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August 13, 2004

Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Pkwy.
Nashville, TN 37243-0505

Via Hand Delivery

Attention: Sharla Dillon, Docket Manager

Re: Petition of On-Site Systems, Inc. To Amend Its Certificate of Convenience and Necessity
Docket No. 03-00329

Petition of Tennessee Wastewater Systems, Inc. To Amend Its Certificate of Convenience and Necessity
Docket No. 04-00045

Dear Chairman Miller

I have enclosed for filing the original and fourteen copies of the Post-Hearing Brief of Tennessee Wastewater Systems, Inc. in this consolidated matter. Please return the extra copy to me stamped filed. Thank you for your assistance in this matter.

Sincerely yours,

Donald L Scholes

DONALD L. SCHOLES

Enclosure
c: Charles Pickney, Jr.
Mark Jendrek
Charles B. Welch, Jr.
G. Scott Thomas

BKSJ File No 04-189

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF ON-SITE SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY	)	**Docket No. 03-00329**
	)	
and	)	
	)	
PETITION OF TENNESSEE WASTEWATER SYSTEMS, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY	)	**Docket No. 04-00045**

POST-HEARING BRIEF OF TENNESSEE WASTEWATER SYSTEMS, INC.

At the conclusion of the hearing in this case, the Hearing Officer, Randal L. Gilliam, requested post-hearing briefs from the parties on two issues:

Issue 1 — Whether T.C.A. § 6-51-301(a) would prohibit the City of Pigeon Forge from providing sewer service outside of its boundaries should the Authority grant the Company a certificate to provide sewer service in the City's urban growth boundaries when the City does not annex such territory.

Issue 2 — Whether the present and future public convenience and necessity requires the grant of the certificates of public convenience and necessity to the Company for all the unincorporated area of Sevier County with the exceptions set forth in the Petitions.

Issue 1

Under T.C.A. § 6-51-301(a), no municipality may provide "utility water service to be consumed in any area outside its municipal boundaries when all of such area is included within the scope of a certificate or certificates of convenience and necessity or other similar orders of the

Tennessee regulatory authority or other appropriate regulatory agency of any person, firm or corporation authorized to render such utility water service." The Company contends that this statute will not prohibit the City of Pigeon Forge (hereafter the City or Pigeon Forge) from providing sewer service to territory within the City's urban growth area which the City has not annexed when the Company has no provided sewer service to such territory.

The language in subsection (a) of T.C.A. § 6-51-301 only protects a utility which provides "utility water service". This language does not reference sewer service or any other type of utility service. When construing a statute for legislative intent, Tennessee law restricts courts from extending a statute's language beyond its plain meaning. Legislative intent and purpose is to be ascertained primarily from the natural and ordinary meaning of the language used when read in the context of the entire statute. *Oliver v. King,* 612 S.W.2d 152, 153 (Tenn. 1981). Furthermore, courts are prohibited from any forced or subtle construction to limit or extend the meaning of the statutory language. *Id.* Where the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, "to say sic lex scripta, and obey it " *Hawks v City of Westmoreland,* 960 S.W.2d 10, 16 (Tenn. 1997). The plain and ordinary meaning of the phrase "utility water service" in T.C.A. § 6-51-301(a) can only refer to a utility which provides water service. Therefore, the statute cannot be construed to apply to the service area of a sewer utility.

A review of the language used in the entire statute further confirms that subsection (a) only applies to the certificated service area of a water utility and not a sewer utility. In subsection (d) of this same statute, the legislature sets forth a specific procedure for municipalities created after January 1, 1972 to takeover the utility operations of a private utility or a utility district. In subsection

(d) the legislature used the term "utility services" and then specifically excluded "natural or artificial gas or telephone service." Therefore, the legislature demonstrated an ability to clearly indicate by express language when it intended to use the term utility to include all utility services and when it intended to address specific utility services. "Where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject." *Bryant v Genco Stamping & Mfg. Co.*, 33 S.W.3d 761, 765 (Tenn. 2000). The proper construction of T.C.A. § 6-51-301(a) can only lead one to conclude that the term "utility water service" applies to a private utility authorized to provide water service. If the legislature had intended to include sewer, natural gas, electric or telephone service under subsection (a), it would have either left out the word water or specifically listed the other types of utilities to be affected by subsection (a).

