STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

APPEAL BY VILLAGE GREEN OF THE CONSUMER AFFAIRS DECISION IN COMPLAINTS 123364, 123365, 123367 AND 123394 CONCERNING THE BILLING OF WATER AND SEWER SERVICES	**)**	**CAUSE NO. 45144**

VILLAGE GREEN'S BRIEF IN SUPPORT OF APPEAL

I. INTRODUCTION

This appeal is taken from the determination of the Indiana Utility Regulatory Commission's (the "Commission") Consumer Affairs Division Director, issued on April 24, 2018, that Village Green Mishawaka Holdings, LLC ("Village Green") acted as a public utility in violation of Ind. Code § 8-1-2-1.2 (the "Sub-billing Statute") and the Commission's corresponding rules in 170 IAC § 15-2 (the "Sub-billing Rules") and should be required to refund all amounts collected from its tenants for water and sewer utility service.

As further discussed below, Village Green should not be required to refund all amounts collected from its tenants for water and sewer utility service because: (1) to require such a remedy would be outside the scope of the Commission's authority given that the Sub-billing Statute provides a specific remedy for its violation, namely, prospective compliance and the refund of overcharges only; (2) such remedy is totally inconsistent with the remedy promulgated by the Commission in the Sub-billing Rules; (3) it would be inequitable to require Village Green to refund all amount collected because it would unjustly enrich Village Green's tenants, Village Green has complied with the legislative intent of the Sub-billing Statute, and Village Green was effectively forced by the utility to distribute water and sewer utility service and sub-bill for the

same; and (4) Village Green has paid to the utility more than the amount collected from tenants and has taken steps to ensure it is compliant with the Sub-billing Statute and Sub-billing Rules.

II. BACKGROUND

Village Green was, at all times relevant to this matter, the owner and landlord of a manufactured home community in Mishawaka, Indiana, known as Village Green Manufactured Home Community. As a landlord, Village Green distributed water and sewer utility services to its tenants pursuant to the Sub-billing Statute and Sub-billing Rules, which exempt a landlord from being considered a public utility and subject to the Commission's jurisdiction over the same. In early 2018, six tenants of Village Green filed complaints with the Commission's Consumer Affairs Division, pursuant to Ind. Code § 8-1-2-34.5, alleging that Village Green was not remitting all funds paid by tenants to the utility provider, Mishawaka Utilities ("MU"), as required under the Sub-billing Statute. The Director of the Consumer Affairs Division issued a determination that Village Green was in violation of the Sub-billing Statute and therefore was acting as a public utility. Based upon that determination, the Director ordered that Village Green refund all amounts collected from its tenants for water and sewer utility service. Village Green appeals from that determination.

III. DISCUSSION

A. Permissible Remedies Ordered by the Commission

1. The Commission is entitled to order refunds only of overcharges under the Sub-billing Statute and Sub-billing Rules.

In enacting the Sub-billing Statute, the Indiana General Assembly set forth specific actions to be taken by the Commission with respect to a complaint alleging that a landlord may be acting as a public utility in violation of the Sub-billing Statute. Ind. Code § 8-1-2-1.2(e). Specifically, the statute states that, "If a complaint is filed under section 34.5 or 54 of this

chapter alleging that a landlord may be acting as a public utility in violation of this section, the commission shall: (1) consider the issues; and (2) if the commission considers necessary, enter an order requiring that billing be adjusted to comply with this section." *Id.* In following this directive, the Commission promulgated the Sub-billing Rules, which state:

> If, after review of the information provided under this rule, the commission's consumer affairs division determines that the landlord has failed to comply with the requirements of IC 8-1-2-1.2 or this rule, the commission shall require the landlord to refund any *overcharges* to the known date of error or for a period of one (1) year, whichever is less, and adjust its sub-billing practices prospectively.

