STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF THE TOWN OF PENDLETON AND TOWN OF PENDLETON WATER UTILITY FOR APPROVAL OF A REGULATORY ORDINANCE ESTABLISHING A SERVICE TERRITORY FOR THE TOWN'S MUNICIPAL WATER SYSTEM PURSUANT TO INDIANA CODE §§ 8-1.5-6-1 ET ESQ.	)	**CAUSE NO. 46087**

PETITIONER, TOWN OF PENDLETON'S SUBMISSION OF BRIEF

The Town of Pendleton, Indiana, by counsel, respectfully submits its Brief.

Dated: May 14, 2025.

Respectfully submitted,

By: */s/ Jeremy L. Fetty*

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THE TOWN OF PENDLETON'S SUBMISSION OF POST-HEARING BRIEF IN SUPPORT OF ITS PROPOSED ORDER AND EXCEPTIONS TO ANDERSON'S PROPOSED ORDER

The Town of Pendleton, Indiana ("Pendleton") hereby submits this post-hearing brief to address deficiencies in the proposed order submitted by the City of Anderson, Indiana ("Anderson") and to support its proposed order and exceptions to Anderson's proposed order.

I. INTRODUCTION

Pendleton filed its Petition in this Cause on June 14, 2024, requesting approval to exclusively serve an expanded service area as set forth in its regulatory ordinance. Pet. Ex. 1. Anderson filed for approval of a regulatory ordinance in Cause No. 46147 on October 28, 2024, and requested the Commission consolidate Cause No. 46147 with this Cause, as both Pendleton and Anderson have requested to exclusively serve a portion of the same territory ("Disputed Area"). The Commission declined to consolidate Cause No. 46147 into this Cause, but did consolidate issues relating to the Disputed Area in this Cause. Anderson relies on its preliminary engineering report, dated March 27, 2024 ("Anderson PER"), to support that it should be the exclusive provider of the Disputed Area. Anderson further seeks to support that it should be the exclusive provider of the Disputed Area by highlighting its concerns with Pendleton's

preliminary engineering report from March 2024 ("Pendleton PER"). However, neither the Anderson PER nor the Pendleton PER support what Anderson witnesses allege. Moreover, granting Anderson authority to exclusively serve the Disputed Area is not in the public interest. The public interest will be best served in Pendleton is the exclusive provider of the Disputed Area.

II. ARGUMENT

A. Neither Pendleton nor Anderson's PER is related to expansion into the Disputed Area.

Both the Anderson PER and Pendleton PER have been included in the record in this Cause. However, neither the Pendleton PER nor the Anderson PER is related to serving the Disputed Area. The Pendleton PER was created for the replacement of lead service lines, and the Anderson PER was created for replacement of aging infrastructure to serve its existing service area. The Commission should not place great weight on either PER when determining which entity should serve the Disputed Area.

i. The Commission should not rely on the Anderson PER to support that Anderson has the ability to serve the Disputed Area.

Anderson relies on the Anderson PER to support that it has been planning to expand into the Disputed Area for several years. Int. Ex. 7, p. 9:10, *see* Int. Ex. 1, p. 7:11-14. However, the Anderson PER is clear that "[t]he City of Anderson's existing and proposed water service area are the same." Int. Ex. 6, p. 15. Moreover, Anderson's "service area is not expected to change in any significant way over the next 20 years." *Id.* at p. 39. It is visually apparent that Anderson's proposal to expand into its proposed service area ("Proposed Service Area"), which includes the Disputed Area, is a significant expansion from its existing service territory. *See* Int. Ex. 3. Based on its plain language, the Anderson PER *is not* related to Anderson's proposed expansion into the

Disputed Area nor was it created with expansion in mind. In fact, the Anderson PER never mentions planned expansion of its water territory. *See generally,* Int. Ex. 6.

