

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

**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)**

**IN RE: APPLICATION OF LIMESTONE)
WATER UTILITY OPERATING COMPANY, LLC)
FOR AUTHORITY TO SELL OR TRANSFER) DOCKET NO.
TITLE TO THE ASSETS, PROPERTY, AND) 21-00055
REAL ESTATE OF A PUBLIC UTILITY, SHILOH)
FALLS UTILITIES, INC., AND FOR A)
CERTIFICATE OF PUBLIC CONVENIENCE)
AND NECESSITY)**

**IN RE: APPLICATION OF LIMESTONE)
WATER UTILITY OPERATING COMPANY, LLC)
FOR AUTHORITY TO PURCHASE TITLE TO) DOCKET NO.
THE ASSETS, PROPERTY, AND REAL ESTATE) 21-00059
OF A WATER SYSTEM, CANDLEWOOD LAKES,)
AND FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY)**

**IN RE: APPLICATION OF LIMESTONE)
WATER UTILITY OPERATING COMPANY, LLC)
FOR AUTHORITY TO PURCHASE TITLE TO) DOCKET NO.
THE ASSETS, PROPERTY, AND REAL ESTATE) 21-00060
OF A WASTEWATER SYSTEM, CHAPEL)
WOODS, AND FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY)**

ORDER REMOVING CONFIDENTIAL DESIGNATION FROM CERTAIN DOCUMENTS

This matter is before the Hearing Officer of the Tennessee Public Utility Commission (“Commission” or “TPUC”) for consideration of whether certain documents initially filed in the

above-captioned dockets as confidential should remain confidential. On September 3, 2021, TPUC Advisory Staff issued a Data Request to Mr. Josiah Cox, President of Limestone Water Utility Operating Company, LLC (“Limestone” or the “Company”) and Central States Water Resources, Inc. (“CSWR”), requesting that the following items attached to the Petitions filed in Docket Nos. 21-00053, 21-00055, 21-00059, and 21-00060 be re-filed as non-confidential: 1) Exhibit 7 (Asset Purchase Agreement), Exhibit 10 (Financials for CSWR), and Exhibit 11 (Limestone Pro Forma Financial Statements); 2) All subsequent data responses filed related to this information; and 3) Any testimony relating to this information. On September 23, 2021, Limestone filed *Limestone’s Brief in Support of a Confidential Designation Regarding Certain Proprietary Information* (“*Limestone’s Brief*” or “*Brief*”). In *Limestone’s Brief*, the Company disagrees that the confidential designation should be removed and argues that making those documents public would expose commercially sensitive information. The Hearing Officer convened a Status Conference on October 12, 2021, to discuss the confidential designation of Exhibits 7, 10, and 11 in Docket Nos. 21-00053, 21-00055, 21-00059, and 21-00060. Limestone, the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General (“Consumer Advocate”), Cartwright Creek, LLC, and TPUC Advisory Staff participated in the Status Conference.

LIMESTONE’S BRIEF

In its *Brief* filed on September 23, 2021, Limestone states the *Protective Order* entered in the dockets defines proprietary or confidential information as: “documents, testimony, material, or information in whatever form which the Producing Party, in good faith, and based on reasonable inquiry, deems to contain trade secrets, confidential research, development or other sensitive information protected by state or federal law, regulation or rule, and which has been specifically

designated by the Producing Party.”¹ Exhibits 7, 10, and 11 were designated confidential by the Company in each of the dockets. According to Limestone, Exhibit 7, the Asset Purchase Agreement, differs only as to the purchase price and seller for each agreement.² Limestone states the financial information contained in CSWR’s Financial Statements, Exhibit 10, is the same in each docket. And Limestone’s Pro Forma Financial Statements, Exhibit 11, are “similarly designed but differ depending on the size and condition of the system.”³

Regarding making the Asset Purchase Agreement public, *Limestone’s Brief* explains that Limestone and its parent company, CSWR, are in the business of acquiring water and wastewater systems in Tennessee and other states, and each acquisition is “individually unique and requires extensive due diligence and arm’s length negotiations.”⁴ Limestone maintains that disclosure of the purchase price would impair future negotiations with potential acquisition targets “creating an artificial expectation of the target and adversely affecting ‘arm’s length’ negotiations.”⁵ According to Limestone, it uses the terms and conditions of the purchase agreements to prepare competitive offers to potential sellers and to “preserve the integrity of the future negotiations with acquisition targets Limestone believes, in good faith, that it is necessary the confidential designation remain intact, at least as to the purchase price...” for the agreements in each of the dockets.⁶

Next, Limestone asserts that CSWR, its parent company, is not a regulated entity and not a public company and “should not be subject to public disclosure in pending proceedings involving its regulated affiliate Limestone.”⁷ Limestone states it is relying on the financial resources of CSWR for equity investments to make acquisitions and for working capital. Limestone argues

¹ *Limestone’s Brief*, p. 2 (September 23, 2021) (quoting *Protective Order*).

² *Id.* at 2.

