

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE COMPLAINT FILED)
BY JOSEPH CANTINELLA AGAINST ARTESIAN)
WATER COMPANY, INC. FOR EXCESS CHARGES) PSC DOCKET NO. 369-10
FOR THE LAST TWO YEARS (FILED JULY 12,)
2010))

ORDER NO. 7938

AND NOW, this 10th day of May, 2011, the Delaware Public Service Commission (the "Commission") having reviewed the record in this case, and having received the Findings and Recommendations of the Hearing Examiner dated March 3, 2011, and having reviewed the Exceptions of the Commission Staff and the Attorney General, and having heard oral argument from the participants at its regularly-scheduled April 19, 2011 meeting; and having deliberated in public at that April 19, 2011 meeting;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the Findings and Recommendations of the Hearing Examiner attached hereto as Exhibit A are adopted by the Commission in their entirety as the Commission's own decision. (4-1, Chair McRae voting nay).

2. That the Commission reserves the jurisdiction and authority to enter such further Orders in this docket as may be necessary or appropriate.

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/ William F. O'Brien
Executive Director

E X H I B I T "A"

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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATE: March 3, 2011

**Mark Lawrence
Hearing Examiner**

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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

Mark Lawrence, duly appointed Hearing Examiner in this Docket pursuant to the assignment by then Acting Executive Director on August 16, 2010, reports to the Commission as follows:

I. APPEARANCES

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

JOSEPH C. HANDLON, ESQUIRE, Deputy Attorney General, Delaware Department of Justice
Kevin Neilson, PSC Regulatory Policy Administrator

On behalf of Artesian Water Company, Inc.:

JOHN J. SHREPPLER, II, ESQUIRE, Vice President, Asst. Sec. & General Counsel
David B. Spacht, Chief Financial Officer & Treasurer
Malcomb T. George, Manager of Customer Relations

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

KENT WALKER, ESQUIRE, Deputy Attorney General, Delaware Department of Justice

II. BACKGROUND

1. On July 12, 2010, Joseph Catinella filed a formal Complaint against Artesian Water Company ("Artesian" or the "Company").¹ (Exh. 2) The Complaint alleged that, although Mr. Catinella had shut off the water service at a residential property he owns in unincorporated New Castle County in March 2008, he began receiving water bills from Artesian in November 2009. (*Id.*; Tr.-9) Mr. Catinella's Complaint challenges the quarterly "Customer Charge" of \$34.67, but not the Distribution System Improvement Charge (the "DSIC Charge") nor the Public Fire Hydrant Ready to Serve Charge (the "Fire Protection Charge").² (*Id.*) The Customer Charge is charged regardless of water usage. (Exh. 7-Artesian's Tariff, 23rd Rev. Sheet No.3)

2. Mr. Catinella's Complaint sought reimbursement of \$135.25 of Customer Charges and a determination that he is not responsible for future Customer Charges. (*Id.*) Staff and the DPA agree with Mr. Catinella that, after he stopped service, Mr. Catinella was no longer responsible for the Customer Charge. However, Staff and the DPA also maintain that, if a customer discontinues service, they are also not responsible for the Fire Protection and DSIC charges since Mr. Catinella is longer an Artesian "customer." (See Staff's Brief filed 12/14/10, p. 11; DPA's Brief filed 12/20/10.)

3. On August 11, 2010, Artesian filed its Answer to the Complaint (the "Answer"), as well as a Motion to Dismiss, arguing that Mr. Catinella was properly billed for the Customer Charge pursuant to Artesian's Tariff. ("the Tariff") The Tariff was approved in Artesian's most

¹ References to "Exh." are references to the Hearing Exhibits admitted during, and after, the evidentiary hearing. Citations to testimony from the Evidentiary Hearing Transcript shall be indicated by "Tr" followed by the page number(s) and line number(s) at which the cited testimony appears.

² The purpose of the statutorily-mandated DSIC charge is to reimburse a utility for water system improvements such as replacing water mains and meters, and system improvements to meet water quality standards. (See 26 Del. C. §314; 23rd Revised Tariff Sheet No. 4 & 28th Rev. Sheet No. 5, Sept. 23, 2009.) Utility expansion costs cannot be included in the DSIC charge. (26 Del. C. §314) The purpose of the Public Fire Hydrant Charge is to reimburse Artesian for "over sizing [its] system [i.e. hydrants, mains, pumps, etc.] to accommodate fire protection or the availability of [water for] fire service at properties." (Tr.-44 LL 3-16)

recent rate case, pursuant to PSC Order No. 7657 (September 22, 2009). Artesian further maintains that the "Customer Charge" is defined in its Tariff as a charge for the "availability of service" and therefore it is proper to bill Mr. Catinella because service is presently "available" to Mr. Catinella's property, which is located within Artesian's Service Territory. (See Artesian's Answer & Motion to Dismiss dated 8/10/10.)³

4. According to Artesian, since the Commission has permitted Artesian to charge an availability charge to seasonal beach residents whose water is disconnected during the colder months, Mr. Catinella is also responsible for the availability charge. (See Artesian's Memo. of Law filed 1/25/11, pp. 7-9.) Artesian argues that Mr. Catinella's inability to sell or lease his property has caused him to temporarily cease service, and that is not materially different from a seasonal beach resident who temporarily stops service, for example for 3, 6 or 9 months. (*Id.*)

5. After receiving no filings from Staff during the two (2) month period following the filing of the Complaint, on September 17, 2010, I granted Artesian's Motion to Dismiss and dismissed the Complaint without prejudice to re-file. My interim ruling was based upon Artesian's then uncontroverted position that Artesian's Tariff permitted it to charge the Customer Charge to Mr. Catinella.

6. Thereafter, on September 28, 2010, Mr. Catinella sent a letter to Artesian asking what he had to do to disconnect from Artesian's system in order to avoid future Customer Charges. (Exh. 2) On September 30, 2010, Artesian's Counsel, Jack Schreppler, Esq., responded as follows:

You will have to dig down to your water line between the curb-stop and your home, sever the line and crimp it. You must

³ Although Artesian's Answer and Motion to Dismiss were not admitted as exhibits at the evidentiary hearing, the parties agreed that both are part of the evidentiary record. (Tr.-17, Tr.-124-25) Also, it is undisputed that Mr. Catinella's property is located within Artesian's Service Territory pursuant to a Water Services Agreement described later.

contact our customer service department to have our representative witness this action. There is no charge for Artesian to observe this disconnection.

If and when you decide to have service restored, you will have to reconnect the service line to the curb-stop in Artesian's presence. There will be a \$50 charge for this reconnection, which is our standard charge for reconnection under the Tariff.

(Exh. 4)

7. On October 6, 2010, Mr. Catinella objected to Artesian's proposal that he crimp his service line to avoid the availability charge as "extreme." (Exh. 2) Thereafter, I reinstated Mr. Catinella's Complaint and scheduled an evidentiary hearing. The Division of Public Advocate (DPA) filed a statutory Notice of Intervention on October 21, 2010, over three months after the Complaint was filed. (See 29 Del. C. §8716(g) permitting DPA intervention.)

III. THE EVIDENTIARY HEARING

8. On November 17, 2010, I held an evidentiary hearing in Dover.⁴ Complainant Mr. Catinella, Artesian's Chief Financial Officer (CFO) David B. Spacht and Malcomb T. George, its Manager of Customer Relations, all testified. Unfortunately, neither Staff nor the DPA presented witnesses to testify.

9. **Complainant Joseph Catinella's Testimony.** Joseph Catinella testified that, pursuant to his request, in March 2008, Artesian had shut off water service to his property at the "curb stop." (Tr.-22, LL 5-9) The curb stop is the valve installed by Artesian to turn the water service to a property off and on. (Tr.-10 LL 1-5) In Mr. Catinella's case, the curb stop is located approximately three (3) feet from the sidewalk and sixteen (16) feet from the house. (Tr.-10, LL

⁴ Although this Complaint was filed by a single Artesian customer, due to the substantial legal issues involved, notice of the evidentiary hearing was published in *The News Journal* and the *Delaware State News*. The Affidavits of Publication and Notices of Hearing were marked as composite Exhibit "1" at the evidentiary hearing.

6-15) The curb stop is accessed by a special wrench which turns the valve on and off. (Tr.-131, LL 18-23)

10. Mr. Catinella testified that the house is currently vacant and that he wants the water turned off so that the pipes do not freeze. (Tr. 10, LL 16-18) He is currently attempting to sell the property by word of mouth, but if unsuccessful, he may list the property for sale with a real estate agent or lease it to a tenant. (Tr.-11, LL 2-8; 39, LL 9-11) If Mr. Catinella leases the property, he hopes to require the tenant to place the water service in the tenant's name only. (Tr.-39, LL 9-17)

11. Mr. Catinella further testified, and Artesian's records confirm that, although Mr. Catinella shut off his water in March, 2008, he did not receive any bills from Artesian until November 2009. (Tr.-26 LL 1-8; Exh. 9) Mr. Catinella testified that when he received the first bill he was "shocked" because he thought he was "free of all charges from here on out." (Tr.-31, LL 9-16) Mr. Catinella complained to Artesian about the availability charge but the Company told him that he was responsible for paying it. (Exh. 5)

12. Mr. Catinella testified that, despite having several conversations with Artesian about his billing, he was never told that he had to crimp his water service line in order to disconnect from Artesian's system and to cease receiving bills.⁵ (Tr.-32, LL 9-24) He heard this for the first time when Artesian's counsel sent the letter to him on September 30, 2010, while this docket was pending. (*Id.*; *see also* Exh. 4.) Mr. Catinella rejected Artesian's crimping proposal as "extreme." (Tr.-13, LL 9-11) Mr. Catinella refused to crimp because "it could cause damage to the copper line going from the curb stop to my house." (Tr.-13, LL 12-15) Moreover,

⁵ Mr. Catinella testified that he asked an Artesian customer service representative whether he could stop the Customer Charge if Artesian removed his meter. According to Mr. Catinella, an Artesian representative told Mr. Catinella that he was responsible for the charge whether his meter was removed or not. (Tr.-33, LL 1-6) A 5/8" water meter remains at the property. (Tr.-33, LL 7-8)

