

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:	October 5, 2011)	
)	
PETITION OF CARTWRIGHT CREEK, LLC TO)	DOCKET NO.
APPROVE ALTERNATIVE FORM OF FINANCIAL)	11-00066
SECURITY UNDER RULE 1220-4-13-.07)	

**ORDER DENYING PETITION AND ORDERING CARTWRIGHT CREEK, LLC TO
PROVIDE SECURITY**

This matter came before Chairman Eddie Roberson, Director Kenneth C. Hill, and Director Sara Kyle, the voting panel of the Tennessee Regulatory Authority (the "TRA" or "Authority") assigned to this docket, at a regularly scheduled Authority Conference held on August 1, 2011 for consideration of the Petition (the "*Petition*") filed by Cartwright Creek, LLC (the "Company") on April 29, 2011, requesting that the Authority approve and accept an alternative form of security under TRA Rule 1220-4-13-.07.¹

The Company

In March 1975, the Tennessee Public Service Commission granted Cartwright Creek Utility Company, Inc. ("Cartwright Utility Co.") the authority to provide wastewater services in Tennessee. Following certification, Cartwright Utility Co. operated a wastewater treatment facility in the 7th Civil District of Williamson County, Tennessee. On September 22, 2004, Cartwright Utility Co., together with Cartwright Creek, LLC, filed a *Petition to Transfer Authority to Provide Utility Services*, requesting that the TRA approve a transfer, from Cartwright Utility Co. to Cartwright Creek, LLC, of the authority previously granted to provide wastewater utility services in Tennessee.

¹ Tenn. Comp. R. & Regs. 1220-4-13-.07.

The TRA approved the transfer on November 8, 2004.² In Docket No. 07-00180, by Order dated November 19, 2007, the TRA approved an expansion of the Company's service area to include a portion of Williamson County, Tennessee known as the Stillwater Development.³

The Petition

The *Petition* states that after the Company was acquired by Sheaffer Wastewater Solutions, LLC in 2004, "Sheaffer's members provided cash equity of \$240,000.00 to purchase a certificate of deposit at Pinnacle Bank and a letter of credit was issued."⁴ The certificate of deposit allowed the Company to post a letter of credit in the amount of \$240,000.00 to comply with Rule 1220-4-13-.07. The *Petition* further states:

5. Sheaffer and Cartwright Creek investigated the posting of a bond as the preferred method of complying with the TRA financial security requirements. Typically, a bond would be posted by an insurance company on behalf of the utility, such bond not requiring a cash infusion by Cartwright Creek, but a 1%-2% fee to obtain a bond. It became evident in a very short time that no insurance company would issue a bond, in the form required by the TRA rules, without a dollar for dollar match by Cartwright Creek in cash to support that bond. Bonding companies were also requiring audited financial statements at costs between \$10,000.00 - \$15,000.00 to Cartwright Creek and its members, as well as personal guarantees, including the requirement that spouses sign personally. Unable to procure a bond, the members of Cartwright Creek contributed equity to Cartwright Creek in the amount of \$240,000.00 so that the appropriate financial security could be provided to the TRA.

6. Subsequent to the initial posting of the letter of credit in 2006, the Company has had no choice but to continue to renew the letter of credit as obtaining a bond was not possible. \$240,000.00 cash from owners that cannot be used for operating is a severe cash strain to any company.⁵

Based on these representations, the Company requested that the Authority enter an order approving an alternative form of financial security for the year July 2011 through June 30, 2012

² *In re: Petition for Approval to Transfer Cartwright Creek Utility Company, Inc.'s Authority to Provide Wastewater Utility Services to Cartwright Creek, LLC*, Docket No. 04-00307, *Order Approving Transfer of Authority* (December 10, 2004).

³ *In re: Petition of Cartwright Creek, LLC to Amend Its Existing Certificate of Convenience and Necessity to Provide Service to the Stillwater Development in Williamson County*, Docket No. 07-00180, *Order Approving Petition to Amend Certificate of Public Convenience and Necessity* (November 19, 2007).

⁴ *Petition*, p. 3.

