STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

JOINT PETITION OF INDIANA-AMERICAN WATER COMPANY, INC. ("INDIANA-AMERICAN") AND THE CITY OF CHARLESTOWN, INDIANA ("CHARLESTOWN") FOR APPROVAL AND AUTHORIZATION OF: (A) THE ACQUISITION BY INDIANA-AMERICAN OF CHARLESTOWN'S WATER UTILITY PROPERTIES (THE "CHARLESTOWN WATER SYSTEM") IN CLARK COUNTY, INDIANA IN ACCORDANCE WITH A PURCHASE AGREEMENT THEREFOR; (B) APPROVAL OF ACCOUNTING AND RATE BASE TREATMENT; (C) APPLICATION OF INDIANA-AMERICAN'S AREA ONE RATES AND CHARGES TO WATER SERVICE RENDERED BY INDIANA-AMERICAN IN THE AREA SERVED BY THE CHARLESTOWN WATER SYSTEM ("THE CHARLESTOWN AREA"); (D) APPLICATION OF INDIANA-AMERICAN'S DEPRECIATION ACCRUAL RATES TO SUCH ACQUIRED PROPERTIES; (E) THE SUBJECTION OF THE ACQUIRED PROPERTIES TO THE LIEN OF INDIANA-AMERICAN'S MORTGAGE INDENTURE AND THE POTENTIAL ENCUMBRANCE FROM RIGHT OF FIRST REFUSAL; AND (F) THE PLAN FOR REASONABLE AND PRUDENT IMPROVEMENTS TO PROVIDE ADEQUATE, EFFICIENT, SAFE AND REASONABLE SERVICE TO CUSTOMERS OF THE CHARLESTOWN WATER SYSTEM	)	**CAUSE NO. 44976**
VERIFIED COMPLAINT AND REQUEST FOR COMMISSION INVESTIGATION BY NOW! INC. AND CUSTOMERS OF THE CITY OF CHARLESTOWN AGAINST INDIANA-AMERICAN WATER COMPANY REGARDING ITS PROPOSED ACQUISITION OF THE CITY OF CHARLESTOWN'S WATER UTILITY.	)	**CAUSE NO. 44964**

[PROPOSED ORDER OF NOW!, INC. – ALTERNATIVE #3
SALE REJECTED]

ORDER OF THE COMMISSION

Presiding Officers:
James D. Atterholt, Chairman
Carol Sparks Drake, Administrative Law Judge

On July 7, 2017, NOW!, Inc. ("NOW") filed its Verified Complaint in Cause No. 44964 against Indiana-American Water Company, Inc. ("Indiana-American") requesting a Commission investigation into Indiana-American's proposed acquisition of the City of Charlestown's ("Charlestown" or the "City") water utility. On July 25, 2017, Indiana-American filed its Answer to Complaint responding to NOW's complaint. On July 31, 2017, NOW filed its Motion for Leave to File Amended Complaint requesting leave under 170 IAC 1-1.1-1-8(c) to amend its Verified Complaint. On August 17, 2017, the Indiana Utility Regulatory Commission (the "Commission") issued a docket entry granting NOW's Motion to Leave to File Amended Complaint. A prehearing conference was held in Cause No. 44964 on August 18, 2017. On September 13, 2017, NOW filed its Verified Amended Complaint Against Indiana-American in Cause No. 44964 ("Amended Complaint"), to which Indiana-American filed its Answer on October 3, 2017.

On August 17, 2017, Indiana-American and Charlestown (collectively "Joint Petitioners") filed their direct testimony and attachments in Cause No. 44976. On August 21, 2017, NOW filed its Petition to Intervene in Cause No. 44976, which was granted by Commission docket entry issued August 29, 2017. On August 28, 2017, Joint Petitioners, the Office of Utility Consumer Counselor ("OUCC") and NOW filed their request for Consolidation and Stipulation as to Procedural Matters requesting consolidation of Cause No. 44976 with the proceedings in Cause No. 44964 and stipulating to procedural matters to govern the consolidated case. On September 21, 2017, the Presiding Officers issued a docket entry consolidating Cause No. 44964 with Cause No. 44976, vacating the prehearing conference in Cause No. 44976, and establishing a procedural schedule in this consolidated Cause.

On August 29, 2017, NOW filed its Motion to Dismiss Joint Petition And/Or Motion to Strike Joint Petitioners' Case-In-Chief in Cause No. 44976. On August 31, 2017, the OUCC filed a Motion to Dismiss Joint Petitioners' Cause.

On September 1, 2017, Indiana-American submitted its late filed Attachment MP-7 to the Verified Direct Testimony of Matthew Prine, and filed its Notice of Submission of Video File. The parties stipulated that with the submission of this attachment, the case-in-chief was complete for purposes of the statutory deadlines that govern this cause. Joint Petitioners filed a Response to the two Motions to Dismiss on September 8, 2017.

On November 2, 2017, NOW and the OUCC filed their respective cases-in-chief and exhibits. On November 15, 2017, Charlestown filed its Motion to Strike Testimony of Michael Williams, which was denied by docket entry issued November 28, 2017. On November 20, 2017, Joint Petitioners filed their Rebuttal Testimony and Attachments in this Cause.

On November 22, 2017, the Presiding Officers issued a docket entry denying NOW's and OUCC's Motions to Dismiss.

On November 27, 2017, NOW filed its Motion for Summary Judgment and Designation of Evidence, and Brief in Support of Motion for Summary Judgment alleging the City of Charlestown failed to comply with the procedure for initiating the sale of its non-surplus utility property in violation of Ind. Code § 8-1.5-2-4 by failing to properly appoint the three appraisers in a concise document, available for public inspection, setting forth a clear and definite deadline for the return of the appraisal. This motion is still pending.

On November 29, 2017, the Presiding Officers issued a docket entry requesting additional information of Joint Petitioners and the OUCC. Joint Petitioners and the OUCC each filed their responses to the docket entry questions on December 4, 2017.

On December 5, 2017, Charlestown filed its Response in Opposition to NOW's Motion for Summary Judgment in which Indiana-American joined at the evidentiary hearing. NOW did not file a written reply.

On December 7, 2017, the Presiding Officers issued a docket entry requesting additional information from Joint Petitioners. On December 11, 2017, Indiana-American and Charlestown filed their respective Responses to the Docket Entry Request Dated December 7, 2017.

Pursuant to notice of hearing duly given and published as required by law, proof of which was incorporated into the record by reference and placed in the official files of the Commission, an evidentiary hearing in consolidated Cause Nos. 44976 and 44964 was held commencing at 9:30 a.m. on December 13, 2017 in Room 222, PNC Center, 101 W. Washington Street, Indianapolis, Indiana. The hearing continued for three successive days and ultimately concluded on December 15, 2017. Joint Petitioners, NOW and the OUCC appeared and participated in the hearing.

Based upon the applicable law and evidence, the Commission now finds:

1. **Notice and Jurisdiction.** Due, legal and timely notice of the public hearing conducted herein was given by the Commission as required by law. Indiana-American is a "public utility" within the meaning of that term in Ind. Code § 8-1-2-1 and is subject to the jurisdiction of the Commission in the manner and to the extent provided by law. The Charlestown water system is a municipally owned utility as that term is defined in Ind. Code § 8-1-2-1. Charlestown is also subject to our jurisdiction. The Commission has jurisdiction over Joint Petitioners and the subject matter of this proceeding.

2. Joint Petitioners' Characteristics.

A. Indiana-American's Characteristics. Indiana-American is an Indiana corporation engaged in the provision of water utility service to the public in and around numerous communities throughout the State of Indiana for residential, commercial, industrial, public

authority, sale for resale and public and private fire protection purposes. Indiana-American also provides sewer utility service in Wabash and Delaware Counties.

B. Charlestown's Characteristics. Charlestown is a municipality located in Clark County, Indiana. Charlestown owns and operates a water distribution system serving 2,898 individually metered customers. The Charlestown Water System is near Indiana-American's existing Southern Indiana Operation.

C. NOW's Characteristics. NOW is an Indiana nonprofit corporation formed by a group of more than ten (10) Charlestown water customer for the purpose of opposing the sale of Charlestown's water utility.

D. OUCC's Characteristics. The OUCC is an agency of the State of Indiana and a statutory party to Commission proceedings that advocates on behalf of ratepayers, consumers and the public.

3. Relief Requested. Joint Petitioners filed Cause No. 44976 pursuant to Ind. Code § 8-1-30.3-5 ("Section 30.3-5") and § 8-1.5-2-6.1 ("Section 6.1") and request that the Commission (1) grant such approvals as may be necessary to consummate the acquisition of the assets comprising the water distribution system owned by Charlestown (the "Charlestown Water System") by Indiana-American on the terms described in the Joint Petition and the Asset Purchase Agreement between Indiana-American and Charlestown (Attachment MP-3); (2) approve that without regard to amounts that may be recorded on Charlestown's books and records and without regard to any grants or contributions that Charlestown may have received, Indiana-American may record for ratemaking purposes as the net original cost rate base of the assets being acquired an amount equal to the full purchase price, incidental expenses, and other costs of acquisition, allocated among utility plant in service accounts as proposed in Joint Petitioners' evidence; (3) authorize Indiana-American to apply the rules and regulations and rates and charges generally applicable to Indiana-American's Area One rate group, as the same may be changed from time to time, for service to be provided by Indiana-American in the areas currently served by the Charlestown Water System; (4) authorize Indiana-American to apply its existing depreciation accrual rates to the Charlestown Water System; and (5) approve the encumbering of the properties comprising the Charlestown Water System with the lien of Indiana-American's Mortgage Indenture.

Cause No. 44964, which was consolidated with Cause No. 44976, was brought by NOW, an organization formed by a group of Charlestown ratepayers opposed to the sale of the water utility. In that case, NOW filed a Complaint, which it subsequently amended, requesting a Commission investigation into the possible acquisition of Charlestown's water utility by Indiana American. NOW raised several concerns about the proposed transaction, including: (a) whether there were other, more cost-effective alternatives, (b) whether the City was attempting to convey property interests belonging to the Indiana Department of Natural Resources, and (c) the fact that the City appeared, according to a certain contract, to be intending to use the proceeds of the sale for questionable "economic development projects" including a redevelopment of a neighborhood known as "Pleasant Ridge." On this third issue, NOW noted in its complaint that the Pleasant

Ridge project had attracted both local and national media attention because of "accusations that the City of Charlestown is using strong-arm tactics to force low income residents to move and sell their real estate" to a certain preferred developer.

4. **Joint Petitioners' Direct Evidence.** Joint Petitioners presented direct testimony from G. Robert Hall, Mayor of Charlestown, Donna S. Coomer, Clerk-Treasurer of Charlestown, William A. Saegesser, president of Saegesser Engineering, Inc., Matthew Prine, Director of Community and Government Affairs for Indiana-American, Gary M. VerDouw, Director of Rates and Regulatory for Indiana-American, and Stacy S. Hoffman, Director of Engineering for Indiana-American.

A. Indiana Code § 8-1.5-2-6.1 and Distressed Utility. Mr. Prine testified regarding Section 6.1, the Indiana Code section which governs the relief sought in this Cause. He explained the legislative history and framework of Ind. Code § 8-1.5-2-6.1 and Ind. Code § 8-1-30.3. Specifically, prior to the passage of Section 6.1, Ind. Code ch. 8-1-30.3 ("Chapter 30.3") was established as a new chapter during the 2015 legislative session governing the process and standards to be applied in the sale of municipal utility property. Mr. Prine further explained that during the 2016 legislative session, Section 6.1 was passed as a new section in the Code and Chapter 30.3 was amended. Together these changes redefined the Commission's role in approving the sale or disposition of non-surplus municipal utility property.

