

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

IN THE MATTER OF THE APPLICATION OF)
ARTESIAN WASTEWATER MANAGEMENT, INC. FOR)
A CERTIFICATE OF PUBLIC CONVENIENCE AND) PSC DOCKET NO. 09-WW-009
AND NECESSITY TO PROVIDE WASTEWATER)
SERVICES PURSUANT TO 26 *DEL. C.* §203D)
(FILED NOVEMBER 30, 2009))
(NEW CASTLE 100109))

ORDER NO. 7768

This 4TH day of May, 2010, the Commission determines and Orders the following:

1. At the Commission's regularly scheduled meeting on March 30, 2010, the Commission denied an application (the "Application") filed by Artesian Wastewater Management, Inc. ("AWMI") seeking a certificate of public convenience and necessity (a "CPCN") to provide wastewater services to eight parcels of land located in New Castle County (the "County") northeast of Middletown, Delaware (the "Proposed Service Territory"). This is the Commission's Order setting forth its decision denying the Application.

BACKGROUND

2. In July 2004, 26 *Del. C.* § 203D was enacted, giving this Commission regulatory jurisdiction over public wastewater utilities.¹ Section 202 was also amended to clarify, consistent with other utility services, that the Commission has no jurisdiction over municipal or county wastewater utilities. See 25 *Del. C.* § 202(a)-(b). However, municipal and governmental wastewater authorities or districts were required, by October 4, 2004, to provide to the Commission "a

¹ See 75 *Del. Laws* ch. 317 (July 6, 2004).

description of any existing service territory for wastewater service" and were to provide "a description of any extension of wastewater territory or new wastewater serviced territory to the Commission." See 26 Del. C. §203D(b).

3. On September 30, 2004, the County provided the Commission with a description of its sewer service area. In that submission, the County also noted that the County Code restricted the construction and operation of sanitary sewer infrastructure in the unincorporated areas of the County. Since its submission to the Commission in 2004, the County's service territory and its Code prohibition of private wastewater utilities have been largely unchallenged, that is, until AWMI filed its Application on November 30, 2009.

4. Shortly after AWMI filed its Application, the County contacted the Commission, questioning the efficacy of the Application since AWMI did not first seek the County's consent.² When it appeared that the parties would be unable to consensually resolve their dispute, the County and AWMI were asked to provide written submissions setting forth their positions.³

² Commission regulations require that CPCN applicants also file their applications with the Department of Natural Resources and Environmental Control, the Office of State Planning, and any county, municipality, town or local authority within whose boundaries the proposed service territory would be located, and any municipality, town or local authority whose boundaries are adjacent to the proposed service territory. See 26 Del. Admin. C. 6001-6.0.

³ AWMI's Application is a form application typical of all other water and wastewater CPCN applications submitted by AWMI and its affiliate, Artesian Water Company, Inc. (for water CPCNs). The Application makes no mention of the statutory requirement of County consent, the County ordinance and why AWMI does not need the County's approval.

5. On March 12, 2010, the County filed an objection to the Application (the "Objection")⁴ and AWMI filed a legal memorandum, accompanied by an appendix. In its Objection, the County argues that the Commission is prohibited from granting the CPCN to AWMI because the Proposed Service Territory is within the County's service territory and AWMI had failed to obtain (and indeed did not seek) the County's approval to serve in its service territory, as required by 26 *Del. C.* §203D(b)⁵ and section 38.02.007(D) of the New Castle County Code (the "Code").⁶

6. The County also argues, among other things, that, by granting the Application, the Commission would impermissibly encroach upon the County's exclusive zoning, land use and sewer decisions in violation of 9 *Del. C.* §1521.⁷ In support of this argument, the County asserts that the Proposed Service Territory is part of an area that has been the subject of "an extensive County land use and wastewater service planning initiative." (See Objection, at pp. 4-5). It claims

⁴ With its Objection, the County also filed a motion to recuse Commissioner Lester, alleging that he had a financial interest connected to the matter. Because Commissioner Lester voluntarily recused himself, the Commission did not, and need not now, address that motion. The County also filed a petition to intervene; however, the County's petition is moot since it is party by virtue of its objection.

