**STATE OF INDIANA **

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**INDIANA UTILITY REGULATORY COMMISSION**

**COMPLAINT OF CLARK BYRUM AGAINST )
CITIZENS WASTEWATER OF WESTFIELD, ) CAUSE NO. 44886
LLC CONCERNING THE PROVISION OF )**

**WASTEWATER SERVICE )**

**ORDER OF THE COMMISSION**

**Presiding Officers:**

**James F. Huston, Commissioner**

**Carol Sparks Drake, Administrative Law Judge**

On November 29, 2016, Beth Heline, General Counsel for the Consumer Affairs Division (“CAD”), referred to the Indiana Utility Regulatory Commission (“IURC” or “Commission”) CAD Complaint Number 117535, which served as the Petition initiating this Cause. The Petition stated that Mr. Clark Byrum (“Complainant” or “Mr. Byrum”) is seeking “to be released” from the Citizens Wastewater of Westfield, LLC (“Respondent” or “Citizens Wastewater of Westfield”) service territory so he can be provided sewer service by Clay Township Regional Waste District (“CTRWD”).

 Pursuant to notice and as provided for in 170 IAC 1-1.1-15, a prehearing conference in this Cause was scheduled for January 10, 2017. On December 28, 2016, appearances were filed by counsel on behalf of Complainant along with Complainant’s First Motion to Continue Prehearing Conference and Preliminary Hearing. On December 29, 2016, Citizens Wastewater of Westfield filed a Motion to Dismiss (“Motion to Dismiss”), requesting the Commission dismiss this Cause. In a Docket Entry dated January 5, 2017, the Commission vacated the January 10, 2017 prehearing conference and ordered that it be rescheduled after the completion of briefing upon the Motion to Dismiss, if appropriate.

 On February 24, 2017, both Complainant and the Indiana Office of the Utility Consumer Counselor (“OUCC”) filed their respective Responses to Citizens Wastewater of Westfield’s Motion to Dismiss (the “Responses”). On March 21, 2017, Citizens Wastewater of Westfield filed its Reply to Responses. By Docket Entry dated April 5, 2017, the Presiding Officers denied Citizens Wastewater of Westfield’s Motion to Dismiss and scheduled this Cause for a Prehearing Conference and Preliminary Hearing on April 26, 2017.

 Pursuant to notice and as provided for in 170 IAC 1-1.1-15, a Prehearing Conference was held on April 26, 2017. Proofs of publication of the notice of the prehearing conference were incorporated into the record and placed in the official files of the Commission. Mr. Byrum appeared by counsel and in person. Respondent and the OUCC also appeared and participated. No members of the general public appeared. On May 3, 2017, the Commission issued a Prehearing Conference Order setting forth a procedural schedule for this Cause.

On June 5, 2017, Complainant prefiled his prepared case-in-chief consisting of the testimony and exhibits of Clark Byrum and Andrew Williams. On July 26, 2017, Citizens Wastewater of Westfield prefiled its prepared case-in-chief consisting of the testimony and exhibits of Edward J. Bukovac. The OUCC also prefiled the testimony and exhibits of James T. Parks. On August 4, 2017, Citizens Wastewater of Westfield prefiled the cross-answering testimony of Edward J. Bukovac. On August 18, 2017, Complainant prefiled the rebuttal testimony and exhibits of Clark Byrum and Andrew Williams.

On September 1, 2017, Respondent filed a Motion for Administrative Notice requesting the Commission to take administrative notice of Administrative Notice Exhibit A and Administrative Notice Exhibit B for the purpose of admitting them into evidence, which was granted by Docket Entry dated September 13, 2017.

The Commission conducted an Evidentiary Hearing on September 14, 2017, at 9:30 a.m. in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. Proofs of publication of the notice of the prehearing conference were incorporated into the record and placed in the official files of the Commission. Complainant, Respondent and the OUCC appeared at that hearing. At the hearing, Complainant’s, Respondent’s and the OUCC’s testimony and exhibits were admitted into the record.

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

1. **Notice and Jurisdiction.** Due, legal and timely notice of these proceedings was given and published as required by law. Respondent is a public utility as defined by Ind. Code § 8-1-2-1. This Commission has authority over Respondent’s rates and charges and its terms of service, including its terms and conditions for service relating to the extension of wastewater service and facilities to prospective customers.
2. **Complainant**. Complainant Clark Byrum is an individual and CEO of Biologics Modular. Mr. Byrum was formerly an investment banker, in which capacity he testified he was intimately familiar with the operational aspects of utilities, from a financial perspective. (Tr. at A-18.) Mr. Byrum is one of six partners in The Byrum Family Limited Partnership (the “Partnership”). The Partnership owns a thirty-two (32) acre undivided tract of land located at 3810 W. 146th Street, Westfield, Indiana (the “Partnership Property”), which is the subject of this proceeding. The Partnership Property was annexed by the City of Westfield in 2005, and since then has been and remains located completely within the corporate boundaries of Westfield.
3. **Respondent**. Respondent is an Indiana limited liability company with its principal office located at 2020 North Meridian Street, Indianapolis, Indiana 46202. Respondent owns, operates, manages, and controls plant, property, and equipment used and useful to provide wastewater utility service to more than 11,000 customers in and around the City of Westfield, Indiana.

