

IN THE
INDIANA SUPREME COURT

No. 19A-EX-2964

DELAWARE COUNTY REGIONAL
WASTEWATER DISTRICT,
Appellant,

v.

MUNCIE SANITARY DISTRICT,
INDIANA UTILITY REGULATORY
COMMISSION, et al.,
Appellees.

Appeal from the Indiana Utility
Regulatory Commission,

No. 45055,

Hon. James F. Huston, Chairman,
Hon. Sarah E. Freeman, Commissioner,
Hon. Stefanie Krevda, Commissioner,
Hon. David L. Ober, Commissioner,
Hon. David E. Ziegner, Commissioner,

Hon. David E. Veleta,
Senior Administrative Law Judge.

**INDIANA UTILITY REGULATORY COMMISSION'S
RESPONSE TO PETITION TO TRANSFER**

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TABLE OF CONTENTS

Table of Authorities3

Introduction.....5

Background and Prior Treatment of Issue on Transfer6

Argument.....10

Transfer is not warranted because the Commission and the Court
of Appeals correctly applied the Regulated Territories Statute, which is
rarely implicated.....10

 A. This case does not present any issues of pressing public
 importance.....11

 B. The Commission’s jurisdiction under the Regulated Territories
 Statute to determine who serves in regulated territories
 supersedes the IDEM statutes’ grant of territory to
 regional districts13

 C. The Commission decision and the Court of Appeals’ opinion do not
 conflict with *Jennings* or other prior case law.....16

Conclusion17

Word Count Certificate.....17

Certificate of Service.....18

TABLE OF AUTHORITIES

CASES

Citizens Action Coalition of Indiana, Inc. v. Pub. Serv. Comm’n of Indiana, 425 N.E.2d 178 (Ind. Ct. App. 1981) 15

City of North Vernon v. Jennings Northwest Regional Utilities, 829 N.E.2d 1 (Ind. 2005) 5, 6, 11, 16

Crowel v. Marshall Cty. Drainage Bd., 971 N.E.2d 638 (Ind. 2012)..... 15

Delaware Cty. Reg’l Wastewater Dist. v. Muncie Sanitary Dist., ___ N.E.3d ___, No. 19A-EX-2964, slip op. (Ind. Ct. App. July 22, 2020) 9

Rodriguez v. State, 129 N.E.3d 789 (Ind. 2019)..... 15

Town of Newburgh v. Town of Chandler, 999 N.E.2d 1015 (Ind. Ct. App. 2013), *trans. denied* 7, 11

STATUTES

Ind. Code § 8-1.5-6-1(2)..... 8

Ind. Code § 8-1.5-6-2 7

Ind. Code § 8-1.5-6-3..... 7

Ind. Code § 8-1.5-6-4..... 8, 14

Ind. Code § 8-1.5-6-5..... 14

Ind. Code § 8-1.5-6-6..... 5, 8, 9, 13

Ind. Code § 8-1.5-6-7(a)–(b) 14

Ind. Code § 8-1.5-6-8..... 5

Ind. Code § 8-1.5-6-8(a)..... 14

Ind. Code § 8-1.5-6-8(g)..... 8, 12, 16

Ind. Code § 8-1.5-6-8(g)(1) 13

Ind. Code § 8-1.5-6-8(g)(2) 13

Response to Petition to Transfer
Indiana Utility Regulatory Commission

STATUTES [CONT'D]

Ind. Code § 8-1.5-6-8(g)(4)	13
Ind. Code § 8-1.5-6-9	5
Ind. Code § 8-1.5-6-9(a).....	7, 14
Ind. Code § 8-1.5-6-9(b).....	7
Ind. Code § 8-1.5-6-9(b)(4)	13
Ind. Code § 8-1.5-6-9(c)	8, 12, 13, 16
Ind. Code § 8-1.5-6-10(a).....	5, 8, 14
Ind. Code art. 13-26	14
Ind. Code § 13-26-2-1 <i>et seq.</i>	15
Ind. Code § 36-9-2-18.....	7

INTRODUCTION

This Court should deny transfer because the Commission followed the plain language of the Regulated Territories Statute, Ind. Code ch. 8-1.5-6, which both authorizes a municipality to expand its service area beyond its boundaries, and charges the Indiana Utilities Regulatory Commission with the responsibility for approving such an expansion and, in the process, settling any territorial disputes with another utility. I.C. §§ 8-1.5-6-6, -8, -9, -10(a).

