

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

June 4, 2014

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

**ORDER DENYING PETITION TO APPEAL AND
AFFIRMING THE INITIAL ORDER OF THE HEARING OFFICER**

This matter came before Chairman James M. Allison, Director Kenneth C. Hill, and Director David F. Jones of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at the regularly scheduled Authority Conference held on May 5, 2014 for consideration of the *Appeal to the Panel to Grant the Consumer Advocate’s Petition to Intervene* (“*Appeal to the Panel*”) filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General (“CAPD” or “Consumer Advocate”) on April 28, 2014. In its *Appeal to the Panel*, the Consumer Advocate requests the Authority to overturn the decision by the Hearing Officer denying the Consumer Advocate’s petition to intervene in this show cause proceeding, which is memorialized in the *Initial Order Denying the Consumer Advocate’s Petition to Intervene* issued by the Hearing Officer on May 1, 2014 (“*Initial Order*” attached as Exhibit 1).

On April 28, 2014, the Consumer Advocate filed its *Appeal to the Panel*. The CAPD maintains that the show cause docket is a contested case, and it has a right to intervene pursuant to Tenn. Code Ann. § 4-5-310 and § 65-4-118. The CAPD states that consumers’ “legal interests are affected by the outcome of this Show Cause Docket.”¹ The CAPD argues that even if the Authority finds that consumer interests are not at stake, it has a right to intervene under another provision of

¹ CAPD *Appeal to the Panel*, p. 6 (April 28, 2014).

law, Tenn. Code Ann. § 65-4-118, under which it qualifies as a statutory intervenor.² According to the CAPD, allowing it to intervene will not impair the orderly and prompt conduct of the proceedings, and the interests of justice dictate that it should be granted intervention.³ The CAPD argues that the “present and future consumers of Tennessee are affected by the Authority’s determinations in this Show Cause.”⁴ Without the CAPD’s participation, which should include the ability to question witnesses, the CAPD argues “there is currently no party to advocate for the consumers regarding any new facts that will be admitted”; therefore, participating as an amicus curie would be insufficient.⁵

TRA Party Staff filed an *Objection to the Intervention of the Consumer Advocate and Protection Division* (“*Party Staff Objection*”) on May 1, 2014 stating that the “Show Cause statute does not contemplate third party intervention when the only issue is whether there has been a violation of the law.”⁶ TRA Party Staff argues that the CAPD does not have a “right to blanket intervention.”⁷ Party Staff maintains that “absent a clear basis for intervention no party should be granted intervention in an Authority show cause proceeding,” and the CAPD has failed to establish what specific interests it seeks to protect by intervening.⁸

On May 2, 2014, Tennessee Wastewater Systems, Inc. (“TWSI”) filed its *Brief of Tennessee Wastewater Systems, Inc.* (“*TWSI Brief*”) asking the Authority to deny the CAPD’s *Appeal to the Panel*, and in addition to relying on the arguments made by TRA Party Staff, TWSI declares that “the case law is clear: third parties do not have a right to intervene under T.C.A. § 4-5-310 in an agency enforcement proceeding.”⁹ TWSI cites a Court of Appeals case in which the Court stated it has been unable to find any legal authority requiring third parties with generalized grievances to participate as

² *Id.* at 7.

³ *Id.* at 8-10.

⁴ *Id.* at 11.

⁵ *Id.* at 15.

⁶ *Party Staff Objection*, p. 2 (May 1, 2014).

⁷ *Id.*

⁸ *Id.* at 3.

⁹ *TWSI Brief*, p. 1 (May 2, 2014).

a party in an enforcement proceeding.¹⁰ TWSI also points out that the Consumer Advocate has previously argued that even if it does not “meet the ‘legal interest’ requirement of T.C.A. § 4-5-310(a)(2), the Advocate is nevertheless statutorily entitled to intervene under T.C.A. § 65-4-118.”¹¹ According to TWSI, the argument that the CAPD has a statutory right to intervene was addressed by the Hearing Officer in Docket No. 13-00017, and the Hearing Officer concluded that such argument by the CAPD is erroneous and “the Advocate’s ‘reading of the statute in this matter is incorrect and deviates from the statute’s clear language and long-standing application.’”¹² The Hearing Officer ruled that “when the Advocate files a petition to intervene, ‘the requirements, criteria, and procedure established in [T.C.A. § 4-5-310] must be satisfied.’”¹³ TWSI argues that the Consumer Advocate did not appeal the Hearing Officer’s Order in Docket No. 13-00017, and “in the two sentences devoted to raising this argument again suggests no reason why the Authority should depart from its ‘long-standing application’ of T.C.A. § 65-4-118.”¹⁴

FINDINGS AND CONCLUSIONS

The panel considered this matter at the regularly scheduled Authority Conference held on May 5, 2014, and the Consumer Advocate, TWSI, and TRA Party Staff were each given an unlimited amount of time for oral arguments on the CAPD’s *Appeal to the Panel*.

The Consumer Advocate erroneously contends that “this case is one of first impression and its outcome necessarily affects Tennessee consumers’ present and future rights. This alone is grounds for the Consumer Advocate intervention.”¹⁵ As TWSI has pointed out, the Consumer Advocate has previously attempted to argue that it has a statutory right to intervene pursuant to Tenn. Code Ann. § 65-4-118 in Docket No. 13-00017, the docket giving rise to this show cause proceeding. In Docket

¹⁰ *Id.* at 2. (citing *Wood v. Metropolitan Nashville & Davidson County Government et al.*, 196 S.W.3d 152,159 (Tn. Ct. App. 2005).