The reference to the application of T.C.A. § 7-82-301(a) in *Lynnwood Utility Co. v. Franklin*, 1990 Tenn. App. LEXIS 228 (Tenn. Ct. App., Apr. 6, 1990)(copy attached) does not alter the correct statutory construction of T.C.A. § 7-82-301(a) which mandates that such subsection (a) does not apply to a sewer utility. In this unreported case the Tennessee Court of Appeals states with reference to T.C.A. § 7-82-301(a), "For the purposes of this opinion we assume, without holding, that the term 'utility water service' in the statute includes sewer service and that the sewer service provided by Lynnwood comes within the statute." The court clearly provides that it is not holding that § 7-82-301(a) applies to sewer service. The decision by the Court in *Lynnwood Utility Co.* is consistent with the court's statement. The issue in *Lynnwood Utility Co.* was not whether the City of Franklin had the right to provide sewer service within unserved territory within Lynnwood's certificated service area but whether the City of Franklin had to compensate Lynnwood for the intangible right

Lynnwood had to provide sewer service within this area. The court concluded that no compensation was owed.

Since T.C.A. § 7-82-301(a) does not apply to sewer service, Pigeon Forge will the right to provide sewer service to territory within the area sought by the Company when the Company has not provided service to such territory. In *Westland Drive Service Co. v. Southern Realty Investors*, 558 S.W.2d 439 (Tenn. App. 1977), the Tennessee Court of Appeals discusses this issue. In this case the Knoxville Utilities Board began providing water service to an apartment complex known as Timbers West which was located outside of the Knoxville city limits but within the certificated service area of Westland Drive Service Company. Westland Drive Service Company was a private water utility with a certificate issued by the Tennessee Public Service Commission to provide water service. After concluding that T.C.A. § 6-51-301(a)(1) was not applicable, the court stated, "Prior to the above amendment it was not a violation of the Tennessee statutes for KUB to serve Timbers West. See T.C.A. 6-604, 6-1304, 6-1408. Having held that the 1974 amendment has no retrospective application, the amendment would have no effect on KUB and Timbers West's valid 1972 agreement " *Id.* at 441. The court's reasoning in *Westland Drive Service Co.* establishes that Pigeon Forge would have the legal right to extend sewer service into any unserved area of the Company's certificated service area even when the City has not annexed such territory.

Issue 2

No testimony was introduced by the intervenors in this case objecting to the grant of the Petitions.

The Authority's decision about whether the present or future public convenience and necessity requires the grant of the certificates sought by the Petitioner must be based upon the evidence introduced at the hearing in this case. None of the intervenors introduced evidence objecting to the grant of the certificates sought by the Company. East Sevier County Utility District and IRM Utility, Inc. introduced no evidence at the hearing. John Jagger testified on behalf of the City of Pigeon Forge. In a letter dated February 12, 2003, Mr. Jagger states, "the City of Pigeon Forge should take a neutral stance on this matter, neither supporting nor opposing the request." In his rebuttal testimony Mr. Jagger states that this letter was "not intended to be an expression of the City's support for Petitioner's petition for a certificate of convenience and necessity to cover the entire urban growth area." Mr. Jagger presented no testimony which indicated that the City *opposed* either petition filed by the Company in this consolidated docket. Exhibit 1 to Mr. Jagger's pre-filed testimony provides, "Pigeon Forge will not provide public sewer outside of its corporate limits." *See* Exhibit 1 to Pre-Filed Testimony of John Jagger at 11.

