

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE

APPEAL OF:	)	Appeal Nos. 92-06
	)	92-08
TIDEWATER UTILITIES, INC., et al)	)	92-09
	)	

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on January 26, 1993. The Board Members present were Thomas J. Kealy, Chairman, Mary Jane Willis, Clifton H. Hubbard, Jr. and Ray K. Woodward. Steven C. Blackmore, Deputy Attorney General, advised the Board. Appellant Tidewater Utilities, Inc. ("Tidewater") was represented by Richard J. Abrams, Esquire. The Secretary of the Department of Natural Resources and Environmental Control ("Secretary") was represented by Deputy Attorney General Kevin P. Maloney. The Permittee, Wilmington Suburban Water Corporation, was represented by Kathy L. Pape, Esquire. Intervenor, Martelli-Davidson Group, Inc. ("Martelli"), was represented by William D. Bailey, Jr., Esquire. The Board upholds the decision of the Secretary.

SUMMARY OF THE EVIDENCE

This appeal involves a dispute between two water utilities over service to the Drawyer's Creek sub-division in New Castle County. These utilities also have competing applications pending for Certificates of Public Convenience and Necessity

("CPCN") to service other nearby areas of southern New Castle County. The Secretary granted Wilmington's application for service to Drawyer's Creek in Secretary's Order No. 91-002 ("Order"). The Secretary then issued 90-CPCN-13 on November 19, 1991. At the time of the Order, Wilmington had another pending CPCN application for service to a nearby sub-division. Tidewater had applied for a CPCN to service a larger area, including the two sub-divisions Wilmington desired to serve. The Secretary had conducted a joint public hearing on all three applications. However, he only granted one CPCN which did not resolve the entire controversy. At the time of the hearing before this Board, the Secretary had decided some, but not all, of the related CPCN applications filed by these two water companies.

Tidewater contends, inter alia, that the Secretary should have decided all three applications initially since he held a hearing to consider all three applications. Tidewater wanted a comparative decision. Also, it objects to a decision which is contrary to the establishment of a regional water development policy, which would be in the best interest of the public. The other participants contend that the Secretary's decision should be affirmed since he did not err by granting the CPCN to Wilmington. Testimony was presented by John F. Alexander, President of Tidewater, and John P. Hollenbach, Assistant Manager of Wilmington. A portion of the testimony before the Board was devoted to applications filed after the issuance of

the Order, and other recent developments. While this testimony provided background information, the Board placed little weight on these later events. The Board will not provide an advisory opinion on other CPCN applications before the Secretary decides them.

#### FINDINGS OF FACT

1. Wilmington has an executed water service agreement with Martelli to provide water service to the Drawyer's Creek sub-division.

2. The Secretary indicated that Drawyer's Creek had a pressing need for water service and the Board does not doubt this conclusion.

3. The Drawyer's Creek water service agreement was entered into the record below after the Hearing Officer reopened the record for this purpose. The Board does not find this to be arbitrary, erroneous or significant for the reasons that follow.

#### CONCLUSIONS OF LAW

This appeal primarily involves the language of Senate Bill No. 144 as amended, codified at 7 Del. C. sec. 6075 et seq. Senate Bill No. 144, enacted July 9, 1991, changed the rules regarding the issuance of CPCNs. It also applied these new rules to existing applications such as the ones at issue here. Senate Bill No. 144 made signed water services agreements an important focus of the Secretary's inquiry. Therefore, when the Hearing Officer reacted to Senate Bill No. 144 and reopened

the record to admit the signed water service agreement with Martelli, he did not act improperly. He was following Senate Bill No. 144. The public hearing on the competing applications had been held before passage of Senate Bill No. 144.

The Order indicates that it was limited in its scope due to the new guidelines from Senate Bill No. 144. The law regarding CPCNs is becoming more developed and the Secretary has issued other CPCNs and participated in two CPCN appeals to this Board. The Secretary has apparently decided to resolve the competing applications here on a piecemeal basis, as signed water service agreements are executed. While Tidewater argues that foresight and public policy should dictate acceptance of its large area CPCN application, it has received subsequent CPCNs for individual subdivisions.

This Board interpreted Senate Bill No. 144 in an earlier CPCN appeal (In Re: Schulte), which should be consulted for additional references. In Schulte the Board concluded that the language of Senate Bill No. 144 authorizes the Secretary to issue CPCNs in six possible situations. See 7 Del. C. sec. 6077(a). Under this section, the Secretary is obligated to issue a CPCN when (1) he ascertains that the existing water supply does not meet human consumption standards; (2) he ascertains that supply is insufficient to meet projected demand; (3) the applicant is in possession of a "signed service agreement with the developer of a proposed subdivision or development, which subdivision or development has been duly

approved by the respective county government" (section 6077(a)(1)(i)); (4) the majority of landowners petition for service; (5) the applicant has approval of the local government; or (6) "[t]he Secretary determines, by findings and conclusions based upon a public hearing record, that sound and efficient water resource planning, allocation, management and regulation would be implemented by the certification of a water utility service territory comprising an area larger than a service territory authorized by paragraph (a)(1) of this section." 7 Del. C. sec. 6077(a)(2). Here, Wilmington qualified for the CPCN because it had a signed water services agreement for an approved development under section 6077(a)(1)(i). Therefore, issuance of this CPCN was mandatory.

Tidewater, however, contends its large area application should have been granted under section (a)(2), which it would like to use to override Wilmington's application. Tidewater's argument must fail. First, the preamble to Senate Bill No. 144 shows that CPCN applications by unwanted utilities to service large land areas should be discouraged. Thus, the "area larger than a service territory authorized by paragraph (a)(1)" language from Section 6077(a)(2) should be limited to situations where an applicant entitled to a CPCN under (a)(1) is granted additional territory. The primary goal of statutory construction is to search for the legislative intent. Coastal Barge Corp. v. Coastal Zone Industrial Control Board, Del.

Supr., 492 A.2d 1242, 1246 (1985). See also Schulte at 16-18. The language of Senate Bill No. 144 shows that it changed the rules behind issuance of CPCNs and it placed a premium on executed water service agreements.

Regardless, Section 6077(a)(2) only requires issuance of a CPCN after the Secretary determines, in his discretion, that a CPCN should issue. After reviewing the evidence, the Secretary did not make such a decision here. Tidewater wants this Board to conclude that the Secretary, in his discretion, should have determined that a large area certification was required and that Tidewater should service that area. While compelling the Secretary to use his discretion in favor of one applicant would be unusual to begin with, it is not justified by the record in this case. Assuming certification of large areas would be in the best interest of the public, such certifications are not mandatory and the Secretary did not decide to certify a large area here. The decision to make large area certifications mandatory must come from the General Assembly, not this Board. Senate Bill No. 144 requires issuance of the CPCN when the applicant is in possession of a signed water services agreement. Wilmington had such an agreement here and therefore the

issuance of the CPCN to Wilmington was compelled by statute.

Conclusion

The Board determines by unanimous vote that the decision of the Secretary should be affirmed.

  
Thomas J. Kealy, Chairman

  
Clifton H. Hubbard, Jr.

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Mary Jane Willis

  
Ray K. Woodward

DATE: March 9, 1993

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DEPARTMENT OF JUSTICE  
CIVIL DIVISION

issuance of the CPCN to Wilmington was compelled by statute.

Conclusion

The Board determines by unanimous vote that the decision of the Secretary should be affirmed.

Thomas J. Kealy, Chairman

Clifton H. Hubbard, Jr.

  
Mary Jane Willis

Ray K. Woodward

DATE: March 13, 1993