

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF)
TIDEWATER ENVIRONMENTAL SERVICES,)
INC. INC. FOR A CERTIFICATE OF PUBLIC) PSC DOCKET NO. 11-WW-008
CONVENIENCE AND NECESSITY TO PROVIDE) ("WANDENDALE 101111")
WASTEWATER SERVICES PURSUANT TO 26)
DEL. C. §203D)
(FILED NOVEMBER 10, 2011))

IN THE MATTER OF THE APPLICATION OF)
TIDEWATER ENVIRONMENTAL SERVICES,)
INC. FOR A CERTIFICATE OF PUBLIC) PSC DOCKET NO. 11-WW-009
CONVENIENCE AND NECESSITY TO PROVIDE) ("WANDENDALE 102411")
WASTEWATER SERVICES PURSUANT TO 26)
DEL. C. §203D)
(FILED DECEMBER 1, 2011))

IN THE MATTER OF THE APPLICATION OF)
TIDEWATER ENVIRONMENTAL SERVICES, INC.) PSC DOCKET NO. 11-329WW
FOR AN INCREASE IN WASTEWATER RATES)
(FILED JULY 29, 2011))

ORDER NO. 8124

This 20th day of March, 2012, the Public Service Commission (the "Commission") determines and orders the following:

WHEREAS, on November 10, 2011, Tidewater Environmental Services, Inc. ("TESI") filed an application with the Commission (the "First Application") requesting a Certificate of Public Convenience and Necessity ("CPCN") to provide wastewater services to four parcels of land east of Georgetown and one parcel of land northeast of Millsboro, Sussex County, Delaware (the "First Proposed Service Area"); and

WHEREAS, on December 1, 2011, TESI filed an application with the Commission (the "Second Application") requesting a CPCN to provide wastewater services to six parcels of land east of

Georgetown, Sussex County, Delaware (the "Second Proposed Service Area"); and

WHEREAS, on February 9, 2012, the Commission reviewed (i) the First Application, together with a memorandum from the Commission Staff dated January 23, 2012, which concluded the First Application complied with all statutory and regulatory requirements and recommended that the Commission approve the First Application; (ii) the Second Application, together with a memorandum from the Commission Staff dated January 23, 2012, which concluded the Second Application complied with all statutory and regulatory requirements and recommended that the Commission approve the Second Application; and (iii) proposed orders for both the First and Second Applications; and

WHEREAS, the Delaware Public Advocate ("DPA") requested that the Commission delay making a decision on whether to grant or deny the CPCNs TESI requested in the First and Second Application until the March 6, 2012 Commission meeting. The DPA stated he needed more time to consider the two matters pending his review of supplemental information he had obtained in litigation in a pending, separate TESI matter; and

WHEREAS, the Commission voted to postpone its decision on the First and Second Applications until the March 6, 2012 meeting; and

WHEREAS, the DPA submitted to the Commission a document dated March 1, 2012, which was labeled as "Attorney - Client Privileged Communication - Prepared in Anticipation of

Litigation" (the "Submission"), and the DPA did not provide a copy of this Submission to anyone other than the DPA's counsel, the Commissioners, counsel to the Commission, and the Executive Director of the Commission; and

WHEREAS, at its March 6, 2012 meeting, the Commission reviewed the Submission, heard the arguments of the DPA and TESI, and consulted with its legal counsel from the Delaware Department of Justice; and

WHEREAS, after a full consideration of the arguments presented to the Commission at the meeting, and with the advice of its legal counsel, the Commission concluded that the Submission was an ex parte consultation as described in 29 Del. C. §10129¹ and that the Submission is related to the First Application, the Second Application, and another case pending before the Commission (i.e., PSC Docket No. 11-329WW); and

WHEREAS, the Commission further concluded that, as an ex parte consultation, the Submission should be sent to all parties in PSC Docket Nos. 11-WW-008, 11-WW-009, and 11-329WW so they could have the opportunity to review the Submission, participate in any discussion regarding the information contained in the Submission, and respond to the Submission; and

WHEREAS, 29 Del. C. §10128(a) requires the Commission to make its final decisions based upon the entire record of a case,

¹ 29 Del. C. §10129 provides, in pertinent part, "No member or employee of an agency assigned to participate in any way in the rendering of a case decision shall discuss or communicate, directly or indirectly, respecting any issue of fact or law with any person or party, except upon notice to and opportunity for all parties to participate."

and 29 *Del. C.* §10127 provides, in pertinent part, that for cases before the Commission, all correspondence between the Commission and the parties must be included in the Commission's record of the case;

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE
AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:**

1. That, for the reasons set forth in the body of this Order, the Commission finds that the submission dated March 1, 2012 (the "Submission"), which the Delaware Public Advocate sent to the Commission is an *ex parte* consultation as defined in 29 *Del. C.* §10129 and must be provided to the parties in PSC Docket Nos. 11-WW-008, 11-WW-009, and 11-329WW so that such parties have the opportunity to review the Submission, participate in any discussion regarding the information contained in the Submission, and respond to the Submission.

2. That the Delaware Public Advocate is hereby directed to provide to all parties in PSC Docket Nos. 11-WW-008, 11-WW-009, and 11-329WW a copy of the Submission on or before seven (7) business days after the effective date of this Order, redacted to remove any material that is claimed to be confidential.

3. That the Delaware Public Advocate may require any party in PSC Docket Nos. 11-WW-008, 11-WW-009, and 11-329WW to execute a confidentiality agreement before such party may receive an unredacted version of the Submission. Such confidentiality agreement may prohibit a signatory from disclosing any confidential information that is not within the public domain,

including, but not limited to, any trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature and any records pertaining to pending or potential litigation which are not records of any court.

4. That the Secretary shall promptly serve a copy of this Order on the Division of the Public Advocate.

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:

Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

/s/ Jeffery J. Clark
Commissioner

ATTEST:

/s/ Alisa Carrow Bentley
Secretary