Authority Conference set for August 17, 2015, during which time the panel would have opportunity to consider the *Request for Stay*, the Consumer Advocate filed a Petition for Judicial Review and a Motion for Stay of Proceedings (“Chancery pleadings”) in the Davidson County Chancery Court on July 31, 2015.¹⁴ In its Chancery pleadings, the Consumer Advocate asks the Chancery Court to stay this show cause proceeding until the TRA’s denial of its intervention can be decided on appeal. On August 11, 2015, the Authority filed a Response asserting that the Court of Appeals is the proper forum

¹¹ *Id.* at ¶ 6.

¹² *Id.* at ¶ 7.

¹³ *Id.*

¹⁴ *In re Consumer Advocate and Protection Division of the Office of the Attorney General of Tennessee by and through Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee v. Tennessee Regulatory Authority*, Case No. 15-926-III (Davidson Co. 20th Jud. Dist.), *Petition for Judicial Review and Motion for Stay of Proceedings* (July 31, 2015).

for review of TRA decisions, and as such, that the Chancery Court lacks jurisdiction. In addition, the TRA asserted that because it had not yet heard the Consumer Advocate's *Request for Stay*, the Consumer Advocate had failed to exhaust its administrative remedies before the Authority.¹⁵ The Consumer Advocate filed a Reply to the TRA's Response on August 12, 2015.¹⁶ On August 13, 2015, the Chancellor convened a hearing on the Motion for Stay of Proceedings, during which the Consumer Advocate and TRA Party Staff appeared and presented argument on the motion.

On August 14, 2015, the Chancery Court issued a *Memorandum and Order Denying Petitioner's Motion for a Stay and Dismissing Petition for Judicial Review* ("Order Denying Stay and Dismissing Petition") (attached to this Order as Exhibit A).¹⁷ In its *Order Denying Stay and Dismissing Petition*, the Chancery Court conducted a thorough textual analysis of the judicial review provisions of the Uniform Administrative Procedures Act set forth in Tenn. Code Ann. § 4-5-322(a) and (b). Upon examination of the statute, the Chancery Court found that although Tenn. Code Ann. § 4-5-322(a)(1) identifies a right of interlocutory review, it does not designate a court.¹⁸ Further, Tenn. Code Ann. § 4-5-322(b)(1)(A)-(B) designates which courts perform judicial review for various cases, and that no particular subsection provides for a general interlocutory authority by the Davidson County Chancery Court.¹⁹ In addition, the Chancery

¹⁵ *In re Consumer Advocate and Protection Division of the Office of the Attorney General of Tennessee by and through Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee v. Tennessee Regulatory Authority*, Case No. 15-926-III (Davidson Co. 20th Jud. Dist.), *Response* (August 11, 2015).

¹⁶ *In re Consumer Advocate and Protection Division of the Office of the Attorney General of Tennessee by and through Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee v. Tennessee Regulatory Authority*, Case No. 15-926-III (Davidson Co. 20th Jud. Dist.), *Reply of the Consumer Advocate and Protection Division of the Office of the Attorney General to the Respondent's Response to the Motion for a Stay* (August 12, 2015).

¹⁷ *In re Consumer Advocate and Protection Division of the Office of the Attorney General of Tennessee by and through Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee v. Tennessee Regulatory Authority*, Case No. 15-926-III (Davidson Co. 20th Jud. Dist.), *Memorandum and Order Denying Petitioner's Motion for a Stay and Dismissing Petition for Judicial Review* (August 14, 2015).

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 4.

Court found that Tenn. Code Ann. § 4-5-322(b)(1)(B)(iii) specifically designates the court of appeals as the appropriate court to review TRA final decisions. As such, the Chancery Court held that it lacked jurisdiction to rule on the Consumer Advocate's Chancery pleadings and, thereafter, denied the request for a stay and dismissed with prejudice the petition for judicial review.²⁰

Thereafter, before the Authority convened its regularly scheduled Authority Conference, the Consumer Advocate filed a Petition for Review in the Middle Section of the Tennessee Court of Appeals on August 17, 2015.²¹

ORAL ARGUMENT

During the regularly scheduled Authority Conference held on August 17, 2015, the Consumer Advocate and Party Staff presented their respective positions on the Consumer Advocate's *Request for Stay*. As an initial matter, the Consumer Advocate verbally amended its *Request for Stay* to include not only its Chancery pleadings, but also the resolution of the Petition for Review that it had filed in the Court of Appeals earlier that day. After reiterating its assertion of an existing consumer interest and that it should have been granted intervention in the docket, the Consumer Advocate rested on its written pleadings.²²

During oral argument, Party Staff noted that in TRA Docket No. 12-00030, and as was consistent with the Consumer Advocate's position in that docket, the Authority found that Laurel

²⁰ *Id.* at 4.