In its November 25, 2013 Order in Cause No. 44273, the Commission approved Respondent’s acquisition of the wastewater utility assets formerly owned by the City of Westfield that were used to serve the City and surrounding areas. Also in Cause No. 44273, the Commission granted Respondent a certificate of territorial authority (“CTA”) to provide service to certain areas outside the corporate boundaries of the City. The Commission also approved Citizens Wastewater of Westfield’s terms and conditions for the provision of wastewater service (the “Terms and Conditions”). The Commission approved certain modifications to the Terms and Conditions in its May 31, 2017 Order in Cause No. 44835.

1. **Evidence of the Parties.**

A. Complainant’s Testimony. Mr. Byrum testified that he is interested in possibly building a residential home for his family on the Partnership Property. Mr. Byrum stated that his other family members who have an ownership interest in the Partnership Property “may or may not do the same.” (Complainant’s Exhibit CB at 3.)

Mr. Byrum stated that, when the City of Westfield annexed the Partnership Property, he believed the City promised that the Partnership Property would receive all municipal services, including water and sewer utilities. Mr. Byrum testified, however, that Citizens Wastewater of Westfield advised him that the utility had no intention of extending utility infrastructure to the Partnership Property. Based upon his understanding of that feedback, Mr. Byrum looked to other utilities in the area. Mr. Byrum stated that CTRWD and the City of Carmel each indicated it had facilities for sewer and water utility service, respectively, just south of 146th Street and had the ability to serve the Partnership Property.

After advising Citizens Wastewater of Westfield that CTRWD and the City of Carmel could serve the Partnership Property, Mr. Byrum stated that Citizens Wastewater of Westfield indicated the Partnership Property “was in their certified territory and if I wanted service, I had to get it from them.” (Id. at 4.) However, Mr. Byrum stated Citizens Wastewater of Westfield indicated it could cost over $1 million to extend sewer service to the Partnership Property. Mr. Byrum testified that he filed the CAD complaint because he believed this amount to be excessive.

Mr. Byrum stated that his goal is to obtain reasonably priced sewer and water service for his new home. Mr. Byrum believes the reasonable solution is for CTRWD and the City of Carmel be authorized to provide sewer and water service, respectively, to the Partnership Property. Mr. Byrum further stated that each of the utilities indicated they would charge the same charges they would collect for any typical residential connections and other tap fees that are part of their approved tariffs. Specifically, Mr. Byrum testified that CTRWD and the City of Carmel had available mains within a few feet of the Partnership Property and upon payment of basic connection fees, they are willing to serve the Partnership Property.

In his prefiled testimony, Mr. Byrum indicated he could not install a septic system to serve the Partnership Property because the local health department would not grant a new septic system permit. However, on cross-examination, Mr. Byrum stated that he has not yet applied for a septic system, and therefore has not been denied. (Tr., p. A-34, lines 17-18.). Mr. Byrum also speculated that a wetland area near the Partnership Property may impact any possible permitting process. Mr. Byrum also expressed a concern about potentially having to install a septic system now, and being forced to connect to a utility system later.

Mr. Byrum stated that he believed Citizens Wastewater of Westfield’s extension rules are not fair as applied to him, because the City of Westfield had promised to provide service upon the annexation of the Partnership Property. Mr. Byrum requested that the Commission allow CTRWD and Carmel Water to be able to provide utility services to the Partnership Property.

Andrew Williams, Utility Director of CTRWD, provided an overview of CTRWD’s characteristics. Mr. Williams stated that CTRWD was formed in 1975 as a non-profit municipal corporation designed to provide sanitary sewer services to customers in Clay Township, Hamilton County, Indiana. Mr. Williams stated that CTRWD is not directly regulated by the Commission. Mr. Williams indicated that CTRWD has adequate capacity to serve Mr. Byrum in the event the territory was available to CTRWD.

Mr. Williams stated that CTRWD currently provides wastewater utility service to several customers immediately south of 146th Street, and he is generally familiar with the Partnership Property. Mr. Williams believes it would be easy for CTRWD to run a main to the Partnership Property. Mr. Williams testified that CTRWD’s collection system in the area is primarily gravity controlled, and would not require the construction of a lift station.

Mr. Williams estimated that the total cost to install and provide wastewater service to the Partnership Property is approximately $225,000 to $250,000, and that on-site costs will vary depending on how the Partnership Property is developed. Assuming 7,000 gallons per month usage, Mr. Williams stated that Mr. Byrum would pay $31.92 per month in recurring service charges to CTRWD.

Mr. Williams stated that he spoke with Mr. Bukovac, a representative of Citizens Wastewater of Westfield, by telephone in the early summer of 2016 and told Mr. Bukovac a connection to the CTRWD system could be made in a temporary or permanent manner. Mr. Williams indicated that CTRWD still was willing to provide service to the Partnership Property via either alternative – temporary or permanent. Mr. Williams also had a face to face meeting with Mr. Bukovac and Randy Edgemon of Citizens Wastewater of Westfield in May 2016, at which time they indicated that Citizens Wastewater of Westfield did not intend to pursue a temporary connection option or give up its service territory.

Mr. Williams also indicated he spoke with Mr. Byrum in the early summer of 2016 and explained to him that the Partnership Property was outside CTRWD’s service area. Mr. Williams explained that as a Regional Sewer District, CTRWD did not generally add additional territory unless asked by an “eligible entity” in accordance with Ind. Code § 13-26-8-1.

