

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:)	
)	
EMERSON PROPERTIES, LLC,)	
)	
Petitioner)	
)	DOCKET NO. 13-00017
v.)	
)	
TENNESSEE WASTEWATER)	
SYSTEMS, INC.,)	
)	
Respondent)	

REPLY BRIEF

In accordance with the procedural schedule issued on April 16, 2013, by Hearing Officer Kelly Cashman-Grams, Tennessee Wastewater Systems, Inc. ("TWSI") submits the following Reply Brief in support of TWSI's Motion to Dismiss this complaint filed by Emerson Properties, LLC ("Emerson").

Statement of Facts and Summary of Argument

Tennessee Wastewater Services, Inc. is the largest provider of stand-alone, wastewater treatment services in Tennessee. TWSI serves over seventy-five locations, each authorized by a certificate of convenience and necessity issued by the Authority and a State Operating Permit issued by the Tennessee Department of Environment and Conservation.

One of TWSI's certificates authorizes the utility to provide wastewater service at a development called Villages at Norris Lake in Campbell County, Tennessee. The certificate was issued in 2007 (TRA Docket 06-00277). As discussed in previous filings in this docket, the owner of the development and TWSI agreed by contract that the developer would build a

wastewater collection and treatment system that met the engineering specifications of TWSI's tariffs and the requirements of TDEC. The developer would then turn over the completed system to TWSI to own and operate in accordance with the utility's tariffs and the TRA's rules. This method of operating is described in TWSI's tariffs and is the business plan typically followed by providers of stand-alone wastewater services in Tennessee.

The developer hired a company called Utility Capacity Corporation, Inc. ("UCC") to construct the system. At that time, the owner of UCC also worked for TWSI but UCC itself was then and is now a separate entity, unrelated to TWSI. UCC installed a substantial portion of the system, but the development owner went bankrupt before the system was completed.

In 2009, Emerson Properties purchased the assets of the prior owner out of bankruptcy and is now the owner of Villages at Norris Lake. As normally happens in a bankruptcy proceeding, the court canceled the contract between TWSI and the bankrupt owner. At this time, there is no contract between TWSI and Emerson and, although Emerson has reportedly received the proceeds of the sewer bond posted by the prior owner,¹ the system remains unfinished and there is no wastewater service available at the development.

Regardless of the change in ownership, TWSI's certificate of convenience and necessity issued by the TRA grants the utility the exclusive right to serve Villages at Norris Lake. As the Davidson County Chancery Court recently held, TWSI has "the legal and exclusive right, status and privilege to provide public wastewater services to the service area known as Villages at Norris Lake in Campbell County, Tennessee pursuant to the CCN issued to [TWSI] by the Tennessee Regulatory Authority on April 11, 2007, which CCN remains valid." Tennessee

¹ TWSI has been told by Emerson that the sewer bonds (one bond was for the collection pipes and another bond was for a treatment system) posted by the prior developer have been paid by the bond company and the proceeds given to Emerson.

Wastewater Systems v. Tennessee Regulatory Authority, et al., Davidson County Chancery Court, Docket No. 12-0143-II. Opinion issued January 7, 2013, at 4-5. The Court explained, "While the bankruptcy court set aside an executory contract for wastewater service between [TWSI] and the previous owner of the property, the bankruptcy proceeding did not affect [TWSI's] service area rights under the CCN. [TWSI's] service area rights are granted by statute and regulations of the TRA, not by contract with the property owner." *Id.*, at 4. Emerson did not appeal the Court's decision which is now final and binding on the parties.

Emerson has not requested wastewater service from TWSI. Instead, Emerson attempted to obtain service from the Caryville-Jacksboro Utility Commission ("CJUC"), a municipal system located several miles away from Villages at Norris Lake. Although CJUC obtained an SOP from TDEC to serve Villages at Norris Lake, Emerson's plan was illegal. As the Chancery Court held, CJUC is prohibited by statute, T.C.A. § 6-51-301(a), from encroaching upon the service area of TWSI. Emerson also illegally resumed construction of the wastewater system in violation of both T.C.A. § 65-5-201 and the terms of the SOP issued to CJUC. TWSI has filed a counterclaim against Emerson over the statutory violation and TDEC has ordered the construction work to stop. (A copy of TDEC's letter is attached to the Motion to Dismiss.)

Emerson now files this complaint, asking the TRA to revoke TWSI's certificate so that Emerson may obtain wastewater service from CJUC. The complaint is based on inaccurate facts and bad law. It should not—and need not—go forward.

In its Response to the Motion to Dismiss, Emerson lists four reasons why the Authority should revoke TWSI's certificate. Two of them are simply inaccurate. But none of them, even if true, provides a sufficient legal basis for canceling TWSI's certificate. The complaint should be dismissed and the parties spared the time and expense of further litigation.

Emerson may, of course, request at any time that TWSI provide wastewater services to the development under terms that are "just and reasonable" and consistent with TWSI's tariffs. If Emerson believes that TWSI is acting unreasonably or in violation of its tariffs, Emerson may seek the assistance of the Authority. In the meantime, Emerson cannot construct a wastewater system nor can it collect tap fees or other sewer-related fees from customers.

