

STATE OF INDIANA
INDIANA UTILITY REGULATORY COMMISSION

COMPLAINT OF CLARK BYRUM AGAINST)
CITIZENS WASTEWATER OF WESTFIELD, LLC) CAUSE NO. 44886
CONCERNING THE PROVISION OF WASTEWATER)
SERVICE

**COMPLAINANT'S REPLY TO CITIZENS RESPONSE ON REQUEST TO
REOPEN RECORD AND GRANT RELIEF**

Complainant, Clark Byrum ("Complainant" or "Byrum"), by counsel, respectfully files his Reply to Citizens August 13, 2018 Response to Complainant's Request to Reopen the Record. In support of this Reply Complainant states as follows:

1. What's good for the goose is good for the gander. Citizens Wastewater/Water of Westfield LLC ("Citizens"), argues and attempts to request a very technical reading of only certain portions of the Commission's procedural rules under 170 IAC 1-1.1, *et seq.* However, upon closer examination Citizens itself has failed to follow basic timing requirements. Both the 10-day response time limit under 170 IAC 1-1.1-22(c) or the more general 10-day filing limit under 170 IAC 1-1.1-10(c)(5)(A) were missed by Citizens. Because of its own delay and failure to timely file its Response, Citizens' cannot and should not be allowed to cloth itself in technical timeliness arguments and should be judicially estopped because it has failed to timely file its Response. Accordingly, Citizens' Response should be disallowed and disregarded.

2. Citizens alleges in Paragraph 5 that the that Complainant filed materials that were purportedly settlement discussions. Citizens attempts to elevate form over substance and hide behind an obvious and inadvertent label. There were no settlement discussions involved which is clear from a simple review of the communications provided. These were all requests to pursue and obtain utility service. The attached emails merely memorialized the requests that were made as well as the founded on Citizen's own EJB-9 continuing offer to provide utility services.

Complainant's Request to Reopen, Attachment 1 communications complained of speak for themselves and reveal Citizens consistent and persistent delays. Additionally, Citizens failure to share the Citizens-CTRWD communications while at the same time putting off Complainant's ongoing requests illustrate Citizens' lack of good faith and fair dealing in this process generally.

3. Because the communications between Citizens Mr. Bukovac and CTRWD¹'s Mr. Williams were never shared with Complainant², these should not now form any rational basis and accepted as a backhanded reason for excusable neglect or some justification for Citizens unreasonable delay. These surprise filings show nothing more than another example of Citizens failure to follow through.

4. It is disingenuous of Citizens to now attempt to twist its own failings in communicating with CTRWD (or Complainant), to somehow now being Mr. Byrum's fault for the CTRWD Board's alleged "reluctance" to proceed. (Response Para. 6(b)). Citizens Response Attachment "A" reveals that Complainant not only reached out via his attorney, but he also attended CTRWD's May 7, 2018 Capital and Construction meeting. (See May 14, 2018 William's Email). To now take a partial quote from a subsequent email that was not shared with Complainant and then suggest it means that Mr. Byrum has not been forthcoming plainly misrepresents reality. It is Citizens failures to communicate and deal openly and fairly, and reasonably, to finalize the alternative wholesale arrangements. Glaringly absent is Citizens lack of response regarding where – if anywhere, Citizens is (or isn't) with its related wholesale water agreement with Carmel that was supposedly almost complete back in July 2017.

¹ Clay Township Regional Waste District on July 1, 2018 changed its name to: **TriCo Regional Sewer Utility**, but for sake of continuity Complainant will continue to refer to this entity as CTRWD.

² The first time these Attachment "A" emails were seen by Complainant was when Citizens Response filing was served on Complainant's counsel the night of August 13, 2018.

Complainant has consistently shared that he wants utility service for the *entirety* of the property – primarily because of the extreme delays and expensive process in just trying to get these utility services established in the first place. The proposal under Citizens EJB-9 states that Citizens, “...is willing to extend retail wastewater and water services to the property...” Additionally, the description of sewer service as presented in Complainant’s case-in-chief and originally described by CTRWD’s Mr. Williams was based on serving the entire Property with a gravity sewer. (See Complainant Exh. 2, Page 5, and attached Exh. AW-2). Even in Mr. William’s May 30, 2018 email, he reiterates that, “When we originally provided the estimated cost to get the service to the property, it was assuming the extension of a gravity sewer *for a 30 acre parcel.*” (See Williams May 30, 2018 email)(emphasis added). Thus, both Citizens EJB-9 and the CTRWD proposal each envisioned serving the entire property. The Commission also noted in its March 14, 2018 Order that “Mr. Byrum will not be required to pay more than it would cost to connect directly to these utilities.” (March 14 Order, at 13). Any further information or technical issues regarding this wholesale connection beyond this customer related detail, Complainant naturally deferred to Citizens to determine with CTRWD (and Carmel) as to exactly what would be needed. This includes what was needed to address or accommodate the Byrum Property as well as any other plans or needs Citizens may want to negotiate with CTRWD beyond the Byrum Property if Citizens so chose. To now try to raise questions and present inferences, as Citizens does, based upon emails that were not shared with Complainant, undercuts credibility of these arguments and unreasonable allegations.

