

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

[Handwritten signatures: JLB, AE, and ARW]

IN THE MATTER OF THE PETITION OF)
THE TOWN OF NASHVILLE, INDIANA, FOR)
APPROVAL OF A REGULATORY) CAUSE NO. 44944
ORDINANCE ESTABLISHING A SERVICE)
TERRITORY FOR THE TOWN'S) APPROVED: FEB 07 2018
MUNICIPAL WATER SYSTEM PURSUANT)
TO IND. CODE § 8-1.5-6 *ET SEQ.*)

ORDER OF THE COMMISSION

Presiding Officers:

Sarah E. Freeman, Commissioner

Carol Sparks Drake, Administrative Law Judge

On May 15, 2017, the Town of Nashville, Indiana ("Nashville" or "Petitioner"), filed a Verified Petition with the Indiana Utility Regulatory Commission ("Commission") in the above-captioned Cause. A Prehearing Conference was held on June 27, 2017, after which the Commission issued a Prehearing Conference Order on July 5, 2017, establishing the procedural schedule for this proceeding.

On June 29, 2017, Nashville filed an Amended Verified Petition and a Motion for Leave to File Amended Verified Petition which was granted by a Docket Entry issued on July 11, 2017. Nashville's amended petition included a corrected service territory map. On June 29, 2017, Nashville also filed its case-in-chief consisting of the testimony and exhibits of Stephen Mark DeBruler, a Professional Engineer with Beam Longest and Neff, LLC.

On August 10, 2017, the Indiana Office of Utility Consumer Counselor ("OUCC") filed the testimony and exhibits of Carl N. Seals, Utility Analyst in the OUCC's Water/Wastewater Division.

The Commission held an evidentiary hearing in this Cause at 9:30 a.m. on September 15, 2017, in Hearing Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. Nashville and the OUCC appeared by counsel and participated in the evidentiary hearing. No members of the general public participated.

Based on applicable law and the evidence presented, the Commission now finds:

1. **Notice and Jurisdiction.** Notice of the hearing in this Cause was given and published by the Commission as required by law. Nashville owns a municipal water utility as that term is defined in Ind. Code § 8-1.5-6-1(1). Under Ind. Code §§ 8-1.5-6-6 and 8-1.5-6-9, the Commission has jurisdiction over the enforceability of certain regulatory ordinances adopted by a municipality after December 31, 2012. Petitioner adopted such an ordinance on May 15, 2017, and amended the ordinance on June 27, 2017. The Commission, therefore, has jurisdiction over Nashville and the subject matter of this proceeding.

2. **Nashville's Characteristics.** Nashville is a municipality located in Brown County, Indiana. Nashville owns and operates a municipal water utility that services approximately 1,319 water customers inside and outside its corporate boundaries. Petitioner relies on two sources of water supply. Nashville has had a water supply and interconnection agreement with the City of Bloomington since 1967 under which Nashville can take up to 30 million gallons per month (i.e., 1,000,000 gallons per day). In 1995, Nashville entered into a second water supply and interconnection agreement with Brown County Water Utility, Inc. ("BCWU"). Nashville presently has an average daily usage of approximately 332,000 gallons and a peak day usage of 532,000 gallons.

3. **Relief Requested.** Nashville requests approval of Ordinance No. 2017-04 adopted under Ind. Code § 8-1.5-6-3 on May 15, 2017, and entitled "An Ordinance Establishing the Town of Nashville's Water Service Area and Regulating the Furnishing of Water Therein", as modified by Ordinance No. 2017-07 adopted by the Nashville Town Council on June 27, 2017, and entitled "An Ordinance Amending Ordinance Nos. 2017-04 and 2017-06 Establishing the Town of Nashville's Water Service Area and Regulating the Furnishing of Water Therein" (collectively the "Regulatory Ordinance"). Nashville asserts jurisdiction to provide water service to certain areas within four miles of Nashville's corporate boundaries, as depicted in Petitioner's Exhibit 5 (the "Water Service Area") and requests the Commission approve the Regulatory Ordinance and the Water Service Area.

