

IN THE
INDIANA COURT OF APPEALS

CAUSE No. 18A-EX-2030

INDIANA OFFICE OF UTILITY
CONSUMER COUNSELOR,

Appellant,
(Statutory Party Below)

v.

INDIANA-AMERICAN WATER
COMPANY, INC.; CITIZENS ACTION
COALITION OF INDIANA, INC.;
TOWN OF SCHERERVILLE,
INDIANA; and INDIANA
UTILITY REGULATORY
COMMISSION,

Appellees,
(Petitioner, Intervenors, and
Administrative Agency Below)

Appeal from the Indiana Utility
Regulatory Commission

IURC Cause No. 45043

Hon. James F. Huston, Chairman
Hon. Sarah E. Freeman,
Hon. Stefanie Krevda,
Hon. David L. Ober,
Hon. David E. Ziegner,
Commissioners

Hon. David E. Veleta,
Administrative Law Judge

BRIEF OF APPELLEE
INDIANA UTILITY REGULATORY COMMISSION

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BRIEF OF APPELLEE
INDIANA UTILITY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

1. Whether the Indiana Utility Regulatory Commission (“IURC” or “Commission”) was required to approve the indemnification provision in the example customer license agreement, which was attached as part of the example communications materials that were included with, but not part of, the lead service line replacement plan submitted by Indiana American Water Company (“Indiana American”).

STATEMENT OF THE CASE

On January 29, 2018, Indiana American filed its petition and case-in-chief with the Commission requesting approval of its lead service line replacement plan under Ind. Code § 8-1-31.6-5, *et seq.* Appendix (“App.”) Vol. 2, p. 42. Citizens Action Coalition of Indiana (“CAC”) filed a Petition to Intervene, which the Commission granted on February 23, 2018. App. Vol. 2, p. 9. On February 26, 2018, Schererville Municipal Water Works (“Schererville”) filed its Petition to Intervene, which was granted on the record at the prehearing conference and preliminary hearing held the same day. *Id.*

After the Office of Utility Consumer Counselor (“OUCC”) filed its case-in-chief on April 13, 2018, and Indiana American filed rebuttal testimony on April 23, 2018, the Commission held an evidentiary hearing on May 7, 2018. *Id.* Indiana American, the CAC, Schererville, and the OUCC appeared and participated in the hearing. *Id.*

On July 25, 2018, the Commission issued its order approving Indiana American’s Plan, but did not approve example exhibits attached to the Plan, which included a sample customer license agreement that Indiana American might use when it contracts with interested customers to replace the customers’ lead service lines. App. Vol. 2, p. 18-19.

The OUCC appealed the Commission’s order on August 24, 2018, and filed its brief in this appeal on December 7, 2018, solely regarding the issue of the indemnity

provision in the example copy of the customer license agreement. Appellant's Br., p. 5.

STATEMENT OF THE FACTS

1. Dangers of Lead Service Pipelines.

This case concerns the replacement of water service pipelines that contain lead, which are owned by customers of Indiana American. Indiana American provides water utility service to approximately 300,000 customers in and around the State of Indiana. Non-confidential Exhibits ("Ex.") Vol. 1, p. 9. Indiana American owns water mains and water distribution pipelines used to serve its customers, but Indiana American's customers own the remaining pipeline from the meter—often located in a meter pit on the customer's property—to the building. This portion of the pipe, from the meter to the customer's building, is called the service line. Some of these customer-owned service lines contain lead.

Lead is a neurotoxin that is classified as a persistent, bioaccumulative, and toxic ("PBT") chemical. Ex. Vol. 1, p. 73. PBT chemicals resist degradation and persist in the environment for an extensive time period, and when inhaled, ingested, or consumed, they bioaccumulate in the fat tissues, bones, and brains of organisms. *Id.* Exposure to lead can have severe health impacts on humans and can lead to death at high doses. *Id.* Lead primarily targets the nervous system, but cardiovascular, kidney, digestive, and reproductive impacts have also been noted with high levels of exposure. *Id.*

Children, especially, are more sensitive to the health effects of lead than adults, and no safe lead level in children has been determined. Ex. Vol. 1, p. 73-74.