The Anderson PER, rather, is about replacing aging infrastructure and addressing current and future needs in Anderson's *existing* service area. The Anderson PER identifies replacement of the Wheeler water treatment plant and wells as a "critical need", explains that the Ranney, Norton and Tuxford well fields need to be replaced, and states that numerous water lines need replacement. *Id.* at p. 40, 44. In addition, several other facilities have reached the end of their useful life. *Id.* at p. 22. The Anderson PER identifies eleven projects, all of which are clearly for replacement. *See id.* at p. 14, 47.[1]

With many facilities at or near the end of their useful life, Anderson cannot meet its needs and provide the same level of service *within its existing service territory* without the identified replacements. Anderson witnesses Mr. McKee and Ms. Young argue that Anderson will have the capacity necessary to serve, and that improvements were allegedly planned and designed to serve, its Proposed Service Area. Int. Ex. 1, p. 8:8-11, p. 13:14-16; Int. Ex. 5, p. 8:14-16. But this is not supported by the Anderson PER, which shows that these exact improvements are necessary to serve the projected 20-year needs within Anderson's current service area. *See generally*, Int. Ex. 6, p. 39-46. The projected needs include an expected increase in water demand from commercial and industrial customers in Anderson's current service area, and particularly in the Flagship Industrial and Business Park. *See id.* at p. 39, 42. The Flagship Industrial and Business Park is in the southwest side of Anderson. *Id.* at p. 34.

[1] All projects identified for Phase I have replacement in the name, and the only project identified in Phase II is necessary to replace the Wheeler water treatment plant and well field. *See* Int. Ex. 6, Ch. 4-1-4-4, p. 65-68.

Anderson's witnesses also argue that the improvements will be used to serve its Proposed Service Area. *See* Int. Ex. 1, p. 7:14-16; Int. Ex. 5, p. 9:16-17; Int. Ex. 7, p. 8:8-11. Unless additional improvements are made, use of these improvements to serve Anderson's Proposed Service Area could come at the detriment of Anderson's existing customers, given that these improvements have been identified as necessary to serve Anderson's current and future needs in its existing service territory. *See* Int. Ex. 6, p. 39-46. To ensure Anderson can provide quality and reliable service to customers in its existing service territory and its Proposed Service Area, it is possible additional facilities may be needed. Therefore, Anderson is not in a different position than the one it alleges Pendleton is in—that additional facilities to serve the Disputed Area may necessitate a rate increase. *See* Int. Ex. 7, p. 11:18-21.

Anderson attempts to characterize the new south side well field as necessary to expand its service territory and serve its Proposed Service Area. But the Anderson PER is clear that it is actually needed to replace production capacity from the Wheeler water treatment plant and wells. The Wheeler water treatment plant and wells currently have a peak water supply of 4.8 million gallons per day ("MGD"), although they were rated to produce 9.7 MGD. Int. Ex. 5, p. 8:11-14. On its face it may appear that Anderson's proposed south side water treatment plant and well field, which is planned to supply 6 MGD of water, will supply an additional 1.2 MGD of water on top of the 4.8 MGD it is replacing. However, the proposed south side water treatment plant and wells are insufficient to replace the 9.7 MGD that the Wheeler plant and wells were rated to produce. The expansion of the Lafayette water treatment plant may add an additional 4 MGD of water supply, however this too was identified in the Anderson PER as necessary to serve Anderson's future needs in its current service territory. *See* Int. Ex. 6, p. 39, 45.

It is clear in the Anderson PER that Anderson's "existing treatment capacity is not sufficient to meet the projected 20-year water needs." *Id.* at p. 40. Therefore, Anderson needs to make these improvements to continue providing service within its existing territory even if it wasn't requesting approval to exclusively serve an expanded territory. This raises questions as to whether additional improvements would be necessary for Anderson to serve its Proposed Service Area, including the Disputed Area. Because the Anderson PER is not about expansion into Anderson's Proposed Service Area, the Anderson PER does not support that Anderson has the ability to serve the Proposed Service Area as alleged by Anderson's witnesses.

ii. The Commission should not rely on the Pendleton PER to support Anderson's assertions that its rates and charges will be less than Pendleton's.

