

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE MOTION OF THE)
THE PUBLIC SERVICE COMMISSION TO)
COMPEL UTILITY SYSTEMS, INC., TO)
COMPLY WITH 26 DEL. C. §207,)
INCLUDING, BUT NOT LIMITED TO, THE)
OBLIGATION UNDER § 207 TO PROVIDE)
THE COMMISSION STAFF WITH ACCESS TO)
ANY AND ALL BOOKS, ACCOUNTS, RECORDS,)
MEMORANDA, PROPERTY, PLANT, FACILI-) PSC DOCKET NO. 05-187
TIES, AND EQUIPMENT OF UTILITY)
SYSTEMS, INC., AND TO FURNISH TO THE)
COMMISSION STAFF ANY AND ALL INFOR-)
MATION WITH RESPECT TO THE BOOKS,)
ACCOUNTS, RECORDS, MEMORANDA,)
PROPERTY, PLANT, FACILITIES, EQUIP-)
MENT, SERVICE, AND OPERATIONS OF)
UTILITY SYSTEMS, INC.)
(OPENED JUNE 7, 2005))

ORDER NO. 6652

AND NOW, this 7th day of June, 2005;

WHEREAS, Utility Systems, Inc. ("USI"), is a corporation of the State of Delaware that provides wastewater utility services to communities within the State of Delaware. USI's business address is Sterling Hall, 1132 South Little Creek Road, Dover, Delaware 19903-0617; and

WHEREAS, on July 6, 2004, the Delaware General Assembly enacted new legislation, found at 74 Delaware Laws, Chapter 317, which granted the Delaware Public Service Commission ("the Commission") jurisdiction to regulate certain Wastewater Utilities having more than fifty customers, including the jurisdiction to grant and revoke Certificates of Public Convenience and Necessity ("CPCNs"); and

WHEREAS, pursuant to 74 Delaware Laws, Chapter 317, and Title 26 of the Delaware Code, USI is a public utility subject to the supervision and regulation of the Commission; and

WHEREAS, USI has been providing wastewater utility services to the Woods on Herring Creek Community for more than a decade; and

WHEREAS, on October 1, 2004, USI filed an application, dated September 29, 2004, with the Commission for a CPCN to provide wastewater utility services to the Woods on Herring Creek Community; and

WHEREAS, the Commission received letters dated August 19, 2004 and October 21, 2004, from the Woods on Herring Creek Homeowners' Association ("Homeowners' Association") requesting that the Commission deny a CPCN to USI and requesting a hearing on the homeowners' complaints against USI; and

WHEREAS, the Homeowners' Association alleged, among other things, that: (a) USI received notices from the Department of Natural Resources and Environmental Control ("DNREC") of violations of Title 7; (b) USI is in material violation of the Delaware Code and state regulations governing Wastewater Utilities; and (c) USI was not a reliable wastewater services contractor; and

WHEREAS, on November 9, 2004, the Commission entered Order No. 6506, which opened PSC Docket No. 04-WW-001 to, among other things, investigate the complaints of the Homeowners' Association against USI, and consider USI's application for a CPCN for the Woods on Herring Creek Community. William F. O'Brien was appointed Hearing Examiner; and

WHEREAS, on December 15, 2004, USI sent a letter to Hearing Examiner O'Brien advising that: (a) USI intended to relinquish its permits from DNREC to operate the wastewater system at the Woods on Herring Creek Community as of December 20, 2004; and (b) concurrently, effective December 20, 2004, USI was withdrawing its application for a CPCN to serve the Woods on Herring Creek Community; and

WHEREAS, on December 22, 2004, Hearing Examiner O'Brien sent a letter to the Commission Staff which, among other things, asked for the Staff's position on whether USI may abandon or discontinue wastewater services to the Woods on Herring Creek Community without obtaining approval from the Commission under 26 Del. C. § 203A(c)(1); and

