STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF GRANGER WATER UTILITY LLC FOR (1) APPROVAL OF AN INITIAL SCHEDULE OF RATES AND CHARGES FOR WATER UTILITY SERVICE; (2) FOR APPROVAL OF LONG TERM DEBT, INCLUDING AN ENCUMBRANCE OF ITS FRANCHISE, WORKS OR SYSTEM RELATED THERETO; (3) FOR ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE WATER UTILITY SERVICE IN CERTAIN AREAS OF ST. JOSEPH COUNTY, INDIANA; (4) FOR CERTAIN DEFERRED ACCOUNTING TREATMENT; AND (5) FOR CONSENT OF THE COMMISSION TO OBTAIN A LICENSE, PERMIT OR FRANCHISE TO USE COUNTY PROPERTY PURSUANT TO IND. CODE § 36-2-2-23	)	**CAUSE NO. 45568**

PETITIONER'S REPLY TO THE OUCC'S PROPOSED ORDER

Petitioner, Granger Water Utility LLC ("Granger Water"), by counsel, replies to the proposed order submitted by the Indiana Office of Utility Consumer Counselor ("OUCC"). The OUCC ignores the law and misapplies the facts in its proposed order (the "OUCC Proposal"). The OUCC Proposal rests its entire argument on the false premise that Indiana Code § 8-1-2-0.5 ("Section 0.5") provides the Indiana Utility Regulatory Commission (the "Commission") jurisdiction to authorize new water utilities to begin operations. Section 0.5 cannot be expanded to encompass the OUCC's position. This proceeding, at its core, is a rate case, plain and simple.

The OUCC Proposal alleges many facts and advocates many positions, not all of which are addressed in this Reply for the sake of brevity and economy of time. This Reply addresses six discrete issues:

- Section 0.5 does not provide the Commission with jurisdiction to authorize new water utilities;
- Granger Water's proposed rates are reasonable;
- Alternate providers are an Indiana Department of Environmental Management ("IDEM") issue, not a Commission issue;
- The certificate requested by Granger Water did not seek exclusivity and served to limit the service area Granger Water would be required to serve;
- The Commission should approve Granger Water's long-term debt & the encumbrance of its franchise, works or system;
- Deferred accounting treatment should be granted.

Simply because this Reply does not address an issue in the OUCC Proposal does not reflect Granger Water's agreement or acquiescence in the OUCC's position. The Commission should reject the OUCC Proposal, follow the law, and issue the proposed order submitted by Granger Water.

Section 0.5 Does Not Provide the Commission Jurisdiction to Authorize New Water Utilities

In the Commission Discussion and Finding section of the OUCC Proposal, the OUCC begins its argument by stating that the Commission has previously "construed [Section 0.5] to create a policy that favors regionalization of water utility operations and protecting affordability of water service." *OUCC Proposal*, at 37. The OUCC offers no citation for its position.[1] Moreover, even if it had offered a citation, the plain language of Section 0.5 reveals a general statement of legislative intent that promotes infrastructure investment while maintaining affordability of rates and that is not specific to water utilities

[1] Granger Water also notes that the OUCC relies heavily on the August 17, 2020 email exchange between Dana Lynn of the Commission and Patrick Matthews that Commission approval of rates and financing was required to attack Granger Water's issuance of debt without Commission approval. *E.g.*, *OUCC Exhibit 2*, 3:6-16, referencing Attachment SD-01. Conspicuously absent from Ms. Lynn's email is an admonition that Commission approval of operating authority was needed before beginning water utility service. *OUCC Exhibit 2*, Attachment SD-01.

but is of general applicability to all utility services. Section 0.5 is not a statute that disrupts the existing regulatory framework. The text of Section 0.5 is set forth below:

> **IC 8-1-2-0.5 State policy to promote utility investment in infrastructure while protecting affordability of service.**
> The general assembly declares that is the continuing policy of the state, in cooperation with local governments and other concerned public and private organizations, to use all practical means and measures, including financial and technical assistance, in a manner calculated to create and maintain conditions under which utilities plan for an invest in infrastructure necessary for operation and maintenance while protecting the affordability of utility services for present and future generations of Indiana citizens.

Granger Water furthers the purposes of Section 0.5: Granger Water provides infrastructure for water service and does so at an affordable cost. The OUCC produced no evidence to demonstrate that Granger Water's proposed rates were not affordable. The OUCC focused its efforts on attempting to demonstrate that another option (which Granger Water demonstrated to be infeasible) might be cheaper. Affordability is not synonymous with the cheapest option available.

