

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

IN THE MATTER OF THE INVESTIGATION INTO )  
THE PROTEST OF THE WOODS ON HERRING CREEK )  
HOMEOWNERS' ASSOCIATION REGARDING THE )  
APPLICATION OF UTILITY SYSTEMS, INC., FOR ) PSC DOCKET NO. 04-WW-001  
A CERTIFICATE OF PUBLIC CONVENIENCE AND )  
NECESSITY TO PROVIDE WASTEWATER SERVICES )  
TO THE COMMUNITY (FILED OCTOBER 22, 2004) )

IN THE MATTER OF THE APPLICATION OF THE )  
WOODS COMMUNITY WASTEWATER SYSTEMS, INC., )  
FOR A CERTIFICATE OF PUBLIC CONVENIENCE )  
AND NECESSITY TO PROVIDE WASTEWATER ) PSC DOCKET NO. 04-WW-011  
SERVICES TO THE COMMUNITY OF THE WOODS ON )  
HERRING CREEK, SUSSEX COUNTY, DELAWARE )  
(FILED NOVEMBER 30, 2004) )

IN THE MATTER OF THE INVESTIGATION INTO )  
THE UNAUTHORIZED ABANDONMENT OR DISCON- )  
TINUANCE OF WASTEWATER UTILITY SERVICES BY )  
UTILITY SYSTEMS, INC., TO THE WOODS ON ) PSC DOCKET NO. 05-58  
HERRING CREEK COMMUNITY AND THE ABILITY )  
OF UTILITY SYSTEMS, INC., TO OPERATE )  
WASTEWATER SYSTEMS SUBJECT TO THE JURIS- )  
DICTION OF THE DELAWARE PUBLIC SERVICE )  
COMMISSION (OPENED FEBRUARY 16, 2005) )

**ORDER NO. 6816**

**AND NOW**, this 10<sup>th</sup> day of January, 2006;

**IT IS SO ORDERED AS FOLLOWS:**

1. That the Public Service Commission is charged by statute with regulating all public utilities in the State of Delaware pursuant to 26 Del. C. § 201.

2. That these dockets involve, among other things, a dispute between Utility Systems, Inc. and the Woods on Herring Creek Homeowners Association related to the operation of a wastewater system serving the Woods on Herring Creek Community development.

3. That, on July 6, 2004, Utility Systems, Inc. became a regulated public wastewater utility, by operation of law, pursuant to 26 Del. C. § 203D. And because the Woods on Herring Creek Community wastewater treatment system serves more than 50 customers, the system itself falls within the jurisdiction of the Commission pursuant to 26 Del. C. § 203D(a)(1).

4. That, on November 22, 2005, the Commission entered Order No. 6783 in these consolidated dockets adopting the Report of Senior Hearing Examiner William F. O'Brien, dated September 26, 2005, with certain modifications, which Order and Report are incorporated by reference herein. Among other things, the Commission concluded that Utility Systems, Inc. unlawfully and voluntarily abandoned the Woods on Herring Creek Community wastewater system.

5. That, on December 20, 2005, Utility Systems, Inc. appealed Commission Order No. 6783 to the Delaware Superior Court. However, these consolidated dockets remain open and pending before the Commission and the Commission anticipates further proceedings involving Utility Systems, Inc.'s conduct related to the Woods on Herring Creek Community wastewater treatment system.

6. That there is an action pending in the Delaware Court of Chancery, C.A. No. 558-S, in which Utility Systems, Inc. is the plaintiff, and the Woods on Herring Creek Homeowners Association and the Woods Community Wastewater System, Inc. are parties. The Woods Community Wastewater System is presently operating the Woods on

Herring Creek Community wastewater system for the Woods on Herring Creek Homeowners Association.

7. That the Chancery Court action and these consolidated dockets involve common questions of law and fact, and common parties.

8. That, on December 6, 2005, the Court of Chancery issued a letter (Exhibit "A" hereto) in the Chancery Court action asking the parties to brief certain issues, including the following:

3. Whether the concerted actions (if that is a fair factual characterization) of the Defendants (and the individual homeowners) in withholding or delaying payment of funds to Utility Systems, Inc., under the circumstances, effectively accomplished a conversion. My concern here (and one for which there is likely debate about its factual foundation) is that where a small utility whose funding is limited to fees charged and collected in its service area, capital contributions by its investors, and, although perhaps not available here, loans, those homeowners in the limited service area may be able "to bring the utility to its knees" and destroy its reasonable commercial expectations simply by acting in concert to deprive it of the funding necessary to maintain the venture.
4. Finally, if the Defendants believe (assuming for purposes of identifying issues to be briefed, a number of adverse conclusions) that a viable remedy (*i.e.*, one other than a damage award) would be in the nature of a return of the system to Utility Systems, Inc., that should be argued now as well.

