

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 25, 2014

IN RE:)	
)	
PETITION OF EMERSON PROPERTIES, LLC)	DOCKET NO.
FOR DECLARATORY RULING)	13-00017

ORDER INITIATING SHOW CAUSE PROCEEDING AGAINST
TENNESSEE WASTEWATER SYSTEMS, INC.

This matter came before Chairman James M. Allison, Director Kenneth C. Hill, and Director David F. Jones of the Tennessee Regulatory Authority (“Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on January 13, 2014 for consideration of the *Amended Petition of Emerson Properties, LLC* (“*Petition*”) filed by Emerson Properties, LLC (“Emerson”) on March 1, 2013 requesting that the TRA revoke the amended certificate of public convenience and necessity (“CCN”) issued to Tennessee Wastewater Systems, Inc. (“TWSI”) for the service area known as Villages at Norris Lake (“Villages”), as described below.

BACKGROUND

CCN

TWSI first received a CCN from the Tennessee Public Service Commission in 1994 in Docket No. 93-09040.¹ Since then, its CCN has been amended numerous times to expand its service territory. On November 6, 2006, TWSI filed a petition requesting that its service area be

¹ TWSI was formerly known as On-Site Systems, Inc.

expanded to include Villages at Norris Lake, a subdivision in Campbell County. In support of its petition, TWSI filed a letter from the developer of Villages at Norris Lake, Land Resource Companies, requesting that TWSI provide service. In addition, letters from the Mayors of the City of LaFollette and Campbell County indicated they had no intent to provide wastewater service to that area. Although no contracts had been signed at the time of the application, TWSI estimated that the system would be complete within 60 days of Tennessee Department of Environment and Conservation (“TDEC”) approval and other approvals. The Authority granted the petition to amend the CCN on January 8, 2007.² TWSI filed its TDEC state operating permit with the Utilities Division of the Authority on February 28, 2007.³

Emerson’s *Petition*

Emerson filed its *Petition* on March 1, 2013⁴ concerning the CCN held by TWSI for a portion of Campbell County, Tennessee, known as Villages at Norris Lake. In its *Petition*, Emerson asserts that the property of Villages was sold to it “by Bankruptcy Court Order, free and clear of other interests which extinguished TWSI’s rights in the real property.”⁵ According to Emerson, “a small portion of sewer connections and the sewer main were installed by TWSI but Emerson believes TWSI received full compensation from the prior owners for such.”⁶ Further, Emerson asserts that in the prior owner’s bankruptcy proceedings, “all of TWSI contracts were set aside and terminated.”⁷ Therefore, Emerson argues, TWSI “has no interest in the real or personal property that will comprise this sewer system, has no contractual rights to

² See *In re: Petition of Tennessee Wastewater Systems, Inc. to Amend its CCN to Expand its Service Area to Include a Portion of Campbell County in Tennessee, Known as Villages at Norris Lake*, Docket No. 06-00277, *Order Approving Petition to Amend Certificate of Public Convenience and Necessity*, p. 3 (April 11, 2007).

³ The TDEC permit was filed in Docket No. 06-00277 on November 4, 2009.

⁴ Emerson initially filed a *Petition for Declaratory Ruling* on January 16, 2013 and filed its *Petition* after it was determined that a request for declaratory ruling was not necessary.

⁵ *Petition of Emerson Properties, LLC for Declaratory Ruling*, p. 2 (January 16, 2013).

⁶ *Id.* at 3.

⁷ *Id.*

obtain any interest in such, and has no right or obligation to complete the construction of the system or provide any services at all.”⁸

Emerson alleges that TWSI has not installed facilities within the two-year period provided for in TRA Rule 1220-04-13-.06.⁹ According to Emerson, TWSI also cannot prohibit the encumbrance or transfer of the assets of the wastewater system as provided in TRA Rule 1220-04-13-.10, since it will not own the wastewater system.¹⁰ Finally, Emerson believes that TWSI’s state operating permit has either expired or will soon expire.¹¹ For these reasons, Emerson asserts that good cause exists for the Authority to terminate TWSI’s CCN under TRA Rule 1220-04-13-.09(2)(a), and requests the TRA to terminate the CCN or convene a contested case to do so.¹²

TWSI’s Answer

On March 27, 2013, TWSI filed its *Answer to Petition, Motion to Dismiss the Petition and Counterclaim by Tennessee Wastewater Systems, Inc. Against Emerson Properties, LLC*. TWSI states that the Davidson County Chancery Court ruled that “the bankruptcy of the former owner and the abrogation of the contract between Respondent [Emerson] and the former owner of the development ‘did not affect Plaintiff’s service area rights under the CCN,’ which are

⁸ *Id.*

⁹ TRA Rule 1220-04-13-.06 (4) reads: “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.”