B. Respondent’s Testimony. Edward J. Bukovac, Manager of Engineering and Plant Operations for Citizens Energy Group, provided an overview of Citizens Wastewater of Westfield’s history in providing service to the area. Mr. Bukovac described the Commission’s November 25, 2013 Order in Cause No. 44273, in which the Commission found, among other things, that the acquisitions of the water and wastewater utility assets formerly owned by the City of Westfield were in the public interest. The Commission also approved Citizens Wastewater of Westfield’s Terms and Conditions for Service in Cause No. 44273. Mr. Bukovac stated that Citizens Wastewater of Westfield provides wastewater utility service to more than 11,700 customers in and around Westfield.

 Mr. Bukovac noted that the Partnership Property is located within the corporate limits of the City of Westfield. Therefore, Mr. Bukovac indicated that Citizens Wastewater of Westfield considers the Partnership Property to be within its service territory, which it is obligated to serve in accordance with its approved Terms and Conditions for Service. Mr. Bukovac explained that the City of Westfield transferred its wastewater and water system assets to Citizens Wastewater of Westfield and Citizens Water of Westfield, respectively, with the expectation that they would be the exclusive service providers for the entire community, with a limited exception relating to a sewer utility already providing service in a small portion of the City. Mr. Bukovac testified that Citizens Wastewater of Westfield and Citizens Water of Westfield paid approximately $91 million to acquire the City’s wastewater and water systems.

 Mr. Bukovac next testified regarding his interactions with Mr. Byrum regarding service to the Partnership Property. Mr. Bukovac stated that in 2015, Mr. Byrum’s former listing agent for the Partnership Property contacted him regarding the provision of sanitary sewer service. Mr. Bukovac responded by providing a map that included a proposal to provide sewer service to the area. In March 2016, Mr. Bukovac explained that Mr. Byrum directly contacted him, inquiring as to potential expansion of wastewater service relative to a potential development of the Partnership Property. Mr. Bukovac informed Mr. Byrum that because there was no other development in the area, Citizens Wastewater of Westfield had no immediate plans to extend service to the area. Mr. Bukovac explained to Mr. Byrum that under Citizens Wastewater of Westfield’s Commission-approved Terms and Conditions for Service it is the responsibility of the developer/property owner to pay for extensions of service.

 Mr. Bukovac stated that he did not tell Mr. Byrum that Citizens Wastewater of Westfield had no desire or ability to serve the Partnership Property, but rather that extending service to the Partnership Property was not in its current capital plan. In fact, Mr. Bukovac reiterated by email that Citizens Wastewater of Westfield intended to serve the Partnership Property in accordance with its Terms and Conditions for Service. Citizens Wastewater of Westfield also provided a Will Serve Letter to Mr. Byrum on July 16, 2016. Mr. Bukovac emphasized that Citizens Wastewater of Westfield stands “willing to serve today and begin that process if somebody was able to execute a main extension agreement and follow our terms and conditions.” (Tr. A-104, lines 14-17).

Mr. Bukovac testified that Citizens Wastewater of Westfield remains willing and able to serve the Partnership Property. Mr. Bukovac also summarized the capital improvements necessary to extend wastewater and water service to the Partnership Property, and estimated the cost would be approximately $917,000 and $1,023,000, respectively. Mr. Bukovac reiterated that in order to provide more detailed cost estimates, a property owner or developer typically provides Citizens Wastewater of Westfield with preliminary plans for the proposed development and allows for due diligence and an exchange of ideas between the developer and Citizens Wastewater of Westfield. Mr. Bukovac stated that in this instance, Mr. Byrum did not provide Citizens Wastewater of Westfield with any plans or drawings regarding how the Partnership Property is intended to be developed or served, which has prevented Citizens Wastewater of Westfield from creating more detailed cost estimates. Mr. Bukovac also testified that Citizens Wastewater of Westfield’s approach to extending service to Mr. Byrum is the same approach that it takes with any other similarly situated property owner.

 Mr. Bukovac noted that Mr. Williams of CTRWD contacted him regarding CTRWD providing service to the Partnership Property. In an effort to provide service to Mr. Byrum, without foregoing Citizens Wastewater of Westfield’s service territory, Mr. Bukovac proposed a lower cost option for Citizens Wastewater of Westfield to serve the Partnership Property. Under Mr. Bukovac’s proposed approach, Citizens Wastewater of Westfield would become a wholesale customer of CTRWD and Citizens Water of Westfield would become a wholesale customer of Carmel Water. Citizens Wastewater of Westfield would then construct the facilities that would interconnect with CTRWD’s facilities and Citizens Water of Westfield would construct the facilities necessary to interconnect with Carmel Water. Mr. Bukovac stated that the infrastructure costs would be equivalent to the estimates put forth by CTRWD (not to exceed $250,000) and Carmel Water (approximately $80,000). Mr. Bukovac explained that this arrangement would amicably resolve this matter, not adversely affect ratepayers, and preserve Citizens Wastewater of Westfield’s service territory. Mr. Bukovac testified that Carmel Water has expressed a willingness to discuss this arrangement and CTRWD is studying the proposal. On cross-examination, Mr. Bukovac explained that John Duffy, the Director of Utilities for the City of Carmel, signed a letter of intent agreeing that Carmel would in fact enter into a wholesale agreement with Citizens Water of Westfield that would allow Citizens Water of Westfield to serve the area. (Tr. B-8, lines 16-25.)

 Mr. Bukovac stated that the wholesale arrangement is a better alternative as compared to Mr. Byrum’s proposal of allowing another utility to provide service directly to the Partnership Property. Mr. Bukovac explained that Mr. Byrum’s proposed relief would result in Citizens Wastewater of Westfield permanently losing a portion of its service territory, and be inconsistent with the purpose of Citizens Wastewater of Westfield’s and Citizens Water of Westfield’s acquisitions of the wastewater and water systems, which were approved by the Commission in Cause No. 44273. Mr. Bukovac further noted that the City of Westfield would need to approve of CTRWD and Carmel Water providing utility services within its municipal boundaries.

Mr. Bukovac also testified that even temporary service by CTRWD and Carmel Water to the Partnership Property could be complex. Mr. Bukovac stated that Citizens Wastewater of Westfield and Citizens Water of Westfield, however, would consider a temporary arrangement, provided certain conditions were met.

On cross-examination, Mr. Bukovac testified regarding an August 25, 2017 letter sent to Mr. Williams, which outlined a potential temporary arrangement with CTRWD. (Complainant’s Exhibit CX-1). The temporary arrangement outlined in the August 25, 2017 letter to Mr. Williams proposed that Citizens Wastewater of Westfield, Mr. Byrum and CTRWD execute a Temporary Service Agreement that would allow CTRWD to extend a single wastewater service line to Mr. Byrum’s home, not to exceed 4 inches in diameter, and that Citizens Wastewater of Westfield would retain the right to connect such line to its wastewater system (“at no cost to Mr. Byrum”) in the future when its infrastructure is more built out near the Partnership Property. (*Id*.) Mr. Bukovac stated that the letter was sent after CTRWD declined to enter into a wholesale arrangement. (Tr. A-96, line 19 through A-97, line 3.)

C. OUCC’s Testimony. James T. Parks, Utility Analyst II in the OUCC’s Water/Wastewater Division, testified on behalf of the OUCC. Mr. Parks compared several options for providing wastewater service to the Partnership Property. Mr. Parks described the Partnership Property, indicating that it currently is zoned AG-SF1 (Agriculture/Single-Family 1) and is located in the Southwest Rural residential area. Based on this zoning, Mr. Parks stated approximately ten homes of a minimum of three acres could be built on the Partnership Property. Mr. Parks also quoted from Westfield-Washington Township Comprehensive Plan, which states that in the Southwest Rural residential area: “[p]ublic water, sanitary sewer, and storm water drainage facilities may not be immediately available.” Mr. Parks stated that because of this, homeowners must initially install on-site water (private wells) and wastewater (such as septic tanks) systems if utility service is not yet available. Mr. Parks stated that in Westfield’s Southwest Rural residential area, all homes have separate private on-site water and sewage systems (non-utility), a point which he reiterated on cross-examination. (Tr. B-35, lines 12-21).

 Mr. Parks next reviewed Citizens Wastewater of Westfield’s main extension estimate. Mr. Parks reviewed that the cost estimate Citizens Wastewater of Westfield submitted to the CAD on September 14, 2016, in which Citizens Wastewater of Westfield estimated the water main cost would be $1,023,000 and sewer would cost $917,036. Mr. Parks stated that he did not agree with all of Citizens Wastewater of Westfield’s assumptions and calculations, but noted that the estimated cost of wastewater service is four to ten times the cost associated with alternatives. Mr. Parks testified that the Partnership Property is within 800 feet of the CTRWD wastewater system, and if Mr. Byrum were legally able to connect to CTRWD, then it would result in lower upfront costs and monthly sewer bills as compared to service from Citizens Wastewater of Westfield.

 Mr. Parks also testified that installing a septic system to provide on-site wastewater treatment would further reduce the costs to Mr. Byrum. Mr. Parks stated that, based on his discussions with the Hamilton County Health Department, Mr. Byrum could obtain a septic tank permit for a residence on the Partnership Property. (Tr. at B-35 through B-36.)

 Mr. Parks also stated that, according to a discovery response, Mr. Byrum had not yet made a formal application for a septic system. Mr. Parks stated that the average national cost to install a septic system is $5,107. Mr. Parks concluded that even assuming installation of a septic system would cost Mr. Byrum $10,000, doing so would be the least expensive alternative to provide wastewater service to a residence on the Partnership Property, and there would be no associated monthly sewer bill. Mr. Parks concluded that either the CTRWD option, or the Citizens Wastewater of Westfield option of extending a main to the Partnership Property, would far exceed the costs of a septic system.

D. Respondent’s Cross-Answering Testimony. Mr. Bukovac stated that Mr. Parks’ conclusion that an on-site septic system for Mr. Byrum’s house on the Partnership Property is sensible, practical and compelling. Mr. Bukovac agreed that an on-site septic system is a solution for homes in undeveloped areas, and it would be substantially cheaper than any other identified option. Mr. Bukovac testified that because Mr. Byrum had conveyed to Citizens Wastewater of Westfield that he needed sewer service to develop the Partnership Property, and due to Mr. Byrum’s testimony that the County Health Department would not approve a septic system permit, Citizens Wastewater of Westfield had not proposed an on-site septic system as a solution. However, in light of Mr. Parks’ testimony, supported by the email correspondence with Hamilton County health officials, Citizens Wastewater of Westfield believes the Commission should consider the installation of an on-site septic system as a wastewater treatment option for Mr. Byrum, in addition to the options presented by Citizens Wastewater of Westfield.

