

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

IN THE MATTER OF THE COMMISSION'S)	
INVESTIGATION ON ITS OWN MOTION,)	
WHETHER BASS PROPERTIES, INC. UNLAW-)	
FULLY ABANDONED AND/OR DISCONTINUED)	PSC COMPLAINT DOCKET
ANY WASTEWATER BUSINESS, OPERATIONS,)	NO. 357-09
OR SERVICES PROVIDED UNDER A CERTIFI-)	
CATE OF PUBLIC CONVENIENCE AND)	
NECESSITY ISSUED BY THE COMMISSION)	
ON APRIL 26, 2005 IN PSC DOCKET NO.)	
05-WW-003, ORDER NO. 6608)	
(OPENED JANUARY 6, 2009))	

ORDER NO. 7777

This 6th day of July, 2010, the Commission determines and orders the following:

PROCEDURAL BACKGROUND

1. On January 6, 2009, the Commission issued a Rule to Show Cause Order (the "Show Cause Order") against Bass Properties, Inc. ("Bass"). (See PSC Order No. 7506 (Jan. 1, 2009)). The Show Cause Order, issued in response to information obtained by Commission staff ("Staff"), opened this complaint docket for the purposes of investigating and determining whether Bass abandoned or discontinued its regulated wastewater business, which provided wastewater services to approximately 300 residential customers in a development in New Castle County known as Lea Eara Farms ("Lea Eara"), in violation of 26 Del. C. §203A.¹

¹ A certificate of public convenience and necessity (a "CPCN") issued by the Commission to Bass, authorizing it to provide wastewater service to Lea Eara, requires that Bass comply with all federal, state, county, and local statutes, ordinances, orders, regulations, rules and permit conditions that are applicable or may become applicable. (See PSC Order No. 6608 (Apr. 26, 2005)). Section 203A(c) prohibits the discontinuance or abandonment of a

2. On March 17, 2009, Bass filed its Response to Rule to Show Cause, in which it claimed that it was not in violation of section 203A by improperly abandoning or discontinuing its wastewater services because, it claimed, it had "transferred" operations to New Castle County. Bass claimed it transferred the utility to the County pursuant to a Trust Declaration, dated October 22, 1990 (the "Trust Declaration"), it executed in connection with the initial permitting of the facility. Bass' response acknowledged that its claimed transfer was against the wishes of the County. (See Response to Rule to Show Cause, p. 3) (acknowledging that it was "clear from the County's correspondence that it did not want to accept responsibility for the maintenance and operation of the facility...").

3. On May 1, 2009, Staff filed a Motion of Commission Staff to Compel Compliance with 26 Del C. §§203A and 215² ("Motion to Compel"), which pointed out that the County did not assume the facility voluntarily, but rather only under protest and on an emergency basis to protect its residents. (See Motion to Compel, ¶7). Staff also noted that Bass' attempted transfer was in violation of section 203A(c), which does not relieve a party from obtaining approval even if the utility will be operated by another entity. (*Id.*, ¶8). Commission Staff also directed the Commission to previous instances where Bass had violated Commission rules and orders with respect to

regulated public utility without first obtaining authorization from the Commission.

² Section 215 prohibits a public utility from, among other things, selling, leasing, assigning or otherwise disposing of any essential part of its franchise, plant, equipment or other property, necessary or useful in the performance of its duty to the public, unless such sale or lease or other disposition is conducted in the ordinary course of business. See 26 Del. C. §215(a)(1) and (g).

its operation of the wastewater facility. (*Id.*, ¶10). Bass responded to Staff's Motion to Compel, and the Commission heard argument on June 2, 2009. Following argument, the Commission issued an order determining Bass to be in "violation of 26 *Del. C.* §§203A and 215 by abandoning and attempting to transfer its wastewater service obligations to [Lea Eara] without Commission approval." (PSC Order 7586, ¶ 2 (Jun. 2, 2009)). The Commission further ordered Bass to file an appropriate application to comply with those code sections.

