

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

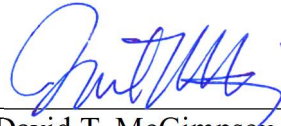
APPEAL BY WYCKFORD COMMONS)
APARTMENTS OF INDIANAPOLIS, LLC OF THE)
CONSUMER AFFAIRS DIVISION'S DECISION IN)
COMPLAINT 128461 CONCERNING THE) CAUSE NO. 45478
BILLING OF WATER SERVICE BY CITIZENS)
WATER)
)
)
RESPONDENT: THE BOARD OF DIRECTORS)
FOR UTILITIES OF THE DEPARTMENT OF)
PUBLIC UTILITIES OF THE CITY OF)
INDIANAPOLIS D/B/A CITIZENS WATER)

SUBMISSION OF PROPOSED ORDER

Complainant-Appellant, Wyckford Commons Apartments of Indianapolis, LLC, by
counsel, respectfully files its proposed order with the Indiana Utility Regulatory Commission in
this Cause.

This 17th Day of March, 2021.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served by e-mail this 17th day of March, 2021, to the following:

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Indianapolis, LLC

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PROPOSED ORDER OF THE COMMISSION

Presiding Officers:

David E. Ziegner, Commissioner

Carol Sparks-Drake, Administrative Law Judge

This matter comes before the Indiana Utility Regulatory Commission (“Commission”) as an appeal from a decision of the Commission’s Consumer Affairs Division (“CAD”). On March 6, 2020, Wyckford Commons Apartments of Indianapolis, LLC (“Wyckford Commons”), contacted the CAD to file a complaint against The Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis d/b/a Citizens Water (“Citizens Water”). On June 30, 2020, the CAD Analyst provided her Resolution, which closed the billing portion of the Complaint as unsubstantiated and determined that a meter test would not be helpful as the existing meter had recently disappeared and a new meter was installed; thus, without a meter test, the meter portion of the Complaint was also unsubstantiated.

On July 6, 2021, Wyckford Commons requested a CAD Director Review of the CAD Analyst’s Resolution in accordance with 170 IAC 16-1-5(d). After discussing the Complaint with Wyckford Commons and Citizens Water, the CAD Director’s Designee issued a Director Review of the CAD Analyst’s Resolution on December 16, 2020. The CAD Decision affirmed the CAD Analyst’s Resolution.

On January 5, 2021, Wyckford Commons filed its Notice of Appeal with the Commission seeking review of the CAD Decision regarding its Complaint (“Appeal”) pursuant to 170 IAC 16-1-6(a). On January 22, 2021, the CAD Record¹ corresponding to Wyckford Commons’ Appeal was uploaded to the Commission’s online case management system. Complainant/Appellant’s Exhibit 1 was offered into the record at the oral argument in this proceeding. Complainant/Appellant’s Exhibit 1 depicts water consumption, charges, occupancy statistics and

¹ The CAD Record consists of the information considered by the CAD Director in making the Director’s Decision, including written correspondence by and between CAD, Wyckford Commons and Citizens Water.

other information in graphical format and was an attachment to an email sent by Wyckford Commons to the CAD Director's Designee on December 15, 2020, one day before the CAD Decision was issued. Citizens Water opposed admission of Complainant/Appellant's Exhibit 1. We overrule Citizens Water's objection and admit Complainant/Appellant's Exhibit 1 into the CAD Record of this proceeding as outlined in this Order.

Pursuant to notice given and published as required by law, proof of which was incorporated into the record of this Cause by reference and placed in the official files of the Commission, the Commission set this matter for oral argument at a Public Hearing on March 5, 2021, at 9:30 a.m., in Room 224 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. A docket entry was issued on February 26, 2021, advising that in accordance with Indiana Governor Holcomb's Executive Orders concerning the COVID-19 pandemic, the Public Hearing would be conducted via WebEx and providing related participation information. Wyckford Commons, Citizens Water and the Indiana Office of the Utility Consumer Counselor appeared and participated in the Public Hearing.

Based on the applicable law and the record before the Commission, the Commission finds:

1. Commission Jurisdiction. Under Ind. Code § 8-1-2-34.5 and 170 IAC 1-1.1-5, any individual or entity may informally complain to CAD about any matter within the jurisdiction of the Commission. Under Ind. Code § 8-1-2-34.5(b), the Commission has authority to review any decision of the CAD upon the request of an affected party. Wyckford Commons initiated this Appeal concerning Citizens Water's provision of water service. Under Ind. Code §§ 8-1-11.1-3 and 8-1-11.1-3.1, Citizens' Water is subject to the Commission's jurisdiction in a manner similar to a municipally owned utility. Specifically, the Commission has jurisdiction over changes to Citizens Water's schedules of rates and charges and terms and conditions of service under Ind. Code §§ 8-1-11.1-3(c)(9) and 8-1.5-3-8. Therefore, the Commission has jurisdiction over Citizens Water and the subject matter of this Cause.