Mr. Prine further testified that due to these legislative changes, the process for the sale of a municipally owned water or sewer utility has changed. He explained that a municipality must now obtain the approval of this Commission to sell its water or sewer utility, with this grant of approval determined under 6.1 – and also, in some circumstances, under Section 30.3-5, as applicable. However, as shown by Attachment MP-5 to his testimony, the prior process allowing for voter approval or rejection of a proposed sale remain intact for utility sales that do not qualify under Ind. Code § 8-1-30.3-5(c) and (d).

Mr. Prine explained that under the current process, the Mayor/Council President or Council of a city or town considering an acquisition must appoint three appraisers to appraise the system's value. These appraisers must return the appraisal within the time specified under Ind. Code § 8-1.5-2-4. Not more than 90 days after return of the appraisal, the municipality must hold a public hearing on the proposed acquisition. If the municipality decides to proceed with the sale, it must adopt an ordinance approving the proposed acquisition within 60 days. For an ordinance adopted pursuant to this process after March 28, 2016, Commission approval is required under Section 6.1. The standard for approval is whether the sale according to the proposed terms and conditions is in the public interest.

However, the acquiring may choose to file a petition with the Commission pursuant to Section 30.3-5(d). If the acquiring utility files such a petition and the Commission makes the required findings set forth in Section 30.3-5(d) and (c), then Section 6.1 directs that the proposed sale according to the proposed terms and conditions is approved.

In his direct testimony, Mr. Prine explained that this is the process Indiana-American elected to attempt in this case. He described how, in his view, the proposed acquisition of the Charlestown Water System followed this process set forth in Section 30.3-5(d) and (c). Mr. Prine testified that because the Charlestown Water System is considered a "distressed utility," the Joint Petitioners in this Cause have chosen to file a petition under Section 30.3-5. He outlined the various requirements of Section 30.3-5(c) and (d), which we will further describe as we undertake our required findings thereunder.

Mr. Prine testified that the proposed purchase price for the system is $13,403,711, as determined by the appraised value of the water utility assets ($13,244,711) and the appraised value of the real property included in the acquired assets ($205,000) for a total appraised value of $13,449,711. From that total, the wells and well pumps were excluded (a total of $46,000) to arrive at the total purchase price.

With respect to the requirements in Section 30.3-5(d), Mr. Prine argued that Indiana-American had provided the required notices – albeit after this case was filed. He further testified that Indiana-American witness Stacy Hoffman would explain Indiana-American's "plan for reasonable and prudent improvements" to the Charlestown Water System, as required by Ind. Code § 1-30.3-5(d).

Mr. Prine summarized how Section 6.1 interacts with Chapter 30.3. He explained that, in his opinion, if the purchase price of the proposed acquisition does not exceed the appraised value, and the elements of Sections 30.3-5(c) and 30.3-5(d) are met, Section 6.1 directs the issuance of a final order not later than 210 days after the filing of the case in chief authorizing the acquiring utility company to record: (1) the full purchase price; (2) incidental expenses; and (3) other costs of acquisition; as the net original cost of the utility plant in service assets being acquired, allocated in a reasonable manner among appropriate utility plant in service accounts.

B. <u>Proposed Acquisition and Asset Purchase Agreement</u>. G. Robert Hall, Mayor of the City of Charlestown, testified regarding the purpose for the proposed acquisition of Charlestown's Water System by Indiana-American. Mayor Hall provided an overview of Charlestown's water utility and its history of brown water issues. He testified that in 2000, it was not uncommon to have 2-3 water leaks and 15-20 brown water complaints per day, and noted that, as further explained in Ms. Donna Coomer's testimony, prior to 2000 no records or maps of the system existed, as such records had been either lost or destroyed by prior administrations. Mayor Hall explained that these brown water and other water quality issues have long plagued Charlestown's Water System and, while a remediation program has been put in place and improvements to the system have been made, a significant amount of work still needs to be accomplished in order to solve the City's brown water issues.

Mayor Hall testified that Charlestown estimates the next phase of improvements would cost at least $7.2 million, with those improvements more fully described in the testimony of Charlestown witness William Saegesser. He further testified Charlestown informally estimated that rates would increase to at least $46 per month for an average residential customer to allow the utility to recover its costs and make these initial necessary capital improvements to the system. Mayor Hall explained that Charlestown's inability to remediate these brown water issues is one of

the reasons Charlestown decided to sell its utility to Indiana-American, as Indiana-American has the expertise and access to capital to effectively address these issues.

In his direct testimony, Mayor Hall claimed that the City followed the statutory process necessary to sell its water assets and appointed three appraisers to appraise the water system. However, he noted that the appraisal was initially provided to Charlestown in November 2016, but that the City was not yet prepared to make a decision on sale within the tight timeframes of the statute. As a result, Charlestown continued its consideration of potentially selling its water utility and had the appraisers recertify their prior appraisal on April 1, 2017.

Mayor Hall sponsored a copy of the original appraisal as Attachment GRH-2 and a copy of the final appraisal recertification as Attachment GRH-3. Mayor Hall testified that the Common Council of the City of Charlestown ("City Council") set a public hearing on the appraisal for May 11, 2017 and provided notice of such hearing on April 11, 2017. Mayor Hall further testified that the City Council introduced the ordinance approving the proposed acquisition on July 3, 2017, and ultimately adopted the ordinance on July 6, 2017. The ordinance adopted by the City Council and the meeting minutes were included in the testimony of Charlestown witness Donna S. Coomer as Attachment DSC-8 and Attachment DSC-6, respectively. Mayor Hall testified that Charlestown intends to use the proceeds from the sale to pay off its outstanding debt in an approximate amount of $1,125,000, to set up a fund to provide credits on sewer utility bills to lessen the immediate rate impact of the acquisition on Charlestown's residents, and to establish a strategic reserve. The total cost of the sewer credit package is approximately $1,740,000.

Ms. Donna S. Coomer, Clerk-Treasurer of the City of Charlestown, testified regarding Charlestown's financial records related to its water utility. Ms. Coomer provided a financial history of Charlestown's water utility and explained that the water utility's capital improvements have historically been funded from non-utility funds. Ms. Coomer further stated that Charlestown issued water utility revenue bonds in 2006 as authorized by this Commission in Cause No. 42878. She testified that Charlestown spent the bond proceeds and made system improvements consistent with its testimony in Cause No. 42878. Ms. Coomer further testified that Charlestown has not disbursed or otherwise directed water utility funds in violation of Indiana law, including Ind. Code § 8-1.5-2-25. Ms. Coomer also testified regarding Charlestown's capital asset ledger and sponsored it as Attachment DSC-5.

Mayor Hall testified regarding Charlestown's negotiations with Indiana-American and the resulting Asset Purchase Agreement. Mayor Hall further testified regarding the agreement entered into between Charlestown and Indiana-American for the leasing of Charlestown's well field, as further described in Mr. Saegesser's testimony. He testified that the negotiations leading up to the Asset Purchase Agreement were conducted at arm's length.

Mr. Saegesser testified regarding Charlestown's rights to its well field and Indiana-American's intention to lease the wells from Charlestown. Mr. Saegesser testified that while Charlestown does not own all of the real estate used for its wells, it holds an "Easement for Right of Way Water Wells" granted by the United States Department of the Army in 1978. He further testified that he believes Charlestown could sell the property outright that it owns in fee, but could not sell the property subject to the Easement Right of Way for Water Wells. Instead, the City will have to obtain the approval of the property owner – identified elsewhere in the evidence as the

Indiana Department of Natural Resources. He noted that Charlestown has decided to lease its wells to Indiana-American as part of the proposed transaction, and will enter into a Well Field Lease Agreement prior to closing for this purpose.

The Asset Purchase Agreement was filed as Attachment MP-3.[1] Mr. Prine testified that Indiana-American proposes to acquire all of the property that is subject to the City's appraisal sponsored by Mayor Hall as Attachment GRH-2, apart from the well field and related equipment and assets, at a purchase price of $13,403,711. He testified that the purchase price was determined based upon the appraised value of the Charlestown Water System as determined by the statutorily appointed appraisers. Mr. Prine stated that consummation of the transaction is conditioned on obtaining certain approvals from the Commission, including with respect to recognition of the full purchase price plus transaction costs in net original cost rate base, and the application of Indiana-American's Area One rates to Charlestown customers.

C. Brown Water Issues and Indiana-American's Plan for Improvements.

Mr. Saegesser, president of Saegesser Engineering, Inc., testified on behalf of Charlestown regarding its long standing water quality issues and the measures Charlestown has taken to address these issues. Mr. Saegesser testified that Charlestown's brown water issues are caused by build-up over several decades of manganese and minerals in Charlestown's storage tanks and distribution system, which was not removed by regular flushing and cleaning.

Mr. Saegesser explained the measures Charlestown has taken to address its water quality issues, and he presented an engineering report outlining a possible series of improvements that could be implemented at a cost of $7.2 million. He testified that these improvements, if implemented, would primarily address Charlestown's water age issues. Mr. Saegesser further testified that the $7.2 million upgrade to Charlestown's existing water utility, if implemented, would place significant rate pressure on Charlestown and its ratepayers. For this reason, he believed the sale of assets to Indiana-American is in the best interests of Charlestown and its residents.

Mr. Stacy Hoffman, Director of Engineering at Indiana-American, testified regarding Indiana-American's "plan" for addressing Charlestown's water quality issues and for other reasonable and prudent improvements to the Charlestown water system. Mr. Hoffman described Charlestown's water quality issues, including brown water and water age. Mr. Hoffman testified there were several potential solutions Indiana-American could implement to address these issues, but that Indiana-American would wait until actually acquiring the utility before engaging in the testing and evaluation necessary to develop a specific plan for improvements.

[1] During the evidentiary hearing, Mr. Prine observed that the version attached to his testimony was not fully executed. The fully executed Asset Purchase Agreement was then admitted into evidence as Joint Petitioners' Ex. 11.

D. Accounting and Ratemaking Treatment.

Mr. VerDouw testified that the accounting and ratemaking treatment reflected in the proposed journal entry conforms with the treatment to be granted under Section 30.3-5(c), where all of the factors set forth in that section are met. Mr. VerDouw noted that Mr. Prine described in his direct testimony how the acquisition of the Charlestown Water System satisfies each of the statutory elements except two—amortization of the cost differential and impact on Indiana-American's rates—which Mr. VerDouw addressed in his testimony. Mr. VerDouw testified that pursuant to Section 30.3-5(e), if this Commission makes the required findings, the resulting Order is to authorize Indiana-American "to make accounting entries recording the acquisition that reflect: (1) the full purchase price; (2) incidental expenses; and (3) other costs of acquisition; as the original cost of the utility plant in service assets being acquired, allocated in a reasonable manner among appropriate utility plant in service accounts." *Id*. Mr. VerDouw testified that as a result, Indiana-American is proposing to record the net original cost of the Charlestown Water System in the manner reflected in the proposed journal entry shown on Attachment GMV-1.