⁵ *Petition*, pp. 5-6.

as follows:

1. The submission of a letter of credit in the amount of \$20,000.00.
2. The assignment of Cartwright Creek accounts receivable and collection rights under all service agreements with its customers.
3. A corporate guaranty of Cartwright Creek and Sheaffer Wastewater Solutions, LLC.⁶

TRA Rule 1220-4-13-.07

TRA Rule 1220-4-13-.07 requires that Authority regulated wastewater utilities maintain financial security, as follows, in pertinent part:

All public wastewater utilities either holding or seeking to hold a CCN and owning wastewater systems shall furnish to the Authority, prior to providing service to a customer, acceptable financial security using a format prescribed by the Authority. The public wastewater utility shall ensure that such financial security is maintained in continuous force in conformity to these rules.⁷

Further, the Rule provides a deadline for filing proof of security and specifies minimum standards as to the amount and form:

On or before July 1 of each year, public wastewater utilities holding a CCN and providing service shall file proof with the Authority of a security in the amount of one hundred percent (100%) of the gross annual revenue in the most recent Authority Form UD20 or \$20,000, whichever is greater. If no UD20 has been filed, the public utility shall file proof of security in the amount of one hundred percent (100%) of the estimated gross annual revenue forecasted in the CCN application submitted to the Authority or \$20,000, whichever is greater. Utilities holding a CCN and not providing a service shall provide a security in the amount of \$20,000.

...

Sufficient financial security shall be provided in one of the following manners:

- (a) A bond issued by any duly licensed commercial bonding or insurance company authorized to do business in Tennessee; or
- (b) An irrevocable letter of credit issued by a financial institution acceptable to the Authority.⁸

⁶ *Petition*, p. 4.

⁷ Tenn. Comp. R. & Regs. 1220-4-13-.07.

⁸ *Id.*

The use of an alternative form of security is conditioned upon approval by the Authority following a utility's observance of proper procedure:

If the public wastewater utility proposes to post financial security other than the type or amount permitted above, it must file with the Authority by May 1 of each year a petition requesting acceptance of the security. A hearing shall be held to determine the amount of the financial security and if the form of the proposed financial security serves the public interest. At this hearing, the burden of proof shall be on the public wastewater utility to show that the proposed financial security and the proposed amount will be in the public interest. The public wastewater utility shall comply with Rule 1220-4-13-.07(2) until the alternative financial security is approved by the Authority.⁹

Consideration of the *Petition* at the June 6, 2011 Authority Conference

This matter initially came before the voting panel at a regularly scheduled Authority Conference held on June 6, 2011. Company representatives were in attendance as follows:

Cartwright Creek, LLC: **Bruce Meyer**, Operations Vice President, Cartwright Creek, LLC, 1551 Thompson's Station Road West, Thompson's Station, TN 37179; and **Thomas L. Kolschowsky, Esq.**, Sheaffer Wastewater Solutions, LLC, 800 Roosevelt Road, Building A, Suite 120, Glen Ellyn, IL 60137.

During the Conference, in response to questioning by the panel, Mr. Kolschowsky, legal counsel for the Company, stated that the insurance companies that the Company had contacted would not provide bonding to satisfy TRA Rule 1220-4-13-.07. Therefore, in order to comply, the Company purchased a certificate of deposit in the amount of \$240,000.00 to back a letter of credit in that amount. He further stated that the certificate of deposit was set to mature at the end of June 2011.¹⁰ Mr. Meyer, who is responsible for operations, stated that the Company's system was about forty years old and, although in compliance with permitting requirements administered by the Tennessee Department of Environment and Conservation, would need to be upgraded in about a year at a cost estimated to be between two and four million dollars.¹¹

⁹ *Id.*

¹⁰ Transcript of Proceedings, Authority Conference (June 6, 2011), pp. 10-11.

¹¹ *Id.*, pp. 12-13, 15-16.

Mr. Meyer testified that the second item of the alternative financial security proposed by the Company would mean that the Company's accounts receivables, which are currently deposited with Pinnacle Bank, would be transferred to the Authority if the Company were to default on its obligation to provide wastewater services.¹² As to the third item proposed, a corporate guaranty, Mr. Kolschowsky stated that this would be a "guaranty of payment" in the form of a contract between the Company and the TRA.¹³ Upon further questioning by TRA General Counsel Richard Collier, Mr. Kolschowsky stated that the "guaranty" would be signed on behalf of LM Development, which is a member company of Sheaffer, by Michael Stahelin, who, with his brother Leland Stahelin, is a principal of Stahelin Properties, the company that owns Sheaffer.¹⁴ The effect of the "guaranty" was to be that if the Company defaulted, LM Development would reimburse the TRA any deficiency that remained after the Company's receivables had been transferred to the TRA. Mr. Kolschowsky ultimately conceded that the "guaranty" was an idea still in process.¹⁵

Chairman Roberson pointed out that the Company was several months behind in providing required financial reports and asked Mr. Meyer for information about the Company's financial status. Mr. Meyer stated that the Company had about \$350,000 a year in revenues, which was sufficient to meet expenses, but he was unable to state whether the Company was earning its authorized rate of return. Mr. Meyer agreed to communicate to management the TRA's request that the Company comply with the financial reporting requirements.¹⁶ Director Kyle asked the Company's representatives why they had not brought with them to the Authority the paperwork necessary to complete their filings and thus enable a full review of the Company's *Petition*. Mr. Kolschowsky stated that the Company had terminated its CFO in April 2011 and

¹² *Id.*, pp. 20-21.

