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ATTORNEYS AT LAW

CONRAD MARK TROUTMAN

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RETIRED CIRCUIT JUDGE

JODY RODENBORN TROUTMAN,
OF COUNSEL

December 9, 2013

VIA Electronically: sharla.dillon@tn.gov

Chairman, Tennessee Regulatory Authority
c/o Sharla Dillon, Dockets and Records Manager
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: Docket No. 13-00017

Dear Ms. Dillon:

Attached to the email please find the Post Hearing Brief of Emerson Properties, LLC. We are also submitting via overnight delivery the original and 4 copies. By cover of a copy of this letter, we are providing an electronic (PDF) version to counsel for Tennessee Wastewater Systems, Inc., and to the Consumer Advocate.

Thank you for your assistance.

Yours very truly,

A handwritten signature in black ink, appearing to read 'C. Mark Troutman', with a long, sweeping horizontal stroke extending to the right.

C. Mark Troutman

Cc: George L. Potter
Henry Walker, Esq.
Charlena S. Aumiller, CPA

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:

PETITION OF EMERSON PROPERTIES, LLC.

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Docket #13-00017

POST TRIAL BRIEF OF EMERSON PROPERTIES, LLC.

Comes the original Petitioner, Emerson Properties, LLC, and for its post trial brief would submit the following:

FACTS

This disputes centers around a Certificate of Public Convenience and Necessity for sewer service for a subdivision in Campbell County, Tennessee, known as The Villages at Norris Lake (“the Subdivision”). The Subdivision was originally developed by The Villages at Norris Lake, LLC, a subsidiary of Land Resource LLC. (Transcript of the proceedings held November 25, 2013, hereinafter “T.R.” at page 41, line 24 –line 21 on page 42) and (Pre filed direct testimony of George L. Potter, page 42, lines 1-13; and Exhibit 2 to the pre filed direct testimony of George L. Potter). Emerson Properties, LLC, hereinafter “Emerson”, was contacted about its interest in the subdivision and began investigating the same. (*Id*). Ultimately, by Special Warranty Deed dated February 11, 2009 and recorded February 12, 2009, Emerson acquired and concluded the acquisition of the Subdivision property. (See Exhibit 1 to the pre filed direct testimony of George L. Potter).

Emerson actually acquired the property through bankruptcy proceedings of the previous developer. (See Exhibit 1 to the Pre filed direct testimony of George L. Potter). The property was purchased through the provisions of the Bankruptcy Code that allow for the sale of the properties free and clear of liens, claims, and other encumbrances. (11 U.S.C. Section 363). In connection with those proceedings, by order entered February 3, 2009, the sale of the property to Emerson free and clear of liens, claims and encumbrances was approved by the Court after notice, opportunity to object, and hearing. (See Exhibit 1 to the pre filed direct testimony of George L. Potter and Exhibit C attached hereto).

Also through the bankruptcy proceedings, the attorneys for the bankrupted developer filed a Motion to Reject the Executory Contracts in favor of Tennessee Waste Water System and Utility Capacity Corporation. (Pre filed direct testimony of George L. Potter, page 4, lines 13 through 16 and see Exhibit 2 thereto). Again after notice, opportunity to be heard, and a hearing conducted on February 10, 2009, the Bankruptcy Court entered an Order rejecting all contracts with Tennessee Waste Water System, Inc. and Utility Capacity Corporation relative to the Villages of Norris Lake. (Exhibit 2 to the Pre filed direct testimony of George L. Potter).

Shortly after Emerson's purchase of the property, Mr. Potter met with Michael Hinds, an officer of the Utility Capacity Corporation, Inc., and the Vice President of the Tennessee Waste Water Systems, Inc. ("TWSI") at that time. (Pre filed testimony of George L. Potter, page 3, lines 15-24 and transcript proceedings page 46, lines 14-25). At that meeting, Mr. Hinds advised Mr. Potter that TWSI had the exclusive right to operate the sewage treatment plant, that the sewage treatment facility would be built as previously designed and per their specifications, that the costs of the entire sewage treatment facility would be paid for in advance in full, and that prior to doing any work, TWSI and Utility Capacity Corporation would have to be paid

\$100,000.00 by Emerson. (Pre filed direct testimony of George L. Potter, page 3, lines 22-24 and TR at page 46, lines 14 through line 19 on page 47.) In addition, Mr. Hines advised Mr. Potter that all future tap fees would go to TWSI as opposed to the developer or the Homeowners association. (TR page 47, lines 20-23).

