

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. 7188

AND NOW, to-wit, this 22nd day of May, A.D., 2007;

WHEREAS, the Commission having received and considered the Findings and Recommendations of the Hearing Examiner ("Report") issued in the above-captioned docket, which was submitted after a duly-noticed public evidentiary hearing; and

WHEREAS, the Hearing Examiner recommends that the Commission approve the hereto attached (Attachment "B") proposed Settlement Agreement, dated April 20, 2007, which disposes of all the outstanding issues raised by the Commission in PSC Order No. 7128 (Feb. 6, 2007) and is endorsed by all the parties; and

WHEREAS, the Commission finds that the terms and conditions of the proposed Settlement Agreement are just and reasonable and that its adoption is in the public interest; now, therefore,

IT IS ORDERED:

1. That, by and in accordance with the affirmative vote of a majority of the Commissioners, the Commission hereby adopts the May 14, 2007 Findings and Recommendations of the Hearing Examiner, attached hereto as Attachment "A."

2. That, the Commission approves the proposed Settlement Agreement, attached hereto as Attachment "B," that disposes of all the outstanding issues raised by the Commission in PSC Order No. 7128 (Feb. 6, 2007).

3. That, the Commission approves implementation of the terms and conditions contained in Attachment "B."

4. That the Commission at this time declines to initiate a further investigation of the utilities that are parties to this docket for potential regulatory or statutory violations related to their applications for water and wastewater Certificates of Public Convenience and Necessity and their water and wastewater Certificates of Public Convenience and Necessity that have previously been granted by this Commission.

5. 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/ Dallas Winslow
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Jeffrey J. Clark
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary

A T T A C H M E N T "A"

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))
)

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATED: May 14, 2007

RUTH ANN PRICE
HEARING EXAMINER

TABLE OF CONTENTS

	PAGE
I. APPEARANCES.....	1
II. BACKGROUND.....	1
III. FINDINGS OF FACT.....	7
IV. THE PARTIES' PROPOSED SETTLEMENT AGREEMENT.....	11
A. Terms of Settlement.....	11
B. The Public Interest.....	13
V. THE INTEGRITY OF THE COMMISSION'S CPCN PROCESS.....	16
VI. ANSWERS TO THE QUESTIONS POSED BY THE COMMISSION.....	19
VII. RECOMMENDATIONS.....	22

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))
)

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

Ruth Ann Price, duly appointed Hearing Examiner in this Docket pursuant to 26 Del. C. § 502 and 29 Del. C. ch. 101, by Commission Order No. 7128, dated February 6, 2007, reports to the Commission as follows:

I. APPEARANCES

On behalf of the Public Service Commission Staff ("Staff"):

Murphy & Landon
BY: FRANCIS J. MURPHY, ESQUIRE

Kevin S. Neilson, Regulatory Policy Administrator
Andrea Maucher, Planner
Sarah Buttner, Regulatory Policy Administrator

On behalf of the Division of Public Advocate ("DPA"):

ARTHUR PADMORE, PUBLIC ADVOCATE
BO SHEN, PH.D., Public Utilities Analyst

On behalf of Artesian Wastewater Management, Inc. ("Artesian"):

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
BY: MICHAEL HOUGHTON, ESQUIRE
R. JUDSON SCAGGS, Jr., ESQUIRE
GEOFFREY A. SAWYER, III, ESQUIRE

BY: JOHN J. SCHREPPLER, II, ESQUIRE, VICE PRESIDENT &
GENERAL COUNSEL

David Spacht, Vice President, Treasurer & Chief Financial Officer

On behalf of Windstone, LLC:

Morris, Nichols, Arsht & Tunnell LLP
By: MICHAEL HOUGHTON, ESQUIRE
R. JUDSON SCAGGS, JR., ESQUIRE
GEOFFREY A. SAWYER, III, ESQUIRE

On behalf of Tidewater Environmental Services, Inc. and Tidewater
Utilities, Inc. ("TESI," "TUI" or "Tidewater"):

Parkowski, Guerke & Swayze
By: JEREMY W. HOMER, ESQUIRE

Gerard Esposito, President

On behalf of WINDSTONE, LLC:

SAMUEL A. FRABIZZIO, ESQUIRE

Louis Capano, III, Member

II. BACKGROUND

1. On July 5, 2005, TESI, a subsidiary of TUI, filed an application for a Certificate of Public Convenience and Necessity ("CPCN") to provide wastewater services for Sussex County Tax Map Parcel No. 2-35-22-24, otherwise known as "Windstone," a proposed 360-unit development located on Cave Neck Road, southeast of Milton in Sussex County, Delaware.

2. In its application, TESI stated that it has been in negotiations with the developer of Windstone and that all the parties had reached agreement to have TESI as the wastewater utility for the

subdivision. The application specifically states that the filing was made pursuant to 26. Del. C. § 203(D)(d)(2), which requires that an applicant must have obtained the consent of the majority of the landowners of the proposed territory to be served. The petition for inclusion, dated February 27, 2005, is signed by Colby D. Cox, Integrity Homes II, LLC, as the property owners. The application further contains a letter dated May 6, 2005, to Mr. Cox at Integrity Homes II, LLC, as the property owner advising him of the procedures by which he can elect to stay with TESI for wastewater services.