Artesian conceded that the cost of hiring a licensed plumber to crimp the line would be a few hundred dollars, if not more. (Tr.-108-09)

13. **Respondent Artesian Water's Testimony.** David Spacht, Artesian's Chief Financial Officer and Vice President, testified first on Artesian's behalf. According to Mr. Spacht, Artesian has been charging a "Customer Charge" for availability of service to its residential customers since "around 1980."⁶ (Tr.-94, LL 15-24; Tr.-43, LL 12-19; Tr.-42 LL 22-24) Artesian's "seasonal customers," such as those residing at the beach only during the summer months, also pay the Customer Charge even if they temporarily turn their service off at the curb stop during the winter or colder months. (Tr.-51, LL 5-12) As of November 16, 2010, Artesian was charging the Customer Charge to 731 of Artesian's seasonal, temporary or construction customers, including Mr. Catinella.⁷ (Tr.-134, LL 6-15; TR.-47,79)

14. Mr. Spacht testified that, in order for Artesian to charge the Customer Charge, a property must be "connected" to Artesian's system, which is the case with seasonal, temporary⁸ and construction customers. (*Id.*; Tr.-46, LL 4-7) If a homeowner has a well or if a main is located near their property and the customer does not seek service, Artesian does not charge the Customer Charge because they are not connected to Artesian's system. (Tr.46-47) However, if a well owner seeks a water service stub which would be operable if his well fails, that customer would be charged a Customer Charge. (Tr.-47)

⁶ Artesian's most recent rate case concluded in September, 2009. (T-43, LL 20-22; see Commission Order No. 7657 (September 22, 2009.)) On September 22, 2009, Artesian filed the Tariffs at issue in this case. (Exh. 7)

⁷ Staff argues that I "need not be concerned" about seasonal, temporary or construction customers. (See Staff's Post-Hearing Brief, 12/14/10, p.16.) However, I disagree because the Commission should not decide Mr. Catinella's case "in a vacuum" by ignoring the fact that Artesian is currently charging the availability charge to seasonal, construction and temporary customers pursuant to Commission-approved Tariffs and prior Commission Orders. See Georgia-Pacific Corp. v. Delmarva Power & Light Company, 1992 WL 396307 (DE Chan. 1992)(unreported decision) (court refused "to interpret Tariff in a vacuum, based solely upon selected Tariff language, and ignore all events that preceded the Tariff, including [a] 1988 PSC Order.").

⁸ Artesian's Tariff provides that the availability charge applies to temporary customers. (Exh. 7; 23rd Rev. Sheet No. 6.)

15. Mr. Spacht was asked to describe the purpose of the Customer Charge. His testified as follows:

"It's an availability charge that deals with costs that aren't directly associated with the actual water consumed by a customer. It includes things such as meter reading, customer service, the depreciation on meter and services and other things that would be associated with having water available at the property....

Your meter readers include all the personnel that we employ there, meter installers, any of our people that are necessary to go out and make sure properties are properly receiving service and being billed appropriately, so that includes computer system, IT personnel. There's a whole host of overhead, what I would call costs that go into providing that bill to the customer. I don't have that in front of me but it is certainly in our cost allocation analysis that's presented at each of our rate applications and I don't know that that was submitted in this case but it's out there."

(Tr.-43, LL 3-11; Tr.-58, LL 5-24; Tr.-59, LL 1-7)

16. According to Mr. Spacht, since "around 1980," the Customer Charge has been "vetted in" every Artesian rate case before the Commission, including Artesian's most recent rate case which concluded in September, 2009. (Tr.-43, LL 12-24, Tr.-44 LL 1-2; Tr.-49 LL 3-15; see Commission Order No. 7657 (September 22, 2009)) Mr. Spacht testified that Mr. Catinella's situation was included in the Customer Class in Artesian's most recent rate case.⁹ (Tr.-43 LL 12-24 -- p.44 LL 1-2; Tr.-49 LL 3-15) Thus, in determining the rates to charge Artesian's residential customers with a 5"8 meter Customer, Fire Protection and DSIC charges, Artesian included Mr. Catinella's situation. (Tr.-49 LL 3-24, 52 LL 15-22)

⁹ Staff and DPA did not proffer any testimony disputing Mr. Spacht's testimony that Mr. Catinella was included in the Customer Class. In response to my post-hearing request for additional evidence as to this issue, Artesian proffered only a short excerpt of its expert witness testimony in the prior rate case generally describing the Customer Charge. (See Artesian's 1/25/11 filing.) Thus, the sole evidence is Mr. Spacht's undisputed but uncorroborated testimony that Mr. Catinella's situation was included in the Customer Class.