Absent any changes and assuming the Commission approves Anderson's requested rate increase, the evidence shows that Anderson's rate of $47.58 in 2029 will be higher than Pendleton's current rate of $44.96. Int. Ex. 7, p. 13:9-11. Anderson witness Ms. Wilson speculates that Pendleton will implement an additional rate increase to expand into the Disputed Area while emphasizing the increased rates in the Pendleton PER. *See id.* at p. 13:11-17. However, as stated by Mr. Reske, the Pendleton PER is preliminary and unrelated to this proceeding. Pet. Ex. 3 Part 1, p. 7:3-6. Moreover, Mr. Reske stated that Pendleton's intention is to charge its current rates to customers in the Disputed Area. Pet. Ex. 2, p. 9:21-22.

While Mr. Reske did not rule out a rate increase in the future related to its to-be-developed master plan, utility rates must be just and reasonable and produce sufficient revenue to maintain and operate the utility and satisfy other obligations. Ind. Code § 8-1.5-3-8. Because circumstances change, all utilities, including Anderson, may have rate increases in the future—regardless of the outcome in this Cause. For instance, Anderson's rate increase is necessary not

because of the proposed expansion, but rather because its current rates and charges "do not produce sufficient income to maintain the Utility in a sound financial and physical condition to render adequate and sufficient service." Int. Ex. 9. Presumably, at some point in time, those rates did produce sufficient income to maintain Anderson's water utility. This is one example demonstrating that rate increases are necessary for a variety of reasons.

The difference between the rate increase set forth in Anderson's testimony and the estimated rate increase set forth in the Pendleton PER is that, assuming Commission approval, the Anderson rate increase is certain, whereas the rate increase included in the Pendleton PER is not. Furthermore, the Pendleton PER specifies that the rates are presented *only* to provide Pendleton with an estimate. Pet. Ex. 3 Part 1, p. 135. Given that Pendleton's current intention is to charge its current rates to customers in the Disputed Area and any rate increase is wholly uncertain, the Commission should not consider the impact the rates set forth in the Pendleton PER could have on customers within the Disputed Area.

iii. If the Commission considers the Pendleton PER, it should also consider that the Anderson PER is unrelated to expansion.

Although the Pendleton PER is unrelated to this matter, Pendleton acknowledges that the Commission may consider it when making its decision as to which provider should serve the Disputed Area. Because neither the Pendleton PER nor the Anderson PER is tailored to expansion, including expansion into the Disputed Area, there is uncertainty as to what additional infrastructure will be needed by either party. Pendleton plans to develop its master plan for expansion into Pendleton's regulated territory after this proceeding, and Anderson's master plan relates only to the Flagship Industrial and Business Park. *Id.*, p. 7:13-15; *see* Int. Ex. 5, p. 18:10-12. To the extent the Commission places weight on the Pendleton PER and its potential impact

on rates, the Commission should similarly consider how the Anderson PER fails to address expansion into Anderson's Proposed Service Area.

B. Granting Anderson's requested relief in this matter would be contrary to the public interest.

Historically, Indiana courts have used a first-in-time rule to resolve disputes between two municipalities possessing "concurrent and complete jurisdiction of a subject matter." *Town of Newburgh v. Town of Chandler*, 999 N.E.2d 1015, 1018 (Ind. Ct. App. 2013); citing *Taylor v. City of Fort Wayne*, 47 Ind. 274, 282 (1874) (group of citizens prevailed where it initiated proceedings to incorporate a new town before the city initiated proceedings to annex same territory); *Ensweiler v. City of Gary*, 350 N.E.2d 658, 659 (Ind. Ct. App. 1976) (city prevailed where it initiated annexation proceedings before a group of citizens initiated proceedings to incorporate the same territory as new town). In *Chandler*, the Indiana Court of Appeals found that Newburgh could exclusively serve an area that Chandler had already been providing service in because Newburgh passed an ordinance establishing itself as the exclusive sewer provider before Chandler did. 999 N.E.2d 1015, 1016–1017 (Ind. Ct. App. 2013). The Indiana General Assembly then passed Ind. Code § 8-1.5-6-6, which gave the Commission jurisdiction over the offering or provision of service by a utility in a regulated territory, including disputes over service in a regulated territory (Ind. Code § 8-1.5-6-10).

