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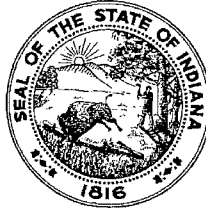
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# STATE of INDIANA

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INDIANA UTILITY REGULATORY COMMISSION  
101 WEST WASHINGTON STREET, SUITE 1500 EAST  
INDIANAPOLIS, INDIANA 46204-3419



www.in.gov/iurc  
Office: (317) 232-2701  
Facsimile: (317) 232-6758

August 14, 2019

Loraine Seyfried  
Chief Administrative Law Judge  
Indiana Utility Regulatory Commission  
101 West Washington Street, Suite 1500E  
Indianapolis, Indiana 46204-3407

**FILED**  
**August 14, 2019**  
**INDIANA UTILITY**  
**REGULATORY COMMISSION**

Re: Referral of Consumer Affairs Division Complaint 126016  
Dispute between Promenade Commercial, LLC, and Citizens Energy Services

Dear Judge Seyfried:

Pursuant to 170 IAC 16-1-5(e), the Director of the Consumer Affairs Division (“CAD”) and the General Counsel are requesting that CAD Complaint number 126016 be docketed for a determination by the Commission due to the complex and technical issues in the complaint.

The matter at issue is an alleged breach of contract by Citizens Energy Services of a Water Main Extension Agreement (“Agreement”) entered into in July 2007 between Promenade Commercial, LLC (“Promenade”) and Veolia Water whereby Promenade agreed to construct a water main extension for use by residential and commercial customers. The Agreement enabled Promenade to recover its costs in constructing the water main extension through revenue allowances, *i.e.*, payments based on the number of customers who become directly or indirectly connected to the water main extension for a period of ten (10) years after it was in service.

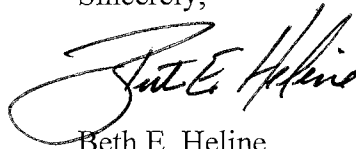
This matter is an open docket in the Hamilton Superior Court, Cause No. 29D01-1611-PL-009906. On February 24, 2017, Promenade filed an Amended Complaint for Damages and Declaratory Judgment. On July 17, 2017, the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis d/b/a Citizens Water or Citizens Energy Services, filed a Motion to Stay on grounds of primary jurisdiction and failure to exhaust administrative remedies through the Indiana Utility Regulatory Commission (“IURC”). On July 23, 2018, the court stayed the matter, agreeing that Promenade had not exhausted its administrative remedies through the IURC. The Court also found that the contract at issue incorporates Citizens Terms and Conditions and its tariffs, regarding which the IURC has special competence and expertise in reviewing.

August 14, 2019

On April 1, 2019, Promenade filed a CAD complaint against Citizens stating that, at its own expense, Promenade constructed a water main extension and entered into an agreement with Citizens (Veolia Water at the time of the agreement), whereby Citizens was to pay Promenade a revenue allowance based on users who connected directly or indirectly to the water main extension. Promenade claims that, in the years following the agreement, numerous residential users connected indirectly to the water main, and at least one commercial user connected directly, and that Citizens refuses to pay Promenade any revenue allowance, claiming the residential users did not connect directly into the water main extension.

Please let me know if you require additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Beth E. Heline", written in a cursive style.

Beth E. Heline  
General Counsel

Enclosures:

Veolia Water - Water Main Extension Agreement  
Veolia Water - Refund of a Water Main Extension Deposit  
Amended Complaint for Damages and Declaratory Judgment  
Defendant's Motion for Stay  
Defendant's Motion for Stay (Exhibit A)  
Plaintiff's Response in Opposition to Defendant's Motion to Stay  
Hamilton Superior Court Order on Defendant's Motion for Stay  
CAD Complaint file 120616  
CAD 120616 – Utility Response  
Map - Promenade of Noblesville

cc: David E. Veleta, Administrative Law Judge  
Deborah Mattingly-Huber, Director's Designee, Consumer Affairs Division  
Daniel K. Burke, Attorney for Promenade Commercial LLC  
Jennett Hill, Sr. Vice President and General Counsel, Citizens Energy Group



Water Main Extension Agreement  
Department of Waterworks  
Consolidated City of Indianapolis

TABLE 1 – CONTRACT PROVISIONS		
The form and content of this contract are as approved by the Board of Waterworks, Consolidated City of Indianapolis, by Resolution No. 24, dated April 22, 2002, and are in accordance with 179 IAC 6-1.5-29.		
PROJECT NUMBER: J-06-230	PROJECT/DEVELOPMENT NAME: Promenade Shoppes	
COUNTY: Hamilton	TOWNSHIP: Noblesville	CONTRACT AUTHOR: JLM
REVIEW AND INSPECTION FEE: \$5.50 per foot of main installed		DATE APPROVED BY DOW BOARD:
REVENUE ALLOWANCE: \$1231.00 for each residential unit		
SUBSEQUENT CONNECTOR FEE: To be Determined at Project Completion		
MAINTENANCE AND REPAIR BOND: Two Years Duration Following In-Service Date 20% of Cost Shown on Final Actual Cost Summary		
OTHER PROVISIONS:		
ATTACHMENTS:		

THIS AGREEMENT, entered into on the date indicated below, by and between:

Promenade Commercial LLC ("Developer"), the Consolidated City of Indianapolis Department of Waterworks ("Department"), and Veolia Water Indianapolis, LLC ("VWI") (individually a "Party," and collectively the "Parties"), WITNESS THAT:

WHEREAS, Department owns the water system serving the greater Indianapolis area and certain areas in the surrounding vicinity (the "Waterworks"); and

WHEREAS, VWI operates and maintains the Waterworks under a long-term contract with the Department; and

WHEREAS, the Developer is engaged in the project identified in Table 1 above, and has requested that the Department provide water service to the development and to future customers within the development; and

WHEREAS, Developer has provided VWI and the Department site plans that detail the desired water utility service, and the Department and VWI are willing to provide such service upon the following terms and conditions; and

WHEREAS, VWI, the Department and Developer agree that the Developer shall, at its own cost and expense, furnish the necessary design and engineering services, labor and materials, to install the Main Extension and obtain all necessary easements, permits, rights-of-way or other authority which is required to install the Main Extension and to provide water service to and throughout the development before the start of construction;

NOW, THEREFORE, in consideration of the premises, covenants, agreements and undertakings hereinafter provided, and each act to be performed pursuant hereto, the Parties agree that:

1. Site-Utility Plan. Developer shall provide VWI, via both paper and AutoCAD or DXF disk, with layer description (if AutoCAD, include release number, a site-utility plan; paper drawings shall be on 24-inch by 36-inch sheets at 1"= 30' to 1"= 50' scale indicating water mains contemplated). All main extensions installed to provide domestic water service shall also be sized and designed provide fire protection service. The Main Extension will be designed to deliver domestic water service at a rate sufficient to serve the number of parcels abutting the Main Extension and public fire protection service at a minimum rate of 1,000 gallons per minute at 30 pounds per square inch residual pressure at the projected maximum daily usage rate. In addition to the above, VWI will determine the size of main reasonably necessary to serve the applicant, consistent with maintaining the integrity of the overall distribution system.

2. Review of Site-Utility Plan. VWI shall review and approve Developer's site-utility plan, offsite main installation plan, and easement drawings (if required), and calculate the appropriate size of the indicated water mains, and shall locate fire hydrants, valves and other appurtenances with respect to the site-utility plan and offsite in accordance with the standards and specifications currently in place for the Waterworks, provided, however, that VWI may require mains larger than 16 inches in order to provide for future service. The additional cost of installing such larger mains shall be at Department's expense unless they are necessary for the development itself. Any additional cost for such oversizing shall be negotiated prior to execution of the contract. Should additional reviews of the same basic plan be required, the first and second reviews will be performed by VWI at no additional cost to the Developer, but subsequent reviews will require compensation to VWI for time expended.

The route and extension of any given water main shall be determined in accordance with 170 IAC 6-1.5-29 (Indiana Administrative Code governing water utility main extensions).

3. Contractor and Materials. VWI shall return the site utility plan to Developer, marked either "Approved," "Approved as Noted," or "Rejected." VWI and Developer shall promptly agree on any changes necessary to comply with Waterworks requirements. After approval, the Developer shall notify VWI in writing of the installation contractor Developer seeks to engage. VWI must approve the Developer's selected contractor, and VWI may withhold approval in its sole discretion. VWI shall inform Developer of any withheld approval within 14 days after Developer notifies VWI of the intended contractor. Failing timely notification to the contrary, approval shall be deemed granted.

The Developer shall purchase and provide pipe, fittings, valves, and hydrants and other appurtenances ("Materials"). All Materials must meet or exceed VWI's standards and specifications, and are subject to VWI approval.