At the point and time that this meeting occurred, Emerson had concluded that the subdivision could not be economically constructed and developed as originally planned. (TR page 43, lines 23 through line 8 on page 44.) At the time Emerson purchased the property, very little infrastructure had been installed and very few roads extended through the subdivision. (Pre filed direct testimony of George L. Potter, page 4, lines 6-7.) In fact, it was apparent that many persons had purchased lots without ever accessing the lots and it appeared that some of the lots were viewed from helicopters. (Pre filed testimony of George L. Potter, Page 4 at lines 6-12). As originally proposed, the subdivision would have consisted of 650 lots. (TR page 47, lines 2-4). Realizing that due to the steep terrain of some of the Subdivision property it could not develop certain areas of the Subdivision, Emerson elected to decrease the number of lots to approximately 400. (TR page 61, lines 1-4). Emerson also embarked upon a plan to exchange lots with owners who had previously purchased lots in undevelopable areas for other lots that were available in developable areas. (TR page 44, lines 9-22). Emerson has identified approximately 70 lots purchased by individuals and which lots cannot be developed and it has successfully arranged for about 60 of these individuals to own replacement lots in more attractive areas. (Pre filed direct testimony of George L. Potter, page 5, lines 8-16).

In addition to determining certain lots were actually undevelopable, Emerson determined that the originally planned location of the waste water treatment facility was not feasible. The property was very rocky, was remotely located from the subdivision and was on the other side of

three ridges and three valleys from the subdivision. (TR page 76, lines 6 through line 5 on page 77). In fact, Mr. Potter is now of the opinion that as a result of the prior developer's actions and other subdivision, it appears they never intended to develop the subdivision as originally planned. (TR page 74 lines 18 through line 14 on page 75).

After Mr. Potter's meeting with Mr. Hinds, it was clear to Mr. Potter that TWSI would require Emerson to construct a facility that greatly exceeded what was needed for the subdivision, that was in a location that made no commercial sense and would require pumping the sewage up and over 3 ridges, and that would be at an expense of several times the cost of what was necessary. (TR page 47, lines 12-19).

After this meeting with Mr. Hinds in early 2009 Emerson began pursuing other options and ultimately reached an agreement with the Caryville-Jacksboro Utility District to operate the wastewater system in the Villages. (TR page 48, lines 2-9). As ultimately developed and approved by the Tennessee Department of Environment and Conservation "TDEC", Emerson plans to construct this facility, deed it to the Homeowners Association for the Villages of Norris Lake, and have Caryville-Jacksboro Utility District operate the system or oversee the operations. (TR page 73, lines 18 through line 4 on page 74.) After Emerson's acquisition of the property and over the course of the next few years, Caryville-Jacksboro Utility District sought and obtained permits from TDEC for the design of the system and to operate the system. (TR page 78, lines 17 through line 5 of page 79). Emerson has already granted perpetual easements to Caryville-Jacksboro Utility District over the property upon which the waste water treatment system is located to facilitate their operations of the system. (TR page 73, lines 18-21).

From Mr. Potter's meeting with Mr. Hinds in early 2009 until November or December, 2012, there was very little direct contact between Emerson and TWSI. (Page 50, lines 22-line 7

on page 51). In fact, the only communication from TWSI during this time period was a “nasty email” to either the Campbell County Planning Commission or to Mr. Potter from Mr. Hinds. (page 51, lines 1-7). Throughout all stages of the permitting process through TDEC, TWSI opposed the applications and attempted to stop Emerson’s use of another utility provider. (TR page 87, lines 4-21, and page 91, lines 6-12). In fact, the only direct efforts by TWSI to meet with Emerson occurred in November or December, 2012. (TR page 108, lines 19-25) In an effort to bridge the significant communication gap, Mr. Hyatt, indicated that TWSI “did reach out” to Emerson when it became aware that Emerson had applied for a TDEC permit. (TR page 107, lines 20-22). However, such reaching out was by letter dated May 25, 2012. Such letter was hardly a “reach out” letter and when the letter dated May 25, 2012 is examined, it is more appropriately characterized as a cease and desist demand letter. (See Exhibit 2 of the pre filed direct testimony of Charles Hyatt on behalf of TWSI).