Applying the statute, the Commission determined that the City of Muncie's amended regulatory ordinance expanding the Muncie Sanitary Department's wastewater service territory would serve the public interest. As a result, Muncie may provide wastewater services to areas up to four miles outside of the City's boundaries (the "Amended Regulated Territory"). Although Muncie's new territory excludes areas where other utilities already had been providing wastewater services, it includes parts of Delaware County that the Delaware County Regional Wastewater District long had a right to serve but had refused or been unable to serve. Believing it has an absolute right to prevent anyone else from providing service in its territory, even though it does not provide service itself, Delaware Regional appealed.

The Commission correctly applied the Regulated Territories Statute, and the Court of Appeals correctly affirmed the Commission's decision. While the result may have been different under this Court's decision in *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1 (Ind. 2005), the legislature abrogated

that decision in 2014 when it enacted the Regulated Territories Statute and empowered the Commission—instead of the courts—to referee territorial disputes between utilities. And while this case is the first to involve the statute, the infrequency of territorial disputes between utilities coupled with the fact-bound nature of the Commission’s public-interest determination belie any assertion of public importance, let alone “great public importance” sufficient to warrant this Court’s attention.

BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

The case arises from a territorial dispute between Muncie and Delaware Regional. In short, Muncie sought to expand its service area to four miles outside the City’s municipal boundaries, but Delaware Regional claims a pre-existing exclusive right to provide services to that area, even though in the nearly 45 years since acquiring that “right” Delaware Regional has not actually served most of the area.

1. This Court settled a similar territorial dispute 15 years ago in *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1 (Ind. 2005), by comparing municipalities broad powers under the Home Rule Act “with the powers granted regional districts” and concluding that “the district prevails unless the municipality was already providing services to the area at the time the district’s service area was created.” *Id.* at 4. In reaching that conclusion the Court stressed that, at the time, there was “no ... statutory dispute resolution mechanism for territorial boundary disputes between municipalities and regional districts.” *Id.* at

Response to Petition to Transfer
Indiana Utility Regulatory Commission

7. Several years later, the Court of Appeals similarly observed in another territorial dispute that “[r]esolution of [such] disputes ... by a commission in the executive branch could likely produce more effective and efficient results,” but acknowledged that “[t]he creation of such mechanisms ... is in the domain of the legislature and not the courts.” *Town of Newburgh v. Town of Chandler*, 999 N.E.2d 1015, 1021 (Ind. Ct. App. 2013), *trans. denied*.

The General Assembly responded in 2014 with the Regulated Territories Statute, which both allows a municipal utility to expand its service area beyond the municipal boundaries and tasks the Commission with refereeing disputes among utilities associated with such an expansion. To enlarge its service area, the municipality must first adopt a regulatory ordinance, I.C. § 8-1.5-6-9(a), which is an ordinance that “asserts the exclusive authority of a municipal utility to provide service within a regulated territory” or “prohibits another utility from providing utility service in the regulated territory,” I.C. § 8-1.5-6-3; *see also* I.C. § 8-1.5-6-2 (defining “regulated territory” as including “the area outside the corporate boundaries of a municipality described in IC 36-9-2-18”); I.C. § 36-9-2-18 (providing that a municipality may exercise certain powers “in areas within four (4) miles outside its corporate boundaries”). Once the municipality adopts a regulatory ordinance, it must file a petition with the Commission, describing the service territory, proposing rates and charges, listing any administrative or judicial proceedings involving the ordinance, and listing “any utilities actually or potentially affected by the regulatory ordinance.” I.C. § 8-1.5-6-9(b).