4. On June 12, 2009, Bass filed an Application for Approval of the Public Service Commission to Transfer Lea Eara Spray Irrigation Facility to New Castle County (the "Transfer Application"). Staff responded to the Transfer Application, arguing, among other things, that it should be treated as an application for approval of an abandonment since CPCN's are non-transferable. Having intervened in the action, the County objected to the Transfer Application, noting that Bass' abandonment came after the Department of Natural Resources and Environmental Control ("DNREC") cited Bass for possible leakage from a lagoon in the wastewater facility. The County noted that it had spent a considerable amount of money to help bring the facility into compliance with DNREC's violation.

5. Following argument on Bass' Transfer Application on November 19, 2009, the Commission assigned the matter to a hearing examiner, pursuant to 26 *Del. C.* §502 and 29 *Del. C.* ch. 101, to hold an evidentiary hearing on the Transfer Application, which the Commission directed be treated as an application for abandonment

approval under 26 Del. C. §203A(c). (See PSC Order No. 7697 (Dec. 8, 2009)).

6. On March 11, 2010, the assigned Hearing Examiner conducted an evidentiary hearing at the Commission's offices in Dover. The record from the evidentiary hearing consists of a transcript of 181 pages, 82 hearing exhibits, including a Stipulation of Facts filed by the parties. At the hearing, the County presented two witnesses who testified regarding repairs made to the wastewater facility since taking it over from Bass and in response to working with DNREC regarding its violation. Bass presented no witnesses. Notably, although Staff identified Bass' sole representative, Joseph Capano, Jr., as a witness on its witness list and requested that he be made available, Mr. Capano failed to appear at the evidentiary hearing.

7. Following the hearing, the parties filed written submissions regarding whether or not Bass should be required to transfer title to the utility (including three parcels consisting of a total of approximately 35 acres) on which the utility sits to the County. Although Bass had no objection to transferring title to the "utility system," Bass believed that such a transfer should not include the land. Both Staff and the County argued that a transfer of the utility system must necessarily include the real property.

8. On April 19, 2010, the Hearing Examiner reported his Findings and Recommendations (the "Report"). In the Report, the Hearing Examiner carefully examined all of the documentary and testimonial evidence and concluded, as did the Commission previously, that Bass had violated both sections 203A(c) and 215 in abandoning the

facility by purportedly transferring operations to the County. (See Report, ¶¶ 36-39). The Hearing Examiner concluded, however, that Bass' application for approval of its abandonment should be granted, but only if it first transferred title to the utility (and the real property) to the County. (*Id.*, ¶¶ 42, 44). The Hearing Examiner stated that without satisfying this condition, he recommends that the Commission find that Bass failed to meet its burden under section 203A. (*Id.*, ¶ 42). Although not recommending a specific penalty, the Hearing Examiner noted that penalties were available to the Commission under 26 *Del. C.* §217. (*Id.*, ¶¶ 57-58).³

9. Bass, Staff and the County timely filed exceptions to the Hearing Examiner's Report. Although the parties did not challenge the many factual determinations made by the Hearing Examiner, they took issue with certain legal conclusions. Bass objected to the recommendation that the Commission order a transfer of the land as well as the utility to the County. Both Staff and the County believed that the Commission could order Bass to reimburse the County for expenses that Bass did not dispute were incurred by the County in repairing the facility. Staff and the County also argued that the Transfer Application should be denied and Bass' CPCN should instead be revoked (Bass had stated in response to a data request that it was not

³ As recognized by the Hearing Examiner, section 217 authorizes the Commission to impose a penalty of \$1,000 per day for each day a public utility is non-compliant with a Commission order. In this regard, the Hearing Examiner found that Bass had been noncompliant for at least 195 days - from September 3, 2008, when it abandoned its wastewater operations without approval, until March 17, 2009, when it responded to the Show Cause Order. (See Report, ¶ 58). The Commission notes that Bass remained, and still remains, non-compliant, even after filing its response to the Show Cause Order, and, accordingly, the Commission could find that the period of noncompliance under section 217 greatly exceeds the 195 days noted by the Hearing Examiner.

opposed to a revocation of its CPCN). Finally, they also argued that the Commission should order a transfer of the utility and the land, and not require it as a condition precedent to some other act (such as granting the Transfer Application).