Although the first-in-time rule is no longer controlling, the Commission should consider whether it is in the public interest for a utility to make significant investments using ratepayer dollars, as Anderson alleges it has done, into serving an area it does not yet, or may never, have exclusive authority to serve. *See* Int. Ex. 1, p. 12:14-16. Pendleton disagrees with Anderson's allegations that it has made significant investments into serving the Disputed Area, as the Anderson PER is unrelated to expansion and shows that Anderson's improvements are necessary

to serve its existing territory. *See generally*, Int. Ex. 6. Moreover, the Anderson PER was created on March 27, 2024, which was several months before Anderson filed its regulatory ordinance requesting to serve the Disputed Area. *See* Int. Ex. 5: p. 5:1-2. If Anderson has planned to expand into its Proposed Service Area for years and as of the date the Anderson PER was created, it is nonsensical for the Anderson PER to state that Anderson's territory "is not expected to change in any significant way." *See* Int. Ex. 6, p. 39. This indicates that Anderson did not intend to serve the Disputed Area until after Pendleton filed its Petition in this Cause. *See* Int. Ex. 1, p. 7:6-7. However, even if and to the extent the Commission finds that Anderson's PER contemplates expansion into its Proposed Service Area and that Anderson has invested resources into serving the Disputed Area, it is not in the public interest for Anderson to be the exclusive provider of the Disputed Area.

Despite supposedly "planning to expand its existing facilities and construct new facilities that can be used to provide service to its existing service area as well as to . . . [Anderson's] Proposed Service Area" for several years, Anderson did not pass its regulatory ordinance until September 12, 2024, which is nearly three (3) months after Pendleton passed its ordinance and filed its Petition in this Cause. Int. Ex. 1 at p. 7:6-7, p. 7:11-14; Int. Ex. 7, p. 9:10-13; *see* Pet. Ex. 1, p. 2. If Anderson wanted to be the exclusive provider of the Disputed Area and has allegedly planned for and known as much for years, it begs the question why Anderson did not pass its regulatory ordinance encompassing the Disputed Area prior to supposedly making significant investments into serving the Disputed Area.

Anderson wants to "protect its investment by having its regulatory ordinance approved by the Commission", but, assuming Anderson's investments were made to serve an expanded territory, which they were not, the best way for it to protect its investment would have been to

file for the regulatory ordinance as soon as it knew it wanted to serve the Disputed Area to ensure it could recoup its investment without burdening existing ratepayers. *See* Int. Ex. 5, p. 19:16-17; *see generally* Int. Ex. 6. Anderson witness Ms. Young argues that, absent the Commission's approval of its regulatory ordinance, neighboring utilities may provide competing service, which could be confusing, lead to stranded or underutilized infrastructure and higher rates. Int. Ex. 5, p. 19:17-20. However, granting Anderson's requested relief and allowing it to exclusively serve the Disputed Area may promote the same issues Anderson identifies.

Since Anderson argues its regulatory ordinance should be granted to protect its alleged investments into serving the Disputed Area, granting Anderson's requested relief could encourage utilities to make significant investments into exclusively serving a territory prior to requesting Commission approval for it to exclusively serve such area. This is contrary to the public interest because multiple utilities may invest significant funds into serving an area without knowledge that other utilities are doing the same, which may lead to unanticipated disputes. When there are disputes and multiple utilities have made significant investments into serving a disputed territory, the utility that is not granted the ability to serve may have stranded or underutilized infrastructure or higher rates that they cannot recoup. If the Commission designates Anderson as the exclusive provider of the Disputed Area, it could set precedent that increases the likelihood of multiple utilities making significant investments they may be unable to recoup if there is a dispute. This is against the public interest and will promote waste of ratepayer funds.

