

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 30, 2008

IN RE:)	
)	
DOCKET TO DETERMINE THE)	DOCKET NO.
RESERVE/ESCROW REQUIREMENT)	07-00062
FOR KINGS CHAPEL CAPACITY, LLC)	
PURSUANT TO TRA RULE 1220-4-13-)	
.07(8))	

**DISSENT OF DIRECTOR RON JONES TO THE
ORDER DETERMINING ESCROW REQUIREMENTS**

The above-styled docket came before a panel of the Tennessee Regulatory Authority during an Authority Conference held on December 3, 2007, for consideration of the escrow requirements for Kings Chapel Capacity, LLC ("KCC"). At the conference, a majority of the panel voted not to require the posting of a fidelity bond and to adopt the definitions of equipment replacement, tank pumping, and preventative maintenance set forth in the *Staff Report*. I dissented from these determinations and offer this opinion in support of my vote.¹

I. RELEVANT PROCEDURAL HISTORY

On November 14, 2007, Authority Staff issued the *Staff Report* in this docket. In the *Staff Report*, Authority Staff set forth five recommendations with regard to the escrow

¹ As is reflected by my signature to the *Order Determining Escrow Requirements*, I agreed with the prevailing motion in regard to requiring KCC: (1) to maintain the existing monthly escrow rate of \$10.13 for residential customers; (2) to establish a separate bank account to administer the escrowed funds; (3) to transfer any escrow revenues collected to date into the newly-established account and provide proof of compliance; and (4) to file annual calendar year end reports detailing the balances and activity in the escrow account.

requirement for KCC. Briefly, the five recommendations are that the Authority: (1) adopt the definitions of equipment replacement, tank pumping, and preventative maintenance contained in the *Staff Report*;² (2) require KCC to maintain the current escrow rate of \$10.13 for residential customers; (3) direct KCC to establish a separate escrow account that includes a fidelity bond covering persons with authority to withdraw funds; (4) direct KCC to transfer revenues collected to date into the separate account and to provide proof of compliance; and (5) direct KCC to file annual calendar year end reports.³

On November 19, 2007, Mr. John Powell, owner of KCC, filed the company's response to the recommendations. Specific to this dissent, KCC contends that a fidelity bond is not needed because a fidelity bond duplicates the existing Williamson County bond. KCC further contends that the fidelity bond requirement is not applicable to the company, because KCC does not have any employees and the bond requirement contained in Rule 1220-4-13-.07(9) applies to employees.⁴ KCC did not address the appropriateness of the proposed definitions in its response.

During the December 3, 2007, Authority Conference, the panel addressed the *Staff Report*. With the exception of the fidelity bond recommendation, a majority of the panel voted in favor of the *Staff Report* recommendations. I voted in favor of the *Staff Report*

² *Staff Report*, p. 2 (Nov. 14, 2007). The definitions are as follows:

1. Equipment Replacement – Necessary improvements to the wastewater system or to replace vital system components in case of failure. The amount of equipment purchased with escrow funds funded by ratepayers, however, should not be included in rate base, but rather be treated as contributed capital.
2. Tank Pumping – This expense is non-routine and is generally incurred approximately every five years. Since this expense is not incurred annually, it is not included in the cost of service to be recovered by monthly rates.
3. Preventative Maintenance – This would probably apply only for unique and extraordinary preventative maintenance that may be required; escrow funds should not be used for annual preventative maintenance that is covered by monthly rates.

Id. at 2-3.

³ *Staff Report*, p. 4 (Nov. 14, 2007).

⁴ *Response of Kings Chapel Capacity to Staff Report*, pp. 2-3 (Nov. 19, 2007).

recommendations with the exception of adopting the proposed definitions of equipment replacement, tank pumping, and preventative maintenance.

The *Order Determining Escrow Requirements* memorializing the majority and consensus decisions was entered on January 17, 2008. In the order, the majority determined that “it is premature to require a fidelity bond”⁵ and that the filing of a fidelity bond is not necessary at this time.⁶ No justification for adopting the definitions contained in the *Staff Report* was set forth in the order.

II. DISCUSSION

A. DEFINITIONS

It is my opinion that the purpose of the escrow account contemplated by Rule 1220-4-13-.07 is to ensure that a wastewater utility has adequate funds available to address non-routine operations and maintenance expenses that are not specifically provided for in the rates of the company, including capital equipment replacement. As reflected in the order, it is my opinion that “an escrow account should be maintained because such an account is beneficial to both ratepayers and KCC given the financial standing of KCC, the start-up nature of the utility, and the small number of customers currently served by the system.”⁷ Additionally, it is my opinion that the amount currently escrowed by KCC for residential customers is based on the escrow rate approved for On-Site Systems, Inc., now known as Tennessee Wastewater Systems, Inc.

⁵ *Order Determining Escrow Requirement*, p. 2 (Jan. 17, 2008).