E. Complainant’s Rebuttal Testimony. In rebuttal, Mr. Byrum stated that when the City of Westfield annexed the Partnership Property in 2005, it promised to provide reasonable sewer and water services to the Partnership Property. Mr. Byrum cited Westfield Ordinance Number 05-09 and Westfield Town Council Resolution 05-06. Mr. Byrum stated that Citizens Wastewater of Westfield should honor the commitment made in Ordinance 04-32, which he interpreted as providing that the City of Westfield would provide water and sewer services without an extension agreement at its expense. Mr. Byrum testified that he also assumed Citizens Wastewater of Westfield already would be laying utility infrastructure along with the expansion of 146th Street.

 Mr. Byrum stated that, subsequent to reviewing Mr. Parks’s testimony, he contacted Baker Construction and the Hamilton County Health Department two days before filing his rebuttal testimony to explore the possibility of installing a septic system and well on the Partnership Property. Mr. Byrum indicated that the preliminary evaluation was that it was doubtful that he could obtain approval to install a septic system. As a result, Mr. Byrum chose not to expend any more time and resources on the investigation. On cross-examination, Mr. Byrum stated that a septic system could cost between $70,000 to $100,000, but it was unclear whether this cost was for only his home, or rather for his home and additional homes built by his extended family members on the Partnership Property. (Tr. B-42, lines 8-17). Mr. Byrum conceded these figures were a “guesstimate.” (Tr. B-46, lines 4-14).

 Mr. Byrum also stated that CTRWD decided to not enter into a wholesale agreement with Citizens Wastewater of Westfield to allow Citizens Wastewater of Westfield to serve the Partnership Property. Mr. Byrum concluded that he has been left with no reasonable options for wastewater service. Mr. Byrum stated that because he is at the extreme edge of a service territory, Citizens Wastewater of Westfield has no facilities in place, and other utilities are contiguous, Citizens Wastewater of Westfield should reach an agreement with those other utilities to serve the customer.

 Mr. Williams testified in rebuttal that on August 14, 2017, CTRWD adopted a resolution finding that CTRWD “declines to enter into a wholesale agreement with Citizens of Westfield.” On cross-examination, Mr. Williams stated that the decision of CTRWD to not enter into the wholesale agreement was based not on capacity issues, but rather the uncertainty and challenges of wholesale agreements in general. (Tr. at B-64.)

1. **Discussion and Findings.**

 The subject of this Cause is a complaint submitted to the CAD on May 12, 2016. The complaint indicated that “the customer wants to get the CTA for Carmel/Clay on his side of the street.” Following investigation of the facts by the CAD, the CAD issued a determination of the matter in a letter to Complainant dated October 18, 2016 (the “Determination Letter”). In its Determination Letter, the CAD stated:

Based on the information provided, your property is located within the corporate boundaries of the City of Westfield. Because you are inside the city limits, there is no Certificate of Territorial Authority (CTA) for sewer services. CTAs are applicable for sewer services only for rural areas outside city limits. In addition, CTAs are not issued for water service. As stated previously, the Commission has approved Citizens to serve the City of Westfield, in which your property is located.

Citizens has indicated that they will provide service to your property in accordance with the expansion rules approved by the Commission under 170 IAC 6-1.5 and 170 IAC 8.5-4. Therefore, it appears that Citizens is in compliance with the Commission's rules with regards to your request.

(October 18, 2016 Letter from CAD to Mr. Byrum)

 On November 29, 2016, Ms. Beth Heline, General Counsel of the Commission, transmitted a letter to the Chief Administrative Law Judge of the Commission indicating that the CAD was referring the complaint to the Commission for further review. The letter states: “Mr. Byrum is seeking to be released from the Citizens Westfield territory, so he can be provided sewer service from the Clay Township Regional Waste District system. Mr. Byrum's request is outside of CAD’s authority. Therefore, CAD is referring Mr. Byrum’s complaint to be decided by the Commission.”

As indicated in the Determination Letter, Citizens Wastewater of Westfield is obligated to address requests for connections pursuant to its Terms and Conditions for Service. Citizens Wastewater of Westfield’s Terms and Conditions for Service initially were approved by the Commission pursuant to our November 25, 2013 Order in Cause No. 44273. The Commission approved certain modifications to the Terms and Conditions for Service in its May 31, 2017 Order in Cause No. 44835.

Section 10 of Citizens Wastewater of Westfield’s Terms and Conditions for Service addresses main extensions. Section 10.2 provides that a person desiring a main extension “shall” apply in writing to Citizens Wastewater of Westfield, and all main extensions require a prior written agreement with Citizens Wastewater of Westfield. The Terms and Conditions for Service also contain provisions relating to the payment of the cost of the main extension. Rule 10.9.5 of Citizens Wastewater of Westfield’s Terms and Conditions for Service provides: “[f]or the Main Extension, the Applicant shall be required to pay the Cost of the Main Extension, and the full gross-up any applicable state and federal taxes associated with the cost of the extension and the Applicant shall receive Refunds as provided in Rule 10.9 of these Terms and Conditions for Sewage Disposal Service.” Citizens Wastewater of Westfield’s Rule 10.9.5 is based on the Commission’s administrative rules in 170 IAC 8.5-4-32, which provides “for the main extension, the applicant shall be allowed to pay the cost of the main extension, and the full gross-up state and federal taxes associated with the cost of the extension and the applicant shall receive refunds as provided in sections 36 through 37. . . .”

