

IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE

IN RE:

PETITION OF TENNESSEE
WASTEWATER SYSTEMS, INC.,
FOR APPROVAL OF ADJUSTMENT
OF ITS RATES AND NEW TARIFF

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DOCKET NO. 16-00139

**CONSUMER ADVOCATE'S MOTION TO STRIKE PORTIONS OF REBUTTAL
TESTIMONY OF ROBERT T. BUCKNER AND BAR THE TESTIMONY OF THE
UNNAMED REPRESENTATIVE FROM DEMPSEY VANTREASE AND FOLLIS PLLC**

Comes the Consumer Protection and Advocate Division of the Office of the Attorney General (Consumer Advocate), and hereby moves to strike the portions of the Rebuttal Testimony of Robert T. Buckner referring to or based on a draft report from the accounting firm Dempsey Vantrease and Follis PLLC. The specific portions of Mr. Buckner's Rebuttal Testimony at issue are: p. 12: lines 13-19; p. 13: lines 1-9, and the draft report attached as Exhibit 2 to the rebuttal testimony. These portions and Exhibit 2 to Mr. Buckner's rebuttal testimony violate the Tennessee Rules of Evidence because Mr. Buckner provides no statement that he prepared, reviewed or is even specifically familiar with the draft report and thus fails to adequately sponsor it. Therefore the draft report offered lacks trustworthiness, relevance and timeliness and must be stricken for the lack of foundation. In addition, the CPA firm representative Mr. Buckner said will be available for questions at the hearing and apparently does not have the background, education or training in the area of utility regulatory accounting to qualify as an expert witness for this Docket.

Under Tennessee law, expert opinion such as the portions of Mr. Buckner's proposed testimony in controversy, must meet the test of Tenn. Rules of Evidence 702 and 703, which

provide as follows:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

The requirement of meeting the standard of Rules 702 and 703 was set forth in *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn.1997):

In Tennessee, under [Tenn. R. Evid. 702 and 703], a trial court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness. The rules together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.

Although the “Independent Accountant’s Report on Applying Agreed-Upon Procedures” (Procedures Report) is attached as Exhibit 2 to Mr. Buckner’s Rebuttal Testimony¹, Mr. Buckner does not and cannot attest to the accuracy or trustworthiness of the Procedures Report. This is

¹ *Robert T. Buckner Rebuttal Testimony* p. 12: line 15. This representative has not presented any pre-filed testimony.

because he is not the expert who prepared the document and has demonstrated no knowledge of it.² When Mr. Buckner introduces the Procedures Report, he simply states the conclusions of the draft Procedure Report.³ However, he cannot make his own conclusions on the billing records because, again, he did not conduct the review.⁴ Mr. Buckner's statement that a representative of the CPA firm will be made available to answer questions regarding the Procedures Report does not provide the foundation required under the Tennessee Rules of Evidence.⁵

Further, the Procedures Report identified as Exhibit 2 is in "draft" form.⁶ A draft is "a piece of writing or drawing that is done early in development of a work to help prepare it in its final form."⁷ Drafts are subject to review, revisions, changes and corrections. Accordingly the Procedures Report attached to Mr. Buckner's Rebuttal Testimony is subject to change. How it will change is completely unknown.

In addition, the Procedures Report was not intended for use by the Commission. Dempsey Vantrease and Follis PLLC (DVF) expresses limited use of the Procedures Report. DVF states that it makes no "representation regarding the sufficiency of the procedures described."⁸ DVF makes clear it "did not, conduct an audit, the objective of which would be the expression of an

² The Company's CPA firm reviewed its billing records. *Robert T. Buckner Rebuttal Testimony* p. 13: lines 4-5. Mr. Buckner twice states in his testimony that a representative from the CPA firm will be available at the hearing to answer questions about the Procedures Report. *Robert T. Buckner Rebuttal Testimony* p. 12: lines 18-19 and p. 13: Lines 5-6. Henry Walker provided a copy of R. Michael Hallum's Curriculum Vitae at 5:04pm, Thursday, June 29, 2017 (CPAD Motion Exhibit 1).

