

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

IN THE MATTER OF THE APPLICATION OF)
TIDEWATER ENVIRONMENTAL SERVICES,)
INC., FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO PROVIDE) PSC DOCKET NO. 05-WW-021
WASTEWATER SERVICES TO ONE PARCEL OF) ("WINDSTONE")
LAND LOCATED ON CAVE NECK ROAD,)
SOUTHEAST OF MILTON, SUSSEX COUNTY,)
DELAWARE (FILED JULY 5, 2005))

IN THE MATTER OF THE APPLICATION OF)
ARTESIAN WASTEWATER MANAGEMENT, INC.,)
FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO PROVIDE) PSC DOCKET NO. 07-WW-003
WASTEWATER SERVICES TO ONE PARCEL OF) ("WINDSTONE")
LAND LOCATED ON CAVE NECK ROAD,)
SOUTHEAST OF MILTON, SUSSEX COUNTY,)
DELAWARE (FILED JANUARY 12, 2007))

ORDER NO. 7128

**CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
TO PROVIDE WASTEWATER SERVICES**

This 6th day of February, 2007, the Commission determines and Orders the following:

1. Fifteen months ago, the Commission granted a Certificate of Public Convenience and Necessity ("CPCN") to Tidewater Environmental Services, Inc. ("TESI") to provide public utility wastewater services to a parcel of property in Sussex County designated Sussex County Tax Map Parcel No. 235-22.00-24.00 ("Parcel 2-35-22-24"). See PSC Order No. 6735 (Oct. 11, 2005). TESI's petition was premised on the provisions of 26 Del. C. § 203D(d)(2) and identified the parcel as the proposed Windstone development. TESI listed "Mr. Colby D. Cox,

Integrity Homes II, LLC" ("Integrity Homes") as the petitioning "land owner[]" of the proposed territory to be served."¹

2. On December 6, 2006, Windstone LLC ("Windstone") submitted a letter asking the Commission to vacate or void the prior CPCN granted to TESI for Parcel 2-35-22-24. Windstone asserted that at the time of TESI's application, the land owner of that parcel was "Island Farm, Inc.," not Integrity Homes (as identified by TESI).² TESI's misrepresentation of ownership, Windstone says, is grounds for vacating the prior CPCN.

3. Then, on January 12, 2007, Artesian Wastewater Management, Inc. ("AWMI") filed its own application to provide wastewater utility services to Parcel 2-35-22-24. In its application, AWMI represents that (according to Sussex County land records) as of January 12, 2007, the land owner of the parcel is "Windstone LLC." The application comes with a petition for AWMI's wastewater services carrying an unidentified signature apparently entered by someone representing Windstone, LLC.

4. TESI has responded to Windstone's request to vacate TESI's CPCN (and indirectly AWMI's later application). TESI suggests that Windstone has seized on a "technicality" as to the identity of the land owner simply to give Windstone the opportunity to choose a

¹See 26 Del. C. § 203D(i) (2004 Supp.). At about the same time, the Commission issued a CPCN to provide water utility services to the same parcel to a corporate sibling of TESI, Tidewater Utilities, Inc. ("Tidewater"). See PSC Order No. 6686 (Aug. 9, 2005). In that application, Tidewater also identified the land owner of record as "Integrity Homes II, LLC," but gave a different address for that entity from the one listed in TESI's application.

²Windstone represents that it is the current developer of the parcel. According to Windstone's letter and documents offered by it, ownership of the parcel subsequently passed to "Island Farm Holdings, LLC" in August, 2005, two months before Order No. 6735 was entered.

different wastewater utility provider for its development.³ According to TESI, when Mr. Cox signed the petition asking for TESI's services, he was directly involved in (or related to the parties controlling) Island Farm, Inc. TESI says Windstone's request, coming more than a year after the CPCN Order and after TESI has expended both time and monies in anticipation of providing services to the parcel, should not be countenanced.

5. At this juncture, the Commission can hardly be expected to divine the "real" facts here or sort out the merits of the competing claims. TESI suggests that Windstone is "gaming" the CPCN system, and any earlier "error" in identifying the owner is harmless, raised too late, and barred by principles of estoppel. On the other hand, the Commission has its own interest in ensuring the integrity of its CPCN processes. In particular, in both wastewater and water CPCN applications, the Commission expects - and relies upon - the applicant to accurately identify the land owners of the proposed territory to be served "as reflected by appropriate tax or land record document."⁴

6. The Commission now sends Windstone's letter application to void the prior CPCN held by TESI to a Hearing Examiner for the development of a full record. In addition, because AWMI's 2007 application appears to be a derivative of Windstone's request to void

³With its response, TESI provided a copy of a water services agreement that reflects that Integrity Homes signed up for Tidewater to provide water services to the parcel. Under another document offered by TESI, Windstone thereafter accepted an assignment of that water service agreement. By its letter, Windstone does not seek to vacate the CPCN granted to Tidewater for the parcel even though Tidewater's application for a CPCN also listed Integrity Homes as the owner of the parcel.