⁵ As set forth more fully herein, that section provides, among other things, that any "wastewater utility shall not extend its territory into a service territory of a municipality, government agency or wastewater authority or district without the approval of such entity and then obtaining approval of a certificate of public convenience and necessity from the Commission under this section."

⁶ Section 38.02.007(D) prohibits any entities from owning, leasing, operating, managing, utilizing or otherwise maintaining any sewer system in the unincorporated areas of the County.

⁷ That statute provides that "New Castle County Council ... shall have general jurisdiction over all matters pertaining to the County ... including the power to act upon all matters pertaining to sewers, sewerage disposal plants, trunk line sewers, and sewerage systems generally...").

that, beginning in the 1990's, the County developed concept plans for its "Southern Sewer Service Area district" (the "SSSA district"), an area generally described as the part of New Castle County below the C&D Canal. (*Id.* at p. 5). The County states that the SSSA district contains an upgraded "Water Farm #1" treatment plant as well as land purchased for the development of a "Water Farm #2" plant. (*Id.*). According to the County, in 2005, it decided to study a previous "concept plan" and retained a consultant to perform a "full evaluation, including considerations of additional alternatives." (*Id.*). A year later, County Council adopted a resolution formalizing many of the recommendations made by the consultant. This resolution included plans for the County to adopt a short and long-term approach to the SSSA District. (*Id.*). The County states that this approach allowed the County to consider sewer infrastructure plans in the context its recent update to its "Comprehensive Development Plan",⁸ which considered sewer infrastructure planning in the context of a "broader view" of the County's development goals, infrastructure, and land use planning. (*Id.*). According to the County, through this process, sewer infrastructure planning was discussed and a plan to use a "multi-phased" approach to the SSSA district was adopted, with short-term growth to be encouraged in the areas served by Water Farm #1 and the Middletown Treatment Plant. (*Id.* at pp. 5-6).

7. The County argues that, as part of its overall land use and sewer service plan, it has invested millions in purchasing property

⁸ As discussed below, the County is required to engage in an extensive development plan process and to periodically submit a Comprehensive Development Plan to the Office of State Planning Coordination.

for Water Farm #2 and has "engaged in extensive land use planning to direct development to areas where County sewer service is planned, and has sized the pipes and regional pump stations within the central spine of the SSSA district for the purpose of servicing the entire SSSA district in the future." (See Objection, at p. 6). The County claims that AWMI's Application seeks to undermine this "expensive and ongoing land use and wastewater service plans by end-running the County process..." (*Id.*).

8. AWMI does not dispute that the Proposed Service Territory falls within the service territory of the County. Rather, AWMI argues that section 38.02.007(D) of the County Code is preempted by section 203D of title 26, which gave the Commission jurisdiction over private wastewater utilities. (See AWMI Mem., pp 8-10). Artesian contends that it has met the statutory prerequisite for obtaining a wastewater CPCN by submitting the petitions of the landowners of the parcels included in the Application and that the Commission has no discretion to deny the application. (*Id.*, pp. 9-10).

9. AWMI also argues that the Commission should not consider the Proposed Service Territory⁹ to be in the County's "service territory" - despite the County's claim to the contrary - because, according to AWMI, the County has all but abandoned any plans to provide County wastewater to that area. (AWMI Mem., pp. 11-13). Accordingly, AWMI claims it does not need the County's consent to provide wastewater service to the Proposed Service Territory under

⁹ AWMI refers to the Proposed Service Territory as the "Port Penn Assemblage" in its memorandum.

section 203D(b), because that area is not within the County's "service territory" as that phrase should be interpreted under that section. (*Id.*).

