

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**  
**NASHVILLE, TENNESSEE**

**January 10, 2014**

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

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**ORDER DENYING IN PART AND GRANTING IN PART TWSI'S MOTION TO STRIKE**

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This matter is before the Hearing Officer upon a *Motion to Strike Portions of Advocate's Brief or to File this Response* ("Motion to Strike") filed by Tennessee Wastewater Systems, Inc. ("TWSI") on January 6, 2014. In accordance with the Notice of Filing & Shortened Deadline for Response, issued by the Hearing Officer on January 6, 2014, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed its Response to the *Motion to Strike* on January 9, 2014.

In its *Motion to Strike*, TWSI requests that all statements in the Consumer Advocate's Post-Hearing Brief that make reference to public comments, which were given during the hearing held on November 25, 2013, be stricken and not considered by the Authority. TWSI asserts that public comments are not evidence and may not be relied upon by the Authority in making its decision. Further, TWSI asserts that the Consumer Advocate's discussion in its Post-Hearing Brief of TRA Docket No. 06-00077 and Appendix A, which contains documents that were filed in Docket No. 06-00077, constitute "new evidence" in this docket and should also be stricken. Or, if not stricken, then the Authority should take official administrative notice of the

full record in Docket No. 06-000077 and allow TWSI's *Motion to Strike* to serve as its rebuttal response to the Consumer Advocate's arguments.

In its Response, the Consumer Advocate contends that the references to public comments are properly included as part of the background of the case and, while they might not be evidence, should not be stricken from its Post-Hearing Brief. Further, the Consumer Advocate provides citations to corresponding sworn testimony in the record for a majority of the challenged statements.<sup>1</sup> In addition, the Consumer Advocate contends that its discussion of the Authority's actions in, and inclusion of documents related to, Docket No. 06-00077, is not "new evidence" nor in violation of the Hearing Officer's limitation of the Consumer Advocate's participation during the hearing.

## **FINDINGS & CONCLUSIONS**

Tennessee Code Annotated §§ 4-5-313(1) and 65-2-109(1) governs the admission and probative effect of evidence in proceedings before the Authority.<sup>2</sup> Public comments are not considered to be "evidence" or part of the "evidentiary record" in TRA proceedings. Nevertheless, in making its decision, the Authority may, and should, consider the verbal and written comments offered by the public along with the evidence in the record. Further, the parties' post-hearing briefs, while providing important analysis and citations to evidence in the record, generally constitutes legal argument and is also not considered part of the "evidentiary record." Therefore, upon consideration, the Hearing Officer finds that the references to public comment contained in the Consumer Advocate's Post-Hearing Brief should not be stricken. Insofar as certain statements do not have specific support in evidence, the Authority, consistent

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<sup>1</sup> The Consumer Advocate notes that Statement Nos. 3 and 6 (referenced at page 8 of its Post-Hearing Brief), which involve general statements concerning lowered or lost property value due to the incomplete status of the sewer system in the subdivision, have no corresponding direct reference in testimony. In addition, Statement No. 4 contains information generated as a result of certain questions directed to a member of the public by Director Hill, and also has no corresponding reference in sworn testimony.

<sup>2</sup> TRA Rule 1220-01-02-.16(1) cites to and references these statutes as governing the admissibility of evidence in TRA proceedings.

with its regulatory judgment, discretion, and past practice, will consider and assign the appropriate weight in these matters, which may include disregarding such arguments in full.

In addition, consistent with Tenn. Code Ann. § 4-5-313(6) and § 65-2-109(2), the Authority has power to take official notice of the record of other proceedings held before, and previous actions taken by, the TRA. Therefore, upon consideration, the Hearing Officer finds that as the Consumer Advocate has included discussion of the actions of the Authority in Docket No. 06-00077, and also attached documents that were filed in Docket No. 06-00077, in its Post-Hearing Brief, it is appropriate to grant TWSI's motion insofar as it alternatively requests that its filing stand as a response in rebuttal to the Consumer Advocate's arguments. In addition, the Hearing Officer finds it appropriate that the Authority take official notice of the full record of Docket No. 06-00077 and will issue such a Notice contemporaneously with this Order.

**IT IS THEREFORE ORDERED THAT:**

1. Insofar as Tennessee Wastewater Systems, Inc.'s *Motion to Strike Portions of Advocate's Brief or to File this Response* requests that all references to public comment contained in the Consumer Advocate and Protection Division of the Office of the Attorney General's Post-Hearing Brief should be stricken, the motion is denied.

2. Insofar as Tennessee Wastewater Systems, Inc.'s *Motion to Strike Portions of Advocate's Brief or to File this Response* requests that its filing stand as a response in rebuttal to arguments set forth in the Consumer Advocate and Protection Division of the Office of the Attorney General's Post-Hearing Brief and that the Authority take official notice of the full record of Docket No. 06-00077, the motion is granted.

  
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Kelly Cashman-Grams, Hearing Officer