

IN THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE

IN RE: )  
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RULEMAKING TO PROMULGATE RULES ) DOCKET NO. 19-00108  
RELATED TO EXTENSION OF SERVICE TO )  
CONTIGUOUS AREAS )

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COMMENTS OF THE CONSUMER ADVOCATE

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Herbert H. Slatery III, the Attorney General and Reporter, through the Consumer Advocate Unit in the Financial Division of the Office of Attorney General (hereinafter Consumer Advocate), hereby files written comments highlighting four areas of concern: (1) Notification of Complaints, Notices of Violations or Administrative Action; (2) Confirmation of Systems Constructed in Accordance with Approved Plans; (3) Confirmation of Sufficient Capacity to Serve its Existing and Future Customers; and (4) Notice to Customers and the Consumer Advocate. The details of the Consumer Advocate's concerns are as follows:

**I. NOTIFICATION OF COMPLAINTS, NOTICES OF VIOLATION OR ADMINISTRATIVE ACTION.**

The Consumer Advocate concurs with the Tennessee Department of Environment and Conservation (TDEC) that the proposed language of subparagraph (a) of 1220-04-01-.13(4) is too narrowly written<sup>1</sup>, and the Consumer Advocate is concerned that the proposed language will not ensure that the Commission is fully informed of alleged non-compliance with environmental statutes and regulations. Specifically, the draft language only requires that "notices of violations" be filed which would severely limit the Commission's ability to be fully informed on any

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<sup>1</sup> Comments by the Tennessee Department of Environment and Conservation, p. 2 (May 22, 2020).

escalation in enforcement actions regarding systems.<sup>2</sup> This is especially important because subsequent enforcement action such as a director's order, a commissioner's order or a judicial complaint may include the assessment of civil penalties and damages in addition to the requirement of corrective action. The potential impact such litigation may have on a utility's customers would be of concern to both the Commission and to the Consumer Advocate. The Consumer Advocate recommends the Commission use its language found in TPUC Rule 1220-04-13-.17(2)(d)4 which identifies "any complaint(s), notices of violation or administrative action filed with or issued by a regulatory agency"<sup>3</sup>

In addition to the concern about the possible limitation of the term "notice of violation," the language of the rule appears to focus on past enforcement actions in the use of the phrase "issued by." The Consumer Advocate believes that a public utility should inform the Commission of enforcement actions issued for a specified time period after its notice to provide service to a contiguous territory.

An example of the Consumer Advocate's concern is exemplified by TPUC Docket No. 05-00293. In this docket, the Company provided notice of its intent to provide service to the nineteen lots in the Stoney Brook subdivision.<sup>4</sup> Within 33 days after the of filing its Notice to

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<sup>2</sup> The United States Environmental Protection Agency defines a notice of violation (NOV) as "one step in EPA's investigation and enforcement of violations of EPA statutes and regulations. A NOV notifies the recipient that EPA believes the recipient committed one or more violations and provides instructions for coming into compliance. NOVs typically offer an opportunity for the recipient to discuss their actions, including efforts to achieve compliance. NOVs are not a final EPA determination that a violation has occurred. EPA considers all appropriate information to determine the final enforcement response." *Frequent Questions: General Enforcement Questions - What is a Notice of Violation (NOV)?*, United States Environmental Protection Agency webpage (last visited May 26, 2020) (One can access this webpage at <https://compliancegov.zendesk.com/hc/en-us/articles/212101707-What-is-a-Notice-of-Violation-NOV->).

<sup>3</sup> *Tenn. Comp. R. & Regs Rule 1220-04-13-.17(2)(d)4* (December 2018) (a copy of this rule is publicly available at <https://publications.tnsosfiles.com/rules/1220/1220-04/1220-04-13.20181204.pdf>).

<sup>4</sup> *Notice of Intent to Serve Stoney Brook Subdivision*, TPUC Docket No. 05-00293 (October 24, 2019) (a copy of this notice is publicly available at <http://share.tn.gov/tra/orders/2005/0500293k.pdf>).

