

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE ADOPTION OF RULES)
CONCERNING THE IMPLEMENTATION OF 72)
DEL. LAWS CH. 402 (2000) GRANTING THE) PSC REGULATION
COMMISSION THE JURISDICTION TO GRANT) DOCKET NO. 51
AND REVOKE THE CERTIFICATES OF PUBLIC)
CONVENIENCE AND NECESSITY FOR PUBLIC)
UTILITY WATER UTILITIES)
(OPENED NOVEMBER 12, 2000; REOPENED)
MARCH 20, 2007))

DOCKET COPY
DO NOT REMOVE FROM OFFICE

FINDINGS, OPINION, AND ORDER NO. 7774

APPEARANCES:

On behalf of the Public Service Commission Staff:

MURPHY & LANDON
Francis J. Murphy, Esquire
Lauren A. Pisapia Cirrinicione, Esquire

On behalf of Tidewater Utilities, Inc.

PARKOWSKI, GUERKE & SWAYZE, P.A.
Jeremy W. Homer, Esquire

On behalf of Artesian Water Company, Inc.

John J. Schreppler, II, Esquire
General Counsel

On behalf of the Division of the Public Advocate:

DEPUTY ATTORNEY GENERAL
Kent Walker, Esquire

This 4th day of May, 2010, the Commission hereby enters this
Order with the following findings of fact and conclusions of
law.

I. BACKGROUND.

1. In 2000, the Delaware General Assembly restored this Commission's authority to issue Certificates of Public Convenience and Necessity ("CPCN") to enable entities to enter the water utility business or to allow existing water utilities to expand their operations and facilities into new service territories. See 26 Del. C. § 203C. The Commission thereafter promulgated rules to chart how the Commission would navigate this water utility CPCN regime. See "Regulations Governing Water Utilities Including the Public Service Commission's Jurisdiction to Grant and Revoke Certificates of Public Convenience and Necessity" (adopted by PSC Order No. 5730 (June 5, 2001) ("2001 Rules")).¹

2. In early 2007, the Commission published notice that it proposed to repeal the 2001 Rules in favor of a new set of rules related to CPCNs for water utilities. See PSC Order No. 7142 (Mar. 20, 2007) (proposing new rules to supersede 2001 Rules); 10 DE Reg. 1563-1580 (April 1, 2007) (formally noticed repeal and proposed new CPCN rules). Among the motivations that prompted the Commission to propose new rules was an earlier request by Staff that the Commission deny three CPCN applications which Staff believed were inconsistent with the meaning and intent of the "majority rule" provision contained in then-existing Section 203C. In certain instances, CPCN applications were made for hundreds of unrelated parcels. It was Staff's position that this

¹ Published in 5 DE Reg. 212 (July 1, 2001).

"majority rule" was being used to add properties to a utility's service territory where the landowner had never affirmatively requested inclusion (by way of a signed petition) or who had not taken the action of notifying the Commission of their desire to have their property excluded from a proposed service area ("opt-out"). Staff maintained that, by engaging in such practices, a water utility was abusing the CPCN process to amass CPCN territory without regard to when, or if, it would extend or expand water services to the property.

3. In an effort to address these issues, the new rules proposed, among other things, that a utility seeking a CPCN certify that it would actually provide water service to the proposed service territory within three years. If the CPCN was granted, but the utility failed to meet the three-year deadline, the new rules provided a mechanism for the Commission to determine whether the utility should be able to retain the CPCN. Staff believed that this certification process facilitated the intent of Section 203C, which authorizes a water utility to "extend[] or expand[] ... its business or operations." 26 Del. C. § 203C(a) (emphasis added). In addition, Staff submitted that the certification's goal to ensure that service follows the CPCN is consistent with the text of Section 203C, which conditions the grant of a CPCN upon a developer's signed "service agreement," with a landowner "requesting such service," or a governmental body "requesting the applicant to provide service." See 26 Del. C. § 203C(e) (emphasis added.) In each instance, the statutory

criteria looked to water "service" in the territory, not simply the utility accumulating parcels for a large, and allegedly exclusive "franchise" area.

4. However, during the course of the proceedings which were instituted to consider these new rules, the General Assembly amended the provisions of § 203C. See 76 Del. Laws ch. 55 (June 28, 2007) ("chap. 55"). In the main, the amendments reworked the listed criteria for awarding a CPCN under § 203C. The amended Section 203C eliminated the "majority rule" provision in most instances and thereby obligated the utility to obtain petitions requesting water services executed by all of the landowners of each parcel to be included in a new service territory.² An exception exists for existing developments, subdivisions, and generally recognized unincorporated communities. In such situations, the 2007 amendments to Section 203C permit a CPCN to be granted based on petitions for service signed by the landowners of a majority of the parcels within the development, subdivision, or unincorporated community.³ In addition, the amendments also direct that, in the case of a CPCN premised on a

² See 26 Del. C. § 203C(e)(1)b., as amended by chap. 55 § 1. Previously, a water utility could obtain a CPCN by presenting petitions signed by a majority of all of the landowners in the proposed service area. The amendment requires petitions for each parcel, executed by all the owners of record of the parcel. At the same time, the amendments did not disturb a utility's ability to receive a CPCN by proffering its agreement with the developer of a new development. The subdivision must have been previously approved by the relevant governmental authority. See 26 Del. C. § 203C(e)(1)a., as carried forward by chap. 55 § 1.

³ See 26 Del. C. § 203C(e)(1)c., as amended by chap. 55 § 1.

resolution or ordinance enacted by a county or municipality, the service territory so authorized cannot extend beyond the political boundaries of the county or municipality entering the ordinance.⁴ Finally, in addition to making some other technical changes, the amendments required a municipal water authority to obtain the endorsement of the municipalities that formed it prior to seeking a CPCN to provide its water services beyond those municipalities' borders.⁵

5. In light of the statutory amendments, the Hearing Examiner suspended further proceedings on the proposed new rules. The Commission then withdrew the rule changes proposed by Order No. 7142, because the legislative changes rendered some of those earlier provisions in need of further revisions.

6. On September 4, 2007, this Commission entered Order No. 7254, in which it proposed a revised set of regulations to govern the Commission's jurisdiction to grant and revoke CPCNs for water utilities. Order No. 7254 thus superseded Order No. 7142 (Mar. 20, 2007).

7. Two Class A water utilities, Artesian Water Company ("Artesian") and Tidewater Utilities, Inc. ("Tidewater"), objected to certain provisions of the proposed regulations. The other three Class A water utilities and seven smaller water utilities did not file objections. *Id.*

⁴ See 26 Del. C. § 203C(e)(1)d., as amended by chap. 55 § 1.

⁵ See 26 Del. C. § 203C(n), as added by chap. 55 § 6. See 16 Del. C. ch. 14 (describing formation and powers of municipal water and sewer authorities.)

8. The assigned Hearing Examiner conducted an evidentiary hearing on November 19, 2007. At the conclusion of the proceeding, the Hearing Examiner approved the submission of certain post-hearing evidence. Thereafter, Staff proposed substantial revisions to the regulations and, on January 25, 2008, served a motion asking the Hearing Examiner to conduct further proceedings. Among other things, the Staff's proposed revisions a) eliminated the requirement that a utility certify that it would provide service within a given period of time, and b) extended the three year window for providing service to five years.

9. On October 7, 2008, this docket was reassigned to a new Hearing Examiner (see Commission Order No. 7451), who granted Staff's motion to conduct further proceedings, and presided at an evidentiary hearing on March 6, 9, and 11, 2009. During the course of the hearings, 163 exhibits were received in evidence. After the submission of post-hearing briefs, the Hearing Examiner issued a 101 page Report with Findings and Recommendations dated November 25, 2009 (the "Report").⁶ The Report included exhibits designated by the Hearing Examiner as A through F. Copies of the Report and exhibits are attached hereto as Exhibit "1".

10. As reflected in the Report, Artesian, Tidewater, the Public Advocate and Staff were ultimately in agreement that the

⁶ Staff's proposed regulations were attached to the Hearing Examiner's Report as Exhibit A. The Artesian/Tidewater alternative regulations (in black-lined format) were attached to the Report as Exhibit B.

Commission should adopt many of the proposed regulations, with certain stipulated modifications. Report pp. 70-2.

11. Artesian and Tidewater contested the following regulations: a) Section 3.2 which limits CPCN applications to five Proposed Service Areas; b) Section 3.13 which requires a utility to file a Plan of Service with a CPCN application; c) Section 6.3 pertaining to the notice to be afforded a municipality of a CPCN application which might affect the municipality; d) Section 7.4 which specifies the parcels of land which may be included in a Proposed Service Area (as that term is defined in Section 2.1); e) Section 8.0, which i) requires a utility to include a notice to landowners with the CPCN solicitation materials sent to them, and ii) requires that the notice provision advise landowners that their ability to obtain a permit for a new well might be affected; f) Section 9.0, which requires the utility to send the form of notice specified in Section 10.0; g) Sections 10.0 and 11.0 to the extent that they require utilities to give notice to landowners and other interested parties, including utility customers, of their rights to object to CPCN applications; and h) Section 12.0 which would have created a process through which a landowner, whose property was subject to a CPCN, could file a request to opt-out of the utility's service territory if five years had elapsed since the CPCN was awarded and the property was still not receiving water service.

12. The Report recommended adoption of proposed Sections 3.13, 6.3, 8.0 and 9.0 as proposed by Staff and supported by the Public Advocate. The Report recommended that the Commission reject all, or portions of, Staff's proposed Sections 3.2, 7.4, 10.0, and 11.0. In addition, the Report recommended that the notice of a CPCN application published in two newspapers of general circulation (required by Section 10.7) include certain descriptive information about the properties covered by the application. Finally, the Report recommended that the Commission reject Section 12.0, which contained the Staff's proposed five year opt-out rule, and instead urged adoption of a competing rule proposed by Artesian and Tidewater.

13. On January 27, 2010, the Commission Staff and the Public Advocate filed timely exceptions to the Report. Artesian and Tidewater did not file exceptions. At its regularly conducted meeting on March 2, 2010, the Commission considered the exceptions filed by the Staff and the Public Advocate, and the arguments of Artesian and Tidewater in opposition to the exceptions.

14. Before the Commission addresses the Report and the exceptions, the following background is also relevant to the issues raised in this docket. On March 17, 2009, six days after the evidentiary hearing in this matter concluded on March 11, 2009, the Commission considered the application of the City of Dover for a CPCN to provide water service to an area formerly known as the Bush Farm property, which is adjacent to the Dover

city limits. See PSC Docket NO. 09-CPCN-11 ("Bush Farm"). Tidewater objected to the application because the Bush Farm property was in an area where Tidewater already held a CPCN. During the Bush Farm proceeding, certain Commissioners expressed a view that the Commission was free, under an appropriate set of facts and circumstances, to review a grant of a CPCN to determine whether such a CPCN remained in the public interest, and ought to be modified in whole or in part. Further, after consideration of the parties' positions, the Commission voted 3 to 1 (Commissioner Clark having recused himself) to approve a motion that the language of § 203C does not create an exclusive service territory and that the Commission is empowered to revisit the issuance of a CPCN. However, the oral motion approved by the Commission was never reduced to a written order, because the proceeding was continued and the parties to the Bush Farm docket settled the dispute before the Commission was able to take any further action on the matter.

II. SUMMARY OF THE EVIDENCE, FINDINGS OF FACT, AND CONCLUSIONS OF LAW.

A. Staff's Proposed Rule 12.0; The Five Year Rule.

15. Staff proposed a new rule 12.0 entitled "Conditional Grant of a CPCN for a Proposed Service Area." Proposed Section 12.0 set forth a process through which a landowner whose property was subject to a CPCN could file a request with the Commission to have the property removed from the water utility's CPCN service territory if the utility was not providing water service to the

property at issue within five years of being awarded the CPCN. The proposed rule did not provide for automatic removal of the property from the utility's service territory. Rather, the utility was afforded the opportunity to object to the landowner's request. In that event, the Commission would have conducted a hearing to address the dispute and the proposed rule contained a description of the factors that the Commission would consider in deciding the matter.

16. The Report recommended that the Commission reject Staff's proposed Section 12.0 for several reasons as discussed below. Report pp. 11-36 (paragraphs 21-62), 40-70 (paragraphs 63(M)-106), and 72-4 (paragraph 112 through the first full paragraph, on p. 74). The Report concluded that the language of Section 203C prohibits the adoption of Staff's proposed five year rule as a matter of law. Report paragraphs 39, 41. The Report also found that the Staff failed to demonstrate that proposed Section 12.0 is just and reasonable and supported by substantial evidence. Report paragraph 41. The Report then went on to adopt an alternative Section 12.0 proposed by Artesian and Tidewater.

17. In its exceptions, Staff argued that the Commission should decline to adopt those findings and recommendations in the Report which served as the bases to reject Staff's proposed Section 12.0. Nevertheless, Staff did not take exception to the ultimate conclusion of the Hearing Examiner that the Commission should decline to adopt Staff's proposed Section 12.0. Staff's exceptions explained in detail that it was not excepting to the

recommendation against adoption of the Staff's proposed rule 12.0, in light of the views expressed by certain Commissioners during the Bush Farm proceeding. The Commissioners' comments during the Bush Farm hearing, in large part, alleviated Staff's original concerns, which prompted Staff to propose the new rules, including Rule 12.0. Staff also expressed concern that further litigation over Section 12.0 might delay the implementation of the other proposed rules which were recommended for adoption in the Report. And Staff pointed out that the adoption of several of the proposed rules, for example, the Plan of Service and the additional notice requirements, would provide greater protections for landowners who are solicited by a water utility to have their properties included within the utility's service territory.

18. The Commission unanimously rejects the Report's findings and recommendations as they relate to Staff's proposed Section 12.0. Those findings and recommendations are found in the Report at: a) pages 11-36 (paragraphs 21-62), b) pages 40-70 (paragraphs 63M-106), and c) pages 72-4 (paragraph. 112 through the first full paragraph on page 74). While the Commission rejects the Report's findings and recommendations, the Commission declines to decide the issue of its legal authority to adopt the Five Year Rule set forth in Section 12.0, and also declines to address the issue of whether the Staff established that the proposed rule is just and reasonable and supported by substantial evidence.

19. The Commission is convinced that the most reasonable course at this juncture is to adopt the regulations without Section 12.0 and assess, over time, the effectiveness of the new regulations in protecting the rights of landowners in Delaware. At this time, the Commission is also of the view that the legal issue of its authority to adopt a rule like Section 12.0 is perhaps best decided in the context of a specific factual record developed by the aggrieved parties, much like the docket involving Bush Farm, discussed above.⁷

B. The Alternative Section 12.0 Proposed by Artesian and Tidewater.

20. Artesian and Tidewater proposed an alternative to Section 12.0 which would have permitted the Commission to revoke a CPCN if a water utility failed to comply with an order of the Commission to provide service to a property in a timely manner. Under the utility proposal, the owner of the property would have the burden of proving the ability to make any contributions in-aid-of construction called for by any Commission rule or order. The Report recommended adoption of the utilities' proposal. Report pp. 73-4.

21. The Commission unanimously rejects the Report's recommendation that it adopt the utilities' proposed Section 12.0. Report pp. 73-4. As reflected above, the Commission is convinced that the most reasonable course at this juncture, based upon the record developed before the Hearing Examiner, the

⁷ In addition, the Commission wishes to implement the rules that are not contested.

exceptions made by the Staff and the Public Advocate, and the arguments raised by Artesian and Tidewater, is to adopt the proposed regulations without Section 12.0 and assess, over time, the effectiveness of the new regulations in protecting the rights of landowners in Delaware.

C. Staff's Proposed Rules 3.2 and 7.4.

22. Section 3.2 of Staff's proposed regulations limits CPCN applications to five "Proposed Service Areas." Section 3.2 should be read in conjunction with Section 7.4 which limits a "Proposed Service Area" to either "a single parcel" or "two or more contiguous parcels that will be provided water utility services by the same stand-alone system or by the same main extension." The Report recommended against the adoption of Sections 3.2 and 7.4. Report pp. 74-8 and 85-8.

23. The Commission declines to adopt the Report's recommendation that it reject Sections 3.2 and 7.4. Instead, the Commission unanimously approves the adoption of proposed Sections 3.2 and 7.4. Sections 3.2 and 7.4 must be read in conjunction with proposed Section 3.13, which will require a water utility to submit a "Plan of Service" with a CPCN application. The Report does recommend adoption of Section 3.13, and Artesian and Tidewater have not taken exception to that recommendation.

24. In Section 3.13, the Plan of Service is defined as follows:

[A] description of how and when the applicant plans to provide water services to the [Proposed Service] Area, including

an estimated timetable for providing service or an explanation as to why such an estimated timetable cannot be provided. If the Proposed Service Area is intended to be part of a regional water system, the applicant shall identify the region that includes the Proposed Service Area, and provide information setting forth the applicant's plans for the regional water system.

25. The Commission concludes that Staff's proposals a) to limit CPCN applications to one to five Proposed Service Areas, and b) to limit the parcels that may be included in a Proposed Service Area, are permitted by law and are just and reasonable limitations which are supported by substantial evidence in the record.

26. Section 203C(c) provides, in relevant part:

An application for a certificate of public convenience and necessity to begin, extend or expand the business of a water utility beyond the territory covered by any existing certificate shall be in writing, [and] shall be in such form as determined by the Commission....

Under Section 203C(c), then, the Commission has the power to prescribe the form that a CPCN application will take, and inherent authority to impose reasonable restrictions on the number of properties that can be included in any one application.

27. At times, the Commission has received CPCN applications which encompassed hundreds of parcels of land that were not contiguous and instead were scattered throughout different parts of a county.⁸ Section 10.6 of the proposed

⁸ See Report pp. 75-6.

regulations, to which no utility objected, requires a utility to publish notice of a CPCN application, which must include a description of the Proposed Service Area. The publication of this information allows landowners in or near a proposed service territory to learn about a pending application and offer input to the Commission, including information about the quality of service afforded to existing customers of the applying utility. Under 26 Del. C. § 203C(f), a CPCN will not be granted if the Commission finds that the utility is failing to provide safe, adequate and reliable service to its existing customers. By limiting the number of Proposed Service Areas, published notices will be more clear and readily understood by the public.

28. While the Report recommends the adoption of the Section 3.13 Plan of Service requirement, it fails to acknowledge that Sections 3.13, 3.2 and 7.4 are interrelated and interdependent provisions. The new Plan of Service requirement will be far less meaningful if there are large numbers of non-contiguous and widely-dispersed properties encompassed within a single CPCN application.

29. The Report recommends the rejection of Section 3.2 on the ground that it might increase advertising expenses for Artesian and Tidewater, as the public must receive published notice of the CPCN application in two newspapers of general circulation. In addition, Artesian and Tidewater complain that they are charged a \$300 filing fee for each CPCN application and that placing limitations on the properties that can be

encompassed by a CPCN application might compel them to file more applications and pay more filing fees than would be required under the current regulations.

30. Staff presented evidence that CPCN applications are typically published in the *News Journal* and the *Delaware State News*. Staff established that, in the case of legal notices, the *News Journal* charges per line, and the *Delaware State News* charges per column inch. Accordingly, there is no reason to conclude, for example, that the cost of publishing two CPCN applications which encompass five Proposed Service Areas, will be materially greater than one application which covers ten Proposed Service Areas.

31. Furthermore, the Commission observes that Sections 3.2 and 7.4 do not place a strict numerical limit on the number of parcels that may be included in a Proposed Service Area. Rather, under Section 7.4, each Proposed Service Area can include multiple parcels of land, provided that they are contiguous. Given that Section 3.2 allows as many as five Proposed Service Areas per CPCN application, it is still possible for a utility that focuses upon contiguous properties to include relatively large tracts of land within a single CPCN application. Carrying this point to its logical conclusion, a water utility might include five non-contiguous residential developments in a single CPCN application. Under all of the circumstances, and considering all of the evidence of record and the arguments made by the parties both pro and con, it is reasonable to conclude

that the publication costs and \$300 filing fee do not impose a burden on the utility.

32. For the reasons set forth above, the Commission is satisfied that Sections 3.2 and 7.4 will not result in the imposition of unfair or burdensome advertising costs or filing fees on the utilities.

33. More importantly, any incremental increase in costs associated with the adoption of Sections 3.2 and 7.4 must be balanced against the need for fair notice to the public. Because of the large number of parcels that have been included in CPCN applications in the past, the published notices have, at times, not been adequate to inform the public about the nature and extent of a CPCN application and its possible effects on nearby landowners and utility customers. And the Commission takes note of and adopts the findings in the Report that a) the property descriptions employed by Artesian and Tidewater in the past are "not descriptive enough,"⁹ b) Delaware residents should receive "improved notice of CPCN Applications,"¹⁰ and c) "notice by publication must be as specific as possible as to where the property is located."¹¹

34. The Commission concludes that the limit of five Proposed Service Areas strikes a reasonable balance between the public's right to know and the potential for additional costs. The award of a CPCN involves governmental action which affects

⁹ Report p. 77.

¹⁰ Report p. 76.

¹¹ Report p. 78.

not only the landowners whose properties fall within the proposed CPCN territory, but surrounding landowners, other customers of the utility, and potentially the public at large. These important public interests outweigh the additional incremental costs that might be incurred by the adoption of Section 3.2 and 7.4.

35. The Report made the following recommendation on pages 76-7 about the published notice of each CPCN application:

[I]n the published notice of each CPCN application, the utilities shall provide a description of the properties involved, including (a) the nearest intersecting roads (i.e. at the intersection of Canterbury Road and Delaware Avenue or approximately one-half mile from intersection of Canterbury Road and Delaware Avenue); (b) directional information about the parcels (i.e. on the north side of Delaware Avenue, etc.); (c) a listing of Property Tax ID numbers if available (metes and bounds descriptions if Tax IN (sic) numbers are unavailable or if neither of those are available, some description capable of being mapped); and (d) the street address(es) shall also be provided if available.

None of the parties took exception to this recommendation and the Commission adopts it because it is just and reasonable and supported by substantial evidence as reflected in the Report.

D. Sections 10.0 and 11.0 of the Proposed Regulations

36. Approval of the Form of Notices and Related Documents.

The Report recommended that the Commission not adopt Section 10.1 to the extent it provided that the notice to landowners required by Section 10.0 "shall be in a form approved by Staff." Report

pp. 97-8. Staff did not intend the quoted language to mean that Staff would have unfettered discretion over the form of notice and pointed out that any such language would be subject to review and approval by the Commission as a matter of course. However, in order to avoid any further dispute about the subject, Staff agreed to change the quoted language of 10.1 to read "shall be in a form approved by the Commission." The Staff made the same revision to Sections 10.4, 10.5, and 10.7 by changing the word "Staff" to "the Commission." The Commission approves those changes, which fairly resolve the complaints of Artesian and Tidewater.

37. Clarification Regarding Section 10.0 Opt-Out Notice.

At the March 2, 2010 hearing, before the Commission, Staff also agreed to add a new provision to address a request by Tidewater and Artesian that the regulations expressly state that water utilities are not required to send the Section 10.0 opt-out notice with a solicitation notice sent pursuant to Section 8.0. The Report recommended that the Commission adopt the utilities' request. Report p. 100. Staff has added the new provision as Section 10.6, and the Commission approves its addition to the regulations as a reasonable clarification of the practice to be followed under the regulations.

38. Sections 10.0 and 11.0 Related to Notice of the Right to Make Objections. The Report recommends that the Commission reject the provisions in proposed Sections 10.0 and 11.0 which i) require utilities to give landowners notice of their rights to

object to CPCN applications, and ii) address the rights of other interested parties, besides landowners, to object to CPCN applications. Report pp. 98-100. Artesian and Tidewater argued that the objection provisions are obsolete in light of the amendment of § 203C(i) by the General Assembly, which removed a portion of the language therein referring to objections.

39. However, the amendments to § 203C, including § 203C(i), did not eliminate all references to the right to object to a CPCN application, thereby demonstrating that the General Assembly did not intend to eliminate such objections. In addition, § 203C(e)(1)b.3. still contains a majority rule provision, and a landowner's right to object to a CPCN application would be implicated under those circumstances. Therefore, the current statutory language supports the inclusion of proposed Sections 10.3 and 11.3.

40. The Commission finds it significant that utility customers have a statutory right to object to a CPCN application under § 203C(f), if they are not receiving adequate water service. Section 11.2 recognizes that right and provides a process for customers to file such objections. The Commission also notes that its current regulations contain essentially the same objection provisions, the utilities have not demonstrated that the existing provisions have created unfair or unnecessary difficulties, and the Commission is unaware of any such difficulties. The current objection provisions were adopted with the 2001 Rules after an appropriate period of public comment. In

addition, the Commission Staff conducted a series of public workshops before the 2001 Rules were approved and all Class A water utilities were invited to participate. None of the Class A water utilities took exception to the objection provisions at that time, and have not lodged any complaints about them prior to the reopening of this docket.

41. For all of the aforesaid reasons, the Commission unanimously rejects the Report's recommendation that the Commission refuse to adopt the objection provisions in Sections 10.0 and 11.0. Furthermore, the Commission unanimously adopts proposed Sections 10.0 and 11.0 with the modifications reflected above.

E. The Sections of the Proposed Regulations Which Were Agreed Upon or to Which No Party Filed Exceptions.

42. Given that the parties either agreed that the Commission should adopt the following rules, or did not take exception to the recommendations in the Report that they be adopted, the Commission hereby adopts Sections 1.0, 2.0, 3.0, 4.0, 5.0, 6.0, 7.0, 8.0, 9.0, 10.0, 11.0, 13.0 (which will be renumbered as Section 12.0), and 14.0 (which will be renumbered as Section 13.0), subject to the Commission's determinations in Sections II. A through D above. And except as otherwise determined in Sections II. A through D above, the Commission adopts the findings and recommendations in the Report which support the adoption of these uncontested regulations, and concludes that the uncontested regulations are just and

reasonable and supported by substantial evidence. See 26 Del. C. § 209(a)(1) and 29 Del. C. § 10118.

III. Additional Conclusions and Implementing Provisions.

43. Except as otherwise set forth herein, the exceptions of the Staff and the Public Advocate are denied.

44. The Commission concludes that the rules proposed for adoption in this order reflect substantive changes from the earlier published rules and therefore constitute a new proposal within the meaning of 29 Del. C. § 10118(c). A copy of the proposed regulations, which the Commission approves and intends to publish for final comment, are attached hereto as Exhibit "2".¹²

45. For the reasons set forth in Section I, II, and III of this Order, and pursuant to 26 Del. C. § 10118(a), the Commission hereby withdraws the notice of repeal and rule revisions proposed by PSC Order No. 7254 (Sept. 4, 2007), and published as proposed regulations at 11 *Delaware Register of Regulations* 465-484 (Oct. 1, 2007). The Commission requests that the Register of Regulations publish notice of such withdrawal in the *Delaware Register of Regulations*.

46. For the reasons set forth in Sections I, II, and III of this Order, and pursuant to 26 Del. C. §§ 209(a)(1) & 203(c) and 29 Del. C. § 10113(a), the Commission now again proposes to

¹² The revised Regulations attached hereto as Exhibit 2 also contain non-substantive, editorial corrections, so that they will, for example, comport with changes in the numbering and lettering of the current version of § 203C in the Delaware Code.

repeal its "Regulations Governing Water Utilities Including the Public Service Commission's Jurisdiction to Grant and Revoke Certificates of Public Convenience and Necessity" (adopted by PSC Order No. 5730 (June 5, 2001)), and to adopt as a replacement for such earlier rules the "Regulations Governing Certificates of Public Convenience and Necessity for Water Utilities," attached to this Order as Exhibit "3."

47. Pursuant to 29 *Del. C.* §§ 10113 and 10115(a), the Secretary shall transmit to the Registrar of Regulations for publication in the *Delaware Register of Regulations* a copy of this Order; a copy of the current "Regulations Governing Water Utilities Including the Public Service Commission's Jurisdiction to Grant and Revoke Certificates of Public Convenience and Necessity" (Exhibit "4") (now proposed to be repealed); and a copy of the now proposed "Regulations Governing Certificates of Public Convenience and Necessity for Water Utilities" (Exhibit "3").

48. In addition, the Secretary shall transmit the Notice of Proposed Rule-Making to the Registrar of Regulation for publication in the *Delaware Register of Regulations* attached as Exhibit "5". In addition, the Secretary shall cause such Notice of Proposed Rule-Making to be published in the *News Journal* and the *Delaware State News* newspapers on or before May 8, 2010. The Secretary shall include proof of such publication in the docket file before the public hearing in this matter. Further, the Secretary shall serve (by regular mail or electronic e-mail) a

copy of such Notice on: (a) the Division of the Public Advocate; (b) the Department of Natural Resources and Environmental Control; (c) the State Fire Marshall; (d) the Division of Public Health; (e) the State Planning Office; (f) each person or entity who has made a timely request for advance notice of regulation-making proceedings; (g) each water utility currently subject to the regulatory jurisdiction of the Commission; and (h) each municipal water utility, governmental water district, or municipal water and sewer authority that has previously applied for a Certificate of Public Convenience and Necessity from this Commission.

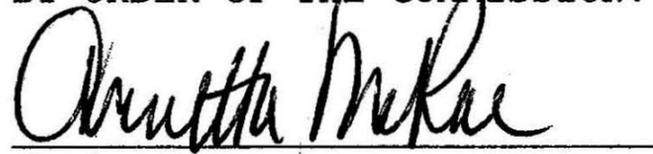
49. Pursuant to 29 Del. C. §§ 10115(a) and 10116, persons or entities may file written comments, suggestions, compilations, of data, briefs, or other written materials, on or before June 30, 2010. The Commission will conduct a public hearing on the proposed new regulations on July 22, 2010 beginning at 1:00 P.M. The comments, documents, briefs, testimony, evidence, exhibits, and data received in response to the revised rules proposed by PSC Order Nos. 7142 (Mar. 20, 2007) (now withdrawn) and 7254 (Sept. 4, 2007) (now withdrawn) shall be incorporated into the record in this proceeding and shall be considered by the Commission.

50. The public utilities regulated by the Commission are notified that they may be charged for the cost of this proceeding under 26 Del. C. § 114.

51. The Commission retains the jurisdiction and authority to enter such further orders in this matter as the Commission deems necessary or appropriate.

IT IS SO ORDERED.

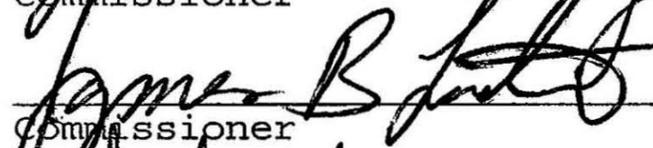
BY ORDER OF THE COMMISSION:



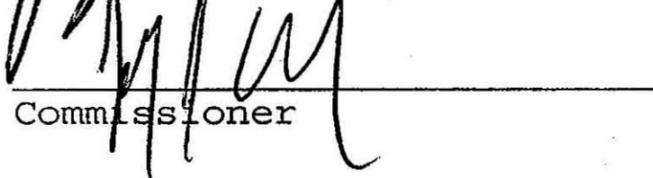
Chair



Commissioner



Commissioner



Commissioner

Commissioner

ATTEST:


Secretary

EXHIBIT "1"

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

IN THE MATTER OF THE ADOPTION OF RULES)
CONCERNING THE IMPLEMENTATION OF 72)
DEL. LAWS CH. 402 (2000) GRANTING THE)
COMMISSION THE JURISDICTION TO GRANT)
AND REVOKE THE CERTIFICATES OF PUBLIC)
CONVENIENCE AND NECESSITY FOR PUBLIC)
UTILITY WATER UTILITIES)
(OPENED NOVEMBER 21, 2000; REOPENED)
MARCH 20, 2007))

PSC REGULATION DOCKET
NO. 51

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATED: November 25, 2009

MARK LAWRENCE
HEARING EXAMINER

TABLE OF CONTENTS

	<u>PAGE</u>
I. APPEARANCES	2
II. BACKGROUND.	4
III. SUMMARY AND DISCUSSION.	6
A. Staff's Proposed 2007 Regulations	
B. Staff's Proposed 2008 Regulations	
IV. CURRENT DELAWARE LAW & STAFF'S PROPOSED FIVE YEAR OPT-OUT RULE	11
A. Delaware Law Governing Issuance of Water CPCNs	
B. Delaware Law Governing Revocation of Water CPCNs	
C. Staff's proposed Five-Year Opt-Out Rule which would allow a landowner to opt-out of a water CPCN if service was not provided within five years not adopted by Hearing Examiner because it is not permitted by Delaware Law governing the Revocation of Water CPCNs; Hearing Examiner's Recommendations Regarding Staff's Proposed Opt-Out Rule	
D. Staff's Legal Argument In Support of Adopting Five- Year Opt-Out Rule	
V. SUMMARY OF STAFF'S PROPOSED 2008 REGULATIONS	37
VI. TESTIMONY AT NOVEMBER, 2007 EVIDENTIARY HEARING.	42
VII. TESTIMONY AT MARCH, 2009 EVIDENTIARY HEARINGS.	52
VIII. AGREEMENTS REACHED BETWEEN THE PARTIES AS TO PROPOSED REGULATIONS RECOMMENDED FOR APPROVAL BY HEARING EXAMINER	70
IX. HEARING EXAMINER'S RECOMMENDATIONS AS TO DISPUTED REGULATIONS.	72
Staff's Proposed Regulations for Notices to Delaware Landowners and Municipalities regarding Water CPCNs and Plan of Service required of Utilities adopted by Hearing Examiner	
X. CONCLUSION.	101

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE ADOPTION OF RULES)	
CONCERNING THE IMPLEMENTATION OF 72)	
DEL. LAWS CH. 402 (2000) GRANTING THE)	
COMMISSION THE JURISDICTION TO GRANT)	PSC REGULATION DOCKET
AND REVOKE THE CERTIFICATES OF PUBLIC)	NO. 51
CONVENIENCE AND NECESSITY FOR PUBLIC)	
UTILITY WATER UTILITIES)	
(OPENED NOVEMBER 21, 2000; REOPENED)	
MARCH 20, 2007))	

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

Mark Lawrence, duly appointed Hearing Examiner in this Docket, pursuant to 26 Del. C. § 502 and 29 Del. C. ch. 101, and by Commission Order No. 7451 dated October 7, 2008:

I. APPEARANCES

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

Murphy & Landon
BY: FRANCIS J. MURPHY, JR., ESQUIRE
BY: LAUREN A. PISAPIA, ESQUIRE

Kevin Neilson, PSC Regulatory Policy Administrator
Andrea Maucher, PSC Public Utilities Analyst

JOSEPH HANDLON, ESQUIRE, Deputy Attorney General, Delaware
Department of Justice

On behalf of Artesian Water Company, Inc.:

JOHN J. SHREPPLER, II, ESQUIRE, Vice President, Asst.
Secretary & General Counsel

Dian C. Taylor, Chief Executive Officer & President

David B. Spacht, Chief Financial Officer & Treasurer
Artesian Resources Corporation and its Subsidiaries
Alan Fleetwood, CPCN Coordinator
Connie McDowell, Rate Analyst
Stuart Lidner, Director of External Affairs

On behalf of Tidewater Utilities, Inc.:

Parkowski, Guerke & Swayze, P.A.
BY: JEREMY W. HOMER, ESQUIRE
Bruce Patrick, Vice President of Engineering
Kirsten Higgins, Director of Water Planning and
Development
Joseph Cuccinello, CPCN Coordinator

On behalf of United Water Delaware Inc.:

Susan Skomorucha, General Manager

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

G. Arthur Padmore, Public Advocate
Michael D. Sheehy, Deputy Director, Public Advocate
KENT WALKER, ESQUIRE, Deputy Attorney General, Delaware
Department of Justice

II. BACKGROUND

1. In 2000, the Delaware General Assembly enacted legislation making applications by water utilities for Certificates of Public Convenience and Necessity ("CPCNs") again subject to the jurisdiction of the Public Service Commission of Delaware (the "Commission").¹ See 26 Del. C. § 203. Section 203C(a) provides that "No person or entity . . . or existing water utility [shall] begin any extension or expansion of its business or operations without first having obtained from the Commission a certificate that the present or future convenience and necessity requires, or will be served by, the operation of such business or the proposed extension or expansion." Before 2000, investor-owned water utilities filed applications for CPCNs with the Department of Natural Resources and Environmental Control ("DNREC"). Transfer of jurisdiction from DNREC to the Public Service Commission became effective July 1, 2001.

2. In preparation for the transfer of jurisdiction, in 2000, the Commission initiated a Rulemaking proceeding in order to promulgate regulations governing CPCN applications filed by private water utilities.² Some of the proposed regulations proposed for promulgation were necessary to comply with the General Assembly's directive to the Commission, codified at 26 Del. C. § 203C(1), requiring the Commission to establish rules governing the revocation of a CPCN held by a water utility.

¹References to the pre-filed direct testimony and other exhibits introduced into this record will be cited as "Exhibit" or "Exh. ___." The Transcript of the hearings in this case will be referred to as "Tr-___."

²26 Del. C. § 203(A) governs when a governmental, municipal, or municipal authority water utility seeks a CPCN from the Commission in order to expand its operations and facilities. The Delaware Legislature also rendered the entire CPCN certificate regime inapplicable in the case of municipal annexations under Chapter 1 of Title 22 where no CPCN has been issued. See 26 Del. C. § 203C(a). Lastly, under current Delaware law, the legislature waived the notice and "opt-out" requirements for some listed municipalities. See 26 Del. C. § 203C(i).

3. On January 30, 2001, the Commission considered the proposed regulations prepared by the Staff, the comments and discussions from a workshop conducted on November 30, 2000, and written comments received from interested parties. On the same date, the Commission issued Order No. 5646 to address matters raised by the new legislation. The Commission's Order also directed publication of notice and circulation of the proposed regulations to all water utilities currently operating under a CPCN in Delaware and all persons who made timely written requests for advance notice of the Commission's regulation-making proceedings.

4. On March 28, 2001, a Hearing Examiner conducted a duly-noticed public hearing in the Commission's Dover office to consider the comments and the proposed regulations. Representatives of Artesian Water Company, Inc. ("Artesian"), United Water Delaware Inc. ("United"), Tidewater Utilities, Inc. ("Tidewater"), The Division of Public Advocate ("DPA"), and the Public Service Commission's ("PSC") Staff attended the hearing.

5. At the public hearing, the participants jointly recommended certain modifications to the proposed regulations. With the Hearing Examiner's approval, the participants agreed to incorporate their recommendations into a revised form of proposed regulations, which they submitted to the Hearing Examiner for his review. The Hearing Examiner's Findings and Recommendations recommended that the Commission adopt the proposed Regulations.

6. On April 24, 2001, by PSC Order No. 5079, the Commission preliminarily adopted the proposed Report of the hearing examiner and the Regulations recommended by the hearing examiner and directed publication of the Regulations. On June 5, 2001, the Commission issued Order No. 5730 adopting the Regulations. Thereafter, on July 5, 2001, the Commission,

pursuant to PSC Order No. 5730, adopted the Regulations after holding a public hearing. The Regulations became effective on July 10, 2001.

III. SUMMARY AND DISCUSSION

7. Between 2002 and 2005, it came to the Commission's attention that certain water utilities were allegedly aggregating widely dispersed parcels into a single service area. In 2005, the Commission asked Staff to review the statutory and legal requirements for CPCNs and to consider revising the Commission's rules as to the issue of how water utilities acquire service areas.

A. Staff's 2007 Proposed Regulations

8. In 2007, the Staff completed its proposed Regulations. For example, Sections 7.1 through 7.5 of the Regulations provided definitions for the "Proposed Service Area" under each statutory option for acquiring a CPCN. In particular, for purposes of the majority vote of the landowners' option then in effect,³ the proposed Regulations limited the new proposed service area to either a single parcel or a group of contiguous parcels to be served by the same water infrastructure. According to Staff, this limitation precluded a utility from crafting a widely disbursed service area which utilizes the requests for water service from one area to then include without requests parcels located in another area which had not requested service. Staff asserted that this service area limitation better comported with the legislative intent in 1990 to limit the majority of landowners' option then in effect.

9. The 2007 Regulations proposed by Staff (§§ 10.1-10.4) also addressed the content of the proposed CPCN application notifications to be sent to landowners, and how such notices should disclose the owner's

³See 26 Del. C. § 203(C)(e)(1)(b). Delaware law currently require all landowners in a "Proposed Service Area" to consent. However, proposed service area is not defined by Statute.

ability to exercise the "opt-out" option provided by 26 Del. C. § 203C(i) (2006 Supp.). The Commission was advised that, while landowners valued the "opt-out" option, landowners were often uninformed about its existence or confused as to how and where to exercise their "opt-out" option. Thus, the 2007 proposed Regulations made all obligatory landowners' notices subject to Commission oversight. They also reworked the language and mailing requirements regarding the "opt-out" option. These "beefed-up" notice requirements sought to ensure that the owners have actual notice that their property would be affected by the CPCN application.⁴

10. The 2007 Regulations proposed by Staff also required the applying utility to certify that the utility would provide water service to the proposed service area within three (3) years. (See § 3.11.) Also, if the utility failed to provide water service within three (3) years, the 2007 Regulations provided a mechanism for the Commission to determine whether the utility should be able to retain the CPCN in order to provide water service to the area. (See §§ 12.1-12.6.) Again, according to Staff, this process dovetailed with the heart of the CPCN process: to authorize a water utility to "extend or expand... its business or operations." (See 26 Del. C. § 203C(a) (2006 Supp.)) According to Staff, the certification's goal to ensure that service follows the CPCN is consistent with the text of § 203C, which conditions the grant of a CPCN for an area on either the developer signing a "service agreement," the landowners "requesting such service," or a governmental body "requesting the applicant to provide service." In each

⁴The statutory provisions of 26 Del. C. § 203C(d)(1) & (e)(1) require the delivery of notices to landowners by certified mail ("or its equivalent"). However, consistent with the "due process" principles articulated in Jones v. Flowers, 547 U.S. 220 (2006), a follow-up mailing of the notices by regular U.S. first-class mail to the landowner's address where an earlier certified mail attempt has been returned as "undeliverable" is also required.

instance, the statutory criteria looks to water "service" in the territory, not simply the utility accumulating parcels for a large, exclusive "wide franchise area."

11. By PSC Order No. 7142, (Mar. 20, 2007), the Commission sought input from water utilities and others on the following issues:

- (a) Whether the three (3) year period for providing water service in a new service territory is reasonable in light of water utilities' actual historical experiences;
- (b) Whether there is a need to include in the new rules more specific provisions detailing who might be considered a landowner, how such land ownership might be established, and how a "majority of the landowners" option under § 203C(e)(1)(b) is to be calculated; and
- (c) Whether additional requirements relating to the manner or form of landowner notices should be specifically included in the new rules.

12. The Commission's Order No. 7142, (Mar. 20, 2007), also designated a hearing examiner to organize, classify, and summarize all materials, evidence, and testimony filed in the docket, to conduct public hearing(s), and to make proposed findings and recommendations to the Commission concerning Staff's proposed regulations on the basis of the materials, evidence, and testimony submitted. The Hearing Examiner was also authorized, in their discretion, to solicit additional comments and to conduct, on due notice, such public hearing(s) as may be required to develop further materials and evidence concerning any later-submitted proposed regulations or amendments thereto.

13. In a public notice published for these proceedings, the Commission invited all interested persons and the public to file written comments concerning the original proposed regulations on or before May 4, 2007. (See Notice Repealing 2001 Rules In favor of Rules Proposed By Commission Order No. 7142. 10 DE. REG. 1563-1580 (April 1, 2007)).

14. By PSC Order No. 7254, (Sept. 4, 2007), issued during the course of the proceedings before the hearing examiner reviewing those rules, the Commission considered new legislative amendments to § 203C which became effective June 28, 2007. These legislative amendments are set forth in detail in Section IV of this Report. However, most importantly, the Delaware legislature required that a water utility could obtain a CPCN only by presenting petitions for each parcel in a proposed service area, whereas previously only a majority of landowners was required under 26 Del. C. § 203C(e)(1)(b). In response to the legislative changes, the Commission withdrew the proposed rule changes previously proposed by Order No. 7142 (Mar. 20, 2007). Instead, the Commission then issued new Regulations proposed by Staff which incorporated the 2007 legislative changes, thus leaving the Commission's 2001 Rules in the current state of being repealed in favor of new regulations, which have not, to date, been enacted. (See Order No. 7254, Para. 3, 4 September 4, 2007.)

15. In a public notice published for these proceedings, the Commission invited all interested persons and the public to file written comments on the proposed regulations on or before November 1, 2007. See Notice Repealing 2001 Rules and Proposing Rules Proposed By Commission Order No. 7142. (See 10 DE. REG. 1563-1580 (April 1, 2007)).

16. At the time, the following utilities submitted written comments: Artesian, (Nov. 1, 2007), Tidewater, (Nov. 1, 2007), and United, (Nov. 9, 2007). No other written comments were filed.

17. On November 19, 2007, Senior Hearing Examiner Ruth Ann Price conducted a duly-noticed public evidentiary hearing in the Commission's Dover office to consider the comments and the proposed regulations. Representatives of Artesian, Tidewater, United, the DPA, and Staff attended the hearing. Municipality representatives also attended the meeting. After the November 19, 2007 hearing, Artesian and Tidewater each submitted post-hearing briefs delineating their legal authorities in support of and against certain proposed regulations. By Motion, Staff requested that hearings be continued for Staff to submit another revised draft of its proposed Regulations.

B. Staff's 2008 Proposed Regulations

18. On January 28, 2008, Staff proposed the Regulations which are attached hereto as **Exhibit "A"**. Staff's proposed Regulations are also summarized in detail in Article V herein. On October 7, 2008, the Commission reassigned this Docket from Hearing Examiner Ruth Ann Price to this Hearing Examiner. (See PSC Order No. 7451, October 7, 2008.)

19. On October 15, 2008, at this Hearing Examiner's request, the parties conducted a Workshop at the Commission's offices in Dover to discuss the Regulations proposed by Staff on January 28, 2008. Artesian, Tidewater, United, and Staff were present. Except for Artesian and Tidewater, no other Delaware utility commented on Staff's proposed Regulations. (See Staff's Opening Brief, p.1.) United's position was that it was monitoring the progress of the Docket. Therefore, any reference in this Report to "the utilities" refers to Artesian and Tidewater only. At the Workshop, the parties reached an agreement regarding Staff's proposed Regulation 2.1 amending the definitions of the terms "existing development," "existing subdivision," and "unincorporated community". This agreement will be discussed in more detail later. A productive discussion took place at the Workshop regarding all remaining issues.

Staff submitted its Memorandum of Law as to the remaining unresolved issues on November 24, 2008. On December 19, 2008, the parties reached an Agreement as to additional issues.

20. Between January and March 2009, the parties and this Hearing Examiner had multiple conference calls concerning the unresolved issues. The parties agreed upon the date and specifics of the Final Evidentiary Hearings, *i.e.* March 6, 9 and 11, 2009, when and which pre-filed testimony would be filed, which "live" witness lay and expert witness testimony would be presented, and the filing of post-hearing briefs. At the final hearings, a total of 163 exhibits were introduced into evidence. The transcript for this docket is 1,235 pages. The parties agreed that all filings contained in the PSC's docket in this case would also form part of the evidentiary record. (March 4, 2009 hearing, T-468-472) After the Final Hearings occurred, Staff, Artesian and Tidewater filed Briefs in support of their respective positions. The DPA thereafter joined Staff's position in this Docket. All regulations agreed upon between the parties are detailed in Article VIII herein. All unresolved issues between the parties are detailed in Article IX herein. However, before discussing the agreed upon Regulations and unresolved issues, a discussion of current Delaware law is necessary.

IV. CURRENT DELAWARE LAW & STAFF'S PROPOSED FIVE YEAR OPT-OUT RULE

A. Delaware Law Governing Issuance of Water CPCNs

21. The Delaware General Assembly has legislated a statutory scheme, now codified at 26 *Del. C.* § 203C, which comprehensively and clearly mandates how future CPCNs are to be issued to water utilities.⁵ This legislative scheme first became effective on July 1, 2001.

⁵26 *Del. C.* § 203(C) (b) provides that the CPCN application requirements do

22. 26 Del. C. § 203 transferred jurisdiction to the Public Service Commission ("the Commission") from DNREC, effective July 1, 2001. See 2000 Del. Laws, c. 402 (2000). This legislation also created 26 Del. C. § 203C. Section 203C dispensed with virtually all of the broad and unfettered discretion formerly enjoyed by the Secretary of DNREC to "issue or refuse to issue" a CPCN for "wide-area franchises" without the consent of property owners. From 1976 through 1991, Delaware law required only that, in order for DNREC to issue a CPCN, "the present or future public convenience and necessity require or will require the operation of such business or extension." (Senate Substitute No. 1 (for Senate Bill 730) with Senate Amend. 2 (128th Gen. Assembly, June 30, 1976 (Sen. Sub. 1, Sec. 6 - adding § 6031 to Title 7); 68 Del. Laws, c. 124 (1991)) In 1991, the Delaware legislature limited DNREC's authority imposing the now familiar requirements of 1) a signed service Agreement with a Developer; 2) a petition signed by a majority of landowners in the proposed territory to be served; and 3) a resolution from a local government. DNREC's Secretary could grant a CPCN for a larger area upon a finding after a public hearing "that sound and efficient water resource planning, allocation, management, and regulation would be implemented." See 7 Del. C. §§ 6076 & 6077 (1991-1994).

23. Effective June 28, 2007, however, according to 26 Del. C. § 203C(e)(1)(a-d), the Public Service Commission is required to issue ("shall issue") a CPCN after notice to the landowner, if a water utility submits any of the following:

- (a) A signed service agreement with the developer of a
proposed subdivision or development, which

not apply to "existing" CPCNs or "for the extension or expansion of operations within a service territory for which a certificate has previously been granted."

- subdivision or development has been duly approved by the respective county government;
- (b) One or more petitions requesting water service from the applicant executed by the *landowners of record of each parcel or property* to be encompassed within the proposed territory to be served:⁶
 - (c) In the case of an *existing development, subdivision, or generally recognized unincorporated community*, one or more Petitions requesting water service from the applicant executed by the landowners of record of parcels and properties that constitute a *majority of the parcels or properties* in the existing, development, subdivision or unincorporated community; or
 - (d) A certified copy of a resolution or ordinance from the governing body of a *county or municipality* that requests, directs, or authorizes the applicant to provide water utility services to the proposed territory to be served, which must be located within the boundary of such county or municipality.

24. Since the Delaware legislature has expressly required the Commission to grant CPCNs to water utilities if certain statutory criteria is satisfied, the CPCN issuance statutes, i.e. 26 Del. C. § 203C(e)(1)a-d described above, must be strictly followed by the Commission. *E.g., Miller v. Spicer*, 602 A.2d 65, 67 (Del. 1991), citing to, Delaware Citizens for Clean Air, Inc. v. Water and Air Resources

⁶Previously, Delaware required only a majority of landowners in a proposed service area to execute any CPCN application, without distinguishing between proposed territories and existing developments as the current statute described above does in sections (b) and (c), respectively. Also, 26 Del. C. § 203(C)(d) addresses CPCN

Commission, 303 A.2d 666, 667 (Del. Super. 1973); see also In re Fountain, 913 A.2d 1180, 1181 (Del. Super. 2006). Regarding issuing CPCNs, the PSC Staff testified in this Docket that, if the statutory criteria for issuance is satisfied, "the Commission must grant the CPCN." (See Staff's Testimony, T-186-187.)

25. Delaware's current water CPCN issuance statutes have been described as a "consent regime." (See Exh. 84, Exh.2/Exh. A/p.4). This means that, by not opting out of a CPCN application filed by a water utility, a landowner consents to the CPCN being issued for their property. (*Id.*) The landowner has a statutory right to "opt out" of the CPCN prior to the CPCN being issued. The landowner may, after receipt of the statutorily-required notice from the utility, but prior to the issuance of a CPCN, "opt-out" of water service with that utility pursuant to 26 Del. C. § 203(C)(i). This is done by the landowner signing an opt-out form provided by the utility in its statutorily-required notice and mailing it to the Commission.

26. Delaware's water CPCN issuance statutes were enacted by the Delaware legislature in 2000; ten (10) years after the Delaware Supreme Court's 1990 decision in Delmarva Power & Light Company v. City of Seaford, 575 A.2d 1089 (Del. 1990), *cert. denied*, 498 U.S. 855 (1990). In Delmarva Power, the Delaware Supreme Court held that an electrical CPCN and franchise issued under Section 203A held by Delmarva Power was not an "exclusive property right." (*Id.* at 1096.) However, the court also held that "the exclusivity warranted by the [electrical CPCN] operates to protect Delmarva from competition from other regulated utilities, not municipal utilities such as Seaford Power." (emphasis supplied) (*Id.* at 1098) The court permitted the City of Seaford's municipal utility to provide electrical service to two (2) Delmarva customers located on land

issuance if water standards' non-compliance or insufficient supply is at issue.

annexed by the City, thereby replacing Delmarva's service. (Id. at 1091.) However, pursuant to Delmarva's Inverse Condemnation claim, the court required the City of Seaford to pay Delmarva reasonable compensation for "the taking" of the income and profits derived from Delmarva's customers, which constituted Delmarva's property rights. (Id at 1098.) The court pointed out that the PSC did not have jurisdiction over municipal utilities such as the one owned by the City of Seaford. (See 26 Del. C. § 202(a); Id at 1097.) see also The Reserves Development Corp. v. PSC, WL 139777 (Del. Super. 2003) (unpublished opinion), affirmed 830 A.2d 409 (Del. 2003) (holding that a Developer was prohibited from serving water to a development's residents because the Developer would be acting as a public utility and another utility had been issued the "exclusive" water CPCN by the PSC)

B. Delaware Law Governing Revocation of Water CPCNs

27. As to revoking a water CPCN, 26 Del. C. §203C(k) was enacted in 2000, when the state's water CPCN issuance statute was enacted. Both statutes became effective July 1, 2001. Delaware's Water CPCN Revocation Statute provides as follows:

(k) The Commission may undertake to suspend or revoke for good cause a certificate of public convenience and necessity held by a water utility. Good cause shall consist of:

(1) A finding made by the Commission of material noncompliance by the holder of the certificate with any provisions of Titles 7, 16 or 26 dealing with obtaining water or providing water and water services to customers, or any

order or rule of the Commission relating to the same; and

- (2) The presence of such additional factors as deemed necessary by the Commission as outlined in subsection (1) of this section.

(1) Prior to July 1, 2001, the Commission shall establish rules for the revocation of a certificate of public convenience and necessity held by a water utility. Such regulations shall outline the factors, in addition to those outlined in subsection (k) of this section, which must be present for a finding of good cause for revocation of a certificate. Such additional factors shall include, but not be limited to, the following:

- (1) A finding by the Commission that, to the extent practicable, service to customers will remain uninterrupted under an alternative water utility or a designated third party capable of providing adequate water service; and,
- (2) To the extent practicable, the Commission should attempt to identify methods to mitigate any financial consequences to customers served by the utility subject to a revocation.

