

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

August 28, 2020

IN RE: )  
)  
JOINT APPLICATION OF AQUA UTILITIES )  
COMPANY, INC. AND LIMESTONE WATER )  
UTILITY OPERATING COMPANY, LLC FOR )  
AUTHORITY TO SELL OR TRANSFER TITLE )  
TO THE ASSETS, PROPERTY, AND REAL )  
ESTATE OF A PUBLIC UTILITY AND FOR A )  
CERTIFICATE OF PUBLIC CONVENIENCE )  
AND NECESSITY )

DOCKET NO.  
19-00062

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ORDER DENYING MOTION TO ADMIT AFFIDAVIT

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This matter came before the Hearing Officer at a Status Conference held August 5, 2020 on the *Joint Applicants' Motion to Admit the Affidavit of James Clausel* ("Motion") filed on August 6, 2020. On August 6, 2020, the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General ("Consumer Advocate") filed the *Consumer Advocate's Objection to the Affidavit of James Clausel* ("Consumer Advocate's Objection") and the Consumer Advocate's *Response to the Joint Applicants' Motion to Admit the Affidavit of James Clausel*. ("Consumer Advocate's Response").<sup>1</sup>

**MOTION**

The Joint Applicants filed the *Motion* to admit the Affidavit of James Clausel ("Affidavit"), owner of Aqua Utilities, Inc. ("Aqua") on August 6, 2020, and the Hearing in the matter was set

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<sup>1</sup> Initially, the Joint Applicants filed the Affidavit of James Clausel in the docket file on August 3, 2020. The Consumer advocate filed the Consume Advocate's Objection in response. After an August 5, 2020 Status Conference with the parties, the Hearing Officer directed the Joint Applicants to file the *Motion* seeking admission of the Affidavit of Mr. Clausel, and the Consumer Advocate filed the *Consumer Advocate's Response* to the *Motion*.

for August 10, 2020.<sup>2</sup> The Joint Applicants argue that it is in the discretion of the Hearing Officer to decide if admitting the evidence is necessary to prevent injustice and thus allowed pursuant to Tenn. Code Ann. § 4-5-313(3). The Joint Applicants state that the Agency [TPUC] has historically been liberal in admitting evidence and has traditionally accepted almost all evidence.<sup>3</sup> According to the Joint Applicants, it appears the Consumer Advocate intends to rely on Aqua's financial reports which show the utility is not generating revenue and is no longer financially sustainable. The Joint Applicants maintain the financial instability of the utility is the subject matter of Mr. Clausel's affidavit, and it should be admitted.

### ***CONSUMER ADVOCATE'S OBJECTION AND CONSUMER ADVOCATE'S RESPONSE***

On August 6, 2020, the Consumer Advocate filed the *Consumer Advocate's Objection* and the *Consumer Advocate's Response* requesting that the *Motion* be denied. The Consumer Advocate argues that the Affidavit filed on August 3, 2020, seven days before the Hearing on the merits and after rebuttal testimony was filed, is an attempt by the Joint Applicants to file additional pre-filed testimony.<sup>4</sup> The Consumer Advocate maintains the Uniform Administrative Procedures Act requires that an affidavit a party seeks to introduce into evidence be submitted at least ten days before the hearing. As a result, the Consumer Advocate contends the Affidavit should be "disallowed or, alternatively, disregarded and provided no weight as the Commission weighs the evidence and deliberates in this docket."<sup>5</sup> According to the Consumer Advocate, it would not be an injustice not to admit the Affidavit, as argued by the Joint Applicants. The Consumer Advocate states that if the Affidavit was so important, the Joint Applicants would have filed it sooner or had Mr. Clausel file testimony.<sup>6</sup> The Consumer Advocate maintains the Joint Applicants had many

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<sup>2</sup> The Joint Applicants initially filed the Affidavit of James Clausel on August 3, 2020. Subsequently, the Hearing Officer held a Status Conference on August 6, 2020, and asked the Joint Applicants to file a motion to admit the Affidavit.

<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> *Consumer Advocate's Response*, p. 3 (August 6, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

opportunities to submit Mr. Clausel's testimony prior to seven days before the Hearing because the Joint Application was filed on July 26, 2019.<sup>7</sup> In addition, the Consumer Advocate states that Mr. Clausel's Affidavit conflicts with information previously filed by the Joint Applicants. The Consumer Advocate argues the late-filed Affidavit deprives the Consumer Advocate of the opportunity to conduct discovery and analyze any new information, and the opportunity to cross-examine Mr. Clausel would be insufficient.<sup>8</sup>

## **FINDINGS AND CONCLUSIONS**

Tenn. Code Ann. § 4-5-313 provides in pertinent part:

(2) At any time not less than ten (10) days prior to a hearing or a continued hearing, any party shall deliver to the opposing party a copy of any affidavit such party proposes to introduce in evidence, together with a notice in the form provided in subdivision (4). Unless the opposing party, within seven (7) days after delivery, delivers to the proponent a request to cross-examine an affiant, the opposing party's right to cross-examination of such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after a proper request is made as provided in this subdivision (2), the affidavit shall not be admitted into evidence. "Delivery" for purposes of this section means actual receipt;

(3) The officer assigned to conduct the hearing may admit affidavits not submitted in accordance with this section where necessary to prevent injustice;

The Joint Applicants filed their initial Joint Application on July 26, 2019 and amended the filing on December 13, 2019. The Hearing Officer issued a Procedural Order in this docket on February 25, 2020, which set forth the anticipated Hearing on the merits in May. The Procedural Schedule was amended on July 6, 2020, to reflect a July 27<sup>th</sup> filing date for the Joint Applicants' rebuttal testimony and an August target Hearing date. Tenn. Code Ann. § 4-5-313 (3) gives the Hearing Officer discretion to admit affidavits that are not submitted in accordance with the statute's ten-day requirement where necessary to prevent injustice, however, based on the facts in this docket,

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 4-5.

the Hearing Officer does not find sufficient basis to do so. The Hearing Officer finds the Joint Applicants had ample time for Mr. Clausel file pre-filed testimony, to file for the admission of the Affidavit, or to have filed rebuttal testimony. Instead, the Joint Applicants waited until seven days before the Hearing to file the Affidavit, which did not give the Consumer Advocate an opportunity to conduct discovery or file supplemental testimony, if necessary. Since the Joint Applicants did not consider filing Mr. Clausel's Affidavit until the last minute, the content of the Affidavit must not have been crucial to the evidence presented in support of the Joint Application, and it would not be an injustice to deny admitting the Affidavit. Based on the foregoing, the Hearing Officer concluded the *Joint Applicants' Motion to Admit the Affidavit of James Clausel* should be denied.

**BE IT THEREFORE ORDERED THAT:**

The *Joint Applicants' Motion to Admit the Affidavit of James Clausel* is **DENIED**.

A handwritten signature in black ink that reads "Monica Smith-Ashford". The signature is written in a cursive, flowing style.

Monica Smith-Ashford, Hearing Officer