3. On October 2, 2005, Staff Planner Andrea Maucher, authored a memorandum to the file stating that she had reviewed the filing, which included all of the required documentation, and found it to be in accordance with the applicable statutes and Commission regulations.¹ Ms. Maucher stated that based upon her review of the application it complied with all of the requirements and that Staff was not aware of any reason to preclude granting TESI a CPCN. The Commission granted TESI's CPCN application pursuant to Order No. 6735 on October 11, 2005.

4. Approximately eleven months after the CPCN was granted, Louis Capano, III, on December 8, 2006, wrote to Connie McDowell, then Chief of Technical Services at the Commission, advising her that Windstone, LLC was the developer of parcel 2-35-22-24. The letter advised Ms. McDowell that Integrity Homes, II, LLC had never been the

¹Initially, Staff had only one concern with the application. Staff noted that TESI had not provided wastewater services to any customers. In light of TESI's inexperience, Ms. Maucher consulted with Ronald E. Graeber of the Division of Water Resources of the Department of Natural Resources and Environmental Control regarding the application. Mr. Graeber responded by requesting that language be included in the order that no determination could be made regarding whether the utility was unwilling or unable to provide safe, adequate, and reliable service to existing customers.

owner of the parcel as the petition filed by TESI had purported. Mr. Capano asserted that Island Farm actually owned the parcel on July 5, 2005, the date on which TESI filed its CPCN application. Further, Mr. Capano asserted that on October 11, 2005, the date on which the Commission granted TESI's application, Island Farm Holdings LLC owned the property. Mr. Capano contended that the CPCN should be revoked because the application filed by TESI misrepresented the owner of the property and the application did not comply with the applicable regulations. Letter of L. Capano, III, dated December 8, 2006, citing Section 10.110 of PSC Order No. 5730.

5. On January 9, 2007, Ms. Maucher wrote to Gerard Esposito, President of Tidewater Utilities, Inc. formally requesting that TUI respond to Mr. Capano's charges by January 18, 2007.² Ms. Maucher's letter noted that Staff had already made two informal requests to TUI for information regarding the allegations, but TUI had thus far failed to respond. Ms. Maucher warned that if TUI failed to respond to her informal request, Staff would present the matter to the Commission at its January 23, 2007 public meeting.

6. On January 12, 2007, Artesian filed its own CPCN petition to provide wastewater services to Windstone. The application includes, among other things, a copy of Artesian's notice to provide wastewater services that was sent to Windstone LLC's address at 2044 Sunset Lake Road, Newark, Delaware 19702 as well as a copy of the return receipt.

²Ms. Maucher further noted in her January 9, 2007 letter to Mr. Esposito that the allegations raised by Mr. Capano cast a cloud on the CPCN granted to TUI for water services to Windstone. See Order No. 6686 (Aug. 9, 2005). The property owner on TUI's water CPCN also listed Integrity Homes II, LLC as the owner of record for the property.

7. TESI and TUI responded to Ms. Maucher's letter of January 9, 2007 through its counsel, Jeremy W. Homer, Esquire. On January 18, 2007, Mr. Homer asserted that Mr. Capano's request to revoke TESI's CPCN for Windstone was based upon a technicality. Mr. Homer further stated that his client had not had time to fully sort out the facts, but he opined that even if the property was owned by Island Farm at the time TESI's CPCN application was filed (as asserted by Mr. Capano), Island Farm was owned by members of Colby D. Cox's family, one of whom may have been a member of Integrity Homes too. Mr. Homer contended that if Island Farm was the actual owner of the property, it had knowledge of the agreements between TUI for water and TESI for wastewater services. Consequently, Mr. Homer concluded that Island Farm, as the legal owner, "tacitly or expressly ratified the agreements," either through a common corporate officer in both companies or through an agent. See Letter of Jeremy W. Homer, Esquire to Andrea Maucher dated January 18, 2007 at p.2.

8. Mr. Homer argued that the applicable law (26 Del. C. §203D (j)) did not permit the Commission to revoke a CPCN based upon a technicality that had been raised more than a year after the CPCN had been granted. Further, Mr. Homer reported that TESI had spent over \$80,000 in engineering fees on the project and permits for wastewater facilities.

9. In addition, Mr. Homer made the point that in April 2005, Integrity Homes II, LLC and TESI executed a water service agreement, which was assigned to Windstone in October 2005. Further, Mr. Homer contends that counsel for Windstone, Samuel J. Frabizzo, Esquire, witnessed Mr. Capano's signature on the assignment of the water

services agreement. Subsequently, in an electronic mail message⁰, dated December 13, 2006, Mr. Frabizzo acknowledged Windstone's intent to be bound by the water services agreement by referring to proposed language for a Declaration of Restrictions to be recorded by the developer in order to obligate the homeowners to the provisions of the water services agreement.

10. In a follow-up letter, dated January 19, 2007, Mr. Homer makes the point that before Mr. Capano purchased Windstone and consented to the assignment of the water services agreement, he must have known the title history for the property. The letter provides that after the water services agreement was executed, TUI began its work to provide water services by constructing a water main to the development.