28. 26 Del. C. § 203C(k)-(1) permits the Commission to revoke a CPCN for "Good Cause." That Statute specifically provides that "Good Cause" shall consist of a finding of a utility's "material noncompliance" with a provision of Title 7 [addressing Conservation], Title 16

[addressing Health & Safety], or Title 26 [addressing Public Utilities] "dealing with obtaining water or providing water and water services to customers," or any order or rule . . . of the Commission relating to the same."

29. Once such an enumerated statutory violation occurs, according to 26 Del. C. § 203C(k)(2), "additional factors" are also considered in deciding whether a CPCN will be revoked by the Commission.⁷ According to Section (k)(2), the Commission is required to evaluate additional factors enacted by the Commission, such as the new factors the PSC Staff has proposed in this docket. Lastly, in deciding whether to revoke a CPCN, the Commission is required to evaluate the factors contained in section (1)(1) of the statute, i.e. whether service to customers remains uninterrupted; and section (1)(2) - the methods of mitigating any financial consequences to customers.

30. Additional evidence of the intent of the Delaware legislature to require a Commission finding of a material non-compliance violation of Del. C. § 203C(k)(1) before revoking a CPCN is also contained in section (k)(2). This section provides that "the Commission shall establish rules for the revocation of a certificate of public convenience and necessity held by a water utility. Such regulations will outline the factors, in addition to those outlined in subsection (k) of this section, which must be present for a finding of good cause for revocation of a certificate." Clearly, a finding of material non-compliance of section (k)(1) is required before a CPCN can be revoked. Section (k)(1) is not the end of the analysis of whether a CPCN may be revoked, but it is the initial, required finding for any CPCN to be revoked. Lastly, in deciding whether

⁷Staff's proposed "additional factors" are listed in Staff's proposed Rule 13.2 which has been agreed upon by the parties. These factors include, for example, fraud, dishonesty, criminal conduct, insolvency, violating water statutes, failure to comply with a court order, and other factors the Commission deems relevant. These factors

to revoke a CPCN, the Commission is required to evaluate the factors contained in section (1)(1) of the statute, i.e. whether service to customers remains uninterrupted; and section (1)(2) - the methods of mitigating any financial consequences to customers.

C. Staff-proposed Five-Year Opt-Out Rule which would allow a landowner to opt-out of a water CPCN if service was not provided within five years not adopted by Hearing Examiner because it is not permitted by Delaware Law governing the Revocation of Water CPCNs

31. Staff's proposed five year Opt-Out Regulation is not permitted 26 Del. C. 203C(k)-(1) because, upon an opt-out request from a landowner approved by the Commission, the proposed Regulation alone would permit the "revocation" of an entire CPCN (or usually the portion thereof relating to the landowner who is opting out) if a utility had not serviced an area within five (5) years of the date the CPCN was issued. However, not serving a property within five (5) years is not a "material non-compliance" violation of section (k)(1) as specifically required by Del. C. §203(C)(k) i.e. it is not a violation of Delaware Code Title 7 [addressing Conservation], Title 16 [addressing Health & Safety], nor a violation of Title 26 [addressing Public Utilities] "dealing with obtaining water or providing water and water services to customers," or any order or rule . . . of the Commission relating to the same."

32. Staff's proposed Opt-Out Rule provides as follows:

12.0 Conditional Grant of a CPCN for a Proposed Service Area

12.1 This Section 12.0 shall only apply to properties subject to a CPCN which was granted by the Commission after the date this Section 12.0 became effective.

are discussed in Paragraphs 108 and 109, *infra*.

12.2 For any CPCN granted pursuant to 26 Del. C. § 203C(e)(1)(2) or § 203C(e)(1)(3) after the effective date of this Section, the landowner of record of a property included in a water utility's certificated service area shall be afforded an opportunity to "opt-out" and have their property removed from the water utility's service area if the water utility has failed to provide water service to the property within five years of the date on which the CPCN was granted. To that extent, a CPCN granted to a water utility shall be conditional.

12.3 When five years have passed since the Commission granted a CPCN to a water utility, the utility shall, within sixty days thereafter, file a report with the Commission plainly identifying the properties within the CPCN service territory that are actually receiving water service from the utility and those properties that are not receiving water service from the utility.

12.4 If five years have passed since a water utility was granted a CPCN, and the water utility is not actually providing water service to any property within the service territory granted by the CPCN, the water utility shall send notice to the landowners of record of each such property that the landowners may have the opportunity to "opt-out" and have their property removed from the utility's service territory, due to the water utility's failure to provide water service. This notice shall be sent within thirty days after the five year period has expired. The notice shall be sent by United States Postal Service

certified mail, return receipt requested, with delivery restricted to the addressee. If the United States Postal Service returns any materials reflecting that, in the case of a particular landowner of record, the certified mail delivery failed because the delivery was "refused," "unclaimed," "undeliverable," "unknown," or otherwise not completed, then the water utility shall promptly re-send the form of the required notice by first class United States Postal Service mail to the best available address of that landowner of record. Copies of documents related to the notices sent to the landowners shall be filed with the Commission. The Commission, by Order, may authorize a method of providing notice to landowners of record that is equivalent to the methods set forth above. The form of notice sent to landowners of record by the water utility must include the following statements:

YOU SHOULD READ THIS NOTICE CAREFULLY. Public records list you as a landowner of the property with the following tax map parcel identification number(s): *[insert tax map parcel identification number(s)]* Your Property is included in [INSERT WATER UTILITY'S NAME] service territory. Five years have passed since the Delaware Public Service Commission granted [INSERT WATER UTILITY'S NAME] a Certificate of Public Convenience and Necessity to provide water service to your property. If [INSERT WATER UTILITY'S NAME] is not providing water service to your property, you may file a request to opt-out, which means your property may be removed from [INSERT WATER UTILITY'S NAME] service

territory.

- 1) You may choose to remain in the utility's service territory. If so, you do not have to take any action.
- 2) You may wish to have your property removed from [INSERT WATER UTILITY NAME] service territory, which means "opt-out" of the service territory. If you wish to "opt-out" you must complete the enclosed form and return it to the Public Service Commission at the address listed below within ninety (90) days from the date you receive this notice:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

Please note that a request to "opt-out" will not automatically remove your property from a water utility's service territory. If the water utility objects to your request to "opt-out," the Commission may consider other factors outlined in its regulations in making a final determination whether your property should be removed from the service territory.

- 3) If you do not send the completed opt-out request form to the Public Service Commission, your property will remain in the utility's service territory. If you have any questions, comments, or concerns, please contact the Public Service Commission at (302) 736-7500 (in Delaware, call 800-282-8574).

12.4.1 If the water utility's CPCN was granted pursuant to 26 Del. C. § 203C(e)(1)(2), the properties of landowners of record, who want their properties to remain within the utility's proposed service territory, shall remain within the water utility's service territory. If the water utility's CPCN was granted pursuant to 26 Del. C. § 203C(e)(1)(3), and a majority of the landowners of record of the existing development, existing subdivision, or existing unincorporated community want their properties to remain within the water utility's service territory, then all of the properties within the existing development, existing subdivision, or existing unincorporated community shall remain within the utility's service territory.

12.5 If the water utility that was granted the CPCN wishes to oppose a request by a landowner of record to opt-out of the utility's service territory, the utility must file a proceeding with the Commission within 150 days of the date on which the landowner filed the opt-out notice with the Commission.

12.6 In a proceeding filed by a water utility under Section 12.5, to obtain a determination whether landowners of record who request to opt-out of the utility's service territory should be permitted to opt-out, the Commission shall consider relevant factors, including, but not limited to, the following: a) whether the water utility has a reasonable plan to begin to provide water utility service to properties whose landowners of record wish to opt-out, and the water utility's anticipated timetable for providing such

service, b) whether the properties support, or are essential to, the water utility providing water utility service to another Proposed Service Area, (c) whether any delay in providing service was beyond the reasonable control of the utility; (d) the extent to which the utility has invested resources pursuant to the CPCN; and (e) the extent to which the public convenience and necessity would be served by denying the landowner's request to opt-out.

12.7 In any proceeding instituted under Section 12.5, the water utility shall have the burden of proof, including the burden of proving the factors set forth in Section 12.6 a) through e).

12.8 In any proceeding instituted under Section 12.5, the Commission shall have the authority to determine the manner and form of notice to be provided to landowners of record whose properties may be affected by the proceeding.

33. The Delaware legislature did not enact the five year Opt-Out rule in the Revocation statute. According to the Revocation statute, a CPCN cannot be revoked without first finding that one of the enumerated statutory grounds for revocation contained in 26 Del. C. § 203C(k)(1) has been established. "Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist [W]hen a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe." State ex rel. Everding v. Simon, 20 Or. 365, 373-74, 26 P. 170 (1891) (quoting Hobbs v. McLean, 117 U.S. 567,

579(1886)); see PSC v. Wilmington Suburban Water Corp., 467 A.2d 446, 450-51 (DE. 1983).

34. When construing a statute, an agency or court must adhere to traditional canons of statutory interpretation. The United States Supreme Court has held that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *E.g.*, Connecticut Nat'l Bank v. Germain, 112 S.Ct. 1146, 1149 (1992). This bedrock canon of statutory interpretation supports the utilities' construction of the Revocation Statute, not Staff's construction. Simply put, the Revocation Statute clearly delineates the statutory criteria for revoking a CPCN or any portion thereof. The Delaware legislature is presumed to have said what it intended to say in the Revocation Statute. See also Amer. Auto. Manuf. Ass'n v. PSC, 1998 WL 283472 (Del. Super. 1998) (unpublished opinion) ("[s]tatutory interpretation necessarily must begin with a straightforward reading of the statute to comprehend its intended operation")

35. Since the Delaware legislature has expressly required the Commission to grant and revoke CPCNs to water utilities if certain statutory criteria is satisfied, the water CPCN Issuance and Revocation statutes, and the criteria contained therein, must be strictly followed by the Commission. *E.g.*, Atlantic Mutual Ins. Co. v. C.I.R., 523 U.S. 382 (1998); Miller v. Spicer, 602 A.2d 65, 67 (Del. 1991), *citing to*, Delaware Citizens for Clean Air, Inc. v. Water and Air Resources Commission, 303 A.2d 666, 667 (Del. Super. 1973); In re Fountain, 913 A.2d 1180, 1181 (Del. Super. 2006). See also Com. v. American Ice. Co., 178 A.2d 768 (PA. 1962) (contemporaneous adoption of statutes reflects legislative intent that the statutes be interpreted together). Regarding the issuance of a CPCN, the PSC Staff admitted during the hearings that, if the statutory criteria for CPCN issuance is satisfied, "the Commission

must grant the CPCN." (See Staff's Testimony, T-186-87.) Therefore, it reasons that the statutory criteria contained in Delaware's Water CPCN Revocation Statute must also be strictly followed.

36. Staff's proposed Opt-Out Rule is entitled "Conditional Grant of a CPCN for a Proposed Service Area." By use of the term "conditional," which is not contained in any statute, Staff's position is apparently that the proposed five year Opt-Out rule is not revocation, but rather some type of "lapse" caused by the failure to provide water service. *Black's Law Dictionary* (8th Ed. 2004, p.1346) defines "revocation" as "[a]n annulment, cancellation, or reversal of an act or power." If the Commission revokes a CPCN due to a "lapse" or for any other reason, it would still constitute revocation and it would be governed solely by Delaware's Revocation statute. The Hearing Examiner submits that there is no distinction between "revocation" and "lapse." This is because, in either case, the CPCN (or a portion thereof) would be taken from the utility holding the CPCN - in favor of the landowner who had consented (or whose predecessor-in-title had consented) to the issuance of the CPCN to the utility holding the CPCN.

37. Moreover, Staff's position is that the Commission may enact the five year Opt-Out rule as a reasonable "condition" upon CPCNs issued by the Commission. Although Staff's legal arguments will be discussed in detail in the following section of this Report, this argument likewise ignores the Water CPCN Revocation Statute passed by the Delaware legislature. The Delaware Public Service Commission was created by the legislature and its subject matter is limited to those matters granted to it by the legislature. *E.g.*, Public Service Commission v. Diamond State Tel. Co., 468 A.2d 1285, 1300 (Del. 1983); Eastern Shore Natural Gas v. PSC, 635 A.2d 1273, 1277 (Del. Super. 1993), *aff'd* 637 A.2d 10 (Del. 1994).

38. The Hearing Examiner's Recommendation is also consistent with 26 Del. C. § 203A(3) raised by Staff, which provides as follows: "The Commission, after hearing, on the complaint of any public utility claiming to be adversely affected by any proposed extension, may make such order and prescribe such terms and conditions with respect to the proposed extension as may be required by the public convenience and necessity." Assuming without deciding that § 203A applies to water utilities, § 203A(3) does not apply to the proposed five (5) year Opt-Out rule because no public utility is "claiming to be adversely affected by any proposed extension"-which is the grant of the CPCN-not its revocation. An opt-out complaint is landowner driven. According to the proposed five (5) year opt-out rule, if service is not provided five (5) years *after* the CPCN is granted, a landowner may opt-out of the CPCN the landowner (or their predecessor-in-title) previously agreed to. § 203A(3) simply does not apply. Clearly, this provision was intended to apply only where two water utilities have a dispute as to a pending CPCN application. Caminetti v. U.S., 242 U.S. 470 (1917) ("if a statute's language is plain and clear, the duty of interpretation does not arise..."); Board of Governors v. Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986) (same).

39. In conclusion, the utilities argue and the Hearing Examiner agrees that, Delaware's water CPCN Revocation Statute unambiguously prohibits the adoption of Staff's proposed five year Opt-Out rule. Caminetti v. U.S., 242 U.S. 470 (1917) ("if a statute's language is plain and clear, the duty of interpretation does not arise..."); Board of Governors v. Fed. Reserve System v. Dimension Fin. Corp., 474 U.S. 361 (1986) (same); Hartford Accident & Indem. Co. v. W.S. Dickey C. Mfg. Co., 24 A.2d 315, 320 (DE. 1942) (same); Rubick v. Security Invest.

Corp., 766 A.2d 15,18 (Del. 2000) (same) (citing Ingram v. Thorpe, 747 A.2d 545, 547 (Del. 2000)).

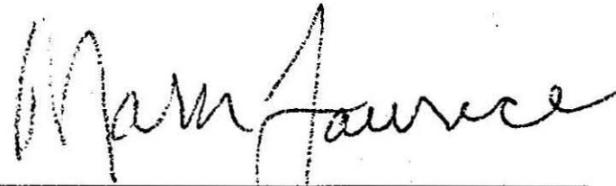
40. **Standard of Review.** If a statute grants power to an administrative agency and is ambiguous with respect to a specific issue, courts will sometimes defer to the agency's reasonable interpretation of a statute. Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). However, Delaware now has one of the least deferential standards if a court reviews an agency's interpretation of a statute, which is the issue concerning the proposed Opt-Out Rule. Basically, a Delaware agency must correctly interpret a Statute or its interpretation will be reversed. *E.g.*, Hirneisen v. Champlain Cable Corp., 892 A.2d 1056 (Del. 2006) (where "plain language" of workers compensation statute contained no exception for spouses of retired workers, the agency and lower court erred in implying one"; Public Water Supply v. DiPasquale, 735 A.2d 378, 382-83 (Del. 1999) (a reviewing court must apply de novo standard, although the court may accord "due weight" but not defer to an agency interpretation of a statute . . . A reviewing court may not defer to such an interpretation as correct merely because it is rational or not clearly erroneous.); New Castle County Dep't of Land Use v. University of Delaware, 842 A.2d 1201 (Del. 2004) (in overturning agency's tax exemption statute, Superior Court held that "the construction of statutes is a purely legal determination . . . reviewed de novo").

41. **Hearing Examiner's Recommendation Regarding Opt-Out Rule.** The Hearing Examiner's Recommendation that Staff's proposed Opt-Out rule not be adopted is based upon a question of law i.e that Delaware's Water CPCN Revocation Statute 26 Del. C. C(k)-(1) unambiguously prohibits its adoption. However, if the Commission holds that there is "a lawful statutory basis" to adopt the opt-out Rule as required by 29 Del. C. §10141(e), for the reasons described in Sections VI and VII describing

X. CONCLUSION

113. For the reasons contained herein, the Hearing Examiner makes the Recommendations to the Commission described in Articles VIII and IX herein. Due to the number of contested issues in this Docket, the Hearing Examiner has not yet drafted a proposed Commission Order. Once the Commission hears this Docket at a Commission Meeting, if directed, the Hearing Examiner will submit a proposed Order to the Commission for its consideration.

Respectfully submitted,

A handwritten signature in cursive script that reads "Mark Lawrence". The signature is written in black ink and is positioned above a horizontal line.

Mark Lawrence
Hearing Examiner

DATED: November 25, 2009

that there should not be any "objection" language in the Opt-Out Notice nor Section 11 because such language is not supported by Delaware law and would only confuse landowners. The statutory framework is addressed only to opting-out, not filing objections. If this recommendation is approved by the Commission, Staff's and the utilities' proposed Notice forms, as presently drafted, must be revised.

Lastly, Artesian and Tidewater argue that Section 10.5 should be modified to make it clear it does not apply to solicitation materials sent to a property owner prior to the filing of a CPCN application. Section 10.5 requires that the utilities "not include any other correspondence with the landowner notice required by these regulations." Although the Section 10 Opt-Out notice entitled "Form of Notice to Landowners of Record" differs from the Staff's Section 8 "solicitation notice," the Hearing Examiner recommends that Regulation 10.5 be clarified that the Section 10 Opt-Out Notice does not need to be included in solicitation materials sent to a landowner prior to the filing of a CPCN application. Of course, when the utility applies for the CPCN, the landowner will receive a Section 10 Opt-Out notice affording the landowner the opportunity to Opt-Out.

approach: (1) there is sparse statutory basis for that approach under the amended law. The only reference to filing an objection is in sec. 203C(i), which includes the statement: "Notwithstanding the objection and opt-out provisions contained in this subsection, if the Town Council of the Town of Ocean View...." In fact, however, there no longer is any "objection" provision in the subsection, the provisions all relate to the opt-out; (2) the proposed regulations logically require, in the case of an objection to the CPCN, that the objection be supported by an explanation of the reasons supporting the objection and (in the case of non-landowners within the proposed territory) a statement of interests. See Sec. 11.0. If the objection "option" is included in the opt-out form, it would either invite the objecting party to object without providing the required information (if, for example, the opt-out form includes only a box to be checked to indicate an objection is being made), or the form would have to require a lot of information that would make it more complicated and perhaps intimidating.

Inasmuch as the statutory requirement addresses only the opt-out "option," it would be simpler to limit the form to that option. The revisions to the notices proposed in the attachment do explain the right to object and set a deadline which is consistent with the opt-out deadline (the deadline is prior to the issuance of the CPCN; the opt-out deadline is so fixed in the statute at 203C(i), there is no deadline for objections or any other procedure related to objections). One goal of taking the objection option off the opt-out form is to avoid the situation of someone "filing" an objection on the opt-out form without explaining the basis for the objection as required. If that happens, and it is more likely to happen if the objection "option" is on the opt-out form, then PSC Staff and everyone else is placed in the position of having to figure out whether the objection as a legal matter should hold up the issuance of the CPCN."

Regarding Section 10.1, for the reasons described in Tidewater's letter above, the Hearing Examiner recommends

approve the form of notice for applications premised on the statutory Sections of 26 Del. C. § 203C(d)(2), (e)(1)(a), or (e)(1)(d) without any guidance. By way of contrast, Artesian and Tidewater note that in Section 9.7 the Commission reserves unto itself the authority by Order to approve alternative methods of notice. The utilities assert that the form of notice should not be left to an "ad-hoc determination" by Staff.

The Hearing Examiner recommends that, regarding Section 10.1, the final language of the "Form of Notice to Landowners of Record" i.e Opt-Out form and indeed Regulation 10 itself, shall be determined by the Commission at a meeting open to the participants of this Docket and that PSC Staff will not have sole discretion as to the Notice's content nor authority to change the form without Commission approval.

Artesian and Tidewater also object to Sections 10.2 and 10.3 as set forth in Mr. Homer's December 10, 2008 letter to Staff's Counsel Mr. Murphy. Artesian and Tidewater persuasively argue that the "objection" option should be deleted from the Opt-Out form for the reasons stated in Mr. Homer's letter to the Hearing Examiner below.

Tidewater's Counsel Jeremy Homer, Esq. sent the following letter to the Hearing Examiner and the parties on January 30, 2009 regarding the Notice in Section 10:

"The notices set out in sec. 10 of the revisions have been simplified so they are easier to understand. [Staff's] Mr. Murphy's version indicates the landowner can use an attached form to either opt-out or object to the CPCN.

Tidewater sees two problems with that

authorize or require the issuance of a potable well permit that would enable a person or entity to act as a water utility without a duly issued certificate of public convenience and necessity.

(emphasis supplied)

Tidewater and Artesian argue that DNREC would not deny a well permit for a farm or farmland. However, neither utility proffered any evidence at the hearings from DNREC, landowners or otherwise to support the utilities' position. While there is a "farm/farmland" exception as underlined in section (b) above, many Delaware landowners solicited by the utilities to sign water service petitions would own property which would not be considered farm/farmland as defined by the Statute, including residential property and commercial property, and therefore would need to receive notice about their well rights. Moreover, the terms "farm" and "farmland" are not defined by the statute, and consequently open to some interpretation. Without any record evidence being proffered, the Hearing Examiner recommends that all of Staff's proposed language in Regulation 10 regarding wells be adopted by the Commission. The policy behind Staff's proposed Rule is sound: to provide adequate notice to Delaware property owners concerning their inter-related well rights and water service rights. Additionally, Staff introduced Opt-Out letters from Delaware landowners in which some landowners were confused as to the Opt-Out process. (Exhs. 97, 98.)

Artesian and Tidewater object to **Section 10.1** (Exhibit "A" - p.21) because it delegates to PSC Staff the authority to

landowner.

- (2) Well rights may be affected. 7 Del. C. §6075 addresses "nonutility wells and permits for nonutility wells within a service territory served by a water utility under a certificate of public convenience and necessity." The statute provides as follows:

(a) The Department may not withhold a permit for a potable water well within the service territory served by a water utility under a certificate of public convenience and necessity, or require an applicant for a potable water well permit in an area served by a water utility to utilize the services of the utility, unless:

(i) The Delaware Geological Survey or the Department of Health and Social Services certifies that the ground water supply is inadequate or unsuitable for the intended use for which the permit is being sought;

(ii) The water utility demonstrates to the satisfaction of the Department that it can provide service of equal or better quality at lower cost; or

(iii) The permit applicant is a resident of a municipality, a county water district authority, or a recorded development where public water is available.

(b) Notwithstanding paragraphs (a)(2) and (3) of this section, following the issuance of a certificate of public convenience and necessity to a water utility, the Department shall not withhold a potable water well permit from any person seeking to construct or extend a well on a farm, farmland or the lands of any existing mobile home community, or an addition, modification or extension of that mobile home community, which as of April 11, 2000, self-supplied potable water under existing permits in an area served by a water utility, nor shall it require that the person utilize the services of the utility. However, this subsection shall not

ramifications of a signature on a CPCN petition. Unlike the Notice in Rule 8, this Notice is specifically prescribed by various Statutes, specifically 26 Del. C. § 203C(d)(2), (e)(1)(a), or (e)(1)(d). ("must notify landowners of the filing of the [CPCN] application"). Staff's proposed Opt-Out Notice is attached as **Exhibit "F"** hereto.

Currently, the Opt-Out Process is being described by the utilities in letters drafted by the utilities. Some landowners have been confused by the language used by the utilities. (T-116, 169, 214, 758, 759, 1207-08, 1758) Additionally, Staff introduced Opt-Out letters from Delaware landowners in which some landowners were confused as to the Opt-Out process. (Exhs. 97, 98)

Also, there are significant consequences to a parcel of land being included in a certificated service area; consequences which, for the most part cannot be "undone." Inclusion of a parcel of land in a CPCN area means the following:

- (1) The land, once included in a service area, cannot, in general, be removed from the service area unless the utility holding the certificate is willing to abandon the certificate. There is no regulation which would allow the Commission to revoke a certificate where the property would be better served by or preferred by the

the [new] CPCN application." The Opt-Out notice is different from the Staff's language which must be contained in the utilities' solicitation letters.

The Opt-Out Notice drafted by Staff sent by water utilities must be sent to landowners along with the utilities' letter asking the landowner to sign a CPCN petition. According to the proposed Regulation, the utilities must establish that each landowner was solicited with such letter and attach it to the CPCN application. Currently, the Opt-Out Process is being described by the utilities in letters drafted by the utilities. Some landowners have been confused by the language used by the utilities in such letters. (T-116, 169, 214, 758, 759, 1207-1208, 1758) Additionally, Staff introduced Opt-Out letters from Delaware landowners in which some landowners were confused as to the Opt-Out process. (Exhs. 97, 98.)

The Hearing Examiner recommends adoption of Regulation 9.0 based upon 26 Del. C. § 203C(d)(1) and 26 Del. C. § 203C(e)(1), which each require each landowner's consent to CPCN application after notice by certified mail. Additionally, 26 Del. C. § 203C(c) provides that a CPCN application "shall be in the form as determined by the Commission" Lastly, the follow-up mail provision in Section 9.6 is required by the United States Supreme Court's decision in Jones v. Flowers, 547 U.S. 220 (2006) (discussed in footnote 4, *supra*.)

As to No. 10.0, the revised Opt-Out Notice, Staff seeks to require water utilities to disclose to landowners the

Moreover, the utilities object to Staff's language in Sections 8.1 and 8.2.7.1 regarding well permits, because that language is allegedly "misleading" in light of 7 Del. C. § 6075. That statute generally permits a landowner to have a well unless public water is available. (Tidewater Answering Brief, p. 2.) According to the utilities, 7 Del. C. § 6075 provides a "high level of protection for property owners seeking a well permit." (See Letter from John J. Schreppler II, Esq., Artesian's General Counsel to Hearing Examiner and parties dated January 30, 2009, Para. 9.)

The Hearing Examiner recommends that the changes proposed by Staff regarding well permits are also necessary. Regarding well permits, the Hearing Examiner's explanation is detailed in the discussion regarding proposed Regulation 10-the revised Opt-Out Notice form, *infra*. Thus, the Hearing Examiner recommends adoption of proposed Regulation 8 in its entirety. The legal support for the Hearing Examiner's position is 26 Del. C. § 203C(c) which provides that a CPCN application "shall be in the form as determined by the Commission" Moreover, the "general powers" provisions of 26 Del. C. §§ 201, 202, and 209 also provide authority for Regulation 8.0 to be enacted.

As to proposed Regulation 9.0, including Regulation 9.2 which requires that a Staff-drafted "Opt-Out Notice form" described in Section 10 be sent certified mail, return receipt requested, to all landowners "not more than thirty-five (35) days and not less than thirty (30) days prior to the filing of

Tidewater apparently has a procedure in place to record when someone opts-out by phone or in writing and not notify the landowner again, but the Hearing Examiner does not believe that such a procedure solves the issue of better notice to Delaware landowners of the CPCN process. (Exh. 130/Tidewater's "Water Opt-Out Notification Procedure")

In light of Staff's valid concerns that Delaware property owners be fully informed of their rights regarding the CPCN process, the Hearing Examiner recommends that Regulation 8 be adopted in its entirety, despite the utilities' rather weak argument that the Opt-Out Notice in Regulation 10 also contains an explanation of opting-out. (T-764.)

Artesian and Tidewater also object to language in Sections 8.1 and 8.2 directing persons who have any questions to contact the Public Service Commission, rather than the utility seeking to obtain the service territory. The Hearing Examiner sees no problem with this approach since Delaware property owners can speak with an objective representative at the PSC about their water rights, as opposed to a utility seeking their business. Again, this requirement is directed toward have Delaware landowners fully informed of their rights.

The parties agree that Section 8.2 must be revised because Section 8.2.1 cannot be made applicable to applications under 26 Del. C. § 203C(e)(1)c, which allows a CPCN to be issued upon the agreement of "a majority of the parcels or properties in the existing development, subdivision, or unincorporated community. (See Footnote 6, *supra*.)

Delaware landowner complained that Tidewater provided absolutely no information about "the opt-out or how to do so" yet the letter requested that the landowner sign a CPCN Petition. (Exh. 97-Mock letter dated 2/24/06 & Tidewater ltr.) Tidewater's letter arguably violates 23 Del. C. C (i) which states that all Delaware landowners "shall be entitled to opt-out and have the landowner's parcel or property excluded from the proposed territory to be served." This particular landowner was not informed by Tidewater of his right to Opt-Out. The words "opt-out" do not appear in Tidewater's letter. This case illustrates the need for the adoption of Staff's Notices proscribed in Rules 8 and 10, except as noted later in this Report. Staff's notice in Section 8 does not address opting-out, like the opt-out notice in Section 10 does, but clearly some Delaware landowners are confused as to the overall CPCN process.

Also, some Delaware landowners, particularly farmers in areas the utilities wish to serve since residential developments may be built there, have complained that the utilities are sending notices every year to get the farmers/landowners to sign up for a CPCN. (Exh. 97) The utilities' CPCN marketing efforts are not restricted by Statute. However, if these farmers/landowners are better informed of their rights, it reasons that it is more likely that they will Opt-Out when they wish to Opt-Out, and not opt-out and give up their water rights, when they did not wish to do so. A farmer/landowner could assume that, if they opted out, that their opt-out is sufficient forever, which is not case if they are sent another CPCN request the following year, which appears to be occurring. (Exh. 97) Only

utilities are required to send Staff's Section 8 notice along with the utilities' solicitation letters, Delaware landowners will be better informed of their rights regarding their water service and CPCNs. (T-1207.) The Hearing Examiner agrees principally because Staff's notice clarifies a landowner's rights regarding their water service much more than the solicitation letters currently being sent by the utilities. (T-765.)

Sample solicitation letters from Artesian and Tidewater are attached as composite **Exhibit "D"** hereto. Staff's proposed "solicitation notice" to accompany all utility solicitation letters is attached as **Exhibit "E"** hereto. The utilities' solicitation letters do not, for example, specify that a landowner can never unilaterally change their water utility after the landowner consents to the CPCN if the landowner is not receiving service or is not satisfied with the service. (See Exhibit "D"-Sample Solicitation Letters from Artesian & Tidewater; Exh. 113-Artesian & Exh. 129-Tidewater) Also, the utilities' current solicitation letters do not describe the possible effect of a CPCN on well rights, nor when service will be provided, nor do the solicitation letters explain that it is unknown when service will be provided. According to Staff, this lack of critical information about the CPCN process has confused many Delaware landowners. (T-Maucher-116, 169, 214, 758, 759, 1207-1208, 1758)

Additionally, Staff introduced into evidence letters from Delaware landowners in which some landowners were confused as to the CPCN process and their water rights. (Exhs. 97, 98) One

written by Staff. See 26 Del. C. § 203C(d)(1) and 26 Del. C. § 203C(e)(1).

Section 11.0 entitled "Landowner's Options to Object or Opt-Out, and Objections from Other Interested Persons or Entities." Staff has proposed that Landowners be able to "object" and "opt-out" to a proposed CPCN, and that non-landowners be permitted to object.

Discussion-Sections 8.0, 9.0, 10.0 & 11.0

Section 8.0. The utilities oppose proposed Section 8, the water service solicitation Notice prepared by Staff to accompany any solicitation letter from a utility - for the following reasons:

- "notice is contemplated by the statute only for the phase where the Commission is to consider the petition for a CPCN;"
- "multiple notices may confuse property owners;" and
- "the average member of the public has no basis for understanding the explanation in the notice." (See Letter from Jeremy Homer, Esq. on behalf of Tidewater to the Hearing Examiner and parties dated December 10, 2008.)

Staff simply yet forcefully argues that, if the

Thus, the Hearing Officer recommends against the adoption of proposed Regulations regarding single parcels (Section 7.4.1) and contiguous parcels (Section 7.4.2). The remainder of proposed Regulation 7.0 has been agreed upon.

(f) Sections 8.0, 9.0, 10.0, and 11.0. "Notices To Landowners and related Regulations." (Exhibit "A"-p. 16) A short explanation of these proposed notices to landowners and related Regulations, is first necessary; a more in-depth discussion of each proposed Regulation thereafter follows:

Section 8.0 proposes a Staff-drafted Notice form to be included with each utility water service solicitation letter sent to "all landowners to be encompassed within a service territory" or to solicit "the majority of landowners in an existing development, subdivision, or unincorporated community." See 26 Del C. § 203C(e)(1)(b) and 26 Del C. § 203C(e)(1)(c), respectively.

Section 9.0 proposes that a Staff-drafted "Opt-Out Notice form" described in Section 10 be sent certified mail, return receipt requested, to all landowners "not more than thirty-five (35) days and not less than thirty (30) days prior to the filing of the [new] CPCN application." See 26 Del. C. § 203C(d)(1) and 26 Del. C. § 203C(e)(1), requiring landowner consent to CPCN application after notice by certified mail.

Section 10.0 proposes the new "Opt-Out Notice form" or "the Landowner's Notice Form" which has been substantially re-

much younger and, therefore, not as fully integrated." (See Letter from John J. Schreppler II, Esq., Artesian's General Counsel, to Hearing Examiner and parties dated February 12, 2009.)

The utilities' reasonably effective regional planning was demonstrated by the extensive hearing testimony of Tidewater's Bruce Patrick and Artesian's David Spacht and their references to their respective water service maps. The utilities seek to develop water systems into larger regional systems which achieve "economies of scale." (T-207) Economies of scale are the cost advantages that a business obtains by adding customers. According to Tidewater's Mr. Patrick, "a lot of these regional systems start out as independent systems that are expanded and eventually become regional systems." (T-1125) How a water system grows depends on who needs the water, when they need the water, and where they need it. (T-1139-1140) Except for the possible duplication of facilities at Meridian Crossing, the utilities' regional planning efforts have been reasonably successful in New Castle County. (T-918-919, T-959-62.)

As Kent and Sussex Counties are developed even more, the Hearing Officer presumes that the utilities will continue their regional planning efforts simply because it is in the utilities' financial self-interest to continue to do so. Unnecessary duplication of water infrastructure would deplete the utilities' net profit which the for-profit water utilities do not want to happen. (T-290.)

proposed Regulations regarding single parcels (Section 7.4.1) and contiguous parcels (Section 7.4.2) for the following three (3) reasons: (1) as the utilities argue, § 203C(d)&(e) do not require contiguous parcels for a CPCN to be issued; for example, § 203C(e) succinctly requires only that "all landowners of the proposed territory" sign the CPCN application; see also Amer. Auto. Manuf. Ass'n v. PSC, *supra*, ("a regulation must reflect the statutory intent"); (2) depending on where a water main is located, a water main can serve close but non-contiguous parcels; (3) in developing water service for an area, it may be necessary for the utilities to obtain a CPCN for non-contiguous parcels before adding other parcels, possibly later making the parcels "contiguous" through a subsequent CPCN; sometimes it takes years for a particular regional service area to develop to allow the utilities to acquire parcels in the area to achieve the "economies of scale" regarding water service. (T-207).

The utilities sufficiently demonstrated to the Hearing Examiner at the evidentiary hearings that, to date, the utilities have engaged in reasonably-effective regional planning in New Castle County and in the lesser-developed counties of Kent and Sussex. Artesian maintains that it "has an Integrated System ("System") connected from the Delaware/Pennsylvania line all the way to Bethel Church Road in Southern New Castle County. In a few years, that System will be interconnected all the way through Middletown, Odessa and Townsend. In the Southern part of Delaware, the System is

certificate shall be in writing, shall be in such form as determined by the Commission...

For the reasons proffered by Staff, the Hearing Officer recommends the adoption of Rule 6.3 in its entirety. The remainder of Regulation 6.0 has been agreed upon.

(e) Sections 7.4.1 & 7.4.2. Proposed Service Area would include single parcel (7.4.1) or "contiguous parcels" (7.4.2). (Exhibit "A"-p. 15)

Tidewater and Artesian object to the above proposed Regulations which require CPCN applications to encompass only a single parcel of land, or two (2) or more contiguous parcels that will be provided water utility services by the same stand-alone system or by the same water main extension. The utilities argue that, because the Delaware legislature eliminated the utilities' prior statutory right to file CPCN applications signed only by a majority of landowners in a proposed CPCN territory, "there is no good reason to require that parcels in the proposed service area be contiguous." Therefore, the utilities propose to strike the references to "single" and "contiguous."

Staff argues that: (a) the requirement that parcels be contiguous will promote regional planning in the CPCN process; and (b) requiring that parcels be contiguous increases the likelihood of communication among affected landowners in determining whether or not to seek water services from a utility, just as the statute intended. (Staff's Opening Brief, pp. 61-62.)

The Hearing Officer recommends against the adoption of

Del. C. § 101(3) that the legislature contemplated a high degree of coordination between municipal water providers and regulated utilities. Staff argues that the Plan of Service requirement imposed by statute on municipalities is comparable to the plan Staff proposes for public water utilities. (See also the pre-filed Testimonies of Anthony J. DePrima, City of Dover's City Manager, pp 1-4 and Curtis Larrimore, Developer-Century Homes, pp 1-3, which illustrate the need for coordination as it related to "the Bush Farm" residential real estate development in Dover-Exhibits 82 & 83, respectively)

Also, several municipalities had filed written objections to CPCN applications for parcels located near their corporate boundaries (for example, Georgetown (T-1210-11), Bridgeville, Selbyville, Frankford; see Staff's Opening Brief, p. 61). In each case, the applying private utility ultimately agreed to remove the parcel from their CPCN application. According to Staff, the Town of Selbyville became so concerned with the actions of a utility that it went through the time and effort to secure from the Commission a CPCN for all properties located outside its municipal boundaries, but within its designated growth zone. (*Id.*)

26 Del. C. § 203C(c) supports the Hearing Examiner's recommendation. This statute provides that a CPCN application "shall be in the form as determined by the Commission"

This statute provides as follows:

An application for a certificate of public convenience and necessity to begin, extend or expand the business of a water utility beyond the territory covered by any existing

planning requirements which municipalities must comply with:

"Comprehensive plan means a document in text and maps, containing at a minimum, a municipal development strategy setting forth the jurisdiction's position on population and housing growth within the jurisdiction, expansion of its boundaries, development of adjacent areas, redevelopment potential, community character, the general uses of land within the community, and critical community development and infrastructure issues."

Therefore, a municipality needs to receive notice of any private water utility's intended expansion into an area designated by the municipality for future growth. Thus, Staff persuasively argues that municipalities should be afforded (30) days prior notice of the filing of a CPCN application by a water utility if any parcel of land in the Proposed Service Area is located within a future annexation area or future growth area of the municipality. The additional thirty (30) days will give the utility, the municipality, and the landowner(s) more time to coordinate comprehensive infrastructure development.

In regards to annexation of properties, 22 Del. C. § 101(3) provides:

"A city or town shall prepare a plan of services indicating those services it expects to provide to the newly annexed area, how such services will be provided, and the fiscal and operating capabilities of the municipality to provide such services. Should any services be provided by another jurisdiction or a public utility regulated by the Delaware Public Service Commission, the written comments of such provider on the provider's ability to provide the necessary services for the proposed annexation shall be obtained and included in the plan of services."

Staff persuasively argues that it is evident from 22

future annexation area or future growth area of the municipality. Artesian and Tidewater object, and propose instead that notice be given at the time of the application or within three (3) days thereafter. Artesian and Tidewater therefore concede that the municipalities (and their utilities) should receive notice. The only objection is the timing of such notice. According to § 203C(h)(1), the Commission is required to act on a completed CPCN application within ninety (90) days of submission. The Commission may extend that period for an additional thirty (30) days for "good cause" shown.

Staff persuasively argues that giving a municipality and its utility thirty (30) days advance notice of the CPCN application will afford the municipality one(1) additional month to address a CPCN application affecting the municipality's residents. Artesian and Tidewater do not claim that the additional thirty (30) days will impose a burden. Allowing municipalities additional time will reduce the likelihood of protracted disputes between municipalities and private utilities which impose substantial expense on municipalities, the PSC, utilities, taxpayers and ratepayers.

Staff included this rule so that municipalities (or their water utilities) providing water services are given ample notice of possible changes which may impact their *planned* growth. Unlike private utilities, towns and municipalities are limited geographically as to where they can extend services. 22 Del. C. § 702 outlines comprehensive

the following week.

26 Del. C. § 203C(c) provides that a CPCN application "shall be in the form as determined by the Commission"

This statute permits the Request for Service and provides as follows:

An application for a certificate of public convenience and necessity to begin, extend or expand the business of a water utility beyond the territory covered by any existing certificate shall be in writing, shall be in such form as determined by the Commission...

Thus, as to the proposed Regulation 3.13 requiring that the utilities submit a Plan of Service, the Hearing Officer recommends adoption of Regulation 3.13 in its entirety. Except for Regulation 3.2 discussed previously, the remainder of Regulation 3.0 has been agreed upon.

(d) Section 6.3. Municipality must be notified 30 days prior to CPCN Application if Proposed Service Area is in a Municipality's "Future Annexation Area" or "Future Growth Area" (Exhibit "A", p. 14)

Artesian and Tidewater question Staff's proposed regulation that municipalities be notified thirty (30) days prior to the filing a CPCN application, and suggest that municipalities should instead be notified at the time of filing of the application or within three (3) days thereafter as provided in Section 6.1 for certain state agencies.

Staff proposed that municipalities (or their water utilities) be given thirty (30) days prior notice of the filing of a CPCN application by a water utility if any parcel of land in the Proposed Service Area is located within a

they engage in extensive regional planning of their water systems. (T-1119.) Thus, creating the required Plan of Service would not burden the utilities because such regional planning has already been performed. Artesian has eleven (11) employees in its Planning Department whose duties include water infrastructure GIS mapping. (See Letter from John J. Schreppler II, Esq., Artesian's General Counsel, to Hearing Examiner and parties dated February 12, 2009.)

Primarily because CPCN applications are a matter of public record and subject to Freedom of Information Act (FOIA) requests, the Hearing Examiner rejects the utilities' unsubstantiated argument that providing the rather limited CPCN information required by Regulation 3.13 would inform their competitors of the utilities' expansion plans. (T-1059-60, 1167-68, Exh. 44-Artesian's 2005 FOIA request directed to PSC requesting Tidewater's CPCN applications, rate information, etc.)

Staff's un rebutted testimony was that public utilities regularly review each other's CPCN applications, which are posted on the PSC's website available to the public. (T-1167-1168.) The utilities regularly telephone PSC Staff about their competitors' CPCN applications. (Id.) CPCN applications are approved at PSC Commission meetings which the utilities regularly attend and which are open to the public. The utilities may review the Agenda for each Commission meeting one (1) week before the meeting on the PSC website. The Agenda contains all CPCN applications (along with a property description) which are being proposed for Commission approval

Answering Brief, pp. 23-24). Proposed Regulation 3.13 requires that a CPCN application include a description of how and when the applicant utility plans to provide water utility service to the Proposed Service Area or an explanation as to why such an estimated timetable cannot be provided. Staff stipulated that, under Delaware law, the Commission could not deny a CPCN application solely on the basis that the Plan of Service submitted by a utility was determined by the Commission to be unsatisfactory. (T-892.)

Additionally, if the Proposed Service Area is intended to be part of a regional water system, Staff has included a Plan of Service requirement that the Applicant Utility identify the regional water system which includes the Proposed Service Area and provide information setting forth the Applicant's plans for the regional water system.¹⁰

Staff's Andrea Maucher testified that the Plan of Service would benefit the Staff to assist the landowners and the public regarding inquiries and to provide other Delaware governmental agencies with planned water service information. (T-749, 754-55, 11 20-24, 11.) The utilities' plans will inform the PSC Staff, Delaware governmental agencies such as DNREC and the Fire Marshall, and Delaware residents, of the utilities' plans for water service in the State. (Maucher-T-754, Nielson-T-889.)

The utilities maintained throughout the hearings that

¹⁰According to Staff's proposed Regulation 3.13 (fn.3), this requirement would not apply to "a Proposed Service Area for a municipal water utility or a governmental water utility which lies within the political boundaries of the municipality or government."

with a better address description than the property descriptions the utilities are currently using. Also, by not limiting the number of parcels on a CPCN application to no more than five (5) proposed service areas, the utilities' newspaper publication costs are contained and all parcels in the same area can be included on a CPCN application. Without providing personal notice to landowners within some radius of the property involving the CPCN Application, notice by publication must be as specific as possible as to where the property is located.

26 Del. C. § 203C(c) supports the Hearing Examiner's recommended Staff's Proposed Regulation, including 3.2 but not adopt Staff's Proposed Service Area definition limiting an application to five service areas, with even more informative publication requirements required of the utilities by the hearing Examiner than those proposed by Staff. This statute provides that a CPCN application "shall be in the form as determined by the Commission" This statute provides as follows:

An application for a certificate of public convenience and necessity to begin, extend or expand the business of a water utility beyond the territory covered by any existing certificate shall be in writing, shall be in such form as determined by the Commission...

(c) No.3.13 Plan of Service Required of Utilities. (Exh.A-p.10)

The utilities also object to proposed **Regulation 3.13** (Exhibit "A", p. 10), because a Plan of Service is allegedly not permitted by 26 Del. C. § 203C(c). (See, e.g., Artesian's

(c) a listing of Property Tax ID numbers if available (metes and bounds descriptions if Tax IN numbers are unavailable or if neither of those are available, some description capable of being mapped); and (d) the street address(es) shall also be provided if available.

Currently, the utilities often publish a property description such as this: "one parcel of land located northeast of Middletown, New Castle County, Delaware." (See Exhibit "C" hereto-Sample newspaper property description published April 4, 2009 by Tidewater.) Although legal now, this type of property description is not descriptive enough to alert most newspaper readers where this land is actually located. Rather, a newspaper reader will more likely understand where a property is located if the utility publishes the following property description: "one parcel on the northwest corner of Canterbury Road intersecting with Delaware Road, Northeast of Middletown, New Castle County Delaware." Then, the utility lists any Property Tax ID numbers involved with this CPCN application. If a reader wants to learn more about which property this CPCN application affects, the reader can travel to the property or reference the Property Tax ID numbers through the County Tax Records.

The Hearing Examiner believes that this recommendation best satisfies the concerns of all interested parties. Landowners receive more detailed notice of CPCN applications

The News Journal and *Delaware State News* is approximately \$1,000. (T-1061, 1033-34.) Currently, Artesian often places thirty (30) parcels in a single application. (T-1063-64.) Staff's response filed February 20, 2009 states that some prior CPCN applications involve "hundreds of parcels." (T-107.) There was also testimony that CPCN applications involved 1 to 300 parcels. (T-144.)

While cost is a concern, the Hearing Examiner strongly agrees with Staff's goal of providing Delaware residents with improved notice of CPCN Applications. However, the Hearing Examiner does not agree that only limiting the number of parcels on the CPCN application will best accomplish Staff's goal of improved notice of CPCN applications to Delaware residents.

Therefore, the Hearing Examiner recommends that the Commission adopt Regulation 3.2 proposed by Staff except that the Proposed Service Area not be limited to five service areas. However, the Hearing Examiner also recommends that the Commission order that the utilities perform the following: in the published notice of each CPCN application, the utilities shall provide a description of the properties involved, including (a) the nearest intersecting roads (i.e. at the intersection of Canterbury Road and Delaware Avenue or approximately one-half mile from intersection of Canterbury Road and Delaware Avenue); (b) directional information about the parcels (i.e. on the north side of Delaware Avenue, etc.);

2009.) Staff's proposal defines the term "Proposed Service Area" in Section 2.1 as follows:

"Proposed Service Area" is equivalent to "the proposed territory to be served" and means the area in which the applicant proposes to offer and provide its water utility services. The proposed service area shall be described by reference to one or more parcels or properties, identified by the relevant county tax map identification designations. If the proposed service area cannot be described by reference to parcels or properties, it may be described by a metes and bounds description, or any other equivalent description capable of being mapped.

Staff argues that, by limiting the number of proposed service areas on a CPCN application, landowners "in or near the utilities' proposed service territory [will be better able to] learn about a pending application and offer input to the Commission." (See Staff's Response to Utilities' January 30, 2009 Filings.) Staff argues that, the less the number of parcels, the more likely the narrower the description of land in the published notice, and therefore the more likely an interested person would receive notice of the CPCN application.

The utilities first objected to Section 3.2 claiming that it would increase the utilities' advertising expense since more parcels are included now in a single advertisement than will be included under the proposed Regulation.

Staff's Ms. Maucher accepted Tidewater's Mr. Patrick's testimony that the cost of publishing a CPCN advertisement in

would be required to pay on a case-by-case basis. (Maucher, Staff, T-1109, B. Patrick/Tide, T-225-228, D. Spacht/Art, T-282-284; see Reybold Group v. PSC, *supra*, for an in-depth discussion of PSC Reg. Dkt. No. 15 and CAC).

Depending on the location of the landowner's property and the utility's nearest water main, the cost involved might be prohibitively expensive for the landowner, and the landowner's refusal to pay the cost would excuse the utilities' failure to serve. (*Id.*; T-1114.) Indeed, to date, no Delaware landowner has agreed to pay Regulation Docket No. 15 costs for water service. (T-788.) The Hearing Examiner nevertheless recommends adoption of Regulation 12.0 proposed by the utilities because it *requires* that a dialog be timely opened between the landowner and the utility holding the CPCN (which PSC Staff typically joins as well), toward resolving the matter. During their dialog, presumably the landowner can learn about the utility's current service and planned future service in the landowner's area and compare same with the landowners' needs for water service, his well service, and the cost for the landowner to receive water service now and plan for the future.

(b) No. 3.2 Application for CPCN. (Exh.A-p.4) Artesian and Tidewater object to Staff's proposed **Section 3.2** which seeks to limit a single CPCN application to five (5) "proposed service areas." "Proposed service area" is not defined by Statute. According to Staff, a service area may contain multiple parcels of land. (See Staff's Response to Utilities' January 30, 2009 Filings, docketed February 20,

five year Opt-Out rule. If the reader wants to refer to the text of a particular Regulation, the exhibit to this Report and page number where each Regulation appears at is listed next to each proposed Regulation throughout this Section. For example, regarding (a) below, the reader can locate the text of the Regulation at Exhibit "A" at page 34.

(a) No. 12-Proposed Five Year Opt-Out Rule. (Exh. A-p. 34) For the reasons stated previously in this Report, the Hearing Examiner recommends that Staff's entire proposed Regulation 12, including the five year Opt-Out rule, not be adopted.

Additionally, the Hearing Examiner recommends adoption of the "Alternative Regulation 12.0" proposed by Tidewater and Artesian. (See Exhibit "B" hereto-the utilities' proposed Regulations-Regulation 12.0 therein, p.23.) The utilities' proposed Regulation No. 12.1 and 12.2 permit the Commission to revoke a CPCN if a utility fails to timely to comply with a Commission Order to provide water service within the utility's certificated service area. The statutory authority for this proposed Regulation is 26 Del. C. §203C(e)(3), 26 Del. C. §203C(f) and 26 Del. C. §403.

The utilities' Proposed Regulation No. 12 also codifies that, if a utility was ordered to provide water service to a CPCN territory, the Commission could require that the landowner pay contributions in aid of construction (CAC) incurred by the utility for on-site infrastructure costs and off-site costs to provide water service to a new customer. The Commission would determine which CAC, if any, a landowner

Regulations be adopted by the Commission as it is in the public interest to do so. Also, pursuant to 26 Del. C. §512, the Commission is charged by statute to "encourage the resolution of matters brought before it through the use of stipulations and settlements."

IX. HEARING OFFICER'S RECOMMENDATIONS AS TO DISPUTED REGULATIONS

111. Staff's and the utilities' proposed Regulations which are disputed are listed below. The Regulation titles have been paraphrased here to aid the reader. The page number in this Report where the Regulation is discussed is located to the right of the Regulation:

- No. 3.2 Application for CPCN (p.74)
- No. 3.13 Plan of Service Required of Utilities (p. 78)
- No. 6.3 Municipality must be notified 30 days prior to CPCN Application If Proposed Service Area is in a Municipality's "Future Annexation Area" or "Future Growth Area" (P.81)
- No. 7.4 "Proposed Service Area" would include single parcel or "contiguous parcels" (p.85)
- No. 8 Utilities' Solicitation Notice To Landowners must include Staff solicitation notice (p.89)
- No. 9 Utilities' Notice to Landowners 30-35 days prior to CPCN Application (p.93)
- No. 10 Notice to Landowners of CPCN Application & Option to "Opt-Out" (p.94)
- No. 11 Landowners' & Others' General Objection and "Opt-Out" Options, etc. (p.99)

Alternative Reg. No. 12 - Proposed by Utilities (p.73)

112. The disputed Regulations will now each be discussed in the order presented above except that "Alternative Regulation No. 12" will be discussed first. This proposed Regulation will be discussed first because it was proposed by the utilities as an alternative to Staff's proposed

subsequently agreed to on February 19, 2009), and 14.0-"Proceedings to Suspend or Revoke a CPCN for Good Cause." (See Exhibit "A" for these regulations.)

109. On February 19, 2009, Staff reported that Tidewater, Artesian, and Staff had also reached an agreement on Section 13.2, which addresses the suspension or revocation of a CPCN for "good cause." Pursuant to the parties' agreement, the initial language in Section 13.2 (as contained in Exhibit "A" hereto), shall read as follows:

"13.2 In addition to the factors required by sections 13.1.1, 13.1.2, and 13.1.3, the Commission may also consider one or more of the following factors to suspend or revoke a CPCN:"

The parties also agreed then that Section 8.5 should be revised in the future to provide that only standard written materials the utility proposes to solicit CPCNs must be filed with the Commission, not each actual solicitation letter sent to a landowner.

110. The Hearing Examiner recommends that the Commission adopt all regulations above agreed upon by the parties because there is "a lawful statutory basis" to adopt these regulations, and there is a just and reasonable and supported by substantial evidence in the record. See 29 Del. C. §10141(e); see Reybold Group et al v. PSC, 2007 WL 2199677 (Del. Super. March 20, 2007), *aff'd* 956 A.2d 643 (Del. 2008); Delmarva Power & Light v. Tolou, 729 A.2d 868,874 (Del. Super.Ct. 1998). The statutory authority for the agreed upon Regulations is 26 Del. C. §203C. The Revocation-related Regulations Nos. 13 and 14 were specifically authorized to be promulgated by the Commission by 26 Del. C. § 203C(k)(1) & (2). Thus, the Hearing Examiner recommends that all agreed upon

a causal link between the utilities' net profits (nor water rates) and the CPCN process. (T-1084)

VIII. AGREEMENTS REACHED BETWEEN THE PARTIES AS TO PROPOSED REGULATIONS RECOMMENDED FOR APPROVAL BY HEARING EXAMINER

107. On October 15, 2008, the parties conducted a Workshop at the Commission's offices in Dover to discuss the regulations proposed by Staff. Artesian, Tidewater, United, and Staff were present. At the Workshop, those parties reached an agreement and adopted Staff's proposed Regulation 2.1 amending the definitions of the terms "existing development," "subdivision," and "unincorporated community." (T-331-32.) Regulation 2.1 was necessary because the 2007 statutory amendment to 26 Del. C. §203C(e)(1)(c) permits a CPCN to be granted if signed by the landowners of a majority of the parcels within the existing development, subdivision or unincorporated community. (See Exhibit "A", pp 2-3 regarding definitions & Pages 12-13, Paragraph 23, *supra*, regarding the 2007 statutory amendment.)