4. Developer Installation. Upon approval of the contractor and the Materials, the Developer agrees to commence construction within one hundred and twenty (120) calendar days, and to prosecute construction to full completion in compliance with all applicable laws and governmental rules and regulations, with all reasonable diligence consistent with good business practices and the availability of required equipment, materials and labor. The Developer shall give VWI a minimum of one week's notice prior to commencing construction.

The Developer hereby agrees that during installation of the Main Extension, VWI will have the authority to inspect the installation for compliance with VWI standards at VWI's convenience and discretion, provided such inspection will not delay or impede the installation work. VWI shall have authority to halt construction if the installation is not consistent with the approved site plan, materials list, or generally accepted industry practices. Should the conditions along the proposed route of the water main be materially different from those indicated in the site plan or reasonably anticipated, the Developer further agrees to cooperate with VWI in modifying the actual construction to render the most efficacious result.

5. **Unforeseen Circumstances.** VWI reserves the right to terminate this agreement, without prejudice to VWI, in the event contaminated soil, significant archaeological material, or any other supervening underground inclusion is encountered. In such an event, VWI shall notify Developer of the termination in writing and may then propose (but is not required to) an alternative route or the use of substitute pipe materials and appurtenances as the situation, in VWI's sole discretion, requires. Developer assumes, with respect to the other Parties, any and all risk of additional cost, fines, penalties, or assessments relating to the uncovering, handling, transporting, environmental testing, or disposing of contaminated soils in the course of construction.

6. **Other Requirements of Developer.** Coincident with delivery of the Transfer of Ownership (as hereinafter defined), and other documents required from the Developer to the Department, there shall also be delivered to VWI by the Developer:

- a) All required permits, and any other information pertaining to the Main Extension requested by VWI;
- b) Copy of the final platted map that is to be recorded for the development and/or address listing;
- c) Copies of any easements, rights of way, deeds, options, and so forth, obtained by Developer to facilitate the Main Extension(s).
- d) Waivers of lien rights executed by all material suppliers, subcontractors, and contractors;
- e) Two (2) year Maintenance and Repair Bond on Main Extension for materials and workmanship. The Maintenance and Repair Bond shall be in an amount equal to twenty percent (20%) of the total project cost as indicated on the Final Actual Cost Form as submitted by Developer. Repair work performed during the warranty period must be coordinated with and inspected by VWI. Customers are to be notified prior to interruption of service. In emergency situations, the customers are to be notified of the approximate length of service interruption. Emergency repairs may be performed by VWI, and the developer/bonding company will be billed the cost of the repair; and
- f) Total itemized project costs, specifying pipe, valve, hydrant size, any engineering design costs, and any land rights (easements), certified by the Developer as being accurate; and
- g) "As built" drawings including materials listing, manufacture, and locations; and
- h) All VWI and Department fees, and any previous main extension subsequent connector fees, if applicable; and
- i) Recorded final platted map of the development, when available, from the County Recorder. However, if platted map has lot line changes that require Department facilities to be relocated (mains, hydrants, blowoff, etc.) the developer will be responsible for the cost of those relocations.
- j) Copy of all permit closures or acceptance from applicable agencies.

NOTE: All VWI materials removed at time of connection (sleeves, tees, blow off, valves, etc.) are to be returned to VWI Store Room before taps will be made.

7. **Hydrostatic Testing and Disinfection.** The installed water mains ("System") shall be hydrostatically tested by Developer's contractor to manufacturer's recommended specifications. Upon satisfactory completion of the hydrostatic testing, and deliverance of all items required under Sections 6 and 9, the Company or its affiliates shall disinfect the System.

8. **Initiation of Water Service.** Upon determination by VWI that installation has been in accordance with the approved plans and specifications, and after Developer conveys title to the Department by the execution and delivery of a Transfer of Ownership of the main extension and related easements, if applicable, ("Transfer of Ownership"), and delivery of all items required by Section 6, water service shall be initiated by VWI.

9. **Timely Submittal of Transfer of Ownership.** If the Developer fails to provide the Department with the Transfer of Ownership and all items required in Sections 6 and 8 within ninety (90) days following the completion of hydrostatic testing and disinfection, Developer shall be required to pay the cost for a new hydrostatic test, re-chlorination, and flushing of the main extension. Said cost will be on a time and materials basis and shall be paid to VWI concurrently with the Transfer of Ownership.

10. **Ownership of Main Extension.** Upon conveyance of the Main Extension by Developer to the Department (including all mains, fire hydrants, easements and other equipment), it shall become the sole property of the Department. After transfer, the Developer shall be responsible for maintenance of the System for 2 years from the date the System is placed in service ("In Service Date"), at Developer's sole expense. Thereafter, VWI shall be responsible for the maintenance and repair of the same.

The Developer shall have no residual property right or interest in the Main Extension or any part thereof by reason of or on account of the Developer having furnished a part or all of the funds used in the purchase of materials and equipment for, or the employment of labor in connection with, the construction of the Main Extension.

11. **Determination of Cost of Main Extension.** The Department and Developer agree that the Cost of Main Extension shall be the amount appearing on the Final Actual Cost Summary Form rendered by Developer to the Department and VWI.

12. **Department Fees.** The fees payable to the Department related to the Main Extension shall be in an amount as indicated in Table I per lineal foot of main appearing on the Transfer of Ownership form, to cover sizing, hydraulics, engineering, administrative costs, legal costs, direct labor costs, overhead and transportation costs.

13. **Revenue Allowance.** The Department agrees that for a period of ten (10) years after the date the main is in service, the Department will make one (1) revenue allowance payment as indicated in Table I to the Developer for each residential or commercial customer who becomes directly or indirectly connected to the Main Extension and begins to receive water service, if any ("Revenue Allowance Payment"). For residential customers, such payment, if any, shall be no less than one time per year and shall be the product of the following: (i) the revenue allowance as indicated in Table I; and (ii) the number of customers who became directly or indirectly connected to the main extension and begins to receive water service, if any, since: (a) the date the main was placed in service; or (b) the date of the most recent annual revenue allowance payment; whichever is later. For commercial customers, the revenue allowance shall be calculated on actual usage at the facilities served, and shall be the product of the following: (i) the projected water revenue from the particular commercial customer; and (ii) three. In no event shall the aggregate Revenue Allowance Payment to the Developer exceed the total project cost.

14. **Subsequent Connector Fees.** If the owner or occupant of any unconnected lot abutting the main ("Owner"), requests water service any time within ten years after the completion date of the Main Extension, the Owner will be obliged, prior to the Department permitting the connection of said lot to the main, to pay to the Department a "subsequent connector's fee" for each lot for which service is requested. The amount of the subsequent connector's fee will be the cost of the Main Extension divided by the number of lots (or lot equivalents as provided in 170 IAC 6-1.5-30) abutting the main.

If the owner of land which abuts the Main Extension and said land was unplatted on the completion date of the Main Extension and said owner or his heirs, successors or assigns (hereinafter, collectively the "owner") subdivides said land within 10 years after the completion date of the Main Extension in such a manner that some or all of the lots will not require service directly from the Main Extension, and the owner requests a lateral Main Extension from the Main Extension to serve such land, the owner will be obliged to pay to the Department a subsequent connector's fee for each lot abutting the earlier Main Extension, regardless of whether such lots are to be served by the earlier Main Extension or by the lateral Main Extension.

Applicants for service connections for lots within the Developer's subdivision shall not be required to pay a subsequent connector's fee. The subsequent connector's fee shall be in addition to any other charges which the subsequent connector must pay to the Department or VWI in order to connect to and receive service from the Department.

The subsequent connector fee, if any, will be determined once the cost of Main Extension has been submitted to the Department along with the Transfer of Ownership by the Developer. The Department will issue a letter to the owner (with a copy to the Developer) specifying the amount of this subsequent connector's fee. Refunds shall be paid by the Department to Developer as provided in 170 IAC 6-1.5-36. Developer, at its sole discretion, may request that the Department reduce or waive the subsequent connector fee. This waiver or reduction in the subsequent connector fee must be in writing and submitted to the Department.

15. **Set Off.** The Department shall have the right to set off against any funds due the Developer in connection with Revenue Allowances and Subsequent Connector Fees for any actual or anticipated losses and/or expenses related to any claims, demands, causes of action, liabilities, losses, damages, penalties, costs or liens asserted by any party against the Department or VWI or their properties for which the Developer is required to defend, indemnify, hold harmless and protect the Department or VWI under the terms of paragraph 19 herein.

**16. Connection to Main Extension.** After the date the main is in service the Developer shall have the right to connect customers to the Main Extension in accordance with VWI and the Department's rates, rules and regulations, as approved by the Indiana Utility Regulatory Commission and in effect from time to time, without further installation charge. The cost of the service pipes from the Main Extension to the individual premises of the Developer or lot owner shall be borne by the Developer or lot owner as a separate expense, such service pipes shall remain the customer's property. The service taps to the Main Extension shall be made by VWI and owned by the Department.