10. On June 1, 2010, the Commission heard argument regarding the exceptions to the Hearing Examiner's Report. At the conclusion of argument, the Commission voted unanimously to require a transfer a title of the utility system, and the three parcels underlying it, to the County. The Commission also directed Bass to reimburse the County in the amount of \$545,327.75, which represents the amount that Bass stipulated the County incurred in repairing Bass' wastewater facility. This is the Commission's written order implementing the rulings reached on June 1, 2010.

DISCUSSION

11. Except as otherwise provided, the Commission adopts the findings in the Hearing Examiner's Report, and, in the sake of brevity, will not report those findings herein. That being said, the Commission very briefly summarizes the following facts, as either undisputed or as found by the Hearing Examiner:

a. On April 26, 2005, the Commission issued Bass a CPCN, which, provided, among other things, that Bass was to abide by federal, state, and county law, as well as any applicable ordinances, orders, regulations, rules and permit conditions. (See PSC Order No. 6608 (Apr. 26, 2005); Report, ¶ 3; and *supra* note 1).

b. In January 2008, DNREC notified Bass that there was a potential issue with increased nitrate levels at Bass' wastewater facility. (Report, ¶ 19).

c. On June 24, 2008, DNREC served Bass with a notice that the facility was in violation of DNREC regulations due to the increased nitrate, as well as sodium and chloride, levels detected at one of the facility's monitoring wells. (Report, ¶ 19).

d. On September 3, 2008, with the notice of the violation unaddressed, Bass walked away from the facility under the auspices of transferring it to the County pursuant to the Trust Declaration. (Report, ¶ 24).

e. Since taking over operation of the facility under protest on September 3, 2008, the County has paid \$338,680.71 in facility repairs (i.e outside vendors, parts and equipment), \$49,250 in pumping and hauling operations to eliminate possible overflow, and \$157,397.04 in internal labor costs, for a total amount, as stated above, of \$545,327.75. (Report, ¶ 25).

f. Bass has repeatedly claimed throughout these proceedings that the utility historically operated in a deficit and that Bass has no funds with which to reimburse the County for the expenses it has incurred.⁴

⁴ See, e.g, Transcript of Commission Meeting, dated Nov. 19, 2009, p. 33 (where Bass' counsel stated that he doesn't know how Bass will resolve the financial issues with the County since "there is no kind of money from which to pay the County."); Transcript of Evidentiary Hearing, dated Mar. 11, 2010, p. 124 (where Bass' counsel claimed that the evidence showed Bass' inability to pay for any of the sums of money that New Castle County has spent or penalties, to the extent penalties are recommended.); Transcript of Commission Meeting, dated Jun. 1, 2010, p. 188 (where Bass' counsel stated

g. Bass has a history of ignoring Commission directives, and has been questioned previously about: 1) not properly informing ratepayers of a rate increase;⁵ and 2) a prior, potential abandonment due to a change in ownership, potentially in violation of 26 *Del. C.* §203A(c) and §215.⁶ (Report, ¶32(f)).

12. With that backdrop, and, again, based upon the extensive factual analysis of the Hearing Examiner, incorporated herein, the Commission addresses certain legal conclusions reached by the Hearing Examiner and the issues raised by the parties' written exceptions.

I. Transfer of Title to the Utility System and Related Real Property.

13. 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 purpose of carrying out the provisions of this title." 26 *Del. C.* §201(a); see also *Georgia-Pacific Corp. v. Delmarva Power & Light Co.*, 1992 WL 396307 (Del. Ch.) (recognizing the Commission's general and exclusive jurisdiction over service classifications). One of the purposes of the Public Utilities Act - if not the primary purpose - is that the Commission ensure that its regulated utilities provide safe and adequate utility services at reasonable rates. See, e.g., 26 *Del. C.* §308(b) (stating that it is

that Bass has no bank accounts or money and that the only asset is the real property).