Children exposed to lead have more severe symptoms at lower exposures than adults. *Id.* Infants and young children also have more opportunities for exposure through other ingestion pathways because they are more likely to put their hands into their mouths after they may have come in contact with lead-laden particles or lead-contaminated objects such as paint chips or soil. *Id.* Exposures in infancy or early childhood can have significant negative impacts on development or behavior. *Id.* Even exposures at less severe levels may slow mental development and cause lower intelligence later in childhood. *Id.* These effects may persist beyond childhood. *Id.*

While water utilities treat and meet standards for lead before water is sent from the drinking water treatment facility, one of the greatest risks of lead exposure to customers occurs as a result of sending the water through the distribution system. Ex. Vol. 1, p. 74. Lead can enter drinking water when service lines or household plumbing that contain lead corrode. *Id.* Homes built before 1986 are more likely to have lead pipes, fixtures and solder. *Id.* The Environmental Protection Agency's Lead and Copper Rule addresses this exposure by requiring drinking water providers to collect and test tap water from a certain number of households likely to have lead piping. *Id.* If ten percent (10%) or more of the samples tested exceed the action level of 15 parts per billion ("ppb") or micrograms per liter (ug/L), the water utility must take steps to further treat or reduce customer's lead exposure, including adding corrosion control treatments to the water supply or replacing the utility-owned portions of lead service lines with lead-free materials. *Id.* However, replacing only the utility-owned portion of lease

service lines can result in an increased lead concentrations in the water, thereby increasing the health risk of lead exposure. App. Vol. 2, pp. 28, 55. Replacing the customer-owned portion of the lead service line at the same time as the utility-owned portion is replaced decreases the risk of increased lead concentrations when replacing water mains and other aging infrastructure. *Id.*

2. Legislation Passed in 2017 Allows for Water Utilities to Replace Customer-owned Lead Service Pipelines with Commission Approval.

On April 20, 2017, Indiana Governor Eric Holcomb signed House Enrolled Act No. 1519 into law, making the legislation effective on July 1, 2017. Ex. Vol 1, p. 10. House Enrolled Act No. 1519 is codified in Indiana Code chapter 8-1-31.6, which establishes a process for water utilities to obtain the authority to replace customer-owned lead service lines and recover a return of and on the investments made to replace those lines, even though portions of the lines are not owned by the utility. *Id.*

The law requires that a water utility submit a plan to the Commission for customer lead service line improvements (“Plan”). Ind. Code § 8-1-31.6-6(a). Upon approval by the Commission of the Plan, the Commission may allow a rate adjustment of the utility’s basic rates and charges to pay for the infrastructure improvement costs under Ind. Code § 8-1-31-8.

3. Indiana American’s Plan.

On January 29, 2018, Indiana American submitted its petition and case-in-chief, including its Plan for the replacement of customer-owned portions of lead service lines. App. Vol. 2, p. 42-68. Included with the Plan were examples of

Indiana American's communications materials as attachments. *Id.* at 63 and 69-83. None of the parties to this matter disputed the completeness of the Plan, and the Commission found that it addressed the categories required by Ind. Code § 8-1-31.6-6 without the attachments. App. Vol. 2, p. 17. The Commission further found that the Plan was reasonable and in the public interest, and attached the Plan, without the example communications materials, to the Commission's order. App. Vol. 2, pp. 18, 20-41.

The Plan consisted of pages 1-22, which contained sections for each component required by Ind. Code § 8-1-31.6-6. App. Vol. 2, pp. 20-41, 47-68. The Plan as approved by the Commission did not include example communications materials offered by Indiana American and admitted into the record by the Commission, which were attachments and comprised pages 23-37 of the same document. *Id.* at 69-83; Ex. Vol. 1, pp. 39-53.