170 IAC § 15-3-3 (emphasis added). The Sub-billing Statute and Sub-billing Rules do not define "overcharge," and this point has not been litigated. Black's Law Dictionary defines "overcharge," with respect to public utilities, as "a charge collected above a lawful tariff rate; a charge of more than is permitted by law." *Black's Law Dictionary*, p. 994 (5th ed. 1979). Both of these definitions contemplate that an overcharge would include an amount that was *above* or *more than* the proper amount charged. In this case, Village Green did not, at any time, charge its tenants more than the amount that was permitted by law. Village Green did not have a tariff, as it was operating under the Sub-billing Statute and Sub-billing Rules, so it could not have collected any charge above its lawful tariff rate. Additionally, it was permitted by law to collect an amount from its tenants for water and sewer service, not to exceed its total net charge less its own usage. While any amounts collected over and above this permitted amount would be considered overcharges, any amounts collected by Village Green that are within the charges permitted by law are, by definition, not overcharges and are not subject to a refund order by the Commission under the Sub-billing Statute and Sub-billing Rules. Nonetheless, to the extent any of Village Green's tenants were charged more than what was permitted in the Sub-billing Statute and Sub-

billing Rules, the proper remedy is a refund of the amount overcharged to the known date of error or for a period of one year, whichever is less.

2. The Commission's general authority to order remedies does not apply to cases under the Sub-billing Statute and Sub-billing Rules.

In enacting the Sub-billing Statute and promulgating the Sub-billing Rules, the General Assembly and Commission, respectively, set forth specific remedies for violations of these authorities, as described above. The Commission also has the general authority, when dealing with public utilities under its jurisdiction, to fix just and reasonable measurements, regulations, acts, practices or service to be furnished, imposed, observed and followed in the future and to make such other order respecting such measurement, regulation, act, practice or service as shall be just and reasonable. Ind. Code § 8-1-2-69. While this may be considered broad authority when it comes to regulating public utilities, the Commission may not exercise this authority when specific authority exists pertaining to violations of the Sub-billing Statute and Sub-billing Rules. A well-established canon of statutory construction is that a general statute will not prevail over a specific one when their terms conflict. *State v. Lake Superior Court*, 500 N.E.2d 737, 739 (Ind. 1986) ("Under our rules of statutory construction, it cannot be presumed the General Assembly intended language used in a statute to be applied in an illogical manner. Nor can it be presumed the Legislature intended to do an absurd thing or to enact a statute that has useless provisions, the effect of which can easily be avoided. Another rule of statutory construction is that a more detailed and specific statute prevails over a more general statute when the two conflict."). (Citations omitted.)

As the Commission noted in its record related to this proceeding (the "Record"), there have been no cases before the Commission or any Indiana court that permit the Commission to order full refunds of all amounts collected by a landlord from tenants under the Sub-billing

Statute. All cases cited by the Commission involve public utilities that have charged customers amounts that were either not included in their filed tariffs or were over and above the permitted amount in their filed tariff. *See In re Boone County Utilities, LLC*, 2003 WL 21049014 (Ind. U.R.C.); *In re Petition of Town of Cedar Lake*, 2010 WL 3444551 (Ind. U.R.C.); *Airco Industrial Gases et al. v. Ind. Mich. Pwr. Co.*, 614 N.E.2d 951 (1993); *N. Ind. Pub. Serv. Co. v. Citizens Action Coal. of Ind., Inc.*, 548 N.E.2d 153, 160 (1989). Additionally, all of the amounts ordered refunded in these cases would be considered overcharges because they were in excess of the amount permitted to be collected by the utility. As noted above, Village Green does not have a filed tariff because it is not a public utility and it distributes water and sewer service pursuant to the Sub-billing Statute and Sub-billing Rules. Further, Village Green has not collected any amounts from its tenants that are over and above what is permitted by law. Therefore, none of the cases cited by the Commission are applicable.

Moreover, as noted in the Commission's General Counsel's legal memorandum, which is part of the Record, the Commission should initiate a rulemaking to determine, in part, "[w]hether the Rule should explicitly state whether the Commission shall treat non-complying landlords as public utilities." As an initial matter, the Commission does not have the authority to determine this issue given that the Sub-billing Statute does not provide for full refunds as a permissible remedy for violations of the that statute, even if the Commission considers a landlord to be acting as a public utility. See Ind. Code § 8-1-2-1.2(e) ("If a complaint is filed under section 34.5 or 54 of this chapter *alleging that a landlord may be acting as a public utility in violation of this section*, the commission shall: (1) consider the issue; and (2) if the commission considers necessary, enter an order requiring that billing be adjusted to comply with this section.") (Emphasis added.) The Commission may promulgate its own rules to administer the statute, but

it may not establish rules that are outside of the scope of the statute. Case law generally describes a state agency's authority to promulgate rules pursuant to its delegated statutory authority.