The OUCC Proposal cites not a single statute or case in its entire Commission Discussion and Findings section that would purport to give the Commission the jurisdiction it would have the Commission exercise in this case. Indiana's regulatory framework does not function as the OUCC Proposal asserts. Gas, sewer and telecommunications utilities are required to obtain a certificate prior to commencing operations. Ind. Code §§ 8-1-2-87 (gas utilities need a certificate of public convenience and necessity prior to commencing service to rural areas) and -89 (sewage disposal utilities need a certificate of territorial authority prior to commencing operations in rural areas), Ind. Code § 8-1-32.5-6 (communications providers must obtain a certificate of territorial authority prior to commencing service in Indiana), and Ind. Code § 8-1-34-16(b) (after June 30, 2006, video

service providers need a certificate of franchise authority to provide video service in Indiana). Indeed, Commission precedent acknowledges that initial operating authority does not exist for water utility service. *See In the Matter of Flowing Wells, Inc.*, Cause No. 40446 at 10 (IURC July 16, 1997), 1997 Ind. PUC Lexis 232 at *25 (Ind. U.R.C. July 16, 1997) ("there are no water CTAs or assigned territories in this State"; territorial dispute authority modified by subsequent legislation but law unchanged for position cited).

No statute provides the Commission with the general initial operating authority jurisdiction over utilities (apart from those statutes previously cited), let alone water utilities specifically, that the OUCC Proposal attempts to have the Commission exercise. It is black letter law that the Commission, as a creature of statute, exercises only that power the General Assembly has given to it. *United REMC v. Indiana & Mich. Elec. Co.*, 549 N.E.2d 1019, 1021 (Ind. 1990). Because the General Assembly has not given the Commission the jurisdiction to approve the establishment of water utilities, the Commission must find it does not have that jurisdiction.

Accordingly, this case, at its core, is a rate case, plain and simple.[2] The OUCC cannot use the Commission's authority over rates and financing to turn this case into an operating authority case. The OUCC Proposal incorrectly attempts to prod the Commission into exercising jurisdiction that the Commission does not have.

Granger Water's Proposed Rates Are Reasonable

The OUCC criticizes Granger Water's proposed $75 per month flat rate by making claims debunked in Granger Water's rebuttal case (financial plan and rates of nearby

[2] Yes, Granger Water requested relief other than rates in this proceeding; however, rates are the primary driver for the case. The requested certificate, the deferred accounting treatment and other relief, apart from the financing relief sought, are important requests to be sure but are not as important as rate approval.

utilities). The OUCC's criticisms overlook the fact that just and reasonable rates are not necessarily equal to the lowest possible rates. The OUCC presented no persuasive evidence that the proposed $75 per month flat fee rate, or the proposed regimen to increase rates, is unreasonable. The Commission should therefore approve the rates as proposed.

Alternate Providers Are an IDEM Issue, Not a Commission Issue

The OUCC argues that the Commission must pursue a regional approach, and the OUCC Proposal collaterally attacks IDEM's determination that Granger Water adequately completed this element of its Water System Management Plan. The OUCC Proposal criticizes Granger Water's compliance with 327 IAC 8-3.6-1 to -7 (the "IDEM Capacity Rule") concerning regionalization and the cost benefit analysis.

First, it has been established that the Commission does not exercise initial operating authority over water utilities. That is the regulatory structure the General Assembly has enacted. That uncontroverted fact should end discussion of this issue but for the OUCC's insistence on arguing in furtherance of law that does not exist.

Second, the OUCC Proposal criticizes Granger Water's compliance with the IDEM Capacity Rule that IDEM itself found Granger Water met. *OUCC Exhibit 3*, Attachment JTP-1. The evidence of record demonstrates that IDEM authorized Granger Water to proceed, permitted the wells and treatment plant, permitted the distribution system, and assigned a PWSID number to Granger Water. *OUCC Exhibit 3*, Attachments JTP-1 and JTP-2. The OUCC cannot dispute these facts and attempts to collaterally attack IDEM's authorizations by claiming, without any authority other than Section 0.5 (again, Section 0.5 does not even mention the word "water"), that Commission approval is needed to begin operating a water utility.

The OUCC Proposal seizes on Granger Water's statement in its proposed order that, "Where regional approaches prove infeasible, the State allows for new water utilities to be formed," to claim that, "Where a reasonable approach is feasible, a new water utility should not be authorized by the Commission." *OUCC Proposal*, at 40. First, as set forth above, the General Assembly has not invested the Commission with initial operating authority over new water utilities. Second, Granger Water was describing the general State policy (hence the choice to use "State" rather than "Commission" when describing the policy) and IDEM Capacity Rule process that incorporates a regionalism concept, not any specific jurisdiction conferred upon the Commission to authorize new water utilities (of which there is none). Granger Water's position, which unlike the OUCC's position, is based on the law and recognizes the Commission does not have jurisdiction to deny initial operating authority to Granger Water.