Mr. VerDouw echoed Mr. Prine and Mayor Hall's testimony and stated that the proposed purchase price is reasonable and the result of an arm's length negotiation between Indiana-American and Charlestown. He stated his opinion that under Section 6.1(d), the purchase price is deemed conclusively reasonable to the extent it does not exceed the appraised value, and in this case it does not. Mr. VerDouw further testified that the depreciation accrual rates to be applied to the Charlestown Water System assets would be the rates approved by the Commission in Cause No. 43081 on November 21, 2006, as included in the calculation of rates with the approval of Indiana-American's rate case in Cause No. 43187 on October 10, 2007.

Mr. VerDouw testified that Indiana-American has access to all of the necessary funds to support the acquisition, with those funds coming initially from internally generated funds. He stated that the projected investment to acquire the Charlestown Water System is equal to approximately 1.5% of Indiana-American's total capital structure as of June 2017, and, thus, Indiana-American does not believe the acquisition would impair its ability to raise necessary capital on reasonable terms while maintaining a reasonable capital structure. Mr. VerDouw also described the encumbrance that would be placed on the Charlestown Water System assets as a result of the acquisition under Indiana-American's General Mortgage, which secures most of Indiana-American's utility property for the benefit of Indiana-American's bond holders.

Mr. VerDouw further testified regarding Indiana-American's intention to apply Indiana-American's Area One tariff rates for water service and private and public fire service on file from time to time to the customers of the Charlestown Water System. Support offered by Joint Petitioners for application of the Area One rates includes the fact that Charlestown is in close proximity to Indiana-American's Southern Indiana Operations. Mr. VerDouw testified that the monthly bill for a residential customer using 5,000 gallons would increase from $18.03 to $44.17 for customers with fire protection, based on the current tariff in effect for both utilities; however, Mr. VerDouw reiterated that Charlestown is and has been unable to undertake the necessary improvements to its system in order to furnish and maintain adequate service to its customers. Mr. VerDouw further testified that given the small size of the Charlestown system, the rates charged by Indiana-American are not expected to increase unreasonably as a result of acquiring the Charlestown System.

5. **OUCC's Evidence**. Ms. Margaret Stull, Senior Utility Analyst with the OUCC, testified regarding Indiana-American's proposed accounting transaction. Ms. Stull expressed concern that Indiana-American proposed to record Charlestown's assets at their gross value (replacement cost), less accumulated depreciation (percent depreciated). Ms. Stull sponsored her own journal entry as Attachment MAS-1 which records gross utility plant in service equal to the purchase price plus transaction costs and no accumulated depreciation. Ms. Stull testified that if the sale is approved, she recommended that Indiana-American be required to record the transaction in a manner consistent with the OUCC's proposed journal entry.

Mr. Carl N. Seals, Utility Analyst with the OUCC, testified regarding Indiana-American's plan for reasonable and prudent improvements. Mr. Seals testified that Indiana-American has not provided an actual "plan for reasonably and prudent investments" as required by Section 30.3-5(d). He testified that Indiana-American's "plan" was simply a menu of possible solutions, without any actual proposed solutions. Rather, Indiana-American indicated it would not begin evaluating Charlestown's water quality issues until after Indiana-American actually acquires the utility.

As such, the "plans" identified in Mr. Hoffman's testimony are not sufficiently developed so as to constitute a "plan for . . . improvements" required by Section 30.3-5(d)(4). He further testified that the "plan" lacked any details, such as specifically identified projects, a rough a timeline for when those projects might be commenced, any estimation of project costs and any explanation of how the proposed projects would address the System's problems.

Mr. Seals also testified regarding the appraisal in this Cause. He took exception with the valuation of the meters in the appraisal, and stated that the meters are likely at the end of their useful life.

Mr. James T. Parks, Utility Analyst II with the OUCC, testified regarding the appraisal in this Cause. Mr. Parks presented many criticisms of the appraisers' appraisal, including that the vintage of much of the City's assets were understated by several decades. Using simple online research, he found the accurate installation dates for major portions of the City's facilities. This was significant because the appraisal was based entirely on the age of the facilities – which were often significantly understated – without regard to the quality of the facilties.

He further criticized the appraised value of the fire hydrants and mains, stating that both the present value and age of fire hydrants used in the appraisal is inaccurate or at best unreliable. Mr. Parks testified that the methodology used to value the Charlestown System's assets included flaws that affected the values across most categories of plant. He stated that of particular concern is the Valuation Report which did not incorporate into its conclusions the poor condition of certain assets making up the Charlestown Water System. Mr. Parks further testified that the values presented in the Valuation Report in Tables 1 and 2 were the results of flawed assumptions, including unsupported cost estimates that he said cast doubt on both the Replacement cost and the "Present Values" on which the utility purchase is based.

Mr. Edward Kaufman, Assistant Director of the Water-Wastewater Division with the OUCC, also testified regarding the appraisal in this Cause. Mr. Kaufman testified that the appraisal contained not only factual and arithmetic errors, but fundamental methodological errors, as well.. Mr. Kaufman further testified that the appraisal is stale and that the valuation methodology combines elements of a reproduction costs study and a replacement costs study, and thus, significantly overstates the value. By way of example, the appraisal used data from 2015 with failed to capture two full years of depreciation, an error of $620,000. Finally, Mr. Kaufman testified that the appraisal in this Cause is much shorter and less detailed than other appraisals he has reviewed.

Mr. Kaufman also testified regarding Indiana-American's compliance with the notice requirement in Section 30.3-5(d)(2). Mr. Kaufman testified that he performed his own calculation to determine whether Indiana-American's revenue requirement would increase by more than 1%, and his calculation showed that Indiana-American's proposed acquisition would exceed the 1% threshold; therefore, notice to Indiana-American's customers was required prior to filing this Cause. He testified that Indiana-American did not give notice to its customers before petitioning the Commission for approval of the acquisition. He further criticized the notice Indiana-American eventually provided to customers, after-the-fact, because it failed to explain that the proposed Charlestown acquisition will cause rates to increase or the anticipated scope of the increase, which are necessary elements of the notice to existing customers. Mr. Kaufman testified that for these reasons, Indiana-American has not satisfied the notice requirement under IC 8-1-30.3-5(d)(2).

6. NOW's Direct Evidence. Mr. Robert L. Isgrigg, P.E., provided testimony on behalf of Intervenor NOW. Mr. Isgrigg testified regarding the proposed sale of the Charlestown water utility from an engineering perspective. Mr. Isgrigg expressed concerns regarding the ownership of the City's well field. He stated that the well field deed specifically requires Indiana Department of Natural Resources ("IDNR") approval prior to transferring easements to other parties, and this requirement presumably applies to Indiana America.

Mr. Isgrigg also expressed concerns regarding whether the terms of the sale would be equitable to Charlestown's customers, stating that the sale would increase water bills for Charlestown's customers 150% with no immediate improvement in water quality. He testified that the proposed sale "does not advance the goal" of improving Charlestown's water quality. Mr. Isgrigg disagreed with Charlestown witness Mr. Saegesser's contention that a $7.2 million investment is needed to mitigate Charlestown's water quality problems. He testified that there are at least four viable, cheaper alternatives that could be used together or separately to improve Charlestown's water quality problems. These alternatives include simple basic changes to its operations and maintenance procedures, as well as pumping or buying water from a different source, including the IDNR.

Mr. Isgrigg testified that any of these alternatives would be cheaper and more effective. However, because DNR was offering to provide Charlestown with fully-treated water beginning immediately, this would be the fastest solution.

Based on his personal experience as former City Engineer for the City of Charlestown, Mr. Isgrigg testified that Mr. Saegesser's $7.2 million plan does not constitute "reasonable and prudent improvements" if the goal is "to ensure that [Charlestown] customers…will receive adequate, efficient, safe and reasonable service." He further testified that generating $13.4 million to fund private development projects seems like an insufficient reason for the sale, as selling the City's water utility and raising customers rates for this purpose is not "equitable to the existing utility customers" of Charlestown.

Mr. Michael Williams, CPA, also testified on behalf of NOW regarding whether the City observed the accounting guidelines established by the State Board of Accounts ("SBOA") and Indiana law. Mr. Williams testified regarding numerous, "serious" audit exceptions found during the 2008-2009 audit performed by the State Board of Accounts which, in his view, "indicat[ed] a serious disregard of SBOA accounting guidelines and Indiana laws." Mr. Williams further noted that the City of Charlestown has not been audited since 2011, making it impossible to tell whether these violations have continued. However, he testified that the SBOA was currently in the process of conducting a thorough audit from 2011 to the present. However, that audit will most likely not be completed prior to the conclusion of this case.

In addition to this testimony, NOW offered the transcript, exhibits and findings of fact from a trial court preliminary injunction hearing concerning Charlestown's code enforcement in a neighborhood undergoing redevelopment in Charlestown. The evidence contained in these exhibits was offered for the purpose of informing this Commission's evaluation of whether the proposed sale is in the "public interest."

Specifically, according to a Redevelopment Agreement submitted as part of NOW's Exhibit 3, a portion of the redevelopment plan for a neighborhood known as Pleasant Ridge was linked to the sale of the City's water utility. That Redevelopment Agreement explicitly conditioned the agreement on the creation of an "economic development fund" containing the proceeds of the sale of the water utility. Whether the City ultimately waived this condition precedent or not, the City clearly contemplated using the proceeds of this sale for the Pleasant Ridge redevelopment project.

As NOW explained in its Response to Objection to Admissibility of this evidence, NOW argued that the City's conduct in the Pleasant Ridge – using municipal fines as a cudgel to force low income residents out of their homes so that the properties could be acquired by a private developer, John Neace – was a criminal violation of federal law. These issues are discussed in more detail below.

7. <u>Joint Petitioners' Rebuttal Testimony</u>.

A. <u>Accounting Transaction</u>. Mr. VerDouw provided rebuttal testimony addressing specific issues raised in Ms. Stull's testimony. Mr. VerDouw asserted that the accounting entry proposed by Indiana-American in this Cause did not deviate from the approach it used in *Indiana American Water & Town of Georgetown,* Cause No. 44915 (IURC 10/11/2017) ("*Georgetown*"), but he agreed that Ms. Stull's journal entry is consistent with that statute and is reasonable.

Therefore, Mr. VerDouw testified that Indiana-American accepts the OUCC's proposed accounting transaction, and he sponsored a revised proposed journal entry as Attachment GMV-R1. Mr. VerDouw noted that this difference in accounting treatment does not make a difference for net original cost rate base purposes and Indiana-American will record $13,583,711 as net original cost rate base.

B. Plan for Reasonable Improvements. Mr. Hoffman responded to Mr. Seals' criticisms of Indiana-American's plan for improvements. Mr. Hoffman argued that the statute's requirement that Indiana-American present a "plan for reasonable and prudent improvements," did not require Indiana-American to specify any actual improvements it would implement.

Despite arguing that it would be too expensive and cumbersome to present a list of proposed capital investments with estimated costs, when this Commission asked Mr. Hoffman to do just that, Mr. Hoffman was able to produce just such a list within three (3) days. Mr. Hoffman's list of potential capital investments along with their estimated costs, as requested by this Commission, was admitted into evidence as Joint Petitioners' Ex. No. 8, Response to Request 7.

C. Appraisal Criticisms. Mr. Stacy Hoffman responded to Mr. Parks' criticisms of the appraisal. Although arguing the Commission could not change the appraisal amount, Mr. Hoffman nonetheless faulted Mr. Parks for not recommending an alternative appraisal value.

