

ORIGINAL

STATE OF INDIANA

Commissioner	Yes	No	Not Participating
Huston	√		
Freeman	√		
Veleta	√		
Ziegner	√		

INDIANA UTILITY REGULATORY COMMISSION

**PETITION OF COMMUNITY UTILITIES OF)
INDIANA, INC. FOR: AUTHORITY TO)
INCREASE ITS RATES AND CHARGES FOR)
WATER AND WASTEWATER UTILITY)
SERVICE; APPROVAL OF NEW SCHEDULES)
OF RATES AND CHARGES APPLICABLE)
THERETO; AUTHORITY TO RECOVER)
CERTAIN COSTS INCURRED IN)
CONNECTION WITH CAUSE NOS. 44724,)
45342 AND 45389; AUTHORITY TO RECOVER)
COSTS INCURRED AND DEFERRED IN)
CONNECTION WITH THE COVID-19)
PANDEMIC; APPROVAL OF A NEW)
RESIDENTIAL LOW-INCOME RATE FOR)
WATER AND WASTEWATER SERVICE; AND)
OTHER APPROPRIATE RELIEF)**

CAUSE NO. 45651

APPROVED: MAY 03 2023

ORDER OF THE COMMISSION ON RECONSIDERATION

**Presiding Officers:
Stefanie N. Krevda, Commissioner
Jennifer L. Schuster, Senior Administrative Law Judge**

On February 1, 2023, the Indiana Utility Regulatory Commission (“Commission”) issued a Final Order in this Cause (“Final Order”).¹ On February 21, 2023, Community Utilities of Indiana, Inc. (“CUII” or “Petitioner”) filed a Petition for Reconsideration (“Petition for Reconsideration”). On March 3, 2023, the Indiana Office of Utility Consumer Counselor (“OUCC”) and intervenor Lake of the Four Seasons Property Owners’ Association (“LOFS”) (together, the “Consumer Parties”) filed a Joint Response to CUII’s Petition for Reconsideration (“Joint Response”). CUII filed a reply in support of the Petition for Reconsideration on March 10, 2023 (“Reply”).

On March 1, 2023, CUII filed a Notice of Appeal with the Indiana Court of Appeals, indicating its intent to appeal the Commission’s Final Order. On March 17, 2023, CUII filed a Verified Unopposed Motion to Stay Appeal Pending the Administrative Agency’s Resolution of Appellant’s Petition for Reconsideration (“Motion to Stay Appeal”). On March 22, 2023, the Indiana Court of Appeals granted CUII’s Motion to Stay Appeal, staying CUII’s appeal and remanding this matter to the Commission for a decision on CUII’s Petition for Reconsideration.

¹ On March 15, 2023, the Commission issued a Nunc Pro Tunc Order in this Cause correcting certain typographical errors in the Final Order.

After considering the Petition for Reconsideration, the Response, and CUII's Reply, applicable law, the Final Order, and the evidence presented in this Cause, we find as follows:

1. Introduction. CUII has sought reconsideration of the Commission's Final Order on four issues: 1) the denial of recovery of legal expenses from its preapproval cases, Cause Nos. 45342 (water preapproval case) and 45389 (wastewater preapproval case) (together the "Preapproval Cases"); 2) the denial of recovery of CUII's engineering costs from Cause No. 45389, in which we declined to preapprove CUII's proposed oversized wastewater treatment plant ("WWTP") and other wastewater capital projects; 3) the denial of recovery of certain limited legal and consulting expenses related to this rate case; and 4) the finding that CUII's meter replacement program should comply with the ten-year meter life cycle established by 170 IAC 6-1-10 and associated limitation of annual recoverable meter costs to ten percent of the total meter replacement cost identified in CUII's rebuttal.

2. Preapproval Case Legal Recovery. CUII's Petition for Reconsideration opines that the Commission's denial of recovery of its legal expenses from the Preapproval Cases is "confiscatory," a "taking," "arbitrary," and "unlawful." In its Reply, CUII argues that the Final Order created a "regulatory quagmire" and that "[t]he alternative to reconsideration is to drive CUII and similarly-situated [sic] utilities out of business, to the detriment of Indiana customers." Reply at 2, 4.

As an initial matter, we note that the Commission is empowered by statute to disallow recovery of a utility's expenses it deems "unnecessary or excessive." Ind. Code § 8-1-2-48(a). "While [a] utility may incur any amount of operating expense it chooses, the Commission is invested with broad discretion to disallow for rate-making purposes any excessive or imprudent expenditures." *City of Evansville v. S. Indiana Gas & Elec. Co.*, 339 N.E.2d 562, 569 (Ind. Ct. App. 1975). Thus, any suggestion that the Commission cannot analyze expenses or limit their recovery in rates if it finds them "unnecessary or excessive" is incorrect.

Here, given the extremely complex circumstances of this rate case, CUII's troubled history, and the Consumer Parties' challenges to CUII's costs, it was appropriate for the Commission to seek and analyze additional information about CUII's claimed legal expenses from the Preapproval Cases.

In the final order in Cause No. 45342, we found that "expenditures associated with . . . regulatory costs are approved to the extent reasonable, which shall be determined in CUII's next rate case." *CUII*, Cause No. 45342, at 10 (Nov. 4, 2020). In Cause No. 45389, we noted that CUII's regulatory costs "*may be* reasonable and may be included for consideration as O&M expenses in CUII's next rate case." *CUII*, Cause No. 45389, at 15 (May 5, 2021) (emphasis added). Neither statement was a guarantee that regulatory costs *will be* recoverable; no analysis of the costs' reasonableness was conducted in the Preapproval Cases.

In its Petition for Reconsideration, CUII cites Ind. R. Prof. Cond. 1.5(a), essentially arguing that, because attorneys are not permitted to "make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses[.]" its requested legal expenses *must* be reasonable, and therefore the Commission erred in denying recovery of those expenses from CUII's ratepayers. By this logic, no court or agency would ever have the authority to analyze

such expenses under any circumstances, because if an attorney says he billed it, it *must* be reasonable. However, this is an oversimplification of the issue, ignoring the fact that what is reasonable for ethical purposes (e.g., an attorney is not fabricating hours he worked) and what may be reasonable to recover from a utility's consumers are not the same thing. An attorney may very well have billed time that the Commission ultimately finds to have been unnecessary or excessive under Ind. Code § 8-1-2-48(a).

CUII also cites several factually inapposite cases in which the Commission allowed recovery of legal expenses without analyzing legal invoices as it did here, essentially arguing that the Commission is holding CUII to a higher standard than it has held other utilities. Again, this oversimplifies the issue. Just because the Commission has allowed certain other utilities to recover legal expenses without scrutinizing invoices in factually distinguishable cases does not preclude us from reviewing invoices to see if the expenses incurred were reasonable and prudent in *this* case. The OUCC and LOFS correctly note the following:

Legal expenses for proceedings other than rate cases is [sic] the exception, not the rule, in utility cases; rate cases are considered the exception to the general American Rule that the party seeking relief bears its own costs, based on the precept that utilities must bring rate cases. Even in rate cases, however, the Commission is well within its rights to reduce an expense it considers excessive or imprudent.

Joint Response at 6-7 (citing *Switzerland County Natural Gas Co.*, Cause No. 45117 (April 17, 2019), at 18-20 (the "45117 Order")).

As noted above, it is well within the Commission's jurisdiction and discretion to determine whether legal expenses were reasonable and prudent before allowing a utility to recover those expenses from its customers. In the 45117 Order, we stated, "We find that what is a reasonable level of rate case expense *is not a one-size-fits-all measure*, i.e., simply because \$230,000 was approved in one case does not make that amount reasonable in another." 45117 Order at 19 (emphasis added). Also in that case, we noted that "[t]he absence of detailed billing information and the errors in Switzco's accounting exhibits make it challenging to determine the prudence of what Petitioner is ultimately being charged and seeks to recover." *Id.* at 20. Similarly, the information CUII provided in response to the Presiding Officers' June 23, 2022 docket entry consisted of highly disordered and unexplained legal invoices that were heavily redacted, rendering them indecipherable in many places. CUII has provided no evidence to support a finding that any of the legal expenses associated with redacted time entries were reasonably incurred.

CUII also argues that, even if it is not entitled to recover all its legal expenses from the preapproval cases, it is at least entitled to recover *some* of those expenses. However, it does not identify any specific amount for inclusion in such a partial recovery. That being said, the Commission has identified \$81,086.50 in legal expenses incurred in Cause No. 45342 associated with unredacted attorney time entries that appear to be reasonable and prudently incurred. Thus, we grant CUII's Petition for Reconsideration in part as to this issue only: CUII may recover \$81,086.50 in legal expenses, representing unredacted attorney time entries for certain legal expenses incurred in Cause No. 45342, CUII's water preapproval case.

However, for the reasons explained in our Final Order and below in Paragraph 3 regarding the engineering expenses incurred in Cause No. 45389, we find that CUII failed to demonstrate that its legal expenses incurred in Cause No. 45389, like its engineering costs in that case, were reasonable or prudently incurred. Because the wastewater projects proposed in Cause No. 45389 were extraordinarily unreasonable in light of the circumstances, we deny CUII's Petition for Reconsideration as to the recovery of related legal expenses from its ratepayers.

