

FILED
September 9, 2021
INDIANA UTILITY
REGULATORY COMMISSION

Joint Petitioners' Exhibit No. 2-R

INDIANA-AMERICAN WATER COMPANY, INC.

AND

TOWN OF LOWELL

INDIANA UTILITY REGULATORY COMMISSION

CAUSE NO. 45550

REBUTTAL TESTIMONY

OF

JUSTIN SCHNEIDER

IURC
JOINT PETITIONERS'
EXHIBIT NO. 2-R
10-4-21 UR
DATE REPORTER

OFFICIAL
EXHIBITS

INDIANA-AMERICAN WATER COMPANY, INC.

AND

TOWN OF LOWELL

Cause No. 45550

Rebuttal Testimony of Justin Schneider

I. WITNESS BACKGROUND

1 **Q.** Please state your name and business address.

2 **A.** My name is Justin Schneider and my business address is 153 N. Emerson Ave.,
3 Greenwood, IN 46143.

4 **Q.** Did you previously submit testimony in this proceeding that was identified as Joint
5 Petitioners' Exhibit No. 2?

6 **A.** Yes, I did.

7 **II. PURPOSE OF TESTIMONY**

8 **Q.** What is the purpose of your rebuttal testimony in this Cause?

9 **A.** The purpose of my rebuttal is to respond to specific issues raised in the direct testimony
10 filed on August 27, 2021 by Richard J. Corey, on behalf of the Indiana Office of Utility
11 Consumer Counselor ("OUCC").

12 **Q.** Have you reviewed the testimony provided in this Cause by OUCC witnesses Corey?

13 **A.** Yes, I have. I will address his testimony below.

1 Mr. Corey recommends that Indiana American’s legal expenses be denied, or limited to
2 those “expenses actually disclosed in its case-in-chief...” Because Mr. Corey’s stated
3 concern is that hourly billing records are necessary to determine the reasonableness of legal
4 expenses, his recommendation would serve to deny Indiana American the ability to recover
5 any legal expenses for this matter after the filing of its petition. Legal services are
6 necessary and will continue after the close of evidence – e.g. appearance at any hearing on
7 the matter and post hearing briefing. Mr. Corey’s recommendation, which would deny the
8 consideration of those incidental expenses, is contrary to Indiana law and the
9 Commission’s Order dated June 2, 2021 in the River’s Edge acquisition, Cause No. 45461:

10 Ind. Code § 8-1-30.3-5(f) allows the acquiring utility to record the actual cost of
11 the acquisition, including incidental expenses and other costs of acquisition. The
12 OUCC’s recommended disallowance of incidental expenses and other costs of
13 acquisitions associated with this proceeding ignores the fact that without this
14 proceeding, closing of the acquisition will not occur. Thus, it is unreasonable to
15 think that legal expenses are not a cost of acquisition and we reject the OUCC’s
16 proposal to eliminate legal expenses.

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18
19 *Id.* at p. 13.

20 **Q. Do you agree with Mr. Corey that Indiana American did not follow the guidance**
21 **provided by the Commission in its final order in Cause No. 45461?**

22 A. No. Mr. Shimansky testified that the only incidental expense being claimed, at this time,
23 was the estimated legal expense of these proceedings. Indiana American has not incurred,
24 or claimed, “appraisal expenses, environmental expenses, and expenses charged to any
25 affiliate such as American Water Works Service Company, Inc.” He explained that the
26 legal expense was an estimate and could increase or decrease based on how the regulatory
27 process proceeds and whether other expenses are incurred after the filing of this petition,

1 but before closing, and reiterated “[t]he final journal entry will be based upon actual
2 incidental expenses and other costs of acquisition and not an estimate.”

3 As with the last three acquisitions, River’s Edge (Wastewater One) (Cause No. 45461),
4 Town of Riley wastewater (Cause No. 45290) and Sheridan (Cause No. 45050), the
5 estimate was based upon the growing experience of Indiana American and our counsel with
6 the costs of acquisition cases and is rooted in the fee agreement Indiana American has with
7 Barnes & Thornburg. During discovery, Indiana American produced its engagement letter
8 that provides outside legal fees by phases of the case. See OUCC Attachment RJC No. 1.
9 That is, the less “controversial” and less work involved in the case, the lower the legal
10 expense.

