filed electronically in docket office on 12/09/13

IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
AMENDED PETITION OF EMERSON PROPERTIES, LLC FOR REVOCATION OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY HELD BY TENNESSEE WASTEWATER SYSTEMS, INC. FOR THE PORTION OF CAMPBELL COUNTY, TENNESSEE, KNOWN AS THE VILLAGES OF NORRIS LAKE, PURSUANT TO TENN. CODE ANN. § 65-4-201	)	**DOCKET NO. 13-00017**

POST-HEARING BRIEF OF THE CONSUMER ADVOCATE

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate"), respectfully submits this Post-Hearing Brief in Tennessee Regulatory Authority ("TRA" or "the Authority") Docket No. 13-00017.

I. INTRODUCTION

At first, this case presented itself as a matter between two companies wanting to serve the same area, neither of which appeared to pose a threat to the public interest. After hearing the arguments from the motion to dismiss, reading the pre-filed testimony, and listening to the adverse effects on concerned consumers, however, it became apparent this dispute does substantially affect the public interest. Based on the facts and circumstances in this case, the Consumer Advocate believes that allowing the law to provide only Tennessee Wastewater Systems Inc. ("TWSI") with the privilege of serving the area at issue known as the Villages at Norris Lake ("VNL" or "Villages") is not in the public interest. Consequently, the Consumer

Advocate recommends that the TRA either (1) revokes TWSI's certificate of public convenience and necessity ("CCN") for the service area of the Villages or, alternatively, (2) find the public interest requires additional services for the Villages, that TWSI does not have a preference for serving the area, and that entities other than TWSI may provide wastewater services.

A CCN is a privilege, not an immutable right. The U.S. Supreme Court has described the purpose of the CCN process: "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority." *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *see also W. Radio Communic., Inc. v. Two-Way Radio Serv. Inc.*, 718 P.2d 15, 21 (Wyo. S.Ct. 1986) ("The public interest is to be given paramount consideration; desires of a utility are secondary."); *Hohorst v. Greenville Bus Co.*, 17 N.J. 131, 146 (N.J. S.Ct. 1954) ("The incidental adverse effects on operators of the existing services may readily be justified by the significant furtherance of the paramount public interest and they in nowise constitute any unconstitutional deprivation of property.").

Although Tenn. Code Ann. § 65-4-201 requires only public utilities, as defined by Tenn. Code Ann. § 65-4-101, to have a CCN, other entities that are not considered a "public utility" can provide utility service pursuant to statutes outside of the TRA jurisdiction. The TRA does not choose which entity will best provide service: a public utility under its jurisdiction or a non-utility outside of its jurisdiction. Rather, the TRA has the statutory authority to determine whether a public utility is serving the public interest pursuant to its CCN. If a public utility fails to serve the public interest, the TRA has the authority (and, arguably, the duty) to revoke or amend the CCN to allow for additional services by other entities that can and will serve the

public interest. *See, e.g.*, Tenn. Code Ann. § 65-4-202; § 65-4-203; and TRA Rule 1220-04-13-.06.

The statutes allow for the TRA to revoke or amend the CCN by setting the standards for the TRA to issue a CCN to another public utility (see Tenn. Code Ann. § 65-4-202 and § 65-4-203); but another CCN is not being sought in this case. Rather, the wastewater system being built to serve the Villages is intended to go to a non-profit utility homeowner's association ("HOA") serving its members. The current CCN granted to TWSI has hindered the HOA's pursuit of securing services from Caryville-Jacksboro Utility Commission ("CJUC"), an experienced municipal utility service provider. Under Tenn. Code Ann. § 6-51-301(a)(1), municipalities, such as CJUC, are prohibited from providing utility service outside of their municipal boundaries "when all of such area is included within the scope of a certificate or certificates of convenience and necessity or other similar orders of the Tennessee regulatory authority or other appropriate regulatory agency outstanding in favor of any person, firm or corporation authorized to render such utility water service."

Although this action was brought by Emerson Properties, LLC ("Emerson") to revoke TWSI's CCN, this action ultimately presents the TRA with the issue of whether TWSI can serve the public interest or whether additional services are needed. The evidence clearly shows that TWSI is providing no service to the Villages, and that TWSI is unable to provide service unless Emerson gives TWSI a system. Thus, the Villages require another service provider. The most efficient and effective means to accomplish the allowance of another service provider to the Villages is to revoke TWSI's CCN; such revocation eliminates further litigation brought by TWSI asserting that it has preference or favor to provide services or any other question of whether Tenn. Code Ann. § 6-51-301(a)(1) prevents CJUC from providing service.

II. BACKGROUND

TWSI is a public utility that provides wastewater service pursuant to its CCN, issued by the TRA's predecessor, the Tennessee Public Service Commission, in Docket No. 93-09040 on April 6, 1994. Since the issuance of its original CCN, TWSI petitions the TRA for amendment to the CCN—as opposed to a new CCN altogether—when it wants to expand its service area. The TRA approved the amendment to the CCN expanding TWSI's service area to the Villages in Docket No. 06-00277 on January 8, 2007. *Order Approving Petition to Amend Certificate of Public Convenience and Necessity*, Docket No. 06-00277, pg. 3 (Apr. 11, 2007). This petition for the amendment was based on the evidence that Land Resources Company ("Land Resources"), the developer of the Villages at the time, requested TWSI to provide wastewater service and that the nearby municipality and utility district stated they did not intend to provide wastewater services in the next 12 months. *See id.*

The order also noted that TWSI stated "the system should be completed within approximately 60 days" after receiving all required approvals. *Id.* TWSI obtained its permit approval from the Tennessee Department of Environment and Conservation ("TDEC") on February 28, 2007, with an effective date of April 1, 2007. *Response of Emerson Properties, LLC to the Motion to Dismiss Filed by Tennessee Wastewater Services, LLC*, Docket No. 13-00017, Ex. A, pg. 1 (Apr. 30, 2013). Despite having the necessary approvals, the system was not completed within the 60 days indicated in the order approving its CCN. Indeed, the system remains incomplete to this day, nearly seven years later.

In mid-2008, Land Resources filed for bankruptcy. *Direct Testimony of George L. Potter on Behalf of Emerson Properties, LLC*, Docket No. 13-00017, pg. 2 (Oct. 11, 2013). In February 2009, Emerson acquired the property out of bankruptcy. *Id.* Ex. 1. Although companies go bankrupt for many reasons, there is one common characteristic in all bankruptcies: the bankrupt

company had problems. This case was no different. After acquiring the property, Emerson began tackling the problems. One problem was getting the bond money. Tr. 43-44. The county had called the bonds six months earlier, but the bond company indicated it would not pay. Tr. 43-44. Some of the infrastructure projects were over-bonded, and many were under-bonded. Tr. 94-95. The bonding company only pays out the amount actually spent up to the bond amount; so Emerson would not receive any additional funds from the over-bonded infrastructure, but it would have to pay the shortfall of the under-bonded infrastructure. Tr. 71-72. Emerson worked with the bond company to come to a settlement that gave Emerson $6.5 million of the $10.9 million. Tr. 94-95. Emerson used the bond money to develop the infrastructure, including fixing some of the infrastructure already built like moving a road that encroached on a private lot by 15 feet. Tr. 62-64, 75.

Emerson also found problems with the land that could be developed, which resulted in a change to the location of the wastewater treatment plant. Originally, the property was supposed to have 650 lots that could be developed. Tr. 47. After evaluating the terrain, Emerson found only about 400 lots could be developed. Tr. 61. Emerson began working with lot owners to trade the lots on terrain that was too difficult to develop with lots that would be developed. Tr. 66-67; *Direct Testimony of George L. Potter on Behalf of Emerson Properties, LLC*, Docket No. 13-00017, pg. 5 (Oct. 11, 2005). Emerson changed the location of the wastewater treatment plant from TWSI's designs, which had the plant in the area of the undevelopable lots to a location that could be developed and serve consumers effectively and efficiently. Tr. 66. After all was said and done, Emerson purchased 650 lots out of bankruptcy and ended up with 400 lots that could be developed, a reduction of nearly 40% of the lots that could be developed.

