

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

August 11, 2014

IN RE:)	
)	
SHOW CAUSE PROCEEDING AGAINST)	DOCKET NO.
TENNESSEE WASTEWATER SYSTEMS, INC.)	14-00041
FOR MATERIAL NON-COMPLIANCE AND/OR)	
VIOLATIONS OF STATE LAW AND/OR TENN.)	
R. & REGS. §§ 1220-04-13, <i>et. seq.</i>)	

**ORDER REVOKING TENNESSEE WASTEWATER SYSTEMS, INC.'S AMENDMENT
TO ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR A PORTION OF
CAMPBELL COUNTY KNOWN AS VILLAGES AT NORRIS LAKE**

This matter came before Chairman James M. Allison, Director Kenneth C. Hill, and Director David F. Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at the regularly scheduled Authority Conference held on June 16, 2014 for consideration of the *Order Requiring Tennessee Wastewater Systems, Inc. to Appear and Show Cause Why the TRA Should Not Take Action to Terminate, Amend, or Revoke It's CCN to Provide Wastewater Service to the Portion of Campbell Co., Tennessee, Known as the Villages at Norris Lake, and to Impose Civil Penalties and Seek Additional Relief Against It for Its Material Non-compliance and/or Violations of State Law and Tenn. R. & Regs. §§ 1220-04-13, et. seq.* ("Show Cause Order" attached as Appendix A) issued by the Hearing Officer on April 24, 2014. The Authority adopts and incorporates herein the findings and conclusions made in the *Show Cause Order*.

RELEVANT FACTS

The evidentiary record initially assembled in Docket No. 13-00017, which has been moved into the record of this docket, establishes the following facts relevant to this proceeding:

1. Tennessee Wastewater Systems, Inc. (“TWSI”) is a public utility subject to the Authority’s jurisdiction and has its principal offices located at 851 Aviation Parkway, Smyrna, Tennessee 37167.

2. On April 6, 1994, TWSI obtained an initial Certificate of Convenience and Necessity (“CCN”) to provide wastewater service to designated areas in Tennessee from the Tennessee Public Service Commission, the TRA’s predecessor agency.¹ Since that time, to expand its service territory, TWSI has petitioned for and obtained several amendments to its CCN.

3. On November 9, 2006, TWSI filed a petition seeking to expand its service area to include the Villages at Norris Lake (“The Villages”).² In support of its petition, TWSI filed with the Authority a letter from Land Resource Companies, the original owner and developer of The Villages, which specifically requested that TWSI provide wastewater service to The Villages. In addition, TWSI filed letters from the Mayors of the City of LaFollette, Tennessee, and Campbell County, Tennessee, which indicated that those governmental entities had no intention of providing wastewater service to the area. Although no contracts had yet been signed, TWSI asserted that it was the intention of [TWSI and Land Resource Companies] that TWSI would own the collection, treatment, and dispersal system and a permanent easement on the property whereon the system would be situated. TWSI further estimated that construction of the system

¹ See *In re: Petition of Tennessee Wastewater Systems Inc. to Operate as a Public Utility Providing Sewage Collection, Treatment, and Disposal for a Proposed Development in Maury County*, TRA Docket No. 93-09040. (TWSI was formerly known as On-Site Systems, Inc., as shown on the TDEC permit filed in the docket file.)

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, *Petition of Tennessee Wastewater Systems, Inc. to Amend Its Certificate of Convenience and Necessity* (November 9, 2006).

would be complete approximately 60 days after the permit was approved by the Tennessee Department of Environment and Conservation (“TDEC”).³

4. On January 8, 2007, the Authority granted TWSI’s petition to amend its CCN to include The Villages.⁴

5. On March 1, 2013, Emerson Properties, LLC (“Emerson”) filed an amended petition (i.e., a complaint) (“*Petition*”) in TRA Docket No. 13-00017 requesting that the Authority terminate TWSI’s CCN and any attendant rights thereto as it relates to the provision of wastewater service to The Villages.⁵ In its *Petition*, Emerson stated that it purchased the property and assets of The Villages through bankruptcy proceedings instituted by the former owner/developer in the United States Bankruptcy Court for the Middle District of Florida, and that, by Order of the Bankruptcy Court, such property was conveyed to it free and clear of all liens, claims and encumbrances.⁶ In addition, by Order of the Bankruptcy Court, all contracts between TWSI and the prior owner/developer concerning the wastewater system and the provision of wastewater service to The Villages were rejected, and all rights and obligations therein extinguished.⁷

6. In Docket No. 13-00017, the Authority conducted an investigation of the allegations made against TWSI. In that docket, full procedural due process was given to the parties, including an opportunity for discovery, the filing of preliminary pleadings, motions, and

³ See TRA Docket No. 06-00277. On February 28, 2007, TWSI filed its TDEC state operating permit with the Utilities Division of the Authority. The TDEC permit was late-filed in Docket No. 06-00277 on November 4, 2009.

⁴ 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* (April 11, 2007).

⁵ See *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 [at] Norris Lake, Pursuant to Tenn. Code Ann. 65-4-201*, Docket No. 13-00017, *Amended Petition of Emerson Properties, LLC* (March 1, 2013).

⁶ *Id.* at *Petition* ¶¶ 3, 6-8, and Exhibit C (March 1, 2013).

⁷ *Id.*

other filings, including pre-filed sworn testimony, and upon notice, a Hearing was held on November 25, 2013.

7. During the regularly scheduled Authority Conference held on January 13, 2014, the panel considered the entire record assembled in Docket No. 13-00017, including sworn testimony given by witnesses at the Hearing and the exhibits presented. After deliberating the merits of the allegations made against TWSI, a majority of the panel made the following findings:

- a) 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, 2007.⁸ However, to date, TWSI has not provided wastewater service to The Villages.⁹ TWSI does not have a contract for service with Emerson, nor does Emerson intend to enter into a contractual relationship with TWSI.¹⁰
- b) TWSI has not been deeded any land at The Villages, nor does it have an easement.¹¹ Emerson has no intention of giving TWSI a deed to property or an easement.¹²

⁸ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, p. 2 (October 11, 2013); Affidavit of Charles Hyatt, p. 2 (October 11, 2013).

⁹ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, p. 2 (October 11, 2013); Affidavit of Charles Hyatt, p. 2 (October 11, 2013); Charles Hyatt, Pre-filed Rebuttal Testimony, pp. 1-2 (October 25, 2013); George L. Potter, Pre-filed Direct Testimony, p. 6, lines 10-12 (October 11, 2013).

¹⁰ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, pp. 2-3 (October 11, 2013); Affidavit of Charles Hyatt, p. 3 (October 11, 2013); Charles Hyatt, Pre-filed Rebuttal Testimony, p. 2 (October 25, 2013); George L. Potter, Pre-filed Direct Testimony, p. 4, lines 14-18 and p. 7, lines 13-17 (October 11, 2013); Transcript of Proceedings, p. 44, lines 23-25 and p. 45, lines 1-2 (November 25, 2013); Transcript of Proceedings, p. 73, lines 12-14 (November 25, 2013); Transcript of Proceedings, p. 85, lines 23-24 (November 25, 2013).