In furthering its legal fiction, the OUCC Proposal assumes Mishawaka is willing to serve The Hills and puts great stock in Mayor Wood's email included in OUCC CX-4 that indicates the City of Mishawaka *might* be willing to serve The Hills. Mayor Wood's email does not say that Mishawaka in fact will serve The Hills, just that Mishawaka needs to "study" such an extension. *OUCC CX-4*, at 9. Even assuming Mayor Wood's email can be construed to agree to extend service (which it cannot), the Mayor's email came only after Mishawaka already rejected Granger Water's inquiries about water service over a year earlier in June of 2020 (*e.g.*, *OUCC CX-4*, at 1). Moreover, Indiana law does not require that Mishawaka (or any other water utility) provide water service to the unincorporated area where The Hills is located. No evidence places The Hills within territory covered by a "regulatory ordinance" pursuant to Ind. Code § 8-1.5-6 such that service could be

compelled. Such unincorporated areas are open to competition. *Flowing Wells*, Cause No. 40446 at 10, 1997 Ind. PUC Lexis 232 at *25 (territorial dispute authority modified by subsequent legislation but law unchanged for position cited).

Finally, the OUCC Proposal twists the arguments contained in Granger Water's proposed order on the issue of Commission authority. *OUCC Proposal*, at 40. Specifically, the OUCC Proposal claims that Granger Water's language that recognizes the Commission's preference for regionalization cannot preclude other options implies that Mishawaka is unwilling to serve. In fact, when Granger Water went through the WSMP process, Mishawaka expressly indicated it would not serve. *Petitioner's Exhibit 1*, Attachment JPM-6 at 74. The OUCC attempts to transform Mayor Wood's email in OUCC CX-4 that offers to study an extension (an email sent only after Granger Water's system was already installed and operational and more than a year after Mishawaka declined to serve) to one that obligates Mishawaka to extend service when the evidence of record indicates that Mishawaka has never extended service to areas not adjacent its corporate limits, has never extended service as far away as would be needed to serve The Hills (*Tr.*, at C-38:12 to C-40:5), and has rejected multiple other extension requests from closer developments (Goddard School and Cobblestone extensions rejected, *Tr.* at D-52:10-15).

Moreover, Mishawaka clearly had notice of this proceeding and chose not to intervene. Indeed, Mayor Wood's email expressly states that he was advised that Mishawaka "should not … get involved in the IURC case[.]" *OUCC CX-4*, at 9.

Regardless of what is construed by Mayor Wood's email in OUCC CX-4, it was an ex post facto communication sent over one year after Mishawaka initially declined service that cannot be used to punish Granger Water for proceeding with creation of its own water

utility. Granger Water reached out to Mishawaka in 2020 in accordance with the IDEM Capacity Rule and IDEM has already approved the notice to surrounding systems element of the IDEM Capacity Rule. Mishawaka had its bite at the apple and passed. *E.g.*, *OUCC Exhibit 3*, Attachment 1.

The Certificate Requested by Granger Water Did Not Seek Exclusivity and Served to Limit the Service Area Granger Water Would Be Required to Serve

The OUCC Proposal wrongly claims that Granger Water asks the Commission to establish an exclusive service territory despite no statute authority to do so. *OUCC Proposal*, at 42. The OUCC, again, is incorrect. Granger Water did not request an exclusive service territory. Rather, Granger Water requested that it only be required to serve within a designated area in order to limit potential requests for extensions that would eat into Granger Water's capacity to serve its intended service area and would divert administrative resources to dealing with such extension requests when Granger Water needs to focus on commencing operations. Granger Water chose the "certificate of public convenience and authority" moniker because that is lexicon common in the industry. The name of the certificate is not what is important. The important element of the relief is that Granger Water not be required to extend service outside of the area it is intended to serve. Because the Commission has authority over a customer's request for a service extension, limiting the set of customers that could request an extension falls squarely within the Commission's jurisdiction. Granger Water's request for a certificate of public convenience and necessity in no way, shape or form contradicts its position in this case. Moreover, because jurisdiction cannot be conferred upon the Commission by the parties, Granger Water's request for a certificate of public convenience and necessity does not somehow provide the Commission with jurisdiction over the Granger Water's initial operating authority. *See*

United REMC, 549 N.E.2d at 1021 (Commission only exercises jurisdiction conferred by legislature).

The Commission Should Approve Granger Water's Long-Term Debt & the Encumbrance of its Franchise, Works or System

The OUCC criticizes the long-term debt and encumbrance for several reasons. The OUCC correctly asserts that Commission pre-approval should have been sought. Granger Water and Mr. Matthews have apologized profusely for that and explained the rationale behind the decision-making process both in pre-filed testimony and at the evidentiary hearing. *Petitioner's Exhibit 3*, at 3:3 to 4:22; *Tr.* at D-25:3 to D-33:9 and D-55:3 to D56:6.