The completion of the wastewater system and working with TWSI presented itself as just another problem that Emerson needed to solve. Emerson's first interaction with TWSI was with

Mr. Mike Hines (Tr. 50) who was Vice President of TWSI at the time and provided services and maintenance for TWSI until at least September 30, 2012.[1] Tr. 113. Emerson had an unpleasant conversation with Mr. Hines, in which it became apparent that TWSI was not going to help solve any problems. Tr. 50; *Direct Testimony of George L. Potter on Behalf of Emerson Properties, LLC*, Docket No. 13-00017, pgs. 3-8 (Oct. 11, 2005). There was no other contact from TWSI other than infrequent contact from Mr. Hines for nearly four years. Tr. 50-51; 124. Accordingly, Emerson decided that it would work with another utility service provider. Tr. 48. It found Caryville-Jacksboro Utility Commission ("CJUC") was willing to help design, construct, and manage the wastewater services. Tr. 48-49. CJUC and Emerson worked together on the TDEC permit. Tr. 48-49. When issuing the permit, TDEC told Emerson that the CJUC permit for the Villages was the most highly scrutinized permit to date. Tr. 48-49. At this time, both CJUC and TWSI hold TDEC permits to allow either entity to provide wastewater service to the Villages. *Letter from TDEC*, Docket No. 13-00017 (Nov. 22, 2013).

At some point, TWSI became aware that Emerson intended to work with CJUC as the wastewater service provider for the Villages. Instead of reaching out to Emerson to discuss the issue, however, TWSI filed a petition for a declaratory order at the TRA and subsequently the Chancery Court requesting an order prohibiting CJUC from providing services to the Villages under Tenn. Code Ann. § 6-51-301 because TWSI had a CCN.[2] *See Petition*, Docket No. 11-00199 (Nov. 16, 2011); *see also* Tr. 124 (showing Mr. Hyatt agreed the first contact since TWSI's contact through Mr. Hines in 2009 was in December 2012). The Chancery Court issued

[1] The record is devoid as to whether Mr. Hines or any of the companies he works at or is an officer of continued to work with TWSI as one of TWSI's preferred contractors.

[2] TWSI did not provide notice and service to the Consumer Advocate in either TRA Docket No. 11-00199 or the ensuing Chancery Court case, Docket No. 12-0143-II.

a declaratory order that stated TWSI's CCN survived bankruptcy and that the TRA has the power to award, amend, or revoke a utility's CCN.[3]

As is typical of property out of bankruptcy, Emerson obtained the property free and clear of any contracts or encumbrances. *Id.* Ex. 1 & Ex. 2. Meaning, any amounts that would have been due TWSI from its dealings with Land Resources were dealt with in the bankruptcy proceeding and did not encumber the property under Emerson's ownership. Moreover, the contracts with TWSI and another company, Utility Capacity Corporation ("UCC"), were specifically rejected during bankruptcy. *Id.* Ex. 2. TWSI does not have any easements in or ownership of the land upon which the system would sit. Tr. 96, 131 (Nov. 25, 2013). Nor does TWSI have any bonds for the Villages area since its bonds are based on the utility's annual revenue and TWSI has no revenue for the Villages.[4] TWSI also has no legal interest in any of the partial sewage system that has already been constructed. Tr. 131. In addition, Emerson has stated that it intends to build the system and give it to the non-profit homeowners' association serving its members in the Villages. Tr. 18, 74. Emerson has also stated that it has no intention of contracting with TWSI or giving TWSI the wastewater system, land, or easements. Tr. 73.

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[3] As TWSI has pointed out many times, based on the arguments presented, the Chancery Court declaratory order indicated TWSI had an exclusive right to provide public wastewater services to the Villages. *Answer to the Petition, Motion to Dismiss the Petition, and Counterclaim by Tennessee Wastewater Systems, Inc. Against Emerson Properties, LLC*, Docket No. 13-00017. Ex. 1, pf. 4 (Mar. 27, 2013). Although the language sounds broad, a court can issue orders only to the extent it has jurisdiction. The Chancery Court's jurisdiction was pursuant to Tenn. Code Ann. § 4-5-225 because the TRA declined to interpret Tenn. Code Ann. § 6-51-301 in Docket No. 11-00199, but the TRA did not decline to interpret the CCN. The Chancery Court's jurisdiction to interpret the CCN was limited to the extent necessary to interpret Tenn. Code Ann. § 6-51-301. *See Initial Order Declining to Accept or to Set Petition for Declaratory Ruling for Hearing*, Docket No. 11-00199, pg. 4-5 (Jan. 11, 2012). Moreover, the broad interpretation of the Chancery Court's order that TWSI uses appears to be inconsistent with the TRA's previous order finding CCNs are not exclusive. *Order Affirming Hearing Officer's Findings and Conclusions in Initial Order Issued February 4, 2005*, Docket No. 03-00329, pg. 11 (May 16, 2006) ("The holder of a CCN for the provision of wastewater treatment services does not enjoy an exclusive right to provide such services within the certificated area."). The extent of the exclusivity of the CCN in the past is an issue that does not need to be decided by the TRA to resolve this case. Nevertheless, nothing in this brief should be construed as the Consumer Advocate waiving its right to petition the Chancery Court to clarify its order.

[4] *See Order Approving Alternative Financial Security*, Docket No. 11-00187 (Dec. 19, 2011) (approving a bond valued at 80% of TWSI's annual revenues as an alternative financial security to satisfy the requirements of TRA Rule 1220-4-13-.07(5)).

Even though TWSI has no investment in the property or the wastewater system, and it has no contracts, TWSI wants the TRA to compel Emerson to contract with it, construct the system, and give the system free of charge to TWSI to allow it to service the Villages. *See, e.g., Answer to the Petition, Motion to Dismiss the Petition, and Counterclaim by Tennessee Wastewater Systems, Inc. Against Emerson Properties, LLC*, Docket No. 13-00017 ¶ 17 (Mar. 27, 2013). Thus, from Emerson's perspective, the contact from TWSI from 2009 to date—or nearly five years—has been consistently hostile, litigious, and little more than an attempt to strong-arm Emerson into dealing with TWSI under the sole argument that TWSI is entitled to serve the area because it holds the CCN. Since TWSI has stated that it does not intend to build its own system (Tr. 117-18; *see also* Tr. 106 ("We do not build systems.")), TWSI's sole basis that it will acquire the system from Emerson is that it has a CCN and no other entity has one. That is, TWSI believes that Emerson will eventually have to give TWSI the system for no payment because, according to TWSI, no other entity can operate in its territory.

While the parties remain in a holding pattern of litigation, the lot owners of the Villages wait. There is a sewer system that is eight to ten weeks away from completion and serving the Villages, weather permitting. Tr. 7. The value of the lots, which is 80-90% less than what it was pre-bankruptcy and continued to lose value for years after bankruptcy, will remain devalued until the sewer system is completed. Tr. 20-24. Owners who build on their property are faced with the burden of paying for expensive pump-and-haul services. Tr. 25-29. Economic development for this community is at a stand-still pending a solution to the problem of who may provide utility service. Tr. 7-24. The lot owners suffer losses both personally and financially awaiting the completion of the system and have a personal interest in who provides their sewer system. Tr. 7-24. In addition to the loss from lots that cannot be developed, if Emerson went along with TWSI's demand that it give TWSI the system, Emerson would face increased costs to pay more

for a sewer system just to meet TWSI's more expensive specifications. Tr. 79, 85; *Rebuttal Testimony of Charles Hyatt*, Docket No. 13-00017, pg. 4 (Oct. 25, 2013) ("[A]ny construction work that is not consistent with our specifications and with the treatment technologies used by TWSI will have to be redone."); *Order Approving Petition to Amend Certificate of Public Convenience and Necessity*, Docket No. 06-00277, pg. 3 (Apr. 11, 2007) (indicating the system under TWSI's specifications would cost $3 million). In contrast to the personal and financial investments of the lot owners and Emerson, TWSI has admitted to having no financial investment in the property or the sewer system. *See, e.g.,* Tr. 131; *Answer to the Petition, Motion to Dismiss the Petition, and Counterclaim by Tennessee Wastewater Systems, Inc. Against Emerson Properties, LLC*, Docket No. 13-00017 ¶ 17 (Mar. 27, 2013). Emerson, with the support of the HOA and its members (Tr. 4-18), has stated that it would like to move forward with completing the system and not use TWSI to provide wastewater service and, therefore, has filed this action requesting the TRA to revoke TWSI's CCN. Tr. 52-53.

III. THE CONSUMER ADVOCATE RECOMMENDS THE AUTHORITY EITHER REVOKE TWSI'S CCN FOR THE VILLAGES OR FIND THE PUBLIC INTEREST REQUIRES OTHER SERVICE PROVIDERS, SIGNALING OTHER ENTITIES MAY SERVE THE VILLAGES IN COMPLIANCE WITH THE LAW.

The purpose of laws requiring a CCN is contradicted by TWSI's insistence that it be the only provider of wastewater services to the Villages. The TRA has the authority to revoke or amend CCNs when a utility has failed to provide service. The public interest requires wastewater service to the Villages. Here, TWSI has failed to provide service and has not demonstrated that it can provide adequate, safe, and proper wastewater service to the Villages. For these reasons, the Consumer Advocate recommends the TRA revoke TWSI's CCN for the amendment of serving the Villages or, alternatively, amend it or clarify it to signal to other utility service providers that they may provide service.

A. ***TWSI's use of the CCN to demand ownership of the system and to serve the Villages directly contradicts the statutory intent of the law requiring CCNs.***

Utilities exist to serve the public interest. *See Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) ("In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority.") When a utility ceases to serve the public interest or otherwise becomes a detriment to the public interest, it no longer has the right to serve the public. *Hohorst v. Greenville Bus Co.*, 17 N.J. 131, 146 (N.J. S.Ct. 1954) ("The incidental adverse effects on operators of the existing services may readily be justified by the significant furtherance of the paramount public interest and they in nowise constitute any unconstitutional deprivation of property."). Therefore, particularly when a utility has become a detriment to the public interest, the State can and should stop or limit the utility from offering service in order to protect the public interest. *See Order Denying Certificate of Public Convenience and Necessity and Requiring Divestiture of Water System*, Docket No. 12-00030 (Apr. 18, 2013).

While the law requires the utility to be adequately compensated for reasonable, prudent, and necessary utility services provided, under no circumstances does the law force the public to be at the mercy of the utility. Instead, the law is designed to protect the public interest from utilities that could abuse their role. *See, e.g.*, Tenn. Code Ann. § 65-4-122(b) ("Any such corporation which charges, collects, or receives more than a just and reasonable rate of toll or compensation for service in this state commits extortion, which is prohibited and declared unlawful."). The needs of the utility are addressed by the law in order to ensure the utility can continue serving the public. Thus, the utilities' needs are a means to the end of upholding the public interest; the utilities' needs are secondary to the public interest. *See, e.g., W. Radio*

Communic., Inc. v. Two-Way Radio Serv. Inc., 718 P.2d 15, 21 (Wyo. S.Ct. 1986) ("The public interest is to be given paramount consideration; desires of a utility are secondary.").

In some cases, the public interest is served by having only one utility provide service to an area.[5] Such a natural monopoly is not given to protect the utility, but rather to protect the public when competition or multiple service providers would be detrimental to the public interest. As one court explained, there is a distinction between the intent to create a monopoly and the intent to protect the public interest by means of allowing a monopoly:

> [T]here is no rule in this jurisdiction giving to an existing utility the absolute right, or imposing upon it the absolute duty, to make its service adequate, before a new utility will be permitted to enter the field . . . . [T]he reason for denial of a certificate to the new utility [in a prior opinion] was to prevent unnecessary duplication of plants, facilities and service, and 'ruinous' competition, and the basis of the decision was the nature and extent of the inadequacy of service was not such as to establish the necessity for a new service system.

Kentucky Utils. Co v. Public Serv. Comm'n, 252 S.W.2d 885, 889-90 (Ky. Ct. App., 1952).

Another court explained:

> It is a basic tenet of public utility regulation that there be no wasteful duplication of facilities. To carry out this concept General Orders of the Commission are designed to prohibit uneconomic and wasteful practices. Such a standard, and the reasons for requiring certificates of convenience and necessity, is to prevent the unnecessary duplication of facilities and to protect the consuming public from inadequate service and higher rates. Public convenience and necessity therefore require that there be no wasteful duplication and that the need be such that duplication will not result in waste.

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[5] For an in-depth history of CCNs generally and how the natural monopoly effect can serve the public interest, see William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the states, 1870-1920*, 79 COL. L. REV. 426 (Apr. 1979). Professor Jones was a professor of Trade Regulation at Columbia University for 42 years, author of the law textbook *Cases and Materials on Regulated Industries*, served as a consultant to the President's task force on telecommunications and the Federal Communications Commission, and served as a public service commissioner for New York from 1970 to 1974. See his biographies at http://www.law.columbia.edu/fac/William_Jones and http://www.law.columbia.edu/media_inquiries/news_events /2009/july2009/jones. In his article, Professor Jones articulated: "If there are 'evils' to multiple firm operation in natural monopoly markets, the sword should cut two ways: not only should entry of new firms be scrutinized, but exclusion of incumbents should be possible." *Id.* at 515. This approach appears consistent with the level of review required of the services that both CCN applicants and the incumbent utility can provide set forth in Tenn. Code Ann. § 65-4-202 and § 65-4-203.

So. Message Serv., Inc. v. Louisiana Pub. Serv. Comm'n, 370 So.2d 874, 880 (La. S.Ct., 1979).

Even the TRA has stated:

> The holder of a CCN for the provision of wastewater treatment services does not enjoy an exclusive right to provide such services within the certificated area. Nevertheless, the holder of a CCN does enjoy the protection of Tenn. Code Ann. § 65-4-201 (2004) and § 65-4-203 (2004) which exclude other applicants from providing such services to areas served by a holder of a CCN unless the Authority first determines that the ***present or future public convenience and necessity require or will require granting the applicant's petition*** for such a CCN and that the ***holder's existing facilities are inadequate to meet the reasonable needs of the public*** ***or*** that the holder of the CCN has refused, neglected, or is unable to make necessary additions and extension.

Order Affirming Hearing Officer's Findings and Conclusions in Initial Order Issued February 4, 2005, Docket No. 03-00329, pg. 11 (May 16, 2006).

Here, wasteful duplication is not an issue. TWSI has no investment in the system. Only one system is expected to be built and used to service the area. And, TWSI does not intend to build that system. The reasons to allow the utility to be a monopoly simply do not exist in this instance.

Like the dog wags its tail, the public's needs dictate how the utility serves it and whether a monopoly is in the public interest. In this case, however, the tail is trying to wag the dog. TWSI insists that because it has the CCN, it is a monopoly and only it can serve the Villages. TWSI has turned to litigation in order to ensure that other utility service providers willing and able to provide wastewater service are prohibited from doing so. Put another way, TWSI has gone out of its way to try to force the public to give TWSI its system and allow only TWSI to provide service. TWSI has not pleaded any of the reasons why the public interest would be served by it being a monopoly. Instead, TWSI has only indicated that it believes it has the right to be the monopoly and, therefore, the public will "eventually" give in to TWSI's demands for Emerson to give the system to TWSI instead of the HOA: "Since no utility other than TWSI can

legally provide wastewater service at this location, TWSI will eventually acquire ownership of the system . . . ." *Answer to the Petition, Motion to Dismiss the Petition, and Counterclaim by Tennessee Wastewater Systems, Inc. Against Emerson Properties, LLC*, Docket No. 13-00017 ¶ 17 (Mar. 27, 2013). TWSI's use of the CCN to put the public at its mercy directly contradicts the statutory intent requiring the issuance of CCNs to utilities in the ***public*** convenience and necessity (as opposed to the ***utility*** convenience and necessity) and, therefore, undermines the purpose that utilities serve the public interest, as opposed to hinder it.

B. The TRA has the authority to revoke or amend the CCN or otherwise find that the Villages require other service providers and signal that entities other than TWSI may provide such service in compliance with applicable laws.

TWSI argues that the TRA can only revoke its CCN if the TRA first finds that TWSI is not "willing" or "able" to provide service, basing its argument on Tenn. Code Ann. § 65-4-203. But Tenn. Code Ann. § 65-4-203 is not controlling here. Under Tenn. Code Ann. § 65-4-203, the TRA must go through certain steps before granting a CCN to a utility other than the public utility operating a same or similar system. As a threshold matter, there is no other public utility seeking a CCN in this docket. Emerson's petition is seeking a revocation of TWSI's CCN, but it is not applying for a CCN itself. Indeed, Emerson has testified that it does not intend to operate the system, but rather it intends to give the wastewater system to the non-profit HOA to serve its members. If Emerson and the HOA are not public utilities, they do not require a CCN. At this time, Mr. Pat Perry, the Secretary of the HOA, has indicated that the HOA wants to contract with CJUC, which is certainly not a public utility that would require a CCN. Because there is no public utility seeking a CCN in this Docket, neither Tenn. Code Ann. § 65-4-202 nor § 65-4-203 is controlling.