> The rule of action which must govern in controversies between adversary parties must be laid down by the legislature itself. It cannot be left to the discretion of administrative agencies. While a law as enacted must be complete, where the legislature has laid down a standard which is as definitely described as is reasonably practicable, it may authorize an administrative agency to amplify or implement that legislation, within prescribed limits, by adopting rules and regulations of general application to all alike, . . . but it cannot confer upon any body or person the power to determine what the law shall be.

State ex rel. Standard Oil Co. v. Review Board of Indiana Employment Sec. Div., 101 N.E.2d 60, 63 (Ind. 1951). The Indiana Supreme Court has addressed this very issue with respect to the Commission. In *Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission*, the Court stated that nothing may be read into a statute that is outside the manifest intention of the General Assembly, as determined by the plain and obvious meaning of the statute. 715 N.E.2d 351, 354 (Ind. 1999). It further stated that:

> The Commission, as an administrative agency, "derives its power and authority solely from the statute, and unless a grant of power and authority can be found in the statute it must be concluded that there is none." Notwithstanding its purpose "to insure that public utilities provide constant, reliable, and efficient service to [their] customers, the citizens of this state," the Commission itself recognizes its jurisdictional limits: "this Commission . . . has only such jurisdiction as is specifically delegated by the statute."

Id. (quoting *General Tel. Co. of Indiana, Inc. v. Public Serv. Comm'n of Indiana*, 150 N.E.2d 891,894 (Ind. 1958); *Office of Utility Consumer Counselor v. Public Serv. Comm'n of Indiana*, 463 N.E.2d 499, 503 (Ind. Ct. App. 1984); *In re Madison Light & Power Co.*, 1924C Pub. Util. Rep. (PUR) 517, 519 (1924)). It is clear that if the Sub-billing Statute grants an explicit remedy for landlords' violations of the statute, it is outside the scope of the Commission's authority to proscribe any other remedies in the Sub-billing Rules.

Even if the Commission were able to establish its own remedies in these situations, clearly this is an issue of first impression that has not been addressed in the Commission's rules, let alone in a contested proceeding. Given the unprecedented nature of the Consumer Affairs Division's ordered remedy, the Commission should not treat Village Green as a public utility and impose such a harsh penalty on a landlord that had no intention of violating the Sub-billing Statute or Sub-billing Rules. Further, the Commission's Consumer Affairs Division appears to be acting outside of the scope of the Commission's own rules by treating Village Green as a public utility even though the Sub-billing Rules do not explicitly state that that is the proper outcome for a noncompliant landlord. In fact, when promulgating the Sub-billing Rules, the Commission specifically intended these rules to serve as the only manner in which complaints under the Sub-billing Statute would be handled. The Commission's Notice of Proposed Rulemaking for the Sub-billing Rules states that, "The rule creates a framework in which the Commission can uniformly and consistently address complaints that allege that a landlord has violated the provisions of the statute and is therefore a 'public utility.'" *Notice of Proposed Rulemaking*, IURC RM #09-01 (Nov. 12, 2009). The Commission's General Counsel's suggestion in the Record that the Commission has the authority to proceed under the Sub-billing Rules or the Commission's general jurisdiction over public utilities in sub-billing cases directly contradicts the Commission's own rulemaking, which clearly provides that the Sub-billing Rules are the only way in which the Commission may "uniformly and consistently" address complaints in these cases.