4. **Summary of the Evidence.**

A. **Nashville's Direct Evidence.** Mr. DeBruler has served as an engineering consultant to Nashville on water and wastewater matters for 25 years. In his testimony, Mr. DeBruler generally described: (i) Nashville's existing water facilities; (ii) the Regulatory Ordinance; (iii) the ability of other utilities to serve within the Water Service Area; (iv) Petitioner's rates and charges for water service in the proposed service territory; (v) present and future economic development within the Water Service Area; (vi) the history of water service within the Water Service Area; and (vii) other factors Mr. DeBruler believes support approval of the Regulatory Ordinance.

Mr. DeBruler stated the Regulatory Ordinance establishes Nashville's water service area. The Water Service Area includes property within Nashville's corporate boundaries and certain areas within four miles outside Petitioner's municipal boundaries as shown on the map attached to Ordinance No. 2017-07 (Amended Exhibit A) and in Petitioner's Exhibit 5. Mr. DeBruler explained that while Nashville presently serves water customers that are located more than four miles from Petitioner's municipal boundaries, for purposes of this proceeding, Nashville seeks approval in the Regulatory Ordinance to exercise Petitioner's authority up to four miles outside its municipal limits. The Regulatory Ordinance states that upon its approval by the Commission, Nashville will hold an exclusive license to furnish potable water service to the public within the Water Service Area.

Mr. DeBruler noted that Nashville is the only water utility providing service within Nashville's corporate limits. Two other water utilities, BCWU and East Monroe Water Corporation ("East Monroe"), provide service nearby but outside Petitioner's corporate limits. According to Mr. DeBruler, the Water Service Area boundaries were drawn to exclude any customers East Monroe and BCWU already serve. Mr. DeBruler testified that BCWU initially indicated an interest in serving two areas northeast of Nashville's municipal limits, identified as the "94 Acre Property" and the "230 Acre Property" on Petitioner's Exhibit 5 (collectively the "Big Woods Properties.") To his knowledge, no other water utility, aside from Petitioner and BCWU, has an interest in serving these two areas.

Mr. DeBruler testified that Big Woods Brewery ("Big Woods") currently operates a brewery within Nashville's existing corporate limits and is Petitioner's largest water and sewer customer. Three years ago, Big Woods began working with Petitioner regarding service to a prospective new, expanded brewery operation to be located within or near Nashville. Big Woods subsequently purchased the Big Woods Properties and requested Nashville annex the 94 Acre Property. Shortly after this Cause was initiated in May 2017, Red Truck LLC executed a Sewer and Water Connection Agreement with Nashville (the "Water Service Agreement" attached to Mr. DeBruler's testimony as Petitioner's Exhibit 6) in May 2017 for sewer and water service to a new brewery, distillery, and event center to be located on the Big Woods Properties, i.e., the Big Woods Brewing Company Facility. Mr. DeBruler stated that Big Woods recently informed Nashville it will soon file a petition for annexation of the 230 Acre Property.

Mr. DeBruler described the location and the status of the installation of Nashville's current water facilities with respect to the Big Woods Properties, including a 6-inch water service line (the "Big Woods Line") and a water meter being installed to meet Big Woods's construction schedule and the terms of the Water Service Agreement. The Big Woods Line and Nashville's water main on Old State Road 46 are sized to provide fire flows for fire protection, and Nashville has fire hydrants adjacent to or near the Big Woods Properties. The Big Woods Line is connected to a looped water main on Old State Road 46 which increases the capacity for fire flows and water supply reliability. Mr. DeBruler noted that the Big Woods Properties do not adjoin any other right-of-way to allow ready accessibility to water lines without crossing private property.