¹³ *Id.*, pp. 21-23.

¹⁴ *Id.*, pp. 24-25.

¹⁵ *Id.*, pp. 25-27.

¹⁶ *Id.*, pp. 27-29.

that the paperwork would be filed within thirty days.¹⁷ Later, in response to Director Hill, Staff confirmed that, except for one report filed in March 2010, the Company had not filed quarterly reports as required since 2005, but the Company had filed all of its annual reports.¹⁸ On the question of security, Mr. Meyer stated in response to questioning from TRA Staff that the Company notified Pinnacle Bank that it did not want to renew the letter of credit.¹⁹

Following the conclusion of testimony and opportunity for public comment, Chairman Roberson moved that Staff and the Company continue to work together to determine an alternative financing arrangement that would meet the spirit of the law and the Authority's rules and to bring a joint proposal before the panel either during an Authority Conference or at the convening of a single-item panel before the end of June 2011. For clarification, Mr. Collier asked whether the letter of credit would remain in force pending resolution, in the event such occurred beyond July 1, 2011. Mr. Kolschowsky indicated that the existing letter of credit would remain in effect until this matter could be resolved. The panel voted unanimously in favor of this motion.²⁰

Consideration of the *Petition* at the July 11, 2011 Authority Conference

This matter came before the voting panel to hear and consider the *Petition* and for an update on the status of a joint proposal, as previously ordered, at a regularly scheduled Authority Conference held on July 11, 2011. Mr. Kolschowsky participated by telephone. Mr. Collier informed the panel that Staff and the Company had not reached an agreement as to an acceptable alternative form of financial security. Thereafter, Mr. Kolschowsky confirmed that there had been no agreement but requested additional time in which to work out the details of an alternative. Mr. Collier further stated that the Company had followed through on its stated

¹⁷ *Id.*, pp. 29-31.

¹⁸ *Id.*, pp. 36-37.

¹⁹ *Id.*, pp. 34.

²⁰ *Id.*, pp. 40-41.

intention to withdraw its existing letter of credit despite its June 6, 2011 assurances to maintain the security, and thus has had no financial security in place since July 1, 2011.²¹ Accordingly, because the Company has not provided security as required under the rule or received Authority approval for an alternative form of security, beginning July 1, 2011, the Company is out of compliance with Rule 1220-4-13-.07.²²

Mr. Collier advised the panel that Staff and the Company were “fairly far apart” in their negotiations.²³ After additional discussion, Mr. Kolschowsky stated that the Company was still willing to work with Staff to come to an agreement. Mr. Kolschowsky stated, “I feel if we have a couple of weeks that we will be able to come up with a solution.”²⁴ Chairman Roberson moved that the matter be placed on the agenda for the next Authority Conference, scheduled for August 1, 2011, that Staff and the Company work together to reach an agreement, and if unable to agree, present their final best offers five days before the Conference.²⁵ Prior to a vote on the motion, the Directors discussed the Company’s lack of security in the interim, that is, between July 1 and the August 1 Conference, during which time the Company would be out of compliance with Rule 1220-4-13-.07. Mr. Kolschowsky was then asked whether the funds that had been withdrawn from the Company’s certificate of deposit were liquid and available to be maintained as such as a form of interim security. Mr. Kolschowsky agreed with this request and stated that the Company would provide a letter affirming its assent. Thereafter, Chairman Roberson renewed his motion, which the panel passed unanimously.²⁶

²¹ Transcript of Proceedings, Authority Conference (July 11, 2011), pp. 66-69, 71.

²² The Company, therefore, is subject to penalties pursuant to Tenn. Code Ann. § 67-4-120, which “may be declared due and payable by the authority, upon complaint, and after hearing.”

²³ Transcript of Proceedings, Authority Conference (July 11, 2011), p. 70.

²⁴ *Id.*, p. 75.

²⁵ *Id.*, p. 76.

²⁶ *Id.*, pp. 75-80.

