



be afforded the opportunity to “participate in the hearing, and in particular, cross-examine witnesses.”<sup>1</sup> The Consumer Advocate asserts several reasons why it should be allowed to cross-examine the witnesses that are scheduled to testify during the hearing. A summary of these reasons include, as follows:

- 1) the Hearing Officer’s *Order Granting Consumer Advocate’s Petition to Intervene* (“*Order*”) does not forbid participation; therefore, declining to allow the Consumer Advocate to participate and, in its discretion, cross-examination witnesses imputes to the *Order* limitations and conditions that have not been included;<sup>2</sup>
- 2) that Tenn. Code Ann. § 65-4-118 empowers the Consumer Advocate with “the statutory right to participate in this hearing;”<sup>3</sup>
- 3) the interests of justice favor the Consumer Advocate’s participation over any objections of TWSI, whom it describes as “another party who sought intervention;”<sup>4</sup>
- 4) in the event the Consumer Advocate would like to cross-examine a witness during the hearing, declining such request silences the “voice of consumers,” an affected party to these proceedings, and is unfair and unjust;<sup>5</sup>
- 5) allowing the Consumer Advocate to cross-examine the witnesses will provide additional information that will help the Directors make a fully informed, just decision;<sup>6</sup>
- 6) declining to allow cross-examination by the Consumer Advocate is contrary to the TRA’s mission statement that it balances the interests of utilities and consumers;<sup>7</sup>

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<sup>1</sup> *Motion*, p. 2 (November 15, 2013).

<sup>2</sup> *Id.* at 3 and 4.

<sup>3</sup> *Id.* at 3-4.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

- 7) TWSI has opportunity to object to specific questions asked of its witness during the hearing;<sup>8</sup>
- 8) TWSI's objection to the Consumer Advocate's request should raise concerns as to its treatment of customers;<sup>9</sup>
- 9) After being contacted by a consumer on November 8, 2013, the Consumer Advocate believes that the witnesses may have information, in addition to what has been provided in pre-filed testimony, that may affect the legal rights and interests of consumers of the Villages of Norris Lake;<sup>10</sup> and,
- 10) Allowing the Consumer Advocate to cross-examine witnesses may enable it to prepare a more complete post-hearing brief, the submission of which has previously been agreed upon by the parties and included in the procedural schedule entered on September 16, 2013.<sup>11</sup>

Thereafter, on November 18, 2013, in response to the Hearing Officer's notice that Responses to the *Motion* would be due by 2:00 p.m. on November 19, 2013, Emerson asserted that it had no objection to the *Motion* and would not be filing a Response.

On November 19, 2013, a *Response of Tennessee Wastewater Systems, Inc. to Advocate's Motion to Participate in the Hearing ("Response")* opposing the Consumer Advocate's *Motion* was filed in the docket file by TWSI. In its *Response*, TWSI disputes the Consumer Advocate's assertion that since the *Order* fails to expressly forbid participation, it should therefore be interpreted as granting unlimited participation.<sup>12</sup> TWSI contends that, as the Consumer Advocate failed to request full or unlimited intervention in its *Petition*, the expansive

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4-5.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Response*, pp. 4-5 (November 19, 2013).

interpretation of the *Order* that it now urges is precluded under Tenn. R. Civ. P. 54.03.<sup>13</sup> In addition, had the Consumer Advocate requested an unlimited intervention, TWSI asserts that it would likely have opposed the request or sought limitations.<sup>14</sup>

Noting that the bulk of the *Motion* is a request to expand the scope of the Consumer Advocate's intervention, TWSI contends that before the Consumer Advocate may be allowed to participate beyond what it requested in its *Petition*, a new or amended petition to intervene must be filed.<sup>15</sup> Further, any new or amended petition must comply with the statutory requirements for intervention, including the express condition set forth in Tenn. Code Ann. § 65-4-118(b)(1), which requires the Consumer Advocate to first obtain the approval of the attorney general and reporter. In summary, TWSI states that in the absence of a new or amended petition, there is no basis upon which to grant the Consumer Advocate's request for an expansion of its intervention.<sup>16</sup> Therefore, TWSI requests that the *Motion* be denied.

#### *Findings & Conclusions*

Upon due consideration of the filings of the parties and the record as a whole, the Hearing Officer makes the following findings and conclusions: First, the Consumer Advocate's contention that Tenn. Code Ann. § 65-4-118 confers upon it a statutory right to participate in this hearing, is erroneous. Its reading of the statute in this manner is incorrect and deviates from the statute's clear language and long-standing application. Tenn. Code Ann. § 65-4-118(b)(1) allows the Consumer Advocate, with the approval of the Attorney General, to intervene and

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<sup>13</sup> *Id.* at 5; Tenn. R. Civ. P. 54.03 states, "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, 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 the party's pleadings; but the court shall not give the successful party relief, though such party 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."