The part of the Plan most relevant to this appeal is the statutory requirement that the Plan include:

- (8) The water utility's proposal for:
 - (A) communicating with the customer the availability of the water utility's plan to replace the customer owned portion of the lead service line in conjunction with the water utility's replacement of the utility owned portion of the lead service line; and
 - (B) documenting the customer's consent or lack of consent to replace the customer owned portion of the lead service line.
- Ind. Code § 8-1-31.6-6(a)(8).

The section of Indiana American's Plan meeting the requirement of the section above is the "communication proposal," consisting of pages 16-18 of the Plan. App. Vol. 2, pp. 36-38, 63-65; Ex. Vol. 1, pp. 33-35. The communication proposal

describes Indiana American's proposal to communicate information about the Plan to customers through various notices or informational flyers Indiana American would provide to customers at various stages in the process. *Id.* The proposal includes providing a "Lead" fact sheet, an "Important Notice About Your Water," and "Assessment Results." *Id.* It also describes the proposal to utilize a license agreement entitled "Water Service Line Replacement" to be signed by the customer if the customer wishes to permit Indiana American to replace the customer's service line. App. Vol. 2, pp. 37, 64. The customer can also decline by signing an acknowledgement to that effect. *Id.* All of these sample communications, including an example license agreement, were included as attachments with the Plan and admitted into evidence by the Commission at the hearing, but they were not attached to the Commission's order nor were they approved by the Commission.

4. Indemnification Provision.

The indemnification provision at issue in this appeal is found in the example license agreement submitted with the Plan, entitled "Water Service Line Replacement." App. Vol. 2, p. 75; Ex. Vol. 1, p. 45. Within the sample license agreement, the indemnification clause reads:

In consideration for performing the work to install the customer service line at company's cost and the company's agreement to provide a 12-month limited workmanship warranty, customer agrees to indemnify, release and hold harmless company and its affiliates and agents from and against all claims, liability and costs ("claims") resulting from acts and omissions of company and/or its approved subcontractors in installing the customer service line.
Id.

The OUCC objected to the indemnity language in the sample license agreement arguing that the language is “very broad” and that it “unduly shifts all risk to the customer for any acts or omissions of Indiana-American or its contractors.” Ex. Vol. 1, p. 87-88.

Any potential liability for damage should already have been built into the estimate Indiana-American provided for the replacement of the lead service lines and the customers should not be held responsible for damage caused by Indiana-American or the contractors Indiana-American has selected to replace the lead service lines.
Ex. Vol. 1, p. 88.

The OUCC recommended that the indemnification language be removed from the Water Service Line Replacement agreement. *Id.*

Indiana American responded by noting that Indiana-American Water and its parent company, American Water, presently use indemnification language for restoration of private property after company construction projects (e.g., main replacement or main relocation) to mitigate unanticipated and unknown costs. Ex. Vol. 1, p. 66-67. “With this program, we are offering to replace a customer asset at no cost to the customer, with a one year warranty on material and workmanship, and site restoration with clearly defined limits.” *Id.* Indiana American further observed that it is only through the offering of the lead service-line program that Indiana-American would be part of the equation at all. *Id.* at 66-67. “Currently, the customer bears the entire cost of replacement, any warranty it may obtain, and all of the risk.” *Id.* at 67. “[R]emoving indemnification language from the agreement...would prevent reliable estimation of liability and instead invite costly dispute.” *Id.*

The Commission stated in its order that the indemnification provision objected to by the OUCC was not part of the Plan necessitating approval and, as such, declined to make a determination whether the terms of that provision were appropriate or not. App. Vol. 2, p. 18.

