

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE**

IN RE:)
)
Petition of Superior Wastewater Systems, LLC)
For A Certificate of Convenience and Necessity)
To Amend Its Existing Service Territory in)
Williamson County)

DOCKET NO. 23-00051

Reply of Tennessee Wastewater in Support of Motion to Hold Proceedings in Abeyance

Tennessee Wastewater Systems, Inc. ("TWSI") submits the following reply to the brief filed on December 8, 2023, by Superior Wastewater Systems, Inc. ("Superior") opposing TWSI's request that the Hearing Officer hold this docket in abeyance pending the outcome of a suit recently filed by Superior in Williamson County Chancery Court.

Summary

As state law requires and the Commission has explained in prior cases, the Commission cannot approve Superior's application to provide service to customers located within TWSI's service area unless TWSI agrees to the application or the Commission finds, following an investigation, notice and a contested case proceeding, that TWSI is unable or unwilling to provide service to requesting customers under reasonable terms or conditions. No such proceeding has been initiated, and the agency can take no such action without, of course, TWSI's participation as a party to the proceedings. Superior has asked the Chancery Court of Williamson County to declare that TWSI must withdraw its opposition to Superior's application and withdraw as a party to this docket. While it is unlikely the Court will agree with Superior, it makes no sense for the agency and the parties to litigate this matter until the Court has ruled. In the meantime, if there is anyone who needs wastewater service

in that portion of TWSI's service area that Superior is trying to take, that person should first request service from TWSI. If someone does, TWSI will determine if it can reasonably provide service from its regional treatment facility or whether it makes more sense to allow another utility with a nearby treatment facility to serve that customer. To date, no such request has been made.¹

Issues Raised by Superior's Application

More than twenty years ago, Tennessee Wastewater Systems, Inc. ("TWSI") applied for a certificate of convenience and necessity ("CCN") to provide wastewater service within the boundaries of the Milcrofton Utility District except for those areas that were already receiving service from the city of Franklin. The Commission granted the application in an order issued March 31, 1998. See Docket 97-01393. Pursuant to the Commission's decision, TWSI constructed a large, regional treatment facility on Cox Road just south of I-840 and today provides wastewater service to three residential developments (and one soon to follow) within what is generally called

¹ Superior already owns a treatment facility that serves the King's Chapel Community on the eastern edge of TWSI's service area. In this docket, Superior proposes to build a new treatment facility about four miles east of its current facility and two miles east of Triune, well outside of TWSI's service area. Although the initial application is vague about the area that Superior's new treatment plant is designed to serve, the application states that Superior's "main collection line" will be "7,920 lineal feet" (i.e., 1.5 miles) long and will cost "\$50.00 per foot" for a total of "\$400.00." See Application, Exhibit 5.6. See also Superior's Response to Consumer Advocate, filed August 7, 2023, Question 8, stating that the total cost of the "collection lines" for all three phases of Superior's proposed wastewater network will be "\$400,000." In other words, the initial application and subsequent filings state that Superior's main collection line will be only 1.5 miles long, stopping well short of reaching TWSI's service area and coming nowhere near potential customers such as Greg Sanford, whose property at 4833 Murfreesboro Road is five miles from Superior's new treatment facility. Superior might, however, be able to connect Sanford to its facility at King's Chapel which is only about one mile away. That would be the most practical way for Superior to serve Sanford's property. Three weeks ago, Superior changed its proposal. On November 30, 2023, John Powell filed "Supplemental Testimony" saying that he now has information regarding "one-time capital costs" that "were not available" when the application was filed in July. As shown on page 2 of the Supplemental Testimony, the "Collection Line Costs" have now tripled from \$400,000 to "\$1,228,864." At \$50.00 per foot, that would make the collection line now 24,577 feet long (about 4.65 miles), which is long enough to reach into TWSI's service area but still a quarter-mile short of Greg Sanford's property and far short of the rest of the service area that Superior wants to take. Nevertheless, Superior now states that its "centralized" treatment system" is intended to serve "the entire geographic region at issue." Supplemental Response 3-3 to Staff's Third Discovery Request. There is nothing in Powell's supplemental testimony explaining why the utility now thinks it would be better to reach Sanford through a five-mile-long pipe to a treatment facility that has not even been built rather than through a one-mile pipeline to Superior's existing facility at King's Chapel (or through a pipe less than a mile to TWSI's nearest connection point on Cox Road.)