<sup>14</sup> *Response*, p. 5.

<sup>15</sup> *Id.* at 6-7.

<sup>16</sup> *Id.* at 7.

participate as a party and to initiate proceedings before the Authority, consistent with the UAPA<sup>17</sup> and the TRA's rules.<sup>18</sup>

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 (emphasis added).*"<sup>19</sup>

While the Consumer Advocate's important role in representing the interests of Tennessee consumers of public utilities is not in dispute, Tenn. Code Ann. § 65-4-118(b)(1) in no way confers upon it an automatic or absolute right to participate in this hearing. Neither does it empower the Consumer Advocate to participate in any other of the Authority's proceedings in whatever way or to whatever extent it deems or desires.

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<sup>17</sup> The Tennessee *Uniform Administrative Procedures Act* ("UAPA") is compiled at Tenn. Code Ann. §§ 4-5-101 *et seq.* The provisions concerning the intervention of parties in administrative proceedings, are set forth in Tenn. Code Ann. § 4-5-310, which states:

- (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 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.

Additional statutory provisions appropriately considered and observed by the TRA are set forth in Title 65, and include Tenn. Code Ann. §§ 65-2-102 (empowering the Authority to adopt rules governing procedure, practice, implementing, interpreting, or making specific the laws which it enforces or administers) and 65-2-107 ("All 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.")

<sup>18</sup> The rules of the Authority ("TRA Rules") are set forth in Tenn. Comp. R & Regs., Chapter 1220. In particular, Rule 1220-01-02-.02 concerns the commencement of contested cases; and, mirroring the UAPA, 1220-01-02-.08 sets forth the requirements, criteria, and procedures related to petitions for intervention, 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

<sup>19</sup> Tenn. Code Ann. § 65-4-118(b)(1) (2004).

Instead, the statute both imposes a legal duty upon, as well as gives authority to, the Consumer Advocate to represent the interests of Tennessee consumers of public utilities before the Authority and other governmental bodies. But, neither this duty nor authority relieves the Consumer Advocate of complying with the statutory and regulatory requirements for intervention and participation. The approval of the Attorney General must be obtained, and the requirements, criteria, and procedures established in the UAPA and TRA Rules must be satisfied. Indeed, if it were true that the statute established a right to participate, there would be no need for the Consumer Advocate to request or petition the Authority to intervene in or to initiate proceedings in any docket. The Consumer Advocate would simply be deemed a party in all proceedings. This is not the case, however, as the Consumer Advocate is required to request intervention and its petition must be found to satisfy the applicable statutory and regulatory requirements before it may participate in proceedings before the Authority.

The language of Tenn. Code Ann. § 65-4-118 does not dispossess the TRA's regulatory authority and discretion in the matters and proceedings that come before it. Instead, it explicitly retains it. As a result, the statute does not mandate that the Authority allow the Consumer Advocate's participation in these or any other proceedings.<sup>20</sup> Rather, Tenn. Code Ann. § 65-4-118(b)(1) enables the Authority, in its review of the matters before it, to recognize the Consumer Advocate's role in representing the interests of Tennessee consumers of public utilities.

Second, the Hearing Officer finds no merit in the Consumer Advocate's contention that an absence of language expressly forbidding participation somehow makes the *Order* deficient, and therefore grants a fuller intervention than was even requested in the Consumer Advocate's *Petition*. The *Petition*, filed by the Consumer Advocate on March 15, 2013, clearly requested

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<sup>20</sup> *Office of the Atty. Gen. v. Tennessee Regulatory Auth.*, M200301363COAR12CV, 2005 WL 3193684 (Tenn. Ct. App. Nov. 29, 2005) citing *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763-64 (Tenn.1998). (holding that the Authority has discretionary authority and is not statutorily mandated to convene a contested case proceeding upon the written complaint of the Consumer Advocate).

“intervention for purposes of notice and service in this proceeding.”<sup>21</sup> Finding that the legal rights and interests of Tennessee consumers may be determined in the proceeding, the petition was timely made, and allowing intervention would not impair the orderly and prompt conduct of the proceedings, i.e., that the *Petition* satisfied the considerations for intervention set forth in the UAPA and TRA Rules, the Hearing Officer granted the Consumer Advocate’s request to intervene.<sup>22</sup>

Third, TWSI is not simply “another intervenor” in this proceeding, as has been asserted by the Consumer Advocate. Irrespective of the styling of the initial or subsequent pleadings or the docket’s caption, insofar as Emerson has made certain allegations against TWSI and asks the Authority to revoke the CCN that was granted to TWSI, these contested case proceedings arise from and are considered in the context of a Complaint. By virtue of the nature of the allegations brought against it, TWSI is the Respondent. It is not an Intervenor; but is deemed a necessary party. As such, there is no need or obligation for it to request intervention to participate.