At this point, Emerson has concluded substantial improvements and the installation of its infrastructure in the Subdivision. It has completed all of the roads in Phases 1 and 3 of the development and installed the rough grade of the roads in Phase 2. (TR page 62 lines 15-19). It has installed all the water lines in all three phases of the subdivision that are going to be completed. (TR page 62, lines 20-24). Likewise, Emerson has installed all of the electrical lines for all phases of the subdivision. (TR page 62, lines 25-through line 2 of page 63). The sewer lines through all of phase 1, all of phase 3 and a portion of phase 2 have been installed. (TR page 63, lines 3-6). Approximately 75% of the work has been concluded on phase 1 of the wastewater treatment facility. (TR page 63, lines 10-15). Emerson estimates that, weather permitting, it can complete the first phase of the wastewater system in less than two months. (TR page 84, lines 8-

12). Such would provide wastewater treatment service to lot owners for the first time in 6+ years.

At this point, TWSI has no legal interest in the real estate. (Pre filed direct testimony of George L. Potter, page 6, at lines 16-18). TWSI owns no portion of the wastewater systems or the pipes in the subdivision. (TR page 96, line 11-13). TWSI owns no easement rights and have not been deeded any property within the subdivision. (TR page 96, line 13-15). And from February, 2009 through the present date, TWSI has provided no services to the development. (Pre filed direct testimony of George L. Potter, page 6, lines 7-9). Further, Caryville-Jacksboro Utility District has already been granted perpetual easements on the property now containing the wastewater treatment plant, (TR page 73, lines 20-21), and Emerson has granted a mortgage/Deed of Trust interest to a lender upon the property that was to contain the prior wastewater treatment plant. (See Exhibit 3 to the Pre filed direct testimony of George L. Potter).

ARGUMENT

Emerson understands that the relief that it seeks in this case is unique and not common. However, when the facts of this particular case and the law are considered, Emerson respectfully submits that there are ample grounds for the termination/revocation of the CCN in favor of TWSI.

A. Grounds exist for the termination/revocation under the Tennessee statutes.

At various points in these proceedings, TWSI has argued that the Tennessee Statutes set the standards for the termination or revocation of the CCN in favor of TWSI. It has argued that as long as it was willing and able to service the area governed by the CCN, the CCN cannot be revoked. While Emerson does not agree that the statutes provide the sole basis for termination or

revocation of the CCN at issue herein¹, Emerson submits that ample grounds exist under the statutes to terminate or revoke the CCN.

T.C.A §65-4-203 (a) provides as follows:

The authority shall not grant a certificate for a proposed route, plant, line, or system, or extension thereof, which will be in competition with any other route, plant, line, or system, unless it shall first determine that the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the public, or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions as may reasonably be required under the provisions of this part.

T.C.A §65-4-204 provides as follows:

The authority may, upon its own initiative, or shall upon written application of any party in interest, order a public hearing with due notice to all interested parties, at which hearing the person proposing to create the development of water power or other plant or equipment, or extension of the same, shall be required to file with the authority, under oath, engineering plans and other information fully descriptive of the proposed development or such thereof as in the opinion of the authority can reasonably be furnished by such applicant, together with such other reasonable information as may be called for at the hearing or any adjournment of the same; and the authority shall have full power to issue or refuse the certificate of public necessity and convenience, or to qualify or withdraw the same as provided in § 65-4-203.

TWSI argues under these statutes that because it is willing and able to provide the service to the area, the CCN should not be revoked or terminated. However, such argument totally ignores the facts in this case.

