



851 Aviation Parkway
Smyrna, TN 37167

October 28, 2016

Chairman David Jones
Tennessee Regulatory Authority
502 Deaderick St., 4th Floor
Nashville, TN 37243

Re: Proposed Rule Changes to Wastewater Regulations

Dear Chairman Jones:

Tennessee Wastewater Systems, Inc. ("TWSI", "Company", or "Utility") appreciates the opportunity to provide comments to the proposed changes to the Wastewater Regulations of the Tennessee Regulatory Authority ("TRA"). TWSI is the largest provider of decentralized wastewater services in Tennessee. TWSI supports the majority of the proposed changes to the Wastewater Regulations, but recommends the following changes and clarifications.¹

Proposed Rule 1220-04-13-.06(2) – Adequacy of Facilities

- (2) *Each public wastewater utility shall adopt operating and maintenance procedures for its wastewater system to ensure safe, adequate and continuous service at all times by qualified staff, and shall make inspections on a regular basis and in accordance to TDEC rules.*

TWSI requests that "to TDEC rules" at the end of the paragraph be deleted and substitute in its place "with the requirements provided for in the TDEC issued permit for the wastewater treatment facility". The permit issued by TDEC for each wastewater treatment facility (State Operating Permit or NPDES) provides the inspection requirements for each permitted facility. The permit is the operative document wastewater utilities rely on for all operational concerns of the wastewater treatment facility. This rule should properly direct wastewater utilities to their facility operating permit for direction on system inspections.

Proposed Rule 1220-04-13-.07 – Financial Security

In general, the proposed rule change reduces the amount of the required financial security from one hundred percent (100%) of a company's annual wastewater revenues as per the company's most recent Annual report to seventy-five percent (75%) of annual revenues or \$20,000, whichever is greater. TWSI understands and appreciates the reasons for and necessity of the financial security requirement, however, given the size of the company and

¹ In addition, TWSI endorses the comments from Mr. Hal Novak except for his third point. TWSI has found that threatened notice to the local health department often persuader customers to pay their bills.

its current and projected growth, the financial security requirement encumbers a significant portion of the Company's capital with more to be tied up as revenues continue to increase. Currently TWSI pays around three percent (3%) of the overall bond amount of \$1.2 million dollars, or \$40,000 a year. This number will increase as revenues for the utility increase. While the bonding cost is ultimately a pass through to the ratepayer, the ratepayers will be better served if the Company has the ability to use this capital in other ways.

To address this financial burden, TWSI proposes a cap on the amount of financial security required by the Authority under the new proposed rules. Adenus Group, LLC, the owner of TWSI owns a wastewater utility in Alabama, Alabama Wastewater Systems, Inc. ("AWSI"). AWSI is regulated by the Alabama Public Service Commission, much like TWSI is regulated by the TRA. Alabama also has a financial security requirement; however, their requirements call for an amount equal to fifty percent (50%) of wastewater revenues with a maximum required amount of \$300,000.² TWSI proposes a similar cap be placed on the financial security requirement under the new proposed rules. The Directors have repeatedly found that it is unlikely that all TWSI systems will fail at the same time³. A reasonable cap on the bonding required by the Authority will still allow for sufficient funds to be available to operate any wastewater system until more permanent arrangements can be made. It also frees up much needed capital which the Company can use in other areas to benefit the ratepayer.

Proposed Rule 1220-04-13-.09 – Procedure for Suspension or Revocation of CCN, Forfeiture of Wastewater Utility Funds, and Claims Against Financial Security; Expired and Terminated CCNs

As written, the rule is tied to the passage of time to allow for the loss of a utility's CCN. This rule should also provide for consideration of whether construction has started on the wastewater facilities thus creating a property interest in maintaining the CCN, as well as in the case of a failed or abandoned development, whether a new developer has emerged and wants a different provider to serve the development.

Under the proposed rules, the three (3) year period for automatic termination of a CCN should either be lengthened to five (5) years or eliminated altogether. Typically, a CCN is sought at the very early stages of a development, before a planning commission has approved the developer's plans and in some cases prior to the purchase of the property proposed for the development. Many factors come into play which may slow the timeframe for development. The potential issues include gaining approvals from the local planning commission, receiving clearances and approvals from governmental agencies (ie. TDOT and TDEC), easements from railroads – which take years in and of itself, developer financing,

² Alabama Public Service Commission, Wastewater Management Entity Rules Chapter 770-X-9-.07. Financial Assurance Requirements

³ TRA Dockets 11-00187, 15-00051, 16-00045

and closing on the property. While some developments come together quickly, many do not and the issues that cause delay are out of the control of the utility.