**17. No Refunds Based Upon Other Main Extension.** Notwithstanding any other provisions of this Agreement, the Department shall have the absolute right at any time to construct and install other main extensions and appurtenant facilities connecting to the Main Extension, provided service to the subject Main Extension is not impaired. Neither the connection of any such other main extension nor any service furnished by or from such other main extensions shall be subject to or in any manner affect this Agreement, and the Developer shall not be entitled to any revenue allowance refund or other payment by reason of the connection of such other main extensions or connections for service therefrom.

**18. Developer Safety Measures.** The Developer and its contractor(s) shall take all steps necessary to ensure the safety of any VWI inspector or other employee at the worksite. VWI shall have no responsibility for identifying, eliminating or otherwise abating any safety, health, or environmental hazard created or otherwise resulting at the worksite from the activities of the Developer or any other person. Nothing in this Agreement shall be construed or interpreted, directly or indirectly, as requiring that VWI undertake any legal duty of the Developer or contractor(s) to the Developer's or contractor's employees, invitees or licensees or to any federal, state or local government agency.

**19. Liability and Indemnity.** The Developer and its contractor(s) shall be solely responsible for all labor, materials, equipment and work at the worksite. The Developer shall defend, indemnify, hold harmless and protect the Department and VWI, their affiliates, employees, agents, officers, and directors (the "Department Indemnified Parties"), from and against any and all claims, demands, causes of action, liabilities, losses, damage, penalties, liens asserted by any party against City, the Department Indemnified Parties, or their properties, costs (including reasonable attorneys' fees), and suits, including without limiting the generality of the foregoing, those claims, demands, causes of action, liabilities, losses, damage, penalties, liens, costs (including reasonable attorneys' fees), and suits for which the Department Indemnified Parties may be, or may be claimed to be, liable through negligence or otherwise, for death, personal injury, illness or loss or damage to property, or economic loss alleged to arise out of, result from, relate to, or be in any manner connected with activities of the Developer or the services provided by the Department Indemnified Parties under this Agreement. The Developer shall provide such defense and indemnity whether the claim, demand, cause of action, lien, or suit alleges that the occurrence, omission, action, liability, loss, or damage was caused or contributed to by the concurrent, joint comparative, active or passive negligent act or omission of any Department Indemnified Party, except that the Developer assumes no liability for the negligent acts or omissions of any Department Indemnified Party, their employees, agents, officers, and directors, which, without contributory fault on the part of the Developer, its contractor(s), subcontractor(s), or their employees, agents, officers, or directors, is the sole cause of loss, damage to person or property, or injury to or death of any person.

The Department Indemnified Parties shall give the Developer prompt written notice of any lien or claim for which indemnification is sought hereunder. The Developer shall at its own expense assume the defense of such lien or claim with counsel selected in consultation with the Department Indemnified Parties; provided, however, that the Developer shall not be entitled to settle any lien or claim against the Department Indemnified Parties without the prior written consent of the Department Indemnified Parties, which consent shall not be unreasonably withheld. The Department Indemnified Parties shall have the right, but not the duty, to employ, at its expense, its own counsel in any such case.

**20. Insurance.** The Developer and its contractor/subcontractors shall add the Department Indemnified Parties as additional insureds on a primary and non-contributory basis under all of the Developer's liability insurance policies covering work at the worksite. As additional insureds, the Department Indemnified Parties shall be provided the same extent and quality of coverage as the Developer and any other primary insured party. The Developer shall provide the Department Indemnified Parties a certificate of insurance evidencing such coverage prior to VWI's performance of any services under this Agreement. Such liability insurance coverage shall remain in full force and effect until the In-Service Date.

**21. VWI Employees.** Under no circumstances shall Department or VWI employees be deemed employees, agents or representatives of the Developer. Nor shall this Agreement be deemed to constitute any Party hereto as the agent or representative of another Party.

**22. Successors and Assigns.** This Agreement shall inure to the benefit of and be binding upon the Parties hereto, including any subsequent connectors, and their respective successors and assigns.

**23. Indiana Utility Regulatory Commission.** This Agreement is entered into in conformity with the rules and regulations of the Indiana Utility Regulatory Commission and the Department's and VWI's Rules, Regulations, and Conditions of Service on file with and approved by such Commission. In the event of any conflict between the terms of this Agreement and the rules and regulations of such Commission and the Department's and VWI's Rules, Regulations and Conditions of Service, the rules and regulations of such Commission and the Department's and VWI's Rules, Regulations and Conditions of Service shall control and shall supersede any inconsistent terms herein. The respective obligations of each of the parties hereunder shall be subject to all applicable laws, rules and regulations.

IN WITNESS WHEREOF, the Parties have properly executed this Agreement or caused the same to be properly executed as of the date herein below set forth.

VEOLIA WATER INDIANAPOLIS, LLC

By: C.S. Voltz  
Printed Name: Charles Voltz  
Title: Vice President - Capital Projects  
Date Signed: 2-23-07

CONSOLIDATED CITY OF INDIANAPOLIS  
DEPARTMENT OF WATERWORKS

By: Michael C. Forchers  
Printed Name: Michael C. Forchers  
Title: Acting Director  
Date Signed: 2/26/2007

DEVELOPER

Firm Name: Promenade Commercial LLC  
By: Dann H. Small  
Printed Name: DANN H. SMALL  
Title: MANAGING AGENT  
Signed: 7/12/07  
Taxpayer ID #: 37-1526728  
Daytime Telephone Number: (317) 573-8100  
Mailing Address: 9011 N Meridian, Suite 202  
Indianapolis, IN 46260  
Project Location: State Road 32 North side

Between Little Chicago & Millcreek Road





## REFUND OF A WATER MAIN EXTENSION DEPOSIT

Refund No.	1	Project No.	J-06-230
		Date:	03/07/11
	Actual Cost .....	\$	268,047.00
Depositor / Assignee	Promenade Commercial, LLC	Prior Refunds .....	\$ -
Address	9011 N. Meridian St, Ste 202	Balance before this refund ...	\$ 268,047.00
City	Indianapolis, IN 46260	This Refund .....	\$ 736.43
Agreement dated		Deposit balance .....	\$ 267,310.57
Released for Taps	2/14/2008	Contract Expires	2/14/2018
	covering main(s) in	Promenade Shoppes	

2 Commercial Revenue allowances totaling \$ 736.43

Commercial allowance calculated on first 12 months metered service, X 3, minus cost to connect customer

Calculation of this refund is based on the following taps:

Site Number	Customer Address	First 12 months service multiplied by 3	Connection Cost	Commercial Revenue Allowance
S000653952	5865 Promenade Shops Blvd.	\$670.04	\$604.00	\$66.04
Irrg.	5865 Promenade Shops Blvd.	\$1,274.39	\$604.00	\$670.39

Signed:

Abby Cudworth  
Capital Projects Accountant  
[Abby.Cudworth@veoliawatema.com](mailto:Abby.Cudworth@veoliawatema.com)

Copies to: Customer, General Accounting, Main Extension Refunds  
General Accounting: 0252504

Lot Number		Address	Billed first 12 Mo. (year)	1st year service times 3	Minus meter connection	Meter Code	Allowance
S000653952	5865	Promenade Shops Blvd.	\$ 223.35	\$ 670.04	604	3	\$ 66.04
Irrg.	5865	Promenade Shops Blvd.	\$ 424.80	\$ 1,274.39	604	3	\$ 670.39



## Smart Suite Internet System

ID: SUJMA0  
CX001M

SMARTSUITE  
MAIN MENU

DATE: ( )  
TIME: 1

SELECT MENU NO.:

1. BILLING

5. SITE

2. CUSTOMER

6. PROJECT DEVELOPMENT

3. CORRESPONDENCE

7. CASH ENTRY

4. INSTALLED SERVICES

8. MISC REMARKS

9. STORM WATER

PHONE LOG INFORMATION:

CODE 000

ACTION DATE

PHONE

\*\*\* SEARCH KEYS \*\*\*

*Jrr.*

ADDRESS 5865

PROMENADE SHOPS BLVD

SITE NO

S000653953

NAME CVS PHARMACY #4375

PARCEL

CUST NO C000902629

METER

ID NBR

WORK ORDER

PHONE

CLIENT ABR

| "

HELP	RETURN	CLR-FLDS	POPUP	BILL	CUST	CORR	
IN-SERV	SITE	P-DEV	NX	C-INFO	S-INFO	I-INFO	REMARK ENTER

11/08	89.52
12/08	- 2041
1/09	78.81
2/09	11.47
3/09	11.47
4/09	11.47
5/09	11.47
6/09	11.47
7/09	11.47
8/09	70.47
9/09	67.06
10/09	70.54

1 <sup>st</sup> yr. water	424.80
	x 3
	<hr/>
	1,274.39
1" meter connection	- 604
	<hr/>
	670.39

# Smart Suite Internet System

ID: SUJMA0  
CX001M

SMARTSUITE  
MAIN MENU

DATE: ( )  
TIME: 1

SELECT MENU NO.:

1. BILLING

5. SITE

2. CUSTOMER

6. PROJECT DEVELOPMENT

3. CORRESPONDENCE

7. CASH ENTRY

4. INSTALLED SERVICES

8. MISC REMARKS

9. STORM WATER

PHONE LOG INFORMATION:

CODE 000

ACTION DATE

PHONE

\*\*\* SEARCH KEYS \*\*\*

ADDRESS 5865

PROMENADE SHOPS BLVD

SITE NO

S000653952

NAME CVS PHARMACY #4375

PARCEL

CUST NO C000902629

METER

ID NBR

WORK ORDER

PHONE

CLIENT ABR

HELP RETURN CLR-FLDS POPUP BILL CUST CORR

IN-SERV SITE P-DEV NX C-INFO S-INFO I-INFO REMARK ENTER

11/08 89.52

12/08 -20.41

1/09 15.11

2/09 15.11

3/09 15.11

4/09 15.11

5/09 15.11

6/09 13.29

7/09 16.85

8/09 16.97

9/09 14.83

10/09 16.74

1" yr. water

1" meter connection

22335

X 3

670.04

- 604

66.04

STATE OF INDIANA       )  
                                  ) SS:  
COUNTY OF HAMILTON )

IN THE HAMILTON SUPERIOR COURT NO. 1  
  
CAUSE NO. 29D01-1611-PL-009906

PROMENADE COMMERCIAL LLC,       )  
  )  
                          Plaintiff,       )  
  )  
                          v.                )  
  )  
THE BOARD OF DIRECTORS FOR       )  
UTILITIES OF THE DEPARTMENT OF    )  
PUBLIC UTILITIES OF THE CITY OF    )  
INDIANAPOLIS d/b/a CITIZENS WATER or    )  
CITIZENS ENTERGY SERVICES,        )  
  )  
                          Defendant.     )

**AMENDED COMPLAINT FOR DAMAGES AND DECLARATORY JUDGMENT**

Plaintiff, Promenade Commercial LLC (“Promenade”), by counsel in accordance with Indiana Trial Rule 15(A), for its Amended Complaint for Damages and Declaratory Judgment against Defendant, the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis d/b/a Citizens Water or Citizens Energy Services (“Citizens”), states as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Promenade is a limited liability company, which is organized pursuant to the laws of the State of Indiana and which maintains its principal place of business in Hamilton County, Indiana.

2. Citizens is a provider of water utilities with its principal place of business located in Indianapolis, Indiana. Citizens can be served with process through its in-house counsel, who has agreed to accept service of process for Citizens.

3. Venue is proper in this Court pursuant to Rule 75(A) of the Indiana Rules of Trial Procedure because the contract at issue in this lawsuit relates to real property located in Hamilton County, Indiana.

### **FACTS**

4. On July 12, 2007, Promenade entered into a certain Water Main Construction Agreement (the “Agreement”) with Veolia Water Indianapolis, LLC (“Veolia”) and the Consolidated City of Indianapolis Department of Water (“Department”) in connection with the development of the Promenade of Noblesville (the “Development”). A true and accurate copy of the Agreement is attached hereto as Exhibit A.

5. The Development is located in Noblesville, Indiana and is bounded to the south by State Road 32, to the east by Mill Creek Road, to the west by Little Chicago Road, and to the north by another parcel of property.

6. As of July 2007, the Department owned the water system serving the greater Indianapolis area and certain surrounding areas, including Noblesville, Indiana and the Development (the “Waterworks”).

7. As of July 2007, Veolia operated and maintained the Waterworks under a contract with the Department.

8. Pursuant to the Agreement, Promenade agreed to construct a water main to serve users within the Development at Promenade’s expense.

9. The Agreement also provides that, for a period of ten (10) years from the date the water main constructed by Promenade is in service, the Department would make certain revenue payments to Promenade as residential and commercial customers connected directly or indirectly to the water main and received water service.

10. Specifically, the Agreement requires that, for each residential customer in the Development who becomes directly or indirectly connected to the water main and begins to receive water service, the revenue payment to Promenade was to be \$1,231.00 per unit per year.

11. For commercial customers, the revenue payment to Promenade was to have been payment is product of three (3) times projected water revenue.

12. Promenade complete construction of the water main, incurring expense of \$290,023.08.

13. The water main was placed into service in February 2008.

14. Once the water main was completed and placed into service, Promenade deeded the water main to Veolia, as required by the Agreement.

15. Promenade Villas is commercial portion of the Development, located in the northeast portion of the Development. Promenade Villas is located immediately adjacent to the water main constructed by Promenade.

16. Promenade Woods is a residential area located in the northeast portion of the Development, just north of the Promenade Villas.

17. Upon information and belief, in or about 2010, the Department terminated its contract with Veolia and placed Citizens in charge of operating and maintaining the Waterworks.

18. Shortly after Citizens assumed this role, it arranged for the primary home builder for the Promenade Woods residential development to connect to the water main constructed by Promenade to supply water service to the homes constructed in the Promenade Woods neighborhood.

19. Through this connection, many residential customers have indirectly connected to the water main constructed by Promenade and begun to receive water service.

20. Upon information and belief, since the water main was placed into service in February 2008, over twenty-five (25) residential customers have indirectly connected to the water main constructed by Promenade and begun to receive water service.

21. Upon information and belief, there are over forty (40) total lots on which homes have been constructed in the Promenade Woods neighborhood. These will soon be – or may already be – additional residential customers who have connected indirectly to the water main constructed by Promenade and will begin – or may have already begun – to receive water service.

**COUNT I**  
**Breach of Contract**

22. Promenade incorporates by reference and realleges each allegation set forth in paragraphs 1 through 21 as if fully set forth herein.

23. The Agreement is a valid, enforceable contract.

24. As discussed herein, Promenade performed all of its obligations under the Agreement.

25. Citizens has breached the Agreement by failing and refusing to pay Promenade the revenue allowances due.

26. As a direct and proximate result of Citizens' breach of the Agreement, Promenade has sustained considerable financial damages in an amount to be established at trial.

**COUNT II**  
**Unjust Enrichment**

27. Promenade incorporates by reference and realleges each allegation set forth in paragraphs 1 through 21 as if fully set forth herein.

28. By constructing the water main at issue in this lawsuit, Promenade has conferred a real and measurable benefit on Citizens. Indeed, Promenade expended \$290,023.08 to construct the water main.

29. To date, Promenade has received no compensation for its work in constructing the water main.

30. Under these circumstances, it would be manifestly unjust to permit Citizens to retain this benefit without requiring that it compensate Promenade for the reasonable value of the benefit conferred.

**COUNT III**  
**Declaratory Judgment**

31. Promenade incorporates by reference and realleges each allegation set forth in paragraphs 1 through 21 as if fully set forth herein.

32. In accordance with Ind. Code § 34-14-1, Promenade seeks a declaratory judgment that, for any residential units constructed in the Promenade Woods or elsewhere within the Development, the Agreement requires revenue payments to Promenade in the amount of \$1,231.00 per unit per year through February 2018.

33. This action for declaratory judgment is brought for the purposes of determining a question of actual controversy by and between the parties.

34. This declaratory judgment is sought because the parties have an interest in obtaining a declaration by the Court with respect to their rights in connection with obligations imposed by Agreement in connection with new residential units that connect directly or indirectly to the water main constructed by Promenade through February 2018.

35. In accordance with Indiana Code § 34-14-1-10, Promenade requests that the Court award its costs, including reasonable attorney's fees, incurred in seeking this declaratory judgment.

WHEREFORE, Plaintiff, Promenade Commercial LLC, respectfully requests that the Court enter judgment in his favor and against Citizens and that Court grant Promenade any other appropriate relief.