Response to Petition to Transfer
Indiana Utility Regulatory Commission

The legislature tasked the Commission with “resolving all issues presented” in a municipality’s petition for approval of a regulatory ordinance, “including the enforceability of the regulatory ordinance in a manner that the commission determines is in the public interest.” I.C. § 8-1.5-6-9(c). To determine the public interest, the Commission is required to “consider the factors set forth in section 8(g),” *id.*, which consist of (1) “[t]he ability of another utility to provide service in the regulated territory”; (2) the effect “on customer rates and charges for service provided in the regulated territory”; (3) the effect “on present and future economic development in the regulated territory”; (4) “[t]he history of utility service in the regulated territory”; and (5) “[a]ny other factors the commission considers necessary,” I.C. § 8-1.5-6-8(g).

Importantly, the Commission has jurisdiction over “the offering or provision of service by a utility in a regulated territory,” even if the Commission does not otherwise have authority to approve that utility’s rates and charges. I.C. § 8-1.5-6-6; *see also* I.C. § 8-1.5-6-1(2) (defining “municipal utility” as including “a municipally owned wastewater utility regardless of whether the municipal utility is under the jurisdiction of the commission for the approval of rates and charges”); I.C. § 8-1.5-6-4 (defining “utility” in a similar manner). Also, section 10 of the statute grants the Commission authority to resolve territorial disputes that arise in a regulated territory outside of the ordinance-approval process. I.C. § 8-1.5-6-10(a).

2. Applying the Regulated Territories Statute, the Commission approved Muncie’s regulatory ordinance, with certain amendments to ensure that Muncie

Response to Petition to Transfer
Indiana Utility Regulatory Commission

would not encroach upon areas where other utilities were actually providing service, finding the amended regulatory ordinance to be in the public interest. II App. 27–

33. With respect to the public-interest factors, the Commission found (1) that Delaware Regional was unable to provide wastewater services in the Amended Regulated Territory, even when requested by the county health department to address serious public health concerns caused by the lack of sewers; (2) that the rates Muncie would charge customers was either comparable or lower than the rates Delaware Regional would charge; (3) that allowing Muncie to provide service would best serve present and future economic growth owing to Delaware Regional’s inability or unwillingness to provide service to the entire area in a timely manner; and (4) that Muncie had displayed a willingness to invest money into the Amended Regulated Territory, whereas Delaware Regional had not displayed such a willingness or ability, as shown by the fact that it served roughly 3,000 customers, despite being authorized to provide service in the area since 1976. *Id.* at 29–31.

The Court of Appeals unanimously affirmed the Commission’s decision. *Delaware Cty. Reg’l Wastewater Dist. v. Muncie Sanitary Dist.*, __ N.E.3d __, No. 19A-EX-2964, slip op. 21 (Ind. Ct. App. July 22, 2020). The court held that *Jennings* did not control the outcome of this case because it “was decided nine years before the enactment of the Regulated Territory Statutes, and the Court conducted its analysis in the absence of any dispute-resolution mechanism created by the legislature.” *Id.* at 18–19. And by enacting Indiana Code section “8-1.5-6-6, the legislature specifically put the provision of service by a utility in a regulated

territory or the approval of a regulatory ordinance under the jurisdiction of the Commission.” *Id.* at 19. The court rejected Delaware Regional’s reliance on statutes “concern[ing] establishment and regulation of regional waste districts,” because “while they address objections at the time a district is established, those statutes do not address resolution of competing territorial claims between an existing waste district and another wastewater utility.” *Id.* at 20–21. The Regulated Territories Statute, on the other hand, expressly “task[s] the Commission, when presented with a petition to approve a regulatory ordinance, with resolving territorial disputes by considering any utilities that are actually or potentially affected by a regulatory ordinance (including regional districts), evaluating their ability to provide service and their history of service, and making a decision that is in the best interest of the public.” *Id.* at 21.

ARGUMENT

Transfer is not warranted because the Commission and the Court of Appeals correctly applied the Regulated Territories Statute, which is rarely implicated.

This case does not implicate any of this Court’s usual criteria for transfer. Although this is the first time the Court of Appeals has interpreted the Regulated Territories Statute, this case does not pose any important questions or issues that must be resolved by this Court. After all, the statute merely funnels territorial disputes between utilities to the Commission, which resolves those disputes based on the public interest. Nor does the decision below conflict with any prior case of this Court or the Court of Appeals—indeed, the fact that it presents an issue of first

Response to Petition to Transfer
Indiana Utility Regulatory Commission

impression necessarily means there is no conflict. Although the outcome in this case differs from the outcomes of prior cases, those differences are attributable to the intervening statute, and the plain terms of that statute vest the Commission with authority to resolve territorial disputes among utilities.