³ *Robert T. Buckner Rebuttal Testimony* p. 12: lines 15-16.

⁴ *Robert T. Buckner Rebuttal Testimony* p. 13: lines 4-5. CPA representative recently has been identified as R. Michael Hallum. CPAD Motion Exhibit 1.

⁵ *Robert T. Buckner Rebuttal Testimony* p. 12: lines 18-19. CPA representative recently has been identified as R. Michael Hallum. CPAD Motion Exhibit 1.

⁶ According to Mr. Buckner the final Procedures Report will be "available shortly." *Robert T. Buckner Rebuttal Testimony* p. 12: lines 17-18. In a letter dated June 28, 2017, Mike Hallum states the final report will be "completed next week so that it can be presented the following week for review." *Robert T. Buckner Rebuttal Testimony* Exhibit 2.

⁷ Cambridge Law Dictionary online at <http://dictionary.cambridge.org/us/dictionary/english/draft>.

⁸ *Robert T. Buckner Rebuttal Testimony* Exhibit 2: The Stockholders and Management June 28, 2017 letter.

opinion on the accounting records. Accordingly, we do not express such an opinion.”⁹ Furthermore, DVF states that the Procedures Report “is not intended to be and should not be used by anyone other than those specified parties.”¹⁰ However, the Company is attempting to utilize the Procedures Report, for a purpose for which it was never intended to be used, as evidence in a contested case hearing before the Tennessee Public Utility Commission (TPUC), and doing so without even offering appropriate expert witness to introduce, substantiate and authenticate it.

The Procedures Report identified as Exhibit 2 in Mr. Buckner’s rebuttal testimony also appears to be missing items that must be provided to the Consumer Advocate and TPUC to enable a complete understanding of the Procedures Report. Specifically, the Procedures Report refers to an “internal control narrative memo provided to stockholders and management” and a “management comment letter provided to the stockholders and management (Comment Letter).”¹¹ The missing documents are very likely significant, especially the Comment Letter, which notes items that indicate or might indicate “certain significant weaknesses, deficiencies and best practices” related to accounting processes, procedures, and internal controls for the Company’s wastewater billing.¹²

In addition to the Procedures Report being a draft subject to change and missing attachments referenced in the draft Procedures Report, the Consumer Advocate has had no opportunity to question the author of the Procedures Report regarding the details of the defined scope of the review, the analytical procedures and protocols utilized, the review of the tariff and rate tables, and the experience, education and background related to utility regulatory accounting of the accountant conducting this review and drafting the existing Procedures Report. The

⁹ *Robert T. Buckner Rebuttal Testimony* Exhibit 2: The Stockholders and Management June 28, 2017 letter.

¹⁰ *Robert T. Buckner Rebuttal Testimony* Exhibit 2: The Stockholders and Management June 28, 2017 letter.

¹¹ *Robert T. Buckner Rebuttal Testimony* Exhibit 2, p. 3.

¹² *Robert T. Buckner Rebuttal Testimony* Exhibit 2, p. 3.

availability of the accountant at the hearing cannot and does not replace the purpose of discovery – “the ascertainment of that which was previously unknown; the disclosure or coming to light what was previously hidden; the acquisition of notice or knowledge of given acts or facts.”¹³ During discovery, a party has the opportunity to review, analyze, research and consult experts on answers provided to it. This would not happen during the questioning of an accountant that is being made available during the hearing.

Finally, this Procedures Report must be stricken because it does not rebut the Consumer Advocate’s very specific concern regarding revenue from commercial tariffs as set forth in the Direct Testimony of Hal Novak. Due to the summary nature of the report, it is unclear if the 65 commercial accounts identified by Hal Novak in his Direct Testimony¹⁴ were reviewed for this Procedures Report. If they were reviewed, the Consumer Advocate has not been provided information on the reconciliation of these specific accounts to the tariff despite requests for such reconciliations.¹⁵ In his Direct Testimony, Mr. Novak detailed problems of determining “proper going level of expenses for setting rates” due to the recasting that occurred in 2014.¹⁶ Specifically, the recasting limited data in many going-level calculations to data from 2015 forward.¹⁷ It is unclear how a report on expenses in 2016 can address the concerns Mr. Novak on missing or limited data on historical expenses.