³ *Id.* at 2-3.

⁴ *Id.* at 3-4.

⁵ *Id.* at 4.

⁶ *Id.*

⁷ *Id.*

that if CSWR's financial statements were made public, they could provide other companies seeking to acquire small water and wastewater systems a competitive advantage in the bidding process.⁸

In addition, Limestone asserts its Pro Forma Financial Statements should not be made public because they contain financial information that would give potential vendors access to estimated operating costs.⁹ According to Limestone, with access to such information, the potential vendors could "set an artificial price point for their respective products or services."¹⁰ Therefore, Limestone maintains the pro forma statements should remain confidential because doing so would negatively impact Limestone's negotiating leverage.

FINDINGS AND CONCLUSIONS

As a State agency, the Commission is subject to the Tennessee Public Records Act which provides in pertinent part:

All state, county and municipal records shall at all times, during business hours... be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.¹¹

In order to protect a record from public disclosure that would otherwise be covered under the Public Records Act, that record must be excluded from disclosure by state law. "The Public Records Act is to be broadly construed so as to give the fullest possible public access to public records. Yet, that Act creates exception for any documents made privileged or protected from disclosure by other state law."¹²

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ Tenn. Code Ann. § 10-7-503(a)(2)(A).

¹² *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 786 (Tenn. App. 1999) (internal citation omitted).

Rule 26.03 of the Tennessee Rules of Civil Procedure as applied to administrative contested cases through the Uniform Administrative Procedures Act (“UAPA”) authorizes the Commission to keep certain documents confidential through the use of Protective Orders. In addition, Tenn. Code Ann. § 65-3-109 provides statutory protection for “contracts, leases or engagements” from public disclosure and permits the Commission to release such documentation if it deems that the public interest requires disclosure.¹³ Parties in contested case dockets before the Commission may seek the issuance of a Protective Order to have certain documents deemed to contain proprietary information filed as confidential documents.

The Tennessee Court of Appeals has held that “confidential business information is akin to trade secrets,” which consist of “any formula, process, pattern, device or compilation of information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it.” Information cannot constitute a trade secret and, thus, is not confidential if the subject matter is “of public knowledge or general knowledge in the industry” or if the matter consists of “ideas which are well known or easily ascertainable.”¹⁴ Establishing that a document is indeed a confidential document goes beyond the owner of the information considering it secret or confidential. “Trade secret status specifically requires a plaintiff to additionally demonstrate the information is not readily ascertainable by others and derives independent economic value from its secrecy.”¹⁵ If a question is raised as to whether a document should be confidential it is up to the party seeking to keep the document confidential to

¹³ This statute specifically applies to the department of transportation; however, pursuant to Tenn. Code Ann. § 65-4-105(a), the Commission has the authority given to the department of transportation.

¹⁴ *Venture Exp., Inc. v. Zilly*, 973 S.W.2d 602, 606 (Tenn. Ct. App. 1998), citing *Heyer-Jordan & Assocs. v. Jordan*, 801 S.W.2d 814, 821 (Tenn.App.1990) (quoting *Hickory Specialties v. B & L Labs., Inc.*, 592 S.W.2d 583, 586–87 (Tenn.App.1979)) (internal citations omitted).

¹⁵ *Hauck Mfg. Co. v. Astec Indus., Inc.*, 376 F. Supp. 2d 808 (E.D. Tenn. 2005).

establish that good cause exists to maintain its confidentiality. The Supreme Court in *Ballard v. Herzke* stated:

To establish ‘good cause’ under Rule 26(c), the moving party must show that disclosure will result in a clearly defined injury to the party seeking disclosure. ‘Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,’ do not amount to a showing of good cause. Mere conclusory allegations are insufficient. The burden of justifying the confidentiality of each and every document sought to be covered by a protective order is on the party seeking the order.¹⁶

On September 3, 2021, TPUC Advisory Staff issued a data request in each of the dockets requesting that Exhibits 7, 10, and 11 be re-filed in the docket file as non-confidential. *Limestone’s Brief* sets forth the supporting law and then presents its argument for why each Exhibit should remain confidential. For Exhibit 7 (Asset Purchase Agreement), Limestone argues that based on its business model, “disclosure of the purchase/sale agreement in each acquisition would seriously impair negotiations with future acquisition targets by disclosing purchase prices and creating an artificial expectation of the target and adversely affecting ‘arm’s length’ negotiations.”¹⁷ Arguing for confidential treatment of the Pro Forma Financial Statements, Limestone states “[p]roviding vendors access to proprietary financial information regarding estimated operating costs would enable vendors to set an artificial price point for their respective products or services.”¹⁸ After considering the arguments presented in its *Brief* and at the Status Conference, the Hearing Officer concludes that Limestone has failed to establish good cause for Exhibit 7, the Asset Purchase Agreement, and Exhibit 11, Limestone’s Pro Forma Financials, to remain confidential.

In each of its dockets, Limestone seeks to acquire a water or wastewater system and seeks a Certificate of Public Convenience and Necessity (“CCN”) from the Commission pursuant to

¹⁶ *Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996) (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.1986)(internal citations omitted).

