

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

November 30, 2020

IN RE:

PETITION OF TENNESSEE WASTEWATER  
SYSTEMS, INC. FOR APPROVAL TO USE ITS  
ESCROW AND RESERVE FUNDS FOR CAPITAL  
IMPROVEMENTS AT THE CROSS PLAINS  
TREATMENT FACILITY

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DOCKET NO.  
20-00108

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ORDER APPROVING USE OF ESCROW AND RESERVE FUNDS

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This matter came before Vice Chairman Herbert H. Hilliard, Commissioner Robin L. Morrison, and Commissioner John Hie of the Tennessee Public Utility Commission, (“TPUC” or “Commission”), the voting panel assigned to this docket, during a regularly scheduled Commission Conference held on October 12, 2020, for consideration of the *Petition of Tennessee Wastewater Systems, Inc. for Approval To Use Its Escrow & Reserve Funds for Capital Improvements At Cross Plains Treatment Facility* (“*Petition*”) filed by Tennessee Wastewater Systems, Inc. (“TWSI,” “Company,” or “Petitioner”) on August 20, 2020. In its *Petition*, TWSI requests the Commission’s approval for use of its escrow and Contribution In Aid of Construction (“CAIC”) reserve funds for needed capital improvements on its Cross Plains Treatment Facility (“Cross Plains Facility”) in Coopertown, Tennessee.

**BACKGROUND AND PETITION**

TWSI is a corporation organized under the laws of the State of Tennessee with a principal place of business located at 851 Aviation Parkway, Smyrna, Tennessee.<sup>1</sup> The Cross Plains Facility consists of a 74,000 gallon-per-day lagoon serving 19 connected customers and another pending 42 lots. Plans for the system called for drip disposal of treated effluent from the

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<sup>1</sup> *Petition* (August 20, 2020).

lagoon, but the drip field and related equipment were never installed.<sup>2</sup> The Cross Plains Facility was constructed by Adenus Capacity, LLC (“Adenus”), a subsidiary affiliate of TWSI, upon land owned by Mar-Car, LLC (“Mar-Car”), a non-affiliate of TWSI. Under the original agreement, Adenus and Mar-Car were to receive an allotment of tap or capacity credits in exchange for their respective investments in the system. Adenus has informed TWSI that it does not intend to complete the facility and will forego its right to receive any payments for the sale of capacity at Cross Plains.<sup>3</sup>

The property provided by Mar-Car is being used for the facility and its drip areas. Therefore, TWSI intends to honor the capacity credits allocated to Mar-Car. Mar-Car was to receive 450 capacity credits after the first 200 credits were sold by Adenus under the original agreement, but Adenus has not used any of its taps for its own use or for others to date. TWSI states that 150 lots requested to be served by the developer, B&P Investments (“B&P”), are part of the 450 capacity credits allocated to Mar-Car. However, B&P has not moved forward with any plans to develop its property and no agreement exists between B&P and TWSI to provide service to the property.<sup>4</sup>

The Tennessee Department of Environment and Conservation (“TDEC”) has conducted inspections of the Cross Plains Facility and noted the absence of the drip disposal system. In 2014, TDEC determined that all but an acre of land was no longer suitable for drip disposal, disqualifying the soils for drip. As a result of this disqualification, TDEC reduced the system capacity from 74,000 gallons per day (“gpd”) to 10,600 gpd.<sup>5</sup> Following an inspection at the

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<sup>2</sup> *Id.* at 2; Matthew Nicks, Pre-Filed Direct Testimony, p. 2. (September 2, 2020).

<sup>3</sup> *Id.* at 4-5; Matthew Nicks, Pre-Filed Direct Testimony, pp. 2-4 (September 2, 2020).

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 2 & Exh. A.