Given that there is no basis in the Sub-billing Statute and therefore, no basis in the Sub-billing Rules for treating Village Green as a public utility, the Consumer Affairs Division's determination is arbitrary and capricious and would likely be reversed. Specifically, a court will

reverse an administrative decision if it is: 1) arbitrary, capricious, an abuse of discretion or otherwise contrary to law; 2) contrary to a constitutional right, power, privilege or immunity; 3) in excess of statutory jurisdiction, authority or limitations; 4) without observance of procedure required by law; or 5) unsupported by substantial evidence. *Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dept. of Envtl. Mgmt.*, 820 N.E.2d 771, 776 (Ind. Ct. App. 2005). "If an agency misconstrues a statute, there is no reasonable basis for the agency's ultimate action, and, therefore, the trial court is required to reverse the agency's action as being arbitrary and capricious." *Id.* at 777.

Finally, even if the Commission did have the authority to fashion a remedy under Ind. Code § 8-1-2-69 in this instance, such remedy must be just and reasonable. As discussed herein, Village Green has paid more to MU for its tenants' water and sewer utility use than it has charged and collected from its tenants. Ordering Village Green to fully refund all amounts collected from its tenants for water and sewer utility service would not only effectively require Village Green to pay twice for the provision of these services, but would also give the tenants a windfall to the extent they used the provided water and sewer services without paying for them at all. This would hardly be a just and reasonable result.

B. Equitable Considerations

1. The tenants would be unjustly enriched by receiving refunds of all amounts paid for water and sewer utility service.

Unjust enrichment is a "legal fiction invented by the common-law courts in order to permit a recovery . . . where, in fact, there is no contract" but where "natural and immutable justice" should permit a recovery as if there had been a contract or promise. *Woodruff v. Ind. Family & Soc. Servs.*, 964 N.E.2d 784, 791 (Ind. 2012). The elements of an unjust enrichment claim include: 1) a benefit conferred by the plaintiff on the defendant at the express or implied

request of the defendant; 2) allowing the defendant to retain the benefit without restitution would be unjust; and 3) the plaintiff expected payment. *Id.* at 791. In other words, for a plaintiff to succeed in an unjust enrichment claim "a plaintiff must establish that it conferred a measurable benefit on the defendant under circumstances in which the defendant's retention of the benefit would be unjust." *Coleman v. Coleman*, 949 N.E.2d 860, 866 (Ind. Ct. App. 2011). For a plaintiff to recover under this theory, the plaintiff must "establish that the defendant impliedly or expressly requested the benefits be conferred." *Id.* Furthermore, the plaintiff must have had "a reasonable expectation of being paid" or the defendant must have reasonably expected to pay for that benefit. *Id.* at 868. The elements of unjust enrichment are met in this case. Village Green conferred a benefit on its tenants at the tenants' request, namely, the distribution of water and sewer utility service, and Village Green expected payment from tenants for the same. Further, it would be unjust to allow the tenants to benefit from the use of the water and sewer service without paying for it.

The Commission stated in the Record that Village Green has unclean hands in the situation, disqualifying it from the equitable relief of an unjust enrichment claim. The doctrine of unclean hands "demands one who seeks equitable relief to be free of wrongdoing in the matter before the court." *Coppolillo v. Cort*, 947 N.E.2d 994, 1000 (Ind. Ct. App 2011). For a party to have acted with unclean hands, "the alleged wrongdoing must be intentional and must have an immediate and necessary relation to the matter being litigated." *Id.* Furthermore, the purpose of the doctrine is to "to prevent a party from reaping benefits from his or her misconduct." *Id.* Any violation of Village Green of the Sub-billing Statute or Sub-billing Rules was purely inadvertent and not intentional. As attested in the Affidavit of Marissa Welner, attached as **Exhibit A** to Village Green's Motion to Supplement Record in this Cause (the "Affidavit"), Village Green

worked with its third-party billing agent to establish water and sewer charges that would not exceed Village Green's total net charges for these services, less its own usage. It also remitted all funds collected from tenants to MU and did not have any intention of profiting from said funds. As attested in the Affidavit, Village Green worked with its third-party billing agent to ensure the proper required language was included on the sub-bills as soon as it discovered its error in omitting the same. Finally, for Village Green to have unclean hands, the Commission must show that it benefitted from its actions. Village Green would not benefit from any alleged violations if it were required to refund only the amounts overcharged to tenants, if any.

