

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.,) PSC DOCKET NO. 04-WW-001
FOR A CERTIFICATE OF PUBLIC CONVENIENCE)
AND NECESSITY TO PROVIDE WASTEWATER)
SERVICES TO THE COMMUNITY)
(FILED OCTOBER 22, 2004))

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

ORDER NO. 6865

This 14th day of March, 2006, the Commission determines and Orders the following:

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

2. That these consolidated dockets involve, among other things, a dispute between Utility Systems, Inc. ("USI") 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, USI 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. § 203(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 ("Report"), with certain modifications, which Order and Report are incorporated by reference herein. Among other things, the Commission concluded that: (a) USI unlawfully and voluntarily abandoned the Woods on Herring Creek Community wastewater system; and (b) on December 21, 2004, USI unlawfully transferred three parcels of land, owned by USI and held as plant in its Woods on Herring Creek service area, without first obtaining Commission approval in violation of 26 Del. C. § 215(a)(1).

5. That the transfer of the three parcels was made by USI, a company whose principal shareholder and President is H. Clark Carbaugh. In addition, Mr. Carbaugh's wife, Elizabeth D. Carbaugh, is a minority shareholder of USI.

6. That USI transferred the three parcels to Carbaugh Property Management, LLC, a corporation jointly owned by Mr. Carbaugh and his wife.

7. That, on December 20, 2005, USI appealed Commission Order No. 6783 (Nov. 22, 2005) to the Delaware Superior Court. However, these consolidated dockets remained open and pending before the Commission and the Commission anticipated further proceedings

involving USI's conduct related to the Woods on Herring Creek and Woodlands of Millsboro community wastewater treatment systems.

8. That Commission Order No. 6783 (Nov. 22, 2005) provides, at pp. 17-8 paragraph 3(b):

The December 2004 transfer and sale of three parcels of land (described as lots 5, 6, and 7) located at "The Woods on Herring Creek" development from Utility Systems, Inc., to Carbaugh Property Management, LLC, having been done without Commission approval, is declared to be in violation of 26 Del. C. § 215(a)(1). Therefore, the transaction conveying the three lots is found to have been illegal. Utility Systems, Inc., shall take appropriate actions to have the title and possession of such parcels returned to the utility plant of Utility Systems, Inc., within ninety days from the date of this Order. If Utility Systems, Inc., reverses those earlier sales and transfers within such time, the Commission will then reconsider whether to forego enforcing and whether to revoke the \$1,000 sanction set forth in paragraph 158 Part G of the Findings and Recommendations of the Hearing Examiner. On or before 90 days from the date of this Order, Utility Systems, Inc., shall file a report with the Commission reporting whether, and when, the title and possession of such parcels have been returned to the utility plant of Utility Systems, Inc.

9. That the ninety-day period referred to above expired on February 20, 2006. USI has not taken steps to have title and possession of the three parcels of land transferred back to USI. Therefore, the Commission concludes that the \$1,000 sanction referred to at pp. 17-8, paragraph 3(b) of Order No. 6783 (Nov. 22, 2005) shall be enforced, and shall not be revoked.

10. That the Commission shall file proceedings against Carbaugh Property Management LLC and USI in the Delaware Court of Chancery to prevent Carbaugh Property Management LLC from conveying the three

parcels of land to any person other than USI, and require that title to and possession of the three parcels of land be returned to USI.

11. That USI failed to file a report with the Commission by February 20, 2006 about the status of the three parcels, and is therefore in violation of Order No. 6783 (Nov. 22, 2005). Pursuant to 26 Del. C. § 217 the Commission will consider at the next Commission meeting on March 28, 2006 at 1:00 PM what penalty, if any, should be imposed upon USI for failing to file the report required by Order No. 6783 (Nov. 22, 2005). USI should file any written opposition to a proposed penalty on or before March 21, 2006.

12. USI shall obtain the return of title to the three parcels of land from Carbaugh Property Management, LLC, to USI by March 24, 2006. USI shall report to the Commission at the next Commission meeting on March 28, 2006 at 1:00 PM whether USI has re-acquired title to the three parcels of land. If USI fails to obtain title to the three parcels by March 24, 2006, the Commission shall impose a penalty upon USI of \$1,000.00 (Commission to decide up to \$1000) per day for each day after March 24, 2006, until USI obtains title to the three parcels of land. USI shall file any written opposition to such a penalty on or before March 24, 2006.

13. In Order No. 6783 (Nov. 22, 2005), the Commission approved a penalty of \$150,000 on USI for inadequate wastewater services and facilities at the Woodlands of Millsboro. Senior Hearing Examiner O'Brien's Report, paragraph 150(b), provides, in part:

b) USI . . . [is] compelled to satisfy the penalty [related to the Woodlands of Millsboro] from any award of damages it may receive in the Chancery Court action against the WOHC Homeowners

Association. In the event the Chancery Court does not make an award of damages in USI's favor, then USI may apply to the Commission for the elimination of, or reduction of, the penalty under the following circumstances: (1) USI establishes that: (a) it is pumping waste from the Woodlands system on a schedule that will reduce or eliminate surfacing of effluent in the treatment beds; or (b) that USI has taken other steps to eliminate the threat of effluent surfacing, such as installing new equipment or improving the operation of its current equipment; (2) USI is completely up-to-date on the cleaning of septic tanks at the Woodlands, and that there are no problems with the septic tank system comparable to those that exist at the WOHC; (3) USI establishes that the wastewater treatment system at the Woodlands is capable of providing safe, reliable and efficient wastewater service to the residents of the Woodlands; (4) USI cooperates with Staff in identifying and correcting the problems with the wastewater system at the Woodlands; and (5) USI pays, in advance, the reasonable cost of an independent consultant, selected by the Commission Staff, to oversee USI's activities at the Woodlands and to verify that USI is meeting and, ultimately, that USI has met, the requirements of conditions 1, 2 and 3, set forth above.

Now, therefore, **IT IS ORDERED:**

1. That, Utility Systems, Inc., is hereby ordered to pay, in advance, the reasonable cost of a consultant, recommended by the Commission Staff and approved by the Commission, to evaluate Utility Systems, Inc.'s wastewater treatment system at the Woodlands of Millsboro. The Commission proposes to approve the consultant at the Commission meeting on March 28, 2006. If Utility Systems, Inc. fails to pay, in advance, the cost of the consultant by April 30, 2006, Utility Systems, Inc. shall be assessed a penalty, pursuant to 26 Del. C. § 217, of \$1,000.00 (Commission to decide up to \$1000) per day, for

each day after April 30, 2006 that Utility Systems, Inc. is in violation of this Order.

2. Pursuant to Order No. 6783 (Nov. 22, 2005), Utility Systems, Inc. has been afforded the opportunity to obtain a reduction of, or elimination of, the \$250,000, \$150,000, and \$90,000 penalties provided for therein. The Commission hereby Orders that Utility Systems, Inc. shall not be eligible for a reduction of, or elimination of, the penalties or sanctions set forth in Order No. 6783 (Nov. 22, 2005) unless Utility Systems, Inc. re-acquires title to the three parcels of land by March 24, 2006.

3. The Commission retains jurisdiction in this matter, including the authority to enter such further Orders and conduct such further proceedings as it deems just, proper, or appropriate.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

/s/ Jeffrey J. Clark
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary