

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF TENNESSEE	)	DOCKET NO. 15-00025
WASTEWATER SYSTEMS, INC.	)	
TO AMEND ITS CERTIFICATE	)	
OF CONVENIENCE AND NECESSITY	)	

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**RESPONSE TO MOTION OF CONSUMER ADVOCATE'S**  
**AMENDED REQUEST FOR OFFICIAL NOTICE**

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Pursuant to TRA Rule 1220-1-2-.06(2), Tennessee Wastewater Systems, Inc. ("TWSI") submits this response to the Consumer Advocate's "Amended Request for Official Notice" filed July 8, 2015, asking that the Tennessee Regulatory Authority take official notice of the following three items:

- (1) "the record in the TRA Docket 14-00006,"
- (2) "the Transcript of Proceedings at the Authority Conference on August 11, 2014,"
- and
- (3) "the record in TRA Docket 14-00136."

The Consumer Advocate states "these records and transcript may be relevant to resolve one or more issues that may be presented by the Consumer Advocate or other parties in this matter." TWSI objects to the Motion because the Consumer Advocate has not specified the "facts or material" which the agency is being asked to notice.

Pursuant to T.C.A. § 4-5-313(6)(A), the Authority may take official notice of "the record of other proceedings before the agency" or "any fact that be judicially noticed in the courts of

this state." The agency may take notice of matters whether requested by a party or not (State v. Lawson, 291 S.W.3d 864, at 869 (Tenn. 2009)) but cannot issue an order relying in whole or in part on any "facts or material noticed" without first giving the parties notice "of the specific facts or material noticed" and affording the parties "an opportunity to contest and rebut the facts or material so noticed." T.C.A. § 4-5-313(6)(B).

The Consumer Advocate's request does not comply with this statutory requirement. To ask the agency to take notice of two entire dockets because something in these voluminous materials "may be relevant" to an issue that "may be presented" in this docket does not describe any "specific facts or material" as required by subsection 6(B). In other words, the Consumer Advocate's broadly worded motion does not provide either adequate notice to the parties or a sufficient legal basis for the agency to rely upon the noticed material. Since the motion does not ask the agency to take notice of "specific facts or materials" it must be denied.<sup>1</sup>

Second, the Consumer Advocate asks the Authority to take notice not only of the "record" in Docket 14-00004 but of comments made by individual Directors during the agency's deliberations in that same docket. As the Advocate's motion implicitly recognizes, comments made during an agency deliberative session are not part of the "record" in that docket. The agency, like a court, speaks through its written orders. TWSI has no objection to the Authority taking official notice of the final order in Docket 14-00004, but comments made during deliberations that are not incorporated into the Authority's written order have no legal

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<sup>1</sup> Even if the Consumer Advocate asked the Authority to take official notice of specific filings or excerpts from filings in other dockets, the agency may only take notice of "the fact of . . . related filings" but cannot rely upon them "to establish the truth of the matters asserted in the other litigation." State v. Lawson, *supra*, at 869-870; quoting from Liberty Mutual Insurance Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388 (2<sup>nd</sup> Cir. 1992). For example, any party may ask the Authority to take notice of a filing in another docket because the fact that the filing was made is not subject to reasonable dispute. The notice process, however, cannot be used as a substitute for evidence concerning matters over which the parties disagree. State v. Lawson, *supra*, at 868-870.

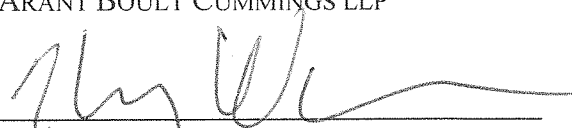
significance. Since such comments are not part of "the record of other proceedings before the agency," such comments do not fall under T.C.A. 4-5-313(6)(A)(ii) and are not admissible under the "official notice" statute.

For these reasons, the Consumer Advocate's "Amended Request for Official Notice" should be denied.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS LLP

By: \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of July, 2015, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

Erin Merrick  
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HENRY WALKER