3. Cause No. 45389 Engineering Expenses. CUII argues that our final order in Cause No. 44724 (the "44724 Order") "directed [CUII] to engage in substantial activity to improve water and wastewater service quality, which necessarily required retention of engineering experts." Petition for Reconsideration at 6. CUII's position seems to be that, because the 44724 Order directed it to engage in certain activities, it therefore could do whatever it wanted, with a virtual blank check for expenses. However, as observed and directly quoted by CUII, in the 44724 Order, the Commission stated that "Petitioner shall propose capital investments that *require* Commission *approvals* and suggested timetables for the filings and approvals." 44724 Order at 76 (emphasis added). The Commission is not *required* to approve any capital investments; it will always utilize its discretion and expertise in deciding matters based on the specific facts presented, such as those in CUII's Preapproval Cases.

Again, we emphasize the importance of the following sentence from the 44724 Order that immediately precedes the one quoted above and relied upon by CUII to justify its argument:

In the [System Improvement Plan ("SIP")], Petitioner shall provide detailed plans to measurably improve performance in the Three Key Aspects through use of two primary components: a ***comprehensive inflow and infiltration ("I&I") program*** and a multi-faceted program to decrease incidences of discolored water, as described below.

44724 Order at 76 (emphasis added). To remediate its I&I problem, CUII needs to search its collection system, including sewers, for any imperfections—such as holes or cracks—where outside water, such as rainwater, can enter the wastewater system. The effect of such imperfections, if unrepaired, is to greatly increase the flow into CUII's wastewater treatment plant. Such inflow is the primary cause of sanitary sewer overflows during wet weather. By repairing these imperfections, CUII could significantly decrease the flow to its wastewater treatment plant. Even though a larger and upgraded plant may still be needed, the new treatment plant would likely be far smaller and less expensive than the one proposed in Cause No. 45389.

The over \$1 million in improvements proposed and subsequently engineered under CUII's direction and of which CUII sought preapproval in Cause No. 45389 are not directly related to any attempt to implement a comprehensive I&I program or to decrease incidences of discolored water. The capital improvement plan proposed under Cause No. 45389 ignored the Commission's directive to address its I&I problem, with CUII instead pursuing capital projects that continued to accept and treat excessive amounts of I&I through the expansion of capacity in both the WWTP and specific lift stations. Those engineering costs were incurred with the intent of *only* replacing CUII's aged WWTP and investing in new capacity without first making a substantive attempt to quantify and recover previously lost capacity through the elimination of I&I as directed in the 44724 Order, resulting in a WWTP that may be substantially overbuilt and

not used and useful. In addition to unreasonable capital improvement costs, customers would also be responsible for incurring ongoing operation and maintenance costs for the lifetime of the facility, which could have been avoided or reduced by simply recovering capacity within the existing system by eliminating I&I.

The evidence of record in this Cause reflects the reality that CUII's proposals in Cause No. 45389, which were *solely* aimed at investing in new capacity of its wastewater system via a new wastewater treatment and lift station updates and which *completely ignored* the need to recover existing capacity by removing I&I, were not made in good faith, either with the 44724 Order *or* the collaborative process that the Commission, LOFS, the OUCC, and CUII engaged in during the years since that order. None of CUII's proposals in Cause No. 45389 related to I&I remediation *at all*, but rather would have invested in adding new capacity to the system, essentially eliminating the need for I&I remediation. To approve the projects proposed by CUII in Cause No. 45389 would have been to endorse CUII's continued failure to make any significant progress in addressing I&I, something that would have decreased the need for the grossly oversized proposals made in Cause No. 45389. To approve CUII's projects proposed in Cause No. 45389 would be to completely obviate the 44724 Order's directive to reduce I&I in order to minimize the need for construction of new capacity or other capital investments.

CUII portrays the path from the 44724 Order to its filing of Cause No. 45389 as a straight line when it was anything but. According to CUII,

[b]ased on [Commission] feedback and instruction, [CUII] filed its revised SIP in October of 2018, which continued to recommend the [Collection System Improvement Program, or CSIP] and WWTP. . . . For the following year, no meaningful feedback was received from the OUCC, LOFS, or the Commission even though [CUII] communicated frequently and consistently that it was implementing the revised SIP through quarterly meetings. . . .

[CUII] subsequently filed two preapproval cases based on the revised SIP.

Petition for Reconsideration at 8. But CUII fails to note its own evidence that demonstrates it knew, at least as of October 2019, that "LOFS and the OUCC had 'grave concerns' regarding the two wastewater projects." Petitioner's Exhibit 1-R, Attachment SL-R09, at 3 (minutes from October 29, 2019 technical conference). As noted by the OUCC and LOFS, "CUII was not 'caught unawares' by the Consumer Parties' concerns with its plans, which the Consumer Parties' [sic] shared long before this case was filed." Joint Response at 8. Despite the concerns expressed by the OUCC and LOFS, CUII pressed forward with the projects and filed Cause No. 45389 on June 10, 2020.

