BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
AMENDED PETITION OF EMERSON PROPERTIES, LLC FOR REVOCATION OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY HELD BY TENNESSEE WASTEWATER SYSTEMS, INC. FOR THE PORTION OF CAMPBELL COUNTY, TENNESSEE, KNOWN AS THE VILLAGES OF NORRIS LAKE, PURSUANT TO TENN. CODE ANN. § 65-4-201	)	**DOCKET NO. 13-00017**

RESPONSE OF TENNESSEE WASTEWATER SYSTEMS, INC. TO ADVOCATE'S MOTION TO PARTICIPATE IN THE HEARING

Tennessee Wastewater Systems, Inc., ("TWSI") submits this response in opposition to the Consumer Advocate's "Motion to Confirm the Consumer Advocate May Participate in the Hearing" filed on November 15, 2013.

Background

This case is a dispute between TWSI and a real estate developer, Emerson Properties, over whether TWSI will provide wastewater service to a development in Campbell County, Tennessee called "Villages at Norris Lake." The development is within the service territory of TWSI. The Complainant, Emerson Properties, prefers to use another utility, Caryville-Jacksboro Utility Commission ("CJUC"), apparently because CJUC plans to use a less expensive treatment process, saving the developer money. Emerson has asked the Tennessee Regulatory Authority to revoke TWSI's certificate of convenience and necessity (Docket 06-00277) to serve this location. The background of this case and the applicable legal standards that govern it are described in more detail in a decision issued earlier this year by the Davidson County Chancery Court, Tennessee Wastewater Systems v. Tennessee Regulatory Authority, Caryville-Jacksboro Utility

Commission and Emerson Properties, Docket No. 12-0143-II, Final Order issued January 7, 2013. (A copy of the opinion has been filed in this docket.) The facts are also discussed in an Order issued by the Authority last year in a related docket. Docket 11-00199, Order issued January 11, 2012.

The Consumer Advocate did not intervene in Docket 11-00199, when this dispute between TWSI and Emerson was first before the Authority, or in the Chancery Court proceedings where the Chancellor held that TWSI's certificate grants the utility the exclusive right to provide wastewater service to Villages at Norris Lake. In March, 2013, after Emerson filed this action asking the TRA to revoke TWSI's certificate, the Advocate filed a Petition to Intervene pursuant to the Tennessee Uniform Administrative Procedures Act, T.C.A. § 4-5-310. The Petition asked the Hearing Officer "to grant the Consumer Advocate's intervention for purposes of notice and service. . . ." Such limited interventions are permitted by T.C.A. § 4-5-310(c). Signed by Attorney General Robert Cooper, the Petition stated that the Consumer Advocate has an interest in the case because "the procedures related to CCNs, including but not limited to canceling or terminating CCNs, may affect ratepayers in the future." Petition, at 2. Neither TWSI nor Emerson objected to the Petition which was granted by the Hearing Officer in an Order issued April 2, 2012. The Order repeats the Advocate's request to "receive notice and service of filings," states that the Petition is granted, and orders that the Advocate "receive copies of any notices, orders or other documents herein." Order, at 2.

Since that time, Emerson and TWSI have exchanged a small amount of informal discovery and filed direct and rebuttal testimony in accordance with the Hearing Officer's procedural schedule. Consistent with the limited intervention granted by the Hearing Officer, the Advocate did not file any discovery or testimony. When the Advocate requested the option of

filing a post hearing brief, TWSI did not object since the Advocate's submission of a post hearing brief will not delay the proceedings or affect the evidentiary record. Moreover, the filing of a post-hearing brief is consistent with the Advocate's expressed interest in how "the procedures relating to CCNs. . . may affect ratepayers in the future."

The hearing is scheduled to begin at 10:00 a.m. November 25, 2013. Two witnesses have pre-filed testimony. Mr. George Potter will testify for Emerson Properties. Mr. Potter is the "Chief Manager" of Emerson and also serves as Treasurer of the homeowners' association, called "Villages at Norris Lake Community Association, Inc."[1] In his prefiled testimony, Mr. Potter states that Emerson does not want to negotiate an agreement for services with TWSI because he would be "in an unfair bargaining position" and would rather do business with CJUC. Mr. Charles Hyatt, President of TWSI, has prefiled testimony that TWSI is willing and able to provide service to the development in accordance with TWSI's tariffs and that if the parties are unable to negotiate an agreement, the matter should be submitted to the Authority. The parties have told the Hearing Officer that the hearing should last no more than an hour.