⁴See 26 Del. C. §§ 203D(i), 203C(j) (2004 Supp.).

the prior CPCN - and because AWWI's application shows a differently-named owner of the parcel on January 12, 2007 than the one Windstone identified in its December 8, 2006 letter - we also commit that matter to the same Hearing Examiner to also have a full record developed.⁵ Finally, because Tidewater's water CPCN application was premised on the same "owner" as TESI's, the Commission specifically invites Tidewater to participate in these proceedings. This invitation is extended even though Windstone's application does not challenge Tidewater's water CPCN. The Commission wants to know how both TESI and Tidewater came to list a particular party as the land owner of record, if indeed (as Windstone alleges) another corporation held the complete fee interest in the property at that time of the application.

7. The Hearing Examiner should develop a full record on Windstone's request concerning the validity of Order No. 6735, and, in turn, AWWI's pending request for a service territory for the same parcel. In her eventual Report, the Hearing Examiner should present her proposed factual findings and her recommended decision whether those facts require, or urge, modification or vacation of Order No. 6735. She should also offer proposed findings and recommendations on AWWI's application in light of what she determines as to the earlier CPCN Order and the on-going cloud over who was, and is, the land owner of the parcel and who can speak for each such owner. Finally, the Hearing Examiner should also provide her recommendations whether the

⁵The petition for Windstone submitted with AWWI's application is undated. However, it is possible it was signed before December 8, 2006, given that is the date AWWI sent its required notice to the "owner." In its December 8, 2006 letter, Windstone says that the owner "Island Farm Holdings, LLC" submitted a petition to AWWI.

course of conduct by any utility concerning Parcel 2-35-22-24 should be investigated for potential violations of the statutory provisions and the Commission's rules governing wastewater (and water) CPCNs. If she believes statutory provisions or rules might have been broken or ignored, she should so report and the Commission can then decide whether to initiate a proceeding premised on such possible violations.

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

1. That consideration of the letter application submitted by Windstone, LLC, on December 8, 2006, seeking the vacation of PSC Order No. 6735 (Oct. 11, 2005) in PSC Dckt. No. 05-WW-021 is referred, pursuant to the provisions of 29 Del. C. § 502 and 29 Del. C. ch. 101, to Hearing Examiner Ruth A. Price for further proceedings. In addition, for the reasons set forth in the body of this Order, the application filed by Artesian Wastewater Management, Inc. for a Certificate of Public Convenience and Necessity to provide its wastewater services to Sussex County Tax Map Parcel No. 235-22.00-24.00 (PSC Dckt. No. 07-WW-003) is also referred to Hearing Examiner Price for further proceedings. These two referred matters should be conducted and heard together by Hearing Examiner Price. Hearing Examiner Price shall conduct such proceedings and hearings that are necessary, or appropriate, to develop a full record on the relevant issues. Thereafter, Hearing Examiner Price shall file a Report with her proposed findings and recommended decisions on the issues identified in the body of this Order. Hearing Examiner Price is delegated, under 26 Del. C. § 102A, the authority to determine the

content and manner of any public notice she finds appropriate. Hearing Examiner Price may also grant or deny petitions to intervene.

2. That Hearing Examiner Price shall endeavor to complete the proceedings and submit her Report in these matters within ninety days from the date of this Order. For good cause (as set forth in this Order), the time for consideration of the application filed in PSC Docket No. 07-WW-003 is extended for an additional thirty days.

3. That the Secretary shall serve a copy of this Order on:

- (a) Tidewater Environmental Services, Inc.;
- (b) Windstone, LLC;
- (c) Artesian Wastewater Management, Inc.;
- (d) Tidewater Utilities, Inc.; and
- (e) The Division of the Public Advocate.

4. That, within ten days of this Order, Tidewater Environmental Services, Inc., Windstone, LLC, and Artesian Wastewater Management, Inc., shall each file with the Commission an opinion of counsel that identifies the land owner of Sussex County Tax Map Parcel No. 235-22.00-24.00 as of the date of this Order. Such opinion of counsel shall include a recitation of the chain of title for such property beginning in 2003 that is based upon the public deed and land records of Sussex County and any unrecorded conveyances involving the parcel. Upon such filings, the Hearing Examiner will then decide how to notify the present land owner of the parcel of these proceedings.

5. That, for the reasons set forth in the body of this Order, Tidewater Utilities, Inc. is specifically requested to intervene in this matter.

6. Tidewater Environmental Services, Inc. and Artesian Wastewater Management, Inc. are hereby notified that they will be charged the costs of these proceedings in each docket under 26 Del. C. § 114(b).

7. 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/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

/s/ Jeffrey J. Clark
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary