**IN THE**

**INDIANA COURT OF APPEALS**

**No. 18A-EX-2179**

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|---|---|
| **INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR,**<br>**CITY OF CROWN POINT, INDIANA,**<br>**and**<br>**TOWN OF SCHERERVILLE, INDIANA,**<br><br>**Appellants (Statutory Party and Intervenors Below),**<br><br>**v.**<br><br>**INDIANA-AMERICAN WATER COMPANY,**<br>**CITY OF LAKE STATION, INDIANA,**<br>**and**<br>**INDIANA UTILITY REGULATORY COMMISSION,**<br><br>**Appellees (Petitioners and Administrative Agency Below).** | **Appeal from the Indiana Utility Regulatory Commission**<br><br>**IURC No. 45041**<br><br>**The Hon. James Huston, Chair**<br>**The Hon. Sarah Freeman,**<br>**The Hon. Stefanie Krevda,**<br>**The Hon. David L. Ober and**<br>**The Hon. David E. Ziegner,**<br>**Commissioners**<br><br>**The Hon. Carol Sparks Drake,**<br>**Administrative Law Judge** |

# CORRECTED BRIEF OF APPELLEE INDIANA-AMERICAN WATER COMPANY


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## STATEMENT OF ISSUE

Appellee Indiana-American Water Company adopts the Statement of the Issue in the Brief of Appellee Indiana Utility Regulatory Commission ("IURC" or "Commission").

## STATEMENT OF CASE

Indiana-American adopts the Statement of the Case in IURC's Brief of Appellee.

## STATEMENT OF FACTS

Indiana-American adopts the Statement of the Facts in IURC's Brief of Appellee.

## SUMMARY OF ARGUMENT

The Commission is the expert agency to which the Legislature has assigned the task of administering Indiana utility laws. These include the General Assembly's regulatory scheme in the distressed utility statute, Indiana Code §§ 8-1-30.3-1 *et seq.* ("Statute" or "Chapter 30.3"), enacted to encourage sales of "distressed" utilities so purchasers like Indiana-American can improve them. If the sale is made under Indiana Code § 8-1.5-2-6.1 ("Section 6.1"), requiring IURC pre-approval of proposed sales of "nonsurplus" municipal utility property, then a utility that (like the City of Lake Station's) serves fewer than 5,000 customers is deemed "distressed."

Among the ways the Statute and Section 6.1 encourage sales of distressed utilities is by allowing the acquiring utility to include the entire purchase price in its rate base. That purchase price is deemed "reasonable" (*see* Section 6.1(d)) to the extent it does not exceed the value of the municipal utility's nonsurplus property under a statutory appraisal process (*see* IND. CODE § 8-1.5-2-5). The Commission approves the proposed sale if certain statutory criteria are met, including that the distressed utility's "utility property is used and useful in providing [utility] service." I.C. § 8-1-30.3-5(c)(1); *see* I.C. § 8-1-30.3-4 (defining "utility property" as "property of a utility company that is the subject of an acquisition," *i.e.*¸ the distressed utility).

Here, the Commission determined that the statutory "is used and useful" requirement did indeed reference "utility property" of the "distressed utility" that is "the subject of [the proposed] acquisition" (Lake Station's), and not the property that will be owned by the purchaser after the acquisition closes (Indiana-American).

The sole issue on appeal is the claim by Joint Appellants—the Indiana Office of Utility Consumer Counselor, joined by the Town of Schererville and City of Crown Point (collectively, "OUCC")—that the Commission's interpretation of the statutes it administers is incorrect. In OUCC's view, the "is used and useful" requirement means the utility property must be "used and useful" to the *acquiring* utility immediately *after* the future closing of the acquisition, regardless if it "*is* used and useful" to the distressed utility that is proposing to sell its "utility property."

To prevail, OUCC must show that the Commission's interpretation of the pertinent statutes is not even a "reasonable" one. OUCC does not and cannot meet this burden.

The IURC interpreted "is used and useful" to mean just what it says—namely, the utility property "is" indeed "used and useful" to the distressed utility at the time the Commission must evaluate the proposed sale. This comports with the statutory appraisal process, establishing that the appraised value of the distressed utility's "nonsurplus" property—which *means* property that "is used and useful" to the distressed utility—is deemed a "reasonable" price, all of which can be included in the acquiring utility's rate base. It comports with the statutory definition of "utility property" as property owned by the distressed utility (not by the proposed purchaser).