Furthermore, the passage of time, whether three (3) years, five (5) years or longer, is not, in and of itself, relevant to the issue that this rule is intended to address. If both the utility and the developer remain committed to the project, by choice or by contract, what purpose is served by terminating the certificate simply because of the passage of time? Conversely, if the original developer wants to use another wastewater provider, why should the new developer have to wait for any specific period of time before asking that the certificate be transferred to another provider?

Instead of addressing this issue by imposing an arbitrary time period, the Authority should address directly the circumstances which may warrant the cancellation or transfer of a certificate by imposing appropriate conditions on the certificate when it is issued.

T.C.A. § 65-4-202 expressly permits the Authority when granting a certificate to “attach . . . such terms and conditions as to time or otherwise as in its judgment the public convenience, necessity and protect may require.” The statute also states that the Authority “may forfeit such certificate . . . for noncompliance with its terms or provide therein for an ipso facto forfeiture of the same for failure to exercise the rights granted within the time fixed by the Authority. . . .”

Instead of trying to craft a one-size –fits-all rule, the Authority should address any concerns about delays or a change in ownership at the time a certificate is granted and insert in the order whatever time limits or other conditions are appropriate based on the evidence presented. That approach makes more sense and is more legally defensible than an arbitrary rule with time limits.

Lastly, the suspension or revocation of a certificate is the most serious penalty the TRA can impose on a utility and should only be invoked as a last resort. Recognizing the extreme nature of such an enforcement action, the current rules provide in Section 1220-4-13-.09 (4) that the Authority will not take such action “without first affording the public wastewater utility a reasonable opportunity to correct the conditions that are alleged to constitute the grounds for such action...”

The proposed rules, by contrast, say that the TRA, in deciding whether to suspend or revoke a certificate “may consider,” among other things, “whether the utility had the opportunity to correction the conditions that are alleged to constitute the grounds for action.”

What is the reason for the change in the rules? Under the current rule, the utility must be provided one final chance to correct the situation and that opportunity must be given after the Authority has determined that the circumstances would otherwise warrant revocation. Under the proposed rule, it is not clear when the “opportunity” to take corrective action

arises. If there is a dispute between the utility and a customer and the utility maintains its position pending a ruling on the dispute by the Authority, does that mean the utility has already been given the opportunity to address the problem? If the TRA eventually rules for the customer, should the utility then be granted the opportunity to take corrective action? Under the current rules, it is clear that such an opportunity must be given. The proposed rules substitute confusion for clarity. Tennessee Wastewater suggests that the current language remain unchanged.

Proposed Rule 1220-04-13-.17 – Minimum Requirements for New and Amendments to Certificate of Convenience and Necessity

(2)(b)(4) Proof that the utility owns the land and/or has easements for the proposed wastewater system.

This new rule is aligned with a similar TDEC requirement for ownership of the land or a permanent easement over the land upon which the wastewater treatment system is installed. This is an impracticable requirement as it does not take into consideration the property development process nor is it consistent with platting timeline process.

Deeds are not executed until after the closing on the sewer system between the developer and Utility. Closing happens at the time the final plat is signed by the Utility. The final plat is not signed by the Utility until the construction of the wastewater facility is complete and the system is accepted by the Utility. At the time of final plat, the developer formally dedicates the lots associated with the wastewater treatment system to the Utility either by deed or permanent easement. Since it is not possible for the utility to own the property upon which the wastewater treatment facility is installed until the Utility accepts and closes on the system, the requirement that it prove ownership of or permanent easement rights in the property prior to the construction of the system is not realistic.

Another problem the Utility consistently runs into with regard to this issue is developers are often very slow in executing and recording the deed or easement to the treatment facility land. Once TWSI accepts the system and signs the plat, it becomes responsible for providing service to the development. Any leverage TWSI has with the developer to timely provide the deed or easement is gone.

To address the mutual concerns of the Authority and the Utility, TWSI proposes the following language:

"Evidence of ownership of the treatment facility land application site(s) and/or a copy of the perpetual easement(s) must be furnished to the Authority prior to the operation of the wastewater treatment and collection system."

This language does not change the Authority's purpose for requiring evidence of ownership of the wastewater treatment facility. It does, however, allow for that requirement to be effective at the relevant stage of the development and platting processes and provides the Utility a means to ensure developers provide it with the required documentation granting ownership of the treatment facility land before the system becomes operational.

Tennessee Wastewater Systems Inc., respectfully requests the Authority to consider and incorporate the above suggestions into the new proposed rules.

Respectfully submitted,



Jeff Ridsen, Esq.
General Counsel

Tennessee Wastewater Systems, Inc.