The testimony of Charles Pickney, Jr. on the need for sewer service and the benefits to the public from the grant of the certificates sought is uncontradicted. The record contains no facts upon which the Authority can conclude that the interests of the intervenors are adversely affected by the grant of the Company's Petitions. Therefore, his testimony should be entitled to controlling weight in determining whether the present or future public convenience and necessity requires the issuance of the certificates sought.

The testimony in the record establishes that a public need exists for the territory sought by the Company in its Petitions.

Mr. Pickney testified that the Company applied for certificates to serve all of the unincorporated area of Sevier County with the exceptions described in the Petitions because of significant growth in Sevier County and the need for sewer service in such area. Prior to filing these petitions, the Company had filed and received thirteen certificates to provide sewer service with the Company's decentralized sewer systems within the area sought in the Petitions in this docket. At the hearing Mr. Pickney testified that the Company has had discussions with eight other developments about providing sewer service within the area sought. One of these developments, Legacy Homes Barnes, decided to proceed with individual septic tank and leach field systems because of the delay in approval of the certificates sought in this case.

Mr. Pickney testified that a petition for a certificate to serve a larger area makes sense when there is significant growth in a geographic area rather than continuing to apply for a certificate on a development by development basis. The unincorporated area of Sevier County is just such an area as evidenced by the number of certificates the Authority has issued to the Company in Sevier County and by the requests which have been made to the Company prior to and since the Petitions in this docket were filed.

The Company has received certificates to provide sewer service in large areas rather than on a development by development basis in other growth areas of the state where decentralized sewer systems are needed. The Company has been awarded certificates to provide sewer service within the geographic area encompassed by the River Road Utility District in Cheatham County; all of Stewart County with the exception of the City of Dover; the geographic area encompassed

by Milcrofton Utility District and the Goose Creek Area in Williamson County; the City of Coopertown (56 square miles) in Robertson County; the Tims Ford State Park Area which encompasses approximately 1/3 of Franklin County and the Paris Landing area in which encompasses most of the geographic area of Northeast Henry County Utility District.

The Company has shown that a public need exists for sewer service by decentralized sewer systems within the area sought in this consolidated docket. Therefore, the present and future public convenience and necessity warrant the award of a certificate to serve the entire area sought rather than requiring multiple applications to serve this area on a development by development basis.

The time delay and expense in requiring the Company to apply for certificates on a development by development basis in the area sought in this consolidated docket is not in the public interest.

The public need for sewer service within the area sought in this consolidated docket is not served by requiring the Company to file a new application for each new potential development which desires sewer service. When a developer seeks to obtain approval of a development from a local planning commission, one of the first steps in the approval process is providing a sewer availability letter to the planning commission from a sewer provider. The Company can issue such a letter in short order when it has already been authorized to provide sewer service within the geographic area covered by the development. When the Company must file an application with the Authority for a certificate for a particular development, a delay occurs between the time a developer requests service and a sewer availability letter can be provided. The Company must prepare the application for filing with the Authority, the Authority must set the application for hearing, the Authority must act on the application at an Authority Conference and an order must

be issued granting the certificate. Such a delay is not in the public interest. Should any person intervene in the application proceeding, the delay could be substantially longer.

Moreover, the Company does incur costs in connection with the filing of each application for a certificate which costs must be passed on to the Company's customers through its rates. The Company must work with the developer to determine its need for service prior to filing an application, the Company must prepare each application, the Company must respond to any information request by the staff, the Company must appear at the hearing scheduled for the application and the Company must appear at the Authority Conference at which the application is considered. When the Company has shown that a public need exists for multiple decentralized sewer systems in a geographic area, it only makes sense to apply for a larger geographic area in one proceeding. Requiring the Company to file 10 or 20 separate applications for a certificate to service each commercial business or development within such an area and to incur the costs associated with each filing makes no economic sense when a public need exists for decentralized sewer systems in a geographic area When the Company must apply for a certificate on a development by development basis, the Company incurs the costs of a certificate proceeding when a development does not go forward for reasons not related to the provision of sewer service. For example, the Company has obtained certificates for thirteen developments in Sevier County; however, four of the developments were not built by the developers after the certificate was obtained The Company and its ratepayers incurred the costs of these four proceedings which ultimately did on result in any additional revenue for the Company. The grant of the certificates sought in this consolidated docket would eliminate the costs of the Company would

incur in getting a certificate for a specific development in the area sought which does not get built by the developer for unrelated financial or other reasons.

