

**ORIGINAL**

STATE OF INDIANA

**INDIANA UTILITY REGULATORY COMMISSION**

*CA*  
*JAE*  
*CM*

PETITION OF THE TOWN OF )  
CHANDLER, INDIANA, FOR APPROVAL ) CAUSE NO. 44516  
OF A REGULATORY ORDINANCE )  
COVERING UNINCORPORATED AREAS ) APPROVED: **MAY 13 2015**  
OF WARRICK COUNTY, INDIANA )

**ORDER OF THE COMMISSION**

**Presiding Officers:**  
**Carolene Mays-Medley, Vice-Chair**  
**Jeffery A. Earl, Administrative Law Judge**

On July 22, 2014, the Town of Chandler, Indiana (“Chandler”) filed its Petition in this Cause. On August 14, 2014, the Town of Newburgh, Indiana (“Newburgh”) intervened in this Cause.

On September 18, 2014, Newburgh filed a Motion to Dismiss this Cause, which the Presiding Officers denied by docket entry on January 13, 2015.

On October 14, 2014, Chandler filed the direct testimony and exhibits of Robert D. Coghill, Director of Public Services for Chandler Utilities. On October 31, 2014, Newburgh filed the direct testimony and exhibits of Leon Key, Newburgh’s Wastewater Treatment Facilities Superintendent. On December 16, 2014, the Indiana Office of Utility Consumer Counselor (“OUCC”) filed the direct testimony and exhibits of James T. Parks, Utility Analyst in the OUCC’s Water/Wastewater Division. On December 19, 2014, Chandler filed rebuttal testimony from Mr. Coghill. Chandler filed corrections to Mr. Coghill’s rebuttal testimony on March 16, 2015.

The Commission held a technical conference in this Cause at 9:30 a.m. on January 14, 2015, in Hearing Room 222, 101 West Washington Street, Indianapolis, Indiana, to promote resolution of the disputed issues in this case through mutual agreement of the parties.

The Commission held an evidentiary hearing in the Cause at 9:30 a.m. on March 18, 2015, in Hearing Room 222, 101 West Washington Street, Indianapolis, Indiana. Chandler, Newburgh, and the OUCC appeared at and participated in the evidentiary hearing. No members of the general public attempted to participate in the hearing.

Based on the applicable law and the evidence presented, the Commission now finds:

- 1. Notice and Jurisdiction.** Notice of the hearings in this Cause was given and published by the Commission as required by law. Chandler is a municipal wastewater utility as that term is defined in Ind. Code § 8-1.5-6-1(2). Under Ind. Code § 8-1.5-6-9, the Commission has jurisdiction over the enforceability of a regulatory ordinance adopted by a municipality after December 31, 2012. Therefore, the Commission has jurisdiction over Chandler and the subject matter of this proceeding.

2. **Chandler’s Characteristics.** Chandler is a municipality located in Warrick County, Indiana. Chandler owns and operates a municipal wastewater utility that provides sewer service to approximately 3,200 customers within and outside its corporate boundaries.

3. **Relief Requested.** Chandler requests approval of Chandler Ordinance 2014-30 (“Regulatory Ordinance”), which asserts Chandler’s jurisdiction to provide sewer utility service within four miles of its corporate boundaries (“Chandler Territory”). Chandler also requests that the Commission resolve various service and infrastructure issues between Chandler and Newburgh and determine “the public interest in the continued provision of utility service in the overlapping unincorporated areas.”

4. **Background.** On April 25, 2007, Newburgh adopted Ordinance 2007-3 asserting its right to provide sewer utility service within a four-mile radius outside its corporate boundaries (“Newburgh Territory”). On June 4, 2007, Chandler adopted Ordinance 2007-12 asserting its right to provide sewer utility service within a four-mile radius outside its corporate boundaries (“Chandler Territory”). A portion of the Chandler Territory overlaps with the Newburgh Territory (“Overlap Area”).

In April 2012, Chandler sued Newburgh in Warrick Superior Court, seeking a declaratory judgment that Newburgh’s 2007 Ordinance could not prohibit Chandler from providing sewer service to new customers in the Overlap Area. After the trial court denied motions for summary judgment filed by both parties, Newburgh sought an interlocutory appeal. On December 23, 2013, the Court of Appeals issued an opinion in Newburgh’s favor, finding that because Newburgh passed its 2007 Ordinance before Chandler, it had the power to prohibit sewer service by Chandler within the Overlap Area. *Newburgh v. Chandler*, 999 N.E.2d 1015 (Ind. Ct. App. 2013). On July 24, 2014, the Indiana Supreme Court denied a petition to transfer the Court of Appeals decision. *Newburgh v. Chandler*, 12 N.E.3d 878 (Ind. 2014).