The evidence reflects that Citizens Wastewater of Westfield has continued to express that it is “willing and able” to serve the Partnership Property in accordance with Rule 10 of its Terms and Conditions for Service. (Respondent’s Exhibit 1 at 10.) On April 10, 2016, Mr. Bukovac sent an e-mail to Mr. Byrum stating that Citizens Wastewater of Westfield would serve the area in accordance with its Terms and Conditions for Service and provided a link to those Terms and Conditions for Service. (Respondent’s Exhibit 1, Attachment EJB-3.) Citizens Wastewater of Westfield also provided a Will Serve Letter to Mr. Byrum on July 16, 2016. (Respondent’s Exhibit 1, Attachment EJB-6.) During the hearing, Mr. Bukovac reiterated: “we are willing to serve today and begin that process if somebody was able to execute a main extension agreement and follow our terms and conditions. We would be willing to serve that property or any other ones in Westfield or our CTA.” (Tr. at A-104.)

Section 10.2 of Citizens Wastewater of Westfield’s Terms and Conditions for Service requires an “applicant” for a main extension to apply in writing for the extension. Mr. Byrum did not submit a formal application for an extension of service.

While submission of an application may seem like a mere technicality, the application process allows a wastewater utility to provide reasonable estimates of the cost of extending service to the area and to address other technical issues. As with the requirement that a developer pay for the cost of a main extension, the requirement that a formal application be submitted is not unique. In fact, the AWWA Rates Manual notes that “[w]hen preparing a main-extension agreement, a fee may be charged for filing the application, developing the contract, and for field inspection and engineering reviews.” AWWA Principles of Water Rates, Fees and Charges M1 (5th Ed.) at 261. While Citizens Wastewater of Westfield does not charge an application fee, Mr. Bukovac noted, typically there is a transparent exchange of data, drawings and other relevant information to help Citizens Wastewater of Westfield ascertain with a good approximation of what is needed to serve the customer’s needs. (Respondent’s Exhibit 1 at 12.)

Importantly, in this case, Mr. Byrum’s communications with Citizens Wastewater of Westfield (and CTRWD) have not been consistent with respect to his or the Partnerhip’s intended use or development of the Partnership Property. Initially, Mr. Byrum indicated to Citizens Wastewater of Westfield “[r]ecently, we have been approached by several developers to purchase portions of that property but, they lose interest when they find out that there are no nearby utilities.” (Respondent’s Exhibit 1, Attachment EJB-2.) Andrew Williams, Utility Director of CTRWD, testified that CTRWD also understood that Mr. Byrum was seeking wastewater service in order to facilitate the development of the Partnership Property:

Q Did you understand the service needed was for a single residence?

A No.

Q And what did you understand to be needed?

A Well, I think -- we made the assumption dealing with that side of town that we -- if sewer was needed, it was for development of the property, but we're not – to clarify that, we're not that familiar with Zionsville zoning or Zionsville/Westfield zoning because we don't deal on that side of town.

(Tr. at A-48). In contrast, however, Mr. Byrum indicated in his direct testimony he would build a single home on the Partnership Property and his other family members “may or may not do the same.” (Complainant’s Exh. 1 at 3.) Absent a property owner providing detail regarding the use of a particular property, it is inherently difficult if not impossible for a utility to make a precise cost estimate.

Notwithstanding the lack of consistent information, Citizens Wastewater of Westfield made a cost estimate available to Mr. Byrum, which was sent to the CAD on September 14, 2016. See 170 IAC 16-1-5(b)(4). Citizens Wastewater of Westfield’s cost estimate submitted to the CAD included an initial estimate that the cost would be approximately $917,000 for wastewater utility service and $1,023,000 for water utility service. Mr. Bukovac acknowledged that Citizens Wastewater of Westfield’s estimates were not perfect, but rather were the best estimate based upon the information that existed in September 2016 and without knowing the full extent of what will be developed on the Partnership Property. In short, the Commission agrees with the determination made by the CAD that Citizens Wastewater of Westfield was “in compliance with the Commission’s rules with regards to [Mr. Byrum’s] request” and complied with its Terms and Conditions for Service.

Mr. Byrum’s chief complaint is not that Citizens Wastewater of Westfield did not comply with certain technical aspects of its Terms and Conditions for Service. Rather, the crux of Mr. Byrum’s complaint is that the possible cost of a main extension to the Partnership Property as determined under Rule 10 of Citizens Wastewater of Westfield’s Terms and Conditions for Service (and 170 IAC 8.5-4-1 *et seq*.) is too expensive.

Mr. Byrum suggests he should not have to pay for the cost of extending service to the Partnership Property in accordance with the Terms and Conditions for Service and 170 IAC 8.5-4-32 for two reasons. First, Mr. Byrum suggests that because adjacent 146th Street was being expanded, Citizens Wastewater of Westfield should correspondingly be laying utility infrastructure nearby. However, it is not customary or necessarily prudent for a utility to install facilities to areas where development is not occurring, or where the facilities will not be “used and useful” just because a road expansion is occurring in a rural area. If utilities were to install facilities in areas where there was little to no customer need, ultimately the other customers of the utility would be required to pay for those facilities. With respect to Citizens Wastewater of Westfield’s policy, Mr. Bukovac explained:

We typically -- And I can't, at least, recall right now any time where we have done it where a developer hasn't had interest where we would go to build something, and, again, they would pay for that, and if we did build it, because there's two options, the developer can build it or we can build it, depending on how the contract is, we've tried to capture that, but, again, we just wouldn't build a lift station somewhere when we weren't sure it was going to be used.