108. On December 19, 2008, the parties informed the Hearing Officer in writing that the parties had also agreed upon the following underlying Regulations proposed by Staff: Section 1.0 entitled "Authority and Scope of Regulations," the remaining portion of the 2.0 "Definitions" section," Section 5.0-"Review of the Application and Deficiencies in the Application," Section 6.0-"Coordination with Other State Agencies, Counties and Municipalities" (except for Section 6.3 which was disputed and is discussed in Article IX), Section 13.0-"Suspension or Revocation of CPCN for Good Cause" (except the first sentence of 13.2-which was

well or even builds a permanent facility which will eventually become a part of the regional water system. (T-1135-36, T-1152-53, T-1126, 1153, respectively.)

104. Mr. Patrick testified that, adopting the five year Opt-Out rule would damage the utilities' ability to plan their regional water systems since customers would be opting-out. (T-1216). According to Tidewater, the Opt-Out rule would result in less Tidewater customers and less economies of scale. (*Id.*)

105. While Staff testified as to various parcels where the CPCN was held by one utility and the parcels were located in the middle of a certificated area of other utilities (*see, e.g.* T-1113-14, single parcel, 1122, 1183), there was no record evidence of *actual* physical duplication of infrastructure equipment by the utilities in any area. In fact, Staff admitted that it had not presented any record evidence regarding this issue. (T-181). Also, if enacted, the utilities persuasively argued that the proposed five year Opt-Out rule would definitely not change the fact that there are interspersed, non-contiguous parcels. This would not change because some customers would be opting-in and other customers would be opting out. (T-1216)

106. Staff raised the issue of the amount of net-profits recently earned by the utilities. In 2007, 1) Artesian earned \$6.3 million net profit based on gross water sales revenue of \$48.5 million; and 2) Tidewater's parent company Middlesex Water Company reported \$11.8 million of net profits based on \$77.1 million of gross water sales revenue. (See Staff's Opening Brief, pp 3-4). However, there was no record evidence of

101. In its Brief, Staff maintained that the Water Supply Coordinating Council recommended that the CPCN process be considered for revision. (See Staff Opening Brief, 5.) However, this has not been done. (Exh. 59 at ES-3, 4) Artesian dissented from that recommendation. (Exh. 59 at ES-5.) Staff's Nielson testified that the amendments are "contemplated," not proposed. (T-863-64.)]

102. As to the utilities' Water Service Agreements with Developers, Mr. Patrick testified that Tidewater has several Service Agreements with Developers and several potential Service Agreements with other Developers. (T-1093). Tidewater probably has entered into more Service Agreements with landowners than Developers. (*Id.*) The utilities record such Agreements in the public records of the County where the property is located. (T-1094) There was not any record testimony that the five year Opt-Out rule would or would not apply to individual homeowners whose homes were built by Developers who had entered into Service Agreements.

103. As he did in the November, 2007 hearing, Mr. Patrick, Tidewater's Vice President of Engineering, effectively refuted Staff's claims that the utilities were randomly selecting isolated parcels and obtaining CPCNs without performing regional planning. Mr. Patrick described Tidewater's regional planning efforts in the area north of the Dover Wal-Mart (T-1097), the Bush Farm area in Dover (T-1111), East Laurel (T-1120), Lewes/Rehoboth (T-1124) and Northwest of Smyrna. (T-1215) Mr. Patrick testified that, until the time that a Tidewater regional water system is fully functional serving all customers the system is intended to serve, Tidewater sometimes swaps CPCNs with Artesian, temporarily purchases water from Artesian, builds a temporary

not had service, it gives them at least an opportunity to see if somebody else is interested. That's how it benefits ratepayers." (T-605-606)

98. Mr. Parcell defended his assumption that under the five year Opt-Out rule, "Artesian would understand that it can instead focus its efforts on landowners whose property it can anticipate serving in five years." Although he did not discuss this assumption with anybody that has management experience in a water company, he did perform a "reality check" because it is "a logical tactic you would expect management to take." (T-603) Yet, Mr. Parcell admitted that Mr. Spacht on behalf of Artesian and Mr. Patrick on behalf of Tidewater would know better than Mr. Parcell how their respective companies will react if the proposed rule goes into effect. (T-604.)

99. When asked one final time to point to any authority supporting his definition of "franchise area", Mr. Parcell pointed to Standard & Poor's financial metrics used in their quantitative rating analysis and concluded that since revenues can only come from existing customers "that's how I can justify that." (T-608-610) But Mr. Parcell conceded that Standard & Poor's also does a qualitative analysis and that Standard & Poor's would not be oblivious to the potential risk of loss of future service territory that has been franchised and certificated but is not yet serving customers. (T-612-13.)

100. Mr. Parcell agreed that if investors in the water sector are unhappy with their perception of the service territory risk in Delaware they can easily bypass investing in Delaware water companies and invest in the other seven (7) major publicly traded water companies. (T-624.)

Commission that says that the CPCN is predicated on the existence of actual utility plant serving customers?

A. Repeat that, please.

Mr. Schreppler: Can you read that back? (Reporter was requested to read back.)

The Witness: I don't know, as I sit here. But, again, the risk, though, pertains to the ability to recover your cost, and that's the focus on my testimony. Whether that language is there, I don't know.

By Mr. Schreppler:

Q. Well, would you concede, sir, that in Delaware the service territory is legally defined by the CPCN?

A. I'll accept that.

Q. And if there's nothing in the CPCN that requires that the service territory be actually served within a specific period of time, then your definition of franchise is different than Delaware's?

A. No. Look again at Page 11 of Tab 3. It talks about a legally defined service territory generally free of significant competition.

What S&P is saying there, clearly they are saying there, is that once you come in, you come in, you put in your infrastructure, you put lines in the ground, you have customers, someone cannot come and take those customers from you and leave you with what's called stranded investment. That's what they're saying there.

Q. Well, can you point to that in the document? I don't see those words.

A. They don't have to. It's such a basic concept of regulation and Standard & Poor's and Moody's; they don't have to say it. (T-591-593)

97. Mr. Parcell was not asked by Staff to quantify the effect that the five year Opt-Out rule would have on rates. (T-600) When asked to explain how the Five-Year Opt-Out rule protects ratepayers, Mr. Parcell confused landowners with ratepayers, stating "it gives them a chance to opt-out if after five years, if they signed up for the CPCN, if they had

When asked whether he agreed with that statement, Mr. Parcell responded "Yes. Because the franchised areas they are referring to are the franchised areas where they are currently serving customers." When asked to point to any language in the document that supports his interpretation of the term "franchised areas", Mr. Parcell could not do so, but simply insisted "it's the only way it could be. It's logic." (T-587)

- b) Mr. Parcell was unable to refer to any authority that supports his definition of "franchise areas." (T-587-588) When asked whether he had talked to Standard & Poor's about his definition, Mr. Parcell replied "No. I don't have to." (T-588)
- c) When directed to a Standard & Poor rating document that used the term "legally defined service territory generally free of significant competition" Mr. Parcell and counsel for Artesian had the following colloquy:

Q. Now, in the second sentence there, legally defined service territory. What does that mean to you?

A. It means to me the area where these companies are presently serving customers, the service territories. They have customers, and they are captive customers.

Q. Well, how are they legally defined in Delaware?

A. I don't know that I can answer that how they are legally defined. I mean, it's a service area where they have the certificate to serve and are serving customers. That seems legal to me, but I'm not a lawyer.

Q. Have you ever seen a CPCN in Delaware?

A. Seen one?

Q. Yes.

A. You mean look at the parcel of land?

Q. The Certificate of Public Convenience and Necessity itself, the document issued by the Public Service Commission, have you ever seen one?

A. I believe there is one in my book here. Yes. I think that was submitted as part of the documents in the early part of this month.

Mr. Schreppler: I think we will put one into evidence at some point.

By Mr. Schreppler:

Q. Is there anything in the certificate issued by this

five years. So, in a sense, it may slow down competition in some regard there because it will make them be more selective and more careful and folks want economics." (T-580.)

Mr. Parcell then admitted that he has no factual basis for that opinion other than his assumption: "That's the way a company should operate. "When asked if he did any "reality check with management of water companies" to vet his opinion, Mr. Parcell responded "No, I have assumed that they are efficient and economical and I did not challenge that." (T-579-581.)

95. Mr. Parcell was directed to the following statement in Artesian's 10-K: "A significant portion of our exclusive service territory remains undeveloped. And if and when development occurs and there's population growth in these areas, we will increase our customer base by providing water service to the newly developed areas and new customers." Mr. Parcell conceded that Artesian considers its certificated service territory where it is not yet providing service as important to the future of the company, but reiterated his opinion that "the five year Opt-Out rule does not significantly increase its risk." (T-581-582.)

96. On the question of service territory risk, Mr. Parcell testified as follows: "Because I'm looking at it from the standpoint of a macro-approach as is reflective of the rating agency, security analysts where they tell us what is important, and Mr. Spacht is focused on a single issue today, which is important to him today, and ignoring the other aspects of risks. And it's the macro approach to risk you should be focusing on, which we always do in rate cases, but for some reason, the companies are not doing in this case." (T-584.)

a) Mr. Parcell was directed to the Standard & Poor's Corporate Ratings Criteria and in particular the following statement about competition: "As the last true utility monopoly, water utilities face very little competition, and there is currently no challenge to the continuation of franchise areas." (T-586)

fair to characterize his opinion about service territory risk as "an economic assumption based on (his) long experience as an economist familiar with regulated utilities" Mr. Parcell responded:

"That's half of it. I mean, you've got to realize that the whole purpose of regulation is you balance the interest of the ratepayers and shareholders. And shareholders want some growth and ratepayers want proper rates. And if you have a system which has no checks and balances, you have a situation where you could have rates that are too high because of that situation. So checks and balances are the whole basis of regulation. That's why we have rate cases. That's why you call them regulated companies." (T-547.)

93. When asked whether the proposed Opt-Out Rule would be a new risk factor, Mr. Parcell responded "to the extent that the company believed it really was a risk factor, and they wanted to tell the investors they could, yes." (T-556-557.) Mr. Parcell conceded that if he market discounts Artesian stock because of this risk factor - - even one time as opined in his pre-filed testimony - - that it is a permanent discount. (T-558-559.)

94. Mr. Parcell also conceded that Artesian disclosed the re-opening of Regulation Docket 51 on March 20, 2007 in its 10-K filing for 2007, but he discounted that disclosure because it was not listed in the risk factor section, even though the proposed rule had not been adopted. (T-577-578.) Mr. Parcell conceded that Artesian's 10-K states: "Our business and our franchise service area is substantially free from direct competition with other utilities, municipalities, and other entities." When then asked to concede that the five year Opt-Out rule could increase competition for service territory, Mr. Parcell responded:

"It could, but what's more likely to happen is that the utilities will be more careful in who they will sign up for a CPCN, if they think that they can't get served in

anything for filing with the SEC. Tr. 535. While Mr. Parcell has estimated the cost of capital for over 50 water companies, he has never managed a water company or any other regulated utility. (T-535-536.)

(d) Mr. Parcell is a Manager of the Society of Utility and Regulatory Financial Analysts but he did not vet his pre-filed testimony with any member of that organization. (T-536-537.)

(e) Mr. Parcell in lines 25 thru 31 of his pre-filed testimony opined that "service territory risk is generally considered within the context of a territory in which rate base is already employed." (T-538.) When asked for the factual basis for his position, Mr. Parcell described in depth how "utility regulation works" and how rate base is determined, but did not directly answer the question. (T-538-540.)

(f) Mr. Parcell conceded, however, that investors do care about service territory for future use. (T-540-541.) Mr. Parcell's position was that what investors care most about is a return on their investment and growth whether from serviced territories or not. (T-541-42.)

(g) Mr. Parcell's testimony about service territory risk is his opinion as an economist and an expert witness on the cost of capital. (T-543.) When asked where else he had testified about what the service territory risk is, Mr. Parcell responded "I've never seen anyone claim a service territory. To my knowledge, that's the first one that has ever become an issue." (*Id.*) When asked whether the concept of "service territory risk" is something new to him, Mr. Parcell responded "it's something new to the company. I think the concept of risk has been around for a hundred years. But the risk pertains to the total company and the total plant. Because risk relates to plant." (*Id.*)

(h) When asked whether he had vetted his opinion about service territory risk with any investors in water companies, Mr. Parcell stated he did not see it mentioned in Artesian's own cost of capital testimony in Artesian's 2008 rate case and he concluded:

"The entire radar screen is capital recovery. And that's, if you want to vet something, that's where I vet it. But that's such basic knowledge that you don't have to vet that. Any cost of capital witness knows that."
(T-543-544.)

92. Mr. Parcell did not vet his opinion about service territory risk with any stock analysts. (T-546.) Mr. Parcell did not vet his opinion with any investment bankers. (T-546-547.) He did not vet his opinion with any water company management. (*Id.*) When asked if it was

disclose. We don't even know if it's going to happen or not." (T-706.)

90. Mr. Spacht refuted Mr. Parcell's "zero sum game" economic assumption, stating:

"Even his own example on the stand suggested that - you know - we could lose some. Tidewater could win some. But it's a loss to the company. It may be zero sum to the State. I mean, the customer is going to get served.

But in terms of us, there is a reason why we strategically piece together the territories in the manner that we do. Any loss could be a substantial loss. It's hard to say sitting here.

Obviously, we've had situations where we've traded properties, or just let one go because it was more economically served by somebody. But to have it forcibly taken away in this case, if they could do that, would not be something that would be a zero sum game to us." (T-707-708.)

91. Staff's Expert Witness David Parcell, an economist, responded to David Spacht's testimony that the proposed Opt-Out Rule: 1) created a risk of loss of substantial funds invested by a utility; 2) decreases future chances of such investment being made; and 3) in all likelihood, would decrease the value of Artesian's stock. Mr. Parcell also testified as to the cost of capital implications of the proposed Regulation. (T-525, 543.)

- (a) Mr. Parcell has worked for Technical Associates, Incorporated his current employer since 1969. He testified as an expert witness primarily about cost of capital in rate cases approximately 425 times. (T-527.)
- (b) Mr. Parcell has never worked for a publicly-traded company. (T-534.) While he has advised Commissions as to the cost of capital, Mr. Parcell has never advised investors whether they should invest in a stock. (T-534.)
- (c) Mr. Parcell has reviewed thousands of prospectuses for issuance of securities, although he has never written one. Mr. Parcell has never worked as an investment banker, has never written a 10-K for a publicly traded company and never written

88. Mr. Spacht also testified as to the interpretation of what the rating agencies mean by the term "service territory and franchise areas." Mr. Spacht testified that as a corporate officer he provided to rating agencies, such as Standard and Poor's "maps of all our legal service territory, which does not include any maps of infrastructure." (T-703.) Accordingly, Mr. Spacht's interpretation of what is meant by "service territory or franchise," in the documents from the rating agencies is "all service territory that the company currently has that is theirs legally [and] theirs in perpetuity, according to the rules and statutes in the states that we occupy those territories - - - or own those territories." (T.-703) Mr. Spacht stated further that Artesian has never had a CPCN revoked for good cause. (T-704.)

89. Mr. Spacht disputed Mr. Parcell's assumption that, if the five year Opt-Out rule was adopted, Artesian would understand that it can instead focus on obtaining service territory where it anticipates serving within five years. (T-704.) Mr. Spacht testified that if the Opt-Out rule becomes law and Tidewater is not serving a property within its CPCN service territory within five years, Artesian, depending on the circumstances, might encourage the property owner to opt-out of Tidewater's service territory. (T-705-706.) If the Opt-Out rule becomes law, Mr. Spacht will draft a new risk factor to disclose same. (T-708.) Contradicting Mr. Parcell, Mr. Spacht testified why the (then proposed) three year lapse rule was not listed as a risk factor in Artesian's 10-K for 2007 as follows:

"Because it wasn't a rule in effect at the time. It was listed in our business disclosures because we knew it was out there, as we do any regulatory action that could have an effect on our business. But until it becomes an actual rule or regulation or law, there is nothing to

When asked why service territory is important to the shareholders, Mr. Spacht responded as follows:

"The predominant story out there in terms of the growth in a water company's share, again, these are from presentations made by myself, as well, it's the growth in the service territory. It's the ability to expand its service territory." (T-683.)

"I mean, we've talked about growing in Delaware. We've talked about growing in Maryland." (T-683-84.)

87. Mr. Spacht testified that, if service territory is lost even where there are no existing Customers and/or rate base, there is a risk of loss of substantial funds invested by a utility and decreases future chances of such investment being made again. (T-687-91.) Mr. Spacht gave as an example Artesian's expansion south of the C&D Canal, where Artesian invested millions of dollars in securing well supplies in anticipation of a State of Delaware initiative to attract a computer chip manufacturing facility. Those wells were paid for by shareholders as they are not in rate base, but rather classified as property held for future use. (*Id.*) Mr. Spacht stated that the five year Opt-Out rule would be a deterrent to Artesian making that type of investment to assure supply. (T-689.) Mr. Spacht testified that the investment in southern New Castle County was "well over a couple of million dollars that went into drilling wells, securing the land, because we had to purchase land, as well, because in New Castle County, you have to buy like a three-acre parcel in order to secure the well site because of the Wellhead Protection Act." (*Id.*) Mr. Spacht testified that there are also a number of other locations throughout the state where Artesian has taken the initiative to find supply ahead of development. (T-690.)

your shares will increase in value, therefore, buy this stock.

It is a marketing . . . piece. It is the strength of our company when we go out to sell our shares. That's personal. Those are the questions we got from our analysts and the brokers whenever we are out selling our shares of stock.

So, it is a significant factor when we're talking to our analyst, our brokers, and selling our shares in the marketplace." (T-664-665.)

86. Mr. Spacht testified that he had discussed the proposed Opt-Out Rule with experts in the investment community, analysts and investment bankers and told them his opinion about what the proposed rule would do for Artesian's growth prospects and the risk factor. After those conversations, Mr. Spacht has not changed his opinion. (T-665-666.) Mr. Spacht testified about his experience in making presentations to the New York Society of Security Analysts and the Philadelphia Security Association regarding the issue of Artesian's trading volume and the lack of liquidity in Artesian's stock. (T-676.) Mr. Spacht testified that the lack of liquidity took a "great toll" on Artesian's stock price when an institutional investor was unable to sell the stock quickly. (T-679.) Mr. Spacht testified that the predominant amount of Artesian's shares are in the retail market, generally held by individuals rather than institutional shareholders. (T-681.) Mr. Spacht testified that these retail investors generally hold onto the stock, looking toward the consistent Dividend growth and consistent growth in the value of the shares. (Id.) Based on his discussion with shareholders and discussions at "road shows" promoting the stock, Mr. Spacht testified that investors consider Artesian's certificated franchise area for future service to be an important factor in terms of the value that they place on Artesian's stock. (T-682-683.)

- (d) Mr. Spacht played the same role in subsequent S-2 and S-3 issuances of securities as he did with respect to the 1996 IPO. (T-647.)
- (e) Mr. Spacht is the primary author and a signatory on all Artesian documents filed with the SEC, including 10-K, 10-Q, F8-K documents and all reporting documents that the company must file. Mr. Spacht is responsible for Artesian's compliance with additional reporting required by the Sarbanes/Oxley Act. As a signatory to these SEC filings, Mr. Spacht is personally liable for the accurate content of those documents. (T- 648-649.)
- (f) Mr. Spacht testified about his direct involvement with investors, investment bankers, stock analyst and stock brokers in connection with Artesian's stock offerings. He stated "at the end of the day, I stand before a crowd of analysts and brokers, and I tell them why you should buy our stock versus somebody else['s stock]." (T-649-650.)
- (g) Mr. Spacht testified that the risk factors listed on page 11 of Artesian's 10-K filing would have to be changed to include the new risk created by the five year opt- rule. (T-662.)

85. Mr. Spacht disagreed with the testimony of Staff's expert witness regarding the market's understanding of Artesian's service territory. Mr. Spacht testified "[o]ur service territory is legally defined by our CPCN's, [and] includes all the service territory we currently are allowed to serve, whether it's served today or not." (T-662.) Mr. Spacht explained the importance of Artesian's certificated service territory for future growth as follows:

"I am personally responsible when we are issuing shares to talk to brokers and analysts in front of them, give a presentation about our company and about what our growth prospects are. That's what I do. It's called the Strategic Direction of the Company, and they want us to go around to the brokers so that they can sell our shares.

In that regard, where I actually physically appear in front of analysts and brokers, I discuss the growth aspects of the company, including franchise territory that is not currently served because it shows to them the future prospects for the company and what growth prospects they can sell to new investors to buy our shares of stock to say there is growth for this company,

some evidence as to how the proposed Opt-Out Rule would protect Delaware landowners, it is the Hearing Examiner's Recommendation that Staff did not establish that the proposed Opt-Out Rule is just and reasonable and supported by substantial evidence in the record.

84. Artesian's CFO David Spacht again testified at the 2009 hearing persuasively arguing that a substantial risk factor would be created in the capital markets by the proposed five year Opt-Out rule. In the 2009 hearing, Mr. Spacht testified regarding the following credentials and experience that he possesses regarding Artesian's access to the capital markets:

- (a) Mr. Spacht has worked with Artesian since 1980, working as a fixed asset accountant, controller, assistant treasurer, and Chief Financial Officer since 1992. He holds a B.S. in Finance and Accounting from Goldey-Beacom College. (T-711-12). Mr. Spacht has been involved on behalf of Artesian in the issuance of one (1) initial public offering (IPO) and four (4) secondary offerings. He was CFO in 1996 when Artesian was listed on NASDAQ which was Artesian's "first big foray into the national markets." (T-644-645.)
- (b) Mr. Spacht's credentials include his service on the faculty of Rate School, which is a seminar offered by the National Association of Regulatory Commissions (NARC). Commissioners and utility and regulatory employees from around the country attend rate school to learn about the calculation of water rates. Mr. Spacht has served on the faculty for approximately ten (10) years. Mr. Spacht's presentations at Rate School include "The Real World View on Return on Equity, in other words, we have an expert that gives their presentations, and I give presentations based upon - - you know - how the markets look at individual companies." (T-714-715.) Mr. Spacht has not given any presentations related to the stock market or risk. (T-715.)
- (c) In 1996, Mr. Spacht was the principal drafter of Artesian's S-1 filing with the Securities and Exchange Commission (SEC), which describes the financial health of the company. (T-646.) Mr. Spacht drafted the sections of the document on risk factors, business, strategic direction, and financials. (Id.) Lawyers and auditors also participated in drafting the S-1 filing. (Id.)

82. Ms. Maucher testified that she was aware that some property owners sign up with Artesian but do not want service immediately because they are happy with their private wells. When asked how to square that admission with her "statement just moments ago that a CPCN application is a request for service," Ms. Maucher responded:

"These proposed rules are to give landowners protections. If they want to be in a CPCN area, that's fine. That's their choice. It's for those people that, for whatever reason, aren't getting service that they thought was coming to them in five years, or however long, and aren't getting it and want it to get out because there may be a better option." (T-1207.)

83. When asked to give examples of a property owner included in a CPCN territory who wanted water service and could not get it in a timely manner, Ms. Maucher testified that she could recall only two (2) Delaware property owners who had notified the PSC, but not filed a Complaint: 1) Mr. Bowman in Tidewater's territory who continues to use his well; and 2) a property owner near Jonathan's Landing in Tidewater's Magnolia territory whose property was adjacent to an Artesian water main. Ms. Maucher repeated her 2007 testimony that she thought the situation near Jonathan's Landing had been worked out because she had not heard further from that property owner. (T-1207-1209; Artesian Brief, p. 42) Additionally, there was evidence that there are sixty (60) homes south of Camden which Tidewater, the CPCN holder, is not currently serving and which the non-profit Camden-Wyoming Sewer & Water Authority ("CWSWA") is willing to serve and has the infrastructure to serve. Instead, these 60 homes have no choice but to rely on their wells. (See pre-filed testimony of S. Gharebaghi, P.E., CWSWA's Independent Consulting Engineer, pp. 5-7, Exhibit 79). Tidewater's position is that it would release the CPCN for \$1,159.62 per EDU. (*Id.* at 10-14; Exh. C-E). Thus, while Staff introduced

but was in fact, a good thing. (T-919.) When asked to explain how the proposed five year Opt-Out rule could decrease water rates for customers, Mr. Neilson's testified that the proposed rule was an "incentive to a utility to think about reasonable planning. [It] will have them thinking before they start just going out and requesting service, or requesting customers to sign up for their service all over the state." (T-919-920.) Mr. Neilson was not able to quantify the savings that Staff anticipates will be caused by this Rulemaking because Staff never performed such any such analysis. (T-920-921.)

80. Andrea Maucher again testified for Staff at the 2009 hearing. In response to a question regarding CPCN parcels obtained for single lots or small parcels by Artesian and Tidewater, Ms. Maucher testified that Artesian had explained to Staff that "they planned on putting a main down the road, and they were going to pick it up as they went along was the response to that one." When asked whether she found that explanation satisfactory, Ms. Maucher responded:

"Well, it goes back to the way the statute has been interpreted. If they have a petition and have provided notice to the landowner, the Commission has granted the CPCN.

So, it has been interpreted that there's no - you can't say no just because it doesn't appear to make any sense [to Staff]. That goes to the heart of some of Staff's memos. These applications should be request for areas to serve and plan of service so we could have that information." (T-1190-1191.)

81. Ms. Maucher testified that, under the five year Opt-Out rule, if a landowner seeks to opt-out and the water utility wants to retain the CPCN, there would be a formal docket opened, with costs associated with the Docket, plus legal fees incurred by the utility and possibly the landowner. (T-1202-1203.)

purchased the properties at a tax sale. (*Id.*) Artesian offered Ms. Ellers that Artesian would relinquish its CPCN provided Artesian retained a right of first refusal of service. (T-831). This would allow the Ellers to use a well which the Ellers wanted to do. (Exh. 78, p. 3). There is a PSC Docket pending involving the Ellers who have filed a Complaint against Artesian. (See PSC Docket 359-09 Ellers adv. Artesian et al.)

79. Mr. Neilson testified that the "Plan of Service" requirement in proposed Regulation 3.13 would allow the Commission to collect information it can share with the PSC Staff and other regulatory agencies, such as DNREC, the Water Supply Coordinating Council, and the Fire Marshall. (T-889.) The Commission would not have the authority to deny a CPCN if the Plan of Service submitted was inadequate as Staff's Counsel so stipulated. (T-889-893.) Mr. Neilson admitted that the proposed five year Opt-Out rule would do nothing to help a customer like Mr. Bowman, who has a working well but would like to sell his home and thinks it would be more valuable if he had public water from Tidewater, except that he does not want to pay the approximately \$30,000 contribution-in-aid of construction required by Regulation Docket 15. (T-905-908.) When asked to give an example of wasteful duplication of infrastructure resulting from isolated areas served by an individual system, Mr. Neilson referred to Meridian Crossing, where the "wide-area franchises" of Artesian and United touch in Northern New Castle County. (T-918-919, see also Testimony of David Spacht regarding Meridian Crossing at T-959-962). Mr. Nielson testified that both Artesian and United have "tanks, pumps and facilities" in the same areas. (T-919.) Mr. Neilson conceded that redundancy of supply to Christiana Care Hospital by both United and Artesian was not wasteful duplication of infrastructure,

VII. TESTIMONY AT MARCH 6, 9 and 11, 2009 EVIDENTIARY HEARINGS

77. Kevin Neilson, the Regulatory Policy Administrator in charge of the water CPCN section, explained Staff's rationale for the five year Opt-Out Rule. Staff's position was that that the Opt-Out Rule would encourage regional planning. (Staff's Opening Brief, p. 47, T-919-920.) Staff's Andrea Maucher also testified that adopting the rule would encourage regional planning between the utilities. (See 2007 hrg.- T-181; 2009 hrg.-p.1172, 1185) Mr. Neilson testified that Staff was also attempting to address concerns of property owners who had signed petitions to be in a CPCN service territory and now the property owners wanted to have the CPCN revoked. (T-843, 866-867.)

78. Mr. Neilson testified that the Staff had received calls concerning only two (2) properties complaining that they were not getting service in a timely manner despite being in a CPCN service territory. Mr. Neilson identified two (2) properties specifically: 1) the Bowman property in Ocean View-waiting on service from Tidewater; and 2) the Bush Farm in Dover which, after the hearing, began being served by the City of Dover which recently obtained the CPCN from Tidewater. (T-868-872; see PSC Docket 09-CPCN-11 "Bush Farm") Mr. Neilson could not recall Staff ever recommending that a CPCN be revoked because a water utility refused to provide service within its CPCN territory. (T-871.) Bruce Patrick of Tidewater had also testified that he did not know of any customer who had complained to Tidewater that they were not receiving timely service, other than Mr. Bowman. (T-258) Not receiving timely service is different from, for example landowner Ms. Marilyn L. Ellers who testified that she and her husband wanted to opt-out of their Artesian CPCN consented to by the prior owner of the Ellers' property. (Exh. 78, p. 3-4). The Ellers

73. Staff was more concerned about isolated, smaller parcels than large certificated parcels because the large parcels might become housing developments but the small parcels within larger parcels have less likelihood of obtaining service if requested. (T-154.)

74. The Hearing Officer also took testimony that Delaware has an ample amount of water from groundwater. (T-287.) Some neighboring states need to obtain water from freshwater streams more than Delaware. (Id.)

75. Lastly, there was also testimony that Tidewater and Artesian have, after CPCN application, publication and Commission approval, "swapped" CPCN-certificated areas where it was mutually beneficial to do so. (T-281.) Swapping occurs when a utility "abandons" its CPCN for a service area, and another utility is awarded a new CPCN and services the area, which may involve only one parcel. (T-171.) "Swapping" between Artesian and Tidewater has occurred only about five (5) times, generally swapping one parcel for another parcel. (T-1199.) Less than fifteen (15) swaps have occurred between other water utilities. (T-1165-66) Ms. Maucher of Staff testified that "swapping" is not a "regular occurrence." The utilities argued that these situations where a utility with the CPCN cannot service a customer are usually amicably resolved between the utilities. (T-254, 256.)

76. The Hearing Examiner requested Artesian's and Tidewater's GIS service maps reflecting where water service was occurring. (T-225, 301.) These maps were received by the Hearing Examiner prior to the March, 2009 evidentiary hearing which is described next.

areas "within a reasonable time" or it was "not economical." (Id.; Exhs. 7 through and including 20, T-117, 122 - economically (T-123.) The utilities strongly disagreed with Staff's assumptions about what the Maps proved, if anything. For example, if the map showed a stand-alone parcel, the utilities' position was Staff did not introduce any evidence that the stand-alone parcel would not be served soon or might be using a well for water service. (T-166-67.)

71. According to Staff, this process is not "cost-effective," although Staff did not perform any analysis as to the cost of water infrastructure such as analyzing the cost of laying pipe vs. the benefits of economies of scale. (T-136, 161, 180-81.) For example, if a utility within a larger utility installs a well to serve an interior isolated pocket, Staff believes that would be less economical than a larger utility using existing mains. (T-124.) No other evidence was introduced by Staff as to cost-effectiveness.

72. According to Staff, the CPCN Maps reflect that there is "service territory" that is surrounded or nearly surrounded by the service territory of another utility, or in limited cases, isolated pockets where there is no nearby existing service. (T-128.) Some of these areas include: an area east of Middletown (T-122); an area between Townsend and the New Castle County/Kent County line (T-126), an area northwest of Smyrna (T-127), south of Smyrna (T-128), south of Dover near Frederica and north of it (T-128-30), west Kent County (T-131), south of Harrington (T-135), east Millsboro (T-138), an area east of Georgetown near the Lewes/Georgetown highway (T-140-41), west of Lewes near Oyster Rocks Road (T-145-46), west of Selbyville (T-148), north of Selbyville (T-149), a very large parcel southeast of Laurel (T-153), eastern Sussex County (T-155), and parcels north and west of Smyrna (T-156).

is today. (T-112, 164, 165, 202, 206-07, 222.) Also, Mr. Patrick believed that, at the time, other Tidewater areas more than (5) five years before had a higher service percentage. (T-245-46.) These areas did not include all Tidewater certificated areas; the areas were selected by the Staff (T-144.) Thus, Tidewater's position is essentially that the utilities are doing everything practicable to timely provide water service in CPCN-certificated areas.

68. On March 27, 2009, Artesian released its statistics on water service provided within five (5) years of CPCN issuance. Artesian's estimated that it served "less than 50%" within 5 years. (See Exhibit 161.) Tidewater served 87% within 5 years, at least before the national economic downturn. (T-112)

69. According to the utilities, "Regional Planning" is less expensive for utilities than stand-alone systems. (T-236.) According to Mr. Patrick of Tidewater, the Developer builds the stand-alone system with supply and the storage tank for on-site distribution with 1/8 inch pipe and a 5/8 inch meter. (T-251, 283.) The Developer pays a \$1,500 fee per residential lot. (T-252, 282.) However, Staff is concerned that, without proper CPCN approvals, extra infrastructure costs could be passed on to the taxpayers. (T-179.) PSC Regulation Docket No. 15 has adequately handled these issues. (Id.)

70. Through Ms. Maucher, Staff introduced into evidence the Commission's color-coded "CPCN Maps" from various areas within Delaware's three (3) Counties which showed service areas where CPCNs had been issued. (T-115-16, 118.) These maps are based upon the Commission's "GIS Map" software. (T-116.) According to Staff, the Maps reflected either certificated areas or areas where CPCN applications had been made but, in Staff's opinion, the utilities could not serve these service

State Planning Opposition (T-203), fire protection issues (T-180, 273, 279-80), protected wildlife including bald eagles (T-205), an unknown grave site/archaeological reasons (T-205), where a water main is located (T-270), and DelDOT Traffic Studies. (T-204.) Development projects can be delayed by the local and state approval process, as well as market conditions. (T-202-07)

- (d) Mr. Spacht also testified that when Artesian was working with the State to attract computer chip manufacturers in the White Hall Farm area, Artesian obtained CPCNs and drilled wells in that area at its expense. Although the wells have not been used yet, Artesian "would not have done those wells, nor participated in the planning exercise if [Artesian] thought that the property could be taken away from us." (T-285; see also T-687-90 & Para. 89 herein)

67. Tidewater's representative, Bruce Patrick, Vice President of Engineering, testified as to the percentage of 68 CPCN-certificated areas requested by the Commission in which Tidewater provided water service: (a) Within three (3) years - 59% of the certificated areas were served by Tidewater (T-112); (b) Within four (4) and five (5) years - 78% of the areas were served (Id.); and (c) Within five years - 87% of the areas were served (Id.) These percentages of CPCN-certificated served areas applied to the five (5) year period preceding the November, 2007 evidentiary hearing - when the economy was substantially better than it

can be used for future customers. (T-163.) Utility Strategic Planning can span fifty (50) years. (T-27.) CPCN's affect the share value of public water utility companies like Artesian. (T-275.) A CPCN review process after three (3) or five (5) years could affect share value because investors consider permanently certificated areas to be more secure and more growth-oriented. (Id., T-308.) This is an issue in some of Artesian's corporate Prospectuses. (T-275.)

- (c) Despite their regional planning, Mr. Patrick from Tidewater and David Spacht, Artesian's CFO, testified that the utilities' objection to the 3- or 5-year review process is due to many factors outside of the utilities' control, such as: *the economy, which is currently poor (T-206); the real estate market which is currently "down" (T-202,206-07,222), i.e. in a poor economy, developers do not want to spend substantial amounts on water infrastructure knowing that sales will not be forthcoming (T-206, 222), County approvals (including a Preliminary Plan approval) which are typically a 12 to 15 month process but can vary (T-202-03,1150), delay in the issuance of sewer permits (T-278), State approvals such as historical designations, DNREC, i.e. sediment and erosion control (T-204), wastewater approvals (T-204),*

maintain that they constantly monitor this process.

(T-258.) Smaller "target areas" are also acquired which may or may not become part of a regional system, depending upon development, water mains, etc. (T-243, 270, 276.) In the early stages, a utility may construct a temporary water plant or even buy water from another utility. (T-1121, 1151). The utilities maintain that, although it may appear somewhat scattered, the utilities are in the "earlier planning stages" in those areas. (T-213.) Although the utilities do not have a regional plan for each area in Delaware, if the utility has a CPCN in an area, the utilities maintain that that area is part of a regional plan. (T-223.) Mr. Spacht testified that Staff does not have all of the information the utilities gather as to planning out their CPCN acquisitions such as site acquisition, paying for infrastructure, etc. (T-289-91.) The utilities' goal is to more efficiently and economically provide water service by achieving "economies of scale." (T-207)

- (b) Utility capital budgets are projected over a five year period. (T-274, 222.) There was no testimony that the utilities' budget cycle is related to the proposed five year Opt Out Rule. The utilities' position is that a 3 or 5 year opt-out rule causes uncertainty with their long term planning because the utilities' lose current CPCN territory which

actually in the "chain-of-title" when a purchaser buys real property. (T-177.) No party introduced testimony from a Delaware real estate attorney or expert as to this issue.

65. Artesian and Tidewater strongly objected to a CPCN possibly lapsing after three years and or even five-years. (T-251, 163, 183, 194.) Artesian and Tidewater are the two (2) water utilities expanding the most in Delaware. (T-115.) [Artesian serves approximately 243,000 Delaware residents while Tidewater serves 31,600 residents. See Staff Opening Brief, pp 3-4 & Artesian's website May 7, 2009] United Water, a water utility serving 36,700 customers in Northern Delaware "did not hold a strong opinion" as to the proposed three-year rule. (T-108, 183; Ex. 2.; see PSC Docket 09-60) Of United's 16 "developer" projects, only one (1) project was not served within five (5) years. (T-191.) Also, representatives of several municipalities attended the hearing. (T-88-89.) Only the Town Manager of Selbyville offered testimony; he suggested increasing the lapse time period or eliminating it. (T-321.)

66. Artesian's and Tidewater's (hereinafter again referred to as "the utilities") legal argument was primarily based upon the statutory framework. However, at this evidentiary hearing, the utilities also presented testimony as to "planning" reasons supporting the utilities' position. Testimony included the following:

- (a) The utilities engage in "regional planning" whereby the utilities plan on acquiring CPCNs beginning with larger parcels with an eye toward more efficiently servicing even larger tracts of land. (T-214, 243, 257, 276, 1121.) The utilities

Ms. Maucher testified that some property owners stated that the CPCN notices were unclear as to the current and future effect of a CPCN on a property owner's rights, i.e. where the company would serve, the cost, etc. (T-116, 169.) One property owner in the Jonathan's Landing subdivision in Magnolia orally complained to Ms. Maucher that one utility was serving an area right next to another utility's service area. (T-168-69.) Apparently, a utility had to lay main through another person's back yard to service the landowner. (T-158.) Ms. Maucher did not recall any landowner who complained that they were not receiving water service within a reasonable amount of time. (T-178.) No "formal complaints" by property owners had been filed with the Commission as of the date of this hearing. (T-168-69, 178.)

(d) Ms. Maucher testified that if "there is a petition for service, signed by the landowner of record, then the Commission must grant the CPCN." (T-186-87.) Ms. Maucher testified that this was due to "the way the statute is written." (T-186-87, 1191.)

(e) Lastly, a CPCN allegedly remains in the chain of title or "goes with the property" and therefore binds future owners of real property. (T-177.) Thus, the decision of a property owner binds the future owner of that property as well. (Id.) There was a dispute as to whether a CPCN is

- (a) According to Staff, a CPCN is a "request to offer service within a reasonable time" which is instead being used by some utilities as a "request for service territory." (T-114-15, 152, 179-80.)
- (b) There have been CPCN applications for parcels which are not located near the Applicant Utility's existing facilities. (T-115, 120, 161.) Thus, the area requested in the CPCN may not be serviced for a reasonable period of time. (T-136.) If an area is not serviced, then a customer is bound to a utility not servicing the area which could cause extra equipment installation expense to the property owner and/or the utility with or without the CPCN when the property owner seeks service. (T-181.) Staff stated that "it appeared to not be cost-effective." (T-181.) Thus, Staff proposed a 3-year review of CPCNs (not an automatic lapse) which evolved into a proposed, five year, "Opt-Out" review, after this hearing occurred. (T-194.)
- (c) Ms. Maucher also testified that some Property Owners have called the Commission asking for an explanation of CPCN solicitation and request for CPCN notices sent by the utilities because the customers did not understand the language in the Notices. Tidewater admitted actively soliciting Property Owners but Tidewater says that this was done to promote its regional service plan. (T-214.)

Commission must consider in making the determination whether landowners may "opt-out" of the utility's service territory.

(P) **Section 13.2.** This section addresses the factors the Commission may consider when making a determination to revoke a CPCN for "good cause." This Section tracks the factors contained in 26 Del. C. § 201C(k)(1). 26 Del. C. § 201C(k)(2), permits the Commission to consider additional factors "deemed necessary by the Commission." Thus, additional factors are also listed by Staff. The Staff's proposed factors are listed in proposed Rule 13, including but not limited to: fraud, dishonesty, criminal conduct insolvency of utility, violations of water statutes, failure to comply with a court order, and other factors the Commission deems relevant. (See Staff's Proposed Rule 13.) (Agreed Upon)

VI. TESTIMONY AT NOVEMBER 19, 2007 EVIDENTIARY HEARING

64. As to the Staff's reasons for developing the proposed Regulations, Andrea Maucher, Public Utilities Analyst III, testified on behalf of the Staff at this hearing. (T-106-07.) At the time, Ms. Maucher was responsible for reviewing CPCN applications and making recommendations to the Commission. (T-107.) During the five (5) years prior to that hearing, Ms. Maucher has reviewed all CPCN applications submitted to the Commission. (Id.) The CPCN applications involve 1 to 300 parcels. (T-144.) Ms. Maucher testified that Staff developed the proposed Regulations because:

utility's service territory. This makes the granting of the CPCN "conditional." See Section 12.2.

The landowner must file the request with the Commission within ninety (90) days of the date which the landowner receives written notice from the utility that they may request to "opt-out." See Section 12.4 & Notice form attached thereto.

The utility has the right to file a proceeding with the Commission within 150 days to oppose the landowner's request to "opt-out." See Section 12.5

For example, the utility may have invested substantial resources to serve the properties within the CPCN territory and has reasonable plans to provide water service in the foreseeable future.

(N) **Section 12.3** requires that five (5) years after a CPCN has been granted to a water utility, the utility must file a report with the Commission specifying those properties within a CPCN territory which are or are not receiving water service from the utility. This report must be filed with the Commission within sixty (60) days after the CPCN reaches its fifth year anniversary. In addition, the water utility must notify customers who are not receiving water service that the customers may file a request with the Commission to "opt-out" of water service with that utility.

(O) **Section 12.6** expands upon the factors that the

(Disputed)

(K) **Section 11.2.** The period of time in which non-landowners may object to a CPCN application is forty (40) days from the date of publication in the newspapers pursuant to Section 10.6, which closely tracks the period for landowners to object after receiving the notices required by Sections 9.1 and 10.1. (Disputed)

(L) **Section 11.6.** The period of time in which a utility must retain all records related to a CPCN application has been extended from five (5) years to seven (7) years. (Agreed Upon)

(M) **Sections 12.1 through 12.6.** (The entire Section 12 is disputed. This is the proposed five year Opt-Out Rule. The actual proposed Regulation is located on pages 34-38 of the Proposed Regulations attached as Exhibit "A" hereto and is entitled the "Conditional Grant of a CPCN for a Proposed Service Area.") This Section has been almost completely rewritten from the Staff's 2007 draft of these Regulations which contained a provision which established a three year (3) period after which a CPCN could lapse. The three (3) year lapse provision has been eliminated. In its place, Staff has substituted a landowner "opt-out" process whereby landowners, who are not receiving service from a water utility five (5) years after the CPCN was granted, may file a request with the Commission to "opt-out" of the

requires the water utilities to include a statement on the petition for water service which the landowner must sign, which advises the landowner that the property may have to remain in the water utility's service territory on a permanent basis. Section 8.5 requires water utilities to file with the Commission any written materials the utilities propose to use to solicit landowners to sign a petition requesting water service. (Disputed)

(G) **Section 9.2.** requires that notice be sent to each landowner in the Proposed Service Area not more than thirty-five (35) days and not less than thirty (30) days, prior to the filing of a CPCN application with the Commission. (Disputed)

(H) **Sections 10.2 and 10.3.** The notices to landowners required by Sections 10.2 and 10.3 have been substantially rewritten in an effort to make them shorter and easier to comprehend. (Disputed)

(I) **Section 10.6.** requires that, in addition to the notice required by Sections 9.1 and 10.1, the utility must also publish the notice in the required newspapers within ten (10) days of filing its CPCN application with the Commission. (Disputed)

(J) **Section 11.1.** requires landowners to file objections to a CPCN application within seventy five (75) days after receiving the written notice from the utility required by Sections 9.1 and 10.1.

Proposed Service Area or an explanation as to why such an estimated timetable cannot be provided. Additionally, if the Proposed Service Area is intended to be part of a regional water system, Staff has included a requirement that the applicant identify the region which includes the Proposed Service Area and provide information setting forth the applicant's plans for the regional water system. This requirement would not apply to a Proposed Service Area for a municipal water utility or a governmental water utility which lies within the political boundaries of the municipality or government. (Disputed)

(D) **Section 6.3.** This Regulation proposes that a Municipality must be notified 30 days prior to CPCN Application if Proposed Service Area is in a Municipality's "Future Annexation Area" or "Future Growth Area." (Disputed)

(E) **Sections 7.4.** This Regulation would require CPCN applications to encompass only a single parcel of land, or two (2) or more contiguous parcels that will be provided water utility services by the same stand-alone system or by the same water main extension. (Disputed)

(F) **Section 8.1** contains a notice which water utilities must send to landowners to solicit the landowner to sign a petition for water service. **Section 8.2**

V. SUMMARY OF STAFF'S 2008 PROPOSED REGULATIONS

63. The Revised Regulations dated January 28, 2008 proposed by Staff are attached hereto as **Exhibit "A."** The utilities' Regulations proposed by Artesian and Tidewater are attached hereto as **Exhibit "B."** The following is a *Summary* of the Staff's proposed Regulations. Some of these proposed Regulations have been "agreed upon" by the parties and others are "disputed." The Agreed Upon Regulations are discussed further herein in Section VIII. The disputed Regulations are discussed further herein in Section IX.

- (A) **Section 2.1.** The proposed Regulations provide as follows: (i) "The existence and boundaries of such a[n existing] development or subdivision may be established by a plat or subdivision map, documents reflecting common deed or conveyance restrictions, homeowner association documents or other means; and (ii) The existence and boundaries of such an *unincorporated community* may be established by a plat, map, census, data, post office designation, testimony of the residents, or other means. (Agreed Upon)
- (B) **Section 3.2.** regarding "Proposed Service Areas." This proposed Regulation seeks to limit a single CPCN application to five (5) "proposed service areas." (Disputed)
- (C) **Section 3.13.** requires that a CPCN application include a description of how and when the applicant plans to provide water utility services to the

must necessarily imply the general power to impose conditions upon the permit.⁹ (*Id.*)

62. According to Staff, its position is also supported by a 1971 case involving a CPCN for bus routes. Greater Wilmington Transportation Authority v. Kline, 285 A.2d 819 (Del. Super. 1971) cited in Delmarva Power & Light Company v. City of Seaford, 575 A.2d 1089 (Del. 1990), cert. denied, 498 U.S. 855 (1990). In Delmarva Power, the Delaware Supreme Court held that an electrical CPCN and franchise issued under Section 203A held by Delmarva Power was not an "exclusive property right." (*Id.* at 1096.) However, the court also held that "the exclusivity warranted by the [electrical CPCN] operates to protect Delmarva from competition from other regulated utilities, not municipal utilities such as Seaford Power." (*Id.* at 1098) Staff argues that since the Kline case was cited in Delmarva Power, Kline holds that CPCN is a license which is not exclusive, and can be revoked by the Grantor "at will" i.e. without cause. (See Kline at 823.) Staff argues that Kline allows the Commission to revoke water CPCNs. (Staff Opening Brief, pp. 40-41)

This completes this Section which describes Staff's legal arguments as to why the five-year Opt-Out Rule should be adopted. For the reasons stated in Sections IV(A), (B) and (C) of this Report, the Hearing Examiner recommends that Staff's proposed five-year Opt-Out rule not be adopted because it is not permitted by Delaware's Water CPCN Revocation Statute, 26 Del. C. 203C(k)-(1). Now, this Report will summarize Staff's proposed 2008 Regulations.

⁹The Hearing Examiner's Recommendation that the proposed opt-out rule not be adopted is consistent with the Formosa Plastics decision. In Formosa Plastics, there was no applicable revocation statute so the Delaware Supreme Court implied the right of revocation. See 504 A.2d at 1088. Regarding water CPCNs, there is a revocation statute enacted by the Delaware legislature.

would result in the immediate closure of an "essential plant" at considerable cost, and significant injury to its business, business reputation, business relationships, and employee relationships. (Staff's Brief dated 11/24/08, pp. 9-10)

60. According to Staff, Formosa Plastics challenged the authority of the Secretary of DNREC to revoke its permits on the ground that the statutes governing DNREC's authority did not contain an express provision authorizing DNREC to revoke its permits. Even though there were no provisions in the governing statutes authorizing the Secretary to revoke Formosa Plastics' permits, the Supreme Court concluded that the Secretary had such authority:

The authority to grant a license includes the power of revocation whether it is expressly or impliedly reserved by statute. (See 504 A.2d at 1088.) (*Id.* at 10)

61. According to Staff, if the Secretary of a state agency has the power to revoke the environmental permits for "an essential plant" and thereby cause the permit holder to immediately close the plant and incur considerable costs and significant injury to its business, even though the governing statutes do not expressly confer such authority, then the Commission certainly has the authority to impose the far less onerous condition proposed under Regulation 12.0. Stated differently, if a set of statutes which expressly permit a state agency to impose conditions on a permit necessarily imply the power to revoke the permit, then statutes which grant a state agency the power to award and revoke a permit, and to impose conditions on the permit because of a complaint by a competitor,

except that under Regulation 12.0 the landowner will have a limited right to request an opt-out. Section 203C does not prohibit the Commission from placing a reasonable regulatory condition on a CPCN. (Staff's Opening Brief, p. 38)

58. According to Staff, the application of Regulation 12.0 would not necessarily result in the loss of the entire service territory encompassed by a CPCN. For example, if there are multiple landowners and multiple parcels in a service territory, only one landowner may seek to opt-out, meaning that, even if the opt-out was approved, the service territory would remain largely intact. Even in the case of a service territory made up of the property of a single landowner, Regulation 12.0 does not involve the revocation of a CPCN, but instead simply affords the opportunity for the landowner to opt-out. The opt-out provision is not exercised at the Commission's initiative. Only the landowner has the right to request the opt-out. Thus, the CPCN is not revoked by the Commission, although the utility admittedly may lose the right to serve the landowner's property. The Staff submitted that there is a substantial distinction between an affirmative act of the Commission to revoke a CPCN where service is being provided, and a request by a landowner to opt-out of a service territory because the utility is not providing any service. Under the latter circumstance, the CPCN will simply lapse if the condition is not met. And the Staff notes that the provision of water service is a matter uniquely within the control of the water utility. (Staff's Opening Brief, pp. 39-40)

59. According to Staff, the Commission's power to impose reasonable conditions upon a CPCN is unequivocally supported by the Delaware Supreme Court's decision in Formosa Plastics Corp. v. Wilson, 504 A.2d 1083 (Del. 1986). There, the appellant Formosa Plastics challenged the power of DNREC to revoke its environmental permits, which

utility's service territory if: (a) five (5) years have elapsed without the provision of water service; and (b) the opt-out is proper based upon a review of all relevant factors under Section 12.6. (Staff's Opening Brief, p. 39)

55. Staff argues that the provisions of Section 203(k) and (l) are not mandatory. For example, paragraph (k) says that the "Commission may undertake to suspend or revoke for good cause a certificate of public convenience and necessity held by a water utility." Viewed in the context of Title 26, Paragraphs (k) and (l) give the Commission the express authority to protect the customers of a utility, if, for example, the utility is providing them with unsafe drinking water. (Staff's Opening Brief, p. 39)

56. According to Staff, Artesian's and Tidewater's argument that Section 203A(a)(3) is inconsistent with Section 203C is unpersuasive. However, Staff maintains that in order to accept the argument, the Hearing Examiner would have to conclude that Section 203C impliedly repealed Section 203A(a)(3), a conclusion that Delaware courts are loathe to reach. Christiana Hospital v. Fattori, 714 A.2d 754, 757 (Del. 1998) (in statutory interpretation, doctrine of implied repeal is not favored); C. v. C., 320 A.2d 717, 721-22 (Del. 1974) (repeal of statute by implication is not favored and occurs only when two statutes are so inconsistent that reconciliation is impossible). (Staff's Opening Brief, p. 38)

57. According to Staff, Artesian and Tidewater argue that Section 203C requires the Commission to issue a CPCN to a water utility if the provisions of the statute are met. However, the argument ignores the fact that the Commission will issue a CPCN under those circumstances,

For the reasons stated in Sections IV(A), (B) & (C) of this Report, the Hearing Examiner does not agree with Staff's interpretation that 26 Del. C. 201, 202, 209(a)(1) and 203(A)(3) grant the Commission the authority to enact the proposed five-year Opt-Out rule. Now, this Report will turn to Staff's argument that the proposed five year Opt-Out rule does not conflict with Delaware's Water CPCN Revocation Statute, 26 Del. C. 203C(k) - (1).

A Summary of Staff's argument follows:

"THE IMPOSITION OF A REASONABLE CONDITION UPON A WATER UTILITY'S CPCN WHICH ALLOWS A LANDOWNER TO REQUEST TO OPT-OUT OF THE SERVICE TERRITORY IF FIVE YEARS HAVE ELAPSED AND WATER SERVICE IS STILL NOT BEING PROVIDED, DOES NOT CONFLICT WITH THE PROVISIONS OF SECTION 203C, INCLUDING PARAGRAPHS (k) AND (l) RELATED TO THE REVOCATION OF A CPCN."