WHEREAS, on December 29, 2004, Staff sent a letter to Hearing Examiner O'Brien advising that it was the Staff's position that USI was not permitted to abandon or discontinue, in whole or in part, the operations and wastewater services being provided to the Woods on Herring Creek Community without first having received Commission approval under 26 Del. C. § 203A(c)(1); and

WHEREAS, Staff also sent a letter dated December 29, 2004 to USI, asking that USI file an application with the Commission seeking Commission approval to abandon or discontinue operation of the Woods on Herring Creek wastewater system; and

WHEREAS, 26 Del. C. § 203A(c)(1) provides:

Subject to the provisions of Chapter 10 and § 706(d) of this title and excluding electric suppliers, no public utility shall abandon or discontinue, in whole or in part, any regulated public utility business, operations or services provided under a certificate of public convenience and necessity or otherwise which

are subject to jurisdiction of the Commission without first having received Commission approval for such abandonment or discontinuance.

WHEREAS, because USI is a public utility subject to the jurisdiction of the Commission under Title 26 of the Delaware Code, including § 203A, the Staff respectfully submits that USI is prohibited from abandoning or discontinuing wastewater services to the Woods on Herring Creek Community without approval of the Commission; and

WHEREAS, the Commission has granted two CPCNs to USI to operate wastewater systems at the Gull Point and Woodlands of Millsboro ("Woodlands") communities in the State of Delaware - PSC Dockets Nos. 04-WW-002 and 04-WW-003; and

WHEREAS, USI's December 15, 2004 letter to Hearing Examiner O'Brien regarding the Woods on Herring Creek wastewater system stated, in part, that it is "financially impossible for USI to continue operating the system . . ." USI's statement raises concerns about USI's financial ability to operate the wastewater systems at Gull Point and Woodlands for which it has received CPCNs from the Commission; and

WHEREAS, USI has an outstanding indebtedness of \$22,100 to a waste hauler who pumped waste from the Woods on Herring Creek wastewater system in 2004; and

WHEREAS, Staff reports that USI has abandoned and discontinued its business and operations at the Woods on Herring Creek wastewater system, without approval from the Commission, under 26 Del. C. § 203A(c)(1); and

WHEREAS, the Staff received a letter dated March 1, 2005 from the Homeowners' Association stating that the wastewater system is failing and expressing concerns about the need for funds to invest in the system; and

WHEREAS, Staff reports that, based upon information and documents received from DNREC and USI, that the wastewater treatment system at the Woods on Herring Creek failed years before it was abandoned by USI; and

WHEREAS, USI has failed to file an application with the Commission seeking Commission approval to abandon or discontinue its operation of the Woods on Herring Creek wastewater system, under 26 Del. C. § 203A(c)(1); and

WHEREAS, the Commission Staff filed a Complaint to serve on USI related to, among other things: (a) USI's failure to obtain approval from the Commission to abandon or discontinue its operation of the Woods on Herring Creek Community wastewater system; and (b) USI's financial capability to continue to operate the two wastewater systems for which USI has received CPCNs granted by the Commission; and

WHEREAS, on March 8, 2005, the Commission entered Order No. 6855: (a) instituting PSC Complaint Docket No. 05-58 against USI; (b) consolidating PSC Docket No. 05-58 with the existing PSC Docket No. 04-WW-001; and (c) referring the new complaint docket to Hearing Examiner William F. O'Brien; and

WHEREAS, pursuant to paragraph 4 of Order No. 6588, Hearing Examiner O'Brien is required to address whether Utility Systems, Inc., may abandon or discontinue the operation of the Woods on Herring Creek

Community wastewater system without Commission approval. Hearing Examiner O'Brien is also required to address, and the Commission Staff is authorized to investigate, whether Utility Systems, Inc., has the financial capability to operate the two wastewater systems for which it has received CPCNs from the Commission, whether Utility Systems, Inc., has been paying its vendors, and whether Utility Systems, Inc., has the financial resources to do so, and any other matter related to the issues presented in this docket or PSC Docket No. 04-WW-001. Hearing Examiner O'Brien shall also address whether further relief is just and proper, including whether the imposition of any statutory penalties on Utility Systems, Inc., is appropriate; and