¹¹ *Amended Order*, citing George L. Potter, Pre-filed Direct Testimony, p. 6, lines 16-21 and p. 7, lines 13-17 (October 11, 2013); Transcript of Proceedings, p. 45, lines 9-12 (November 25, 2013); Transcript of Proceedings, p. 96, lines 11-15 (November 25, 2013); Transcript of Proceedings, p. 131, lines 2-9 (November 25, 2013).

¹² *Amended Order*, citing Transcript of Proceedings, p. 73, lines 7-11 (November 25, 2013); Transcript of Proceedings, p. 85, lines 15-25 and p. 86, lines 1-7 (November 25, 2013); Transcript of Proceedings, p. 130, lines 2-9 (November 25, 2013).

- c) TWSI does not own a wastewater system or pipes at The Villages.¹³ Emerson will not give its system or pipes to TWSI.¹⁴
- d) TWSI's business model is that the developer builds the system and then deeds it to TWSI.¹⁵ TWSI's tariff does not include capital costs for it to build a system.¹⁶
- e) TWSI is not willing to provide service to The Villages if the wastewater system is not given to TWSI.¹⁷
- f) 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.¹⁸
- g) 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).¹⁹

8. Upon the record and these specific findings, a majority of the panel concluded that the allegations were sufficiently proven to demonstrate that TWSI has failed to comply with and/or violated state law and TRA Rules so as to justify instituting a show cause proceeding to require TWSI to show why the Authority should not take action to terminate, amend, or revoke

¹³ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, p. 5 (October 11, 2013); Transcript of Proceedings, p. 96, lines 11-15 (November 25, 2013).

¹⁴ *Amended Order*, citing Transcript of Proceedings, p. 73, lines 15-17 (November 25, 2013); Transcript of Proceedings, p. 106, lines 2-10 (November 25, 2013).

¹⁵ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, p. 5 (October 11, 2013); Charles Hyatt, Pre-filed Rebuttal Testimony, p. 2 (October 25, 2013); Transcript of Proceedings, p. 106, lines 2-10 (November 25, 2013).

¹⁶ *Amended Order*, citing Charles Hyatt, Pre-filed Rebuttal Testimony, p. 2 (October 25, 2013).

¹⁷ *Amended Order*, citing Transcript of Proceedings, p. 119, lines 1-3 (November 25, 2013).

¹⁸ *Amended Order*, citing George L. Potter, Pre-filed Direct Testimony, p. 6, lines 22-25 and p. 7, lines 1-6, 18-20 (October 11, 2013); Transcript of Proceedings, p. 44, lines 11-14 (November 25, 2013).

¹⁹ *Amended Order*, citing Transcript of Proceedings, p. 131, lines 13-25 and p. 132, lines 1-8 (November 25, 2013).

TWSI's CCN as it relates to The Villages and impose civil penalties, fines and sanctions for such violations.

ALLEGED VIOLATIONS OF STATE LAW/TRA RULES

The following acts or omissions alleged and found by the TRA to have been performed or having failed to have been performed by TWSI, constitute violations of state law and/or TRA Rules:

COUNT 1

By Order of the Bankruptcy Court, Emerson purchased The Villages, its land and assets, free and clear of all liens, claims, and encumbrances, and did not assume any contractual obligations of the prior owner.²⁰ TWSI does not have a contract or any other enforceable agreement with Emerson to provide service to The Villages, and Emerson has testified that it does not wish or intend to enter into a contractual relationship with TWSI for such service.²¹ TWSI does not own and has not been deeded any land, nor does it have an easement to any land located at The Villages. Emerson has no obligation, and has testified that it has no desire or intention, to convey a deed or an easement to TWSI for any of its property.²² Further, TWSI does not own a wastewater system or any component pipes at The Villages.²³ Emerson has testified that it will not give its system or pipes to TWSI. TWSI's business model anticipates and

²⁰ *Amended Order*, p. 9, fn. 38, citing *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 [at] Norris Lake, Pursuant to Tenn. Code Ann. 65-4-201*, Docket No. 13-00017, *Amended Petition of Emerson Properties, LLC*, Exhibit C (March 1, 2013).

²¹ Charles Hyatt, Pre-filed Direct Testimony, pp. 2-3 (October 11, 2013); Affidavit of Charles Hyatt, p. 3 (October 11, 2013); Charles Hyatt, Rebuttal Testimony, p. 2 (October 25, 2013); George Potter, Pre-filed Direct Testimony, p. 4, lines 14-18 and p. 7, lines 13-14 (October 11, 2013); Transcript of Proceedings, Testimony of George Potter, p. 73, line 14 (November 25, 2013); Transcript of Proceedings, Testimony of George Potter, p. 85, lines 23-24 (November 25, 2013).

²² George Potter, Pre-filed Direct Testimony, p. 6, line 18 (October 11, 2013); Transcript of Proceedings, Testimony of George Potter, p. 73, line 11 (November 25, 2013); Transcript of Proceedings, Testimony of George Potter, p. 85, line 25 and p. 86, line 1 (November 25, 2013).

²³ Charles Hyatt, Pre-filed Direct Testimony, p. 5 (October 11, 2013); Transcript of Proceedings, Testimony of George Potter, p. 73, line 17 (November 25, 2013); Transcript of Proceedings, Testimony of George Potter, p. 96, lines 13-15 (November 25, 2013).

requires that the owner/developer build the wastewater system and convey it by deed to TWSI. TWSI's tariff does not include capital costs for the construction of a wastewater system at The Villages.²⁴ Finally, TWSI is not willing to provide service to The Villages unless ownership of the wastewater system is freely transferred to TWSI.²⁵

Based on the record as a whole, including the specific facts noted above, the Authority found TWSI unwilling and/or incapable of effectively operating and/or managing The Villages in compliance with TRA rules and Tennessee statutes, and that such constitutes material non-compliance and/or a violation under TRA Rule 1220-4-13-.09, which states:

- (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.

²⁴ Charles Hyatt, Pre-filed Direct Testimony, p. 5 (October 11, 2013); Charles Hyatt, Rebuttal Testimony of Charles Hyatt, p. 2 (October 25, 2013).

²⁵ Transcript of Proceedings, Testimony of Charles Hyatt, p. 119, line 3 (November 25, 2013).

- (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.

The Authority found that TWSI has no ownership or easement rights to either the land or the wastewater system at The Villages, and TWSI's business model requires that the owner/developer build the wastewater system and convey it by deed to TWSI. Since TWSI is unable to obtain legal ownership or an easement to either the land or the system from the owner/developer, it is unable to provide service at The Villages.

COUNT 2

On April 11, 2007, in an Order entered in TRA Docket No. 06-00277, TWSI's CCN was amended to include The Villages. More than six years have elapsed since the CCN was approved, yet TWSI has not provided wastewater service to The Villages.²⁶ TWSI's failure to provide wastewater service within two (2) years of obtaining its CCN, regardless of demand or lack thereof for service, constitutes material non-compliance and/or violation of TRA Rule 1220-04-13-.06(4), which states:

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 (*emphasis added*).

The Authority found that TWSI has failed to provide wastewater service to The Villages within the time period noted above, and such failure appears from the evidence to be the result of an unwillingness and/or incapacity on the part of TWSI to provide such service.