¹¹ *Id.* at 2.

¹² *Id.* (citations omitted).

¹³ *Id.* (citations omitted).

¹⁴ *Id.*

¹⁵ *Consumer Advocate’s Reply to the Party Staff’s Objection to the Intervention of the Consumer Advocate and Protection Division*, p. 2 (April 24, 2014).

No. 13-00017, the Hearing Officer found that the CAPD's assertion of a statutory right to intervene is misguided and that no such right exists.¹⁶ In the *Pre-Hearing Order*, the Hearing Officer found that the Consumer Advocate's reading of this statute is erroneous and "deviates from the statute's clear language and long-standing application."¹⁷ The Hearing Officer held that when the CAPD files a petition to intervene, "the requirements, criteria, and procedures established in the UAPA and TRA Rules must be satisfied."¹⁸

Even though the Consumer Advocate made the same argument regarding the interpretation of Tenn. Code Ann. § 65-4-118, it chose not to appeal the Hearing Officer's ruling in the underlying docket. Further, the Consumer Advocate does not provide any basis as to why the Authority should depart from the manner in which it has interpreted Tenn. Code Ann. § 65-4-118 to date. In fact, as noted by the Hearing Officer, the CAPD has even acknowledged that "TWSI is accountable to the TRA, and not to other third parties, for its actions or lack thereof."¹⁹

When considering the *Appeal to the Panel*, the Authority has very serious concerns about infringing on the due process rights of TWSI by allowing the CAPD to sit second chair in the Authority's enforcement proceeding. Additionally, the Authority is persuaded by the fact that the Court of Appeals has stated that "our independent research has failed to uncover any legal authority for the proposition that citizens with generalized grievance . . . must be permitted to participate as a party in an enforcement proceeding" brought by a government regulatory agency.²⁰ Furthermore, the Hearing Officer points out that she is "not aware of any instance in which the Consumer Advocate

¹⁶ See *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, *Pre-Hearing Order* (November 20, 2013).

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 6; *TWSI Brief*, p. 2 (May 2, 2014).

¹⁹ *Initial Order*, p. 18 (May 1, 2014).

²⁰ *Wood v. Metropolitan Nashville & Davidson County Government et al.*, 196 S.W.3d 152, 159 (Tn. Ct. App. 2005).

has been permitted to intervene in an enforcement or show cause proceeding of the TRA over the reasonable objections of the Authority's enforcement counsel and the named respondents."²¹


After reviewing the Hearing Officer's *Initial Order*, the *Appeal to the Panel*, *Party Staff Objection*, and TWSI's Brief, as well as the record in this matter at the May 5, 2014 Authority Conference, the majority of the panel voted to deny the *Appeal to the Panel* and to affirm the Hearing Officer's *Initial Order*.²²

IT IS THEREFORE ORDERED THAT:

1. The *Appeal to the Panel to Grant the Consumer Advocate's Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General is denied;
2. The *Initial Order Denying the Consumer Advocate's Petition to Intervene* issued by the Hearing Officer on May 1, 2014, attached to this Order as Exhibit 1, is hereby affirmed and adopted as if fully rewritten herein; and
3. Any party aggrieved by the decision of the Authority may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

Director Kenneth C. Hill and Director David F. Jones concur. Chairman James M. Allison dissents.

ATTEST:



Earl R. Taylor, Executive Director

²¹ *Initial Order*, p. 17 (May 1, 2014).

²² Chairman Allison did not vote with the majority. Chairman Allison found that the Consumer Advocate presented sufficient grounds pursuant to Tenn. Code Ann. § 4-5-310 to be granted intervention.

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

May 1, 2014

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

INITIAL ORDER DENYING CONSUMER ADVOCATE'S PETITION TO INTERVENE

This matter is before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") upon a *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General ("Consumer Advocate") on April 22, 2014. On April 24, 2014, the parties to the docket, the Tennessee Regulatory Authority Staff designated as a Party ("Party Staff")¹ and the Respondent Utility, Tennessee Wastewater Systems, Inc. ("TWSI" or "Respondent"), each filed separate Objections to the *Petition to Intervene* in the docket file.² Also on April 24, 2014, the Consumer Advocate filed a Reply to the Objection of the Party Staff.³ Oral arguments on the *Petition to Intervene* were presented before the Hearing Officer during a Status Conference held on April 24, 2014, which had been scheduled and noticed on April 16, 2014.

¹ In accordance with TRA Rule 1220-1-2-.21(1), as to show cause proceedings, staff members designated by the Authority and represented by counsel employed by the Authority *shall* participate as a party.

² Party Staff and TWSI each filed separate responses, both titled *Objection to the Intervention of the Consumer Advocate and Protection Division*, opposing the Consumer Advocate's request to intervene in the proceedings.

³ *Consumer Advocate's Reply to the Party Staff's Objection to the Intervention of the Consumer Advocate and Protection Division* (April 24, 2014).

