

IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:)
)
SHOW CAUSE PROCEEDING AGAINST) DOCKET NO. 14-00041
TENNESSEE WASTEWATER SYSTEMS,)
INC., FOR MATERIAL NON-)
COMPLIANCE AND/OR VIOLATION OF)
TENN. R. & REGS. 1220-04-13, *et seq.*)

APPEAL TO THE PANEL TO GRANT THE CONSUMER ADVOCATE'S PETITION
TO INTERVENE

The Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") submits for filing this *Appeal to the Panel to Grant the Consumer Advocate's Petition to Intervene* in this Show Cause Docket.¹

I. BACKGROUND

The Authority issued its Show Cause Order orally on April 14, 2014, and in a written order dated April 24, 2014. The Consumer Advocate filed its *Petition to Intervene* Tuesday morning, April 22, 2014, signed by the Attorney General as required by Tenn. Code Ann. § 65-4-118, requesting intervention to protect the consumer interests affected by the Show Cause proceeding and the ultimate determination of whether to revoke or amend the Certificate of Public Convenience and Necessity ("CCN") of Tennessee Wastewater Systems, Inc. ("TWSI") as it pertains to the Villages of Norris Lake ("The Villages"). Mr. Shiva Bozarth served the Consumer Advocate with his objection to the petition for Party Staff near the end of business on

¹ This appeal is filed with permission of the Hearing Officer. *Transcript*, pg. 26, lines 19-21 (Apr. 24, 2014). And, at the suggestion of the Hearing Officer, the Consumer Advocate is filing this Appeal in an expedited fashion, before the written order has been issued, so it may be heard at the May conference, if the Directors see fit to hear it then. Since there is no written order, the Consumer Advocate cites the oral order based on the expedited transcript that was emailed to the Consumer Advocate at 9:53 p.m. on Sunday, April 27, 2014.

Wednesday, April 23, 2014.² Mid-day on Thursday, April 24, 2014, Mr. Henry Walker served the Consumer Advocate with the objection for TWSI. Two hours later, at 2:00 p.m., the Authority heard the Consumer Advocate's petition and objections at a status conference previously noticed to address the procedural schedule. *Notice of Status Conference*, Docket No. 14-00041 (Apr. 15, 2014). The Consumer Advocate filed a written response to Party Staff's objection at 11:12 a.m. on Thursday, April 24, 2014, but it did not have time to file a response to TWSI's objection prior to the status conference.

At the status conference, the Hearing Officer denied the Consumer Advocate's *Petition to Intervene*. The Hearing Officer's written order was not available at the time of this Appeal, but the expedited transcripts with her oral order were available on Monday, April 28, 2014. In the oral order, the Hearing Officer finds that this is "not simply a contested case proceeding";³ this proceeding is being conducted in accordance with Tenn. Code Ann. § 65-2-106;⁴ and that the Authority is "empowered to conduct this enforcement action without undue interference and may rely upon counsel employed by the agency."⁵ The Hearing Officer stated that "[i]ntervention in administrative proceedings is not of right, and the TRA has substantial discretion to grant or deny intervention."⁶ The Hearing Officer made a finding that the parties to Docket No. 13-00017 "were given full procedural due process and had the opportunity to explore the issues and examine the evidence,"⁷ but did not close the evidentiary record and made no findings that the consumers' interests are not affected by the outcome of this case. Moreover, the Hearing Officer

² The Notice designating Mr. Bozarth as Party Staff under Rule 1220-1-2-.21(5) has not yet been issued by the Authority, but the Consumer Advocate is under the impression that Mr. Bozarth is the Party Staff in this Docket. In some cases, Party Staff refers to witnesses and the attorney is the counsel for those Staff witnesses. In this case, the Consumer Advocate is not aware of any other TRA Staff participating, only that Mr. Bozarth is participating as counsel.

³ *Transcript*, pg. 24, lines 20-21.

⁴ *Transcript*, pg. 24, lines 21-24.

⁵ *Transcript*, pg. 25, lines 7-12.

⁶ *Transcript*, pg. 25, lines 13-15 (no citation to authority provided).