Respectfully submitted,

/s/ Daniel K. Burke

Daniel K. Burke (#24572-49)

DKB LEGAL LLC

1016 3<sup>rd</sup> Avenue SW, Suite 100

Carmel, IN 46032

317-709-4242

Email: [dan@dkblegal.com](mailto:dan@dkblegal.com)

Attorney for Plaintiff,

Promenade Commercial LLC



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served upon the following counsel of record via the Court's electronic filing system and by Certified Mail on February 24, 2017:

Alex Valle, Senior Legal Counsel  
Citizens Energy Group  
2020 North Meridian Street  
Indianapolis, IN 46202

/s/ Daniel K. Burke



STATE OF INDIANA ) IN THE HAMILTON SUPERIOR COURT  
 ) SS:  
 COUNTY OF HAMILTON ) CAUSE NO. 29D01-1611-PL-9906

PROMENADE COMMERCIAL, LLC, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE BOARD OF DIRECTORS FOR )  
 UTILITIES OF THE DEPARTMENT OF )  
 PUBLIC UTILITIES OF THE CITY OF )  
 INDIANAPOLIS d/b/a CITIZENS WATER )  
 OR CITIZENS ENERGY SERVICES, )  
 )  
 Defendant. )

**DEFENDANT'S MOTION FOR STAY**

Defendant, the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis, d/b/a Citizens Water ("Citizens") (incorrectly identified by Plaintiff as "d/b/a Citizens Water or Citizens Energy Services"), by counsel, moves the Court for stay of this action, on grounds of primary jurisdiction and failure to exhaust administrative remedies pursuant to *Austin Lakes Joint Venture v. Avon Utilities, Inc.*, 648 N.E.2d 641, 646 (Ind. 1995) and related case law. In support of its motion for stay, Defendant states as follows:

1. Plaintiff filed its complaint on November 15, 2016, in which, as to Citizens (albeit referred to incorrect as "Citizens Energy Services Company, LLC"), Plaintiff purported to allege a cause of action for breach of contract and related claims for unjust enrichment and for declaratory relief.

2. On February 24, 2017, Plaintiff filed its amended complaint (the "Complaint"), asserting therein substantially the same claims, but substituting as the defendant the currently named Citizens entity.

3. Plaintiff's Complaint attaches a copy of the contract allegedly breached by Citizens (Complaint Exhibit A). Such contract, in turn, necessarily implicates Citizens's Terms and Conditions, also known as a "tariff," on file with the Indiana Utility Regulatory Commission ("Commission"), due to the fact that the contract expressly incorporates, in two separate places, the "rules and regulations ... on file with and approved by such Commission." *See* Complaint Ex. A, at ¶ 16 ("Developer shall have the right to connect customers to the Main Extension in accordance with [the] rates, rules and regulations, as approved by the [Commission] and in effect from time to time ....") and ¶ 23 ("This Agreement is entered into in conformity with the rules and regulations of the [Commission] and [the] Rules, Regulations, and Conditions of Service on file with and approved by such Commission.").

4. The issues alleged in the case involve a Water Main Extension Agreement between the Plaintiff and Citizens's predecessors-in-interest, Veolia Water Indianapolis, LLC and the Consolidated City of Indianapolis Department of Waterworks <sup>1</sup>.

5. While this court may exercise subject matter jurisdiction over this action, nevertheless unexhausted administrative remedies remain, and furthermore primary jurisdiction over a key issue lies with the Commission, such that the case should be stayed and the matter referred to the Commission for exhaustion of prescribed remedies and for resolution of such key issue.

6. Citizens is a local water utility regulated by the Commission. *See* I.C. 8-1-11.1-3(c)(9) (setting forth the powers of the Citizens Board, and stating that Citizens has the power to "adopt rules for service and rates for service," but adding that "any such rules and rates for service shall be in effect only after the rules and rates have been filed with and approved by the

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<sup>1</sup> *See* Complaint Ex. A, at ¶ 22 ("This Agreement shall inure to the benefit of and be binding upon the Parties hereto, ... and their respective successors and assigns."). Emphasis added.

commission and such approval shall be granted by the commission only after notice of hearing and hearing as provided by IC 8-1-1 and IC 8-1-2....”).

7. When Citizens acquired the water utility effective August 26, 2011, the Commission approved, in Commission Cause No. 43936, a set of Water Service Terms & Conditions (“Water Terms & Conditions” or “Terms & Conditions”). *See attached Exhibit A* (excerpts).

8. Any attack on the validity or application of a Commission-approved utility tariff is within the exclusive jurisdiction of the Public Service Commission (now the Indiana Utility Regulatory Commission). *Haggard v. PSI Energy, Inc.*, 575 N.E.2d 687, 690 (Ind. Ct. App. 1991).

9. Rule 11 of the Water Terms & Conditions<sup>2</sup>, titled “Complaint Procedure,” provides for complaints about bills, security deposits, disconnection notices, and “any other matter relating to the Utility’s service....”

10. Complaints under Rule 11 may be made “in person, in writing, or by completing a form available from either the Commission or from the Utility at its business office.” *See* Rule 11.1. The complainant also “may ... request a review of the Utility’s proposed disposition by the Commission.” *See* Rule 11.2.

11. Additionally, the Commission has published rules regarding informal complaints to the Commission, wherein “[a]ny individual or entity may informally complain to the commission’s consumer affairs division, with respect to any matter within the jurisdiction of the commission.” *See* 170 Indiana Administrative Code 1-1.1-5(a).

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<sup>2</sup> Since 2011, the Terms & Conditions have been amended, with Commission approval, several times, most recently in 2016. The current Terms & Conditions describe the applicable complaint procedures at their Rule 9, instead of at Rule 11, but the language used is exactly the same. In this Motion, Citizens will use the term “Rule 11” with reference to the complaint procedures, as that is the rule set forth in the attached *Exhibit A*, although currently Rule 9 applies.

12. It is axiomatic in Indiana that “a claimant with an available administrative remedy must pursue that remedy before being allowed access to the judicial power.” *See, e.g., Advantage Home Health Care Inc. v. Ind. State Dep’t of Health*, 829 N.E.2d 499, 503 (Ind. 2005) (quoting *City of East Chicago v. Sinclair Refining Co.*, 111 N.E.2d 459, 464 (1953)).

13. Indeed, the Indiana Supreme Court has described the rationale for the doctrine of exhaustion of administrative remedies as follows:

Premature litigation may be avoided, an adequate record for judicial review may be compiled, and agencies retain the opportunity and autonomy to correct their own errors. Even if the ground of complaint is the unconstitutionality of the statute, which may be beyond the agency's power to resolve, exhaustion may still be required because 'administrative action may resolve the case on other grounds without confronting broader legal issues.'

*Turner v. City of Evansville*, 740 N.E.2d 860, 862 (Ind. 2001) (quoting *Turner v. City of Evansville*, 740 N.E.2d 860, 862 (Ind. 2001)).

14. As was explained by the Indiana Supreme Court in the *Austin Lakes* case (cited above), after a trial court has determined that it has subject matter jurisdiction, it “must review the issues in the case claimed to be matters within the purview of an administrative or regulatory agency to determine whether the doctrine of primary jurisdiction should be invoked, *i.e.*, whether the court, while retaining jurisdiction over the case, should refer an issue or some subset of issues in the case to the expert agency for its opinion or final decision.” 648 N.E.2d at 646. The trial court must also assess whether referral to the agency is mandatory, as is the case when there is (as here) a failure to exhaust administrative remedies. *Id.* at 646-647.

15. This case, in large part, turns on the definition of the term “indirectly,” as that term is used in ¶ 13 of the Agreement. *See* Complaint, ¶ 10. The Agreement does not define this term, although other provisions in the Agreement suggest its likely meaning. Plaintiff does not

agree with Citizens's interpretation of this term. Significantly, this term is clarified with reference to Citizens's Commission-approved Water Terms & Conditions, in Section 12.14.3 thereof<sup>3</sup>, and the Agreement clearly provides at ¶ 23 that "[i]n the event of a conflict between the terms of this Agreement and the rules and regulations of such Commission and the ... Regulations and Conditions of Service, the rules and regulations of such Commission and the ... Rules, Regulations and Conditions of Service [which includes the Commission-approved Terms & Conditions] shall control and shall supersede any inconsistent terms herein." Emphasis added. *See also id.* ("The respective obligations of each of the parties hereunder shall be subject to all applicable laws, rules and regulations."). Emphasis added.

16. Interpretation and application of Water Terms & Conditions that have already been approved by the Commission previously, in connection with an Agreement that expressly incorporates the Commission's rules and the Terms & Conditions at issue by reference, clearly falls within the purview of the Commission's expertise. Moreover, the Commission has provided a mechanism for resolution of this aspect of Plaintiff's complaint, *i.e.*, the complaint procedure described above. Accordingly, regardless of whether this Court may properly exercise over the subject matter of this action, referral of the principal issue in the case, *i.e.*, interpretation of the term "indirectly" as it is used in the parties' contract at issue, should be made to the Commission. Moreover, Plaintiff should be required to exhaust the prescribed administrative remedies in this matter before proceeding any further with its court action. Accordingly, the present action should be stayed pending resolution of the administrative process and of this court's referral.