SUMMARY OF THE ARGUMENT

The OUCC's arguments are based on a misreading of the evidence. The plain language of the Plan indicates that the example communications materials included with (not in) the Plan were just that – examples, not part of the Plan itself. The indemnification provision contained within the example customer license agreement was not part of the Plan that was required under the statute for Commission approval. The Commission's factual determination that the example communications materials were not part of the required Plan in this case is reasonable. Furthermore, even if the indemnification language had been part of the Plan and did require Commission approval (an interpretation the Commission rejects), the indemnification provision is not unreasonable, considering the agreement is a voluntary, arm's length transaction between the utility and interested customers.

ARGUMENT

1. Standard of Review.

This case presents a question of fact – whether the indemnification provision in the example customer service agreement (that was part of the example communications materials included with the Plan) was part of the Plan that the

Commission was required to approve. The Indiana Supreme Court provided the standard of review for facts decided by an executive branch agency as follows:

Such determinations of basic fact are reviewed under a substantial evidence standard, meaning the order will stand unless no substantial evidence supports it. In substantial evidence review, “the appellate court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the Board’s findings.” (internal citations omitted)

N. Ind. Pub. Serv. Co. v. U.S. Steel Corp., 907 N.E.2d 1012, 1016 (Ind. 2009). The Court went on to state that the review of factual determinations material to the Commission’s ultimate conclusions are reviewed for reasonableness, with deference given to the Commission depending on whether the subject of the Commission’s order is within or outside the Commission’s special competence and expertise. *Id.*

As stated in a recent opinion by the Indiana Supreme Court:

When reviewing a claim that an agency’s decision lacks substantial evidence, “the reviewing court may vacate the decision only if the evidence, when viewed as a whole, demonstrates that the conclusions reached by the agency are clearly erroneous. A judgment is clearly erroneous when there is not evidence supporting the findings or the findings fail to support the judgment.

Moriarity v. Ind. Dep’t of Nat. Res., No. 18S-PL-00296, slip op., at 10, (Ind., Jan. 3, 2019) (citations omitted).

The Plan approved by the Commission did not include the example customer license agreement or other example customer communication materials. However, the Commission did approve the Plan submitted by Indiana American that included details about its customer communication process—as required under the statute. The Commission admitted the Plan, with these details, into evidence and therefore, the Commission’s Order also complied with the substantial evidence standard.

Citizens Action Coal. of Ind., Inc. v. Indianapolis Power & Light Co., 74 N.E.3d 554, 562-563 (Ind. Ct. App. 2017), quoting *N. Ind. Pub. Serv.* at 1016 (Ind. 2009) (First, the court reviews whether the Commission’s order is based on substantial evidence, and second whether the order contains specific factual findings.)

This case also presents the first case filed with the Commission and the first case appealed in which a water utility has petitioned the Commission under Ind. Code chapter 8-1-31 for approval of a plan to replace customer-owned lead service lines. The statute has consequently not been previously interpreted. When a statute has not previously been construed, the Court’s interpretation is controlled by the express language of the statute and the rules of statutory construction. *Shaffer v. State*, 795 N.E.2d 1072 (Ind. Ct. App. 2003), citing *Ross v. Ind. State Bd. of Nursing*, 790 N.E.2d 110, 119 (Ind. Ct. App. 2003). The goal in statutory construction is to determine, give effect to, and implement the intent of the legislature. *Id.*, citing *Robinson v. Gazvoda*, 783 N.E.2d 1245, 1250 (Ind. Ct. App. 2003), trans. denied.

In this case, the lead service line statute is a statute that the Commission is charged with enforcing. It is the Commission that approves the Plan submitted by the utility, and the Commission determines what constitutes an appropriate Plan under the statutory framework. The deferential standard of review for administrative agencies—including the Commission—was confirmed again most recently by the Indiana Supreme Court on January 3, 2019. *Moriarity*, slip op. (Ind., Jan. 3, 2019). It stated “[w]e do not try the facts de novo but rather defer to the agency’s findings if they are supported by substantial evidence.” *Moriarity*, slip op. 5 (Ind., Jan. 3, 2019). The Court went on: “interpretation of a statute by an

administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.” *Id.* “In fact, if the agency’s interpretation is reasonable, we stop our analysis and need not move forward with any other interpretation, *Id.*, quoting *Jay Classroom Teachers Association v. Jay School Corp.* 55 N.E.3d 813, 816 (Ind. 2016).