Mr. DeBruler testified that based on his understanding of BCWU's water line locations, BCWU does not have existing water facilities on or adjacent to the Big Woods Properties. The BCWU water line closest to Big Woods Properties is about 430 feet away at its closest point, but it is a four-inch line which does not meet the minimum size to provide fire flows. According to Mr. DeBruler, the closest BCWU water line potentially adequate in size and capacity for fire flows is located north along Greasy Creek Road away from the Big Woods Properties, but the length of this line and other BCWU distribution system characteristics likely prohibit its ability to provide fire flows notwithstanding its size. Mr. DeBruler explained that rural water utilities are not typically designed to provide fire flows because the distances the water must travel and the lack of significant water main looping make fire flows difficult to provide without excessively large water mains. He also noted the actual water main extension lengths needed for BCWU to serve the Big Woods Properties could be significantly greater than the "as the crow flies" distances to reach the Big Woods Properties. Additionally, the locations of the BCWU lines are not consistent with the development plan for the Big Wood Properties, which assumes service from Nashville. Meeting this plan would necessitate a service line from BCWU crossing the Big Woods Properties over a significant distance through difficult terrain. The only alternative Mr. DeBruler identified for BCWU to serve the Big Woods Properties would require extending BCWU's existing six-inch water main on Greasy Creek Road south for about one mile. This line is unlooped and would have limited fire flow availability; it would also run parallel to Nashville's main that serves the Big Woods Properties for about one-half mile.

Mr. DeBruler opined that it would not be practical or cost-effective to connect Big Woods to BCWU's system. In addition to capacity and fire flow issues, the time schedule for BCWU to provide water service does not meet Big Woods' development schedule, as construction is underway. While Mr. DeBruler explained scenarios under which BCWU could provide service, he noted that because Nashville already has facilities to the Big Woods Properties with adequate capacity for potable water

and fire protection service (i.e., the Big Woods Line), interconnection with BCWU seems impractical, redundant, and unnecessarily expensive. Further, even if Big Woods connected to BCWU, Mr. DeBruler testified Big Woods would still need to connect to Nashville to obtain fire protection service.

Mr. DeBruler testified that BCWU previously acknowledged the Big Woods Properties are within Nashville's service area in a map BCWU submitted to the Commission in Cause No. 44648. He stated the Water Service Area that Nashville proposes to serve in this Cause is substantially similar to Petitioner's service territory depicted in Cause No. 44648 except for one major difference unrelated to serving the Big Woods Properties. Mr. DeBruler stated Nashville has made improvements and operated its utility in reliance on being able to serve the Water Service Area. A major construction project was undertaken by Petitioner in the late 1970s extending water service from Nashville to almost all of the Water Service Area, and Nashville has continuously served this area since that time.

It is Mr. DeBruler's understanding that Big Woods prefers water service from Nashville based on cost, ease of interconnection, the need for fire protection, and Big Woods and Nashville's work to find a site for the new facility which Nashville could serve. The terms of the Water Service Agreement memorialize this preference. According to Mr. DeBruler, Nashville has the ability and capacity to serve the Water Service Area, having contracted for almost 1.8 million gallons per day of water and providing water service throughout most of the Water Service Area for nearly 40 years. In Mr. DeBruler professional opinion, Nashville has the capacity and ability to serve the Water Service Area. Mr. DeBruler also testified regarding the terms and conditions for the proposed water service, including the rates and charges to be imposed on users within the Water Service Area.

Mr. DeBruler testified that approval of the Regulatory Ordinance will protect the investment Nashville has made in its water utility, eliminate costly parallel pipeline installations that are contrary to the public interest, and enable Nashville to monitor, oversee, and encourage development in the area immediately surrounding its municipal boundaries. Absent such approval, he opined that Nashville will not have robust safeguards to protect its water utility, its utility customers, and its bondholders' interest. Mr. DeBruler testified that Nashville can readily extend its existing facilities to areas in the proposed Water Service Area. In addition to Big Woods Properties, there is an area south and west of Nashville's corporate limits shown on the map identified as Petitioner's Exhibit 5 for which Nashville has also received inquiries about potential development and has an existing water main within the adjacent right-of-way.

Mr. DeBruler testified that Big Woods requested immediate water service for the Big Woods Properties, and Nashville is the only entity with facilities in place that can meet the timing requirements. He believes approval of the Regulatory Ordinance will enable other developers to know which utility to contact for water service and, therefore, provide greater certainty to the development community and encourage economic growth. In addition, Nashville will have an exclusive, defined area for planning purposes. While East Monroe and BCWU have water facilities near the Water Service Area, neither has facilities nor is serving customers in the Water Service Area. To Mr. DeBruler's knowledge, East Monroe has no plans to provide water service in the Water Service Area, and from his perspective, BCWU will benefit if Nashville develops more customers within the Water Service Area because Nashville could then purchase more water from BCWU on a wholesale basis.