53. According to Staff, Sections 201, 202, 203A, and 209 of Title 26, which permit the Commission to impose reasonable conditions upon CPCNs issued to water utilities, do not conflict with the revocation provisions of Section 203C. Sections 203C(k) and (l) allow the Commission to suspend or revoke a CPCN issued to a water utility. According to Staff, by their terms, paragraphs (k) and (l) of Section 203C only apply to CPCNs for service territories where the utility has instituted water service, and the service is seriously deficient because, for example, the water fails to meet public health standards. (Staff's Opening Brief, pp. 33-39)

54. According to Staff, Regulation 12.0 deals solely with cases where the water utility is not providing any water service whatsoever. Therefore, the new regulation does not conflict with paragraphs (k) and (l), and would simply allow a landowner to request to opt-out of a water

Second, such a limited reading would mean that a water utility's competitors have an equal or greater say in determining whether to impose conditions upon a CPCN as the Commission, because the Commission would be without power to act unless another utility lodged a complaint. Third, such an interpretation would be unreasonable and inequitable, because it would mean that certain public utilities may receive CPCNs without conditions in circumstances where others may not, based entirely upon a competitor's decision to contest a CPCN. (Staff's Opening Brief, pp. 37-38)

51. According to Staff, a more reasonable interpretation of the relevant Sections of Title 26 would be that: (a) the Commission has general authority, on its own initiative, to impose appropriate conditions upon a CPCN by regulation; and (b) under Section 203A(a)(3), if a competitor of a public utility will be adversely affected by the issuance of a CPCN, it can file a complaint and ask the Commission to impose appropriate conditions upon the CPCN. Thus, Section 203A(a)(3) was intended to address standing, and ensure that public utilities have standing to ask the Commission to use its general authority over CPCNs to impose reasonable conditions upon a CPCN being issued to a competitor. (Staff's Opening Brief, pp. 37-38)

52. According to Staff, Statutes must be considered and construed together and harmonized if reasonably possible. State ex rel. Price v. 0.0673 Acres of Land, 224 A.2d 598 (Del. 1966). Staff's position is that its construction of the relevant sections of Title 26 is reasonable and harmonizes the pertinent statutory provisions. (Staff's Brief dated 11/24/08, p.7)

service" within five years of receiving the CPCN to provide water to the new service territory. (Staff's Brief dated 11/24/08, p.5)

47. Also critical to the Staff's statutory analysis of the Commission's authority is Section 203A, which contains the general provisions in Title 26 related to CPCNs. Section 203A(a)(3) provides, in pertinent part, that:

The Commission, after hearing, on the complaint of any public utility claiming to be adversely affected by any proposed extension, may make such order and prescribe such terms and conditions with respect to the proposed extension as may be required by the public convenience and necessity.

(Staff's Opening Brief, pp. 37-38)

48. According to Staff, by its express terms, Section 203A empowers the Commission to prescribe conditions for a CPCN to extend the service territory of a public water utility. Staff maintains that one cannot read Section 203A(a)(3) and conclude that the Commission lacks the authority to impose conditions upon a CPCN. (*Id.*)

49. According to Staff, the utilities' argument is unpersuasive that the Commission may only impose conditions upon a water utility's CPCN if a competitor files a complaint with the Commission alleging that it would be adversely affected by the issuance of a CPCN. In other words, the Commission lacks the power to impose a reasonable condition on a water utility's CPCN, unless Section 203A(a)(3) is triggered by the filing of a complaint by a competitor. (Staff's Opening Brief, pp. 37-38)

50. According to Staff, Staff submits that the argument is unpersuasive for several reasons. First, Section 203A(a)(3) should be read in conjunction with the related Sections in Title 26, including Sections 201, 202, and 209, which should reasonably be interpreted as allowing the Commission to impose conditions upon CPCNs generally.

utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title.

44. According to Staff, Section 201 grants the Commission broad authority to regulate public utilities and their "property rights, . . . [and] service territories." According to Staff, Section 202 of Title 26 contains the limitations that the General Assembly chose to impose upon the Commission's jurisdiction, and there are no provisions prohibiting the Commission from imposing "reasonable conditions" upon a CPCN, such as the five year opt-out rule. (Staff's Post-Hearing Opening Brief (hereinafter Opening Brief," pp. 36-37)

45. According to Staff, Section 201 grants the Commission broad authority to regulate public utilities and their "property rights, . . . [and] service territories." While Section 202 imposes certain limits on the Commission's powers, nothing in Sections 201 or 202 precludes the Commission from imposing reasonable conditions upon a CPCN. (Staff's Opening Brief, pp. 36-37)

46. According to Staff, Section 209(a)(1) authorizes the Commission to "fix just and reasonable . . . regulations to be imposed . . . and followed thereafter by any public utility." Also, Section 209(a)(2) allows the Commission to "require every public utility to furnish safe and adequate and proper service" Read in conjunction with Sections 201 and 202, Section 209 authorizes the Commission to impose regulations which require a public utility to furnish adequate and proper water service. Section 12.0 is a reasonable incidental application of the pertinent statutes, as it allows a landowner to request to "opt-out" of a water utility's service territory, if the utility has failed to provide "adequate and proper [water]

the testimony at the evidentiary hearings, the Hearing Examiner's Recommendation is also that Staff has not demonstrated that the proposed Opt-Out rule is just and reasonable and supported by substantial evidence in the record.⁸ See 29 Del. C. §10141(e); see Reybold Group et al v. PSC, 2007 WL 2199677 (Del. Super. March 20, 2007), *aff'd* 956 A.2d 643 (Del. 2008); Delmarva Power & Light v. Tolou, 729 A.2d 868,874 (Del. Super. Ct. 1998).

42. **Hearing Examiner's Recommendations Regarding Other Staff-Proposed Regulations.** Regarding a number of other Staff-proposed Regulations as described in Sections VIII and IX herein, including its proposed Regulations regarding water CPCN notices to landowners and municipalities, and Plan of Service required of utilities, it is the Hearing Officer's recommendation that Staff has indeed demonstrated that there is "a lawful statutory basis" for those Regulations and that those Regulations are just and reasonable and supported by substantial evidence in the record.

D. Staff's Legal Argument In Support of Adopting Five-Year Opt-Out Rule

43. Staff principally relies upon the general powers of 26 Del. C. 201(a) which provides, in pertinent part:

The Commission shall have exclusive original supervision and regulation of all public

⁸Staff's three (3) primary public policy arguments regarding the alleged reasonableness of Staff's proposed five year Opt-Out rule included: (1) the utilities were allegedly "banking properties" for the future by obtaining CPCNs for properties which the utilities did not intend to "timely" provide service to; (2) that allowing an exclusive water CPCN allegedly does not facilitate regional water planning, duplicates infrastructure and increases rates; and (3) it is unfair to a landowner who consented to (or whose predecessor-in-interest consented to) a CPCN to not be able to later choose to obtain less expensive service from another private utility without the consent of the private utility holding the CPCN. (See Staff's Opening Brief at pp. 14, 47-8.) As to (3) above, the Delaware Supreme Court stated regarding electrical service, "We hold as matter of policy, customer choice does not play a decisive role in determining the relative rights of providers of electrical service." Delmarva Power & Light v. Seaford, 575 A.2d at 1102. Staff's policy arguments are detailed in Sections VI and VII herein which discuss the testimony at the evidentiary hearings.

EXHIBIT "2 and 3"

**REGULATIONS CONCERNING CERTIFICATES OF PUBLIC
CONVENIENCE AND NECESSITY FOR WATER UTILITIES**

TABLE OF CONTENTS

Attached (To Be Constructed Before Final Adoption)

REGULATIONS

1.0 Authority and Scope of Regulations

- 1.1 These regulations shall govern the process: (a) for a person or entity (as described in 26 Del. C. § 203C(a)) to obtain a Certificate of Public Convenience and Necessity to begin operation as a water utility; and (b) for a water utility to obtain a Certificate of Public Convenience and Necessity to extend, expand, or enlarge its operations, business, or facilities beyond its then certificated service territory. These regulations also govern, in conjunction with the provisions of 26 Del. C. § 203C, how the Commission administers, supervises, and revokes any such Certificate of Public Convenience and Necessity previously granted to a water utility.
- 1.2 These regulations are enacted pursuant to 26 Del. C. §§ 203C and 209(a).
- 1.3 In granting, denying, or revoking a Certificate of Public Convenience and Necessity under 26 Del. C. § 203C and these regulations, the Commission shall act consistently with the procedures required by 29 Del. C. ch. 101, Subchapters III and IV.
- 1.4 The Commission may modify or extend any of the timing requirements set forth in these regulations so long as such timing requirement is not required by statutory provision.

1.5 The Commission may by Order, and for good cause, waive any obligation under these regulations that is not required by statute and may, in an individual application, excuse any failure to comply with these regulations that is not material to the Commission's decision.

2.0 Definitions

2.1 The following words and terms, when used in these regulations, should have the following meanings, unless the context clearly indicates otherwise:

"Commission" refers to the Public Service Commission.

"CPCN" or "Certificate" means a Certificate of Public Convenience and Necessity required by the provisions of 26 Del. C. § 203C.

"DPH" refers to the Division of Public Health of the Department of Health and Social Services.

"DNREC" refers to the Department of Natural Resources and Environmental Control.

"Existing development" or "existing subdivision" means an aggregate of parcels or properties within a particular geographic area:

- (a) that constitute a single-named development or subdivision;
- (b) that share common deed restrictions or covenants;
or
- (c) that are governed by a common homeowners' association or similar type of body.

The existence and boundaries of such a development or subdivision may be established by a plat or subdivision map, documents reflecting common deed or conveyance restrictions, homeowner association documents, or other means.

“Existing unincorporated community” means an aggregate of parcels or properties lying within a particular compact unincorporated geographic area that share common community interests; and

- (a) that are generally recognized as an unincorporated community;
- (b) that are commonly described as comprising a named community; or
- (c) that are identified on maps as a particular named community.

The existence and boundaries of such an unincorporated community may be established by a plat, map, census data, post office designation, testimony of the residents, or other means.

“Landowner notification” means the process for delivering to each landowner of record the relevant form of notice prescribed by either these regulations or further Commission directive.

“Landowner of record” shall mean each person or entity as defined and described in 26 Del. C. § 203C(j). A landowner of record may be identified by reference to public tax or public land records or by relevant land conveyance documents.

“New water utility” means, for the purposes of 26 Del. C. § 203C(e)(2), an entity that has not previously provided water utility services to the public within this State.

“Postal Service” refers to the United States Postal Service.

“Proposed Service Area” is equivalent to “the proposed territory to be served” and means the area in which the applicant proposes to offer and provide its water utility services. The proposed service area shall be described by reference to one or more parcels or properties, identified by the relevant county tax map identification designations. If the proposed service area cannot be described by reference to parcels or properties, it may be described by a metes and bounds

description, or any other equivalent description capable of being mapped.

“Record date” means the date for determining the persons and entities who are landowners of record in the Proposed Service Area. The record date shall be a date chosen by the applicant that is no more than sixty days prior to the date of filing of the application for a CPCN.

“SFM” refers to the Office of the State Fire Marshal.

"Staff" refers to the Staff of the Commission.

"Secretary" refers to the Secretary of the Commission.

“Water utility” means a person or entity as defined by 26 Del. C. § 102(8) that is obligated to obtain a CPCN under 26 Del. C. § 203C(a).

3.0 Application for Certificate of Public Convenience and Necessity

In General

- 3.1 An application for a Certificate to begin the business of a water utility, or to extend or expand the business, operations, or facilities of any existing water utility, shall be made in writing and shall be filed with the Commission.
- 3.2 An applicant may request, by a single application, Certificates for one to five Proposed Service Areas. In the case of an application joining multiple Proposed Service Areas, the application shall contain sufficient information and documentation to establish the applicant's entitlement to a Certificate for each separate Proposed Service Area. The Commission shall separately determine for each Proposed Service Area whether to grant a Certificate for that area. However, the Commission, by a single Order, may grant a CPCN for one or more of the Proposed Service Areas that have been joined in a single application.

3.3 The CPCN application shall include all information and supporting documentation required by 26 Del. C. § 203C, the Commission's Rules of Practice and Procedure, and these regulations. An application shall not be considered to be complete and filed until all such information and supporting documentation has been submitted to the Commission. An application shall:

3.3.1 summarize the reason(s) why the Commission should grant the CPCN for each requested Proposed Service Area;

3.3.2 provide specific citations to the statutory and regulatory provisions relied upon for a CPCN for each Proposed Service Area;

3.3.3 identify any significant element of the application that, to the applicant's knowledge, poses a unique statutory or factual question or represents a departure from prior decisions of the Commission; and

3.3.4 prominently state the name, address, telephone number, and e-mail address of the individual to be notified concerning the contents of the application.

Information about each Proposed Service Area

3.4 The application shall include, for each Proposed Service Area requested:

3.4.1 a written description of the general geographic location of the area which also describes the type of area (such as a proposed development, an existing development or existing subdivision, an existing unincorporated community, or an aggregation of a number of parcels);

3.4.2 a general map (reflecting towns or cities, and major transportation routes) appropriately marked to show the location of each Proposed Service Area;

3.4.3 for applications premised on 26 Del. C. § 203C(e)(1)b.3. a map, plat, or precise description of the boundaries of the existing development, existing subdivision, or existing unincorporated community accompanied by references to the documents or filings used to define and describe the existing development, existing subdivision, or unincorporated community;

3.4.3.1 Upon request, the applicant shall provide the underlying documents or filings utilized to define and describe the existing development, existing subdivision, or existing unincorporated community; and

3.4.4 a listing (using county, tax map parcel numbers or designations) of each parcel encompassed within the Proposed Service Area, accompanied by the name and mailing addresses of the landowner(s) of record for each such parcel as of the record date;

3.4.4.1 The listing shall conspicuously identify the tax records or land record documents utilized by the applicant to determine the name and address of each landowner of record;

3.4.4.2 The listing shall conspicuously identify the record date used for determining the landowners of record of the encompassed parcel or parcels;

3.4.4.3 For a request premised on 26 Del. C. § 203C(e)(1)b.3., the listing shall denote each parcel where all of the landowners of record have executed a

petition requesting water utility services from the applicant; and

- 3.4.4.4 For a request premised on 26 Del. C. § 203C(e)(1)b.3., the listing shall also indicate the applicant's calculation of the total number of parcels in the Proposed Service Area and the total number of parcels where the landowners of record have executed a petition requesting water utility services from the applicant.

Evidence of Landowner Notification

- 3.5 The application shall contain for each Proposed Service Area the documentation reflecting landowner notification as required by 26 Del. C. § 203C(d)(1) or (e)(1), including:
 - 3.5.1 copies of relevant Postal Service forms demonstrating that the applicant sent by certified mail the appropriate form of notice as required by these regulations to each landowner of record of each parcel encompassed within the Proposed Service Area;
 - 3.5.2 copies of all materials or messages provided to the applicant by the Postal Service reflecting either delivery of the certified mail or failure of certified mail delivery because the delivery was "refused," "unclaimed," "undeliverable," "unknown," or otherwise not completed; and
 - 3.5.3 a certification (or other evidence) that, for each earlier notice that was returned by the Postal Service due to a failure of certified mail delivery, the applicant then sent another copy of the required notice by first class United States mail to the best available address of the applicable landowner of record.

Criteria for a CPCN Request

- 3.6 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(d)(2)a., the application shall include all evidence (including reports or studies) that establish that the water sources and supplies then available in the Proposed Service Area do not meet the relevant standards governing drinking water for human consumption promulgated and enforced by the Department of Health and Social Services.
- 3.7 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(d)(2)b., the application shall include all evidence (including reports or studies) demonstrating that the supply of water available to the Proposed Service Area is insufficient to meet the projected demand.
- 3.8 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(e)(1)b.1., the application shall include a copy of a signed service agreement between the applicant and the developer of the proposed development or subdivision, and appropriate documentation reflecting that the development or subdivision has finally been approved by the relevant county or municipal government.
- 3.9 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(e)(1)b.2., the application shall include copies of each petition requesting that the applicant provide water services which has been signed by all of the landowners of record of each parcel in the Proposed Service Area. Each such petition must meet the criteria set forth in Section 8.0.
- 3.10 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(e)(1)b.3., the application shall include copies of each petition requesting that the applicant provide water services which has been signed by all of the landowners of record of a parcel to be encompassed by the Proposed Service Area. Each such petition must meet the criteria set forth in Section 8.0. The application shall include such petitions for a majority of the parcels within the existing development, existing subdivision, or existing unincorporated community that constitutes the Proposed Service Area.

3.11 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(e)(1)b.4., the application shall include a certified copy of the resolution or ordinance from the governing body of the relevant county or municipality that requests, directs, or authorizes the applicant to provide water utility services to the Proposed Service Area. If requested, the applicant must also provide additional references to demonstrate that the county or municipality enacting the ordinance or resolution has the appropriate legal authority to authorize the provision of water utility services to the Proposed Service Area.¹

Additional Criteria for a CPCN Request by a Municipal Water Authority

3.12 If the applicant is a municipal water authority created under the provisions of Chapter 14 of title 16 of the Delaware Code, and it seeks a Proposed Service Area that lies, wholly or in part, outside of the political boundaries of the municipality or municipalities that originally created such municipal authority, the application shall also include, as required by 26 Del. C. § 203C(n), a certified copy of a resolution of the governing body of each such municipality requesting that the Certificate for the extra-territorial portion of the Proposed Service Area be granted.²

¹Pursuant to the provisions of 26 Del. C. § 203C(e)(1)b.4., the resolution or ordinance shall only entitle the applicant to a Proposed Service Area that lies within the political boundaries of the county or municipality that entered the resolution or ordinance. If the applicant is a municipality or municipal utility, and it seeks a Proposed Service Area that lies, wholly or in part, outside of the municipality's political boundaries, the applicant must, in the case of those parcels that are outside of the political boundaries, either (1) provide documentation to support a Certificate under some other provision of 26 Del. C. § 203C(d) or (e), or (2) cite another statutory provision that entitles the applicant to serve such parcels and which preempts the limitation expressed in 26 Del. C. § 203C(e)(1)b.4..

²This requirement for a resolution from each municipality requesting the grant of a Certificate does not excuse the municipal water authority from establishing its entitlement to a Certificate for the Proposed Service Area outside of the municipality's boundaries under the provisions of 26 Del. C. § 203C(d) or (e).

Plan of Service

- 3.13 An application shall include, for each Proposed Service Area, a description of how and when the applicant plans to provide water utility services to the Area, including an estimated timetable for providing service or an explanation as to why such an estimated timetable cannot be provided. If the Proposed Service Area is intended to be part of a regional water system, the applicant shall identify the region that includes the Proposed Service Area, and provide information setting forth the applicant's plans for the regional water system.³

Quality of Service Certifications and Information

- 3.14 In the case of a request by a water utility to expand or extend its operations and business, the application shall contain a certification that the proposed extension and expansion will satisfy the provisions of 26 Del. C. § 403(c). The applicant shall certify that:

- 3.14.1 the applicant is then furnishing water to its present customers in such manner that water pressure at every connection is at least 25 pounds at all times;
- 3.14.2 the applicant will furnish water to each new customer in each Proposed Service Area at the pressure of at least 25 pounds at the service connection while continuing also to supply each existing customer at a pressure of at least 25 pounds at each service connection;
- 3.14.3 the applicant is not then subject to a ruling, decision, or finding by any Federal or State regulatory authority that found, concluded, or determined that the applicant materially failed to comply with applicable safe drinking water or water quality standards; and

³ This requirement shall not apply in the case of a Proposed Service Area for a municipal water utility or a governmental water utility that lies within the political boundaries of the municipality or government.

- 3.14.4 the applicant is not subject to any finding or Order of the Commission that determined that the applicant materially failed to provide adequate or proper safe water services to existing customers.
- 3.15 If an applicant cannot supply each of the above certifications, the application shall include a statement why the provisions of 26 Del. C. § 403(c) do not apply to the applicant or the particular application.
- 3.16 If an application will involve a water utility project or water utility services that require the review, approval, or authorization of any other State or Federal regulatory body (including DNREC, the SFM, or the DPH) the application shall also include:
- 3.16.1 a description of the nature of the review by the other regulatory body and current status of such review; and
- 3.16.2 a copy of any permit, order, certificate, approval, or other documents already issued by any other regulatory body relating to the water project or services.
- 3.17 If, after the filing of the application, any other State or Federal regulatory body issues any permit, order, certificate, approval, or other documents related to the water project or services relevant to the application, the applicant shall promptly file such document with the Commission.

Additional Materials to be Supplied with the Application

- 3.18 Unless the following materials are already on file with, or available to, the Commission, an applicant – other than a municipal or other governmental water utility - shall provide with the application the following information:
- 3.18.1 a corporate or business history including dates of incorporation and subsequent acquisitions and/or mergers;

- 3.18.2 a complete description of all relationships between the applicant and its parent, subsidiaries, and affiliates, including a chart of such intra- and inter-company relationships;
 - 3.18.3 a map identifying all areas where the applicant then provides water utility services;
 - 3.18.4 the Annual Reports provided to owners of the applicant, or to the owners of its parent or subsidiaries, over the two-year period prior to the filing of the application;
 - 3.18.5 the audited financial statements, SEC 10K filings, and all proxy material related to the applicant for the two years prior to the filing of the application; and
 - 3.18.6 copies of all reports submitted by the applicant within the preceding twelve months to any State or Federal authority related to whether the applicant has complied with any statute, regulation, rule, or order concerning the provision of safe, adequate, and reliable water services (including the quality of water provided to existing customers).
- 3.19 Unless the materials are already on file with the Commission or available to the Commission, a municipal or other governmental water utility shall provide with the application the statement and documents identified in Sections 3.18.3 and 3.18.6.

4.0 Additional Requirements for an Application Filed by a New Water Utility

- 4.1 If the applicant is a new water utility, the application, in addition to fulfilling the requirements of Sections 3.0 through 3.19, shall also include the following:

- 4.1.1 a copy of the applicant's certificate of incorporation, partnership agreement, or other enabling document;⁴
- 4.1.2 materials that demonstrate that the applicant possesses the financial, operational, and managerial capacity to comply with all State and Federal safe drinking requirements and that the applicant has available, or will be able to procure, an adequate supply of water (even during drought conditions) to meet reasonably anticipated peak daily and monthly demands for its water utility services;
- 4.1.3 a description of the plant to be utilized to provide its water utility services (including details as to the type and capacity of treatment facilities, cost of facilities, and the projected construction schedule);
- 4.1.4 a map detailing the composition, diameter, length, and location of mains and pipes to be initially installed; and
- 4.1.5 a projection of the number of customers to be served in the five-year period following the grant of the requested CPCN.

5.0 Review of the Application and Deficiencies in the Application

- 5.1 An applicant may ask the Staff to informally review a draft of an application prior to its formal filing. Such informal review shall not affect or delay the filing of an application that complies with applicable statutes and these regulations.

⁴If the business structure of the applicant is a sole proprietorship, the Commission will presume, subject to rebuttal, that the applicant lacks the financial, operational, and managerial capabilities to provide adequate water utility services. An applicant that is a sole proprietorship may provide with its application evidence to rebut this presumption and demonstrate that it will have the capabilities to provide adequate and reliable services.

- 5.2 Upon filing, the Staff shall review an application for compliance with the applicable statutory provisions and these regulations. Within thirty days after the date of filing, Staff may notify the applicant of specific deficiencies in the application. The applicant shall have thirty days from the date of the receipt of such notice to file an amended or supplemental application. The Commission may, in its discretion, extend the period for curing deficiencies in the application for an additional period of time.
- 5.3 If the applicant submits an amended or supplemental application, the application shall then be deemed filed on the date of such submission for the purposes of the time limits set forth in 26 Del. C. § 203C(h). In the event the deficiencies identified by Staff are not cured within the time period provided, Staff may request that the Commission reject the application.
- 5.4 During the period the application is pending before the Commission, the Staff may request that the applicant provide additional relevant information or documents.

6.0 Coordination with Other State Agencies, Counties, and Municipalities

- 6.1 At the time of the filing of an application, or within three days thereafter, the applicant shall serve copies of its application on DNREC, the SFM, and the DPH.
- 6.2 At the time of the filing of an application, or within three days thereafter, the applicant shall also send a notice of its application, with a description of the Proposed Service Area, to the county in which the Area lies (in whole or in part).
- 6.3 In addition, if any parcel of land in a Proposed Service Area is located within a "future annexation area" or "future growth area" under a comprehensive plan (22 Del. C. §§ 101 and 702) adopted by a municipality that provides water utility services, then the applicant shall also serve a copy of the application on the municipality (or its municipal utility). The applicant shall serve such copy on the municipality (or its utility) at least thirty days prior to filing the

application with the Commission. The application filed with the Commission shall include a certification of such service on the identified municipality.

- 6.4 During the process of reviewing an application, the Staff shall coordinate and cooperate with DNREC, the SFM, and the DPH. Staff may also coordinate and cooperate with other interested State, local, and Federal authorities in reviewing the request for a CPCN.

7.0 Proposed Service Area

- 7.1 For a request premised on 26 Del. C. § 203C(d)(2)a, the Proposed Service Area shall encompass only such parcels of land that lack available water sources or supplies that meet the standards governing drinking water for human consumption promulgated and enforced by the Department of Health and Social Services.
- 7.2 For a request premised on 26 Del. C. § 203C(d)(2)b, the Proposed Service Area shall encompass only such parcels of land that lack available water sources or supplies sufficient to meet the projected demand for water in such parcels.
- 7.3 For a request premised on 26 Del. C. § 203C(e)(1)b.1., the Proposed Service Area shall encompass only such parcels that are within the subdivision or development plat or plan that has been finally approved by the relevant county or municipal government.
- 7.4 For a request premised on 26 Del. C. § 203C(e)(1)b.2., the Proposed Service Area shall encompass either:
- 7.4.1 a single parcel; or
 - 7.4.2 two or more contiguous parcels that will be provided water utility services by the same stand-alone system or by the same main extension.⁵

⁵If a landowner of record removes a contiguous property from the Proposed Service Area by the exercise of the "opt-out" option available under 26 Del. C. § 203C(i), the exclusion of the parcel shall not render the remaining parcels non-contiguous.

7.5 For a request premised on 26 Del. C. § 203C(e)(1)b.4., the Proposed Service Area shall encompass only such parcels of land that the governing body of the county or municipality has directed, requested, or authorized the applicant to serve;

7.5.1 For a request premised on 26 Del. C. § 203C(e)(1)b.3., the Proposed Service Area shall encompass only such parcels of land that lie within the existing development, existing subdivision, or the existing unincorporated community as described and defined under Section 2.1.

8.0 Requirements Related to 26 Del. C. § 203C(e)(1)(2) and (3)

8.1 If a water utility solicits a landowner of record of a property to sign a petition to request water service, the utility must provide the landowner with the following notice:

YOU SHOULD READ THIS NOTICE CAREFULLY.

Public records list you as a landowner of the property with the following tax map parcel identification number(s): *[insert tax map parcel identification number(s)]*. *[insert water utility's name]* plans to file an application with the Delaware Public Service Commission requesting a Certificate of Public Convenience and Necessity (Certificate) to provide water service to a new territory described as *[insert name and description of existing development, existing subdivision, or existing unincorporated community]*.

[INSERT WATER UTILITY'S NAME] WANTS YOU TO SIGN A PETITION BY WHICH YOU AGREE TO INCLUDE YOUR PROPERTY IN THE TERRITORY IT INTENDS TO SERVE. [INSERT WATER UTILITY'S NAME] ESTIMATES THAT IT WILL PROVIDE WATER SERVICE TO *[insert description of proposed service territory and estimated timetable for providing service. If the utility cannot provide an estimated timetable for providing service, the notice must make the following disclosure in conspicuous language:*

[INSERT UTILITY'S NAME] IS UNABLE TO ESTIMATE WHEN IT WILL PROVIDE WATER SERVICE TO YOUR PROPERTY [AND] *[insert description of proposed service territory]*.

IF YOU SIGN THE PETITION PROPOSED BY [INSERT WATER UTILITY'S NAME] YOUR DECISION TO INCLUDE YOUR PROPERTY IN [INSERT WATER UTILITY'S NAME] SERVICE TERRITORY MAY BE PERMANENT. IT MAY ALSO AFFECT YOUR ABILITY TO OBTAIN A PERMIT FOR A NEW WELL.

IF YOU DO NOT WISH TO BE INCLUDED IN
[INSERT WATER UTILITY'S NAME] SERVICE
TERRITORY, DO NOT SIGN THE PETITION.

IF YOU DO NOT SIGN THE PETITION, [INSERT
WATER UTILITY'S NAME] MAY NEVERTHELESS SEND
YOU A LETTER ASKING YOU TO INCLUDE YOUR
PROPERTY IN ITS SERVICE TERRITORY. IF YOU
RECEIVE SUCH A LETTER, YOU MAY HAVE TO TAKE
ADDITIONAL ACTION.

IF YOU HAVE ANY QUESTIONS,
COMMENTS, OR CONCERNS, PLEASE CONTACT
THE PUBLIC SERVICE COMMISSION AT (302) 736-
7500 (in Delaware, call 800-282-8574).

- 8.2 For a request premised on either 26 Del. C. § 203C(e)(1)b.2. or 26 Del. C. § 203C(e)(1)b.3., each petition requesting water utility services from the applicant must:
- 8.2.1 bear the signature of each landowner of record (or a duly authorized agent) that is requesting water utility services from the applicant;
 - 8.2.2 reflect the date for each signature by each landowner of record, which date shall not be any earlier than one year prior to the date of the filing of the application;

- 8.2.3 bear a printed recitation of the name of each landowner of record executing the petition;
- 8.2.4 describe the nature and office of the executing individual if the request is by an artificial entity;
- 8.2.5 identify the tax map parcel number associated with each landowner of record requesting water service;
- 8.2.6 list the present mailing address and telephone number of each landowner of record that executes the request for water utility services; and
- 8.2.7 contain the following statement in conspicuous language:

I UNDERSTAND THAT BY SIGNING THIS PETITION MY PROPERTY MAY HAVE TO REMAIN IN [INSERT WATER UTILITY'S NAME] SERVICE TERRITORY PERMANENTLY. I ALSO UNDERSTAND THAT IT MAY AFFECT MY ABILITY TO OBTAIN A PERMIT FOR A NEW WELL.

IF YOU HAVE ANY QUESTIONS, COMMENTS, OR CONCERNS, PLEASE CONTACT THE PUBLIC SERVICE COMMISSION AT (302) 736-7500 (in Delaware, call 800-282-8574).

- 8.3 If a petition under 26 Del. C. § 203C(e)(1)b.2. or 26 Del. C. § 203C(e)(1)b.3. involves a petition for water utility services on behalf of condominium units as defined by 26 Del. C. § 203C(j), the applicant shall provide with such petition the materials required by 26 Del. C. § 203C(g)(1).
- 8.4 If a petition for water utility services is executed by an agent of the landowner of record, the applicant shall provide with the petition evidence to demonstrate the agent's authority to act for the landowner of record.

- 8.5 Each water utility shall file with the Commission any written materials the utility proposes to use to solicit landowners of record to sign a petition requesting water utility service from the utility.

9.0 Notice to Landowners in the Proposed Service Area

- 9.1 Pursuant to the provisions of 26 Del. C. § 203C(d)(1) and (e)(1), prior to filing the application, the applicant shall send the form of notice prescribed by these regulations to each landowner of record in the Proposed Service Area. The landowners of record shall be determined as of the record date.
- 9.2 The form of notice required by these regulations shall be sent to each landowner of record not more than thirty-five days and not less than thirty days prior to the filing of the application.
- 9.3 For requests premised on 26 Del. C. § 203C(d)(2)a. or b., the notices shall be sent by United States Postal Service certified mail, return receipt requested, with delivery restricted to the addressee.
- 9.4 For requests premised on 26 Del. C. § 203C(e)(1)b.1. or 4., the notices shall be sent by United States Postal Service certified mail, return receipt requested, with delivery restricted to the addressee.
- 9.5 For requests premised on 26 Del. C. § 203C(e)(1)b.2. or 3., the notices shall be sent to those landowners of record who did not execute a petition for water services by United States Postal Service certified mail, return receipt requested, and with delivery restricted to the addressee. In the case of landowners of record who did execute petitions for water service, the notices shall be sent by United States Postal Service certified mail, return receipt requested.
- 9.6 If the Postal Service returns to the applicant any materials reflecting that, in the case of a particular landowner of record, the certified mail delivery required under Sections 9.3 through 9.5 failed because the delivery was "refused," "unclaimed," "undeliverable," "unknown," or otherwise not completed, then the applicant shall promptly re-send the

form of the required notice by first class United States mail to the best available address of that landowner of record.

- 9.7 The Commission, by Order, may authorize a method of providing notice to landowners of record that is equivalent to the methods set forth in Sections 9.3 through 9.6.

10.0 Form of Notice to Landowners of Record

- 10.1 The notice to be sent to landowners of record in a request premised on either 26 Del. C. § 203C(d)(2), 26 Del. C. § 203C(e)(1)b.1., or 26 Del. C. § 203C(e)(1)b.4. shall be in a form approved by the Commission.
- 10.2 If the request is premised on 26 Del. C. § 203C(e)(1)b.2., the form of notice sent to landowners of record must include the following statements:

**YOU SHOULD READ THIS NOTICE
CAREFULLY.**

Public records list you as a landowner of the property with the following tax map parcel identification number(s): *[insert tax map parcel identification number(s)]*. Within thirty-five (35) days, *[insert water utility's name]* plans to file an application with the Delaware Public Service Commission requesting a Certificate of Public Convenience and Necessity (Certificate) to provide water service to a new territory described as *[insert description of the proposed service territory]*.

[INSERT WATER UTILITY'S NAME] HAS INCLUDED YOUR PROPERTY IN THE TERRITORY IT INTENDS TO SERVE. [INSERT WATER UTILITY'S NAME] ESTIMATES THAT IT WILL PROVIDE WATER SERVICE TO *[insert description of proposed service territory and estimated timetable for providing service. If the utility cannot provide an estimated timetable for providing service, the notice must make the following disclosure in conspicuous language: [INSERT UTILITY'S NAME] IS UNABLE TO ESTIMATE WHEN IT WILL PROVIDE WATER SERVICE TO YOUR PROPERTY OR [insert description of proposed service territory].*

IF YOU DO NOT TAKE ANY ACTION NOW, YOU MAY LOSE YOUR CHOICE OF WHO CAN PROVIDE WATER SERVICE TO YOUR PROPERTY AND WHETHER YOU CAN OBTAIN A WELL PERMIT.

- 1) You may choose to be included in the utility's proposed service territory. If you

signed a petition for water service asking to be included in the utility's proposed service territory, you do not have to take any action.

- 2) You have the right to "opt-out" of the utility's proposed service territory. If you "opt-out", your property will not be included in the utility's service territory. You can do this even though others in *the proposed service territory* might desire water service from the utility. You should understand that being included in a utility's service territory does not mean that public water service will be immediately available to your property or that, when available, you will be required to hook-up to the public water system. However, if your property is included in the utility's water service territory, and later the water from the well providing your drinking water cannot be used, the Department of Natural Resources and Environmental

Control might deny you a permit for a new well if public water is available to your property. On the other hand, if you elect to "opt-out" of the utility's service territory, but later change your mind and decide to connect to the utility's public water system, you could be charged additional fees.

- 3) You may object to the Public Service Commission granting a Certificate for *the proposed service territory*. For example, you may object that the water utility does not have the legal right to serve the territory. You should review the law about what a utility must provide in order to obtain a Certificate (contact the Public Service Commission to obtain a copy of the law). If you file such an objection, you will need to tell the Public Service Commission why the utility should not receive the Certificate. Please note that an objection will not

remove your property from a proposed service territory. To remove your property from the service territory, you must request to "opt-out."

Attached to this letter is a form which allows you (and other owners of the property) to exercise your options. You have seventy-five (75) days from your receipt of this notice to file your objection with the Commission. Although you may exercise your right to "opt-out" of the utility's service territory at any time before the Certificate is granted, if you choose to opt-out, it is requested that you complete the form and return it to the Public Service Commission at the address listed below within seventy-five (75) days from the date you receive this notice:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

If you want to "opt-out" or object, you must send the completed form to the Public Service Commission, even if you already informed the utility of your intent to "opt-out" or object.

If you have any questions, comments or concerns, please contact the Public Service Commission at (302) 736-7500 (in Delaware, call 800-282-8574).

- 10.3 If the request is premised on 26 Del. C. § 203C(e)(1)b.3., the form of notice sent to landowners of record must include the following statements:

**YOU SHOULD READ THIS NOTICE
CAREFULLY.**

Public records list you as a landowner of the property with the following tax map parcel identification number(s): *[insert tax map parcel identification number(s)]*. Within thirty-five (35) days, *[insert water utility's name]* plans to file an application with the Delaware Public Service Commission requesting a Certificate of Public Convenience and Necessity (Certificate) to provide water service to a new territory described as *[insert name and description of existing development, existing subdivision, or existing unincorporated community]*.

[INSERT WATER UTILITY'S NAME] HAS
INCLUDED YOUR PROPERTY IN THE TERRITORY

IT INTENDS TO SERVE. *[INSERT WATER UTILITY'S NAME]* ESTIMATES THAT IT WILL PROVIDE WATER SERVICE TO *[insert description of proposed service territory and estimated timetable for providing service. If the utility cannot provide an estimated timetable for providing service, the notice must make the following disclosure in conspicuous language: [INSERT UTILITY'S NAME] IS UNABLE TO ESTIMATE WHEN IT WILL PROVIDE WATER SERVICE TO YOUR PROPERTY OR [insert name and description of existing development, existing subdivision, or existing unincorporated community].*

IF YOU DO NOT TAKE ANY ACTION NOW, YOU MAY LOSE YOUR CHOICE OF WHO CAN PROVIDE WATER SERVICE TO YOUR PROPERTY AND WHETHER YOU CAN OBTAIN A WELL PERMIT.

- 1) You may choose to be included in the utility's proposed service territory. If you signed a petition for water service asking to

be included in the utility's proposed service territory, or, if you did not sign a petition for water service but want to be included, you do not have to take any action.

- 2) You have the right to "opt-out" of the utility's proposed service territory. If you "opt-out", your property will not be included in the utility's service territory. You can do this even though others in *[insert development or community name]* might desire water service from the utility. You should understand that being included in a utility's service territory does not mean that public water service will be immediately available to your property or that, when available, you will be required to hook-up to the public water system. However, if your property is included in the utility's water service territory, and later the water from the well providing your drinking water cannot

be used, the Department of Natural Resources and Environmental Control might deny you a permit for a new well if public water is available to your property. On the other hand, if you elect to "opt-out" of the utility's service territory, but later change your mind and decide to connect to the utility's public water system, you could be charged additional fees.

- 3) You may object to the Public Service Commission granting a Certificate for *[insert development or community name]*. For example, you may object that the water utility does not have the legal right to serve the territory. You should review the law about what a utility must provide in order to obtain a Certificate (contact the Public Service Commission to obtain a copy of the law). If you file such an objection, you will need to tell the Public Service Commission

why the utility should not receive the Certificate. Please note that an objection will not remove your property from a proposed service territory. To remove your property from the service territory, you must request to "opt-out."

Attached to this letter is a form which allows you (and other owners of the property) to exercise your options. You have seventy-five (75) days from your receipt of this notice to file your objection with the Commission. Although you may exercise your right to "opt-out" of the utility's service territory at any time before the Certificate is granted, if you choose to opt-out, it is requested that you complete the form and return it to the Public Service Commission at the address listed below within seventy-five (75) days from the date you receive this notice:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

If you want to "opt-out" or object, you must send the completed form to the Public Service Commission, even if you already informed the utility of your intent to "opt-out" or object.

If you have any questions, comments or concerns, please contact the Public Service Commission at (302) 736-7500 (in Delaware, call 800-282-8574).

- 10.4 In a request under 26 Del. C. § 203C(e), the notice sent to each landowner shall also include a form of response (in a form approved by the Commission) that allows the landowner to easily and plainly exercise the options available under the form of notice.
- 10.5 Except as the Commission might specifically approve, the applicant shall not include any other correspondence with the landowner notice required by these regulations. The exterior of the envelope for any notice shall carry language (approved by the Commission) to alert the landowner of the importance of the notice.
- 10.6 The applicant is not required to send the Section 10.0 opt-out notice with a solicitation notice sent pursuant to Section 8.0 of these regulations.
- 10.7 Within ten days of the filing of the application, the applicant shall also publish in two newspapers of general circulation a form of public notice of its application. The Commission shall approve a form of such public notice. The applicant shall promptly file proof of such publication with the Commission. In the published notice of each CPCN application, the utilities shall provide a description of the properties involved, including (a) the nearest intersecting roads (i.e at the intersection of Canterbury Road and Delaware Avenue or approximately one-half mile from intersection of Canterbury Road and Delaware Avenue); (b) directional information about the parcels

(i.e. on the north side of Delaware Avenue, etc.); (c) a listing of Property Tax ID numbers if available (metes and bounds descriptions if Tax ID numbers are unavailable or if neither of those are available, some description capable of being mapped); and (d) the street address(es) shall also be provided if available.

11.0 Landowner's Options to Object or "Opt-Out," and Objections from Other Interested Persons or Entities

- 11.1 A landowner of record of a parcel that is, in whole or in part, within a Proposed Service Area may object to a CPCN being granted by filing with the Commission a signed written document reflecting such objection. The objection shall set forth the reasons why the applicant is not entitled to a Certificate. Except for good cause, the written objection shall be filed with the Commission no later than seventy-five (75) days after the landowner receives the notice required under Sections 9.1 and 10.1.
- 11.2 The Commission may allow persons or entities that are not landowners of record to file an objection to an application for a CPCN. The objection shall set forth the person's or entity's interest in the matter and the reasons why the applicant is not entitled to a Certificate. Except for good cause, the objection by a non-landowner shall be filed with the Commission no later than forty days after publication of the notices required under Section 10.7.
- 11.3 In an application premised on 26 Del. C. § 203C(e)(1)b.2. or 3., a landowner of record of a parcel that is, in whole or in part, within a Proposed Service Area may: (a) object to the issuance of the CPCN, or (b) "opt-out" and have the landowner's parcel excluded from the Proposed Service Area pursuant to 26 Del. C. § 203C(i). A landowner of record may exercise one or more of the above options;
- 11.3.1 The applicant shall immediately inform the Commission of the name and address of each landowner of record that notifies the applicant, either verbally or in writing, that the landowner wishes to exercise any of the options under Section 11.3. The applicant shall immediately file with the Commission

any written documents from a landowner that exercises any of the options in Section 11.3.

- 11.4 At any time prior to the issuance of the CPCN premised on 26 Del. C. § 203C(e)(1)b.2.or 3., a landowner of record of a parcel that is, in whole or in part, within a Proposed Service Area, may file with the Commission a signed written document requesting that the landowner's parcel be excluded from the Proposed Service Area pursuant to 26 Del. C. § 203C(i). A parcel will be excluded from the Proposed Service Area if any landowner of record of such parcel submits a signed "opt-out" request for exclusion of the parcel. The Commission may deny an "opt-out" request submitted by a landowner of record if the landowners of record holding, or vested with, a controlling interest in the parcel rescind, or countermand, the request to "opt-out." The other owners shall demonstrate to the Commission that they hold the authority to bind the parcel.
- 11.5 The Commission shall maintain a record of all written documents received from landowners of record that exercise the options available under Sections 11.1 through 11.4.
- 11.6 An applicant shall retain all records related to an application for a Certificate for a period of seven years after the date of the filing of the application. The applicant shall make such records available to the Commission upon request.

12.0 Suspension or Revocation of CPCN for Good Cause

- 12.1 Pursuant to the provisions of 26 Del. C. § 203C(k) and (l), the Commission may suspend or revoke a CPCN, or a portion thereof, for good cause. Good cause shall consist of:
- 12.1.1 a finding by the Commission that the holder of a CPCN has not materially complied with: (a) any provisions of

Titles 7, 16, or 26 of the Delaware Code dealing with obtaining water or providing water and water services to customers; or (b) any order or rule of the Commission relating to the same;

12.1.2 a finding by the Commission that, to the extent practicable, service to customers will remain uninterrupted under an alternative water utility or a designated third party capable of providing adequate water service, including a trustee or receiver appointed by the Delaware Court of Chancery; and

12.1.3 either (a) a finding by the Commission that there are certain methods to mitigate any financial consequences to customers served by the utility subject to suspension or revocation and the adoption of a plan to implement those methods; or (b) a finding by the Commission that there are no practicable methods to mitigate the financial consequences to customers.

12.2 In addition to the factors required by Sections 12.1.1, 12.1.2, and 12.1.3, the Commission may also consider one or more of the following factors in determining whether to suspend or revoke a CPCN:

12.2.1 fraud, dishonesty, misrepresentation, self-dealing, managerial dereliction, or gross mismanagement on the part of the water utility; or

12.2.2 criminal conduct on the part of the water utility; or

12.2.3 actual, threatened or impending insolvency of the water utility; or

12.2.4 persistent, serious, substantial violations of statutes or regulations governing the water utility in addition to any finding of non-compliance required by Section 12.1.1 above; or

12.2.5 failure or inability on the part of the water utility to comply with an Order of any other State or Federal regulatory body after the water utility has been notified of its non-compliance and given an opportunity to achieve compliance; or

12.2.6 such other factors as the Commission deems relevant to the determination to suspend or revoke a CPCN.

13.0 Proceedings to Suspend or Revoke a CPCN for Good Cause

13.1 Proceedings before the Commission to suspend or revoke a CPCN for good cause shall be conducted in accordance with the procedures set forth in 29 Del. C. ch. 101, Subchapters III and IV.

13.2 Unless the Commission finds, pursuant to proceedings conducted in accordance with Section 13.1 above, that (a) the conduct of the water utility poses an imminent threat to the health and safety of its customers; or (b) the water utility is incapable of providing safe, adequate, and reliable water service, the Commission will not suspend or revoke a CPCN for good cause without initially affording the water utility a reasonable opportunity to correct the conditions that are alleged to constitute the grounds for the suspension or revocation of the CPCN.

TABLE OF CONTENTS

REGULATIONS

1.0 Authority and Scope of Regulations.....	1
1.1.....	1
1.2.....	1
1.3.....	1
1.4.....	1
1.5.....	2
2.0 Definitions.....	2
2.1.....	2, 3, 4
3.0 Application for Certificate of Public Convenience and Necessity.....	4
In General.....	4
3.1.....	4
3.2.....	4
3.3.....	5
3.3.1.....	5
3.3.2.....	5
3.3.3.....	5
3.3.4.....	5
Information about each Proposed Service Area.....	5
3.4.....	5
3.4.1.....	5
3.4.2.....	6
3.4.3.....	6
3.4.3.1.....	6
3.4.4.....	6
3.4.4.1.....	6
3.4.4.2.....	6
3.4.4.3.....	6, 7
3.4.4.4.....	7
Evidence of Landowner Notification.....	7
3.5.....	7
3.5.1.....	7
3.5.2.....	7
3.5.3.....	7
Criteria for a CPCN Request.....	8

3.6.....	8
3.7.....	8
3.8.....	8
3.9.....	8
3.10.....	8
3.11.....	9
Additional Criteria for a CPCN Request by a Municipal Water Authority.....	9
3.12.....	9
Plan of Service.....	10
3.13.....	10
Quality of Service Certifications and Information	10
3.14.....	10
3.14.1.....	10
3.14.2.....	10
3.14.3.....	10
3.14.4.....	11
3.15.....	11
3.16.....	11
3.16.1.....	11
3.16.2.....	11
3.17.....	11
Additional Materials to be Supplied with the Application	11
3.18.....	11
3.18.1.....	11
3.18.2.....	12
3.18.3.....	12
3.18.4.....	12
3.18.5.....	12
3.18.6.....	12
3.19.....	12
4.0 Additional Requirements for an Application Filed by a New Water Utility.....	12
4.1.....	12
4.1.1.....	13
4.1.2.....	13
4.1.3.....	13

4.1.4.....	13
4.1.5.....	13
5.0 Review of the Application and Deficiencies in the Application	13
5.1.....	13
5.2.....	14
5.3.....	14
5.4.....	14
6.0 Coordination with Other State Agencies, Counties, and Municipalities	14
6.1.....	14
6.2.....	14
6.3.....	14, 15
6.4.....	15
7.0 Proposed Service Area.....	15
7.1.....	15
7.2.....	15
7.3.....	15
7.4.....	15
7.4.1.....	15
7.4.2.....	15
7.5.....	16
7.5.1.....	16
8.0 Requirements Related to 26 Del. C. § 203C(e)(1)(2), and (3).....	16
8.1.....	16, 17, 18
8.2.....	18
8.2.1.....	18
8.2.2.....	18
8.2.3.....	19
8.2.4.....	19
8.2.5.....	19
8.2.6.....	19
8.2.7.....	19
8.3.....	19
8.4.....	19
8.5.....	20
9.0 Notice to Landowners in the Proposed Service Area	20
9.1.....	20

9.2.....	20
9.3.....	20
9.4.....	20
9.5.....	20
9.6.....	20, 21
9.7.....	21
10.0 Form of Notice to Landowners of Record	21
10.1.....	21
10.2.....	21, 22, 23, 24, 25, 26
10.3.....	26, 27, 28, 29, 30, 31
10.4.....	31
10.5.....	31
10.6.....	31
10.7.....	32
11.0 Landowner's Options to Object or "opt-Out," and Objections from Other Interested Persons or Entities	32
11.1.....	32
11.2.....	32
11.3.....	32, 33
11.3.1.....	33
11.4.....	33
11.5.....	33
11.6.....	33
12.0 Suspension or Revocation of CPCN for Good Cause	34
12.1.....	34
12.1.1.....	34
12.1.2.....	34
12.1.3.....	34
12.2.....	34
12.2.1.....	34
12.2.2.....	34
12.2.3.....	35
12.2.4.....	35
12.2.5.....	35
12.2.6.....	35
13.0 Proceedings to Suspend or Revoke a CPCN for Good Cause.....	35
13.1.....	35
13.2.....	35



**TITLE 26 PUBLIC UTILITIES
DELAWARE ADMINISTRATIVE CODE**

Public Service Commission

2002 Regulations Governing Certificates of Public Convenience and Necessity for Water Utilities

REGULATIONS CONCERNING WATER UTILITIES INCLUDING THE PUBLIC SERVICE COMMISSION'S JURISDICTION TO GRANT AND REVOKE CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

1.0 Scope of Regulations.

These regulations are intended to govern certain practices and procedures before the Delaware Public Service Commission relating to water utilities.

2.0 Definitions.

As used in these regulations:

"**Commission**" means the Delaware Public Service Commission.

"**CPCN**" means a Certificate of Public Convenience and Necessity.

"**DPH**" means the Delaware Division of Public Health.

"**DNREC**" means the Delaware Department of Natural Resources and Environmental Control.

"**Staff**" means the Staff of the Delaware Public Service Commission.

"**Secretary**" means the Secretary of the Delaware Public Service Commission.

3.0 Application for Certificate of Public Convenience and Necessity.

3.1 An application for a Certificate of Public Convenience and Necessity to begin the business of a water utility or to extend or expand the business or operations of any existing water utility shall be made in writing and filed with the Commission. The application shall include all information and supporting documentation required by statute, the Rules of Practice and Procedure of the Commission, these regulations, and shall not be considered complete until all such information and supporting documentation has been filed with the Commission. At the time of filing, the application shall:

3.1.1 Contain a statement explaining the reason(s) why the Commission should grant the CPCN, and citations to all statutory and regulatory authority upon which the application is based, or upon which the applicant relies to support the application;

3.1.2 Clearly state the relief sought by the application;

3.1.3 State the name, address, telephone number, and e-mail address (if any) of the person to be notified in the event the Staff determines there are deficiencies in the application;

3.1.4 Contain the supporting documentation required by 26 Del.C. §203C, including evidence that all the landowners of the proposed territory have been notified of the application;

3.1.5 Include a complete list of county tax map parcel number(s) for the area covered by the application;

3.1.6 Include (along with a complete list of tax map number(s)) corresponding names and addresses of property owners and a copy of all tax map(s) for the area;

3.1.7 For any proposed extension of service, contain a certification by the applicant that the extension will satisfy the provisions of 26 Del.C. §403C, including the following:

3.1.7.1 The applicant is furnishing water to its present customers or subscribers in this State in such fashion that water pressure at every house supplied is at least 25 pounds at all times at the service connection;

3.1.7.2 The applicant shall furnish water to the house or separate location of each new customer or subscriber in this State at the pressure of at least 25 pounds at each such location or house at all times at the service connection while continuing also to supply each old customer or subscriber at the pressure of at least 25 pounds at each house at all times at the service connection;

- 3.1.7.3 The applicant is not subject to a finding by the appropriate federal or state regulatory authority that it has materially failed to comply with applicable safe drinking water or water quality standards; and
- 3.1.7.4 The applicant is not subject to any Order issued by the Commission finding that the company has materially failed to provide adequate or proper safe water services to existing customers; and
- 3.1.8 For applications submitted under 26 Del.C. §203C(e), include a statement indicating whether the applicant has determined if a majority of the landowners of the proposed territory to be served object to the issuance of a CPCN to the applicant, and the documentation relied upon to support the applicant's determination.
- 3.2 If an application for a CPCN involves a water utility project or service that requires the review, approval or authorization of any other state or federal regulatory body, including DNREC, the State Fire Marshal or DPH, the application to the Commission shall so state and shall include the following:
 - 3.2.1 A statement of the current status of such application;
 - 3.2.2 If the application to the other regulatory body or bodies has already been filed, a copy of any permit, order, certificate, or other document issued by the regulatory body relating thereto; and
 - 3.2.3 If such an application or amendment thereof is filed with another state or federal regulatory body or a determination is made by any such regulatory body subsequent to the date of filing the CPCN application with the Commission, but prior to its determination, a copy of any permit, order, certificate or other document that has been issued relating thereto shall be filed with the Commission.
- 3.3 An applicant for a CPCN – other than a municipality or other governmental subdivision – shall provide with the application (if not presently on file with the Commission) the following:
 - 3.3.1 A corporate history including dates of incorporation, subsequent acquisitions and/or mergers;
 - 3.3.2 A complete description of all relationships between the applicant and its parent, subsidiaries, and affiliates. Furnish a chart or charts which depict(s) the inter-company relationships;
 - 3.3.3 A map identifying all areas, including all towns, cities, counties, and other government subdivisions to which service is already provided;
 - 3.3.4 A statement identifying any significant element of the application which, to the applicant's knowledge, represents a departure from prior decisions of the Commission;
 - 3.3.5 Annual reports to stockholders for applicant, its subsidiaries, and its parent for the last two years;
 - 3.3.6 The applicant's audited financial statements, 10K's, and all proxy material for the last two years; and
 - 3.3.7 Any reports submitted by the applicant within the preceding twelve months to any state or federal authorities in any proceedings wherein an issue has been raised about the applicant's failure to comply with any statute, regulation, rule, or order related to the provision of safe, adequate and reliable water service, including the water quality of water provided to existing customers.
- 3.4 A municipality or other governmental subdivision applying for a CPCN shall provide with the application (if not presently on file with the Commission) the statement and documents identified in subsections 3.3, 3.3.3, 3.3.4 and 3.3.7 hereof.
- 3.5 After a completed application has been filed and during the course of the Staff investigation of an application, the Commission may require an applicant to furnish additional information specifically related to the statutory standards for Commission review and consideration of an application, including the provision of safe, adequate, and reliable water service.
- 3.6 Supporting documentation not filed with the application must be made available for Staff inspection upon request.

