IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE RESERVES DEVELOPMENT CORPORATION,	)	
Appellant,	)	
v.	)	
STATE OF DELAWARE PUBLIC SERVICE COMMISSION,	)	**C.A. No. 02A-07-001 HDR**
Appellee,	)	
and	)	
TIDEWATER UTILITIES, INC.,	)	
Intervenor.	)	

Submitted: October 11, 2002
Decided: January 17, 2003

Richard P. Beck, Esq., Morris, James, Hitchens & Williams, LLP, Wilmington, Delaware, for Appellant.

Gary A. Myers, Esq., Department of Justice, Dover, Delaware, for Appellee.

Jeremy W. Homer, Esq., Parkowski & Guerke, P.A., Dover, Delaware, for Intervenor.

O P I N I O N

Upon The Reserves Development Corporation's
Appeal from an Order of the Public Service Commission
AFFIRMED

RIDGELY, President Judge

The Reserves Dev. Corp. v. Public Serv. Comm'n
C.A. No. 02A-07-001 HDR
January 17, 2003

This is an appeal from an order of the Delaware Public Service Commission ("PSC") which found that a water system contemplated by The Reserves Development Corporation ("The Reserves") for its development named "The Reserves Resort, Spa, and Country Club" ("the community") in Ocean View, Delaware, is a "water utility" under 26 *Del. C.* § 102(8), and, therefore, cannot operate without a Certificate of Public Convenience and Necessity ("CPCN"), under 26 *Del. C.* § 203C, and regulatory oversight by the PSC.

The Reserves made an inquiry to the PSC, seeking a determination that water may be privately provided to homes in the community by a system of one or more on-site wells and a self-contained water distribution system. The Reserves proposed that ownership and control of the water system would be passed to an entity controlled by a homeowners' association. For the PSC to make such a determination, it would have been necessary to determine that the proposed water system was not a "water utility" under 26 *Del. C.* § 102(8) and 7 *Del. C.* § 6002(27), and, therefore, that The Reserves was not required to obtain a CPCN. The Reserves sought such a determination because Tidewater Utilities, Inc.'s ("Tidewater") CPCN for the area was exclusive and, therefore, prohibited issuance of a CPCN to any other entity for that area.

The PSC directed a Hearing Examiner to conduct proceedings in this matter. After conducting a hearing, listening to oral arguments and considering written submissions, the Hearing Examiner recommended that the water system be characterized as a public water utility that could not operate without a CPCN and regulatory oversight by the PSC. The PSC adopted the Hearing Examiner's Findings

and Recommendations. The Reserves appealed.

I find that the water system proposed by The Reserves would constitute a public water utility under 26 *Del. C.* § 102(2) and 7 *Del. C.* § 6002(27), and, therefore, that The Reserves would be required to obtain a CPCN. Accordingly, the PSC's decision is affirmed.

I. FACTS AND BACKGROUND

The Reserves Development Corporation owns approximately ninety-six acres of land near Ocean View in Baltimore Hundred, Sussex County, Delaware. This land has been approved by the Town of Ocean View and Sussex County Council for development as 6 townhouses and 179 single family detached homes under the name of "The Reserves Resort, Spa and Country Club." On November 15, 2001, The Reserves submitted a letter asking for a written determination from the PSC that a proposed self-contained water system designed to serve the community would not constitute a "water utility" and, hence, would not require a Certificate of Public Convenience and Necessity nor become subject to the PSC's regulatory authority.

The Reserves proposed to provide potable water by means of a self-contained on-site central water distribution system. The water system would be designed by licensed engineers for construction and a licensed water system operator would operate the water system. Once constructed and approved, the water system would be conveyed to the homeowners, as co-tenants in trust for one another. The Reserves anticipated creating a non-profit membership corporation, in which the homeowners would be equal voting members having equal rights to obtain water from the water

system and equal obligations to pay the costs of the water system based on the amount of water consumed. The Reserves asserted that by deed restriction and by corporate charter and bylaws of the corporation, the homeowners would be required to provide for the operation, maintenance and repair of the water system under contract with one or more water system operators licensed in the State of Delaware.