Fourth, the Hearing Officer disagrees with, and takes strong exception to, the Consumer Advocate’s baseless charge that, should the Authority decide to decline the Consumer Advocate’s request and limit its participation during the hearing in this matter [which is a particularly egregious statement in light of the fact that the Consumer Advocate was granted the intervention that it requested – for the limited “purposes of notice and service”], that the Authority acts unfairly or unjustly to silence the “voice of consumers” and contrary to its role of promoting the public interest by balancing the interests of utilities and consumers. The TRA is well within its authority and discretion to maintain the limited intervention of the Consumer Advocate in these proceedings, and such is not an abuse of discretion or contrary to its authority.

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<sup>21</sup> *Petition*, pp. 1 and 2 ¶ 6 (March 15, 2013).

<sup>22</sup> See *supra* notes 12 and 13; and see *Order Granting Consumer Advocate’s Petition to Intervene* (April 2, 2013).

Finally, while the Consumer Advocate has not requested or taken an active role before in these proceedings, the Hearing Officer notes that Emerson does not object to the Consumer Advocate's request and that both Emerson and TWSI have consented to the Consumer Advocate's submission of a post-hearing brief. The positions of the parties aside, under Tenn. Code Ann. § 4-5-310(c) and (d), whether or not conditions or limits are placed on an intervenor's participation at the time the intervention is granted, or subsequently, the Hearing Officer may modify an intervention order at any time:

(c) If a petitioner qualifies for intervention, the administrative judge or hearing officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

- (1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
- (2) Limiting the intervenor's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
- (3) Requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings.

(d) The administrative judge, hearing officer or agency, at least twenty-four (24) hours before the hearing, shall render an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. ***The administrative judge, hearing officer or agency may modify the order at any time, stating the reasons for the modification.*** The administrative judge, hearing officer or agency shall promptly give notice of an order granting, denying or modifying intervention to the petitioner for intervention and to all parties (***emphasis added***).

Ultimately, upon finding that a party is qualified to intervene and participate, the Hearing Officer has discretion to modify and impose conditions as to any intervening party.

Therefore, considering the pleadings of the parties, the record as a whole, and the potential impact of the Consumer Advocate's ill-timed request upon the proceedings, the Hearing Officer finds that the Consumer Advocate should be permitted to participate - in a limited way - during the hearing. Nevertheless, in order to do so, it must demonstrate



compliance with the statutory requirements of such participation. As such, in accordance with Tenn. Code Ann. §65-4-118(b)(1), and consistent with its regular practice before the agency, the Consumer Advocate must file a notice signed by the Attorney General confirming that it has approval to participate in this proceeding, beyond that of notice and service. This notice must be received by the Authority's Docket Manager no less than twenty-four (24) hours before the hearing, as noticed.

The Consumer Advocate, consistent with its limited intervention did not engage in discovery or file pre-filed testimony. It will not be presenting a witness; but only questioning the witnesses of the other parties in this matter. As such, upon receipt of a timely notice that satisfies the statutory condition in Tenn. Code Ann. §65-4-118(b)(1), as discussed above, the Consumer Advocate should be allowed to cross-examine witnesses during the hearing, but such examination is limited to those matters presented in pre-filed testimony and elicited during direct examination. The time for discovery has long since passed, and the hearing is not an appropriate forum to bring out information that has not been previously addressed or discovered by the parties. These limits and parameters of witness examination are to be strictly observed, as are the standard practices of the agency, which include but are not necessarily limited to the matters specifically set forth in this Order.

Therefore, subject to the conditions and limitations set forth above, which are to be strictly enforced, the Consumer Advocate shall be permitted to participate in a limited cross-examination of the witnesses presented during the hearing.

## **II. PROCEDURAL MATTERS**

### **A. Notice of Hearing & Public Comment**

The purpose of the hearing is to consider the *Amended Petition* filed by Emerson on March 1, 2013. On November 15, 2013, a *Notice of Hearing* was issued notifying the public that

the hearing will begin at **10:00 a.m. CST on Monday, November 25, 2013**. As included in the *Notice of Hearing*, members of the public are encouraged to participate by filing written comments in the docket file and/or presenting verbal comments during the hearing.

### **B. Opening Statements**

After preliminary matters are considered, if any, each party is permitted a maximum of ten (10) minutes to present an opening statement. Opening statements will be presented first by Emerson, then by TWSI.

### **C. Witnesses**

Two witnesses have been identified by the parties, and will be presented as follows:

- 1) Emerson – George L. Potter, Chief Manager & Member of Emerson
- 2) TWSI – Charles Hyatt, President of TWSI

During direct examination, each witness will be permitted ten (10) minutes to summarize his pre-filed testimony. In addition, each witness should be advised that he is subject to recall for rebuttal purposes and should remain available throughout the length of the proceedings.