4.0 Additional Requirements for an Application Filed by a New Water Utility.

- 4.1 If the applicant for a CPCN is a new water utility that has not previously been awarded a CPCN in Delaware, the application, in addition to meeting the requirements of section 3.0, shall include the following:
- 4.1.1 Evidence that it possesses the financial, operational, and managerial capacity to comply with all state and federal safe drinking water requirements and that it has, or will procure, adequate supplies of water to meet demand, even in drought conditions, by maintaining supply sufficient to meet existing and reasonably anticipated future peak daily and monthly demands;
 - 4.1.2 A certified copy of the applicant's certificate of incorporation;
 - 4.1.3 Details of plant as to type, capacity, cost, status of plant construction, construction schedule, and estimated number of customers to be served; and
 - 4.1.4 A map showing the location and size, in acres or square feet, of the proposed territory, and the composition, diameter, length, and location of pipes to be initially installed.
- 4.2 If the applicant for a CPCN is a new water utility that is an unincorporated proprietorship, the applicant shall be subject to a rebuttal presumption that the applicant lacks the financial, operational, and managerial capacity to comply with the requirements for a CPCN.

5.0 Review of application; deficiencies in the application.

- 5.1 The Staff shall review all CPCN applications for compliance with applicable statutes and these regulations. The Staff will, within twenty-one days after the date of filing, specifically identify any deficiencies in the application, and immediately request the Secretary to promptly notify the applicant of the alleged deficiencies. The applicant shall have thirty days from the date of the receipt of the notice from the Secretary of the deficiencies in the application to file a corrected or supplemental application. The Commission may, in its discretion, extend the period to cure deficiencies in the application for an additional thirty days.
- 5.2 Only upon the applicant's filing of a corrected or supplemental application correcting the deficiencies shall such application be deemed completed and filed with the Commission for purposes of the time limits for action by the Commission under 26 Del.C. §203C(h). In the event the alleged deficiencies are not cured within the time provided hereunder, Staff may move the Commission to reject the utility's application for non-compliance with these regulations.
- 5.3 Nothing in this regulation shall prevent an applicant from filing an application in draft form for Staff's informal review and comment without prejudice, such informal review and comment not to be unreasonably withheld by Staff; nor shall this regulation affect or delay the filing date of applications that comply with applicable statutes and these regulations, or whose non-compliance is deemed minor or immaterial by the Commission or its Staff.

6.0 Filing of application with DNREC, the State Fire Marshal, and DPH; coordination and cooperation.

An applicant for a CPCN shall file a copy of the application and the supporting documentation required by section 3.0, subsections 3.1, 3.1.5, and 3.1.6 with DNREC, the State Fire Marshal, and DPH within three days of filing the same with the Commission. The Staff shall send written requests to DNREC, the State Fire Marshal, and DPH soliciting immediate written comment as to whether they are aware of any matters indicating that the applicant has been unwilling or unable to provide safe, adequate and reliable drinking water service to existing customers. The Staff shall coordinate and cooperate with DNREC, the State Fire Marshal, and DPH during the process of reviewing an application for a CPCN. The Staff shall also coordinate and cooperate with other interested state, local, and federal authorities.

7.0 Provision of notice to all landowners of the proposed territory.

- 7.1 Pursuant to the provisions of 26 Del.C. §203C(d)(1) and (e)(1), prior to filing the application with the Commission, the applicant shall provide written notice to all landowners of the proposed territory of the anticipated filing of the application.

7.2 The written notice required by 26 Del.C. §203C(d)(1) and (e)(1) shall be sent to all landowners of the proposed territory not more than sixty days and not less than thirty days prior to the filing of the application.

8.0 Landowners who object, opt-out, and/or request a public hearing; time limits; extension of time.

8.1 In proceedings involving an application submitted under 26 Del.C. §203C(e), any landowner whose property, or any part thereof, is located within the proposed territory to be served shall be permitted to (i) object to the issuance of the CPCN; (ii) opt-out of inclusion in the territory; and/or (iii) request a public hearing. The applicant shall inform the Commission of the name and address of all landowners who notify the applicant of their objection to the issuance of the CPCN, their intention to opt-out of inclusion in the territory, and/or request a public hearing, and shall file with the Commission any written notices received from such landowners. The Commission shall maintain records identifying all landowners who have provided written notice of their objection to the issuance of the CPCN, their intention to opt-out of inclusion in the territory, and/or request a public hearing, and shall make such records available to the applicant.

8.2 A landowner shall notify the Commission, in writing, if the landowner

8.2.1 objects to the issuance of the CPCN;

8.2.2 intends to opt-out of inclusion in the territory; and/or

8.2.3 requests a public hearing.

8.3 The notice to the Commission from the landowner must be filed with the Commission within

8.3.1 sixty days from the date of the landowner's receipt of a written notice from the water utility that complies with applicable statutes and these regulations, of the landowner's inclusion in the service territory; or

8.3.2 thirty days of the filing of the completed application, whichever period is greater.

8.4 The Commission may, in the exercise of its discretion, extend the time to object, opt-out, and/or request a public hearing even though the period in which to do so has expired. The Commission shall accept for filing written notices from landowners that were sent to the applicant and transmitted by the applicant to the Commission.

9.0 Notification to all landowners of the proposed territory of their rights to object, opt-out, and/or request a public hearing.

9.1 Pursuant to 26 Del.C. §203C(e), and for the purposes of notification to all landowners of the proposed territory encompassed by the CPCN, the notice sent to the landowners of the proposed territory must include, at a minimum, the following statement:

"(1) Pursuant to Title 26, §203C(e) of the Delaware Code, an application for a Certificate of Public Convenience and Necessity (CPCN) will be submitted to the Delaware Public Service Commission on or about {enter date of intended submission}. Your property has been included within an area {enter name of your organization} intends to serve with public water and we are required to inform you of certain information. The area to be served is {provide a short hand description of the service area}. If you agree to the inclusion of your property in the proposed service area, no action on your part is required.

(2) Pursuant to current law, you may file an objection to receiving water service from {enter name of your organization}. Under Delaware law, the Public Service Commission cannot grant a CPCN to {enter name of your organization} for the proposed service area, including your property, if a majority of the landowners in the proposed service area object to the issuance of the CPCN. If you object to receiving water service from {enter the name of your organization}, you must notify the Commission, in writing, within sixty days of your receipt of this notice or within thirty days of the filing of the completed application for a CPCN, whichever is greater.

(3) Pursuant to current law, you may also elect to opt-out of inclusion in the proposed service area. The term "opt-out" means that you decide that you do not want to receive water service from {enter name of your organization}, even if a majority of the landowners in the proposed service area do

elect to receive water service from {enter name of your organization}. If you decide that you do not want to receive water service from {enter name of your organization} and instead wish to opt-out, you must notify the Commission, in writing, within sixty days of your receipt of this notice or within thirty days of the filing of the completed application for a CPCN, whichever is greater.

- (4) You may also request a public hearing on this matter. A request for a public hearing must be made in writing to the Commission within sixty days of your receipt of this notice or within thirty days of the filing of the completed application for a CPCN, whichever is greater.
- (5) The written notice of your decision to object to the issuance of the CPCN, to opt-out of receiving water service from {enter name of your organization}, and/or your written request for a public hearing, shall be sent to the Secretary of the Delaware Public Service Commission at the following address:

Secretary

Delaware Public Service Commission

{insert the address of the Secretary of the Delaware Public Service Commission}

- (6) Any written notice you send to the Commission must include the description of the service area referred to in paragraph (1) above and the name of the applicant so the Commission will be able to identify the CPCN application to which your notice is related.
 - (7) Questions regarding objections, opt-outs, and hearings may be directed to: {enter the name or title, and the address and telephone number of the Commission's contact person(s)}."
- 9.2 If a landowner sends a written notice directly to the applicant, the applicant shall file the notice with the Commission.

10.0 Suspension or revocation of CPCN for good cause.

- 10.1 Pursuant to the provisions of 26 Del.C. §203C(k) and (l), the Commission may suspend or revoke a CPCN, or a portion thereof, for good cause. Good cause shall consist of:
 - 10.1.1 A finding by the Commission of material non-compliance by the holder of a CPCN with any provisions of Titles 7, 16, or 26 of the **Delaware Code** dealing with obtaining water or providing water and water services to customers, or any order or rule of the Commission relating to the same; and
 - 10.1.2 A finding by the Commission that, to the extent practicable, service to customers will remain uninterrupted under an alternative water utility or a designated third party capable of providing adequate water service, including a trustee or receiver appointed by the Delaware Court of Chancery; and
 - 10.1.3 Either
 - 10.1.3.1 a finding by the Commission that there are certain methods to mitigate any financial consequences to customers served by the utility subject to suspension or revocation and the adoption of a plan to implement those methods; or
 - 10.1.3.2 a finding by the Commission that there are no practicable methods to mitigate the financial consequences to customers.
- 10.2 In addition to the factors required by sections 10.1, 10.1.1, 10.1.2 and 10.1.3, the Commission may consider one or more of the following factors in determining whether to suspend or revoke a CPCN:
 - 10.2.1 Fraud, dishonesty, misrepresentation, self-dealing, managerial dereliction, or gross mismanagement on the part of the water utility; or
 - 10.2.2 Criminal conduct on the part of the water utility; or
 - 10.2.3 Actual, threatened or impending insolvency of the water utility; or
 - 10.2.4 Persistent, serious, substantial violations of statutes or regulations governing the water utility in addition to any finding of non-compliance required by section 10, paragraph 10.1 above; or
 - 10.2.5 Failure or inability on the part of the water utility to comply with an order of any other state or federal regulatory body after the water utility has been notified of its non-compliance and given an opportunity to achieve compliance; or

10.2.6 Such other factors as the Commission deems relevant to the determination to suspend or revoke a CPCN.

11.0 Proceedings to suspend or revoke a CPCN for good cause.

11.1 Proceedings before the Commission to suspend or revoke a CPCN for good cause shall be conducted in accordance with the procedures set forth in 29 Del.C. Ch. 101, Subchapter III.

11.2 Unless the Commission finds, pursuant to proceedings conducted in accordance with subsection 11.1 above, that

11.2.1 the conduct of a water utility poses an imminent threat to the health and safety of its customers; or

11.2.2 a water utility is unable to provide safe, adequate, and reliable water service, the Commission will not suspend or revoke a CPCN for good cause without first affording the water utility a reasonable opportunity to correct the conditions that are alleged to constitute the grounds for the suspension or revocation of the CPCN.

12.0 Compliance with 29 Del.C. Ch. 101, Subchapter III.

Proceedings before the Commission involving Certificates of Public Convenience and Necessity for water utilities shall be conducted in accordance with the procedures set forth in 29 Del.C. Ch. 101, Subchapter III, including any proceedings related to any findings under 26 Del.C. §203C(f) that an applicant is unwilling or unable to provide safe, adequate, and reliable water service to existing customers, or is currently subject to such a Commission finding.

13.0 Waiver of requirements of sections 3.0 and 4.0.

The Commission may, in the exercise of its discretion, waive any of the requirements of sections 3.0 and 4.0 above.

5 DE Reg. 212 (07/01/01)

EXHIBIT "5"

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

IN THE MATTER OF THE ADOPTION OF RULES)
CONCERNING THE IMPLEMENTATION OF 72)
DEL. LAWS CH. 402 (2000) GRANTING THE) PSC REGULATION
COMMISSION THE JURISDICTION TO GRANT) DOCKET NO. 51
AND REVOKE THE CERTIFICATES OF PUBLIC)
CONVENIENCE AND NECESSITY FOR PUBLIC)
UTILITY WATER UTILITIES)
(OPENED NOVEMBER 12, 2000; REOPENED)
MARCH 20, 2007))

**NOTICE OF FURTHER PROPOSED RULE-MAKING:
AMENDMENT OF RULES FOR GRANTING, SUPERVISING, and REVOKING
CERTIFICATES OF PUBLIC CONVENIENCE AND
NECESSITY FOR WATER UTILITIES**

TO: ALL WATER UTILITIES, CONSUMERS, AND OTHER INTERESTED PERSONS

Under 26 Del. C. § 203C, the Public Service Commission ("PSC") holds the authority to grant a Certificate of Public Convenience and Necessity ("CPCN") to authorize an entity to begin water utility operations or allow an existing water utility to expand its operations or business to a new proposed service territory. This CPCN authority encompasses water utilities subject to the PSC's general regulation as well as municipal and other governmental water utilities, districts, or authorities. In 2001, the PSC adopted "Regulations Governing Water Utilities Including the Public Service Commission's Jurisdiction to Grant and Revoke Certificates of Public Convenience and Necessity." See 5 DE Reg. 212 (July 1, 2001). Those regulations set forth the process and criteria for reviewing, granting, or denying requests for CPCNs filed by water utilities.

Earlier, the PSC proposed to repeal the 2001 Rules related to water utility CPCNs in favor of a proposed new set of Rules. See 10 DE Reg. 1563-1580 and 11 DE Reg. 465-484. The Commission has now withdrawn those earlier proposed rules.

Pursuant to 26 *Del. C.* §§ 203(c) and 209(a), the PSC now proposes to repeal the 2001 rules and replace them with new "Regulations Governing Certificates of Public Convenience and Necessity for Water Utilities." As set forth in PSC Order No. 7774 (May 4, 2010), the PSC believes the new rules will make improvements in the administration of the CPCN process. Initially, the proposed new rules implement the statutory changes made to the criteria for obtaining a CPCN (and the provisions of 26 *Del. C.* § 203C) by 76 *Del. Laws* ch. 55 (June 28, 2007). Second, the new rules provide for more detailed requirements for notice to affected landowners, other interested persons, and the public of the CPCN application and provide specific requirements about the form of notice to be sent to affected landowners to inform them of their options. In addition, the new regulations add provisions placing limitations on the number of Proposed Service Areas that may be included in a CPCN application, and requiring the inclusion of a Plan of Service with the CPCN application.

You can review PSC Order No. 7774 (May 4, 2010) and the proposed new rules in the June 1, 2010 issue of the Delaware Register of Regulations. You can also review the Order and the new regulations at the PSC's Internet website located at <http://depsc.delaware.gov>. Written copies of the Order and proposed regulations can be obtained at the PSC's office at the address located below, for \$0.25 per page.

The PSC now solicits comments, suggestions, compilations of data, briefs, or other written materials about the proposed repeal of the 2001 Water Utility CPCN rules and the adoption of the proposed new Water Utility CPCN rules. If you want to file any such materials, you should submit an original and ten copies of such written documents on or before June 30, 2010. You should file such materials with the PSC at the following address:

Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, DE 19904
Attn: Reg. Dckt. No. 51

If possible, you should accompany such written comments with an electronic version of the submission. Such electronic copy may be filed on a copy-capable CD-Rom disk or sent as an attachment to an Internet e-mail addressed to alisa.bentley@state.de.us.

The PSC will also conduct a public hearing on the new proposed regulations on Thursday, July 22, 2010. That hearing will begin at 1:00 P.M. and will be held at the PSC's office at the address set forth above. You may also submit comments and materials at such public hearing.

If you are disabled and need assistance or help to participate in the proceedings, please contact the PSC to discuss that assistance. If you want more information or have questions, you can contact the PSC about the matter at (800) 282-8574 (toll-free in Delaware) or (302) 736-7500. Inquiries can also be sent by Internet e-mail addressed to andrea.maucher@state.de.us.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE ADOPTION OF RULES)
CONCERNING THE IMPLEMENTATION OF 72)
DEL. LAWS CH. 402 (2000) GRANTING THE)
COMMISSION THE JURISDICTION TO GRANT)
AND REVOKE THE CERTIFICATES OF PUBLIC)
CONVENIENCE AND NECESSITY FOR PUBLIC)
UTILITY WATER UTILITIES)
(OPENED NOVEMBER 21, 2000; REOPENED)
MARCH 20, 2007))

PSC REGULATION DOCKET
NO. 51

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATED: November 25, 2009

MARK LAWRENCE
HEARING EXAMINER

TABLE OF CONTENTS

	<u>PAGE</u>
I. APPEARANCES	2
II. BACKGROUND.	4
III. SUMMARY AND DISCUSSION.	6
A. Staff's Proposed 2007 Regulations	
B. Staff's Proposed 2008 Regulations	
IV. CURRENT DELAWARE LAW & STAFF'S PROPOSED FIVE YEAR OPT-OUT RULE	11
A. Delaware Law Governing Issuance of Water CPCNs	
B. Delaware Law Governing Revocation of Water CPCNs	
C. Staff's proposed Five-Year Opt-Out Rule which would allow a landowner to opt-out of a water CPCN if service was not provided within five years not adopted by Hearing Examiner because it is not permitted by Delaware Law governing the Revocation of Water CPCNs; Hearing Examiner's Recommendations Regarding Staff's Proposed Opt-Out Rule	
D. Staff's Legal Argument In Support of Adopting Five- Year Opt-Out Rule	
V. SUMMARY OF STAFF'S PROPOSED 2008 REGULATIONS	37
VI. TESTIMONY AT NOVEMBER, 2007 EVIDENTIARY HEARING.	42
VII. TESTIMONY AT MARCH, 2009 EVIDENTIARY HEARINGS.	52
VIII. AGREEMENTS REACHED BETWEEN THE PARTIES AS TO PROPOSED REGULATIONS RECOMMENDED FOR APPROVAL BY HEARING EXAMINER	70
IX. HEARING EXAMINER'S RECOMMENDATIONS AS TO DISPUTED REGULATIONS.	72
Staff's Proposed Regulations for Notices to Delaware Landowners and Municipalities regarding Water CPCNs and Plan of Service required of Utilities adopted by Hearing Examiner	
X. CONCLUSION.	101

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE ADOPTION OF RULES)
CONCERNING THE IMPLEMENTATION OF 72)
DEL. LAWS CH. 402 (2000) GRANTING THE)
COMMISSION THE JURISDICTION TO GRANT) PSC REGULATION DOCKET
AND REVOKE THE CERTIFICATES OF PUBLIC) NO. 51
CONVENIENCE AND NECESSITY FOR PUBLIC)
UTILITY WATER UTILITIES)
(OPENED NOVEMBER 21, 2000; REOPENED)
MARCH 20, 2007))

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

Mark Lawrence, duly appointed Hearing Examiner in this Docket, pursuant to 26 Del. C. § 502 and 29 Del. C. ch. 101, and by Commission Order No. 7451 dated October 7, 2008:

I. APPEARANCES

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

Murphy & Landon
BY: FRANCIS J. MURPHY, JR., ESQUIRE
BY: LAUREN A. PISAPIA, ESQUIRE

Kevin Neilson, PSC Regulatory Policy Administrator
Andrea Maucher, PSC Public Utilities Analyst

JOSEPH HANDLON, ESQUIRE, Deputy Attorney General, Delaware
Department of Justice

On behalf of Artesian Water Company, Inc.:

JOHN J. SHREPPLER, II, ESQUIRE, Vice President, Asst.
Secretary & General Counsel

Dian C. Taylor, Chief Executive Officer & President

David B. Spacht, Chief Financial Officer & Treasurer
Artesian Resources Corporation and its Subsidiaries
Alan Fleetwood, CPCN Coordinator
Connie McDowell, Rate Analyst
Stuart Lidner, Director of External Affairs

On behalf of Tidewater Utilities, Inc.:

Parkowski, Guerke & Swayze, P.A.
BY: JEREMY W. HOMER, ESQUIRE
Bruce Patrick, Vice President of Engineering
Kirsten Higgins, Director of Water Planning and
Development
Joseph Cuccinello, CPCN Coordinator

On behalf of United Water Delaware Inc.:

Susan Skomorucha, General Manager

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

G. Arthur Padmore, Public Advocate
Michael D. Sheehy, Deputy Director, Public Advocate
KENT WALKER, ESQUIRE, Deputy Attorney General, Delaware
Department of Justice

II. BACKGROUND

1. In 2000, the Delaware General Assembly enacted legislation making applications by water utilities for Certificates of Public Convenience and Necessity ("CPCNs") again subject to the jurisdiction of the Public Service Commission of Delaware (the "Commission").¹ See 26 Del. C. § 203. Section 203C(a) provides that "No person or entity . . . or existing water utility [shall] begin any extension or expansion of its business or operations without first having obtained from the Commission a certificate that the present or future convenience and necessity requires, or will be served by, the operation of such business or the proposed extension or expansion." Before 2000, investor-owned water utilities filed applications for CPCNs with the Department of Natural Resources and Environmental Control ("DNREC"). Transfer of jurisdiction from DNREC to the Public Service Commission became effective July 1, 2001.

2. In preparation for the transfer of jurisdiction, in 2000, the Commission initiated a Rulemaking proceeding in order to promulgate regulations governing CPCN applications filed by private water utilities.² Some of the proposed regulations proposed for promulgation were necessary to comply with the General Assembly's directive to the Commission, codified at 26 Del. C. § 203C(1), requiring the Commission to establish rules governing the revocation of a CPCN held by a water utility.

¹References to the pre-filed direct testimony and other exhibits introduced into this record will be cited as "Exhibit" or "Exh. ___." The Transcript of the hearings in this case will be referred to as "Tr-___."

²26 Del. C. § 203(A) governs when a governmental, municipal, or municipal authority water utility seeks a CPCN from the Commission in order to expand its operations and facilities. The Delaware Legislature also rendered the entire CPCN certificate regime inapplicable in the case of municipal annexations under Chapter 1 of Title 22 where no CPCN has been issued. See 26 Del. C. § 203C(a). Lastly, under current Delaware law, the legislature waived the notice and "opt-out" requirements for some listed municipalities. See 26 Del. C. § 203C(i).

3. On January 30, 2001, the Commission considered the proposed regulations prepared by the Staff, the comments and discussions from a workshop conducted on November 30, 2000, and written comments received from interested parties. On the same date, the Commission issued Order No. 5646 to address matters raised by the new legislation. The Commission's Order also directed publication of notice and circulation of the proposed regulations to all water utilities currently operating under a CPCN in Delaware and all persons who made timely written requests for advance notice of the Commission's regulation-making proceedings.

4. On March 28, 2001, a Hearing Examiner conducted a duly-noticed public hearing in the Commission's Dover office to consider the comments and the proposed regulations. Representatives of Artesian Water Company, Inc. ("Artesian"), United Water Delaware Inc. ("United"), Tidewater Utilities, Inc. ("Tidewater"), The Division of Public Advocate ("DPA"), and the Public Service Commission's ("PSC") Staff attended the hearing.

5. At the public hearing, the participants jointly recommended certain modifications to the proposed regulations. With the Hearing Examiner's approval, the participants agreed to incorporate their recommendations into a revised form of proposed regulations, which they submitted to the Hearing Examiner for his review. The Hearing Examiner's Findings and Recommendations recommended that the Commission adopt the proposed Regulations.

6. On April 24, 2001, by PSC Order No. 5079, the Commission preliminarily adopted the proposed Report of the hearing examiner and the Regulations recommended by the hearing examiner and directed publication of the Regulations. On June 5, 2001, the Commission issued Order No. 5730 adopting the Regulations. Thereafter, on July 5, 2001, the Commission,

pursuant to PSC Order No. 5730, adopted the Regulations after holding a public hearing. The Regulations became effective on July 10, 2001.

III. SUMMARY AND DISCUSSION

7. Between 2002 and 2005, it came to the Commission's attention that certain water utilities were allegedly aggregating widely dispersed parcels into a single service area. In 2005, the Commission asked Staff to review the statutory and legal requirements for CPCNs and to consider revising the Commission's rules as to the issue of how water utilities acquire service areas.

A. Staff's 2007 Proposed Regulations

8. In 2007, the Staff completed its proposed Regulations. For example, Sections 7.1 through 7.5 of the Regulations provided definitions for the "Proposed Service Area" under each statutory option for acquiring a CPCN. In particular, for purposes of the majority vote of the landowners' option then in effect,³ the proposed Regulations limited the new proposed service area to either a single parcel or a group of contiguous parcels to be served by the same water infrastructure. According to Staff, this limitation precluded a utility from crafting a widely disbursed service area which utilizes the requests for water service from one area to then include without requests parcels located in another area which had not requested service. Staff asserted that this service area limitation better comported with the legislative intent in 1990 to limit the majority of landowners' option then in effect.

9. The 2007 Regulations proposed by Staff (§§ 10.1-10.4) also addressed the content of the proposed CPCN application notifications to be sent to landowners, and how such notices should disclose the owner's

³See 26 Del. C. § 203(C)(e)(1)(b). Delaware law currently require all landowners in a "Proposed Service Area" to consent. However, proposed service area is not defined by Statute.

ability to exercise the "opt-out" option provided by 26 Del. C. § 203C(i) (2006 Supp.). The Commission was advised that, while landowners valued the "opt-out" option, landowners were often uninformed about its existence or confused as to how and where to exercise their "opt-out" option. Thus, the 2007 proposed Regulations made all obligatory landowners' notices subject to Commission oversight. They also reworked the language and mailing requirements regarding the "opt-out" option. These "beefed-up" notice requirements sought to ensure that the owners have actual notice that their property would be affected by the CPCN application.⁴

10. The 2007 Regulations proposed by Staff also required the applying utility to certify that the utility would provide water service to the proposed service area within three (3) years. (See § 3.11.) Also, if the utility failed to provide water service within three (3) years, the 2007 Regulations provided a mechanism for the Commission to determine whether the utility should be able to retain the CPCN in order to provide water service to the area. (See §§ 12.1-12.6.) Again, according to Staff, this process dovetailed with the heart of the CPCN process: to authorize a water utility to "extend or expand... its business or operations." (See 26 Del. C. § 203C(a) (2006 Supp.)) According to Staff, the certification's goal to ensure that service follows the CPCN is consistent with the text of § 203C, which conditions the grant of a CPCN for an area on either the developer signing a "service agreement," the landowners "requesting such service," or a governmental body "requesting the applicant to provide service." In each

⁴The statutory provisions of 26 Del. C. § 203C(d)(1) & (e)(1) require the delivery of notices to landowners by certified mail ("or its equivalent"). However, consistent with the "due process" principles articulated in Jones v. Flowers, 547 U.S. 220 (2006), a follow-up mailing of the notices by regular U.S. first-class mail to the landowner's address where an earlier certified mail attempt has been returned as "undeliverable" is also required.

instance, the statutory criteria looks to water "service" in the territory, not simply the utility accumulating parcels for a large, exclusive "wide franchise area."

11. By PSC Order No. 7142, (Mar. 20, 2007), the Commission sought input from water utilities and others on the following issues:

- (a) Whether the three (3) year period for providing water service in a new service territory is reasonable in light of water utilities' actual historical experiences;
- (b) Whether there is a need to include in the new rules more specific provisions detailing who might be considered a landowner, how such land ownership might be established, and how a "majority of the landowners" option under § 203C(e)(1)(b) is to be calculated; and
- (c) Whether additional requirements relating to the manner or form of landowner notices should be specifically included in the new rules.

12. The Commission's Order No. 7142, (Mar. 20, 2007), also designated a hearing examiner to organize, classify, and summarize all materials, evidence, and testimony filed in the docket, to conduct public hearing(s), and to make proposed findings and recommendations to the Commission concerning Staff's proposed regulations on the basis of the materials, evidence, and testimony submitted. The Hearing Examiner was also authorized, in their discretion, to solicit additional comments and to conduct, on due notice, such public hearing(s) as may be required to develop further materials and evidence concerning any later-submitted proposed regulations or amendments thereto.

13. In a public notice published for these proceedings, the Commission invited all interested persons and the public to file written comments concerning the original proposed regulations on or before May 4, 2007. (See Notice Repealing 2001 Rules In favor of Rules Proposed By Commission Order No. 7142. 10 DE. REG. 1563-1580 (April 1, 2007)).

14. By PSC Order No. 7254, (Sept. 4, 2007), issued during the course of the proceedings before the hearing examiner reviewing those rules, the Commission considered new legislative amendments to § 203C which became effective June 28, 2007. These legislative amendments are set forth in detail in Section IV of this Report. However, most importantly, the Delaware legislature required that a water utility could obtain a CPCN only by presenting petitions for each parcel in a proposed service area, whereas previously only a majority of landowners was required under 26 Del. C. § 203C(e)(1)(b). In response to the legislative changes, the Commission withdrew the proposed rule changes previously proposed by Order No. 7142 (Mar. 20, 2007). Instead, the Commission then issued new Regulations proposed by Staff which incorporated the 2007 legislative changes, thus leaving the Commission's 2001 Rules in the current state of being repealed in favor of new regulations, which have not, to date, been enacted. (See Order No. 7254, Para. 3, 4 September 4, 2007.)

15. In a public notice published for these proceedings, the Commission invited all interested persons and the public to file written comments on the proposed regulations on or before November 1, 2007. See Notice Repealing 2001 Rules and Proposing Rules Proposed By Commission Order No. 7142. (See 10 DE. REG. 1563-1580 (April 1, 2007)).

16. At the time, the following utilities submitted written comments: Artesian, (Nov. 1, 2007), Tidewater, (Nov. 1, 2007), and United, (Nov. 9, 2007). No other written comments were filed.

17. On November 19, 2007, Senior Hearing Examiner Ruth Ann Price conducted a duly-noticed public evidentiary hearing in the Commission's Dover office to consider the comments and the proposed regulations. Representatives of Artesian, Tidewater, United, the DPA, and Staff attended the hearing. Municipality representatives also attended the meeting. After the November 19, 2007 hearing, Artesian and Tidewater each submitted post-hearing briefs delineating their legal authorities in support of and against certain proposed regulations. By Motion, Staff requested that hearings be continued for Staff to submit another revised draft of its proposed Regulations.

B. Staff's 2008 Proposed Regulations

18. On January 28, 2008, Staff proposed the Regulations which are attached hereto as **Exhibit "A"**. Staff's proposed Regulations are also summarized in detail in Article V herein. On October 7, 2008, the Commission reassigned this Docket from Hearing Examiner Ruth Ann Price to this Hearing Examiner. (See PSC Order No. 7451, October 7, 2008.)

19. On October 15, 2008, at this Hearing Examiner's request, the parties conducted a Workshop at the Commission's offices in Dover to discuss the Regulations proposed by Staff on January 28, 2008. Artesian, Tidewater, United, and Staff were present. Except for Artesian and Tidewater, no other Delaware utility commented on Staff's proposed Regulations. (See Staff's Opening Brief, p.1.) United's position was that it was monitoring the progress of the Docket. Therefore, any reference in this Report to "the utilities" refers to Artesian and Tidewater only. At the Workshop, the parties reached an agreement regarding Staff's proposed Regulation 2.1 amending the definitions of the terms "existing development," "existing subdivision," and "unincorporated community". This agreement will be discussed in more detail later. A productive discussion took place at the Workshop regarding all remaining issues.

Staff submitted its Memorandum of Law as to the remaining unresolved issues on November 24, 2008. On December 19, 2008, the parties reached an Agreement as to additional issues.

20. Between January and March 2009, the parties and this Hearing Examiner had multiple conference calls concerning the unresolved issues. The parties agreed upon the date and specifics of the Final Evidentiary Hearings, *i.e.* March 6, 9 and 11, 2009, when and which pre-filed testimony would be filed, which "live" witness lay and expert witness testimony would be presented, and the filing of post-hearing briefs. At the final hearings, a total of 163 exhibits were introduced into evidence. The transcript for this docket is 1,235 pages. The parties agreed that all filings contained in the PSC's docket in this case would also form part of the evidentiary record. (March 4, 2009 hearing, T-468-472) After the Final Hearings occurred, Staff, Artesian and Tidewater filed Briefs in support of their respective positions. The DPA thereafter joined Staff's position in this Docket. All regulations agreed upon between the parties are detailed in Article VIII herein. All unresolved issues between the parties are detailed in Article IX herein. However, before discussing the agreed upon Regulations and unresolved issues, a discussion of current Delaware law is necessary.

IV. CURRENT DELAWARE LAW & STAFF'S PROPOSED FIVE YEAR OPT-OUT RULE

A. Delaware Law Governing Issuance of Water CPCNs

21. The Delaware General Assembly has legislated a statutory scheme, now codified at 26 *Del. C.* § 203C, which comprehensively and clearly mandates how future CPCNs are to be issued to water utilities.⁵ This legislative scheme first became effective on July 1, 2001.

⁵26 *Del. C.* § 203(C) (b) provides that the CPCN application requirements do

22. 26 Del. C. § 203 transferred jurisdiction to the Public Service Commission ("the Commission") from DNREC, effective July 1, 2001. See 2000 Del. Laws, c. 402 (2000). This legislation also created 26 Del. C. § 203C. Section 203C dispensed with virtually all of the broad and unfettered discretion formerly enjoyed by the Secretary of DNREC to "issue or refuse to issue" a CPCN for "wide-area franchises" without the consent of property owners. From 1976 through 1991, Delaware law required only that, in order for DNREC to issue a CPCN, "the present or future public convenience and necessity require or will require the operation of such business or extension." (Senate Substitute No. 1 (for Senate Bill 730) with Senate Amend. 2 (128th Gen. Assembly, June 30, 1976 (Sen. Sub. 1, Sec. 6 - adding § 6031 to Title 7); 68 Del. Laws, c. 124 (1991)) In 1991, the Delaware legislature limited DNREC's authority imposing the now familiar requirements of 1) a signed service Agreement with a Developer; 2) a petition signed by a majority of landowners in the proposed territory to be served; and 3) a resolution from a local government. DNREC's Secretary could grant a CPCN for a larger area upon a finding after a public hearing "that sound and efficient water resource planning, allocation, management, and regulation would be implemented." See 7 Del. C. §§ 6076 & 6077 (1991-1994).

23. Effective June 28, 2007, however, according to 26 Del. C. § 203C(e)(1)(a-d), the Public Service Commission is required to issue ("shall issue") a CPCN after notice to the landowner, if a water utility submits any of the following:

- (a) A signed service agreement with the developer of a
proposed subdivision or development, which

not apply to "existing" CPCNs or "for the extension or expansion of operations within a service territory for which a certificate has previously been granted."

subdivision or development has been duly approved by the respective county government;

- (b) One or more petitions requesting water service from the applicant executed by the *landowners of record of each parcel or property* to be encompassed within the proposed territory to be served:⁶
- (c) In the case of an *existing development, subdivision, or generally recognized unincorporated community*, one or more Petitions requesting water service from the applicant executed by the landowners of record of parcels and properties that constitute a *majority of the parcels or properties* in the existing, development, subdivision or unincorporated community; or
- (d) A certified copy of a resolution or ordinance from the governing body of a *county or municipality* that requests, directs, or authorizes the applicant to provide water utility services to the proposed territory to be served, which must be located within the boundary of such county or municipality.

24. Since the Delaware legislature has expressly required the Commission to grant CPCNs to water utilities if certain statutory criteria is satisfied, the CPCN issuance statutes, i.e. 26 Del. C. § 203C(e)(1)a-d described above, must be strictly followed by the Commission. *E.g., Miller v. Spicer*, 602 A.2d 65, 67 (Del. 1991), citing to, Delaware Citizens for Clean Air, Inc. v. Water and Air Resources

⁶Previously, Delaware required only a majority of landowners in a proposed service area to execute any CPCN application, without distinguishing between proposed territories and existing developments as the current statute described above does in sections (b) and (c), respectively. Also, 26 Del. C. § 203(C)(d) addresses CPCN

Commission, 303 A.2d 666, 667 (Del. Super. 1973); see also In re Fountain, 913 A.2d 1180, 1181 (Del. Super. 2006). Regarding issuing CPCNs, the PSC Staff testified in this Docket that, if the statutory criteria for issuance is satisfied, "the Commission must grant the CPCN." (See Staff's Testimony, T-186-187.)

25. Delaware's current water CPCN issuance statutes have been described as a "consent regime." (See Exh. 84, Exh.2/Exh. A/p.4). This means that, by not opting out of a CPCN application filed by a water utility, a landowner consents to the CPCN being issued for their property. (*Id.*) The landowner has a statutory right to "opt out" of the CPCN prior to the CPCN being issued. The landowner may, after receipt of the statutorily-required notice from the utility, but prior to the issuance of a CPCN, "opt-out" of water service with that utility pursuant to 26 Del. C. § 203(C)(i). This is done by the landowner signing an opt-out form provided by the utility in its statutorily-required notice and mailing it to the Commission.

26. Delaware's water CPCN issuance statutes were enacted by the Delaware legislature in 2000; ten (10) years after the Delaware Supreme Court's 1990 decision in Delmarva Power & Light Company v. City of Seaford, 575 A.2d 1089 (Del. 1990), *cert. denied*, 498 U.S. 855 (1990). In Delmarva Power, the Delaware Supreme Court held that an electrical CPCN and franchise issued under Section 203A held by Delmarva Power was not an "exclusive property right." (*Id.* at 1096.) However, the court also held that "the exclusivity warranted by the [electrical CPCN] operates to protect Delmarva from competition from other regulated utilities, not municipal utilities such as Seaford Power." (emphasis supplied) (*Id.* at 1098) The court permitted the City of Seaford's municipal utility to provide electrical service to two (2) Delmarva customers located on land

issuance if water standards' non-compliance or insufficient supply is at issue.

annexed by the City, thereby replacing Delmarva's service. (Id. at 1091.) However, pursuant to Delmarva's Inverse Condemnation claim, the court required the City of Seaford to pay Delmarva reasonable compensation for "the taking" of the income and profits derived from Delmarva's customers, which constituted Delmarva's property rights. (Id at 1098.) The court pointed out that the PSC did not have jurisdiction over municipal utilities such as the one owned by the City of Seaford. (See 26 Del. C. § 202(a); Id at 1097.) *see also The Reserves Development Corp. v. PSC*, WL 139777 (Del. Super. 2003) (unpublished opinion), *affirmed* 830 A.2d 409 (Del. 2003) (holding that a Developer was prohibited from serving water to a development's residents because the Developer would be acting as a public utility and another utility had been issued the "exclusive" water CPCN by the PSC)

B. Delaware Law Governing Revocation of Water CPCNs

27. As to revoking a water CPCN, 26 Del. C. §203C(k) was enacted in 2000, when the state's water CPCN issuance statute was enacted. Both statutes became effective July 1, 2001. Delaware's Water CPCN Revocation Statute provides as follows:

(k) The Commission may undertake to suspend or revoke for good cause a certificate of public convenience and necessity held by a water utility. Good cause shall consist of:

(1) A finding made by the Commission of material noncompliance by the holder of the certificate with any provisions of Titles 7, 16 or 26 dealing with obtaining water or providing water and water services to customers, or any

order or rule of the Commission relating to the same; and

- (2) The presence of such additional factors as deemed necessary by the Commission as outlined in subsection (1) of this section.

(1) Prior to July 1, 2001, the Commission shall establish rules for the revocation of a certificate of public convenience and necessity held by a water utility. Such regulations shall outline the factors, in addition to those outlined in subsection (k) of this section, which must be present for a finding of good cause for revocation of a certificate. Such additional factors shall include, but not be limited to, the following:

- (1) A finding by the Commission that, to the extent practicable, service to customers will remain uninterrupted under an alternative water utility or a designated third party capable of providing adequate water service; and,
- (2) To the extent practicable, the Commission should attempt to identify methods to mitigate any financial consequences to customers served by the utility subject to a revocation.

28. 26 Del. C. § 203C(k)-(1) permits the Commission to revoke a CPCN for "Good Cause." That Statute specifically provides that "Good Cause" shall consist of a finding of a utility's "material noncompliance" with a provision of Title 7 [addressing Conservation], Title 16

[addressing Health & Safety], or Title 26 [addressing Public Utilities] "dealing with obtaining water or providing water and water services to customers," or any order or rule . . . of the Commission relating to the same."

29. Once such an enumerated statutory violation occurs, according to 26 Del. C. § 203C(k)(2), "additional factors" are also considered in deciding whether a CPCN will be revoked by the Commission.⁷ According to Section (k)(2), the Commission is required to evaluate additional factors enacted by the Commission, such as the new factors the PSC Staff has proposed in this docket. Lastly, in deciding whether to revoke a CPCN, the Commission is required to evaluate the factors contained in section (1)(1) of the statute, i.e. whether service to customers remains uninterrupted; and section (1)(2) - the methods of mitigating any financial consequences to customers.

30. Additional evidence of the intent of the Delaware legislature to require a Commission finding of a material non-compliance violation of Del. C. § 203C(k)(1) before revoking a CPCN is also contained in section (k)(2). This section provides that "the Commission shall establish rules for the revocation of a certificate of public convenience and necessity held by a water utility. Such regulations will outline the factors, in addition to those outlined in subsection (k) of this section, which must be present for a finding of good cause for revocation of a certificate." Clearly, a finding of material non-compliance of section (k)(1) is required before a CPCN can be revoked. Section (k)(1) is not the end of the analysis of whether a CPCN may be revoked, but it is the initial, required finding for any CPCN to be revoked. Lastly, in deciding whether

⁷Staff's proposed "additional factors" are listed in Staff's proposed Rule 13.2 which has been agreed upon by the parties. These factors include, for example, fraud, dishonesty, criminal conduct, insolvency, violating water statutes, failure to comply with a court order, and other factors the Commission deems relevant. These factors

to revoke a CPCN, the Commission is required to evaluate the factors contained in section (1)(1) of the statute, i.e. whether service to customers remains uninterrupted; and section (1)(2) - the methods of mitigating any financial consequences to customers.

C. Staff-proposed Five-Year Opt-Out Rule which would allow a landowner to opt-out of a water CPCN if service was not provided within five years not adopted by Hearing Examiner because it is not permitted by Delaware Law governing the Revocation of Water CPCNs

31. Staff's proposed five year Opt-Out Regulation is not permitted 26 Del. C. 203C(k)-(1) because, upon an opt-out request from a landowner approved by the Commission, the proposed Regulation alone would permit the "revocation" of an entire CPCN (or usually the portion thereof relating to the landowner who is opting out) if a utility had not serviced an area within five (5) years of the date the CPCN was issued. However, not serving a property within five (5) years is not a "material non-compliance" violation of section (k)(1) as specifically required by Del. C. §203(C)(k) i.e. it is not a violation of Delaware Code Title 7 [addressing Conservation], Title 16 [addressing Health & Safety], nor a violation of Title 26 [addressing Public Utilities] "dealing with obtaining water or providing water and water services to customers," or any order or rule . . . of the Commission relating to the same."

32. Staff's proposed Opt-Out Rule provides as follows:

12.0 Conditional Grant of a CPCN for a Proposed Service Area

12.1 This Section 12.0 shall only apply to properties subject to a CPCN which was granted by the Commission after the date this Section 12.0 became effective.

are discussed in Paragraphs 108 and 109, *infra*.

12.2 For any CPCN granted pursuant to 26 Del. C. § 203C(e)(1)(2) or § 203C(e)(1)(3) after the effective date of this Section, the landowner of record of a property included in a water utility's certificated service area shall be afforded an opportunity to "opt-out" and have their property removed from the water utility's service area if the water utility has failed to provide water service to the property within five years of the date on which the CPCN was granted. To that extent, a CPCN granted to a water utility shall be conditional.

12.3 When five years have passed since the Commission granted a CPCN to a water utility, the utility shall, within sixty days thereafter, file a report with the Commission plainly identifying the properties within the CPCN service territory that are actually receiving water service from the utility and those properties that are not receiving water service from the utility.

12.4 If five years have passed since a water utility was granted a CPCN, and the water utility is not actually providing water service to any property within the service territory granted by the CPCN, the water utility shall send notice to the landowners of record of each such property that the landowners may have the opportunity to "opt-out" and have their property removed from the utility's service territory, due to the water utility's failure to provide water service. This notice shall be sent within thirty days after the five year period has expired. The notice shall be sent by United States Postal Service

certified mail, return receipt requested, with delivery restricted to the addressee. If the United States Postal Service returns any materials reflecting that, in the case of a particular landowner of record, the certified mail delivery failed because the delivery was "refused," "unclaimed," "undeliverable," "unknown," or otherwise not completed, then the water utility shall promptly re-send the form of the required notice by first class United States Postal Service mail to the best available address of that landowner of record. Copies of documents related to the notices sent to the landowners shall be filed with the Commission. The Commission, by Order, may authorize a method of providing notice to landowners of record that is equivalent to the methods set forth above. The form of notice sent to landowners of record by the water utility must include the following statements:

YOU SHOULD READ THIS NOTICE CAREFULLY. Public records list you as a landowner of the property with the following tax map parcel identification number(s): *[insert tax map parcel identification number(s)]* Your Property is included in [INSERT WATER UTILITY'S NAME] service territory. Five years have passed since the Delaware Public Service Commission granted [INSERT WATER UTILITY'S NAME] a Certificate of Public Convenience and Necessity to provide water service to your property. If [INSERT WATER UTILITY'S NAME] is not providing water service to your property, you may file a request to opt-out, which means your property may be removed from [INSERT WATER UTILITY'S NAME] service

territory.

- 1) You may choose to remain in the utility's service territory. If so, you do not have to take any action.
- 2) You may wish to have your property removed from [INSERT WATER UTILITY NAME] service territory, which means "opt-out" of the service territory. If you wish to "opt-out" you must complete the enclosed form and return it to the Public Service Commission at the address listed below within ninety (90) days from the date you receive this notice:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

Please note that a request to "opt-out" will not automatically remove your property from a water utility's service territory. If the water utility objects to your request to "opt-out," the Commission may consider other factors outlined in its regulations in making a final determination whether your property should be removed from the service territory.

- 3) If you do not send the completed opt-out request form to the Public Service Commission, your property will remain in the utility's service territory. If you have any questions, comments, or concerns, please contact the Public Service Commission at (302) 736-7500 (in Delaware, call 800-282-8574).

12.4.1 If the water utility's CPCN was granted pursuant to 26 Del. C. § 203C(e)(1)(2), the properties of landowners of record, who want their properties to remain within the utility's proposed service territory, shall remain within the water utility's service territory. If the water utility's CPCN was granted pursuant to 26 Del. C. § 203C(e)(1)(3), and a majority of the landowners of record of the existing development, existing subdivision, or existing unincorporated community want their properties to remain within the water utility's service territory, then all of the properties within the existing development, existing subdivision, or existing unincorporated community shall remain within the utility's service territory.

12.5 If the water utility that was granted the CPCN wishes to oppose a request by a landowner of record to opt-out of the utility's service territory, the utility must file a proceeding with the Commission within 150 days of the date on which the landowner filed the opt-out notice with the Commission.

12.6 In a proceeding filed by a water utility under Section 12.5, to obtain a determination whether landowners of record who request to opt-out of the utility's service territory should be permitted to opt-out, the Commission shall consider relevant factors, including, but not limited to, the following: a) whether the water utility has a reasonable plan to begin to provide water utility service to properties whose landowners of record wish to opt-out, and the water utility's anticipated timetable for providing such

service, b) whether the properties support, or are essential to, the water utility providing water utility service to another Proposed Service Area, (c) whether any delay in providing service was beyond the reasonable control of the utility; (d) the extent to which the utility has invested resources pursuant to the CPCN; and (e) the extent to which the public convenience and necessity would be served by denying the landowner's request to opt-out.

12.7 In any proceeding instituted under Section 12.5, the water utility shall have the burden of proof, including the burden of proving the factors set forth in Section 12.6 a) through e).

12.8 In any proceeding instituted under Section 12.5, the Commission shall have the authority to determine the manner and form of notice to be provided to landowners of record whose properties may be affected by the proceeding.

33. The Delaware legislature did not enact the five year Opt-Out rule in the Revocation statute. According to the Revocation statute, a CPCN cannot be revoked without first finding that one of the enumerated statutory grounds for revocation contained in 26 Del. C. § 203C(k)(1) has been established. "Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist [W]hen a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe." State ex rel. Everding v. Simon, 20 Or. 365, 373-74, 26 P. 170 (1891) (quoting Hobbs v. McLean, 117 U.S. 567,

579(1886)); see PSC v. Wilmington Suburban Water Corp., 467 A.2d 446, 450-51 (DE. 1983).

34. When construing a statute, an agency or court must adhere to traditional canons of statutory interpretation. The United States Supreme Court has held that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *E.g.*, Connecticut Nat'l Bank v. Germain, 112 S.Ct. 1146, 1149 (1992). This bedrock canon of statutory interpretation supports the utilities' construction of the Revocation Statute, not Staff's construction. Simply put, the Revocation Statute clearly delineates the statutory criteria for revoking a CPCN or any portion thereof. The Delaware legislature is presumed to have said what it intended to say in the Revocation Statute. See also Amer. Auto. Manuf. Ass'n v. PSC, 1998 WL 283472 (Del. Super. 1998) (unpublished opinion) ("[s]tatutory interpretation necessarily must begin with a straightforward reading of the statute to comprehend its intended operation")

35. Since the Delaware legislature has expressly required the Commission to grant and revoke CPCNs to water utilities if certain statutory criteria is satisfied, the water CPCN Issuance and Revocation statutes, and the criteria contained therein, must be strictly followed by the Commission. *E.g.*, Atlantic Mutual Ins. Co. v. C.I.R., 523 U.S. 382 (1998); Miller v. Spicer, 602 A.2d 65, 67 (Del. 1991), *citing to*, Delaware Citizens for Clean Air, Inc. v. Water and Air Resources Commission, 303 A.2d 666, 667 (Del. Super. 1973); In re Fountain, 913 A.2d 1180, 1181 (Del. Super. 2006). See also Com. v. American Ice. Co., 178 A.2d 768 (PA. 1962) (contemporaneous adoption of statutes reflects legislative intent that the statutes be interpreted together). Regarding the issuance of a CPCN, the PSC Staff admitted during the hearings that, if the statutory criteria for CPCN issuance is satisfied, "the Commission

must grant the CPCN." (See Staff's Testimony, T-186-87.) Therefore, it reasons that the statutory criteria contained in Delaware's Water CPCN Revocation Statute must also be strictly followed.

36. Staff's proposed Opt-Out Rule is entitled "Conditional Grant of a CPCN for a Proposed Service Area." By use of the term "conditional," which is not contained in any statute, Staff's position is apparently that the proposed five year Opt-Out rule is not revocation, but rather some type of "lapse" caused by the failure to provide water service. *Black's Law Dictionary* (8th Ed. 2004, p.1346) defines "revocation" as "[a]n annulment, cancellation, or reversal of an act or power." If the Commission revokes a CPCN due to a "lapse" or for any other reason, it would still constitute revocation and it would be governed solely by Delaware's Revocation statute. The Hearing Examiner submits that there is no distinction between "revocation" and "lapse." This is because, in either case, the CPCN (or a portion thereof) would be taken from the utility holding the CPCN - in favor of the landowner who had consented (or whose predecessor-in-title had consented) to the issuance of the CPCN to the utility holding the CPCN.

37. Moreover, Staff's position is that the Commission may enact the five year Opt-Out rule as a reasonable "condition" upon CPCNs issued by the Commission. Although Staff's legal arguments will be discussed in detail in the following section of this Report, this argument likewise ignores the Water CPCN Revocation Statute passed by the Delaware legislature. The Delaware Public Service Commission was created by the legislature and its subject matter is limited to those matters granted to it by the legislature. *E.g.*, Public Service Commission v. Diamond State Tel. Co., 468 A.2d 1285, 1300 (Del. 1983); Eastern Shore Natural Gas v. PSC, 635 A.2d 1273, 1277 (Del. Super. 1993), *aff'd* 637 A.2d 10 (Del. 1994).

38. The Hearing Examiner's Recommendation is also consistent with 26 Del. C. § 203A(3) raised by Staff, which provides as follows: "The Commission, after hearing, on the complaint of any public utility claiming to be adversely affected by any proposed extension, may make such order and prescribe such terms and conditions with respect to the proposed extension as may be required by the public convenience and necessity." Assuming without deciding that § 203A applies to water utilities, § 203A(3) does not apply to the proposed five (5) year Opt-Out rule because no public utility is "claiming to be adversely affected by any proposed extension"-which is the grant of the CPCN-not its revocation. An opt-out complaint is landowner driven. According to the proposed five (5) year opt-out rule, if service is not provided five (5) years after the CPCN is granted, a landowner may opt-out of the CPCN the landowner (or their predecessor-in-title) previously agreed to. § 203A(3) simply does not apply. Clearly, this provision was intended to apply only where two water utilities have a dispute as to a pending CPCN application. Caminetti v. U.S., 242 U.S. 470 (1917) ("if a statute's language is plain and clear, the duty of interpretation does not arise..."); Board of Governors v. Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986) (same).

39. In conclusion, the utilities argue and the Hearing Examiner agrees that, Delaware's water CPCN Revocation Statute unambiguously prohibits the adoption of Staff's proposed five year Opt-Out rule. Caminetti v. U.S., 242 U.S. 470 (1917) ("if a statute's language is plain and clear, the duty of interpretation does not arise..."); Board of Governors v. Fed. Reserve System v. Dimension Fin. Corp., 474 U.S. 361 (1986) (same); Hartford Accident & Indem. Co. v. W.S. Dickey C. Mfg. Co., 24 A.2d 315, 320 (DE. 1942) (same); Rubick v. Security Invest.

Corp., 766 A.2d 15,18 (Del. 2000) (same) (citing Ingram v. Thorpe, 747 A.2d 545, 547 (Del. 2000)).

40. **Standard of Review.** If a statute grants power to an administrative agency and is ambiguous with respect to a specific issue, courts will sometimes defer to the agency's reasonable interpretation of a statute. Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). However, Delaware now has one of the least deferential standards if a court reviews an agency's interpretation of a statute, which is the issue concerning the proposed Opt-Out Rule. Basically, a Delaware agency must correctly interpret a Statute or its interpretation will be reversed. *E.g.*, Hirneisen v. Champlain Cable Corp., 892 A.2d 1056 (Del. 2006) (where "plain language" of workers compensation statute contained no exception for spouses of retired workers, the agency and lower court erred in implying one"; Public Water Supply v. DiPasquale, 735 A.2d 378, 382-83 (Del. 1999) (a reviewing court must apply de novo standard, although the court may accord "due weight" but not defer to an agency interpretation of a statute . . . A reviewing court may not defer to such an interpretation as correct merely because it is rational or not clearly erroneous.); New Castle County Dep't of Land Use v. University of Delaware, 842 A.2d 1201 (Del. 2004) (in overturning agency's tax exemption statute, Superior Court held that "the construction of statutes is a purely legal determination . . . reviewed de novo").