Moreover, even if § 65-4-203 did control here,[6] it plainly states that no CCN shall be granted to a competitor until the TRA first determines that "the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the public, ..." Here, TWSI has admitted it has no facilities. Since TWSI has no "existing" facilities and does not intend to construct facilities, it cannot assert that it has adequate facilities to provide adequate, safe, and proper service. Consequently, the TRA should authorize other service providers to ensure the Villages can be served adequately, safely, and properly.

Even if one does accept TWSI's argument that the TRA cannot revoke a CCN unless the existing public utility with a CCN is unwilling or unable to provide service, TWSI's argument still fails. By its own admission, TWSI is unable to provide service unless conditions change. Emerson has no intention of voluntarily giving the system to TWSI, and Emerson has no intention of contracting with TWSI. TWSI's contention that it is "willing and able" to provide service is accurate only if the conditions change and a system is given to it. The statutes certainly do not state that a utility must be willing and able to provide service ***if*** all the conditions are in the utility's favor. Nor do the statutes authorize the TRA to change conditions to make them favorable to the utility with the current CCN.

Although Tenn. Code Ann. § 65-4-203 does not appear to control the issues in this petition, it does appear the TRA has contemplated that a need may arise to revoke a public utility's CCN for inadequacy of facilities in TRA Rule 1220-4-13-.06. The following subparts of TRA Rule 1220-4-13-.06 appear specifically applicable to this Docket:

[6] TWSI appears to rely on the Chancery Court order to argue that Tenn. Code Ann. § 65-4-203 controls this issue. *See* Tr. 38-39. But, again, TWSI's interpretation expands the Chancery Court's order to a meaning beyond what the court was asked to interpret. *See* footnote 3. The TRA was not asked to interpret Tenn. Code Ann. § 65-4-201 or § 65-4-203 in TWSI's petition in Docket No. 11-00199, nor did the TRA actually decline to interpret such statutes, so these statutes were not before the Chancery Court pursuant to Tenn. Code. Ann. § 4-5-225(b). TWSI's argument that TRA attorneys presented arguments before the Chancery Court regarding such statutes does not displace the TRA's authority as the tribunal w ith the primary jurisdiction to interpret the CCN it issued and the statutes authorizing the TRA to issue such CCNs. Nonetheless, the Chancery Court order need not be interpreted at all to determine the TRA's authority in this Docket to revoke the CCN going forward.

> (3) If the Authority finds that any public wastewater utility has failed to provide service to any customer reasonably entitled thereto, the Authority may amend the CCN to delete the area not being properly served by the public wastewater utility, or it may revoke the CCN of that public wastewater utility.
>
> (4) If wastewater service has not been provided in any part of the area which a public wastewater utility is authorized to serve within two (2) years after the date of authorization for service to such part, 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 or part thereof, or that based on the circumstances of a particular case, there should be no change in the certificated area, to avoid revocation or amendment of a CCN.

The rules do not require that there be a certain level of failure, nor do they require only certain reasons for failure—that is, the utility is unwilling or unable—to provide service. Rather, subpart (3) simply states if the utility "has failed to provide service", then the TRA may amend or revoke the CCN. And, subpart (4) requires a showing by the utility that "it intends to provide service in the area or part thereof, or that ***based on the circumstances of a particular case***, there should be no change in the certificated area, to avoid revocation or amendment of a CCN." (Emphasis added.)

Other TRA rules also confer on the TRA the authority to revoke the CCN when, as here, a wastewater system has demonstrated the incapacity to serve an area or the inability to comply with the rules or statutes. TRA Rule 1220-04-13-.09(1) states that where a public wastewater utility has demonstrated the incapacity to comply with the rules or statutes, the "Authority shall take the appropriate action based on good cause that may include suspension revocation of a public wastewater utility's CCN . . . ." The use of the word "shall" actually indicates the TRA has the duty to suspend or revoke a wastewater utility's CCN when it cannot comply with the rules or the statutes. Here, TWSI cannot comply with the service requirements because it does not have a system to be able to provide wastewater system, it has no intention of building a system, and Emerson does not intend to give TWSI its system. This lack of title to the system

also means that TWSI cannot comply with TRA Rule 1220-04-10(a), requiring the physical assets of the wastewater system operated or managed by a public utility to be free and clear of all liens, judgments, and encumbrances. Without title to the property, TWSI cannot prevent Emerson from encumbering the wastewater system and, indeed, the system is currently encumbered. *Direct Testimony of George L. Potter on Behalf of Emerson Properties, LLC*, Docket No. 13-00017, pgs. 6-7 (Oct. 10, 2013).

These rules clearly provide the TRA with the authority to revoke or amend CCNs regardless of whether there is no other public utility applying for a CCN. And nothing in these rules supports TWSI's argument that the TRA is limited to revoking CCNs only when the utility decides it is unwilling or unable to provide service. Rather, the rules are clear: if the utility fails to provide service or has the incapacity to comply with the rules and statutes, the TRA can revoke or amend the CCN. The rules allow the utility to demonstrate why the CCN should remain in effect. But, as discussed in the next two sections, TWSI has failed to demonstrate why the CCN should remain in effect for the Villages.

C. TWSI cannot furnish adequate, safe, and proper wastewater service to the Villages.

TWSI has no wastewater system in place to serve the Villages. It also has stated it has no intention of building a wastewater system. TWSI's proposed solution is that the TRA force Emerson to build the system and give it to TWSI. But this solution does not work. TWSI has not shown that the TRA has jurisdiction over Emerson or the HOA. The facts presented in this case suggest Emerson is not a public utility because it does not intend to provide service. Emerson plans to build the system and give it to the HOA. The facts in this case also suggest the

HOA is not a public utility because it is a non-profit serving its members.[7] Thus, TWSI has failed to demonstrate how the TRA has jurisdiction over either Emerson or the HOA. If the TRA has no jurisdiction over Emerson, it certainly cannot require Emerson to build a system and give it to TWSI. If the TRA does not have jurisdiction over the HOA, it cannot require the HOA to contract with TWSI for services.

Moreover, even if the TRA had jurisdiction over Emerson or the HOA, it would raise numerous constitutional questions to have a state agency forcing one private entity to build an asset and give it away to another private entity, particularly in the absence of any showing that there are health and safety concerns with either of the entities providing service.

In addition, if Emerson is forced to contract with TWSI because no other entity is allowed to provide service, then such contract could be unenforceable because it would have been formed under duress. The Tennessee courts have long held that contracts formed when one party is under duress are unenforceable. *Holloway v. Evers*, 2007 WL 4322128, *1, at *8 (Tenn. Ct. App., 2007) (citing *Belote v. Henderson*, 45 Tenn. (5 Cold.) 471 (1868)); *see also Johnson v. Ford*, 245 S.W. 531, 540 (Tenn. 1922). The Court of Appeals has defined "duress" as "a condition of mind produced by the improper external pressure or influence that practically destroys the free agency of a party, and causes him to do and act or make a contract not of his own volition, but under such wrongful external pressure." *Holloway*, 2007 WL 4322128, at *9.

[7] The HOA is not a party in this Docket. Nevertheless, at the hearing, TWSI attempted to gather information about the HOA in its cross examination of Emerson's witness, Mr. Potter. Tr. 54-60. Such questioning could be considered inappropriate because it sought discovery from a non-party entity through a witness called to represent a legally separate entity that is a party. The HOA had no notice that it needed to have its attorney present to determine whether to object to such questioning. Every entity has the right to choose who represents it, even if it is a non-party. Tenn. R. Civ. P. 30.02(6). In this case, there is no showing that the HOA designated Mr. Potter to represent it. Instead, Mr. Pat Perry came to speak during the public comments on behalf of the HOA. Tr. 4-18; *Public Comments from Owners at Villages of Norris Lake*, Docket No. 13-00017, (Nov. 22, 2013) (showing 31 emails from lot owners and members of the HOA sending their comments to Mr. Perry as representative of the HOA). There is no evidence to suggest that Mr. Potter's part ownership of Emerson has prevented him from fulfilling his fiduciary duties to the HOA as one of its board members. *See* Tenn. Code Ann. § 48-58-302. Moreover, there is no statute or case law to suggest that a non-profit entity's nature changes based on the ownership or full-time job of its individual board members.