Cross Plains Facility in November 2019, TDEC issued a Notice of Violation (“NOV”) citing the following violations<sup>6</sup>:

- The drip dispersal was never constructed.
- The lagoon was not constructed as designed, has limestone rock outcrops, and is not retaining wastewater for treatment in a deep cell environment.
- Effluent is being discharged to groundwater without a UIC authorization.
- As constructed and operated, the system does not treat, store, or land apply wastes as required by the SOP.<sup>7</sup>

TWSI and TDEC entered into a Settlement Agreement and Order (“Settlement Agreement”) that addresses, among other things, the violations at the Cross Plains Facility. With regard to the Cross Plains Facility, the Settlement Agreement provides as follows:

1. TWSI shall submit a correction action plan (“CAP1”) for temporary treatment consisting of installation of a FAST system to treat the wastewater to permit limits and discharge into the lagoon;
2. Temporary discharge into the lagoon will be permitted for no more than 120 days, to commence upon funding authorization from the Commission, while TWSI installs drip on lands presently approved by TDEC;
3. TWSI shall submit a correction action plan (“CAP2”) for approval to construct and complete a sand filter (or other treatment option) and additional drip fields within 90 days after the drip system receives discharge from the FAST system.
4. TWSI will complete the construction of the sand filter (or other treatment option) and additional drip fields within ten (10) months of the latter of either

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<sup>6</sup> *Id.* at Exh. B, pp. 5-6 of Exh. C to Exh. B.

<sup>7</sup> *Id.*

TDEC approval of plans or TPUC authorization of funding and shall submit written and photographic documentation to TDEC upon completion.<sup>8</sup>

In its *Petition*, TWSI is requesting that the Commission authorize expenditures of up to \$400,000 from its escrow and CIAC reserve funds to finance both the CAP1 and CAP2 projects at the Cross Plains Facility. The CAP1 project, which Mr. Nicks testified, “must be handled immediately,” is estimated to cost \$186,216.<sup>9</sup> TWSI provided a breakdown of estimated CAP1 project components and estimated costs as follows:

1. FAST unit connection to influent line discharge to lagoon - \$46,500;
2. Completion of the control building - \$75,966; and,
3. Installation of land application area (drip system) - \$63,750.<sup>10</sup>

The remaining \$213,784 is requested to finance the CAP2 project. TWSI estimates an estimated cost of \$67,500 to replace the lagoon with sand filter treatment plant. However, there is insufficient information to estimate the cost of installation of the associated drip field pending completion of additional soil work.<sup>11</sup>

TWSI states that it had an escrow balance of \$1,162,662.66 as of August 10, 2020, and CIAC reserves of \$164,750.57 as of August 3, 2020.<sup>12</sup> In Docket No. 19-00085, the Commission authorized TWSI to spend up to \$808,000 of these funds to finance needed capital improvements at Hidden Springs Resort.<sup>13</sup> Additionally, the Company notes that TWSI is presently collecting about \$37,500 monthly, or \$450,000 annually, through monthly escrow charges approved in most recent rate case.<sup>14</sup> TWSI also estimates that it will collect approximately \$110,400 in

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<sup>8</sup> *Id.* at 1; Matthew Nicks, Pre-Filed Direct Testimony, p. 3 (September 2, 2020).

<sup>9</sup> Matthew Nicks, Pre-Filed Direct Testimony, p. 3 (September 2, 2020).

<sup>10</sup> *Petition*, Exh. C, p. 13 (August 20, 2020).

<sup>11</sup> *Id.* at 3-4.

<sup>12</sup> *Id.* at 4 and Exh. D.

<sup>13</sup> *In re: Petition of Tennessee Wastewater Systems, Inc. for Approval to Use Its Escrow and Reserve Funds for Capital Improvements at Hidden Springs Resort*, Docket No. 19-00085, *Order* (April 8, 2020).

