

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF INDIANA-AMERICAN)
WATER COMPANY, INC. ("INDIANA)
AMERICAN") FOR (1) APPROVAL OF ITS)
LEAD SERVICE LINE PLAN PURSUANT)
TO IND. CODE CHAP. 8-1-31.6 AND (2))
APPROVAL OF ASSOCIATED CHANGES)
TO INDIANA AMERICAN'S RULES AND)
REGULATIONS FOR WATER SERVICE.)

CAUSE NO. 45043

SUBMISSION OF PROPOSED ORDER ON REMAND

On May 10, 2019, the Indiana Court of Appeals issued a Memorandum Decision in Case No. 18A-EX-2030 on the Appeal from the Indiana Utility Regulatory Commission ("Commission") by the Indiana Office of Utility Consumer Counselor ("OUCC") with respect to the Order of the Commission dated July 25, 2018 in this Cause. The Court of Appeals reversed and remanded the July 25, 2018 Order, holding that the Commission must either approve or disapprove the license agreement ("License Agreement"), including the indemnification clause contained therein, that was attached to the lead service line replacement plan ("Plan") submitted by Petitioner Indiana-American Water Company, Inc. ("Indiana American") in this Cause. Indiana American, by counsel, hereby submits its Proposed Order on Remand to address the Court of Appeals' decision. Counsel for Indiana American previously informed counsel for the OUCC of its intention to make this submission. Indiana American does not object to allowing the OUCC a reasonable period of time to submit its own proposed order on remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served this 20th day of June, 2019, by electronic transmission to the following:

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ORDER OF THE COMMISSION ON REMAND

Presiding Officers:

Sarah Freeman, Commissioner

David Veleta, Administrative Law Judge

On January 29, 2018, Indiana-American Water Company, Inc. ("Indiana American") filed its Petition in this Cause seeking certain approvals of the Indiana Utility Regulatory Commission (this "Commission") for its lead service line replacements plan ("LSLR Plan"). Following a comprehensive procedural schedule and after conducting a duly noticed public hearing, we issued our Final Order on July 25, 2018. The Indiana Office of Utility Consumer Counselor ("OUCC") appealed, and on May 10, 2019, the Court of Appeals reversed and remanded with instructions for us to issue additional findings with respect to the license agreement attached to the LSLR Plan including the indemnification and release clause contained therein. The opinion was thereafter certified and the Cause remanded to us.

1. **Review of Course of Proceedings.** Indiana American requested approval of its lead service line replacement plan ("LSLR Plan") pursuant to Ind. Code ch. 8-1-31.6, which allows water utilities to petition the Commission for permission to implement a plan to replace customer-owned lead service lines, even though these lines are not owned by the utility, and to recover a return of and on the investments made to replace these lines through a rate adjustment mechanism. Ind. Code § 8-1-31.6-6(b), (c). Attached to the LSLR Plan were examples of Indiana American's proposed customer communications materials. Among the documents attached to the LSLR Plan was a proposed license agreement ("License Agreement") between Indiana American and the customer who owns the lead service line. The License Agreement includes the following indemnification language (the "Indemnification Clause"):

IN CONSIDERATION FOR PERFORMING THE WORK TO INSTALL THE CUSTOMER SERVICE LINE AT COMPANY'S COST AND THE COMPANY'S AGREEMENT TO PROVIDE A 12-MONTH LIMITED WORKMANSHIP WARRANTY, CUSTOMER AGREES TO INDEMNIFY, RELEASE AND HOLD HARMLESS COMPANY AND

ITS AFFILIATES AND AGENTS FROM AND AGAINST ALL CLAIMS, LIABILITY AND COSTS (“CLAIMS”) RESULTING FROM ACTS AND OMISSIONS OF COMPANY AND/ OR ITS APPROVED SUBCONTRACTORS IN INSTALLING THE CUSTOMER SERVICE LINE.

On April 13, 2018, the OUCC filed its response to the LSLR Plan, objecting to the inclusion of the Indemnification Clause in the License Agreement. The OUCC argued that any costs associated with a risk of liability for damages should have been included in Indiana American’s estimate of the costs of replacing the customer-owned lines. The OUCC recommended the indemnification language be removed from the License Agreement. On April 23, 2018, Indiana American responded in rebuttal that the Indemnification Clause was a part of the program of offering the replacement of customer-owned lead service lines at no cost to the customer, including a one-year warranty. Without the Indemnification Clause, Indiana American argued it would not be able to reliably estimate its risk of liability under the LSLR Plan.

After hearing the evidence, which is summarized in our Order dated July 25, 2018, this Commission found that the specific provisions of the License Agreement, including the Indemnification Clause, were not part of the LSLR Plan we were asked to approve, and therefore we declined to make a determination whether the terms of a particular indemnification provision are appropriate or not.

The Court of Appeals held that Indiana American had submitted the License Agreement to the Commission as part of its LSLR Plan to fulfill its statutory obligations, indicating the License Agreement, with its Indemnification Clause, was part of Indiana American’s Plan. The Court of Appeals expressed no opinion on the propriety of the License Agreement and the Indemnification Clause, holding only that the License Agreement and Indemnification Clause were part of the LSLR Plan submitted by Indiana American and directing this Commission to either approve or disapprove the License Agreement and Indemnification Clause.

2. Commission Discussion and Findings.

While the OUCC has provided testimony that the Indemnification Clause is very broad, it has made no attempt to propose language that is tailored to address the concerns raised by Ms. Armstrong while also acknowledging the risks described by Mr. Hoffman if the language were to be stricken in its entirety. We find such an “all or nothing” approach to the indemnity language as advocated by the OUCC in this Cause to run counter to the policy set forth by the General Assembly in Ind. Code ch. 8-1-31.6, namely, promoting the replacement of customer-owned service lines. Without the protections of the Indemnification Clause, we grow concerned that the inability to reliably estimate the potential liability for damage cited in Indiana American’s evidence will be considered by Indiana American to outweigh any benefits it may realize from the recovery of a return on and of its investments in customer-owned lead service lines. The OUCC’s evidence states that the OUCC believes the LSLR Plan should be approved, but without the safeguard afforded by the Indemnification Clause. We find that course of action to be self-defeating. The

inability cited by Mr. Hoffman to perform the calculus of risk in the absence of the protection afforded by indemnification language seems to us likely to curtail the replacement of customer-owned lead service lines. Accordingly, we find the Indemnification Clause to be reasonable under the circumstances. We also acknowledge that the documents attached to the LSLR Plan were described in the evidence as samples and that experience gained throughout the duration of a multi-year, and perhaps multi-decade program, may recommend changes to the specific language included. We further find that administrative efficiency is best served where our finding of the reasonableness of the particular language of the License Agreement, including the Indemnification Clause, is construed to apply to substantially similar language that may be included in similar customer agreements used in connection with the LSLR Plan. Individual customers may avail themselves of our informal complaint procedure if particular facts and circumstances would render indemnification language unreasonable in terms or application and we retain the authority to open investigations into allegations that the LSLR plan is not meeting its intended goals.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION, that:

1. The License Agreement, including the Indemnification Clause contained therein, shall be and hereby is approved, together with such modifications as may be made without materially altering the substance of such provision.
2. This Order shall be and hereby is effective upon and after the date of its approval.

HUSTON, FREEMAN, KREVDA, OBER, AND ZIEGNER CONCUR:

APPROVED:

I hereby certify that the above is a true and correct copy of the Order as approved.

Mary M. Becerra
Secretary to the Commission