WHEREAS, Staff has received documents from DNREC and USI in PSC Dockets Nos. 04-WW-001 and 05-58 indicating that USI's wastewater treatment system at the Woodlands has failed and is in need of substantial capital investment; and

WHEREAS, paragraph 6 of Order No. 6588 provides:

Pursuant to 26 Del. C. § 207, Utility Systems, Inc., is ordered to make available for inspection by the Commission's Staff and provide Staff with access to: (a) all of Utility Systems, Inc.'s books, accounts, appraisals, valuations, contracts, reports of engineers, records, memoranda, and other documents and data; and (b) all of Utility Systems, Inc.'s premises, property, plant, facilities, and equipment.

WHEREAS, Commission Staff sent a letter to H. Clark Carbaugh, President of Utility Systems, Inc., dated May 19, 2005, confirming that Staff would conduct an inspection and audit of the books and records of USI on May 26, 2005 in connection with PSC Dockets Nos. 04-WW-001 and 05-58. A copy of the Staff's letter is attached hereto as Exhibit A; and

WHEREAS, on May 26, 2005, three members of the Commission's Staff arrived at USI's offices to perform the inspection and audit; and

WHEREAS, H. Clark Carbaugh was USI's representative that met with Staff for the inspection and audit at USI's offices on May 26, 2005; and

WHEREAS, the inspection and audit on May 26, 2005 lasted less than one hour, USI failed to produce any of the records that Staff considered vital to its audit, and USI has made no commitment to produce any such records; and

WHEREAS, while Staff was at USI's offices on May 26, 2005, Mr. Carbaugh produced a letter dated that day from his legal counsel in PSC Dockets Nos. 04-WW-001 and 05-58. A copy of the letter is attached hereto as Exhibit B; and

WHEREAS, the May 26, 2005 letter from USI's counsel argued that the jurisdiction of the Public Service Commission does not extend to USI's books and records that predate the Commission's jurisdiction under 74 Delaware Laws, Chapter 317; and

WHEREAS, Staff's investigation in PSC Dockets Nos. 04-WW-001 and 05-58 disclosed that, at any given time, USI has only about \$25,000 in its bank account to operate the wastewater systems at Gull Point and Woodlands; and

WHEREAS, the Commission is empowered to revoke USI's CPCNs for Gull Point and the Woodlands of Millsboro, pursuant to 26 Del. C. § 203D(j); and

WHEREAS, § 203D(j) of Title 26 provides:

(j) The Commission may, for good cause, undertake to suspend or revoke a certificate of public convenience

and necessity held by a wastewater utility. Good cause shall consist of:

- (1) A finding made by the Commission of material noncompliance by the holder of the certificate with any provisions of Titles 7, 16 or 26 dealing with the provision of wastewater services to customers, or any order or rule of the Commission relating to the same; or
- (2) A finding by the Commission that the wastewater utility has failed in a material manner to provide adequate or safe wastewater service to customers as evidenced by inadequate customer service, insufficient investment in, or inadequate operation of, the system or otherwise; and
- (3) A finding by the Commission that, to the extent practicable, service to customers will remain uninterrupted under an alternative wastewater utility or a designated third party capable of providing adequate wastewater service; and
- (4) A finding by the Commission that to the extent practicable, any financial consequences to customers served by the utility subject to a revocation are appropriately mitigated.

WHEREAS, any and all books and records of USI that predated the inception of the Commission's jurisdiction over certain wastewater utilities on July 6, 2004, remained books and records of USI after it became a regulated public utility; and

WHEREAS, § 207 of Title 26 is broad in scope, and provides that the Commission "shall at all times have access to and the right to inspect any and all books, accounts, records, memoranda, property, plant, facilities and equipment of public utilities."; and

WHEREAS, §207 does not limit the Commission's jurisdiction to the books and records of a public utility that came into existence after the public utility became regulated by the Commission; and

WHEREAS, 26 Delaware Code § 208 provides, in part:

(a)(1) The Commission may, after hearing, upon notice, by order in writing, require every public utility to make, keep, and preserve for such periods of time, such accounts, records of cost accounting procedures, correspondence, memoranda, papers, books and other records as the Commission may by rules and regulations or order prescribe as necessary or appropriate for purposes of the administration of this chapter.