Interestingly, Citizens fails to also quote Mr. Williams’ May 30, 2018 email on two other important matters. First, the May 30, 2018 Williams email raises and suggests that if Mr. Byrum were to seek a limit on the requested service to “a single family house” it could be more “easily be

served by a low pressure grinder pump and a 1 1/2" force main," and presumably be cheaper, as opposed to the 8" sanitary sewer main detailed under the original estimated proposal. (See Complainant's Exh. 2, Pg. 8, Ln. 8). Secondly, and more compelling are the key technical details Mr. Williams seeks regarding the length of time and permanency of the arrangement³. These are clearly issues that only Citizens is capable of and should be addressing and responding to.

From the beginning of Cause No. 44886, Complainant sought service for the entirety of the "30 acre parcel" as was acknowledged and reiterated in the Williams May 30, 2018 email. (Response Attachment "A"). This is also what Complainant sought 4 months ago when he requested services under the Citizens "EJB-9" alternative proposal – a proposal founded on the 8" service line that could serve the entire property. To suggest otherwise is just not supported by the record, Mr. Byrum's supporting affidavit and born out in the Attachment 1 information provided. Further, it just makes practical sense to address and resolve these utility service issues once and for all. Never has Mr. Byrum raised or discussed condos or a strip mall on the Property, as the record shows. The introduction of these new service types arises only between Citizens and CTRWD⁴. To now raise and somehow suggest some new or different service requests are attributable to Mr. Byrum makes no sense and Citizens failure to share the emails and directly raise this with Mr. Byrum is telling. Had the email been shared, he could have clarified his ongoing and consistent intentions. The fact that the email was not shared suggests another possible interpretation, namely the reality that: (1) Citizens has no facilities in the area; (2) CTRWD's concerns generally with wholesale arrangements – especially with no clear timeline; and (3) the

³ This issue was also raised by Mr. Byrum regarding the viability of these wholesale arrangements and exposure of additional costs for future changes, connections, and fees, that Citizens continues to avoid answering. (See Complainant Exh. 3, Pg 4; OUCC Exh. 1, Pg. 22).

⁴ As noted above, Citizens failed to share the CTRWD Williams emails, so he was not aware that these questions may have still been present.

possibility that Citizens may later attempt to seek to provide service for other customers beyond the Byrum Property via this connection point. Regardless of whether this alternative interpretation is correct, Complainant submits that these issues, just like the length of time concerns raised by CTRWD, are issues that can and should be properly addressed between the utilities under their wholesale service contract, and not something Mr. Byrum can or should be forced to deal with or somehow negotiate on their behalf.

Complainant is effectively being held hostage and unreasonably delayed waiting on Citizens to decide upon and properly address such questions with CTRWD⁵ in spite of the fact that 4 months ago⁶ Citizens reaffirmed that it would still offer and presumably pursue the utility services under EJB-9. Complainant has proactively attempted to do his part and, at Citizens request, reached out multiple times to CTRWD, but he is still waiting and being blamed for issues Citizens itself either failed to address, follow up on, or timely share. If Mr. Byrum is being asked to do Citizens' job for them and negotiate wholesale arrangements, then maybe he should likewise receive his reasonable utility-related expense recovery and a fair return too.

5. The Commission has broad authority to address and fix any issues related to its Orders. As stated by the Indiana Appellate Court, "Our agencies "[have] such implicit power and authority as is inherent in [their] broad grant of power from the legislature which is necessary to effectuate the regulatory scheme outlined by the statute." *Northern Indiana Public Service Co. v. Citizens Action Coalition* (1989), Ind., 548 N.E.2d 153, 158. Further, as originally raised in Complainant's Request to Reopen the Record, the determination of whether to grant or deny a

⁵ Any oversizing of facilities that Citizens may decide upon and the related costs would presumably be borne by Citizens under its Terms and Conditions of Service and 170 IAC 8.5-1 and 170 IAC 6-1. As noted above, the cost estimates provided by CTRWD recognized it was for providing service to the entirety of the Byrum Property (with the same amounts referenced in Citizens EJB-9). However, it appears in the newly provided May 30, 2018 Williams email, that the costs could be lower if Mr. Byrum would want to limit the request to a single residence.

⁶ The EJB-9 service arrangement was actually offered over a year ago by Citizens in this Cause.

petition to reopen the record is within the IURC's sound discretion. (See *Citizens Action Coal. of Ind., Inc. v. S. Ind. Gas & Elec. Co.* (Vectren II), 70 N.E.3d 429 (Ind. Ct. App. 2017). Citizens is taking the position that the proceedings and determinations to-date in this docket are final for Complainant, but conveniently continues to overlook and ignore its own obligations or duties as a public utility to follow through and spend effort on actually providing reasonable utility services. Mr. Byrum has been seeking and requesting this service for nearly 2 ½ years now. Although Complainant could file a second complaint with the Commission and start this process over, it would be costly, repetitive, and a waste of Commission resources and punitive toward the Complainant. Complainant would obviously start out with pointing to and incorporating the entirety of this relevant docket, the record, and rulings made anyway. Judicial economy and practicality require that the Commission reopen the record and find that Citizens failed to comply with Ind. Code 8-1-2-4 and 8-1-2-69 which requires, in part, that "...any service which can be reasonably demanded can not be obtained..." Complainant still cannot get service.

Complainant respectfully requests that the Commission reopen the evidentiary record in this proceeding, accept the attached Complainant's Affidavit, and grant the relief set forth in his August 2, 2018 Request, and grant all other relief appropriate and reasonable in its premises.

Respectfully Submitted,

/s/ Keith L. Beall

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August 2018, copies of Complainant's Reply to Citizens Response to Request to Reopen the Record filed electronically with the IURC has been served via electronic mail delivery to the following counsel of record:

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/s/ Keith L. Beall