The community is located in a territory as to which Tidewater Utilities, Inc. has been granted a CPCN with an exclusive franchise to operate a public water utility. Tidewater had recently installed a water main and constructed a water tower to serve several of the existing and proposed subdivisions in the area, with capacity to serve the community.

The Reserves planned to extend its water distribution system to a location close to the Tidewater main so that homeowners could readily discontinue use of the community's water system and connect to the Tidewater system if the need or desire were to arise.

On January 29, 2002, by PSC Order No. 5860, the PSC opened a docket to investigate the factual, policy, and legal issues posed by The Reserves' inquiry and to consider whether the PSC should initiate a regulation docket to govern future, similar inquiries. The PSC designated a Hearing Examiner to conduct hearings and to report to the PSC proposed findings and recommendations based on the evidence and argument presented. On April 2, 2002, The Reserves and Tidewater submitted written comments and/or statements of fact. A public hearing was held on April 11,

2002. On May 24, 2002, the Hearing Examiner filed his Findings and Recommendations with the PSC. The Hearing Examiner recommended that the PSC find the proposed water system to be a public water utility under 26 *Del. C.* § 102(2) and, therefore, cannot operate without a CPCN under 26 *Del. C.* § 203C. On June 4, 2002, the PSC issued Order No. 5966 after considering the Hearing Examiner's Findings and Recommendations, and, by an affirmative vote of the majority of the Commissioners, adopted the May 24, 2002 Findings and Recommendations of the Hearing Examiner.

The operative facts of this appeal are undisputed. The only issue before this Court is whether the proposed water system qualifies as a "public water utility."

II. STANDARD OF REVIEW

The standard of review on appeal from the decision of an administrative agency is to determine whether the agency ruling is supported by substantial evidence and free from legal error.[1] A *de novo* standard of review applies to Superior Court review of an administrative agency's interpretation of a statute.[2] Where, as here, the issue is one of construction of statutory law and the application of the law to undisputed facts, the court's review is plenary.[3]

III. DISCUSSION

---

[1] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999).

[2] *Id.*

[3] *Id.* at *381, *citing E.I. du Pont de Nemours Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. Super. Ct. 1985).

"Public utility" includes every individual, partnership, association, corporation, joint stock company, agency or department of the state or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a "cooperative") . . . that operates or hereafter may operate *for public use* within this state . . . water . . . service, system, plant, or equipment.[4] 7 *Del. C.* § 6002(27) defines "water utility" as "any person or entity operating within this State any water service, system, plant or equipment for public use." The pivotal question is the meaning of the phrase "for public use" in the definition of public water utility.[5]

The Delaware Supreme Court has acknowledged a "public interest" test for determining whether a service is a "public utility." That test states that, regardless of whether a company sells to less than the general public, when a company engages in the sale of a regulated commodity to independent third parties, the selling entity may be subject to the jurisdiction of the PSC under the Public Utilities Act of 1974 for the purposes of regulation.[6] The pivotal issue in the determination of a company's status as a public utility is whether the company's activities have a significant impact on the

---

[4] 26 *Del. C.* § 102(2), *emphasis added.*

[5] *See Eastern Shore Natural Gas Co. v. Delaware Public Serv. Comm'n*, 637 A.2d 10, 15-16 (Del. 1994).

[6] *DiPasquale*, 735 A.2d at 383-384, *citing Eastern Shore Natural Gas Co. v. Delaware Public Serv. Comm'n*, 637 A.2d 10, 18 (Del. 1994).

public interest the PSC was designed to protect.[7] This creates a two-part test: 1) First, a determination is made as to whether there is a sale of a regulated commodity to independent third parties; 2) If so, then it must be determined whether such sales affect the public interest in a significant manner. The Reserves asserts that the proposed water system will not result in the sale of a regulated commodity to independent third parties and that the system will have no significant impact on the public interest.

