

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF INDIANA-AMERICAN)
WATER COMPANY, INC. (“INDIANA)
AMERICAN”) FOR (1) APPROVAL OF ITS)
LEAD SERVICE LINE PLAN PURSUANT)
TO IND. CODE CHAP. 8-1-31.6 AND (2))
APPROVAL OF ASSOCIATED CHANGES)
TO INDIANA AMERICAN’S RULES AND)
REGULATIONS FOR WATER SERVICE.)

CAUSE NO. 45043

**RESPONSE TO OUCC’S PETITION FOR RECONSIDERATION OF
ORDER ON REMAND**

Indiana-American Water Company, Inc. (“Indiana American”) submits its response to the Petition for Reconsideration of Order on Remand filed by the Indiana Office of Utility Consumer Counselor (“OUCC”) and asks the Indiana Utility Regulatory Commission (“Commission”) to DENY the OUCC’s request for reconsideration of the Commission’s Order on Remand. In support, Indiana American now states:

1. The OUCC’s relentless appeals of the Commission’s approval of Indiana American’s plan for replacing customer-owned lead service lines belie its claims that it supports Indiana American’s lead service line replacement plan, albeit with a never-articulated “appropriate indemnification clause” contained in the License Agreement. At no time has the OUCC proposed alternative language for the indemnification clause or otherwise proposed what it would consider “appropriate”.¹ This failure to declare what it would find acceptable is all the more egregious when one considers the OUCC litigated the original approval, its appeal, and now this Petition for Reconsideration. Neither the Commission nor Indiana American should be left to guess what

¹ The most recent opportunity to do so would have been in conjunction with the OUCC’s most recent post-hearing petition, which could have been a petition for rehearing under 170 IAC 1-1.1-22(e).

would satisfy the OUCC's undeclared litigation strategy. Indiana American's customers should not be left to fund the OUCC's continued delay of declared State health policy. On appeal, the OUCC's position was that the Commission must make a finding approving or disapproving the indemnification clause. The Commission has approved it.

2. The OUCC misstates what the Commission found in its Order on Remand, in an apparent effort to paint such finding as unsupported by the evidence in the record. Contra the OUCC, Indiana American cannot "transfer to its individual customers an unknown level of risk caused by Indiana American's own acts and omissions" (OUCC Pet. For Recons., p. 2), and the Commission did not purport to grant any such power to Indiana American. Customers own their service lines. It is their property and their responsibility. The Commission's Order on Remand did not attempt to change ownership. As such, the customer retains the right to negotiate whatever deal it wants to replace its lead service line, or not change its line at all. Indiana American simply presented the Commission with its plan to replace customer-owned lead service lines, including its proposal for communicating with the customer the availability of its plan and for documenting customer content. The Commission approved the proposal.²

The Commission's Order on Remand, further, did not find that "Indiana American would choose not to replace customer owned lead service line if it does not have an indemnification provision that protects it from its own acts and omissions" (OUCC Pet. for Recons., p. 3). What the Commission found was that "[t]he inability cited by [Indiana American witness] Hoffman to perform the calculus of risk in the absence of the protection afforded by indemnification language

² This highlights the irony that it was the OUCC which appealed specifically to require the Commission to find the indemnity clause reasonable or not. The Commission found it reasonable. Yet now, the OUCC wants to pivot to ask for more than a determination, while still providing no clue of what it would deem more reasonable than an owner being responsible and free to contract for its own property.

seems to us likely to curtail the replacement of customer owned lead service lines if the Indemnification Clause is not approved.” Order on Remand (IURC 8/7/2019), at p. 2. What was presented to the Commission was Indiana American’s plan to move from having no responsibility (or liability) for customer-owned property to providing help achieving State health-based policy. The Commission’s conclusion that assessing risk is important to Indiana American in incurring such liability is certainly a reasonable inference from the evidence cited.

3. The OUCC suggests that the License Agreement is, or is akin to, a “construction or design contract” such as those subject to Ind. Code § 26-2-5-1. It is not. The anti-indemnity provisions cited apply to the relationship between “construction” and “design” professionals. The License Agreement is a sample of the document by which the customer contracts to have Indiana American replace the customer’s lead service line *at Indiana American’s cost* and with a 12-month limited workmanship warranty. That is, the customer gets \$3,500 worth of work and a 12-month warranty to replace what the State of Indiana has determined to be an unsafe service line, in exchange for agreeing not to sue Indiana American for replacing the line.

On its face, Ind. Code § 26-2-5-1 has limited applicability. A “construction or design contract” subject to Ind. Code § 26-2-5-1 refers to “a design-build contract under which all of the following for the same project are included: (1) Architectural, engineering, and related design services. (2) Labor, materials, and other construction services.” Even then, it excludes highway contracts. The consideration under contracts subject to that statute is likely to be vastly different from the proposal for Indiana American to pay the cost of the customer’s lead service line replacement as well as offer a limited warranty. Here, customers are free to refuse to have Indiana American replace the lead service line at the company’s cost. The allocation of risk under the

Indiana American License Agreement is reasonable and is not the same as that intended to be prevented by the language of the design-build statute.

4. The OUCC criticizes the Commission's finding that further docketed proceedings are unnecessary for changes in the language of the License Agreement unless such changes render the language no longer "substantially similar." Surprisingly, and without further explanation, the OUCC describes the Commission's own Consumer Affairs Division process – which may be used to review the application of the indemnification clause if customers' circumstances warrant – as inefficient. The OUCC does not say why it believes that to be the case. The OUCC has not shown why adding layers of process (similar to what it proposed, and this Commission rejected, when it recommended that the plan automatically expire in five years (Order in Cause No. 45043 (IURC 7/25/18), pp. 9-10) is necessary or appropriate. It certainly is not a more expeditious avenue to replacing customers' lead service lines.

5. What is presented in the License Agreement, including its indemnification clause, is Indiana American's "proposal for: (A) communicating with the customer the availability of the water utility's plan to replace the customer owned portion of the lead service line in conjunction with the water utility's replacement of the utility owned portion of the lead service line; and (B) documenting the customer's consent or lack of consent to replace the customer owned portion of the lead service line." Ind. Code § 8-1-31.6-6(a)(8). The statute requires the plan to include the utility's *proposal* for communicating with customers and documenting their consent. It does not require the precise language of every such communication or document to be included, just as it does not foreclose the ability of the Commission to approve a change to that language, or to approve the proposed sample language and substantially similar language.

Conclusion

At the end of the day, the OUCC's actions in attempting to impede the progress of Indiana American's lead service line replacement plan simply cannot be reconciled with a genuine desire to see such a solution implemented. What other explanation can there be for repeated complaints about the specific language of a provision without offering alternative language, or objections to the Commission's long-established customer complaint process as improper for handling specific customer concerns? The OUCC has offered none. For the foregoing reasons, the OUCC's Petition for Reconsideration of Order on Remand should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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