41. **Hearing Examiner's Recommendation Regarding Opt-Out Rule.** The Hearing Examiner's Recommendation that Staff's proposed Opt-Out rule not be adopted is based upon a question of law i.e that Delaware's Water CPCN Revocation Statute 26 Del. C. C(k)-(1) unambiguously prohibits its adoption. However, if the Commission holds that there is "a lawful statutory basis" to adopt the opt-out Rule as required by 29 Del. C. §10141(e), for the reasons described in Sections VI and VII describing

the testimony at the evidentiary hearings, the Hearing Examiner's Recommendation is also that Staff has not demonstrated that the proposed Opt-Out rule is just and reasonable and supported by substantial evidence in the record.⁸ See 29 Del. C. §10141(e); see Reybold Group et al v. PSC, 2007 WL 2199677 (Del. Super. March 20, 2007), *aff'd* 956 A.2d 643 (Del. 2008); Delmarva Power & Light v. Tolou, 729 A.2d 868,874 (Del. Super. Ct. 1998).

42. **Hearing Examiner's Recommendations Regarding Other Staff-Proposed Regulations.** Regarding a number of other Staff-proposed Regulations as described in Sections VIII and IX herein, including its proposed Regulations regarding water CPCN notices to landowners and municipalities, and Plan of Service required of utilities, it is the Hearing Officer's recommendation that Staff has indeed demonstrated that there is "a lawful statutory basis" for those Regulations and that those Regulations are just and reasonable and supported by substantial evidence in the record.

D. Staff's Legal Argument In Support of Adopting Five-Year Opt-Out Rule

43. Staff principally relies upon the general powers of 26 Del. C. 201(a) which provides, in pertinent part:

The Commission shall have exclusive original supervision and regulation of all public

⁸Staff's three (3) primary public policy arguments regarding the alleged reasonableness of Staff's proposed five year Opt-Out rule included: (1) the utilities were allegedly "banking properties" for the future by obtaining CPCNs for properties which the utilities did not intend to "timely" provide service to; (2) that allowing an exclusive water CPCN allegedly does not facilitate regional water planning, duplicates infrastructure and increases rates; and (3) it is unfair to a landowner who consented to (or whose predecessor-in-interest consented to) a CPCN to not be able to later choose to obtain less expensive service from another private utility without the consent of the private utility holding the CPCN. (See Staff's Opening Brief at pp. 14, 47-8.) As to (3) above, the Delaware Supreme Court stated regarding electrical service, "We hold as matter of policy, customer choice does not play a decisive role in determining the relative rights of providers of electrical service." Delmarva Power & Light v. Seaford, 575 A.2d at 1102. Staff's policy arguments are detailed in Sections VI and VII herein which discuss the testimony at the evidentiary hearings.

utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title.

44. According to Staff, Section 201 grants the Commission broad authority to regulate public utilities and their "property rights, . . . [and] service territories." According to Staff, Section 202 of Title 26 contains the limitations that the General Assembly chose to impose upon the Commission's jurisdiction, and there are no provisions prohibiting the Commission from imposing "reasonable conditions" upon a CPCN, such as the five year opt-out rule. (Staff's Post-Hearing Opening Brief (hereinafter Opening Brief," pp. 36-37)

45. According to Staff, Section 201 grants the Commission broad authority to regulate public utilities and their "property rights, . . . [and] service territories." While Section 202 imposes certain limits on the Commission's powers, nothing in Sections 201 or 202 precludes the Commission from imposing reasonable conditions upon a CPCN. (Staff's Opening Brief, pp. 36-37)

46. According to Staff, Section 209(a)(1) authorizes the Commission to "fix just and reasonable . . . regulations to be imposed . . . and followed thereafter by any public utility." Also, Section 209(a)(2) allows the Commission to "require every public utility to furnish safe and adequate and proper service" Read in conjunction with Sections 201 and 202, Section 209 authorizes the Commission to impose regulations which require a public utility to furnish adequate and proper water service. Section 12.0 is a reasonable incidental application of the pertinent statutes, as it allows a landowner to request to "opt-out" of a water utility's service territory, if the utility has failed to provide "adequate and proper [water]

service" within five years of receiving the CPCN to provide water to the new service territory. (Staff's Brief dated 11/24/08, p.5)

47. Also critical to the Staff's statutory analysis of the Commission's authority is Section 203A, which contains the general provisions in Title 26 related to CPCNs. Section 203A(a)(3) provides, in pertinent part, that:

The Commission, after hearing, on the complaint of any public utility claiming to be adversely affected by any proposed extension, may make such order and prescribe such terms and conditions with respect to the proposed extension as may be required by the public convenience and necessity.

(Staff's Opening Brief, pp. 37-38)

48. According to Staff, by its express terms, Section 203A empowers the Commission to prescribe conditions for a CPCN to extend the service territory of a public water utility. Staff maintains that one cannot read Section 203A(a)(3) and conclude that the Commission lacks the authority to impose conditions upon a CPCN. (*Id.*)

49. According to Staff, the utilities' argument is unpersuasive that the Commission may only impose conditions upon a water utility's CPCN if a competitor files a complaint with the Commission alleging that it would be adversely affected by the issuance of a CPCN. In other words, the Commission lacks the power to impose a reasonable condition on a water utility's CPCN, unless Section 203A(a)(3) is triggered by the filing of a complaint by a competitor. (Staff's Opening Brief, pp. 37-38)

50. According to Staff, Staff submits that the argument is unpersuasive for several reasons. First, Section 203A(a)(3) should be read in conjunction with the related Sections in Title 26, including Sections 201, 202, and 209, which should reasonably be interpreted as allowing the Commission to impose conditions upon CPCNs generally.

Second, such a limited reading would mean that a water utility's competitors have an equal or greater say in determining whether to impose conditions upon a CPCN as the Commission, because the Commission would be without power to act unless another utility lodged a complaint. Third, such an interpretation would be unreasonable and inequitable, because it would mean that certain public utilities may receive CPCNs without conditions in circumstances where others may not, based entirely upon a competitor's decision to contest a CPCN. (Staff's Opening Brief, pp. 37-38)

51. According to Staff, a more reasonable interpretation of the relevant Sections of Title 26 would be that: (a) the Commission has general authority, on its own initiative, to impose appropriate conditions upon a CPCN by regulation; and (b) under Section 203A(a)(3), if a competitor of a public utility will be adversely affected by the issuance of a CPCN, it can file a complaint and ask the Commission to impose appropriate conditions upon the CPCN. Thus, Section 203A(a)(3) was intended to address standing, and ensure that public utilities have standing to ask the Commission to use its general authority over CPCNs to impose reasonable conditions upon a CPCN being issued to a competitor. (Staff's Opening Brief, pp. 37-38)

52. According to Staff, Statutes must be considered and construed together and harmonized if reasonably possible. State ex rel. Price v. 0.0673 Acres of Land, 224 A.2d 598 (Del. 1966). Staff's position is that its construction of the relevant sections of Title 26 is reasonable and harmonizes the pertinent statutory provisions. (Staff's Brief dated 11/24/08, p.7)

For the reasons stated in Sections IV(A), (B) & (C) of this Report, the Hearing Examiner does not agree with Staff's interpretation that 26 Del. C. 201, 202, 209(a)(1) and 203(A)(3) grant the Commission the authority to enact the proposed five-year Opt-Out rule. Now, this Report will turn to Staff's argument that the proposed five year Opt-Out rule does not conflict with Delaware's Water CPCN Revocation Statute, 26 Del. C. 203C(k)-(1).

A Summary of Staff's argument follows:

"THE IMPOSITION OF A REASONABLE CONDITION UPON A WATER UTILITY'S CPCN WHICH ALLOWS A LANDOWNER TO REQUEST TO OPT-OUT OF THE SERVICE TERRITORY IF FIVE YEARS HAVE ELAPSED AND WATER SERVICE IS STILL NOT BEING PROVIDED, DOES NOT CONFLICT WITH THE PROVISIONS OF SECTION 203C, INCLUDING PARAGRAPHS (k) AND (l) RELATED TO THE REVOCATION OF A CPCN."

53. According to Staff, Sections 201, 202, 203A, and 209 of Title 26, which permit the Commission to impose reasonable conditions upon CPCNs issued to water utilities, do not conflict with the revocation provisions of Section 203C. Sections 203C(k) and (l) allow the Commission to suspend or revoke a CPCN issued to a water utility. According to Staff, by their terms, paragraphs (k) and (l) of Section 203C only apply to CPCNs for service territories where the utility has instituted water service, and the service is seriously deficient because, for example, the water fails to meet public health standards. (Staff's Opening Brief, pp. 33-39)

54. According to Staff, Regulation 12.0 deals solely with cases where the water utility is not providing any water service whatsoever. Therefore, the new regulation does not conflict with paragraphs (k) and (l), and would simply allow a landowner to request to opt-out of a water

utility's service territory if: (a) five (5) years have elapsed without the provision of water service; and (b) the opt-out is proper based upon a review of all relevant factors under Section 12.6. (Staff's Opening Brief, p. 39)

55. Staff argues that the provisions of Section 203(k) and (l) are not mandatory. For example, paragraph (k) says that the "Commission may undertake to suspend or revoke for good cause a certificate of public convenience and necessity held by a water utility." Viewed in the context of Title 26, Paragraphs (k) and (l) give the Commission the express authority to protect the customers of a utility, if, for example, the utility is providing them with unsafe drinking water. (Staff's Opening Brief, p. 39)

56. According to Staff, Artesian's and Tidewater's argument that Section 203A(a)(3) is inconsistent with Section 203C is unpersuasive. However, Staff maintains that in order to accept the argument, the Hearing Examiner would have to conclude that Section 203C impliedly repealed Section 203A(a)(3), a conclusion that Delaware courts are loathe to reach. Christiana Hospital v. Fattori, 714 A.2d 754, 757 (Del. 1998) (in statutory interpretation, doctrine of implied repeal is not favored); C. v. C., 320 A.2d 717, 721-22 (Del. 1974) (repeal of statute by implication is not favored and occurs only when two statutes are so inconsistent that reconciliation is impossible). (Staff's Opening Brief, p. 38)

57. According to Staff, Artesian and Tidewater argue that Section 203C requires the Commission to issue a CPCN to a water utility if the provisions of the statute are met. However, the argument ignores the fact that the Commission will issue a CPCN under those circumstances,

except that under Regulation 12.0 the landowner will have a limited right to request an opt-out. Section 203C does not prohibit the Commission from placing a reasonable regulatory condition on a CPCN. (Staff's Opening Brief, p. 38)

58. According to Staff, the application of Regulation 12.0 would not necessarily result in the loss of the entire service territory encompassed by a CPCN. For example, if there are multiple landowners and multiple parcels in a service territory, only one landowner may seek to opt-out, meaning that, even if the opt-out was approved, the service territory would remain largely intact. Even in the case of a service territory made up of the property of a single landowner, Regulation 12.0 does not involve the revocation of a CPCN, but instead simply affords the opportunity for the landowner to opt-out. The opt-out provision is not exercised at the Commission's initiative. Only the landowner has the right to request the opt-out. Thus, the CPCN is not revoked by the Commission, although the utility admittedly may lose the right to serve the landowner's property. The Staff submitted that there is a substantial distinction between an affirmative act of the Commission to revoke a CPCN where service is being provided, and a request by a landowner to opt-out of a service territory because the utility is not providing any service. Under the latter circumstance, the CPCN will simply lapse if the condition is not met. And the Staff notes that the provision of water service is a matter uniquely within the control of the water utility. (Staff's Opening Brief, pp. 39-40)

59. According to Staff, the Commission's power to impose reasonable conditions upon a CPCN is unequivocally supported by the Delaware Supreme Court's decision in Formosa Plastics Corp. v. Wilson, 504 A.2d 1083 (Del. 1986). There, the appellant Formosa Plastics challenged the power of DNREC to revoke its environmental permits, which

would result in the immediate closure of an "essential plant" at considerable cost, and significant injury to its business, business reputation, business relationships, and employee relationships. (Staff's Brief dated 11/24/08, pp. 9-10)

60. According to Staff, Formosa Plastics challenged the authority of the Secretary of DNREC to revoke its permits on the ground that the statutes governing DNREC's authority did not contain an express provision authorizing DNREC to revoke its permits. Even though there were no provisions in the governing statutes authorizing the Secretary to revoke Formosa Plastics' permits, the Supreme Court concluded that the Secretary had such authority:

The authority to grant a license includes the power of revocation whether it is expressly or impliedly reserved by statute. (See 504 A.2d at 1088.) (*Id.* at 10)

61. According to Staff, if the Secretary of a state agency has the power to revoke the environmental permits for "an essential plant" and thereby cause the permit holder to immediately close the plant and incur considerable costs and significant injury to its business, even though the governing statutes do not expressly confer such authority, then the Commission certainly has the authority to impose the far less onerous condition proposed under Regulation 12.0. Stated differently, if a set of statutes which expressly permit a state agency to impose conditions on a permit necessarily imply the power to revoke the permit, then statutes which grant a state agency the power to award and revoke a permit, and to impose conditions on the permit because of a complaint by a competitor,

must necessarily imply the general power to impose conditions upon the permit.⁹ (*Id.*)

62. According to Staff, its position is also supported by a 1971 case involving a CPCN for bus routes. Greater Wilmington Transportation Authority v. Kline, 285 A.2d 819 (Del. Super. 1971) cited in Delmarva Power & Light Company v. City of Seaford, 575 A.2d 1089 (Del. 1990), cert. denied, 498 U.S. 855 (1990). In Delmarva Power, the Delaware Supreme Court held that an electrical CPCN and franchise issued under Section 203A held by Delmarva Power was not an "exclusive property right." (*Id.* at 1096.) However, the court also held that "the exclusivity warranted by the [electrical CPCN] operates to protect Delmarva from competition from other regulated utilities, not municipal utilities such as Seaford Power." (*Id.* at 1098) Staff argues that since the Kline case was cited in Delmarva Power, Kline holds that CPCN is a license which is not exclusive, and can be revoked by the Grantor "at will" i.e. without cause. (See Kline at 823.) Staff argues that Kline allows the Commission to revoke water CPCNs. (Staff Opening Brief, pp. 40-41)

This completes this Section which describes Staff's legal arguments as to why the five-year Opt-Out Rule should be adopted. For the reasons stated in Sections IV(A), (B) and (C) of this Report, the Hearing Examiner recommends that Staff's proposed five-year Opt-Out rule not be adopted because it is not permitted by Delaware's Water CPCN Revocation Statute, 26 Del. C. 203C(k)-(1). Now, this Report will summarize Staff's proposed 2008 Regulations.

⁹The Hearing Examiner's Recommendation that the proposed opt-out rule not be adopted is consistent with the Formosa Plastics decision. In Formosa Plastics, there was no applicable revocation statute so the Delaware Supreme Court implied the right of revocation. See 504 A.2d at 1088. Regarding water CPCNs, there is a revocation statute enacted by the Delaware legislature.

V. SUMMARY OF STAFF'S 2008 PROPOSED REGULATIONS

63. The Revised Regulations dated January 28, 2008 proposed by Staff are attached hereto as **Exhibit "A."** The utilities' Regulations proposed by Artesian and Tidewater are attached hereto as **Exhibit "B."** The following is a *Summary* of the Staff's proposed Regulations. Some of these proposed Regulations have been "agreed upon" by the parties and others are "disputed." The Agreed Upon Regulations are discussed further herein in Section VIII. The disputed Regulations are discussed further herein in Section IX.

- (A) **Section 2.1.** The proposed Regulations provide as follows: (i) "The existence and boundaries of such a[n existing] development or subdivision may be established by a plat or subdivision map, documents reflecting common deed or conveyance restrictions, homeowner association documents or other means; and (ii) The existence and boundaries of such an *unincorporated community* may be established by a plat, map, census, data, post office designation, testimony of the residents, or other means. (Agreed Upon)
- (B) **Section 3.2.** regarding "Proposed Service Areas." This proposed Regulation seeks to limit a single CPCN application to five (5) "proposed service areas." (Disputed)
- (C) **Section 3.13.** requires that a CPCN application include a description of how and when the applicant plans to provide water utility services to the

Proposed Service Area or an explanation as to why such an estimated timetable cannot be provided. Additionally, if the Proposed Service Area is intended to be part of a regional water system, Staff has included a requirement that the applicant identify the region which includes the Proposed Service Area and provide information setting forth the applicant's plans for the regional water system. This requirement would not apply to a Proposed Service Area for a municipal water utility or a governmental water utility which lies within the political boundaries of the municipality or government. (Disputed)

(D) **Section 6.3.** This Regulation proposes that a Municipality must be notified 30 days prior to CPCN Application if Proposed Service Area is in a Municipality's "Future Annexation Area" or "Future Growth Area." (Disputed)

(E) **Sections 7.4.** This Regulation would require CPCN applications to encompass only a single parcel of land, or two (2) or more contiguous parcels that will be provided water utility services by the same stand-alone system or by the same water main extension. (Disputed)

(F) **Section 8.1** contains a notice which water utilities must send to landowners to solicit the landowner to sign a petition for water service. **Section 8.2**

requires the water utilities to include a statement on the petition for water service which the landowner must sign, which advises the landowner that the property may have to remain in the water utility's service territory on a permanent basis. *Section 8.5* requires water utilities to file with the Commission any written materials the utilities propose to use to solicit landowners to sign a petition requesting water service. (Disputed)

- (G) *Section 9.2.* requires that notice be sent to each landowner in the Proposed Service Area not more than thirty-five (35) days and not less than thirty (30) days, prior to the filing of a CPCN application with the Commission. (Disputed)
- (H) *Sections 10.2 and 10.3.* The notices to landowners required by Sections 10.2 and 10.3 have been substantially rewritten in an effort to make them shorter and easier to comprehend. (Disputed)
- (I) *Section 10.6.* requires that, in addition to the notice required by Sections 9.1 and 10.1, the utility must also publish the notice in the required newspapers within ten (10) days of filing its CPCN application with the Commission. (Disputed)
- (J) *Section 11.1.* requires landowners to file objections to a CPCN application within seventy five (75) days after receiving the written notice from the utility required by Sections 9.1 and 10.1.

(Disputed)

- (K) **Section 11.2.** The period of time in which non-landowners may object to a CPCN application is forty (40) days from the date of publication in the newspapers pursuant to Section 10.6, which closely tracks the period for landowners to object after receiving the notices required by Sections 9.1 and 10.1. (Disputed)
- (L) **Section 11.6.** The period of time in which a utility must retain all records related to a CPCN application has been extended from five (5) years to seven (7) years. (Agreed Upon)
- (M) **Sections 12.1 through 12.6.** (The entire Section 12 is disputed. This is the proposed five year Opt-Out Rule. The actual proposed Regulation is located on pages 34-38 of the Proposed Regulations attached as Exhibit "A" hereto and is entitled the "Conditional Grant of a CPCN for a Proposed Service Area.") This Section has been almost completely rewritten from the Staff's 2007 draft of these Regulations which contained a provision which established a three year (3) period after which a CPCN could lapse. The three (3) year lapse provision has been eliminated. In its place, Staff has substituted a landowner "opt-out" process whereby landowners, who are not receiving service from a water utility five (5) years after the CPCN was granted, may file a request with the Commission to "opt-out" of the

utility's service territory. This makes the granting of the CPCN "conditional." See Section 12.2.

The landowner must file the request with the Commission within ninety (90) days of the date which the landowner receives written notice from the utility that they may request to "opt-out." See Section 12.4 & Notice form attached thereto.

The utility has the right to file a proceeding with the Commission within 150 days to oppose the landowner's request to "opt-out." See Section 12.5

For example, the utility may have invested substantial resources to serve the properties within the CPCN territory and has reasonable plans to provide water service in the foreseeable future.

(N) **Section 12.3** requires that five (5) years after a CPCN has been granted to a water utility, the utility must file a report with the Commission specifying those properties within a CPCN territory which are or are not receiving water service from the utility. This report must be filed with the Commission within sixty (60) days after the CPCN reaches its fifth year anniversary. In addition, the water utility must notify customers who are not receiving water service that the customers may file a request with the Commission to "opt-out" of water service with that utility.

(O) **Section 12.6** expands upon the factors that the

Commission must consider in making the determination whether landowners may "opt-out" of the utility's service territory.

(P) **Section 13.2.** This section addresses the factors the Commission may consider when making a determination to revoke a CPCN for "good cause." This Section tracks the factors contained in 26 Del. C. § 201C(k)(1). 26 Del. C. § 201C(k)(2), permits the Commission to consider additional factors "deemed necessary by the Commission." Thus, additional factors are also listed by Staff. The Staff's proposed factors are listed in proposed Rule 13, including but not limited to: fraud, dishonesty, criminal conduct insolvency of utility, violations of water statutes, failure to comply with a court order, and other factors the Commission deems relevant. (See Staff's Proposed Rule 13.) (Agreed Upon)

VI. TESTIMONY AT NOVEMBER 19, 2007 EVIDENTIARY HEARING

64. As to the Staff's reasons for developing the proposed Regulations, Andrea Maucher, Public Utilities Analyst III, testified on behalf of the Staff at this hearing. (T-106-07.) At the time, Ms. Maucher was responsible for reviewing CPCN applications and making recommendations to the Commission. (T-107.) During the five (5) years prior to that hearing, Ms. Maucher has reviewed all CPCN applications submitted to the Commission. (Id.) The CPCN applications involve 1 to 300 parcels. (T-144.) Ms. Maucher testified that Staff developed the proposed Regulations because:

- (a) According to Staff, a CPCN is a "request to offer service within a reasonable time" which is instead being used by some utilities as a "request for service territory." (T-114-15, 152, 179-80.)
- (b) There have been CPCN applications for parcels which are not located near the Applicant Utility's existing facilities. (T-115, 120, 161.) Thus, the area requested in the CPCN may not be serviced for a reasonable period of time. (T-136.) If an area is not serviced, then a customer is bound to a utility not servicing the area which could cause extra equipment installation expense to the property owner and/or the utility with or without the CPCN when the property owner seeks service. (T-181.) Staff stated that "it appeared to not be cost-effective." (T-181.) Thus, Staff proposed a 3-year review of CPCNs (not an automatic lapse) which evolved into a proposed, five year, "Opt-Out" review, after this hearing occurred. (T-194.)
- (c) Ms. Maucher also testified that some Property Owners have called the Commission asking for an explanation of CPCN solicitation and request for CPCN notices sent by the utilities because the customers did not understand the language in the Notices. Tidewater admitted actively soliciting Property Owners but Tidewater says that this was done to promote its regional service plan. (T-214.)

Ms. Maucher testified that some property owners stated that the CPCN notices were unclear as to the current and future effect of a CPCN on a property owner's rights, i.e. where the company would serve, the cost, etc. (T-116, 169.) One property owner in the Jonathan's Landing subdivision in Magnolia orally complained to Ms. Maucher that one utility was serving an area right next to another utility's service area. (T-168-69.) Apparently, a utility had to lay main through another person's back yard to service the landowner. (T-158.) Ms. Maucher did not recall any landowner who complained that they were not receiving water service within a reasonable amount of time. (T-178.) No "formal complaints" by property owners had been filed with the Commission as of the date of this hearing. (T-168-69, 178.)

(d) Ms. Maucher testified that if "there is a petition for service, signed by the landowner of record, then the Commission must grant the CPCN." (T-186-87.) Ms. Maucher testified that this was due to "the way the statute is written." (T-186-87, 1191.)

(e) Lastly, a CPCN allegedly remains in the chain of title or "goes with the property" and therefore binds future owners of real property. (T-177.) Thus, the decision of a property owner binds the future owner of that property as well. (Id.) There was a dispute as to whether a CPCN is

actually in the "chain-of-title" when a purchaser buys real property. (T-177.) No party introduced testimony from a Delaware real estate attorney or expert as to this issue.

65. Artesian and Tidewater strongly objected to a CPCN possibly lapsing after three years and or even five-years. (T-251, 163, 183, 194.) Artesian and Tidewater are the two (2) water utilities expanding the most in Delaware. (T-115.) [Artesian serves approximately 243,000 Delaware residents while Tidewater serves 31,600 residents. See Staff Opening Brief, pp 3-4 & Artesian's website May 7, 2009] United Water, a water utility serving 36,700 customers in Northern Delaware "did not hold a strong opinion" as to the proposed three-year rule. (T-108, 183; Ex. 2.; see PSC Docket 09-60) Of United's 16 "developer" projects, only one (1) project was not served within five (5) years. (T-191.) Also, representatives of several municipalities attended the hearing. (T-88-89.) Only the Town Manager of Selbyville offered testimony; he suggested increasing the lapse time period or eliminating it. (T-321.)

66. Artesian's and Tidewater's (hereinafter again referred to as "the utilities") legal argument was primarily based upon the statutory framework. However, at this evidentiary hearing, the utilities also presented testimony as to "planning" reasons supporting the utilities' position. Testimony included the following:

- (a) The utilities engage in "regional planning" whereby the utilities plan on acquiring CPCNs beginning with larger parcels with an eye toward more efficiently servicing even larger tracts of land. (T-214, 243, 257, 276, 1121.) The utilities

maintain that they constantly monitor this process.

(T-258.) Smaller "target areas" are also acquired which may or may not become part of a regional system, depending upon development, water mains, etc. (T-243, 270, 276.) In the early stages, a utility may construct a temporary water plant or even buy water from another utility. (T-1121, 1151). The utilities maintain that, although it may appear somewhat scattered, the utilities are in the "earlier planning stages" in those areas. (T-213.) Although the utilities do not have a regional plan for each area in Delaware, if the utility has a CPCN in an area, the utilities maintain that that area is part of a regional plan. (T-223.) Mr. Spacht testified that Staff does not have all of the information the utilities gather as to planning out their CPCN acquisitions such as site acquisition, paying for infrastructure, etc. (T-289-91.) The utilities' goal is to more efficiently and economically provide water service by achieving "economies of scale." (T-207)

- (b) Utility capital budgets are projected over a five year period. (T-274, 222.) There was no testimony that the utilities' budget cycle is related to the proposed five year Opt Out Rule. The utilities' position is that a 3 or 5 year opt-out rule causes uncertainty with their long term planning because the utilities' lose current CPCN territory which

can be used for future customers. (T-163.) Utility Strategic Planning can span fifty (50) years. (T-27.) CPCN's affect the share value of public water utility companies like Artesian. (T-275.) A CPCN review process after three (3) or five (5) years could affect share value because investors consider permanently certificated areas to be more secure and more growth-oriented. (Id., T-308.) This is an issue in some of Artesian's corporate Prospectuses. (T-275.)

- (c) Despite their regional planning, Mr. Patrick from Tidewater and David Spacht, Artesian's CFO, testified that the utilities' objection to the 3- or 5-year review process is due to many factors outside of the utilities' control, such as: *the economy, which is currently poor (T-206); the real estate market which is currently "down" (T-202, 206-07, 222), i.e. in a poor economy, developers do not want to spend substantial amounts on water infrastructure knowing that sales will not be forthcoming (T-206, 222), County approvals (including a Preliminary Plan approval) which are typically a 12 to 15 month process but can vary (T-202-03, 1150), delay in the issuance of sewer permits (T-278), State approvals such as historical designations, DNREC, i.e. sediment and erosion control (T-204), wastewater approvals (T-204),*

State Planning Opposition (T-203), fire protection issues (T-180, 273, 279-80), protected wildlife including bald eagles (T-205), an unknown grave site/archaeological reasons (T-205), where a water main is located (T-270), and DelDOT Traffic Studies. (T-204.) Development projects can be delayed by the local and state approval process, as well as market conditions. (T-202-07)

- (d) Mr. Spacht also testified that when Artesian was working with the State to attract computer chip manufacturers in the White Hall Farm area, Artesian obtained CPCNs and drilled wells in that area at its expense. Although the wells have not been used yet, Artesian "would not have done those wells, nor participated in the planning exercise if [Artesian] thought that the property could be taken away from us." (T-285; see also T-687-90 & Para. 89 herein)

67. Tidewater's representative, Bruce Patrick, Vice President of Engineering, testified as to the percentage of 68 CPCN-certificated areas requested by the Commission in which Tidewater provided water service: (a) Within three (3) years - 59% of the certificated areas were served by Tidewater (T-112); (b) Within four (4) and five (5) years - 78% of the areas were served (Id.); and (c) Within five years - 87% of the areas were served (Id.) These percentages of CPCN-certificated served areas applied to the five (5) year period preceding the November, 2007 evidentiary hearing - when the economy was substantially better than it

is today. (T-112, 164, 165, 202, 206-07, 222.) Also, Mr. Patrick believed that, at the time, other Tidewater areas more than (5) five years before had a higher service percentage. (T-245-46.) These areas did not include all Tidewater certificated areas; the areas were selected by the Staff (T-144.) Thus, Tidewater's position is essentially that the utilities are doing everything practicable to timely provide water service in CPCN-certificated areas.

68. On March 27, 2009, Artesian released its statistics on water service provided within five (5) years of CPCN issuance. Artesian's estimated that it served "less than 50%" within 5 years. (See Exhibit 161.) Tidewater served 87% within 5 years, at least before the national economic downturn. (T-112)

69. According to the utilities, "Regional Planning" is less expensive for utilities than stand-alone systems. (T-236.) According to Mr. Patrick of Tidewater, the Developer builds the stand-alone system with supply and the storage tank for on-site distribution with 1/8 inch pipe and a 5/8 inch meter. (T-251, 283.) The Developer pays a \$1,500 fee per residential lot. (T-252, 282.) However, Staff is concerned that, without proper CPCN approvals, extra infrastructure costs could be passed on to the taxpayers. (T-179.) PSC Regulation Docket No. 15 has adequately handled these issues. (Id.)

70. Through Ms. Maucher, Staff introduced into evidence the Commission's color-coded "CPCN Maps" from various areas within Delaware's three (3) Counties which showed service areas where CPCNs had been issued. (T-115-16, 118.) These maps are based upon the Commission's "GIS Map" software. (T-116.) According to Staff, the Maps reflected either certificated areas or areas where CPCN applications had been made but, in Staff's opinion, the utilities could not serve these service

areas "within a reasonable time" or it was "not economical." (Id.; Exhs. 7 through and including 20, T-117, 122 - economically (T-123.) The utilities strongly disagreed with Staff's assumptions about what the Maps proved, if anything. For example, if the map showed a stand-alone parcel, the utilities' position was Staff did not introduce any evidence that the stand-alone parcel would not be served soon or might be using a well for water service. (T-166-67.)

71. According to Staff, this process is not "cost-effective," although Staff did not perform any analysis as to the cost of water infrastructure such as analyzing the cost of laying pipe vs. the benefits of economies of scale. (T-136, 161, 180-81.) For example, if a utility within a larger utility installs a well to serve an interior isolated pocket, Staff believes that would be less economical than a larger utility using existing mains. (T-124.) No other evidence was introduced by Staff as to cost-effectiveness.

72. According to Staff, the CPCN Maps reflect that there is "service territory" that is surrounded or nearly surrounded by the service territory of another utility, or in limited cases, isolated pockets where there is no nearby existing service. (T-128.) Some of these areas include: an area east of Middletown (T-122); an area between Townsend and the New Castle County/Kent County line (T-126), an area northwest of Smyrna (T-127), south of Smyrna (T-128), south of Dover near Frederica and north of it (T-128-30), west Kent County (T-131), south of Harrington (T-135), east Millsboro (T-138), an area east of Georgetown near the Lewes/Georgetown highway (T-140-41), west of Lewes near Oyster Rocks Road (T-145-46), west of Selbyville (T-148), north of Selbyville (T-149), a very large parcel southeast of Laurel (T-153), eastern Sussex County (T-155), and parcels north and west of Smyrna (T-156).

73. Staff was more concerned about isolated, smaller parcels than large certificated parcels because the large parcels might become housing developments but the small parcels within larger parcels have less likelihood of obtaining service if requested. (T-154.)

74. The Hearing Officer also took testimony that Delaware has an ample amount of water from groundwater. (T-287.) Some neighboring states need to obtain water from freshwater streams more than Delaware. (Id.)

75. Lastly, there was also testimony that Tidewater and Artesian have, after CPCN application, publication and Commission approval, "swapped" CPCN-certificated areas where it was mutually beneficial to do so. (T-281.) Swapping occurs when a utility "abandons" its CPCN for a service area, and another utility is awarded a new CPCN and services the area, which may involve only one parcel. (T-171.) "Swapping" between Artesian and Tidewater has occurred only about five (5) times, generally swapping one parcel for another parcel. (T-1199.) Less than fifteen (15) swaps have occurred between other water utilities. (T-1165-66) Ms. Maucher of Staff testified that "swapping" is not a "regular occurrence." The utilities argued that these situations where a utility with the CPCN cannot service a customer are usually amicably resolved between the utilities. (T-254, 256.)

76. The Hearing Examiner requested Artesian's and Tidewater's GIS service maps reflecting where water service was occurring. (T-225, 301.) These maps were received by the Hearing Examiner prior to the March, 2009 evidentiary hearing which is described next.

VII. TESTIMONY AT MARCH 6, 9 and 11, 2009 EVIDENTIARY HEARINGS

77. Kevin Neilson, the Regulatory Policy Administrator in charge of the water CPCN section, explained Staff's rationale for the five year Opt-Out Rule. Staff's position was that that the Opt-Out Rule would encourage regional planning. (Staff's Opening Brief, p. 47, T-919-920.) Staff's Andrea Maucher also testified that adopting the rule would encourage regional planning between the utilities. (See 2007 hrg.- T-181; 2009 hrg.-p.1172, 1185) Mr. Neilson testified that Staff was also attempting to address concerns of property owners who had signed petitions to be in a CPCN service territory and now the property owners wanted to have the CPCN revoked. (T-843, 866-867.)

78. Mr. Neilson testified that the Staff had received calls concerning only two (2) properties complaining that they were not getting service in a timely manner despite being in a CPCN service territory. Mr. Neilson identified two (2) properties specifically: 1) the Bowman property in Ocean View-waiting on service from Tidewater; and 2) the Bush Farm in Dover which, after the hearing, began being served by the City of Dover which recently obtained the CPCN from Tidewater. (T-868-872; see PSC Docket 09-CPCN-11 "Bush Farm") Mr. Neilson could not recall Staff ever recommending that a CPCN be revoked because a water utility refused to provide service within its CPCN territory. (T-871.) Bruce Patrick of Tidewater had also testified that he did not know of any customer who had complained to Tidewater that they were not receiving timely service, other than Mr. Bowman. (T-258)Not receiving timely service is different from, for example landowner Ms. Marilyn L. Ellers who testified that she and her husband wanted to opt-out of their Artesian CPCN consented to by the prior owner of the Ellers' property. (Exh. 78, p. 3-4). The Ellers

purchased the properties at a tax sale. (*Id.*) Artesian offered Ms. Ellers that Artesian would relinquish its CPCN provided Artesian retained a right of first refusal of service. (T-831). This would allow the Ellers to use a well which the Ellers wanted to do. (Exh. 78, p. 3). There is a PSC Docket pending involving the Ellers who have filed a Complaint against Artesian. (See PSC Docket 359-09 Ellers adv. Artesian et al.)

79. Mr. Neilson testified that the "Plan of Service" requirement in proposed Regulation 3.13 would allow the Commission to collect information it can share with the PSC Staff and other regulatory agencies, such as DNREC, the Water Supply Coordinating Council, and the Fire Marshall. (T-889.) The Commission would not have the authority to deny a CPCN if the Plan of Service submitted was inadequate as Staff's Counsel so stipulated. (T-889-893.) Mr. Neilson admitted that the proposed five year Opt-Out rule would do nothing to help a customer like Mr. Bowman, who has a working well but would like to sell his home and thinks it would be more valuable if he had public water from Tidewater, except that he does not want to pay the approximately \$30,000 contribution-in-aid of construction required by Regulation Docket 15. (T-905-908.) When asked to give an example of wasteful duplication of infrastructure resulting from isolated areas served by an individual system, Mr. Neilson referred to Meridian Crossing, where the "wide-area franchises" of Artesian and United touch in Northern New Castle County. (T-918-919, see also Testimony of David Spacht regarding Meridian Crossing at T-959-962). Mr. Nielson testified that both Artesian and United have "tanks, pumps and facilities" in the same areas. (T-919.) Mr. Neilson conceded that redundancy of supply to Christiana Care Hospital by both United and Artesian was not wasteful duplication of infrastructure,

but was in fact, a good thing. (T-919.) When asked to explain how the proposed five year Opt-Out rule could decrease water rates for customers, Mr. Neilson's testified that the proposed rule was an "incentive to a utility to think about reasonable planning. [It] will have them thinking before they start just going out and requesting service, or requesting customers to sign up for their service all over the state." (T-919-920.) Mr. Neilson was not able to quantify the savings that Staff anticipates will be caused by this Rulemaking because Staff never performed such any such analysis. (T-920-921.)

80. Andrea Maucher again testified for Staff at the 2009 hearing. In response to a question regarding CPCN parcels obtained for single lots or small parcels by Artesian and Tidewater, Ms. Maucher testified that Artesian had explained to Staff that "they planned on putting a main down the road, and they were going to pick it up as they went along was the response to that one." When asked whether she found that explanation satisfactory, Ms. Maucher responded:

"Well, it goes back to the way the statute has been interpreted. If they have a petition and have provided notice to the landowner, the Commission has granted the CPCN.

So, it has been interpreted that there's no - you can't say no just because it doesn't appear to make any sense [to Staff]. That goes to the heart of some of Staff's memos. These applications should be request for areas to serve and plan of service so we could have that information." (T-1190-1191.)

81. Ms. Maucher testified that, under the five year Opt-Out rule, if a landowner seeks to opt-out and the water utility wants to retain the CPCN, there would be a formal docket opened, with costs associated with the Docket, plus legal fees incurred by the utility and possibly the landowner. (T-1202-1203.)

82. Ms. Maucher testified that she was aware that some property owners sign up with Artesian but do not want service immediately because they are happy with their private wells. When asked how to square that admission with her "statement just moments ago that a CPCN application is a request for service," Ms. Maucher responded:

"These proposed rules are to give landowners protections. If they want to be in a CPCN area, that's fine. That's their choice. It's for those people that, for whatever reason, aren't getting service that they thought was coming to them in five years, or however long, and aren't getting it and want it to get out because there may be a better option." (T-1207.)

83. When asked to give examples of a property owner included in a CPCN territory who wanted water service and could not get it in a timely manner, Ms Maucher testified that she could recall only two (2) Delaware property owners who had notified the PSC, but not filed a Complaint: 1) Mr. Bowman in Tidewater's territory who continues to use his well; and 2) a property owner near Jonathan's Landing in Tidewater's Magnolia territory whose property was adjacent to an Artesian water main. Ms. Maucher repeated her 2007 testimony that she thought the situation near Jonathan's Landing had been worked out because she had not heard further from that property owner. (T-1207-1209; Artesian Brief, p. 42) Additionally, there was evidence that there are sixty (60) homes south of Camden which Tidewater, the CPCN holder, is not currently serving and which the non-profit Camden-Wyoming Sewer & Water Authority ("CWSWA") is willing to serve and has the infrastructure to serve. Instead, these 60 homes have no choice but to rely on their wells. (See pre-filed testimony of S. Gharebaghi, P.E., CWSWA's Independent Consulting Engineer, pp. 5-7, Exhibit 79). Tidewater's position is that it would release the CPCN for \$1,159.62 per EDU. (*Id.* at 10-14; Exh. C-E). Thus, while Staff introduced

some evidence as to how the proposed Opt-Out Rule would protect Delaware landowners, it is the Hearing Examiner's Recommendation that Staff did not establish that the proposed Opt-Out Rule is just and reasonable and supported by substantial evidence in the record.

84. Artesian's CFO David Spacht again testified at the 2009 hearing persuasively arguing that a substantial risk factor would be created in the capital markets by the proposed five year Opt-Out rule. In the 2009 hearing, Mr. Spacht testified regarding the following credentials and experience that he possesses regarding Artesian's access to the capital markets:

- (a) Mr. Spacht has worked with Artesian since 1980, working as a fixed asset accountant, controller, assistant treasurer, and Chief Financial Officer since 1992. He holds a B.S. in Finance and Accounting from Goldey-Beacom College. (T-711-12). Mr. Spacht has been involved on behalf of Artesian in the issuance of one (1) initial public offering (IPO) and four (4) secondary offerings. He was CFO in 1996 when Artesian was listed on NASDAQ which was Artesian's "first big foray into the national markets." (T-644-645.)
- (b) Mr. Spacht's credentials include his service on the faculty of Rate School, which is a seminar offered by the National Association of Regulatory Commissions (NARC). Commissioners and utility and regulatory employees from around the country attend rate school to learn about the calculation of water rates. Mr. Spacht has served on the faculty for approximately ten (10) years. Mr. Spacht's presentations at Rate School include "The Real World View on Return on Equity, in other words, we have an expert that gives their presentations, and I give presentations based upon - - you know - how the markets look at individual companies." (T-714-715.) Mr. Spacht has not given any presentations related to the stock market or risk. (T-715.)
- (c) In 1996, Mr. Spacht was the principal drafter of Artesian's S-1 filing with the Securities and Exchange Commission (SEC), which describes the financial health of the company. (T-646.) Mr. Spacht drafted the sections of the document on risk factors, business, strategic direction, and financials. (*Id.*) Lawyers and auditors also participated in drafting the S-1 filing. (*Id.*)

- (d) Mr. Spacht played the same role in subsequent S-2 and S-3 issuances of securities as he did with respect to the 1996 IPO. (T-647.)
- (e) Mr. Spacht is the primary author and a signatory on all Artesian documents filed with the SEC, including 10-K, 10-Q, F8-K documents and all reporting documents that the company must file. Mr. Spacht is responsible for Artesian's compliance with additional reporting required by the Sarbanes/Oxley Act. As a signatory to these SEC filings, Mr. Spacht is personally liable for the accurate content of those documents. (T- 648-649.)
- (f) Mr. Spacht testified about his direct involvement with investors, investment bankers, stock analyst and stock brokers in connection with Artesian's stock offerings. He stated "at the end of the day, I stand before a crowd of analysts and brokers, and I tell them why you should buy our stock versus somebody else['s stock]." (T-649-650.)
- (g) Mr. Spacht testified that the risk factors listed on page 11 of Artesian's 10-K filing would have to be changed to include the new risk created by the five year opt- rule. (T-662.)

85. Mr. Spacht disagreed with the testimony of Staff's expert witness regarding the market's understanding of Artesian's service territory. Mr. Spacht testified "[o]ur service territory is legally defined by our CPCN's, [and] includes all the service territory we currently are allowed to serve, whether it's served today or not." (T-662.) Mr. Spacht explained the importance of Artesian's certificated service territory for future growth as follows:

"I am personally responsible when we are issuing shares to talk to brokers and analysts in front of them, give a presentation about our company and about what our growth prospects are. That's what I do. It's called the Strategic Direction of the Company, and they want us to go around to the brokers so that they can sell our shares.

In that regard, where I actually physically appear in front of analysts and brokers, I discuss the growth aspects of the company, including franchise territory that is not currently served because it shows to them the future prospects for the company and what growth prospects they can sell to new investors to buy our shares of stock to say there is growth for this company,

your shares will increase in value, therefore, buy this stock.

It is a marketing . . . piece. It is the strength of our company when we go out to sell our shares. That's personal. Those are the questions we got from our analysts and the brokers whenever we are out selling our shares of stock.

So, it is a significant factor when we're talking to our analyst, our brokers, and selling our shares in the marketplace." (T-664-665.)

86. Mr. Spacht testified that he had discussed the proposed Opt-Out Rule with experts in the investment community, analysts and investment bankers and told them his opinion about what the proposed rule would do for Artesian's growth prospects and the risk factor. After those conversations, Mr. Spacht has not changed his opinion. (T-665-666.) Mr. Spacht testified about his experience in making presentations to the New York Society of Security Analysts and the Philadelphia Security Association regarding the issue of Artesian's trading volume and the lack of liquidity in Artesian's stock. (T-676.) Mr. Spacht testified that the lack of liquidity took a "great toll" on Artesian's stock price when an institutional investor was unable to sell the stock quickly. (T-679.) Mr. Spacht testified that the predominant amount of Artesian's shares are in the retail market, generally held by individuals rather than institutional shareholders. (T-681.) Mr. Spacht testified that these retail investors generally hold onto the stock, looking toward the consistent Dividend growth and consistent growth in the value of the shares. (*Id.*) Based on his discussion with shareholders and discussions at "road shows" promoting the stock, Mr. Spacht testified that investors consider Artesian's certificated franchise area for future service to be an important factor in terms of the value that they place on Artesian's stock. (T-682-683.)

When asked why service territory is important to the shareholders, Mr. Spacht responded as follows:

"The predominant story out there in terms of the growth in a water company's share, again, these are from presentations made by myself, as well, it's the growth in the service territory. It's the ability to expand its service territory." (T-683.)

"I mean, we've talked about growing in Delaware. We've talked about growing in Maryland." (T-683-84.)

87. Mr. Spacht testified that, if service territory is lost even where there are no existing Customers and/or rate base, there is a risk of loss of substantial funds invested by a utility and decreases future chances of such investment being made again. (T-687-91.) Mr. Spacht gave as an example Artesian's expansion south of the C&D Canal, where Artesian invested millions of dollars in securing well supplies in anticipation of a State of Delaware initiative to attract a computer chip manufacturing facility. Those wells were paid for by shareholders as they are not in rate base, but rather classified as property held for future use. (*Id.*) Mr. Spacht stated that the five year Opt-Out rule would be a deterrent to Artesian making that type of investment to assure supply. (T-689.) Mr. Spacht testified that the investment in southern New Castle County was "well over a couple of million dollars that went into drilling wells, securing the land, because we had to purchase land, as well, because in New Castle County, you have to buy like a three-acre parcel in order to secure the well site because of the Wellhead Protection Act." (*Id.*) Mr. Spacht testified that there are also a number of other locations throughout the state where Artesian has taken the initiative to find supply ahead of development. (T-690.)

88. Mr. Spacht also testified as to the interpretation of what the rating agencies mean by the term "service territory and franchise areas." Mr. Spacht testified that as a corporate officer he provided to rating agencies, such as Standard and Poor's "maps of all our legal service territory, which does not include any maps of infrastructure." (T-703.) Accordingly, Mr. Spacht's interpretation of what is meant by "service territory or franchise," in the documents from the rating agencies is "all service territory that the company currently has that is theirs legally [and] theirs in perpetuity, according to the rules and statutes in the states that we occupy those territories - - - or own those territories." (T.-703) Mr. Spacht stated further that Artesian has never had a CPCN revoked for good cause. (T-704.)

89. Mr. Spacht disputed Mr. Parcell's assumption that, if the five year Opt-Out rule was adopted, Artesian would understand that it can instead focus on obtaining service territory where it anticipates serving within five years. (T-704.) Mr. Spacht testified that if the Opt-Out rule becomes law and Tidewater is not serving a property within its CPCN service territory within five years, Artesian, depending on the circumstances, might encourage the property owner to opt-out of Tidewater's service territory. (T-705-706.) If the Opt-Out rule becomes law, Mr. Spacht will draft a new risk factor to disclose same. (T-708.) Contradicting Mr. Parcell, Mr. Spacht testified why the (then proposed) three year lapse rule was not listed as a risk factor in Artesian's 10-K for 2007 as follows:

"Because it wasn't a rule in effect at the time. It was listed in our business disclosures because we knew it was out there, as we do any regulatory action that could have an effect on our business. But until it becomes an actual rule or regulation or law, there is nothing to

disclose. We don't even know if it's going to happen or not." (T-706.)

90. Mr. Spacht refuted Mr. Parcell's "zero sum game" economic assumption, stating:

"Even his own example on the stand suggested that - you know - we could lose some. Tidewater could win some. But it's a loss to the company. It may be zero sum to the State. I mean, the customer is going to get served.

But in terms of us, there is a reason why we strategically piece together the territories in the manner that we do. Any loss could be a substantial loss. It's hard to say sitting here.

Obviously, we've had situations where we've traded properties, or just let one go because it was more economically served by somebody. But to have it forcibly taken away in this case, if they could do that, would not be something that would be a zero sum game to us." (T-707-708.)

91. Staff's Expert Witness David Parcell, an economist, responded to David Spacht's testimony that the proposed Opt-Out Rule: 1) created a risk of loss of substantial funds invested by a utility; 2) decreases future chances of such investment being made; and 3) in all likelihood, would decrease the value of Artesian's stock. Mr. Parcell also testified as to the cost of capital implications of the proposed Regulation. (T-525, 543.)

(a) Mr. Parcell has worked for Technical Associates, Incorporated his current employer since 1969. He testified as an expert witness primarily about cost of capital in rate cases approximately 425 times. (T-527.)

(b) Mr. Parcell has never worked for a publicly-traded company. (T-534.) While he has advised Commissions as to the cost of capital, Mr. Parcell has never advised investors whether they should invest in a stock. (T-534.)

(c) Mr. Parcell has reviewed thousands of prospectuses for issuance of securities, although he has never written one. Mr. Parcell has never worked as an investment banker, has never written a 10-K for a publicly traded company and never written

anything for filing with the SEC. Tr. 535. While Mr. Parcell has estimated the cost of capital for over 50 water companies, he has never managed a water company or any other regulated utility. (T-535-536.)

- (d) Mr. Parcell is a Manager of the Society of Utility and Regulatory Financial Analysts but he did not vet his pre-filed testimony with any member of that organization. (T-536-537.)
- (e) Mr. Parcell in lines 25 thru 31 of his pre-filed testimony opined that "service territory risk is generally considered within the context of a territory in which rate base is already employed." (T-538.) When asked for the factual basis for his position, Mr. Parcell described in depth how "utility regulation works" and how rate base is determined, but did not directly answer the question. (T-538-540.)
- (f) Mr. Parcell conceded, however, that investors do care about service territory for future use. (T-540-541.) Mr. Parcell's position was that what investors care most about is a return on their investment and growth whether from serviced territories or not. (T-541-42.)
- (g) Mr. Parcell's testimony about service territory risk is his opinion as an economist and an expert witness on the cost of capital. (T-543.) When asked where else he had testified about what the service territory risk is, Mr. Parcell responded "I've never seen anyone claim a service territory. To my knowledge, that's the first one that has ever become an issue." (*Id.*) When asked whether the concept of "service territory risk" is something new to him, Mr. Parcell responded "it's something new to the company. I think the concept of risk has been around for a hundred years. But the risk pertains to the total company and the total plant. Because risk relates to plant." (*Id.*)
- (h) When asked whether he had vetted his opinion about service territory risk with any investors in water companies, Mr. Parcell stated he did not see it mentioned in Artesian's own cost of capital testimony in Artesian's 2008 rate case and he concluded:

"The entire radar screen is capital recovery. And that's, if you want to vet something, that's where I vet it. But that's such basic knowledge that you don't have to vet that. Any cost of capital witness knows that."
(T-543-544.)

92. Mr. Parcell did not vet his opinion about service territory risk with any stock analysts. (T-546.) Mr. Parcell did not vet his opinion with any investment bankers. (T-546-547.) He did not vet his opinion with any water company management. (*Id.*) When asked if it was

fair to characterize his opinion about service territory risk as "an economic assumption based on (his) long experience as an economist familiar with regulated utilities" Mr. Parcell responded:

"That's half of it. I mean, you've got to realize that the whole purpose of regulation is you balance the interest of the ratepayers and shareholders. And shareholders want some growth and ratepayers want proper rates. And if you have a system which has no checks and balances, you have a situation where you could have rates that are too high because of that situation. So checks and balances are the whole basis of regulation. That's why we have rate cases. That's why you call them regulated companies." (T-547.)

93. When asked whether the proposed Opt-Out Rule would be a new risk factor, Mr. Parcell responded "to the extent that the company believed it really was a risk factor, and they wanted to tell the investors they could, yes." (T-556-557.) Mr. Parcell conceded that if he market discounts Artesian stock because of this risk factor - - even one time as opined in his pre-filed testimony - - that it is a permanent discount. (T-558-559.)

94. Mr. Parcell also conceded that Artesian disclosed the re-opening of Regulation Docket 51 on March 20, 2007 in its 10-K filing for 2007, but he discounted that disclosure because it was not listed in the risk factor section, even though the proposed rule had not been adopted. (T-577-578.) Mr. Parcell conceded that Artesian's 10-K states: "Our business and our franchise service area is substantially free from direct competition with other utilities, municipalities, and other entities." When then asked to concede that the five year Opt-Out rule could increase competition for service territory, Mr. Parcell responded:

"It could, but what's more likely to happen is that the utilities will be more careful in who they will sign up for a CPCN, if they think that they can't get served in

five years. So, in a sense, it may slow down competition in some regard there because it will make them be more selective and more careful and folks want economics." (T-580.)

Mr. Parcell then admitted that he has no factual basis for that opinion other than his assumption: "That's the way a company should operate. "When asked if he did any "reality check with management of water companies" to vet his opinion, Mr. Parcell responded "No, I have assumed that they are efficient and economical and I did not challenge that." (T-579-581.)

95. Mr. Parcell was directed to the following statement in Artesian's 10-K: "A significant portion of our exclusive service territory remains undeveloped. And if and when development occurs and there's population growth in these areas, we will increase our customer base by providing water service to the newly developed areas and new customers." Mr. Parcell conceded that Artesian considers its certificated service territory where it is not yet providing service as important to the future of the company, but reiterated his opinion that "the five year Opt-Out rule does not significantly increase its risk." (T-581-582.)

96. On the question of service territory risk, Mr. Parcell testified as follows: "Because I'm looking at it from the standpoint of a macro-approach as is reflective of the rating agency, security analysts where they tell us what is important, and Mr. Spacht is focused on a single issue today, which is important to him today, and ignoring the other aspects of risks. And it's the macro approach to risk you should be focusing on, which we always do in rate cases, but for some reason, the companies are not doing in this case." (T-584.)

- a) Mr. Parcell was directed to the Standard & Poor's Corporate Ratings Criteria and in particular the following statement about competition: "As the last true utility monopoly, water utilities face very little competition, and there is currently no challenge to the continuation of franchise areas." (T-586)

When asked whether he agreed with that statement, Mr. Parcell responded "Yes. Because the franchised areas they are referring to are the franchised areas where they are currently serving customers." When asked to point to any language in the document that supports his interpretation of the term "franchised areas", Mr. Parcell could not do so, but simply insisted "it's the only way it could be. It's logic." (T-587)

- b) Mr. Parcell was unable to refer to any authority that supports his definition of "franchise areas." (T-587-588) When asked whether he had talked to Standard & Poor's about his definition, Mr. Parcell replied "No. I don't have to." (T-588)
- c) When directed to a Standard & Poor rating document that used the term "legally defined service territory generally free of significant competition" Mr. Parcell and counsel for Artesian had the following colloquy:

Q. Now, in the second sentence there, legally defined service territory. What does that mean to you?

A. It means to me the area where these companies are presently serving customers, the service territories. They have customers, and they are captive customers.