¹⁰ TRA Rule 1220-04-13-.10 (1) reads: “Title to all physical assets of the wastewater system managed or operated by a public 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.”

¹¹ *Petition of Emerson Properties, LLC for Declaratory Ruling*, p. 4 (January 16, 2013).

¹² *Id.* TRA Rule 1220-04-13-.09(2)(a) reads: “Good cause shall include, but is not limited to the following: 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 service to customers, or any order or rule of the Authority relating to the same.”

obtained from the TRA in accordance with state law, ‘not by contract with the property owner.’”¹³

TWSI disagrees with Emerson’s argument that TRA Rule 1220-04-13-.10 prohibits a utility from mortgaging its property without Authority approval.¹⁴ According to TWSI, “[s]ince no utility other than TWSI can legally provide wastewater service at this location, TWSI will eventually acquire ownership of the system, which has been partially built and will own and operate the system in accordance with the Authority’s rules.”¹⁵

TWSI maintains that the Davidson County Chancery Court opined that TWSI’s CCN prohibits other utilities from serving this location unless the TRA determines that TWSI is unwilling or unable to provide service. “There is no allegation in the Petition that Respondent is unable or unwilling to provide such service. Therefore, as a matter of law, the Petition does not state a claim sufficient to warrant termination of Respondent’s [TWSI] certificate.”¹⁶ And TWSI asks the TRA to dismiss Emerson’s *Petition* to terminate TWSI’s CCN.¹⁷

According to TWSI, if the lot owners are paying tap fees or a surcharge earmarked for wastewater service, that money should be placed in escrow and used to construct and operate a wastewater system and until Emerson and TWSI have reached an agreement. TWSI admits that it currently does not own any wastewater facilities at this site. TWSI asserts that once construction is completed, TWSI will take ownership of the system and operate it, and this is the same business model TWSI follows in almost all of its systems in Tennessee.

¹³ See *Motion to Dismiss*, pp. 5-6 (March 27, 2013).

¹⁴ TRA Rule 1220-04-13-.10 provides:

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

¹⁵ See *Motion to Dismiss*, p. 6.

¹⁶ *Id.*

¹⁷ *Id.* at 7.

NOVEMBER 25, 2013 HEARING, APPEARANCES AND POST-HEARING FILINGS

A Hearing in this matter was held before the voting panel on November 25, 2013, as noticed by the Authority on November 15, 2013. Pursuant to the Procedural Schedule issued by the Hearing Officer on September 16, 2013, the parties filed Direct Testimony on October 11, 2013 and Rebuttal Testimony October 25, 2013.¹⁸ The Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”) initially filed a petition for limited intervention for purposes of notice and service.¹⁹ On November 15, 2013, the Consumer Advocate filed a *Motion to Confirm the Consumer Advocate may Participate in the Hearing*. The Hearing Officer granted the motion and allowed the CAPD to participate in the hearing on a limited basis.²⁰

Participating in the hearing were the following parties and their respective counsel:

Emerson Properties, LLC - C. Mark Troutman, Esq., 124 Independence Lane, P.O. Box 757, LaFollette, TN 37766.

Tennessee Wastewater Systems Inc. – Henry W. Walker, Esq., Bradley Arant Boult Cummings LLP, 1600 Division Street, Suite 700, Nashville, TN 37203.

Consumer Advocate – Charlena Aumiller, Esq., Office of the Attorney General, 425 Fifth Avenue North, Fourth Floor, John Sevier Building, P.O. Box 20207, Nashville, TN 37202.

George Potter appeared as the witness for Emerson, and Charles Hyatt appeared as the witness for TWSI. The witnesses were subject to cross-examination by the other parties and questions from the panel. In addition, at the start of the Hearing, members of the public were given an opportunity to present comments to the panel. Following the Hearing, the panel took the matter under advisement, and the parties filed Post-Hearing Briefs on December 9, 2013.

¹⁸ See *Order Establishing Procedural Schedule to Completion* (September 16, 2013).

¹⁹ See *Petition to Intervene* (March 15, 2013).

²⁰ See *Pre-Hearing Order* (November 20, 2013).

The Post-Hearing Briefs reiterated a number of the arguments made previously by the parties. The following is a summary of any new arguments put forth by the parties.