11. As ordered by PSC Order No. 7128 (Feb. 6, 2007), TUI and Artesian filed opinions of counsel and chronologies of events regarding the title history of the Windstone development and the circumstances that lead to the current CPCN dispute by February 16, 2007. In anticipation that the Commission would sign PSC Order No. 7128, this Hearing Examiner forwarded a letter to the parties on January 31, 2007 scheduling a conference call on February 7, 2007 to discuss the issues and to establish a procedural schedule.³

³The parties in this case engaged in two rounds of discovery. All parties submitted prefiled direct testimony on March 14, 2007 and rebuttal testimony on March 26, 2007. At the request of the parties, the evidentiary hearing was continued from March 29 to April 4, 2007.

12. An evidentiary hearing was held on April 4, 2007, at the Commission's offices in Dover. The record, as developed at the hearing, consists of a 151-page verbatim transcript and 21 exhibits.⁴

13. I have considered all of the record evidence and, based thereon, I submit for the Commission's consideration these findings and recommendations.

III. FINDINGS OF FACT

14. Based upon the opinions filed by counsel for the respective parties, the chronologies submitted by the parties at the Commission request, the prefiled testimonies of the parties and the testimony admitted into evidence at the hearing, the following constitutes my findings of facts in this case:

a. Parcel no. 2-35-22-24, known as "the Windstone development" or "Windstone," was conveyed by H. Carlton Draper, Helen M. Draper, Isabel D. Draper and Patricia D. Bonk to The Island Farm, Inc. by deed dated March 14, 1979. This deed was recorded in the office of the Recorder of Deeds for Sussex County, Delaware on May 4, 1979.

b. On February 27, 2005, Colby D. Cox, as a member of Integrity Homes, II, LLC, signed a petition for inclusion with TESI to provide wastewater services to Windstone.

⁴Exhibits will be cited as "Ex.____" and references to the evidentiary hearing transcript will be cited as "Tr.____." At the evidentiary hearing, the parties present the testimonies of five (5) witnesses: Windstone LLC presented the testimony of its member, Mario Capano (Exs. 1 and 2; Tr. 7-42); Artesian presented the testimony of its Vice President & General Counsel, John J. Schreppler, II, Esquire (Ex. 3;Tr. 42-72); TUI presented the testimonies of Kristen E. Higgins (Ex. 7; Tr. 76-131) and Bruce Patrick (Ex. 8; Tr. 133-144) and the Commission presented the testimony of Andrea Maucher (Ex. 21;145-150).

c. On March 28, 2005, Colby D. Cox and Preston Dyer Lynch signed, on behalf of Integrity Homes, II, LLC, a petition for inclusion for TUI to provide water services to Windstone.

d. On April 28, 2005, TUI and Integrity Homes II, LLC executed a water services agreement to provide Windstone with water services.

e. On July 5, 2005, TESI filed an application for a CPCN to provide wastewater services to the Windstone development.

f. Windstone LLC was formed on July 21, 2005 pursuant to a filed and executed Limited Liability Company Certification of Formation. Ex. 1. At the time Windstone was formed, Mario Capano was not a member of Windstone LLC, but he was closely advising the members. Ex. 1.

g. Windstone LLC and Integrity Homes II, LLC entered into an assignment agreement on July 14, 2005 in which Windstone LLC agreed to purchase the Windstone development pursuant to an underlying Agreement of Sale between Integrity Homes and The Island Farm, Inc. dated October 28, 2003. Ex. 1.

h. Island Farm Holdings was formed in the State of Delaware on August 8, 2005.

i. Pursuant to Order No. 6686 (Aug. 9, 2005), the Commission granted a water services CPCN to TUI to provide water to the development.

j. On August 10, 2005, the Windstone development was conveyed from The Island Farm Inc. to Island Farm Holdings, LLC, a Delaware limited liability company. The deed was recorded in the

Office of the Recorder of Deeds for Sussex County, Delaware the same date.

k. On or about August 11, 2005, the Deed for the Windstone development was re-recorded in the Office of the Recorder of Deeds in and for Sussex County, Delaware so as to add the metes and bounds legal description in Deed Book 3183, Page 64.

l. On or about August 12, 2005, Island Farm Holdings, LLC filed a Certificate of Merger with the Delaware Secretary of State, merging Island Farm Holdings, LLC with and into Windstone, LLC under the name of Windstone, LLC, a limited liability company organized and existing under the laws of the State of Delaware.

m. On August 12, 2005, Mario Capano became a twenty-five percent (25%) owner of Windstone, LLC.

n. In September 2005, Mario Capano became aware that Pret Dyer's Company, Integrity Homes II, LLC, had not at any time held title to the Windstone property. Mario Capano had a telephone conversation with a TUI employee identified in a September 23, 2005 memorandum as "Josh T.," concerning the fact that the Company had submitted CPCN applications for water and wastewater services that did not state the legal title owner of the Windstone property. "Josh T" memorialized his conversation with Mario Capano in a memorandum addressed to Kisten Higgins of TUI. Thereafter, Kisten Higgins had a telephone conversation with Mario Capano in which he asked her the question of whether the water services agreement was valid.

o. Pursuant to PSC Order No. 6735 (Oct. 11, 2005), the Commission granted a CPCN for wastewater services to TESI.

p. On October 18, 2005, Preston Lynch Dyer, on behalf of Integrity Homes, II, LLC, Mario Capano, on behalf of Windstone, LLC and Gerard L. Esposito, on behalf of TUI, entered into an assignment agreement whereby Integrity Homes assigned its rights under the water services agreement, dated April 28, 2005, to Windstone LLC. Pursuant to this assignment, Windstone, LLC purportedly stepped into the shoes of Integrity Homes, LLC and assumed its obligations and privileges under the water services agreement.