### **D. Examination of Witnesses and Questions by the Authority**

While redirect examination of a witness is allowed, the parties are reminded that redirect examination is limited to matters elicited during cross-examination that require clarification. It is not appropriate to raise new issues during redirect examination. Re-cross examination is not permitted except in the event that a new issue is raised during the immediately preceding redirect examination. The Authority's Advisory Staff has the opportunity to ask questions following cross-examination, before redirect examination. The parties should be aware that the Directors might ask questions at any time during a witness's testimony, as well as following cross-examination.

### **E. Exhibits**

The parties should exchange any demonstrative exhibits related to a witness's pre-filed testimony before that witness appears on the stand. Each party should have its own copy of all exhibits, including those appended to pre-filed testimony, available for reference during the hearing, and is responsible for supplying a sufficient number of copies of any exhibits that it intends to reference or discuss with a witness. A party should use its own judgment and discretion in determining the total number of copies to have on hand, but at a minimum, copies of an exhibit should be provided to the court reporter, each Director, Legal Staff, and each Authority Division Chief. Delaying or interrupting the proceedings to make copies is disfavored and, in the discretion of the panel, may not be permitted.

Further, the parties should inform the Hearing Officer of any requests or requirements as to visual display aids and technology that might be needed during the hearing. So that the appropriate arrangements and accommodations may be made, all such requests and information should be provided via email to the Hearing Officer at [kelly.grams@tn.gov](mailto:kelly.grams@tn.gov) no later than 12:00 noon on November 21, 2013.

#### **F. Post-Hearing Briefs**

In accordance with the agreement of the parties, as previously adopted by the Hearing Officer and established in the *Order Establishing Procedural Schedule* entered on September 16, 2013, in lieu of closing arguments the parties shall file post-hearing briefs two weeks after the hearing, or by 4:00 p.m. on December 9, 2013.

### **III. GENERAL OUTLINE & PRESENTATION OF PROOF @ HEARING**

#### ***Public Comment***

#### ***Opening Statements:***

- Emerson (10 minutes)
- TWSI (10 minutes)

***Witness Testimony:***

**Emerson witness**

\*Summary of pre-filed

Cross-examination

Limited cross-examination

Questions

Re-direct examination

Re-cross examination

**TWSI witness**

\*Summary of pre-filed

Cross-examination

Limited cross-examination

Questions

Re-direct examination

Re-cross examination

**George L. Potter, Chief Mgr & Member**

Limited to ten (10) minutes

TWSI

Consumer Advocate (if any)

TRA Advisory Staff and/or Directors<sup>23</sup>

Emerson

(if requested & determined appropriate)

**Charles Hyatt, President**

Limited to ten (10) minutes

Emerson

Consumer Advocate (if any)

TRA Advisory Staff and/or Directors

TWSI

(if requested & determined appropriate)

***Final Public Comment*** (if any)

**IT IS THEREFORE ORDERED THAT:**

1. The *Motion to Confirm the Consumer Advocate May Participate in the Hearing*, filed by the Consumer Advocate and Protection Division of the Office of the Attorney General on November 15, 2013, is granted subject to the conditions and limitations set forth in this Order.

a. In accordance with Tenn. Code Ann. §65-4-118(b)(1), and consistent with the regular practice of the Consumer Advocate and Protection Division of the Office of the Attorney General, a notice signed by the Tennessee Attorney General and Reporter confirming his approval that the Consumer Advocate and Protection Division of the Office of the Attorney General may participate in this proceeding, beyond the notice and service previously requested, and to the extent permitted by this Order, must be received by the Authority's Docket Manager

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<sup>23</sup> The TRA Advisory Staff has an opportunity to question a witness between cross and re-direct examination. Directors may ask questions at any time, including between cross and re-direct examination.

for filing in the docket file no less than twenty-four (24) hours before the hearing, as noticed, or in other words, **no later than 10:00 a.m. CST on Friday, November 21, 2013.**

b. Upon satisfaction of the condition set forth above, the Consumer Advocate shall be allowed to cross-examine the witnesses presented during the hearing in this matter, limited to those matters presented in pre-filed testimony and elicited during direct examination.

2. Requests for visual aids or technology or information concerning the technical requirements of the parties should be provided via email to the Hearing Officer at [kelly.grams@tn.gov](mailto:kelly.grams@tn.gov) **no later than 12:00 noon on November 21, 2013.**

3. The hearing scheduled to begin at **10:00 a.m. CST on November 25, 2013**, shall be conducted in accordance with this Pre-Hearing Order unless otherwise ordered by the Chairman/Presiding Director.

4. The parties shall file post-hearing briefs two weeks after the hearing, **or by 4:00 p.m. on December 9, 2013.**

  
Kelly Cashman-Grams, Hearing Officer