2. Standard of Review. This proceeding involves an appeal of issues that were considered and decided by CAD pursuant to Ind. Code § 8-1-2-34.5 and 170 IAC 1-1.1-5. The CAD Record consists of information supplied by the parties. Therefore, consistent with the Commission's authority as set forth in Ind. Code § 8-1-2-24.5, 170 IAC 1-1.1-5 and 170 IAC 16-1-6, the decision in this proceeding shall be based upon: (1) a review of the CAD Record; (2) consideration of any arguments made by the parties based on the CAD Record; and (3) whether any clear errors were made in rendering the CAD Decision.

3. The CAD Record.

A. Complaint. On March 6, 2020, Wyckford Commons' representative, Nick Fuhrman, contacted the CAD to file the Complaint against Citizens Water, and the Complaint was assigned to a CAD Analyst to review. As to the specifics of the Complaint, Mr. Fuhrman stated,

This is for the [CAD Analyst] as we have previously discussed this case, and she is aware of the details. Citizens Energy replaced our meter at our property 3-4 months ago and once the meter was replaced, the usage was a normal usage which was half

of what we were previously charged. I believe there has been a billing error / meter issue at this property for well over a year[.]

CAD Record at 000021.

The CAD Record does not reflect the details the conversation between Mr. Furhman and the CAD Analyst referenced in the Complaint.

B. The CAD Analyst's Investigation and Resolution. On March 10, 2020 and March 17, 2020, the CAD Analyst contacted Citizens Water and requested Citizens Water to respond to the Complaint. *CAD Record* at 000023 and 000029.

Citizens Water responded to the CAD Analyst on March 17, 2020, that its Large Piping Supervisor and his crew checked the meter on March 3, 2020, and March 16, 2020. *CAD Record* at 000032. Citizens Water reported that, "No anomalies were found and all reads verified that billing is correct." *Id.*

On March 19, 2020, the CAD Analyst requested Citizens Water to provide a timeline of events, and reiterated that request on March 25, 2020, March 31, 2020, and April 3, 2020. *CAD Record* at 000034, 000036, 000043, and 000051. On April 3, 2020, Citizens Water responded with the following:

The 1 ½ in meter went missing here as well as at 10 West, so that is similar.

Getting actual reads until September 2019

From 9-19 through when meter was removed on December 31, 2019, the 1 ½ in meter read the same at 396185

We can surmise that the tech was reading the ERT. If the 1 ½ in meter was removed the ERT would continue to show no usage as no meter is there to drive the remote to change.

12/31/19- Replaced 1 ½ meter and ERT

3/3/20 – Checked vault and pumped it. Checked meter no issues

3/16/20-Sent techs out to investigate low usage. Read meter, no issues noted

This is a timeline of all activity to account concerning this meter. We did not find any valves off nor any problems. (*sic*) with this vault or new meter. The old 1 ½ inch meter could not be tested as it was missing but we billed no usage on it from Sept through December

CAD Record at 000054-000055.

On March 26, 2020, Mr. Fuhrman provided an Excel spreadsheet detailing the total billing, consumption and number of occupied units in Wyckford Commons Apartments that also graphed consumption and total water and sewer expense, as well as water and sewer expense versus occupancy. *CAD Record* at 000039-000041.

Subsequent correspondence between the CAD Analyst and Citizens Water sought information on consumption and billing. On April 10, 2020, Citizens Water provided the billing history for Wyckford Commons demonstrating that consumption dropped precipitously from September 2019 forward, including after installation of the new meter. A table of relevant consumption information using the data from CAD Record at 000094 and 000095 is set forth below:

Bill Date	Service From Date	Service to Date	Days of Service	Water Consumption	Water Charges	Sewer Consumption	Sewer Charges
3/6/2020	2/5/2020	3/5/2020	29	1084.6	4096.87	1084.6	6958.78
2/6/2020	1/7/2020	2/5/2020	29	943.7	3758.4	943.7	6048.16
1/9/2020	12/5/2019	1/7/2020	33	984.5	3867.21	984.5	6336.74
12/6/2019	11/4/2019	12/5/2019	31	945	3761.87	945	6155.38
11/6/2019	10/4/2019	11/4/2019	31	1850	5800.68	1850	12086.13
10/7/2019	9/5/2019	10/4/2019	29	1735	5544.68	1735	11335.87
9/6/2019	8/6/2019	9/5/2019	30	2250	6691.09	2250	14695.73
8/7/2019	7/8/2019	8/6/2019	29	2043.5	6231.42	2043.5	12342.07
7/9/2019	6/5/2019	7/8/2019	33	1995	6123.45	1995	11811.94
6/6/2019	5/3/2019	6/5/2019	33	2211.5	6605.38	2211.5	13090.18
5/7/2019	4/4/2019	5/3/2019	29	2000	6134.58	2000	11841.46
4/5/2019	3/6/2019	4/4/2019	29	2123	6408.38	2123	12567.66
3/7/2019	2/5/2019	3/6/2019	29	2102.5	6362.75	2102.5	12446.63
2/6/2019	1/7/2019	2/5/2019	29	2113	6386.13	2113	12508.62
1/8/2019	12/4/2018	1/7/2019	34	2581.5	7663.35	2581.5	15547.29
12/5/2018	11/1/2018	12/4/2018	33	3034.5	8437.4	3034.5	17581.15
11/5/2018	10/3/2018	11/1/2018	41	2989	8480.28	2989	17529.85
10/4/2018		10/3/2018	12	1218	3602.22	1218	7053.72