I first consider whether the proposed water system would be a sale of a regulated commodity to independent third parties. Water utility service is clearly a regulated commodity. The Reserves asserts that no "sale" takes place because the homeowners will always own the actual water from the time it is underground through its pumping, treatment, pressurization and distribution. The Reserves also asserts that the homeowners are not "independent third parties" because any money collected from them by the membership corporation will remain their money so long as it is held in the corporation's account. A sale does take place, however, because the water itself is transferred from the collective community, as the corporation, to the individual homeowner. Furthermore, the fundamental nature of a public utility is service rather than property. The homeowners would be paying for the service of a water system much in the same way that they would pay for other utilities, such as electricity or telephone service, where no property is actually transferred but essential

---

[7] *Eastern Shore Natural Gas Co.*, 637 A.2d at 17.

services are provided. Therefore, a "sale" of a regulated utility does indeed take place. The Reserves also argues that the non-profit nature of the corporation-homeowner relationship eliminates the commercial underpinnings that characterize a sale. However, I find that the absence of profit is irrelevant to the concept of whether a sale has taken place. The individual homeowners would be making payments to a third party entity, the corporation, for the provision of water service. That is sufficient to justify the classification of such a transfer as a "sale."

I have also determined that the proposed sale of water service is to "independent third parties." The Reserves has stated that the membership corporation would have the ability to sue an individual homeowner for non-payment of costs associated with the system. This alone creates separate entities, making the individual homeowners independent third parties to the corporation for purposes of the transaction. There is also a disparity of bargaining power between the supplier (the corporation) and the consumer (the individual homeowner). An individual homeowner is dependent upon the corporation for supply of water service. However, the corporation is run through a majority-rules system. Therefore, without PSC regulation, the individual homeowner would have no recourse for dissatisfaction in the event that the majority disagrees with that individual. For these reasons, I have determined that the water system proposed by The Reserves would result in a sale of a regulated commodity to independent third parties.

I next turn to whether such a sale of a regulated commodity to independent third parties would affect the public interest in a significant manner. A wide range

of regulatory authority was granted to the PSC to ensure that consumers of public utilities would receive adequate water service and quality at reasonable rates. If The Reserves' water system were to be approved without a CPCN, the PSC would not have regulatory authority and the homeowners in the community would then have no recourse to any governmental agency for complaints relating to the quality of their water provided by the membership corporation. The experience and expertise of the PSC with regard to quality and service as well as rates to be paid are essential to proper regulation of essential commodities such as water service. Therefore, the public interest is significantly affected.

The Reserves points out that individual homeowners could choose to opt out of the membership corporation and receive water service from Tidewater through its nearby water main. However, as discussed by the PSC's Hearing Examiner, the costs of extending the water main and constructing water lines for individual customers would be prohibitive, thereby making that option an unreasonable choice and no real option at all. Prohibitive costs to an individual homeowner sufficiently affect the public interest to affirm the PSC's conclusion. Furthermore, the costs already expended by Tidewater in constructing the existing water main and lines, in reliance on its exclusive CPCN for the area, would be passed on to far fewer customers if their exclusive CPCN for the area is not honored. The fact that existing customers and future customers, including homeowners who make the unreasonable choice to opt out, would be faced with shouldering the costs of Tidewater's lost business after expending such large costs would make any proposed competition by the Reserves

destructive. Such destructive competition would not serve the public interest. The interests of Tidewater's customers must be considered and are sufficient to satisfy the public interest test.

Since the water system proposed by The Reserves would be a sale of a regulated commodity to independent third parties that would significantly affect the public interest, it is reasonable for the PSC to require The Reserves to obtain a CPCN for the water system. Given that Tidewater already has an exclusive CPCN for the area, The Reserves will not be able to obtain one and, therefore, the community must rely on Tidewater for water service, absent permission to drill individual wells for each residence.

IV. CONCLUSION

This is a case which turns on the legal definition of "for public use" as it applies to a "public utility" under 26 *Del. C.* § 102(2) and, more specifically, to a "water utility" under 7 *Del. C.* § 6002(27). The water system proposed by The Reserves would qualify as a sale of a regulated commodity to independent third parties that would affect the public interest in a significant manner. Therefore, the Public Service Commission's Order No. 5966, finding that the water system is a "water utility" under 26 *Del. C.* § 102(2) and, therefore, cannot operate without a Certificate of Public Convenience and Necessity under 26 *Del. C.* § 203C, is ***AFFIRMED***.

IT IS SO ORDERED.

/s/ Henry duPont Ridgely
President Judge

cmh
oc: Prothonotary
xc: Order distribution