10. In support of its claim that the County has abandoned its plan to serve the Proposed Service Territory, AWMI asserts that two property owners (the "Warrens"), together with Toll Bros., Inc. ("Toll Brothers"), have been attempting to obtain County wastewater service since approximately 2004 to support proposed residential development on the Warrens' property, approximately 134 acres located within the Proposed Service Territory. (AWMI Mem., p. 3). AWMI claims that in 2006, the County postponed and then cancelled plans to build Water Farm #2 and allocated the County's sewer capacity to other areas within the SSSA district. (*Id.*). AWMI asserts that a 2007 version of the County's Comprehensive Development Plan shows that the Proposed Service Area is within the Water Farm #2 sewer service area and a notation on the County's map indicates that "Capacity Not Available and No Improvements are Funded." (*Id.*, p. 4). According to a copy of a letter provided by AWMI, the County informed an engineering firm representing the Warrens and Toll Brothers that their record plan would not be processed because County sewer capacity is not "currently" available. (*Id.*, p. 5; Appendix, Ex. 6). AWMI states that, in response, Toll Brothers offered to construct pumping stations to convey sewage from the proposed development to Water Farm #1 (and then to Water Farm #2, when constructed). (*Id.*). The Warrens and Toll Brothers then sued the County in federal court in an attempt to

compel the county to provide County wastewater services. (*Id.* at pp. 5-6).¹⁰

11. AWWMI also alleges that more recent actions taken by the County further demonstrate that it has abandoned any plans of providing wastewater service to the Proposed Service Territory. AWWMI submitted a copy of a County ordinance wherein the County apparently eliminated a requirement that a developer install dry sewer lines in a development to be built with septic systems where the development is in an area without County sewer capacity. (AWMI Mem., p. 7; Appendix, Ex. 12). AWWMI also alleges that the County has removed all funding for Water Farm #2, cancelled a construction contract, and allowed a construction permit to expire. (*Id.*, p. 7; Appendix 18).

DISCUSSION

12. This Commission has "exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purposes of carrying out the provisions [title 26]." 26 Del. C. §201(a). Generally, the Commission does not have jurisdiction over public utilities that are owned or operated by governmental entities, such as municipalities and

¹⁰ In further support of its claim that the County has abandoned the Proposed Service Territory, AWWMI has provided a transcript of an oral argument in the United States District Court for the District of Delaware, wherein an attorney for the County apparently told the Court, in arguing against an equal protection claim, that the County was not providing sewer services to residents in the Proposed Service Territory. As discussed below, there is no dispute that the County is not currently providing wastewater services to the Proposed Service Territory. Accordingly, the Commission does not believe that counsel's argument in this regard is material to the issues before the Commission.

the State's three counties. Section 202, entitled "Limitations on Jurisdiction of Commission," specifically excludes "municipally-owned utilities," and water and wastewater utilities created and operated pursuant to title 9 (Counties) and title 16 (water and wastewater "authorities"). 26 Del. C. §202(a)-(b). Section 202(b)'s only caveat is an indication that the Commission has limited jurisdiction over such entities only "as may be necessary to implement" sections 203C (water) and 203D (wastewater) regarding the issuance of CPCNs. *Id.* While counties generally do not need a CPCN, they are required to obtain Commission approval under limited circumstances, such as when a County extends wastewater service into an area already covered by a Commission CPCN. *See* 26 Del. C. §203D(b). Thus, in these limited circumstances, the Commission does have limited jurisdiction over governmental entities.

13. When the General Assembly amended title 26 to bring wastewater utilities within the Commission's jurisdiction, it likely recognized the Commission's limited role regarding utilities operated by governmental units and subdivisions. Section 203D(b) provides, in full:

(b) Although municipalities, governmental agencies, and wastewater authorities or districts engaging in or desiring to engage in the business of a wastewater utility are not required to obtain a certificate of public convenience and necessity from the Commission for any existing or new service territory, these entities shall supply to the Commission a description of any existing service territory for wastewater service no later than October 4, 2004, and shall promptly give notice and a description of any extension of wastewater territory or new wastewater service territory to the Commission. Such entity shall

not extend service in areas, which the Commission has granted a certificate of public convenience and necessity to another wastewater utility without receiving the approval of the Commission. Any wastewater utility shall not extend its territory into a service territory of a municipality, government agency or wastewater authority or district without the approval of such entity and then obtaining approval of a certificate of public convenience and necessity from the Commission under this section. A municipality desiring to provide wastewater service to any property outside its municipal boundary must file with the Commission a petition requesting wastewater service from the municipality executed by the landowner of record of such property.