On April 23, 2020, the CAD Analyst provided the Excel spreadsheet and graphs to Citizens Water and inquired as to whether the meter might have been malfunctioning. *CAD Record* at 000190. The CAD Analyst made subsequent requests of Citizens Water for a response on April 28, 2020, May 4, 2020, May 8, 2020, and May 11, 2020. *CAD Record* at 000201, 000213, 000221, and 000225. On May 11, 2020, Citizens Water responded that although Citizens Water's Billing Supervisor,

agrees that the usage was higher before the meter was changed we could find no errors in our billings statements. It is highly unlikely that the meter malfunctioned and over charged the customer. Water meters tend to slow down with age, not speed up. I sent a technical crew out on 3/3 to look for anything unusual such as a closed valve that would result in lower consumption. They did not indicate any issues with the meter or vault.

CAD Record at 000229.

On May 26, 2020, Mr. Fuhrman updated the Excel spreadsheet and graphs initially provided on March 26, 2020, that detailed consumption since the Complaint was filed consistent

with other post-meter changeout consumption. *CAD Record* at 000299-000305. The Excel spreadsheet and graphs indicate that despite increasing occupancy levels at Wyckford Commons Apartments, water consumption dropped by nearly 677,000 gallons per month since the original meter went missing. *CAD Record* at 000299.

On June 9, 2020, the CAD Analyst requested Citizens Water to provide the configuration of the compound meter. *CAD Record* at 000330. Citizens Water responded the same day indicating that the meter serving Wyckford Commons Apartment is a multi-registered meter with 6-inch and 1 ½ inch sizes. *CAD Record* at 000332.

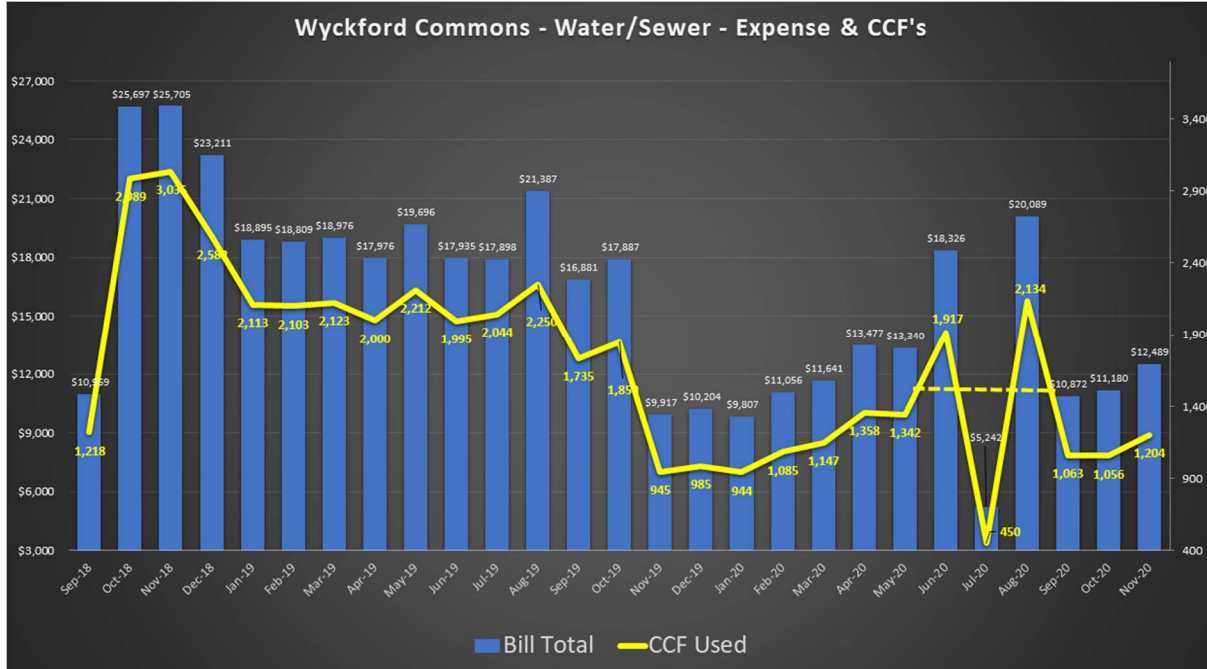
On June 16, 2020 and again on June 24, 2020, the CAD Analyst inquired of Citizens Water how a multi-registered meter could be tested. *CAD Record* at 000340 and 000342. On June 24, 2020, Citizens Water responded that the meter could be tested on site, but that Citizens Water had been at the property on June 22, 2020, and found the 1 ½ inch meter to again have been removed without authorization. *CAD Record* at 000351. Citizens Water replaced the 1 ½ inch meter the same day. *Id.*

