BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:	:
	:
	: EAB Nos.
The Appeal of Tidewater Utilities, Inc.	: 95-03 & 95-04
from the Secretary's Decision and	:
Order No. 95-WR-0024	:
	:

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on December 12, 1995. The Board members present were Clifton H. Hubbard, Jr., Chairman, Joan Donoho, Robert S. Ehrlich, Ray K. Woodward, and Charles Morris. Diana M. O'Neill, Deputy Attorney General, advised the Board. Richard J. Abrams, Esquire, represented Tidewater Utilities. Mary B. Graham, Esquire, represented Artesian Water Company, Inc. Kevin P. Maloney, Esquire, represented the Secretary of the Department of Natural Resources and Environmental Control ("DNREC"). For the reasons that follow, the Board affirms the Secretary's Order No. 95-WR-0024.

STATEMENT OF THE CASE

This case is before the Board on an appeal filed by Tidewater Utilities of the Secretary's Order No. 95-WR-0024 granting Artesian's applications for Certificates of Public Convenience and Necessity ("CPCN") to provide central public water to properties in southern New Castle County owned by Robert L. and Sarah C. Emerson, James D. and Mary E. Deeney, and William and Margaret Conner. After the entry of the disputed order, the Secretary granted Artesian additional CPCNs for similarly situated territories. Tidewater has also appealed the Secretary's decision to grant the additional CPCN. The appeals were consolidated for hearing and decision by the Board. The Board granted Artesian's petition to intervene as a party to the appeals.

The parties submitted pretrial memoranda and asked that the Board hear oral argument on the questions of law raised by the appeal in lieu of holding an evidentiary hearing because the facts are substantially undisputed. Although the Board denied the parties' request and held an evidentiary hearing, it did allow counsel to the parties to present legal arguments and respond to the Board's questions regarding their respective positions.

SUMMARY OF THE EVIDENCE

1. Jeffrey F. Alexander was sworn and testified in support of Tidewater's position before the Board as follows:

He is the Vice-president and General Manager of Tidewater Utilities.

He directly supervised the preparation of the map of the Water Utilities Service Areas in Southern New Castle County. The map was prepared using information in the CPCN applications of Tidewater Utilities and Artesian Water Company after consultation with DNREC employee Al Farling.

With some minor corrections, the smaller exhibit map attached to Tidewater's opening memorandum as Exhibit "C" is a fair and accurate representation of the service areas for which CPCNs have been issued and for which they are pending.

2. Bruce P. Kraeuter, P.E., was sworn and testified in support of Artesian's position before the Board as follows:

He is a vice-president and chief engineer for Artesian Water Company. He has been employed by Artesian for six years. He is responsible for all water supply operations and capital planning. Before Artesian, he worked for the New Castle County Water Resources Agency for 15 years on the technical aspects of planning management for waste water and water supply facilities.

Artesian has water service agreements with all the landowners involved in this appeal. He explained the entire process of providing water service to the landowners and they understood that Artesian would apply for CPCNs based on their agreements.

While all the landowners do not expect to develop their property immediately, virtually all envision their properties being developed at some point in time. Some of the properties are in the process of gaining subdivision approval. Approval for the first subdivision, Earnest Farms, will before the County Council at its next meeting. The landowners signed the agreements because of the quality service provided by Artesian and because they believe a CPCN will add value to their property. With a CPCN, the Agreement obligates Artesian to provide water service when the landowners actually want water service.

A water system needs a source of supply, treatment, transmission and storage in order to provide service. The source of supply can be either surface water streams or groundwater wells. The area where the properties at issue are located is south of the Canal and ground water wells are the source of supply. Artesian is interested in the construction of deeper wells to more confined aquifers. Deeper wells help avoid problems with potential contamination from surface activities and also avoid conflict with other users in the area.

The wells in the area of the properties at issue go into the Potomac formation aquifer. The Magothy and Mt. Laurel formation, also known as the water table, are aquifers located above the Potomac formation. Most uses in the area, such as agricultural and household, are typically supplied by wells into the shallow Mt. Laurel formation.

The water Artesian has pumped and examined contains naturally occurring iron in excess of the EPA standards for safe drinking water. In addition to removing the excess iron, Artesian adds chlorine and chloride to the water. Treatment is done centrally in a facility located in the vicinity of the well head. Central treatment is the most cost-effective and reliable system.

Water must be transmitted from the source of supply to the point of demand. Fire demand is a major consideration and is the driving force in the sizing of transmission lines. Fire demands significantly exceed the anticipated normal demand for domestic uses.

Storage facilities are necessary because water demand varies during the course of a day. The varied demand can be accommodated by adjusting the pumping rate or by storage. Artesian prefers to pump at a consistent rate and allow system pressure and service to be maintained by using stored supply. Storage is also used to provide additional water to meet the extraordinarily higher demands that may be anticipated from fire.