On June 16, 2014, Chandler adopted the Regulatory Ordinance, which amended its Ordinance 2007-12. The Regulatory Ordinance asserts jurisdiction to regulate sewer service in the Chandler Territory. Specifically, the Regulatory Ordinance says that Chandler:

shall hold an exclusive license to furnish sewer service within the [Chandler] Territory, and all other utilities are expressly prohibited from furnishing sewer service within the [Chandler] Territory except for those customers located in the [Chandler] Territory that are connected to another sewer utility as of [June 16, 2014].

5. **Summary of the Evidence.**

A. **Chandler’s Direct Evidence.** Mr. Coghill testified that Chandler provides sewer service to customers within its corporate boundaries and in areas surrounding Chandler within Warrick County. All of Chandler’s current extraterritorial customers are within four miles of its corporate limits. Chandler has constructed infrastructure capable of serving all of its current customers and all unserved customers located within the four-mile territory included in the Regulatory Ordinance.

Mr. Coghill testified that historically, Chandler has tried to avoid duplication of facilities and to promote logical and cost-effective growth for its system. When situations arose where a customer was capable of receiving service from either Chandler or another utility, Chandler has been able to cooperate with the other utilities to determine the best method of providing service to the customer and limit the need for multiple parties to construct facilities in the same area. If Chandler received a request for service in an area where service could be more efficiently and cost-effectively provided by another utility, Chandler refers the customer to the more logical provider.

Mr. Coghill testified that in June 2007, Newburgh adopted an ordinance claiming the exclusive right to provide sewer utility service within four miles of its corporate boundaries. A portion of the Newburgh Territory overlaps with the Chandler Territory, where Chandler had already been serving customers. Newburgh continued to allow customers to choose sewer service from Chandler until mid-2011. In that time, Chandler has connected approximately 139 homes in the Overlap Area. In addition, Chandler has four lift stations, approximately 30 miles of sewer lines, and 570 manhole covers in the Overlap Area. Since mid-2011, Newburgh has claimed an exclusive right to serve new customers in the Overlap Area.

**B. Newburgh's Direct Evidence.** Mr. Key testified that Newburgh provides sewer service to approximately 9,436 customers in and around Newburgh, including 3,700 customers in the Overlap Area. Newburgh also has 10 lift stations, approximately 82 miles of sewer lines, and 1,452 manholes in the Overlap Area.

Mr. Key testified that Newburgh adopted Ordinance 2007-3 on April 25, 2007. Ordinance 2007-3 designated Newburgh as the exclusive provider of sewer service up to four miles outside of its corporate boundaries within Warrick County. Ordinance 2007-3 preceded Chandler's Ordinance 2007-12, which claimed exclusive territorial rights for Chandler up to four miles outside of Chandler's boundaries. Newburgh and Chandler are not contiguous, and are separated by approximately five miles of unincorporated territory in Warrick County.

Mr. Key testified that, to his knowledge, Newburgh has never indicated that customers in the Overlap Area who connected to Chandler between 2007 and mid-2011 would have to disconnect from Chandler and become Newburgh's customers.

**C. OUC's Direct Evidence.** Mr. Parks testified that the Newburgh Territory includes, with some exceptions, all territory in the unincorporated areas of Warrick County that are within four miles of Newburgh's corporate boundaries. The Newburgh Territory does not include those sanitary sewer customers who were connected to another sewer utility as of April 25, 2007.

Mr. Parks testified that the Overlap Area is located entirely in unincorporated areas of Warrick County between Chandler and Newburgh. Mr. Parks described several distinct parts of the Overlap Area—a portion that contains only sewer infrastructure owned and operated by Newburgh; a portion that is generally undeveloped, which Newburgh has included in its planning area since at least 1999 and where Newburgh is installing sewer improvements; and a largely developed portion served primarily by Chandler's sewer system.