The grant of the Petitions will provide efficiencies in the maintenance and operations decentralized sewer systems and which will benefit the public.

Mr. Pickney testified that the public served by the Company's decentralized sewer systems will benefit from the grant of the Petitions in this consolidated docket through more the efficient maintenance of such systems. When one sewer utility has several systems in the same geographic area, the maintenance cost to serve the customers in this geographic area will less than if five different sewer providers have sewer systems in the same geographic area. If the sewer utility systems in a geographic area are served by five different sewer providers, each sewer provider must have its own personnel or contracts to provide maintenance and operational services to the systems thereby increasing the overall maintenance and operations cost of service to the public. In addition, the maintenance personnel used by the Company can perform regular maintenance more efficiently on several systems within the same area than on systems scattered in different locations.

Should the Authority conclude that utilities which provide sewer service with decentralized sewer systems should compete for such service, the grant to the Company's Petitions is consistent with such an objective.

Counsel for intervenors East Sevier County Utility District and IRM Utility, Inc. has asserted in this proceeding that the Authority should not grant this Petition because competition for sewer service should exist in this area. While the Company may not agree with this assertion, the Company contends that the grant of the certificates sought in this consolidated docket is

consistent with such an objective.[1] East Sevier County Utility District has taken the position that it currently has the power to provide sewer service within the area sought by the Company in this consolidated docket. If a developer desires sewer service within the area sought in this case, the developer purportedly has only one choice, East Sevier County Utility District.[2] Upon the grant of the Company's Petitions, a developer would be able to choose between two sewer providers. If the Company's Petitions are not granted because the Authority determines certificates should be issued only a development by development basis, a potential developer in this area would have to wait until the Company filed an application for a certificate and it was acted upon by the Authority before the developer would have a choice. Such a delay in the authorization of a competing utility would not foster competition. The Authority has the ability to authorize more than one private sewer utility to provide sewer service in this area under T.C.A. §§ 65-4-201 and 202. If the Authority seeks to introduce competition into the provision of sewer service by decentralized sewer systems, it can approve more than one private sewer utility in the same geographic area to give the public choices. No other private utility has filed an application with the Authority to provide sewer service within the area sought by the Company in this consolidated docket. If competition is in the public interest, the public is better served by having two or more utilities able to immediately provide service. Requiring a developer to negotiate with a specific sewer provider for its development and then requiring the sewer provider to file

1 As discussed *infra* the Company is uncertain whether the Authority has sufficient legal authority to determine whether the provision of sewer service by utilities providing decentralized sewer service should be subject to competition within the State of Tennessee

2 The Company has asserted in this case that East Sevier County Utility District may not have the power to provide sewer service outside of its boundaries because its order of creation failed to specify the services it is authorized to provide as required by T C A § 7-82-202(a)(2)

an application for a certificate for a specific development places an undue burden and delay on the developer needing sewer service in a competitive environment.

The needs of the public are better served by the grant of the Company's Petitions to serve the unincorporated area described in the Petitions rather than on a development by development basis whether the Authority desires to introduce competition or not. If the Authority determines that competition in the provision of sewer services by utilities providing decentralized sewer systems is in the public interest, the grant of the Company's Petitions will give the public an immediate choice. If the Authority determines that competition should not be a consideration in determining whether the certificate should be issued, the public is served by the grant of the Petitions in that it will have sewer service available immediately in the area sought upon the grant of the Petitions by a utility which has the managerial, financial and technical ability to provide such service.

Because the Authority has no jurisdiction over nonutilities as defined by T.C.A. § 65-4-101, the Authority's decision on whether the public convenience and necessity requires the grant of the Company's Petitions should be based solely upon the merits of the Company's ability to provide the service requested.

