

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 7, 2013

IN RE:

**PETITION OF AQUA GREEN UTILITY INC. TO
IMPLEMENT TAP FEES**

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**DOCKET NO.
12-00004**

ORDER DENYING PETITION

This matter came before Vice Chairman Herbert H. Hilliard,¹ Director Kenneth C. Hill and Director Sara Kyle of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on November 8, 2012, to consider the *Petition of Aqua Green Utility Inc. to Amend Its Certificate of Convenience and Necessity* (“*Petition*”) filed by Aqua Green Utility, Inc. (“Aqua Green” or the “Company”) on January 23, 2012.

Background

Aqua Green received a Certificate of Public Convenience and Necessity (“CCN”) to operate a wastewater treatment plant in Tennessee on July 31, 2009.² On July 16, 2010, Aqua Green filed a petition to amend its CCN to expand its service territory to include Stonebridge on Douglas Lake (“Stonebridge”) in Jefferson County, Tennessee. In that petition, Aqua Green stated that the developer, Stonebridge on Douglas Lake, LLC, would pay for all costs of constructing the

¹ Director Mary W. Freeman was assigned to the panel and participated in the Hearing held on February 27, 2012. Thereafter, Director Freeman left the agency and Vice Chairman Herbert H. Hilliard was assigned to the panel and reviewed the existing record prior to deliberations pursuant to Tenn. Code Ann. § 4-5-314. See Transcript of Proceedings, p. 35 (November 8, 2012).

² See *In re: Petition of Aqua Green Utility, Inc. to Obtain a CCN for the Service of the Part of Jefferson County, Tennessee Known as The Peninsula Previously Known as Parrott Bay*, Docket No. 09-00045, *Order Approving Petition for Certificate of Public Convenience and Necessity* (July 31, 2009).

wastewater treatment system.³ Advanced Septic, Inc. (“Advanced Septic”), which was constructing the system, was also owned by Mr. Dart Kendall, president of Aqua Green.⁴ Aqua Green noted that the developer had paid in-full all bills for Stonebridge as of June 17, 2011, and had previously paid for another project in-full.⁵ Further, Aqua Green stated that in the event the developer did not honor the payment arrangements as set forth in the contract, legal action could be taken against the developer for breach of contract.⁶

At the time of the CCN petition, over 100 lots had been sold, and six homes were either complete or under construction.⁷ The Stonebridge homeowners were using an expensive “pump and haul” system until the wastewater system was constructed.⁸ Although the CCN petition stated that the wastewater treatment system would be built to service 107 homes, the Tennessee Department of Environment and Conservation (“TDEC”) approved a State Operating Permit for 50 homes based on the useable soil area.⁹ Aqua Green stated that the developer had been informed that additional land was needed for the system and that the developer would be required to purchase that

³ See *In re: Petition of Aqua Green Utility Inc. to Amend Its CCN and Expand Its Service Area to Include a Portion of Jefferson County in Tennessee, Known as Stonebridge on Douglas Lake*, Docket No. 10-00145, *Petition*, p. 2 (July 16, 2010).

⁴ See *In re: Petition of Aqua Green Utility Inc. to Amend Its CCN and Expand Its Service Area to Include a Portion of Jefferson County in Tennessee, Known as Stonebridge on Douglas Lake*, Docket No. 10-00145, *Amended Pre-filed Testimony of Dart Kendall*, pp. 1-2 (August 4, 2011).

⁵ See *In re: Petition of Aqua Green Utility Inc. to Amend Its CCN and Expand Its Service Area to Include a Portion of Jefferson County in Tennessee, Known as Stonebridge on Douglas Lake*, Docket No. 10-00145, *Data Response* (June 27, 2011).

⁶ *Id.* at 5.

⁷ *Id.* at 1.

⁸ See *In re: Petition of Aqua Green Utility Inc. to Amend Its CCN and Expand Its Service Area to Include a Portion of Jefferson County in Tennessee, Known as Stonebridge on Douglas Lake*, Docket No. 10-00145, *Data Response* (June 27, 2010).

