

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 4, 2015

IN RE:

SHOW CAUSE PROCEEDING AGAINST LAUREL
HILLS CONDOMINIUMS PROPERTY OWNERS
ASSOCIATION FOR ALLEGED VIOLATIONS OF
TENN. CODE ANN 65-4-201, 65-4-301(A), 65-5-102, 65-
4-101 AND/OR 65-4-103, AND 65-4-115

DOCKET NO.
12-00077

ORDER DENYING CONSUMER ADVOCATE'S PETITION TO INTERVENE

This matter is before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") upon a *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Tennessee Attorney General ("Consumer Advocate or "CAPD") on December 8, 2014.

BACKGROUND

On July 17, 2012, the Hearing Officer in this docket issued an *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"). The *Show Cause Order* was issued as a result of proceedings held in TRA Docket No. 12-00030, in which Laurel Hills Condominiums Property Owners Association ("Laurel Hills") applied for a Certificate of Public Convenience and Necessity ("CCN"). On April 18, 2013, the panel in TRA Docket No. 12-00030 issued an *Order* denying the CCN and ordering Laurel Hills

to divest its water system.¹ Laurel Hills appealed the panel's decision to the Court of Appeals and to the Tennessee Supreme Court.

On October 21, 2014, Compliance Division Staff, acting as a Party ("Party Staff"), filed the *Renewed Motion to Initiate Proceedings* ("Motion") requesting that the Hearing Officer set this matter for Hearing. In support of the *Motion*, Party Staff stated:

On April 14, 2014, the Court of Appeals for the Middle District of Tennessee upheld the Authority's decision in docket number 12-00030. Laurel Hills Condominiums Property Owners Association filed an application for permission to appeal the Court of Appeals decision in docket number 12-00030. On October 15, 2014, the Tennessee Supreme Court denied Laurel Hills Condominiums Property Owners Association application. At this time there is no reason to continue to delay the proceedings.²

During the regularly scheduled Authority Conference held on November 4, 2014, the panel considered the *Motion*. The panel found that since the appellate court proceedings had concluded in TRA Docket No. 12-00030, abeyance of further TRA proceedings was no longer warranted and, therefore, unanimously voted to grant Party Staff's *Motion*.

PETITION TO INTERVENE

In its *Petition to Intervene*, the Consumer Advocate states that this proceeding is a contested case proceeding and "consumers have an interest in the proceeding."³ According to the Consumer Advocate, it has met the three requirements of Tenn. Code Ann. § 4-5-310(a) because:

(1) the Petition is timely; (2) the Petitioner's 'rights, duties, privileges, immunities or other legal interest may be determined and the Petitioner also qualifies as an Intervenor under Tenn. Code Ann. § 65-5-118; and (3) the 'interests of justice and the prompt conduct of the proceedings shall not be impaired.[']

¹ 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* (April 18, 2013) ("Order"). A full account of the TRA proceedings prior to and subsequent to the issuance of the *Show Cause Order* is set forth in TRA Docket No. 12-00030.

² *Renewed Motion to Initiate Proceedings*, p. 1 (October 21, 2014). In addition, Party Staff filed in TRA Docket No. 12-00030 a copy of the Mandate issued from the Tennessee Court of Appeals and related appellate court filings. The TRA Order was affirmed in all respects. See *Laurel Hills Condominiums Property Owners' Association v. Tennessee Regulatory Authority*, 2014 WL 1494126 (Tenn. Ct. App. Apr. 14, 2014), *perm. app. denied* (Tenn. Oct. 15, 2014).

³ See *Petition to Intervene* p. 2 (December 8, 2014).