Mr. Hoffman further criticized Mr. Parks' overall approach by noting that there is no single "right answer" regarding the value of an asset. However, on cross examination Mr. Hoffman agreed that there can be "wrong" answers.

Mr. Hoffman stated that Mr. Parks improperly relied on this Commission's language in the *Georgetown* Order that an appraisal must be conducted "appropriately." Mr. Hoffman testified that he does not believe Mr. Parks' approach to criticizing the appraisal is what the Commission had in mind when it indicated that it is appropriate to consider whether the appraisal was "conducted appropriately." He explained that when the Commission opened up the proceedings to evidence as to whether the appraisal was conducted appropriately, he believed the Commission was referring to whether the statutory requirements of appointing three disinterested, qualified appraisers to conduct an appraisal have been met.

In short, Mr. Hoffman testified that, in his view, the sole criterion for whether an appraisal was conducted "appropriately" was whether it was performed by three qualified appraisers. For these reasons, Mr. Hoffman testified that Mr. Parks' testimony criticizing the appraisal is ultimately irrelevant to the Commission's determination of the reasonableness of the purchase price in this Cause. He recommended that the independent qualified appraisers' valuation be recognized as complying with the statute.

Similarly, Mr. VerDouw testified in his rebuttal that this Commission lacks the authority to change the sale price of the utility due to errors in the appraised value. He reiterated that the appraisal satisfies the requirements of Ind. Code § 8-1.5-2-5, as it was conducted by three professionals possessing all of the qualifications required by statute. Therefore, Mr. VerDouw suggested this Commission need not inquire further as to any errors.

D. Notice Criticisms. Mr. VerDouw also responded to Mr. Kaufman's assertion that Indiana-American has not satisfied the notice requirement under Section 30.3-5(d)(2). Mr. VerDouw argued that the "notice" required in the statute does not specify written notice to customers, nor does it require any particular information be included in the notice. He testified that although Indiana-American has provided a calculation that shows its existing customers will not see an increase in rates by an amount that is greater than 1% of the utility company's base annual revenue, Indiana-American took its cue from the Commission's Order in *Georgetown* and informed all of its customers via a bill insert and bill message – albeit well after this case was filed.

E. Rebuttal of NOW Position. Mr. Prine responded to the issues raised by NOW. Mr. Prine responded to Mr. Isgrigg's concern that IDNR approval may be needed to transfer easements. Mr. Prine did not disagree, but he stated that this Commission should not consider that a significant concern because Indiana-American intended to address this as part of its "due diligence" process prior to closing. However, he did not specify how Indiana-American would address this issue.

Mr. Saegesser responded to Mr. Isgrigg's testimony. Mr. Saegesser challenged Mr. Isgrigg's lack of specificity in his testimony. Further, Mr. Saegesser suggested that because Mr. Isgrigg had not been the City Engineer for the City of Charlestown since approximately 1980, his knowledge of the system was outdated. Like Mr. Prine, Mr. Saegesser indicated the real estate approval issue raised by Mr. Isgrigg is a non-issue for purposes of this proceeding, as the parties will address any consent requirements prior to closing the transaction.

Mr. Hoffman also responded to Mr. Isgrigg's testimony regarding Charlestown's water quality. Mr. Hoffman stated that some of Mr. Isgrigg's statements regarding water quality are perplexing, while other statements made by him are simply wrong. However, this testimony was submitted before Mr. Isgrigg corrected an obvious misstatement in one portion of his testimony. Mr. Hoffman noted that the approach suggested by Mr. Isgrigg in his testimony, that of focusing on hardness, would not alleviate Charlestown's decades-old brown water problems. He further disputed that the manganese sediment that had accumulated in Charlestown's system over several decades – due to a lack of system-wide flushing – could be remedied by renewed system-wide flushing.

5. Evidence from Cross Examination of Witnesses

Eight witnesses were called for cross examination. However, examination of several witnesses was brief. Below is a summary of the evidence elicited on cross examination that we find relevant to our conclusions in this Order:

A. Matthew Prine

On cross examination by NOW's counsel, Mr. Prine was directed to the first page of Attachment MP-5 to his testimony. He explained this was a "flow chart" prepared by Indiana-American's attorneys showing how a municipality must proceed in order to obtain approval of the proposed sale of its utility facilities.

According to Mr. Prine's cross examination testimony, the process begins with the appointment of three (3) appraisers under Ind. Code § 8-1.5-2-4. Mr. Prine stated he was aware that NOW had filed a Motion for Summary Judgment alleging the City had not complied with this first step. He further acknowledged that he was aware that the City had allowed the appraisal to "lapse" – i.e., the City had not conducted its first public hearing within 90 days after the appraisal was returned. He was aware that the City had instead "recertified" the appraisal in an attempt to re-start the statutory clock. When asked, he testified he did not know if this "recertification" of an expired appraisal satisfied the statute's requirements.

B. Gary VerDouw

In his rebuttal testimony, Mr. Gary VerDouw had responded to the OUCC's criticisms regarding the appraisers' appraisal in this Cause. Mr. VerDouw noted that despite all of the concerns raised in the OUCC's testimony, the OUCC made no final recommendation to change the appraised value. Mr. VerDouw quantified the impact of the OUCC's collective criticisms and testified that the total effect would have reduced the appraised value by $1,966,500. However, on cross examination by Counsel for the OUCC, Mr. VerDouw acknowledged that OUCC's witness Kaufman had also quantified an additional $620,000 overstatement to the value of the utility's assets by failing to capture two (2) years of depreciation – yielding a total overstatement of the value of the City's facilities of roughly $2.6 million.

C. Stacy Hoffman

On cross examination, Mr. Hoffman was asked about the statutory requirement that Indiana-American present this Commission with "a plan for reasonable and prudent improvements[.]" Ind. Code § 8-1-30.3-5(d). He denied that this required "plan for . . . improvements" must specify any actual plan for improvements to Charlestown's water system.

Indeed, he acknowledged repeatedly on cross examination that Indiana-American's "plan" does not identify any specific "solutions" to Charlestown's water quality issues. Rather, he described Indiana-American's "plan" as a plan to **study** the issues for the purpose of identifying specific "improvements" at some later date.

Mr. Hoffman further testified regarding the $13.4 million appraisal that was the basis for the purchase price for the Charlestown water utility. He suggested that this Commission cannot reject the appraisal due to errors in the methodology or accuracy. Rather, he testified that any appraisal signed by three qualified appraisals was determinative – i.e., that the accuracy of the appraisal itself was beyond this Commission's authority to question.

However, when presented with an extreme hypothetical in which three qualified appraisers simply arrived at an appraised value of $1 billion with no justification, he acknowledged that such an appraisal would not be valid. The clear implication from this admission is that this Commission **does** have authority to inquire into the accuracy and quality of the appraisal and reject it if it appears improper.

Moreover, Mr. Hoffman was cross examined regarding the OUCC's Cross Exhibit 12, which was a data request response from Indiana-American to the OUCC's Data Request 14.3. In its response, Indiana-American admitted that "Indiana American did not perform a study or

analysis of the accuracy or quality of the appraisal, and therefore did not criticize the appraisal valuations."

On cross examination by counsel for NOW, Mr. Hoffman acknowledged that as of the date of the hearing, no one from Indiana-American had yet done any analysis of the "accuracy or quality" of the appraisal. As such, none of Joint Petitioner's witnesses were competent to testify that the appraisal was, in fact, "accurate" or of sufficient "quality."

In contrast, he acknowledged that the OUCC had presented the testimony of three (3) expert witnesses – Mr. Kaufman, Mr. Parks, and Mr. Seals – who had each found technical, arithmetic, and methodological errors in the appraisal. In short, using Mr. Hoffman's own words, three (3) OUCC witnesses had testified that the appraisal was "wrong" while zero (0) witness in this case had testified that the appraisal was "accurate."

6. Commission Discussion and Findings.

A. Statutory Framework: Ind. Code § 8-1.5-2-5; Ind. Code § 8-1.5-2-6.1; and Ind. Code § 8-1-30.3-5.

Prior to the enactment of Ind. Code § 8-1.5-2-6.1 and Ind. Code § 8-1-30.3-5 by P.L.98-2016 in 2016, the legal process for a public utility to acquire the non-surplus property of a municipal utility was set forth in Ind. Code §§ 8-1.5-2-4 and 5. The new provisions enacted in P.L.98-2016 did not repeal the process outlined in Ind. Code § 8-1.5-2-5; they simply built upon the existing legal framework, adding an additional process for review by this Commission that may, in some circumstances, supersede the existing "public question" process contained in Ind. Code § 8-1.5-2-5(g-k).

The current statutory procedure was depicted visually as a "flow chart" on the first page of Attachment MP-5 attached to the testimony of Matthew Prine submitted by Indiana-American. According to Mr. Prine on cross examination, this document was prepared by legal counsel for Indiana-American to show the procedure a municipal utility must follow in order to sell its utility assets to a public utility. While this chart is imperfect, we find it a useful tool for understanding the process. For that reason, we are attaching a copy of page 1 of Indiana American's exhibit MP-5 to this Order as a guide.

Under this statutory framework, for the proposed sale of a municipal water utility such as Charlestown's, the process still begins with the appointment of three appraisers under Ind. Code § 8-1.5-2-4. This statute states:

> Whenever the municipal legislative body or the municipal executive determines to sell or otherwise dispose of nonsurplus municipally owned utility property, it shall provide for the following in a written document that shall be made available for inspection and copying at the offices of the municipality's municipally owned utility in accordance with IC 5-14-3.

(1) The appointment, as follows, of three (3) residents of Indiana to serve as appraisers:

* * *

(2) The appraisal of the property.

(3) The time that the appraisal is due.

Ind. Code § 8-1.5-2-4.

In other words, the City was required to maintain a single, publicly-available document containing three pieces of information: (1) the names of the appraisers, (2) the identity of the property to be appraised, and (3) a deadline for the return of the appraisal. As explained by Indiana American's witness Prine and shown on the attached chart, this document is the triggering event that starts the clock on a strict set of deadlines for the municipality to conduct public hearings under Ind. Code § 8-1.5-2-5.

Specifically, Ind. Code § 8-1.5-2-5 states, "The appraisers **shall** . . . return their appraisal, in writing, to the . . . municipal executive . . . that appointed them **within the time fixed in the written document appointing them under section 4 of this chapter**." As discussed in more detail below, that was not done in this case.

Once the appraisal is timely returned to the municipality, the City then has a sixty (60) day window to hold its first public hearing on the proposed sale – i.e., "not earlier than the thirty (30) day period described in subsection (e) and not later than ninety (90) days after the return of the appraisal[.]" Ind. Code § 8-1.5-2-5(d). The City then must wait at least thirty (30) days, but not more than sixty (60) days, to approve the sale. *Id*.

Once the sale is approved by ordinance, any residents opposed to the sale have thirty (30) days to "sign and present a petition to the legislative body opposing the sale or disposition[.]" Ind. Code § 8-1.5-2-5(g). Under the original procedure set forth Ind. Code § 8-1.5-2-5, a petition containing the requisite number of signatures of registered voters would trigger the need for an election on a "public question."[2] In other words, the voters of the municipality would vote on whether to approve the sale, and that vote would be determinative.