It comports, too, with the key purpose of the Chapter 30.3 and Section 6.1—namely, to encourage sales of distressed municipal utilities so service can be improved. That purpose will be frustrated if municipalities must accept significantly less than the appraised value of their utility property, or if acquiring utilities cannot include the full purchase price in their rate base.

For these and other reasons, the Commission's statutory interpretation is correct. But it is unquestionably a *reasonable* agency reading of the pertinent statutes. As shown *infra* in the Standard of Review, this ends the Court's inquiry and requires affirmance. This would be so even if OUCC's contrary reading were itself reasonable (which it is not).

The Court should affirm the Commission's Order approving the sale of Lake Station's distressed municipal water utility to Indiana-American.

## ARGUMENT

### *Standard of Review*

The governing standard of review, ignored by OUCC, disposes of its appeal.

In its December 28, 2018 Brief, OUCC says this Court must review the meaning of the pertinent statutory provisions *de novo*, with no deference to the IURC's reading. OUCC Br. 20-21 (citing *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234 (Ind. 2018)).

Six days later, our Supreme Court rejected OUCC's core proposition that courts needn't defer to an agency's interpretation of its governing statutes. The Court instead reaffirmed the long-standing rule that "if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation." *Moriarity v. Ind. Dep't of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019) (citation & internal quotations omitted; rejecting argument that this governing rule was abrogated by *NIPSCO Industrial Group*).

The rule just reaffirmed in *Moriarity* is firmly grounded in precedent. *E.g.*, *Andy Mohr West v. Office of Sec'y of State of Ind.*, 54 N.E.3d 349, 353 (Ind. 2016) ("if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation"); *Jay Classroom Teachers Ass'n v. Jay Sch. Corp.*, 55 N.E.3d 813, 816 (Ind. 2016) (same); *State v. Hargrave*, 51 N.E.3d 255, 259 (Ind. Ct. App. 2016) ("When an administrative agency charged with enforcing a statute provides a reasonable interpretation of the

statute, this Court should defer to the agency") (citing *Ind. Wholesale Wine & Liquor Co. v. State ex rel. Ind. Alcoholic Beverage Comm'n,* 695 N.E.2d 99, 105 (Ind. 1998)).

Deference to an agency's reasonable interpretation is required even if a different reading, proposed by the party challenging the agency's view, may *also* be reasonable. "When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency." *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003); *accord Sullivan v. Day*, 681 N.E.2d 713, 716 (Ind. 1997) (when agency and challengers both "offered plausible interpretations" of statute and regulation, trial court "erred in not deferring to [agency]'s interpretation," as it was "charged with interpreting the statute and regulation in the first instance"); *Chrysler Grp. LLC v. Review Bd. of Ind. Dep't of Workforce Dev.,* 960 N.E.2d 118, 124 (Ind. 2012) ("we defer to the agency's reasonable interpretation of such a statute even over an equally reasonable interpretation by another party"); *Jay Classroom Teachers*, 55 N.E.3d at 816 (same).

This required deference to an agency's reasonable statutory interpretation is plainly appropriate in the utility regulation arena, a technically complex field that often entails interplay of statutory provisions. *See Citizens Action Coalition of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 76 N.E.3d 144, 151 (Ind. Ct. App. 2017) ("General Assembly created the IURC 'primarily as a fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature'") (quoting *Ind. Gas Co. v. Ind. Fin. Auth.*, 999 N.E.2d 63, 65 (Ind. 2013)).

The sole issue on appeal is whether the IURC's reading and harmonization of Chapter 30.3 and Section 6.1—*i.e.*, that the term "is used and useful" refers to "nonsurplus" property owned by the distressed utility—is reasonable. If the answer is "yes," the Court's inquiry ends and it will affirm, even assuming *arguendo* that OUCC's different view were also reasonable.

## I. The Commission Correctly Harmonized Chapter 30.3 and Section 6.1 In Applying The Term "Is Used And Useful" To The Distressed Utility's Use.

Indiana-American adopts Parts 2 and 3 of the Argument in IURC's Brief of Appellee, which show that when (as here) the IURC is asked to pre-approve proposed sale of a distressed municipal utility, the requirement that the "utility property is used and useful" (IND. CODE § 8-1-30.3-5(c)(1)) necessarily means the property "*is* used and useful" to the distressed utility (not "*will be* used and useful" to the acquiring utility immediately after the acquisition closes). The Commission is correct that this properly harmonizes Chapter 30.3 and Section 6.1.