⁹ See *In re: Petition of Aqua Green Utility Inc. to Amend Its CCN and Expand Its Service Area to Include a Portion of Jefferson County in Tennessee, Known as Stonebridge on Douglas Lake*, Docket No. 10-00145, Letter from TDEC to Dart Kendall (December 14, 2010) and State Operating Permit (March 29, 2011).

land pursuant to the contract with Aqua Green.¹⁰ Aqua Green asserted that the system should be completed approximately 60 days after approval of the CCN.¹¹

The Authority approved Aqua Green's request to expand its CCN to include Stonebridge, conditioned upon Aqua Green's receiving approval of its engineering plans from TDEC. Aqua Green was also directed to file monthly reports with the Authority detailing the progress of the system build-out, including documentation of the funds provided, until the system was completed.¹²

Beginning with its first report, dated September 30, 2011, Aqua Green stated that as of August 2011, the developer had stopped making payments.¹³ On January 23, 2012, Aqua Green filed the *Petition* for approval of a tap fee, which is the subject of this docket, as further explained below.

The Petition

Aqua Green filed the *Petition* on January 23, 2012, requesting that it be allowed to assess a \$4,250 tap fee to lot owners in order to fund the remaining construction.¹⁴ The *Petition* indicates that the developer has not paid the most recent invoices for construction and will not return any telephone calls or other forms of communication.¹⁵ Aqua Green further states: "Per the terms of our contract, [the developer] is in breach of contract and Advanced Septic Inc. nor Aqua Green Utility Inc. has no obligation to continue working on the sewer."¹⁶ The *Petition* further indicates that an

¹⁰ See *In re: Petition of Aqua Green Utility Inc. to Amend Its CCN and Expand Its Service Area to Include a Portion of Jefferson County in Tennessee, Known as Stonebridge on Douglas Lake*, Docket No. 10-00145, *Amended Pre-filed Testimony of Dart Kendall*, pp. 2-3 (August 4, 2011).

¹¹ *Id.* at 3.

¹² See *In re: Petition of Aqua Green Utility Inc. to Amend Its CCN and Expand Its Service Area to Include a Portion of Jefferson County in Tennessee, Known as Stonebridge on Douglas Lake*, Docket No. 10-00145, *Order Approving Amended Certificate of Public Convenience and Necessity*, p. 4 (October 11, 2011).

¹³ See *In re: Petition of Aqua Green Utility Inc. to Amend Its CCN and Expand Its Service Area to Include a Portion of Jefferson County in Tennessee, Known as Stonebridge on Douglas Lake*, Docket No. 10-00145, *Update on Stonebridge Project* (October 21, 2011). Reports on the build-out of the system were filed with the Authority on October 21, 2011, December 7, 2011, February 8, 2012, March 19, 2012, May 4, 2012, June 11, 2012, July 6, 2012, and August 10, 2012.

¹⁴ *Petition*, p. 1 (January 23, 2012). The cost of the tap fee will increase 6% 90 days after TRA approval and 6% per year thereafter.

¹⁵ *Id.*

¹⁶ *Id.*

agreement has been worked out with the homeowners association to collect the requested tap fee and transfer the money to Advanced Septic as construction is completed.¹⁷ Once plant construction is complete, Aqua Green will assume operation and responsibility along with ownership of all components of the system and drip field property.¹⁸ Because only 50 homes are approved by TDEC, Aqua Green will accept customers on a “first to pay the tap fee” basis.¹⁹ Aqua Green also states that if someone decides not to pay the tap fee, the Company will not allow that person to connect to the system.²⁰

Aqua Green indicated in a data response that Advanced Septic had no expectation of collecting the monies owed to it by the developer and did not intend to take any legal action for breach of contract.²¹ In addition, the Company declined to answer the Authority’s questions concerning the construction costs to complete the system, asserting that the information was proprietary and that its affiliate, Advanced Septic, is not a regulated corporation and is “not subject to open records laws.”²²

THE HEARING

The Hearing in this matter was held on February 27, 2012 during a regularly scheduled Authority Conference and was duly noticed on February 17, 2012. Mr. Dart Kendall, president of Aqua Green, presented testimony and was subject to questions from the panel and Authority Staff. Mr. Michael Sorrells, a representative of the Stonebridge homeowners, also presented comments during the Hearing.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Data Response*, pp. 2-3 (February 10, 2012).

²² *Data Response*, pp. 1-2 (March 5, 2012).