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<sup>3</sup> Again, the current Terms & Conditions are numbered differently. The applicable rule is currently labeled "Rule 10.14.3," but precisely the same language is in prior Citizens Water tariffs at Section 12.14.3. In this Motion, Defendant will refer to this provision as Rule 12.14.3. *See Exhibit A.*

17. Counsel for the Defendant inquired with Plaintiff's counsel on July 17, 2017, regarding whether the Plaintiff has any objection to the relief sought by Defendant herein. As of the filing of this motion for stay, Plaintiff and its counsel have indicated opposition to Defendant's motion and its intent to file a response.

WHEREFORE, Defendant, by counsel, hereby requests that the Court stay this case, pending exhaustion of administrative remedies and resolution of the issues referred to the Commission (*i.e.*, interpretation of the term "indirectly" as it is used in the parties' contract at issue), and further grant all other just and proper relief in the premises.

Respectfully submitted,

/s/ Alejandro Valle  
Alejandro Valle, Attorney No. 22863-49  
Citizens Energy Group  
2020 North Meridian Street  
Indianapolis, Indiana 46202  
avalle@citizensenergygroup.com  
Phone / fax: (317) 927-4317



## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been served upon the following party by placing a copy of the same in the United States Mail, first class, postage pre-paid, on this 19<sup>th</sup> day of July, 2017:

Daniel K. Burke  
DKB Legal LLC  
1016 3<sup>rd</sup> Avenue SW, Suite 100  
Carmel, IN 46032

/s/ Alejandro Valle  
Alejandro Valle



Exhibit A

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**WATER SERVICE TARIFF  
RATES, TERMS AND CONDITIONS  
FOR WATER SERVICE WITHIN  
MARION COUNTY, INDIANA**

**Issued By The**

**Department of Public Utilities for  
The City of Indianapolis, acting by  
and through The Board of Directors for Utilities,  
as Trustee, in furtherance of a Public Charitable Trust for  
the Water System d/b/a Citizens Waterworks  
2020 North Meridian Street  
Indianapolis, Indiana 46202**

**Martha D. Lamkin  
President of  
Board of Directors**

**Carey B. Lykins  
President, and  
Chief Executive Officer**

**ISSUED PURSUANT TO**  
**WATER TERMS AND CONDITIONS**  
**I.U.R.C. CAUSE NO. 43936**

**43936**  
**JUL 13 2011**

Date  
Indiana Utility Regulatory Commission

**EFFECTIVE**  
**EFFECTIVE: August 26, 2011**

**AUG 26 2011**

**INDIANA UTILITY  
REGULATORY COMMISSION**

9.6.3 maintain and repair, at the Customer's sole expense, the Customer's private fire service system, including the Customer's pipes installed within the Public Right-of-Way or Easement,

9.6.4 compensate the Utility for any and all damage to the Utility's facilities located in the Public Right-of-Way or Easement caused by the Customer, its system, installation or use,

9.6.5 indemnify the Utility against any and all liability and claims arising from damage to property or injury (whether or not alleged to be the result of the Utility's negligence) caused by the Customer's system or its installation, maintenance or use, and

9.6.6 relocate, at no expense to the Utility, its facilities installed within the Public Right-of-Way if such relocation is necessitated by a public improvement.

9.7 Detector Checks. An Underwriters Laboratory-approved detector check with a bypass Meter or double check detector check assembly shall be installed in all new private fire system Service Pipes. In addition, detector checks with bypass Meters or double check detector check assemblies shall be installed where existing private fire system Service Pipes are being modified, replaced or relocated, where existing private fire systems are being extended, and when a Customer being served has been found by the Utility to be using water, without authorization from the Utility, from an existing unmetered Service Pipe for purposes other than fire service. The detector check or double check detector check assembly shall be located after all metered Branched Service Pipe connections. The bypass Meter around the detector check or double check detector check assembly shall be sized, purchased, installed and owned by the Utility. The detector check or double check detector check assembly, meter pit or vault, and all other piping facilities within the meter pit or vault, shall be subject to the Utility's prior approval and be constructed and installed by, and the responsibility of, the Customer.

#### RULE 10. UTILITY'S RESPONSIBILITY FOR SERVICE

10.1 Interruptions, Pressure, and Volume. The Utility will use reasonable care and diligence to avoid interruptions and fluctuations in its service, but it cannot and does not guarantee that interruptions and fluctuations will not occur. Variations in pressure or volume of flow are to be expected. In the Utility's judgment, Customers requiring uniform service, an uninterrupted supply, or uniform pressure or volume shall make their own special provisions on their Premises. Customers needing special provisions for uninterrupted service may also be required to install multiple meters or multiple backflow devices to allow the Utility to test Meters and backflow devices or repair Meters during the Utility's normal business hours and to allow the Customer to repair its backflow devices.

10.2 Liability for Damages on Customer's Premises. The Utility shall not be liable for any damage done or inconvenience caused by reason of any break, leak or defect in, or by water escaping from, Service Pipes or fixtures on the Premises of the owner or Customer.

#### RULE 11. COMPLAINT PROCEDURE

11.1 Complaint. A Customer may complain to the Utility at any time about any bill which is not then delinquent, a security deposit, a disconnection notice, or any other matter relating to the Utility's service and may also request a conference about such matters. The complaints may be made in person, in writing, or by completing a form available from either the Commission or from the Utility at its business office. A complaint shall be considered filed upon receipt by the Utility, except mailed complaints shall be considered filed as of the postmark date. In

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making a complaint or requesting a conference (hereinafter "complaint"), the Customer shall state his/her name, service address and the general nature of his/her complaint.

11.2 Investigation of Complaint and Notification of Proposed Disposition. Upon receiving each such complaint, the Utility will investigate the matter, confer with the Customer when requested and notify him/her, in writing, of its proposed disposition of the matter. Such written notification will advise the Customer that he/she may, within seven days following the date on which such notification is mailed, request a review of the Utility's proposed disposition by the Commission. If the Customer requests a special Meter reading, the first reading of the Customer's Meter by the Utility during its investigation shall not be subject to the charge for a special Meter reading prescribed in the Utility's Rate Schedules. Subsequent readings, however, if requested by the Customer, will be subject to the charge.

11.3 Service During Review of Complaint. If the Customer is receiving service at the time the complaint is received by the Utility, his/her service will not be disconnected until at least ten days after the date on which the Utility mails the notification of its proposed disposition of the matter to the Customer. If the Customer, within seven days after the mailing by the Utility of its proposed disposition of the matter, requests the Commission to review the Utility's proposed disposition of the complaint, the Utility will not disconnect the Customer's service until at least three days after the date of the mailing of the Commission's decision on the matter, provided the Customer has paid and continues to pay all undisputed bills, portions of disputed bills as specified hereinafter, and all future undisputed bills prior to their becoming delinquent. If the Customer and the Utility cannot agree as to what portion of a bill is undisputed, the Customer shall pay on the disputed bill an amount equal to his average bill for the twelve months immediately preceding the disputed bill, except in those cases where the Customer has received fewer than twelve bills, in which event the Customer shall pay an amount equal to 1/12 of the Utility's estimate of its annual cost of rendering service to such Customer.

11.4 Record of Complaints. The Utility's record of complaints under this rule will be available during normal business hours upon request by the concerned Customer, his agent possessing written authorization, or the Commission.

## RULE 12. MAIN EXTENSIONS

12.1 Definitions. The following terms as used in this rule have the following meanings:

12.1.1 "Completion date of the Main extension" means the date the Utility declares the Main extension to be in service and releases it for Taps.

12.1.2 "Cost of the Main extension" means the estimated cost of installing the Main or the actual cost of a developer-installed extension.

12.1.3 "Deposit" means the amount required to be deposited by or on behalf of each prospective Customer for a Main extension prior to the Utility commencing construction of the Main extension.

12.1.4 "Main extension" means the Mains, hydrants and appurtenances installed by the Utility to provide the water utility service requested by or on behalf of the prospective Customer or Customers, but does not include the Customer's Service Pipe.

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Indiana Utility Regulatory Commission

INDIANA UTILITY  
REGULATORY COMMISSION

the lateral Main extension. Applicants for service connections for parcels within subdivision developments included in a Main extension agreement shall not be required to pay a subsequent connector's fee. The subsequent connector's fee shall be in addition to any other charges which the subsequent connector must pay to the Utility in order to connect to and receive service from the Utility.

12.14 Provisions Regarding the Refund of Deposits.

12.14.1 All Main extensions are the Utility's property. The Utility shall have the right to make further extensions therefrom without the original depositors being entitled to any refund by reason of such further extensions or connections thereto, except as provided in Rule 12.13.

12.14.2 No refund shall be based on connections to the Main extension made more than 10 years after the completion date of the Main extension. In no event shall the total amount of the refunds to an original depositor exceed the amount of his deposit. No interest shall be paid on any deposit made pursuant to this Rule 12.

12.14.3 No refund of any deposit shall be made on account of any Customer connecting to the Main extension for whom a final revenue allowance was allowed in establishing or adjusting the amount of such deposit, or whose property does not directly abut upon the particular section of the public thoroughfare in which the Main extension is installed.