COUNT 3

Based on the TRA's findings and the foregoing facts set forth in Counts 1 and 2 above, TWSI does not own either land or the wastewater system and appears unable to obtain ownership of the system from the owner/developer.²⁷ As such, it is not in compliance nor 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, as follows:

²⁶ Charles Hyatt, Pre-filed Direct Testimony, p. 2 (October 11, 2013); Affidavit of Charles Hyatt, p. 2 (October 11, 2013). Charles Hyatt, Rebuttal Testimony, pp. 1-2 (October 25, 2013); George Potter, Pre-filed Direct Testimony, p. 6, line 12 (October 11, 2013).

²⁷ George Potter, Pre-filed Direct Testimony, p. 6, lines 23-24 and p. 7, line 1-3 (October 11, 2013); Transcript of Proceedings, Testimony of George Potter, p. 44, lines 11-14 (November 25, 2013).

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.

TWSI does not have title or any enforceable right to either the land or the wastewater system at The Villages. And, as testified to by representatives of TWSI and further reflected in the structure of its tariff, TWSI's business model anticipates and requires that the owner/developer build the wastewater system and convey it by deed to TWSI, which, as is demonstrated by the evidence in the record, the current owner/developer has, by Court Order, been relieved from any such obligation of the prior owner, and has stated that it will not, and is not otherwise obligated to, deliver such title or rights.

Thus, the Authority found that the evidence indicates that TWSI is not able to obtain title or easement rights to the land or the system from the owner/developer, and neither has it, nor can it, prevent any liens, judgments, or encumbrances. As such, the Authority found that TWSI appears unable to provide service at The Villages in compliance with state law or the TRA's Rules.

COUNT 4

TWSI has failed to file a petition requesting that the TRA approve an alternative proof of financial security by May 1st of 2012 and 2013 and has also failed to file a bond until such alternative financial security is approved.²⁸ Such inaction by TWSI constitutes material non-compliance and/or violations of Tenn. Code Ann. § 65-4-201(e) and TRA Rule 1220-4-13-.07(5). Tenn. Code Ann. § 65-4-201(e) states, in relevant part:

(e) The authority shall direct the posting of a bond or other security by a public utility providing wastewater service or for a particular project proposed by a public utility providing wastewater service. The purpose of the bond or other security shall be to

²⁸ Transcript of Proceedings, Testimony of Charles Hyatt, p. 132, lines 2-4 and 7-8 (November 25, 2013).

ensure the proper operation and maintenance of the public utility or project. The authority shall establish by rule the form of such bond or other security, the circumstances under which a bond or other security may be required, and the manner and circumstances under which the bond or other security may be forfeited.

- (1) The requirement under this subsection (e) to post a bond or other security by a public utility providing wastewater service shall also satisfy the requirement on such a public utility to provide a bond or other financial security to the department of environment and conservation as required by § 69-3-122.
- (2) The authority shall establish by rule the amount of such bond or other security for various sizes and types of facilities.²⁹

Further, TRA Rule 1220-4-13-.07, *et seq.*, sets forth the financial security regulations to be observed and adhered to by all public wastewater utilities. Specifically, TRA Rule 1220-4-13-.07(5) addresses the posting of alternative financial security, as follows:

- (5) If the public wastewater utility proposes to post financial security other than the type or amount permitted above, it must file with the Authority by May 1 of each year a petition requesting acceptance of the security. A hearing shall be held to determine the amount of the financial security and if the form of the proposed financial security serves the public interest. At this hearing, the burden of proof shall be on the public wastewater utility to show that the proposed financial security and the proposed amount will be in the public interest. The public wastewater utility shall comply with Rule 1220-4-13-.07(2) until the alternative financial security is approved by the Authority.

The Authority found that TWSI failed to file and obtain approval of an alternative form of financial security in accordance with the above statute and TRA Rule.

JUNE 10, 2014 HEARING

The panel convened for the hearing in this matter on June 10, 2014. A *Notice of Convening Panel for a Hearing* was issued on June 2, 2014. Participating in the hearing were the following parties and their respective counsel:

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

TRA Party Staff: Shiva Bozarth, Esq., 502 Deaderick Street, Nashville, TN 37243.

²⁹ Tenn. Code Ann. § 65-4-201(e) (2005).

TWSI called Charles Hyatt, President of TWSI, as its witness, Party Staff did not present any witnesses.

The Consumer Advocate and Protection Division for the Tennessee Attorney General (“CAPD” or “Consumer Advocate”) was allowed to participate in the docket as amicus.³⁰ On June 4, 2014, the Consumer Advocate filed an Amicus Brief, and it was allowed to present comments at the June 10, 2014 hearing. The CAPD recommends that the TRA find that:

1) TWSI has failed to provided service in the seven years that it has had the CCN; 2) TWSI has demonstrated the incapacity to provide adequate, safe, and proper wastewater services to the Villages under the current circumstances; 3) the public interest requires wastewater service to the Villages by a willing and able entity; 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 the revocation of TWSI’s CCN.³¹

TWSI’S PROPOSAL

At the Hearing, Charles Hyatt testified that TWSI is now willing to do the following:

- Oversee completion of Phase I of the system by Emerson using Braeburn Construction, the company chosen by Emerson to construct the system;
- Inspect the Phase I construction process;
- Provide the Authority and Staff with updates as frequently as they require and also update the HOA and any party to the status of the process to get the system up and running and provide service as quickly as possible;
- Operate the facility;
- Collect and put into escrow a \$5000 tap fee per tap as residents tap on to the system to fund and build Phases II and III of the system;

³⁰ See *Initial Order Denying Consumer Advocate’s Petition to Intervene* (May 1, 2014).

³¹ See *Amicus Brief of the Consumer Advocate*, p. 10 (June 4, 2014).

- If Mr. Potter is unable to finish the Phase I facility, TWSI will call the letter of credit to complete construction;
- If Mr. Potter refuses to give the system to TWSI once it is completed, TWSI will acquire it by eminent domain.

TWSI stated that it will do “whatever it takes legally to complete the system and provide service, and if that includes eminent domain, that’s what we’ll do.”³²

At the hearing, TRA Party Staff asserted that “the law requires that a utility be given a reasonable amount of time to correct conditions which would justify the revocation of a CCN.”³³ Party Staff states “TWSI is willing to obtain the system either by agreement between TWSI and Emerson Properties or eminent domain and to do so quickly.”³⁴ Party Staff suggests that since Mr. Potter stated he can complete the system in 60 days, TWSI be given a couple of months to provide service and provide updates within 30 days of TWSI’s progress towards obtaining the system. Party Staff states that “[i]f it [TWSI] has not made any progress within 30 days or cannot demonstrate that progress will be made within the remaining month, then the Authority should revoke the CCN.”³⁵

FINDINGS AND CONCLUSIONS

As Tennessee’s public utilities regulatory body, the Tennessee General Assembly has delegated to the TRA broad powers to exercise its jurisdiction over matters involving public utilities.³⁶ To that end, the Authority is charged and authorized to ensure that the laws of this State as they relate to the Authority’s jurisdiction “are enforced and obeyed, that violations

³² Transcript of Proceedings, pp. 105-106 (June 10, 2014).

³³ *Id.* at 100.

