

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

December 1, 2022

IN RE: APPLICATION OF LIMESTONE WATER	)	
UTILITY OPERATING COMPANY, LLC FOR	)	
AUTHORITY TO SELL OR TRANSFER TITLE	)	DOCKET NO.
TO THE ASSETS, PROPERTY, AND REAL	)	21-00053
ESTATE OF A PUBLIC UTILITY,	)	
CARTWRIGHT CREEK, L.L.C., AND FOR A	)	
CERTIFICATE OF PUBLIC CONVENIENCE	)	
AND NECESSITY	)	

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INITIAL ORDER DENYING JOINT MOTION FOR CLARIFICATION

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This matter is before the Hearing Officer of the Tennessee Public Utility Commission (“Commission” or “TPUC”) for consideration of the *Joint Motion for Clarification* (“*Joint Motion*”) filed on September 26, 2022, by Limestone Water Utility Operating Company, LLC (“Limestone” or the “Company”), Cartwright Creek, LLC (“Cartwright Creek”), and the Consumer Advocate Division in the Office of the Tennessee Attorney General (“Consumer Advocate”), the parties in this matter.

***JOINT MOTION***

On January 24, 2022, the Commission issued an Order approving the *Stipulation and Settlement Agreement* between the parties and granting Limestone a Certificate of Public Convenience and Necessity (“CCN”) to serve Arrington Retreat, The Grasslands, The Hideaway, and the Hardeman Springs subdivisions in Williamson County currently served by Cartwright Creek. According to the *Joint Motion*, consistent with Rule 60.02 of the Tennessee Rules of Civil

Procedure, the parties have filed the *Joint Motion* asking the Commission to clarify that the new certificate granted to Limestone covers the same service territory as the certificate held by Cartwright Creek. The *Joint Motion* explains that in Docket No. 04-00358, Cartwright Creek was granted a CCN to serve an undeveloped portion of land in Williamson County known as Planned Growth Area 5 (“PGA 5”), and it was the intent of the parties that the CCN for the undeveloped land in PGA 5 be transferred from Cartwright Creek to Limestone as well. The *Joint Motion* states:

[n]ot only did the Applicants request the transfer of ‘all assets’ from Cartwright Creek to Limestone but the Applicants also asked that the Commission transfer Cartwright Creek's certificate to Limestone which would have given Limestone the same service territory previously granted to Cartwright Creek. The Application then stated (at 11) that if the Commission did not transfer Cartwright Creek's certificate to Limestone, the Commission should, in the alternative, grant Limestone a new certificate to serve areas ‘currently served’ by Cartwright Creek.

The *Joint Motion* argues that:

[s]ince neither the Application nor the Order specifically mentions PGA5, which encompasses two of those developments as well as nearby, undeveloped land, the Order may be interpreted, contrary to the intent of the Applicants, as granting Limestone a certificate to provide service only within the boundaries of the four developments but not in other parts of Cartwright Creek’s service area.

Accordingly, the *Joint Motion* maintains it was the intent of the parties that the CCN for PGA 5 be transferred to Limestone, and the Order should be clarified to make it clear that a CCN for the undeveloped land in PGA 5 should have been granted to Limestone as well. The parties ask that the Commission make it clear that the CCN granted to Limestone encompasses the same service area as the certificate previously held by Cartwright Creek, no more and no less. The *Joint Motion* is supported by all of the parties to the docket.

## FINDINGS AND CONCLUSIONS

The *Joint Motion* cites Tenn. R. Civ. P. 60.02 as the legal basis for the request to “clarify” the Order. Rule 60.02 provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment.

Relief granted pursuant to Rule 60.02 is extraordinary relief and those seeking it must establish by clear and convincing evidence that the facts warrant such relief.<sup>1</sup> The Hearing Officer finds that the parties have failed to establish that such extraordinary relief is appropriate based on these facts, and therefore, the *Joint Motion* should be denied. In the *Application* filed with the Commission on May 6, 2021, Cartwright Creek sought to sell to Limestone “title to all assets, property, and real estate **currently used** to provide regulated wastewater service to customers **in four separate service areas** in Williamson County, Tennessee --**Arrington Retreat, The Grasslands, The Hideaway, and Hardeman Springs.**”<sup>2</sup> Not only do the *Application* and the administrative record fail to mention PGA 5, as admitted by the parties, but the entire record in the docket is devoid of any mention of the undeveloped land that is part of PGA 5 and at issue in the *Joint Motion*. The *Application* did not mention the undeveloped area, the Pre-Filed Testimony of Josiah Cox does not reference the undeveloped land, nor was there a map included of the

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<sup>1</sup> See *Furlough v. Spherion Atl. Workforce, LLC*, 397 S.W.3d 114, 128 (Tenn. 2013).