Serve, TDEC issued a Notice of Violation (NOV) to the Company.<sup>5</sup> The allegations in the NOV are significant. TDEC alleged that the lagoon had not been constructed as designed resulting in wastewater not being retained in the lagoon.<sup>6</sup> As a result, “the untreated wastewater [was] being discharged to groundwater, a violation of statute, rules and the permits.”<sup>7</sup> Additionally, TDEC alleged that wastewater system, as currently operated, “does not treat, store, or land apply wastes, and as such is in violation of the [State Operating Permit].”<sup>8</sup>

The Company responded to the NOV disputing the allegations.<sup>9</sup> According to TDEC, the Company: (1) continued to discharge wastewater to the lagoon; (2) did not construct a drip field; (3) did not conduct a dye trace; and (4) did not present a plan to repair the lagoon to TDEC.<sup>10</sup> As a result, TDEC escalated its enforcement with issuance of a Director’s Order to the Company on March 5, 2020 which included required corrective action and civil penalties amounting to \$92,155.<sup>11</sup>

Under the proposed rules as drafted, the Commission would not ordinarily<sup>12</sup> be informed

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<sup>5</sup> *Notice of Violation, Cross Plains Treatment Facility, UIC Number ROB 0000023 and SOP-05057* (Tenn. Dep’t of Env’t and Conservation November 25, 2019) (a copy of this NOV is publicly available at <http://share.tn.gov/tra/orders/2005/0500293m.pdf>).

<sup>6</sup> *Id.* at 1. The first customers were connected to the lagoon in February 2010. Despite the years with customers connected to the wastewater system, the lagoon does not retain wastewater and the Company has never constructed its drip field. *Director’s Order WPC20-0012*, p. 4, ¶¶ IX-X and p. 5, ¶ XII. (Tenn. Dep’t of Env’t and Conservation March 5, 2020) (a copy of this order is publicly available at <http://share.tn.gov/tra/orders/2005/0500293t.pdf>).

<sup>7</sup> *Notice of Violation, Cross Plains Treatment Facility* at 1.

<sup>8</sup> *Id.* at 1. The NOV’s corrective action requirements are also significant and included the immediate discontinuance of the discharge to the lagoon until an approved treatment design has been constructed; an inventory of connections contributing to the wastewater system; and the design of a dye trace to determine groundwater flow paths from the lagoon. *Id.* at 2.

<sup>9</sup> *Letter from Jeff Risden, General Counsel, to Brad Harris, Manager of Land Based Systems Unit, TDEC* (December 23, 2019) (a copy of this letter is publicly available at <http://share.tn.gov/tra/orders/2005/0500293q.pdf>).

<sup>10</sup> *Director’s Order WPC20-0012*, p. 6, ¶ XIV.

<sup>11</sup> *Id.*

<sup>12</sup> The Company at issue in TPUC Docket No. 05-00293 is currently required to file a monthly report to the Commissioner regarding Notices of Violations and other Corrective Orders issued by TDEC. *Order Approving Petition to Amend Certificate of Public Convenience and Necessity*, p. 17, ¶¶ 2.h-i, TPUC Docket No. 15-00025 (September 23, 2015). This is the only utility required to file such monthly reports; therefore, ordinarily the

of the alleged violations of state statutes, rules and permit requirements or the escalating enforcement action by TDEC so soon after the Notice to Serve as filed with the Commission by the Company. The Consumer Advocate recommends that the Commission be informed of “any complaint(s), notices of violation or administrative action” issued within 60 days of a Company’s Written Notice to the Commission of its intent to provide service to a contiguous territory. This notification would provide the Commission and the Consumer Advocate the ability to review and evaluate the administrative action to determine if any subsequent action is warranted to ensure current and future customers of the system will have access to safe and adequate wastewater service.

## **II. CONFIRMATION OF SYSTEMS CONSTRUCTED IN ACCORDANCE WITH APPROVED PLANS.**

The Consumer Advocate is concerned that under the proposed rules the Commission will not be informed of whether a system is in compliance or in non-compliance with state approved construction plans and specifications. The details of TPUC Docket No. 05-00293, described in Section I. above, illustrate the importance of the Commission being informed whether a system is constructed properly before providing service to new customers. While recognizing the Commission’s need to streamline requirements for utilities planning to provide service to a contiguous territory, it is imperative for the Commission to be assured that customers who are being added to an existing system are added to one that is “constructed in accordance with TDEC-approved construction plans and specifications.”<sup>13</sup> This requirement should also apply to

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Commission would not be given notice of any informal or formal administrative action by TDEC after a *Notice to Serve* is filed by a utility.