Mr. DeBruler testified that in his opinion, approval of the Regulatory Ordinance is necessary because: (1) having an exclusive area of service allows Nashville to most efficiently plan for

expansions and system upgrades without concerns about undersizing, oversizing, or unnecessary duplication of facilities; (2) serving the Water Service Area is consistent with Nashville's long-term plans for promoting development in the area; (3) Nashville has pipes in the ground and is currently serving the Water Service Area, so approval will limit the likelihood of costly duplication of facilities; and (4) Big Woods prefers Nashville as its water service provider. Mr. DeBruler testified that the Regulatory Ordinance should be approved and Nashville's exclusive license to furnish potable water service within the Water Service Area established.

B. OUCC's Direct Evidence. Mr. Seal testified that Nashville now serves 1,319 customers in Brown County, located inside and outside its municipal limits. Petitioner withdrew from Commission jurisdiction on May 15, 1989, and a copy of its current rates and charges was included in Petitioner's case-in-chief as Petitioner's Exhibit 8. Nashville purchases its water supply under agreements with the City of Bloomington and BCWU. According to IDEM Monthly Reports of Operations for the 12-month period of February 2016 through January 2017, Nashville's maximum demand was 628,000 gallons per day (0.628 MGD). Big Woods estimates it will use 990,000 gallons of water per month upon full buildout of Big Woods Properties or approximately 33,000 gallons per day (0.033 MGD). Based upon Mr. DeBruler's testimony, Nashville has more than sufficient capacity to meet the estimated water needs of the Big Woods Properties.

Mr. Seals reviewed the requirements Ind. Code § 8-1.5-6-9(b) places upon Nashville as a municipality seeking Commission approval of the Regulatory Ordinance. He testified the following information is required under this statute in the municipality's petition:

- (1) A description of the service territory established in the regulatory ordinance.
- (2) Proposed rates and charges for the services to be provided in the service territory.
- (3) A list of any administrative or judicial proceedings involving the regulatory ordinance.
- (4) A list of any utilities actually or potentially affected by the regulatory ordinance.

Mr. Seals testified that Nashville provided a description of the service territory and the rates and charges to be applied. Nashville also identified the utilities that may be affected, but with regard to administrative or judicial proceedings involving the Regulatory Ordinance, the OUCC learned through its independent research that on June 20, 2017, BCWU filed a federal lawsuit against Nashville and Nashville's Town Council Members, requesting the United States District Court to prohibit "the Town [Nashville] from providing water service to Big Woods and the Firecracker Hill area."¹ Mr. Seals testified the Federal Proceeding remains pending.

Mr. Seal also testified that Ind. Code § 8-1.5-6-8(g) requires the Commission to consider certain criteria when reviewing requests filed under Ind. Code ch. 8-1.5-6 and granting the requested authority. He testified that Mr. DeBruler addressed each of these criteria, and he concurred that granting Nashville's request could facilitate development of the Firecracker Hill area, which is located within the Water Service Area and includes the Big Woods Properties. Mr. Seals agreed that Nashville

¹ U.S. District Court for the Southern District of Indiana, Civil Action No. 1:17-cv-02134 (the "Federal Proceeding"), Complaint for Injunctive Relief, p. 6.

has the facilities and, it appears, more than sufficient capacity to meet the estimated needs of the Big Woods Properties. He noted the Water Service Agreement also requires Nashville to provide sewer and fire protection service to the Big Woods Properties which, according to the testimony of Mr. DeBruler, Nashville has the necessary facilities to provide.

Mr. Seals testified that no other utility has intervened in this Cause to provide evidence about its ability to provide water service to the Big Woods Properties. While it may theoretically be possible for BCWU to serve the new Big Woods facility, given the volume of water needed for domestic water and fire protection services, Mr. Seals testified it is unlikely BCWU could extend facilities to provide similar service within the customer's time constraints. Mr. Seals explained that Nashville already has the infrastructure in place to provide water utility service, including fire protection, to the Big Woods Properties, so any extension by BCWU of its facilities to provide this service could lead to unnecessary duplication of facilities and additional cost to Big Woods. Also, the loss of Big Woods as a customer could harm Nashville's other water utility customers because Big Woods is Nashville's largest commercial customer, and other customers' rates are based on Nashville receiving water revenues from Big Woods. Mr. Seals noted that Big Woods chose to enter into the Water Service Agreement with Nashville and not with BCWU.