On June 30, 2020, the CAD Analyst emailed Citizens Water and emailed Wyckford Commons to relay the resolution of the Complaint that no billing errors were found and that because the meter had been removed, a meter test may not prove helpful. *CAD Record* at 000361 and 000363. Accordingly, the CAD Analyst resolved the Complaint as unsubstantiated.

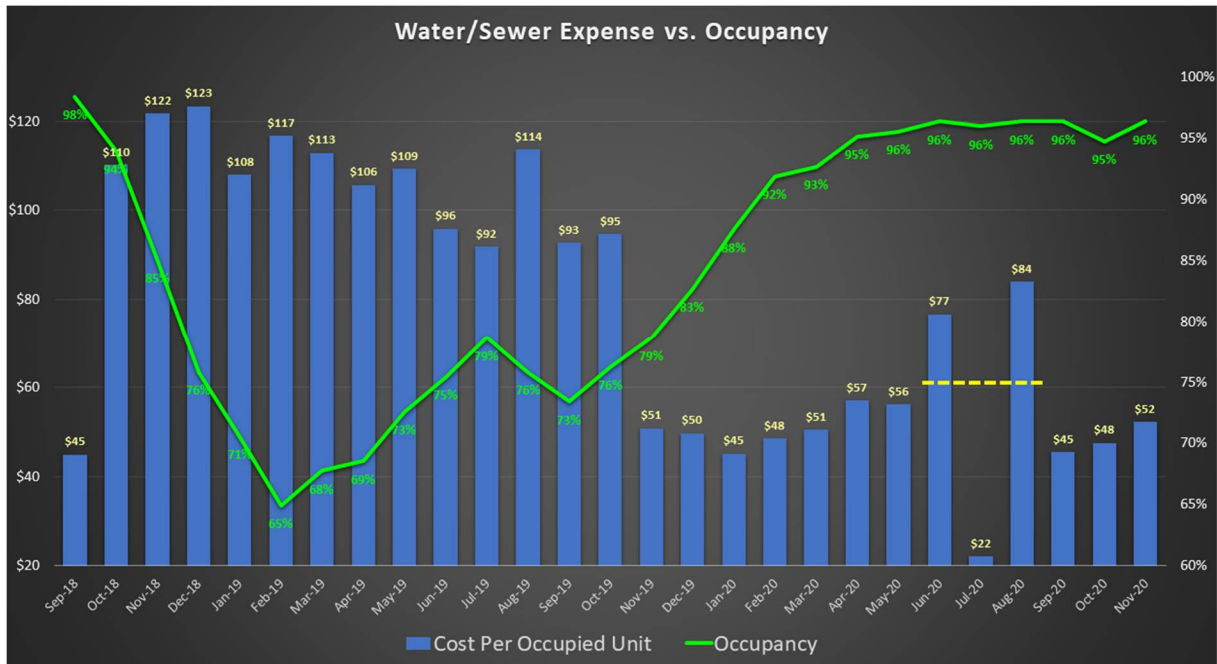
C. The CAD Director's Designee's Review. On July 6, 2020, Wyckford Commons appealed the CAD Analyst's resolution. During the Director's Designee's Review, Wyckford Commons provided additional documentation, including a survey of the property (*CAD Record* at 000419-000426), information that Wyckford Commons had undertaken extensive renovations of all 248 apartment units that included extensive plumbing work and found no major water leaks (*CAD Record* at 000379), information that Wyckford Commons added washer/dryer connections in 152 units that would naturally increase water consumption (*Id.*), and information that Wyckford Commons added hot water submeters in every unit in September 2019 before the meter changeout and consumption measured in the hot water submeters did not change before and after the meter changeout (*Id.*).

Wyckford Commons also provided more recent bills and other information during the review conducted by the CAD Director's Designee. It is undisputed that Mr. Fuhrman of Wyckford Commons emailed the CAD Director's Designee on December 15, 2020. That email contained an attachment, which is Complainant/Appellant's Exhibit 1, but the email and attachment were not included as independent correspondence in the CAD Record. Complainant/Appellant's Exhibit 1 depicts graphs updated from prior similar graphs (e.g., *CAD Record* at 000396) to show consumption versus billings and consumption versus occupancy. *Complainant Appellant's Exhibit 1*. The graphs from Mr. Fuhrman's December 15, 2015 email appear below as Graph 1 (consumption versus billing) and Graph 2 (consumption versus occupancy):

Graph 1



Graph 2



D. The CAD Decision. On December 16, 2020, the CAD Director's Designee issued his summary decision affirming the CAD Analyst's Resolution. No rationale was provided.