TWSI's "Milcrofton" service area. Any potential customer in the area needing wastewater service may submit a request to TWSI.

Like every regulated utility in Tennessee, TWSI is statutorily protected from competition in its service area – whether or not it has facilities throughout the area – as long as the utility can provide service that is adequate “to meet the reasonable needs of the public.” See Peoples Telephone Company v. Tennessee Public Service Commission, 393 S.W. 2d 285 (Tenn. 1965) and T.C.A. 65-4-203(a). If, however, the Commission finds as required by T.C.A. 65-4-203(a) that a certificated utility is unable or unwilling to provide service under reasonable terms and conditions, the agency may allow a competing carrier to serve all or a portion of the incumbent's service area. As the Commission explained in 2006:

“The holder of a CCN for the provision of wastewater treatment services does not enjoy an exclusive right to provide such services within the certificated area. Nevertheless, the holder of a CCN does enjoy the protection of Tenn. Code Ann. 65-4-201 (2004) and 65-4-203 (2004) which exclude other applicants from providing such services to areas served by a holder of a CCN unless the Authority first determines that the present or future public convenience and necessity require or will require granting the applicant's petition for such a CCN and that the holder's existing facilities are inadequate to meet the reasonable needs of the public or that the holder of the CCN has refused, neglected, or is unable to make necessary additions and extensions.”

See Docket 03-00329, Order issued May 6, 2006, at p. 11, quoting with approval the Initial Order of the Hearing Officer issued February 4, 2005, at 38. See also Rule 1220-4-13-.09(1). Any agency action to alter a utility's certificated service area must, in the absence of an emergency, be proceeded by providing the utility notice and an opportunity to be heard and any such proceeding must be “conducted in accordance with the contested case provisions of the Tennessee Uniform Administrative Procedures Act.” Rule 1220-04-13-.09 (4).

In that same order, the Commission recognized that once the agency has granted a utility a certificate to serve a specific area, any other utility that wished to serve a customer in that service area

faces substantial “legal and administrative burdens.” Id., at 13. The agency therefore announced a new policy, holding, “Those burdens could be avoided or lessened by approving a CCN to provide wastewater service on a project-by-project basis rather than on a geographic basis without regard for whether the CCN holder has an actual intent to serve the entire area within the scope of the request.” Id. Emphasis added. More recently, the Commission reiterated that policy, explaining that no wastewater utility would be granted a certificated area unless there is “an immediate public need” for service in a specific area. Docket 21-00053, Initial Order issued December 1, 2022, at 6. The Hearing Officer in that case wrote, “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.” Id.

Superior has filed an application requesting permission to build a new, wastewater treatment plant approximately two miles east of Triune and approximately three miles east of TWSI’s Milcrofton service area. Superior has not submitted any evidence of immediate public need, such as a proposal from a developer, and admits that it has no idea how many customers the new facility will serve or when service will be needed. See, for example, Response 5 to Consumer Advocate Comments on Minimum Filing Requirements (“[T]he specific usage requirements for individual commercial customers ... is unknown.”); and Response 2-6 to Staff’s 2nd Discovery Request (“At this time, Superior does not expect to serve any incremental customers after that initial build-out.”) Challenged by the Consumer Advocate to state, as the Commission’s rules require, “the maximum potential number of customers the utility will service in the proposed area,” Superior admitted that it could not answer the question because the agency’s “existing wastewater rules do not envision the creation of

the regional wastewater system proposed here as opposed to one that is designed to only support a single subdivision.” Similarly, when asked by the Staff whether there is an “immediate public need” for service, Superior states that it is proposing a “regional wastewater system” that has “the capacity to provide service to all lots and parcels” that might need service at some time in the future. Supplement Response to TPUC Staff’s Third Discovery Request 3-3. In other words, Superior is asking the agency to return to its practice of twenty years ago when the agency allowed a utility to “lock up” a large service area where there might be a need for service in the future but there is no evidence of an “immediate need” for service.

