

Wastewater Systems v. Tennessee Regulatory Authority, Caryville-Jacksboro Utility Commission and Emerson Properties, Docket 12-0143-II, Davidson County Chancery Court, January 7, 2013 (attached as an exhibit to the "Answer" filed by TWSI on March 27, 2013).

In addition, it is important to note that the certificate of convenience and necessity issued by the TRA to TWSI to provide wastewater service at Villages of Norris Lake (Docket No. 06-00277, Order issued April 11, 2007) states that the developer, not TWSI, will pay the initial costs of constructing the wastewater system. The Order states (at 3), "The estimated contributed capital from the developer is \$3,000,000¹]; therefore limited funding is needed by TWS to construct the initial wastewater system. TWS is responsible for any future additions to its infrastructure." The certificate also states that TWSI "will own the collection, treatment, and dispersal system and a permanent easement to the property occupied by the system." *Id.* In other words, the certificate states that the developer will pay for construction of the system and turn the completed system over to TWSI as "contributed capital." The utility will record it as a contribution in aid of construction *ie.*, a contributed asset that is free and clear of encumbrances. During the hearing, TWSI witness Mr. Charles Hyatt further explained that this is the business model TWSI has followed for each of its seventy wastewater systems, that TWSI itself does not raise capital or construct systems, and that TWSI's tariffs do not include "tap fees" and are not designed to recover the cost of raising capital or to provide recovery of a capital investment.

Argument

It is undisputed that TWSI's certificate to provide wastewater service at Villages of Norris Lake cannot be revoked unless the utility "demonstrates an unwillingness, incapacity, or

¹ As explained in the Order, this figure is the cost of building a system to serve the entire development, which originally included 540 residential lots and 60 commercial lots. To the extent Emerson is now planning a smaller development, the cost of the system will be proportionally less.

refusal to effectively operate and/or manage the wastewater system(s) in compliance with these rules and Tennessee statutes." TRA Rule 1220-4-13-.09(1) Dispute over other matters such as the rates, terms and conditions of service (see T.C.A. § 65-5-101) or the company's obligation to extend service to unserved areas (see T.C.A. § 65-4-114) may be brought before, and settled by, the Authority. Nothing, however, warrants the termination of a utility's certificate other than the utility's inability or unwillingness to provide service in accordance with its legal obligations.

Emerson offers two arguments why TWSI's certificate should be revoked. First, Emerson relies on TRA Rule 1220-4-13-.06(4), which states that if wastewater service has not been provided within two years after the date of authorization "whether or not there has been a demand for such service," the Authority "may require the public wastewater utility to demonstrate that it intends to provide service in the area and part thereof or that based on the circumstances of a particular case, there should be no charge in the certificated area, to avoid revocation or amendment of a CCN." The rules also state that any such proceeding by the Authority "to revoke or amend a CCN shall be taken in accordance with Tenn. Code Ann. § 65-2-106 [authorizing the Authority to issue show cause orders]." Emerson argues that TWSI's certificate can be revoked pursuant to this rule because more than two years have passed since the issuance of TWSI's certificate in 2007 and no wastewater service is being provided.

This rule does not apply to Emerson's complaint. First, this is not a "show cause" proceeding brought by the Authority pursuant to T.C.A. § 65-2-106. In order for the Authority to revoke TWSI's certificate pursuant to this rule, the agency must conduct a "preliminary investigation," issue a show cause order that "fully and specifically state[s] the grounds thereof," and otherwise comply with the requirements of T.C.A. § 65-2-106. That has not happened. Second, if the Authority were to conduct a "preliminary investigation," TWSI would

demonstrate—again—that it intends to provide service to this area in accordance with the terms of its certificate and tariffs as soon as the developer, Emerson Properties, pays for the construction of the system. That is what the certificate and tariffs require. Implicit in Emerson's argument is the demand that TWSI must build the system without charge to the developer and that TWSI's failure to raise money and construct a system for free (free, at any rate, to Emerson) is grounds for revocation of TWSI's certificate. It is a frivolous argument.