On November 13, 2013, Mr. Pat Perry, who owns a lot in the development and serves as Secretary of the homeowners association, sent an email to the Authority supporting Mr. Potter's testimony. Mr. Perry states that he has been told CJUC's treatment system will be less expensive for the developer and that TWSI's exercise of the rights granted by its TRA-issued certificate deprives him and other lot owners of their "rights to have our choice of sewage services

[1] According to the website for Villages at Norris Lake, the homeowners association is governed by a five-member board. At this time, three of the five members of the Board, including the President, appear to work for the developer. Mr. Potter is Treasurer of the Board. Mr. Pat Perry is the Secretary. See www.villagesatnorrislake.com/Leadership.

providers." Mr. Perry asked that his letter be placed in the docket file and that he be allowed to address the Authority during the "public comment" portion of the hearing.

On November 15, 2013, the Advocate filed a Motion "to confirm the Consumer Advocate may participate in the hearing." In the Motion, the Advocate asks the Hearing Officer to "confirm" that even though the Order grants the Advocate the right to intervene "for purposes of notice and service," the Order implicitly allows the Advocate to "participate in the hearing, including cross-examining witnesses." Motion, at 5. The Advocate has not filed a new or amended petition to intervene nor has the Advocate disclosed what position the Advocate intends to take on the merits of the dispute between Emerson and TWSI. The Advocate's only explanation for this last minute request is the receipt of Mr. Perry's email.[2]

Argument

1. At this time, the Advocate's participation is limited to "receiving notice and service of filings" as recited in the prehearing Order.

The Advocate argues that even though the Attorney General requested intervention in this case "for purposes of notice and service," a request that neither Emerson nor TWSI opposed, the Hearing Officer's Order granting the Petition gives the Advocate more relief than the Attorney General had requested or than the other parties consented to give. She argues that since "there is nothing" in the Petition or Order "expressly forbidding the Consumer Advocate's participation in

[2] Mr. Perry, a resident of Texas, owns one of the lots in Villages at Norris Lake. He says he speaks for the homeowners association which he serves as Board Secretary. As previously noted (supra, at footnote 1), the Association is presently run by the developer who controls three of the five Board positions. Whatever interest Mr. Perry may have as an Association Board member is adequately represented in this case by Emerson itself and by the testimony of Mr. Potter, a fellow member of the Association Board. See Tenn. R. Civ. P. 24.01. Nevertheless, TWSI has no objection to members of the public making written or oral comments to the Authority prior to the beginning of the hearing.

the hearing," the Order should be interpreted as putting "no limitations or conditions on the Consumer Advocate's participation at the hearing." Motion, at 3.

In deciding not to oppose the Attorney General's limited request for intervention, TWSI did not—and does not—consent to allowing the Advocate unlimited participation in this case. That is not what was requested in the Petition. Had it been requested, TWSI would likely have opposed the request or sought limitations, such as those described in T.C.A. § 4-5-310(c), on the Advocate's participation. In granting the Petition, the Hearing Officer's Order recites the Advocate's request for "receiving notice and service of filings," notes that no one opposes the Petition, and then states that the Advocate is "granted leave to intervene." Order, at 2. It does not by expression or implication grant more relief than was asked or make any findings other than those necessary to demonstrate compliance with the statutory requirements for intervention.