<sup>2</sup> *Application of Limestone Water Utility Operating Company, LLC for Authority to Sell or Transfer Title to the Assets, Property, and Real Estate of a Public Utility and for a Certificate of Public Convenience and Necessity* (“*Application*”), p. 1 (May 6, 2021) emphasis added.

undeveloped area.<sup>3</sup> Everything in the record refers to the four systems being transferred from Cartwright Creek to Limestone: Arrington Retreat, The Hideaway, The Grasslands, and Hardeman Springs. The Commission could not have made a decision on an issue that it was not aware that it was considering. Therefore, the Hearing Officer finds the administrative record lacks substantial and material evidence for the Commission to have made the determination that a CCN for the undeveloped area of PGA 5 was transferred from Cartwright Creek to Limestone.

Even if Cartwright Creek and Limestone had included the undeveloped land in PGA 5 in the *Application*, the Hearing Officer could not grant the relief sought in the *Joint Motion* because it fails to meet the requirements of the Commission's wastewater rules. Further, granting or transferring the CCN for the land in PGA 5 fails to comply with Commission policy and precedent. Tenn. Code Ann. § 65-4-201 provides in pertinent part:

- (a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the commission, after written application and hearing, a certificate that the **present or future public convenience and necessity require or will require such construction, establishment, and operation**, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate... (emphasis added)

At issue in the *Joint Motion* is the CCN for a tract of undeveloped land within PGA 5, and Cartwright Creek was granted a CCN for the entire PGA 5 in Docket No. 04-00358.<sup>4</sup> In 2005, the

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<sup>3</sup> If the undeveloped tract of land in PGA 5 could be seen on one of the maps submitted for the other systems, it was not labelled as such. Limestone did not provide a map with the intent to show the undeveloped land in PGA 5. The only maps provided were for the four systems.

<sup>4</sup> See *In Re: Petition to Amend Cartwright Creek's CCN and Petition to Intervene In Tennessee Wastewater Systems, Inc.'s Petition to Amend CCN*, Docket No. 04-00358, *Order Approving Petition to Amend Certificate of Convenience and Necessity* (July 12, 2005).

Commission, then Tennessee Regulatory Authority or TRA, recognized an increase in the number of wastewater applications and sought to implement certain changes in the way the petitions for those CCNs were evaluated and also to promulgate rules stating:

[t]he number of wastewater providers seeking authority to offer service is increasing. During the year of 2003 there were fourteen (14) petitions filed, and in 2004 there were twenty-three (23) petitions filed. One of the primary reasons for this increase is due to the development of residential subdivisions in geographic areas where the soil is not suitable for private septic tanks. The TRA considers applications from alternative providers for authority to provide these wastewater services in instances when the established local government does not want to provide wastewater services in a given area. Occasionally, multiple applications for the same area are received by the Authority.<sup>5</sup>

In Docket No. 03-00329, the Hearing Officer denied On-Site Systems a CCN for all of Sevier County. The Hearing Officer found:

the grant of a countywide CCN would result in a bypass of an important regulatory requirement for the Company and at the same time automatically impose additional statutory and administrative requirements on other public utilities seeking to offer service in Sevier County. Any public utility seeking a certificate to offer service in the Company's proposed service area would arguably be in competition with the Company's system. The effect of granting a countywide CCN would be that all subsequent applicants for certificates in Sevier County would be required to meet the burden of proof set forth in Tenn. Code Ann. §65-4-201 (2004), as discussed above, and the additional burden of proof required by Tenn. Code Ann. § 65-4-203(a) (2004) which contemplates the presence of an existing system. The Hearing Officer concludes that the reasonable needs of the public are better served where the first public utility to be authorized by the TRA to extend its service area to a particular location has a **present and actual intent to provide service to that location**, rather than an apparent desire to “lock up” an area or to otherwise remove the area from further regulatory oversight.<sup>6</sup>

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<sup>5</sup>See *In Re Certification, Permitting, & Installation of Waste Water Sys.*, Docket No. 04-00434, *Order Approving Report and Recommendation* (June 21, 2005).