³⁴ *Id.*

³⁵ *Id.* at 101.

³⁶ Tenn. Code Ann. §§ 65-4-104, 105, and 106.

thereof are promptly prosecuted, and all penalties due the State are collected.”³⁷ The Authority is empowered to hear this matter and render an Order pursuant to the powers delegated to it by the Tennessee General Assembly, which include, but are not necessarily limited to those powers provided in Tenn. Code Ann. §§ 65-2-106, 65-3-105, 65-4-104, 65-4-105(a), 65-4-106, 65-4-116, 65-4-117(1), 65-4-120, and 65-4-202 through 204.

Specifically, 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.” In addition, Tenn. Code Ann. § 65-2-109 assigns the burden of proof in a show cause proceeding upon the party that is required to appear and show cause why the Authority should not proceed in a certain manner.

Finally, under TRA Rules 1220-04-13, *et. seq.*, where a public wastewater utility demonstrates through its actions an unwillingness or incapacity to effectively operate or manage the wastewater system (i.e., provide service) in compliance with applicable statutes, rules, and orders of the Authority, the TRA shall take appropriate action based on good cause; such action may include a suspension or revocation of the utility’s CCN.³⁸ Proceedings to revoke a wastewater utility’s CCN shall be conducted in accordance with Tenn. Code Ann. § 65-2-106, which, except when exigent circumstances exist, includes notice and an opportunity to be heard.³⁹ In addition, the Authority is not required to afford a utility an opportunity to correct the conditions that are alleged to constitute grounds for the revocation when there is an imminent threat to public health or safety or the utility is unable to provide safe, adequate, and reliable

³⁷ Tenn. Code Ann. § 65-1-113 (2004).

³⁸ Tenn. R. & Regs. 1220-04-13-.09(1).

³⁹ Tenn. R. & Regs. 1220-04-13-.09(4).

service.⁴⁰ It has been clearly established in the record that TWSI is unable to provide safe, adequate, and reliable service at The Villages, thus the Authority is not required to provide TWSI with an opportunity to cure. Nevertheless, even if the Authority were required to provide an opportunity to cure, the Authority has done so. TWSI has had multiple opportunities to cure, the most recent being since the filing of Emerson's complaint in Docket No. 13-00017 on January 6, 2013.

The panel considered this matter at the regularly scheduled Authority Conference held on June 16, 2014. As stated above, the law requires that TWSI show why the Authority should not take the action set forth in its *Show Cause Order*. TWSI did not present any evidence at the hearing to rebut the violations against it. Instead, TWSI presented testimony regarding a new proposal to provide wastewater service to The Villages. Even if TWSI's proposal could be interpreted as a showing that TWSI is now able to provide service to The Villages, TWSI still faces additional hurdles that prevent it from demonstrating that the TRA should not take action against TWSI. TWSI presented a proposal but failed to present any evidence that Emerson agreed with its proposal. TWSI's proposal, on its own, without a showing that Emerson agrees, is insufficient evidence to show that the TRA should not take action against TWSI. Further, even if Emerson agreed with TWSI's proposal, which it does not, while TWSI might be able to provide wastewater service, but any agreement between Emerson and TWSI would address only Count 1 of the violations alleged against TWSI. Therefore, TWSI still fails to meet its burden of proof as to Counts 2, 3, and 4.

Nevertheless, this scenario does not reflect the facts presented before the Authority. TWSI did not present any evidence to show that Emerson has agreed with TWSI's proposal. In fact, both Emerson and The Villages HOA have clearly expressed that they refuse to do business

⁴⁰ *Id.*

with TWSI. The facts supporting the violations against TWSI have not changed from the time they were established in Docket No. 13-00017. At the hearing in this docket, TWSI did not present any evidence to indicate that Emerson and The Villages HOA have changed their positions.

During the public comment portion of the hearing, George Potter, Chief Manager of Emerson, presented comments about his experience with TWSI and about TWSI's proposal. These comments are not evidence, but the Authority may consider them and assign appropriate weight to the comments. Mr. Potter's comments on the day of the hearing were consistent with his sworn testimony given in Docket No. 13-00017 and consistent with his sworn deposition taken by TWSI on May 12, 2014. Mr. Potter, states in his deposition that "...because I'm the one that's been paying for things to be completed, and as long as I'm in that position, then it does matter to me [who the HOA picks to operate or maintain the wastewater system]."⁴¹ Mr. Potter said that he didn't see how it would be practical for TWSI to operate the system because "they [the HOA] don't trust that utility [TWSI] and they don't want to have a relationship with that utility [TWSI]."⁴² Mr. Potter declared that while he wanted to do whatever gets the system up and running the fastest, he knows that "the HOA is not comfortable with Tennessee Wastewater and I feel like if we start over with Tennessee Wastewater or any other utility that means we're going to take even longer and even further delays. And so that's why I'm pushing forward with the CJU [Caryville-Jacksboro Utility Commission] model."⁴³ At the hearing, Mr. Potter stated unequivocally "we don't want to be associated with Tennessee Wastewater."⁴⁴

As stated herein, during the show cause hearing, TWSI failed to address the violations alleged against it, nor did it present evidence that would cause the Authority to not take action

⁴¹ Deposition of George Potter, pp. 40-41 (May 12, 2014).

⁴² *Id.* at 41-42.

⁴³ *Id.* at 43.

⁴⁴ Transcript of Proceedings, p. 48 (June 10, 2014).

against TWSI. The panel considered TWSI's proposal as it relates to the allegations, and the majority of the panel made the following findings:

FINDING OF VIOLATION ON COUNT 1

TWSI claims it is changing its business model in this situation, but the facts of its proposal show there has not been any substantial change in the circumstances or facts at issue in this docket. TWSI still refuses to operate a system it does not own and still expects Emerson to build the system and give it to TWSI. TWSI failed to present any evidence that Emerson will either give its system to TWSI or grant any easements to TWSI. In its proposal, TWSI agrees to use Emerson's plans and construction company; however, the only new fact presented by TWSI relevant to Count 1 is that TWSI will now seek to take Emerson's system by eminent domain if Emerson continues to refuse to give its system to TWSI. Emerson maintains that it does not want to do business with TWSI and will not give or sell its system or grant an easement to TWSI.

Further, although TWSI now asserts -- over seven years after being granted a CCN for The Villages -- a willingness to take the system by eminent domain, it has provided no evidence that it has taken any steps toward exercising any eminent domain rights it may have. Therefore, TWSI has not demonstrated a current ability to provide service. TWSI remains unable to assert legal ownership or an easement to the land or the system from the owner/developer. TWSI did not present any evidence at the hearing to overcome the finding that it was unable to provide service at The Villages. Nor did TWSI present any evidence that would cause the Authority to refrain from taking action against TWSI on this violation. Thus, TWSI failed to meet its burden of proof as to Count 1.