BACKGROUND

During the regularly scheduled Authority Conference held on January 13, 2014, considering the entire record in Docket No. 13-00017, which included the hearing held on November 25, 2013, the Authority found that the evidence was sufficient to conclude that TWSI should be required to appear and show cause why the Authority should not proceed to take action against TWSI for the actions and omissions alleged against it in the Amended Petition (i.e., Complaint) filed by Emerson Properties, LLC (“Emerson”), on March 1, 2013.⁴ Subsequently, during the regularly scheduled Authority Conference on April 14, 2014, the Authority opened the instant docket for the purpose of conducting a show cause proceeding in accordance with Tenn. Code Ann. § 65-2-106 and Tenn. R & Regs. 1220-04-13-.09(4), and further moved that the evidentiary record assembled in Docket No. 13-00017 be made part of the record in the show cause docket. Finally, the Authority appointed the Hearing Officer to expeditiously administer all preliminary matters and promptly present this proceeding for hearing no later than June 16, 2014.⁵

DOCKET FILINGS

Consumer Advocate’s Petition to Intervene

In its *Petition to Intervene*, the Consumer Advocate states that, pursuant to Tenn. Code Ann. § 65-4-118, it seeks to intervene in this show cause proceeding on behalf of the public interest.⁶ Specifically, the Consumer Advocate asserts that its request should be granted because the issues to be considered in this docket involve the TRA’s procedures concerning Certificates of Public Convenience and Necessity (“CCNs”) and could result in the revocation of TWSI’s

⁴ See *Order Initiating Show Cause Proceeding Against Tennessee Wastewater Systems, Inc.* (April 14, 2014) (entered in Docket No. 13-00017 on March 25, 2014).

⁵ See *Amended Order Initiating Show Cause Proceeding Against Tennessee Wastewater Systems, Inc.* (April 14, 2014) (entered in Docket No. 13-00017 on April 24, 2014).

⁶ *Petition to Intervene*, p. 1 (April 22, 2014).

CCN to provide service to a subdivision located in Campbell County, Tennessee, known as The Villages at Norris Lake (“The Villages”), as well as, the imposition of civil penalties and fines on TWSI for violation of state law and various provisions of the TRA’s wastewater rules. In addition, the Consumer Advocate noted that its intervention in Docket No. 13-00017 had been limited, and further expressed its desire to avoid any similar limitations to its participation in the show cause docket. For these reasons, the Consumer Advocate contends that this proceeding may affect ratepayers in the future and, therefore, only by participating as a party can it protect the interests of consumers.⁷

Party Staff’s Objections to Intervention

In its Objection, the Party Staff asserts that the Consumer Advocate’s request to intervene should be denied. First, Party Staff notes that Docket No. 13-00017 involved a dispute between Emerson and TWSI concerning whether or not TWSI should be allowed to retain its CCN to provide service to The Villages.⁸ In addition, Party Staff points out that neither TWSI, nor any other utility, currently provides wastewater service to The Villages.⁹ Party Staff further asserts that the Consumer Advocate’s participation in Docket No. 13-00017 does not establish a basis for its request to intervene in this enforcement action. Next, Party Staff states that the Authority panel specifically ordered the Hearing Officer to expedite this proceeding and set a target hearing date of June 16, 2014, and that the parties have committed between themselves to a procedural

⁷ *Id.* at 2-3.

⁸ On January 8, 2007, the Authority granted TWSI’s petition to amend its CCN to include The Villages in Docket No. 06-00277. Subsequently, Emerson purchased the property and assets of The Villages through bankruptcy proceedings were instituted by The Villages’ former owner/developer in the United States Bankruptcy Court for the Middle District of Florida. See *Order Requiring Tennessee Wastewater Systems, Inc. to Appear and Show Cause Why the TRA Should Not Take Action to Terminate, Amend, or Revoke It’s CCN to Provide Wastewater Service to the Portion of Campbell Co., Tennessee, known as The Villages at Norris Lake, and to Impose Civil Penalties and Seek Additional Relief Against It for Its Material Non-Compliance and/or Violations of State Law and Tenn. R. & Regs. §§ 1220-04-13, et. seq.* (April 24, 2014).

⁹ Party Staff’s *Objection to the Intervention of the Consumer Advocate and Protection Division*, p. 1, ¶¶ 1-2 (April 24, 2014).

schedule that complies with that directive. Party Staff further states that the Consumer Advocate's *Petition to Intervene* provides no assurances that their intervention will not delay or impair the timeline set by the panel.¹⁰

Finally, Party Staff states that this docket is an enforcement action initiated by the Authority against TWSI for violations of law.¹¹ Under law, only the Authority and respondent utility are deemed parties to Show Cause Actions and, while the named respondent must be given opportunity to fully reply to the allegations brought against it, third party intervention is not contemplated.¹² In addition, the Consumer Advocate's originating statute allows it to petition the TRA to intervene, but does not grant it blanket intervention or intervention as of right in this or any other of the TRA's Show Cause dockets.¹³ Further, Party Staff contends that the Consumer Advocate has raised general and unspecific concerns about unknown harm to unidentified customers, which is an insufficient basis for intervention.¹⁴ Finally, in the exercise of its plenary authority, the Authority is empowered to issue Show Cause Orders to enforce matters under its jurisdiction and may rely upon counsel employed by the TRA to conduct such actions.¹⁵

Consumer Advocate's Reply to Party Staff's Objection

In its Reply, the Consumer Advocate asserts that the outcome of this enforcement proceeding will necessarily affect consumers' rights presently and in the future. Further, that the Consumer Advocate not only has authority to intervene to represent the interests of consumers, but also a duty to do so. And, while it does not seek to intervene in every show cause proceeding of the Authority, the interests of consumers are necessarily affected by this proceeding. The

¹⁰ *Id.* at pp. 1-2, ¶¶ 4-5.