(Tr. A-71, lines 8-16).

Second, Mr. Byrum suggests Citizens Wastewater of Westfield may somehow be compelled to provide service to the Partnership Property at no cost to the Partnership because of alleged representations made by the City of Westfield in connection with the annexation of the Partnership Property by the City in 2005. The evidence in this proceeding, however, does not reflect that there was any promise made by the City of Westfield to extend service to the Partnership Property as claimed by Mr. Byrum. At the time the Partnership Property was annexed, the Town of Westfield’s Fiscal Plan for the Annexation of Lands (adopted before the Town of Westfield became a City) (“Fiscal Plan,” Exhibit CBR-1(b)) stated:

***The Town of Westfield will provide access to sewer and water utility service for any proposed development, with the costs for connecting to that utility service to be borne by the developer/owner, in accordance with the policies and fee structure set forth by the Westfield Town Council.***

Fiscal Plan, page 24 (emphasis in original). The Fiscal Plan further stated that “[t]he policy of providing municipal wastewater service is also not to be construed as being ‘free’ in any respect, and the costs of such service are certainly not covered by property taxes.” (Fiscal Plan, page 27).

Mr. Byrum also cited Town of Westfield Ordinance 04-32, which stated, in part, that “[t]he Town Council establishes a policy to extend water and sewer mains and facilities, without an extension agreement from landowners or developers and at the Town’s initial expense, to undeveloped areas in which the Town has authority to serve.” However, the Ordinance continued: “[a]n ordinance for each extension shall be approved by the Town Council and shall set forth subsequent connector fees established by the Town Council applicable to such extension…” More significantly, the policy contained in Ordinance 04-32 was expressly changed and amended by Ordinance 05-33, which provides that the cost for extensions of water and sewer mains and facilities would be at the Town’s initial expense “*or a developer’s initial expense.*” (See Respondent’s Motion to Take Administrative Notice (emphasis added).)

Even if Westfield Ordinance 04-32 had not been amended by Ordinance 05-33, both Ordinances were repealed by Westfield Ordinance 12-32, which was adopted in connection with the sale of utility assets to Citizens Wastewater of Westfield and Citizens Water of Westfield. Section 4 of Ordinance 12-32, adopted on November 5, 2012, states: “[u]pon the conclusion of the Closing (as such term is defined in the Agreements), those ordinances of the City which are inconsistent with the operation and ownership of the Utilities by Citizens or otherwise inconsistent with the provisions of this Ordinance are repealed to the extent of such inconsistencies.”

 Based on the evidence of record, we decline to find any basis for Citizens Wastewater of Westfield to extend its facilities to the Partnership Property at no cost to the Partnership or at some arbitrary reduced cost based on another utility’s estimated cost to extend service. Any reduction in cost that the developer of the Partnership Property would receive would inappropriately have to be borne by Citizens Wastewater of Westfield’s other ratepayers.

Mr. Byrum’s alternative solution is for the Commission to in some way authorize or support CTRWD’s extension of facilities into the corporate boundaries of the City of Westfield. We do not find that the evidence supports a finding that a second provider should be allowed to provide services within the City of Westfield, even assuming the Commission has authority to expand the service territory of a regional district into an incorporated city.[[1]](#footnote-2) Substantial evidence was presented that Citizens Wastewater of Westfield has attempted and been successful in presenting viable alternatives to Mr. Byrum. During the hearing, Mr. Byrum acknowledged that Citizens Wastewater of Westfield had “offered some proposals” for alternative solutions to him. (Tr. at A-35).

 OUCC witness Parks presented extensive evidence regarding one of those alternatives. Mr. Parks stated that owners of undeveloped property in Westfield, can and typically do obtain water and sewer service via well and septic systems due to the significant expense required for a utility to extend a main extension and related utility infrastructure to undeveloped property. Mr. Parks noted that all of the property owners in the vicinity of the Partnership Property use well and septic systems, and Mr. Byrum testified that until recently, the Partnership Property was in fact served in this very manner. Mr. Parks stated: “[i]n fact, everybody in that whole area is on well and septic. I don't think there's any utilities in this area, so there's other homes, and I believe they have well and septic.” (Tr. at B-3.)

 While Mr. Byrum expressed concern that the Hamilton County Health Department would not approve a septic system for the Partnership Property, it does not appear that he applied for a septic permit. Moreover, OUCC witness Parks introduced contrary evidence, in writing, from the Health Department. CTRWD Utility Director supported Mr. Parks’s testimony that a septic permit would be available notwithstanding the proximity of CTRWD’s service territory:

Q. Are you aware of any customers, excluding Mr. Byrum, of course, who have or potential customers who are located outside of your service territory who have said, we're applying for service; we want to be served by you because we're within 300 feet of a line, and the Health Department has told us we can't get a septic system because of that?

A. Anyone outside our territory or within our territory?

Q. Outside your territory.

A. I'm not aware of anyone outside our territory.

Q. Thank you.

(Tr. at A-45)

 Mr. Byrum failed to provide evidence that he has sought any formal estimates for the installation of a septic system. During the evidentiary hearing, Mr. Byrum suggested the cost could be $70,000 to $100,000. However, Mr. Byrum indicated that was a “guesstimate” based on past septics and wells that he “put in at vacation homes.” (Tr. at B-46.)