26 *Del. C. §203D(b)*. Thus, in 2004, when this statute was enacted, the governmental entities listed were required to supply the Commission with their "service territory". AWMI does not dispute that the County is one of the covered entities, that the County provided its territory to the Commission in a timely fashion, and that the Proposed Service Territory is within the County's "service territory."¹¹

14. AWMI's primary argument is that because of the County's actions over the last six years, the Commission should ignore the County's submissions of its service territory because, essentially, it cannot presently provide wastewater service to that area, or cannot provide it in a timeframe that AWMI deems reasonable. AWMI's position is untenable for a number of reasons.

¹¹ The County re-submitted its service territory to the Commission in 2008, after it had taken over a wastewater facility operated by Bass Properties, Inc. (See Objection, Ex. C). Like the submission in 2004, the service territory map submitted in 2008 also includes the Proposed Service Territory.

A. Section 203D(b) Bars AWMI's Application as a Matter of Law.

15. First, and most importantly, the plain language of title 26 prohibits this Commission from granting AWMI's Application. Clearly, under section 203D(b), AWMI "shall not extend its territory into a service territory" of the County without receiving its approval and then obtaining a CPCN from the Commission. AWMI's argument that the Proposed Service Territory is not within the County's territory because it is not actually providing service (or cannot in a timeframe that AWMI deems acceptable) is premised on the faulty assumption that the Commission somehow has the power to second-guess, or challenge, the territory that the County has claimed as its service territory. To be sure, the County currently claims the Proposed Service Territory to be within its service territory, as it undisputedly did in 2004 and again in 2008. Unlike its power with respect to regulated wastewater utilities, the Commission has no general supervision and regulatory powers over the County's service territory.¹²

15. Second, in addition to ignoring the plain language of section 203D(b), AWMI's argument would impermissibly interject the Commission into assessing the reasonableness of the County's development plans. As the County points out, it is required to undergo a comprehensive development planning process pursuant to the Quality of Life Act of 1988 in conjunction with the Office of State Planning Coordination. *See generally* 9 Del. C. §§2651, *et seq.* Under

¹² *Cf.* 26 Del. C. §201(a) (giving the Commission "exclusive original supervision and regulation of all public utilities and also over their rates ... service territories and franchises...").

that statute, the County is required to provide a "Comprehensive Development Plan" to the Governor's Advisory Council on Planning Coordination every five years. 9 Del. C. §2660(a). The Comprehensive Development Plan must include, among other things, "a water and sewer element correlated to principles and guidelines for future land use, indicating ways to provide for future potable water, and wastewater disposal for the area." 9 Del. C. §2656(g)(3). After a plan is approved by County Council, land use maps forming part of the plan "shall have the force of law, and no development, as defined in [the Quality of Life Act] shall be permitted except in conformity with the land use map or map series and with land development regulations enacted to implement the other elements of the adopted comprehensive plan." 9 Del. C. §2659(a) (emphasis added). As indicated above, the County's development of its wastewater services in the SSSA district, while not acceptable to certain landowners, Toll Brothers and AWMI, is part of its planning process required by statute and may "have the force of law." Regardless of whether the Commission agrees with the progress of the County's development or how it has seemingly handled the Warrens' requests for County sewer, the Commission simply does not have the power or jurisdiction to modify the County's service territory.