<sup>14</sup> *In re: Joint Petition of Tennessee Wastewater Systems, Inc. and TPUC Staff (As A Party) to Increase Rates and Charges*, Docket No. 20-00009 (“2020 Rate Case”), *Order* (August 25, 2009) (“2020 Rate Case Order”).

capacity and utility fees that will be recorded as CIAC and developer income for 23 lots in a second phase in the Stony Brook subdivision that have requested connection to the sand filter facility once it is constructed.<sup>15</sup>

In its *Petition*, TWSI agrees to submit to reporting requirements that the Commission deems necessary, proposing reporting requirements similar to those established for Maple Green, Cedar Hill, and Smoky Village in Docket No. 16-00096,<sup>16</sup> and Hidden Springs Resort in Docket No. 19-00085.<sup>17</sup> In these dockets, TWSI is required to provide monthly updates to the Commission that include project expenditures and account balances. Additionally, TWSI's escrow and reserve accounts are subject to annual reporting requirements in the Company's 2020 *Rate Case Order*. TWSI plans to minimize project costs by utilizing affiliates in the provision of services, materials, and supplies while abiding by Commission Rules on transactions with affiliates.<sup>18</sup>

On September 28, 2020, TWSI filed a letter in this docket providing clarification in response to a question from the Consumer Advocate Unit in the Financial Division of the Office of the Attorney General ("Consumer Advocate").<sup>19</sup> In response to the Consumer Advocate's inquiry regarding the accounting of capacity and utility fees, the Company stated that it will record the capacity fees as CIAC and deposit the funds in its CIAC reserve account to be used for necessary capital projects, subject to approval by the Commission, and governed by the same procedures surrounding use of the Company's escrow funds.<sup>20</sup>

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<sup>15</sup> *Petition*, p. 4 (August 20, 2020).

<sup>16</sup> *In re: Petition of Tennessee Wastewater Systems, Inc. for Approval of Capital Improvement Surcharges and Financing Arrangements for the Wastewater Systems Located at Maple Green and Cedar Hill, in Robertson County, and at Smoky Village Subdivision, in Sevier County, Tennessee*, Docket No. 16-00096, *Order Approving Stipulation and Settlement Agreement* (October 1, 1998).

<sup>17</sup> *In re: Petition of Tennessee Wastewater Systems, Inc. for Approval to Use Its Escrow & Reserve Funds for Capital Improvement at Hidden Springs Resort*, Docket No. 19-00085, *Order* (April 8, 2020).

<sup>18</sup> *Petition*, p. 5 (August 20, 2020). See also Tenn. Comp. R. & Regs. 1220-04-13-.16.

<sup>19</sup> *TWSI Response to the Consumer Advocate Re: Company's Statement on Page 4 of the Petition Filed on August 20, 2020* (September 28, 2020).

<sup>20</sup> *Id.*

On October 1, 2020, the Consumer Advocate filed a letter it sent to the Company stating that with the clarification addressed in the September 28, 2020 letter from TWSI, the Consumer Advocate stated that the issue that the Consumer Advocate raised with TWSI had been satisfactorily addressed.<sup>21</sup> Neither the Consumer Advocate nor any other party sought to intervene in this docket.

### **THE HEARING**

A Hearing in this matter was held before the voting panel of Commissioners during the regularly scheduled Commission Conference on October 12, 2020, as noticed by the Commission on October 2, 2020. Participating in the Hearing were:

Tennessee Wastewater Systems, Inc. – Jeff Riden, Esq., General Counsel;  
Matthew Nicks, President; 851 Aviation Parkway, Smyrna, Tennessee.

During the Hearing, Matthew Nicks, President of TWSI, presented testimony on behalf of the Company and adopted his Pre-Filed Direct Testimony. He offered no corrections or amendments to his Pre-Filed Testimony or the Company's filings. Mr. Nicks was subject to questions from the voting panel of Commissioners. Members of the public were given an opportunity to offer comments, at which time, no comments were submitted.

### **STANDARD FOR COMMISSION APPROVAL**

A public wastewater utility must obtain Commission approval for extraordinary expenditures from reserve or escrow funds, as set forth in TPUC Rule 1220-04-13-.07(7) which states, in relevant part:

Reserve/escrow accounts established by a public wastewater utility shall be limited to paying for or reimbursing the utility for extraordinary expenses of the utility or for necessary capital projects, unless otherwise permitted by the Commission. Extraordinary expenses are those resulting from events which are infrequent and unusual in nature, and unrelated to the utilities' routine service or business activities. The utility must first receive authorization from the Commission via approved petition or, in emergency situations, authorization in

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<sup>21</sup> Letter to Jeff Riden, Esq. from Karen H. Stachowski, Consumer Advocate (October 1, 2020).