<sup>6</sup>See *In Re: Petition Of On-Site Systems, Inc. to Expand Its Service Area to Include an Area Known as Sevier County*, Docket No. 03-000329, *Initial Order Approving In Part, and Denying In Part, Petition to Amend Certificate of Convenience and Necessity* (February 4, 2005). emphasis added

Tennessee has continued to experience a lot of growth and a concomitant increase in the number of petitions, amendments, and transfers for wastewater CCNs. Likewise, the Commission has implemented new policies and promulgated rules to address the increase in CCN petitions and to reflect changes in the wastewater industry. One such Commission policy that has evolved and is reflected in the wastewater rules is that the Commission no longer grants CCNs where there is not an immediate public need to provide the service. An example of an immediate public need is when a developer contracts with a wastewater utility to provide service to a new housing community where the local utility district or municipality does not provide such service. The public need is reflected in Commission Rule 1220-4-13-.17 which sets forth the specific filing requirements that the applicant must provide about the proposed system when a utility seeks to acquire or amend a wastewater CCN. For example, Commission Rule 1220-4-13-.17(7) requires the applicant to file the following:

7. A complete description of the geographic territory to be served by the applicant, including the name and location of development (subdivision) and the number of acres. Include the name of the subdivision or development and the name of the wastewater system as stated in the TDEC permit. In addition, provide a legible map of the area with the proposed service territory clearly and accurately plotted. The map should include:
  - (i) The location of the wastewater system, i.e., treatment plant, pre-application treatment facilities, collection infrastructure, building(s) for equipment, drip fields, disposal fields and/or wetland cells. Include the physical address of the wastewater system and the associated latitude and longitude coordinates.
  - (ii) The names of surrounding streets and roads.
  - (iii) A map to show access roads and names of access roads (if available) and other utilities necessary to provide wastewater service.
  - (iv) All residences and habitable structures served by the wastewater system.
  - (v) Any portion of the areas that will not be served when the wastewater system becomes operational. If the wastewater system will be operational in phases, show the phases on the map.

Even if the undeveloped tract of land in PGA 5 had been properly before the Commission, Limestone arguably would not have been granted a CCN until it complied with Commission Rules, including the minimum filing requirements set forth in Commission Rule 1220-4-13-.17, and the Commission could evaluate Limestone's technical, managerial, and financial ability to provide the applied for services. For the foregoing reasons the Hearing Officer finds that the Commission could not have made a determination on the undeveloped land contained in PGA 5 due to a lack of evidence in the administrative record. Further, had the tract of land been before the Commission for a determination, there is no evidence in the record that Limestone and Cartwright Creek complied with or could have complied with Commission Rule 1220-4-13-.17 or that they could establish that a public need exists for wastewater service. Therefore, the Hearing Officer concludes that the *Joint Motion* should be **DENIED**.

This order should not be interpreted as precluding the parties from applying for a CCN for the undeveloped land in PGA 5 when they can comply with Commission Rules and establish a public need to provide service, nor should the order be interpreted as prejudging the merits of such future application.

**IT IS THEREBY ORDERED THAT:**

1. The *Joint Motion for Clarification* filed by Limestone Water Utility Operating Company, LLC, Cartwright Creek, LLC, and the Consumer Advocate Division in the Office of the Tennessee Attorney General is **DENIED**.

2. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Public Utility Commission within fifteen (15) days from the date of this Order.

3. In the event this Order is not appealed to the Directors of the Tennessee Public Utility Commission within fifteen (15) days, this Order shall become final and shall be effective from the date of entry. Thereafter, any party aggrieved by the decision of the Hearing Officer may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

A handwritten signature in cursive script that reads "Monica Smith-Ashford".

Monica Smith-Ashford, Hearing Officer