WHEREAS, the books and records that Staff sought to inspect and audit pursuant to Staff's May 19, 2005 letter are relevant to issues in proceedings involving USI in PSC Dockets Nos. 04-WW-001 and 05-58, in that they relate to: (a) the sufficiency of USI's investment in its wastewater systems at the Woods on Herring Creek, Gull Point, and Woodlands; (b) the adequacy of USI's funding for its operations; (c) customer complaints about USI's mismanagement of funds paid to USI by customers; and (d) whether USI is a reliable wastewater contractor; and

WHEREAS, 26 Delaware Code § 207 affords the Commission access to the books and records of any regulated public utility, whether or not a docket is pending against the public utility; and

WHEREAS, the records sought by Staff nevertheless also relate to USI's utility rates charged to customers and capital investments, among other things;

WHEREAS, pursuant to 26 Del. C. § 217, the Commission is empowered to impose a penalty of up to \$1,000 per day for every day in which a public utility fails to comply with any Order of the Commission. In addition, the Commission is empowered to invoke the

provisions of any other statute which addresses violations of Commission Orders or State law by a public utility.

Now, therefore, **IT IS HEREBY ORDERED AS FOLLOWS:**

1. That, the Commission hereby formally opens this docket captioned:

IN THE MATTER OF THE MOTION OF THE)
THE PUBLIC SERVICE COMMISSION TO)
COMPEL UTILITY SYSTEMS, INC., TO)
COMPLY WITH 26 DEL. C. §207,)
INCLUDING, BUT NOT LIMITED TO, THE)
OBLIGATION UNDER § 207 TO PROVIDE)
THE COMMISSION STAFF WITH ACCESS TO)
ANY AND ALL BOOKS, ACCOUNTS, RECORDS,)
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MENT, SERVICE, AND OPERATIONS OF)
UTILITY SYSTEMS, INC.)
(OPENED JUNE 7, 2005))

2. That, Utility Systems, Inc., shall henceforth comply with 26 Del. C. § 207, in its entirety.

3. That, Utility Systems, Inc., shall hereafter maintain any and all books and records of Utility Systems, Inc., and shall not destroy any of its books and records, unless it receives prior written authorization from the Commission, or the Commission's Staff.

4. That, within seven business days of the date of this Order, Utility Systems, Inc., shall submit to the Commission a sworn affidavit of H. Clark Carbaugh: (a) stating whether Utility Systems, Inc., destroyed any of its books and records after May 19, 2005, regardless of when the books and records were created; and (b)

identifying any and all books and records, if any, that were destroyed by Utility Systems, Inc., on or after May 19, 2005.

5. That, pursuant to 26 Del. C. § 207, Utility Systems, Inc., shall provide Staff with access to all of its books and records, whether they were created before, on, or after July 7, 2004.

6. That, Utility Systems, Inc., shall immediately maintain its books and records in accordance with Generally Accepted Accounting Principles and the National Association of Regulatory Commissions' System of Accounts for Wastewater and Sewer Systems.

7. That, Utility Systems, Inc.'s objection to the Staff's audit and inspection of its records as set forth in the letter of its counsel dated May 26, 2005 is denied for the reasons set forth in this Order.

8. That, Utility Systems, Inc., and Mr. Carbaugh are cautioned that, among other things, Utility Systems, Inc., may be penalized for noncompliance with 26 Del. C. § 207 or Orders of the Commission.

9. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as it deems appropriate.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joshua M. Twilley
Vice Chair

/s/ Joann T. Conaway
Commissioner

PSC Docket No. 05-187, Order No. 6652 Cont'd.

/s/ Dallas Winslow
Commissioner

/s/ Jaymes B. Lester
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary