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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF THE )  
TOWN OF HUNTERTOWN, INDIANA FOR (A) )  
REVIEW OF THE RATES AND CHARGES )  
BEING IMPOSED BY FORT WAYNE OF FORT )  
WAYNE, INDIANA FOR WHOLESALE )  
SERVICE PURSUANT TO IND. CODE § 8-1-2- )  
61.7; AND (B) APPROVAL OF REGULATORY )  
ORDINANCES ESTABLISHING SERVICE )  
TERRITORIES FOR THE TOWN'S )  
MUNICIPAL WASTEWATER AND WATER )  
SYSTEMS PURSUANT TO IND. CODE § 8-1.5-6 )  
ET SEQ. )

CAUSE NO. 44519

APPROVED: SEP 17 2014

RESPONDENT: CITY OF FORT WAYNE, )  
INDIANA )

PREHEARING CONFERENCE ORDER OF THE COMMISSION

**Presiding Officers:**

**Carolene Mays-Medley, Vice Chair**

**Loraine L. Seyfried, Chief Administrative Law Judge**

On July 29, 2014, the Town of Huntertown, Indiana ("Huntertown") filed its Verified Petition ("Petition") with the Indiana Utility Regulatory Commission ("Commission") for (a) review pursuant to Ind. Code § 8-1-2-61.7 of the rates and charges being imposed by the City of Fort Wayne, Indiana ("Fort Wayne") for wholesale sewage service; and (b) approval pursuant to Ind. Code ch. 8-1.5-6 of Huntertown's regulatory ordinances (as defined in Ind. Code § 8-1.5-6-3) establishing service territories for Huntertown's municipal wastewater and water systems (collectively, the "Regulatory Ordinances"). Fort Wayne was named a Respondent.

On August 18, 2014, Huntertown filed a Verified Motion for Entry of Order Governing the Provision of Services on an Interim Basis and Request for Approval of an Expedited Briefing Schedule ("Motion"). In accordance with the Presiding Officers' August 20, 2014 Docket Entry, Fort Wayne filed a Response in Opposition to the Motion on August 22, 2014.<sup>1</sup> Huntertown filed its Reply on August 25, 2014.

<sup>1</sup> On August 26, 2014, Twin Eagles Development II, LLC ("Twin Eagles") filed two Responses in Opposition to the Motion. Huntertown objected to Twin Eagles' Responses as being untimely and failing to comply with the Commission's procedural rules. Given our decision on the Motion, we need not consider Twin Eagles' Responses or Huntertown's objection, but caution Twin Eagles that future filings should be made in accordance with the Commission's procedural rules and direction or it should seek leave to deviate for good cause.

Pursuant to notice and as provided for in 170 IAC 1-1.1-15, a Prehearing Conference in this Cause was held in at 10:00 a.m. on August 25, 2014, in Hearing Room 224, 101 West Washington Street, Indianapolis, Indiana. Proofs of publication of the notice of the Prehearing Conference have been incorporated into the record and placed in the official files of the Commission. Counsel for Huntertown, Fort Wayne, the Indiana Office of Utility Consumer Counselor (“OUCC”), Twin Eagles and the Allen County Regional Water and Sewer District (“District”) appeared and participated at the Prehearing Conference. No members of the general public appeared.

Prior to the opening of the record and with the consent of all parties in attendance, an informal discussion was held regarding procedural and scheduling matters in this Cause. The agreement of the parties concerning the procedural schedule was then read into the record.

The Commission now enters the following Findings and Order, which shall become a part of the record in this proceeding:

1. **Mutual Agreement.** In accordance with Ind. Code § 8-1.5-6-8(e)(1), the Commission encourages Huntertown, Fort Wayne and other interested utilities to attempt to reach a mutual agreement relating to service territory issues as soon as practicable. Huntertown and Fort Wayne shall provide a status report to the Commission on or before October 14, 2014.

2. **Huntertown Motion.** Huntertown’s August 18, 2014 Motion requests the Commission issue an order pursuant to Ind. Code § 8-1-2-113 requiring Huntertown to provide, on an interim basis, water and wastewater service to prospective customers located within the service areas defined by the regulatory ordinances at issue in this Cause. Fort Wayne opposed the Motion.

Unlike electric utilities, water and wastewater utilities generally do not have exclusive service areas. Pursuant to Ind. Code ch. 36-9-2, Indiana municipalities may own and operate water or wastewater utilities, as well as regulate the furnishing of water and wastewater service, within its corporate boundaries. Indiana law also authorizes a municipality to exercise those powers within a limited radius of their corporate boundaries. *See* Ind. Code §§ 36-9-2-18, -19 and 36-9-23-36. In 2014, the Legislature adopted Ind. Code ch. 8-1.5-6 (“Chapter 6”). Chapter 6 did not alter a municipality’s ability to furnish or regulate the furnishing of water or wastewater service within extraterritorial areas or its “regulated territory.”<sup>2</sup> Rather, Chapter 6 established specific requirements for resolving certain actions taken by or disputes between municipalities concerning a regulated territory.

Specific to this Cause, Ind. Code § 8-1.5-6-8(d) provides the Commission with jurisdiction over a municipal utility for purposes of approving a regulatory ordinance that asserts exclusive authority of the municipality to provide water and/or wastewater service within an area outside its corporate boundaries. The municipality may not enforce its regulatory ordinance until the Commission issues its decision and, if necessary, the ordinance is modified accordingly. Ind. Code § 8-1.5-6-8(b). The Commission is to issue its order within 300 days of a petition’s filing.

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<sup>2</sup> Regulated Territory is defined as “the area outside the corporate boundaries of a municipality described in: (1) IC 36-9-2-18; (2) IC 36-9-2-19; or (3) IC 36-9-23-36.” Ind. Code § 8-1.5-6-2.

Ind. Code § 8-1.5-6-8(f). Although the Commission is vested with the authority to determine the municipal utility's service area, the preferred method for establishing service territories among water and sewer utilities is through mutual agreement. Ind. Code § 8-1.5-6-8(e)(1).

As set forth in Huntertown's Verified Petition, Huntertown adopted two ordinances in October 2013 ("Regulatory Ordinances") establishing exclusive service territories for Huntertown's water and wastewater utilities. In accordance with Chapter 6, those ordinances may not be enforced until, among other things, they are approved by the Commission. Consequently, until the Commission issues its order in this Cause, other water and wastewater utilities with the authority to operate within the area identified in Huntertown's Regulatory Ordinances may offer and provide utility service.

In its Motion, Huntertown requests the Commission exercise its authority to act in emergencies under Ind. Code § 8-1-2-113 and issue an interim order for Huntertown to provide temporary water and wastewater utility service to any customer desiring service within the regulated territory, including the two proposed developments for which Fort Wayne has recently entered into utility service related contracts. Huntertown argues that issuance of an interim order will preserve the "status quo" with customers within the utilities' respective service territories and assist the utilities in reaching a mutual agreement, avoids the installation of potentially unnecessary and duplicative water mains, and preserves the Commission's jurisdiction to determine which utility should provide service.

Ind. Code § 8-1-2-113 provides the Commission with the authority to temporarily alter or amend any existing rates, service, practices or schedules of a utility when the Commission considers it necessary to prevent injury to the business or interests of the people or any public utility in the case of an emergency. Indiana courts have held that this authority extends to municipally owned utilities, particularly where the subject matter is one within the Commission's jurisdiction. *Richmond v. Public Service Commission*, 406 N.E.2d 1269 (Ind. Ct. App. 1980). The burden of demonstrating an emergency exists rests on the party requesting relief. *State of Indiana, ex rel. Indianapolis Traction and Terminal Co., v. Lewis*, 120 N.E. 129 (Ind. 1918). The Commission has previously defined an "emergency" as "a condition or occurrence requiring immediate correction action" and "requires proof that a situation exists which absent immediate corrective action will result in serious harm to the petitioning utility and its customers." *Hoosier Energy Rural Electric Cooperative, Inc.*, Cause No. 37294, 1984 Ind. PUC LEXIS 777, at \*4 -\*5 (IURC Feb. 15, 1984).

Contrary to Huntertown's assertion, an interim order from the Commission does not preserve the "status quo." Although Huntertown had a previous agreement with Fort Wayne concerning the provision of service within its regulated territories, the agreement no longer exists. Nor does it avoid the installation of potentially unnecessary and duplicative water mains. Until the Commission issues a final order, after the taking of evidence from all affected parties and conducting a formal hearing, the "status quo" is that any utility with the legal authority to provide service within the area identified by the Regulatory Ordinances may do so. Issuing an interim order limiting the provision of service in the area identified by the Regulatory Ordinances to Huntertown does not preserve the "status quo." Furthermore, allowing Huntertown to be the exclusive provider on a temporary basis does not ensure that the

installation of water mains to prospective customers will not be duplicative because the Commission may ultimately determine that approving the Regulatory Ordinances is not in the public interest and service should be provided by another utility.

However, based on the evidence presented in Huntertown's Verified Motion, we do share Huntertown's concern that duplicative water and/or wastewater facilities may be constructed within the regulated territory covered by the Regulatory Ordinances resulting in financial losses for either the utility or its customers depending on the outcome of this proceeding. Huntertown provided evidence that Fort Wayne has recently entered into contracts with Twin Eagles and IRM Partnership related to the extension of facilities to provide water and wastewater service and that the extension of new water mains may duplicate water mains already in place by Huntertown. While our concern for adverse impacts in this particular instance is alleviated by the fact that Twin Eagles, and not Fort Wayne, is paying the cost associated with Fort Wayne's extension of service and expressed an understanding that it bears the risk that such facilities may be rendered worthless and additional expenditures required should the Commission approve Huntertown's Regulated Ordinances, not all potential customers may be similarly situated.<sup>3</sup>

Although Huntertown has failed to demonstrate that an emergency exists in this instance, the Commission does have subject matter jurisdiction to resolve water and wastewater territorial disputes arising as a result of Huntertown's adoption of the Regulatory Ordinances. Because Chapter 6 requires we make a determination concerning which utility should provide service after notice and an evidentiary hearing where we consider certain enumerated factors, we are unable to make a determination at this time as to which utility should provide service within the disputed area. Therefore, to prevent the potential for injury to business, the public, the utilities and their customers, the Commission finds that until a final order is issued in this Cause, no further water or sewer connections shall be made to new customers within the regulated territory covered by the Regulatory Ordinances unless:

- (1) Huntertown, Fort Wayne and the District reach agreement concerning which utility shall provide the requested water and/or wastewater service, or
- (2) When a request for water and/or wastewater service is made by a prospective customer willing to pay for the extension of facilities for the provision of service, the utility provides that customer with written notice informing them that a dispute exists between the utilities over who should provide water and wastewater service and discloses the potential financial risks to the customer if the customer elects for services to be provided prior to a final order being issued in this Cause. The utility shall obtain written acknowledgement from the customer that it has provided such notice.

Copies of any settlement agreement or the written notice provided by the utility and acknowledgement of the customer shall be filed with the Commission under this Cause within three business days of the effective date of the agreement or acknowledgement by the customer.

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<sup>3</sup> See Tr. at A-7 through A-10.

### **3. Procedural Schedule.**

**A. Case-in-Chief Prefiling Date.** Huntertown shall prefile with the Commission the prepared testimony and exhibits constituting its case-in-chief relating to the enforceability of the Regulatory Ordinances on or before October 16, 2014. Fort Wayne shall prefile with the Commission the prepared testimony and exhibits constituting its case-in-chief relating to the reasonableness of the wholesale rates being assessed to Huntertown on or before October 16, 2014. The foregoing prefiling dates reflect the parties' respective burdens of proof. Copies of the foregoing testimony and exhibits shall be served on all parties of record.

**B. Parties Responses to Cases-in-Chief and Intervenor's Prefiling Date.** Huntertown shall prefile with the Commission the prepared testimony and exhibits constituting its case-in-chief relating to the reasonableness of the wholesale rates being assessed by Fort Wayne on or before November 18, 2014. Fort Wayne and any Intervenor shall prefile with the Commission the prepared testimony and exhibits constituting their respective cases-in-chief relating to the enforceability of the Regulatory Ordinances on or before November 18, 2014. Copies of the foregoing testimony and exhibits shall be served on all parties of record.

**C. OUCS Prefiling Date.** The OUCS shall prefile with the Commission the prepared testimony and exhibits constituting its case-in-chief on or before December 4, 2014. Copies of same shall be served upon all parties of record.

**D. Rebuttal Prefiling Date.** Huntertown shall prefile its rebuttal testimony and exhibits relating to the enforceability of the Regulatory Ordinances on or before December 19, 2014. Fort Wayne shall file its rebuttal testimony and exhibits relating to the reasonableness of the wholesale rates being assessed on or before December 19, 2014. Copies of the foregoing testimony and exhibits shall be served on all parties of record.

**E. Evidentiary Hearing on Reasonableness of Wholesale Rates.** In the event this Cause is not settled, the cases-in-chief of the parties relating the reasonableness of the wholesale rates being assessed to Huntertown by Fort Wayne shall be presented in an evidentiary hearing to commence at 9:30 a.m. on January 13, 2015, in Hearing Room 222, 101 West Washington Street, Indianapolis, Indiana. At such time, the direct evidence of the respective parties relating to the reasonableness of the wholesale rates shall be presented and their respective witnesses examined. Thereafter, Fort Wayne shall present its prefiled rebuttal evidence.

**F. Evidentiary Hearing Regarding Enforceability of Regulatory Ordinances.** In the event this Cause is not settled, the cases-in-chief of the parties relating to the enforceability of the Regulatory Ordinances shall be presented in an evidentiary hearing to commence at 9:30 a.m. on January 15, 2015, in Hearing Room 222, 101 West Washington Street, Indianapolis, Indiana. At such time, the direct evidence of the respective parties relating the enforceability of the Regulatory Ordinances shall be presented and their respective witnesses examined. Thereafter, Huntertown shall present its prefiled rebuttal evidence.

**G. Proposed Orders.** All parties, other than the OUCC, wishing to submit a proposed order shall provide one electronically to the Presiding Administrative Law Judge on or before February 13, 2015. The OUCC shall submit its proposed order or reply to a proposed order on or before March 6, 2015. Replies to those proposed orders shall be submitted on or before March 18, 2015. Only parties filing a proposed order may file a reply.

**H. Sworn Testimony.** Any witness testimony to be offered into the record of this proceeding shall be made under oath or affirmation. In accordance with 170 IAC 1-1.1-18(h), if the prefiled testimony of a witness is to be offered into evidence at the Evidentiary Hearing, and the witness sponsoring the prefiled testimony is not required to, and does not, attend the Evidentiary Hearing, the prefiled testimony shall be accompanied by the witness's sworn affidavit or written verification at the time the evidence is offered into the record.

**I. Discovery.** Discovery is available for all parties and shall be conducted on an informal basis. Any response or objection to a discovery request shall be made within ten calendar days of the receipt of such request until December 19, 2014. Beginning on December 19, 2014, any response or objection to a discovery request shall be made within seven calendar days.

**J. Prefiling of Workpapers.** When prefiling technical evidence with the Commission, each party shall file copies of the work papers used to produce that evidence within two business days after the prefiling of the technical evidence. Copies of same shall also be provided to any other party requesting such in writing. When submitting workpapers to the Commission, two copies of each document shall be filed with the Secretary of the Commission.

**K. Number of Copies/Corrections.** With the exception of work papers, the parties shall file with the Commission an original and five copies of all prefiled testimony and exhibits. Any corrections to prefiled testimony shall be made in writing as soon as possible after discovery of the need to make such corrections. Although the Commission's rules require that original copies be one-sided, it is the Commission's preference that duplicate copies use both sides of the paper.

Parties may also elect to file documents with the Commission using the Commission's Electronic Filing System in lieu of filing paper documents. Pursuant to the terms and conditions of the Electronic Filing System, documents filed electronically are deemed filed the date they are submitted, subject to verification and acceptance by the Commission, and will receive an electronic file stamp. For filings greater than 30 pages in length, a party shall file with the Commission an original and one paper copy within two business days of the electronic filing. When supplying such copies, the party must provide a copy of the email reflecting the electronic filing was accepted by the Commission.

**L. Objections to Prefiled Testimony and Exhibits.** Any objections to the admissibility of prefiled testimony or exhibits shall be filed with the Commission and served on all parties of record no less than two business days prior to the date scheduled for commencement of the hearing at which the testimony or exhibit will be offered into the record.

**M. Intervenors.** Any party permitted to become an Intervenor in this Cause shall be bound by the record as it stands at the time its Petition to Intervene is granted, pursuant to 170 IAC 1-1.1-11.

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

1. The determinations of the Prehearing Conference set forth in this Order are made a part of the record in this Cause and shall be binding on all present and future parties of record during the proceedings of this Cause.

2. Huntertown's Verified Motion for Entry of Order Governing the Provision of Services on an Interim Basis is denied. However, water and sewer connections to new customers within the regulatory territory covered by the Regulatory Ordinances shall be made in accordance with Paragraph 2 above.

3. This Order shall be effective on and after the date of its approval.

**STEPHAN, MAYS-MEDLEY, WEBER AND ZIEGNER CONCUR:**

**APPROVED:** SEP 17 2014

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

A handwritten signature in cursive script, appearing to read "Brenda A. Howe", is written over a horizontal line.

**Brenda A. Howe**

**Secretary to the Commission**