Q. Well, how are they legally defined in Delaware?

A. I don't know that I can answer that how they are legally defined. I mean, it's a service area where they have the certificate to serve and are serving customers. That seems legal to me, but I'm not a lawyer.

Q. Have you ever seen a CPCN in Delaware?

A. Seen one?

Q. Yes.

A. You mean look at the parcel of land?

Q. The Certificate of Public Convenience and Necessity itself, the document issued by the Public Service Commission, have you ever seen one?

A. I believe there is one in my book here. Yes. I think that was submitted as part of the documents in the early part of this month.

Mr. Schreppler: I think we will put one into evidence at some point.

By Mr. Schreppler:

Q. Is there anything in the certificate issued by this

Commission that says that the CPCN is predicated on the existence of actual utility plant serving customers?

A. Repeat that, please.

Mr. Schreppler: Can you read that back? (Reporter was requested to read back.)

The Witness: I don't know, as I sit here. But, again, the risk, though, pertains to the ability to recover your cost, and that's the focus on my testimony. Whether that language is there, I don't know.

By Mr. Schreppler:

Q. Well, would you concede, sir, that in Delaware the service territory is legally defined by the CPCN?

A. I'll accept that.

Q. And if there's nothing in the CPCN that requires that the service territory be actually served within a specific period of time, then your definition of franchise is different than Delaware's?

A. No. Look again at Page 11 of Tab 3. It talks about a legally defined service territory generally free of significant competition.

What S&P is saying there, clearly they are saying there, is that once you come in, you come in, you put in your infrastructure, you put lines in the ground, you have customers, someone cannot come and take those customers from you and leave you with what's called stranded investment. That's what they're saying there.

Q. Well, can you point to that in the document? I don't see those words.

A. They don't have to. It's such a basic concept of regulation and Standard & Poor's and Moody's; they don't have to say it. (T-591-593)

97. Mr. Parcell was not asked by Staff to quantify the effect that the five year Opt-Out rule would have on rates. (T-600) When asked to explain how the Five-Year Opt-Out rule protects ratepayers, Mr. Parcell confused landowners with ratepayers, stating "it gives them a chance to opt-out if after five years, if they signed up for the CPCN, if they had

not had service, it gives them at least an opportunity to see if somebody else is interested. That's how it benefits ratepayers." (T-605-606)

98. Mr. Parcell defended his assumption that under the five year Opt-Out rule, "Artesian would understand that it can instead focus its efforts on landowners whose property it can anticipate serving in five years." Although he did not discuss this assumption with anybody that has management experience in a water company, he did perform a "reality check" because it is "a logical tactic you would expect management to take." (T-603) Yet, Mr. Parcell admitted that Mr. Spacht on behalf of Artesian and Mr. Patrick on behalf of Tidewater would know better than Mr. Parcell how their respective companies will react if the proposed rule goes into effect. (T-604.)

99. When asked one final time to point to any authority supporting his definition of "franchise area", Mr. Parcell pointed to Standard & Poor's financial metrics used in their quantitative rating analysis and concluded that since revenues can only come from existing customers "that's how I can justify that." (T-608-610) But Mr. Parcell conceded that Standard & Poor's also does a qualitative analysis and that Standard & Poor's would not be oblivious to the potential risk of loss of future service territory that has been franchised and certificated but is not yet serving customers. (T-612-13.)

100. Mr. Parcell agreed that if investors in the water sector are unhappy with their perception of the service territory risk in Delaware they can easily bypass investing in Delaware water companies and invest in the other seven (7) major publicly traded water companies. (T-624.)

101. In its Brief, Staff maintained that the Water Supply Coordinating Council recommended that the CPCN process be considered for revision. (See Staff Opening Brief, 5.) However, this has not been done. (Exh. 59 at ES-3, 4) Artesian dissented from that recommendation. (Exh. 59 at ES-5.) Staff's Nielson testified that the amendments are "contemplated," not proposed. (T-863-64.)]

102. As to the utilities' Water Service Agreements with Developers, Mr. Patrick testified that Tidewater has several Service Agreements with Developers and several potential Service Agreements with other Developers. (T-1093). Tidewater probably has entered into more Service Agreements with landowners than Developers. (*Id.*) The utilities record such Agreements in the public records of the County where the property is located. (T-1094) There was not any record testimony that the five year Opt-Out rule would or would not apply to individual homeowners whose homes were built by Developers who had entered into Service Agreements.

103. As he did in the November, 2007 hearing, Mr. Patrick, Tidewater's Vice President of Engineering, effectively refuted Staff's claims that the utilities were randomly selecting isolated parcels and obtaining CPCNs without performing regional planning. Mr. Patrick described Tidewater's regional planning efforts in the area north of the Dover Wal-Mart (T-1097), the Bush Farm area in Dover (T-1111), East Laurel (T-1120), Lewes/Rehoboth (T-1124) and Northwest of Smyrna. (T-1215) Mr. Patrick testified that, until the time that a Tidewater regional water system is fully functional serving all customers the system is intended to serve, Tidewater sometimes swaps CPCNs with Artesian, temporarily purchases water from Artesian, builds a temporary

well or even builds a permanent facility which will eventually become a part of the regional water system. (T-1135-36, T-1152-53, T-1126, 1153, respectively.)

104. Mr. Patrick testified that, adopting the five year Opt-Out rule would damage the utilities' ability to plan their regional water systems since customers would be opting-out. (T-1216). According to Tidewater, the Opt-Out rule would result in less Tidewater customers and less economies of scale. (*Id.*)

105. While Staff testified as to various parcels where the CPCN was held by one utility and the parcels were located in the middle of a certificated area of other utilities (see, e.g. T-1113-14, single parcel, 1122, 1183), there was no record evidence of actual physical duplication of infrastructure equipment by the utilities in any area. In fact, Staff admitted that it had not presented any record evidence regarding this issue. (T-181). Also, if enacted, the utilities persuasively argued that the proposed five year Opt-Out rule would definitely not change the fact that there are interspersed, non-contiguous parcels. This would not change because some customers would be opting-in and other customers would be opting out. (T-1216)

106. Staff raised the issue of the amount of net-profits recently earned by the utilities. In 2007, 1) Artesian earned \$6.3 million net profit based on gross water sales revenue of \$48.5 million; and 2) Tidewater's parent company Middlesex Water Company reported \$11.8 million of net profits based on \$77.1 million of gross water sales revenue. (See Staff's Opening Brief, pp 3-4). However, there was no record evidence of

a causal link between the utilities' net profits (nor water rates) and the CPCN process. (T-1084)

VIII. AGREEMENTS REACHED BETWEEN THE PARTIES AS TO PROPOSED REGULATIONS RECOMMENDED FOR APPROVAL BY HEARING EXAMINER

107. On October 15, 2008, the parties conducted a Workshop at the Commission's offices in Dover to discuss the regulations proposed by Staff. Artesian, Tidewater, United, and Staff were present. At the Workshop, those parties reached an agreement and adopted Staff's proposed Regulation 2.1 amending the definitions of the terms "existing development," "subdivision," and "unincorporated community." (T-331-32.) Regulation 2.1 was necessary because the 2007 statutory amendment to 26 Del. C. §203C(e)(1)(c) permits a CPCN to be granted if signed by the landowners of a majority of the parcels within the existing development, subdivision or unincorporated community. (See Exhibit "A", pp 2-3 regarding definitions & Pages 12-13, Paragraph 23, *supra*, regarding the 2007 statutory amendment.)

108. On December 19, 2008, the parties informed the Hearing Officer in writing that the parties had also agreed upon the following underlying Regulations proposed by Staff: Section 1.0 entitled "Authority and Scope of Regulations," the remaining portion of the 2.0 "Definitions" section," Section 5.0-"Review of the Application and Deficiencies in the Application," Section 6.0-"Coordination with Other State Agencies, Counties and Municipalities" (except for Section 6.3 which was disputed and is discussed in Article IX), Section 13.0-"Suspension or Revocation of CPCN for Good Cause" (except the first sentence of 13.2-which was

subsequently agreed to on February 19, 2009), and 14.0-"Proceedings to Suspend or Revoke a CPCN for Good Cause." (See Exhibit "A" for these regulations.)

109. On February 19, 2009, Staff reported that Tidewater, Artesian, and Staff had also reached an agreement on Section 13.2, which addresses the suspension or revocation of a CPCN for "good cause." Pursuant to the parties' agreement, the initial language in Section 13.2 (as contained in Exhibit "A" hereto), shall read as follows:

"13.2 In addition to the factors required by sections 13.1.1, 13.1.2, and 13.1.3, the Commission may also consider one or more of the following factors to suspend or revoke a CPCN:"

The parties also agreed then that Section 8.5 should be revised in the future to provide that only standard written materials the utility proposes to solicit CPCNs must be filed with the Commission, not each actual solicitation letter sent to a landowner.

110. The Hearing Examiner recommends that the Commission adopt all regulations above agreed upon by the parties because there is "a lawful statutory basis" to adopt these regulations, and there is a just and reasonable and supported by substantial evidence in the record. See 29 Del. C. §10141(e); see Reybold Group et al v. PSC, 2007 WL 2199677 (Del. Super. March 20, 2007), *aff'd* 956 A.2d 643 (Del. 2008); Delmarva Power & Light v. Tolou, 729 A.2d 868,874 (Del. Super.Ct. 1998). The statutory authority for the agreed upon Regulations is 26 Del. C. §203C. The Revocation-related Regulations Nos. 13 and 14 were specifically authorized to be promulgated by the Commission by 26 Del. C. § 203C(k) (1) & (2). Thus, the Hearing Examiner recommends that all agreed upon

Regulations be adopted by the Commission as it is in the public interest to do so. Also, pursuant to 26 Del. C. §512, the Commission is charged by statute to "encourage the resolution of matters brought before it through the use of stipulations and settlements."

IX. HEARING OFFICER'S RECOMMENDATIONS AS TO DISPUTED REGULATIONS

111. Staff's and the utilities' proposed Regulations which are disputed are listed below. The Regulation titles have been paraphrased here to aid the reader. The page number in this Report where the Regulation is discussed is located to the right of the Regulation:

- No. 3.2 Application for CPCN (p.74)
- No. 3.13 Plan of Service Required of Utilities (p. 78)
- No. 6.3 Municipality must be notified 30 days prior to CPCN Application If Proposed Service Area is in a Municipality's "Future Annexation Area" or "Future Growth Area" (P.81)
- No. 7.4 "Proposed Service Area" would include single parcel or "contiguous parcels" (p.85)
- No. 8 Utilities' Solicitation Notice To Landowners must include Staff solicitation notice (p.89)
- No. 9 Utilities' Notice to Landowners 30-35 days prior to CPCN Application (p.93)
- No. 10 Notice to Landowners of CPCN Application & Option to "Opt-Out" (p.94)
- No. 11 Landowners' & Others' General Objection and "Opt-Out" Options, etc. (p.99)

- Alternative Reg. No. 12 - Proposed by Utilities (p.73)

112. The disputed Regulations will now each be discussed in the order presented above except that "Alternative Regulation No. 12" will be discussed first. This proposed Regulation will be discussed first because it was proposed by the utilities as an alternative to Staff's proposed

five year Opt-Out rule. If the reader wants to refer to the text of a particular Regulation, the exhibit to this Report and page number where each Regulation appears at is listed next to each proposed Regulation throughout this Section. For example, regarding (a) below, the reader can locate the text of the Regulation at Exhibit "A" at page 34.

(a) **No. 12-Proposed Five Year Opt-Out Rule.** (Exh. A-p. 34) For the reasons stated previously in this Report, the Hearing Examiner recommends that Staff's entire proposed Regulation 12, including the five year Opt-Out rule, not be adopted.

Additionally, the Hearing Examiner recommends adoption of the "Alternative Regulation 12.0" proposed by Tidewater and Artesian. (See Exhibit "B" hereto-the utilities' proposed Regulations-Regulation 12.0 therein, p.23.) The utilities' proposed Regulation No. 12.1 and 12.2 permit the Commission to revoke a CPCN if a utility fails to timely to comply with a Commission Order to provide water service within the utility's certificated service area. The statutory authority for this proposed Regulation is 26 Del. C. §203C(e)(3), 26 Del. C. §203C(f) and 26 Del. C. §403.

The utilities' Proposed Regulation No. 12 also codifies that, if a utility was ordered to provide water service to a CPCN territory, the Commission could require that the landowner pay contributions in aid of construction (CAC) incurred by the utility for on-site infrastructure costs and off-site costs to provide water service to a new customer. The Commission would determine which CAC, if any, a landowner

would be required to pay on a case-by-case basis. (Maucher, Staff, T-1109, B. Patrick/Tide, T-225-228, D. Spacht/Art, T-282-284; see Reybold Group v. PSC, *supra*, for an in-depth discussion of PSC Reg. Dkt. No. 15 and CAC).

Depending on the location of the landowner's property and the utility's nearest water main, the cost involved might be prohibitively expensive for the landowner, and the landowner's refusal to pay the cost would excuse the utilities' failure to serve. (*Id.*; T-1114.) Indeed, to date, no Delaware landowner has agreed to pay Regulation Docket No. 15 costs for water service. (T-788.) The Hearing Examiner nevertheless recommends adoption of Regulation 12.0 proposed by the utilities because it *requires* that a dialog be timely opened between the landowner and the utility holding the CPCN (which PSC Staff typically joins as well), toward resolving the matter. During their dialog, presumably the landowner can learn about the utility's current service and planned future service in the landowner's area and compare same with the landowners' needs for water service, his well service, and the cost for the landowner to receive water service now and plan for the future.

(b) No. 3.2 Application for CPCN. (Exh.A-p.4) Artesian and Tidewater object to Staff's proposed **Section 3.2** which seeks to limit a single CPCN application to five (5) "proposed service areas." "Proposed service area" is not defined by Statute. According to Staff, a service area may contain multiple parcels of land. (See Staff's Response to Utilities' January 30, 2009 Filings, docketed February 20,

2009.) Staff's proposal defines the term "Proposed Service Area" in Section 2.1 as follows:

"Proposed Service Area" is equivalent to "the proposed territory to be served" and means the area in which the applicant proposes to offer and provide its water utility services. The proposed service area shall be described by reference to one or more parcels or properties, identified by the relevant county tax map identification designations. If the proposed service area cannot be described by reference to parcels or properties, it may be described by a metes and bounds description, or any other equivalent description capable of being mapped.

Staff argues that, by limiting the number of proposed service areas on a CPCN application, landowners "in or near the utilities' proposed service territory [will be better able to] learn about a pending application and offer input to the Commission." (See Staff's Response to Utilities' January 30, 2009 Filings.) Staff argues that, the less the number of parcels, the more likely the narrower the description of land in the published notice, and therefore the more likely an interested person would receive notice of the CPCN application.

The utilities first objected to Section 3.2 claiming that it would increase the utilities' advertising expense since more parcels are included now in a single advertisement than will be included under the proposed Regulation.

Staff's Ms. Maucher accepted Tidewater's Mr. Patrick's testimony that the cost of publishing a CPCN advertisement in

The News Journal and Delaware State News is approximately \$1,000. (T-1061, 1033-34.) Currently, Artesian often places thirty (30) parcels in a single application. (T-1063-64.) Staff's response filed February 20, 2009 states that some prior CPCN applications involve "hundreds of parcels." (T-107.) There was also testimony that CPCN applications involved 1 to 300 parcels. (T-144.)

While cost is a concern, the Hearing Examiner strongly agrees with Staff's goal of providing Delaware residents with improved notice of CPCN Applications. However, the Hearing Examiner does not agree that only limiting the number of parcels on the CPCN application will best accomplish Staff's goal of improved notice of CPCN applications to Delaware residents.

Therefore, the Hearing Examiner recommends that the Commission adopt Regulation 3.2 proposed by Staff except that the Proposed Service Area not be limited to five service areas. However, the Hearing Examiner also recommends that the Commission order that the utilities perform the following: in the published notice of each CPCN application, the utilities shall provide a description of the properties involved, including (a) the nearest intersecting roads (i.e. at the intersection of Canterbury Road and Delaware Avenue or approximately one-half mile from intersection of Canterbury Road and Delaware Avenue); (b) directional information about the parcels (i.e. on the north side of Delaware Avenue, etc.);

(c) a listing of Property Tax ID numbers if available (metes and bounds descriptions if Tax IN numbers are unavailable or if neither of those are available, some description capable of being mapped); and (d) the street address(es) shall also be provided if available.

Currently, the utilities often publish a property description such as this: "one parcel of land located northeast of Middletown, New Castle County, Delaware." (See **Exhibit "C"** hereto-Sample newspaper property description published April 4, 2009 by Tidewater.) Although legal now, this type of property description is not descriptive enough to alert most newspaper readers where this land is actually located. Rather, a newspaper reader will more likely understand where a property is located if the utility publishes the following property description: "one parcel on the northwest corner of Canterbury Road intersecting with Delaware Road, Northeast of Middletown, New Castle County Delaware." Then, the utility lists any Property Tax ID numbers involved with this CPCN application. If a reader wants to learn more about which property this CPCN application affects, the reader can travel to the property or reference the Property Tax ID numbers through the County Tax Records.

The Hearing Examiner believes that this recommendation best satisfies the concerns of all interested parties. Landowners receive more detailed notice of CPCN applications

with a better address description than the property descriptions the utilities are currently using. Also, by not limiting the number of parcels on a CPCN application to no more than five (5) proposed service areas, the utilities' newspaper publication costs are contained and all parcels in the same area can be included on a CPCN application. Without providing personal notice to landowners within some radius of the property involving the CPCN Application, notice by publication must be as specific as possible as to where the property is located.

26 Del. C. § 203C(c) supports the Hearing Examiner's recommended Staff's Proposed Regulation, including 3.2 but not adopt Staff's Proposed Service Area definition limiting an application to five service areas, with even more informative publication requirements required of the utilities by the hearing Examiner than those proposed by Staff. This statute provides that a CPCN application "shall be in the form as determined by the Commission" This statute provides as follows:

An application for a certificate of public convenience and necessity to begin, extend or expand the business of a water utility beyond the territory covered by any existing certificate shall be in writing, shall be in such form as determined by the Commission...

(c) No.3.13 Plan of Service Required of Utilities. (Exh.A-p.10)

The utilities also object to proposed **Regulation 3.13** (Exhibit "A", p. 10), because a Plan of Service is allegedly not permitted by 26 Del. C. § 203C(c). (See, e.g., Artesian's

Answering Brief, pp. 23-24). Proposed Regulation 3.13 requires that a CPCN application include a description of how and when the applicant utility plans to provide water utility service to the Proposed Service Area or an explanation as to why such an estimated timetable cannot be provided. Staff stipulated that, under Delaware law, the Commission could not deny a CPCN application solely on the basis that the Plan of Service submitted by a utility was determined by the Commission to be unsatisfactory. (T-892.)

Additionally, if the Proposed Service Area is intended to be part of a regional water system, Staff has included a Plan of Service requirement that the Applicant Utility identify the regional water system which includes the Proposed Service Area and provide information setting forth the Applicant's plans for the regional water system.¹⁰

Staff's Andrea Maucher testified that the Plan of Service would benefit the Staff to assist the landowners and the public regarding inquiries and to provide other Delaware governmental agencies with planned water service information. (T-749, 754-55, 11 20-24, 11.) The utilities' plans will inform the PSC Staff, Delaware governmental agencies such as DNREC and the Fire Marshall, and Delaware residents, of the utilities' plans for water service in the State. (Maucher-T-754, Nielson-T-889.)

The utilities maintained throughout the hearings that

¹⁰According to Staff's proposed Regulation 3.13 (fn.3), this requirement would not apply to "a Proposed Service Area for a municipal water utility or a governmental water utility which lies within the political boundaries of the municipality or government."

they engage in extensive regional planning of their water systems. (T-1119.) Thus, creating the required Plan of Service would not burden the utilities because such regional planning has already been performed. Artesian has eleven (11) employees in its Planning Department whose duties include water infrastructure GIS mapping. (See Letter from John J. Schreppler II, Esq., Artesian's General Counsel, to Hearing Examiner and parties dated February 12, 2009.)

Primarily because CPCN applications are a matter of public record and subject to Freedom of Information Act (FOIA) requests, the Hearing Examiner rejects the utilities' unsubstantiated argument that providing the rather limited CPCN information required by Regulation 3.13 would inform their competitors of the utilities' expansion plans. (T-1059-60, 1167-68, Exh. 44-Artesian's 2005 FOIA request directed to PSC requesting Tidewater's CPCN applications, rate information, etc.)

Staff's un rebutted testimony was that public utilities regularly review each other's CPCN applications, which are posted on the PSC's website available to the public. (T-1167-1168.) The utilities regularly telephone PSC Staff about their competitors' CPCN applications. (Id.) CPCN applications are approved at PSC Commission meetings which the utilities regularly attend and which are open to the public. The utilities may review the Agenda for each Commission meeting one (1) week before the meeting on the PSC website. The Agenda contains all CPCN applications (along with a property description) which are being proposed for Commission approval

the following week.

26 Del. C. § 203C(c) provides that a CPCN application "shall be in the form as determined by the Commission" This statute permits the Request for Service and provides as follows:

An application for a certificate of public convenience and necessity to begin, extend or expand the business of a water utility beyond the territory covered by any existing certificate shall be in writing, shall be in such form as determined by the Commission..

Thus, as to the proposed Regulation 3.13 requiring that the utilities submit a Plan of Service, the Hearing Officer recommends adoption of Regulation 3.13 in its entirety. Except for Regulation 3.2 discussed previously, the remainder of Regulation 3.0 has been agreed upon.

(d) Section 6.3. Municipality must be notified 30 days prior to CPCN Application if Proposed Service Area is in a Municipality's "Future Annexation Area" or "Future Growth Area" (Exhibit "A", p. 14)

Artesian and Tidewater question Staff's proposed regulation that municipalities be notified thirty (30) days prior to the filing a CPCN application, and suggest that municipalities should instead be notified at the time of filing of the application or within three (3) days thereafter as provided in Section 6.1 for certain state agencies.

Staff proposed that municipalities (or their water utilities) be given thirty (30) days prior notice of the filing of a CPCN application by a water utility if any parcel of land in the Proposed Service Area is located within a

future annexation area or future growth area of the municipality. Artesian and Tidewater object, and propose instead that notice be given at the time of the application or within three (3) days thereafter. Artesian and Tidewater therefore concede that the municipalities (and their utilities) should receive notice. The only objection is the timing of such notice. According to § 203C(h)(1), the Commission is required to act on a completed CPCN application within ninety (90) days of submission. The Commission may extend that period for an additional thirty (30) days for "good cause" shown.

Staff persuasively argues that giving a municipality and its utility thirty (30) days advance notice of the CPCN application will afford the municipality one(1) additional month to address a CPCN application affecting the municipality's residents. Artesian and Tidewater do not claim that the additional thirty (30) days will impose a burden. Allowing municipalities additional time will reduce the likelihood of protracted disputes between municipalities and private utilities which impose substantial expense on municipalities, the PSC, utilities, taxpayers and ratepayers.

Staff included this rule so that municipalities (or their water utilities) providing water services are given ample notice of possible changes which may impact their *planned* growth. Unlike private utilities, towns and municipalities are limited geographically as to where they can extend services. 22 Del. C. § 702 outlines comprehensive

planning requirements which municipalities must comply with:

"Comprehensive plan means a document in text and maps, containing at a minimum, a municipal development strategy setting forth the jurisdiction's position on population and housing growth within the jurisdiction, expansion of its boundaries, development of adjacent areas, redevelopment potential, community character, the general uses of land within the community, and critical community development and infrastructure issues."

Therefore, a municipality needs to receive notice of any private water utility's intended expansion into an area designated by the municipality for future growth. Thus, Staff persuasively argues that municipalities should be afforded (30) days prior notice of the filing of a CPCN application by a water utility if any parcel of land in the Proposed Service Area is located within a future annexation area or future growth area of the municipality. The additional thirty (30) days will give the utility, the municipality, and the landowner(s) more time to coordinate comprehensive infrastructure development.

In regards to annexation of properties, 22 *Del. C.* § 101(3) provides:

"A city or town shall prepare a plan of services indicating those services it expects to provide to the newly annexed area, how such services will be provided, and the fiscal and operating capabilities of the municipality to provide such services. Should any services be provided by another jurisdiction or a public utility regulated by the Delaware Public Service Commission, the written comments of such provider on the provider's ability to provide the necessary services for the proposed annexation shall be obtained and included in the plan of services."

Staff persuasively argues that it is evident from 22

Del. C. § 101(3) that the legislature contemplated a high degree of coordination between municipal water providers and regulated utilities. Staff argues that the Plan of Service requirement imposed by statute on municipalities is comparable to the plan Staff proposes for public water utilities. (See also the pre-filed Testimonies of Anthony J. DePrima, City of Dover's City Manager, pp 1-4 and Curtis Larrimore, Developer-Century Homes, pp 1-3, which illustrate the need for coordination as it related to "the Bush Farm" residential real estate development in Dover-Exhibits 82 & 83, respectively)

Also, several municipalities had filed written objections to CPCN applications for parcels located near their corporate boundaries (for example, Georgetown (T-1210-11), Bridgeville, Selbyville, Frankford; see Staff's Opening Brief, p. 61). In each case, the applying private utility ultimately agreed to remove the parcel from their CPCN application. According to Staff, the Town of Selbyville became so concerned with the actions of a utility that it went through the time and effort to secure from the Commission a CPCN for all properties located outside its municipal boundaries, but within its designated growth zone. (*Id.*)

26 Del. C. § 203C(c) supports the Hearing Examiner's recommendation. This statute provides that a CPCN application "shall be in the form as determined by the Commission"

This statute provides as follows:

An application for a certificate of public convenience and necessity to begin, extend or expand the business of a water utility beyond the territory covered by any existing

certificate shall be in writing, shall be in such form as determined by the Commission...

For the reasons proffered by Staff, the Hearing Officer recommends the adoption of Rule 6.3 in its entirety. The remainder of Regulation 6.0 has been agreed upon.

(e) Sections 7.4.1 & 7.4.2. Proposed Service Area would include single parcel (7.4.1) or "contiguous parcels" (7.4.2).

(Exhibit "A"-p. 15)

Tidewater and Artesian object to the above proposed Regulations which require CPCN applications to encompass only a single parcel of land, or two (2) or more contiguous parcels that will be provided water utility services by the same stand-alone system or by the same water main extension. The utilities argue that, because the Delaware legislature eliminated the utilities' prior statutory right to file CPCN applications signed only by a majority of landowners in a proposed CPCN territory, "there is no good reason to require that parcels in the proposed service area be contiguous." Therefore, the utilities propose to strike the references to "single" and "contiguous."

Staff argues that: (a) the requirement that parcels be contiguous will promote regional planning in the CPCN process; and (b) requiring that parcels be contiguous increases the likelihood of communication among affected landowners in determining whether or not to seek water services from a utility, just as the statute intended. (Staff's Opening Brief, pp. 61-62.)

The Hearing Officer recommends against the adoption of

proposed Regulations regarding single parcels (Section 7.4.1) and contiguous parcels (Section 7.4.2) for the following three (3) reasons: (1) as the utilities argue, § 203C(d)&(e) do not require contiguous parcels for a CPCN to be issued; for example, § 203C(e) succinctly requires only that "all landowners of the proposed territory" sign the CPCN application; see also Amer. Auto. Manuf. Ass'n v. PSC, *supra*, ("a regulation must reflect the statutory intent"); (2) depending on where a water main is located, a water main can serve close but non-contiguous parcels; (3) in developing water service for an area, it may be necessary for the utilities to obtain a CPCN for non-contiguous parcels before adding other parcels, possibly later making the parcels "contiguous" through a subsequent CPCN; sometimes it takes years for a particular regional service area to develop to allow the utilities to acquire parcels in the area to achieve the "economies of scale" regarding water service. (T-207).

The utilities sufficiently demonstrated to the Hearing Examiner at the evidentiary hearings that, to date, the utilities have engaged in reasonably-effective regional planning in New Castle County and in the lesser-developed counties of Kent and Sussex. Artesian maintains that it "has an Integrated System ("System") connected from the Delaware/Pennsylvania line all the way to Bethel Church Road in Southern New Castle County. In a few years, that System will be interconnected all the way through Middletown, Odessa and Townsend. In the Southern part of Delaware, the System is

much younger and, therefore, not as fully integrated." (See Letter from John J. Schreppler II, Esq., Artesian's General Counsel, to Hearing Examiner and parties dated February 12, 2009.)

The utilities' reasonably effective regional planning was demonstrated by the extensive hearing testimony of Tidewater's Bruce Patrick and Artesian's David Spacht and their references to their respective water service maps. The utilities seek to develop water systems into larger regional systems which achieve "economies of scale." (T-207) Economies of scale are the cost advantages that a business obtains by adding customers. According to Tidewater's Mr. Patrick, "a lot of these regional systems start out as independent systems that are expanded and eventually become regional systems." (T-1125) How a water system grows depends on who needs the water, when they need the water, and where they need it. (T-1139-1140) Except for the possible duplication of facilities at Meridian Crossing, the utilities' regional planning efforts have been reasonably successful in New Castle County. (T-918-919, T-959-62.)

As Kent and Sussex Counties are developed even more, the Hearing Officer presumes that the utilities will continue their regional planning efforts simply because it is in the utilities' financial self-interest to continue to do so. Unnecessary duplication of water infrastructure would deplete the utilities' net profit which the for-profit water utilities do not want to happen. (T-290.)

Thus, the Hearing Officer recommends against the adoption of proposed Regulations regarding single parcels (Section 7.4.1) and contiguous parcels (Section 7.4.2). The remainder of proposed Regulation 7.0 has been agreed upon.

(f) Sections 8.0, 9.0, 10.0, and 11.0. "Notices To Landowners and related Regulations." (Exhibit "A"-p. 16) A short explanation of these proposed notices to landowners and related Regulations, is first necessary; a more in-depth discussion of each proposed Regulation thereafter follows:

Section 8.0 proposes a Staff-drafted Notice form to be included with each utility water service solicitation letter sent to "all landowners to be encompassed within a service territory" or to solicit "the majority of landowners in an existing development, subdivision, or unincorporated community." See 26 Del C. § 203C(e)(1)(b) and 26 Del C. § 203C(e)(1)(c), respectively.

Section 9.0 proposes that a Staff-drafted "Opt-Out Notice form" described in Section 10 be sent certified mail, return receipt requested, to all landowners "not more than thirty-five (35) days and not less than thirty (30) days prior to the filing of the [new] CPCN application." See 26 Del. C. § 203C(d)(1) and 26 Del. C. § 203C(e)(1), requiring landowner consent to CPCN application after notice by certified mail.

Section 10.0 proposes the new "Opt-Out Notice form" or "the Landowner's Notice Form" which has been substantially re-

written by Staff. See 26 Del. C. § 203C(d)(1) and 26 Del. C. § 203C(e)(1).

Section 11.0 entitled "Landowner's Options to Object or Opt-Out, and Objections from Other Interested Persons or Entities." Staff has proposed that Landowners be able to "object" and "opt-out" to a proposed CPCN, and that non-landowners be permitted to object.

Discussion-Sections 8.0, 9.0, 10.0 & 11.0

Section 8.0. The utilities oppose proposed Section 8, the water service solicitation Notice prepared by Staff to accompany any solicitation letter from a utility - for the following reasons:

- "notice is contemplated by the statute only for the phase where the Commission is to consider the petition for a CPCN;"
- "multiple notices may confuse property owners;" and
- "the average member of the public has no basis for understanding the explanation in the notice." (See Letter from Jeremy Homer, Esq. on behalf of Tidewater to the Hearing Examiner and parties dated December 10, 2008.)

Staff simply yet forcefully argues that, if the

utilities are required to send Staff's Section 8 notice along with the utilities' solicitation letters, Delaware landowners will be better informed of their rights regarding their water service and CPCNs. (T-1207.) The Hearing Examiner agrees principally because Staff's notice clarifies a landowner's rights regarding their water service much more than the solicitation letters currently being sent by the utilities. (T-765.)

Sample solicitation letters from Artesian and Tidewater are attached as composite **Exhibit "D"** hereto. Staff's proposed "solicitation notice" to accompany all utility solicitation letters is attached as **Exhibit "E"** hereto. The utilities' solicitation letters do not, for example, specify that a landowner can never unilaterally change their water utility after the landowner consents to the CPCN if the landowner is not receiving service or is not satisfied with the service. (See Exhibit "D"-Sample Solicitation Letters from Artesian & Tidewater; Exh. 113-Artesian & Exh. 129-Tidewater) Also, the utilities' current solicitation letters do not describe the possible effect of a CPCN on well rights, nor when service will be provided, nor do the solicitation letters explain that it is unknown when service will be provided. According to Staff, this lack of critical information about the CPCN process has confused many Delaware landowners. (T-Maucher-116, 169, 214, 758, 759, 1207-1208, 1758)

Additionally, Staff introduced into evidence letters from Delaware landowners in which some landowners were confused as to the CPCN process and their water rights. (Exhs. 97, 98) One

Delaware landowner complained that Tidewater provided absolutely no information about "the opt-out or how to do so" yet the letter requested that the landowner sign a CPCN Petition. (Exh. 97-Mock letter dated 2/24/06 & Tidewater ltr.) Tidewater's letter arguably violates 23 Del. C. C (i) which states that all Delaware landowners "shall be entitled to opt-out and have the landowner's parcel or property excluded from the proposed territory to be served." This particular landowner was not informed by Tidewater of his right to Opt-Out. The words "opt-out" do not appear in Tidewater's letter. This case illustrates the need for the adoption of Staff's Notices proscribed in Rules 8 and 10, except as noted later in this Report. Staff's notice in Section 8 does not address opting-out, like the opt-out notice in Section 10 does, but clearly some Delaware landowners are confused as to the overall CPCN process.

Also, some Delaware landowners, particularly farmers in areas the utilities wish to serve since residential developments may be built there, have complained that the utilities are sending notices every year to get the farmers/landowners to sign up for a CPCN. (Exh. 97) The utilities' CPCN marketing efforts are not restricted by Statute. However, if these farmers/landowners are better informed of their rights, it reasons that it is more likely that they will Opt-Out when they wish to Opt-Out, and not opt-out and give up their water rights, when they did not wish to do so. A farmer/landowner could assume that, if they opted out, that their opt-out is sufficient forever, which is not case if they are sent another CPCN request the following year, which appears to be occurring. (Exh. 97) Only

Tidewater apparently has a procedure in place to record when someone opts-out by phone or in writing and not notify the landowner again, but the Hearing Examiner does not believe that such a procedure solves the issue of better notice to Delaware landowners of the CPCN process. (Exh. 130/Tidewater's "Water Opt-Out Notification Procedure")

In light of Staff's valid concerns that Delaware property owners be fully informed of their rights regarding the CPCN process, the Hearing Examiner recommends that Regulation 8 be adopted in its entirety, despite the utilities' rather weak argument that the Opt-Out Notice in Regulation 10 also contains an explanation of opting-out. (T-764.)

Artesian and Tidewater also object to language in Sections 8.1 and 8.2 directing persons who have any questions to contact the Public Service Commission, rather than the utility seeking to obtain the service territory. The Hearing Examiner sees no problem with this approach since Delaware property owners can speak with an objective representative at the PSC about their water rights, as opposed to a utility seeking their business. Again, this requirement is directed toward have Delaware landowners fully informed of their rights.

The parties agree that Section 8.2 must be revised because Section 8.2.1 cannot be made applicable to applications under 26 *Del. C.* § 203C(e)(1)c, which allows a CPCN to be issued upon the agreement of "a majority of the parcels or properties in the existing development, subdivision, or unincorporated community. (See Footnote 6, *supra.*)

Moreover, the utilities object to Staff's language in Sections 8.1 and 8.2.7.1 regarding well permits, because that language is allegedly "misleading" in light of 7 Del. C. § 6075. That statute generally permits a landowner to have a well unless public water is available. (Tidewater Answering Brief, p. 2.) According to the utilities, 7 Del. C. § 6075 provides a "high level of protection for property owners seeking a well permit." (See Letter from John J. Schreppler II, Esq., Artesian's General Counsel to Hearing Examiner and parties dated January 30, 2009, Para. 9.)

The Hearing Examiner recommends that the changes proposed by Staff regarding well permits are also necessary. Regarding well permits, the Hearing Examiner's explanation is detailed in the discussion regarding proposed Regulation 10-the revised Opt-Out Notice form, *infra*. Thus, the Hearing Examiner recommends adoption of proposed Regulation 8 in its entirety. The legal support for the Hearing Examiner's position is 26 Del. C. § 203C(c) which provides that a CPCN application "shall be in the form as determined by the Commission" Moreover, the "general powers" provisions of 26 Del. C. §§ 201, 202, and 209 also provide authority for Regulation 8.0 to be enacted.

As to proposed Regulation 9.0, including Regulation 9.2 which requires that a Staff-drafted "Opt-Out Notice form" described in Section 10 be sent certified mail, return receipt requested, to all landowners "not more than thirty-five (35) days and not less than thirty (30) days prior to the filing of

the [new] CPCN application." The Opt-Out notice is different from the Staff's language which must be contained in the utilities' solicitation letters.

The Opt-Out Notice drafted by Staff sent by water utilities must be sent to landowners along with the utilities' letter asking the landowner to sign a CPCN petition. According to the proposed Regulation, the utilities must establish that each landowner was solicited with such letter and attach it to the CPCN application. Currently, the Opt-Out Process is being described by the utilities in letters drafted by the utilities. Some landowners have been confused by the language used by the utilities in such letters. (T-116, 169, 214, 758, 759, 1207-1208, 1758) Additionally, Staff introduced Opt-Out letters from Delaware landowners in which some landowners were confused as to the Opt-Out process. (Exhs. 97, 98.)

The Hearing Examiner recommends adoption of Regulation 9.0 based upon 26 Del. C. § 203C(d)(1) and 26 Del. C. § 203C(e)(1), which each require each landowner's consent to CPCN application after notice by certified mail. Additionally, 26 Del. C. § 203C(c) provides that a CPCN application "shall be in the form as determined by the Commission" Lastly, the follow-up mail provision in Section 9.6 is required by the United States Supreme Court's decision in Jones v. Flowers, 547 U.S. 220 (2006) (discussed in footnote 4, *supra*.)

As to No. 10.0, the revised Opt-Out Notice, Staff seeks to require water utilities to disclose to landowners the

ramifications of a signature on a CPCN petition. Unlike the Notice in Rule 8, this Notice is specifically prescribed by various Statutes, specifically 26 Del. C. § 203C(d)(2), (e)(1)(a), or (e)(1)(d). ("must notify landowners of the filing of the [CPCN] application"). Staff's proposed Opt-Out Notice is attached as **Exhibit "F"** hereto.

Currently, the Opt-Out Process is being described by the utilities in letters drafted by the utilities. Some landowners have been confused by the language used by the utilities. (T-116, 169, 214, 758, 759, 1207-08, 1758) Additionally, Staff introduced Opt-Out letters from Delaware landowners in which some landowners were confused as to the Opt-Out process. (Exhs. 97, 98)

Also, there are significant consequences to a parcel of land being included in a certificated service area; consequences which, for the most part cannot be "undone." Inclusion of a parcel of land in a CPCN area means the following:

- (1) The land, once included in a service area, cannot, in general, be removed from the service area unless the utility holding the certificate is willing to abandon the certificate. There is no regulation which would allow the Commission to revoke a certificate where the property would be better served by or preferred by the

landowner.

- (2) Well rights may be affected. 7 Del. C. §6075 addresses "nonutility wells and permits for nonutility wells within a service territory served by a water utility under a certificate of public convenience and necessity." The statute provides as follows:

- (a) The Department may not withhold a permit for a potable water well within the service territory served by a water utility under a certificate of public convenience and necessity, or require an applicant for a potable water well permit in an area served by a water utility to utilize the services of the utility, unless:
- (i) The Delaware Geological Survey or the Department of Health and Social Services certifies that the ground water supply is inadequate or unsuitable for the intended use for which the permit is being sought;
 - (ii) The water utility demonstrates to the satisfaction of the Department that it can provide service of equal or better quality at lower cost; or
 - (iii) The permit applicant is a resident of a municipality, a county water district authority, or a recorded development where public water is available.
- (b) Notwithstanding paragraphs (a) (2) and (3) of this section, following the issuance of a certificate of public convenience and necessity to a water utility, the Department shall not withhold a potable water well permit from any person seeking to construct or extend a well on a farm, farmland or the lands of any existing mobile home community, or an addition, modification or extension of that mobile home community, which as of April 11, 2000, self-supplied potable water under existing permits in an area served by a water utility, nor shall it require that the person utilize the services of the utility. However, this subsection shall not

authorize or require the issuance of a potable well permit that would enable a person or entity to act as a water utility without a duly issued certificate of public convenience and necessity.

(emphasis supplied)

Tidewater and Artesian argue that DNREC would not deny a well permit for a farm or farmland. However, neither utility proffered any evidence at the hearings from DNREC, landowners or otherwise to support the utilities' position. While there is a "farm/farmland" exception as underlined in section (b) above, many Delaware landowners solicited by the utilities to sign water service petitions would own property which would not be considered farm/farmland as defined by the Statute, including residential property and commercial property, and therefore would need to receive notice about their well rights. Moreover, the terms "farm" and "farmland" are not defined by the statute, and consequently open to some interpretation. Without any record evidence being proffered, the Hearing Examiner recommends that all of Staff's proposed language in Regulation 10 regarding wells be adopted by the Commission. The policy behind Staff's proposed Rule is sound: to provide adequate notice to Delaware property owners concerning their inter-related well rights and water service rights. Additionally, Staff introduced Opt-Out letters from Delaware landowners in which some landowners were confused as to the Opt-Out process. (Exhs. 97, 98.)

Artesian and Tidewater object to **Section 10.1** (Exhibit "A" - p.21) because it delegates to PSC Staff the authority to

approve the form of notice for applications premised on the statutory Sections of 26 Del. C. § 203C(d)(2), (e)(1)(a), or (e)(1)(d) without any guidance. By way of contrast, Artesian and Tidewater note that in Section 9.7 the Commission reserves unto itself the authority by Order to approve alternative methods of notice. The utilities assert that the form of notice should not be left to an "ad-hoc determination" by Staff.

The Hearing Examiner recommends that, regarding Section 10.1, the final language of the "Form of Notice to Landowners of Record" i.e Opt-Out form and indeed Regulation 10 itself, shall be determined by the Commission at a meeting open to the participants of this Docket and that PSC Staff will not have sole discretion as to the Notice's content nor authority to change the form without Commission approval.

Artesian and Tidewater also object to Sections 10.2 and 10.3 as set forth in Mr. Homer's December 10, 2008 letter to Staff's Counsel Mr. Murphy. Artesian and Tidewater persuasively argue that the "objection" option should be deleted from the Opt-Out form for the reasons stated in Mr. Homer's letter to the Hearing Examiner below.

Tidewater's Counsel Jeremy Homer, Esq. sent the following letter to the Hearing Examiner and the parties on January 30, 2009 regarding the Notice in Section 10:

"The notices set out in sec. 10 of the revisions have been simplified so they are easier to understand. [Staff's] Mr. Murphy's version indicates the landowner can use an attached form to either opt-out or object to the CPCN.

Tidewater sees two problems with that

approach: (1) there is sparse statutory basis for that approach under the amended law. The only reference to filing an objection is in sec. 203C(i), which includes the statement: "Notwithstanding the objection and opt-out provisions contained in this subsection, if the Town Council of the Town of Ocean View...." In fact, however, there no longer is any "objection" provision in the subsection, the provisions all relate to the opt-out; (2) the proposed regulations logically require, in the case of an objection to the CPCN, that the objection be supported by an explanation of the reasons supporting the objection and (in the case of non-landowners within the proposed territory) a statement of interests. See Sec. 11.0. If the objection "option" is included in the opt-out form, it would either invite the objecting party to object without providing the required information (if, for example, the opt-out form includes only a box to be checked to indicate an objection is being made), or the form would have to require a lot of information that would make it more complicated and perhaps intimidating.

Inasmuch as the statutory requirement addresses only the opt-out "option," it would be simpler to limit the form to that option. The revisions to the notices proposed in the attachment do explain the right to object and set a deadline which is consistent with the opt-out deadline (the deadline is prior to the issuance of the CPCN; the opt-out deadline is so fixed in the statute at 203C(i), there is no deadline for objections or any other procedure related to objections). One goal of taking the objection option off the opt-out form is to avoid the situation of someone "filing" an objection on the opt-out form without explaining the basis for the objection as required. If that happens, and it is more likely to happen if the objection "option" is on the opt-out form, then PSC Staff and everyone else is placed in the position of having to figure out whether the objection as a legal matter should hold up the issuance of the CPCN."

Regarding Section 10.1, for the reasons described in Tidewater's letter above, the Hearing Examiner recommends

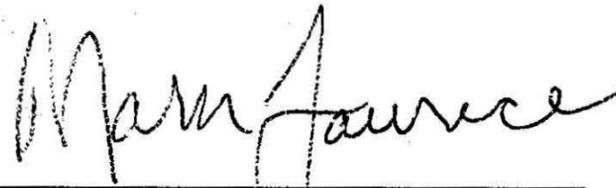
that there should not be any "objection" language in the Opt-Out Notice nor Section 11 because such language is not supported by Delaware law and would only confuse landowners. The statutory framework is addressed only to opting-out, not filing objections. If this recommendation is approved by the Commission, Staff's and the utilities' proposed Notice forms, as presently drafted, must be revised.

Lastly, Artesian and Tidewater argue that **Section 10.5** should be modified to make it clear it does not apply to solicitation materials sent to a property owner prior to the filing of a CPCN application. Section 10.5 requires that the utilities "not include any other correspondence with the landowner notice required by these regulations." Although the Section 10 Opt-Out notice entitled "Form of Notice to Landowners of Record" differs from the Staff's Section 8 "solicitation notice," the Hearing Examiner recommends that Regulation 10.5 be clarified that the Section 10 Opt-Out Notice does not need to be included in solicitation materials sent to a landowner prior to the filing of a CPCN application. Of course, when the utility applies for the CPCN, the landowner will receive a Section 10 Opt-Out notice affording the landowner the opportunity to Opt-Out.

X. CONCLUSION

113. For the reasons contained herein, the Hearing Examiner makes the Recommendations to the Commission described in Articles VIII and IX herein. Due to the number of contested issues in this Docket, the Hearing Examiner has not yet drafted a proposed Commission Order. Once the Commission hears this Docket at a Commission Meeting, if directed, the Hearing Examiner will submit a proposed Order to the Commission for its consideration.

Respectfully submitted,



Mark Lawrence
Hearing Examiner

DATED: November 25, 2009

EXHIBIT "2 AND 3"

REGULATIONS CONCERNING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR WATER UTILITIES

TABLE OF CONTENTS

Attached (To Be Constructed Before Final Adoption)

REGULATIONS

1.0 Authority and Scope of Regulations

- 1.1 These regulations shall govern the process: (a) for a person or entity (as described in 26 Del. C. § 203C(a)) to obtain a Certificate of Public Convenience and Necessity to begin operation as a water utility; and (b) for a water utility to obtain a Certificate of Public Convenience and Necessity to extend, expand, or enlarge its operations, business, or facilities beyond its then certificated service territory. These regulations also govern, in conjunction with the provisions of 26 Del. C. § 203C, how the Commission administers, supervises, and revokes any such Certificate of Public Convenience and Necessity previously granted to a water utility.
- 1.2 These regulations are enacted pursuant to 26 Del. C. §§ 203C and 209(a).
- 1.3 In granting, denying, or revoking a Certificate of Public Convenience and Necessity under 26 Del. C. § 203C and these regulations, the Commission shall act consistently with the procedures required by 29 Del. C. ch. 101, Subchapters III and IV.
- 1.4 The Commission may modify or extend any of the timing requirements set forth in these regulations so long as such timing requirement is not required by statutory provision.

1.5 The Commission may by Order, and for good cause, waive any obligation under these regulations that is not required by statute and may, in an individual application, excuse any failure to comply with these regulations that is not material to the Commission's decision.

2.0 Definitions

21 The following words and terms, when used in these regulations, should have the following meanings, unless the context clearly indicates otherwise:

"Commission" refers to the Public Service Commission.

"CPCN" or "Certificate" means a Certificate of Public Convenience and Necessity required by the provisions of 26 Del. C. § 203C.

"DPH" refers to the Division of Public Health of the Department of Health and Social Services.

"DNREC" refers to the Department of Natural Resources and Environmental Control.

"Existing development" or "existing subdivision" means an aggregate of parcels or properties within a particular geographic area:

- (a) that constitute a single-named development or subdivision;
- (b) that share common deed restrictions or covenants;
or
- (c) that are governed by a common homeowners' association or similar type of body.

The existence and boundaries of such a development or subdivision may be established by a plat or subdivision map, documents reflecting common deed or conveyance restrictions, homeowner association documents, or other means.

"Existing unincorporated community" means an aggregate of parcels or properties lying within a particular compact unincorporated geographic area that share common community interests; and

- (a) that are generally recognized as an unincorporated community;
- (b) that are commonly described as comprising a named community; or
- (c) that are identified on maps as a particular named community.

The existence and boundaries of such an unincorporated community may be established by a plat, map, census data, post office designation, testimony of the residents, or other means.

"Landowner notification" means the process for delivering to each landowner of record the relevant form of notice prescribed by either these regulations or further Commission directive.

"Landowner of record" shall mean each person or entity as defined and described in 26 Del. C. § 203C(j). A landowner of record may be identified by reference to public tax or public land records or by relevant land conveyance documents.

"New water utility" means, for the purposes of 26 Del. C. § 203C(e)(2), an entity that has not previously provided water utility services to the public within this State.

"Postal Service" refers to the United States Postal Service.

"Proposed Service Area" is equivalent to "the proposed territory to be served" and means the area in which the applicant proposes to offer and provide its water utility services. The proposed service area shall be described by reference to one or more parcels or properties, identified by the relevant county tax map identification designations. If the proposed service area cannot be described by reference to parcels or properties, it may be described by a metes and bounds

description, or any other equivalent description capable of being mapped.

"Record date" means the date for determining the persons and entities who are landowners of record in the Proposed Service Area. The record date shall be a date chosen by the applicant that is no more than sixty days prior to the date of filing of the application for a CPCN.

"SFM" refers to the Office of the State Fire Marshal.

"Staff" refers to the Staff of the Commission.

"Secretary" refers to the Secretary of the Commission.

"Water utility" means a person or entity as defined by 26 Del. C. § 102(8) that is obligated to obtain a CPCN under 26 Del. C. § 203C(a).

3.0 Application for Certificate of Public Convenience and Necessity

In General

- 31 An application for a Certificate to begin the business of a water utility, or to extend or expand the business, operations, or facilities of any existing water utility, shall be made in writing and shall be filed with the Commission.
- 3.2 An applicant may request, by a single application, Certificates for one to five Proposed Service Areas. In the case of an application joining multiple Proposed Service Areas, the application shall contain sufficient information and documentation to establish the applicant's entitlement to a Certificate for each separate Proposed Service Area. The Commission shall separately determine for each Proposed Service Area whether to grant a Certificate for that area. However, the Commission, by a single Order, may grant a CPCN for one or more of the Proposed Service Areas that have been joined in a single application.

3.3 The CPCN application shall include all information and supporting documentation required by 26 Del. C. § 203C, the Commission's Rules of Practice and Procedure, and these regulations. An application shall not be considered to be complete and filed until all such information and supporting documentation has been submitted to the Commission. An application shall:

- 3.3.1 summarize the reason(s) why the Commission should grant the CPCN for each requested Proposed Service Area;
- 3.3.2 provide specific citations to the statutory and regulatory provisions relied upon for a CPCN for each Proposed Service Area;
- 3.3.3 identify any significant element of the application that, to the applicant's knowledge, poses a unique statutory or factual question or represents a departure from prior decisions of the Commission; and
- 3.3.4 prominently state the name, address, telephone number, and e-mail address of the individual to be notified concerning the contents of the application.

Information about each Proposed Service Area

3.4 The application shall include, for each Proposed Service Area requested:

- 3.4.1 a written description of the general geographic location of the area which also describes the type of area (such as a proposed development, an existing development or existing subdivision, an existing unincorporated community, or an aggregation of a number of parcels);

- 3.4.2 a general map (reflecting towns or cities, and major transportation routes) appropriately marked to show the location of each Proposed Service Area;
- 3.4.3 for applications premised on 26 Del. C. § 203C(e)(1)b.3. a map, plat, or precise description of the boundaries of the existing development, existing subdivision, or existing unincorporated community accompanied by references to the documents or filings used to define and describe the existing development, existing subdivision, or unincorporated community;
 - 3.4.3.1 Upon request, the applicant shall provide the underlying documents or filings utilized to define and describe the existing development, existing subdivision, or existing unincorporated community; and
- 3.4.4 a listing (using county , tax map parcel numbers or designations) of each parcel encompassed within the Proposed Service Area, accompanied by the name and mailing addresses of the landowner(s) of record for each such parcel as of the record date;
 - 3.4.4.1 The listing shall conspicuously identify the tax records or land record documents utilized by the applicant to determine the name and address of each landowner of record;
 - 3.4.4.2 The listing shall conspicuously identify the record date used for determining the landowners of record of the encompassed parcel or parcels;
 - 3.4.4.3 For a request premised on 26 Del. C. § 203C(e)(1)b.3., the listing shall denote each parcel where all of the landowners of record have executed a

petition requesting water utility services from the applicant; and

- 3.4.4.4 For a request premised on 26 Del. C. § 203C(e)(1)b.3., the listing shall also indicate the applicant's calculation of the total number of parcels in the Proposed Service Area and the total number of parcels where the landowners of record have executed a petition requesting water utility services from the applicant.

Evidence of Landowner Notification

3 5 The application shall contain for each Proposed Service Area the documentation reflecting landowner notification as required by 26 Del. C. § 203C(d)(1) or (e)(1), including:

- 3.5.1 copies of relevant Postal Service forms demonstrating that the applicant sent by certified mail the appropriate form of notice as required by these regulations to each landowner of record of each parcel encompassed within the Proposed Service Area;
- 3.5.2 copies of all materials or messages provided to the applicant by the Postal Service reflecting either delivery of the certified mail or failure of certified mail delivery because the delivery was "refused," "unclaimed," "undeliverable," "unknown," or otherwise not completed; and
- 3.5.3 a certification (or other evidence) that, for each earlier notice that was returned by the Postal Service due to a failure of certified mail delivery, the applicant then sent another copy of the required notice by first class United States mail to the best available address of the applicable landowner of record.