¹¹ *Id.* at p. 2, ¶6.

¹² *Id.* at p. 2, ¶¶ 7-8.

¹³ *Id.* at p. 2, ¶ 9.

¹⁴ *Id.* at p. 2, ¶ 10.

¹⁵ *Id.* at p. 2, ¶ 11-13.

Consumer Advocate further claims that this case involves a matter of first impression, which alone constitutes grounds upon which its intervention should be granted.¹⁶

In addition, the Consumer Advocate contends that it has been granted intervention in other show cause dockets, and that the TRA properly admits such intervention when such dockets affect rates.¹⁷ The Consumer Advocate contends, “the statutes do not preclude other parties if issues in a show cause will affect the public interest or the rights of other persons and entities.”¹⁸ Therefore, the fact that this is a show cause enforcement proceeding should not bar the Consumer Advocate’s intervention as a party. Further, the Consumer Advocate asserts that its request meets the statutory requirements for intervention, and that the legislature neither preempted its authority nor excused its duty to represent consumer as concerns show cause proceedings before the Authority.¹⁹ Finally, the Consumer Advocate states that it has no intention of delaying the proceedings so long as the public interest is being served, and is eager to see the matter resolved.²⁰

TWSI’s Objections to Intervention

In its Objection, TWSI joins in the Objection filed by the Party Staff and further asserts that, to preserve its rights to fundamental fairness and procedural due process, the Consumer Advocate’s request to intervene should be denied. TWSI contends that, under Tenn. Code Ann. § 65-2-106, the Authority is empowered to bring this show cause action on its own initiative, and that the proceeding rests upon a preliminary investigation made by the Authority. As such, in a civil enforcement proceeding, the TRA issues a Show Cause Order that outlines its case against

¹⁶ *Consumer Advocate’s Reply to the Party Staff’s Objection to the Intervention of the Consumer Advocate and Protection Division*, pp. 1-2 (April 24, 2014).

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.* at 4.

the regulated entity, and, so doing, the agency steps into the role of “prosecutor.”²¹ By statute and the requirements of due process, the Consumer Advocate has no legal role in the proceeding, and “no legal right to act as a separate prosecutor, taking its own discovery, presenting its own case, and making its own argument for whatever remedies [it] may request.”²² TWSI contends that to allow the Consumer Advocate to intervene and present a separate case against it is inconsistent with Tenn. Code Ann. § 65-2-106 and unfair to TWSI.²³

In addition, citing the cases of *State v. Brown and Williamson Tobacco Corp.* (Tenn. 2000) and *State v. Siliski* (Tenn. Crim. App. 2006), TWSI asserts that it is well established that third parties have no right to intervention in proceedings brought by the State. Similarly, in this proceeding, the TRA is not litigating the legal interests of third parties in this enforcement proceeding. As such, the TRA is the sole representative of the State’s interests and allowing a third party to intervene and act as an additional prosecutor does not serve the “interests of justice” or the “orderly and prompt conduct of the proceedings.”²⁴ Nevertheless, while TWSI opposes the Consumer Advocate’s participation as a party, it does not object to the Consumer Advocate’s participation as *amicus curiae* in these proceedings.²⁵

STATUS CONFERENCE

On April 24, 2014, oral argument on the *Petition to Intervene* was presented before the Hearing Officer by the Consumer Advocate, Party Staff, and TWSI, during the Status Conference held in the Executive Conference Room in the Offices of the Tennessee Regulatory

²¹ TWSI’s *Objection to the Intervention of the Consumer Advocate and Protection Division*, p. 1 (April 24, 2014).

²² *Id.*

²³ *Id.* at 1-2.

²⁴ *Id.* at 2.

²⁵ *Id.* at 3.

Authority located at 502 Deaderick Street, 4th Floor, Nashville, Tennessee.²⁶ The parties were represented as follows:

For TRA/Party Staff:

Shiva K. Bozarth, Esq., Tennessee Regulatory Authority, 502 Deaderick Street, 4th Floor, Nashville, Tennessee 37243;

For TWSI:

Henry Walker, Esq., and Pat Moskal, Esq., Bradley, Arant, Boult, Cummings, LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203.

Appearances were made by the Consumer Advocate, as represented by Charlena Aumiller, Esq., and Vance Broemel, Esq., and also by C. Mark Troutman, Esq., who appeared via telephone. In addition to the arguments set forth in their various filings, the Hearing Officer notes, in brief, the following additional arguments presented by the Consumer Advocate, Party Staff, and TWSI during the Status Conference:

Consumer Advocate

The Consumer Advocate states that a show cause proceeding is not a criminal case, and disagrees that such proceedings are similar or analogous in any way.²⁷ As the resolution of this matter involves the possible revocation of TWSI's CCN, the outcome of the proceeding will dictate whether the property owners at The Villages can choose to receive service from a provider of their choice. The Consumer Advocate asserts that is the claim and public interest at issue in this proceeding - that consumers have a right to obtain service from whomever they choose – and that it must be allowed to intervene as a party to protect such interest.²⁸ In addition, the Consumer Advocate contends that just as its intervention is proper in matters involving rates, its intervention in this case is proper because it involves the implementation of

²⁶ Public notice of the Status Conference was duly issued on April 15, 2014.

²⁷ Transcript of Proceedings, p. 4, 13 (April 24, 2014).