²¹ *In re Consumer Advocate and Protection Division of the Office of the Attorney General of Tennessee by and through Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee v. Tennessee Regulatory Authority*, Tenn. Ct. App. Case No. M-2015-01564-COA-R12-CV, *Petition for Review* (August 17, 2015) (asserting that under Tenn. Code Ann. § 65-4-118(b)(1) the Consumer Advocate has an absolute right to intervene in any TRA proceeding and that the TRA erred in denying the Consumer Advocate's petition to intervene in show cause Docket No. 12-00077.)

²² Transcript of Authority Conference, p. 13 (August 17, 2015).

Hills was not qualified or competent to operate or manage the water system.²³ Despite this, in accordance with the TRA's Order, Laurel Hills has continued to provide necessary service to its established customers. Now, as was advocated by the Consumer Advocate and in conformance with the stated desire of the water system's customers, Laurel Hills has agreed to place the water system into receivership, as set forth in the *Settlement Agreement and Release* as amended by the *First Addendum to the Settlement Agreement and Release*.²⁴ Finally, Party Staff contended that a stay of the proceedings would undermine and thwart the progress made toward obtaining a qualified system operator and owner for the benefit of the water system customers.²⁵

Also during the time for oral argument, members of the public were given the opportunity to speak, but no one sought recognition to do so.²⁶ In addition, the Consumer Advocate, Party Staff, and Laurel Hills were questioned and further discussed to the satisfaction of the TRA Directors the impact of a stay on the proceedings and the procedural implications of potential action by the Court of Appeals.²⁷

FINDINGS & CONCLUSIONS

Upon review and after due consideration, the panel noted during the Authority Conference that, regardless of the new petition filed with the Court of Appeals, the Davidson County Chancery Court denied the Consumer Advocate's Motion for Stay of Proceedings and dismissed, with prejudice, its Petition for Judicial Review in the *Order Denying Stay and Dismissing Petition* issued on August 14, 2015. Further, the panel found that the current situation, wherein Laurel Hills, an unqualified and uncertificated entity, by necessity, has been

²³ See *In re Petition of Laurel Hills Condominiums Property Owners' Association for a Certificate of Public Convenience and Necessity*, TRA Docket No. 12-00030, *Order Denying Certificate of Public Convenience and Necessity and Requiring Divestiture of Water System* ("Divestiture Order") (April 18, 2013).

²⁴ *Petition to Adopt Settlement Agreement*, with attached *Settlement Agreement and Release* (July 27, 2015); and *First Addendum to the Settlement Agreement and Release* (August 13, 2015).

²⁵ Transcript of Authority Conference, p. 14-15 (August 17, 2015).

²⁶ *Id.* at 15-16 (August 17, 2015).

²⁷ *Id.* at 16-22 (August 17, 2015).

operating the water utility pursuant to the TRA's *Divestiture Order* and under Order of the Cumberland County Chancery Court, has been pending for more than three years.

While acknowledging the Consumer Advocate's important role in the representation of consumers, the panel recalled that a majority of the panel had determined that the interests of the consumers and, likewise, the Consumer Advocate's interests, do not extend to this particular show cause proceeding.²⁸ Nevertheless, in the event a receivership is instituted, the Consumer Advocate would have an opportunity to participate in issues that impact customers, such as a future rate case. Importantly, the panel further noted that the customers of Laurel Hills, whom had intervened as a party in Docket No. 12-00030, had filed, through their private counsel, a letter in the docket file opposing any further delays in this matter. Based upon these findings, the panel voted unanimously to deny the Consumer Advocate's *Request for a Stay of Proceedings Pending Judicial Review*.

IT IS THEREFORE ORDERED THAT:

The *Request for Stay of Proceedings Pending Judicial Review* filed by the Consumer Advocate and Protection Division of the Tennessee Attorney General on July 21, 2015, and amended verbally by the Consumer Advocate during the Authority Conference held on August 17, 2015, is denied.

Vice Chairman David F. Jones and Director Kenneth C. Hill concur. Director James M. Allison concurred with the motion.

ATTEST:



Earl R. Taylor, Executive Director

²⁸ See Transcript of Proceedings, pp. 47-64 (June 29, 2015) (denying the *Appeal to the Authority* and affirming the Hearing Officer's February 4, 2015, *Initial Order*.)

Exhibit A

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CLERK & MASTER
DAVIDSON & CO. CHANCERY CT.

D.C. & M.

Petitioner,

vs.

NO. 15-926-III

**TENNESSEE REGULATORY
AUTHORITY,**

Respondent.

This case is before the Court on the Petitioner's preliminary motion to stay proceedings before the Tennessee Regulatory Authority ("TRA") in TRA Docket No. 12-00077 *In Re Show Cause Proceeding of Laurel Hills Condominium Property Owners' Association*. The stay seeks to hold the show cause proceedings in abeyance pending resolution in this Court of Petitioner's contemporaneously filed *Petition for Judicial Review* of TRA's denial of Petitioner's intervention in the TRA show cause proceedings. Based upon textual analysis of the applicable jurisdictional statute in this case, Tennessee Code

Annotated section 4-5-322, the Court denies the Petitioner's *Motion for Stay* for lack of jurisdiction. The Court's reasoning is as follows.