FINDING OF VIOLATION ON COUNT 2

In violation of TRA Rule 1220-04-13-.06(4), TWSI did not begin providing service to The Villages within 2 years of receiving its CCN. Emerson purchased The Villages out of bankruptcy in February 2009. Even though the previous developer at The Villages filed for bankruptcy, TWSI has had at least since 2009, when Emerson purchased the property, to come into compliance with this rule. Yet, TWSI has done nothing to attempt to comply with the rule for several years. TWSI admitted that it did not contact Emerson to try to reach an agreement after Emerson's negative experience with Mr. Hines, who was TWSI's representative. In fact, Mr. Hyatt testified at the hearing that:

[W]e should have been more aggressive shortly after the bankruptcy and called the bonds. The bonds were held by the county on our behalf to complete all three phases of the sewer system. ... If we would have stepped in right then and there and negotiated the bonds, I don't think we would be here today talking about this.⁴⁵

By its own testimony, TWSI could have called the construction bonds to complete the system and begin providing service, yet it did not take action. TWSI could have tried to reach an agreement with Emerson after it purchased The Villages, but it neglected to do so. Thus, TWSI has failed to provide wastewater service to The Villages within the time period required by TRA Rule 1220-04-13-.06(4), and such failure appears from the evidence to be the result of an unwillingness and/or incapacity on the part of TWSI. TWSI failed to present any evidence to rebut Count 2 that would cause the Authority to refrain from taking action against TWSI on this violation. Thus, TWSI has failed to meet its burden of proof as to Count 2.

FINDING OF VIOLATION ON COUNT 3

TWSI also failed to present any evidence to rebut Count 3. TWSI is not currently in compliance or in a position to comply with this rule, which prohibits the title of the physical

⁴⁵ Transcript of Proceedings, p. 18 (June 10, 2014).

assets of a wastewater system from being subject to any liens or judgments. TWSI does not own the wastewater system, and based on the facts in the record, remains unable to obtain ownership of the system. As such, TWSI remains in violation of TRA Rule 1220-04-13-.10(1). In fact, the record shows that the title of the physical assets has indeed been encumbered. The facts in the record clearly show that TWSI is currently unwilling and unable to provide service at The Villages in compliance with state law or the TRA's Rules, and TWSI did not offer any evidence that would cause the Authority to refrain from taking action on this violation. Thus, TWSI has failed to meet its burden of proof on Count 3.

NO FINDING OF VIOLATION ON COUNT 4

On June 3, 2014, TWSI and TRA Party Staff filed a Stipulation of Facts agreeing that TWSI is now in compliance with TRA statutes and rules regarding alternative financial security set forth in Tenn. Code Ann. § 64-4-201(e) and TRA Rule 1220-4-13-.07. During the hearing, Party Staff asserted that TWSI had made a good faith effort to come into compliance and should not be penalized for these violations in 2012 and 2013.

As a result, the majority of the panel found that TWSI is currently in compliance with Tenn. Code Ann. § 64-4-201(e) and TRA Rule 1220-4-13-.07 and that penalties should not be assessed against TWSI for these previous violations.

In conclusion, based on its consideration of the entire record, the majority of the panel found that TWSI has failed to meet its required burden of proof. Thereafter, the majority of the panel voted that because TWSI has failed to provide service to The Villages within two years of receiving authorization in violation of TRA Rule 1220-4-13-.06, and cannot prohibit the title of the physical assets of a wastewater system from being subject to liens or judgments in violation of TRA Rule 1220-04-13-.10(1), and at present, TWSI is unwilling and incapable of providing wastewater service to The Villages at Norris Lake in violation of TRA Rule 1220-4-13-.09,

TWSI's amendment to its CCN authorizing it to provide service to The Villages at Norris Lake should be revoked.⁴⁶


IT IS THEREFORE ORDERED THAT:

1. Tennessee Wastewater Systems, Inc.'s amendment to its certificate of convenience and necessity authorizing it to serve a portion of Campbell County known as the Villages at Norris Lake is hereby revoked.

2. Any party aggrieved by the decision of the Authority may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

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

ATTEST:



Earl R. Taylor, Executive Director

⁴⁶ Director Hill did not vote with the majority and will file a dissenting opinion explaining his analysis.

**BEFORE THE TENNESSEE REGULATORY AUTHORITY AT
NASHVILLE, TENNESSEE**

IN RE:)	
)	
SHOW CAUSE PROCEEDING AGAINST)	DOCKET NO.
TENNESSEE WASTEWATER SYSTEMS, INC.)	14-00041
FOR MATERIAL NON-COMPLIANCE AND/OR)	
VIOLATIONS OF STATE LAW AND TENN. R. &)	
REGS. §§ 1220-04-13, <i>et. seq.</i>)	

**ORDER REQUIRING TENNESSEE WASTEWATER SYSTEMS, INC.
TO APPEAR AND SHOW CAUSE WHY THE TRA SHOULD NOT TAKE ACTION TO
TERMINATE, AMEND, OR REVOKE IT'S CCN
TO PROVIDE WASTEWATER SERVICE TO THE PORTION OF CAMPBELL CO.,
TENNESSEE, KNOWN AS THE VILLAGES AT NORRIS LAKE,
AND TO IMPOSE CIVIL PENALTIES AND SEEK ADDITIONAL RELIEF AGAINST IT
FOR ITS MATERIAL NON-COMPLIANCE AND/OR VIOLATIONS OF
STATE LAW AND TENN. R. & REGS. §§ 1220-04-13, *ET. SEQ.***

During the regularly scheduled Authority Conference held on April 14, 2014, Chairman James M. Allison, Director Kenneth C. Hill, and Director David F. Jones of the Tennessee Regulatory Authority ("Authority" or "TRA"), in conjunction with its consideration of a *Motion to Continue Hearing* filed by Tennessee Wastewater Systems, Inc. ("TWSI" or "Respondent"), which was treated, in part, as a petition for reconsideration because it raised certain issues as to the sufficiency of the Authority's *Order Initiating Show Cause Proceeding Against Tennessee Wastewater Systems, Inc. ("Initial Order")* entered in Docket No. 13-00017, voted unanimously to reconsider its *Initial Order* and to supplement and amend such order so as to supplement the basis for the panel's findings against TWSI by including specific citations to the facts in the

record.¹ In addition, the panel voted to open the instant docket in which to conduct the show cause proceeding, which is convened in accordance with Tenn. Code Ann. § 65-2-106 and Tenn. R. & Regs. 1220-04-13-.09(4), and moved the evidentiary record assembled in Docket No. 13-00017 into this new docket. Finally, the panel appointed the Hearing Officer to prepare this proceeding for hearing by June 16, 2014.

In the *Amended Order Initiating Show Cause Proceeding Against Tennessee Wastewater Systems, Inc.* (“*Amended Order*”), the panel, after notice and a hearing, upon consideration of the entire record, found the evidence sufficient to conclude that TWSI should be required to appear 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, the termination, amendment, or revocation of the amendment to its Certificate of Public Convenience and Necessity (“CCN”) to provide service to a subdivision located in Campbell County, Tennessee, known as The Villages at Norris Lake (“The Villages”), and, as determined appropriate, the imposition of civil penalties, fines, and sanctions, for material non-compliance and/or violation of various provisions of the TRA’s wastewater rules, Tenn. R. & Regs. 1220-4-13, *et. seq.* Therefore, upon the panel’s *Amended Order*, entered in Docket No. 13-00017 and moved thereby into the instant docket, this matter is now before the Hearing Officer for administration of all preliminary matters relating this show cause proceeding.