²⁸ Id. at pp. 11-12, 13.

procedures related to CCNs, which is also a matter of public interest.²⁹ The Consumer Advocate asserts that without its intervention, the interpretation and application of the TRA's statutes and rules concerning CCNs, and in particular the revocation of a CCN, will be determined without its input.³⁰ Finally, the Consumer Advocate noted that none of dates in the proposed procedural schedule offered by the parties appeared controversial and that it would commit to making every effort to comply with any reasonable schedule.³¹

Party Staff

Party Staff contends that simply asserting the existence of a generalized consumer interest is not alone sufficient for intervention under the statute. Further, Party Staff asserts that the Consumer Advocate has failed to show a basis for its intervention in this proceeding.³² While it agrees that the instant docket is not a criminal proceeding, a show cause enforcement proceeding is analogous in a variety of ways. Providing further analogy, Party Staff stated that even in a civil court proceeding, third parties without a substantial claim are barred from becoming parties to the litigation.³³ In addition, Party Staff asserted that the outcome of this case is dependent on its particular facts and, therefore, is not likely to have precedential value in future cases.³⁴

TWSI

TWSI asserted that while not a criminal proceeding, a show cause is a civil enforcement proceeding and is reasonably analogous as to the role and structure of the TRA in such cases. As such, permitting the Consumer Advocate to intervene and raise separate issues, theories of the

²⁹ Id.

³⁰ Id. at p. 12, 17, 20.

³¹ Id. at pp. 14-15.

³² Id. at pp. 5-6.

³³ Id. at p. 6.

³⁴ Id. at p. 18.

case, conduct its own discovery, etc., is unfair and violates due process.³⁵ This is particularly so when one petitioning for intervention has no claim at issue for determination in the proceeding.³⁶ Opening up intervention in a show cause action on grounds such as that presented by the Consumer Advocate in this case would be detrimental to the agency's administration of its own proceedings and should not be permitted.³⁷ The grant of party status carries with it the right to present evidence, to cross-examine witnesses, and bring an appeal should the intervenor be dissatisfied with the Authority's decision. Under the circumstances of this case and the reasons for intervention presented by the Consumer Advocate, TWSI contends intervention is improper.³⁸ TWSI further stated, however, that allowing the Consumer Advocate to file an amicus brief would be appropriate in this case.³⁹

FINDINGS & CONCLUSIONS

As Tennessee's public utilities regulatory body, the General Assembly has delegated to the TRA broad powers to exercise its jurisdiction over matters involving public utilities.⁴⁰ To that end, the TRA is charged and authorized to ensure that the laws of this State as they relate to its jurisdiction "are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the State are collected."⁴¹ Under Tenn. Code Ann. § 65-2-106, the Authority is empowered and authorized to cite persons under its jurisdiction to appear and show cause why the TRA should not take certain actions that appear justified by its preliminary investigation, as indicated in its Show Cause Order, against those cited respondents:

The authority is empowered and authorized in the exercise of the powers and jurisdiction conferred upon it by law to issue orders on its own motion citing

³⁵ Id. at pp. 8-9.

³⁶ Id. at p. 10.

³⁷ Id. at p. 21.

³⁸ Id. at p. 23.

³⁹ Id. at p. 22.

⁴⁰ Tenn. Code Ann. §§ 65-1-104-106 (2004).

⁴¹ Tenn. Code Ann. § 65-1-113 (2004).

persons under its jurisdiction to appear before it and show cause why the authority should not take such action as the authority shall indicate in its show cause order appears justified by preliminary investigation made by the authority under the powers conferred upon it by law. All such show cause orders shall fully and specifically state the grounds and bases thereof, and the respondents named in the orders shall be given an opportunity to fully reply thereto. Show cause proceedings shall otherwise follow the provisions of this chapter with reference to contested cases, except where otherwise specifically provided.⁴²

By statute, the Authority's Show Cause Order must provide the grounds and bases for the TRA's action. Upon issuance of the Show Cause Order, the statute requires only that the respondents named in the orders must be given an opportunity to fully reply, and directs that the proceedings otherwise follow the provisions of Chapter 2 concerning contested cases. Upon determining, after preliminary investigation, that the record contained evidence sufficient to support the allegations of violations of state law and the TRA's rules, the Authority initiated this civil enforcement proceeding against TWSI by issuance of a Show Cause Order. As the named Respondent, TWSI must be given opportunity to fully reply to the TRA's Show Cause Order. Tenn. Code Ann § 65-2-106, however, does not grant a right or otherwise require the Authority to allow anyone other than those named as respondents to participate in the proceeding.

According to Tenn. Code Ann. § 65-2-101(2), "contested case" means a proceeding in which the "legal rights, duties, or privileges of specific parties are determined after a hearing before the [Authority]." A show cause proceeding is considered a contested case because an opportunity for a hearing after reasonable notice must be given before the Authority may determine the rights, duties, or privileges of any named respondent. Further, as concerns participation in contested cases under the provisions of Chapter 2, Tenn. Code Ann. §65-2-107 states, "All persons having a right under the provisions of the laws applicable to the [A]uthority to appear and be heard in contested cases as defined in this chapter shall be deemed parties to

⁴² Tenn. Code Ann. § 65-2-106.

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.”⁴³ Therefore, persons that have a right to appear and be heard, such as respondents named in a Show Cause Order, are deemed parties. The TRA may, however, exercise its discretion to allow any interested persons to intervene and become a party.