However, it is at this point in the sale approval process that Ind. Code § 8-1.5-2-6.1 and Ind. Code § 8-1-30.3-5 **may, in some instances,** supersede any vote in opposition to the sale by

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[2] Under Ind. Code § 8-1.5-2-5(h)(3), voters opposed to a municipal utility sale in a municipality with 5,000 to 25,000 registered voters must collect signatures equaling or exceeding 10% of the registered voters in the municipality. According to Mayor Hall's cross examination testimony, the City of Charlestown has approximately 8,500 residents. While not in evidence, the number of registered voters in Charlestown is presumably less.

NOW attempted to late file an exhibit, NOW!, Inc.'s Exhibit 7, which was a petition purportedly served on the City of Charlestown within thirty (30) days of the ordinance approving the sale and appearing to contain more than 1,000 signatures. While this purported document would appear to satisfy the requirements of Ind. Code § 8-1.5-2-5(h), it was not admitted into evidence. Moreover, such a determination would be beyond the scope of this Commission's jurisdiction.

a majority of the City's voters as set forth in Ind. Code § 8-1.5-2-5. Specifically, Ind. Code § 8-1.5-2-6.1 says that the Commission must conduct a hearing on the proposed sale and "shall determine whether the factors set forth in IC 8-1-30.3-5(c) are satisfied[.]" If the requirements of Ind. Code 8-1-30.3-5(c) are satisfied, then the sale is approved – regardless of any vote in opposition by the voters of the municipality. If the requirements of Ind. Code 8-1-30.3-5(c) **are not** satisfied, then the Commission **may** still approve the sale under Section 6.1, but that approval would be potentially **subject to a vote by the voters of the municipality**.

In short, if voters timely presented to the City a valid petition in opposition to this sale, there are three possible outcomes for this case before this Commission:

(1) If this Commission finds that the requirements of Ind. Code § 8-1-30.3-5(c) have been met, then the sale is approved. The voters of the City of Charlestown are not entitled to vote on the proposed sale as a public question.

(2) If this Commission finds that Joint Petitioners have failed to satisfy Ind. Code § 8-1-30.3-5(c), the Commission may, nonetheless, approve the sale as being in the "public interest" under Ind. Code § 8-1.5-2-6.1. However, this approval would be **subject to** ratification or rejection by a majority vote of the citizens of Charlestown under Ind. Code § 8-1.5-2-5. In other words, it would be up to the voters to decide whether the sale will be approved.

(3) If the Commission rejects the sale under **both** Ind. Code § 8-1-30.3-5 **and** Ind. Code § 8-1.5-2-6.1, then the sale may not go forward at all.

In addition, it is important to note that a public utility may seek approval of its transaction under Ind. Code § 8-1-30.3-5(c) **either before or after it acquires the utility property**. In this case, Indiana American chose to file this case for approval under Ind. Code § 8-1-30.3-5(c) **before** approval of the sale – either by voters or by this Commission. As a result of this choice, Indiana American must **also** satisfy the requirements of Ind. Code § 8-1-30.3-5(d).

Specifically, Ind. Code § 8-1-30.3-5(d) states:

A utility company **may** petition the commission in an independent proceeding to approve a petition under subsection (c) **before** the utility company acquires the utility property **if the utility company provides**:

(1) notice of the proposed acquisition and any changes in rates or charges to customers of the distressed utility;

(2) notice to customers of the utility company if the proposed acquisition will increase the utility company's rates by an amount that is greater than one percent (1%) of the utility company's base annual revenue;

(3) notice to the office of the utility consumer counselor; and

(4) a plan for reasonable and prudent improvements to provide adequate, efficient, safe, and reasonable service to customers of the distressed utility.

Ind. Code § 8-1-30.3-5(d) (emphasis added).

In other words, before we even determine whether the requirements of Ind. Code § 8-1-30.3-5(c) have been satisfied – potentially removing the decision from the hands of Charlestown voters – we must first find that Indiana American has provided the proper notices to customers and the OUCC, and that Indiana American has presented "a plan for reasonable and prudent improvements" to Charlestown's water utility, as required by Ind. Code § 8-1-30.3-5(d).

B. Ind. Code § 8-1-30.3-5(d).

As discussed above, Joint Petitioners could have waited until a vote by the voters of the City of Charlestown before coming to this Commission for approval of this sale under Ind. Code § 8-1.5-2-6.1 and Ind. Code § 8-1-30.3-5(c). They did not. So, by virtue of that choice, Indiana American has the additional burden of proving the requirements of Ind. Code § 8-1-30.3-5(d). We find that it has not.

As noted above, Ind. Code § 8-1-30.3-5(d) imposes the following requirements on a public utility seeking pre-approval of its transaction:

> A utility company **may** petition the commission in an independent proceeding to approve a petition under subsection (c) **before** the utility company acquires the utility property **if the utility company provides**:
>
> (1) notice of the proposed acquisition and any changes in rates or charges to customers of the distressed utility;
>
> (2) notice to customers of the utility company if the proposed acquisition will increase the utility company's rates by an amount that is greater than one percent (1%) of the utility company's base annual revenue;
>
> (3) notice to the office of the utility consumer counselor; and
>
> (4) **a plan for reasonable and prudent improvements to provide adequate, efficient, safe, and reasonable service to customers of the distressed utility.**

Ind. Code § 8-1-30.3-5(d) (emphasis added).

In testimony below, witnesses for the OUCC argued that the notices required to Charlestown's customers and the OUCC were not timely. Indeed, the only "notice" the OUCC received was the Joint Petition filed in this case, which the OUCC received contemporaneously with its filing. This strains the interpretation of "notice," but we do not find it dispositive.

In addition, according to calculations by OUCC's witness Kaufman, notice was required to Indiana American's customers under subsection (2) of this statute, as well. Eventually, Indiana American did provide this notice, but not within a time for customers to meaningfully participate in this case.

For that reason alone, we could reject the Joint Petition. However, we need not do so because we find the Joint Petitioners case in chief to be defective in more substantive ways.

Specifically, nowhere in Indiana American's testimony can we find anything that can be considered "a plan for reasonable and prudent improvements to provide adequate, efficient, safe, and reasonable service to customers of" Charlestown Water. Ind. Code § 8-1-30.3-5(d)(4). Giving the words of the statute their ordinary meaning, as understood in common usage, Indiana American has not articulated a "plan for . . . improvements[.]"

In his direct testimony and again in his rebuttal, Indiana American's witness Hoffman articulated nothing more than a **plan to make a plan**. Both in written testimony and in cross examination, Mr. Hoffman stated that Indiana American's "plan" was simply to "study" and "evaluate" the issues so that Indiana American **can then** develop proposed solutions – but only **after** acquiring the utility. On cross examination Mr. Hoffman was unable to identify a single "improvement" that Indiana American actually planned to implement. Indeed, he repeatedly testified his testimony did not propose any actual "solutions" to Charlestown's water quality problems.

We find this is insufficient. This Commission understands the pitfalls that would face Indiana American were it to irrevocably commit to a detailed list of improvement projects. Fortunately, the statute requires nothing of the sort. Again, using the words in their ordinary usage, Indiana American was simply required to articulate **"a plan"** for actual "reasonable and prudent improvements" to the utility. Nothing in the statute states this plan may not change based on the exigencies of the situation going forward, nor does the statute require final, detailed engineering of those solutions.

Rather, the statute only required Indiana American to present to this Commission with the improvements it **intends** to implement, along with evidence showing such improvements would be "reasonable and prudent." Implied in the word "prudent" is some estimate of the costs of such improvements. While we find such cost estimates need to be as detailed as might be required for approval of distribution system improvement projects under Ind. Code § 8-1-31-5, Indiana American nonetheless had the burden of presenting **some** evidence it had at least conducted preliminary evaluations of both the efficacy and cost effectiveness of its proposed plan of improvements.

Indeed, presenting an actual "plan" for "reasonable and prudent improvements" seems to be a very low bar. Somehow, Indiana American still failed to meet it. For this reason, we find that Joint Petitioners' failed to satisfy the requirements of Ind. Code § 8-1-30.3-5(d). As such, Indiana American's request for pre-approval of is accounting and rate base treatment is denied.

Despite our rejection of the Joint Petition under Ind. Code § 8-1-30.3-5(d), the sale could still go forward solely under Ind. Code § 8-1.5-2-6.1 **if** we were to find that the acquisition is in the "public interest." As noted above, however, any approval of this sale under Section 6.1 alone would be subject to possible rejection or approval of the sale by a majority of voters of the City of Charlestown.

C. Ind. Code § 8-1-30.3-5(c).

As noted above, because this case was filed **before** a vote on the sale by the citizens of Charlestown, Joint Petitioners were required to satisfy the requirements of Ind. Code § 8-1-30.3-5(d). We have found that Joint Petitioners failed to satisfy those requirements. We could end our inquiry there and simply wait until such a vote is held – or until the petition in opposition to the sale is rejected by the Clark County Clerk – before evaluating the sale under Ind. Code § 8-1.5-2-6.1.

Specifically, Ind. Code § 8-1.5-2-6.1(e) states:

> (1) If:
>
> (A) the municipality's municipally owned utility petitions the commission under IC 8-1-30.3-5(d); and
>
> (B) the commission approves the municipality's municipally owned utility's petition under IC 8-1-30.3-5(c);
>
> the proposed sale or disposition is considered to be in the public interest.

Id.

Again, because we find Indiana American failed to present the requisite information required under Ind. Code § 8-1-30.3-5(d), we need not go further to evaluate the Joint Petition under Ind. Code § 8-1-30.3-5(c).

However, if the voters of Charlestown reject the sale, then Joint Petitioners could theoretically return to this Commission and attempt to set aside that vote by proving these eight (8) elements set forth in Ind. Code § 8-1-30.3-5(c). See, Ind. Code § 8-1-30.3-5(h). Moreover, even if the voters of Charlestown approve the sale (or if no vote occurs at all because the Petition signed by voters in opposition to the sale is somehow found to be invalid) then Joint Petitioners will still be required to come to this Commission and request approval of the sale under Ind. Code § 8-1.5-2-6.1.

So, in the interest of providing guidance for any future filing under Ind. Code § 8-1-30.3-5(c), we will proceed to consider these issues now. For the reasons set forth below, we conclude that Indiana American has not satisfied the eight (8) elements found in Ind. Code § 8-1-30.3-5(c) either.

Specifically, if we were, at this stage, reviewing the sale under Ind. Code § 8-1-30.3-5(c), we would be required to determine whether the Joint Petitioners had proven the following:

> (1) The utility property is used and useful in providing water service, wastewater service, or both water and wastewater service.
>
> (2) The distressed utility failed to furnish or maintain adequate, efficient, safe, and reasonable service and facilities.

(3) The utility company will make reasonable and prudent improvements to ensure that customers of the distressed utility will receive adequate, efficient, safe, and reasonable service.

(4) The acquisition of the utility property is the result of a mutual agreement made at arms length.

(5) The actual purchase price of the utility property is reasonable.

(6) The utility company and the distressed utility are not affiliated and share no ownership interests.

(7) The rates charged by the utility company before acquiring the utility property of the distressed utility will not increase unreasonably as a result of acquiring the utility property.

(8) The cost differential will be added to the utility company's rate base to be amortized as an addition to expense over a reasonable time with corresponding reductions in the rate base.

Ind. Code § 8-1-30.3-5(c).