JURISDICTION

As Tennessee’s public utilities regulatory body, the Tennessee General Assembly has delegated to the TRA broad powers to exercise its jurisdiction over matters involving public

¹ *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, Order Initiating Show Cause Proceeding Against Tennessee Wastewater Systems, Inc.* (March 25, 2013).

utilities.² To that end, the Authority is charged and authorized to ensure that the laws of this State as they relate to the Authority's jurisdiction "are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the State are collected."³ The Authority is empowered to hear this matter and render an Order pursuant to the powers delegated to it by the Tennessee General Assembly, which include but are not necessarily limited to those powers provided in Tenn. Code Ann. §§ 65-2-106, 65-3-105, 65-4-104, 65-4-105(a), 65-4-106, 65-4-116, 65-4-117(1), 65-4-120, and 65-4-202 through 204.

Specifically, 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." In addition, Tenn. Code Ann. § 65-2-109 assigns the burden of proof in a show cause proceeding upon the party that is required to appear and show cause why the Authority should not proceed in a certain manner.

Finally, under TRA Rules 1220-04-13, *et. seq.*, where a public wastewater utility demonstrates through its actions an unwillingness or incapacity to effectively operate or manage the wastewater system (i.e., provide service) in compliance with applicable statutes, rules, and orders of the Authority, the TRA shall take appropriate action based on good cause; such action may include a suspension or revocation of the utility's CCN.⁴ Proceedings to revoke a wastewater utility's CCN shall be conducted in accordance with Tenn. Code Ann. § 65-2-106, which, except when exigent circumstances exist, includes notice and an opportunity to be heard.⁵

² Tenn. Code Ann. §§ 65-4-104, 105, and 106.

³ Tenn. Code Ann. § 65-1-113 (2004).

⁴ Tenn. R. & Regs. 1220-04-13-.09(1).

⁵ Tenn. R. & Regs. 1220-04-13-.09(4).

In addition, unless there is an imminent threat to public health or safety or the utility is unable to provide safe, adequate, and reliable service, the TRA will not seek to suspend or revoke a utility's CCN without first affording the utility an opportunity to correct the conditions that are alleged to constitute grounds for the revocation.⁶

RELEVANT FACTS

Upon the evidentiary record initially assembled in Docket No. 13-00017, which has been moved into the instant docket file upon the *Amended Order* of the Authority, the Hearing Officer sets forth the following factual findings relevant to this proceeding:

1. TWSI is a public utility subject to the Authority's jurisdiction, and has its principal offices located at 851 Aviation Parkway, Smyrna, Tennessee, 37167.

2. On April 6 1994, TWSI obtained an initial CCN to provide wastewater service to designated areas in Tennessee from the Tennessee Public Service Commission, the TRA's predecessor agency.⁷ Since that time, to expand its service territory, TWSI has petitioned for and obtained several amendments to its CCN.

3. On November 9, 2006, TWSI filed a petition seeking to expand its service area to include The Villages.⁸ In support of its petition, TWSI filed with the Authority a letter from Land Resource Companies, the original owner and developer of The Villages, which specifically requested that TWSI provide wastewater service to The Villages. In addition, TWSI filed letters from the Mayors of the City of LaFollette, Tennessee, and Campbell County, Tennessee, which indicated that those governmental entities had no intention of providing wastewater service to the

⁶ Tenn. R. & Regs. 1220-04-13(4).

⁷ See *In re [Petition of Tennessee Wastewater Systems Inc.] to Operate as a Public Utility Providing Sewage Collection, Treatment, and Disposal for a Proposed Development in Maury County*, TRA Docket No. 93-09040. (TWSI was formerly known as On-Site Systems, Inc., as shown on the TDEC permit filed in the docket file.)

⁸ 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, *Petition of Tennessee Wastewater Systems, Inc. to Amend Its Certificate of Convenience and Necessity* (November 9, 2006).

area. Although no contracts had yet been signed, TWSI asserted that it was the intention of [TWSI and Land Resource Companies] that TWSI would own the collection, treatment, and dispersal system and a permanent easement on the property whereon the system would be situated. TWSI further estimated that construction of the system would be complete approximately 60 days after the permit was approved by the Tennessee Department of Environment and Conservation ("TDEC").⁹

4. On January 8, 2007, based on the assertions of TWSI and the record as a whole, the Authority granted TWSI's petition to amend its CCN to include The Villages.¹⁰

5. On March 1, 2013, Emerson Properties, LLC ("Emerson") filed an amended petition (i.e., a complaint) ("*Petition*") in TRA Docket No. 13-00017 requesting that the Authority terminate TWSI's CCN and any attendant rights thereto as it relates to the provision of wastewater service to The Villages.¹¹ In its *Petition*, Emerson stated that it purchased the property and assets of The Villages through bankruptcy proceedings instituted by the former owner/developer in the United States Bankruptcy Court for the Middle District of Florida, and that, by Order of the Bankruptcy Court, such property was conveyed to it free and clear of all liens, claims and encumbrances.¹² In addition, by Order of the Bankruptcy Court, all contracts between TWSI and the prior owner/developer concerning the wastewater system and the

⁹ See TRA Docket No. 06-00277. On February 28, 2007, TWSI filed its TDEC state operating permit with the Utilities Division of the Authority. The TDEC permit was late-filed in Docket No. 06-00277 on November 4, 2009.

¹⁰ 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* (April 11, 2007).

¹¹ See *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 [at] Norris Lake, pursuant to Tenn. Code Ann. 65-4-201*, Docket No. 13-00017, *Amended Petition of Emerson Properties, LLC* (March 1, 2013).

¹² *Id.* at *Petition* ¶¶ 3, 6-8, and Exhibit C (March 1, 2013).

provision of wastewater service to The Villages were rejected, and all rights and obligations therein extinguished.¹³

6. In Docket No. 13-00017, the Authority conducted an investigation of the allegations made against TWSI. In that docket, full procedural due process was given to the parties, including an opportunity for discovery, the filing of preliminary pleadings, motions, and other filings, including pre-filed sworn testimony, and upon notice, a Hearing was held on November 25, 2013.

7. During the regularly scheduled Authority Conference held on January 13, 2014, the panel considered the entire record assembled in Docket No. 13-00017. After deliberating the merits of the allegations made against TWSI, a majority of the panel made the following findings:

- a) 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, 2007.¹⁴ However, to date, TWSI has not provided wastewater service to the Villages.¹⁵ TWSI does not have a contract for service with Emerson, nor does Emerson intend to enter into a contractual relationship with TWSI.¹⁶

¹³ *Id.*

¹⁴ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, p. 2 (October 11, 2013); Affidavit of Charles Hyatt, p. 2 (October 11, 2013).

¹⁵ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, p. 2 (October 11, 2013); Affidavit of Charles Hyatt, p. 2 (October 11, 2013); Charles Hyatt, Pre-filed Rebuttal Testimony, pp. 1-2 (October 25, 2013); George L. Potter, Pre-filed Direct Testimony, p. 6, lines 10-12 (October 11, 2013).