Indiana-American notes the following as further support for the IURC's arguments:

***First,*** it bears emphasis that this Court, in the first reported case involving the Statute, just held that Chapter 30.3 and Section 6.1 "apply to the same subject matter and must be con-strued harmoniously." *NOW!, Inc. v. Ind.-Am. Water Co.*, -- N.E.3d --, 2018 WL 6837732, at *7 (Ind. Ct. App. Dec. 31, 2018). As the IURC notes, *NOW* correctly held that "[p]aramount consideration must be given to the basic principle that two statutes that apply to the same subject matter must be construed harmoniously." *Id*. (citation & internal quotations omitted).

***Second,*** *NOW* applied these principles, upholding the IURC's harmonizing of Chapter 30.3 and Section 6.1, even *without* deferring to the agency's reasonable interpretation of the statutes. Like OUCC here, the *NOW* panel believed *NIPSCO Industrial Group* required *de novo* review of the IURC's statutory interpretation, with "no deference" to the agency's reading. *Id.*, at *3. Three days later, the Supreme Court in *Moriarity* made clear that this view of *NIPSCO Industrial Group* was mistaken, reaffirming that courts must indeed defer to an agency's reason-able statutory interpretations. This leaves no doubt that deference to the IURC's harmonizing of Chapter 30.3 and Section 6.1 is required in the case at bar.

***Third,*** the rule that statutes *in para materia* should be harmonized "takes precedence over other rules of statutory construction," *NOW*, 2018 WL 6837732, at *7; but the Commission's interpretation of "is used and useful" also comports with other statutory construction rules discussed in Lake Station's Brief of Appellee.

***Fourth***, reading "utility property [that] is used and useful" as referencing the property's use by the distressed utility—the utility which, in the pre-acquisition approval context, "is" using the property until the proposed sale is approved and closes—likewise comports with Chapter 30.3's definition that "[a]s used in this chapter, 'utility property' refers to property of a utility company that is the subject of an acquisition" (I.C. § 8-1-30.3-4).

***Fifth***, the IURC interpreted "is used and useful" as referencing the municipal utility's property in the *pre*-acquisition approval context (when the distressed utility owns the property), but not in the *post*-acquisition approval context (when the acquiring utility owns the property). This means "full purchase price" is included in the acquiring utility's rate base if pre-approval is granted (Section 6.1(f); I.C. § 8-1-30.3-5(e)), but might not be if IURC approval isn't sought till after the acquisition. This encourages acquiring utilities to seek Commission approval *before* acquisition of a distressed municipal utility—which in turn ensures the acquisition will proceed only if the Commission first finds that pertinent statutory criteria are met (*see* I.C. § 8-1-30.3-5(c)), making the sale of the municipal utility "in the public interest" (Section 6.1(e)).

This underscores that the Commission's statutory interpretation advances the public interest objectives of Chapter 30.3 and Section 6.1.

***Finally,*** OUCC's proposed reading of "is used and useful"—under which "is" means "will be," rather than ordinary, present-tense "is"—is facially implausible. OUCC's attempted rationales cannot transform that unnatural reading into a reasonable statutory "interpretation."

A prime example is OUCC's saying that I.C. § 30.3-1-30-5(c)(4)'s approval criterion—*i.e.*, "a finding that 'the acquisition of the utility property *is* the result of an arm's length transaction'"—supposedly shows that "a present tense verb still should be applied prospec-tively," since the required finding is "associated with an event that ha[s] not yet happened—the acquisition." OUCC Br. 29 (OUCC's added emphasis).

This awkward locution is unconvincing on its own terms. Depending on context, "acquisition" may just as easily mean "proposed acquisition," as opposed to "closed acquisition." In the statutory context here—petitions for IURC *pre*-acquisition approval of sale of a distressed municipal utility—"proposed acquisition" is the obvious, virtually self-evident meaning.

Further, it is commonplace to say a transaction "is" (or "is not") at arm's-length before the transaction closes—just as it is commonplace to say a contract to sell a car or a house "is" or "is not" fair before the sale closes. It is *not* common parlance to say a sale or other transaction whose terms have been negotiated "will be" at arms-length or "will be" fair, once the sale or other transaction closes. The status of being fair or at arms-length exists and "is" established by the negotiated terms; it is not some "future" status that "will be" triggered on closing.

OUCC's attempted extrapolation from I.C. § 30.3-1-30-5(c)(4) is not credible. Even if it were, it would at best be a strained, highly attenuated rationale for OUCC's thesis that "is used and useful" really means "will be used and useful right after the acquisition closes." And neither this nor any other OUCC argument even begins to demonstrate that the Commission's contrary interpretation is not even *reasonable*—which is what OUCC must show to prevail on appeal.