2. The legislative intent of the Sub-billing Statute was to prevent landlord profit from tenants' utility payments.

One of the three main requirements of the Sub-billing Statute is that "[t]he total charge for the [water and sewer utility services] is not more than what the landlord paid the utility for the same services, less the landlord's own use." Ind. Code § 8-1-2-1.2(b)(2). In fact, the statute stems from a Commission investigation into complaints that landlords were charging their tenants higher rates than what a public utility would be permitted to charge its customers, including additional fees.[1] The Sub-billing Statute was enacted within a year of the Commission's investigation into these matters. It is clear that the point of the Sub-billing Statute was to address concerns associated with landlords charging rates and fees that were higher than what they were being charged by utilities in an effort to profit off their distribution of utility services to tenants. As discussed above, Village Green's practices are consistent with the legislative intent of the Sub-billing Statute because it did not, and did not at any time intend to, profit from distributing utility services to its tenants. In fact, it lost money in doing so.

[1] *See Landlord handling of water, sewer bills under scrutiny: Utility commission examining charges to see whether owners operate as utilities*, Indianapolis Business Journal, July 16, 2007 (https://www.ibj.com/articles/13075-landlord-handling-of-water-sewer-bills-under-scrutiny-utility-commission-examining-charges-to-see-whether-owners-operate-as-utilities, last accessed Jan. 12, 2019).

Additionally, it is clear from the Commission's Notice of Proposed Rulemaking that the Commission's intent in promulgating the Sub-billing Rules was to create "a framework in which the Commission can uniformly and consistently address complaints that allege that a landlord has violated the provisions of the statute and is therefore a 'public utility.'" It would be inequitable for the Commission to establish rules that claim to be the sole framework for addressing these alleged violations and then to proceed under different authority in fashioning a remedy for a particular landlord.

3. Village Green was effectively forced by MU to sub-bill its tenants.

Finally, Village Green should not be subjected to the unreasonable penalty imposed by the Consumer Affairs Division Director because Village Green, despite its articulated desire to the contrary, was required by MU to sub-bill its tenants. As attested in the Affidavit, Village Green requested that MU provide water and sewer utility service to its tenants individually and bill them accordingly so that Village Green would not be required to distribute utility service to and sub-bill its tenants. However, MU refused to do so, stating that it did not want to maintain the distribution facilities within the community. This required Village Green, against its desires, to act as a distributor of water and sewer utility services to its tenants and placed it within the authority of the Sub-billing Statute and Sub-billing Rules. At that time, as attested in the Affidavit, Village Green determined that it would be fairer to tenants to sub-bill them for water and sewer utility services rather than increasing rent overall. Unfortunately, Village Green's attempts to charge its tenants fairly have resulted in an order from the Consumer Affairs Division for Village Green to pay twice for the water and sewer utility serviced rendered to its tenants and for the tenants to receive these services for free.

C. Village Green's Alleged Violations of the Sub-billing Statute and Sub-billing Rules

The Sub-billing Statute provides three conditions that a landlord distributing water or sewage disposal service from a public utility or a municipally owned utility to one or more dwelling units must meet in order to not be considered a public utility. First, the landlord must bill tenants, separately from rent, for the water or sewage disposal service distributed and any other permitted costs. Ind. Code § 8-1-2-1.2(b)(1). Secondly, the total charge for the water or sewage disposal service distributed may not be more than what the landlord paid the utility for the service, less than landlord's own use. Ind. Code § 8-1-2-1.2(b)(2). Finally, the landlord must disclose to the tenant certain statutory terms and conditions in either the lease, the tenant's first utility bill, or a writing separate from the lease and signed by the tenant before entering into the lease. Ind. Code § 8-1-2-1.2(b)(3). Compliance with the foregoing will exempt the landlord from consideration as a public utility. Additionally, the Commission has promulgated the Sub-billing Rules to implement the Sub-billing Statute. As explained below, Village Green did not violate the Sub-billing Statute or Sub-billing Rules in a manner that should subject it to Commission regulation as a public utility.