¹⁶ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, pp. 2-3 (October 11, 2013); Affidavit of Charles Hyatt, p. 3 (October 11, 2013); Charles Hyatt, Pre-filed Rebuttal Testimony, p. 2 (October 25, 2013); George L. Potter, Pre-filed Direct Testimony, p. 4, lines 14-18 and p. 7, lines 13-17 (October 11, 2013); Transcript of Proceedings, p. 44, lines 23-25 and p. 45, lines 1-2 (November 25, 2013); Transcript of Proceedings, p. 73, lines 12-14 (November 25, 2013); Transcript of Proceedings, p. 85, lines 23-24 (November 25, 2013).

- b) TWSI has not been deeded any land at the Villages, nor does it have an easement.¹⁷ Emerson has no intention of giving TWSI a deed to property or an easement.¹⁸
- c) TWSI does not own a wastewater system or pipes at the Villages.¹⁹ Emerson will not give its system or pipes to TWSI.²⁰
- d) TWSI's business model is that the developer builds the system and then deeds it to TWSI.²¹ TWSI's tariff does not include capital costs for it to build a system.²²
- e) TWSI is not willing to provide service to the Villages if the wastewater system is not given to TWSI.²³
- f) 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.²⁴
- g) 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

¹⁷ *Amended Order*, citing George L. Potter, Pre-filed Direct Testimony, p. 6, lines 16-21 and p. 7, lines 13-17 (October 11, 2013); Transcript of Proceedings, p. 45, lines 9-12 (November 25, 2013); Transcript of Proceedings, p. 96, lines 11-15 (November 25, 2013); Transcript of Proceedings, p. 131, lines 2-9 (November 25, 2013).

¹⁸ *Amended Order*, citing Transcript of Proceedings, p. 73, lines 7-11 (November 25, 2013); Transcript of Proceedings, p. 85, lines 15-25 and p. 86, lines 1-7 (November 25, 2013); Transcript of Proceedings, p. 130, lines 2-9 (November 25, 2013).

¹⁹ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, p. 5 (October 11, 2013); Transcript of Proceedings, p. 96, lines 11-15 (November 25, 2013).

²⁰ *Amended Order*, citing Transcript of Proceedings, p. 73, lines 15-17 (November 25, 2013); Transcript of Proceedings, p. 106, lines 2-10 (November 25, 2013).

²¹ *Amended Order*, citing Charles Hyatt, Pre-filed Direct Testimony, p. 5 (October 11, 2013); Charles Hyatt, Pre-filed Rebuttal Testimony, p. 2 (October 25, 2013); Transcript of Proceedings, p. 106, lines 2-10 (November 25, 2013).

²² *Amended Order*, citing Charles Hyatt, Pre-filed Rebuttal Testimony, p. 2 (October 25, 2013).

²³ *Amended Order*, citing Transcript of Proceedings, p. 119, lines 1-3 (November 25, 2013).

²⁴ *Amended Order*, citing George L. Potter, Pre-filed Direct Testimony, p. 6, lines 22-25 and p. 7, lines 1-6, 18-20 (October 11, 2013); Transcript of Proceedings, p. 44, lines 11-14 (November 25, 2013).

alternative financial security is approved in violation of TRA Rule 1220-4-13-.07(5).²⁵

8. Upon the record and these specific findings, a majority of the panel concluded that the allegations were sufficiently proven to demonstrate that TWSI has failed to comply with and/or violated state law and TRA Rules so as to justify instituting this show cause proceeding to require TWSI to show why the Authority should not take action to terminate, amend, or revoke TWSI's CCN as it relates to The Villages and impose civil penalties, fines and sanctions for such violations.

ALLEGED VIOLATIONS OF STATE LAW/TRA RULES

The following acts or omissions alleged and found by the panel to have been performed or having failed to have been performed by TWSI, constitute violations of state law and/or the TRA Rules:

COUNT 1

By Order of the Bankruptcy Court, Emerson purchased The Villages, its land and assets, free and clear of all liens, claims, and encumbrances, and did not assume any contractual obligations of the prior owner.²⁶ TWSI does not have a contract or any other enforceable agreement with Emerson to provide service to The Villages, and Emerson has testified that it does not wish or intend to enter into a contractual relationship with TWSI for such service.²⁷ TWSI does not own or been deeded any land, nor does it have an easement to any land located at

²⁵ *Amended Order*, citing Transcript of Proceedings, p. 131, lines 13-25 and p. 132, lines 1-8 (November 25, 2013).

²⁶ *Amended Order*, p. 9, fn. 38, citing *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 [at] Norris Lake, pursuant to Tenn. Code Ann. 65-4-201*, Docket No. 13-00017, *Amended Petition of Emerson Properties, LLC*, Exhibit C (March 1, 2013).

²⁷ *Pre-filed Direct Testimony of Charles Hyatt*, pp. 2-3 (October 11, 2013); *Affidavit of Charles Hyatt*, p. 3 (October 11, 2013); *Rebuttal Testimony of Charles Hyatt*, p. 2 (October 25, 2013); *Pre-filed Direct Testimony of George Potter*, p. 4, lines 14-18 and p. 7, lines 13-14 (October 11, 2013); *Transcript of Proceedings, Testimony of George Potter*, p. 73, line 14 (November 25, 2013); *Transcript of Proceedings, Testimony of George Potter*, p. 85, lines 23-24 (November 25, 2013).

the Villages. Emerson has no obligation, and has testified that it has no desire or intention, to convey a deed or an easement to TWSI for any of its property.²⁸ Further, TWSI does not own a wastewater system or any component pipes at the Villages.²⁹ Emerson has testified that it will not give its system or pipes to TWSI. TWSI's business model anticipates and requires that the owner/developer build the wastewater system and convey it by deed to TWSI. TWSI's tariff does not include capital costs for the construction of a wastewater system at the Villages.³⁰ Finally, TWSI is not willing to provide service to the Villages unless ownership of the wastewater system is freely transferred to TWSI.³¹

Based on the record as a whole, including the specific facts noted above, the panel found TWSI unwilling and/or incapable of effectively operating and/or managing The Villages in compliance with TRA rules and Tennessee statutes, and that such constitutes material non-compliance and/or a violation under TRA Rule 1220-4-13-.09, which states:

- (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

²⁸ *Pre-filed Direct Testimony of George Potter*, p. 6, line 18 (October 11, 2013) *Transcript of Proceedings*, *Testimony of George Potter*, p. 73, line 11 (November 25, 2013); *Transcript of Proceedings*, *Testimony of George Potter*, p. 85, line 25 and p. 86, line 1 (November 25, 2013).

²⁹ *Pre-filed Direct Testimony of Charles Hyatt*, p. 5 (October 11, 2013); *Transcript of Proceedings*, *Testimony of George Potter*, p. 73, line 17 (November 25, 2013); *Transcript of Proceedings*, *Testimony of George Potter*, p. 96, lines 13-15 (November 25, 2013).

³⁰ *Pre-filed Direct Testimony of Charles Hyatt*, p. 5 (October 11, 2013); *Rebuttal Testimony of Charles Hyatt*, p. 2 (October 25, 2013).

³¹ *Transcript of Proceedings*, *Testimony of Charles Hyatt*, p. 119, line 3 (November 25, 2013).

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.

(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.