Argument

Emerson's Response alleges there are four "causes" to revoke TWSI's certificate (Response at pp. 1-2). Two of the causes are based on inaccurate information. More importantly, none of the four causes—whether accurate or not—is legally sufficient to justify revocation of TWSI's certificate.

1. Emerson alleges that TWSI is not providing wastewater service at this development and is not currently working on completion of a wastewater system.

The same statement could be made of any utility which has not received a request to provide service to a particular location. Until such a request is made and the utility is either unable or unwilling to comply with that request, there is no basis in state law or the TRA's rules to revoke the utility's certificate.

When this dispute between Emerson and TWSI was litigated in the Davidson County Chancery Court last year, counsel for the TRA explained to the Court that TWSI's certificate gave the utility an exclusive right to provide wastewater service at Villages of Norris Lake unless the Authority found that TWSI was unable or unwilling to provide wastewater service at that location. Counsel for the Authority wrote,

Further, 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 extensions.

"Memorandum of Tennessee Regulatory Authority in Response to Plaintiff's Motion for Summary Judgment," filed December 3, 2012 in Tennessee Wastewater Systems v. Tennessee Regulatory Authority, et al., supra, at 2.

The Court adopted the TRA's explanation in the Court's "Final Judgment Order," stating,

The TRA further advised the Court that the holder of a CCN has the protection afforded by Tenn. Code Ann. § 65-4-201 (2004) and § 65-4-203 (2004), which exclude other applicants from providing public utility services to the same service areas already subject to a CCN unless the TRA 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 existing facilities of the holder of the CCN 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 extensions.

Opinion, supra, at 2. A copy of the Court's opinion is attached to TWSI's "Motion to Dismiss" filed March 27, 2013.

Emerson does not allege that it has requested service from TWSI or that TWSI is unable or unwilling to provide service. To the contrary, TWSI has submitted an affidavit declaring that the utility is willing and able to provide wastewater services in accordance with the rates, terms, and conditions of TWSI's tariffs. There are no facts alleged by Emerson disputing TWSI's offer to serve. The fact that TWSI is not currently providing service or building a treatment facility does not warrant revocation of TWSI's certificate.

2. Emerson next alleges that TWSI "attempted to extract an inappropriate and unfounded payment from Emerson prior to commencing any services."

That statement is inaccurate. As TWSI explained in paragraph 9 of its "Answer," there have been no such communications between TWSI and Emerson. Those discussions, which may or may not be accurately described by Emerson, were probably between Emerson and Utility Capacity Corporation, Inc. ("UCC"), a company that builds sewer systems. UCC is not affiliated with TWSI.² In its "Response," Emerson does not dispute TWSI's explanation.

Even if this conversation had occurred between Emerson and TWSI, it would demonstrate only that the parties were unable to agree to "just and reasonable" terms under which TWSI would provide service. Such disputes are not uncommon between utilities and their customers. For that reason, state law provides customers the right to bring complaints about utility rates and service to the Authority. See T.C.A. § 65-4-114 and 115. These statutory remedies would be meaningless if a disagreement between a utility and its customers over the cost of service meant that the utility should lose its certificate. Emerson's suggestion that the Authority may legally revoke a utility's certificate because the utility made what Emerson calls an "inappropriate" and "unfounded" demand for payment is not a serious argument and deserves no further consideration.

3. Emerson alleges that TWSI's State Operating Permit issued by the Tennessee Department of Environment and Conservation ("TDEC") has expired and that there is no indication "that any efforts to renew the same were made by TWSI." Emerson's Response at 2.

² Utility Capacity Corporation, Inc. is owned by Mr. Mike Hines. In addition to owning UCC, Mr. Hines formerly managed a number of TWSI sites in East Tennessee. Mr. Hines is no longer associated with TWSI but continues to own UCC.

Under TWSI's tariffs, the developer is responsible for the construction of a wastewater system. The owner selects a contractor to build the system. TWSI will take possession of the completed system and operate it as long as the system meets appropriate engineering standards as described in TWSI's tariffs. It is TWSI's understanding that the former owner of Villages at Norris Lake hired UCC to construct a wastewater system to serve the development. TWSI has no interest in any dispute between Emerson and UCC over the ownership of the partially completed system.

That statement is inaccurate. Attached also is a letter from TDEC confirming that TWSI has a valid State Operating Permit for this site. TDEC has also sent a copy of the letter to counsel for Emerson who will presumably now withdraw this argument.³

4. Emerson's final argument why TWSI's certificate should be canceled is that "TWSI has no contractual relationship with Emerson, the subdivision property or owners of lots within the subdivision." Emerson's Response, at 2.

Emerson's argument is not clear. The parties agree that TWSI has no contract to provide wastewater service at Villages at Norris Lake. Emerson has not asked for one. In its "Response" to the Motion to Dismiss, Emerson does not explain how the absence of a contract threatens a utility's certificate. A developer cannot simply refuse to sign a service contract and then claim that the utility has lost its right to serve the area.