More importantly, the Advocate's interpretation of the Order is precluded by Rule 54.03 of the Tennessee Rules of Civil Procedure. The Rule states, in part, "The Court shall not give the successful party relief, even though he may be entitled to it, where the propriety of such relief was not litigated and the opposing party had no opportunity to assert defenses to such relief." As the Tennessee Court of Appeals has explained, Rule 54.03 means that when a party fails to request in his pleadings a specific type of relief, the request is not litigated, and the opposing party is never made aware of the request, such relief may not be granted by the court. See Southern College of Optometry v. Tennessee Academy of Ophthalmology, 1989 WL 105635 (Tenn. Ct. App.). A copy of the decision is attached. In other words, the Hearing Officer could not, consistent with Tenn. R. Civ. P. 54.03, have granted the Advocate the unlimited right to intervene which the Advocate now claims to have.

2. Unless the Advocate files a petition to intervene in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-4-118, the Advocate cannot be granted further relief.

Anticipating, perhaps, that her interpretation of the Hearing Officer's Order may not persuade the Authority,[3] the Advocate next argues that her office has a statutory right to intervene pursuant to § 65-4-118(b)(1) and that the "interests of justice" will be served by allowing the Advocate to participate fully in the hearing on this matter. Motion, at 3-5. The Advocate has not, however, filed a new or amended petition to intervene. Unless she does, no further relief may be granted.

The Advocate's statutory right to intervene is not self-executing. The Advocate must still comply with the Tennessee Uniform Administrative Procedures Act, file a petition to intervene, and demonstrate compliance with the statutory requirements for intervention. As the Consumer Advocate stated in the Petition to Intervene filed March 15, 2013, the Advocate has a right to intervene "in accordance with the Uniform Administrative Procedures Act and Authority rules."

Furthermore, the statute granting the Consumer Advocate authority to intervene or participate in this docket expressly requires the Advocate to obtain "the approval of the attorney general and reporter." T.C.A. § 65-4-118(b)(1). Consistent with that requirement, the Petition to Intervene filed by the Advocate on March 15, 2013, is co-signed by Attorney General Robert Cooper.[4]

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[3] The Advocate writes, "Even if the TRA is persuaded by TWSI's interpretation of the intervention. . . ." Motion, at 3.

[4] Other petitions to intervene recently filed by the Consumer Advocate have all been signed by Attorney General Cooper. See, for example, Dockets 12-00157, 13-00111 and 13-00130.

Rather than file a new or amended petition, which would also require the approval of General Cooper, the Advocate has either overlooked or is trying to bypass that statutory requirement by characterizing her request as a "motion to confirm" the Advocate's current status. The Advocate's current status, however, is very clear. The bulk of the Motion is a request to expand the scope of the Advocate's participation beyond what was requested in the Attorney General's original Petition. To obtain that relief, the Advocate must file a new or amended petition to intervene as required by T.C.A. § 4-5-310. In the absence of such a petition, there is no basis upon which to grant the Advocate's expanded intervention request.[5]

Conclusion

For these reasons, the Advocate's Motion should be denied.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS LLP

By: _____

Henry Walker (B.P.R. No. 000272)
Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203
Phone: 615-252-2363
Email: hwalker@babc.com

[5] Should the Advocate file a new or amended petition to intervene, TWSI will likely oppose it and reserves the right to file a response to any such petition. Given that the applicable law regarding TWSI's rights under its CCN have already been determined by the Chancery Court and that the facts of the case are largely undisputed, it is far from clear how the "interests of Tennessee consumers" represented by the Advocate are affected by whether Emerson pays TWSI or CJUC to provide wastewater service to vacation homes in this development.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2013, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

C. Mark Troutman (BPR No. 011712)
Troutman & Troutman, P.C.
P.O. Box 757
LaFollette, TN 37766

Charlena Aumiller (BPR #031465)
Assistant Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202-0207

HENRY WALKER

Court of Appeals of Tennessee, Western Section at Jackson.
SOUTHERN COLLEGE OF OPTOMETRY,
Plaintiff/Appellee,
v.
TENNESSEE ACADEMY OF OPHTHALMOLOGY, INC., Dr. Richard D. Drewry, Jr., Dr. John Montgomery, Jr., Dr. Samuel E. Wallace, and Dr. Roger L. Hiatt, Defendants,
Tennessee Academy of Ophthalmology, Inc., and Dr. Roger L. Hiatt, Defendants/Appellants.

Sept. 12, 1989.
Permission to Appeal Denied by Supreme Court November 20, 1989.