The only issue which the Authority can address in this proceeding is whether the present or future public convenience and necessity requires the issuance of the certificates to the Company. The Authority is not charged with determining whether a city or a utility district can or should provide service within the area sought by the Company.

The legislature has determined that a municipality has the exclusive right to provide utility services in any territory it annexes. Pursuant to T.C.A. § 6-51-111, the annexing municipality has the right to be the exclusive provider of utility services in any territory it

annexes when such area is served by a utility district, another municipality or other instrumentality of the State of Tennessee. Pursuant to T.C.A. § 6-51-112, the annexing municipality has the right to be the provider of electric service in any territory it annexes when such area is served by an electric cooperative. Pursuant to T.C.A. § 6-51-301(a), the annexing municipality has the right to be the provider of water service in any territory it annexes. A number of other statutes and Tennessee case law establish that a municipality has the right to be provider of utility services within its municipal boundaries. *Duck River Elec. Membership Corp. v. Manchester*, 529 S.W.2d 202 (Tenn. 1975); *Franklin Power & Light Co. v. Middle Tenn. Elec. Membership Corp.*, 434 S.W.2d 829, 222 Tenn. 182 (1968).

The determination of whether the public convenience and necessity requires a utility district to provide utility services within a geographic area in Tennessee is vested in the County Mayor or County Mayors within the county or counties in which the utility district is located. A utility district can only be created or its boundaries expanded when the County Mayor determines the public convenience and necessity requires it. T.C.A. § 7-82-201. The County Mayor has the authority to decide whether the public convenience and necessity requires other or additional utility services within the boundaries of a utility district. T.C.A. § 7-82-301(a)

Because the Authority has no jurisdiction over nonutilities which provide sewer service in Tennessee, the Authority's ability to determine whether competition in the provision sewer service in is in the public interest in Tennessee is limited. The Company also questions whether this certificate proceeding is the appropriate proceeding to address competition in the provision of sewer service. Such a determination would be more appropriate in a generic proceeding on this issue alone or in a rulemaking proceeding since it would be establishing a new policy for

utilities in Tennessee. The Company is unaware of any policy decision by the Authority in which it has endorsed competition in the provision of utility service other than for telephone utilities At a minimum this issue should be addressed when another private utility files an application to serve the same area sought by the Company.

The grant of the Petitions in this consolidated docket does not preclude East Sevier County Utility District or the City of Pigeon Forge from providing service within the area sought by the Company. If the District wants to provide sewer service within the area sought by the Company after the grant of its Petitions, the District may file a petition with the Sevier County Mayor to expand the District's boundaries to include territory within the Company's certificated service area. The City of Pigeon Forge has the exclusive right to provide sewer service within any territory it may annex within its urban growth area. As previously set forth in this Post-Hearing Brief, the City would have the prior right over the Company to extend service even in an area in which the City has not annexed. Mr. Pickney testified that the Company does not seek to provide sewer service in any area in which a city desires to serve and would not object to such service by the City in any territory in the area sought which the Company has not served.

The Company has the managerial, financial and technical ability to provide sewer service within the geographic area requested in the Petitions. The Company has submitted evidence which supports the public need for grant of the entire area sought. The grant of the certificates sought will not affect the City's ability to provide sewer serve within its urban growth area. To the extent the District needs any additional authority to provide sewer service within the area sought by the Company, it has a statutory procedure for doing so. Therefore, the Company

contends that it has met its burden of showing that the present or future public convenience and necessity requires the grant of the Company's Petitions.

Dated this 13th day of August, 2004.