Letter from TRA General Counsel to Counsel for the Company

On July 15, 2011, a letter from Mr. Collier to Mr. Kolschowsky of that date was placed in the docket file in this matter. The letter confirms their telephone conversation of July 13, 2011 in which Mr. Kolschowsky stated that negotiations between the Company and Staff had come to an end.²⁷ In addition, the letter notes that the Company's position "is not consistent with its representations during the July 11, 2011 Authority Conference, where [Mr. Kolschowsky] asked the Directors to give Cartwright additional time to work with TRA staff on the basis that such would likely lead to a resolution of this matter."²⁸ The letter further states:

Irrespective of the breakdown of negotiations, of greater concern is the fact that Cartwright refuses to hold in pledge the \$244,000 which was withdrawn by Cartwright as the funds backing Cartwright's letter of credit. Cartwright proceeded to cancel that letter of credit as of July 1, 2011 without putting any financial security in its place. When this fact came to the attention of the panel presiding over this docket, Chairman Roberson and Directors Hill and Kyle, during the Authority Conference on July 11, 2011, the panel voted unanimously to require Cartwright to cure its noncompliance with TRA Rule 1220-4-13-.07 by using those funds (\$244,000) as Cartwright's security during the pendency of this docket. You informed me and TRA staff members Pat Murphy and Patsy Fulton on July 13, 2011 that Cartwright does not intend to secure the \$244,000 through a certificate of deposit, a letter of credit or holding it in a special account. In essence, Cartwright is refusing to follow the directive of the TRA that Cartwright maintain financial security while this proceeding is pending.²⁹

Consideration of the *Petition* at the August 1, 2011 Authority Conference

This matter again came before the panel at the August 1, 2011 Authority Conference, with Mr. Meyer attending personally and Mr. Kolschowsky participating by telephone. Chairman Roberson asked why the Company had not submitted a final best offer as directed, to which Mr. Kolschowsky replied that the Company's offer had been rejected by Staff and the

²⁷ Letter from Richard Collier to Thomas Kolschowsky, July 15, 2011, p. 1.

²⁸ *Id.*

²⁹ *Id.*

Company did not have another proposal that it wished to put forth for consideration.³⁰ Responding to Director Hill, Mr. Kolschowsky stated that the Company had no security in place and confirmed that, notwithstanding its agreement during the July 11, 2011 Conference to do so, the Company had not obtained a letter from Pinnacle Bank stating that the funds previously described as being held liquid were still being kept available to provide interim security pending resolution of the security issue.³¹

Before deliberations began, the Company requested another opportunity to meet with TRA Staff, and the docket was moved to the heel of the Conference agenda.³² Members of the Staff acting as a party in this matter then met with the Company's representatives outside the presence of the Directors. When the docket was called, and following the Staff's report that no agreement had been reached on the security issue, Chairman Roberson moved to require the Company to submit a bond or letter of credit in the amount of \$100,000 and meet the other conditions listed in its *Petition*, including the assignment of accounts receivables and collection rights and the furnishing of a corporate guaranty. This motion did not pass.³³ Director Hill then moved to deny the *Petition* and to direct the Company to obtain financial security in the amount of \$350,799 by August 12, 2011. Director Hill's motion passed by a two-to-one vote, with Chairman Roberson voting in opposition.³⁴

IT IS THEREFORE ORDERED THAT:

1. The *Petition* of Cartwright Creek, LLC for approval to file an alternative form of financial security under Rule 1220-4-13-.07 is denied.

³⁰ Transcript of Proceedings, Authority Conference (August 1, 2011), pp. 7-9.

³¹ *Id.*, pp. 9-14.

³² *Id.*, pp. 15-17.

³³ *Id.*, pp. 42-45.

³⁴ *Id.*, pp. 45-48.

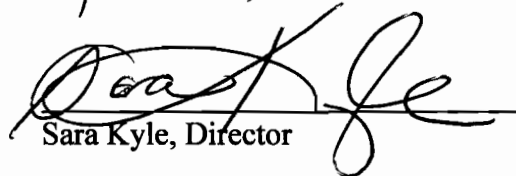
2. No later than **August 11, 2011**, Cartwright Creek, LLC shall file with the Authority a security bond or irrevocable letter of credit, in the form prescribed in Authority Rule 1220-4-13-.07, in the amount of \$350,799.

IT IS SO ORDERED.

Eddie Roberson, Chairman



Kenneth C. Hill, Director



Sara Kyle, Director

*** Chairman Roberson dissented from the decision of the majority of the panel. He noted his comments on the record during the August 1, 2011 Authority Conference as follows:

One of the reasons that I came up with the hundred thousand dollars instead of the larger amount is because I do believe that it is consistent with the flexibility that we have under Rule 1220-4-13-.07(5).

I'm also concerned about (7) of those rules where it allows the company to pass on the cost of this financial security to its customers. So I was reluctant to go the full monty, I guess, the full amount, because of the financial – or because of the economic times and the customer will have to pay for the financial security.³⁵

³⁵ *Id.*, pp. 47-48.