The OUCC also criticizes the cross-collateralization of the debt and overlooks Commission precedent concerning pooled financing arrangements. Initially, the OUCC's position ignores the benefit received by the utility as a result of cross-collateralization. Granger Water received a lower interest rate as a result of the cross-collateralization than it would have if it were required to obtain a stand-alone loan. *Tr.* at D-10:7-8. The cross-collateralization undertaken by Granger Water has many similarities with the pooled financing program approved by the Commission in Cause No. 45458. In Cause No. 45458, Southern Indiana Gas & Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc., sought approval of a financing plan that included a financial services agreement (referred to below as FSA) that allowed for pooled finances with several of its affiliates. As explained in the Final Order approving the arrangement (where "VUHI" is an unregulated affiliate of the regulated utilities and "Participants" are the regulated utilities):

> Mr. Jerasa testified, in accordance with the FSA, VUHI sells its own long-term debt securities in the public or private markets in the amount of the combined long-term debt requirements of the Participants and re-loans the proceeds to the Participants on the same terms as apply to the VUHI debt. Each Participant executes a

> promissory note to VUHI in the amount of the loan to it. To ensure the availability of financing by VUHI to meet its financing needs and those of the Participants, and to maximize the benefits of the pooling arrangement, ***the Participants provide ongoing joint and several guarantees of all of VUHI's debt to make VUHI's debt issues attractive to investors and to achieve lower debt costs***.

Petition of Southern Indiana Gas and Electric Company, Cause No. 45458, at 5 (IURC Apr. 14, 2021) (emphasis added). In the financing arrangement approved in Cause No. 45458, the Commission approved an Indiana regulated utility pooling risk with affiliates by becoming jointly and severally liable for the debts of its affiliates, including a utility not even regulated by the Commission (Vectren Energy Delivery of Ohio, Inc.). This is very similar to what Granger Water did. Granger Water pooled the risk with affiliated entities to obtain a lower interest rate for the loan. As Mr. Matthews testified, these sorts of cross-collateralized loan agreements (*i.e.*, pooled risk arrangements) are standard practice in the industry for sophisticated borrowers. *Petitioner's Exhibit 3*, at 28:18-19. The Commission's approval of the pooled financing program in Cause No. 45458 demonstrates that the OUCC is incorrect that "encumbering utility assets to secure debt incurred by affiliates is neither common nor permitted by this Commission[.]" *OUCC Proposal*, at 48.

Finally, Granger Water notes that undertaking debt in and of itself is reasonable. A capital structure consisting entirely of equity would not be reasonable. *See In the Matter of Indiana American Water Company*, Cause No. 44682 at 5-6 (IURC May 11, 2016), 2016 Ind. PUC Lexis 136 at *13 (Ind. U.R.C. May 11, 2016) (Final Order summarized OUCC's position as being "because debt is typically less expensive than equity, a capital structure that includes an excessive proportion of equity will increase the authorized cost of capital and impose an unnecessary and excessive cost on the utility's ratepayers"). The OUCC Proposal focuses on the debt issuance and asset encumbrance without Commission

approval and on the cross-collateralization as the rationale to deny the financing and encumbrance approval. *OUCC Proposal*, at 47-48. The OUCC Proposal does not criticize the terms of the loan (apart from the cross-collateralization), such as the term or the interest rate. Accordingly, Granger Water's debt issuance and related encumbrance of its franchise, works, or system was reasonable notwithstanding the lack of Commission pre-approval.

The Commission should reject the OUCC's criticisms and approve the debt issuance and encumbrance.

Deferred Accounting Treatment Should Be Granted

The OUCC Proposal rules against Granger Water's request for deferred accounting treatment finding that such treatment should not be used, "as a basic feature of a business plan." *OUCC Proposal*, at 48. Granger Water obviously disagrees with the OUCC and points out that deferred accounting treatment is not being presented as a "basic feature" of its financial plan but rather as a fair and reasonable request to balance the interests of initial customers, future customers, and Granger Water. Initial customers receive a rate subsidized by Granger Water. Future customers will benefit from the risks taken by Granger Water to provide the subsidized rate to initial customers. Accordingly, allowing Granger Water to present its losses in its early years of operations for potential, not guaranteed, recovery in a future rate case fairly and reasonably balances the risks and rewards amongst initial customers, future customers, and Granger Water.

WHEREFORE, Granger Water Utility LLC respectfully requests that the Indiana Utility Regulatory Commission issue the proposed order submitted by Granger Water Utility LLC in this proceeding.

Dated this 11th day of January, 2022.

Respectfully submitted,

By: _____
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been served by electronic service on the following this 11th day of January, 2022:

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