To be clear, the Consumer Advocate is not asserting that TWSI will use duress to force Emerson into a contract. Indeed, the Consumer Advocate is aware of an instance in which TWSI has recognized the inappropriateness of using a CCN to force another party to contract with it and, consequently, TWSI petitioned the TRA to revoke its CCN. *See Response of TWSI to Complaint*, Docket No. 06-00077 (Nov. 3, 2008) (filed as Appendix A).

Although TWSI has voluntarily walked away from CCNs under conditions similar to those presented in this Docket, it appears that TWSI has taken an opposite approach with Emerson. TWSI has attempted to eliminate any competition first by seeking the declaratory order from the Chancery Court and, second, by heavily relying on TWSI's interpretation that the Chancery Court's order applies to all other entities, not just municipal wastewater service providers.[8] Moreover, TWSI has shown that it intends to use the approach of blocking all other service providers to acquire the system in this Docket: "Since no utility other than TWSI can legally provide wastewater service at this location, TWSI will eventually acquire ownership of the system . . . ." *Answer to the Petition, Motion to Dismiss the Petition, and Counterclaim by Tennessee Wastewater Systems, Inc. Against Emerson Properties, LLC*, Docket No. 13-00017 ¶ 17 (Mar. 27, 2013). Even if TWSI were to use duress to acquire ownership, such transfer would arguably be unenforceable under Tennessee's case law that contracts are unenforceable when formed under duress. Moreover, it is against public policy to allow the law to be used in such a manner.

For these reasons, TWSI cannot provide adequate, safe, and proper wastewater service.

D. Wastewater service providers other than TWSI are necessary to serve the public interest.

The Villages require wastewater service. The lack of a wastewater system is directly stalling economic development. Without wastewater service, the property of the Villages will

[8] *See* footnote 3.

remain devalued and the homeowners who want to reside there will need to pay for expensive pump-and-haul services. For the reasons previously discussed, TWSI cannot provide adequate, safe, and proper service to the Villages. Therefore, other service providers are required to serve the public interest.

The survival of CCNs during bankruptcy is consistent with the underlying purpose of CCNs to protect the public. In order to protect the public interest, utility service must be continuous, regardless of a bankruptcy. In many cases, the public's health and safety could be at risk if a CCN were to be revoked automatically in a bankruptcy. Here, however, the public policy reasons for maintaining a CCN after bankruptcy do not exist. TWSI had no investment in the facility. No service was or is being provided, so the health and safety concern of discontinued service is not an issue. And, even though TWSI currently has an inactive TDEC permit, it is likely the designs approved for such permit require changes and re-approval from TDEC as a result of the original designs putting the treatment plant on undevelopable property. Moreover, TWSI has no investment in the facility partially built, so there is not even an argument that TWSI deserves to serve the area under arguments of equity. It is in the public interest for the TRA to revoke the CCN or otherwise signal that other entities may provide wastewater service under applicable laws.

Even though it is correct the CCN survived bankruptcy, it does not necessarily follow that the CCN is immutable going forward or will remain in the public interest after bankruptcy. Each case is different as to whether the CCN remains in the public interest after bankruptcy. In this case, maintaining TWSI's CCN can actually hinder the public health and safety in the long-term, since it will require homeowners to pump and haul sewage. TWSI's insistence that it has the right to prevent any other entity from providing services merely because it has a CCN for an

area for which it has never provided any services turns the purpose of a CCN upside down by putting the utility's interest before that of the public.

It is impossible to ignore that the public interests for this CCN have changed since the bankruptcy. Prior to bankruptcy, TWSI supported its petition that the nearby municipalities did not intend to serve the area and the prior developer/owner, Land Resources, wanted to contract with TWSI to provide service. Since bankruptcy, the new developer has no intention of contracting with TWSI and a nearby municipal service provider is willing and able to provide service. It is highly unlikely TWSI would even petition for a CCN under the current circumstances. But, even if TWSI were to apply for a CCN to serve the Villages under the current circumstances, it would inarguably be denied. Since the bankruptcy, the public interest has changed.

Revoking TWSI's CCN to allow other wastewater service providers to provide service is warranted here. Alternatively, the TRA could amend or clarify the scope of the CCN to allow other providers, including municipal providers, and express that the CCN does not confer TWSI a preference or other favoritism to provide service. But, if the CCN is simply amended or the scope clarified, it is still possible that TWSI will seek litigation to oppose the CCN application of other providers or continue to advance new arguments that it has an exclusive right of service, regardless of what the TRA's amendment says. Even if this position of exclusivity is ultimately rejected, the process would likely be long and drawn-out, thus adding to the woes of the long-suffering VNL owners.

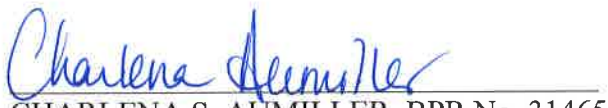
Based on the history of litigation that TWSI has sought, the Consumer Advocate recommends the TRA revoke the CCN as the most effective and efficient method of allowing wastewater services to the Villages. To allow TWSI to be the sole provider despite the wishes of the new developer can only delay services to the Villages as well as potentially burden future

bankruptcies and further devalue bankrupt property with similar circumstances. While there is no compelling reason to allow TWSI to be the sole service provider, there are several compelling reasons to allow other service providers access to provide service so long as service is provided in compliance with the law.

IV. CONCLUSION

The Consumer Advocate recommends the TRA find that (1) the public interest requires wastewater service to the Villages; (2) TWSI has failed to provide service in the seven years that it has had the CCN; (3) TWSI has demonstrated the incapacity to provide adequate, safe, and proper wastewater services to the Villages under the current circumstances; and (4) the allowance of other service providers to provide service to the Villages in compliance with applicable laws serves the public interest. Furthermore, the Consumer Advocate recommends that, based on these findings, the TRA order either (a) TWSI's CCN amendment to provide service to the Villages is revoked as it is no longer in the public interest, or (b) the scope of TWSI's CCN is amended or otherwise clarified to state that the CCN does not give TWSI a preference or other favoritism to provide service and that interpretation of the CCN going forward should be that entities other than TWSI are allowed to provide wastewater services under applicable laws.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

C. Mark Troutman, Esq.
Troutman & Troutman, P.C.
P.O. Box 757
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Henry Walker, Esq.
Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203
615-252-2363

This the 9th day of December, 2013.

Charlena Aumiller
Charlena S. Aumiller

APPENDIX

A

BOULT ▪ CUMMINGS®
CONNERS ▪ BERRY PLC

Henry Walker
(615) 252-2363
Fax: (615) 252-6363
Email: hwalker@boultcummings.com

November 3, 2008

filed electronically in docket office on 11/03/08

J. Richard Collier, Esq.
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: Petition of Tennessee Wasterwater Systems, Inc. to Expand Its Service Area to Include a Portion of Jefferson County, Tennessee, Known as Parrott's Bay
Docket No. 06-00077

Dear Richard:

On behalf of Tennessee Wastewater Systems, Inc. ("TWS"), I am responding to the complaint filed in this docket by Mr. Chip Leonard regarding the provision of wastewater treatment service to a portion of Jefferson County called Parrott's Bay.

TWS was awarded a certificate to serve this area by order of the Authority on August 29, 2006. In its application, TWS noted that the developer of this proposed subdivision had requested in writing that TWS provide sewer services for the development and had agreed to pay the cost of constructing the wastewater system. A letter from the developer is included with the application.

The land for the proposed development has now been sold and the new owner, Mr. Leonard, is no longer interested in obtaining wastewater services from TWS. At this time, no houses have been built in the development and no sewer system has been built. Mr. Leonard has declined to sign an agreement with TWS to provide sewer service and presumably intends to find another provider. He asks the TRA to revoke the certificate of TWS "in order to have another utility petition the TRA for our subdivision in the near future."

Under these circumstances, TWS agrees that the new owner of the development should be able to choose another provider. TWS would not have applied for this certificate without the agreement and support of the former development owner. Therefore, TWS will file a petition requesting voluntary cancellation of its certificate. After the certificate is cancelled, TWS will have no further obligation to provide sewer service in this territory. Mr. Leonard will be free to contact other potential providers.