In Order No. 6783, the Commission decided the issue identified in paragraph 3 of the Court's letter. As to the issue raised in paragraph 4, Utility Systems, Inc. informed the Commission that it did

not want to operate the Woods on Herring Creek Community wastewater system on a going forward basis, and declined to seek such relief.

In its December 6, 2005 letter, the Court of Chancery also indicated that a question that might require future consideration would relate to the jurisdiction of the Commission:

I do not mean to limit the topics which can be addressed. My hope is that, with this effort, the following can be resolved: (1) did USI succeed or fail with respect to the underlying merits of its substantive claim regarding the Defendants' conduct? And (2) if it succeeded, is a monetary award the only viable remedy? That would, if appropriate, leave the following questions for future consideration: (1) who should determine the amount (the Court or the Public Service Commission)? And (2) how much should be awarded?

9. That, on December 20, 2005, the Commission voted to intervene in the Chancery Court action to protect its jurisdiction and its interests under Order No. 6783, as well as the public interest as it relates to these proceedings.

10. That the Commission has exclusive jurisdiction over the rates that a public utility, such as Utility Systems, Inc., may charge its customers pursuant to 26 Del. C. § 302. The Commission Staff reports that the Chancery Court action may involve a damage claim by Utility Systems, Inc. that is actually an effort to impose retroactive wastewater rates on former Utility Systems, Inc.'s customers at the Woods on Herring Creek Community and thereby circumvent the Commission's jurisdiction.

11. That the Commission is a governmental entity created pursuant to 26 Del. C. Subchapters 1 and 2. None of the parties in the Chancery Court action are capable of protecting the Commission's jurisdiction, the interests of the Commission, or the public interest. None of the parties in the Chancery Court action have expertise or substantial experience in public utility law.

12. That the Commission has an ongoing interest in assuring that: (a) the Woods on Herring Creek Community has adequate and reliable wastewater service; and (b) the Woods on Herring Creek Community wastewater treatment system is operated in a manner that complies with Delaware law, and does not constitute a threat to public health and safety.

13. That the Commission shall move to intervene in the Chancery Court action.

14. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae  
Chair

/s/ Jeffrey J. Clark  
Commissioner

/s/ Joann T. Conaway  
Commissioner

Eric C. Howard, Esquire  
December 6, 2005  
Page 6

/s/ Dallas Winslow  
Commissioner

/s/ Jaymes B. Lester  
Commissioner

ATTEST:

/s/ Karen J. Nickerson  
Secretary

E X H I B I T "A"

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

John W. Noble  
Vice Chancellor

417 South State Street  
Dover, Delaware 19901  
Telephone: (302) 739-4397  
Facsimile: (302) 739-6179

December 6, 2005

Eric C. Howard, Esquire  
Wilson, Halbrook & Bayard  
107 West Market Street  
P.O. Box 690  
Georgetown, DE 19947-0690

Re: Utility Systems, Inc. v. Woods on Herring Creek  
Homeowners Association, et al.  
C.A. No. 558-S

Dear Mr. Howard:

I write to address briefing of the above-referenced matter.

I ask that the following issues be briefed:

1. Was there a conversion of the wastewater treatment system by one or more of the Defendants? Perhaps another framing of the issue would be: was there an unjustified (or improperly implemented) exercise of the reversion?

2. The effect of the Court's order of August 16, 2004. Did it "undo" (or could it have "undone") any conversion?

3. Whether the concerted actions (if that is a fair factual characterization) of the Defendants (and the individual homeowners) in withholding or delaying payments of funds to USI, under the circumstances,

Eric C. Howard, Esquire

December 6, 2005

Page 2

effectively accomplished a conversion. My concern here (and one for which there is likely debate about its factual foundation) is that where a small utility whose funding is limited to fees charged and collected in its service area, capital contributions by its investors, and, although perhaps not available here, loans, those homeowners in the limited service area may be able “to bring the utility to its knees” and destroy its reasonable commercial expectations simply by acting in concert to deprive it the funding necessary to maintain the venture.

4. Finally, if the Defendants believe (assuming, for purposes of identifying issues to be briefed, a number of adverse conclusions) that a viable remedy (*i.e.*, one other than a damage award) would be in the nature of a return of the system to USI, that should be argued now as well.

I do not mean to limit the topics which can be addressed. My hope is that, with this effort, the following can be resolved: (1) did USI succeed or fail with respect to the underlying merits of its substantive claim regarding the Defendants’ conduct? and (2) if it succeeded, is a monetary award the only viable remedy? That would, if appropriate, leave the following questions for further consideration: (1) who should determine the amount (the court or the Public Service Commission)? and (2) how much should be awarded?

I ask that you consult with Mr. Sergovic and provide to the Court a schedule for this submittal and any response from USI.

Very truly yours,

*/s/ John W. Noble*

JWN/cap

cc: John A. Sergovic, Jr., Esquire  
Kevin P. Maloney, Esquire  
Register in Chancery-S