TRA Rule 1220-01-02-.08 sets forth the ways in which requests to intervene in contested cases before the Authority are to be made and considered, 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.⁴⁴

In addition to its own Rules and statutes, contested case proceedings before the Authority are governed by the provisions of the Uniform Administrative Procedures Act (“UAPA”) found at Tenn. Code Ann. § 4-5-101, *et. seq.* As noted in the above Rule, the Authority shall grant petitions to intervene according to the standards provided under the UAPA, Tenn. Code Ann. § 4-5-310, and as provided in the Authority’s statutes at Tenn. Code Ann. § 65-2-107, discussed above. Tenn. Code Ann. § 4-5-310 establishes the following criteria for mandatory and permissive or discretionary intervention, as follows:

- (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;

⁴³ Tenn. Code Ann. § 65-2-107.

⁴⁴ Tenn. Comp. R. & Regs. 1220-01-02-.08.

- (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.
- (b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.⁴⁵

In *Wood v. Metropolitan Nashville & Davidson Co. Gov't*, the Tennessee Court of Appeals considered whether the denial of a city resident's request to intervene in administrative enforcement proceedings that had been brought against a solid waste power generation plant for violations of air quality regulations was proper.⁴⁶ In considering the procedures and criteria for intervention found in Tenn. Code Ann. § 4-5-310 and the applicable regulations of the Metropolitan Department of Health ("Department"), an administrative agency subject to the UAPA, Judge Koch writing for the Court, stated:

These [intervention] provisions are designed to strike a balance between public participation in an administrative proceeding and the rights of the parties. The rights of the parties counterbalances the drive to let all interested persons participate. Accordingly, intervention in administrative proceedings is not of right, and administrative agencies have substantial discretion whether to grant or deny intervention.⁴⁷

Further, the Court found that the Department was entrusted with the power to enforce the regulations at issue and, in the absence of proof to the contrary, the Court must presume that the Department was discharging its duties in good faith and in the manner prescribed by law. Holding that generalized grievances were not sufficient grounds for intervention, and noting that the resident requesting intervention was given great latitude in presenting his information and

⁴⁵ Tenn. Code Ann. § 4-5-310.

⁴⁶ *Wood v. Metro. Nashville & Davidson Cnty. Gov't*, 196 S.W.3d 152 (Tenn. Ct. App. 2005).

⁴⁷ *Id.* at 159 (Tenn. Ct. App. 2005) (internal citations omitted); *see also* Tenn. Op. Atty. Gen. No 11-06, *3 (2011).

opinions to the Department during each public step of the proceedings, the Court affirmed the denial of intervention.⁴⁸

In its written filings and oral arguments, the Consumer Advocate asserts that it satisfies the criterion for mandatory intervention in this case. Therefore, the Hearing Officer considers the Consumer Advocate's request to intervene in accordance with the standards for mandatory intervention set forth above in Tenn. Code Ann. § 4-5-310(a), and finds as follows:

Timeliness of Petition

The Authority ordered this show cause docket to be opened on April 14, 2014. On April 16, 2014, the Hearing Officer issued public notice setting a Status Conference with the parties on April 24, 2014. Thereafter, on April 22, 2014, the Consumer Advocate filed its *Petition to Intervene* in the proceedings. Under TRA Rule 1220-01-02-.06(2), any party opposing a motion in a contested case must file and serve a response to the motion within seven (7) days of service of the motion. Within two business days, both Party Staff and TWSI filed Objections in response to the Consumer Advocate's *Petition to Intervene*. Despite the prohibition against filing a Reply to a response to a preliminary motion except upon leave given or the order of the TRA or Hearing Officer, as set forth in TRA Rule 1220-01-02-.06(3), the Consumer Advocate filed its Reply to the Party Staff's Objection on April 24, 2014.

The Hearing Officer permitted the Consumer Advocate to present its request to intervene during the Status Conference. Neither the Consumer Advocate nor either of the parties raised an objection to the Hearing Officer's consideration of the *Petition to Intervene*, or to the presentation of oral argument thereon, during the Status Conference. Under Tenn. Code Ann. § 4-5-310(a)(1) and TRA Rule 1220-01-02-.08(3), to be considered timely, a petition for intervention must be filed at least seven (7) days prior to the date of the contested case hearing.

⁴⁸ *Wood v. Metro. Nashville & Davidson Cnty. Gov't*, 196 S.W.3d 152, 159 (Tenn. Ct. App. 2005).

Therefore, as the date for the hearing in this docket exceeds seven days, the Hearing Officer considers the Consumer Advocate's *Petition to Intervene* timely-filed.

Determination of Rights in the Proceeding/Qualification

Under Tenn. Code Ann. 4-5-310(a)(2), a petition to intervene must state facts that demonstrate 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. In its *Petition to Intervene*, the Consumer Advocate states that, pursuant to Tenn. Code Ann. § 65-4-118, it seeks to intervene in this proceeding on behalf of the public interest.⁴⁹ In addition, the Consumer Advocate asserts that the present and future rights of consumers will necessarily be affected by the outcome of the proceeding.⁵⁰ Specifically, the Consumer Advocate contends that the Authority's interpretations of its statutes and rules concerning CCNs "will affect not only the present rights of the property owners of The Villages, but it will also affect the rights and interests of all Tennessee consumers" in the future.⁵¹

Both Tenn. Code Ann. 4-5-310(a)(2) and TRA Rule 1220-01-02-.08(2) require that a petition to intervene state facts, with particularity, demonstrating a legal right or interest held by the petitioner may be determined in the proceeding. Consistent with the statute and the legal authority cited above, both Party Staff and TWSI contend an intervenor must have some actual claim that will be resolved in the proceeding, and that a generalized interest will not suffice. The parties further contend that in this enforcement proceeding, neither the Consumer Advocate nor the property or home owners at The Villages, whom the Consumer Advocate asserts it has a duty

⁴⁹ *Petition to Intervene*, p.1 (April 22, 2014).