E. Appeal to the Commission. On January 5, 2021, Wyckford Commons filed its Notice of Appeal pursuant to 170 IAC 16-6-1(a). The CAD Record was uploaded to the Commission's online case management system on January 22, 2021. This proceeding was subsequently noticed for oral argument at a Public Hearing to be held on March 5, 2021.

i. Wyckford Commons' Notice of Appeal. In its Notice of Appeal, Wyckford Commons limits its appeal to whether or not Citizens violated 170 IAC 6-1-8(a) that Citizens Water failed to provide a meter "(1) in good mechanical condition; (2) adequate in size and design for the type of service that they measure; and (3) accurate to within generally accepted standards." Wyckford Commons states that the meter serving its property through September 2019 was not accurate to within generally accepted standards.

Neither the original meter nor the second meter are available for testing, but Wyckford Commons argues that the best available evidence demonstrates that the original water meter was not accurate to within generally accepted standards. Moreover, the delay in making the request to test the second meter was not the fault of Wyckford Commons, as Wyckford Commons alleges Citizens Water's delay was the reason the second meter was not tested prior to its disappearance.

In its request for relief, Wyckford Commons requests that Citizens Water refunds to Wyckford Commons the amount of \$114,527.56 (calculated by multiplying the consumption overage of 12,753.20 by Citizens Water's average rate of \$8.9803 per CCF during the 12 months at issue). Alternatively, Wyckford Commons requests that the proceeding be remanded to the CAD for purposes of either calculating the refund due Wyckford Commons or producing the evidence needed to allow a decision to be made in this case.

ii. Citizens Water's Response in Opposition to Appeal. Citizens Water's Response detailed several issues in opposition to Wyckford Commons Notice of Appeal. First, Citizens Water argues that the CAD Record is limited to materials submitted to the CAD Analyst on or before June 30, 2020, and materials submitted after the CAD Analyst's Resolution. Accordingly, Citizens Water argues that all the email correspondence, including the December 15, 2020 email from Mr. Fuhrman to the CAD Director's Designee that was attached as Attachment 3 to the Notice of Appeal should be excluded from consideration.

Next, Citizens Water identifies a number of factual allegations it claims are not included within the CAD Record, including the number of units in Wyckford Commons Apartments, the date Wyckford Commons acquired Wyckford Commons Apartments, and other factual allegations. Citizens Water also states that the cause of the delay for the meter test cannot be attributed to Citizens Water because nothing in the CAD Record supports it and further that Governor Holcomb issued Executive Order 20-02 concerning the public health emergency caused by the COVID-19 pandemic on March 6, 2020, the same day the Complaint was filed. Citizens Water further asks the Commission to take administrative notice of Executive Order 20-02.

Turning to the substance of the Complaint, Citizens Water argues that the Complaint is unsubstantiated because there is no evidence in the record that the meter in question failed to be accurate to within generally acceptable standards and because Wyckford Commons never made a request to test the meter. Citizens Water points to its tariff that requires customers to request meter

tests and allows Commission supervision of tests when requested by the customer. In this case, Citizens Water argues that Wyckford Commons never requested a meter test. Citizens Water also points to its tariff for the refund policy that allows refunds only when a meter is found to have an error percentage exceeding 2% during a test.

Citizens Water also disputes Wyckford Commons' argument that the meter at issue should be presumed to be faulty without a test. Citizens Water again points to its tariff, Rule 8.3, for the position that Citizens Water cannot be held liable for any failures or delay in performing its obligations when the failures or delays are caused by contingencies beyond its control. Citizens Water indicates that the CAD Record contains no evidence of any fault, neglect or omission in connection with the meters serving Wyckford Commons. Citizens Water further argues that the second meter (i.e., the meter installed in December 2019) is not the relevant meter to be tested.

Citizens Water notes that Wyckford Commons owned the meter pit and related facilities serving Wyckford Commons (except the meter) and are the responsibility of the customer under Citizens Waters' tariff, thus Wyckford Commons is the party that should have or could have prevented the disappearance of the meter from the premises. Citizens Water states that its tariff clearly places the responsibility over the facilities surrounding the water meter upon the customer and not on Citizens Water.

Another rationale Citizens Water puts forth against presuming the original meter to be fast is that meters tend to run slower as they age, whereas in this case, Wyckford Commons alleges the meter ran fast. Citizens Water also identifies an alleged inconsistency in the date of the meter changeout from December 2019 in the CAD Record to the September 2019 changeout stated in the Notice of Appeal.