## II. Municipal Utility Property That "Is Used And Useful" Under Chapter 30.3 Is Identical To "Nonsurplus" Municipal Utility Property Under Section 6.1.

Indiana-American adopts Part 4 of the Argument in IURC's Brief of Appellee, which shows that municipal utility property that "is used and useful" under Chapter 30.3—including the

approval criteria delineated in I.C. § 30.3-1-30-5(c)—is necessarily identical to "nonsurplus" municipal utility property under Section 6.1.

Indiana-American notes the following as further support for the IURC's arguments:

***First***, the IURC is correct that in this utility law context, "nonsurplus" and "is used and useful" are simply different ways of saying the same thing. Utility property is "nonsurplus" *if and because* it "is used and useful" in providing utility service. By definition, property *not* "used and useful" for that purpose is "surplus"—*i.e.*, "more than what is needed or used." BING ONLINE DICT., https://www.bing.com/search?q=surplus+definition&src=IE-SearchBox&FORM=IESR4Am. This is baseline harmonization of Chapter 30.3 and Section 6.1, which "apply to the same subject matter and must be construed harmoniously." *NOW*, 2018 WL 6837732, at *7. Indeed, at the core of that "same subject matter" is proposed sale of "nonsurplus" or "used and useful" municipal utility property.

***Second,*** treating these utility regulation terms as "different" or "non-synonymous" yields a confusing, decidedly non-harmonious reading of the two statutes. Consider:

The appraised value of "nonsurplus" utility property (determined under I.C. § 8-1.5-2-5) is deemed a reasonable purchase price for a distressed municipal utility (under Section 6.1(d) and I.C. § 8-1-30.3-5(c)(5)). *See NOW*, 2018 WL 6837732, at *8. If IURC pre-approval is granted, that "full purchase price" is included in the acquiring utility's rate base. Section 6.1(f); I.C. § 8-1-30.3-5(e). The IURC may not adjust that price as part of its review. *See* Section 6.1(e)(4) (IURC "shall accept as reasonable" the appraisal value price). All this fits and works hand-in-glove with I.C. § 8-1-30.3-5(c)(1)'s approval criterion if—as the IURC shows—municipal utility property that "is used and useful" *means* the "nonsurplus" property whose appraised value is deemed, by Legislative command, to be a "reasonable price" for that utility property.

Under OUCC's contrary view—*i.e.*, that "nonsurplus" municipal utility property means something "different" from property that "is used and useful" to the distressed utility—this harmonious statutory scheme flies apart. Again, the Legislature has said appraised value of nonsurplus property is deemed a reasonable price; that this full purchase price is included in the acquiring utility's rate base; and that the IURC may not adjust that price. But OUCC submits that at the same time, the Legislature *also* (and indirectly) undermined these statutory directives, *via* including an approval criterion requiring (in OUCC's rendition) that the property "*will be* used and useful" to the acquiring utility immediately after the acquisition.

If so, the statutory provisions deeming appraised value a reasonable price, adding the full price to the acquirer's rate base, and barring the IURC from adjusting that price are largely (if not entirely) stripped of practical import. OUCC's view also means the Legislature chose a remarkably obscure way of accomplishing this supposed (and inexplicable) objective, when all it had to say—if this is what it meant—is that "the utility property will be used and useful to the acquiring utility immediately after the acquisition closes."

The General Assembly in fact said no such thing. Nothing in Chapter 30.3 or Section 6.1 supports any reasonable inference that this is what the Legislature "really meant." That is why OUCC's proposed interpretation of the statutes is not a reasonable one. But even if it were, the IURC's natural reading of these utility regulation terms—*i.e.*, that "nonsurplus" utility property *means* property that "is used and useful"—is unquestionably reasonable, and therefore prevails.

## III. Chapter 30.3 And Section 6.1 Deliberately Depart From How "Used And Useful" Applies In Ordinary Ratemaking Under Indiana Code § 8-1-2-6.

Indiana-American adopts Part 5 of the Argument in IURC's Brief of Appellee, which shows that in crafting Chapter 30.3 and Section 6.1, the Legislature purposely departed from how the "used and useful" standard applies in routine ratemaking under Indiana Code § 8-1-2-6, which

of course focuses on whether property is "used and useful" to the utility whose rates are being established or adjusted.