<sup>13</sup> *Tenn. Comp. R. & Regs Rule 1220-04-13-.17(2)(d)5*. Unfortunately, the situation with TPUC Docket No. 05-00293 is not unique. Recently, a utility sought approval to use its escrow and reserve funds for capital improvements for a system that was not built according the TDEC approved construction plans and specifications. Only the first phase of a three-phase system was built, and the utility connected 114 cabins to the system. However, the first phase of the system had the capacity for only 56 cabins. *Petition of Tennessee Wastewater Inc., for*

a new system that is being built to serve the contiguous territory. The utility should still be required to file the certification from a design engineer “in the docket file prior to providing service” to new customers in the contiguous territory.<sup>14</sup>

The Consumer Advocate recognizes that the proposed rule contains language that provides for “other information as required by the Commission in the performance of its statutory general supervisory and regulatory duties.” However, the confirmation that a wastewater system is constructed in accordance with approved construction plans and specifications is integral to a utility providing safe and adequate wastewater service to its existing and future customers. Accordingly, the Consumer Advocate recommends that utilities be specifically required to provide certification that the “wastewater system was constructed in accordance with TDEC-approved construction plans and specifications” as required in TPUC Rule 1220-04-13-.17(2)(d)5.<sup>15</sup>

### **III. CONFIRMATION OF SUFFICIENT CAPACITY TO SERVE ITS EXISTING AND FUTURE CUSTOMERS.**

In two recent dockets<sup>16</sup>, the Consumer Advocate became aware of differences that exist between the number of actual utility customers and the design capacity authorized by the existing

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*Approval to Use Its Escrow & Reserve Funds for Capital Improvements at Hidden Springs Resort*, pp. 1-2, TPUC Docket No. 19-00085 (September 16, 2019) (a copy of this petition is publicly available at <http://share.tn.gov/tra/orders/2019/1900085.pdf>).

<sup>14</sup> *Tenn. Comp. R. & Regs Rule 1220-04-13-.17(2)(d)5*.

<sup>15</sup> *Id.*

<sup>16</sup> The two dockets are TPUC Docket Nos. 05-00293 and 19-00062. TPUC Docket No. 05-00293 will be further discussed in this Section. In TPUC Docket No. 19-00062, the TDEC State Operating Permit authorizes a design capacity of .01481MGD (or 14,810GPD) to serve approximately 49 homes. The Petitioners state that the wastewater system currently provides service to 353 customers. The Company states that only 10% of the homes have year-round occupancy. As such, the actual flow from the existing 353 homes averages 3,968-7,581GPD, which is below the 14,810GPD authorized by SOP-92082. Limestone Water Utility Operating Company’s Response to the Consumer Advocate’s Discovery Request No. 2-4, TPUC Docket No. 19-00062 (March 10, 2020) and Limestone’s Supplemental Response to Data Request No. 2-4, TPUC Docket No. 19-00062 (March 16, 2020). *See also*, Email from James Clausel, Aqua Utilities, Inc. to Allen Rather, TDEC (February 27, 2020 7:36AM CST) ) (A copy of the email is publicly available at <http://share.tn.gov/tra/orders/2019/1900062y.pdf>)

TDEC Permit. This discrepancy could indicate possible concerns regarding the capacity of the utility's system to serve both its existing and future customers. However, the proposed rule does not require a utility to file information that would highlight for the Commission whether a discrepancy exists or not. In its comments, TDEC also expressed concern about a utility having sufficient capacity to serve a proposed contiguous territory.<sup>17</sup> The edits suggested by TDEC provide not only clarity regarding TDEC's permit and the design flow of a permitted treatment system, the suggested edits will also provide necessary information to Commission Staff at the time of a utility's filing, which will assist Commission Staff in moving more quickly in its review and analysis.