Finally, Citizens Water opposed Wyckford Commons' alternative suggestion to remand the case back to the CAD for a determination on the issues because the original meter is missing and is incapable of being tested and such a remand would prove futile for that reason.

4. Public Hearing. At the March 5, 2021, Public Hearing in this Cause, Wyckford Commons, Citizens Water and the OUCC appeared via WebEx. Initially, the parties agreed, including Citizens Water, to admit into the record of this proceeding Joint Exhibit 1, which is the CAD Record as previously described. Complainant/Appellant's Exhibit 1 was also offered into the record of this proceeding as previously described. Each party was offered the opportunity to argue its points. Wyckford Commons and Citizens Water each presented arguments. The OUCC did not present any arguments.

5. Commission Discussion and Findings. The CAD Record consists of multiple emails and telephone conversation summaries between Wyckford Commons, Citizens Water, the CAD Analyst, the CAD Director and the CAD Director's Designee regarding the details of the situation at issue. Upon review of the CAD Record and consideration of the issues presented, we address the issues in the following order.

A. CAD Record; Admission of Complainant/Appellant's Exhibit 1. In its Response, Citizens Water claimed that the CAD Record is limited to the documentation reviewed

by the CAD Analyst in rendering the CAD Analyst's Resolution. Citizens Water cited no authority for this position, however. Citizens Water did not object to the CAD Record being admitted in this proceeding as Joint Exhibit 1, so Citizens Water's arguments pertaining to the contents of the CAD Record are deemed waived.

Nevertheless, we find that we should address this issue of what constitutes the CAD Record as it is likely to rise again. The Commission's rule, 170 IAC 16-1-6(c), provides more latitude to the Commission in reviewing CAD appeals than Citizens Water's position allows. Specifically, the Commission's review is "reasonably" limited, meaning that our review is not strictly limited to the CAD Record, but that we may reasonably review issues or evidence not strictly contained within the CAD Record.

Additionally, 170 IAC 16-1-6(c) provides that the review is of the entire CAD process undertaken in section 5, of which the CAD Director or CAD Director's Designee is a part. Our review is of the CAD Decision, not the CAD Analyst's Resolution, and thus ignoring evidence on which the CAD Director or CAD Director's Designee might rely does not comport with Accordingly, we reject Citizens Water's claim that all correspondence and documents provided after June 30, 2020 (the date on which the CAD Analyst rendered its Resolution), should fall outside the CAD Record we review in this appeal. The CAD Record encompasses all of the evidence received through December 16, 2020, which is the date on which the CAD Director's Designee issued the CAD Decision. This interpretation also comports with our prior reviews. *See, e.g., Appeal by Wayne Clark*, Cause No. 45366, 2020 WL 6132216 at *5-6 (Oct. 14, 2020) (basing decision on CAD Record, which included evidence received after the CAD Analyst's Resolution taken into consideration by the CAD Director's Designee).

This information includes Complainant/Appellant's Exhibit 1. We note that Wyckford Commons attached the December 15, 2021, email to its Notice of Appeal. *CAD Record* at 000534-000539. While Citizens Water objected to admission of Complainant/Appellant's Exhibit 1, it is clear that the exhibit was provided to the CAD Director's Designee prior to issuance of the CAD Decision and should be a part of the CAD Record. We overrule Citizens Water's objection and admit Complainant/Appellant's Exhibit 1 into the record of this Cause.

Also, Citizens Water identified several facts alleged in the Notice of Appeal that it claims fall outside the CAD Record. While most of the alleged non-record facts are immaterial to the outcome of the proceeding, some of these facts help provide context to this case. Based on our holding above, we find the following facts are part of the CAD Record: Wyckford Commons Apartments is a 248 unit apartment community (at 000379); Wyckford Commons acquired the Wyckford Commons Apartments in September 2018 (at 000094 and 000534); the September 2018 billing for Wyckford Commons Apartments was a partial billing period (at 000094); washer and dryer connections were added to 152 units between January 2019 and December 2019 (at 000379); and no leaks were discovered in the Wyckford Commons Apartments during 2019 renovations that included significant plumbing work (at 000379).

Other facts such as the corporate structure of the parent companies and affiliates of Wyckford Commons and Wyckford Commons' experience with apartment communities are immaterial to our review, but we find these ancillary facts that are not dispositive in and of

themselves and provide background on the dispute should also fall within our review as being “reasonably limited” to the matters raised in this proceeding, consistent with the standard set forth in 170 IAC 16-1-6(c).

To the extent correspondence and information submitted to the CAD during the CAD review process but not included in the CAD Record uploaded to the Commission’s case management system, we would be well within our jurisprudence to incorporate such correspondence into the CAD Record of this Appeal. As discussed below, however, such incorporation is not necessary in this case, as the Commission has the evidence in the record before it needed to resolve this Appeal.