TWSI

In its Post-Hearing Brief, TWSI argues that Emerson bases its request to revoke TWSI's CCN on TRA Rule 1220-4-13-.06(4), which requires that a wastewater utility provide service within two (2) years after the date of authorization, and this rule does not apply to this proceeding because the rule also requires that any revocation be done pursuant to Tenn. Code Ann. § 65-2-106 and this proceeding is not a show cause proceeding.²¹ According to TWSI, the Authority has not conducted a preliminary investigation and issued a show cause order that “fully and specifically state[s] the grounds thereof” as required by Tenn. Code Ann. § 65-2-106.²² TWSI claims that had a preliminary investigation been conducted by the Authority, it would show that TWSI “intends to provide service to this area in accordance with the terms of its certificate and tariffs as soon as the developer, Emerson Properties, pays for the construction of the system.”²³ TWSI also makes this same argument regarding Emerson's claim that TWSI is not in compliance with TRA Rule 1220-4-13-.10(1) that requires that physical assets of the wastewater utility not be subject to any liens or encumbrances.²⁴ According to TWSI “any such preliminary investigation would show that TWSI does not currently ‘manage or operate’ any physical assets of a wastewater system at this location and therefore has not violated—and could not have violated –Rule 1220-4-13-.01(1).”²⁵

²¹ *Post-Hearing Brief of Tennessee Wastewater Systems, Inc.*, p. 3 (December 9, 2013).

²² *Id.*

²³ *Id.* at 3-4.

²⁴ *Id.* at 4.

²⁵ *Id.*

TWSI states that its counterclaim may be dismissed “in light of Mr. Potters’ sworn testimony that construction has been halted and that tap fees collected from the lot owners are being held in escrow pending the outcome of this dispute.”²⁶

Emerson

Emerson argues that while it “does not agree that the statutes provide the sole basis for termination or revocation of the CCN at issue herein, Emerson submits that ample grounds exist under the statutes to terminate or revoke the CCN.”²⁷ Emerson maintains that TWSI has failed to comply with the Authority’s initial order granting the CCN, and “[t]hat order notes TWSI represented in early 2007 that the wastewater treatment system should be completed within 60 days after receiving all required approvals.”²⁸ According to Emerson, “[n]otwithstanding 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.”²⁹ Emerson argues “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.”³⁰ Emerson maintains that since it purchased the Villages in 2009, TWSI has not been able to provide service because:

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. 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.³¹

²⁶ *Id.* at 6.

²⁷ *Post Trial Brief of Emerson Properties, LLC*, pp. 6-7 (December 9, 2013) (footnote omitted).

²⁸ *Id.* at 7.

²⁹ *Id.* at 8.

³⁰ *Id.*

³¹ *Id.* (Citation omitted).

Emerson states that “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.”³² Emerson maintains that because TWSI does not have an interest in Villages real property or the system and because it has no contracts it is not legally able to perform any services to the Villages.³³

Emerson points out that the facts of this docket also establish grounds for revocation under TRA Rule 1220-04-13-.09, which states the TRA shall take appropriate action, including suspension or revocation of a CCN where a wastewater utility has demonstrated an unwillingness, incapacity or refusal to operate the system in accordance with TRA rules or state statutes.³⁴

Consumer Advocate

The Consumer Advocate also filed a Post-Hearing Brief on December 9, 2013. Its arguments are summarized as follows:

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. 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.³⁵

³² *Id.* (Emphasis in original).

³³ *Id.* at 8-9.

³⁴ *Id.* at 11-12.

³⁵ *Post-Hearing Brief of the Consumer Advocate*, p. 21 (December 9, 2013).

FINDINGS AND CONCLUSIONS

The Authority conducted a preliminary investigation through its review of the entire record in this docket, including sworn testimony given by witnesses at the Hearing held on November 25, 2013 and the exhibits presented. At a regularly scheduled Authority Conference held on January 13, 2014, the panel deliberated this matter.

After hearing statements of counsel, testimony of witnesses and reviewing the entire record in this docket, the majority of the panel found that the record in this docket has established the following:

1. Tennessee Wastewater's CCN was amended to include the Villages at Norris Lake in an Order issued in TRA Docket No. 06-00277 on April 11, 2007. However, to date, TWSI has not provided wastewater service to the Villages. TWSI does not have a contract for service with Emerson, nor does Emerson intend to enter into a contractual relationship with TWSI.
2. TWSI has not been deeded any land at the Villages, nor does it have an easement. Emerson has no intention of giving TWSI a deed to property or an easement.
3. TWSI does not own a wastewater system or pipes at the Villages. Emerson will not give its system or pipes to TWSI.
4. TWSI's business model is that the developer builds the system and then deeds it to TWSI. TWSI's tariff does not include capital costs for it to build a system.
5. TWSI is not willing to provide service to the Villages if the wastewater system is not given to TWSI.