CUII argues that "Commission Staff was involved in the review of [CUII's] engineering and capital planning efforts and at no point was [CUII] led to believe its efforts were in vain or were contrary to the Commission's intent as expressed in the 44724 Order." Petition for Reconsideration at 5. This statement is a misrepresentation of what occurred during the technical conference process following the 44724 Order. CUII never indicated to the Commission that it would propose capital projects completely unrelated to I&I remediation. CUII also fails to note that, during Cause No. 45389, it also refused to consider the Consumer Parties' suggestion that

smaller, phased, capital improvement proposals might be more acceptable, which would have provided CUII more opportunity to recover existing system capacity through ongoing I&I abatement.

For these reasons, we deny CUII's Petition for Reconsideration on the issue of recovery of engineering and legal expenses from Cause No. 45389. However, we note that, should CUII ever build any of the components of the projects proposed in Cause No. 45389, in whole or in part, and such projects become used and useful, CUII may seek recovery of related engineering expenses in the future to the extent those expenses are reasonable. One example of such a project is the headworks approved in this Cause.

4. Cause No. 45651 Rate Case Expense Recovery. CUII argues that the Commission erred in disallowing recovery of certain expenses from this case: an un-itemized \$50,000 "consulting expense" added by CUII on rebuttal and \$32,500 for expenses related to drafting and revising its minimum standard filing requirements ("MSFR"), which were so deficient upon initial filing that the Commission required CUII to re-submit them.

Regarding the \$50,000 in consulting expense, as with legal expenses, we are not obligated to allow recovery of expenses Petitioner has not shown to be reasonable and prudent. Having provided essentially no information about what made up this \$50,000 other than its relation to rebuttal witnesses, we cannot find that it was reasonably and prudently incurred.

Regarding the \$32,500 for MSFR expenses, CUII witness Andrew Dickson testified on rebuttal that "CUII made its best effort to file a complete case on December 7, 2021, including the hiring of consultants to help ensure smooth filing, and was still met with a list of deficiencies by the OUCC. This is ample evidence of the need for additional outside assistance[.]" Petitioner's Exhibit 4-R at 40. However, we find this argument to be unpersuasive. The evidence of record demonstrates that CUII has sufficient employees with knowledge of its operation and matters related to its rate case filing and, for this reason, should not need to go outside the company to have its MSFRs properly completed. The fact that CUII used such consultants to prepare and revise its deficient MSFR filing is not evidence that the expense to hire them was prudent and reasonable; indeed, it seems to be indicative of the opposite situation.

Because its employee salaries (most of which were increased, per the Final Order) are already incorporated into base rates, we find that there is no reason that CUII should have had to spend any additional money on outside consultants to draft (and, in this case, revise) its MSFRs. Thus, we deny CUII's Petition for Reconsideration regarding the \$82,500 in rate case expense.

5. Meter Replacement Life Cycle. As noted in our Final Order, we considered all the evidence of record presented by CUII, the OUCC, and LOFS regarding CUII's proposed meter replacement plan. Upon weighing the evidence, for the reasons explained in the Final Order, we found that the totality of evidence supported a finding that CUII's proposed meter replacement program appears in part to be a response to poor planning and execution of prior meter replacements. Customers should not be responsible for incurring excess costs attributable to poor managerial decisions.

CUII's position was that replacing meters is more cost effective than repairing them or replacing them under warranty. CUII witness Loren Grosvenor's calculation of the cost of warranty repair versus replacement of existing meters was based on the premise that a repaired meter is returned to the same customer and location from which it was removed. However, it seems more logical to replace a suspected malfunctioning meter on the spot. Should the removed meter be repairable, it could be returned to the utility's general meter inventory for re-use within the system; there is no need to return it to the same customer. To follow this practice would eliminate many of the tasks listed in Mr. Grosvenor's estimate such as labor to disassemble, reassemble, and reinstall the same meter with the same customer.

We also note, again, that the meter replacement program proposed by Petitioner is not based on a ten-year life cycle cost prescribed by 170 IAC 6-1-10, and we did not find CUII's evidence attempting to establish that it needs a shorter life cycle (based on Mr. Grosvenor's proposal for meter repair and replacement, summarized above) to be persuasive. Thus, we deny CUII's Petition for Reconsideration on this issue.

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

1. CUII's Petition for Reconsideration is denied except as to the issue noted in Ordering Paragraph 2.
2. CUII's Petition for Reconsideration is granted in part as to its request to recover legal expenses incurred in Cause No. 45342, but only for those expenses for which unredacted invoices were provided to the Commission, as described in Paragraph 2 above, which total \$81,086.50.
3. This Order shall be effective on and after the date of its approval.

HUSTON, FREEMAN, VELETA, AND ZIEGNER CONCUR:

APPROVED: MAY 03 2023

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

Dana Kosco
Secretary of the Commission