B. Original Meter and Testing. The Commission’s rule on meters provided by water utilities requires three things: meters “shall be (1) in good mechanical condition; (2) adequate in size and design for the type of service that they measure; and (3) accurate to within generally acceptable standards.” 170 IAC 6-1-8(a). Wyckford Commons argues that Citizens Water violated the third aspect of 170 IAC 6-1-8(a). Citizens Water contends that Wyckford Commons never requested a test of the original meter and now that the original meter has disappeared and is incapable of being tested, that precludes issuance of a refund to Wyckford Commons. We disagree.

The Commission is a creature of statute and exercises only those powers prescribed to it by statute. *Tyus v. Indianapolis Power & Light Co.*, 134 N.E.3d 389, 405 (Ind. Ct. App. 2019). Within its statutory jurisdiction, however, the Commission has broad discretion and implicit powers necessary to carry out the regulatory regime established by statute. *Solarize Indiana, Inc. v. Southern Ind. Gas & Elec. Co.*, -- N.E.3d --, 2021 WL 325845 at *5 (Ind. Ct. App. Jan. 29, 2021) citing *Ind. Bell Tel. Co. v. Ind. Util. Regul. Comm’n*, 810 N.E.2d 1179, 1184 (Ind. Ct. App. 2004). It is clear under the facts of this case, that the issue of service and refunds for overcharged service fall squarely within the Commission’s mandate. We note that Citizens Water has not challenged the Commission’s jurisdiction to order a refund, but rather argues that no refund should be required because no meter test has been performed.

The facts of this case present a unique situation where the metered consumption dropped dramatically by nearly 50% from October 2019 to November 2019 around the time the original meter went missing and remained low thereafter after two meters and at least 2 meter checks by Citizens Water. The depictions (Graphs 1 and 2, above) of this drop in consumption are striking. *See also Complainant/Appellant’s Exhibit 1* (graphs emailed to the CAD Director’s Designee on December 15, 2020).

Citizens Water provided no explanation for the drop in consumption and admitted that, “the usage was higher than before the meter was changed[.]” *CAD Record* at 000229. Citizens Water did indicate that over-registering consumption was highly unlikely because meters tend to run slower as they age. Citizens Water’s arguments on this point are not supported by the record because the age of the original meter is not in the CAD Record. Additionally, meters may be more prone to running slow over time, but they do not always run slow over time. It is possible for meters to over-register consumption.

Citizens Water also made two trips to Wyckford Commons in March of 2020 to check on the low usage reported by the second meter that had been installed in December 2020, each time reporting no issues with the meter. *CAD Record* at 000054. We view these meter checks on March 3, 2020, and March 16, 2020, to be meter “tests”, consistent with our prior findings that a meter service could be deemed a meter test. *In re Indianapolis Power & Light Company*, Cause No. 42704, 2005 WL 1025363 (Ind. U.R.C. March 30, 2005). Because Citizens Water expressly checked the meter for low usage, common sense dictates that Citizens Water did more than a visual inspection of the meter and meter pit and performed a check of the meter itself.

In stark contrast to Citizens Water’s lack of explanation for the extremely high usage from September 2018 to October 2019, Wyckford Commons demonstrated through record evidence that it undertook extensive renovations at Wyckford Commons Apartments, including substantial plumbing work, throughout 2019 and found no significant leaks. *CAD Record* at 000379. We further note that during the periods of high consumption, occupancy rates were falling to as low as 65% from around 90% as Wyckford Commons undertook its renovations, yet usage remained high and even increased during this period of relatively low occupancy. Graph 2 and *Complainant/Appellant’s Exhibit 1*. Moreover, during renovations, Wyckford Commons installed washer/dryer connections in 152 of the units, which would have increased water consumption once occupancy started to rise. *CAD Record* at 000379.

Additionally, the meter readings from the third meter installed in June 2020 act to confirm the accuracy of the second meter (along with Citizens Water’s constructive meter tests on March 3 and 16, 2020), thereby deriving a strong inference that the original meter over-registered water consumption. Graph 1 and *Complainant/Appellant’s Exhibit 1*.

We find that the CAD Decision clearly erred in finding the complaint unsubstantiated. The record evidence demonstrates that while the original meter may never have been tested, the best evidence available to us clearly demonstrates the original over-registered consumption and was not accurate to within generally accepted standards in violation of 170 IAC 6-1-8(a). The CAD Analyst requested a meter test of the second meter, which indicates a belief that the test of a meter can aid in proving the inaccuracy of another meter. Moreover, Citizens Water offers no logical explanation for the consumption discrepancies, while Wyckford Commons presents a compelling case that the original meter significantly over-registered consumption at Wyckford Commons Apartments from September 2018 to October 2019 and that such meter was not accurate to within generally accepted standards in violation of a Commission rule². Accordingly, we find that the original meter over-registered consumption from September 2018 to October 2019.