Shelby Law No. 35, from the Circuit Court of Shelby County, William W. O'Hearn, Judge.
Bruce S. Kramer, Sharon L. Petty, Memphis, Borod & Kramer, for appellee, Southern College of Optometry.

John C. Lyell, II, Nashville, Lyell, Eades, Seaman & Shelton, for appellant, Tennessee Academy of Ophthalmology, Inc.

Jerry E. Mitchell, William H. Haltom, Jr., Memphis, for defendant, Roger L. Hiatt, M.D.

HIGHERS, Judge.

*1 This case comes to this **Court** with a rather lengthy and involved history in the Circuit **Court** for Shelby County where, pertinent to this appeal, the plaintiff Southern College of Optometry (SCO) was **granted injunctive relief** against defendants Tennessee Academy of Ophthalmology, Inc. (TAO) and Dr. Roger L. Hiatt, Jr. who have appealed.

SCO is a private, non-profit, institution in Memphis Tennessee with a four-year curriculum in the profession of optometry, successful completion of which results in an O.D. degree. TAO is a non-profit corporation and professional association of medical doctors who practice the specialty of ophthalmology. Hiatt is such a specialist, is chairman of the Department of Ophthalmology at the University of Tennessee-Memphis, and is former president of TAO. SCO advocates expansion of the lawful scope of the practice of optometry in Tennessee into areas now restricted to medical doctors specializing in ophthalmology, including the use of diagnostic and therapeutic drugs. Officials at SCO also sought a merger with the UT Medical School and to add ophthalmologists and other medical doctors to its staff.

TAO opposed SCO on these and other issues, advocating instead continued limitation of certain diagnosis and treatment to medical doctors. Hiatt, as a leader in TAO and at UT Medical School, was particularly vocal in his opposition to expansion of optometry generally and the SCO's efforts specifically. The ongoing battle between the TAO and the SCO was fought through lobbying efforts both for and against proposed optometry-expanding legislation, and through competition to receive at least one endowment from a civic organization, the Lions' Club, which promotes eye care.

In December of 1982, conflict between the two organizations resulted in a lawsuit. SCO sued TAO and several of its individual members, including Hiatt, alleging in Count I, libel and in Count II, unlawful interference with business. This appeal arises solely out of Count II which specifically alleged that TAO and its members first, unlawfully adopted a resolution discouraging its members from teaching at SCO and second, interfered with SCO's attempts to hire medical doctors to serve on its faculty, interfered with operation of SCO's externship programs, interfered with SCO's receipt of a bequest, interfered with SCO's attempts to merge with

UT Medical School, and interfered with patient referral to SCO.

SCO sought compensatory and punitive damages, requested a mandatory injunction requiring TAO to repeal the resolution mentioned above, and then prayed for general relief. After five years of discovery, the case went to trial in September of 1987. In December 1987, after all proof, on motion for directed verdict by TAO, the trial court ruled that the only damages to be considered by the jury under Count II were those related to loss of funds related to the bequest and to the salary for the administrator of SCO's externship program.

The jury returned a verdict on Count I in favor of SCO against all defendants for a total amount of $2,263,400, but on Count II, against only Hiatt and TAO. Hiatt and TAO were each found liable for $10 in punitive and $10 in compensatory damages. On February 1, 1988, the trial **court** entered an order on the verdict. Thereafter the judgment on Count I was set aside and the matter settled by the parties. On February 15, 1988, SCO made a motion for permanent **injunctive relief** which was **granted** after a hearing, by order entered September 27, 1988. That order enjoined TAO from interference with "referral of patients between ophthalmologists and optometrists and the conduct of any policy that would endeavor to accomplish such interference." Hiatt was enjoined from "any wrongful interference with the externship program of [SCO] and enjoined from discouragement, as a matter of policy of any ophthalmologists from teaching at [SCO]."