In *Moriarity*, the Court confirmed that this deference to an agency’s statutory interpretation is consistent with its prior holding in *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 100 N.E.3d 234 (Ind. 2018). Reconciling the two cases, the Court explained, “differences in the respective agencies’ statutory interpretations in NIPSCO and here lead us to focus on different parts of the standard of review. In both cases, however, the whole standard remains the same.” *Moriarity*, slip op. 6 (Ind., Jan. 3, 2019). The Court further stated that this standard of review “recognizes the expertise contained within a co-equal branch of government and the value to the public in being able to rely on reasonable agency interpretations.” *Id.*

2. The Indemnification Provision to Which the OUCC Objects Was Not a Part of Indiana American’s Plan and Was Not Approved by the Commission.

The Commission made a factual determination based on the substantial evidence in the record that the indemnification provision was included in a sample customer contract that was not part of the Plan. This factual determination was reasonable. The Commission does not dispute that Indiana American submitted its Plan “with” the accompanying attachments. App. Vol. 2, pp. 42-83; Ex. Vol. 1, pp. 5-54. But the Plan itself referred to the attachments as **examples**: “**Examples** of referenced communication materials are attached in the Appendices of this plan.”

App. Vol. 2, pp. 36, 63 (emphasis added). Similarly, Indiana American's Plan specifies that all documents in the attachments are included **with** the Plan: "All documents listed above are attached to this Plan and listed as 'Communication Materials Included **with** Customer Lead Service Line Replacement Plan.'" App. Vol. 2, pp. 38, 65 (emphasis added). The attachment itself contains the same language near the top of the first page of the attachment: "Communication Materials Included **with** Customer Lead Service Line Replacement Plan." App. Vol. 2, p. 69 (emphasis added). The communication materials included "with" the Plan are clearly separate and distinct from the Plan itself; the materials are not in the Plan or part of the Plan.

Related to the Commission's determination that the customer agreement (and the other example communication materials in the attachments) are not included as part of the Plan, the relevant statute also does not require that communication materials be included in the plan or require approval of those types of documents by the Commission. The statute requires only that, for a plan to be eligible for Commission approval, it must address, as applicable to this case, the following:

(8) The water utility's proposal for:

(A) communicating with the customer the availability of the water utility's plan to replace the customer owned portion of the lead service line in conjunction with the water utility's replacement of the utility owned portion of the lead service line; and

(B) Documenting the customer's consent or lack of consent to replace the customer owned portion of the lead service line."

Indiana Code § 8-1-31.6-6(a)(8).

Section 8 of the Plan addresses exactly that. App. Vol. 2, pp. 36-38, 63-65. That section describes Indiana American’s **proposal** for communicating with its customers and its **proposal** for documenting the customer’s consent. *Id.* In fact, section 8 of the Plan—not the attached communications materials—is titled “Indiana American’s Communication and Documentation Proposal.” *Id.* The proposal does not need to include the actual agreement to be signed by the customer; it is enough that Indiana American describes in its proposal the type of agreement that will be used—as it does. From the Plan itself, Indiana American’s proposal says this:

Indiana American personnel or consultant representatives share by mail, or in person, the customer owned water service line replacement license agreement entitled “Water Service Line Replacement.” The Indiana American personnel or consultant representatives share details about the work and schedule and answer any questions in person or by telephone. The license agreement describes the work, the schedule, a 12-month workmanship warranty, indemnification provisions, the provisions that the service line will continue to be owned and maintained by the customer, and acknowledgements by the customer, including an acknowledgment that they have received and read the “Important Notice About Your Water” and the “Lead” fact sheet, which is given to them at this time.
Id.