⁵See PSC Order No. 7161 (Apr. 24, 2007) (granting Bass Properties a rate increase) and PSC Order No. 7225 (July 3, 2007) (noting that Bass Properties "on several instances, had failed to comply with earlier Commission directives" regarding notifying customers of a rate increase)).

⁶See letters from the former Deputy Attorney General Gary A. Myers to Bass, dated Jan. 12, 2006 and February 6, 2006. (Evidentiary Hearing Exs. (hereafter, "Hr. Ex." 1 and 3)).

the "legislative intent that efficient, sufficient and adequate services, products and facilities be provided by public utilities."); *Public Service Commission v. DiPasquale*, 2000 WL 303632, *6 (Del. Super.) ("[I]n its regulation, the PSC is to consider the 'efficiency, sufficiency and adequacy' of the utility's service and protect against unreasonable rates while ensuring a reasonable rate of return for the utility.") (citations omitted).

14. In determining whether to approve Bass' Transfer Application (with or without conditions), the Commission is mindful of the extent of its jurisdiction over Bass' property rights so far as necessary to ensure that the residents of Lea Eara not suffer further risk that the wastewater service they receive will be inefficient, insufficient or inadequate as a result of Bass' actions. The undisputed facts show that Bass abandoned the wastewater facility upon receiving notice from DNREC that the facility was potentially leaking and would need significant repairs. The County took over the facility, only under protest and on an emergency basis to protect the residents of Lea Eara. It is undisputed that the County spent \$545,327.75 to repair Bass' facility in addressing DNREC's violation. Bass wants nothing further to do with the wastewater facility, agrees that title to the system should be transferred (as contemplated in the Trust Declaration), but asserts that title to the real property should remain with it, for the simple reason that the property may be valuable some day. Bass takes this position, despite the fact that it claims it has no funds with which to reimburse the County for the undisputed amounts the County has spent on Bass' behalf. Indeed, Bass

has repeatedly threatened to file bankruptcy, which, at the very least, creates a cloud over the title to the real property on which Bass expects the County to operate and maintain the wastewater facility into the indefinite future. Given these unique circumstances and the objectives of the Public Utilities Act in ensuring safe and adequate utility services, the Commission agrees with the Hearing Examiner that title to the Lea Eara wastewater facility should be transferred to the County, and the Commission rejects Bass' contention that title to the real property should somehow be separated out and retained by Bass.

15. The only difference between the Commission's decision with respect to this issue and the recommendation of the Hearing Examiner is that the Commission orders Bass to transfer full title affirmatively and not require the transfer only as a condition precedent to granting Bass' Transfer Application. The Commission agrees with the exceptions filed by Staff and the County that the Transfer Application should be denied and, instead, Bass' CPCN revoked. Given the facts of this case, it is clear that Bass is, and has been, in material noncompliance with title 26, including, but not limited to, sections 203A(c) and 215. Accordingly, Bass' CPCN should be revoked pursuant to 26 *Del. C.* §203D(j)(1).

16. Bass has consented to a revocation of its CPCN. Therefore, this decision, sound as it is without Bass' agreement, should be uncontroversial. Revoking the CPCN also avoids the necessity of a Commission finding that the abandonment or discontinuance is "reasonable, necessary and not unduly disruptive to the present or

future public convenience and necessity." See 26 Del. C. § 203A(c)(3). This the Commission cannot do, even if conditioned upon Bass' transferring full title. Nothing, in the Commission's view, can make Bass' abandonment in 2008 reasonable and necessary today. It also bears repeating that applications for approval of abandonment or discontinuance of utility operations must be filed before a utility actually abandons or discontinues its operation. Finally, the Commission recognizes at least one practical problem that would result from granting the Transfer Application on the condition of transfer of title. Bass may not transfer title,⁷ and the Commission and the parties would be in the position they were in over a year ago prior to the commencement of this complaint docket. Such an outcome is clearly undesirable.