Respectfully submitted,

Donald L. Scholes

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing Post-Hearing Brief of Tennessee Wastewater Systems, Inc. has been served upon the following persons on this 13th day of August, 2004 by U.S. Mail, postage prepaid:

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LEXSEE 1990 TENN APP LEXIS 228

LYNNWOOD UTILITY COMPANY, Plaintiff-Appellant v. THE CITY OF FRANKLIN, TENNESSEE, Defendant-Appellee

Appeal No. 89-360-II

Court of Appeals of Tennessee, Middle Section, at Nashville

1990 Tenn. App. LEXIS 228; 118 P.U.R.4th 288

April 6, 1990, Filed

PRIOR HISTORY: [*1]

From the Chancery Court, Williamson County, The Honorable Henry Denmark Bell, Chancellor

LexisNexis(R) Headnotes

COUNSEL:

HARRIS A GILBERT, J GRAHAM MATHERNE, WYATT, TARRANT, COMBS, GILBERT & MILOM, Nashville, Tennessee, ATTORNEYS FOR PLAINTIFF-APPELLANT

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CHARLES W BURSON, Attorney General and Reporter, JOHN KNOX WALKUP, Solicitor General, MICHAEL W CATALANO, Deputy Attorney General, Nashville, Tennessee

JUDGES:

SAMUEL L LEWIS, Judge, HENRY F TODD, Presiding Judge, BEN H CANTRELL, Judge, concur

OPINIONBY:

LEWIS

OPINION:

OPINION

SAMUEL L LEWIS, JUDGE

Plaintiff Lynnwood Utility Company (Lynnwood) filed its complaint against defendant, The City of Franklin, Tennessee (Franklin), in which Lynnwood sought compensation from Franklin for Franklin's alleged taking of Lynnwood's right to serve an area in North Williamson County, Tennessee, with utility sewer service Franklin had annexed the area in question subsequent to the Tennessee Public Service Commission (PSC) granting Lynnwood a "Certificate of Convenience and Necessity" to provide utility sewer service to the area in question

Following the filing of Franklin's answer, **[*2]** Lynnwood moved for partial summary judgment pursuant to *Tenn Code Ann § 6-51-301*, et seq Thereafter, Franklin moved for summary judgment on the grounds (1) that Lynnwood was not entitled to rely on *Tenn Code Ann § 6-51-101*, et seq , (2) that even if *Tenn Code Ann § 6-51-101*, et seq were applicable, Lynnwood's damages under *Tenn Code Ann § 6-51-101* would be zero, (3) that Franklin had complied with *Tenn Code Ann § 65-4-207* and therefore no legal dispute existed between Franklin and Lynnwood, (4) that Lynnwood had no constitutional taking claim, and (5) that public policy considerations dictate that Franklin be permitted to serve the disputed area without payment of compensation to Lynnwood

The trial court thereafter took the matter under advisement and, on 29 December 1988, entered an order overruling Lynnwood's motion for partial summary

judgment and sustaining Franklin's motion for summary judgment on grounds (1), (2) and (3)

Lynnwood filed a petition to rehear the 29 December 1988 order and moved the trial court to reach the constitutional issues which it had raised in its pleadings and which had arisen because of the nature of Franklin's motion for summary judgment **[*3]** In conjunction with its petition to rehear, Lynnwood also moved that the Tennessee Attorney General be made party defendant in order to fully bring before the court the issues concerning the constitutionality of *Tenn Code Ann § 6-51-301*

On 7 July 1989, the trial court denied all of Lynnwood's motions. Lynnwood has properly perfected its appeal

The facts pertinent to our inquiry are as follows

Lynnwood is a privately-owned sewer utility company and subject to the rules of the PSC *Tenn Code Ann § 65-4-101*

In June 1976, Lynnwood applied for and was granted a Certificate of Public Convenience and Necessity to serve the Cottonwood Development and Drainage Basin of the Lynnwood Branch in northern Williamson County Since the issuance of its Certificate, Lynnwood has been operating in its designated service district, providing sewer service to a large residential development, as well as other customers within its designated service area. Lynnwood had not extended its system to certain undeveloped areas of its designated service district, but had never refused to do so Lynnwood has never been requested to provide sewer service to these undeveloped areas