⁵⁰ *Consumer Advocate's Reply to the Party Staff's Objection to the Intervention of the Consumer Advocate and Protection Division* p. 2 (April 24, 2014).

⁵¹ *Id.*

to represent in this matter, have any claims that will be resolved in these proceedings.⁵²

Interestingly, the Consumer Advocate admits that, despite its CCN, TWSI has never provided wastewater service to The Villages.⁵³ In fact, as noted by Party Staff, the evidentiary record in this case shows that, at this time, TWSI has no customers at The Villages. Thus, there are no actual customers of public utility wastewater service to be represented in this proceeding, but, instead, homeowners that may or may not become customers in the future. As such, the Consumer Advocate presents a generalized, rather than specific, interest in the proceedings when it contends that because the issues involve the TRA's implementation of its CCN procedures, and could result in civil penalties and fines and the revocation of TWSI's CCN, the outcome of the case is likely to affect ratepayers in the future.

Tenn. Code Ann. § 65-4-118(b)(1) allows the Consumer Advocate, with the approval of the Attorney General and consistent with the UAPA and the TRA's rules, to intervene and participate as a party and to initiate proceedings before the Authority to represent the interests of Tennessee consumers of public utility services, as follows:

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.⁵⁴

While it may provide a general basis for qualification of the Consumer Advocate as an intervenor for the purpose of representing the interests of consumers of public utility services, Tenn. Code Ann. § 65-4-118(b)(1) does not confer an automatic or absolute right upon the Consumer Advocate to participate in this or any other of the Authority's proceedings.

⁵² Transcript of Proceedings, pp. 5-6, 10 (April 24, 2014).

⁵³ *Petition to Intervene*, p. 2 ¶ 3 (April 22, 2014).

⁵⁴ Tenn. Code Ann. § 65-4-118(b)(1).

The Hearing Officer agrees that more than a generalized interest or potential to be affected by the resolution of the proceeding is required to be demonstrated under the mandatory intervention provisions of the UAPA and TRA Rules. In fact, the Hearing Officer can think of no docket or matter than comes before the Authority that might not in some way or other affect consumers of public utility services. Such is the integral work and purpose of the Authority. The Hearing Officer acknowledges that Tenn. Code Ann. § 65-4-118(b)(1) provides a general basis for qualification of the Consumer Advocate as an intervenor for the purpose of representing those interests of consumers of public utility services that may be determined in a proceeding before the TRA. Nevertheless, while the TRA's enforcement and application of its CCN statute and rules may be of interest to consumers generally, and the property owners of The Villages have shown over the course of Docket No. 13-00017 that they are interested in the outcome of this matter, in light of the purpose of these proceedings, the assertion that a legal right, duty, privilege, immunity or other legal interest held by an actual consumer of public wastewater utility service will be determined in this proceeding appears tenuous.

Impairment to Interests of Justice/Conduct of Proceeding

Finally, Tenn. Code Ann. 4-5-310(a)(3) requires that the Hearing Officer grant the petition for intervention only upon determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention." Therefore, the Hearing Officer must weigh the impact of the proceedings upon the general legal rights and interests presented by the Consumer Advocate against the interests of justice and the need for orderly and prompt proceedings. In considering the interests of justice, it is proper that the Hearing Officer consider the rights of the Respondent to fundamental fairness and due process in

these proceedings.⁵⁵

The Hearing Officer is not aware of any instance in which the Consumer Advocate has been permitted to intervene in an enforcement or show cause proceeding of the TRA over the reasonable objections of the Authority's enforcement counsel and the named respondents. The dockets cited by the Consumer Advocate as precedent for its intervention, namely, Berry's Chapel Utility Docket No. 11-00065 and Atmos Energy Corporation Docket No. 05-00258, are neither persuasive nor binding upon the agency in this instance. First, the Authority did not issue a Show Cause Order in either of those dockets.⁵⁶ The proceedings in those dockets are and were preliminary investigations of allegations raised against those respective regulated entities, instituted by the TRA for the purpose of determining whether or not a Show Cause Order should be issued. In addition, both dockets directly involved the setting of consumers' rates, with the latter proceeding evolving into a full-blown rate case proceeding. Finally, no objection to the Consumer Advocate's request to intervene in those proceedings was raised by any party.

The Consumer Advocate noted that its intervention in Docket No. 13-00017 was limited, and that it seeks unrestricted intervention in this docket. It is important to note that, in Docket No. 13-00017, the Hearing Officer granted the intervention that the Consumer Advocate requested in its Petition to Intervene, and, at least initially, the restrictions therein were self-

⁵⁵ TWSI's *Objection to the Intervention of the Consumer Advocate and Protection Division*, p. 1-2 (April 24, 2014) ("By statute – and by the requirements of due process – there is only one "show cause" case being brought against TWSI, and that is the case outlined in the agency's "Show Cause" Order. The Advocate has no legal right to act as a separate prosecutor, taking its own discovery, presenting its own case, and making its own argument for whatever remedies the Advocate may request. To allow the Advocate to present a separate case is inconsistent with the T.C.A. § 65-2-106 and unfair to TWSI. TWSI is prepared to oppose the case presented by the TRA Staff, but it is not required to prepare to defend itself against a second case presented by the Advocate . . . To allow a third party to intervene and act as an additional prosecutor does not serve the 'interests of justice' or the 'orderly and prompt conduct of the proceedings.'").