12.14.4 In the event that more than one party contributes to the total required deposit, refunds shall be divided among the parties making the total required deposit in the same proportion as their contributions bear to the total required deposit, unless otherwise provided for in the Main extension agreement.

12.14.5 The Utility shall notify the original depositor or depositors of the completion date of the Main extension. Within 30 days after the first anniversary of said completion date, and within 30 days after the next nine anniversaries of said completion date, the Utility shall compute credits toward its repayable investment, if any, and the refunds due the original depositor or depositors. Such credits shall consist of the sum of the following:

(a) The subsequent connector's fees collected by the Utility from Customers connected to the Main extension after the completion date of the Main extension and for whom no credit has been previously allowed.

(b) A revenue allowance in the amount specified in the Main extension agreement for each single family residential Customer who connected to the Main after the completion date of the Main extension and for whom no credit has previously been allowed.

(c) A revenue allowance for each non-residential or multi-dwelling complex Customer for whom no credit was previously allowed in the amount of three times the first normal 12-months' Metered and private fire protection service bills paid by such Customer within four years after connection to the Main, less the Utility's cost of so connecting them. If the connection occurs in the tenth year after the completion date of the Main extension, the credit under this subparagraph (c) shall be based on the Utility's estimate of the first normal 12-months' revenue from that Customer for each nonresidential or multiple dwelling unit complex Customer who connected to the Main extension and for whom no credit has previously been allowed.

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WATER TERMS AND CONDITIONS  
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Indiana Utility Regulatory Commission

EFFECTIVE  
EFFECTIVE: August 26, 2011  
AUG 26 2011

INDIANA UTILITY  
REGULATORY COMMISSION

STATE OF INDIANA        )  
                                  ) SS:  
COUNTY OF HAMILTON    )

IN THE HAMILTON SUPERIOR COURT NO. 1  
  
CAUSE NO. 29D01-1611-PL-009906

PROMENADE COMMERCIAL LLC,        )  
  )  
                          Plaintiff,        )  
  )  
                          v.                )  
  )  
THE BOARD OF DIRECTORS FOR        )  
UTILITIES OF THE DEPARTMENT OF    )  
PUBLIC UTILITIES OF THE CITY OF    )  
INDIANAPOLIS d/b/a CITIZENS WATER or    )  
CITIZENS ENTERGY SERVICES,        )  
  )  
                          Defendant.        )

**PLAINTIFF'S RESPONSE IN OPPOSITION TO**  
**DEFENDANT'S MOTION FOR STAY**

Plaintiff, Promenade Commercial LLC (hereinafter "Promenade"), by counsel, submits its Response in Opposition to the Motion to Stay filed by Defendant, The Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis d/b/a Citizens Water or Citizens Energy Services (hereinafter "Citizens"), and, in support thereof, would respectfully show the Court as follows:

1.       This is a breach of contract case. In July 2007, Promenade and Veolia Water Indianapolis LLC (Citizens' predecessor-in-interest) entered into a Water Main Extension Agreement (the "Agreement"), whereby Promenade agreed to construct a water main extension for use by residential and commercial customers. The Agreement enabled Promenade to recover its costs in constructing the water main extension through revenue allowances, *i.e.*, payments based on the number of customers who become directly or indirectly connected to the water main

extension for a period of ten (10) years after it was in service. Through this action, Promenade claims that Citizens breached the Agreement by failing and refusing to pay revenue allowances.

2. Citizens requests that the Court stay these proceedings and refer the matter to the Indiana Utility Regulatory Commission (the “Commission”) because: (a) the Commission affords Promenade administrative remedies that Promenade has failed to exhaust; and (b) the Commission has primary jurisdiction to resolve certain key issues in this matter. However, as described further below, Citizens is mistaken on both fronts, and Promenade respectfully requests that Citizens’ Motion for Stay be denied in all respects.

3. Citizens contends that Rule 11 (now Rule 9) of its Terms & Conditions, which is entitled “Complaint Procedure,” affords Promenade with an administrative remedy and that Promenade has failed to exhaust this remedy. *See* Motion to Stay at ¶ 9. Specifically, Citizens contends that Rule 11 “provides for complaints about bills, security deposits, disconnection notices, and ‘any other matter relating to the Utility’s service ...’” *Id.* Citizens further asserts that Rule 11.1 provides a mechanism for making complaints in person or in writing and for reviewing the Utility’s proposed disposition. *Id.* at ¶ 10.

4. However, this complaint procedure is not available to Promenade. This is because the Rule 11’s complaint procedure is expressly made available to a “Customer.” Although Citizens omits the beginning of the first sentence of Rule 11.1, the language used plainly limits the application of the complaint procedure described in Rule 11 to a “Customer.” *See* Motion for Stay at Exhibit A, ¶ 11.1. Further, all paragraphs of Rule 11 relate to the complaint procedures available to a “Customer.” *See* Motion for Stay at Exhibit A, ¶¶ 11.1 through 11.4. Citizens has not provided a complete copy its 2011 Terms and Conditions and has also not provided the portion of its Terms & Conditions containing the definition of “Customer.” However, a more recent version of



Citizens' Terms & Conditions, which became effective on April 22, 2016, defines "Customer" as "An individual, firm, corporation, government agency or other entity that has agreed, orally or otherwise, to pay for water utility service received from the Utility." *See* 2016 Terms & Conditions, ¶ 1.9 (A complete copy of the more recent Terms & Conditions is attached hereto as Exhibit A).

5. Promenade is not a "Customer," as defined by Citizens' Terms & Conditions. In the context of its breach of contract claim against Citizens, Promenade is not an entity that has agreed to pay for water utility service. As such, the complaint procedures outlined in Rule 11 of Citizens' Terms & Conditions are not available to Promenade. Because these complaint procedures are not available to Promenade, it has no available administrative remedy to exhaust.

6. Citizens also contends that parties disagree as to the interpretation of the term "indirectly" as it is used in the Agreement and points to Section 12.14.3 of its Terms & Conditions as providing clarification with respect to this term. *See* Motion for Stay at ¶ 15. This does not appear to be accurate. Section 12.14.3 provides:

No refund of any deposit shall be made on account of any Customer connecting to the Main extension for whom a final revenue allowance was allowed in establishing or adjusting the amount of such deposit, or whose property does not directly abut upon the particular section of the public thoroughfare in which the Main extension is installed.

7. As noted above, Promenade filed this lawsuit to recover revenue allowances due under the Agreement. Although it is true that the Agreement provides that Promenade is entitled to a revenue allowance for all residential or commercial customers who become directly or indirectly connected to the Main extension that Promenade constructed, Section 12.14.3 of Citizens' Terms & Conditions appears to address the availability of refunds of deposits for Customers, not revenue allowances. Moreover, this section can hardly be read to provide any sort of interpretation of the term "indirectly."

8. Further, Section 10.5 of Citizens' 2016 Terms & Conditions addresses the determination and calculation of revenue allowances. This provision of the Terms & Conditions contains no interpretation of "indirectly" and does not even reference the terms "directly" or "indirectly."

9. Because Citizens has not identified any conflicting interpretation of the term "indirectly," there is no reason even to consider referring this issue to the Commission for resolution. Moreover, even if 12.14.3 could somehow be read as establishing a conflicting interpretation of the term "indirectly" with respect to the determination and calculation of revenue allowances under the agreement, this Court is perfectly capable of resolving such a dispute regarding the language used in the contract.

10. The Indiana Supreme Court's decision in *Austin Lakes Joint Venture v. Avon Utils.*, 648 N.E.2d 641 (Ind. 1995), is instructive. In *Austin Lakes*, a real estate developer sued a utility provider for breach of contract and fraud, and the utility raised exhaustion of remedies and primary jurisdiction as defenses. *Id.* at 644-650. The court first rejected the exhaustion of remedies defense, noting that this was "a lawsuit for breach of contract and fraud between two private parties." *Id.* at 645. It was "not a challenge to an agency regulation or action." *Id.* Similarly, Promenade's claim against Citizens is not a challenge to an agency regulation or action – it is a breach of contract action. And, as noted above, Citizens' Terms & Conditions afford Promenade to administrative remedy to pursue.

11. The court in *Austin Lakes* next considered the application of the doctrine of primary jurisdiction; specifically, the court discussed whether a trial court should retain jurisdiction over a case but refer an issue to the agency for its opinion. 648 N.E.2d at 646. First, the court concluded that primary jurisdiction should be invoked where "one (but less than all) of the issues in the case

requires exhaustion of remedies before judicial review can occur.” *Id.* at 647. Here, as noted above, there was no available administrative remedy for Promenade to exhaust. Second, the court reasoned that the primary jurisdiction doctrine cannot be invoked where there is nothing to refer to the administrative agency. *Id.* Here, there is nothing to refer to the Commission. As noted above, Citizens has not pointed to any interpretation by the Commission of the term “indirectly,” particularly in the context of determining and calculating revenue allowances, that is at issue here.