It should be noted that this particular statute does not authorize us to make modifications to the proposed sale if we find one of these elements is not satisfied. Rather, we are evaluating the sale that has been proposed as it stands; we may either approve it or reject it, depending on whether these elements are satisfied.

In the present case, we find that the proposed sale, based on the evidence presented, fails to satisfy the following requirements:

(1) The utility property is used and useful in providing water service, wastewater service, or both water and wastewater service.

* * *

(3) The utility company will make reasonable and prudent improvements to ensure that customers of the distressed utility will receive adequate, efficient, safe, and reasonable service.

* * *

(5) The actual purchase price of the utility property is reasonable.

First, we find that much of the utility property included in the sale – and included in the sale **price** – has not been shown by a preponderance of the evidence to be "used and useful." By way of example is the inclusion of the meters Indiana American has agreed to purchase from the City of Charlestown. As shown in the direct testimony of Indiana American's engineering witness Hoffman – and confirmed on cross examination – upon acquisition of the utility assets,

Indiana American intends to immediately replace all of the City's meters. Ironically, despite Indiana American's lack of a "plan for . . . improvements" discussed above, this is the one, concrete change Indiana American **has** committed to implement.

Given that Indiana American has agreed to purchase meters that the Company admits will not be used, we cannot find these meters are "used and useful." Although the meters themselves only account for less than $200,000 of the total purchase price, we again note that we are not authorized to make modifications to the proposed sale. At this stage, our role is simply to determine whether it satisfies the statutory requirements. On this point, it does not.

Moreover, we find that there is a significant question about whether many other facilities included in the proposed sale are "used and useful." As the Indiana Court of Appeals has stated, "The Commission's 'used and useful' standard requires: (1) that the utility plant be actually devoted to providing utility service, and (2) that the plant's utilization be reasonably necessary to the provision of utility service." *Indiana-Am. Water Co. v. Indiana Office of Util. Consumer Counselor*, 844 N.E.2d 106, 111 (Ind. App. 2006).

In the present case, any attempt for us to determine whether specific items of plant included in the sale are "reasonably necessary to the provision of utility service" is confounded by Indiana American's lack of a plan for improvements. Specifically, Indiana American's engineering witness Hoffman testified that Indiana American intends to make substantial changes to the City's facilities. Indeed, the Asset Purchase Agreement itself requires Indiana American spend at least $7 million on capital improvements within the first year.

However, Indiana American has presented no evidence as to what these capital improvements will include. As Mr. Hoffman repeatedly testified, Indiana American has not yet identified "solutions" to the City's water quality problems. In fact, he testified that Indiana American has not yet even evaluated those problems. Consequently, we have no idea what facilities are in immediate need of replacement and are, therefore, not "reasonably necessary to the provision of utility service."

This question is not academic. The five engineering witnesses that presented testimony in this case – from the City, Indiana American, the OUCC, and NOW – all seem to agree that the City's facilities are significantly deteriorated and much of the infrastructure needs to be replaced.

But, Indiana American has given us no inkling of what facilities it actually **intends** to replace. Obviously, without some indication of what facilities Indiana American will replace, we cannot determine whether – and to what extent – the City's facilities included in the sale are not "reasonably necessary to the provision of utility service." Therefore, the record lacks sufficient evidence for us to conclude that all of the facilities included in the sale are "used and useful." Joint Petitioners therefore have not carried their burden of proof required to satisfy Ind. Code § 8-1-30.3-5(c)(3).

Finally, we find that there is insufficient evidence in the record to establish that "[t]he actual purchase price of the utility property is reasonable," as required by Ind. Code § 8-1-30.3-5(c)(5). The OUCC's engineering witnesses Mr. Parks and Mr. Seals both identified numerous errors in the valuation of specific items in the appraisal on which the purchase price was based.

By way of example, Mr. Parks identified several major facilities which were decades older than the appraisers believed. This was critical because, according to the appraisers themselves, the valuation was based exclusively on the age of the facilities. Specifically, discovery responses offered on cross examination showed that the appraisers based their valuation of these facilities **exclusively** on the facilities' age, without any regard to the condition of those facilities. In other words, the values placed on these facilities were simply wrong.

In addition, OUCC's witness Kaufman identified significant problems with the appraisal's underlying methodology. Among these errors was the appraisers use of stale data which failed to capture two full years of depreciation.

Indiana American's ratemaking expert, Mr. VerDouw, helpfully quantified the errors Mr. Parks and Mr. Seals identified in the appraisal. According to Indiana American's own witness, these errors overstated the value of these facilities by $1,966,500. (VerDouw Rebuttal, p. 9.) In addition, as shown during cross examination, Mr. VerDouw acknowledged that OUCC witness Kaufman's testimony identified an additional $620,000 in depreciation that the appraisers failed to take into account. (See Kaufman Testimony, p. 17.)

In other words, the evidence in the record indicates that the $13.4 million appraised value is overstated by roughly $2.6 million. This means the purchase price is roughly 19% too high.

More importantly, the evidence showing defects in the appraisal are uncontested. During cross examination of Indiana American's witness Hoffman, the OUCC admitted its Cross Examination Exhibit 12. This was a discovery response by Indiana American stating that "Indiana American did not perform a study or analysis of the accuracy or quality of the appraisal[.]" As Mr. Hoffman acknowledged during cross examination, neither he nor any other Indiana American witness was testifying that the appraisal was, in fact, "accurate."

None of the appraisers who performed the appraisal testified in this matter. No witness by Indiana American testified as to the "accuracy or quality" of the appraisal. No witness for the City of Charlestown testified as to the "accuracy or quality" of the appraisal. In short, there is no evidence in the record by any witness in support of the accuracy or quality of the appraisal.

In contrast, the OUCC presented three (3) expert witnesses – Mr. Kaufmann, Mr. Seals, and Mr. Parks – who identified numerous errors in the appraisal.

In short, on the one hand, we have three (3) expert witnesses who testified that the appraisal was defective. On the other hand, we have zero (0) witnesses who testified it is accurate. As a matter of law, we simply lack the legal authority to approve the appraisal based on that record. See, *Think Tank Software Dev. Corp. v. Chester, Inc.*, 30 N.E.3d 738, 744 (Ind. Ct. App.), transfer denied, 35 N.E.3d 672 (Ind. 2015) ("Judgment on the evidence is proper where all or some of the issues are not supported by sufficient evidence.")

For these reasons, we find that Joint Petitioners have not satisfied all eight (8) of the requirements of Ind. Code § 8-1-30.3-5(c).

As explained above in our discussion of the requirements of Ind. Code § 8-1-30.3-5(d), this is not the end of the road for this proposed sale. Indeed, it is not even the end of our inquiry.

This Commission still has the option of approving the sale solely under the "public interest" standard of Ind. Code § 8-1.5-2-6.1. However, approval of the sale exclusively under Section 6.1 would be entirely subject to the will of the voters of Charlestown. In other words, the registered voters of Charlestown would ultimately have the final say.

D. Ind. Code § 8-1.5-2-6.1.

Although we have found that Joint Petitioners have satisfied neither Ind. Code § 8-2-30.3-5(c) nor Ind. Code § 8-2-30.3-5(d), we choose not to end our inquiry there. We may nonetheless approve the sale under Ind. Code § 8-1.5-2-6.1 by simply finding the sale to be "in the public interest."

However, any approval under section 6.1 alone would potentially be subject to approval of a majority of voters in an election on a public question under Ind. Code § 8-1.5-2-5. While the evidence shows that a petition in opposition to the sale has been served on the City of Charlestown, whether that petition contains the requisite number of signatures of registered voters and otherwise satisfies the requirements of Ind. Code § 8-1.5-2-5 is a question for the Clerk of Clark County, Indiana – not this Commission.

Under Section 6.1, the ultimate question we must answer is whether "the sale or disposition according to the terms and conditions proposed is in the public interest." This language seems to give this Commission broad discretion. **If** Joint Petitioners had successfully brought this case under Ind. Code § 8-1-30.3(d) **and** had proved the eight (8) elements Ind. Code § 8-1-30.3(c), then our discretion would be limited.[3] Ind. Code § 8-1.5-2-6.1(e).

But, because Indiana American failed to present the necessary information to file under Ind. Code § 8-1-30.3-5(d), we are not so constrained. Instead, the statute gives us broad discretion to determine whether the sale, under the terms proposed, is in the "public interest."

As part of our analysis, the statute directs us to "consider the extent to which the proposed terms and conditions of the proposed sale or disposition would require the existing utility customers of either the prospective purchaser or the municipality's municipally owned utility, as applicable, to pay rates that would subsidize utility service to the other party's existing customers." Ind. Code § 8-1.5-2-6.1(g)(2).

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[3] Again, Ind. Code § 8-1.5-2-6.1(e) states:

(1) If:

(A) the municipality's municipally owned utility petitions the commission under IC 8-1-30.3-5(d); and

(B) the commission approves the municipality's municipally owned utility's petition under IC 8-1-30.3-5(c);

the proposed sale or disposition is considered to be in the public interest.

However, the term "public interest" is not defined by statute and this is not the only factor we may consider. Indeed, the Indiana Court of Appeals has stated the following regarding this Commission's authority to make determinations about the "public interest":

> Where a term is not statutorily defined, we employ the term's plain, ordinary, and usual meaning. . . . Thus, "public interest" may be taken to encompass a wide range of considerations, from environmental, health, and safety concerns to the financial concerns of employers, employees, and ratepayers.

Gen. Motors Corp. v. Indianapolis Power & Light Co., 654 N.E.2d 752, 762 (Ind. Ct. App. 1995) (internal quotations and citations omitted).

With this guidance by the Indiana Court of Appeals, we now proceed to consider whether the sale, as proposed, is "in the public interest." In doing so, we may take in "a wide range of considerations, from environmental, health, and safety concerns to the financial concerns of employers, employees, and ratepayers." *Id.*

i. "Public Interest": Purchase Price Overstated.

As noted above, we have significant concerns about the purchase price for the City of Charlestown's water utility assets. As noted above, the OUCC presented the testimony of three (3) witnesses that opposed the appraisal, noting numerous errors that significantly overstated the purchase price. Based on the rebuttal testimony and cross examination testimony of Indiana-American's ratemaking witness Mr. VerDouw, we know the appraisal overstates the actual value of the City's facilities by $2,586,500 ($1,966,500 calculated by Mr. VerDouw plus the $620,000 in additional depreciation overlooked by the appraisers, as calculated by Mr. Kaufman).

This represents an overpayment to the City of Charlestown, financed by Indiana-American's captive ratepayers. As noted in the direct testimony of Charlestown Mayor Hall, the City plans to use a small portion of this purchase price to provide "credits" to its sewer customers of $20 per month for the first year, then reducing this credit by $5 per month for each successive year. (Pet. Ex. 1, p. 15.) This constitutes an impermissible rate subsidy, prohibited under Ind. Code § 8-1.5-2-6.1(e)(2).

At a minimum, we could not approve the proposed sale at the current price. Rather, we would have to reduce the purchase price by $2,586,500. However, for the reasons described below, we find that the overall transaction is not in the "public interest," and we decline to approve it.

ii. "Public Interest": Subsidies for Non-Utility Projects.

In the present case, intervenor, NOW, has raised some troubling issues regarding the management of the City of Charlestown and the City's plans for the use of the proceeds of the pending sale. As discussed above, the sale price constitutes roughly a $2.6 million overpayment

on the value of the City's utility facilities. We do not support granting the City a multi-million dollar windfall, particularly in light of the City's apparent intention for the funds. Because the purchase price is being paid using funds derived from water rates from Indiana-American's captive ratepayers, we find these issues to be relevant to our "public interest" analysis.