q. On or about February 10, 2006, the Certificate of Merger merging Island Farm Holdings, LLC with and into Windstone, LLC was filed and recorded in the Office of the Recorder of Deeds in and for Sussex County on February 10, 2006 in Deed Book 00892, Page 026.

r. Throughout the year of 2006, Gerard Esposito and Mario Capano discussed whether TUI could come close to or meet the price of \$5,500 per lot for infiltration services for the Windstone development. As the year 2006 closed, it became evident to Mr. Capano that TUI could not meet the required price.

s. Late in 2006, Mr. Capano contacted Artesian to find out if they would provide wastewater services at the Windstone development at a price that he could accept.

t. In November of 2006, Artesian researched the land records at the Sussex County Recorder of Deeds and verified that Integrity Homes had never been in the chain of title of the Windstone Development.

u. On or about December 5, 2006, Artesian made a proposal to Mario Capano to provide wastewater services to the Windstone

development. Artesian also offered to assist in pursuing revocation of the CPCN obtained by TESI.

v. On or about December 6, 2007, Artesian and Windstone LLC executed a wastewater services agreement.

w. On December 7, 2006, Artesian received by facsimile, a petition for wastewater services executed by Windstone LLC.

x. On December 8, 2006, Artesian notified Windstone LLC by certified mail of Artesian's intention to file for a wastewater CPCN to serve the Windstone Development.

y. On January 12, 2007, AWMI filed a CPCN application with the Commission to provide wastewater services to the Windstone development.

z. On or about January 25, 2007, AWMI and Windstone LLC executed a revised Wastewater Services Agreement.

aa. Mr. Capano has represented that Windstone LLC does not contest or dispute the CPCN granted by the Commission to TUI for water services.

III. THE PARTIES' PROPOSED SETTLEMENT AGREEMENT

A. Terms of the Settlement

15. Following the evidentiary hearing in this matter, all of the parties to this docket agreed to engage in mediation on a voluntary basis. The mediation resulted in the Proposed Settlement Agreement attached hereto as "Attachment B." All parties recommend and agree to adhere to the Proposed Settlement Agreement. The terms of the parties' settlement can be summarized as follows:

(a) Tidewater and TESI have agreed to apply to the Commission to abandon the wastewater CPCNs for the Windstone

development and another development called Cool Springs. TESI's CPCN application to provide wastewater service for the Cool Springs development was approved by the Commission in Order No. 6780 (June 25, 2005). AWWI will proceed with its application for the wastewater CPCN for the Windstone development and TESI and Tidewater will not oppose the application. In addition, AWWI will file an application with the Commission seeking to obtain the wastewater CPCN for Cool Springs.

(b) Artesian will apply to the Commission to abandon its water CPCNs for the residential parcels at Hazel Farm (approved by DNREC May 16, 2001) and SK Pepper Creek. Tidewater will apply for the water CPCNs for Hazel Farm and SK Pepper Creek.

(c) TESI agrees that it will forego any attempt to recover \$80,000 in engineering-related expenses that it incurred in preparation for providing wastewater services to the Windstone development and will provide AWWI with the information produced by its engineering work.

(d) Significantly, Tidewater, TESI, Artesian, and AWWI have agreed to engage in additional mediation efforts with the assistance of Staff and Staff counsel to resolve their differences over other projects and service areas.

(e) The parties agreed that, based on Windstone's stated desire to retain Tidewater as its water provider, the CPCN to provide water services to the Windstone development awarded to Tidewater in Order No. 6686 (Aug. 9, 2005) is considered valid and not subject to challenge.

(f) The parties agreed to support Staff's proposal to amend the Commission's regulations governing wastewater CPCNs to include

provisions that would require the applicant to conspicuously identify the tax record or land record documents utilized by the applicant to verify the name and address of each landowner of record, and the record date used by the applicant for determining the landowner of record. A copy of the proposed regulation is attached to the parties' Settlement Agreement and also to the Direct Testimony of Andrea B. Maucher. Ex. 21.

(g) Tidewater and Artesian agreed to jointly petition the Commission to seek a change in water regulation 6.6, which presently prohibits a water utility from refusing or discontinuing water services for failure to pay. They agree to ask the Commission to approve a regulation allowing a water utility to refuse or to discontinue water service for nonpayment of wastewater services, akin to 9 Del. C., Sections 2214 and 6714, which permit New Castle and Sussex Counties to similarly act for nonpayment of county sewer service. The Public Advocate and the Commission Staff have made no commitment to support the joint Tidewater and Artesian petition, and are at liberty to oppose such a petition.

(h) Tidewater, TESI, Artesian, and AWMI agreed to take the steps necessary to implement the terms of the settlement, and not to interfere in each other's efforts to effectuate the settlement.

B. The Public Interest

16. Section 512 of Title 26 provides:

512. Settlements are to be encouraged.

(a) Insofar as practical, the Commission shall encourage the resolution of matters brought before it through the use of stipulations and settlements.

(b) The Commission's Staff may be an active participant in the resolution of such matters.

(c) The Commission may upon hearing approve the resolution of matters brought before it by stipulations or settlements whether or not such stipulations or settlements are agreed to or approved by all parties where the Commission finds such resolutions to be in the public interest.