In 1986, Lynnwood petitioned **[*4]** the PSC for an increase in its rates and tap fees During the hearing on its petition, Lynnwood stated that no new customers were expected in its existing service area It also developed that Lynnwood did not have any excess capacity in its sewer treatment facilities In order to serve other customers, additional capacity would have been needed

In the Summer of 1986, Harlon East Properties (Harlon), a Raleigh, North Carolina based land development Company, commenced negotiations with owners of property in northern Williamson County The property was undeveloped and a large portion of the property was in Lynnwood's utility service district The property was open farmland owned by three different owners, and only a few persons resided on the property No part of the property Harlon wished to purchase contained sewer mains, pumping stations, treatment stations, sewer lines, or any other type of sewer equipment

Harlon planned to develop this property into a residential development to be known as Fieldstone Farms A portion of Fieldstone Farms is within Lynnwood's service area

On 28 October 1986, a referendum election regarding whether the land in question would be annexed by Franklin **[*5]** was passed and 1147 acres were annexed into Franklin

On 12 November 1986, Lynnwood wrote Harlon requesting a meeting to discuss Lynnwood's providing sewer services to that portion of Fieldstone Farms located within Lynnwood's designated service area A copy of the correspondence was sent to Franklin

On 25 November 1986, Harlon wrote the Mayor of Franklin confirming that the area containing Fieldstone Farms was annexed and acknowledging that Harlon and Franklin had reached a "tentative agreement" that Franklin would provide water and sewer services to the annexed area Harlon requested that Franklin exercise its right to provide water and sewer service to the annexed area and also requested Franklin to attempt to reach an agreement with Lynnwood regarding Franklin's providing sewer service to Fieldstone Farms

On 8 December 1986, the Water Committee of the Franklin Board of Mayor and Aldermen unanimously recommended that Franklin provide sewer service to the entire newly annexed area

On 9 December 1986, the Mayor and Board of Aldermen unanimously approved the Water Committee's recommendation with a proviso that Lynnwood be notified of Franklin's intention The 9 December minutes **[*6]** of the Board do not reflect an election by Franklin to exercise exclusive rights to service the annexed area

On 14 April 1987, the Franklin Board of Mayor and Aldermen passed a resolution declaring its intention to serve the annexed area and confirming the right of Lynnwood to compete for service pursuant to *Tenn Code Ann § 65-4-207*

Lynnwood's first issue is

Does *T C A § 6-51-301* provide a right of compensation for a private sewer water utility company's right to serve an area when that utility company holds a Certificate of Convenience and Necessity from the Tennessee Public Service Commission where the utility has operated a sewer plant in part of the area for many years, and then an adjoining municipality annexes part of the undeveloped area?"

A Does *T C A § 6-51-301* apply only to a purified water utility company and not to a sewer water utility company

B Does *T C A § 6-51-301* apply only where there have been physical improvements laid into the ground by the sewer water company, or does the statute apply to the right to serve the service area lost by the utility when part of its overall service area is appropriated by the municipality through annexation?

For the purposes **[*7]** of this opinion we assume, without holding, that the term "utility water service" in the statute includes sewer service and that the sewer service provided by Lynnwood comes within the statute

With that assumption in place, we must determine if Lynnwood, under the undisputed facts, suffered damages as a result of Franklin's election to provide sewer service to that portion of the annexed area in which Lynnwood held a Certificate of Convenience and Necessity

The trial court, in granting Franklin's motion for summary judgment, determined that even if *Tenn Code Ann § 6-51-301* did apply to a sewer utility provider such as Lynnwood, summary judgment was still appropriate since the amount of damages to which Lynnwood would be entitled would not exceed zero under *Tenn Code Ann § 6-51-301(a)(2)* which provides

Such proceeding [to determine damages] shall be conducted according to the laws of eminent domain, Title 29, Ch 16, and shall include a determination of actual damages, incidental damages, and incidental benefits, as provided for therein, but in no event shall the amounts so determined exceed the replacement cost of the facilities