¹⁷ *Limestone’s Brief*, p. 4 (September 23, 2021).

¹⁸ *Id.* at 5.

Tenn. Code Ann. § 65-4-201, 65-4-113 and/or Commission Rule 1220-04-13-.17, as applicable. In petitioning for a CCN, Limestone must establish, among other things, that it has sufficient technical, managerial, and financial ability to provide the services for the system it seeks to acquire. If Limestone's Petition is approved, it will be granted a CCN for the system it acquired, and the Commission will set a rate that customers will pay for wastewater service. Utility ratemaking is a complex process, and many factors go into setting a rate, including operation and maintenance expenses. This information would be contained in Limestone's Pro Forma Financial Statements and in the purchase price paid for the wastewater system. Limestone correctly cites the Commission's authority pursuant to Tenn. Code Ann. § 65-3-109 to maintain the confidentiality of business contracts and other documents filed with the Commission if releasing them would be harmful; however, Limestone neglected to quote the remainder of the statute which provides "unless, in the judgment of the department of transportation [Commission], the public interest requires it." The Hearing Officer concludes the public interest does, indeed, require that the basis for the rates that customers will be charged should be made public.

Further, the Asset Purchase Agreement and the Pro Forma Financials have been filed non-confidential in other states for other CSWR subsidiaries. The Hearing Officer finds that the possibility of putting Limestone at a negotiating disadvantage is more of a broad allegation of harm which is insufficient to establish good cause for Exhibits 7 and 11 to remain confidential. Limestone points to Docket No. 11-00182 as a similar situation, and the Hearing Officer allowed the confidential designation to remain in place.¹⁹ The Hearing Officer disagrees that Docket No. 11-00182 is analogous. In that docket, the Hearing Officer recognized the competitive relationship between Pay-Tel Communications, Inc. and Telmate and only allowed Pay-Tel limited

¹⁹ See *In Re: Petition Of Telmate, LLC for Authority to Provide COCOT Services in Tennessee*, Docket No. 11-00182, *Order Denying Motion to Remove Confidential Designation* (October 24, 2012).

intervention and only Pay-Tel's attorney was allowed to review confidential information. It was actually Pay-Tel, a direct competitor, that filed to have the confidential designation of two vendor contracts removed. The vendor contracts contained proprietary information and releasing such information to a competitor would have put Telmate at a competitive disadvantage. As a result, the Hearing Officer did not remove the confidential designation. Here, there is no specific competitor that is a party to the docket seeking access to confidential information. The potential harm Limestone alleges in removing the confidential designation from Exhibits 7 and 11 is much more nebulous. Thus, when balancing a broad allegation of harm against the customer having access to the basis of the rates they are being charged for service, the Hearing Officer concludes that public interest requires the Asset Purchase Agreement and Limestone's Pro Forma Financial Statements be re-filed in the docket as non-confidential.

Lastly, with regard to Exhibit 10, CSWR's Financial Statements, Limestone maintains that since CSWR is not a regulated entity or a public company, its financial statements should remain confidential. Limestone argues that making CSWR's Financial Statements public will harm CSWR by "potentially providing other companies seeking to acquire small water and wastewater systems a competitive advantage within the bidding process."²⁰ Limestone relies solely on its parent company, CSWR, for financial resources used to make acquisitions and to provide working capital. CSWR's financial resources are a significant part of Limestone's proof of its financial ability to provide the services it has applied for. The Hearing Officer finds that since CSWR is a private company and because CSWR's financial statements are not the basis for setting customer rates, those documents can remain confidential. In addition, both the Consumer Advocate and Commission Staff will review CSWR's financial statements as support for Limestone's financial

²⁰ *Id.* at 4.

ability to provide the applied for services. The Hearing Officer's determination regarding the confidential treatment of Exhibit 10 should not be used as precedent in other dockets and is based on the facts set forth in these dockets.

IT IS THEREBY ORDERED THAT:

1. Limestone Water Utility Operating Company, LLC shall file in the docket file Exhibit 7 to the Petition, the Asset Purchase Agreement, as non-confidential by November 16, 2021.

2. Limestone Water Utility Operating Company, LLC shall file in the docket file Exhibit 11 to the Petition, the Pro Forma Financial Statements of Limestone Water Utility Operating Company, LLC, as non-confidential by November 16, 2021.

3. All subsequent data responses filed relating to the Asset Purchase Agreement and the Pro Forma Financial Statements of Limestone Water Utility Operating Company, LLC shall be filed non-confidential.

4. Testimony relating to the Asset Purchase Agreement and the Pro Forma Financial Statements of Limestone Water Utility Operating Company, LLC shall be filed non-confidential.

5. The Financial Statements of Central States Water Resources, Inc., Exhibit 10 to the Petition, may remain confidential.

A handwritten signature in black ink that reads "Monica Smith-Ashford". The signature is written in a cursive, flowing style.

Monica Smith-Ashford, Hearing Officer