Mr. Parks testified that in 1999, Newburgh had a Sewer Utility Master Planning Report prepared. That report recognized and excluded from the planning area, existing sewer lines constructed by Chandler. In 2003, Newburgh had another Sewer System Master Plan prepared that identified areas for potential development and updated the 1999 planning report. The 2003 plan focused on alternatives to increase capacity on the western side of Newburgh's collection system. In response to the 2003 plan, Newburgh developed the Westside Master Lift Station project. In 2007, Newburgh had a West Side Master Plan prepared, which proposed constructing new sewer infrastructure to serve the west side of the Overlap Area. Newburgh has planned two pending improvement projects in the Overlap Area—a \$5 million sewer extension and a \$1 million lift station elimination project.

Mr. Parks testified that Chandler does not have a master plan for its sewer system and does not have specific areas upsized for future growth. Chandler did indicate to Mr. Parks that it plans to extend its system in the upper north-west section of the Overlap Area, but it had no designs for such an expansion.

Mr. Parks testified that Newburgh's Ordinance 2007-3 does not impact customers in the Overlap Area who were already connected to Chandler's system prior to April 27, 2007. In response to a discovery request, Newburgh assured Mr. Parks that the 139 customers in the Overlap Area who have connected to Chandler's system between April 25, 2007 and mid-2011 do not have to be disconnected from Chandler and hooked up to Newburgh. In addition, Newburgh indicated to Mr. Parks that it has no intentions regarding Chandler's sewer system infrastructure in the Overlap Area.

Mr. Parks proposed that the Commission should not require existing Chandler customers in the Overlap Area to become Newburgh customers. He proposed that Chandler should be allowed to provide sewer service to any new customers in the Overlap Area whose property abut or are adjacent to Chandler's existing infrastructure. Finally, he proposed that the two towns should work together to develop a clear boundary dividing their service areas in the Overlap Area.

**D. Chandler's Rebuttal Evidence.** Mr. Coghill testified that on September 16, 2014, the Warrick Superior Court entered summary judgment on behalf of Newburgh as required by the Court of Appeals opinion. Mr. Coghill attached a copy of the trial court's order to his testimony.

Mr. Coghill testified that Newburgh had recently granted an exception to allow a customer in the Overlap Area to connect to Chandler's system. He said that although Chandler appreciates Newburgh's willingness to grant an exception, the process to obtain a waiver is cumbersome.

Mr. Coghill testified that no party has objected to Chandler's Regulatory Ordinance with respect to those areas outside of the Overlap Area, so the Commission should approve the Regulatory Ordinance in that respect. With respect to the Overlap Area, Chandler does not dispute or ask the Commission to overturn the Court of Appeals decision. Rather, Chandler asks that Commission to resolve the remaining issues, such as the fate of existing Chandler customers and Chandlers infrastructure in the Overlap Area.

**E. Newburgh’s Stipulations.** On March 17, 2015, Newburgh filed proposed stipulations in an effort to narrow the issues in dispute between the parties. Newburgh submitted a list of subdivisions where it believes Chandler is already providing sewer service within the Overlap Area. Newburgh stipulated that it will waive its right to provide sewer service to new residential customers who build new homes on currently undeveloped lots in the listed subdivisions. Newburgh also submitted a list of 158 properties in the Overlap Area, which Chandler began serving between 2007 and December 1, 2014. Newburgh stipulated that it does not object to Chandler’s continued provision of sewer service to those properties with the exception of the property located a 3700 Bell Rd. (“Ciholas Property”). According to the list submitted by Newburgh (which it received from Chandler), the Ciholas Property was connected to Chandler’s system on December 27, 2013—Newburgh disputes the connection date.

**F. Evidence Adduced at the Hearing.** In live testimony, Mr. Coghill explained that the owner of the Ciholas Property constructed the connection between the property and Chandler’s system. Mr. Coghill could not recall exactly when the Ciholas Property was connected to Chandler’s system nor whether the connection occurred prior to or after the Court of Appeals decision was issued. When directly questioned by the presiding ALJ, Mr. Coghill testified that he would have to assume the December 27, 2013 date is correct, but he did not attempt to verify the connection date. He said that Chandler would have started providing service on the date of the connection.

In live testimony, Mr. Key stipulated Newburgh’s position that Chandler would keep its existing infrastructure in the Overlap area and that Newburgh would serve customers in the Overlap Area using its own infrastructure. In response to questions from the presiding ALJ, Mr. Key testified that Newburgh has a couple of options for serving the Ciholas Property—by connection to an existing Newburgh sewer line that would necessitate installation of a grinder pump or as part of the lift station elimination project that Newburgh has planned. Mr. Key expressed his opinion that the Ciholas property was actually connected to Chandler’s system around April 2013, but he could not provide any other evidence to support that date.