16. The Commission's lack of power and jurisdiction over the County's service territory, without detailed statutory or regulative guidance, is for good reason. How would the Commission determine what is reasonable with respect to the County's progress? What if, instead of seeking encroachment today in 2010, AWMI submitted its application

in August 2004. Lack of authority aside, surely it would be unreasonable in that instance to modify (or revoke) the County's territory because the County could not provide wastewater service to the Proposed Service Territory in one month's time. On the other hand, what if thirty years go by and the County still has not provided County sewer to the Proposed Service Territory? Should the Commission in that case grant AWMI's Application? In that instance, the property owners may have legal redress against the County.¹³ However, unless the statutory scheme is vastly and comprehensively altered in a thoughtful fashion to give the Commission the proper jurisdiction and the guidance on how to resolve disputes between its regulated utilities and governmental entities, the Commission would still lack the power and jurisdiction to modify the County's claimed territory. Simply, the issue is one of territory and a separation of state and local government established in various statutory provisions, not only in title 26, but also in the Quality of Life Act in title 9, as well as in various provisions pertaining to State planning in title 29.

B. The Commission's Decisions in the Town of Milton Matter is Distinguishable.

17. In concluding that the Commission has no jurisdiction over the County's claimed service territory and that AWMI must first obtain the County's consent before serving in that area, the Commission is mindful of its 2007 decision in PSC Dockets Nos. 07-WW-002 and 07-WW-

¹³ Indeed, the Warrens have already sued the County in Federal Court seeking to compel County sewer. That case is still pending. Although a Magistrate has recommended the dismissal of the complaint, the decision appears to be premised on a failure of the plaintiffs to exhaust their remedies. (See AWMI's Appendix, Ex. 10).

006, relating to AWMI's applications to provide wastewater services to parcels of land located near the town of Milton.¹⁴ There, the Commission granted CPCN applications to Artesian to provide wastewater service in areas designated by the town of Milton, under 203D(b), as its service territory. However, as the Commission cautioned there, the service territory designed by Milton was territory outside of its municipal boundaries. Thus, the Commission carefully limited its holding under the specific facts and circumstances of that proceeding - in the context of a municipality using the "service territory" description in 203D(b) to claim "an exclusive, preemptive right to serve presently unserved areas beyond its corporate boundaries." (See Order No. 7209, pp. 3, 22). The Commission there believed, in that context, it was not the General Assembly's intent in enacting 203D(b) to "empower a municipality to use the notice process (without more) to force non-residents into a sewer service arrangement with the municipality that the non-residents do not want, or do not prefer, and which they will have no political voice to try to control." (*Id.* at p. 23). The Commission stated that a government's exercise of a "veto" over landowner choice "might be viewed as reasonable, and acceptable, if it would come from the landowner's own government. It seems less acceptable when the landowner's choice of provider is denied by a town government in which the non-resident has no political say." (*Id.*). The Commission further expressed its concern that Milton's reading of the statute would "work a change in the

¹⁴ A copy of the Milton decision, PSC Order No. 7209 (June 19, 2007), is included in AWMI's Appendix at Ex. 11.

traditional view of the ability of a municipality to exercise its 'governmental' powers outside its corporate boundaries," noting that when municipality acts beyond its boarders it does so in a "proprietary" - not governmental - capacity. (*Id.* at 24, and note 38).

18. Here, the Commission is not confronted with a governmental body using what was described in Milton as "the notice provision of 203D(b)" to provide service outside of its boarders. Thus, the concerns the Commission thoroughly articulated in the Milton decision are not present here. Here, unlike the residents in the territory claimed by Milton, residents in the Proposed Service Territory have a political voice in the County's development. Indeed, the Comprehensive Planning Process, which includes the development of its sewer systems, is a public process. As the Commission stated in its Milton decision, a government's exercise of a "veto" over landowner choice might be reasonable and acceptable if it comes from the landowner's own government.¹⁵ Here, such a veto is coming from the landowner's own government. Finally, because the County is not acting outside its own boarders, it is not acting in a "proprietary capacity," as the town of Milton was acting in seeking to provide wastewater services outside of its boarders.

C. The County Code is Not Preempted by Title 26.

¹⁵ Indeed, the District Court Magistrate's decision in the Warrens' lawsuit details an extensive process whereby the landowners have taken advantage of various administrative avenues to pursue sewer from the County. See AWWI Appendix, Ex. 10.