writing from the Chairman of the Commission upon written request by a representative of the utility to use such funds.<sup>22</sup>

Additionally, because TWSI proposes to use affiliate companies to provide services, materials, and supplies in the CAP1 and CAP2 projects, Commission Rules concerning affiliate transactions establish specific requirements concerning accounting, record keeping, annual reporting, and Commission access to books and records with regard to such transactions. These requirements may be waived for good cause. However, the burden of proof is upon the wastewater utility to demonstrate good cause for such waivers. The requirements set forth in this Commission Rule serve to protect public wastewater utility ratepayers from unauthorized or unwarranted cross-subsidies.<sup>23</sup>

### **FINDINGS AND CONCLUSIONS**

In its *Petition*, TWSI has asked the Commission for approval of extraordinary expenditure of escrow and reserve funds to make repairs necessary to remedy system deficiencies at the Cross Plains Facility outlined in a Settlement Agreement with TDEC concerning the system. TWSI provided, as an Exhibit to its *Petition*, copies of the Settlement Agreement with TDEC that specifies corrective action to remedy the identified deficiencies at the Cross Plains Facility and civil penalties that will be levied if repairs to the failed system are not completed.<sup>24</sup> The Settlement Agreement requires TWSI to obtain approval of construction plans from TDEC and report evidence of completion of these projects to TDEC.<sup>25</sup> The voting panel found that the proposed CAP1 and CAP2 projects are necessary and that it is prudent and reasonable to utilize TWSI escrow and reserve funds to abate and permanently resolve the environmental concerns that exist at the Cross Plains Facility and to bring the system into compliance with TDEC regulations.

In addition, the panel found that the combined balances of the TWSI escrow and reserve funds

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<sup>22</sup> Tenn. Comp. R. & Regs. 1220-04-13-07(7).

<sup>23</sup> Tenn. Comp. R. & Regs. 1220-04-13-.16.

<sup>24</sup> *Petition*, Exh. B (August 20, 2020).

<sup>25</sup> *Id.*

totals \$1,327,413. Based upon this balance, and the Commission's previous approval of expenditure of \$808,000 of these funds for capital improvements at the Hidden Springs Resort, TWSI has \$519,413 available to fund the \$400,000 projects at the Cross Plains Facility. Therefore, the panel found that there are sufficient escrow and reserve funds available to provide financing for the proposed Cross Plains Facility capital improvements.

TWSI's *2020 Rate Case Order* provides for the collection of \$37,500 monthly through amortized monthly escrow charges, replenishing the escrow and reserve funds over the coming year. However, to ensure that unanticipated cost overruns do not utilize funds without prior Commission oversight, the panel found that that TWSI should expressly seek Commission authority prior to spending more than the \$400,000 estimated project costs from escrow and reserve funds.

TWSI did not request a waiver of the affiliate transaction requirements. In addition, TWSI indicated its awareness of the affiliate transaction rules and its intent to continue compliance with these rules.<sup>26</sup> Therefore, the panel voted unanimously to require compliance with the specific reporting requirements concerning affiliate transactions in order to ensure that utility funds are spent prudently and in accordance with Commission Rules.

The panel also found that the construction and repairs at the Cross Plains Facility is being funded by ratepayers and to the extent the Company collects utility fees for new service connections to the new system, such fees should be retained by the Company and recorded as CIAC for the benefit of ratepayers. The panel unanimously voted to prohibit TWSI from allotting, reserving, or giving capacity rights or service connections to the new system to developers or other non-ratepayers.

With regard to the retention of certain capacity rights reserved for Adenus and Mar-Car in the original construction agreement, Adenus is not entitled to any capacity rights at the Cross Plains Facility, including receipt of any fees or connections, without prior express approval from the

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<sup>26</sup> *Petition*, p. 5 (August 20, 2020).