The cancellation of the certificate by TWS will render moot the complaint filed by Mr. Leonard. Nevertheless, TWS would like to respond briefly to the two issues raised in Mr. Leonard's letter.

First, Mr. Leonard states that TWS has informed him that TWS "will not operate a system that their affiliates do not sell or construct." He charges that this practice has "forced us to purchase goods and services from their affiliates at above market rates."

That allegation is untrue. Like every developer doing business with TWS, Mr. Leonard has the choice of building the system himself or hiring a contractor to do it. The contractor may be anyone of the developer's choosing, including an engineering and construction firm that is affiliated with TWS. But regardless of the developer's decision, TWS requires that the system be built in accordance with the technical specifications of TWS and will closely monitor and inspect the construction of the system to insure compliance.

Here, Mr. Leonard was offered two contracts. Copies of those contracts are attached. One contract is the standard agreement between TWS and a developer. It requires the developer to build the system and then turn it over to TWS to operate and maintain. The contract does not require the developer to use any particular construction company, but it does state that TWS must give final approval to the construction plans and the completed system. It also provides that TWS will inspect and monitor the project as it is being built.

The second contract is a proposed agreement between the developer and Utility Capacity Corporation, Inc. ("UCC"), a company which designs and builds sewage collection and treatment systems.[1]

Mr. Leonard is not required to hire UCC to construct the sewer system in Mr. Leonard's development. Mr. Leonard is free to hire anyone to build that system as long as it is built in accordance with the specifications of TWS. Mr. Leonard's allegation that he was required to do business with UCC, or any other particular construction firm, is incorrect.

Second, Mr. Leonard complains that he should not be required to pay a charge of $800 per lot to TWS for "connecting into a system we just paid them for." He also states that this $800 fee is not included in the tariffs of TWS on file at the TRA.

Mr. Leonard apparently did not notice that this $800 fee is explained in paragraph 4 of the proposed contract between the developer and TWS. That section states, "The aforementioned fee shall be used by Tennessee Wastewater to pay for expenses associated with obtaining public service commission approvals and for inspections of the system design and

[1] UCC is not an affiliate of TWS. UCC is owned by Mike Hines who also owns Southeast Environment Engineering which manages TWS properties in East Tennessee.

construction and residential tank installations." In other words, the fee covers all project management costs incurred by TWS from the time TWS first visits the site until the last customer's tank is installed under the supervision of TWS. The utility believes it is more appropriate to charge these costs to the developer rather than to end users. Charges agreed to between TWS and developers are not charges for sewer service and are therefore not included in the utility's retail tariffs.

In sum, TWS submits that neither of Mr. Leonard's complaints has any merit. TWS has always made it clear in its filings with the TRA that the developer is responsible for building the sewer system in accordance with the design specifications of TWS. In this case, TWS sought a certificate to serve this project only after being requested to do so by the former developer. Now that the current owner of the property wants to explore other options, TWS agrees that he should do so.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/cas

cc: Chip Leonard
Senator Mae Beavers

SEWERAGE SYSTEM MAINTENANCE AND MANAGEMENT CONTRACT

JEFFERSON COUNTY – THE PENINSULA AT LAKE DOUGLAS

This sewerage system maintenance and management contract, made and entered as of this ____ day of May, 2008, by and between, Tennessee Wastewater Systems, Inc., a Tennessee corporation, herein referred to as "Tennessee Wastewater" and Southeastern Development Group, Inc., herein referred to as "Developer":

WHEREAS, Developer is developing a tract of real property located in Jefferson County, Tennessee and is generally referred to herein as The Peninsula at Lake Douglas project; and

WHEREAS, Developer requires public utility ownership of a sewage collection, treatment, and disposal system for The Peninsula at Lake Douglas project; and

WHEREAS, Tennessee Wastewater Systems, Inc. has the capability to manage and maintain the sewerage treatment, collection, and disposal system for The Peninsula at Lake Douglas project, the parties hereto have entered into the following agreements:

WITNESSETH

1. Developer is developing a tract of real property in Jefferson County, Tennessee and such property is generally referred to herein as The Peninsula at Lake Douglas development. The development project has been mapped, platted, and surveyed. The plat for The Peninsula at

Lake Douglas project as recorded in the Register's Office for Jefferson County is attached hereto as Exhibit 1.

2. Developer shall, at its own expense, design and construct a wastewater collection, treatment, and effluent dispersal system to serve the 80 lots in the project. All design plans shall be approved by Tennessee Wastewater prior to construction of the system. Developer is to perform all of the necessary work for the installation of said system, completely install the system at no cost whatsoever to Tennessee Wastewater, all in accordance with the drawings, plans, and specifications herein above referred to, and for that purpose has entered into a contract for completion of that work.

3. All construction begun, continued, and completed hereunder shall be subject to the supervision and approval of Tennessee Wastewater's engineers and/or representatives who shall have a continuous right of inspection throughout the progress of the work. No pipe, fittings, or connections shall be covered until inspected and approved by Tennessee Wastewater.

4. In addition to the costs of the installation herein provided for, the Developer hereby agrees to pay to Tennessee Wastewater a fee of $800 per platted lot to be connected to the sewerage system, said fee payable at the time Tennessee Wastewater signs the final plat for the proposed lots. The aforementioned fee shall be used by Tennessee Wastewater to pay for expenses associated with obtaining the public service commission approvals and for inspections of the system design and construction and residential tank installations.

5. Tennessee Wastewater hereby agrees to own, operate, maintain, and manage the sewerage system for the properties identified in Exhibit. Developer agrees for Tennessee

Wastewater to have exclusive responsibility for the ownership, operation, maintenance, and management of the sewerage system as installed and as may be expanded from time to time.

6. Developer agrees to provide Tennessee Wastewater with copies of all plans, specifications, drawings, and other documentation accompanying the design and installation and any expansions of the sewerage system. Tennessee Wastewater shall secure all local, state, and federal permits, licenses, or other approval necessary for the operation of a sewerage system on the property identified as Exhibit 1.

7. Developer agrees to require as a condition of sale that the owner of each parcel of property shown on Exhibit 1 for which a service connection to the sewerage system is available, installed, or expanded but for which no residence, building, or structure has been attached to the service connection, shall pay Tennessee Wastewater a yearly sewer access fee of $84.00. Such yearly sewer access fees for each lot shown on Exhibit 1 shall be first payable on or before December 15, 2008, for all owners of record of December 1, 2008. Once residences, buildings, or structures on any parcel of property shown on Exhibit 1 are connected to the sewer system through a service connection, the owner of such property shall no longer be liable for the sewer access fee for that calendar year, and, thereafter, the annual sewer access fee referenced herein shall not apply.

8. Developer agrees to require as a condition of sale or lease of each lot that any building, residence, or other structure, constructed on the lot to be attached to the sewerage system, shall have a lockable shut off valve installed on the property owner's side of the water meter on the water supply line to the building. Such conditions shall be included in any restrictive covenants prepared and recorded for the property included in The Peninsula at

Lake Douglas project. This valve is for the exclusive use of Tennessee Wastewater Systems, Inc. in accordance with its sewer service agreement with the property owner and is to be used to shut off water supply to the property in the event that the monthly sewer fee is not paid.

9. To allow for maintenance and management of the sewer system, Developer shall provide Tennessee Wastewater an all-weather access road, the necessary power lines, and power drop to the sewage treatment site and the drip effluent dosing station. Developer shall provide written five (5) foot sewerage easements on each side of the centerline of all sewers and all interceptor tanks installed in the development other than those sewers and those connections that are located along the public right of way.

10. Tennessee Wastewater Systems, Inc. shall approve all plans and drawings accompanying the initial sewerage system and any additions or expansions to the system as installed or the additional capacity associated with the system. The actual design and construction and installation of the sewerage system and any expansions to it shall be subject to the final approval and final inspection of Tennessee Wastewater Systems, Inc. Developer shall provide Tennessee Wastewater a one (1) year warranty for the collection system and assign to Tennessee Wastewater the one (1) year warranty provided to Developer by Utility Capacity Corporation, Inc. (UCC) for the treatment and effluent dispersal systems wherein the Developer and UCC shall warrant that, for the first year after the initial system is placed into service following acceptance by Tennessee Wastewater, the Developer or UCC shall immediately repair, or cause to be repaired, all breaks, leaks, or defects of any type in the installation, construction, or materials included in the sewerage system. After the expiration of the one (1) year period,

Tennessee Wastewater shall be responsible for the repair of all breaks, leaks, or defects of any type in the installation, construction, or materials used in the sewerage system.