Based on his review of the evidence in this Cause and Petitioner's responses to OUCC data requests, Mr. Seals testified that it appears Nashville has met the statutory requirements to receive Commission approval of Ordinance No. 2017-04, as amended by Ordinance No. 2017-07, and he, therefore, recommended approval.

5. Commission Discussion and Findings. Nashville seeks approval of its Regulatory Ordinance. Under Ind. Code § 8-1.5-6-9, a municipality may not enforce a regulatory ordinance until the Commission issues an order approving the ordinance.

A. Sufficiency of the Petition. Under Ind. Code § 8-1.5-6-9(b), a municipality's petition for approval of a regulatory ordinance must contain the following:

- (1) A description of the service territory established in the regulatory ordinance.
- (2) The proposed rates and charges for the services to be provided in the service territory.
- (3) A list of any administrative or judicial proceedings involving the regulatory ordinance.
- (4) A list of any utilities actually or potentially affected by the regulatory ordinance.

In its Amended Verified Petition, Nashville described the Water Service Area as including the area within Nashville's municipal boundaries, as well as certain areas within four miles outside Nashville's boundaries as depicted on the map attached as Amended Exhibit A to Ordinance No. 2017-07. This amended boundary map delineates the proposed new Water Service Area. Based on the Commission's review of Amended Exhibit A and Nashville's Amended Verified Petition (admitted as Petitioner's Exhibit 4), the Commission finds Nashville's proposed Water Service Area was described in its Amended Verified Petition as required and does not extend greater than four miles outside Nashville's corporate boundaries. Also, the exhibits Petitioner attached to its Amended Verified Petition included a schedule of the rates and charges for water service within the Water

Service Area, and in Paragraph 14 of its Amended Verified Petition, Nashville listed the utilities (BCWU and East Monroe) potentially impacted by the Regulatory Ordinance. Nashville did not, however, list the Federal Proceeding initiated on June 20, 2017, in the Amended Verified Petition filed in this Cause or otherwise notify the Commission of these proceedings.² That information was provided by the OUCC in the testimony of Mr. Seals filed on August 10, 2017.

Based on our review of the Verified Petition and the Amended Verified Petition, the Commission finds Nashville complied with the requirements of Ind. Code § 8-1.5-6-9(b)(1), (2), and (4). Because the OUCC provided the information required by Ind. Code § 8-1.5-6-9(b)(3) and has recommended approval of the Regulatory Ordinance, the Commission finds the intent of assuring the Commission is provided with the information listed has been satisfied, but the practice Petitioner followed is not approved or encouraged.

B. Public Interest Factors. Under Ind. Code § 8-1.5-6-9(c), before approving the Regulatory Ordinance, the Commission must consider the following public interest factors set forth in Ind. Code § 8-1.5-6-8(g):

- (1) The ability of another utility to provide service in the regulated territory.
- (2) The effect of a Commission order on customer rates and charges for service provided in the regulated territory.
- (3) The effect of the Commission order on present and future economic development in the regulated territory.
- (4) The history of utility service in the regulated territory, including any contracts for utility service entered into by the municipality that adopted the regulatory ordinance and any other municipalities, municipal utilities, or utilities.
- (5) Any other factors the Commission considers necessary.

As Mr. Seals noted in his testimony, no utility intervened in this Cause. The OUCC did not dispute that Nashville has the ability to serve the Water Service Area. The evidence demonstrates that Nashville also has adequate capacity to meet current and future projected water demand. While BCWU has mains north of the Water Service Area, no evidence was presented showing that any entity other than Nashville has, historically, provided water service within the Water Service Area, and Nashville claims to have served customers throughout most of the proposed area for over 40 years.