19. AWMI's preemption argument is also rejected. The Delaware Supreme Court recently stated the preemption test for potential conflicts between State statutes and county ordinances as follows:

In Delaware, the State and its political subdivisions are permitted to enact similar provisions and regulations, so long as the two regulations do not conflict. But 'where [a] conflict exists between a state statute and a municipal ordinance, the statute must always prevail.' The predominate test for conflict in a preemption analysis is whether the state statute was intended to be exclusive.

Legislative intent to make a state statute exclusive of any regulation of the same subject matter by a political subdivision may be express or implied. Express exclusivity intent exists where the statutory text or legislative history explicitly provides or demonstrates that the state statute is intended to replace or prevail over any preexisting laws or ordinances that govern the same subject matter. Implied exclusivity intent may be found where the two regulations are inconsistent; for example, where a state statute prohibits an act that is premised by a local ordinance. To be inconsistent by implication, however, the local ordinance must hinder the objectives of the state statute.

Cantinca v. Fontana, 884 A.2d 468, 474-75 (Del. 2005) (citations and footnotes omitted).

20. AWMI claims that the County Code infringes upon the Commission's exclusive and original jurisdiction over privately-owned public utilities because it bars those utilities from providing service in the County. (AWMI Mem., pp. 9-10). However, this argument ignores section 203D(b), which requires the County's consent to serve in its territory. Thus, far from there being any conflict between title 26 and the County Code, the Code and title 26 are, in fact, in perfect harmony.

21. AWMI's reliance upon *In re Slaughter Beach Co.*, 427 A.2d 893 (Del. 1981) is misplaced. There, the Court held that title 26 preempted a town charter conferring power on the town's commissioners to regulate public utilities within the town. Unlike the town charter in *Slaughter Beach*, the County Code does not confer power upon the County to regulate public utilities or interfere with the Commission's jurisdiction to regulate them. And even if the County's refusal to give permission to AWMI or other private wastewater utilities to operate in the County (by County Code or otherwise) can be viewed somehow as regulating private utilities, such regulation is expressly permitted by the very statute AWMI claims preempts that regulatory power.

D. The Commission has No Jurisdiction to Modify or Revoke the County's Service Territory.

22. An additional problem with Artesian's Application is that it may be seen as a revocation of the County's service territory. Unlike with private utilities, there is no provision in title 26 that allows the Commission to revoke or modify the County's service territory.¹⁶ Again, the absence of such a provision is indicative of the fact that, as already noted, the Commission does not have jurisdiction over the counties.

E. Even Ignoring the Consent Requirement, Granting the Application May Require a Public Interest Analysis That Even AWMI Argues is Impermissible.

¹⁶ Cf. 26 Del. C. §203D(j) (providing that the Commission "may, for good cause, undertake to suspend or revoke a [CPCN] held by a wastewater utility.").

23. Finally, the Commission notes that a decision to second guess the County's service territory would require the Commission, as indicated above, to make a judgment call regarding the reasonableness of the County's development of its sewer system. Such an analysis would inevitably require the Commission to consider issues that relate to the public convenience and necessity. According to AWMI, section 203D itself prohibits the Commission from considering such issues in addressing AWMI's Application. As AWMI points out, section 203D(d) provides that, for applications filed under section 203D(d)(3) (existing developments where applicant obtains a majority of signatures), the Commission may consider the public convenience and necessity. Thus, AWMI contends that the Commission cannot consider the public convenience and necessity for the Proposed Service Territory, since its Application was filed under section 203D(d)(2), not (d)(3). Thus, Artesian's own submission seems to argue against the Commission making a judgment call on the County's service territory. However, as discussed above, the plain language of 203D(b) requires the County's approval to serve in its service territory. The Commission need not decide whether it can, or cannot, consider the public interest in addressing applications filed under section 203D(d)(2).

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

For the foregoing reasons, the Commission hereby denies the Application filed by Artesian Wastewater Management, Inc. for a Certificate of Public Convenience and Necessity in this docket.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joann T. Conaway
Commissioner

Commissioner

/s/ Jeffrey J. Clark
Commissioner

Commissioner

ATTEST:

/s/ Alisa Carrow Bentley
Secretary