17. Mr. Spacht maintained that Mr. Catinella's situation was decided in Artesian's rate case after extensive expert witness testimony by the Commission, the DPA and Artesian. (Tr.-43 LL 20-24 – p.44 LL 1-2) According to Mr. Spacht, Artesian intends to file its next rate case in April 2011, approximately one (1) month from now.¹⁰ (Tr.-80 LL 23-24 – p.81 LL 1-5) Mr. Spacht also testified that, if the Commission agrees with Mr. Catinella in this case, in its 2011 rate case, Artesian will seek that Mr. Catinella's charges be absorbed by other Artesian ratepayers. (T-49, LL 3-15)

18. As to whether Artesian changed its policy in 2009 regarding billing customers for the Customer Charge after water service has been shut off, Mr. Spacht testified that Artesian's "policy is that all customers of the system that are connected to our system receive an availability charge. That's part of the Tariff, always has been and it's the same today as it's always been." (Tr.-45, LL 6-17)

19. According to Mr. Spacht's testimony, the reason Mr. Catinella was not billed for the availability charge until late 2009 was because Artesian changed its customer billing system.

"We had a long history of this policy and it's been in our tariff like I said for as long as I can remember. We did have a time when we were converting our legacy system, which was an in-house developed customer billing system, when we were transferring it over to our present system, the PeopleSoft system.

At that time we recognized that we had accumulated a long history of fire protection charges to properties that didn't have service to the company; in other words, they weren't connected at all. We had a fire hydrant in a neighborhood that didn't have service and they weren't part of our system. There was no way of collecting the fire protection charge because there was no way to shut off the property, there was no way to recover those costs.

We ended up having to write them off according to accounting rules because they were virtually uncollectible. At that

¹⁰ On January 28, 2011, Artesian filed a Notice of Intent with the Commission stating the company intended to file a request for a rate increase which would be filed on or before April 1, 2011. (See PSC file.)

time we wanted to make a change in our system to stop charging people who were not connected to our system for these fire protection charges and we did that. There was something done in our programming that accomplished that. Unfortunately what we found out as we moved forward here that it had the incorrect effect of stopping those charges to anybody we shut off for some period of time.

We found it out when we were charging some of our folks in Sussex County who routinely turn off service in the [winter] time for seasonal purposes but still get charged the availability charge because of services there year round and it was found there was some other properties in northern New Castle County that weren't getting charged those and we found out what had happened and corrected that and the bills started going back out.

But the policy was always there, was always in our rates, but for some period of time they had just stopped because of some changes we had made to our program and the system change."¹¹

(Tr.49, L19 - Tr.-51, L8)

20. **Testimony of Malcolm T. George.** Malcomb T. George, Artesian's Manager of Customer Relations, also testified at the evidentiary hearing. Mr. George testified about the theft of Artesian Water which costs the ratepayers, and why "the crimping proposal" was made to Mr. Catinella. Mr. George testified that people sometimes turn the water on at the curb stop, remove their water meter and insert a meter bar to circumvent the metering of used water. (Tr.-129-30; Tr.-140-41) Meter bars are easily obtainable from plumbing supply stores. (Tr.-132, LL 2-4) Artesian discovers 3 or 4 people per week using meter bars to steal water, although Artesian did not quantify how much these thefts cost the Company and, in turn, the ratepayers. (Tr.-130, LL

¹¹ In November, 2009, approximately one (1) month after its rate case was concluded and its new Tariffs were filed with the PSC, Artesian began billing Mr. Catinella. (Tr.-26 LL 1-8; Exh. 9) A cynic could conclude that, after the Commission entered its Order permitting Artesian's new rates (and thereby establishing its projected revenue), Artesian searched for existing, metered customers like Mr. Catinella who were not being billed the Customer Charge so that Artesian could increase its net profit in excess of what the Commission ordered. However, I accept Mr. Spacht's undisputed but uncorroborated testimony that, due to its computer system change, Artesian had simply mistakenly failed to bill the availability charge to Mr. Catinella (and others) in New Castle County.

16-18) Thus, due to theft, Artesian prefers not to turn off its customers' water at the curb stop. (Tr.-140-41)

21. Of course, none of the parties allege that Mr. Catinella stole water from Artesian or that he intends to do so, by using a meter bar, or otherwise. (Tr.-142, LL 11-16) Mr. Catinella filed this Complaint simply because he believes that it is unfair for Artesian to charge him the availability charge when he has discontinued service. (Tr.-31, LL 13-16) However, preferring not to allow turn-offs at the curb stop due to theft, Artesian proposed that Mr. Catinella crimp the water line between his house and the curb stop to remove himself from Artesian's service and not be charged the water availability charge. (Tr.-32 LL 9-16; 108 LL 5-12)

IV. DISCUSSION

A. **Should Mr. Catinella be permitted to shut off his service at the curb stop?**

Answer: Yes

22. As argued in their post-hearing Briefs, I agree with Staff and the DPA that Mr. Catinella has the right to discontinue the water service to his property at the curb stop. Rule 18 of Artesian's Tariff's "Rules and Regulations" entitled "Discontinuance of Service," provides that "[a]n owner must give the Company three (3) business days notice in order to discontinue (shut off) service. (Exh. 7)

23. Artesian's Tariff further requires a \$50 fee to have water shut off (\$65 during non-regular working hours). (Exh. 7; Artesian Orig. Tariff Sheet No. 6(a)) Thus, Artesian's Tariff permits a Mr. Catinella to discontinue his water service provided that he provides three (3) business days notice and pays the applicable shutoff fee.