Emerson also claims that the TRA should revoke TWSI's certificate because TWSI is not in compliance with TRA Rule 1220-04-13-.10(1). That rule states that the physical assets "managed or operated" by a wastewater utility "shall not be subject to any liens, judgments, or encumbrances, except as approved by the Authority pursuant to Tenn. Code Ann. § 65-4-109." The only provision for revocation of a certificate for violation of this rule is found in Section 1220-4-13-.09 et seq. "Procedure for Suspension or Revocation of CCN. . . ." Those procedures state, "Proceedings before the Authority for suspension or revocation of a public wastewater utility's CNN . . . shall be conducted in accordance with Tenn. Code Ann. § 65-2-106 [providing for the issuance of show cause orders]."

Here again, this is not a "show cause" proceeding initiated by the agency based upon a "preliminary investigation" as required by T.C.A. § 65-2-106. Furthermore, any such preliminary investigation would show that TWSI does not currently "manage or operate" any physical assets of a wastewater system at this location and therefore has not violated—and could not have violated—Rule 1220-4-13-.10(1). Emerson, though, appears to argue that TWSI will be unable to comply with the rule in the future. All of the property in the development has been mortgaged to a local bank, according to Emerson. Since the TRA did not approve that mortgage, Emerson seems to be saying that even if Emerson turns over the system to TWSI, the utility will

become the owner of a system that has already been mortgaged without TRA approval. That, according to Emerson, would violate Rule 1220-4-13-.10(1) and warrants revocation of TWSI's certificate.

This convoluted argument is, in essence, another iteration of Emerson's first issue. As previously discussed, TWSI's certificate requires the developer to pay for construction of the system and turn it over to TWSI as "contributed capital." Once TWSI assumes ownership of the system, TWSI may not mortgage those assets without TRA approval. But Emerson cannot use its own unwillingness or inability to pay for the system and grant unencumbered ownership to TWSI as grounds for claiming that TWSI cannot comply with the rule. This is just another way of saying that TWSI should lose its certificate because Emerson cannot, or will not, pay the cost of completing the system. It is, again, a completely frivolous issue.

Arguments of the Consumer Advocate

Given the Consumer Advocate's last minute and limited participation in the hearing, it is not clear what, if any, arguments the Advocate will make on the merits of Emerson's complaint. The Advocate's cross-examination of Emerson's witness, Mr. George Potter, elicited relevant information explaining, if not justifying, why Mr. Potter filed this complaint. The witness acknowledged that he had met with TWSI a year ago, found the company's representative cooperative, but did not want to negotiate an agreement with TWSI solely because of a disagreement two or three years earlier with Mr. Mike Hines, a TWSI executive who independently operated a utility construction company and believed that Emerson owed money to that company. Instead of talking to others at TWSI or taking his complaint to the Authority, Mr. Potter decided to find an alternative wastewater provider. He continued that effort even after the Chancery Court held that TWSI's certificate remained in effect following the bankruptcy of

the first developer and after learning that TWSI no longer employed Mr. Hines and had no interest in a dispute between Emerson and Mr. Hines' construction company. In the meantime, Mr. Potter collected bond money earmarked for construction of the wastewater system and apparently spent much of it on other infrastructure improvements. It is not clear from the testimony if Emerson can afford to complete the system or why Emerson believes that initiating a lengthy revocation proceeding will be quicker or cheaper than negotiating an agreement for service with TWSI. Whatever is left of the bond money will presumably now be spent toward the completion of the wastewater system, which will eventually be managed by either TWSI or CJUC. Of course, neither utility is going to pay the costs of completing construction of the system, regardless of the outcome of this case.

Finally, the Advocate's cross-examination of TWSI's witness, Mr. Charles Hyatt, elicited the fact that TWSI is not willing to pay to complete construction of the wastewater system. As discussed above, Mr. Hyatt testified that TWSI does not construct systems or raise capital to construct systems. He also explained to the Advocate that TWSI's tariffs do not include "tap fees" nor are the rates designed to recover the costs of raising capital or building wastewater systems. The Advocate's questions indicate that she may not have known that TWSI's certificate states that the developer, not TWSI, is responsible for the initial construction of the system. Mr. Hyatt's testimony is consistent with the terms of the certificate.

Conclusion

For these reasons, Emerson's complaint should be dismissed. The counterclaim brought by TWSI may also be dismissed in light of Mr. Potter's sworn testimony that construction has been halted and that tap fees collected from the lot owners are being held in escrow pending the outcome of this dispute.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2013, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

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