The CAPD maintains that the alleged violations against Laurel Hills directly affect the interests and rights of Laurel Hills' customer, "particularly charging unauthorized rates and withholding service."⁴ In addition, the CAPD asserts that if there is a settlement agreement that is adverse to consumers' interests, it will not be able to contest such a settlement agreement if it is not allowed to intervene.⁵ The CAPD states that "[o]nly by participating in this proceeding can the Consumer Advocate work adequately to protect the interests of consumers."⁶

RESPONSES TO CAPD PETITION TO INTERVENE

LAUREL HILLS

Laurel Hills filed *Respondent's Opposition to the Consumer Advocate Divisions' Motion to Intervene* ("Respondent's Opposition") on January 2, 2015. Laurel Hills states the Consumer Advocate "seeks intervention in this case as a result of unidentified interests that customers have in the Proceeding. This Proceeding strictly entails whether Laurel Hills purportedly violated state law and has no impact on any customers of Laurel Hills."⁷ Laurel Hills states that in a show cause action only one party is contemplated by the statute and that the "TRA then functionally acts as a prosecutor of this civil enforcement proceeding and no other entity can assume that role."⁸ Quoting *State v. Brown and Williamson Tobacco Corp.*, Laurel Hills asserts "the Supreme Court held that where the State brings suit in its official capacity as sovereign to enforce state law, third parties 'do not have a substantial legal interest in the State's suit entitling them to intervene.'"⁹ Laurel Hills argues that in this proceeding, the TRA seeks to impose a civil penalty against Laurel Hills for purported violations of state law and enjoin it from continuing such purported violations.¹⁰ Further,

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.* at 5.

⁷ *Respondent's Opposition*, p. 1 (January 2, 2015).

⁸ *Id.* at 2.

⁹ *Id.* citing *State v. Brown and Williamson Tobacco Corp.*, 18 S.W.3d 186 (Tenn. 2000).

¹⁰ *Id.*

Laurel Hills argues “it is simply unclear what role the CAD [Consumer Advocate] seeks to assume and they do not attempt whatsoever to define such a role. In fact, they cite to no statute, law, or even fact that would justify their intervention in this Proceeding.”¹¹ In addition, Laurel Hills maintains that “[i]ncluding them [the CAPD] in this proceeding would only add to the cost and expense of this Proceeding without any appreciable benefit gained by their inclusion.”¹²

TRA PARTY STAFF

TRA Party Staff filed its *Objection to Intervention Requests* on December 30, 2014 stating that “[t]he only parties that are entitled under the law to participate in a Show Cause proceeding are Party Staff appointed by the TRA and the respondent utility.”¹³ Party Staff states this proceeding is an enforcement action against Laurel Hills and “the Show [C]ause statute does not contemplate third party intervention when the only issue is whether there has been a violation of the law.”¹⁴ Party Staff argues that the Consumer Advocate’s *Petition to Intervene* is “devoid of any facts that would create a basis for intervention.”¹⁵ Further, Party Staff asserts that the Consumer Advocate has been silent regarding the interests they seek to protect because there are none and this proceeding “is simply an enforcement action against the company for violations of law.”¹⁶

REQUESTS TO REPLY

On December 22, 2014, the Hearing Officer issued an *Order Extending Time to Respond to Petition to Intervene and Holding Procedural Schedule in Abeyance*, which gave Party Staff until January 30, 2015 to respond to the CAPD’s *Petition to Intervene*, and held the procedural schedule in abeyance until a new schedule was issued.

On January 22, 2015, the Consumer Advocate filed a *Request of the Consumer Advocate*

¹¹ *Id.*

¹² *Id.*

¹³ See *Objection to Intervention Requests*, p. 1 (December 30, 2014).

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

and Protection Division of the Attorney General's Office to File a Reply to Party Staff's Objection to the Consumer Advocate's Petition to Intervene ("Request to Reply to Party Staff") and its Reply of the Consumer Advocate and Protection Division of the Attorney General's Office to the Party Staff's Objection to Petition to Intervene ("Reply to Party Staff"). The Consumer Advocate also filed its *Request of the Consumer Advocate and Protection Division of the Attorney General's Office to File a Reply to Respondent Laurel Hills' Objection to Consumer Advocate's Petition to Intervene ("Request to Reply to Respondent")* and its *Reply of the Consumer Advocate and Protection Division of the Attorney General's Office to Respondent Laurel Hills' Objection to Petition to Intervene ("Reply to Laurel Hills")*.