A report by an accounting firm on the Company’s billing system would require specialized knowledge of the person(s) conducting the review and drafting the report. As explained earlier, Mr. Buckner is not the appropriate expert witness to provide the foundation for the Procedures

¹³ Black’s Law Dictionary 466 (rev. 6th ed. 1990).

¹⁴ *William H. Novak Direct Testimony* p 8: lines 19-23 and p 9: lines 1-7.

¹⁵ Consumer Advocate made repeated requests for reconciliation of these accounts. *William H. Novak Direct Testimony* p 9: Lines 10-13.

¹⁶ *William H. Novak Direct Testimony* p 11: lines 21-22.

¹⁷ *William H. Novak Direct Testimony* p 11: lines 18-20.

Report to be entered into evidence. The Company has not offered any pre-filed testimony of an expert regarding the details of the review of the Company's billing and subsequent report. Rather, Mr. Buckner simply states "a representative from the CPA firm will be available to answer questions."¹⁸ This unnamed CPA representative was identified last night and a copy of his curriculum vitae provided.¹⁹ A review of the curriculum vitae does not show any experience relevant to utility regulatory accounting or related subject matter expertise and provides no history of cases involving utilities in which he has testified.²⁰ Accordingly, it does not appear he would qualify as an expert witness in this Docket.

For the foregoing reasons, the Consumer Advocate respectfully requests that the Hearing Officer:

1. Strike Exhibit 2 and the sections of the Rebuttal Testimony of Robert T. Buckner addressing the "Independent Accountant's Report on Applying Agreed-Upon Procedures"; and
2. Bar the responses to the questions and any testimony of the unnamed representative of Dempsey Vantrease and Follis PLLC that is to be available at the hearing; or
3. Continue the Contested Hearing for this Docket until at least the August 14, 2017 TPUC Conference so the Consumer Advocate and TPUC staff have time to conduct discovery regarding the qualifications of the accountant and accounting firm that conducted "Independent Accountant's Report on Applying Agreed-Upon Procedures, "the procedures and methodology used and the specifics of said report.

¹⁸ *Robert T. Buckner Rebuttal Testimony* p. 13: lines 5-6.

¹⁹ CPAD Motion Exhibit 1.

²⁰ CPAD Motion Exhibit 1.

4. Provide any other relief deemed just and proper.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served via U.S. Mail or electronic mail upon:

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This the 30th day of June, 2017



KAREN H. STACHOWSKI

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Sent: Thursday, June 29, 2017 5:04 PM
To: Karen H. Stachowski
Subject: FW: Scan from a Samsung MFP
Attachments: 001.pdf; Attachment.txt

Here you go.

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PROFESSIONAL HISTORY

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Certified Public Accountants and
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Tarpley & Underwood, P.C.
Certified Public Accountants and Consultants
Atlanta, Georgia (1989 to 1996)

Metcalf, Zima & Company
Certified Public Accountants and Consultants
Atlanta, Georgia (1987 to 1989)

Ernest T. Northrup, CPA
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AREAS OF SPECIAL COMPETENCE

- Tax research, planning and preparation (Corporation, Partnership and Individual)
- Valuations of closely-held businesses
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- Financial statement audits and reviews of closely-held businesses in manufacturing, distribution, construction, real estate development and retail

PROFESSIONAL & BUSINESS ASSOCIATIONS

Bachelor of Business Administration, Georgia State University, Atlanta, Georgia 1985

Certified Public Accountant, Georgia 1990

Certified Public Accountant, Tennessee 1997

Certified Valuation Analyst, 2000

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