C. Whether Citizens Water Must Issue a Refund. Under normal conditions, Citizens Water’s rules and regulations for water service require that the original meter be tested. In this case, however, the original meter is missing and is incapable of being tested, and Citizens Water argues that precludes the issuance of a refund. We find under the unique circumstances of this case that a refund may be ordered.

² We note that just because Citizens Water has Commission-approved rules and regulations for water service, those rules do not replace but rather supplement the Commission’s rules generally applicable to water utilities.

As previously established in our cite to the *Solarize Indiana* case, the Commission enjoys broad discretion in matters within its jurisdiction, and this matter comes within our jurisdiction. While we recognize that the CAD appropriately examined and issued the CAD Decision in the context of a billing dispute review, several factors merit a deeper review. We note specifically that the CAD Analyst only determined that the consumption reported by the original meter was properly billed. The CAD Analyst made no findings on the accuracy of the meter. The CAD Analyst did not foreclose recovery because the original meter could not be tested, rather when the CAD Analyst attempted to have the second meter tested, the second meter was found to be missing. Next, we note that oftentimes decisions from the CAD lay out the supporting framework for the outcomes. That is not the case with the CAD Decision in this case. Here, the CAD Decision was a summary unsubstantiated finding. We again note that the CAD Analyst's Resolution made no findings on meter accuracy, but was based on billing errors.

Further, Citizens Waters' arguments for lack of a meter test and Wyckford Commons' allegedly better position to prevent mischief with the meter and meter pit fall flat. Citizens Water's meter testing rule was clearly designed for a situation where the meter is capable of being tested. Where a situation exists like the present with reliable data that shows significantly lower consumption, in this case nearly 50% lower consumption, we find our broad powers to carry out the regulatory regime should be exercised in an equitable manner to afford a refund. This Commission has long striven to provide fair and equitable outcomes in our decisions, including in CAD appeals. *See, e.g., In re Rosewood Manor Estates*, Cause No. 42716, 2005 WL 1287416 (Ind. U.R.C. April 20, 2005) (finding "we believe these additional factors and issues require further examination by the Commission as a means of a fair and equitable disposition.").

The record evidence tilts strongly in favor of finding the original meter serving Wyckford Commons over-registered consumption, as described in Finding Paragraph 6.B. of this Order, that it would be inequitable to deny a refund. Moreover, Citizens Water's claim that its rules and regulations provide that its customers own the meter pit and appurtenant facilities (but not the meter itself) is counteracted by its rule that despite that ownership, Citizens Water must approve of such meter pits and that its meters "must at all times be accessible for reading, inspection and removal for testing." *Water Service Tariff Rates, Terms and Conditions for Water Service within Marion County, Indiana*, Rule 7.2. As pointed out by Wyckford Commons at oral argument, while Wyckford Commons might own the meter pit and appurtenances, it is Citizens Water that controls that ownership – specifies what may be owned and how it may be owned and used. We further note that Citizens Water's rules and regulation expressly require its customers to allow access at all times to the meter for reading, inspection and removal. Wyckford Commons could not, without violation Citizens Water's rules and regulations, have prevented access to the meter.

The unique facts of this case – the second and third meters registering consistent and significantly lower usage than the original meter, the inability to test the original meter, the March 3 and 16, 2020 constructive meter tests by Citizens Water, Citizens Water's admission that the consumption declined after the original meter was changed out, and more – all contribute to our finding that a refund is merited in this case. The refund shall be for a 12 month period of consumption running from the October 3, 2018 meter read through the October 4, 2019 meter read.

This decision is not taken lightly nor should future litigants look to set aside tariff provisions easily. It is a high bar requiring unique and significant factual circumstances. The magnitude of the meter discrepancies, again, approaching 50%, the inability to test the original meter, along with the other previously identified factual circumstances, met an extremely high bar to merit this relief.

D. Calculation of the Refund. Using the evidence contained in the CAD Record at 000215, we determine that total consumption for the meter reads between October 3, 2018 and October 4, 2019, was 27,179 CCFs. Again using the evidence contained in CAD Record at 000215, we find that the average cost per CCF during that same period was \$8.9803. Again using CAD Record at 000215 for consumption data from November 2019 to March 2020 and using Graph 1 for consumption data from April 2020 to November 2020, total consumption for the November 2019 to November 2020 period was 14,425 CCFs. The difference in consumption for that period, i.e., the estimated over-registered consumption, is 12,753.20 CCFs. Multiplying the over-registered consumption of 12,753.20 by the average cost per CCF of \$8.9803 during the period of over-registered consumption yields a refund due of \$114,527.56.

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

1. The December 16, 2020, CAD Decision is vacated and replaced with findings contained in this Order.
2. Citizens Water shall refund \$114,527.56 to Wyckford Commons Apartments of Indianapolis, LLC, consistent with Finding Paragraph 6 of this Order.
3. This Order shall be effective on 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.**

**Dana Kosco
Secretary of the Commission**