24. Further, nothing in Artesian's Tariff requires Mr. Catinella to incur the substantial expense of hiring a licensed plumber to dig down to the water line between the curb stop and his home and "sever the line and crimp it" in the presence of an Artesian employee. Additionally, even Artesian admitted that its seasonal customers "often" discontinue the water service at their vacation homes at the curb stop. (See Artesian's 1/25/11 Brief, p. 9, LL 4-5.)

25. Moreover, at the evidentiary hearing, I asked Mr. Spacht of Artesian whether, if Mr. Catinella crimped his water line, whether Mr. Catinella *could* violate the Certificate of Occupancy ("CO") for his residence. Mr. Spacht answered "[b]y not having water service, he could." (Tr.-112, LL 6-17) In its brief, Artesian obliquely argued that the New Castle County Code requires Mr. Catinella to have water supply "available" to his home to keep his CO. (See Artesian's 1/25/11 Brief, p.8.) Thus, I find that Artesian's crimping proposal is unacceptable based on the possibility that Mr. Catinella could lose his CO if he crimps his service line and therefore makes water service "unavailable" to his home. Artesian has not proffered any legal authority which permits Artesian to require Mr. Catinella to crimp his service line. Moreover, sound public policy dictates that, if a customer wishes to turn off his water service, the customer should not even risk the possibility of violating his Certificate of Occupancy.

26. Finally, Artesian unpersuasively argues that Mr. Catinella should not be allowed to discontinue service at the curb stop because "a dishonest person can readily turn on the water at the curb stop after Artesian has shut it off and that this happens regularly." (See Artesian's Brief filed 1/25/11, p.5.) Mr. George had testified that Artesian was "finding about an average of three or four of these per week, including new housing." (Tr.-130, LL 16-18) However, Artesian never proffered any documentary evidence corroborating Mr. George's testimony in this regard nor quantifying how much this type of theft costs Artesian. Thus, I find Artesian's theft

argument unpersuasive, particularly when balanced against requiring a good customer like Mr. Catinella to pay at least a few hundred dollars to crimp his service line. It is Artesian's responsibility to reduce its losses due to theft by employing theft monitoring equipment and diligent theft monitoring by its employees. Accordingly, I find that Mr. Catinella has the right to discontinue water service to his property at the curb stop.

B. Is Mr. Catinella responsible for the Customer Charge, DSIC and Fire Protection Charges?

Answer: Yes.

27. In Artesian's 2008-09 rate case, the Commission entered Order No. 7657 on September 22, 2009. In that Order, the Commission approved a Settlement Agreement describing the water rates that Artesian would be permitted to charge its Delaware customers within its Service Territory. The Settlement Agreement was entered into by the three (3) primary parties in that case and this case: Artesian Water, the DPA and PSC Staff.

28. Exhibit "A" of the Settlement Agreement is entitled "Artesian Water Company, Inc. Proof of Revenue." It states that a quarterly Customer Charge of \$34.67 would apply to Artesian customers with a 5/8' meter, like Mr. Catinella. In its 2008-09 rate case, Artesian filed the testimony of Paul R. Herbert, its Cost of Service Allocation expert.¹² According to Mr. Herbert's testimony:

Customer Costs are costs associated with serving customers regardless of their usage or demand characteristics. Customer costs include the operating and capital costs related to meters and services, meter reading costs, and billing and collecting costs. The customer costs were allocated basis of the relative capacity of

¹² The parties have agreed that Mr. Herbert's testimony is admissible in this case. (Tr.-119; LL 17-23)

meters and services, the number of meter readings and the number of bills.

(Exh. 8 - p.3 of P.R. Herbert's Study)

29. Mr. Herbert's Cost of Service Allocation Study is based on the Base-Extra Capacity Method for developing water rates. (*Id.* at pp. 2-3.) The method is described in the 2000 and prior editions of the Water Rates Manual published by the American Water Works Association "AWWA."¹³ (See Artesian's 1/25/11 Brief; p.2 of P.R. Herbert's Report.) The Base-Extra Capacity Method separates the cost of providing water services into four (4) primary cost components, one of which is Customer Costs.¹⁴ (Exh. 8-P.R. Herbert's Study, pp. 2-3)

30. According to the Base-Extra Capacity Method, the Customer Charge applies to every metered customer in each Customer Class within the Service Territory. (See NARUC Water Cost of Service & Rate Design, David A. Sheard, P.E., pp. 20, 43-44; Exh. 8-P.R. Herbert's Study, pp. 2-3.) In other words, when Artesian was determining its Customer Charges for metered service in its prior rate case, Artesian simply divided its total amount of projected costs by the number of metered service customers to derive its Customer Charge for each Customer Class. (*Id.*) Mr. Catinella was one of those customers. (Tr.-135)

31. If Mr. Catinella is no longer paying the water availability charge, the Base-Extra Capacity Method presumes that another customer at that residence replaces Mr. Catinella and pays the Customer Charge. (See NARUC Water Cost of Service & Rate Design, David A.