The record reflects that Nashville has water rates in place that will apply to new customers in the proposed service area, and since Big Woods is currently Nashville's largest customer, it will benefit Nashville's other customers for Petitioner to continue to serve this commercial customer. Additionally, the Commission finds, based upon the evidence, that the Regulatory Ordinance will advance economic development in and around the Water Service Area, including the Big Woods Properties and that Nashville has historically provided water service to customers located within the Water Service Area.

² In the Amended Verified Petition filed on June 29, 2017, Nashville stated, "There is not currently any administrative or judicial proceedings regarding the Regulatory Ordinance." The Federal Proceeding, however, commenced on June 20, 2017.

The governing statute allows the Commission discretion to consider additional factors. While the Commission is not required to consider Big Woods' preference for Nashville as its water service provider, customer preference has traditionally been a factor the Commission considers when deciding territorial disputes. The requested approval of the Regulatory Ordinance, the Commission finds, also merits considering this existing customer's preference to continue receiving water service from Nashville at its new location. Also, although the Commission is aware of the Federal Proceeding that BCWU initiated, BCWU did not intervene in this Cause; consequently, minimal evidence was presented from which to determine the extent, if any, of BCWU's interest in serving the Water Service Area and whether BCWU is a realistic alternative water service provider that would further the public interest.

Based upon the evidence, including Mr. Seals' recommendation on behalf of the OUCC that the Commission approve Nashville's Regulatory Ordinance and Big Woods' preference to continue receiving water service from Nashville, the Commission finds the Regulatory Ordinance in regard to water service, with the modified service boundaries described in Ordinance No. 2017-07, should be approved.

6. Other Matters. As discussed above in Finding No. 5.A., Ind. Code § 8-1.5-6-9(b)(3) requires a petitioner seeking approval of a regulatory ordinance to include in its petition "a list of any administrative or judicial proceedings involving the regulatory ordinance." Nashville did not list the Federal Proceeding in its Amended Verified Petition nor did it request leave to further amend its Petition and provide this information consistent with Ind. Code § 8-1.5-6-9(b)(3). At the public hearing in this Cause on September 15, 2017, this omission was discussed, and Nashville was directed to notify the Commission promptly of any action taken in the Federal Proceeding and to file a status report in this Cause at least every 30 days updating the Commission about the Federal Proceeding. The first report was to be filed on or before October 15, 2017. After this report was not received, a Docket Entry was issued on October 23, 2017, again directing Nashville to file the status report which Nashville did on that same date. Nashville timely filed a second status report on November 14, 2017, a third report on December 14, 2017, and a fourth report on January 10, 2018. Attached to Petitioner's fourth status report was a copy of a motion filed in the Federal Proceeding indicating Nashville's Town Council was holding an executive session on January 4, 2018, "after which the Town [Nashville] expects to provide Brown County Water with a substantive response" to the outstanding settlement proposal. Nashville did not, in its fourth status report, update the Commission upon whether this response was provided.

The Commission has granted the relief requested in this Cause despite Nashville's failure to apprise the Commission of the Federal Proceeding as required by law. This outcome is based upon the OUCC having provided the omitted information and recommending approval of Nashville's Petition, with no testimony in this Cause recommending otherwise. Petitioner's failure to comply with Ind. Code § 8-1.5-6-9(b)(3) is, however, troublesome. The Commission encourages compliance with all statutory and other requirements, as well as candor.

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

1. Nashville's request for approval of the Regulatory Ordinance (Ordinance No. 2017-04, as modified by Ordinance No. 2017-07) in regard to water service is approved.

2. In accordance with Ind. Code § 8-1-2-70, Nashville shall pay the following itemized charges within 20 days from the date of this Order into the Commission public utility fund account described in Ind. Code § 8-1-6-2, through the Secretary of the Commission, as well as any additional costs that were incurred in connection with this Cause:


Commission Charges:	\$ 2,675.30
OUCG Charges:	\$ 599.37
Legal Advertising Charges:	\$ 115.18
Total:	\$ 3,389.85

3. This Order shall be effective on and after the date of its approval.

HUSTON, WEBER, AND ZIEGNER CONCUR; FREEMAN ABSENT:

APPROVED: FEB 07 2018

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



Mary M. Becerra
Secretary of the Commission