The centralization of a water system as opposed to a system of individual wells eliminates unnecessary redundancy in supply and gives the supplier much better control over the quality of the water going to the consumer. Also, a subdivision with individual wells would have no provision for fire protection.

In the Odessa/Fieldsboro area, Artesian's efforts are focused on the proposed Stonefield subdivision, where two wells are located.

In the Boyd's Corner area, Artesian has one production well in Chestnut Grove and two production wells on the Davis property. The Davis property wells will be used to service the Price farm. It also has one well on the Emerson property and two wells on the Lester property that in the future will be converted to production wells.

Artesian has two package treatment plants in place in the Boyd's corner area. On is in Chestnut Grove and one is on the Price farm. A package treatment plant is a small, completely contained treatment facility with a 10,000 to 20,00 gallon capacity. To remove iron from the water, Artesian uses a Manganese Green Sand Filter. The filter is periodically backwashed with clean water from a backwash holding tank. The iron solids removed from the water are taken off-site for disposal.

Artesian also has observation wells on the Emerson property, among others, as part of an exploratory drilling program in cooperation with DNREC. Observation wells are used to determine the long term yield of the aquifer.

For storage, Artesian has hydro-pneumatic tanks in place for each of the two subdivisions it is serving. Artesian will put in larger storage facilities when it is required to provide fire flow. The Fire Marshall mandates fire flow when the number of units in a subdivision exceeds twenty-five.

To date, Artesian has spent in excess of a half-million dollars on drilling in the area. Most of the drilling costs result from the depth of the wells. It only cost Artesian an extra $5,000 to drill eight inch wells instead of six inch ones. Artesian purchased two acres of land for each wellhead to comply with County wellhead protection requirements. Each acre cost approximately $30,000. Package plants cost approximately $150,000.

The total capacity of Artesian's wells in the areas at this time is approximately three million gallons per day. Although varying the diameter of the well might somewhat vary output, the capacity of a well is basically determined by the nature of the aquifer.

Artesian has put in wells on both the Emerson property and the Chestnut Grove development to provide a redundancy of supply for the entire system. The redundancy ensures that the region's needs will be met in the event of a power failure or other unforeseeable event.

Although Artesian anticipates having 24 customers in Chestnut Grove, it presently only has 12 customers there. Artesian is actively participating with a group of landowners in the Boyd's Corner area and anticipates significant development there in the next decade.

Artesian believes it made good business sense to put in a central system with deep wells even though currently only a 24 home development is under construction because it has service commitments in the region. It is installing facilities it will need to provide the service it is committed to provide. Artesian would not have taken these steps if it did not believe it had the exclusive right to service the areas covered by its agreements. Instead, the water system for the development would probably be a system of shallow individual wells. That system would be less reliable and would not provide fire protection. Also, in the long run, the system would cost more than a centralized one.

FINDINGS OF FACT

Based on the evidence, the Board makes the following factual findings:

1. Artesian Water Company entered into water service agreements with all the owners of the property at issue in this appeal.

2. The water service agreements are intended to bind any future owners of the property.

3. The water service agreements are intended to grant Artesian the exclusive right to provide water service to the properties at issue.

4. The water service agreements obligate Artesian to begin to provide water service to the properties when requested by the landowners under the terms of the agreements.

5. Artesian did not pay the landowners for entering into the water service agreements.

6. The territory Artesian proposes to serve consists of the individual landowners' property, which is not contiguous.

7. The water service agreements are petitions requesting service by a majority of the owners of the proposed territory to be served entered into for the purpose of obtaining certificates of public convenience and necessity to facilitate the provision of future water service.

8. On the basis of the water service agreements, Artesian, in fact, filed applications for Certificates of Public Convenience and Necessity with the Department of Natural Resources and Environmental Control under 7 Del.C. § 6077(a)(1)(ii), which mandates that the Secretary shall grant a CPCN if the applicant is in possession of a petition requesting such service signed by a majority of the landowners of the proposed territory to be served.

CONCLUSIONS OF LAW

Under 7 Del.C. § 6076, a water utility must not begin or expand its business or operation "without having first obtained from the Secretary a certificate that the present or future public convenience and necessity requires or will require the operation of such business or extension". The Secretary's issuance of Certificates of Public Convenience and Necessity are governed by 7 Del.C. § 6077. Section 6077 has been modified in recent years to eliminate the Secretary's discretion with regard to whether or not a certificate should be issued.

The General Assembly enacted the statute currently governing the issuance of CPCN to water utilities by DNREC in 1991. 7 Del.C. § 6077. Although the enactment essentially transferred and codified powers previously existing in the Public Service Commission, the 1991 enactment set out criteria for the issuance of CPCN. see statements of Senator Cordrey during Senate Debate on S.B. 144. In 1994, the General Assembly amended § 6077 and removed the Secretary's discretion to grant CPCN to water utilities without the consent of the property owners or the local government. The General Assembly passed the amendment, which places a premium on the existence of a signed water service agreement, in response to a public outcry against the existence of a scheme that provides for the granting of CPCN for large tracts of undeveloped property without the knowledge or consent of the actual owners of the property.

This appeal involves the propriety of the Secretary's grant of specific CPCNs to Artesian Water Company on the basis of its water service agreements with the owners of the proposed territory to be served. The governing statute, as amended, provides that the Secretary is obligated to issue a CPCN when the applicant is in possession of a petition requesting service signed by a majority of the owners of the proposed territory to be served. 7 Del.C. § 6077(a)(1)(ii). Tidewater Utilities objects to the issuance of the CPCN and filed this appeal.

Tidewater contends that Artesian does not qualify for a CPCN under 7 Del.C. § 6077(a)(1)(ii) because the water service agreements it entered into with the owners of the proposed territory to be served are for future water service and the landowners do not desire the imminent provision of service. In support of this contention, Tidewater argues that the General Assembly intended the 1994 amendments to § 6077 to create a right in every landowner, including any successor landowners, to choose a water utility until water facilities have been installed to serve the particular piece of property. Presumably, along with the right of choice for landowners comes the right to compete for water utilities. Tidewater further argues that subsection (1)(ii) must be interpreted to require the request by the landowners be for the imminent provision of service before a CPCN can be issued in order to implement the intent of the General Assembly and to avoid reaching an absurd result. According to Tidewater, binding future owners of wide expanses of undeveloped land is as unsupportable as binding present landowners without their knowledge or consent.

In the alternative, Tidewater contends that any CPCN issued on the basis of the water service agreements should be made subject to modification or revocation before the installation of water service facilities if the Secretary determines that it would best serve public convenience

and necessity. Tidewater asserts that it would be in the public convenience and necessity to modify or revoke a CPCN under such circumstances if successor owners want different water service providers.

The Department of Natural Resources and Environmental Control argued that the Secretary's determination is supported by the record and is proper under the current statutory scheme. In support of its argument, DNREC asserts that the Secretary's role in the CPCN application process has been reduced to one of almost a clerk under the current statutory scheme and that he has no discretion to consider sound water policy and planning when considering a CPCN application. As was done with the CPCN applications at issue in this appeal, the Secretary reviews the applications to see if one of the conditions in 24 Del.C. § 6077 are satisfied and, if he finds that one is, issues the CPCN. With regard to the applications at issue in this case, the Secretary found that the condition in § 6077(a)(1)(ii) was satisfied.

Tidewaters's arguments fail to convince the Board that the Secretary's decision should be overturned. Essentially, Tidewater asks that the Board interpret §6077(a)(1)(ii) as including a requirement that the landowner's petition must relate to the need for imminent water service. However, the rules of statutory construction do not allow such an interpretation. Great caution must be taken when supplying alleged omissions from statutes. It may only be done when "the intent to have the statute so read is plainly verifiable from the other parts of the statute, as, for example, where the ordinary interpretation would lead to consequences so mischievous and absurd that it is clear the Legislature could not have so intended." Dooley v. Rhodes, Del.Super., 134 A.2d 260, 262 (1957); Normal J. Singer, 2A Sutherland Statutory Construction, §47.38 (4th ed. 1984).

Neither the statutory scheme nor its legislative history evidence a clear intent of the General Assembly to require an imminent desire for water service by landowners before the Secretary may issue a CPCN under § 6077(a)(1)(ii). None of the three subparts of § 6077(a)(1) contain an imminence requirement. Section 6076, which imposes the requirement of a CPCN, refers to "present or *future* public convenience and necessity that requires or *will require* the operation of such business or extension." (emphasis added). Further, the consequences of granting a CPCN with out a desire for imminent service are neither mischievous nor absurd because the landowner himself makes the request and its issuance is done with both his knowledge and consent.

In this case, Artesian is in possession of a petition for service signed by the owners of the proposed territory to be served. There is no requirement that the proposed territory to be served be contiguous or that it have more than one owner. Therefore, the Board finds that under §6077(a)(1)(ii), Artesian is entitled to a CPCN. The Board further finds no reason to require that the CPCN be conditional or subject to modification other than as provided for by 7 Del.C. § 6077. The traditional nature of CPCN is that they are exclusive unless or until the water utility holding them is unable or unwilling to provide adequate water service.

CONCLUSION

The Board determines by unanimous vote that the decision of the Secretary to grant the Certificates of Public Convenience and Necessity should be affirmed.

Clifton H. Hubbard, Jr., Chairman

Joan Donoho Joan Donoho

Robert S. Erhlich

Ray K. Woodward

Charles Morris

DATE: March 3 February _____, 1996.

CONCLUSION

The Board determines by unanimous vote that the decision of the Secretary to grant the Certificates of Public Convenience and Necessity should be affirmed.

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