***2** TAO and Hiatt have each raised three grounds for appeal, two of which are common. Hiatt asserts the **injunction** against him constitutes a prior restraint of speech in violation of the First Amendment of the U.S. Constitution and Article 1, Section 19 of the Constitution of the State of Tennessee. TAO asserts that the **injunction** against it concerns issues that were **not** matters of proof at trial and that were dismissed on directed verdict. Both Hiatt and TAO assert that the **injunctive relief** was erroneous in that it was **not** requested until two months after the jury verdict, and in that there was no proof of irreparable injury and that SCO requested and received a remedy at law. We address the common issues as we find them dispositive.

Our research has yielded no Tennessee cases governing whether a request for **injunctive relief** must be a matter of specific **pleading** in order to be **granted** or whether a general prayer for **relief** is sufficient. The general rule precludes **injunctive relief** under a prayer for general **relief**; "it must be expressly prayed, and the precise nature of the **injunctive relief sought** must be specified." 43A C.J.S. ***Injunctions*** § 200 (1978). It has been held in at least one state that a prayer for general **relief** in addition to a prayer for specific **injunctive relief** may support the **granting** of any **relief** which the **court** deems justified under the circumstances. *High School Activities Association v. Uncompahgre Broadcasting Co.,* 134 Colo. 131, 300 P.2d 968, 971 (1956); 42 Am.Jur.2d, ***Injunctions*** § 275 (1969).

The reason behind the general rule regarding prayers for **injunctive relief** is an extension of the underlying purpose of all **pleadings**, that being "to develop the point of difference between the contending parties. The point of difference is the *issue,* the thing to be tried. If it be **not** disclosed at the trial, the proceedings would be a mere groping in the dark. An unknown point of difference could **not** be intelligently tried by the **court**; nor could the parties intelligently prepare for the trial." (Emphasis in original; footnotes omitted.) Caruthers, *History of a Lawsuit,* § 97 (1963). In this case, the reason for the general rule requiring that **injunctive relief** be specifically prayed is "that the defendant might by his answer make a different case under the general prayer from what he would if an **injunction** was specifically prayed." 43A C.J.S. ***Injunctions*** § 200, n. 91 (1978).

SCO's **pleadings** contained no request for **injunctive relief** against Hiatt, and the only **injunctive relief** specifically requested against TAO was repeal of the resolution discouraging members from

teaching at SCO. No other **relief** was requested until after trial. Even if this request for **injunction** when viewed with the general prayer for **relief** contained in the **pleadings** opens the door for other **injunctive relief**, in this case the door was **not** opened wide enough to allow the **relief granted** by the trial **court**.

* While the **relief** was clearly the subject of extensive posttrial hearings, the order encompasses matters **not** sufficiently litigated. SCO's failure to **plead** for such **relief** left TAO and Hiatt unaware of the potential for such **relief** during the trial. While the **injunction** is prospective, the proof at trial related only to issues in retrospect and focused primarily on conduct prior to 1982. Little or no consideration was given to activity, attitudes or changes in circumstances from 1982 on.

T.R.Civ.P. 54.03 provides that "every final judgment shall **grant** the **relief** to which the party in whose favor it is rendered is entitled, even if the party has **not** demanded such **relief** in his **pleadings**." While this may prevent adoption of a rigid rule requiring the specific **pleading** of **injunctive relief**, it cannot interfere with the requirement that such **relief** be clearly necessary as shown by the proof presented. T.R.Civ.P. 54.03 continues, "[T]he **court** shall **not** give the successful party **relief**, *though he may be entitled to it,* where the propriety of such **relief** was **not** litigated and the opposing party had no opportunity to assert defenses to such **relief**." (Emphasis ours.)

Under the facts of the case at bar, we find that the failure of SCO to specifically **plead** the **injunctive relief granted** resulted in TAO's and Hiatt's being denied the opportunity sufficiently to defend against its being **granted**. The proof at trial was insufficient to allow the **injunction granted** by the trial **court**. The order **granting** permanent **injunctive relief** is accordingly reversed and the matter is dismissed. Costs are adjudged against SCO.

FARMER, J., and SUMMERS, Sp.J., concur.

Tenn.App.,1989.
Southern College of Optometry v. Tennessee Academy of Ophthalmology, Inc.
Not Reported in S.W.2d, 1989 WL 105635 (Tenn.Ct.App.)

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