Both Requests to Reply state "[t]he Consumer Advocate believes that a reply would be helpful to the Authority in determining the status of its Petition to Intervene because significant legal issues concerning the Consumer Advocate's duties and responsibilities have been raised" by Party Staff and Laurel Hills in their Objections.¹⁷ Since there have been no objections filed to the Requests to Reply, the Hearing Officer will grant them.

In its *Reply to Party Staff*, the CAPD argues that consumers have a specific interest in this proceeding and that it has properly given notice to Party Staff as to why intervention is necessary.¹⁸ According to the CAPD, the legal rights of Laurel Hills' customers are at issue in this docket and "if a utility engages in wrongdoing of the type alleged by TRA Party Staff, the consumer interest is necessarily implicated."¹⁹ The CAPD contends that "[c]harging unauthorized rates and refusing to provide service to customers are clearly matters of interest to consumers, not just issues between the TRA and Laurel Hills. Therefore it is proper for the Consumer Advocate to intervene in this matter because its enabling statute gives it the authority to represent the interests of Tennessee consumers

¹⁷ *Request to Reply to Respondent*, p. 1 (January 22, 2015); *Request to Reply to Party Staff*, p. 1 (January 22, 2015).

¹⁸ *Reply to Party Staff*, p. 1 (January 22, 2015).

¹⁹ *Id.* at 3.

of public utilities services.”²⁰ The Consumer Advocate also argues that “[w]ithout intervention, the Consumer Advocate would not be able to fully participate in these proceedings or be able to appeal a decision of the Authority that it believes is adverse to consumers, nor would it be able to represent consumer interests if Laurel Hills were to appeal a decision of the Authority.”²¹ To support its argument, the Consumer Advocate cites two instances where Settlement Agreements between the Respondent and Party Staff in show cause dockets were rejected by the Authority and asserts that these instances demonstrate “the importance of Consumer Advocate participation when consumer interests are at stake.”²²

In its reply to the specific arguments presented by TRA Party Staff, the Consumer Advocate argues that Party Staff’s role is to balance the interests of consumers and providers. Further, the CAPD argues, Laurel Hills argues for itself, but there is “no one to represent the consumer interest in the proceeding if the Consumer Advocate does not intervene.”²³ Citing *Mid-South Indoor Horse Racing, Inc. v. Tennessee State Racing Commission*, the Consumer Advocate argues that “the General Assembly intended for the UAPA [Uniform Administrative Procedures Act] to apply to all administrative agencies unless they were specifically exempted. The TRA is not exempt from the UAPA.”²⁴ Therefore, the TRA “must conduct its proceedings in accordance with the UAPA, which allows intervention in contested cases such as this show cause proceeding.”²⁵

The CAPD’s *Reply to Laurel Hills* mirrors the argument outlined in its *Reply to Party Staff* except for its response to specific arguments made by Laurel Hills. Countering an argument put forth by Laurel Hills, the Consumer Advocate asserts that “[t]his show cause docket is a contested case proceeding governed by the UAPA, and labeling it a ‘civil enforcement action’ does not make

²⁰ *Id.*

²¹ *Id.* at 4.

²² *Id.* at 5.

²³ *Id.* at 6.

²⁴ *Id.* at 8.

²⁵ *Id.*

it something other than what it is.”²⁶ Asserting that Laurel Hills’ reliance on *Brown and Williamson* is misplaced, the CAPD argues that “the case in *Brown and Williamson* was an action brought by the State of Tennessee through the Attorney General in a chancery court, not an action initiated by an administrative agency that is subject to the UAPA.”²⁷ Therefore, the CAPD concludes, “the holding of this case cannot be extended to apply to contested case proceedings before and administrative tribunal such as the TRA.”²⁸ The Consumer Advocate maintains that its intervention will not impede Laurel Hills’ ability to defend this action. Finally, the Consumer Advocate states that it does not plan to file any discovery requests and will comply with the procedural schedule.²⁹

FINDINGS & CONCLUSIONS

Under Tenn. Code Ann. § 65-2-107, “[a]ll 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.” Along with its own statutes and rules, contested case proceedings before the Authority are governed by the provisions of Tenn. Code Ann. § 4-5-101, *et seq.*, the UAPA. Tenn. Code Ann. § 4-5-310 establishes the following criteria for considering mandatory and permissive requests for intervention:

- (a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:
 - (1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;
 - (2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in

²⁶ *Reply to Laurel Hills*, p. 6 (January 22, 2015).