In the "Amended Petition" (paragraph 13), Emerson phrased the issue differently, arguing that "without any contractual right to provide . . . utility services, TWSI has no valid and protectable rights in or to a certificate of convenience and necessity and no other interests or rights in this matter." That contention—that the utility's contract, not its certificate, gives the utility its legal right to provide service—has already been rejected by the Davidson County Chancery Court. Emerson cannot raise it again.

As explained in the Motion to Dismiss, Emerson is barred by the doctrine of collateral estoppel from arguing this issue because it was litigated and resolved in the Chancery Court case.

³ Even if the SOP were not currently in effect, that is not sufficient reason to revoke TWSI's certificate. Only if TWSI, which currently holds SOPs for more than seventy-five sites in Tennessee, is unwilling or unable to obtain an SOP to serve Villages at Norris Lake would the Authority be justified in canceling TWSI's certificate.

In its Response, Emerson argues that the Chancery Court did not rule on the merits of Emerson's counterclaim, in which Emerson tried to persuade the Court to cancel TWSI's certificate, and the Court further stated that Emerson could "proceed to the TRA." Opinion, at 4.

Emerson's Response is factually correct but misses the point. The Court held that it could not rule on Emerson's counterclaim because Emerson had not first brought its case to the TRA. But Emerson ignores what the Court did rule. TWSI, the Plaintiff, asked the Court to issue a declaratory judgment that the CCN issued by the Authority to TWSI to serve Villages at Norris Lake precluded CJUC from serving the same territory. In order to make that determination, the Court had to decide first whether TWSI's certificate remained in effect despite the bankruptcy of the former owner and the cancellation of the contract between the former owner and TWSI. In holding that TWSI's certificate "remains valid," the Court expressly rejected Emerson's argument that the voiding of the prior contract effectively nullified the utility's CCN. The Chancellor held (Opinion, at 4):

Emerson Properties, LLC acquired Villages at Norris Lake out of bankruptcy proceedings. While the bankruptcy court set aside an executory contract for wastewater service between Plaintiff and the previous owner of the property, the bankruptcy proceeding did not affect Plaintiff's service area rights under the CCN. Plaintiff's service area rights are granted by statute and regulations of the TRA, not by contract with the property owner.

Counsel for the TRA also addressed this issue, advising the Chancery Court that "the bankruptcy proceeding . . . does not have any effect on the current CCN held by [TWSI]." TRA brief at 6. The Court agreed.

Though not specifically discussed by Emerson, the collateral estoppel rule squarely applies to this issue. The rule precludes rearguing a point when (1) the same issue was (2) fully litigated (3) by the same parties and (4) necessarily decided (5) in a decision which is now final.

As the Tennessee Supreme Court said in Mullins v. State, 294 S.W.3d 529, 535 (Tenn. 2009), "[W]hen an issue has been actually litigated and necessarily determined in an earlier proceeding between the parties, that determination is conclusive against the parties in subsequent proceedings." Here, the Chancellor determined that TWSI's certificate "remains valid" and therefore prohibits Emerson from obtaining wastewater service from CJUC. In light of that ruling, Emerson cannot continue to argue that the cancellation of the contract with the former owner or the absence of a contract with Emerson undermines TWSI's exclusive right to provide wastewater service at Villages at Norris Lake. Emerson is free to "proceed before the TRA," as the Chancellor said, but is not free to repeat claims which have already been argued and lost.

The Chancery Court's ruling resolves the issue framed by Emerson in the Amended Petition. If Emerson is now making another point, it is not clear what it is.

Conclusion

None of Emerson's four "causes" for revocation, even if factually accurate, provides a legal basis for the revocation of TWSI's certificate. Emerson's complaint should be dismissed. The parties should be spending their resources arriving at a contract for wastewater service, not litigating meritless arguments over the validity of TWSI's certificate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2013, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

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VIA Email

Christopher A. Bowles
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Re: The Villages at Norris Lake-Campbell County

Dear Mr. Bowles:

This letter is to confirm that Tennessee Wastewater Systems, Inc. ("TWSI") currently holds a valid State Operating Permit (SOP-07001) for the operation of a wastewater treatment facility at the Villages at Norris Lake. Prior to the permit's February 28, 2012 expiration date, the department received a renewal application. Pursuant to T.C.A. 4-5-320 (b), the permit is administratively extended until the department takes further action on the renewal application.

To be clear, the department's position concerning Tennessee Wastewater Systems, Inc.'s SOP-07001 and Caryville-Jacksboro Utilities Commission's SOP-10051 has not changed. Both have been issued valid wastewater treatment operating permits for the Villages at Norris Lake — Campbell County. However, neither can be used until all conditions for actual operation are met. That specifically includes the acquisition of requisite property rights.

Sincerely,

A handwritten signature in cursive script, appearing to read "E. Joseph Sanders", is written over a horizontal line.

E. Joseph Sanders
General Counsel

CC: Wade Murphy-TDEC Division of Water Resources

C. Mark Troutman-Attorney for Emerson Properties, LLC. - cmtroutman@troutmanlaw.net

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