An example of the importance of this information is illustrated by TPUC Docket No. 05-000293. In the *Notice to Serve* filed in this docket, the utility seeks to add 19 residential lots from the Stoney Brook subdivision to its existing wastewater system, and states that it has "sufficient capacity to serve the 19 lots."<sup>18</sup> However, a deeper look into details, beyond what was provided in the utility's notice, appears to indicate the utility does not have the capacity<sup>19</sup> to serve the additional 19 lots.<sup>20</sup>

For purposes of furthering this particular discussion, we will say there is confirmation that the wastewater system is compliant with construction plans and specifications.<sup>21</sup> This utility's existing TDEC permit authorizes a wastewater system with a design capacity of

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<sup>17</sup> Comments by the Tennessee Department of Environment and Conservation, p. 2 (May 22, 2020).

<sup>18</sup> *Notice of Intent to Serve Stoney Brook Subdivision*, p.1.

<sup>19</sup> For purposes of this discussion it is important to note the distinction between capacity and flow. Flow is "simply the actual amount of water [or wastewater] flowing by a particular point over some specified time." Capacity is the "ability to treat, move or use water [or wastewater]." *What is the Difference Between Capacity and Flow*, Florida Department of Environmental Protection (March 21, 2019, 2:10PM CDT) (One can access this webpage at <https://floridadep.gov/water/domestic-wastewater/content/capacity-versus-flow>).

<sup>20</sup> See Section I. Notification of Non-Compliance for details of wastewater system and the lack of capacity due to the failure to comply with approved construction plans and specifications.

<sup>21</sup> See Section I. for the discussion on this Company's recent administrative enforcement actions by TDEC.

.0106MGD (or 10,600GPD).<sup>22</sup> According to the utility, the wastewater system is currently providing service to 19 residential customer out of a 52-lot planned subdivision and 3 commercial customers.<sup>23</sup>

Under TDEC's guidance, a system is designed using the flow of 300GPD per customer.<sup>24</sup> Using the 300GPD per customer guidance, the calculations for the active customers, commitments, proposed additions are as follows:

19 active residential customers x 300GPD =	5,700GPD
3 active commercial customers x site specific standards =	1,000GPD <sup>25</sup>
33 lots remain in 52-lot planned subdivision x 300GPD =	<u>9,900GPD</u>
	16,600GPD
System's Design Capacity	<u>10,600GPD</u>
	-6,000GPD

With the calculations set out above, it appears that the wastewater system at issue does not have sufficient capacity to treat the design flow of the existing residential and commercial customers in addition to the commitment to serve the remaining 33 lots of the 52-lot planned subdivision.

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<sup>22</sup> State Operating Permit No. SOP-05057, Tennessee Department of Environment and Conservation (Effective August 31, 2017) (A copy of SOP-05057 is publicly available at <http://share.tn.gov/tra/orders/2005/05002931.pdf>).

<sup>23</sup> E-mail from Jeff Ridsen, Tennessee Wastewater Systems, Inc., to Patsy Fulton, TPUC (November 8, 2019, 11:51AM CDT) (A copy of the email is publicly available at <http://share.tn.gov/tra/orders/2005/0500293p.pdf>). The existing 52-lot planned subdivision was to be part of a 150-home subdivision. The utility says that the developer has not discussed the tying on the remaining 98 lots to the existing system. E-mail from Jeff Ridsen, Tennessee Wastewater Systems, Inc., to Patsy Fulton, TPUC (October 28, 2019, 03:34 CDT) (A copy of the email is publicly available at <http://share.tn.gov/tra/orders/2005/0500293p.pdf>).

<sup>24</sup> E-mail from Allen Rather, TDEC, to James Clausel, Aqua Utilities, Inc. (February 27, 2020, 07:47AM CDT) (A copy of the e-mail is publicly available at <http://share.tn.gov/tra/orders/2019/1900062y.pdf>). See Design Criteria for Review of Sewage Works Construction Plans and Documents, Chp.15.3.1 (February 2016) (this chapter is publicly available at [https://www.tn.gov/content/dam/tn/environment/water/documents/wr-wq\\_pub\\_design-criteria-ch15.pdf](https://www.tn.gov/content/dam/tn/environment/water/documents/wr-wq_pub_design-criteria-ch15.pdf)).