A. This case does not present any issues of pressing public importance.

Not every matter of first impression needs this Court's review. This case is a good example. That the Regulated Territories Statute has not been previously reviewed on appeal actually points to the *lack* of great public importance: The statute has been around since March 2014, yet it has taken six years for a case to implicate it because territorial disputes among utilities are uncommon.

This is not to say that the statute is unimportant, for it obviously serves the important public-health interest of allowing municipal utilities to expand their service areas to rural areas if it is in the public interest to do so. Yet the feature of the statute at issue here is the legislature's decision to have the Commission referee those disputes, a decision the legislature made after this Court and the Court of Appeals invited a legislative solution. *City of North Vernon v. Jennings Nw. Reg'l Utils.*, 829 N.E.2d 1, 7 (Ind. 2005); *Town of Newburgh v. Town of Chandler*, 999 N.E.2d 1015, 1021 (Ind. Ct. App. 2013), *trans. denied*. Notably, the courts' invitation stemmed from a desire to "produce more effective and efficient results," *Town of Newburgh*, 999 N.E.2d at 1021, *not* an urgent need to solve a public problem of vital significance.

Response to Petition to Transfer
Indiana Utility Regulatory Commission

What is more, the legislature tasked the Commission with assessing the public interest on a case-by-case basis that turns on the facts and circumstances. I.C. § 8-1.5-6-9(c); *see also* I.C. § 8-1.5-6-8(g). In the abstract, it would be rare for the Commission's fact-bound determination of the public interest to present an important legal question requiring this Court's intervention. And in this case, the evidence firmly supports the Commission's determination that allowing Muncie to expand its service coverage to areas not currently served by other utilities is in the public interest. The Commission found that Delaware Regional cannot provide wastewater service to the Amended Regulated Territory. II App. 29. Delaware Regional was either unable or unwilling to serve the entire Amended Regulated Territory in a timely fashion, and Muncie has had the willingness to invest infrastructure, engineering, and construction money into service to the Amended Regulated Territory. II App. 31.

To the residents in the surrounding areas to Muncie this case is important because it means they will have the option to connect to a city wastewater system to replace their septic systems, some of which are failing. But this is not a case that has statewide effects, addresses broad public policy issues, resolves territorial disputes in any other locations, or will have significant ramifications for other regional districts or municipalities. This case does not significantly modify the landscape of the provision of wastewater service throughout Indiana except for ensuring service in this specific Amended Regulated Territory.

B. The Commission’s jurisdiction under the Regulated Territories Statute to determine who serves in regulated territories supersedes the IDEM statutes’ grant of territory to regional districts.

Not only does this case lack any important statewide implications, but transfer is also unnecessary because the Commission and the Court of Appeals correctly applied the plain terms of the Regulated Territories Statute.

The statute unambiguously confers on the Commission authority to resolve territorial disputes among utilities in a regulated territory. The Commission has jurisdiction over “the offering or provision of service by a utility in a regulated territory,” even if the Commission lacks jurisdiction over the particular utility’s rates. I.C. § 8-1.5-6-6. To approve a regulatory ordinance, the Commission must “resolv[e] all issues presented in the petition” and determine that the ordinance “is in the public interest,” I.C. § 8-1.5-6-9(c), which requires the Commission to consider “[t]he ability of another utility to provide service in the regulated territory” and “[t]he history of utility service in the regulated territory,” I.C. § 8-1.5-6-8(g)(1), (4). Those two factors explicitly contemplate the Commission having to settle a territorial dispute between two utilities, and another factor requires the Commission to consider how approving the regulatory ordinance would change or effect “customer rates and charges for service provided in the regulated territory.” I.C. § 8-1.5-6-8(g)(2). Indeed, the statute requires the municipality to include in its petition for approval “[a] list of any utilities actually or potentially affected by the regulatory ordinance” to facilitate notice, hearing, and the Commission’s resolution of the request. I.C. § 8-1.5-6-9(b)(4).