²⁷ *Id.* at 7.

²⁸ *Id.*

²⁹ *Id.* at 8.

the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

- (3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.
- (b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.

Further, the UAPA provides that a Hearing Officer may, at any time, limit or impose conditions upon or otherwise modify an intervenor's participation in the proceedings. Similarly, TRA Rule 1220-01-02-.08 directs that requests for intervention before the Authority are to be made and considered as follows:

- (1) Petitions for intervention shall be granted in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-2-107.
- (2) A petition for intervention shall set forth with particularity those facts that demonstrate that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law. Intervention may be denied or delayed for failure to provide such specific facts.
- (3) A petition for intervention shall be filed at least seven (7) days prior to the date of the contested case hearing.

Timeliness

Under Tenn. Code Ann. § 4-5-310(a)(1) and TRA Rule 1220-01-02-.08(3), a petition for intervention must be filed at least seven (7) days prior to the date of the contested case hearing. The current proceeding is not subject to any particular statutory deadline and is in its early stages. The Consumer Advocate filed its *Petition to Intervene* prior to the formal commencement of discovery and before the establishment of a hearing date. Therefore, the Hearing Officer considers the Consumer Advocate's *Petition to Intervene* timely-filed.

Content & Requisite Showing

Tenn. Code Ann. 4-5-310(a)(2) and TRA Rule 1220-01-02-.08(2) require that a petition to

intervene state particular facts that demonstrate a legal right or interest held by the petitioner may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law. Tenn. Code Ann. § 65-4-118(b)(1) provides a general basis for the qualification of the Consumer Advocate as an intervening party to represent the interests of Tennessee public utility consumers, as follows:

The consumer advocate division has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division may, with the approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the authority or any other administrative, legislative or judicial body and initiate such proceeding, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and the rules of the authority.³⁰

Thus, according to the statute, with the approval of the Attorney General and upon satisfaction of the requisite showing for intervention under the UAPA and the TRA's Rules, the Consumer Advocate may be permitted to intervene as a party for the purpose of representing those Tennessee consumers of public utility services that have legal rights or interests that may be determined in proceedings before the TRA. Tenn. Code Ann. § 65-4-118(b)(1) provides for the Consumer Advocate's qualification as an intervenor under law, but in no way confers upon the Consumer Advocate an automatic or absolute right to participate in any particular Authority proceeding.

In the current proceeding, the Consumer Advocate asserts that consumers have an interest in this proceeding and that it has met the three (3) requirements for intervention and should, therefore, be allowed to intervene. According to the Consumer Advocate, “these alleged violations of law directly affect interests and rights of the customers of Laurel Hills, particularly charging unauthorized rates and withholding service.”³¹ The Hearing Officer disagrees. Laurel Hills was denied a CCN and ordered to divest itself of the water system in TRA Docket No. 12-00030, and both the customers of Laurel Hills and the Consumer Advocate participated fully in that docket.

³⁰ Tenn. Code Ann. § 65-4-118(b)(1).

³¹ *Petition to Intervene*, p. 4 (December 8, 2014).

TRA Docket No. 12-00030 was appealed and the TRA's ruling was upheld by the Court of Appeals. As a result, the consumers' rights and interests in being charged and paying only rates authorized by the TRA and in receiving safe, adequate, and proper service have been adjudicated by the Authority and affirmed by the Court of Appeals.

This show cause docket has been initiated for the purpose of determining whether Laurel Hills has violated the law and, if so, what penalty should be imposed. Further, in its October 16, 2013 Order, the Chancery Court of Cumberland County ordered Laurel Hills to continue to provide water service to its customers until further order and set the rate for water service at \$33.10, the rate recommended by the TRA in Docket No. 12-00030. The outcome of the Authority's show cause proceeding neither impacts the provision of water service nor the rates that consumers are required to pay for the service. The Hearing Officer has already held that the customers of Laurel Hills do not have a legal interest that will be determined in this proceeding and denied the *Petition to Intervene* filed by actual customers of Laurel Hills.³² Thus, as Laurel Hills' customers do not have a legal interest in this proceeding, neither does the Consumer Advocate.