1. Village Green paid all utility charges collected from tenants to MU.

A primary tenet of the Sub-billing Statute and Sub-billing Rules is that a landlord may not charge tenants more for the utility service rendered than what the utility charges the landlord, less the landlord's own utility use. *See* Ind. Code § 8-1-2-1.2(b)(2); 170 IAC § 15-2-2(a). In essence, a landlord may not profit from distributing water or sewage utility service to its tenants. As shown in the Record and attested in the Affidavit, Village Green billed a total of $174,645.27 to its tenants for water and sewer services between the time that Village Green began sub-billing tenants and the time Village Green sold the community. Village Green did not bill its tenant for trash services. Additionally, as shown in the Record, Affidavit and settlement agreement

between Village Green and MU, of which the Commission took administrative notice on November 19, 2018 (the "Settlement Agreement"), Village Green has made the following payments to MU for water and sewer services rendered to the tenants: 1) $258,868.54 in water, sewer and trash utility payments as invoiced monthly[2] by MU to Village Green for the community; 2) $102,320.77 as payment under the Settlement Agreement representing the amounts due and owing through March 22, 2018 for water service; 3) $17,073.37 as payment under the Settlement Agreement representing the remaining balance on Village Green's April 2018 invoice from MU;[3] 4) $172,782.52 as payment under the Settlement Agreement representing the remaining past due balance for sewer utility service;[4] and 5) $194,023.19 as a payoff amount to MU upon the sale of the community to its current owner on November 30, 2018. This payoff amount was paid by Village Green on behalf of some of its tenants, who, by the time Village Green sold the community, had stopped paying their utility bills altogether. In summary, it is clear from the Record, Affidavit and Settlement Agreement that, over the course of the period that Village Green sub-billed its tenants, Village Green charged a total of $174,645.27 to its tenants for water and sewer services and paid to MU a total of $745,068.39 for the same services. Even removing funds paid by Village Green to MU for Village Green's own water and sewer usage and funds paid to MU for tenants' trash service, the difference between the amount Village Green charged its tenants for water and sewer utility service and the amount it paid to MU for the same service is significant. It is clear that all monies collected from the

[2] There was a period between November 2017 and February 2018 during which MU did not send any utility invoices to Village Green. This period was the subject of the dispute and Settlement Agreement between Village Green and MU, which resulted in Village Green's additional settlement payments to MU as described herein.
[3] This invoice included water, sewer and electric utility service, so not all of this $17,073.37 payment represented payment for water and sewer services.
[4] This amount was paid to MU by Village Green's mortgagee in order to remove MU's sewer lien on the community. Village Green then repaid its mortgagee under a repayment plan negotiated between the parties.

tenants, and then some, were paid to MU, and that Village Green in no way profited from distributing water or sewage utility service to its tenants.

Further, the Sub-billing Statute and Sub-billing Rules do not provide a required timeline for remitting payment collected from tenants to the utility providing service. It is true that the Sub-billing Statute speaks in the past tense regarding amounts remitted by a landlord to a utility. Ind. Code § 8-1-2-1.2(b)(2) ("The total charge for the services described in subdivision (1)(A) is not more than what the landlord paid the utility for the same services, less the landlord's own use.") However, nothing in the Sub-billing Statute explicitly states that a landlord must pay the total invoice to the utility prior to billing tenants for their respective portions. In many cases, such a requirement would cause cash flow issues for landlords who may need to collect the proper amounts from tenants before being able to pay the full invoice to the utility. The Sub-billing Rules do not at all indicate that a landlord must pay all amounts invoiced by the utility before charging the same to tenants. It merely states that the amounts charge by landlords to tenants may not be more than the total net charge for water or sewer utility service, respectively. 170 IAC § 15-2-2(a). "Total net charge" for a service is defined as the charge that a utility imposes on a landlord for the service for a given billing period inclusive of applicable taxes but exclusive of late fees and other incidental or extraordinary fees and charges. 170 IAC § 15-1-11, 12. None of these provisions set forth a required timeframe for payment from the landlord to the utility, either before or after the permitted amounts are collected from tenants. In fact, the legal memorandum in the Record, drafted by Commission's own General Counsel and relied upon by the Consumer Affairs Division in its determination, notes that some provisions of the Sub-billing Statute conflict with the Sub-billing Rules and recommends that the Commission initiate a rulemaking to update the Sub-billing Rules. Specifically, the Commission's General Counsel

