

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

IN THE MATTER OF THE APPLICATION OF )  
ARTESIAN WATER COMPANY, INC., FOR A )  
CERTIFICATE OF PUBLIC CONVENIENCE AND )  
NECESSITY TO PROVIDE WATER SERVICES )  
TO A TOTAL OF TWENTY-NINE PARCELS OF ) PSC DOCKET NO. 05-CPCN-01  
LAND LOCATED IN THE NORTH MURDERKILL, )  
SOUTH MURDERKILL, AND MILFORD )  
HUNDREDS, KENT COUNTY, DELAWARE )  
(FILED JANUARY 10, 2005 AND AMENDED )  
FEBRUARY 7, 2005) )

IN THE MATTER OF THE APPLICATION OF )  
TIDEWATER UTILITIES, INC., FOR A )  
CERTIFICATE OF PUBLIC CONVENIENCE AND )  
NECESSITY TO PROVIDE WATER SERVICES ) PSC DOCKET NO. 05-CPCN-11  
TO FOUR PARCELS OF LAND LOCATED NEAR )  
THE TOWN OF FREDERICA, KENT COUNTY, )  
DELAWARE (FILED MARCH 14, 2005) )

**ORDER NO. 6616**

This 10<sup>th</sup> day of May, 2005, the Commission determines and Orders the following:

1. On January 10, 2005, Artesian Water Company, Inc. ("Artesian"), filed an application to obtain a Certificate of Public Convenience and Necessity ("CPCN") to provide water utility services in a new service territory encompassing some twenty odd parcels of property located in Kent County. The application is premised on the provisions of 26 Del. C. § 203C(e)(1)b. (2004 Supp.) which provides that the Commission shall grant a CPCN (after notice) if the utility has presented "a petition requesting such service signed by a majority of the landowners of the proposed territory to be served." The parcels contained in Artesian's application are not all contiguous to each other, and Artesian has presented petitions executed by a

majority of the landowners of the parcels, but not all the landowners of all the parcels. PSC Dckt. No. 05-CPCN-01.

2. On March 14, 2005, Tidewater Utilities, Inc. ("Tidewater"), filed its own application for a certificate to provide utility water services to a new service territory encompassing four parcels of land in Kent County. Like Artesian's, Tidewater's application for a CPCN relies on the provisions of 26 Del. C. § 203C(e)(1)b. (2004 Supp.). Two of the parcels in Tidewater's proposed service territory had initially been included in Artesian's CPCN application.<sup>1</sup> With its application, Tidewater includes petitions for water service executed by landowners of all the parcels. PSC Dckt. No. 05-CPCN-11.<sup>2</sup>

3. By letter dated April 28, 2005, the Town of Frederica (the "Town") objected to eight particular parcels of property being included in the proposed service territories of either Artesian or Tidewater.<sup>3</sup> Five of the parcels listed by the Town are encompassed within Artesian's proposed service territory; two fall within Tidewater's proposed service territory; and one was originally within

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<sup>1</sup>After Tidewater filed its application, Artesian removed these two parcels from its application. Later, the landowners of the two parcels filed "opt-out" petitions to have their properties removed from Artesian's proposed service territory. 26 Del. C. § 203C(i) (2004 Supp.).

<sup>2</sup>Tidewater also filed a second application for another new service territory encompassing five other parcels. PSC Dckt. No. 05-CPCN-04. Two of the parcels in this application had also been included in the service territory proposed by Artesian in its earlier application for a CPCN. However, the landowners of these two parcels also later filed petitions to "opt-out" of Artesian's service territory. See 26 Del. C. § 203C(i) (2004 Supp.). None of the parcels encompassed by this second Tidewater application are included in the list of parcels later objected to by the Town of Frederica.

<sup>3</sup>The Town had earlier, in February 2005, filed a letter objecting to eight parcels being included in Artesian's service territory.

Artesian's proposed service territory but is now the subject of a landowners' "opt-out" petition. The Town alleges that the eight parcels (while outside of the Town's present limits) are in the municipality's "growth area," and that the Town, in the near future, plans to annex these areas and thereafter provide municipal water and other services to the properties. The Town also says that the owners of eight properties and the Town have discussed the matter and that municipal water services are desired by both the parcel owners as well as the Town.<sup>4</sup>

4. In light of the Town's objection, the Commission will refer these two CPCN applications by Artesian and Tidewater to a Hearing Examiner in order to have him build a more complete record for final Commission consideration. The Town's objection alleges that the landowners now desire to have municipal water services (once annexation comes). On one level, that assertion poses questions related to whether the two applications fulfill the conditions of § 203C(e)(1)b. However, the Town's objection also suggests a second - potentially lurking - issue. What is the appropriate interplay between the statutory requirements for a CPCN set forth in § 203C and other legislative directives which call upon municipalities to develop

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<sup>4</sup>The Town suggests that "this information would seem to call into question whether the owners of the properties listed have in fact requested service by" Artesian or Tidewater. Letter from Wm. W. Pepper, Sr., solicitor for the Town, at pg. 2 (dated April 28, 2005). In this regard, Staff reports that in the context of Artesian's application, the landowners of one of the now five "contested" parcels executed a petition for water service from Artesian. Landowners from the other four "contested" parcels have not filed "opt-out" petitions for their properties. In the case of Tidewater's application, the landowners of both contested properties executed documents requesting water service from Tidewater.