Criteria for a CPCN Request

- 3.6 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(d)(2)a., the application shall include all evidence (including reports or studies) that establish that the water sources and supplies then available in the Proposed Service Area do not meet the relevant standards governing drinking water for human consumption promulgated and enforced by the Department of Health and Social Services.
- 3.7 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(d)(2)b., the application shall include all evidence (including reports or studies) demonstrating that the supply of water available to the Proposed Service Area is insufficient to meet the projected demand.
- 3.8 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(e)(1)b.1., the application shall include a copy of a signed service agreement between the applicant and the developer of the proposed development or subdivision, and appropriate documentation reflecting that the development or subdivision has finally been approved by the relevant county or municipal government.
- 3.9 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(e)(1)b.2., the application shall include copies of each petition requesting that the applicant provide water services which has been signed by all of the landowners of record of each parcel in the Proposed Service Area. Each such petition must meet the criteria set forth in Section 8.0.
- 3.10 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(e)(1)b.3., the application shall include copies of each petition requesting that the applicant provide water services which has been signed by all of the landowners of record of a parcel to be encompassed by the Proposed Service Area. Each such petition must meet the criteria set forth in Section 8.0. The application shall include such petitions for a majority of the parcels within the existing development, existing subdivision, or existing unincorporated community that constitutes the Proposed Service Area.

3 11 For a request for a Proposed Service Area premised on 26 Del. C. § 203C(e)(1)b.4., the application shall include a certified copy of the resolution or ordinance from the governing body of the relevant county or municipality that requests, directs, or authorizes the applicant to provide water utility services to the Proposed Service Area. If requested, the applicant must also provide additional references to demonstrate that the county or municipality enacting the ordinance or resolution has the appropriate legal authority to authorize the provision of water utility services to the Proposed Service Area.'

Additional Criteria for a CPCN Request by a Municipal Water Authority

3.12 If the applicant is a municipal water authority created under the provisions of Chapter 14 of title 16 of the Delaware Code, and it seeks a Proposed Service Area that lies, wholly or in part, outside of the political boundaries of the municipality or municipalities that originally, ,created such municipal authority, the application shall also include, as required by 26 Del. C. § 203C(n), a certified copy of a resolution of the governing body of each such municipality requesting that the Certificate for the extra-territorial portion of the Proposed Service Area be granted.²

²Pursuant to the provisions of 26 Del. C. § 203C(e)(1)b.4., the resolution or ordinance shall only entitle the applicant to a Proposed Service Area that lies within the political boundaries of the county or municipality that entered the resolution or ordinance. If the applicant is a municipality or municipal utility, and it seeks a Proposed Service Area that lies, wholly or in part, outside of the municipality's political boundaries, the applicant must, in the case of those parcels that are outside of the political boundaries, either (1) provide documentation to support a Certificate under some other provision of 26 Del. C. § 203C(d) or (e), or (2) cite another statutory provision that entitles the applicant to serve such parcels and which preempts the limitation expressed in 26 Del. C. § 203C(e)(1)b.4..

This requirement for a resolution from each municipality requesting the grant of a Certificate does not excuse the municipal water authority from establishing its entitlement to a Certificate for the Proposed Service Area outside of the municipality's boundaries under the provisions of 26 Del. C. § 203C(d) or (e).

Plan of Service

- 3.13 An application shall include, for each Proposed Service Area, a description of how and when the applicant plans to provide water utility services to the Area, including an estimated timetable for providing service or an explanation as to why such an estimated timetable cannot be provided. If the Proposed Service Area is intended to be part of a regional water system, the applicant shall identify the region that includes the Proposed Service Area, and provide information setting forth the applicant's plans for the regional water system.³

Quality of Service Certifications and Information

- 3.14 In the case of a request by a water utility to expand or extend its operations and business, the application shall contain a certification that the proposed extension and expansion will satisfy the provisions of 26 Del. C. § 403(c). The applicant shall certify that:

3.14.1 the applicant is then furnishing water to its present customers in such manner that water pressure at every connection is at least 25 pounds at all times;

3.14.2 the applicant will furnish water to each new customer in each Proposed Service Area at the pressure of at least 25 pounds at the service connection while continuing also to supply each existing customer at a pressure of at least 25 pounds at each service connection;

3.14.3 the applicant is not then subject to a ruling, decision, or finding by any Federal or State regulatory authority that found, concluded, or determined that the applicant materially failed to comply with applicable safe drinking water or water quality standards; and

³ This requirement shall not apply in the case of a Proposed Service Area for a municipal water utility or a governmental water utility that lies within the political boundaries of the municipality or government.

- 3.14.4 the applicant is not subject to any finding or Order of the Commission that determined that the applicant materially failed to provide adequate or proper safe water services to existing customers.
- 3.15 If an applicant cannot supply each of the above certifications, the application shall include a statement why the provisions of 26 Del. C. § 403(c) do not apply to the applicant or the particular application.
- 3.16 If an application will involve a water utility project or water utility services that require the review, approval, or authorization of any other State or Federal regulatory body (including DNREC, the SFM, or the DPH) the application shall also include:
- 3.16.1 a description of the nature of the review by the other regulatory body and current status of such review; and
- 3.16.2 a copy of any permit, order, certificate, approval, or other documents already issued by any other regulatory body, relating to the water project or services.
- 3.17 If, after the filing of the application, any other State or Federal regulatory body issues any permit, order, certificate, approval, or other documents related to the water project or services relevant to the application, the applicant shall promptly file such document with the Commission.

Additional Materials to be Supplied with the Application

- 3.18 Unless the following materials are already on file with, or available to, the Commission, an applicant — other than a municipal or other governmental water utility - shall provide with the application the following information:
- 3.18.1 a corporate or business history including dates of incorporation and subsequent acquisitions and/or mergers;

- 3.18.2 a complete description of all relationships between the applicant and its parent, subsidiaries, and affiliates, including a chart of such intra- and inter-company relationships;
 - 3.18.3 a map identifying all areas where the applicant then provides water utility services;
 - 3.18.4 the Annual Reports provided to owners of the applicant, or to the owners of its parent or subsidiaries, over the two-year period prior to the filing of the application;
 - 3.18.5 the audited financial statements, SEC 10K filings, and all proxy material related to the applicant for the two years prior to the filing of the application; and
 - 3.18.6 copies of all reports submitted by the applicant within the preceding twelve months to any State or Federal authority related to whether the applicant has complied with any statute, regulation, rule, or order concerning the provision of safe, adequate, and reliable water services (including the quality of water provided to existing customers).
- 3.19 Unless the materials are already on file with the Commission or available to the Commission, a municipal or other governmental water utility shall provide with the application the statement and documents identified in Sections 3.18.3 and 3.18.6.

4.0 Additional Requirements for an Application Filed by a New Water Utility

- 4.1 If the applicant is a new water utility, the application, in addition to fulfilling the requirements of Sections 3.0 through 3.19, shall also include the following:

- 4.1.1 a copy of the applicant's certificate of incorporation, partnership agreement, or other enabling document;`
- 4.1.2 materials that demonstrate that the applicant possesses the financial, operational, and managerial capacity to comply with all State and Federal safe drinking requirements and that the applicant has available, or will be able to procure, an adequate supply of water (even during drought conditions) to meet reasonably anticipated peak daily and monthly demands for its water utility services;
- 4.1.3 a description of the plant to be utilized to provide its water utility services (including details as to the type and capacity of treatment facilities, cost of facilities, and the projected construction schedule);
- 4.1.4 a map detailing the composition, diameter, length, and location of mains and pipes to be initially installed; and
- 4.1.5 a projection of the number of customers to be served in the five-year period following the grant of the requested CPCN.

5.0 Review of the Application and Deficiencies in the Application

- 5.1 An applicant may ask the Staff to informally review a draft of an application prior to its formal filing. Such informal review shall not affect or delay the filing of an application that complies with applicable statutes and these regulations.

⁴If the business structure of the applicant is a sole proprietorship, the Commission will presume, subject to rebuttal, that the applicant lacks the financial, operational, and managerial capabilities to provide adequate water utility services. An applicant that is a sole proprietorship may provide with its application evidence to rebut this presumption and demonstrate that it will have the capabilities to provide adequate and reliable services.

- 5.2 Upon filing, the Staff shall review an application for compliance with the applicable statutory provisions and these regulations. Within thirty days after the date of filing, Staff may notify the applicant of specific deficiencies in the application. The applicant shall have thirty days from the date of the receipt of such notice to file an amended or supplemental application. The Commission may, in its discretion, extend the period for curing deficiencies in the application for an additional period of time.
- 5.3 If the applicant submits an amended or supplemental application, the application shall then be deemed filed on the date of such submission for the purposes of the time limits set forth in 26 Del. C. § 203C(h). In the event the deficiencies identified by Staff are not cured within the time period provided, Staff may request that the Commission reject the application.
- 5.4 During the period the application is pending before the Commission, the Staff may request that the applicant provide additional relevant information or documents.

6.0 Coordination with Other State Agencies, Counties, and Municipalities

- 6.1 At the time of the filing of an application, or within three days thereafter, the applicant shall serve copies of its application on DNREC, the SFM, and the DPH.
- 6.2 At the time of the filing of an application, or within three days thereafter, the applicant shall also send a notice of its application, with a description of the Proposed Service Area, to the county in which the Area lies (in whole or in part).
- 6.3 In addition, if any parcel of land in a Proposed Service Area is located within a "future annexation area" or "future growth area" under a comprehensive plan (22 Del. C. §§ 101 and 702) adopted by a municipality that provides water utility services, then the applicant shall also serve a copy of the application on the municipality (or its municipal utility). The applicant shall serve such copy on the municipality (or its utility) at least thirty days prior to filing the

application with the Commission. The application filed with the Commission shall include a certification of such service on the identified municipality.

6.4 During the process of reviewing an application, the Staff shall coordinate and cooperate with DNREC, the SFM, and the DPH. Staff may also coordinate and cooperate with other interested State, local, and Federal authorities in reviewing the request for a CPCN.

7.0 Proposed Service Area

7.1 For a request premised on 26 Del. C. § 203C(d)(2)a, the Proposed Service Area shall encompass only such parcels of land that lack available water sources or supplies that meet the standards governing drinking water for human consumption promulgated and enforced by the Department of Health and Social Services.

7.2 For a request premised on 26 Del. C. § 203C(d)(2)b, the Proposed Service Area shall encompass only such parcels of land that lack available water sources or supplies sufficient to meet the projected demand for water in such parcels.

7.3 For a request premised on 26 Del. C. § 203C(e)(1)b.1., the Proposed Service Area shall encompass only such parcels that are within the subdivision or development plat or plan that has been finally approved by the relevant county or municipal government.

7.4 For a request premised on 26 Del. C. § 203C(e)(1)b.2., the Proposed Service Area shall encompass either:

7.4.1 a single parcel; or

7.4.2 two or more contiguous parcels that will be provided water utility services by the same stand-alone system or by the same main extension.⁵

⁵If a landowner of record removes a contiguous property from the Proposed Service Area by the exercise of the "opt-out" option available under 26 Del. C. § 203C(i), the exclusion of the parcel shall not render the remaining parcels non-contiguous.

7.5 For a request premised on 26 Del. C. § 203C(e)(1)b.4., the Proposed Service Area shall encompass only such parcels of land that the governing body of the county or municipality has directed, requested, or authorized the applicant to serve;

7.5.1 For a request premised on 26 Del. C. § 203C(e)(1)b.3., the Proposed Service Area shall encompass only such parcels of land that lie within the existing development, existing subdivision, or the existing unincorporated community as described and defined under Section 2.1.

8.0 Requirements Related to 26 Del. C. § 203C(e)(1)(2) and (3)

8.1 If a water utility solicits a landowner of record of a property to sign a petition to request water service, the utility must provide the landowner with the following notice:

YOU SHOULD READ THIS NOTICE CAREFULLY.

Public records list you as a landowner of the property with the following tax map parcel identification number(s): *[insert tax map parcel identification number(s)]* . *[insert water utility's name]* plans to file an application with the Delaware Public Service Commission requesting a Certificate of Public Convenience and Necessity (Certificate) to provide water service to a new territory described as *[insert name and description of existing development, existing subdivision, or existing unincorporated community]* .

[INSERT WATER UTILITY'S NAME] WANTS YOU TO SIGN A PETITION BY WHICH YOU AGREE TO INCLUDE YOUR PROPERTY IN THE TERRITORY IT INTENDS TO SERVE. *[INSERT WATER UTILITY'S NAME]* ESTIMATES THAT IT WILL PROVIDE WATER SERVICE TO *[insert description of proposed service territory and estimated timetable for providing service. If the utility cannot provide an estimated timetable for providing service, the notice must make the following disclosure in conspicuous language:* [INSERT UTILITY'S NAME] IS UNABLE TO ESTIMATE WHEN IT WILL PROVIDE WATER SERVICE TO YOUR PROPERTY [AND] *[insert description of proposed service territory]*.

IF YOU SIGN THE PETITION PROPOSED BY [INSERT WATER UTILITY'S NAME] YOUR DECISION TO INCLUDE YOUR PROPERTY IN [INSERT WATER UTILITY'S NAME] SERVICE TERRITORY MAY BE PERMANENT. IT MAY ALSO AFFECT YOUR ABILITY TO OBTAIN A PERMIT FOR A NEW WELL.

IF YOU DO NOT WISH TO BE INCLUDED IN [INSERT WATER UTILITY'S NAME] SERVICE TERRITORY, DO NOT SIGN THE PETITION.

IF YOU DO NOT SIGN THE PETITION, [INSERT WATER UTILITY'S NAME] MAY NEVERTHELESS SEND YOU A LETTER ASKING YOU TO INCLUDE YOUR PROPERTY IN ITS SERVICE TERRITORY. IF YOU RECEIVE SUCH A LETTER, YOU MAY HAVE TO TAKE ADDITIONAL ACTION.

IF YOU HAVE ANY QUESTIONS, COMMENTS, OR CONCERNS, PLEASE CONTACT THE PUBLIC SERVICE COMMISSION AT (302) 736-7500 (in Delaware, call 800-282-8574).

8.2 For a request premised on either 26 Del. C. § 203C(e)(1)b.2. or 26 Del. C. § 203C(e)(1)b.3., each petition requesting water utility services from the applicant must:

- 8.2.1 bear the signature of each landowner of record (or a duly authorized agent) that is requesting water utility services from the applicant;
- 8.2.2 reflect the date for each signature by each landowner of record, which date shall not be any earlier than one year prior to the date of the filing of the application;

- 8.2.3 bear a printed recitation of the name of each landowner of record executing the petition;
- 8.2.4 describe the nature and office of the executing individual if the request is by an artificial entity;
- 8.2.5 identify the tax map parcel number associated with each landowner of record requesting water service;
- 8.2.6 list the present mailing address and telephone number of each landowner of record that executes the request for water utility services; and
- 8.2.7 contain the following statement in conspicuous language:

I UNDERSTAND THAT BY SIGNING THIS PETITION MY PROPERTY MAY HAVE TO REMAIN IN [INSERT WATER UTILITY'S NAME] SERVICE TERRITORY PERMANENTLY. I ALSO UNDERSTAND THAT IT MAY AFFECT MY ABILITY TO OBTAIN A PERMIT FOR A NEW WELL.

IF YOU HAVE ANY QUESTIONS, COMMENTS, OR CONCERNS, PLEASE CONTACT THE PUBLIC SERVICE COMMISSION AT (302) 736-7500 (in Delaware, call 800-282-8574).

- 8.3 If a petition under 26 Del. C. § 203C(e)(1)b.2. or 26 Del. C. § 203C(e)(1)b.3. involves a petition for water utility services on behalf of condominium units as defined by 26 Del. C. § 203C(j), the applicant shall provide with such petition the materials required by 26 Del. C. § 203C(g)(1).
- 8.4 If a petition for water utility services is executed by an agent of the landowner of record, the applicant shall provide with the petition evidence to demonstrate the agent's authority to act for the landowner of record.

8.5 Each water utility shall file with the Commission any written materials the utility proposes to use to solicit landowners of record to sign a petition requesting water utility service from the utility.

9.0 Notice to Landowners in the Proposed Service Area

- 9.1 Pursuant to the provisions of 26 Del. C. § 203C(d)(1) and (e)(1), prior to filing the application, the applicant shall send the form of notice prescribed by these regulations to each landowner of record in the Proposed Service Area. The landowners of record shall be determined as of the record date.
- 9.2 The form of notice required by these regulations shall be sent to each landowner of record not more than thirty-five days and not less than thirty days prior to the filing of the application.
- 9.3 For requests premised on 26 Del. C. § 203C(d)(2)a. or b., the notices shall be sent by United States Postal Service certified mail, return receipt requested, with delivery restricted to the addressee.
- 9.4 For requests premised on 26 Del. C. § 203C(e)(1)b.1. or 4., the notices shall be sent by United States Postal Service certified mail, return receipt requested, with delivery restricted to the addressee.
- 9.5 For requests premised on 26 Del. C. § 203C(e)(1)b.2. or 3., the notices shall be sent to those landowners of record who did not execute a petition for water services by United States Postal Service certified mail, return receipt requested, and with delivery restricted to the addressee. In the case of landowners of record who did execute petitions for water service, the notices shall be sent by United States Postal Service certified mail, return receipt requested.
- 9.6 If the Postal Service returns to the applicant any materials reflecting that, in the case of a particular landowner of record, the certified mail delivery required under Sections 9.3 through 9.5 failed because the delivery was "refused," "unclaimed," "undeliverable," "unknown," or otherwise not completed, then the applicant shall promptly re-send the

form of the required notice by first class United States mail to the best available address of that landowner of record.

9.7 The Commission, by Order, may authorize a method of providing notice to landowners of record that is equivalent to the methods set forth in Sections 9.3 through 9.6.

10.0 Form of Notice to Landowners of Record

10.1 The notice to be sent to landowners of record in a request premised on either 26 Del. C. § 203C(d)(2), 26 Del. C. § 203C(e)(1)b.1., or 26 Del. C. § 203C(e)(1)b.4. shall be in a form approved by the Commission.

10.2 If the request is premised on 26 Del. C. § 203C(e)(1)b.2., the form of notice sent to landowners of record must include the following statements:

YOU SHOULD READ THIS NOTICE
CAREFULLY.

Public records list you as a landowner of the property with the following tax map parcel identification number(s): *[insert tax map parcel identification number(s)]* . Within thirty-five (35) days, *[insert water utility's name]* plans to file an application with the Delaware Public Service Commission requesting a Certificate of Public Convenience and Necessity (Certificate) to provide water service to a new territory described as *[insert description of the proposed service territory]* .

[INSERT WATER UTILITY'S NAME] HAS INCLUDED YOUR PROPERTY IN THE TERRITORY IT INTENDS TO SERVE. *[INSERT WATER UTILITY'S NAME]* ESTIMATES THAT IT WILL PROVIDE WATER SERVICE TO *[insert description of proposed service territory and estimated timetable for providing service. If the utility cannot provide an estimated timetable for providing service, the notice must make the following disclosure in conspicuous language:* [INSERT UTILITY'S NAME] IS UNABLE TO ESTIMATE WHEN IT WILL PROVIDE WATER SERVICE TO YOUR PROPERTY OR *[insert description of proposed service territory]*.

IF YOU DO NOT TAKE ANY ACTION NOW, YOU MAY LOSE YOUR CHOICE OF WHO CAN PROVIDE WATER SERVICE TO YOUR PROPERTY AND WHETHER YOU CAN OBTAIN A WELL PERMIT.

- 1) You may choose to be included in the utility's proposed service territory. If you

signed a petition for water service asking to be included in the utility's proposed service territory, you do not have to take any action.

2) You have the right to "opt-out" of the utility's proposed service territory. If you "opt-out", your property will not be included in the utility's service territory. You can do this even though others in *the proposed service territory* might desire water service from the utility. You should understand that being included in a utility's service territory does not mean that public water service will be immediately available to your property or that, when available, you will be required to hook-up to the public water system. However, if your property is included in the utility's water service territory, and later the water from the well providing your drinking water cannot be used, the Department of Natural Resources and Environmental

Control might deny you a permit for a new well if public water is available to your property. On the other hand, if you elect to "opt-out" of the utility's service territory, but later change your mind and decide to connect to the utility's public water system, you could be charged additional fees.

- 3) You may object to the Public Service Commission granting a Certificate for *the proposed service territory*. For example, you may object that the water utility does not have the legal right to serve the territory. You should review the law about what a utility must provide in order to obtain a Certificate (contact the Public Service Commission to obtain a copy of the law). If you file such an objection, you will need to tell the Public Service Commission why the utility should not receive the Certificate. Please note that an objection will not

remove your property from a proposed service territory. To remove your property from the service territory, you must request to "opt-out."

Attached to this letter is a form which allows you (and other owners of the property) to exercise your options. You have seventy-five (75) days from your receipt of this notice to file your objection with the Commission. Although you may exercise your right to "opt-out" of the utility's service territory at any time before the Certificate is granted, if you choose to opt-out, it is requested that you complete the form and return it to the Public Service Commission at the address listed below within seventy-five (75) days from the date you receive this notice:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

If you want to "opt-out" or object, you must send the completed form to the Public Service Commission, even if you already informed the utility of your intent to "opt-out" or object.

If you have any questions, comments or concerns, please contact the Public Service Commission at (302) 736-7500 (in Delaware, call 800-282-8574).

10.3 If the request is premised on 26 Del. C. § 203C(e)(1)b.3., the form of notice sent to landowners of record must include the following statements:

YOU SHOULD READ THIS NOTICE
CAREFULLY.

Public records list you as a landowner of the property with the following tax map parcel identification number(s): *[insert tax map parcel identification number(s)]*. Within thirty-five (35) days, *[insert water utility's name]* plans to file an application with the Delaware Public Service Commission requesting a Certificate of Public Convenience and Necessity (Certificate) to provide water service to a new territory described as *[insert name and description of existing development, existing subdivision, or existing unincorporated community]*.

[INSERT WATER UTILITY'S NAME] HAS
INCLUDED YOUR PROPERTY IN THE TERRITORY

IT INTENDS TO SERVE. *[INSERT WATER UTILITY'S NAME]* ESTIMATES THAT IT WILL PROVIDE WATER SERVICE TO *[insert description of proposed service territory and estimated timetable for providing service. If the utility cannot provide an estimated timetable for providing service, the notice must make the following disclosure in conspicuous language: [INSERT UTILITY'S NAME] IS UNABLE TO ESTIMATE WHEN IT WILL PROVIDE WATER SERVICE TO YOUR PROPERTY OR [insert name and description of existing development, existing subdivision, or existing unincorporated community]* .

IF YOU DO NOT TAKE ANY ACTION NOW, YOU MAY LOSE YOUR CHOICE OF WHO CAN PROVIDE WATER SERVICE TO YOUR PROPERTY AND WHETHER YOU CAN OBTAIN A WELL PERMIT.

1) You may choose to be included in the utility's proposed service territory. If you signed a petition for water service asking to

be included in the utility's proposed service territory, or, if you did not sign a petition for water service but want to be included, you do not have to take any action.

- 2) You have the right to "opt-out" of the utility's proposed service territory. If you "opt-out", your property will not be included in the utility's service territory. You can do this even though others in *[insert development or community name]* might desire water service from the utility. You should understand that being included in a utility's service territory does not mean that public water service will be immediately available to your property or that, when available, you will be required to hook-up to the public water system. However, if your property is included in the utility's water service territory, and later the water from the well providing your drinking water cannot

be used, the Department of Natural Resources and Environmental Control might deny you a permit for a new well if public water is available to your property. On the other hand, if you elect to "opt-out" of the utility's service territory, but later change your mind and decide to connect to the utility's public water system, you could be charged additional fees.

- 3) You may object to the Public Service Commission granting a Certificate for *[insert development or community name]* . For example, you may object that the water utility does not have the legal right to serve the territory. You should review the law about what a utility must provide in order to obtain a Certificate (contact the Public Service Commission to obtain a copy of the law). If you file such an objection, you will need to tell the Public Service Commission

why the utility should not receive the Certificate. Please note that an objection will not remove your property from a proposed service territory. To remove your property from the service territory, you must request to "opt-out."

Attached to this letter is a form which allows you (and other owners of the property) to exercise your options. You have seventy-five (75) days from your receipt of this notice to file your objection with the Commission. Although you may exercise your right to "opt-out" of the utility's service territory at any time before the Certificate is granted, if you choose to opt-out, it is requested that you complete the form and return it to the Public Service Commission at the address listed below within seventy-five (75) days from the date you receive this notice:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

If you want to "opt-out" or object, you must send the completed form to the Public Service Commission, even if you already informed the utility of your intent to "opt-out" or object.

If you have any questions, comments or concerns, please contact the Public Service Commission at (302) 736-7500 (in Delaware, call 800-282-8574).

- 10.4 In a request under 26 Del. C. § 203C(e), the notice sent to each landowner shall also include a form of response (in a form approved by the Commission) that allows the landowner to easily and plainly exercise the options available under the form of notice.
- 10.5 Except as the Commission might specifically approve, the applicant shall not include any other correspondence with the landowner notice required by these regulations. The exterior of the envelope for any notice shall carry language (approved by the Commission) to alert the landowner of the importance of the notice.
- 10.6 The applicant is not required to send the Section 10.0 opt-out notice with a solicitation notice sent pursuant to Section 8.0 of these regulations.
- 10.7 Within ten days of the filing of the application, the applicant shall also publish in two newspapers of general circulation a form of public notice of its application. The Commission shall approve a form of such public notice. The applicant shall promptly file proof of such publication with the Commission. In the published notice of each CPCN application, the utilities shall provide a description of the properties involved, including (a) the nearest intersecting roads (i.e at the intersection of Canterbury Road and Delaware Avenue or approximately one-half mile from intersection of Canterbury Road and Delaware Avenue); (b) directional information about the parcels

(i.e on the north side of Delaware Avenue, etc.); (c) a listing of Property Tax ID numbers if available (metes and bounds descriptions if Tax ID numbers are unavailable or if neither of those are available, some description capable of being mapped); and (d) the street address(es) shall also be provided if available.

11.0 Landowner's Options to Object or "Opt-Out," and Objections from Other Interested Persons or Entities

11.1 A landowner or record of a parcel that is, in whole or in part, within a Proposed Service Area may object to a CPCN being granted by filing with the Commission a signed written document reflecting such objection. The objection shall set forth the reasons why the applicant is not entitled to a Certificate. Except for good cause, the written objection shall be filed with the Commission no later than seventy-five (75) days after the landowner receives the notice required under Sections 9.1 and 10.1.

11.2 The Commission may allow persons or entities that are not landowners of record to file an objection to an application for a CPCN. The objection shall set forth the person's or entity's interest in the matter and the reasons why the applicant is not entitled to a Certificate. Except for good cause, the objection by a non-landowner shall be filed with the Commission no later than forty days after publication of the notices required under Section 10.7.

11.3 In an application premised on 26 Del. C. § 203C(e)(1)b.2. or 3., a landowner of record of a parcel that is, in whole or in part, within a Proposed Service Area may: (a) object to the issuance of the CPCN, or (b) "opt-out" and have the landowner's parcel excluded from the Proposed Service Area pursuant to 26 Del. C. § 203C(i). A landowner of record may exercise one or more of the above options;

11.3.1 The applicant shall immediately inform the Commission of the name and address of each landowner of record that notifies the applicant, either verbally or in writing, that the landowner wishes to exercise any of the options under Section 11.3. The applicant shall immediately file with the Commission

any written documents from a landowner that exercises any of the options in Section 11.3.

- 11.4 At any time prior to the issuance of the CPCN premised on 26 Del. C. § 203C(e)(1)b.2.or 3., a landowner of record of a parcel that is, in whole or in part, within a Proposed Service Area, may file with the Commission a signed written document requesting that the landowner's parcel be excluded from the Proposed Service Area pursuant to 26 Del. C. § 203C(i). A parcel will be excluded from the Proposed Service Area if any landowner of record of such parcel submits a signed "opt-out" request for exclusion of the parcel. The Commission may deny an "opt-out" request submitted by a landowner of record if the landowners of record holding, or vested with, a controlling interest in the parcel rescind, or countermand, the request to "opt-out." The other owners shall demonstrate to the Commission that they hold the authority to bind the parcel.
- 11.5 The Commission shall maintain a record of all written documents received from landowners of record that exercise the options available under Sections 11.1 through 11.4.
- 11.6 An applicant shall retain all records related to an application for a Certificate for a period of seven years after the date of the filing of the application. The applicant shall make such records available to the Commission upon request.

12.0 Suspension or Revocation of CPCN for Good Cause

- 12.1 Pursuant to the provisions of 26 Del. C. § 203(k) and (1), the Commission may suspend or revoke a CPCN, or a portion thereof, for good cause. Good cause shall consist of:
- 12.1.1 a finding by the Commission that the holder of a CPCN has not materially complied with: (a) any provisions of

Titles 7, 16, or 26 of the Delaware Code dealing with obtaining water or providing water and water services to customers; or (b) any order or rule of the Commission relating to the same;

12.1.2 a finding by the Commission that, to the extent practicable, service to customers will remain uninterrupted under an alternative water utility or a designated third party capable of providing adequate water service, including a trustee or receiver appointed by the Delaware Court of Chancery; and

12.1.3 either (a) a finding by the Commission that there are certain methods to mitigate any financial consequences to customers served by the utility subject to suspension or revocation and the adoption of a plan to implement those methods; or (b) a finding by the Commission that there are no practicable methods to mitigate the financial consequences to customers.

12.2 In addition to the factors required by Sections 12.1.1, 12.1.2, and 12.1.3, the Commission may also consider one or more of the following factors in determining whether to suspend or revoke a CPCN:

12.2.1 fraud, dishonesty, misrepresentation, self-dealing, managerial dereliction, or gross mismanagement on the part of the water utility; or

12.2.2 criminal conduct on the part of the water utility; or

12.2.3 actual, threatened or impending insolvency of the water utility; or

12.2.4 persistent, serious, substantial violations of statutes or regulations governing the water utility in addition to any finding of non-compliance required by Section 12.1.1 above; or

12.2.5 failure or inability on the part of the water utility to comply with an Order of any other State or Federal regulatory body after the water utility has been notified of its non-compliance and given an opportunity to achieve compliance; or

12.2.6 such other factors as the Commission deems relevant to the determination to suspend or revoke a CPCN.

13.0 Proceedings to Suspend or Revoke a CPCN for Good Cause

13.1 Proceedings before the Commission to suspend or revoke a CPCN for good cause shall be conducted in accordance with the procedures set forth in 29 Del. C. ch. 101, Subchapters III and IV.

13.2 Unless the Commission finds, pursuant to proceedings conducted in accordance with Section 13.1 above, that (a) the conduct of the water utility poses an imminent threat to the health and safety of its customers; or (b) the water utility is incapable of providing safe, adequate, and reliable water service, the Commission will not suspend or revoke a CPCN for good cause without initially affording the water utility a reasonable opportunity to correct the conditions that are alleged to constitute the grounds for the suspension or revocation of the CPCN.

TABLE OF CONTENTS

REGULATIONS

1.0 Authority and Scope of Regulations	
1.1	1
1.2	1
1.3	1
1.4	1
1.5	1
2.0 Definitions.....	2
2.1	2
3.0 Application for Certificate of Public Convenience and Necessity	3, 4
In General.....	4
3.1	4
3.2	4
3.3	5
3.3.1	5
3.3.2	5
3.3.3	5
3.3.4	5
Information about each Proposed Service Area	5
3.4	5
3.4.1	5
3.4.2	6
3.4.3	6
3.4.3.1	6
3.4.4	6
3.4.4.1	6
3.4.4.2	6
3.4.4.3	6
3.4.4.4	7
Evidence of Landowner Notification	7
3.5	7
3.5.1	7
3.5.2	7
3.5.3	7
Criteria for a CPCN Request	8

3.6.....	8
3.7.....	8
3.8.....	8
3.9.....	8
3.10.....	8
3.11.....	9
Additional Criteria for a CPCN Request by a Municipal Water Authority	9
3.12.....	9
Plan of Service.....	10
3.13.....	10
Quality of Service Certifications and Information.....	10
3.14.....	10
3.14.1.....	10
3.14.2.....	10
3.14.3.....	10
3.14.4.....	11
3.15.....	11
3.16.....	11
3.16.1.....	11
3.16.2.....	11
3.17.....	11
Additional Materials to be Supplied with the Application	11
3.18.....	11
3.18.1.....	11
3.18.2.....	12
3.18.3.....	12
3.18.4.....	12
3.18.5.....	12
3.18.6.....	12
3.19.....	12
4.0 Additional Requirements for an Application Filed by a New Water Utility	12
4.1.....	12
4.1.1.....	13
4.1.2.....	13
4.1.3.....	13

4.1.4	13
4.1.5	13
5.0 Review of the Application and Deficiencies in the Application.....	13
5.1	13
5.2	14
5.3	14
5.4	14
6.0 Coordination with Other State Agencies, Counties, and Municipalities	14
6.1	14
6.2	14
6.3	14, 15
6.4	15
7.0 Proposed Service Area.....	15
7.1	15
7.2	15
7.3	15
7.4	15
7.4.1	15
7.4.2	15
7.5	16
7.5.1	16
8.0 Requirements Related to 26 Del. C. § 203C(e)(1)(2), and (3)	16
8.1	16, 17, 18
8.2	18
8.2.1	18
8.2.2	18
8.2.3	19
8.2.4	19
8.2.5	19
8.2.6	19
8.2.7	19
8.3	19
8.4	19
8.5	20
9.0 Notice to Landowners in the Proposed Service Area	20
9.1	20

9.2.....	20
9.3.....	20
9.4.....	20
9.5.....	20
9.6.....	20, 21
9.7.....	21
10.0 Form of Notice to Landowners of Record	21
10.1	21
10.2.....	21, 22, 23, 24, 25, 26
10.3.....	26, 27, 28, 29, 30, 31
10.4.....	31
10.5.....	31
10.6.....	31
10.7.....	32
11.0 Landowner's Options to Object or "opt-Out," and Objections from Other Interested Persons or Entities.....	32
11.1.....	32
11.2.....	32
11.3.....	32, 33
11.3.1.....	33
11.4.....	33
11.5.....	33
11.6.....	33
12.0 Suspension or Revocation of CPCN for Good Cause.....	34
12.1.....	34
12.1.1.....	34
12.1.2.....	34
12.1.3.....	34
12.2.....	34
12.2.1.....	34
12.2.2.....	34
12.2.3.....	35
12.2.4.....	35
12.2.5.....	35
12.2.6.....	35
13.0 Proceedings to Suspend or Revoke a CPCN for Good Cause	35
13.1.....	35
13.2.....	35

EXHIBIT

4

TITLE 26 PUBLIC UTILITIES
DELAWARE ADMINISTRATIVE CODE

Public Service Commission

2002 Regulations Governing Certificates of Public Convenience and Necessity for Water Utilities

REGULATIONS CONCERNING WATER UTILITIES INCLUDING THE PUBLIC SERVICE COMMISSION'S JURISDICTION TO GRANT AND REVOKE CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

1.0 Scope of Regulations.

These regulations are intended to govern certain practices and procedures before the Delaware Public Service Commission relating to water utilities.

2.0 Definitions.

As used in these regulations:

"Commission" means the Delaware Public Service Commission.

"CPCN" means a Certificate of Public Convenience and Necessity.

"DPH" means the Delaware Division of Public Health.

"DNREC" means the Delaware Department of Natural Resources and Environmental Control.

"Staff" means the Staff of the Delaware Public Service Commission.

"Secretary" means the Secretary of the Delaware Public Service Commission.

3.0 Application for Certificate of Public Convenience and Necessity.

3.1 An application for a Certificate of Public Convenience and Necessity to begin the business of a water utility or to extend or expand the business or operations of any existing water utility shall be made in writing and filed with the Commission. The application shall include all information and supporting documentation required by statute, the Rules of Practice and Procedure of the Commission, these regulations, and shall not be considered complete until all such information and supporting documentation has been filed with the Commission. At the time of filing, the application shall:

- 3.1.1 Contain a statement explaining the reason(s) why the Commission should grant the CPCN, and citations to all statutory and regulatory authority upon which the application is based, or upon which the applicant relies to support the application;
- 3.1.2 Clearly state the relief sought by the application;
- 3.1.3 State the name, address, telephone number, and e-mail address (if any) of the person to be notified in the event the Staff determines there are deficiencies in the application;
- 3.1.4 Contain the supporting documentation required by 26 Del.C. §203C, including evidence that all the landowners of the proposed territory have been notified of the application;
- 3.1.5 Include a complete list of county tax map parcel number(s) for the area covered by the application;
- 3.1.6 Include (along with a complete list of tax map number(s)) corresponding names and addresses of property owners and a copy of all tax map(s) for the area;
- 3.1.7 For any proposed extension of service, contain a certification by the applicant that the extension will satisfy the provisions of 26 Del.C. §403C, including the following:
 - 3.1.7.1 The applicant is furnishing water to its present customers or subscribers in this State in such fashion that water pressure at every house supplied is at least 25 pounds at all times at the service connection;
 - 3.1.7.2 The applicant shall furnish water to the house or separate location of each new customer or subscriber in this State at the pressure of at least 25 pounds at each such location or house at all times at the service connection while continuing also to supply each old, customer or subscriber at the pressure of at least 25 pounds at each house at all times at the service connection;

- 3.1.7.3 The applicant is not subject to a finding by the appropriate federal or state regulatory authority that it has materially failed to comply with applicable safe drinking water or water quality standards; and
- 3.1.7.4 The applicant is not subject to any Order issued by the Commission finding that the company has materially failed to provide adequate or proper safe water services to existing customers; and
- 3.1.8 For applications submitted under 26 DeI.C. §203C(e), include a statement indicating whether the applicant has determined if a majority of the landowners of the proposed territory to be served object to the issuance of a CPCN to the applicant, and the documentation relied upon to support the applicant's determination.
- 3.2 If an application for a CPCN involves a water utility project or service that requires the review, approval or authorization of any other state or federal regulatory body, including DNREC, the State Fire Marshal or DPH, the application to the Commission shall so state and shall include the following:
 - 3.2.1 A statement of the current status of such application;
 - 3.2.2 If the application to the other regulatory body or bodies has already been filed, a copy of any permit, order, certificate, or other document issued by the regulatory body relating thereto; and
 - 3.2.3 If such an application or amendment thereof is filed with another state or federal regulatory body or a determination is made by any such regulatory body subsequent to the date of filing the CPCN application with the Commission, but prior to its determination, a copy of any permit, order, certificate or other document that has been issued relating thereto shall be filed with the Commission.
- 3.3 An applicant for a CPCN — other than a municipality or other governmental subdivision — shall provide with the application (if not presently on file with the Commission) the following:
 - 3.3.1 A corporate history including dates of incorporation, subsequent acquisitions and/or mergers;
 - 3.3.2 A complete description of all relationships between the applicant and its parent, subsidiaries, and affiliates. Furnish a chart or charts which depict(s) the inter-company relationships;
 - 3.3.3 A map identifying all areas, including all towns, cities, counties, and other government subdivisions to which service is already provided;
 - 3.3.4 A statement identifying any significant element of the application which, to the applicant's knowledge, represents a departure from prior decisions of the Commission;
 - 3.3.5 Annual reports to stockholders for applicant, its subsidiaries, and its parent for the last two years;
 - 3.3.6 The applicant's audited financial statements, 10K's, and all proxy material for the last two years; and
 - 3.3.7 Any reports submitted by the applicant within the preceding twelve months to any state or federal authorities in any proceedings wherein an issue has been raised about the applicant's failure to comply with any statute, regulation, rule, or order related to the provision of safe, adequate and reliable water service, including the water quality of water provided to existing customers.
- 3.4 A municipality or other governmental subdivision applying for a CPCN shall provide with the application (if not presently on file with the Commission) the statement and documents identified in subsections 3.3, 3.3.3, 3.3.4 and 3.3.7 hereof.
- 3.5 After a completed application has been filed and during the course of the Staff investigation of an application, the Commission may require an applicant to furnish additional information specifically related to the statutory standards for Commission review and consideration of an application, including the provision of safe, adequate, and reliable water service.
- 3.6 Supporting documentation not filed with the application must be made available for Staff inspection upon request.

4.0 Additional Requirements for an Application Filed by a New Water Utility.

- 4.1 If the applicant for a CPCN is a new water utility that has not previously been awarded a CPCN in Delaware, the application, in addition to meeting the requirements of section 3.0, shall include the following:
- 4.1.1 Evidence that it possesses the financial, operational, and managerial capacity to comply **with all** state and federal safe drinking water requirements and that it has, or will procure, adequate supplies of water to meet demand, even in drought conditions, by maintaining supply sufficient to meet existing and reasonably anticipated future peak daily and monthly demands;
 - 4.1.2 A certified copy of the applicant's certificate of incorporation;
 - 4.1.3 Details of plant as to type, capacity, cost, status of plant construction, construction schedule, and estimated number of customers to be served; and
 - 4.1.4 A map showing the location and size, in acres or square feet, of the proposed territory, and the composition, diameter, length, and location of pipes to be initially installed.
- 4.2 **If the** applicant for a CPCN is a new water utility that is an unincorporated proprietorship, the applicant **shall** be subject to a rebuttal presumption that the applicant lacks **the** financial, operational, and managerial capacity to comply with the requirements for a CPCN.

5.0 Review of application; deficiencies in the application.

- 5.1 The Staff shall review **all CPCN** applications for compliance **with applicable** statutes and these regulations. The Staff will, **within** twenty-one days after the date **of filing**, specifically identify any deficiencies in the application, and immediately request the Secretary to promptly notify the applicant of the alleged deficiencies. **The applicant** shall have thirty days from the date of the receipt of **the** notice from the Secretary of the deficiencies in the application to file a corrected or supplemental application. The **Commission may, in** its discretion, **extend the period to cure** deficiencies in the application for an additional thirty days.
- 5.2 Only upon the applicant's filing of a corrected or supplemental application correcting the deficiencies shall such application be deemed completed and filed with the Commission for purposes of the time limits for action by the Commission under 26 **Del.C.** §203C(h). In the event the alleged deficiencies are not cured within the time provided hereunder, Staff may move the Commission to reject the utility's application for non-compliance with these regulations.
- 5.3 Nothing in this regulation shall prevent an applicant from **filing an application in draft form for Staffs** informal review and comment without prejudice, such **informal review and comment not to be** unreasonably withheld by Staff; nor shall this regulation affect **or delay the filing date of applications** that comply with applicable statutes and these regulations, or whose non-compliance **is deemed** minor or immaterial by **the Commission or its Staff**.

6.0 Filing of application with DNREC, the State Fire Marshal, and DPH; coordination and cooperation.

An applicant for a CPCN shall file **a** copy of the application and the supporting documentation required by section 3.0, subsections 3.1, 3.1.5, and 3.1.6 with DNREC, the State Fire Marshal, and DPH within three days of filing the same with the Commission. **The Staff shall send written requests to DNREC,** the State Fire Marshal, and DPH soliciting immediate written comment as to whether they are aware of any matters indicating **that the** applicant has been unwilling or unable to provide safe, adequate and reliable drinking water service to existing customers. **The Staff shall** coordinate and cooperate with DNREC, the State Fire Marshal, and DPH during the process of reviewing an application for a CPCN. The Staff shall also coordinate and cooperate with other interested state, local, and federal authorities.

7.0 Provision of notice to all landowners of the proposed territory.

- 7.1 Pursuant to the provisions of 26 **Del.C.** §203C(d)(1) **and (e)(1), prior to filing** the application with the Commission, the applicant shall provide written notice to **all landowners of the** proposed territory of the anticipated filing of the application.

- 7.2 The written notice required by 26 Del.C. §203C(d)(1) and (e)(1) shall be sent to all landowners of the proposed territory not more than sixty days and not less than thirty days prior to the filing of the application.
- 8.0 Landowners who object, opt-out, and/or request a public hearing; time limits; extension of time.
- 8.1 In proceedings involving an application submitted under 26 Del.C. §2030(e), any landowner whose property, or any part thereof, is located within the proposed territory to be served shall be permitted to (i) object to the issuance of the CPCN; (ii) opt-out of inclusion in the territory; and/or (iii) request a public hearing. The applicant shall inform the Commission of the name and address of all landowners who notify the applicant of their objection to the issuance of the CPCN, their intention to opt-out of inclusion in the territory, and/or request a public hearing, and shall file with the Commission any written notices received from such landowners. The Commission shall maintain records identifying all landowners who have provided written notice of their objection to the issuance of the CPCN, their intention to opt-out of inclusion in the territory, and/or request a public hearing, and shall make such records available to the applicant.
- 8.2 A landowner shall notify the Commission, in writing, if the landowner
- 8.2.1 objects to the issuance of the CPCN;
- 8.2.2 intends to opt-out of inclusion in the territory; and/or
- 8.2.3 requests a public hearing.
- 8.3 The notice to the Commission from the landowner must be filed with the Commission within
- 8.3.1 sixty days from the date of the landowner's receipt of a written notice from the water utility that complies with applicable statutes and these regulations, of the landowner's inclusion in the service territory; or
- 8.3.2 thirty days of the filing of the completed application, whichever period is greater.
- 8.4 The Commission may, in the exercise of its discretion, extend the time to object, opt-out, and/or request a public hearing even though the period in which to do so has expired. The Commission shall accept for filing written notices from landowners that were sent to the applicant and transmitted by the applicant to the Commission.
- 9.0 Notification to all landowners of the proposed territory of their rights to object, opt-out, and/or request a public hearing.
- 9.1 Pursuant to 26 Del.C. §2030(e), and for the purposes of notification to all landowners of the proposed territory encompassed by the CPCN, the notice sent to the landowners of the proposed territory must include, at a minimum, the following statement:
- "(1) Pursuant to Title 26, §203C(e) of the Delaware Code, an application for a Certificate of Public Convenience and Necessity (CPCN) will be submitted to the Delaware Public Service Commission on or about {enter date of intended submission}. Your property has been included within an area {enter name of your organization} intends to serve with public water and we are required to inform you of certain information. The area to be served is {provide a short hand description of the service area}. If you agree to the inclusion of your property in the proposed service area, no action on your part is required.
- (2) Pursuant to current law, you may file an objection to receiving water service from (enter name of your organization). Under Delaware law, the Public Service Commission cannot grant a CPCN to {enter name of your organization} for the proposed service area, including your property, if a majority of the landowners in the proposed service area object to the issuance of the CPCN. If you object to receiving water service from {enter the name of your organization}, you must notify the Commission, in writing, within sixty days of your receipt of this notice or within thirty days of the filing of the completed application for a CPCN, whichever is greater.
- (3) Pursuant to current law, you may also elect to opt-out of inclusion in the proposed service area. The term "opt-out" means that you decide that you do not want to receive water service from {enter name of your organization}, even if a majority of the landowners in the proposed service area do

elect to receive water service from {enter name of your organization}. If you decide that you do not want to receive water service from {enter name of your organization} and instead wish to opt-out, you must notify the Commission, in writing, within sixty days of your receipt of this notice or within thirty days of the filing of the completed application for a CPCN, whichever is greater.

(4) You may also request a public hearing on this matter. A request for a public hearing must be made in writing to the Commission within sixty days of your receipt of this notice or within thirty days of the filing of the completed application for a CPCN, whichever is greater.

(5) The written notice of your decision to object to the issuance of the CPCN, to opt-out of receiving water service from {enter name of your organization}, and/or your written request for a public hearing, shall be sent to the Secretary of the Delaware Public Service Commission at the following address:

Secretary

Delaware Public Service Commission

{insert the address of the Secretary of the Delaware Public Service Commission}

(6) Any written notice you send to the Commission must include the description of the service area referred to in paragraph (1) above and the name of the applicant so the Commission will be able to identify the CPCN application to which your notice is related.

(7) Questions regarding objections, opt-outs, and hearings may be directed to: {enter the name or title, and the address and telephone number of the Commission's contact person(s)}."

9.2 If a landowner sends a written notice directly to the applicant, the applicant shall file the notice with the Commission.

10.0 Suspension or revocation of CPCN for good cause.

10.1 Pursuant to the provisions of 26 Del.C. §203C(k) and (l), the Commission may suspend or revoke a CPCN, or a portion thereof, for good cause. Good cause shall consist of:

10.1.1 A finding by the Commission of material non-compliance by the holder of a CPCN with any provisions of Titles 7, 16, or 26 of the Delaware Code dealing with obtaining water or providing water and water services to customers, or any order or rule of the Commission relating to the same; and

10.1.2 A finding by the Commission that, to the extent practicable, service to customers will remain uninterrupted under an alternative water utility or a designated third party capable of providing adequate water service, including a trustee or receiver appointed by the Delaware Court of Chancery; and

10.1.3 Either

10.1.3.1a finding by the Commission that there are certain methods to mitigate any financial consequences to customers served by the utility subject to suspension or revocation and the adoption of a plan to implement those methods; or

10.1.3.2a finding by the Commission that there are no practicable methods to mitigate the financial consequences to customers.

10.2 In addition to the factors required by sections 10.1, 10.1.1, 10.1.2 and 10.1.3, the Commission may consider one or more of the following factors in determining whether to suspend or revoke a CPCN:

10.2.1 Fraud, dishonesty, misrepresentation, self-dealing, managerial dereliction, or gross mismanagement on the part of the water utility; or

10.2.2 Criminal conduct on the part of the water utility; or

10.2.3 Actual, threatened or impending insolvency of the water utility; or

10.2.4 Persistent, serious, substantial violations of statutes or regulations governing the water utility in addition to any finding of non-compliance required by section 10, paragraph 10.1 above; or

10.2.5 Failure or inability on the part of the water utility to comply with an order of any other state or federal regulatory body after the water utility has been notified of its non-compliance and given an opportunity to achieve compliance; or

10.2.6 Such other factors as the Commission deems relevant to the determination to suspend or revoke a CPCN.

11.0 Proceedings to suspend or revoke a CPCN for good cause.

11.1 Proceedings before the Commission to suspend or revoke a CPCN for good cause shall be conducted in accordance with the procedures set forth in 29 Del.C. Ch. 101, Subchapter III.

11.2 Unless the Commission finds, pursuant to proceedings conducted in accordance with subsection 11.1 above, that

11.2.1 the conduct of a water utility poses an imminent threat to the health and safety of its customers; or

11.2.2 a water utility is unable to provide safe, adequate, and reliable water service, the Commission will not suspend or revoke a CPCN for good cause without first affording the water utility a reasonable opportunity to correct the conditions that are alleged to constitute the grounds for the suspension or revocation of the CPCN.

12.0 Compliance with 29 *Del.C.* Ch. 101, Subchapter III.

Proceedings before the Commission involving Certificates of Public Convenience and Necessity for water utilities shall be conducted in accordance with the procedures set forth in 29 Del.C. Ch. 101, Subchapter III, including any proceedings related to any findings under 26 Del.C. §2030(f) that an applicant is unwilling or unable to provide safe, adequate, and reliable water service to existing customers, or is currently subject to such a Commission finding.

13.0 Waiver of requirements of sections 3.0 and 4.0.

The Commission may, in the exercise of its discretion, waive any of the requirements of sections 3.0 and 4.0 above.

5 DE Reg. 212 (07/01/01)

EXHIBIT " 5 "

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE ADOPTION OF RULES)
CONCERNING THE IMPLEMENTATION OF 72)
DEL. LAWS CH. 402 (2000) GRANTING THE) PSC REGULATION
COMMISSION THE JURISDICTION TO GRANT) DOCKET NO. 51
AND REVOKE THE CERTIFICATES OF PUBLIC)
CONVENIENCE AND NECESSITY FOR PUBLIC)
UTILITY WATER UTILITIES
(OPENED NOVEMBER 12, 2000; REOPENED)
MARCH 20, 2007)

NOTICE OF FURTHER PROPOSED RULE-MAKING:
AMENDMENT OF RULES FOR GRANTING, SUPERVISING, and REVOKING
CERTIFICATES OF PUBLIC CONVENIENCE AND
NECESSITY FOR WATER UTILITIES

TO: ALL WATER UTILITIES, CONSUMERS, AND OTHER INTERESTED PERSONS

Under 26 *Del. C.* 203C, the Public Service Commission ("PSC") holds the authority to grant a Certificate of Public Convenience and Necessity ("CPCN") to authorize an entity to begin water utility operations or allow an existing water utility to expand its operations or business to a new proposed service territory. This CPCN authority encompasses water utilities subject to the PSC's general regulation as well as municipal and other governmental water utilities, districts, or authorities. In 2001, the PSC adopted "Regulations Governing Water Utilities Including the Public Service Commission's Jurisdiction to Grant and Revoke Certificates of Public Convenience and Necessity." See 5 DE Reg. 212 (July 1, 2001). Those regulations set forth the process and criteria for reviewing, granting, or denying requests for CPCNs filed by water utilities.

Earlier, the PSC proposed to repeal the 2001 Rules related to water utility CPCNs in favor of a proposed new set of Rules. See 10 DE Reg. 1563-1580 and 11 DE Reg. 465-484. The Commission has now withdrawn those earlier proposed rules.

Pursuant to 26 *Del. C.* §§ 203(c) and 209(a), the PSC now proposes to repeal the 2001 rules and replace them with new "Regulations Governing Certificates of Public Convenience and Necessity for Water Utilities." As set forth in PSC Order No. 7774 (May 4, 2010), the PSC believes the new rules will make improvements in the administration of the CPCN process. Initially, the proposed new rules implement the statutory changes made to the criteria for obtaining a CPCN (and the provisions of 26 *Del. C.* 203C) by 76 Del. Laws ch. 55 (June 28, 2007). Second, the new rules provide for more detailed requirements for notice to affected landowners, other interested persons, and the public of the CPCN application and provide specific requirements about the form of notice to be sent to affected landowners to inform them of their options. In addition, the new regulations add provisions placing limitations on the number of Proposed Service Areas that may be included in a CPCN application, and requiring the inclusion of a Plan of Service with the CPCN application.

You can review PSC Order No. 7774 (May 4, 2010) and the proposed new rules in the June 1, 2010 issue of the Delaware Register of Regulations. You can also review the Order and the new regulations at the PSC's Internet website located at <http://depssc.delaware.gov>. Written copies of the Order and proposed regulations can be obtained at the PSC's office at the address located below, for \$0.25 per page.

The PSC now solicits comments, suggestions, compilations of data, briefs, or other written materials about the proposed repeal of the 2001 Water Utility CPCN rules and the adoption of the proposed new Water Utility CPCN rules. If you want to file any such materials, you should submit an original and ten copies of such written documents on or before June 30, 2010. You should file such materials with the PSC at the following address:

Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, DE 19904
Attn: Reg. Dckt. No. 51

If possible, you should accompany such written comments with an electronic version of the submission. Such electronic copy may be filed on a copy-capable CD-Rom disk or sent as an attachment to an Internet e-mail addressed to alisa.bentley@state.de.us.

The PSC will also conduct a public hearing on the new proposed regulations on Thursday, July 22, 2010. That hearing will begin at 1:00 P.M. and will be held at the PSC's office at the address set forth above. You may also submit comments and materials at such public hearing.

If you are disabled and need assistance or help to participate in the proceedings, please contact the PSC to discuss that assistance. If you want more information or have questions, you can contact the PSC about the matter at (800) 282-8574 (toll-free in Delaware) or (302) 736-7500. Inquiries can also be sent by Internet e-mail addressed to andrea.maucher@state.de.us.