The issue in the *Petition For Judicial Review* is whether the Respondent Tennessee Regulatory Authority ("TRA") had the right to deny Petitioner's motion to intervene on behalf of consumers in a show cause hearing TRA is conducting to sanction a water service provider, Laurel Hills Condominium Property Owners' Association, who did not have a service provider certificate. The Petitioner asserts it has an absolute right by statute to intervene; the Respondent asserts the right is not absolute. Also disputed by the parties is whether TRA's denial of Petitioner's motion to intervene is a final decision or an interlocutory matter. Further necessary context is that a settlement has been reached with the water provider in the show cause proceedings to turn over the facility, and on August 17, 2015, that settlement will be presented to TRA for approval. The Petitioner asserts TRA's denial of its intervention precludes its input and/or objections on the settlement proposal.

It is in this context that the Petitioner has filed a Tennessee Code Annotated section 4-5-322(c) motion for the Court to stay the TRA show cause proceedings until the intervention issue can be decided on appeal, and it is in this context that the Court concludes it does not have jurisdiction to rule on the stay, and does not have jurisdiction of the contemporaneously filed *Petition For Judicial Review*.

The Court's conclusion is based upon Tennessee Code Annotated section 4-5-322, particularly subsection (b)(1)(B)(iii). It provides that appeals of TRA "final decision[s]" are filed with the middle division of the court of appeals:

(iii) A person who is aggrieved by any final decision of the Tennessee regulatory authority, or by a final decision of the state board of equalization in a contested case involving centrally assessed utility property assessed in accordance with title 67, chapter 5, part 13, shall file any petition for review with the middle division of the court of appeals.

Accordingly, if TRA's denial of Petitioner's intervention constitutes a "final decision," then jurisdiction is with the court of appeals, and this Court has no jurisdiction to issue a stay.

If, on the other hand, TRA's denial of Petitioner's intervention is an interlocutory matter, this Court nevertheless concludes it still does not have jurisdiction.

The source of interlocutory jurisdiction in administrative cases is Tennessee Code Annotated section 4-5-322(a)(1). It provides as follows:

(a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy [emphasis added].

Significant to this case is that the format of subsection 4-5-322(a)(1) does not designate the chancery court of Davidson County as the jurisdiction for interlocutory appeals. While the second sentence of section (a)(1) provides for interlocutory review, it does not designate a court. Thus, the provision for interlocutory review in section 4-5-322(a)(1) appears to be just the identification and designation that such a right exists.

It is the next subsection, 4-5-322(b)(1)(A)-(B), which designates which courts perform judicial review for various cases. As quoted above, the court of appeals, in section 4-5-322(b)(1)(B)(iii), designates the middle division court of appeals for TRA issues.

While it is the case that the designation of the court of appeals for TRA matters in subsection 4-5-322(b)(1)(B)(iii) references that designation in terms of a TRA "final decision," the same can be said about the designation of Davidson County chancery court in subsection 4-5-322(b)(1)(A). This subsection is not broader than subsection 4-5-322(b)(1)(B)(iii).

The designation of the Davidson County chancery court, like the text designating the court of appeals for TRA matters, both arise, the text says, from "final" orders or decisions. There is no broader text, indicative of general interlocutory authority by Davidson County Chancery Court, in section 4-5-322(a)(1), b(1)(A), or (b)(1)(B)(iii). For ease of reference and to demonstrate these are quoted in sequence as follows:

(a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy [emphasis added].

* * *


(b)(1)(A) Proceedings for review are instituted by filing a petition for review in the chancery court of Davidson County, unless another court is specified by statute. Such petition shall be filed within sixty (60) days after the entry of the agency's final order thereon [emphasis added].

* * *

(iii) A person who is aggrieved by any final decision of the Tennessee regulatory authority, or by a final decision of the state board of equalization in a contested case involving centrally assessed utility property assessed in accordance with title 67, chapter 5, part 13, shall file any petition for review with the middle division of the court of appeals [emphasis added].

From this textual analysis, the Court concludes it lacks jurisdiction to rule on the Petitioner's *Motion For A Stay*, and to proceed on the *Petition For Judicial Review*.

It is therefore ORDERED that the Petitioner's *Motion For Stay* is denied, and the *Petition For Judicial Review* is dismissed with prejudice. Court costs are taxed to the Petitioner.



ELLEN HOBBS LYLE
CHANCELLOR

cc: Rachel Newton
Shiva K. Bozarth
Ben Gastel (nonparty counsel, for information only)

RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.



Deputy Clerk and Master
Chancery Court

8/14/15

Date