In Section 512, the Delaware General Assembly set forth an express public policy favoring the settlement of contested Commission proceedings. Section 512 also provides that "[t]he Commission's staff may be an active participant in the resolution of such matters." Here, the Commission Staff and its counsel were pro-active in encouraging the parties to mediate an amicable settlement of their differences. Finally, Section 512 authorizes the Commission to approve settlements "where the Commission finds such resolution to be in the public interest." The parties maintain that their Settlement Agreement is in the public interest, for the reasons set forth below.

17. First, the parties assert that the settlement will save them substantial sums that would otherwise be expended on attorneys' fees and costs. AWMI and Windstone contend that TESI's wastewater CPCN for the Windstone development is void or voidable, because the CPCN application was not supported by a petition signed by the actual landowner of record. The wastewater CPCN application submitted by TESI was based upon a petition executed by Integrity Homes II, LLC ("Integrity Homes"). It is now undisputed that, at the time TESI submitted its wastewater CPCN application, Integrity Homes was the equitable owner of the Parcel at issue, and the actual landowner of record was The Island Farm, Inc. However, TESI argues that its CPCN is valid, and that Windstone is equitably estopped from challenging TESI's wastewater CPCN.

18. If the matter continues to be litigated, only one side can prevail. Any party whose position is rejected by the Hearing Examiner has the right to take exceptions to the Commission. Any party that is unsuccessful in arguing its position to the Commission has the right to appeal to the Delaware Superior Court, and also to the Delaware Supreme Court. The potential cost of litigating this matter through the appeals courts is substantial, and much of the cost would be borne by the utility ratepayers and/or the utility shareholders. The settlement is likely to save the parties, collectively, hundreds of thousands of dollars in attorneys' fees and costs. For that reason, the public interest weighs in favor of settlement.

19. The parties also contend that the settlement promotes administrative and judicial economy. A resolution of this contested docket by settlement will mean that the Commission, the Commission Staff, and the Division of the Public Advocate will not have to expend substantial time addressing the matters raised in this docket, and can put their resources into other matters. In addition, it is notable that the Public Advocate, who is charged by law with protection of the public interest under 29 Del. C. § 8716, considers the settlement to be in the public interest. Furthermore, the settlement will virtually eliminate the possibility of an appeal to the Delaware Superior and Supreme Courts.

20. Windstone, which is a Delaware limited liability company, is in favor of the settlement, which will bring about a prompt resolution of the contest over who will be its wastewater utility. The settlement will allow Windstone to proceed with development of the Parcel, which is presently at a standstill. Tr. at 27-28. Windstone presented evidence

at the hearing on April 4, 2007, that each day of delay in resolving the CPCN dispute causes it to incur substantial additional interest charges on a loan related to the development. *Id.*

21. Significantly, Tidewater, TESI, Artesian, and AWMI have, at Staff's suggestion, agreed to continue the mediation process in an effort to resolve differences that they have over other projects and service territories. If they are able to successfully mediate their other differences, it can be expected to result in substantial savings of resources for the utilities, the Commission, the Commission's Staff, and the Division of the Public Advocate.

22. For these reasons, it is reasonable to conclude that the parties' Settlement Agreement is in the public interest.

V. THE INTEGRITY OF THE COMMISSION'S CPCN PROCESSES

23. As the Commission observed in Order No. 7128, the Commission has its own interest in ensuring the integrity of its CPCN processes. In that regard, the Staff presented the testimony of Andrea B. Maucher. Ms. Maucher is the Staff member responsible for the review of applications filed by water and wastewater utilities for CPCNs. Ex. 21 at 1.

24. Ms. Maucher testified that, while Delaware law provides alternative ways for a public utility to obtain a water or wastewater CPCN, the vast majority of applications filed with the Commission are based upon a utility having obtained the consent of a majority of the landowners in a proposed service area. *Id.* and see 26 Del. C. §§ 203C(d) and (e) and 203D(d). In circumstances where the CPCN application is based on the consent of the landowner(s), the utility

submits with its application a written petition signed by a majority of the landowner(s). Id.

25. Because of the large volume of CPCN applications, Staff does not typically attempt to verify that the petition is signed by the landowner(s) of record. Id. Staff will spot check the landowner information if the contents of the application raise a concern. However, Staff typically has relied upon the utility to provide accurate information. Id.

26. Although Staff relies largely upon the utilities to provide accurate information, the CPCN process has proven to be highly reliable. *Id.* at 3. Staff points out that the Commission assumed jurisdiction over water CPCNs in 2001 and over wastewater CPCNs in 2004. Id. Since 2001, The Commission has granted CPCNs for thousands of parcels. For example, in 2006 alone, the Commission granted water CPCNs for 1,742 distinct parcels of land, and wastewater CPCNs for 53 distinct parcels. *Id.* at 2-3. To date, there has been only one formal challenge to a CPCN issued by the Commission, which is the subject of this docket. *Id.*

27. Although there has been testimony in this docket that there may be one or two other incidents like Windstone, they have not resulted in a contested docket, and it appears that any discrepancies can be worked out by the Staff and the affected parties. *Id.* at 3.