⁷ *Transcript*, pg. 24, lines 7-12.

made no findings as to how the Consumer Advocate would impair the prompt and orderly conduct of the proceedings. At the same status conference, the parties made it known that TWSI intends to conduct two depositions,⁸ presumably with the intent of introducing new evidence to add to the preliminary investigation findings in this Show Cause Docket.

The Consumer Advocate submits this Appeal on the second business day after the Status Conference and on the same day the expedited transcript of such conference became available. The Consumer Advocate requests the panel to reconsider the Hearing Officer's order and grant the Consumer Advocate's *Petition to Intervene* for the reasons stated as follows.

II. ARGUMENT

A. This Show Cause Docket is a contested case subject to Tenn. Code Ann. § 4-5-310.

The Hearing Officer made a finding that this is a contested case.⁹ TRA Rule 1220-1-2-.08(1) states “[p]etitions for intervention shall be granted in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-2-107.” 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.” “Contested case” is defined as “all proceedings before the authority in which the legal rights, duties, or privileges of specific parties are determined after a hearing before the authority . . .” Tenn. Code Ann. § 65-2-101(2). The Tennessee General Assembly provides another definition of a “contested case” as the term is used in § 4-5-310: a “proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing.” Tenn. Code Ann. § 4-5-102. Moreover, the Tennessee Supreme Court has opined

⁸ *Transcript*, pg. 28.

⁹ “This docket is not simply a contested case proceeding.” *Transcript*, page 24, lines 20-21.

intervention as of right “must involve a direct claim on the subject matter of the suit such that the intervenor will either gain or lose by direct operation of the judgment.” *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 192 (2000).¹⁰

The outcome of this Show Cause Docket affects not only the utility’s rights, duties, and privileges, but it also affects the consumers’ rights, duties, and privileges. A finding that the consumers’ legal interests are not affected by the determinations in this Show Cause Docket would be necessary in order to deny the Consumer Advocate’s petition under the TRA statutes and the Administrative Procedure Act (“APA”) statutes. The Hearing Officer made no such finding.

As TRA Rule 1220-1-2-.08(1) states, the intervention into contested cases at agencies is codified in Tenn. Code Ann. § 4-5-310:

- (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 petition 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.

The APA requires enforcement actions affecting licenses to follow the contested case provisions in § 4-5-310. Tenn. Code Ann. § 4-5-320(a) (“When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.”).

¹⁰ This case was first cited by TWSI in its written objection, and this argument was made by the Consumer Advocate during the oral arguments. *Transcript*, pg. 15. The other case cited by TWSI is about a criminal proceeding, which is not on point because, as discussed below, criminal proceedings have many different procedural requirements than civil cases.

Show cause orders issued at the Authority are subject to Tenn. Code Ann. § 4-5-310 “except where otherwise specifically provided.” Tenn. Code Ann. § 65-2-106. Neither the parties nor the Hearing Officer cited any statute excepting this type of show cause order from the contested case provisions in Tenn. Code Ann. § 65-2-107 or § 4-5-310. Even TWSI’s counsel, Mr. Walker, has made the argument that show cause enforcement actions are subject to contested case provisions for other clients in another show cause, Docket No. 00-00170, stating in a letter dated July 7, 2000:

In essence, the Staff proposes that the TRA approve a proposed “Show Cause” Order against BellSouth and then, without allowing anyone to intervene, approve a proposed “Settlement Agreement” which will immediately close the docket.

The flaw in the Staff’s proposed course of action is this: a “show cause” proceeding initiated pursuant is, by definition, a “contested case.” Therefore, once the TRA issues the show cause order, anyone who has a legally recognizable interest in the outcome of that proceeding has a statutory right to intervene pursuant to T.C.A. § 4-5-310.

(attached as Appendix A to this Motion for the convenience of the Directors).

In the Staff’s petition to the Authority in Docket No. 00-00170, the Staff found certain sections of the utility’s tariff against public policy and requested the Authority to issue a show cause order requiring the utility to show cause that its tariff reflected sound policy and did not violate the law. *Petition*, Docket No. 00-00170, pgs. 2, 17 (Mar. 6, 2000). Before the show cause order was issued, the Staff entered into a settlement agreement with the utility. *Proposed Settlement Agreement*, Docket No. 000-00170 (May 9, 2000). The Consumer Advocate and companies affected by the settlement agreement petitioned to intervene. *Order Rejecting Proposed Settlement Agreement and Dismissing Show Cause Petition*, Docket No. 00-00170, pg. 3 (Oct. 4, 2000). The Staff filed a response to the petitions to intervene and letters sent from the non-party companies urging the Authority to approve the settlement before hearing the petitions

to intervene. *Staff's Response*, Docket No. 00-00170 (June 27, 2000). The Authority rejected the Staff's proposal for the reason that the settlement agreement "ultimately affected the rights and liabilities" of entities that were not allowed to participate. *Order Rejecting Proposed Settlement Agreement and Dismissing Show Cause Petition*, Docket No. 00-00170 (Oct. 4, 2000).¹¹

Since there is no statute excepting this Show Cause from Tenn. Code Ann. § 4-5-310, this Show Cause Docket is subject to the Code related to interventions found under Tenn. Code Ann. § 4-5-310 and § 65-2-107. The Authority's enabling statute "should not be construed so broadly that they permit the Authority to exercise its power in a manner contrary to law The Authority must comply with the statutes and constitutional provisions governing its procedures." *Consumer Advocate v. Tennessee Regulatory Authority*, 2005 WL 3193684, at *9 (Nov. 29, 2005) ("*Welcoming Rewards*"). Similar to the Show Cause proceeding in Docket No. 00-00170, non-party rights and legal interests are affected by the determinations in this proceeding. Like in Docket No. 00-00170, the Authority should reject any recommendations to exclude persons who will be affected by the determinations in this case because to exclude such persons would deny them their rights under the law.

B. The Consumer Advocate has the right to intervene in this Show Cause Docket under Tenn. Code Ann. § 4-5-310.

a. The Consumer Advocate has the right to intervene because consumers' legal interests are affected by the outcome of this Show Cause Docket.

As stated in its *Petition to Intervene*, paragraphs 2 to 8, and argued in its response to the Party Staff's objection on page 2, the determination of whether TWSI should continue to have a CCN to serve The Villages necessarily affects the consumers of The Villages. If the outcome of

¹¹ The Authority dismissed the show cause petition because a majority of the panel determined that the issues could be addressed in a rulemaking proceeding. As a result of the dismissal, the Authority dismissed the petitions to intervene as moot.

this Show Cause Docket does not affect consumers, then there would be no reason to hold Docket No. 13-00017 in abeyance pending the outcome of this Show Cause. But the Authority has ordered the abeyance of Docket No. 13-00017 pending the outcome of this Show Cause and, therefore, consumers are necessarily affected by the outcome of this docket. *Transcript of the Authority Conference*, pg. 12-13 (Jan. 13, 2014). Moreover, the purpose of CCNs is to ensure the public convenience and necessity.¹² Whether a utility maintains a CCN certainly affects the public.

The Hearing Officer made no finding that the consumers' interests are not affected in any way by the outcome of this Show Cause. Therefore, the Consumer Advocate has the right to intervene because consumers' legal interests are affected by this Show Cause Docket.

b. The Consumer Advocate has the right to intervene under Tenn. Code Ann. § 65-4-118.

Even if the Authority does find that consumers' legal interests are not affected by the determinations in this Show Cause, the Consumer Advocate qualifies as a statutory intervenor under another provision of law—Tenn. Code Ann. § 65-4-118. *Petition to Intervene*, ¶ 1 (Apr. 22, 2014); *Consumer Advocate's Reply to the Party Staff's Objection to the Intervention of the Consumer Advocate and Protection Division*, pg. 3 (Apr. 24, 2014); *Transcript*, page 25, lines 16-21 (Apr. 24, 2014).

Therefore, the Consumer Advocate has both grounds for intervention provided in Tenn. Code Ann. § 4-5-310(a)(2).