**6. Commission Discussion and Findings.** Chandler seeks approval of its Regulatory Ordinance. Under Ind. Code § 8-1.5-6-9, a municipality may not enforce a regulatory ordinance until the Commission issues an order approving the ordinance.

**A. Sufficiency of the Petition.** A petition for approval of a regulatory ordinance must contain the following information:

- (1) a description of the service territory established in the Regulatory Ordinance;
- (2) the proposed rates and charges for the services to be provided in the service territory;
- (3) a list of any administrative or judicial proceedings involving the Regulatory Ordinance;
- (4) a list of any utilities actually or potentially affected by the regulatory ordinance.

Ind. Code § 8-1.5-6-9(b). Chandler’s Petition describes the proposed service territory, which is the unincorporated area of Warrick County within four miles of Chandler’s corporate boundaries. Chandler attached a copy of Chandler Ordinance 2013-18, which includes the rates and charges collected by Chandler for sewage service. The Regulatory Ordinance was passed to amend Chandler Ordinance

2007-12. Chandler and Newburgh are currently involved in litigation related to Chandler Ordinance 2007-12 and Newburgh Ordinance 2007-3, which resulted in the Court of Appeals opinion discussed above. In addition to Newburgh, Chandler identified the City of Boonville, Indiana, as a utility that is actually or potentially affected by the regulatory ordinance. Therefore, we find that Chandler's Petition complies with the requirements of Ind. Code § 8-1.5-6-9(b).

**B. Public Interest Factors.** Under Ind. Code § 8-1.5-6-9(c), prior to approving the Regulatory Ordinance, we must consider the public interest factors set forth in Ind. Code § 8-1.5-6-8(g), which are:

- (1) the ability of another utility to provide service in the Regulated Territory;
- (2) the effect of a Commission order on customer rates and charges for service provided in the Regulated Territory;
- (3) the effect of the Commission order on present and future economic development in the Regulated Territory;
- (4) the history of utility service in the Regulated Territory; and
- (5) any other factors the Commission considers necessary.

In considering the ability of another utility to provide service in the Regulated Territory, we must discuss the effect of the Court of Appeals opinion on this case. The Court of Appeals case resolved litigation between Chandler and Newburgh related to conflicting regulatory ordinances (Chandler Ordinance 2007-12 and Newburgh Ordinance 2007-3). The court reasoned that Indiana courts have long used a first-in-time rule to resolve disputes when two municipalities possess concurrent and complete jurisdiction of a subject matter. *Newburgh*, 999 N.E.2d at 1018. The court noted that although both towns had been providing sewer service in the Overlap Area for many years, Newburgh was first to adopt a regulatory ordinance claiming the exclusive right to regulate sewer service in the Overlap Area. *Id.* The court concluded that state law authorized Newburgh's ordinance prohibiting others from providing new sewer service within four miles of its corporate boundaries, which includes the Overlap Area. *Id.* at 1021.

In reaching its decision, the court discussed arguments raised by Chandler and two *amici curiae* (Warrick County and Boonville), who argued that enforcement of Newburgh's ordinance would chill economic development, that competition in sewer service in the area has been the norm for decades, and that a town could stake a claim to a particular area whether or not it had the ability to provide service there. *Id.* The court noted in dicta that the arguments possess some weight and that resolution of such disputes by the Commission could likely produce more effective and efficient results. *Id.* However, the court said that creation of such a mechanism was up to the legislature. *Id.* In 2014, the Indiana General Assembly passed P.L. 213-2004, creating Ind. Code ch. 8-1.5-6, which gives the Commission the type of authority discussed by the court.

The Regulatory Ordinance purports to grant Chandler "an exclusive license to furnish sewer service within the [Chandler Territory], and all other utilities are expressly prohibited from furnishing sewer service within the [Chandler Territory] . . . ." The Regulatory Ordinance's definition of the Chandler Territory (referred to as the Regulated Territory in the ordinance) contains no carve out for the overlap area. Newburgh argues, and we agree, that the failure of the Regulatory Ordinance to exclude

the Overlap Area from the Chandler Territory is contrary to the Court of Appeals opinion. Although Chandler claims that it is not seeking to re-litigate the territory issues decided by the Court of Appeals that claim is not backed up by the language of the Regulatory Ordinance. Because the Regulatory Ordinance would violate the Court of Appeals opinion, we cannot approve it as written. The Court of Appeals has determined that Newburgh has the exclusive right to serve new customers in the Overlap Area. In light of this finding, we need not address the remaining public interest factors.