Commission, as Adenus has stated that it does not plan to complete construction of the lagoon's drip field. In addition, although TWSI states that it plans to honor Mar-Car's original capacity rights since the Mar-Car contributed land is still being utilized in the system, the panel found that Mar-Car is not entitled to any capacity rights in the new Cross Plains Facility without further approval and review of the Commission because much of the Mar-Car donated land is not suitable for drip disposal according to TDEC. Further, Mar-Car shall not exercise any originally claimed capacity rights until the usefulness of the donated property is fully evaluated and such use is authorized by the Commission.

The panel found that it is necessary to track the costs of the CAP1 and CAP2 projects through periodic reporting. While detailed cost estimates of the CAP1 project have been provided, the panel directed TWSI to file a detailed cost estimate for the CAP2 project when it becomes available after completion of soil work. The panel also directed the Company to file quarterly reports specifying the escrow and CIAC reserve funds spent for the CAP1 and CAP2 projects detailing construction costs on both a quarterly and cumulative basis. The quarterly reports should specifically identify the amount of goods and services billed to TWSI by its affiliates.

The panel also unanimously voted to require that upon completion of the Cross Plains Facility improvements, which must be completed within ten (10) months after TDEC approval of the CAP2 construction plans, TWSI shall file a final accounting of the escrow and reserve funds spent and total construction costs incurred for the new Cross Plains Facility. Such final accounting shall be submitted in a format that will permit Commission Staff to trace the use of funds and accumulation of costs to TWSI's general ledger and shall include all information required by Commission Rule 1220-04-13-.16 paragraphs (4) and (5) relating to the recording of information regarding each affiliate transaction.

**IT IS THEREFORE ORDERED THAT:**

1. The *Petition of Tennessee Wastewater Systems, Inc. for Approval To Use Its Escrow & Reserve Funds for Capital Improvements At Cross Plains Treatment Facility* is

approved.

2. Tennessee Wastewater Systems, Inc. shall obtain express authority from the Commission before spending more than \$400,000 from its escrow and reserve accounts for the Cross Plains projects.

3. Tennessee Wastewater Systems, Inc. shall adhere to the Commission's affiliate transaction rules for all goods and services supplied by affiliates of Tennessee Wastewater Systems, Inc. for the Cross Plains projects.

4. Tennessee Wastewater Systems, Inc. shall retain all per-lot capacity and utility fees for connections to the newly constructed wastewater system at Cross Plains, recording all such fees as Contributions in Aid of Construction and depositing such funds in the reserve account.

5. Tennessee Wastewater Systems, Inc. shall not grant any capacity rights to any affiliated or non-affiliated entity in the newly constructed wastewater system at Cross Plains, including the right to receive per-lot fees or service connections.

6. Tennessee Wastewater Systems, Inc. shall not permit any affiliated or non-affiliated entity, including Adenus Capacity, LLC and Mar-Car, LLC, to exercise any existing or claimed capacity rights or interest in the newly constructed wastewater system at Cross Plains without first obtaining express authorization from the Commission.

7. Tennessee Wastewater Systems, Inc. shall file a detailed cost estimate of the correction action plan to construct and complete the sand filter and additional drip fields within ten (10) days after it becomes available.

8. Commencing with the fourth quarter of 2020, Tennessee Wastewater Systems, Inc. shall file quarterly reports within thirty (30) days after the end of each quarter specifying funds spent and detailing construction costs on a quarterly and cumulative basis for the Cross

Plains projects, including labor, materials, supplies, equipment, and any other costs billed to the Company by any of its affiliates.

9. Within sixty (60) days after the completion of the Cross Plains projects, Tennessee Wastewater Systems, Inc. shall file a final accounting of the projects detailing all funds spent and all construction costs incurred in a format traceable to its general ledger, and shall file all information required by Tennessee Rules and Regulations 1220-04-13-.16 (4) and (5).

10. Any person who is aggrieved by the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within fifteen (15) days from the date of this Order.

11. Any person who is aggrieved by the Commission's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

**FOR THE TENNESSEE PUBLIC UTILITY COMMISSION:**

**Vice Chairman Herbert H. Hilliard,  
Commissioner Robin L. Morrison, and  
Commissioner John Hie concurring.**

None dissenting.

**ATTEST:**



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**Earl R. Taylor, Executive Director**