

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

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PETITION OF INDIANA-AMERICAN )  
WATER COMPANY, INC. ("INDIANA )  
AMERICAN") FOR (1) APPROVAL OF ITS ) CAUSE NO. 45043  
LEAD SERVICE LINE PLAN PURSUANT TO )  
IND. CODE CHAP. 8-1-31.6 AND (2) )  
APPROVAL OF ASSOCIATED CHANGES ) APPROVED: AUG 07 2019  
TO INDIANA AMERICAN'S RULES AND )  
REGULATIONS FOR WATER SERVICE. )

ORDER OF THE COMMISSION ON REMAND

**Presiding Officers:**

**Sarah E. Freeman, Commissioner**

**David E. Veleta, Senior Administrative Law Judge**

On January 29, 2018, Indiana-American Water Company, Inc. ("Indiana American") filed its Petition in this Cause seeking certain approvals of the Indiana Utility Regulatory Commission (this "Commission") for its lead service line replacements plan ("LSLR Plan"). Following a comprehensive procedural schedule and after conducting a duly noticed public hearing, we issued our Final Order on July 25, 2018. The Indiana Office of Utility Consumer Counselor ("OUCC") appealed, and on May 10, 2019, the Court of Appeals reversed and remanded with instructions for us to issue additional findings with respect to the license agreement attached to the LSLR Plan including the indemnification and release clause contained therein. The opinion was thereafter certified and the Cause remanded to us.

1. **Background.** Indiana American requested approval of its LSLR Plan pursuant to Ind. Code ch. 8-1-31.6, which allows water utilities to petition the Commission for permission to implement a plan to replace customer owned lead service lines, even though these lines are not owned by the utility, and to recover a return of and on the investments made to replace these lines through a rate adjustment mechanism. Ind. Code § 8-1-31.6-6. Attached to the LSLR Plan were examples of Indiana American's proposed customer communications materials. Among the documents attached to the LSLR Plan was a proposed license agreement ("License Agreement") between Indiana American and the customer who owns the lead service line. The License Agreement includes the following indemnification language (the "Indemnification Clause"):

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.

On April 13, 2018, the OUCC filed its response to the LSLR Plan, objecting to the inclusion of the Indemnification Clause in the License Agreement. The OUCC argued that any costs associated with a risk of liability for damages should have been included in Indiana American's estimate of the costs of replacing the customer-owned lines. The OUCC recommended the indemnification language be removed from the License Agreement. On April 23, 2018, Indiana American responded in rebuttal that the Indemnification Clause was a part of the program of offering the replacement of customer-owned lead service lines at no cost to the customer, including a one-year warranty. Indiana American argued it would not be able to reliably estimate its risk of liability under the LSLR Plan without the inclusion of the Indemnification Clause, which Indiana American uses in construction projects to mitigate unanticipated and unknown costs. After hearing the evidence, which is summarized in our Order dated July 25, 2018, this Commission found that the specific provisions of the License Agreement, including the Indemnification Clause, were not part of the LSLR Plan we were asked to approve, and therefore we declined to make a determination whether the terms of a particular indemnification provision are appropriate or not. The Court of Appeals held that Indiana American had submitted the License Agreement to the Commission as part of its LSLR Plan to fulfill its statutory obligations, indicating the License Agreement, with its Indemnification Clause, was part of Indiana American's Plan. The Court of Appeals expressed no opinion on the propriety of the License Agreement and the Indemnification Clause, holding only that the License Agreement and Indemnification Clause were part of the LSLR Plan submitted by Indiana American and directing this Commission to either approve or disapprove the License Agreement and Indemnification Clause.

**2. Commission Discussion and Findings.** The OUCC argued that the Indemnification Clause is very broad and has the effect of shifting all risk from Indiana American to its customers. The OUCC's evidence states that the OUCC believes the LSLR Plan should be approved, but without the Indemnification Clause. The inability cited by Mr. Hoffman to perform the calculus of risk in the absence of the protection afforded by indemnification language seems to us likely to curtail the replacement of customer owned lead service lines if the Indemnification Clause is not approved. Accordingly, we find the Indemnification Clause to be reasonable under the circumstances. We also acknowledge that the documents attached to the LSLR Plan were described in the evidence as samples and that experience gained throughout the duration of a multi-year, and perhaps multi-decade program, may result in recommendations to change the specific language included. We further find that administrative efficiency is best served where our finding of the reasonableness of the particular language of the License Agreement, including the Indemnification Clause, is construed to apply to substantially similar language that may be included in similar customer agreements used in connection with the LSLR Plan. Individual customers may avail themselves of our informal complaint procedure if particular facts and circumstances would render indemnification language unreasonable in terms or application and we retain the authority to open investigations into allegations that the LSLR Plan is not meeting its intended goals.

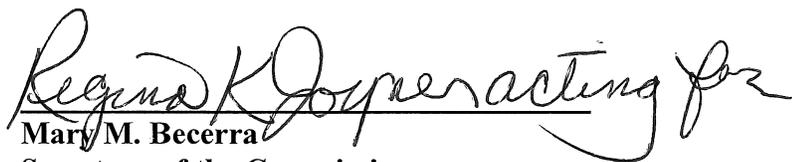
**IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:**

1. The License Agreement, including the Indemnification Clause contained therein, is approved, together with such modifications as may be made without materially altering the substance of such provision.
2. This Order shall be effective upon and after the date of its approval.

**HUSTON, OBER, AND ZIEGNER CONCUR; FREEMAN AND KREVDA ABSENT:**

**APPROVED:      AUG 07 2019**

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

  
**Mary M. Becerra**  
**Secretary of the Commission**