11. Tennessee Wastewater shall hold and manage any excess capacity of the sewerage system for future use and. Once the sewerage system, or necessary sections thereof, are installed, completed, and functioning, those elements of the system shall be turned over or dedicated to Tennessee Wastewater for ownership, operation, management, and maintenance of the sewerage system operations. Prior to the delivery or the turn over of the ownership, operation, maintenance, and management of the system to Tennessee Wastewater and the acceptance of same by Tennessee Wastewater, Tennessee Wastewater shall inspect and approve the initial system as installed and any expansions of such system as may be constructed from time to time.

12. Property Rights and Ownership

a. Developer hereby grants Tennessee Wastewater an exclusive right to own and operate all of the sewage collection, treatment, and disposal systems and exclusive use of the land on which said systems are located in the development shown on Exhibit 1 and Developer hereby conveys to Tennessee Wastewater said exclusive right to own and operate all of said systems and lands therein without the necessity of any further contract, deed, conveyance, or easement, for a period of 99 years or so long as said property is used and operated for wastewater collection, treatment, and disposal, whichever shall first occur. Tennessee Wastewater shall have the right to renew at any time said exclusive rights to operate all of the sewerage collection, treatment, and disposal systems, and the land on which said systems are located in The Peninsula at Lake Douglas shown on Exhibit 1.

b. Developer will grant Tennessee Wastewater a permanent, platted, easement to the 4+ acre tract identified, mapped, and approved for use as the sewage treatment and drip dispersal site for the system.

c. In addition, Developer further agrees to execute, acknowledge, and deliver to Tennessee Wastewater any and all easements that may be necessary or appropriate as determined by Tennessee Wastewater for the construction, operation, and maintenance of Tennessee Wastewater's sewerage system, or any portion thereof.

13. Upon installation, testing, approval, and acceptance for use by Tennessee Wastewater, all sewerage system improvements up to the property line of any lot shall become and remain the sole property of Tennessee Wastewater without the necessity of a formal conveyance from the Developer to Tennessee Wastewater. Developer does hereby warrant that title to the same shall be free and unencumbered. Notwithstanding said provision as to title, Developer further agrees that it will execute, acknowledge, and deliver a deed formally conveying title to said sewerage system improvements and utility easements over individual lots to Tennessee Wastewater upon demand by Tennessee Wastewater.

14. Developer agrees to execute, acknowledge, and deliver to Tennessee Wastewater any and all easements that may be necessary or appropriate as determined by Tennessee Wastewater for the construction, operation, and maintenance of Tennessee Wastewater's sewerage system, or portion thereof.

15. The Developer warrants that, should its development include restrictive covenants, said covenants shall include paragraphs regarding the sewerage system as drafted by

Tennessee Wastewater and shall specifically reference include the necessary shut off valve described in Paragraph 8 herein.

16. Developer agrees to inform each lot buyer or lessee, at the time of closing or before, that each buyer or lessee shall provide or cause to be provided, installed, or constructed the appropriate and necessary lines, filters, tanks, pumps, or interceptor tanks at its expense for each planned unit to connect to the wastewater system contemplated under this agreement; and that all tanks, pumps, filters, control panels, and appurtenances shall be as approved by Tennessee Wastewater.

17. Developer agrees to inform each lot buyer or lessee, at the time of closing or before, that the lot is served by a public utility sewerage system for which monthly sewer charges will be billed to the property owner or lessee at rates established by the Tennessee Regulatory Authority, the state's public service commission.

18. This contract is valid only so long as Developer remains the owner of project. This contract is not assignable to or for the benefit of any other person or entity without Tennessee Wastewater's prior written consent. Likewise, Tennessee Wastewater may not assign this contract to any other person or entity without Developer's prior written consent. The Developer commitments and covenants contained in Paragraph 4 shall survive the termination of this contract as to Developer. Nothing in this agreement shall be pledged, mortgaged, hypothecated, or utilized as collateral for any obligations of Developer to any third parties.

19. This agreement shall be governed and interpreted under the laws of the State of Tennessee without regard to any other choice of law statutes or procedures.

20. Should any part of this agreement be found or held invalid or unenforceable by any court or government agency, regulatory body, or utility regulatory commission, such invalidity or unenforceability shall not affect the remainder of this agreement which shall survive and be construed as if such invalidity or unenforceability part had not been contained therein.

21. This agreement cannot be amended except by a written agreement signed by the authorized agents of both Developer and Tennessee Wastewater.

22. Developer and Tennessee Wastewater Systems, Inc. and their respective officers and directors of each company are not agents, representatives, or employees of each other company and neither party shall have the power to obligate or bind any other party in any manner except as otherwise expressly provided in this agreement.

23. Neither party shall be in breach of this agreement by reason of its delay in performance or for failure to perform any of its obligations herein if such delay or failure is cause in whole or in part by strikes or other labor disputes, acts of God or the public enemy, riots, incendiaries, interference by civil or military authorities, delays in transit or delivery, or subsequent events which are beyond its reasonable control or without its fault or negligence.

For	For
SOUTHEASTERN DEVELOPMENT GROUP, INC	TENNESSEE WASTEWATER SYSTEMS, INC.
_____	_____
Chip Leonard, Managing Partner	Michael Hines, P.E., Vice President

PENINSULA AT LAKE DOUGLAS
WASTEWATER SYSTEM
DESIGN AND CONSTRUCTION CONTRACT

This wastewater system construction and expansion contract, made and entered as of this _____th day of May, 2008, by and between, Utility Capacity Corporation, Inc., a Tennessee corporation, having a principal place of business in Knoxville, Knox County, Tennessee, herein referred to as "UCC" and Southeastern Development Group Inc., a Tennessee corporation, having a principle place of business in Knoxville, Tennessee, herein referred to as "Developer":

WHEREAS, the Developer is the owner and developer of a tract of real property located in Jefferson County, Tennessee, within the jurisdiction limits of the Jefferson County Planning Commission, containing approximately 165 acres more or less and generally referred to herein as The Peninsula at Lake Douglas development project; and;

WHEREAS, The Peninsula at Lake Douglas development project shall have approximately 80 residential lots that will require wastewater disposal, and;

WHEREAS, the Developer requires a sewage treatment, collection, and disposal system, be designed and constructed to serve the aforementioned units, and;

WHEREAS, UCC is in the business of designing and constructing wastewater collection, treatment, and disposal systems, and has the capability to design, construct, and expand the necessary sewage collection, treatment, and disposal system for The Peninsula at Lake Douglas development project;

NOW, THEREFORE, in consideration of the mutual promises set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties warrant, covenant, grant, and make the following agreements:

WITNESSETH

1. Developer is the owner of a tract of real property in Jefferson County, Tennessee, within the jurisdictional limits of the Jefferson County Planning Commission, of approximately 165 acres, and such property is generally referred to herein as The Peninsula at Lake Douglas development project. The Peninsula at Lake Douglas development project has been mapped, platted, and surveyed. The plat for this development as submitted to the Jefferson County Planning Commission for approval, showing 80 lots to be recorded in the Register's Office for Jefferson County, is attached hereto as Exhibit 1.

2. UCC shall design the appropriate wastewater collection, treatment, and reuse system of sufficient size and capacity to collect, treat, and reuse all of the wastewater resulting from the proposed 80 total lots. Total design flow to the system shall not exceed a maximum of 16,000 gallons per day based on peak daily flow expected from those residential units to be located within The Peninsula at Lake Douglas development development.

3. Developer shall provide all materials and labor to install the collection system sewers in accordance with the approved plans and the specifications and requirements of Tennessee Wastewater Systems, Inc.

4. UCC shall provide all materials and labor to install a recirculating packed-bed filter treatment system, an effluent pumping system, and an effluent drip dispersal system in accordance with the approved plans and the specifications and requirements of Tennessee Wastewater Systems, Inc.

5. Developer shall provide permanent access to sufficient land area to site the treatment units and to the four acres approved by the Tennessee Department of Environment and Conservation for drip dispersal of the treated effluent from the sewerage system installed to serve the units described in the previous sections.