¹³ See American Water Works Association (AWWA) *Principles of Water Rates, Fees and Charges Manual of Water Supply Practices*, M1, 5th ed., 1991. AWWA is an "[i]nternational, non-profit scientific and educational society dedicated to the improvement of drinking water quality and supply." (See AWWA's Website.) It has 57,000 members in 100 countries outside of North America. (*Id.*)

¹⁴ The three (3) remaining cost components in the Base-Extra Capacity Method are: 1) "base costs" defined as those costs which vary with the total quantity of water used, plus operations and maintenance expenses and capital costs associated with service to customers under average demand conditions; 2) "extra capacity costs" defined as operating and capital costs associated with meeting demand in excess of average demand i.e. during peak periods; and 3) "fire-protection costs" for public fire hydrants. (See Artesian's 1/25/11 filing, P.R. Herbert's Report, p.3.) The Base-Extra Capacity Method has been upheld by numerous courts as a valid method of calculating water rates. *E.g.*, City of Novi v. City of Detroit, 446 N.W.2d 118 (MI. 1989); Water Works Board of the City of Birmingham v. Barnes, 448 So.2d 296 (AL. 1984).

Sheard, P.E., pp. 20, 43-44.) In Delaware, the Commission has made a public policy decision to require seasonal residents to pay the Customer Charge after turning their water service off. (Tr.-134, LL 6-15; Tr.-47) According to Mr. Spacht, an availability charge fairly and evenly spreads the substantial cost of maintaining expensive water infrastructure throughout the entire customer base. (*Id.*)

32. According to Mr. Spacht, since "around 1980," the Customer Charge has been "vetted" in every Artesian rate case before the Commission, including its most recent rate case which concluded in September 2009. (T-43, LL 20-22; *see* Commission Order No. 7657 (September 22, 2009). It appears that Mr. Catinella's situation was included in the Customer Class in Artesian's most recent rate case as the only evidence is the undisputed but uncorroborated testimony of Artesian's CFO David Spacht that Mr. Catinella's situation was, in fact, included in the Customer Class. (Tr.-43 LL 12-24 – Tr.-44 LL 1-2; Tr.-49 LL 3-15)

33. According to Mr. Spacht, Mr. Catinella's situation was decided in Artesian's rate case after extensive expert witness testimony from the respective parties i.e the Commission, the DPA and Artesian. (T-43 LL 20-24 – p.44 LL 1-2) Since Artesian's prior rate case involved a Settlement Agreement, the parties agreed upon a cost allocation and revenue requirement which permitted Artesian to charge the Customer, Fire and DSIC charges to Mr. Catinella. (Tr.-49 LL 3-24, 52 LL 15-22; *see* Commission's Order No. 7657, Sept. 22, 2009)

34. Although its facts are different than the facts in this case, I find that the Superior Court's decision in *Cat Hill Water Company v. PSC* is controlling precedent in this case. *See Cat Hill Water Company v. Public Service Commission*, 1991 WL 302547 (DE Super. 1991) (unpublished opinion) (affirming Commission Order), *on appeal* 1992 WL 54799 (DE Super. 1992). Additionally, I find that the rule of law from the *Cat Hill Water* decision: 1) supports the

Commission's current policy of charging water availability charges to seasonal, temporary and construction customers; and 2) supports Artesian Water charging an availability charge to Mr. Catinella.

35. In the *Cat Hill Water* case, a Developer constructed a residential community and its water distribution system, but sold only 46 of 148 residential lots. (*Id.* at pp. 1-2.) The Cat Hill Water Company had been formed by the Developer to supply water to lot purchasers who request water service. (*Id.*) Without first having in place duly-filed tariffs approved by the Commission, the Cat Hill Water Company began supplying water to the lot purchasers who had requested service. (*Id.*)

36. In August 1988, the Cat Hill Water Company finally filed proposed rates with the Commission. (*Id.* at p.1.) However, needing funds due to slow sales, the rates proposed by the company sought to charge the lot owners who were connected to the Cat Hill Water system, and those lot owners who were not connected to the Cat Hill Water System and who were not using Cat Hill water. (*Id.* at pp. 1-2.) The company unsuccessfully argued that it was providing "standby service" to the lot owners who were not connected to its system. (*Id.*) In its post-hearing brief, Artesian likewise unpersuasively argues that it is providing "standby service" to Mr. Catinella. (*See* Artesian's 1/25/11 Brief, p.7.) The legal issue in the *Cat Hill Water* case ultimately did not involve standby service; that is simply what the company argued.¹⁵

37. The narrow legal issue in the *Cat Hill Water* case was simply, if a lot purchaser is not connected to a private water utility's system and is not using its water, can that utility charge

¹⁵ In Delaware, "standby service" is usually associated with natural gas, not water. In dicta in the Commission's decision regarding Cat Hill Water, the Commission did state that it would continue to permit natural gas standby service pursuant to Commission approved Tariff. (*See Application of Cat Hill Water Company*, 1989 LEXIS 14, August 15, 1989, p.2.) Seizing upon that dicta, Artesian's brief attempts to draw an analogy between natural gas standby service and water availability charges, arguing that water availability is, in effect, "standby water service." (*See* Artesian's 1/25/11 Brief, p.7.) However, since two totally different industries with different contracts, costs, rates and infrastructure are involved, Artesian's analogy did not aid me in resolving the issues in this case.

an availability charge to that customer? The Superior Court correctly answered "no." The court held that, in the absence of a "contractual relationship" or a "customer relationship," an availability charge is not permitted. (*Id.* at 2.) Thus, I find that, according to the *Cat Hill Water* case, assuming the Commission's prior approval, a water availability charge is permitted if a contractual or customer relationship exists.¹⁶ Finally, for the following reasons, I find that Mr. Catinella and Artesian Water have both a contractual relationship and a customer relationship.