First, it should be noted that TWSI has failed to comply with the initial Order granting the CCN at issue in this case. That order notes that TWSI represented in early 2007 that the wastewater treatment system should be completed within 60 days after receiving all required approvals. (See Order Approving Petition to Amend Certificate of Public Convenience and Necessity, Docket No. 06-00277, April 11, 2007). TWSI obtained approval to construct the

¹ Such argument by TWSI ignores the authority granted to the Tennessee Regulatory Authority under T.C.A. §65-4-104 and T.C.A. §65-4-117.

facility on February 28, 2007, effective as of April 1, 2007. (See Exhibit A to the Response of Emerson Properties, LLC to the Motion to Dismiss filed by Tennessee Wastewater Systems, Inc., in this matter). Notwithstanding having all regulatory permission at least as of April 1, 2007, the wastewater treatment facility was not installed over the course of the next 2 years up until Emerson's purchase of the property. So even without regard to the events that transpired over the next 4 plus years since Emerson's purchase, TWSI's inaction from April of 2007 through February of 2009 casts doubt upon its argument that it was willing and able to provide service to the governed area.

But, since Emerson's purchase in 2009, TWSI is not able to provide the service. All contracts in its favor were terminated in connection with the prior developer's bankruptcy proceedings. (Pre filed direct testimony of George L. Potter, page 4, lines 13 through 16 and see Exhibit 2 thereto). TWSI has no current interest in the land constituting the Subdivision and holds no deeded rights, easement rights, or any other interest in the real property, the assets that comprise the system, or the sewer system pipes underneath the Subdivision real property. (Pre filed direct testimony of George L. Potter, page 6, at lines 16-18; and TR page 96, line 11-15). Therefore, TWSI has no legal rights at all to enter upon the property of the Subdivision and other than holding the bare CCN, it has no legal ability to provide any services to the area governed by the CCN.

Black's Law Dictionary defines the concept of "ready, willing and able" in a transactional setting "as persons who are *legally* and financially able to complete" the contemplated transaction. (Black's Law Dictionary, online 2nd edition, emphasis added). Because TWSI lacks an interest in the Subdivision real property, in the system itself, and because it has no contracts at all, it has no legal ability to perform any services to the area

governed by the CCN. As a result, because it has failed to provide any services in the area since April of 2007 and because it has no legal ability to provide any services, TWSI's CCN should be terminated or revoked.

It is also noteworthy that at this point, TWSI is owed no funds from its prior involvement with this project. (TR at page 112, lines 19-22). And, when completed, this system will be almost 10 times the size of TWSI's average system. (TR at page 129, lines 1-10).

In an effort to appear "willing and able" to render the service, TWSI submitted the testimony of Mr. Hyatt that he "reached out" to Emerson in an effort to work with it and that TWSI was still willing to provide service to the Subdivision. However, such ignores the 4 year history of TWSI in attempting to thwart Emerson's development by opposing the TDEC applications and filing the other TRA and Chancery Court matter. Further, Mr. Hyatt candidly admitted that at this point, if TWSI were to become involved, any part of the system that did not meet their specifications or technology would have to be "redone." (Pre filed Rebuttal Testimony of Charles Hyatt, Page 4). Such hardly evidences an intention on the part of TWSI to work with Emerson and the Subdivision owners to provide service in a cost efficient manner. TWSI's conduct over the past 6+ years seems to be more revenue driven than service driven at the expense of Emerson and the various lot owners.

Also in an effort to avoid the effect of its having no contract to provide service and no legal rights in the real or personal property of the facility, TWSI argues that TRA may resolve contractual issues between the parties. However, Tennessee Courts are clear that they will not create contractual provisions between parties where none exist. *Marcum v. Ayers*, 398 S.W. 3d 624, 629 (Tenn. Ct. App. 2012). Further, there is simply no statutory or regulatory basis for the TRA to impose a contract on Emerson without its consent.

Emerson submits that the CCN of TWSI should be terminated or revoked because it is not legally able to provide the services and it is truly not willing to work with the effected parties in getting service to the lot owners.

B. The CCN should be terminated because TWSI has failed to comply with the applicable regulations.

Emerson also submits that ample grounds exist under the TRA Regulations to terminate or revoke the CCN.

TRA Rule 1220-04-13-.06 provides in pertinent part as follows:

(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.

There is no dispute that TWSI has failed to comply with this regulation. Interestingly, no explanation is offered by TWSI as to why it did not comply with such between April of 2007 and February of 2009 when it had represented in its petition for the CCN that it could complete the system within 60 days of regulatory approval. Clearly, TWSI has provided no services in the 6+ years since it obtained the CCN and TDEC permits for this subdivision. As stated above, TWSI has no legal rights to provide any services and in fact has no right to even enter upon the subdivision property.