II. Ordering Transfer of Full Title is Consistent with Bass' Expectations as Evidenced by the Trust Declaration.

17. The Commission believes that its decision to Order Bass to transfer full title to the utility system and the associated real property is consistent with the covenants in Bass' Trust Declaration. Bass was required to execute the Trust Declaration in connection with the operation of the Lea Eara development. (See Trust Declaration, p. 1). That document ensured the continuity of maintenance and operation of the utility system, through Bass' covenant that Bass or its predecessor would maintain and operate the system. (See *id.*). The document contemplated two scenarios where the system could be turned

⁷ During argument, Commission Clark asked Bass' counsel what Bass would do if the Commission imposed a condition that Bass transfer title to the facility and the land to the County. Counsel responded that he did not know and would have to consult with bankruptcy counsel. (See Transcript of Commission Meeting, dated Jun. 1, 2010, p. 192-93).

over to the County, however, both of which provide for the transfer of title to the "utility system" to the County.

18. The first scenario contemplates a voluntary transition. Section 5(e) of the Trust Declaration provides that Bass covenants and agrees in connection with the "utility system" that Bass, "at its expense, shall, unless or until [Bass] defaults ... [a]fter 100% completion of the utility system (as defined hereinabove) and acceptance thereof by New Castle County, grant, convey, assign and transfer to New Castle County full title to the utility system free and clear of any liens or encumbrances together with any rights of entry required by [the County] for the purpose of operating and maintaining said utility system."

19. The second scenario, alluded to in section 5(e), contemplates a County takeover upon a default by Bass under the Trust Declaration. (See Trust Declaration, § 7). In that event, the document provides that:

[Bass] shall have no further right, title or interest in the utility system **or the property governed by this Declaration** and shall not be entitled to any portion of the proceeds resulting from any sale of such utility system **or property**. [Bass] shall in that event grant, convey, assign and transfer to [the County] full title to the utility system.

(Trust Declaration, ¶8 (emphasis added)).

20. The Trust Declaration provides further that:

the utility system includes all appurtenances such as manholes, pumping stations, and the sewage treatment plant including affluent line to point of final disposal and spray irrigation facilities, heretofore constructed or to be constructed, including all easements incident to the ownership and operation of said sewage

system. *The plant, wastewater treatment facilities, storage and distribution facilities includes the sewer main and lateral lines, heretofore constructed or to be constructed, including all easements incident to the ownership and operation of said treatment system and specifically including the spray irrigation field, aeration pond and wastewater storage ponds.*

(Trust Declaration, ¶2 (Hr. Ex. 77)).

21. These provisions read with the Trust Declaration as whole and with an understanding of the makeup of the Lea Eara "utility system,"⁸ clearly evidence an intent by Bass to transfer full title to the utility system, which, the Commission concludes, includes the associated real property.⁹ Reading the document otherwise, would render, with respect to a takeover upon a default, the reference to Bass having "no further right, title or interest in the utility system **or the property governed by this Declaration**" in section 8 meaningless.

22. In analyzing the Trust Declaration, the Commission need not, as the Hearing Examiner believed, conclude that Bass breached the Trust Declaration, although the undisputed facts clearly indicate that Bass was in default. Rather, the Commission emphasizes these

⁸ The Hearing Examiner described the wastewater system at Lea Eara as including, among other things, a 1.43 million gallon aerated lagoon, a second, 9.4 million gallon lagoon for "polishing and storage," and 13.5 acres of spray irrigation fields for disposal. (See Report, ¶26). It is curious whether title to the real property of the utility system could, as legal and practical matter, be separated when the utility system - a spray irrigation, wastewater treatment plant - is necessarily made up of lagoons and spray fields. The Commission need not engage in such an analysis, however, because, if such was the intended result, the Trust Declaration is woefully deficient in making that intent apparent.