6. Since TWSI does not and cannot own the system, it is not in a position to comply with TRA Rule 1220-04-13-.10(1), which prohibits the title of the physical assets of a wastewater system from being subject to any liens or judgments.
7. TWSI has failed to file a petition requesting approval of its alternative proof of financial security by May 1st of 2012 and 2013 and has failed to file a bond until alternative financial security is approved in violation of TRA Rule 1220-4-13-.07(5).

Based on these facts, the majority of the panel found that TWSI is unwilling and incapable of effectively operating and/or managing the Villages at Norris Lake system in compliance with TRA rules and Tennessee statutes in violation of TRA Rule 1220-4-13-.09, which provides:

(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:

(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.

(3) In addition to the above, the Authority may consider one or more of the following in determining whether a public wastewater utility's CCN should be

suspended or revoked, whether its wastewater utility funds should be forfeited and/or whether a claim should be made against its financial security:

(a) Whether, to the extent practicable, service to customers will remain uninterrupted under an alternative public wastewater utility or a designated third party capable of providing adequate wastewater service, including a trustee or receiver appointed by the appropriate court;

(b) Whether there are certain methods to mitigate any financial consequences to customers served by the utility subject to suspension or revocation and the adoption of a plan to implement those methods; or whether there are no practicable methods to mitigate the financial consequences to customers; and

(c) Such other factors as the Authority deems relevant to the determination.

(4) Proceedings before the Authority for 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 shall be conducted in accordance with Tenn. Code Ann. § 65-2-106 and after notice to the public wastewater utility and its surety, and an opportunity to be heard, unless the conduct of a public wastewater utility poses an imminent threat to the health or safety of the public. In such exigent circumstances, the Authority may order the summary suspension of the CCN and follow the procedures as set forth in Tenn. Code Ann. § 4-5-320.

The Authority will not seek to suspend or revoke a public wastewater utility's CCN, to forfeit the wastewater utility funds, or make a claim against the public wastewater utility's financial security for good cause without first affording the public wastewater utility a reasonable opportunity to correct the conditions that are alleged to constitute the grounds for such action unless:

(a) the conduct of a public wastewater utility poses an imminent threat to the health or safety of the public; or

(b) a public wastewater utility is unable to provide safe, adequate, and reliable wastewater service.

Tenn. Code Ann. § 65-2-106 empowers the Authority to “issue orders on its own motion citing persons under its jurisdiction to appear before it and show cause why the [A]uthority should not take such action as the [A]uthority shall indicate in its show cause order appears justified by preliminary investigation made by the [A]uthority under the powers conferred upon it by law.” Tenn. Code Ann. § 65-2-109 provides that the burden of proof in a show cause proceeding falls upon the party that is required to come forward to the Authority and show cause why the Authority should not proceed in a certain manner.

Based on its findings, the majority of the panel voted that pursuant to Tenn. Code Ann. § 65-2-106, TWSI should appear before the Tennessee Regulatory Authority and show cause why the Authority should not proceed to take action against TWSI for the unlawful actions and omissions alleged against it, including, but not limited to, revoking its amended CCN to serve the Villages at Norris Lake and imposing civil penalties and sanctions for violation of TRA Rule 1220-4-13-.07(5).³⁶

In addition, the majority of the panel voted to dismiss the counterclaim filed by TWSI and that the *Amended Petition* filed by Emerson Properties be held in abeyance until the Authority has made a decision in the show cause proceeding.

IT IS THEREFORE ORDERED THAT:

1. Tennessee Wastewater Systems, Inc. shall appear before the Tennessee Regulatory Authority at 1:00 p.m. CDT on April 14, 2014, in the Hearing Room G.201 located on the ground floor of the Andrew Jackson State Office Building at 500 Deaderick Street, Nashville, TN 37243 and show cause why the Authority should not proceed to take action against it for the unlawful actions and omissions alleged against it, including, but not limited to, revoking the amendment to its CCN to serve the Villages at Norris Lake and imposing civil penalties and sanctions for violation of TRA Rules 1220-4-13-.07(5).

2. The counterclaim filed by Tennessee Wastewater Systems, Inc. is dismissed.

Chairman James M. Allison and Director David F. Jones concur. Director Kenneth C. Hill dissents.

ATTEST:



Earl R. Taylor, Executive Director

³⁶ Director Hill did not vote with the majority. Director Hill stated that while he did not agree with all of the statements in Chairman Allison's motion, and therefore could not vote for it, he would remain open to having more questions answered during the show cause hearing.