The application raises other issues as well. Since there is no developer to pay the capital costs of building this new system, Mr. Powell proposes to build the system himself at a cost per gallon that appears far in excess of what comparable systems cost² and recover those costs by charging each customer a large, one-time “capital cost” in order to receive service. Mr. Powell admits that this “capital cost” is “not rate regulated by the Commission.” Powell Supplemental Testimony at 6. In other words, he will be able to charge whatever rate a captive customer can be forced to pay.³ Worse, Mr. Powell, a developer, could use his ownership of a monopoly utility to control and profit from development throughout the service territory.

Finally, despite Superior’s repeated assertion that there is an “immediate” need for service from customers (Response Brief at 3 and 4) and Superior’s promise to provide “immediate service to the entire area requested” (*id.*, at 4), Superior’s construction plans show that it will be many years

² Thompson’s Station is currently building a wastewater treatment facility with capacity of 1.5 million gallons per day for \$32 million, or about \$21 per gallon, less than half the \$51.54 per gallon cost of Superior’s new system.

³ Mr. Powell states (at 6) that he will include the “capital cost” charge in his tariff to provide “transparency for the customer.” But if a rate is not subject to the Commission’s jurisdiction, it can be changed at any time and for any reason. It does not have to be “reasonable” or “non-discriminatory.” Such a rate does not have the force of law and, therefore, should not be in a utility’s tariff. See T.C.A. §65-5-101.

before the utility is able to provide the “immediate” service it has promised. Superior’s schedule calls for constructing the system in four sections over a period of three to ten years and perhaps more. As described in Superior’s “Responses to Consumer Advocate Comments on Minimum Filing Requirements,” Superior has divided the requested service area into four “construction sections.” A map of each section is shown in Response 2. Superior states that it “expects construction” of Phase I “to be done in...3 to 4 years,” Phase 2 to be done in “3 to 7 years” and construction of Phase 3 to be done in “6 to 10 years.” Response 6. There is no projected date for the construction of section 4. Surprisingly, even though most of the “green” areas (indicating a request for service) shown on Superior’s map are located in and around Triune and there are four letters from local officials calling for service in the Triune area, Superior has not prioritized the Triune area for service. Instead, Phase I and Phase 2 of the project, which will be constructed in the next three to seven years, will cover the area west of Nolensville Road and largely within TWSI’s service area. By contrast, Superior states that Phase 3, which encompasses the area east of Nolensville Road and south of Murfreesboro Road and appears to have the largest demand for service, will not be constructed for “6 to 10 years.” There is nothing “immediate” about Superior’s proposed plan to deliver service.

Given these novel and troublesome issues, it is unsurprising that Mr. Powell has not yet filed a complete application for a State Operating Permit with the Tennessee Department of Environment and Conservation (“TDEC”). Although the Commission’s rules require a utility to file with its CCN application a copy of its SOP application submitted to TDEC, Mr. Powell explained to the Consumer Advocate that filing “an entire SOP application” will cost “several thousand dollars” and therefore he will not spend money on “soil scientists and wastewater engineers” until he finds out whether or not the Commission is going to grant his unusual application. Response 10 to Consumer Advocate

Comments on Minimum Filing Requirements. Mr. Powell may suspect that his application will be denied.