Lynnwood concedes that it has no pipes in **[*8]** the ground, that it had constructed no plant, that it has no equipment of any kind, nor has it made any physical addition of any kind in that portion of the area annexed in which it holds a Certificate of Convenience and Necessity Lynnwood had not constructed its treatment plant so that it has an over capacity as a result of not being able to serve the annexed area

Lynnwood only has a Certificate of Convenience and Necessity issued by the PSC and has never provided sewer services to the annexed area

Lynnwood contends that the issue is what is meant by the term "facilities" as used in *Tenn Code Ann § 6-51-301(a)(2)* Lynnwood argues that its Certificate of Convenience and Necessity is included within the term "facilities " We respectfully disagree

We are of the opinion that the term "facilities" as used in *Tenn Code Ann § 6-51-301(a)(2)* means physical facilities, not a right to construct physical facilities and not a right to serve an area We reiterate that Lynnwood has no physical facilities of any kind in or on the annexed area. Further, it cannot be argued that there has been damage to Lynnwood's physical facilities located outside the annexed area Lynnwood admitted in the **[*9]** hearing before the PSC that its treatment facilities were not presently built to serve excess customers In other words, Lynnwood has not constructed its physical facilities in anticipation of serving a larger area

Our search has not revealed any Tennessee authority, and Lynnwood has not cited any Tennessee Authority, to support its argument that its Certificate of Convenience and Necessity, i,e , its right to serve the annexed area, is a "facility" which is compensable under the statute

Lynnwood relies on *Hartford Electric Light Co v Federal Power Comm'n , 131 F.2d 953 (2nd Cir 1942),* and *Mississippi Power and Light Co v City of Clarksdale, 288 So 2d 9 (Miss 1973)* We are of the opinion that these cases are inapposite to the facts in the case before us

In *Hartford,* the court found that the plaintiff company's contracts, accounts, memoranda, papers and other records utilized in connection with sales constituted facilities for the purposes of the Federal Power Act, *16 U S C § 791*(a), et seq Here, none of these items are at issue Franklin has not attempted to assume operating any of Lynnwood's existing facilities, nor has it attempted to acquire any of Lynnwood's **[*10]** accounts, papers, contracts, etc

In *Mississippi Power and Light Co* , the statute did not give the municipality the absolute first right to serve upon annexation The Mississippi statute contained a "grandfather" provision that favored the original service providers The court therefore deemed the grandfather franchise a "valuable right " We have no such provision in *Tenn Code Ann § 6-51-301*

A Certificate of Convenience and Necessity is not a facility. However, even if we could find that the Certificate of Convenience and Necessity is included in the term "facilities," Lynnwood has, under the facts and circumstances of this case, damages which do not exceed zero

When an area is annexed in which an individual or corporation has a Certificate of Convenience and Necessity and the "municipality chooses to render a utility or water services," the holder of the Certificate is entitled to damages but these damages may not "exceed the replacement cost of the facilities " *Tenn Code Ann § 6-51-301(a)(2)* Lynnwood possesses nothing in the annexed area except the Certificate of Convenience and Necessity, i e , an intangible "right" to provide sewer services As argued by Franklin, payment **[*11]** of the

"replacement costs" of items to be transferred makes no sense in the context of an intangible right to provide sewer service

While an intangible right to provide sewer services might have some value in the context of the "law of eminent domain," *Tenn Code Ann § 29-16-101*, et seq., damages under *Tenn Code Ann § 6-51-301(a)(2)* are limited to replacement costs There is no replacement cost as contemplated by *Tenn Code Ann § 6-51-301(a)(2)* for an intangible right to provide sewer services

The Chancellor properly granted summary judgment on the ground that the damages Lynnwood suffered did not exceed zero

In view of our holding under this issue, we deem it unnecessary to address other issues raised by Lynnwood and, therefore, pretermit them

The judgment of the Chancellor is affirmed with costs assessed to Lynnwood and the cause remanded to the trial court for the collection of costs and any further necessary proceedings