<sup>25</sup> The design flow for commercial customers is evaluated and approved by TDEC based upon site-specific standards but the site-specific standards for the three commercial properties are unknown to the Consumer Advocate. Therefore, for this discussion, we will use the amount of flow identified in correspondence between Utility Staff and Commission Staff. E-mail from Jeff Ridsen, Tennessee Wastewater Systems, Inc., to Patsy Fulton, TPUC (November 8, 2019, 11:51AM CDT) (A copy of the email is publicly available at <http://share.tn.gov/tra/orders/2005/0500293p.pdf>). See also Design Criteria for Review of Sewage Works Construction Plans and Documents at Chp.15.3.1 (February 2016) (this chapter is publicly available at [https://www.tn.gov/content/dam/tn/environment/water/documents/wr-wq\\_pub\\_design-criteria-ch15.pdf](https://www.tn.gov/content/dam/tn/environment/water/documents/wr-wq_pub_design-criteria-ch15.pdf)).

Even if one simply looked at the design flow for the current active customers and the proposed 19 lots from Stoney Brook, it appears that there is still insufficient capacity to treat the design flow:

19 active residential customers x 300GPD =	5,700GPD
3 active commercial customers x site specific standards =	1,000GPD
19 lots in Stoney Brook subdivision x 19 =	<u>5,700GPD</u>
	12,400GPD
System's Design Capacity	<u>10,600GPD</u>
	-1,800GPD

The utility may have an explanation for the discrepancy in the number of customers and the design capacity authorized by the existing TDEC Permit such as that the actual residential flow generally accepted by the industry is 150-170GPD<sup>26</sup> or that the as-built lagoon<sup>27</sup> is capable of treating 74,000GPD. No matter the explanation, the Commission should first be informed that a discrepancy exists. The utility can then provide an explanation of why the discrepancy between the actual number of customers and the design capacity authorized by the existing TDEC permit does not mean it has insufficient capacity to serve its current and future customers. Without such information, both the existing and future customers of the utility are at risk from a wastewater system that lacks sufficient to address the anticipated flow of wastewater from the development for the current and future customers of the utility.

#### **IV. NOTICE TO CUSTOMERS AND THE CONSUMER ADVOCATE.**

The Consumer Advocate is concerned that the proposed rule does not address notice to either a utility's customers or the Consumer Advocate of a utility's intent to expand its service. In reading the proposed rule, it is unclear if the written notice to the Commission of a utility's

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<sup>26</sup> E-mail from Jeff Risden, Tennessee Wastewater Systems, Inc., to Patsy Fulton, TPUC (November 8, 2019, 3:14PM CDT) (A copy of the email is publicly available at <http://share.tn.gov/tra/orders/2005/0500293p.pdf>).

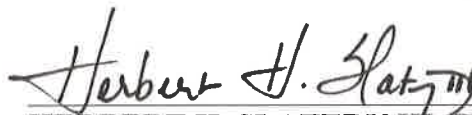
<sup>27</sup> E-mail from Jeff Risden, Tennessee Wastewater Systems, Inc., to Patsy Fulton, TPUC (October 28, 2019, 3:34PM



intent to provide service to a contiguous area will be filed in a docket such that the utility's customers, the Consumer Advocate and other interested parties would have access to the notice from the Commission's public docket page. When a utility expands its service area, multiple issues may arise such as (1) whether the existing systems have sufficient capacity; (2) if the existing system is to be expanded, will the existing customers of the utility be responsible for the cost of such expansion; and (3) if a new system is being built, whether the existing customers of the utility will be paying for that new system. With such potential issues, the interest of consumers may be affected by a utility's expansion into a contiguous territory; therefore, consumers should be provided notice of such action.

The Consumer Advocate requests the Commission's consideration of the revisions recommended herein. For the Commission to meet its obligations and the challenges of a changing utility environment, it needs to be fully informed of a utility's regulatory history and current regulatory status; as well as, informed of the details of a system's capacity to provide proper wastewater service in the proposed service territory.

RESPECTFULLY SUBMITTED,



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## CERTIFICATE OF SERVICE

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

Mail or electronic mail upon:

Kelly Cashman Grams, General Counsel  
Tennessee Public Utility Commission  
Legal Division  
502 Deaderick Street, 4<sup>th</sup> Floor  
Nashville, TN 37243

This the 20<sup>th</sup> day of July, 2020.

Karen H. Stachowski  
Karen H. Stachowski