⁶ *Id.* at 3.

⁷ *Id.* at 2.

(“TWS”), in Docket No. 99-00393.⁸ As reflected in the *Order Determining Escrow Requirements*, it is my opinion that it is appropriate for KCC to continue to charge the same escrow rate charged by TWS when it first began to provide service to customers, because KCC “is a new wastewater service provider, serves a single service area, and is using a system similar to that used by Tennessee Wastewater [Systems], Inc.”⁹

It follows that because KCC is using the escrow rate originally calculated for TWS, the purposes for which KCC should be permitted to use the funds should track the purposes for which TWS’s escrow account was intended. The Authority calculated TWS’s escrow rate, and by implication KCC’s escrow rate, in Docket No. 99-00393 by summing the costs associated with certain tank pumping and equipment replacement costs for the collection, treatment and disposal systems that TWS did not include in the average monthly cost. The escrow rate did not include costs for preventative maintenance. TWS included all preventative maintenance costs in the non-escrowed portion of the average monthly cost.¹⁰ It is the detail in Docket No. 99-00393 that should define the scope of the escrow account of KCC. In my opinion, adopting broad, general definitions that redefine the purposes of the escrow account should be avoided until the Authority completes a more detailed analysis of non-routine operation and maintenance expenses.

⁸ Compare *In re: Petition of On-Site Systems, Inc. to Change Rate Structure, Increase Rates and Add Fees*, Docket No. 99-00393, *Petition*, Exh. 1, 2, and 4 (Jun. 3, 1999) with King’s Chapel Capacity Wastewater Service Tariff, TRA #1 Cost of Residential Services, Sheet #1, #2, #3, and #5 (Effective October 1, 2005). Although KCC’s tariff includes an amount for preventative maintenance in its current escrow rate, I suspect this to be an error as the same amount appears in the cost justification filed in Docket No. 99-00393, but is listed as equipment replacement costs. Compare *In re: Petition of On-Site Systems, Inc. to Change Rate Structure, Increase Rates and Add Fees*, Docket No. 99-00393, *Petition*, Exh. 2 (Jun. 3, 1999) with King’s Chapel Capacity Wastewater Service Tariff, TRA #1 Cost of Residential Services, Sheet #2 (Effective October 1, 2005).

⁹ *Order Determining Escrow Requirement*, p. 2 (Jan. 17, 2008).

¹⁰ See *In re: Petition of On-Site Systems, Inc. to Change Rate Structure, Increase Rates and Add Fees*, Docket No. 99-00393, *Petition*, Exh. 1, 2, and 4 (Jun. 3, 1999).

B. FIDELITY BOND

As to the need for a fidelity bond, I disagree with KCC's assertion that a fidelity bond is not needed because a fidelity bond duplicates the existing Williamson County bond. In Docket No. 07-00151, the Authority determined that the purpose of the Williamson County bond was for the performance and maintenance of the wastewater system.¹¹ The term "fidelity bond," as defined in *Black's Law Dictionary*, is a "contract whereby, for a consideration, one agrees to indemnify another against loss arising from the want of honesty, integrity, or fidelity of an employee or other person holding a position of trust."¹² Given the Authority's earlier finding in Docket No. 07-00151 and the definition of fidelity bond, I find that the purposes of the bonds are different and KCC's arguments to the contrary should be rejected.

Additionally, although the reference to fidelity bonds in Rule 1220-4-13-.07(9) mentions only employees and not other persons holding positions of trust, the rule in no way prevents the Authority from requiring a person holding a position of trust, such as the owner of a company, to obtain a fidelity bond. Moreover, the Authority may impose a requirement for an owner to obtain a fidelity bond pursuant to Tennessee Code Annotated section 65-4-104.

Lastly, I am unaware of the basis for the majority's conclusion that a fidelity bond is premature or unnecessary. In my opinion, the very nature of requiring and establishing an escrow account is to ensure that those resources will be available when needed. The institution of a fidelity bond further ensures that the money will be available even in the event of bad acts by those in positions of trust. If the escrow account is needed at this time, so too is a fidelity bond.

¹¹ *In re: Petition of King's Chapel Capacity for Exemption from Financial Security as Required by the Tennessee Regulatory Authority's Proposed Wastewater Regulations*, Docket No. 07-00151, *Order Granting Petition*, 3 (Sept. 13, 2007)

¹² BLACK'S LAW DICTIONARY 624 (6th ed. 1990).

III. CONCLUSION

For the foregoing stated reasons, it is my opinion that the majority erred when it voted to not require Kings Chapel Capacity, LLC to post a fidelity bond and to adopt the definitions of equipment replacement, tank pumping, and preventative maintenance set forth in the *Staff Report*. Therefore, I dissent from the *Order Determining Escrow Requirements* in these regards.



Ron Jones, Director