⁹ The wastewater utility system is situated upon three parcels, totaling approximately 35 acres of land. (See Hr. Exs. 38-40). The only evidence as to the total value of the property is the County's tax records, indicating an appraised value of \$87,200. (REPORT, ¶ 31).

provisions to demonstrate that its decision to order a transfer of full title under 26 *Del. C.* §201 is consistent with promises and covenants Bass made almost two decades ago. Bass' intent to transfer full title to the County, as demonstrated in the Trust Declaration, also contradicts its current claim that requiring a transfer of title would be a "forfeiture without compensation." Bass' claim that this result is "inequitable" is curious, to say the least, considering the fact that Bass' defense to the County's demands for restitution has been, solely, its inability to pay.

III. Bass is Required to Reimburse the County's Expenses Pursuant to 26 *Del. C.* § 201.

23. In addition to requiring transfer of title to the facility, including the three parcels of associated real property, the Commission will also require that Bass reimburse the County in the amount of \$545,327.75, the amount the County spent repairing Bass' facility.¹⁰

24. As stated above, the Commission has broad jurisdiction over its regulated utilities and their rates, property rights, equipment, facilities, service territories and franchises pursuant to 26 *Del. C.* §201(a). In ordering that Bass reimburse the County under its section 201 powers, the Commission emphasizes that Bass did not even dispute that the expenses incurred by the County were reasonable and necessary. Moreover, it is likely that the County will incur further significant expenses associated with the facility, as the undisputed

¹⁰ As discussed during argument on the exceptions, to the extent the County can determine that it has collected customer payments during the period it incurred the expenses discussed above, the County should provide a credit to Bass in the amount of those receipts. (See Transcript of Commission Meeting, dated Jun. 1, 2010, pp. 210-12).

facts established that the County has obtained estimates totaling as much as \$600,000 from prospective contractors for additional repairs that may be necessary at the facility. (See Hr. Ex. 22, ¶ 19). Finally, we are aware of no evidence that DNREC has withdrawn its notice of violation. In light of these facts, the Commission believes that Bass should, at the very least, reimburse the County for the undisputed expenses already paid, \$545,327.75.

25. Finally, in ordering reimbursement, the Commission observes that it could have issued significant penalties to Bass pursuant to 26 *Del. C.* §308(a).¹¹ That statute allows the Commission to impose penalties sufficient to restore utility facilities found to be inefficient, insufficient or inadequate as may be necessary to restore such facilities. The Commission believes substantial evidence exists to support a finding that the facilities are inefficient, insufficient or inadequate for purposes of section 308. There is no evidence that DNREC has removed the notice of violation and additional repairs may still be needed. Further, there presently remains a lingering cloud over the title to the utility system created by Bass' refusal to transfer full title. Although the County repaired the facility sufficient to allay immediate concerns, there is still substantial support in the record for penalties under this section. Although the Commission could order penalties under section 308, it feels that reimbursement to the County is more appropriate given the facts and circumstances of this case, especially in light of Bass' apparent lack of liquidity.

¹¹ These penalties could be issued in addition to any penalties issued under 26 *Del. C.* § 217, as discussed *supra* note 3.

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

1. The Application of Bass Properties, Inc. for Approval of the Public Service Commission to Transfer Lea Eara Spray Irrigation Facility to New Castle County, dated, June 12, 2009, is denied.

2. Within thirty (30) days of the date of this Order, Bass Properties, Inc. shall transfer full title to the utility system operated and maintained pursuant to PSC Order No. 6608 (Apr. 26, 2005) (PSC Docket No. 05-WW-003). Such transfer of title shall include the three parcels of real property identified by New Castle County Tax Parcel Nos. 1300230061, 1300240111, and 1300240112. Bass Properties, Inc. shall not transfer said utility system and real property to any other individual or entity.

3. For the reasons discussed above, the Commission orders Bass Properties, Inc. to reimburse the County in the amount of not less than \$545,327.75.

4. Effective sixty (60) days from the date of this Order, the Certificate of Public Convenience and Necessity issued to Bass Properties, Inc. pursuant to PSC Order No. 6608 (Apr. 26, 2005) shall be deemed revoked pursuant to 26 Del. C. §203D(j).

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5. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

Commissioner

ATTEST:

/s/ Alisa Carrow Bentley
Secretary