28. While the existing CPCN processes have proven highly reliable, the Commission Staff is taking steps to improve the processes in light of the Windstone experience. *Id.* Staff has instituted a requirement that a utility filing a wastewater CPCN include with the application a statement by the utility certifying

that it has examined the appropriate land records to confirm that the petition filed with the Commission was signed by the landowner of record. Staff has proposed a new regulation that would apply to water and wastewater CPCNs that would require the applicant to conspicuously identify the tax record or land documents utilized by the applicant to verify the name and address of each landowner of record, and the record date used by the applicant to determine the landowner of record. A copy of the proposed regulation is attached to the parties' Settlement Agreement and the parties agree to support Staff's proposal to amend the regulations.

29. Staff is also contemplating a requirement that the utilities maintain copies of the records relied upon to make the certification about the identity of the landowner of record for a specified period of time, perhaps five years. The records would have to be made available for inspection by Staff upon request.

30. Staff is also seeking to institute changes to the CPCN process to require applicants to provide a printed name, mailing address, and phone number, and in the case of artificial entities, such as an LLC, to specify the nature of the office and the individual executing the landowner petition.

31. Staff also considered recommending a requirement that the CPCN applicant file with the Commission the documentation relied upon to determine the landowner of record. However, the Staff concluded that the drawbacks of imposing such a requirement would outweigh the benefits. First, to review the extra paperwork would consume additional Staff time. By law, the Commission must complete the CPCN review process within 90 days. See 26 Del. C. §§ 203C (h)(1) and 203D

(g)(1). Ms. Maucher has testified that the review process is lengthy and time-consuming as it is, and it would seem unduly burdensome to require Staff to review a large volume of landowner documents a second time, after the utility has already done so and certified the results. Under Staff's proposal, utilities will be required to maintain the backup documentation for inspection by Staff in the event a question arises. Id. at 5-6. Ms. Maucher testified that it is preferable to have the utilities preserve the records, rather than the Commission Staff, because the Staff has limited file space that will not accommodate the thousands of additional pages of CPCN materials that would be submitted with the applications. Id. at 4-6. She also testified that requiring the utilities to file the supporting documentation would add unnecessary copying expense that will be paid ultimately by the ratepayers. Id. at 5. The Staff indicated that the problems with the Windstone CPCN applications are isolated occurrences, and the existing CPCN procedures, augmented by the latest improvements and recommendations by Staff, should suffice to prevent future problems like Windstone. Id. at 4-5.

VI. ANSWERS TO THE QUESTIONS POSED BY THE COMMISSION

32. Each question posed by the Commission in PSC Order No. 7128 will be answered below.

33. How did Tidewater and TESI come to list a particular party as the landowner of record, when another corporation held the complete fee title interest in the property at the time of the application?

Answer: Tidewater and TESI presented documentary evidence, prefiled testimony, and live testimony at the April 4, 2007 evidentiary hearing to explain how it came to list Integrity Homes,

II, LLC as the landowner of record in its CPCN applications, when the actual landowner was Island Farm, Inc.

Tidewater's water and TESI's wastewater CPCN applications were submitted to the Commission on May 9, 2005 and July 5, 2005, respectively. The applications identified the landowner as Integrity Homes II, LLC. As required by the Commission's regulations, the applications included copies of letters from Tidewater and TESI dated May 6, 2005 to Mr. Colby D. Cox, advising Integrity Homes of its rights, as the owner of the property, to object to the issuance of the CPCNs. In addition, the applications were supported by petitions signed by representatives of Integrity Homes. The signed petitions identified Integrity Homes as the recorded property owner according to current tax records of the parcel.

It is now undisputed that, in early July 2005, the record owner of the parcel was Island Farm, Inc. On October 28, 2003, about one year and nine months before TESI submitted its water and wastewater CPCN applications to the Commission, Integrity Homes had entered into a written contract with Island Farm, Inc. to purchase the parcel. Therefore, while Integrity Homes was not the record owner of the parcel at the time the applications were submitted, it was the equitable owner.

Tidewater and TESI have explained that they relied upon the representations of the representatives of Integrity Homes in submitting their CPCN applications to the Commission. Tidewater and TESI admit that they did not take steps to verify whether Integrity Homes was the record owner. However, Tidewater and TESI presented evidence that, in January 2007, they adopted a new written corporate

policy that requires that the identity of the record owner be verified by obtaining the name of the parcel owner from the appropriate county government website, and comparing it to the petition that is to be used to support the CPCN application.

34. Do the facts require modification or vacation of Order No. 6735?

Answer: The parties' Settlement Agreement renders this question moot. TESI has agreed to ask the Commission for permission to abandon the wastewater CPCN for the Windstone development.

35. Should AWMI's application for the wastewater CPCN for Windstone be approved by the Commission?

Answer: AWMI's wastewater CPCN application is supported by a Petition signed by the Windstone, LLC, landowner of record on the date AWMI's application was filed, as required by 26 Del. C. §203D(2)(i). Therefore, upon the Commission's approval of the abandonment of the wastewater CPCN previously awarded to TESI, it is recommended that the Commission award the wastewater CPCN for Windstone to AWMI.

36. Should the course of conduct of any utility concerning the Parcel be investigated for potential regulatory or statutory violations?

