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May 19, 2004

Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Pkwy
Nashville, TN 37243-0505

Via Hand Delivery

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 Tate

On May 18, 2004, I filed a Memorandum of Law of Tennessee Wastewater Systems, Inc in this consolidated matter In the Memorandum of Law, I state that the case of *Lynnwood Utility Corp. v. City of Franklin, Tennessee*, 1990 Tenn App Lexis 228 (Apr 6, 1990) was attached to the Memorandum This case was inadvertently left off of the Memorandum of Law when it was filed I have enclosed 14 copies of this case which I would appreciate your distributing to all persons who received the Memorandum of Law Thank you for your assistance in this matter

Sincerely yours,

Donald L Scholes

DONALD L SCHOLES

Enclosures
c Charles Pickney, Jr
Mark Jendrek
Charles B Welch, Jr
G Scott Thomas

BKSJ File No 04-189

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

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff utility company appealed a decision of the Chancery Court, Williamson County (Tennessee), which granted summary judgment in favor of defendant city on the utility company's action seeking compensation from Franklin for the city's alleged taking of the utility company's right to serve an area in the county with utility sewer service

OVERVIEW: After a development company purchased farmland in the utility company's service area, the city annexed the land and passed a resolution declaring its intention to serve the annexed area and confirming the right of the utility company to compete for service pursuant to Tenn Code Ann § 65-4-207 The utility company, in seeking compensation from the city for taking its right to serve the area, conceded that it had done nothing to establish service in the area to be annexed that was included in its Certificate of Convenience and Necessity On appeal from summary judgment in favor of the city, the court affirmed, holding that the term "facilities" as used in Tenn Code Ann § 6-51-301(a)(2) meant physical facilities, not a right to construct physical facilities, and not a right to serve an area Even if the Certificate of Convenience and Necessity was included in the term "facilities," the utility company had damages which did not exceed zero There was no replacement cost as contemplated by Tenn Code Ann § 6-51-301(a)(2) for an intangible right to provide sewer services

OUTCOME: Summary judgment in favor of the city on the utility company's action was affirmed

LexisNexis (TM) HEADNOTES - Core Concepts:

Governments > Public Improvements > Sanitation & Water
[HN1] See Tenn. Code Ann § 6-51-301(a)(2)

Governments > Public Improvements > Sanitation & Water
[HN2] 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

Governments > Public Improvements > Sanitation & Water
[HN3] 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)

Governments > Public Improvements > Sanitation & Water

[HN4] 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

COUNSEL:

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

WILLIAM L BAGGETT, JR , FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, ATTORNEY FOR DEFENDANT-APPELLEE

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

[HN1] 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 [HN2] 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

[HN3] 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

[HN4] 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