Because TWSI has no ownership or easement rights to either the land or the wastewater system at The Villages, and as TWSI's business model, as is further reflected in the structure of its tariff, anticipates and requires that the owner/developer build the wastewater system and convey it by deed to TWSI, and, as is demonstrated by the evidence, TWSI is unable to obtain legal ownership or an easement to either the land or the system from the owner/developer and, therefore, is unable to effectuate the provision of service at The Villages, the Authority has good cause to take appropriate action in this matter, which may include the termination, amendment, or revocation of TWSI's CCN and imposition of civil penalties, fines, and sanctions.

COUNT 2

On April 11, 2007, in an Order entered in TRA Docket No. 06-00277, TWSI's CCN was amended to include The Villages. More than six years has elapsed since the CCN was approved, yet TWSI has not provided wastewater service to The Villages.³² The failure of TWSI to provide wastewater service within two (2) years of obtaining authorization to do so, *via* its CCN,

³² *Pre-filed Direct Testimony of Charles Hyatt*, p. 2 (October 11, 2013); *Affidavit of Charles Hyatt*, p. 2 (October 11, 2013). *Rebuttal Testimony of Charles Hyatt*, pp. 1-2 (October 25, 2013); *Pre-filed Direct Testimony of Emerson witness, George Potter*, p. 6, line 12 (October 11, 2013).

regardless of demand or lack thereof for service, constitutes material non-compliance and/or violation of TRA Rule 1220-04-13-.06(4), which states:

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 (*emphasis added*).

Because TWSI has failed to provide wastewater service to The Villages within the time period noted above, and as such failure appears from the evidence to be the result of an unwillingness and/or incapacity on the part of TWSI to provide such service, the Authority has good cause to take appropriate action in this matter, which may include the termination, amendment, or revocation of TWSI's CCN and imposition of civil penalties, fines, and sanctions.

COUNT 3

Based on the findings of the panel, and the foregoing facts set forth in Counts 1 and 2 above, TWSI does not own either land or the wastewater system, and appears unable to obtain ownership of the system from the owner/developer.³³ As such, it is not in compliance nor 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, as follows:

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.

TWSI does not have title or any enforceable right to either the land or the wastewater system at The Villages. And, as testified to by representatives of TWSI and further reflected in the

³³ *Pre-filed Direct Testimony of George Potter*, p. 6, lines 23-24 and p. 7, line 1-3 (October 11, 2013); *Transcript of Proceedings, Testimony of George Potter*, p. 44, lines 11-14 (November 25, 2013).

structure of its tariff, TWSI's business model anticipates and requires that the owner/developer build the wastewater system and convey it by deed to TWSI, which, as is demonstrated by the evidence in the record, the current owner/developer has, by Court Order, been relieved from any such obligation of the prior owner, and has stated that it will not, and is not otherwise obligated to, deliver such title or rights. Thus, the evidence indicates that TWSI is not able to obtain title or easement rights to the land or the system from the owner/developer, and neither has it, nor can it, prevent any liens, judgments, or encumbrances. As such, TWSI appears unable to effectuate the provision of service at The Villages in compliance with state law or the TRA's Rules. Therefore, the Authority has good cause to take appropriate action in this matter, which may include the termination, amendment, or revocation of TWSI's CCN and imposition of civil penalties, fines, and sanctions.

COUNT 4

TWSI has failed to file a petition requesting that the TRA approve an alternative proof of financial security by May 1st of 2012 and 2013 and has also failed to file a bond until such alternative financial security is approved.³⁴ Such inaction by TWSI constitutes material non-compliance and/or violations of Tenn. Code Ann. § 65-4-201(e) and TRA Rule 1220-4-13-.07(5). Tenn. Code Ann. § 65-4-201(e) states, in relevant part:

(e) The authority shall direct the posting of a bond or other security by a public utility providing wastewater service or for a particular project proposed by a public utility providing wastewater service. The purpose of the bond or other security shall be to ensure the proper operation and maintenance of the public utility or project. The authority shall establish by rule the form of such bond or other security, the circumstances under which a bond or other security may be required, and the manner and circumstances under which the bond or other security may be forfeited.

(1) The requirement under this subsection (e) to post a bond or other security by a public utility providing wastewater service shall also satisfy the requirement on

³⁴ *Transcript of Proceedings, Testimony of Charles Hyatt, p. 132, lines 2-4 and 7-8 (November 25, 2013).*

such a public utility to provide a bond or other financial security to the department of environment and conservation as required by § 69-3-122.

- (2) The authority shall establish by rule the amount of such bond or other security for various sizes and types of facilities.³⁵

* * *

Further, TRA Rule 1220-4-13-.07, *et seq.*, sets forth the financial security regulations to be observed and adhered to by all public wastewater utilities. Specifically, TRA Rule 1220-4-13-.07(5) addresses the posting of alternative financial security, as follows:

- (5) If the public wastewater utility proposes to post financial security other than the type or amount permitted above, it must file with the Authority by May 1 of each year a petition requesting acceptance of the security. A hearing shall be held to determine the amount of the financial security and if the form of the proposed financial security serves the public interest. At this hearing, the burden of proof shall be on the public wastewater utility to show that the proposed financial security and the proposed amount will be in the public interest. The public wastewater utility shall comply with Rule 1220-4-13-.07(2) until the alternative financial security is approved by the Authority.

Because TWSI has failed to file and obtain approval of an alternative financial security in accordance with the above statute and TRA Rule, the Authority has good cause to take appropriate action in this matter, which may include the termination, amendment, or revocation of TWSI's CCN and imposition of civil penalties, fines, and sanctions.

UPON THE FOREGOING INFORMATION AND RECORD, as presented by the parties and adjudged by the panel in Docket No. 13-00017, all of which has been made part of the evidentiary record in this docket file, and pursuant to the scope of its regulatory authority as provided in, but not limited to, Tenn. Code Ann. §§ 65-2-106, 65-3-105, 65-4-104, 65-4-105(a), 65-4-106, 65-4-116, 65-4-117(1), 65-4-120, and 65-4-202 through 204, the Authority has determined and ordered that Tennessee Wastewater Systems, Inc., be required to appear and

³⁵ Tenn. Code Ann. § 65-4-201(e) (2005).

show cause why it should not be found in violation of state law and the TRA's Rules, as noted above, and immediately thereafter take such action as may include, but not be limited to issuing a cease and desist order, terminating, amending, or revoking its CCN as relates to The Villages, imposing civil penalties, fines, and sanctions, and, as appropriate, seeking additional relief to the maximum extent allowed by law.

BE IT THEREFORE ORDERED THAT:

Tennessee Wastewater Systems, Inc., shall appear before the Tennessee Regulatory Authority for a hearing, at a date and time to be determined, in Hearing Room G.201 located on the Ground Floor of the Andrew Jackson State Office Building, 500 Deaderick Street, Nashville, Tennessee, and shall show cause why the Authority should not proceed to take action against it for the unlawful actions and omissions alleged against it in this Order, including, but not limited to, the issuance of a cease and desist order, the termination, amendment, or revocation of its CCN insofar as relates to the provision of wastewater service to a subdivision located in Campbell County, Tennessee, known as The Villages at Norris Lake, imposition of civil penalties, fines, and sanctions, and, as appropriate, to further seek additional relief to the maximum extent allowed by law.


Kelly Cashman-Grams, Hearing Officer