The Consumer Advocate contends that it should be allowed to intervene based on the possibility of the parties reaching a settlement agreement that might not be in the interests of the consumers. Once again, the legal rights or interests of consumers are not at issue in this proceeding. Any potential settlement agreement that might be reached, if any at all, would be an agreement between Laurel Hills and Party Staff in an attempt to resolve the violations and potential penalties against Laurel Hills and would not impact the rights or interests of consumers. This argument fails to show that a legal interest would be decided in this proceeding and does not provide sufficient basis for granting the Consumer Advocate's *Petition to Intervene*.

Moreover, if based on Laurel Hills' violation of law the Authority were to determine that a

³² See *Order Denying Petitions to Intervene*, p. 8 (February 2, 2015).

refund is due to customers, any calculations regarding the amount or method of refunding customers would be considered in a separate docket. At such time, the Consumer Advocate would then have an opportunity to file a petition to intervene in the new docket. In this regard, the Consumer Advocate's arguments appear to put the cart before the horse. The instant docket in which it seeks to intervene is where the Authority will consider whether there has been a violation of law and, if so, whether and to what extent a penalty should be imposed. Consumers do not have a legal right or interest in this proceeding because the issues involve a determination of whether Laurel Hills has violated state law or the TRA Rules. Therefore, the Hearing Officer finds that the Consumer Advocate has failed to show a factual basis to establish that the legal rights or interests of the customers of Laurel Hills may be determined in this proceeding, the Consumer Advocate's request to intervene does not satisfy the requirements for the mandatory intervention.


Procedural Due Process

Finally, Tenn. Code Ann. 4-5-310(a)(3) requires that the Hearing Officer grant a petition for intervention only upon determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention." Both Party Staff and the Respondent, Laurel Hills, have objected to the Consumer Advocate's request to intervene in this matter. Thus, weighing the impact of the proceedings upon the general rights and interests presented by the Consumer Advocate against the interests of justice, including the rights of the Respondent to fundamental fairness and due process and the need for orderly and prompt proceedings, the Hearing Officer is unable to find that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention. Furthermore, considering the purpose and specific considerations at issue in this docket, granting the Consumer Advocate's request for intervention appears contrary to the interests of justice and increases the likelihood for disruption in the administration of these proceedings.

Upon due consideration, the Hearing Officer concludes that while the *Petition to Intervene* was timely filed, the Consumer Advocate has failed to establish that the legal rights, duties, privileges, immunities or other legal interest of the customers of Laurel Hills may be determined in this proceeding. In addition, given the nature of this matter, the Hearing Officer cannot conclude that allowing intervention would not impair the interests of justice or the orderly and prompt conduct of this proceeding. For these reasons, the Hearing Officer determines that the Consumer Advocate's *Petition to Intervene* should be denied. Further, the Hearing Officer finds that the interests of justice and prompt conduct of the proceedings do not warrant allowing intervention under Tenn. Code Ann. § 4-5-310(b). Although these findings are based on the specific facts and circumstances of this case, this ruling is consistent with previous decisions of the Authority in recent proceedings of this nature.³³

IT IS THEREFORE ORDERED THAT:

The *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Tennessee Attorney General is denied.


Monica Smith-Ashford
Hearing Officer

cc: Docket File
Interested Parties

³³ See *In re: Show Cause Proceeding Against Tennessee Wastewater Systems, Inc. for Material Non-Compliance and/or Violation of State Law and Tenn. R. & Regs. 1220-04-13, et seq.*, Docket No. 14-00041, *Initial Order Denying Consumer Advocate's Petition to Intervene* (May 1, 2014); see also *In re: Show Cause Proceeding Against Tennessee Wastewater Systems, Inc. for Material Non-Compliance and/or Violation of State Law and Tenn. R. & Regs. 1220-04-13, et seq.*, Docket No. 14-00041, *Order Denying Petition to Appeal and Affirming the Initial Order of the Hearing Officer* (June 4, 2014).