11 **Q. Are you saying that the \$120,000 estimate is what ultimately should be included in**
12 **the Journal Entry?**

13 A. No. Consistent with prior acquisitions under IC 8-1-30.3 approved by the Commission,
14 the actual acquisition cost to be applied to the asset will be calculated from actual expenses.
15 This way, no more and no less than what was actually incurred will be included in the
16 journal entry. Indiana American provided the \$120,000 figure as a way of illustrating what
17 the incidental costs might be. The final costs will reflect the work necessary to advance the
18 petition based upon arguments raised by intervenors.

19 **Q. How can the Commission check that the actual legal expenses are reasonable, now**
20 **or in a rate case?**

21 A. A threshold safeguard is that under the Indiana Rules of Professional Conduct:

1 A lawyer shall not make an agreement for, charge, or collect an unreasonable fee
2 or an unreasonable amount for expenses.

3 Rule 1.5(a). The fee agreement provides phases of preparation and prosecution of this
4 petition. If the case could be settled early in the process, legal expense would be avoided.
5 Conversely, the more discovery and the more litigation necessary to obtain approval, the
6 more expensive the legal fees. This framework provides certainty and value to Indiana
7 American, the Commission, and our customers, but it is also presented against the backstop
8 of the Rules of Professional Conduct. If Indiana American and Barnes & Thornburg did
9 not estimate and price the phases properly and the resulting fee would be unreasonable, it
10 “shall not” be charged or collected, the agreement notwithstanding. Any Journal Entry or
11 rate case review would be trued up to the actual expense, which must be professionally
12 “reasonable.”

13 **Q. What about Mr. Corey’s concern that a lack of hourly billing records deprives the**
14 **OUCC or Commission from determining if hourly billing would result in lower**
15 **expenses or recovery would incentivize higher legal expenses?**

16 A. Not all time increments are created equal. The Indiana Rules of Professional Conduct
17 recognize this.¹ Corporate legal departments recognize this.² Hourly billing has been
18 shown to be imprecise and inefficient and is not the only way to determine reasonableness.
19 This reality is why alternative billing models have increasingly been utilized throughout
20 the legal profession.

21 Alternative fee arrangements, like the one Indiana American entered into for this matter

¹ Indiana Rule of Professional Conduct 1.5

² See e.g. “*Alternative Fees for Litigation*”; Shomper and Courson, ACC Docket, May, 2000 ()

1 provide certainty and predictability to the expenses, within the parameters of the
2 agreement. In the River's Edge matter, Cause No. 45461, the OUCC submitted data
3 request 3-12 seeking information as to the effect of responding to data requests on the
4 incidental expenses or acquisition costs to be claimed in that acquisition. Indiana American
5 answered:

6 Each set of data requests in each case is factored into the assumptions and analysis
7 of the legal costs of approvals. The more questions and the more time expended
8 answering the questions, the greater the 'expenses' and 'costs of acquisitions'
9 impact future cases. The assumption underlying the fee arrangement, in this cause,
10 is that there would be no more than four sets of discovery, based on history and
11 based on the fact that Indiana American is paying less than half of the appraised
12 value for a small system close to existing Indiana American infrastructure. This is
13 the third set of discovery. Accordingly, this particular set of responses, by
14 themselves, will not cause an adjustment to the fee in this case, but will be factored
15 into fee arrangements in future cases.

16 If Indiana American had been on an hourly agreement in that matter, or in this cause,
17 responding to such data requests would increase the legal expense with each round of
18 discovery, as would proceeding to a hearing and briefing as opposed to settlement. Indiana
19 American, instead, entered into a fee arrangement whereby a certain number of data
20 requests were presumed and priced, regardless of their value to resolving the cause. The
21 fees by phase were determined through historical experience and allow Indiana American
22 to determine the reasonableness overall of the predictability and certainty of legal expense
23 against the acquisition value and mitigate against the inefficiency and lack of predictability
24 in hourly billing.

25 Mr. Corey's concern and recommendation(s) would not achieve the result he purports to
26 promote. The Indiana Rules of Professional Conduct, the experience of corporate counsel,
27 and the legal profession over the last 20 plus years have determined that there are multiple

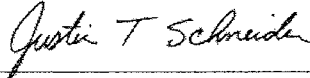
1 ways to determine the reasonableness of legal expenses other than by hourly billing
2 records. Nothing in Mr. Corey's testimony raises a new or novel concept necessitating the
3 Commission change course from established precedent.

4 **Q. Does this conclude your rebuttal testimony?**

5 A. Yes, it does.

VERIFICATION

I, Justin Schneider, Director of Consumer Affairs, Indiana-American Water Company, Inc., affirm under penalties of perjury that the foregoing representations are true and correct to the best of my knowledge, information and belief.



Justin Schneider

Date: 9/8/21