Evidence NOW obtained in discovery and admitted into evidence shows that an economic development project planned for a low income neighborhood in Charlestown known as the "Pleasant Ridge Project" is linked to the pending sale of the City's water utility. Specifically, pursuant to a contract between the City and a development company known as Springville Manor, LLC, owned by a developer named John Neace, a portion of the Pleasant Ridge redevelopment plan is – or at lease was at one time – conditioned on the sale of the City water utility, at issue in this case.

NOW filed the City's response to certain discovery requests as NOW Exhibit 3. In this response, the City provided a signed Development Agreement between the City and the Developer for the "Redevelopment Plan ('the Plan') for the redevelopment of the Pleasant Ridge Redevelopment Area ('Pleasant Ridge Area')." (See NOW Ex. 3.) Under this Development Agreement, the City is to initially pay the Developers $1.4 million. However, this contract is, by its terms, subject to the following condition precedent:

> The Commission's obligations hereunder are subject to:
>
> * * *
>
> - Restricted Economic Development Fund established for the receipt of proceeds of the sale of the utility and the use of funds for economic development projects.

(NOW Ex. 3, p. 14 of 22.)

In cross examination, Charlestown Mayor Robert Hall confirmed that this language refers to the sale of the water utility, which is pending in this case. Upon further questioning, Mayor Hall acknowledged that the Springville Manor agreement makes reference to the Pleasant Ridge redevelopment, as well. He specifically acknowledged that the City planned to offer financial incentives to displaced residents of Pleasant Ridge to buy homes in Springville Manor from Mr. Neace. However, Mayor Hall denied the City has any concrete plans to use the proceeds of the utility sale in furtherance of the Pleasant Ridge Project.

Given that the utility sale is listed as a condition precedent to the City's obligations under the Springville Manor Redevelopment Agreement and given that the proposed sale will, obviously, provide a $13.4 million infusion of cash to the City, we do not find the Mayor's testimony that the two are unrelated to be credible. Based on the plain language of the Springville Manor Redevelopment Agreement, at least a portion of the Pleasant Ridge redevelopment project was, at the time of that Agreement, subject to the outcome of this case.

Because the money to be paid by Indiana American came from Indiana American's ratepayers and because we have statutory jurisdiction to generally determine whether the sale is in the "public interest," the City's plans for the use of these funds is relevant to our "public interest"

analysis. We should not, for example, approve a sale that would result in the use of ratepayer money for an illegal purpose.

In the present case, NOW not only makes the argument that the City's planned use of the funds is contrary to the "public interest," NOW contends the City's Pleasant Ridge project constitutes a criminal conspiracy in violation of the Racketeer Influenced Corrupt Organizations Act, 18 USC § 1964, and the Hobbs Act, 18 USC § 1952.

Under the Federal RICO statute, "racketeering" includes conduct which would constitute a violation of the Hobbs Act. 18 USC § 1961(1). The Federal Hobbs Act is an anti-corruption statute which states, in part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both.

18 USC 1951.

The statute defines "extortion" as follows:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, ***or under color of official right***.

Id. (emphasis added).

A Hobbs Act violation does not require any threat of physical violence. Rather, it is sufficient that a public official used his or her office to coerce someone to willingly part with his or her property. Stated another way,

> In a Hobbs Act prosecution of a public official, the government need not prove actual or threatened force, violence or duress because "[t]he coercive element is supplied by the existence of the public office itself." *United States v. Williams*, 621 F.2d 123, 124 (5th Cir.1980), cert. denied, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981).3 Therefore, the government is required to prove only two things: (1) that a public official obtained property from another in exchange for performance or nonperformance of his official duties; and (2) that this extortionate activity affected interstate commerce.

United States v. Adair, 951 F.2d 316, 318 (11th Cir. 1992). See also, *United States v. Tomblin*, 46 F.3d 1369, 1383 (5th Cir. 1995).

In NOW's Exhibit 4, we were presented with evidence – in the form of notes of meetings and emails between the Mayor, the City's Building Inspector, and Mr. Neace and his employee, John Hampton (jointly, "Developers") – showing that the Developers and City officials conspired to force low income residents of Pleasant Ridge out of their homes using newly-increased fines passed by the City. The Developers would buy the properties from the homeowners or landlords at a steeply discounted price of $10,000 under the threats of tens of thousands of dollars in fines. The City would then waive the fines for any property owner who

sold to the City's chosen Developer, and ***no fines were ever imposed on the Developer for the same violations***.

According to notes of meetings between the Mayor, the City Attorney, and the Developers, the City planned to then acquire any remaining properties through eminent domain, and the entire area would be redeveloped, using City funds paid to the Developers. Indeed, these meeting notes show the City intentionally drove down the property values in the hopes of acquiring the homes more cheaply using eminent domain.

This is shown by the following evidence – all of which was admitted into the record, without objection:

Page 2 of NOW Exhibit 4 shows an email from the Charlestown Mayor to the Developers on April 8, 2016 – at least three (3) months before Pleasant Ridge property owners were notified of the newly increased fines. The Mayor wrote:

> A lot is happening right now in order to put a successful project together for Pleasant Ridge. There is [sic] certain legal things that have to be done on the City's part to be able to condemn and blight the area. When this is completed (goal is in June) 90% of the legal work is complete. Once the area is declared blighted and condemned the PR [Pleasant Ridge] folks only have 10 days to appeal it. If a [sic] appeal happens the Judge can only rule on if the area meets statutory requirements. That is a slam dunk.

(NOW Exhibit 4, p. 2 of 19.)

The Mayor then complained that he was having trouble reaching the Developer, John Neace, and stated:

> That makes me very nervous because ***I don't like making decisions that ultimately affects your money and the success of this project***.

(NOW Exhibit 4, p. 2 of 19 (emphasis added).) It is important to note that the City did not have any official agreement with the Developers at this time.

On April 30, 2016, the Mayor then emailed the developer, John Neace, stating that opposition by the residents of Pleasant Ridge seemed to be flagging, stating,

> This last Thursday we invited the PR Assoc. and they gave no plans. There were only two people there in support of Pleasant Ridge. They have lost most of their support.

(NOW Exhibit 4, p. 3 of 19.)

The Mayor then concluded his email by encouraging the Developers to buy homes to set prices for condemnation, stating, "Also try to purchase homes to establish comps."

Pages 4 and 5 of NOW Exhibit 4 are a typed memo from John Hampton to John Hall regarding his interactions with the Mayor of Charlestown beginning in May of 2016 – more than

two (2) months ***before*** the City began its campaign of imposing higher fines on Pleasant Ridge residents.

In this memo, Mr. Hampton asserts that he and the Mayor "talked about lots in Pleasant Ridge with delinquent taxes that might be able to be purchased for the tax amount and he [the Mayor] will have Dave Reinhart, the City Tax Collector, get us a list." (NOW Exhibit 4, p. 3 of 19.)

Mr. Hampton also stated the following about his meeting with the City Building Inspector:

> Tony Jackson (tony.jackson@cityofcharlestown.com) . . . with the City of Charlestown brought me a set of 1941 original blue prints of Pleasant Grove [sic] which includes a topographical map and utility and sewer layout. I will get copies made for us. ***Tony is the person that will enforce the new requirements to get the existing homes up to code***.

(NOW Exhibit 4, p. 4 of 19 (emphasis added).)

Mr. Hampton went on to state the following regarding the Mayor:

> Bob needs a plan from us with estimated costs so he can determine what the city can do for us financially.
>
> On vacant lots the city will acquire he said we can do a "Wrap Around Agreement" to be sure we have the right to buy the lots from the city. I am not sure what that is.
>
> * * *
>
> On June 29th I texted Bob the following" I hope yu are enjoying your vacation
>
> > John Neace reminded this morning that you were going to get some form of a subordination agreement indemnifying us from a law suit is (IF) such a suit was filed against us or the city for what we are trying to do at Plessant (sic) Ridge. We'd like to have that in place before we start closing on lots if possible.
>
> He replied the following on Tuesday, July 5yth [sic]
>
> > John, the letter we talked about before was paret [sic] of the blight eliminationprogram [sic] that formalized a partnership. It is important to note that the city is not involved in these private transaction. We would be glad to discuss this with you and our attorney if you desire.

(NOW Exhibit 4, p. 4-5 of 19.)

Again, all of this is ***before*** the City began implementing its plan its increased fines.

Page 6 of NOW Ex. 4 is a page of handwritten notes of the Developers from a meeting with the Mayor and the City Attorney, Michael Gillenwater, which include the following outline

of the plan between the Mayor and the Developers to utilize eminent domain by the city to acquire any holdouts at lower prices:

> **"Plan"**
>
> **Our purchases establish values**
>
> **Board up homes will lower values**
>
> **Trying to postpone date to use eminent domain**
>
> *** * ***
>
> **Until the city "adopts" a redevelopment plan can't do agreement to indemnify us.**
>
> **Only limited things they can challenge city with "public purpose"**

(NOW Exhibit 4, p. 6 of 19.)

Page 10 of NOW Ex. 4 is an email from John Hampton to John Neace, in which Mr. Hampton appears discuss this same meeting with Mayor Hall. ("I met with Mayor Hall this morning[.]") He then ***explains the scheme in detail***. Specifically, Mr. Hampton says the following about his meeting with Mayor Hall and the City Attorney, Michael Gillenwater:

> Regarding the indemnity agreement, I talked to Bob and also for a half hour after I left Bob's office with the city's attorney Michael Gillenwater. ***Bob says for all of this to work properly for the condemnation of homes we need to remain independent of the city*** as we are right now considered a private developer with no contractual relationship with the city which is 100% factual. ***Once the city starts condemnation proceedings, no purchases from that date forward can be used to determine value, only purchases prior to that point which are all arms length [sic] transaction between us and the owners and that is what sets the value for the condemnations***. The city only anticipate [sic] 20 to 40 holdouts [out of 350 homes] at that point. Michael said an agreement can't be entered into between us and the city without consideration from both parties and at this point, because we are not partners in anyway [sic] in the redevelopment, there is no consideration to be offered. ***Once a development plan has received final approval we will become the approved developer and we would be able to enter into an indemnification agreement***. At that point the plan with us as developer would be in place ***and then the city would commence condemnation proceedings against anyone remaining that has not agreed to sell***. Michael said there are only limited things someone can challenge anyway because what we are doing has a "public purpose".

(NOW Exhibit 4, p. 10 of 19 (emphasis added).)

