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February 18, 2010

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Re: Public Service Commission of the State of Delaware v.
Utility Systems, Inc., et al.
C.A. No. 2036-VCN
Date Submitted: February 3, 2010

Dear Counsel:

Plaintiff Public Service Commission of the State of Delaware seeks, under Court of Chancery Rule 59(f), reargument of two aspects of the Court's Letter Opinion of January 21, 2010.¹

Reargument is available if the Court has misapprehended a material fact or a principle of law that, if more properly understood or applied by the Court, would have yielded a different outcome.²

¹ *Public Serv. Comm'n v. Util. Sys., Inc.*, 2010 WL 318269 (Del. Ch. Jan. 21, 2010) (the "Letter Opinion"). Terms defined in the Letter Opinion will be used here.

² *See, e.g., VGS, Inc. v. Castiel*, 2003 WL 1794210, at *1 (Del. Ch. Mar. 27, 2003).

1. The Letter Opinion requires the reconveyance of the Lots by CPM to USI because they were transferred in violation of 26 *Del. C.* § 215(a), a finding by the PSC that the Court determined collaterally bound CPM. The Court, however, subjected the Lots on reconveyance to a lien in favor of CPM for the purchase price which it paid—\$120,000.³ Of the purchase price, \$84,000 was applied to pay off a third-party mortgage. The PSC does not contest a lien in favor of CPM in that amount. It does, however, challenge the Court’s decision to include the balance of the purchase price, \$36,000, as part of the lien. It argues that the \$36,000 accrued to the benefit of the “Carbaugh interests”—USI, CPM, and the Carbaugh family.

There is no evidence—and the PSC has not identified any—that would demonstrate that these funds went anywhere other than into USI accounts and were used for any purpose other than USI’s proper business purpose—payment of expenses incurred in providing a public utility service. From CPM’s perspective, it received no benefit, direct or indirect, from the application of the purchase price,

³ In its response to PSC’s motion for reargument, but without seeking reargument for its own benefit, CPM notes that it has paid interest in excess of \$40,000 and taxes of approximately \$13,000 with respect to the Lots since their acquisition.

other than its acquisition of the Lots. Indeed, the balance of the purchase price conferred no direct benefit upon Mr. Carbaugh because the \$36,000 apparently was used, not for Mr. Carbaugh's benefit, but for the benefit of USI.⁴ In short, because there is no reason to believe that the entire purchase price was not applied to USI's expenses and debts, there is no reason to attribute some sort of incidental benefit to the "Carbaugh interests" and reduce the amount of the lien that will burden the reconveyance of the Lots.

Accordingly, the PSC's motion for reargument as to the amount of the lien to be imposed upon the Lots in order to approximate the status quo ante is denied.

⁴ The PSC suggests that the Court's formulation allows a double recovery. In essence, USI received the \$36,000 net of the mortgage, and CPM will receive, under the Court's approach, \$36,000 above the amount of the mortgage lien. The difficulty with PSC's analysis is that it fails to acknowledge that the \$36,000 differential was applied by USI and did not directly benefit either CPM or Mr. Carbaugh. The PSC's argument might prevail if it had shown that the "corporate veils" of USI and CPM should have been "pierced" with the result that the separate interests of CPM, USI, and Mr. Carbaugh were indistinguishable. There is no basis for any such conclusion on the record before the Court. The grounds for (i) disregarding corporate entities and (ii) collaterally estopping closely related parties in certain circumstances, while perhaps not unrelated, have a materially different doctrinal underpinning. Simply because CPM may be estopped collaterally by factual findings adverse to USI does not lead to the conclusion that USI and CPM are not separate and distinct legal entities.

2. In the Letter Opinion, the Court wrote:

With payment being withheld by many of the homeowners in Herring Creek and the costs of pumping, hauling, and off-site treatment ongoing, USI was unable to continue to perform its services.⁵

The hearing examiner, whose findings were adopted by the PSC, found that: at the time USI abandoned service at the end of 2004, it had funds available; it had collected 89% of its charges invoiced to the Herring Creek homeowners; and if it needed more funds, it could have requested a rate increase, but did not.⁶ Accordingly, “USI was not forced to cease operations at the end of 2004 without first gaining Commission approval.”⁷ The Court’s characterization of USI’s predicament

⁵ Let. Op., 2010 WL 318269, at *2. The source of this description of USI’s plight was drawn from the Affidavit of H. Clark Carbaugh, at ¶¶ 21-22:

21. On December 15, 2004, USI still had no permit from PSC to operate a wastewater treatment facility at Herring Creek. The funds being remitted to USI for wastewater treatment services were grossly inadequate to meet the costs of the required pump and haul service, placing a severe strain on USI’s resources which, if continued, threatened to result in USI’s collapse.

22. Bowing to reality, USI informed DNREC that USI was relinquishing the permits previously issued to it for operations at Herring Creek, and would cease operations at Herring Creek by the end of the year. . . .

⁶ One may wonder about the likelihood of any such effort’s success, but it was an option, at least as a theoretical matter.

⁷ Findings ¶ 127 (A62).

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does not present a debate that needs resolution because these facts were not material to the Court's conclusions in the Letter Opinion. That said, on the summary judgment record before the Court, there is a reasonable inference to be drawn from the hearing examiner's findings that would be contrary to the Court's statement. Accordingly, the Court will revise the Letter Opinion and the sentence which offends the PSC to read as follows:

In light of its deteriorating relationship with the residents of Herring Creek and with the costs of pumping, hauling, and off-site treatment ongoing, USI decided to discontinue its services.

The context is preserved, but no factual finding inconsistent with those of the hearing examiner has been made unnecessarily. To this limited extent, the PSC's Motion for Reargument is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K