notes that a rulemaking by the Commission should address "[w]hether the Rule should explicitly state landlords can only bill tenants for amounts they were billed after landlords have paid the utility" and "[w]hether the Rule should put a time limit on how far back in time landlords can bill tenants." Given that there is conflicting authority on the subject, Village Green should not be subjected to the harsh penalty of having to refund all amounts collected from its tenants for water and sewer utility services. Village Green has satisfied its requirement to not charge tenants more for the utility service rendered than what the utility charges the landlord, less the landlord's own utility use, by collecting the appropriate amounts from the tenants and then remitting them, via all of the payments described above, to MU.

Finally, as attested to in the Affidavit, Village Green and its third-party billing agent worked to ensure that the water and sewer utility charges billed to the tenants did not collectively total more than the total net charges for water and sewer utility service billed by the utility to Village Green and did not include charges for any water or sewer utility service attributed to Village Green's own usage, as required by Ind. Code § 8-1-2-1.2(b)(2) and 170 IAC § 15-2-2(a), (b). At no time did Village Green collectively charge its tenants amounts that would exceed Village Green's total net charges for water and sewer utility service from MU.

2. Village Green has inserted the required language into tenants' sub-bills.

The Sub-billing Rules set forth the Commission's standards for sub-billing, including certain language that is to be included in sub-bills to tenants. *See* 170 IAC § 15-2-3(c). Specifically, sub-bills must show the following information: 1) sub-billing date, 2) sub-billing rate charged, 3) previous balance, 4) amount of sub-bill, 5) amount of initial set-up fee, if any, 6) reasonable administrative fee, not to exceed $4, 7) insufficient funds fee, if due, 8) due date, 9) if estimated, a clear and conspicuous coding identifying the sub-bill as estimated, 10) explanation

of all codes or symbols, 11) name and phone number of persons for tenants to contact about sub-billing matters, and 12) the following statement: "If you believe you are being charged in violation of IC 8-1-2-1.2, you have a right to file a complaint with the Indiana Utility Regulatory Commission at (800) 851-4268 or www.in.gov/iurc." *Id.* Water sub-bills must also include beginning and end dates and readings of tenant's submeter (if submetered) and the name and phone number of a person to contact for water service matters. *Id.* Sewer sub-bills must also include the beginning and end dates of the sub-billing period and the name and phone number of a person to contact for sewer service matters. *Id.*

As noted in the Record, Village Green's sub-bills contained much of this information and any required information that they did not contain was immediately added upon Village Green's notice of any missing information. As noted in the Affidavit, Village Green did not act in bad faith in inadvertently excluding any required information, which would have been missing from sub-bills for only two or three months at most, and it acted quickly to remedy the issue upon its discovery. The sub-bills now contain all of the information required under 170 IAC § 15-2-3(c).

IV. CONCLUSION

As set forth above, Village Green has, in good faith, attempted to comply with the Sub-billing Statute and Sub-billing Rules at all times and, in most cases, has succeeded in complying with the same. For example, Village Green paid all funds collected from tenants – and then some – to MU for the utility services provided. It also did not charge rates that were in excess of what it was being charged by MU. Finally, it has ensured that all required language is contained on its sub-bills. More importantly, Village Green has fully complied with the intent of the Sub-billing Statute and Sub-billing Rules – that a landlord does not profit from the distribution of utility services to its tenants.

To the extent the Commission's Consumer Affairs Division has determined that Village Green violated the Sub-billing Statute and Sub-billing Rules, it has attempted to require remedies that are outside of its lawful authority and that would be inequitable to Village Green and provide a windfall to Village Green's tenants. The proper remedy in this case would be for the refund of any overcharges to the known date of error or for a period of one year, whichever is less, and prospective adjustment of Village Green's billing practices. For these reasons, Village Green respectfully requests that the Commission overturn the determination of its Consumer Affairs Division and issue an order that is just and reasonable under the circumstances of this case.

Respectfully submitted,

By: *__/s/ Jeremy L. Fetty_____*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served electronically or via U.S. First Class Mail upon the following this 15th day of January, 2019:

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