38. First, I agree with Artesian that Mr. Catinella and Artesian Water have a "contractual relationship." (*See* Artesian's 1/25/11 Brief, p.7.) Mr. Catinella purchased his property in 1983 subject to a Water Services Agreement ("WSA") covering his residential community.¹⁷ (Exh 6-WSA) In that WSA, the Developer of Mr. Catinella's community granted Artesian Water the exclusive right to provide (indeed the duty to provide), water service and Fire Protection service to all homes located in that community, including Mr. Catinella's home. (*See* Artesian's 1/25/11 Brief, Exh. 6, pp.1-2.) Thus, there is a contractual relationship between Artesian Water and Mr. Catinella because Artesian is required, by contract, to provide water service, Fire Protection service and the statutorily-required DSIC service to Mr. Catinella, regardless of whether or not Mr. Catinella has shut off his water service at the curb stop. (*Id.*) Therefore, according to the holding in the *Cat Hill Water* case, due to the contractual relationship between Artesian and Mr. Catinella, Artesian has the right to charge the availability charge to Mr. Catinella.

¹⁶ In addition to the *Cat Hill Water* case, in 2010, another Delaware court upheld water availability charges. That court enforced a municipal ordinance requiring a property owner and unimproved lot owner to connect to municipality's water system and to pay a quarterly water availability charge. *See Town of Ocean View v. Brown*, 2010 WL 3159808 (DE Chan. 2010) (unpublished opinion).

¹⁷ I took administrative notice of Mr. Catinella's Deed, which is recorded in New Castle County's Public Records, in my Hearing Examiner's Report dated January 21, 2011. (*See, e.g.* Del. R. Evid. 201(e) - "judicial notice may be taken at any stage of the proceeding.")

39. Additionally, I find that there is also a "customer relationship" between Artesian Water and Mr. Catinella. Mr. Catinella's situation is not materially different from Artesian's seasonal customers who remain Artesian's customers even when not using water service for the season but are required to pay the availability charge. Thus, Artesian has the right to charge the availability charge to Mr. Catinella.¹⁸

40. Mr. Catinella has not been able to sell or rent his property, however, he hopes to transfer the water service to the new owner or tenant if and when either event occurs. (Tr.-11, LL 2-8; Tr.-39 LL 9-17) Thus, Mr. Catinella's situation is not any different from Delaware's seasonal beach residents who temporarily shut off their water service for the season but are currently required by the Commission to pay the availability charge. What if Mr. Catinella does not sell or lease the property and Mr. Catinella decides to move into the property? What if a proposed tenant does not have the financial creditworthiness to place the water service in their name? I find that Mr. Catinella's situation is not materially different from seasonal residents because he has not permanently ceased service. Therefore, Mr. Catinella is responsible for paying the Customer, Fire Protection, and DSIC Charges.

41. Artesian's Tariff supports my conclusion that Mr. Catinella is responsible for these charges. After Artesian's 2008-09 rate case concluded, Artesian filed its Tariff on September 22, 2009, which provides, in pertinent part, as follows:

METERED SERVICE

These Rules and Rates are applicable throughout the territory served by the Company for all metered service

¹⁸ Staff's Brief concedes that seasonal customers "may" continue to maintain a customer relationship with Artesian. (See Staff's 12/14/11 Brief, p.17.)

The total charge for metered service consists of the sum of the Customer Charge, and to the extent applicable, the Water Charge and Fire Protection Charge, as each is specified below.

Customer Charge: This is a quarterly or monthly service fee, depending on frequency of billing, for providing the customer with the availability of service and expenses not directly associated with water production or delivery, such as meter reading, billing, payment remittance and other costs. The charge is the same each billing period, is billed in advance, and is based on the size of the meter through which service is furnished.¹⁹

(Exh. 7-23rd Rev. Tariff Sheet No. 3)

42. Artesian's Tariff further defines a "customer" as "a person or entity being supplied water service by the Company ... whether owner or occupant." (4th Revised Tariff Sheet No. 8.) Artesian's Tariff does not define the phrase "being supplied water service." However, based upon the *Cat Hill Water* case, for purposes of this Tariff, I find that Artesian is currently supplying water service to Mr. Catinella. This is because, regardless of the fact that Mr. Catinella has temporarily turned his water service off at the curb stop: 1) Artesian is required by contract to, and continues to supply, Fire Protection and DSIC service to Mr. Catinella; and 2) since Mr. Catinella's situation is akin to a seasonal resident, Mr. Catinella remains a customer of Artesian Water. Thus, I find that, pursuant to the parties' Water Services Contract and because he remains an Artesian customer, Artesian is currently supplying water service to Mr. Catinella for purposes of the above-referenced Tariff.²⁰