Answer: As stated above, the Commission has considered and approved water and wastewater CPCN applications for thousands of parcels of land. Less than a handful of those applications have been called into question, and only one has resulted in a contested docket. Given that Tidewater, TESI, Artesian, and AWMI are among the largest water and wastewater utilities in Delaware, and would have,

collectively, submitted hundreds of CPCN applications, it appears that overall they have been reasonably diligent in meeting their regulatory and statutory duties. Presumably, with the improvements to the CPCN process recommended by Staff and the new policy put in place in January 2007 by Tidewater and TESI, the Commission will not, in the future, see a repeat of the circumstances that led to this contested docket. Therefore, I do not recommend that the Commission order an investigation of any utility for potential regulatory or statutory violations.

VII. RECOMMENDATIONS

37. In summary, and for the reasons discussed above, I propose and recommend to the Commission the following:

A. That the Commission approve in its entirety, as just, reasonable and in the public interest, the Proposed Settlement Agreement, which is attached hereto as "Attachment B;"

B. That the Commission permit the parties to take the steps required to implement the parties' Proposed Settlement Agreement;

C. That the Commission decline to initiate a further investigation of the utilities that are parties to this docket for potential regulatory or statutory violations related to the water and wastewater CPCNs and CPCN applications for the Windstone development.

Respectfully submitted,

/s/ Ruth Ann Price_____
Ruth Ann Price
Hearing Examiner

Dated: May 14, 2007

A T T A C H M E N T "B"

Formatted: Top: 57.6 pt, Bottom: 57.6 pt, Header distance from edge: 36 pt

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))

SETTLEMENT AGREEMENT

On this 20th day of April, 2007, Tidewater Utilities, Inc. ("Tidewater"), Tidewater Environmental Services, Inc. ("TESI"), Artesian Water Company, Inc. ("Artesian"), Artesian Wastewater Management, Inc. ("AMWI"), Windstone LLC ("Windstone"), the Division of the Public Advocate ("Public Advocate"), and the Commission Staff ("Staff"), (all of whom together are the "Settling Parties") hereby propose a Settlement Agreement for consideration by the Commission that, in the Settling Parties' view, appropriately resolves the disputed issues raised among the parties to this proceeding.

I. INTRODUCTION

1. On October 11, 2005, the Commission granted a Certificate of Public Convenience and Necessity ("CPCN") to TESI to provide public utility wastewater services to a parcel of real property in Sussex County designated Sussex County Tax Map Parcel No. 235-22.00-24.00

("Parcel"). 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."⁵

2. On December 8, 2006, Windstone LLC ("Windstone") submitted a letter asking the Commission to vacate or void the prior CPCN granted to TESI for the Parcel. Windstone asserted that at the time of TESI's application, the land owner of the Parcel was "Island Farm, Inc.," not Integrity Homes (as identified by TESI).⁶

3. On January 12, 2007, AWMI filed its own CPCN application to provide wastewater utility services to the Parcel. In its application, AWMI represented that (according to Sussex County land records) as of January 12, 2007, the land owner of the parcel is "Windstone LLC." The application was supported by a petition for AWMI's wastewater services carrying the signature of a representative of Windstone, LLC.

4. TESI responded to Windstone's request to vacate TESI's CPCN (and indirectly AWMI's CPCN application).

5. On February 6, 2007, the Commission entered Order No. 7128, to address the dispute about the wastewater CPCN for the Windstone

⁵See 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."

⁶Windstone represents that it is the current record owner and 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. On August 12, 2005, Island Farm Holding, LLC merged with and into Windstone, LLC, a limited liability company organized and existing under the laws of Delaware.

development, and referred the matter to Hearing Examiner Ruth A. Price for further proceedings, including an evidentiary hearing.

6. After pre-hearing discovery was completed, Hearing Examiner Price conducted an evidentiary hearing on April 4, 2007.

7. On April 11, 2007, at the suggestion of the Commission Staff, all of the parties engaged in a mediation which was conducted by counsel for the Commission Staff, as mediator. The parties were able to reach a settlement at the mediation.

II. SETTLEMENT PROVISIONS

8. The terms of the Settling Parties' settlement agreement are as follows:

(a) Tidewater and TESI agree that TESI will apply to the Commission to abandon the wastewater CPCNs for the Windstone development and another development identified as Cool Springs. TESI's CPCN application to provide wastewater service for the Cool Springs development was approved by the Commission in Order No. 6780 (June 25, 2005). AMWI agrees to proceed with its previously filed application for the wastewater CPCN for the Windstone development and TESI and Tidewater agree not to oppose the application, which is supported by Windstone. In addition, AMWI will file an application with the Commission seeking to obtain the wastewater CPCN for Cool Springs.

(b) Artesian will apply to the Commission to abandon its water CPCNs for residential parcels at Hazel Farm (approved by DNREC May 16, 2001, 01-CPCN-03) and SK Pepper Creek. Tidewater will apply for the water CPCNs for Hazel Farm and SK Pepper Creek.

(c) TESI will forego any attempt to recover the approximate \$80,000 in engineering-related expenses that it incurred in preparing to provide wastewater service to the Windstone development and will provide AMWI with the documents and information obtained through its engineering work.

(d) Tidewater, TESI, Artesian, and AMWI agree to engage in additional mediation efforts with the assistance of Staff and Staff counsel to resolve their differences over other projects and service areas.

(e) Tidewater and Artesian agree to jointly petition the Commission to seek a change in water regulation 6.6, which presently prohibits a water utility from refusing or discontinuing water service for failure to pay for wastewater service. They agree to ask the Commission to approve a regulation allowing a water utility to refuse or discontinue water service for nonpayment of wastewater service. The Public Advocate and the Commission Staff have made no commitment to support the joint Tidewater and Artesian petition, and are at liberty to oppose such a petition.

(f) The Settling Parties agree that, based on Windstone's stated desire to retain Tidewater as its water provider, the CPCN to provide water service to the Windstone development awarded to Tidewater in Order No. 6686 (August 9, 2005) is valid and not subject to challenge.

(g) The Settling Parties agree to support Staff's proposal to amend the Commission's regulations governing wastewater CPCNs to include the provisions attached hereto as Exhibit A, which have been proposed for inclusion in the regulations governing water CPCNs.

(h) Tidewater, TESI, Artesian, and AMWI will take the steps necessary to implement the terms of this Settlement Agreement, and the Settling Parties agree that they will not interfere in efforts to implement the terms of this Settlement Agreement. Likewise, Tidewater and TESI agree not to take any action which may interfere with AWMI's efforts to obtain the wastewater CPCNs for Windstone and Cool Springs; and Artesian and AMWI agree not to take any action which may interfere with Tidewater's efforts to obtain the water CPCNs for Hazel Farm and SK Pepper Creek.

III. STANDARD PROVISIONS AND RESERVATIONS

9. The provisions of this Settlement Agreement are not severable, unless otherwise agreed by the Settling Parties.

10. This Settlement Agreement recommends a compromise for the purposes of settlement and shall not be regarded as a precedent with respect to any future case or in any existing proceeding, except that, consistent with and subject to the provisos expressly set forth below, this Settlement Agreement shall preclude any Settling Party from taking a contrary position with respect to issues specifically addressed and resolved herein in proceedings involving the review of this Settlement Agreement, including any appeals. No party to this Settlement Agreement necessarily agrees or disagrees with the treatment of any particular item, any procedure followed, or the resolution of any particular issue addressed in this Settlement Agreement other than as specified herein, except that each Settling Party agrees that the Settlement Agreement may be submitted to the Commission for a determination that it is in the public interest and that no Settling Party will oppose such a determination.

11. In the event that this Settlement Agreement does not become final, either because it is not approved by the Commission or because it is the subject of a successful appeal and remand, each of the Settling Parties reserves its respective rights to submit additional testimony, file briefs, or otherwise take positions as it deems appropriate in its sole discretion to litigate the issues in this proceeding.

12. The Settlement Agreement will become effective upon the Commission's issuance of a final order approving it and all the settlement terms and conditions without modification. After the issuance of such final order, the terms of this Settlement Agreement shall be implemented and enforceable notwithstanding the pendency of a legal challenge to the Commission's approval of it, or to actions taken by another regulatory agency or Court, unless such implementation and enforcement is stayed or enjoined by the Commission, another regulatory agency, or a Court having jurisdiction over the matter.

13. The Settling Parties may enforce this Settlement Agreement through any appropriate action before the Commission or through any other available remedy. The Settling Parties shall consider any final Commission order related to the enforcement or interpretation of this Settlement Agreement as an appealable order to the Superior Court of the State of Delaware. This shall be in addition to any other available remedy at law or in equity.

14. If a Court grants a legal challenge to the Commission's approval of this Settlement Agreement and issues a final non-appealable order which prevents or precludes implementation of any

material term of this Settlement Agreement, or if some other legal bar has the same effect, then this Settlement Agreement is voidable upon written notice by any of the Settling Parties.

15. This Settlement Agreement resolves all of the issues specifically addressed herein and precludes the Settling Parties from asserting contrary positions during subsequent litigation in this proceeding or related appeals; provided, however, that this Settlement Agreement is made without admission against or prejudice to any factual or legal positions which any of the Settling Parties may assert (a) in the event that the Commission does not issue a final, non-appealable order approving this Settlement Agreement without modifications; or (b) in other proceedings before the Commission or other governmental body so long as such positions do not attempt to abrogate this Settlement Agreement. This Settlement Agreement is determinative and conclusive of all of the issues addressed herein and, upon approval by the Commission, shall constitute a final adjudication as to the Settling Parties of all of the issues in this proceeding.

16. This Settlement Agreement is expressly conditioned upon the Commission's approval of all of the specific terms and conditions contained herein without modification. If the Commission should fail to grant such approval, or should modify any of the terms and conditions herein, this Settlement Agreement will terminate and be of no force and effect, unless the Settling Parties agree to waive the application of this provision. The Settling Parties will make their best efforts to support this Settlement Agreement and to secure its approval by the Commission.

17. It is expressly understood and agreed that this Settlement Agreement constitutes a negotiated resolution of the issues in this proceeding and any related court appeals.

IV. CONCLUSION

IN WITNESS WHEREOF, intending to legally bind themselves and their successors and assigns, the undersigned parties have caused this Settlement Agreement to be signed by their duly authorized representatives.

By: /s/ Bruce E. Patrick
Tidewater Utilities, Inc.

By: /s/ Bruce E. Patrick
Tidewater Environmental Services, Inc.

By: /s/ Dian C. Taylor
Artesian Water Company, Inc.

By: /s/ Dian C. Taylor
Artesian Wastewater Management, Inc.

By: /s/ Mario Capano
Windstone, LLC

By: /s/ G. Arthur Padmore
Division of the Public Advocate

By: /s/ Kevin S. Neilson
Public Service Commission Staff