(in coordination with county government and State agencies) comprehensive land use plans? Under those other directives, such development plans are to speak to municipal development strategies (including the delivery of municipal services) to be applied not only within the Town's present boundaries but to surrounding areas where annexation might be contemplated.<sup>5</sup> Of course, at this juncture, the Commission does not express any position on the merits of the Town's objections at either of these two levels. In fact, the Commission is unsure whether the municipal comprehensive plan process is, on the facts, applicable here, or, if it is, whether such statutory process carries "veto-weight" in the context of a CPCN sought under § 203C. The Town's letter of objection does not mention the planning process; it simply refers to the Town's "growth area" and a contemplated annexation. With this uncertainty, the referral to a Hearing Examiner will allow all the issues, both factual and legal, to be more clearly defined and will give the Commission the benefit of the Examiner's proposed findings and recommendations. If the matter does eventually need to delve into issues surrounding the § 203C certification process and its interplay with municipal comprehensive plans, the Commission would expect the Hearing Examiner to provide interested county and

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<sup>5</sup>See e.g., 22 Del. C. § 702 (2004) (municipal comprehensive plans); 22 Del. C. § 101 (2004) (guidelines for proposed municipal annexations). The Commission notes that if a Town completes an annexation under the process set forth in 22 Del. C. § 101 and the to-be annexed area is not already encompassed within a service territory under a water utility CPCN, the entire certification process under § 203C does not apply to the Town's ability to provide water service to that annexed area. 26 Del. C. § 203C(a) (2004 Supp.).

State officials - such as the office of State Planning Coordination - the opportunity to make their views known.

5. Both Artesian's and Tidewater's applications include within their proposed service territories parcels not contained in the Town's list of contested properties. The referral here does not preclude either utility, if it so chooses, from reformatting its application to allow the Commission to consider an amended proposed service territory encompassing those parcels not involved in the Town's objection. Of course, such a revised proposed service territory would have to fit, on its own, the requirements of § 203C.<sup>6</sup> The Commission leaves it to each involved utility to decide whether it might wish to press ahead and ask the Commission to consider a truncated service territory.

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

1. That the applications for Certificates of Public Convenience and Necessity filed by Artesian Water Company, Inc., on January 10, 2005, and Tidewater Utilities, Inc., on March 14, 2005, and the objection filed by the Town of Frederica by letter dated April 28, 2005, are now referred to Senior Hearing Examiner William F. O'Brien. Pursuant to 26 Del. C. § 511, Senior Examiner O'Brien shall conduct such proceedings, and preside over such hearings as deemed

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<sup>6</sup>If a utility might decide to move ahead with such a revised service territory, it should make sure it continues to have a basis under § 203C for a CPCN for its "contested" parcels, judged on a stand-alone basis. Otherwise, an earlier grant of a CPCN for a revised service territory might make this proceeding moot as to the remaining contested parcels. Of course, the Commission does not now express any opinion whether either utility is entitled to a CPCN for any such revised service territory. There may, or may not, be other glitches which prevent the award of such a CPCN under the requirements of § 203C.

necessary or appropriate, to construct a full and complete record on the applications and objection as it applies to the eight parcels of land listed in the Town of Frederica's objection dated April 28, 2005. Senior Examiner O'Brien shall thereafter submit a Report to the Commission containing proposed findings and a recommended decision concerning the two applications and the Town of Frederica's objection. Senior Examiner O'Brien is hereby delegated the authority, under 26 Del. C. § 102A, to determine the content and manner of any further public notice deemed necessary or appropriate in this matter. In addition, Senior Examiner O'Brien is delegated the authority under Rule 21 of the Commission's Rules of Practice and Procedure to grant or deny petitions to intervene. Senior Examiner O'Brien shall endeavor to conduct the proceeding and file his Report in an expedited manner.

2. That, as explained in ¶ 5 of the Body of this Order, the referral in Ordering Paragraph 1 does not foreclose either Artesian Water Company, Inc., in PSC Docket No. 05-CPCN-01, or Tidewater Utilities, Inc., in PSC Docket No. 05-CPCN-11, from asking the Commission to consider granting a Certificate of Public Convenience and Necessity to encompass a revised proposed service territory which does not include any of the parcels included in the Town of Frederica's objection filed April 28, 2005.

3. That the Secretary shall serve a copy of this Order on the two applicants, the Town of Frederica, and the Division of the Public Advocate. In addition, the Secretary shall deliver a copy of this Order to the Office of State Planning Coordination.

4. That Francis J. Murphy, Esquire, is designated as Rate Counsel for this matter.

5. That Artesian Water Company, Inc., and Tidewater Utilities, Inc., are hereby notified that they will be assessed the costs of this proceeding under 26 Del. C. § 114.

6. 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/ Joshua M. Twilley  
Vice Chair

/s/ Joann T. Conaway  
Commissioner

/s/ Jaymes B. Lester  
Commissioner

/s/ Dallas Winslow  
Commissioner

ATTEST:

/s/ Karen J. Nickerson  
Secretary