6. UCC represents and warrants that the system, as constructed, will meet or exceed all requirements of the Tennessee Department of Environment and Conservation, which has regulatory authority over the design and construction of this system.

7. The Developer has agreed for UCC to have exclusive responsibility for the design, development, construction, and expansion of the wastewater system for the property identified in Exhibit 1. By execution of this agreement, the Developer represents to UCC that it has full right, title, and authorization to allow the construction of the wastewater system contemplated by this agreement.

8. In addition to the original plat shown as Exhibit 1 to this agreement, the Developer agrees upon written request by UCC to provide UCC a boundary line survey of the property shown on Exhibit 1.

9. The Developer agrees upon written request by UCC to provide UCC a copy of the warranty deed(s) evidencing the actual ownership of the property known as the Peninsula at Lake Douglas development project as shown on Exhibit 1.

10. The Developer shall provide UCC a topographic map in electronic format, compatible with AutoCAD R14 or higher, which map includes the acreage to be developed or improved by the Developer in connection with the Peninsula at Lake Douglas development project and the location and boundaries of all roads, lots, and common areas. The Developer shall provide any revisions or updates of the aforesaid topographic map to UCC.

11. To allow access to and the construction and expansion of the initial wastewater system, the Developer shall provide UCC an all weather access road and easement, the necessary power lines, and necessary power drop to the wastewater treatment site and to the effluent drip dispersal site. Such access road and easement shall be free of structures, buildings, woody vegetation, and any uses that would interfere with or obstruct access to wastewater treatment

sites and any lift stations. The power lines shall include all lines, poles, conduit, etc. and related excavations to bring power to the power disconnect and meter base to be set by UCC.

12. UCC shall design, construct, and install the wastewater treatment and effluent dispersal systems and any future expansions thereof as required to serve the units described herein. The location of the treatment and effluent dispersal components of the wastewater system is, or will be, as shown on the plat and the Developer agrees to dedicate such areas as may be needed to be used for the purposes of proper wastewater treatment and effluent dispersal. The location of the collector lines, pump stations, and other reasonably necessary appurtenances or components shall be within the necessary utility easements or rights-of-way shown on Exhibit 1.

13. Developer agrees that only residential facilities shall be connected to the wastewater system and that no restaurant or other commercial food preparation or dining facility or unless shall be connected to the wastewater system unless and until sufficient capacity exists in or is added to the wastewater system and unless and until the Developer provides the necessary and sufficient pretreatment waste stream units for any restaurant, commercial food preparation operations, or dining facility (excluding catered events), or any other non-domestic wastewater generating facility as may be required and approved by Tennessee Wastewater Systems, Inc.

14. As compensation for the design and construction of the sewerage system described above, Developer shall pay UCC the sum of Two Hundred Ninety Thousand Dollars ($290,000) as stipulated in the payment schedule in Paragraphs 15 and 16 below. Upon completion of the system, Developer is entitled to connect 80 residential lots to the system provided that said lots shall not produce more than 16,000 gallons per day of actual sewage flow based on average daily flows as measured at the discharge to the drip dispersal system.

15. Developer shall make periodic progress payments to UCC for the $290,000 total cost for system design and construction of Phase 1 of the wastewater system herein described as follows:

a. $100,000 upon signature of this agreement; and

b. $35,000 upon completion of installation of the recirculating packed-bed filter unit, the influent blend tank, and the effluent pumping tank; and

c. $65,000 upon completion of installation of the effluent transfer pumps, Arkal filter, UV units, and control panel; and

d. $60,000 upon completion of installation of the drip dispersal fields, and

e. $30,000 upon completion of the construction and receipt of a written acceptance of the system from Tennessee Wastewater Systems, Inc.

16. All payments due under Paragraphs 15 and this agreement shall be made within twenty (twenty) calendar days of their invoice dates by check or by electronic funds transfer to a bank account designated by UCC to the Developer. The Developer agrees to pay a one and one-half percent (1.5%) late charge for each month or any portion thereof that any payment due under this agreement is not received by UCC within the agreed upon time.

17. Final payment for construction of the wastewater system shall be made prior to the transfer of ownership of the system to Tennessee Wastewater Systems, Inc. for their ownership, management, and operation of the wastewater system. Tennessee Wastewater Systems, Inc. shall approve all plans and drawings accompanying the wastewater system and any additions or expansions to the system as installed. The actual construction and installation of the wastewater system and any expansions to it shall be subject to the final approval and final inspection of Tennessee Wastewater Systems, Inc.

18. Tennessee Wastewater Systems, Inc. shall hold, manage, and access any excess capacity of the wastewater system for the undeveloped property for future use and expansion

consistent with the development plan identified and attached hereto. Once the wastewater system, or the necessary sections thereof, is installed, completed, and functioning, those elements of the system shall be turned over or dedicated to Tennessee Wastewater Systems, Inc. for management and maintenance of the wastewater system operations as the operator of the wastewater system. UCC shall have no obligation or responsibility to manage or maintain the wastewater system, or certain sections thereof, once it has been installed, completed, and dedicated to Tennessee Wastewater Systems, Inc. Prior to the delivery or the turn over of the maintenance and management of the system to Tennessee Wastewater Systems, Inc., Tennessee Wastewater Systems, Inc. shall inspect and approve the initial system as installed.

19. At the time the wastewater system is to become operational, UCC warrants to the Developer or its assigns the design, construction, and operational characteristics of the wastewater treatment and effluent dispersal systems for a period of one (1) year following the date that such system is dedicated to Tennessee Wastewater Systems, Inc. During such warranty period, UCC will, promptly and in a manner to ensure no unreasonable interruption of wastewater service to the property owners within the Peninsula at Lake Douglas development project, undertake any repairs or replacements necessary to ensure the proper operation of the wastewater system.

20. Developer shall provide UCC and/or Tennessee Wastewater Systems, Inc. a platted and recorded perpetual utility easement to the collection lines, on-lot or common property interceptor tanks, any sewage lift station sites, the treatment and disposal sites, or sites of other necessary components of the wastewater system that may be necessary for the operation, management, and expansion of the wastewater system.

21. In the event of any changes to the initial plat, as recorded, identified as Exhibit 1, the development plan, identified as Exhibit 2, the costs and payments identified herein may be

increased in a pro rata amount to cover the additional costs of design, construction, or building of the wastewater system expansion.

22. This agreement shall be governed and interpreted under the laws of the State of Tennessee without regard to any other choice of law statutes or procedures.

23. Should any part of this agreement be found or held invalid or unenforceable by any court or government agency, regulatory body, or utility regulatory commission, such invalidity or unenforceability shall not affect the remainder of this agreement which shall survive and be construed as if such invalidity or unenforceability part had not been contained therein.

24. This agreement cannot be amended except by a written agreement signed by the authorized agents of both the Developer and UCC.

25. The Developer, UCC, and Tennessee Wastewater Systems, Inc. and their respective officers and directors of each company are not agents, representatives, or employees of each other company and no party shall have the power to obligate or bind any other party in any manner except as otherwise expressly provided in this agreement. Nothing in this agreement shall operate or be construed to establish a partnership, limited partnership, or other joint venture by or between the Developer, UCC, or Tennessee Wastewater Systems, Inc.

26. Neither party shall be in breach of this agreement by reason of its delay in performance or for failure to perform any of its obligations herein if such delay or failure is cause in whole or in part by strikes or other labor disputes, acts of God or the public enemy, riots, incendiaries, interference by civil or military authorities, compliance with governmental laws, rules, regulations, delays in transit or delivery, or subsequent events which are beyond its reasonable control or without its fault or negligence.

27. To ensure that any subsequent property owners, developers, lenders, or contractors have notice of these covenants, agreements, and the obligations contained therein regarding the operation and installation of the wastewater system, the Developer will include in

all instruments conveying, offering, or describing any portion or all of the property and units described herein, specific reference to these covenants and agreements along with the recorded plat(s) referenced herein. The covenant and agreements contained herein are permanent and shall run with the land. This construction and expansion agreement, exclusive of the exhibits, may be recorded in the Register's Office for Jefferson County, Tennessee.

For Developer

SOUTHEASTERN DEVELOPMENT GROUP, INC.

Chip Leonard, Managing Partner
Southeastern Development Group, Inc.

For UCC

UTILITY CAPACITY CORPORATION, INC.

Michael Hines, M.S., P.E., President
Utility Capacity Corporation, Inc.