Superior's Opposition to the Motion to Hold Proceedings in Abeyance

While recognizing that this proceeding “may well become litigious, costly and protracted” (Response at 6), Superior suggests that instead of holding the docket in abeyance pending a ruling by the Chancery Court, the Hearing Officer should proceed with a hearing to rule on: (1) whether TWSI has a legally enforceable right to protect its certificated service area from competition; and (2) whether TWSI “has the capacity to serve the parcels at issue.” *Id.* There are two problems with that suggestion. First, Superior has asked the Chancery Court to declare that TWSI “must withdraw its Intervening Petition in Docket No. 23-0-0051.” Complaint, paragraph 37. The Hearing Officer cannot very well conduct a hearing on TWSI’s right to protect its service area or its ability to provide service if TWSI is not a party to the docket.⁴ The second problem with Superior’s suggestion is that Superior does not understand what it is asking the Hearing Officer to do. As the Tennessee Supreme Court ruled in the Peoples Telephone case, *supra*, and as this Commission explained in Docket 03-00329, *supra*, the applicable legal standard that the Commission must address before permitting one utility to offer service within the certificated territory of an incumbent provider are the criteria set forth in T.C.A. 65-4-203(a). The standard is not, as Superior states, whether the incumbent “has the capacity to serve the parcels at issue” but whether the incumbent utility “refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such extensions as may reasonably be required under this part.” T.C.A. 65-4-203(a). Such a proceeding would typically begin with an

⁴ Ironically, Superior argues in court that TWSI must withdraw from this docket and pay Superior’s legal expenses caused by TWSI’s intervention while, at the same time, asks the Hearing Officer to proceed with a hearing to determine the rights of TWSI.

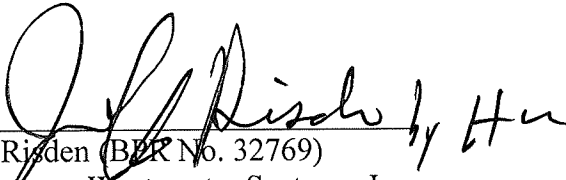
investigation by the agency and, if warranted, the issuance of a show cause order. This docket is not such a proceeding.

Conclusion

Superior's proposal is, at bottom, nothing but a plan conceived by Mr. Powell to use this agency and state public utility law to further his interests as a developer in Williamson County. If he is successful, he will own and control the only wastewater utility in a large area and will sell access to wastewater service at an unregulated, market rate, which he calls a "capital charge," to residential and commercial customers who have no alternative provider. As a developer, he can provide access to wastewater service at a reduced capital charge or at no charge to an area that he intends to develop while charging an exorbitant rate or denying access altogether to an area owned by a competing developer. In short, his proposal is flatly at odds with the statutory and common law obligations of a public utility.

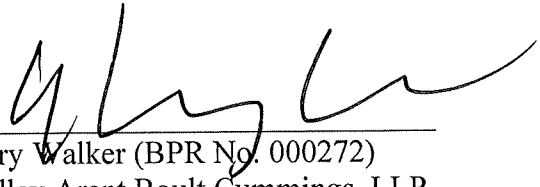
At this time, these considerations may be premature but signal that Superior's application is not likely to be approved. For now, it is enough to know that Superior is trying both to rush this docket along as quickly as possible and eliminate any opposition from TWSI. Neither would serve the public interest. TWSI plans to participate fully in this case as its interests warrant but, until the Chancery Court has ruled, neither TWSI nor the agency knows whether that effort will ultimately be found to be a waste of time and money. Therefore, the Hearing Officer should hold this case in abeyance until the Chancery Court has ruled on whether or not TWSI has the right to be a party to this docket.

Respectfully submitted,



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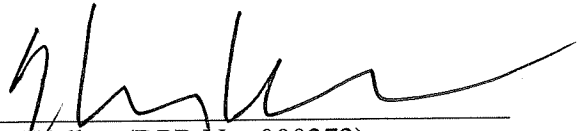
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

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This the 15th day of December 2023.


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