Indiana-American notes the following as further support for the IURC's arguments:

***First,*** as the Commission correctly notes, OUCC argues at length that IURC's application of "used and useful" under Chapter 30.3 and Section 6.1 differs from how this standard applies in valuing utility property for rate base purposes in ordinary I.C. § 8-1-2-6 ratemaking cases. As the IURC also correctly points out, OUCC overlooks that I.C. § 8-1-2-6 carves-out exceptions for the special valuation and rate base provisions of Chapter 30.3 and Section 6.1, which apply when a utility like Indiana-American acquires a distressed municipal water utility like Lake Station's. *See* I.C. § 8-1-2-6(b) (twice articulating ordinary ratemaking valuation rules that apply "except as provided in IC 8-1-30.3-5 and IC 8-1.5-2-6.1").

As shown, the special valuation and rate base provisions of Chapter 30.3 and Section 6.1, which apply to acquisition of a distressed municipal utility, establish that the appraised value of that utility's "nonsurplus" utility property is deemed a reasonable purchase price, and the "full purchase price" is included in the acquiring utility's rate base. As shown, "nonsurplus" utility property *means* property that "is used and useful" to the distressed municipal utility. As shown, this IURC reading of these special statutory valuation and rate base provisions is a reasonable one, to which this Court defers even if an alternative proposed reading may also be reasonable. Nothing about the ordinary valuation and rate base provisions that apply in routine I.C. § 8-1-2-6 ratemaking proceedings alters this in the least.

***Second,*** the special valuation and rate base provisions for acquiring distressed municipal utilities, correctly interpreted by the IURC, further the core purpose of Chapter 30.3 and Section

6.1—encouraging sale of such utilities to purchasers like Indiana-American, which can improve them and provide quality service to customers.

OUCC's view—requiring that acquired property must immediately be "used and useful" to an acquiring utility—frustrates that statutory purpose. Distressed municipal utilities will be unwilling to sell for significantly less than appraised value, which the statutes deem a reasonable price. But prospective acquirers will be unwilling to pay that price, if the portion included in their rate base is significantly reduced when all acquired property isn't immediately "used" by the acquirer. This underscores that OUCC's proposed interpretation cannot supplant the IURC's reasonable reading. *See In re Supervised Estate of Kent*, 99 N.E.3d 634, 638-39 (Ind. 2018) ("Our primary goal in reviewing statutes is to determine and follow the legislature's intent," including "the objects and purposes of the statute") (citation & internal quotations omitted).

## IV. Applying The "Is Used And Useful" Standard To Predicted Future Use By The Acquiring Utility Is Unworkable And Unreasonable.

Indiana-American adopts Part 6 of the Argument in IURC's Brief of Appellee, which shows it is impractical and unreasonable to read "used and useful" as referencing an acquiring utility's predicted post-acquisition use of distressed municipal utility property.

Indiana-American notes the following as further support for the IURC's arguments:

In addition to the insuperable practical problems detailed by the IURC, the OUCC's view that "is used and useful" really means "will be used and useful" by the acquiring utility is irreconcilable with the statutory appraisal process for the distressed utility's nonsurplus property.

Appraisals—whether of a home, a car, jewelry, or utility property—assess fair value of an owner's property, regardless of its varying usefulness to possible acquirers. Assessments of residential real estate for property tax purposes don't vary based on whether three bedrooms may be more or less "used and useful" to different purchasers. The Kelley Blue Book doesn't value

the same vehicle differently based on whether 4-wheel drive is more or less "used and useful" to different buyers. This is true even of appraisals to guard against unlawful acquisition. Appraisal of a diamond ring for insurance purposes doesn't go up or down based on whether it will be more "used and useful" to one thief than another (perhaps because the first has a better "fence").

Statutory appraisal of a distressed municipal utility's nonsurplus property necessarily focuses on utility property that "is used and useful" to the distressed utility. Nothing in Chapter 30.3, Section 6.1, or related provisions (*e.g.*, I.C. 8-1.5-2-5's appraisal process) suggests that "different" appraisals must be obtained based on how the property may or may not be "used and useful" to different potential acquirers. No such regulatory scheme could possibly function in practice. And here again, the IURC's reading of the statutes, which avoids such unmanageable speculation and complexities, is in any event a reasonable one, to which this Court will defer.

## CONCLUSION

The Commission correctly interpreted the pertinent statutory provisions of the regulatory scheme it is charged with administering. Its interpretation is reasonable. That ends the inquiry on judicial review, even if the OUCC's contrary reading were also reasonable (which it is not).

The Court should affirm the IURC's Order approving Indiana-American's proposed acquisition of Lake Station's distressed municipal water utility.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Pursuant to Indiana Appellate Rules 24(D) & 68(F), I certify that on January 30, 2019, copies of the foregoing Corrected Brief were served electronically on the following, *via* the Indiana Electronic Filing System:

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