12. Rather, as the court concluded in *Austin Lakes*, “[t]he construction of contracts and actions for their breach are matters for judicial determination” 648 N.E.2d at 649. The doctrine of primary jurisdiction does not apply here, where Promenade’s claim is that Citizens breached its contractual obligations, not that Commission erred in some way. *Id.*

WHEREFORE, Plaintiff, Promenade Commercial LLC, respectfully requests that the Court enter an Order: (1) denying Citizens’ Motion for Stay; and (2) awarding Promenade any other appropriate relief.

Respectfully submitted,

/s/ Daniel K. Burke

Daniel K. Burke, #24572-49

DKB LEGAL LLC

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Carmel, IN 46032

(317) 709-4242


[dan@dkblegal.com](mailto:dan@dkblegal.com)

Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

The undersigned, hereby certifies that on August 24, 2017, a copy of the foregoing was served on all counsel of record via the Court's electronic filing system.

/s/ Daniel K. Burke



CLERK OF THE HAMILTON  
CIRCUIT COURT

STATE OF INDIANA ) IN THE HAMILTON SUPERIOR  
 ) SS: COURT #1  
COUNTY OF HAMILTON ) CAUSE NO.: 29D01-1611-PL-9906

PROMENADE COMMERCIAL, LLC, )  
Plaintiff, )  
 )  
v. )  
 )  
THE BOARD OF DIRECTORS FOR )  
UTILITIES OF THE DEPARTMENT OF )  
PUBLIC UTILITIES OF THE CITY OF )  
INDIANAPOLIS d/b/a CITIZENS WATER )  
OR CITIZENS ENERGY SERVICES, )  
Defendant. )

ORDER AFTER HEARING OF JULY 23, 2018 ON  
DEFENDANT'S MOTION FOR STAY

This matter came before the Court for a hearing on the Defendant's Motion to Stay filed with this Court on July 20, 2017. Present at the hearing was counsel for the Plaintiff, Mr. Daniel K. Burke. The Defendant appeared by counsel, Mr. Alejandro Valle. Argument on the Motion and Responses were heard.

The Court agrees with the Defendant that this matter should be stayed on the grounds of the Doctrine of Primary Jurisdiction and failure to exhaust administrative remedies through the Indiana Utility Regulatory Commission ("IURC"). Additionally, even if not a mandatory stay, the Court finds in its discretion that the IURC has special competence and expertise in reviewing Citizen's Terms and Conditions, also known as "tariff", which

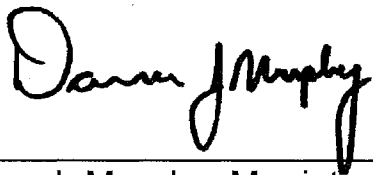
the contract at issue incorporates, and determine what degree this Court's decision might affect the uniformity of a regulatory scheme created by the terms of the tariff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause shall be and hereby is stayed until exhaustion of all administrative remedies, and until final resolution of all issues to be determined by the IURC. In particular, the IURC needs to adjudicate the matter and provide its interpretation of the term "indirectly" as it is used by the parties' contract at issue. See Amended Complaint, Exhibit A.

The Plaintiff has a pending Partial Motion for Summary Judgment to which the Defendant has not responded. According to the Trial Rule 56(I), good cause must be shown to extend the deadline for the Defendant's response. The Defendant has not yet filed an extension request. This order does not relieve the Defendant of its obligation to file for such an extension within the time allowed by TR56.

SO ORDERED this July 23, 2018.

Recommended for approval,



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Darren J. Murphy, Magistrate

Approved and ordered,



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Steven R. Nation, Judge  
Hamilton Superior Court 1

Distribution:  
Counsel of Record





## Case

126016


Assigned Date

4/1/2019 3:34 PM

Case Closed Date

Owner

4/1/2019 3:35 PM

 China Miles

## Summary

## CUSTOMER AND CONTACT

## Complainant



Service Address is Same as Customer

Yes

Pro

men Address Line 1

1016

ade

3rd

Co

Aven

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ue

erci

Address Line 2

SW

al

LLC. City

Carm

## Customer is also Complainant

No

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State

IN

## Customer



Dan County

Hami

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K.

Zip Code



Bur

460

ke

32

## Customer Type

Busin  
ess

## CASE DETAILS

## Company Name

Prom  
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Case Closed Date

e

Is Case Closed

No

## Email

dan  
@dk  
blega  
l.com

Resolution Type

## Home Phone

Adjustment

## Business Phone

## Contact Phone

317-  
709-  
4242

## Contact Method

Telep  
hone

## UTILITY

## Contacted Utility

Yes

**Contacted Utility Date****Utility**

Citizens Water

**Industry**

Water

**Description****CASE DESCRIPTION**

Attached to this email are: (1) a copy of the amended complaint my client filed in Hamilton County Superior Court; (2) Citizens' motion to stay the lawsuit pending my client's submission of a complaint through the IURC; (3) my client's response in opposition to Citizens' motion; and (4) the court's order requiring that the matter be submitted through the IURC.

In essence, Promenade constructed a water main extension at its own expense and entered into an agreement with Citizens (actually, with Veolia Water – Citizens' predecessor) whereby Citizens was to pay Promenade a revenue allowance based on users who connected directly or indirectly to the water main extension constructed by Promenade. In the years following the construction of the water main extension, numerous residential users connected indirectly to the water main extension, and at least one commercial user connected directly. However, to date, Citizens has refused to pay Promenade any revenue allowance, claiming that the approximately 40-50 residential users did not connect directly to the water main extension.

Promenade filed a lawsuit in Hamilton County, claiming breach of contract by Citizens. In response, Citizens sought to stay the lawsuit until after Promenade had attempted resolution through the IURC's consumer complaint process. Specifically, Citizens claims that the IURC must determine how to interpret the term "indirectly" as used in the agreement.

Based on my reading of the consumer complaint process, it appears to be designed to address complaints raised by utility consumers, not the situation here. However, the court has ordered that Promenade at least submit the matter to the IURC. If this is the sort of matter that the IURC complaint process can resolve, we would appreciate an expedited ruling. On the other hand, if this is not the sort of complaint that the process was intended to resolve, we would very much appreciate it if the IURC would communicate this to us as quickly as possible.

Thank you for your assistance, and please do not hesitate to contact me if you have any questions or if you need any additional information.

**More Case Details****CASE CODING****Case Number**12601  
6**Type**

Case

**Case Type**Com  
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ons**Case Detail 2****Hot Case Type****Referred By****INTERNAL INFORMATION****Case Created By**  
China Miles**Assigned To**  
Krista Tate**Legacy Assigned To****Referred To**

Citizens

**Referred Date**

4/1/2019

\*\*\*\* This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. \*\*\*\*

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Write ABOVE THIS LINE to post a reply

The Promenade has been paid the revenue allowance for the 'Hospital' aka. CVS. The CVS is the only user that has been constructed within the Promenade Shoppes development and therefore is the only water connection eligible for any revenue allowance. No additional payments are due as no additional connections within the revenue allowance area have been made. (See attachment)

Susie

\*\*\*\* This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. \*\*\*\*

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Write ABOVE THIS LINE to post a reply

We will attempt to clarify our previous response and provide further explanation and guidance with this response. We would also offer that if anyone has further questions, please feel free to contact Citizens Energy Group directly for further explanation or education.

Paraphrasing the language found within the Terms and Conditions of the Utility and the referenced water Main Extension contract, a revenue allowance is to be paid to the owner/developer of the Main Extension contract for each new water service connection made within 10 years, within the development limits being directly served via a water main as constructed under that contract. The specific contract referenced in this inquiry provided for a water main construction which provided direct water service to outlots within the Promenade Shops development. Only property connections within the Promenade Shops development would result in revenue allowance payments to the original contract owner/ developer. A CVS was the only connection within the development which would have resulted in a revenue allowance payment to the contract owner.

Properties which lie outside of the Promenade Shops development may be considered eligible to pay a Subsequent Connector fee if they also have direct access to the water main and make an individual water service connection within the first 10 years of the contract. The properties potentially subject to payment of a subsequent connector fee would include various lots outside of and to the south of the development which have direct access for water service connections to the water main constructed under the referenced contract..

Simply put, the residential development to the north lies neither within the Promenade Shops development and therefore not eligible for revenue allowance, nor does it lie outside of promenade shops and have direct access for service connections to the water main constructed under the referenced contract.

There have been no service line connections to the water main constructed under this contract that would be eligible for either a revenue allowance or subsequent connector fee payment other than the previously identified and paid CVS.

# PROMENADE OF NOBLESVILLE