In summation, the proposal that is part of the Plan describes the process by which Indiana American will ensure customer consent, which is all that is required by statute. It is not meant to require that Indiana American use documents identical in all respects to the examples provided with its Plan. Those materials are instead attached for illustrative purposes.

In addition to the absence of a statutory requirement that the Commission approve the example communication materials in the attachment and the fact that

the materials were attached as examples, there are other reasons why the Commission should not approve the attachments and require strict adherence to the text of those example documents. The Plan to replace customer-owned lead service lines approved by the Commission contemplates the possibility that some lead service lines will be replaced as far out as 2041, or 24 years from the start date of the Plan. App. Vol. 2, p. 30-31, 57-58. The example communication materials included with the Plan constitute ten different documents.

- Attachment 1: We are Investing in Your Neighborhood
- Attachment 2: Important Notice About Your Water Service and Lead Service
- Attachment 3: Service Line Assessment Results
- Attachment 4: Water Service Line Replacement
- Attachment 5: Lead
- Attachment 6: Water Sampling Process
- Attachment 7: It's Time to Flush Your Water Line
- Attachment 8: Important Notice About Your Water
- Attachment 9: 72 Hour Water Sample Reminder
- Attachment 10: Lead Service Line Replacement & Electrical Grounding

These documents consist of examples of informational materials or flyers describing in writing and pictorially Indiana American's project to replace customer-owned service lines. Some of the materials contain information about lead, the health risks from lead, answers to frequently asked questions that customers may have, graphical flow-type charts to inform customers about the process, and other information. For each of these documents, including Attachment

4, the Water Service Line Replacement agreement at issue in this case, the Commission has no reason to doubt the accuracy of the information or the intention to provide useful information to customers. However, the information is, and should be, subject to modification by Indiana American as the Plan is carried out over many years. Details of the process may change or Indiana American might find customers continue to have certain questions or concerns that can be addressed better or more thoroughly in the communication materials. The Commission cannot, and should not, endorse each piece of communication to be provided to customers during the decades of the Plan. This would be tantamount to requiring Commission approval of what are essentially Indiana American's advertising scripts and targeted customer messaging.

These concerns are especially true considering that participation in the Plan is voluntary. Customers may have little to no choice in selecting their water utility, but customers may replace their lead service line themselves, choose any other contractor to replace their lead service line, or leave the lead service line in place. The option to participate in Indiana American's Plan, which replaces the service line at no cost to the customer, is a voluntary, arm's length transaction between Indiana American and its customers. If customers do not like the deal, they are free to say no.

3. The Indemnification Provision is Not Unreasonable

Though the Commission did not, and was not, required to approve the customer agreement or the specific indemnification language to which the OUCC objects, the indemnification language is not on its face unreasonable or unfair. As

stated, the agreement between Indiana American and its customer is voluntarily negotiated between the two parties, and the customer is not bound to accept the agreement. Still, if the customer does agree to participate in the Plan, Indiana American provides a 12-month warranty in consideration for the indemnification provision. For Indiana American, the liability for damages arising from lawsuits brought about by the replacement of customer-owned lead service lines are unpredictable and would make cost estimates of the project that included potential liability impossible. Potential liability could also thwart the public health goals of the legislature to incentivize the replacement of the lead service lines by placing additional risk on Indiana American that might make it, and companies like it, disinclined to even offer a Plan.

Finally, if the Commission determines that Indiana American carries out its Plan in a way that violates the Plan or any other law, the Commission still retains the means to address concerns through its authority under Ind. Code § 8-1-2-69 to investigate the practices of Indiana American. Likewise, a customer may file a complaint with the Commission under Ind. Code § 8-1-2-34.5.

CONCLUSION

For all the foregoing reasons, the Commission respectfully requests that the Court affirm the Commission's order in all respects and not require the Commission to approve example copies of communications materials included with Indiana American's Plan.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on January 7, 2019, I electronically filed the foregoing document using the Indiana E-filing System. I also certify that on January 7, 2019, I served the foregoing document on the following contacts through E-Service using the IEFS:

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