We recognize that the Chandler Territory encompasses more area than the Overlap Area and that no objections were raised with respect to those areas. Under Ind. Code § 8-1.5-6-9(d), Chandler may modify the Regulatory Ordinance to carve out the Overlap Area and resubmit it for approval. But we point out that Mr. Parks testified that Chandler does not have a master plan for its sewer system in the Chandler Territory. Though we need not decide the issue at this time, we question whether the public interest is served by granting an exclusive right to regulate sewer service outside of a municipality's corporate boundaries, if the municipality has no master plan for actually providing service to those areas.

**C. Other Issues.** Chandler requests that we settle certain disputes between it and Newburgh related to the Overlap Area, specifically, “overlap area service, infrastructure costs, and rates and charges.” Despite this request, Chandler provided almost no testimony or evidence to support this request or to assist us in addressing those issues. As Mr. Coghill testified in response to questions from the Presiding Commissioner, Chandler did not provide a list of subdivisions or other properties in the Overlap Area where it was currently providing service. Further, when Newburgh provided such a list, including a stipulation that it would not require those customers to disconnect from Chandler's system and that Chandler could serve new customers on undeveloped lots within the subdivisions, Mr. Coghill said that he had not taken the time to review the list, but felt that it was not sufficient. But Chandler still did not provide any list of its own or attempt to clarify or amend the list.

In light of Newburgh's effort at cooperation and the paucity of Chandler's evidence, we find that the evidence and stipulations presented by Newburgh are a reasonable way to address the issues raised by Chandler regarding service in the Overlap Area. Specifically, we find that Chandler may continue to serve its existing customers in the Overlap Area who reside in the subdivisions listed in Exhibit A to Intervenor Newburgh's Exh. 2 and any new residential customers seeking to build new homes on currently undeveloped individual lots located inside those subdivisions. Chandler may continue to serve the 158 parcels listed in Exhibit B to Intervenor Newburgh's Exh. 2, which Chandler began serving between 2007 and December 1, 2014. To the extent that Chandler wishes to serve any new customers in the Overlap Area outside of those listed above, it may do so only with Newburgh's express permission. Both parties presented evidence that Newburgh has a waiver process in place for circumstances where Chandler might be better situated to serve a new customer and that Newburgh has already granted waivers for some new customers.

We note that Newburgh objected to Chandler providing sewer service of the Ciholas Property. Neither party presented adequate evidence by which we can make a finding of when the property was connected to Chandler's system or when Chandler began providing sewer service; nor do we have sufficient evidence to determine which utility should be allowed to serve the Ciholas Property going forward, especially given the potential financial impact to the property owner, which was estimated to

be at least \$60,000. We have serious concerns about Chandler's actions in connecting the Ciholas Property to its system, apparently while litigation over the property was pending, and our initial impression is that Newburgh has the exclusive right to serve the Ciholas Property. But because of the inadequate evidence presented to us on the issue, the question of whether that connection was in violation of Newburgh's Ordinance 2007-12 or an order of the trial court or the Court of Appeals, and the proper remedy if the connection was improper, is better left for the trial court to determine.

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

1. Chandler's request for approval of its Regulatory Ordinance (Chandler Ordinance 2014-30) is denied. Chandler may resubmit an amended ordinance for approval as discussed above under Ind. Code § 8-1.5-6-9(d).

2. In accordance with Indiana Code § 8-1-2-70, Chandler shall, within 20 days from the date of this Order, pay into the Treasury of the State of Indiana, through the Secretary of this Commission, the following itemized charges, as well as any additional charges which were or may be incurred in connection with this Cause:

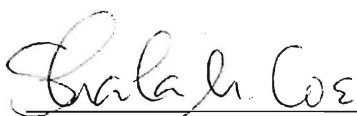
Commission Charges:	\$ 4,094.17
OUCC Charges:	\$ 9,145.56
Legal Advertising Charges:	\$ 138.12
<b>Total:</b>	<b>\$13,377.85</b>

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

**STEPHAN, HUSTON, AND MAYS-MEDLEY CONCUR; WEBER AND ZIEGNER ABSENT:**

**APPROVED: MAY 13 2015**

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



**Shala M. Coe**  
**Acting Secretary to the Commission**