

**STATE OF INDIANA**

**INDIANA UTILITY REGULATORY COMMISSION**

<b>IN THE MATTER OF THE PETITION OF</b>	)	
<b>CWK INVESTMENTS - HILLSDALE, LLC</b>	)	
<b>FOR DETERMINATION THAT A</b>	)	
<b>PROPOSED WASTEWATER BYPASS</b>	)	<b>CAUSE NO. 45070</b>
<b>ARRANGEMENT IS LAWFUL AND NOT</b>	)	
<b>IN VIOLATION OF UTILITY LAW</b>	)	
<b>REQUIREMENTS</b>	)	

**CWK INVESTMENTS - HILLSDALE, LLC'S RESPONSE TO  
THE TOWN OF DARMSTADT'S MOTION TO DISMISS  
FOR LACK OF JURISDICTION**

CWK Investments – Hillsdale, LLC (“CWK” or “Petitioner”), by counsel, submits the following response to the Town of Darmstadt, Indiana’s (“Darmstadt” or “Town”) Motion to Dismiss for Lack of Jurisdiction (“Motion”). As more fully discussed below, the Commission has jurisdiction over the subject matter, meaning CWK’s petition to bypass Darmstadt’s sewer service. CWK respectfully requests that the Commission dismiss Darmstadt’s Motion. In support of this request, CWK states as follows:

1. An administrative body generally possesses the authority to determine initially whether a matter presented to it falls within the jurisdiction conveyed to that body. *Guinn v. Light*, 558 N.E.2d 821, 823 (Ind. 1990). The Commission has jurisdiction to determine the extent of its own authority. While the Commission can make determinations about its jurisdiction in rulings on motions to dismiss, Darmstadt’s motion to dismiss does not provide a meaningful basis to grant such a motion in this case.

2. As set forth in the Petition, CWK is a private developer seeking to construct a 400-unit apartment development located in the southeast portion of Darmstadt's municipal limits at the corner of Old State Road and East Hillsdale Road ("Development").

3. Darmstadt, a municipal corporation of the State of Indiana, has heretofore constructed and has in operation a sewage works pursuant to IC 36-9-23 *et seq.* for the purpose of collecting and disposing of, in a sanitary manner, the sewage of the residents and other non-resident users of the sewer utility within the municipal limits of the Town.

4. Darmstadt does not have a sewage treatment plant. Instead, Darmstadt utilizes a gravity and pressure system in which wastewater flows to septic tanks. These septic tanks hold the solids while gray water is pumped through Darmstadt's system, and then from Darmstadt to the EWSU lines to be treated at EWSU's wastewater treatment plant. Pursuant to Ind. Code § 36-9-23-16(a), Darmstadt contracts with EWSU for the required treatment. Darmstadt is charged by EWSU for the amount of wastewater pumped to EWSU based on internal metering.

5. In its Motion, Darmstadt focuses on whether it is a "municipally owned utility" as that term is defined in Ind. Code § 8-1-2-1 (h), arguing the Town and Evansville Water & Sewer Utility ("EWSU") do not meet the statutory definition. CWK concedes that, as a general rule, municipal sewer utilities are not considered public utilities under Ind. Code § 8-1-2-1.

6. The Indiana General Assembly recently granted additional authority to the Commission over disputes involving utilities "regardless of whether the utility is under the jurisdiction of the commission for the approval of rates and charges." Ind. Code § 8-1.5-6-4.

7. The newly enacted Ind. Code § 8-1.5-6-10 addresses service area disputes by providing that for these jurisdictional disputes, regardless of whether the utilities involved are under Commission jurisdiction, the "...dispute *shall* be resolved by the commission under this section." (Emphasis added.)

8. Ind. Code § 8-1.5-6-6 directly states: “*Notwithstanding any other provision in this title or IC 36, the offering or provision of service by a utility in a regulated territory is under the jurisdiction of the commission as set forth in sections 7, 8, 9, and 10 of this chapter.*” (Emphasis added.)

9. Ind. Code § 8-1.5-6-2 defines *regulated territory* as the “area outside the corporate boundaries of a municipality described in (1) I.C. 36-9-2-18; (2) I.C. 36-9-2-19; and (3) I.C. 36-9-23-36.” These sections all concern a municipality’s exercise of extraterritorial powers outside corporate boundaries, which is precisely the issue and dispute before the Commission in this proceeding. Here, Darmstadt seeks to deny CWK’s right and ability to obtain sewer service outside Darmstadt’s corporate boundaries.

10. Although this is not necessarily a dispute directly between two public utilities, Ind. Code § 8-1.5-6-10(a) sets forth that “[a] proceeding under this section may be initiated: (1) by a utility that is a party to a dispute described in subsection (a); or (2) *by the commission on its own initiative.*” (Emphasis added.) This section and chapter shows a clear intent and desire by the legislature to vest in this Commission broad jurisdiction over territorial disputes, especially those related to water and sewer matters.

11. CWK noted in its Petition that in analyzing cases where there are no specific statutory criteria for determining a territorial dispute, the Commission stated: “We believe that the Legislature would have provided guidance as to any specific approach or criteria to be used in resolving such [water territorial] disputes if it intended us to use a particular approach. . . . the Commission should retain the flexibility to determine on a case-by-case basis the appropriate resolution to the dispute based upon the unique facts contained therein.” *Damon Run Conservancy District*, Cause No. 43966 (IURC October 19, 2011); citing *In re White River Valley Water Corporation*, Cause No. 40719 at 6 (IURC January 7, 1998); *In re Morgan County Rural Water*

*Corporation*, Cause No. 40757 at 6 (IURC January 7, 1998); citing *Flowing Wells, Inc.*, Cause No. 40446 at 9 (IURC July 16, 1997).

12. The Indiana General Assembly recently reiterated and underscored the importance of encouraging necessary utility investment, planning, and maintenance, but qualified that it must do so “...while protecting the affordability of utility services for ...Indiana citizens.” Ind. Code § 8-1-2-0.5. Demanding and requiring a lone customer like CWK to come up with exorbitant fees and charges under the cloud of a development dispute is the epitome of absurd and “unaffordable” utility service.

13. The Commission is the only appropriate venue to address and resolve all of these issues and matters raised. There is ample statutory basis and support for the broad authority to both consider and address the issues presented.

14. For all of the foregoing reasons, Darmstadt’s Motion to Dismiss should be denied because the Commission does have all proper and appropriate jurisdiction and authority over this matter.

WHEREFORE, CWK, by counsel, respectfully requests that Darmstadt’s Motion to Dismiss be denied and requests all other just and proper relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Response was served by electronic mail deliver, this 2nd day of May, 2018, to:

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