Even though Anderson argues that it must serve the Disputed Area to protect its alleged investment, any potential loss of investment, to the extent the Commission determines such investment is even related to the Disputed Area, is minimal compared to the harm that may result if Anderson is granted the exclusive right to serve the Disputed Area. Further, any such loss is its

own doing due to its failure to timely pass a regulatory ordinance encompassing the Disputed Area, even though it had allegedly planned to serve such area for years. Anderson has drilled seventeen (17) test wells looking for a new water supply, including four (4) test wells in the Disputed Area. *Id.* at p. 7:19-21; p. 8:17-20; p. 9:1-3. The majority of these wells are outside the Disputed Area, nothing in the record supports that all these wells will be used by Anderson, and the test production well that Anderson has identified as a sustainable source of water supply is on the Cooper Property. *See id.* at p. 7:19-21, p. 8:2-3. However, the Cooper Property is not in the Disputed Area; it is located in the southeastern-most portion of Anderson's municipal boundary. Int. Ex. 1, p. 11:1-5. While Anderson has noted it is possible that the south side water treatment plant and well field could be located in the eastern portion of the Disputed Area on the Beerbower property, this is uncertain, as the Cooper Property has also been identified as a location for the south side water treatment plant and south side well field. *Id.* at p. 10:4-7.

Ultimately, Anderson needed to find a new source of water supply to replace the Wheeler water treatment plant and well fields, as the supply at such facilities was contaminated. Int. Ex. 5, p. 8:17-20; p. 9:1-3. The test wells were a means to achieve this goal and to ensure that Anderson could find a sustainable source of water supply to continue providing service within its existing territory. *Id.* at p. 8:3; *see* Int. Ex. 6, p. 39-40. Given that Anderson has identified the Cooper Property as the location of a sustainable source of water supply and a possible site for the south side water treatment plant, it is clear that Anderson will still be able to make the improvements it wants to make outside the Disputed Area. Additionally, the public interest will not be similarly harmed if Pendleton is the exclusive provider of the Disputed Area because it would not set precedent that would encourage utilities to make unnecessary and expensive investments into an area they do not have exclusive authority to serve.

The Commission's decision in this Cause must be made in a manner it determines in the public interest. Ind. Code § 8-1.5-6-7. For the foregoing reasons, it would not be in the public interest if Anderson is the exclusive provider of the Disputed Area.

C. To the extent that the Commission determines that Anderson should serve the Disputed Area, it should ensure that Anderson has the ability to serve the entirety of its Proposed Service Area and that all other requirements it identified to make its improvements are met.

Although issues related to the Disputed Area have been consolidated into this Cause, Anderson's ability to serve the Disputed Area should not be considered in a vacuum. It is possible that Anderson could have the ability to serve the Disputed Area but not the entirety of its Proposed Service Area. In such a case, it would be in the best interest of the customers in the Disputed Area to have a certain, exclusive provider with the ability to provide reliable service. If the Commission determines that Anderson should be the exclusive provider of the Disputed Area, it should condition such approval on its finding in Cause No. 46147 that Anderson has the ability to serve its entire Proposed Service Area.

Additionally, Anderson's ability to construct and operate its new water treatment plant, which is necessary to replace the Wheeler plant and allegedly serve the Disputed Area, is contingent on approval of its increased rates and charges. *See* Int. Ex. 7, p. 9:13-16. Not only this, but Anderson's plan is to finance the new southside water treatment plant with bonds from the State Revolving Fund Loan Program, which it has not yet been granted. *See id.* at p. 7:13-14, p. 8:15-18. Therefore, should the Commission designate Anderson as the exclusive provider of the Disputed Area, it should condition such designation on approval of Anderson's proposed rates and charges and receipt of bonds.

III. CONCLUSION

In light of the foregoing analysis and issues as raised in Pendleton's Post-Hearing Brief and Exceptions, the Commission should adopt Pendleton's proposed revisions to Anderson's Proposed Order, grant Pendleton exclusive authority to serve the Disputed Area, and deny Anderson's requested relief.

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