Accordingly, based on the evidence presented by Mr. Parks, we find that installation of a septic system could present a viable and low-cost alternative to the extension of wastewater service to the Partnership Property. If, however, the installation of a septic system is not a viable alternative, the evidence reflects that both Citizens Water of Westfield and Citizens Wastewater of Westfield have made considerable efforts to explore alternatives and creative ways in which both water and sewer service could be provided to the Partnership Property. In fact, both Citizens Water of Westfield and Citizens Wastewater of Westfield have offered to enter into wholesale arrangements solely to serve the Partnership Property.

Mr. Bukovac stated that Citizens Wastewater of Westfield was willing to become a wholesale customer of CTRWD and Citizens Water of Westfield was willing to become a wholesale customer of Carmel Water. Under this approach, Citizens Wastewater of Westfield and Citizens Water of Westfield would each construct the facilities that would interconnect with CTRWD’s and Carmel Water’s respective facilities, and infrastructure costs would be equivalent to the estimates put forth by CTRWD (not to exceed $250,000) and Carmel Water (approximately $80,000). In other words, Mr. Byrum would not be required to pay any more than it would cost him to connect to those utilities directly. Mr. Bukovac explained that this arrangement would amicably resolve this matter, not adversely affect ratepayers, and preserve Citizens Wastewater of Westfield’s service territory.

John Duffy, the Director of Utilities for the City of Carmel, signed a letter of intent indicating that the City of Carmel would in fact enter into a wholesale agreement with Citizens Water of Westfield for the area.

CTRWD has thus far declined to enter into a wholesale agreement with Citizens Wastewater of Westfield. However, Citizens Wastewater of Westfield alternatively proposed an arrangement whereby the Partnership Property would receive sewer service through a temporary arrangement between Citizens Wastewater of Westfield and CTRWD. Citizens Wastewater of Westfield sent its proposed conditions for a temporary agreement with CTRWD in an August 25, 2017 letter to Mr. Williams. Under the temporary arrangement CTRWD could extend a single wastewater service line to Mr. Byrum’s home, not to exceed 4 inches in diameter. Citizens Wastewater of Westfield would retain the right to connect such line, at no further cost to Mr. Byrum, to its wastewater system in the future when its infrastructure is more built out near the Partnership Property. Mr. Williams was clear in his direct testimony that CTRWD was willing to provide service to the Partnership Property on a temporary basis, stating: “connection to the CTRWD system could be a temporary or permanent option.” (Complainant’s Exh. AW at 6.)

The fact that CTRWD had yet to enter into a wholesale agreement with Citizens Wastewater of Westfield or enter into a temporary arrangement is not a basis for somehow divesting the Partnership Property from Citizens Wastewater of Westfield’s service territory or finding that CTRWD should serve within the City of Westfield as a second utility. The evidence reflects that Citizens Wastewater of Westfield has worked diligently to collaborate with its neighboring utilities to find a reasonable solution to extend wastewater and water service to the Partnership Property at a cost that Mr. Byrum may find acceptable. We also note the City of Carmel has reciprocated and commend Citizens Wastewater of Westfield and the City of Carmel for their efforts. Additionally, we are cognizant that allowing another utility to take over a service territory under these circumstances could create “bidding wars” among utilities for parcels of land under development, as opposed to adherence to the utilities’ Commission-approved terms and conditions for service or the Commission’s main extension rules found in 170 IAC 8.5-4.

In summary, we encourage Mr. Byrum to further explore the alternative of installing a septic system or septic systems on the Partnership Property. Should Mr. Byrum be unable to obtain a septic permit from the Hamilton County Health Department, and/or should Mr. Byrum remain unwilling to execute a main extension agreement with Citizens Wastewater of Westfield in accordance with its terms and conditions, and/or should CTRWD be unwilling to enter into an arrangement with Citizens Wastewater of Westfield to provide temporary or wholesale service to the Partnership Property, Mr. Byrum should advise the Commission, provide evidence to this effect, and request that the Commission exercise its authority to require CTRWD to allow Citizens Wastewater of Westfield to interconnect with its system under Ind. Code § 8-1-2-5.

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

1. The decision of the CAD set forth in the Determination Letter that Citizens Wastewater of Westfield is in compliance with the Commission’s rules with regards to Mr. Byrum’s request is confirmed.
2. The request for relief sought by Mr. Byrum is hereby denied.
3. This Order shall be effective on and after the date of its approval.

**ATTERHOLT, FREEMAN, HUSTON, WEBER AND ZIEGNER CONCUR:**

**APPROVED:**

**I hereby certify that the above is a true**

**and correct copy of the Order as approved.**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Mary M. Becerra**

**Secretary of the Commission**

1. The findings in Complainant’s Proposed Order did not specify which statute Complainant proposed the Commission rely on in finding that a second provider should serve within Westfield. Presumably, Complainant was referring to Ind. Code § 8-1-2-86 which provides: "no license, permit, or franchise shall be granted to any person, copartnership, or corporation to own, operate, manage, or control any plant or equipment of any public utility in any municipality where there is in operation a public utility engaged in similar service under a license, franchise, or permit without first securing from the commission a declaration, after a public hearing, of all parties interested, that public convenience and necessity require such second public utility. . . ." Ind. Code § 8-1-2-86 does not apply to regional waste districts, which are not a "person, copartnership, or corporation," and moreover, it does not apply because they are not granted a "license, permit, or franchise" — but instead are expanded and established by IDEM pursuant to Ind. Code § 13-26. [↑](#footnote-ref-2)