

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:)
)
AMENDED PETITION OF)
EMERSON PROPERTIES, LLC)
FOR REVOCATION OF)
CERTIFICATE OF PUBLIC) DOCKET NO. 13-00017
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)

MOTION TO STRIKE PORTIONS OF ADVOCATE'S BRIEF
OR TO FILE THIS RESPONSE

Tennessee Wastewater Systems, Inc. ("TWSI") asks the Hearing Officer to strike two portions of the Post-Hearing Brief filed by the Consumer Advocate. These sections of the brief violate the Authority's rules of evidence and the Hearing Officer's "Pre-Hearing Order."

The Advocate's Post-Hearing Brief at pp. 7, 8, and 9 describes "Background" information based on statements made by members of the public prior to the beginning of the evidentiary hearing. These "public comments" are found in pages 1-30 of the hearing transcript. The public witnesses were not under oath and not subject to cross examination. Therefore, these statements are not part of the evidentiary record. See T.C.A. § 4-5-313(1)¹ and TRA Rule 1220-1-2-.16(1). The Consumer Advocate knows or should know that public comment is not evidence and may not be relied upon by the Authority in making its decision. Nevertheless, the Advocate's brief

¹ "The agency shall admit and give probative effect to evidence admissible in a court"[except in circumstances not relevant here].

cites to pages 1-30 of the transcript as if those comments are part of the evidentiary record. See, pp. 7, 8, and 9 of the Advocate's brief. All references to pp. 1-30 of the transcript and statements relying on those references should be struck from the Advocate's brief.

The Advocate was granted limited participation in this case by the Hearing Officer. The Advocate requested and was granted the right to cross-examine witnesses but only about "matters presented in pre-filed testimony and elicited during direct examination." Pre-Hearing Order, at 9. The Advocate was not allowed to ask about other matters, much less introduce new evidence. "The time for discovery has long since passed," the Hearing Officer wrote, "and the hearing is not an appropriate forum to bring out information that has not been previously addressed or discovered by the parties." Id.

Disregarding these instructions, the Advocate attempts to introduce new evidence into the record by attaching an "Appendix" to its Post-Hearing Brief consisting of nineteen pages from TRA Docket No. 06-00077. This Appendix is discussed on page 18 of the Advocate's brief. Since TWSI had no notice of this, TWSI had no opportunity to ask its witness, Mr. Charles Hyatt, to respond to the Advocate's argument. Here again, the Advocate knows, or should know, that this "evidence" has not been properly introduced and certainly knows that the Hearing Office prohibited the Advocate from bringing out "information that has not been previously addressed or discovered by the parties."

The Authority has the right to take notice of information from the Authority's own records, including the nineteen pages from Docket 06-00077 attached to the Advocate's brief. See T.C.A. § 4-5-313(6). In that docket, TWSI voluntarily surrendered a certificate of convenience and necessity at the request of a developer who wanted to use another wastewater provider. The pages attached to the Advocate's brief state that the development in Docket 06-


00077 had only eighty residential lots. (See paragraph 2 of the contract between TWSI and the developer.) These pages also state that at the time TWSI voluntarily surrendered its certificate, there were no houses in the development and no work had been done on the sewer system. (See letter to Richard Collier, page 1.) Here, the development at issue includes 400 to 650 lots, more than five times the size of the development in Docket 06-00077, and a substantial amount of construction work on the sewer system has already been done. Furthermore, these pages from the record in Docket 06-00077 demonstrate that, even though TWSI does not pay for the costs of constructing a wastewater system, TWSI nevertheless has a substantial, financial investment—"project management costs" averaging \$800 per lot—in every development prior to the initiation of service.² Should this information from Docket 06-00077 become part of the record in this case, this evidence demonstrates that TWSI will incur a substantial financial loss if the Authority revokes TWSI's certificate to serve Villages at Norris Lake.

The inclusion of this new evidence is a clear violation of the Hearing Officer's Order. The Advocate's "Appendix" and related sections of the Advocate's brief should be struck. But if the Authority decides to take administrative notice of the information in the Appendix, TWSI asks that the Authority take notice of the entire record in Docket 06-00077, and asks that the Authority accept this filing as rebuttal to this new argument in the Advocate's brief.

² See letter to Richard Collier, pp. 2-3 (The \$800-per-lot fee "covers all project management costs incurred by TWS from the time TWS first visits the site until the last customer's tank is installed under the supervision of TWS." See paragraph 4 of the contract between TWS and the developer, also included in the Appendix.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS LLP

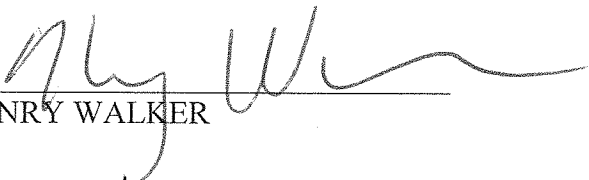
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2014, 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:

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