

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

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-002
WASTEWATER SERVICES TO TWO PARCELS OF) ("NORTH MILTON")
LAND LOCATED NEAR THE TOWN OF MILTON,)
SUSSEX COUNTY, DELAWARE)
(FILED JANUARY 7, 2007))

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-006
WASTEWATER SERVICES TO FOUR PARCELS) ("NORTH MILTON")
OF LAND LOCATED NEAR THE TOWN OF)
MILTON, SUSSEX COUNTY, DELAWARE)
(FILED FEBRUARY 6, 2007))

ORDER NO. 7134

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

This 27th day of February, 2007, the Commission determines and Orders the following:

1. Subsection 203D(b) of Title 26 says that a wastewater utility (an investor-owned one) can expand its service territory into the service territory of a municipal wastewater utility only if the municipal utility agrees and this Commission approves.¹ In 2004, each municipal (and other governmental) wastewater utility was to provide this Commission with a description of its then "existing" service

¹See 26 Del. C. § 203D(b) (2004 Supp.) ("§ 203D").

territory, and was to then update such description with its later extensions or new territories.²

2. In 2005, this Commission adopted Wastewater Utility CPCN rules.³ In the process of doing so, the Commission declined to include a provision in those regulations that would have explicitly defined "existing service territory" under § 203D to encompass areas a municipal or other governmental system might be planning to serve consistent with the "future annexation" or "growth areas" it had designated in its most recent Comprehensive Plan endeavor. The Hearing Examiner told the Commission that such a provision would "in effect, reserve[e] future service territory for a municipal utility, without first considering the interests of ratepayers or competing wastewater utilities."⁴ The better approach, the Examiner said, was Staff's view where a municipality could intervene with a challenge before the Commission if a private wastewater utility sought a Certificate to provide its services in such a municipality's "future annexation" or "growth area." With such a challenge, the Commission would then institute proceedings to resolve the dispute.⁵

²Id.

³"Regulations Concerning the Jurisdiction of the Public Service Commission to Grant and Revoke Certificates of Public Convenience and Necessity to Provide Wastewater Services," as adopted by PSC Order No. 6573 (Feb. 22, 2005) ("Order No. 6573").

⁴See Order No. 6573, H. Exam. Rpt. at ¶ 22.

⁵Id. In Order No. 6573, the Commission adopted all of the Hearing Examiner's findings and recommendations. Neither the Hearing Examiner's Report, nor the Commission's adopting Order, identify the rule or criteria to be applied in the case of such type of dispute. Would the Commission define a municipal or government utility's "existing service territory" on a case-by-case basis? Or would the Commission look to use its discretionary "denial" authority under § 203D(d)(2) as the basis - in light of the facts presented

3. These two dockets now cause the Commission to return to the issue. In 2004, the Town of Milton ("Town") filed its description of its "existing service territory" for its wastewater system. The description covered not only the Town but areas outside its then municipal boundaries. As the Town described it, its service territory "includes all lands within the Town's annexation area as described in the Town of Milton Comprehensive Plan certified by the State of Delaware in 2003."⁶ Artesian Wastewater Management, Inc. ("AWMI") has now filed two applications for Certificates of Public Convenience and Necessity ("CPCNs") to expand its operations for wastewater services. Both requests are premised on 26 Del. C. § 203D(d)(2) and come accompanied with petitions requesting AWMI's wastewater services signed by the landowners of the parcels in the proposed service territory. But all six of the parcels in the service territories proposed by AWMI's applications lie within the "existing service territory" previously designated by the Town. The Town has not consented to AWMI's expansion. In fact, in a February 12, 2007 filing, it has strenuously objected to both applications.

4. In their submissions so far, the Town and AWMI offer two divergent views of the legal landscape. AWMI claims that in the CPCN rule-making, the Commission implicitly found the phrase "existing service territory" to exclude future annexation areas or growth areas.

in the particular matter - whether to allow the private utility to serve in a future annexation or growth area?

⁶Letter of Mayor J. Bushey to PSC (Sept. 17, 2004). The Town re-affirmed that description in 2006. Letter of Mayor D. Post to C. McDowell, PSC (Nov. 21, 2006).

Thus, the Town's designation here - originally keyed to such concepts - cannot prevail. In contrast, the Town says that the language of § 203D grants it (and other municipalities and government entities) the exclusive authority to designate and describe an "existing service territory." Thus, regardless of whether the Town's description might include areas marked for growth in a comprehensive plan is irrelevant, once designated as an existing service territory by the Town, that description prevails, and intrusions into such area requires its consent.

5. The Commission now refers these two applications to a Hearing Examiner so the facts and legal issues can be more thoroughly developed and vetted. While the Commission does not desire to either predict, or pre-judge, any issues, numerous legal issues might lurk here. For examples, what is the scope and effect of the Commission's earlier decision in the water CPCN rules' proceeding and what is the meaning of "existing service territory" in § 203D? And, depending on the appropriate definition, how does that definition apply to the "facts" (whatever they may be) of these two applications? And finally, even if the Town's "existing service territory" under § 203D might have been different than what it has described, is there reason - based on the facts - for the Commission to exercise its discretionary "public interest" authority under § 203D in either application? The Hearing Examiner can build a record on both the factual and legal issues.

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

1. That, pursuant to 26 Del. C. § 502 and 29 Del C. ch. 101, these two matters are now consolidated and referred to Senior Hearing Examiner William F. O'Brien. Senior Hearing Examiner O'Brien shall conduct such proceedings, including evidentiary hearings, that he deems necessary or appropriate to compile a full and complete record in these matters. Thereafter, Senior Hearing Examiner O'Brien shall submit a Report to the Commission with his proposed findings of fact, proposed conclusions of law, and recommended decision. Senior Hearing Examiner O'Brien is delegated the authority to grant or deny petitions to intervene. In addition, Senior Hearing Examiner O'Brien is delegated, under 26 Del. C. § 102A, the authority to determine the form and content of further public notices that might be necessary or appropriate.

2. That Senior Hearing Examiner O'Brien shall promptly provide notice of these proceedings (in a form he deems appropriate) to the Office of State Planning and the government of Sussex County.

3. That the time for consideration of each application filed by Artesian Wastewater Management, Inc. is extended, under 26 Del. C. § 203D(g)(1), for an additional period of thirty days. The public interest will be served by allowing further time for development of the legal and factual questions involved in these matters.

4. 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