¹² Please see the *Post-Hearing Brief of the Consumer Advocate*, Docket No. 13-00017 (Dec. 9, 2013) for a more in-depth discussion of the purpose of CCNs.

c. The Hearing Officer made a finding that the Consumer Advocate's Petition was timely, and there is no evidence or finding that the Consumer Advocate's intervention will impair the orderly and prompt conduct of the proceedings.

The Hearing Officer made a finding that the Consumer Advocate's petition was timely filed,¹³ thereby satisfying Tenn. Code Ann. § 4-5-310. The Hearing Officer made no findings that the Consumer Advocate's intervention would impair the orderly and prompt conduct of the proceedings. Indeed, the Consumer Advocate's agreeing to arguing its petition just two hours after receiving an objection shows its commitment to the prompt and orderly conduct of this proceeding.

Party Staff argued that part of its objection was because the Consumer Advocate "failed to indicate that it is capable of complying with the Authority's directive that this matter be presented on or before June 16, 2014." *Objection to the Intervention of the Consumer Advocate and Protection Division*, Docket No. 14-0004, ¶ 17 (Apr. 23, 2014). As it discussed in its response, the Consumer Advocate was prepared to participate in the show cause hearing on April 14, 2014 when it opposed TWSI's *Motion to Continue*. Thus, the ability to be prepared for a hearing by June 16, 2014 seemed self-evident, particularly since there was no express indication that the Consumer Advocate could not be prepared by then. Although neither party nor the Hearing Officer asked, the Consumer Advocate does not intend to submit pre-filed testimony if intervention is granted. Rather, the Consumer Advocate wants the opportunity to ask questions of the witnesses and make legal and factual arguments about the issues listed in the Show Cause order, just like any other party whose legal interests are affected by the determinations in this case.

¹³ *Transcript*, pg. 25, lines 16-17.

It is possible that Party Staff was seeking to have the Consumer Advocate commit to a proposed procedural schedule¹⁴ that was set by Party Staff and TWSI, and not shared with the Consumer Advocate until the status conference. Requiring the Consumer Advocate to affirmatively commit to comply with a proposed procedural schedule that it had not even seen is an unreasonable barrier to intervention that is not required by § 4-5-310. To imply such requirement would allow existing parties to use procedural maneuvers to block the meaningful participation of intervenors. The law certainly does not condone an approach that puts some parties in a more advantageous procedural position than others when all parties have legal interests that are affected. *See* Tenn. Code Ann. § 4-5-308. Nevertheless, as the Consumer Advocate pointed out during the oral arguments after receiving the procedural schedule, it does not foresee any conflicts with the dates in the schedule and would be able to abide by it like it abides by any procedural order of a case. Moreover, even if any of the dates becomes an issue for any of the parties, as stated during the oral argument, the Consumer Advocate is committed to cooperate with the other parties to help ensure this case is heard by June 16, 2014. Indeed, the two depositions that TWSI requested could be done in a day, so its request for an additional two months seems more than adequate to get this case to the finish line by the June 16, 2014 conference.

In its oral argument, TWSI expressed concern that the Consumer Advocate “will come up with an argument after the hearing is over, that had it been raised earlier, could have been addressed by one of the witnesses at the hearing.”¹⁵ TWSI failed to provide any examples or other support for this argument. If parties do not file pre-hearing briefs and are not allowed to provide opening and closing arguments, the only opportunity to make any argument—legal or

¹⁴ The procedural schedule was only proposed and had not been considered by the Hearing Officer until after the Consumer Advocate’s petition was denied. *Transcript*, pg. 27, line 2.

¹⁵ *Transcript*, pg. 33, lines 24-25; pg. 34, lines 1-2.

factual—is during the post-hearing brief (if one is scheduled). In the related Docket No. 13-00017, the Consumer Advocate was only allowed to raise arguments on the merits during the post-hearing brief, which was submitted timely. This limitation of when and how the Consumer Advocate could make its argument was as a direct result of TWSI's recommendation in its objection to limit the Consumer Advocate's participation. *Response of Tennessee Wastewater Systems, Inc. to Advocate's Motion to Participate in the Hearing*, Docket No. 13-00017, pgs. 4-5 (Nov. 19, 2013). The Consumer Advocate cannot be faulted for following the rules of litigation set at the request and under the objection of TWSI.

TWSI, on the other hand, has waited to raise some arguments which has resulted in this case going on for over a year. For example, TWSI waited until the post-hearing brief submitted on December 9, 2013 in Docket No. 13-00017 to raise the argument that a CCN could not be revoked without a show cause proceeding. *Post-Hearing Brief of Tennessee Wastewater Systems, Inc.*, Docket No. 13-00017, pg. 3-4 (Dec. 9, 2013). Such an argument could have been—and arguably should have been—raised in its motion to dismiss as contending the Authority could not grant Emerson relief based on its complaint, filed on March 27, 2013, over eight months before the post-hearing brief.

Since the Hearing Officer made a finding that the Consumer Advocate's petition was timely, and the Hearing Officer made no findings that the Consumer Advocate's intervention would impair the orderly and prompt conduct of the proceedings, the Consumer Advocate also satisfies Tenn. Code Ann. § 4-5-310(a)(1) and § 4-5-310(3).

C. The Consumer Advocate recommends granting its intervention because it meets the statutory requirements of an intervening party and its intervention is in the interests of justice.

Granting the Consumer Advocate's Petition to Intervene is in the interest of justice. The present and future consumers of Tennessee are affected by the Authority's determinations in this Show Cause. The Consumer Advocate has the statutory duty and authority to represent those consumer interests. Tenn. Code Ann. § 65-4-118(b)(1). TWSI's objection is correct that the "TRA is not litigating the legal interests of third parties," but its contention that third party interests are not affected is wrong. *TWSI's Objection to the Intervention of the Consumer Advocate*, Docket No. 14-00041 (Apr. 24, 2014). As discussed in previous sections, the determinations in this case necessarily affect consumers' interest.

TWSI's argument that third party intervention allows the third party intervenor to act as an additional prosecutor is baseless. See *id.* At the outset, it is critical to appreciate this is not a criminal case,¹⁶ and to make such an analogy confuses the applicable law. Neither the Authority nor its Party Staff are prosecutors,¹⁷ even in a show cause. If the show cause was in essence a criminal case, it would certainly be unconstitutional to place the burden of proof on the respondent utility, as is the case in show cause proceedings. In addition, the TRA statutes regularly put the burden of proof on the utility in matters affecting its rights, including but not limited to petitions to increase rates or obtain a CCN. The Authority routinely grants the Consumer Advocate intervention in those matters, even though the utility has the burden of proof.

Moreover, the burden of persuasion is far different in show cause hearings than in criminal cases. A prosecutor in a criminal case is convinced of the defendant's guilt and has the

¹⁶ Party Staff admits this is not a criminal proceeding, and instead raises the argument that the Consumer Advocate should not be allowed to intervene because it has no claims. *Transcript*, pg. 6, line 15.

¹⁷ *Transcript*, pg. 8, lines 12-13 (calling the TRA the prosecutor). TWSI also analogized the show cause order to an indictment. *Transcript*, pg. 8, lines 13-15. Indictments require a defendant to answer guilty or not guilty. Here, TWSI intends to provide no such response. A show cause order is alleging preliminary facts (also known as findings) with sufficient particularity, which is no different than the requirements of a complaint of any plaintiff in civil litigation.

burden of persuading the tribunal to convict the defendant. In show cause proceedings at the Authority, the TRA has made preliminary findings of fact, but it must be permitted to be convinced that those findings of fact could be wrong; otherwise, the utility would have no meaningful opportunity to show cause why it did not violate the law and the process would be unconstitutional.

To take TWSI's argument to the logical extreme, TWSI is stating that it would be unfair for the Authority to consider the consumers' interest when determining whether TWSI complied with the law. This is a particularly disturbing argument. As Party Staff argued in his objection, the Authority can, should, and—arguably must—consider the consumers' interests in enforcement actions. TWSI and Party Staff's objection, if sustained, would mean the Authority may consider consumers' interests without allowing the consumers to participate and inform the Authority what their interests are.

The parties' objections also imply that the consumers can be involved in investigations leading up to the enforcement action, but not in the enforcement action itself. As a threshold matter, it is important to be aware that the investigation for this matter is not over. If it was, then the evidentiary record would be closed and no new facts would be admissible. Here, the parties have scheduled two depositions, a strong indication that at least one party intends to introduce new facts in an effort to change the investigation results (*i.e.*, the preliminary findings in the show cause order). While the TRA may view the investigation as complete and that no further evidence is necessary to determine the issues, TWSI must believe more evidence will change the results.¹⁸

¹⁸ TWSI has not and, based on the proposed procedural scheduled filed on April 24, 2014 in this docket, does not intend to file a response to the Show Cause Order. Therefore, TWSI has not said whether it views the investigation as complete, but its request for depositions indicates that it seeks to submit additional facts beyond those admitted in the preliminary investigation.

The Authority has conducted its preliminary investigation and provided the defined set of issues for this show cause, which can be expanded only by the Authority and cannot be expanded by any party. While the Authority controls the issues heard in this case, the consumers have a right to introduce evidence on issues that affect their legal interests so long as the evidentiary record is open. *See Welcoming Rewards*, 2005 WL 3193684 at *11 (vacating the Authority's decision to not convene a contested case, thereby preventing intervention under § 4-5-310, as an abuse of discretion without properly addressing factual arguments raised by affected entities wanting a contested case so they could intervene and remanding the case). The consumers' ability to question witnesses and make factual arguments is even more important if the TRA does not intend to further investigate issues beyond what TWSI presents as evidence.

In addition, TWSI's argument that it is acceptable for the Consumer Advocate to intervene in show cause proceedings affecting rates but not those show cause proceedings that do not affect rates is a difference without a distinction. Indeed, a utility that is currently overearning would have the same argument when it is the respondent of a show cause order enforcing the statute requiring rates to be just and reasonable, *i.e.*, both show causes to revoke a CCN and show causes to adjust rates are based on a statute. But the Consumer Advocate is allowed to be a party in those dockets. Moreover, rates could be affected by the outcome of this docket. One of the findings in the Show Cause Order is that TWSI's tariff does not allow recovery for capital. The determinations in this case may be relied upon in other litigation that could allow the utility to obtain the system, after which TWSI would have the constitutional right to recover the capital through rates. Thus, this show cause could affect rates.

Rates are not the only matters that affect consumers' legal interests. There is nothing in the statutes that states consumers legal interests are limited to the rates charged. And it cannot be

reasonably argued that the ability to get service at all is not a legal interest of consumers. This Show Cause is hearing issues about whether to revoke or amend a CCN for a wastewater service utility that has failed to provide service. The determinations in this case necessarily affect who can provide service and, consequently, when and how service will be provided and at what rate. The issue of whether a utility can withhold service—intentionally or unintentionally—and keep its CCN is certainly a matter affecting consumers’ legal interests.

During oral arguments before the Hearing Officer, TWSI also contended that if the Consumer Advocate is made a party, it would then have a right to appeal the determination and the Consumer Advocate should have no such rights of appeal.¹⁹ Under TWSI’s argument, no person or entity could appeal the decision if the Authority finds in favor of TWSI. The TRA Party Staff cannot appeal the Authority’s decision. Consequently, even if the Party Staff believes it is arguing to the Authority on behalf of consumers, its role is limited because Party Staff does not have the fundamental right of appeal if the agency does not follow its recommendation. Party Staff’s alternative remedy that the Consumer Advocate can petition the Authority for a declaratory order to interpret the same laws at issue in this case is inadequate to afford adequate due process to protect the consumers’ legal interests.²⁰ Party Staff argued that consumers’ legal interests would not be affected by the interpretations of law in this case because it is likely the determinations in this case would not be precedential and a declaratory order would be more appropriate for protecting consumers’ legal interests. First, it is speculative to argue that the Authority will make the decision in this case non-precedential. Second, it is questionable whether the Authority could constitutionally make this decision non-precedential. Assume for argument purposes that the Authority permits TWSI to keep its CCN in this case;

¹⁹ *Transcript*, pg. 23, lines 4-5.

²⁰ The Consumer Advocate did not address this argument in its response to the Party Staff’s objection because this argument was made during oral arguments, but was not in the Party Staff’s written objection.

and in the future, issues another show cause order against a different wastewater utility with the same exact facts under the same rules and statutes. The utility-respondent in the future show cause could raise constitutional questions as to the different applications of law if the Authority revokes or amends its CCN. Third, to recommend pursuit of a declaratory order seems inefficient when a contested case is addressing the same issues and legal interpretations and, therefore, in contradiction with doctrine of judicial economy.

TWSI's alternative remedy that the Consumer Advocate be permitted to participate as *amicus curae*, or "friend of the court", which the Hearing Officer ordered was an acceptable approach, is also inadequate to protect the consumers' legal interests. First, as previously discussed, the evidentiary record is not closed in this case and facts may be introduced that affect legal interests. Without the ability to participate as a party, there is currently no party to advocate for the consumers regarding any new facts that will be admitted. Second, even though TWSI initially said "I would give [the Consumer Advocate] as much latitude as they would like, as long as they're not a party to the case",²¹ TWSI later requested the Hearing Officer prohibit the Consumer Advocate from making comments after the hearing specifically so the Consumer Advocate cannot comment on the evidence and legal arguments made at the hearing.²² in the event that the deliberations occur on or before June 16, 2014, and post-hearing briefs are unnecessary, TWSI has requested, and the Hearing Officer is considering, having the Consumer Advocate provide its comments before the hearing and disallow public comments at the end of the hearing. Since TWSI is not providing a response and, currently, there are no pre-hearing

²¹ *Transcript*, pgs. 22-23.

²² *Transcript*, pg. 33-34. The timing of when the Consumer Advocate could speak at the hearing was a question raised by the Consumer Advocate because the proposed procedural schedule did not mention when an amicus brief or comments would be made. *Transcript*. Pgs. 31-34. As mentioned during the status conference related to the procedural schedule, the Consumer Advocate wants the Directors to have the opportunity to deliberate on or before the June 16, 2014 conference if they so desire, which if they did, the post-hearing briefs would be unnecessary and, therefore, the Consumer Advocate could not file an amicus brief.

briefs or pre-filed testimony, the Consumer Advocate would have to provide its comments before the legal arguments or any new facts are presented. Such an approach results in the illusion that the Consumer Advocate can participate but provides no meaningful opportunity to actually comment on the legal arguments or any new facts.

The Consumer Advocate is not seeking blanket intervention in every show cause proceeding. History shows that the Consumer Advocate properly exhibits restraint and very rarely petitions to intervene in show cause dockets. When it does petition to intervene, it is in show cause dockets that affect consumers' legal rights. *See* Docket No. 05-00258 (show cause docket brought by the Consumer Advocate's petition for Atmos to show cause that it was not overearning); Docket No. 01-00216 (Show cause proceeding against Talk.Com, Inc. for violations of law not pertaining to rates; Consumer Advocate's intervention was granted).²³ While the Authority has denied the intervention of the Consumer Advocate in show cause dockets that are dismissed or such intervention has become moot, see *Order* in Docket No. 00-00170, neither the opposing parties nor the Hearing Officer have cited cases where the Authority has denied the Consumer Advocate's timely petitions to intervene in any contested matter—show cause or otherwise—that affects consumers' legal interests.

Dockets determining issues that affect consumers' legal interests should not be out of the consumers' reach merely because, instead of being brought by a third party, they are brought by the Authority. No findings have been made that the determinations in this show cause

²³ The Hearing Officer asked the Consumer Advocate which other show cause dockets it had intervened in, and the Consumer Advocate provided Docket No. 05-00258 and stated that the Consumer Advocate had not petitioned for intervention in any other show cause dockets. *Transcript*, pg. 16. The Consumer Advocate's statement was based on the research conducted in the short timeframe between the filing of the parties' objections and the oral argument. The Consumer Advocate should have said that it was not aware of any other show cause dockets that it had petitioned to intervene in. Since the oral arguments, the Consumer Advocate has become aware of one of other docket, Docket No. 01-00216, that it petitioned to intervene in, and another docket that it intended to petition to intervene in had the show cause order been issued (Docket No. 00-00170, discussed previously). At this time, the Consumer Advocate is not aware of any petitions to intervene in show cause dockets that have been denied for reasons other than mootness.

proceeding will not affect consumers' legal interests and no authority has been cited that enforcement actions are outside of the purview of Tenn. Code Ann. § 65-4-118. Because consumers' legal interests may be affected, the granting of the Consumer Advocate's Petition is in the interest of justice.

III. CONCLUSION

The Consumer Advocate requests the panel of the Authority grant the Consumer Advocate's *Petition to Intervene*. Given the expedited nature of this case, the Consumer Advocate requests the panel consider this appeal at the May conference, if possible, to allow the Consumer Advocate the meaningful opportunity to participate if its petition is granted.

RESPECTFULLY SUBMITTED,



Charlena Aumiller, BPR # 031465
Assistant Attorney General
Consumer Advocate and Protection Division
P.O. BOX 20207
Nashville, Tennessee 37202-0207
(615) 741-2812, (615) 741-1026-FAX

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appeal was served via U.S.

Mail or electronic mail upon:

C. Mark Troutman, Esq.
Troutman & Troutman, P.C.
P.O. Box 757
LaFollette, TN 37766
(423) 566-6001

Henry Walker, Esq.
Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203
615-252-2363

Jean Stone, General Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

This the 28th day of April, 2014.


Charlena Aumiller

APPENDIX A

BOULT
CUMMINGS
CONNERS
& BERRY

PLC REC'D TH
REGULATORY AUTH.

LAW OFFICES

414 UNION STREET, SUITE 1600
POST OFFICE BOX 104061
NASHVILLE, TENNESSEE 37219

JUL 7 PM 1 17

July 7, 2000

OFFICE OF THE
EXECUTIVE SECRETARY

TELEPHONE (615) 244-2582
FACSIMILE (615) 252-2380
INTERNET WEB <http://www.bccb.com/>

Henry Walker
(615) 252-2363
Fax: (615) 252-6363
Email: hwalker@bccb.com

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

In Re: *Petition to Require BellSouth to Appear and Show Cause that Certain Sections of the General Subscriber Services Tariff and Private Line Services Tariff Do Not Violate Current State and Federal Law*
Docket No. 00-00170

Dear David:

This letter is submitted on behalf of NEXTLINK, Tennessee, Inc. ("NEXTLINK") and the Southeastern Competitive Carriers Association ("SECCA") in reply to the "Staff Team's Collective Response" filed June 27, in the above-captioned proceeding. This matter is scheduled to be on the TRA's July 11 conference agenda.

In essence, the Staff proposes that the TRA approve a proposed "Show Cause" Order against BellSouth and then, without allowing anyone to intervene, approve a proposed "Settlement Agreement" which will immediately close the docket.

The flaw in the Staff's proposed course of action is this: a "show cause" proceeding initiated pursuant to T.C.A. §65-2-106 is, by definition, a "contested case."¹ Therefore, once the TRA issues the show cause order, anyone who has a legally recognizable interest in the outcome of that proceeding has a statutory right to intervene pursuant to T.C.A. § 4-5-310.

While NEXTLINK and SECCA understand the Staff's desire to clear a shortcut through various procedural requirements as well as the Staff's ethical obligation to advocate approval of the Settlement Agreement, which was privately negotiated between the Staff and BellSouth, SECCA and NEXTLINK will not waive their rights to participate, as appropriate, in the "Show

¹ The "show cause" statute itself, T.C.A. § 65-2-106, states that a show cause proceeding "shall follow the provisions of this chapter with reference to contested cases."

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7-7-00

Mr. David Waddell
July 7, 2000
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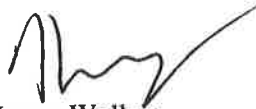
Cause" proceeding.

Therefore, SECCA and NEXTLINK reiterate their suggestion that the TRA open this docket by issuing the proposed show cause order against BellSouth and then delegate the case to a Hearing Officer (preferably, the General Counsel who recommended issuance of the Show Cause Order) so that he can entertain petitions to intervene and consider whether the proposed Settlement Agreement should be approved.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


Henry Walker

HW/nl
c: Parties