During the Hearing, Mr. Kendall confirmed that Advanced Septic was not pursuing legal action against the developer.²³ In addition, Mr. Kendall did not answer Authority Staff's questions concerning the costs to complete the system.²⁴ Upon conclusion of the Hearing and public comment, the panel unanimously voted to take the matter under advisement and to schedule deliberations at a later date.

PETITION TO INTERVENE

On April 3, 2012, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed a *Petition to Intervene for Purposes of Service and Notice* ("*Petition to Intervene*"). The *Petition to Intervene* states that the Consumer Advocate does not request a contested case, but rather seeks intervention in order to receive notice and service in order to monitor the developments of this docket and assist, if possible, in the resolution of this matter."²⁵

FINDINGS AND CONCLUSIONS

The panel deliberated this matter during its Authority Conference on November 8, 2012.²⁶ The panel found that the funding obligation to build the system remains with Advanced Septic. However, Advanced Septic has chosen not to pursue legal action against the developer who has refused to pay for the system. Mr. Kendall, who owns Advanced Septic, requests to impose the funding obligation on the customers of the public utility, Aqua Green.²⁷ These fees would flow directly to Advanced Septic for construction of the facility. Therefore, approval of these proposed

²³ Transcript of Proceedings, pp. 25-26 (February 27, 2012).

²⁴ *Id.* at 63-66. TRA Staff repeated these questions related to costs to complete the system in data requests issued on February 29, 2012 and on August 2, 2012.

²⁵ *Petition to Intervene for Purposes of Service and Notice*, p. 2 (April 3, 2012).

²⁶ The matter was also noticed for deliberations during the March 26, 2012 Authority Conference but was removed from the Conference agenda at the request of the Company.

²⁷ The panel suggested potential alternative solutions for completion of the system, including a voluntary direct payment by the homeowners and lot owners to Advanced Septic to complete construction, and for Aqua Green to borrow money to complete construction and then charge a tap fee for reimbursement of costs. *See* Transcript of Proceedings, pp. 37-38 (November 8, 2012).

tap fees would take regulated ratepayer money and give it directly to an affiliated company without any regulatory oversight of the relevant costs by the Authority. Moreover, the term “tap fee” in utility ratemaking generally means a fee paid to tap onto a system when completed and is not an accepted mechanism for fronting the cost of the utility.

In addition, Aqua Green has not provided any specific cost information related to the completion of the system, asserting that because its affiliate, Advanced Septic, is a non-regulated entity, such information is confidential. Therefore, even if the Authority were to approve the setting of a tap fee, the panel found that it lacked the information necessary to establish a fair and reasonable fee.

The panel also found that the *Petition to Intervene* filed by the Consumer Advocate was filed after the date of the hearing, and, therefore, was not timely filed pursuant to Tenn. Code Ann. § 4-5-310(a)(1). The panel then declined to exercise its discretion pursuant to Tenn. Code Ann. § 4-5-310(b) and denied the *Petition to Intervene*.²⁸

IT IS THEREFORE ORDERED THAT:

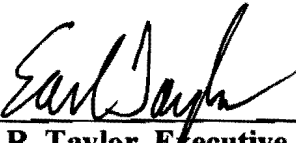
1. The *Petition of Aqua Green Utility Inc. to Amend Its Certificate of Convenience and Necessity filed by Aqua Green Utility, Inc.* is denied.
2. The *Petition to Intervene for Purposes of Service and Notice* filed by the Consumer Advocate and Protection Division is denied.
3. Any party aggrieved by the Authority’s decision in this matter may file a Petition for Reconsideration with the Authority within fifteen days from the date of this Order.

²⁸ Tenn. Code Ann. § 4-5-310(a)(1) requires the granting of a request for intervention only if the petition is submitted in writing at least seven days before the Hearing. The Authority has discretion to grant an intervention at any time pursuant to Tenn. Code Ann. § 4-5-310(b), but declined to do so in this instance.

4. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty days from the date of this Order.

Vice Chairman Herbert H. Hilliard and Director Kenneth C. Hill concur. Director Sara Kyle voted with the majority, but resigned her position prior to the issuance of this order.

ATTEST:



Earl R. Taylor, Executive Director