Consequently, the CCN should be revoked or terminated under this regulation. Alternatively, the CCN should be amended to provide that Emerson is free to utilize the municipal utility per its stated intentions.

In addition, other regulatory provisions provide a basis for the termination or revocation of the CCN. TRA Rule 12-04-13-.10. provides:

(1) Title to all physical assets of the wastewater system managed or operated by a public 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.

Again there is no dispute that TWSI does not hold title to, or any other interest in, the assets of the wastewater system at issue herein. In fact, easements have been granted to the Caryville-Jacksboro Utility District and a bank holds a mortgage on the property. TWSI simply cannot comply with this provision and offers no explanation for the same other than asserting that if this petition is denied, it will own the assets. There is simply no legal or factual basis to support TWSI's argument.

Finally, TRA Rule 1220-04-13-.09 provides in pertinent part as follows:

(1) Where a public wastewater utility through the actions of its owner(s), operator(s), or representative(s) demonstrates an unwillingness, incapacity, or refusal to effectively operate and/or manage the wastewater system(s) in compliance with these rules and Tennessee statutes, or the wastewater system(s) has been abandoned, the Authority shall take appropriate action based on good cause that may include suspension or revocation of a public wastewater utility's CCN, forfeiture of wastewater utility funds, and/or making a claim against the public wastewater utility's financial security.

(2) Good cause shall include, but is not limited, to the following:

(a) A finding by the Authority of material non-compliance by the holder of a CCN with any provisions of Title 65 of the Tennessee Code dealing with obtaining a public wastewater utility CCN or providing wastewater services to customers, or any order or rule of the Authority relating to the same.

(b) A finding by the Authority of:

1. Fraud, dishonesty, misrepresentation, self-dealing, managerial dereliction, or gross mismanagement on the part of the public wastewater utility;
2. Criminal conduct on the part of the public wastewater utility;
3. Actual, threatened or impending insolvency of the public wastewater utility;

4. Actual or threatened abandonment of the public wastewater utility by its owners or its operators;
5. Persistent, serious, substantial violations of statutes or regulations governing the public wastewater utility; or
6. Failure or inability on the part of the wastewater utility to comply with an order of any other state or federal regulatory body after the public wastewater utility has been notified of its non-compliance and given an opportunity to achieve compliance.

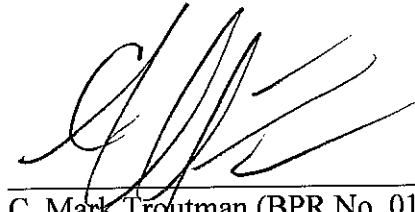
Emerson submits the facts also establish grounds under this provision for termination. For the reasons cited above, TWSI has failed to provide the services and thus "good cause" exists under subparts (1) and (2) (a) above. Further, TWSI's demand for a baseless payment of \$100,000.00 establishes cause under (b) 1 above.

Therefore, Emerson submits that the regulations provide sufficient grounds for the termination, revocation or alternatively, modification of the CCN at issue herein.

CONCLUSION

Emerson respectfully submits that ample statutory and regulatory grounds exist for the revocation or termination of the CCN in favor of TWSI. The simple facts are that TWSI has failed to provide services in 6+ years at great harm to the lot owners in the subdivision. Emerson is within 6-8 weeks of making alternative services available through a respectable local municipality utility. TWSI should not be allowed to deny the lot owners sewer service any longer simply because it holds a CCN that it has done nothing with.

Respectfully submitted this 9th day of December, 2013.




C. Mark Troutman (BPR No. 011712)
TROUTMAN & TROUTMAN, P.C.

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(423) 566-6001
Attorney for Emerson Properties, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing documents have been served Henry Walker, Bradley Arant Boult Cummings LLP, 1600 Division Street, Suite 700, Nashville, TN 37203, counsel of record for the Respondent and to Charlena S. Aumiller, CPA, Assistant Attorney General, Consumer Advocate and Protection Division, Office of the Tennessee Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243-3400, via email and/or United States mail addressed to said counsel at his office with sufficient postage thereon to carry it to its destination.

This is 9th day of December, 2013.

By: 
C. Mark Troutman