¹⁹ Artesian provides its Tariff to new customers. Also, the Tariff is available to all customers on Artesian's website. (Tr. 85, LL 10-11)

²⁰ Staff and the DPA argue that, by notifying Artesian that he was discontinuing service, Mr. Catinella was no longer an Artesian "customer." (See Staff 2/2/11 Reply Brief, p.1; DPA's Brief 12/17/10 Brief, p. 3.) However, the *Cat Hill Water* decision permitted an availability charge if a contractual or a customer relationship exists. Thus, even assuming that the Commission held that Mr. Catinella is not akin to a seasonal customer and is therefore no longer an Artesian customer, by virtue of the Water Services Agreement, a contractual relationship between Artesian Water and Mr. Catinella continues to exist. This contractual agreement requires Mr. Catinella to pay the availability charge because Artesian is required to continue providing Fire Protection and DSIC service even if Mr. Catinella shuts off his water service at the curb stop.

43. Assuming a customer other than Mr. Catinella does not have a contractual relationship with Artesian, and that customer seeks to discontinue service for purposes of Artesian's current Tariff, I find that "discontinuing service" means *permanently* discontinuing service. For example, this includes if a customer sells property with the new owner assuming service in their name, if a customer leases property with a tenant assuming service in their name, foreclosure, or if a property is condemned or demolished.²¹ However, seasonal residents and Mr. Catinella's situation are quite different from these examples.

44. Therefore, based upon the limited record presented to me in this private Complaint case, I find that Artesian's approved Tariffs permit Artesian to charge the Customer Charge, Fire Protection and DSIC charges to Mr. Catinella.²² Thus, Mr. Catinella is responsible for those charges from October, 2009 through the date of the Commission's Order.

C. Should the Commission continue to hold Mr. Catinella (and seasonal customers) responsible for water availability charges in the future?

Answer: This is a public policy decision to be made by the Commission.

45. Artesian intends to file its next rate case in April, 2011, approximately one (1) month from now. (See Artesian's 1/28/11 Letter of Intent, PSC file.) In Artesian's next rate case, the Commission has three (3) options regarding seasonal, temporary and construction customers, including Mr. Catinella: 1) the Commission can permit Artesian Water to continue charging the availability charge to seasonal, temporary and construction customers; 2) alternatively, the

²¹ Moreover, Staff concedes that a customer who has had their service *recently* turned off due to failing to pay their bill "may" be considered a customer. (See Staff's 12/14/11 Brief, p.17.) I find that such a customer has not "permanently discontinued service."

²² Thus, I find that Artesian has met its burden of proof as required by 26 Del. C. §307(a). This statute places the burden of proof upon the utility to "show that the rate involved is just and reasonable...."

Commission can require Artesian to cease charging the availability charge to its seasonal, temporary and construction customers; or 3) the Commission can follow other governmental entities and authorize Artesian to charge seasonal, temporary and construction customers only 50% (or some other percentage) of the availability charge.²³

46. However, the Commission can *now* order that, in its 2011 rate case, Artesian include a comprehensive analysis of the water availability charges Artesian is seeking charge from its customers.²⁴ In my Recommendations, I specify which information the Commission should require Artesian to include in its 2011 rate case filing.

V. RECOMMENDATIONS

47. In summary, and for the reasons described above, I recommend to the Commission as follows:

- a. Since Mr. Catinella has both a contractual and customer relationship with Artesian Water, the Commission must hold Mr. Catinella responsible for paying to Artesian all Customer, Fire Protection and DSIC Charges from October, 2009 through the date of the Commission's Order. Since Mr. Catinella has continued paying the charges as they became due, as of Nov. 17, 2010, those unpaid charges totaled only \$27.93. (Exh. 9)
- b. That the Commission dismiss Mr. Catinella's Complaint with prejudice.

²³ For example, by state statute, the State of Wisconsin permits municipalities to charge seasonal residents approximately 50% of the customary availability charge. See Wisc. Stat. §66.0809(1); Wisc. Stat., Chap. 196.

²⁴ Although not part of the record in this case, I assume that other private water utilities in Delaware are charging an availability charge, including some smaller water utilities near the beach with a large number of seasonal residents. With other private water utilities filing rate cases in 2011, the time is ripe for the Commission to again closely examine the availability charges being charged to customers, including seasonal, temporary and construction customers.

- c. That the Commission order Artesian Water to include in its 2011 rate case a segregated, comprehensive analysis of Artesian's water availability charges.
- d. Specifically, Artesian's 2011 rate case filing should include: 1) by category, the number of seasonal, temporary, construction and other customers being charged the availability charge; 2) a description of when the availability charge is charged and when it ceases for all such customer categories; 3) a disclosure of all costs allocated to all customer categories being charged the availability charge; and 4) proposed Tariffs regarding these issues should be filed when the rate case is filed.
- e. That the Commission order any and all relief which the Commission deems just and proper.

Respectfully submitted,

/s/ Mark Lawrence
Mark Lawrence
Hearing Examiner

Dated: March 3, 2011