At the end of July/beginning of August – ***after*** these communications between City officials and the Developers – the City finally implemented its scheme of heavily fining properties in Pleasant Ridge. Prior to initiating the increased fining scheme, the Mayor

forwarded the Developer a letter he was sending to the Pleasant Ridge rental property owners. (NOW Ex. 4, p. 7 of 19.) This letter to the landlords included the following:

> In January 2, 2016, the Common Council of the city of Charlestown, Indiana, passed Resolution No. 2016-R-1, a *Resolution Authorizing Action Two Develop and Implement Plans For Improvement of Conditions In The Pleasant Ridge Subdivision.* That resolution directed the Mayor and Redevelopment Commission to develop plans for redeveloping Pleasant Ridge, in order to remediate the conditions that are causing it to be an area needing redevelopment.
>
> Afterward, the Common Council enacted ordinance number 2016-OR-2, an *Ordinance Establishing An Inspection Program For At-Risk Residential Rental Properties In The City Of Charlestown, Indiana.* That ordinance requires owners of certain rental properties to register of those properties with the City's Building Commissioner's office before July 1, 2016. Failure to register rental properties by July 1, may result in penalties of up to $1500.00 per day for each day registration is neglected.
>
> * * *
>
> All Rental Properties will be required to be brought up to the standards set out in the *Property Maintenance Code*. Each violation of the city's property maintenance code is considered a separate offense. Each day any violation exists also constitutes a separate offense. Please understand that these same standards are being applied to owner-occupied homes.
>
> Because it is anticipated that it may be economically unfeasible for many properties to be brought up to the standards set out in the city's *Property Maintenance Code*, some landowners may choose to remedy the problem by removal of the buildings, rather than spending the money required to bring structures up to code. In that case, property owners should present a plan for removal of the building. Until such buildings are removed, windows and doors should be promptly boarded up and the grass and exterior of the premises maintained.

(NOW Exhibit 4, pp. 8-9.)

As shown by the testimony of the City's Building Inspector, Tony Jackson, filed as NOW"s Exhibit 5, owners of homes in Pleasant Ridge were then hit with large fines – some in excess of $5,000 per day, with fines accruing ***before the property owner was even served with notice***. (See, NOW Ex. 5, pp. 121-127.)

For example, this was shown in the following exchange about one specific property owner:

> Q So isn't it true that the fines begin to run on September 26th but they were not delivered according to this, until October 4th?
>
> A that is correct.

Q And so during that time, we have $600.00 dollars [sic] a day, I calculate that to be nine (9) days, by the time that this was delivered the Association had already received $5,400 dollars [sic] in fines.

A Apparently that is correct Sir.

(NOW Ex. 5, p. 123.)

Similarly, the City's Building Inspector testified regarding another example – a home the neighborhood Homeowners' Association itself purchased in an attempt to save the house from redevelopment:

Q So now turn two (2) pages to the post office tracking for those mailings, it on that page arrived at USPS facility on November 9th, 2016, do you see that?

A Yes Sir.

Q And then it says delivered November 14, 2016.

A Yes Sir.

Q So let's go from, let's be charitable here to your side and go from November 5th, 2016 to November 14 that is a period of nine (9) days, is that correct?

So the fines begin to run on November 5th but this was not delivered until November 16th, is that true?

A That is correct

Q So that is 200 times nine (9) days that is $1,800.00 dollars [sic] of fines before the Association received this mailing, is that true?

A Yes Sir.

(NOW Ex. 5, pp. 123-24.)

Another example involved a property owner named James Woods. He owned several properties, all of which were hit with multiple fines on the same day. However, this exchange with the City Building Inspector only involved one of Mr. Woods' properties:

Q Do you see at the bottom that this was a determination was made on the 29th day of August, 2016?

A Yes Sir.

Q And that the fines started that day, the 29th day of August?

Q Yes Sir.

Q And they were daily fines in the amount of $350.00 dollars [sic]?

A Yes Sir.

Q And now flip back to the first page, looks like this was a cover letter [where] you sent all these a[t] once to Mr. Woods?

A That is correct.

Q And isn't it true that the cover letter is dated the 31st day of August, 2016?

A Yes Sir if that is what it is stated, yeah.

Q So just for that one (1) property [--] looks like there are many more in here for various amounts of fines [--] that property had three (3) days times $350.00 dollars [sic] already by the time you put it in the mail to Mr. Woods?

A That is correct, yes.

(NOW Ex. 5, pp. 126-27.)

In contrast, ***these fines were not imposed or enforced against John Neace's company, Pleasant Ridge Redevelopment, LLC***, when it bought these properties from the suddenly embattled property owners. Mr. Jackson admitted as much, as follows:

Q Isn't it true that you issued citations against other landlords for example Mr. Westmorland who is listed here?

A I had, yes Sir.

Q So, in the approximately two (2) months between August, late August and late October, this letter dated 2016, isn't it true that some of the properties owners to who you had issued order and fines sold their properties to Pleasant Ridge Redevelopment, LLC.

A Yes that is apparent, they have.

Q Now let's turn back to the letter, first page, can you look in the first paragraph second sentence it says, at your request this letter comes to confirm Pleasant Ridge redevelopment responsibility regarding those properties, and the tenants and the houses. Do you confirm it says that?

* * *

A Yes Sir.

Q Okay now if you could review, don't read it out loud, just review the paragraphs that are numbered one (1) through six (6), these requirements.

A Uh-huh.

Q Okay, now under those requirements once Pleasant Ridge Redevelopment [acquires] a property from a landlord with pending citations, did you require Pleasant Ridge Redevelopment to perform any of the repairs ordered in the citations?

A No Sir.

Q And it is true that you did not require Pleasant Ridge Redevelopment to fix up these newly acquired properties pursuant to the citations even when tenants remained in them?

A No Sir what I did when a, if I was given a request to have a, if there was a problem then I contacted the owners and have them fix it. In this particular case these houses the list of these houses that went before the Board of Public Works and approved for demolition

Q Right then people remained living in some of those homes for several months is that true?

A Yes Sir.

Q And isn't it true that under paragraph four (4) of this letter it states that, any fines attached to the properties will no longer remain once the property is raised an removed?

A That is correct.

Q [Now] based on the practice towards Pleasant Ridge Redevelopment, LLC if the Association had sold it property to Pleasant Ridge Redevelopment, LLC after you issued those citations against it you would not have required Pleasant Ridge Redevelopment, LLC to fix the property up in the way that the Association did fix the property up, isn't that true?

A That would be up to the owner of the house.

Q But you would have not required Pleasant Ridge Redevelopment to fix the property up, correct?

A It is according to what the circumstances were, I believe?

Q If Pleasant Ridge Redevelopment promised to eventually [raze] and remove the property you would have not forced them to fix the property up correct?

A Oh I understand what you're saying yeah I'm sorry, ugh, yes.

Q And you would not have required Pleasant Ridge Redevelopment to fix up the Association's property in that case even if the Association's [tenants] remained there for a period of time.

A That is correct.

(NOW Ex. 5, pp. 130-132 (emphasis added).)

As this exchange shows, homeowners were faced with a choice: either pay thousands of dollars in fines to the City of Charlestown or sell their homes to John Neace.

As this accumulated evidence shows, the Mayor, the Building Inspector, and the City Attorney, all conspired to use the City's fining authority to coerce property owners in Pleasant Ridge to hand over their homes to a private entity, the Developers. This constitutes the "obtaining of property from another, with his consent . . . under color of official right." That appears to constitute a criminal violation of the Hobbs Act. Moreover, the a conspiracy to engage in a violation of the Hobbs Act is, itself, a criminal violation of the federal RICO statute, 18 USC § 1961(1).

Obviously, allegations of criminality are far beyond the jurisdiction of this Commission. However, determining whether a utility sale is generally in the "public interest" is not. If we alone were considering these issues, we would be reluctant to weigh in on these issues. However, we are aware that an Indiana Circuit Court Judge has already imposed an injunction on the City of Charlestown related to this conduct.

Specifically, NOW's Exhibit 6 is a copy of the "Findings of Fact and Conclusions of Law" issued by Special Judge Jason Mount in the pending Injunction Case against the City of Charlestown. Of interest to this Commission, Judge Mount held on page 33 of his Order that issuing an injunction against the City was in "[t]he Public Interest."

Moreover, on pages 23 through 30 of his Order, Judge Mount found that the City of Charlestown had violated both the "Equal Protection" clause of the 14th Amendment to the United States Constitution and the "Privileges and Immunities" provision of the Indiana Constitution. Specifically, Judge Mount found that the City had "intentionally" given preferential treatment to a private developer, John Neace, and imposed draconian fines on other property owners without any "rational basis" for the disparate treatment.

We are deeply troubled by the public interest ramifications of approving the proposed sale in light of the City's plans. In short, if the Commission approves this sale, they will be approving the funding for what appears, on its face, to be a criminal enterprise. Although allegations of criminality exceed our jurisdiction, we cannot ignore this evidence. We find that approving the sale would be contrary to the "public interest." We therefore decline to approve the sale under Ind. Code § 8-1.5-2-6.1.

E. Conclusion.

To summarize our decision, we reject the proposed sale for several defects. Specifically, the following:

First, the City failed to follow the statutory process for appointing three appraisers under Ind. Code § 8-1.5-2-4, obtaining an appraisal within the deadline established under Ind. Code § 8-1.5-2-4, then conducting its first public hearing within the time prescribed by Ind. Code § 8-1.5-2-5(d). Instead, the City failed to appoint the appraisers in a publicly-available document with a set deadline for the appraisal to be returned. Then, when the appraisal was returned, the City allowed the appraisal to lapse and attempted to rectify this error by "recertifying" the lapsed appraisal. (Pet. Ex. 1, pp. 18-19.) This is an independent basis for rejecting the Joint Petition.

Second, Indiana-American failed to satisfy the requirements of Ind. Ind. Code § 8-1-30.3-5(d). In this case, Joint Petitioners, Indiana-American and the City of Charlestown, chose to seek pre-approval of the proposed sale from this Commission under Ind. Code § 8-1-30.3-5(d). As a result of this choice, Indiana-American was obligated to present this Commission with "a plan for reasonable and prudent improvements to provide adequate, efficient, safe, and reasonable service to customers of" Charlestown Water. Ind. Code § 8-1-30.3-5(d)(4). This, Indiana-American has failed to do by failing to identify a single improvement the Company plans to make to the City's facilities or operations. This also is an independent basis for rejecting the Joint Petition at this time.

Third, Indiana-American has failed to satisfy three (3) of the eight (8) requirements set forth in Ind. Code § 8-1-30.3-5(c). Specifically, because we have no idea how Indiana-American plans to proceed to improve the City's water facilities, we cannot, as a matter of law, find that all of the facilities are "used and useful" as required under subsection (c)(1). Similarly, we lack sufficient evidence to find that the "utility company will make reasonable and prudent improvements" as required under subsection (c)(3). Moreover, because there are no witnesses of record in this case who have testified that the appraisal is even accurate, we are unable to find that the purchase price is "reasonable," as required by subsection (c)(5). While this is not an independent basis for rejecting the Joint Petition **outright**, under Ind. Code § 8-1.5-2-6.1(h), this failure to satisfy Ind. Code § 8-1-30.3-5(c) means the voters of Charlestown could potentially decide for themselves whether to approve the sale. See, Ind. Code § 8-1.5-2-5(g-k) and 6.1(h).

Fourth, given the overstated purchase price and our concerns about the City's intended use of the sales proceeds, we find that Joint Petitioners have failed to carry their burden of proving that the proposed sale is in the "public interest" under Ind. Code § 8-1.5-2-6.1.

We hold this fourth and final conclusion to be dispositive. Our rejection of the sale under Ind. Code § 8-1.5-2-6.1 means the sale may not go forward. Because the sale cannot proceed without our approval under Section 6.1, it is unnecessary for the proposed sale to be submitted to voters as a "public question" under Ind. Code § 8-1.5-2-5.

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

Joint Petitioners' request for approval and authorization for the proposed sale is denied under Ind. Code § 8-1.5-2-6.1.

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

PROCESS FOR MUNICIPAL ACQUISTIONS