⁵⁶ Berry's Chapel Utility Docket No. 11-00065 is an active docket currently pending before the Authority. Atmos Energy Corporation Docket No. 05-00258 was closed by Order of the panel dated December 5, 2007.

imposed.⁵⁷ Further, in later amending the Consumer Advocate's intervention so as to allow it to participate in the hearing, due to the late timing of its request to expand its participation, the Hearing Officer properly exercised her discretion under Tenn. Code Ann. § 4-5-310(c) in placing reasonable conditions on such participation.⁵⁸ Regardless, the parties in Docket No. 13-00017, including the Consumer Advocate, were given full procedural due process and had opportunity to explore the issues and examine evidence. The record assembled in Docket No. 13-00017 constitutes the agency's preliminary investigation concerning the matters now raised in this enforcement proceeding. Nevertheless, the Consumer Advocate's participation in Docket No. 13-00017 does not form a basis for its intervention in this docket.

This docket is not simply a contested case proceeding; it is a full-on civil enforcement proceeding brought by the agency consistent with its delegated regulatory powers and in accordance with Tenn. Code Ann § 65-2-106. As an enforcement proceeding, the burden is upon TWSI to show why the agency should not take particular action against it for violations of state law and the TRA's Rules.⁵⁹ As was aptly noted by the Consumer Advocate in its *Response in Opposition to Motion to Continue Hearing* filed in Docket No. 13-00017, in this enforcement proceeding, TWSI is accountable to the TRA, and not to other third parties, for its actions or lack thereof.⁶⁰ Further, the Authority is empowered to conduct this action without undue interference and may rely upon counsel employed by the agency. There has been no allegation, nor is there any reason to believe, that in bringing this action to enforce its statutes and rules, the agency or its designated counsel is not discharging its duties in good faith. Finally, the panel specifically

⁵⁷ Docket No. 13-00017, *Consumer Advocate's Petition to Intervene* (March 15, 2013); and see Docket No. 13-00017, *Order Granting Consumer Advocate's Petition to Intervene* (April 2, 2014).

⁵⁸ Docket No. 13-00017, *Pre-Hearing Order* (November 20, 2013).

⁵⁹ Tenn. Code Ann. 65-2-109(5).

⁶⁰ Docket No. 13-00017, *Consumer Advocate's Response in Opposition to Motion to Continue Hearing*, p. 5 (April 9, 2014).

ordered, and was clear in its directive, that the Hearing Officer expedite this proceeding and prepare it for a hearing as soon as possible, but no later than June 16, 2014.

Thus, weighing the impact of the proceedings upon the general rights and interests presented by the Consumer Advocate against the interests of justice, including the rights of the Respondent to fundamental fairness and due process, and the need for orderly and prompt proceedings, the Hearing Officer is unable to find that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention. Furthermore, considering the purpose and specific considerations at issue in this docket, granting this request for intervention appears contrary to the interests of justice and increases the likelihood of disruption in the prompt conduct of these proceedings. In addition, for all the reasons given above, the Hearing Officer also declines to grant discretionary intervention under Tenn. Code Ann. § 4-5-310(b).

In conclusion, the Hearing Officer finds that the *Petition to Intervene* was filed within the time required under Tenn. Code Ann. § 4-5-310 and TRA Rule 1220-01-02-.08(3). Further, although the Hearing Officer agrees that, under Tenn. Code Ann. § 65-4-118, the Consumer Advocate qualifies as an intervenor for the purpose of representing the legal rights and interests of consumers of public utility services. Nevertheless, as there are no consumers of public utility wastewater service at The Villages to be represented, the Consumer Advocate has presented only a generalized interest or reasons for its intervention. Further, the Hearing Officer is unable to find that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention.

Therefore, upon due consideration of the filings made by the Consumer Advocate, Party Staff, and TWSI, and the arguments presented during the Status Conference on April 24, 2014,

all of which has been briefly summarized above, and for all of the reasons stated herein, the Hearing Officer concludes that the Consumer Advocate's request to intervene in this enforcement proceeding against TWSI should be denied. Nevertheless, while not a party to these proceedings, upon TWSI's suggestion and without objection of the Party Staff, the Hearing Officer agrees that the Consumer Advocate may, as an amicus curiae, file a substantive brief(s) in accordance with the deadlines designated for such filings provided in the procedural schedule (issued separately). Further, the Consumer Advocate is afforded opportunity to observe and comment just as are other members of the public, at such times as are appropriate.

IT IS THEREFORE ORDERED THAT:

1) The *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General is denied.

2) While not a party to these proceedings, the Consumer Advocate may file a substantive brief(s) in accordance with the deadlines designated for amicus curiae in the procedural schedule. In addition, the Consumer Advocate shall be afforded the opportunity as any other member of the public to observe and comment, at such times as are appropriate.

3) In accordance with TRA Rule 1220-01-02-.06(6), the Hearing Officer grants permission for interlocutory review of this Order by the presiding panel of the Authority.


Kelly Cashman-Grams, Hearing Officer