Response to Petition to Transfer
Indiana Utility Regulatory Commission

Any lingering doubt that the legislature intended the Regulated Territories Statute to funnel territorial disputes to the Commission for resolution is eliminated once examining the statute as a whole. Like section 9, sections 7, 8, and 10 provide that the Commission is to resolve territorial disputes between utilities. *See* I.C. § 8-1.5-6-7(a)–(b) (providing that if “a dispute arises or exists between a utility owned by a municipality and another utility,” then “a utility shall petition the commission for resolution of the dispute”); I.C. § 8-1.5-6-10(a) (providing that a dispute “between two or more utilities as to which utility will provide utility service in a regulated territory ... shall be resolved by the commission”). Indeed, the four sections of the statute are parallel provisions that apply in different factual circumstances: Section 7 applies to territorial disputes arising mostly before the statute’s enactment. I.C. § 8-1.5-6-7(a)–(b). Section 8 applies when a municipal utility adopts a regulatory ordinance *and* files a “wholesale sewage petition,” I.C. § 8-1.5-6-8(a), which triggers a rate case, *see* I.C. § 8-1.5-6-5. Section 9 applies when a municipal utility adopts a regulatory ordinance but “does not, or is not eligible, to file a wholesale sewage petition.” I.C. § 8-1.5-6-9(a). And section 10 applies to territorial disputes between utilities that are not covered by section 7, 8, and 9. I.C. § 8-1.5-6-10(a).

Critically, the Regulatory Territories Statute contains no exemption from the Commission’s dispute-resolution jurisdiction for regional districts with territories established previously under the IDEM Statutes, *see* I.C. art. 13-26. Indeed, the Regulatory Territories Statute applies to all utilities, even those who are not otherwise subject to the Commission’s rate jurisdiction. I.C. § 8-1.5-6-4. And

Response to Petition to Transfer
Indiana Utility Regulatory Commission

Delaware Regional has never identified any statute stripping the Commission of authority to resolve a territorial dispute involving a regional utility. Instead, it has relied on the statutes that authorize the establishment of a regional waste district, which, as the Court of Appeals acknowledged, “address objections at the time a district is established.” Slip op. 21; *see* I.C. § 13-26-2-1 *et seq.* (providing procedure for establishment of regional waste districts). At all events, the plain terms of the Regulated Territories Statute contain no exemption for regional waste districts, and that statute would supersede any earlier conflicting IDEM statutes, for the most recent enactment controls when “two statutes are incompatible with one another.” *Rodriguez v. State*, 129 N.E.3d 789, 797 (Ind. 2019); *see also, e.g., Citizens Action Coalition of Indiana, Inc. v. Pub. Serv. Comm’n of Indiana*, 425 N.E.2d 178, 184 (Ind. Ct. App. 1981).

Taken to the logical end, if the regional district’s territory always wins in a conflict under the Regulated Territories statute as urged by Delaware Regional, that would render moot the Regulated Territories Statute in general, and specifically its grant of jurisdiction to the Commission to decide who will serve in the Regulated Territory. Instead, the Regulated Territories Statute deals with the resolution of disputes between all utilities, as defined, including regional districts. The plain language of the statute is unambiguous in this regard. And because the statute is clear and unambiguous, there is no need to resort to the rules of statutory construction to determine whether the Regulated Territories Statute or the IDEM Statute are more specific, as Delaware Regional beckons. *See, e.g., Crowel v.*

Marshall Cty. Drainage Bd., 971 N.E.2d 638, 646 (Ind. 2012); *Jennings*, 829 N.E.2d at 4–5. The Regulated Territories Statute empowered the Commission to resolve all territorial disputes in a regulated territory, even those involving a regional waste district.

C. The Commission decision and the Court of Appeals’ opinion do not conflict with *Jennings* or other prior case law.

Nor does the decision below conflict with this Court’s or the Court of Appeals’ prior cases. It is true that *Jennings* held, in a case involving similar circumstances, “that where there is an overlap between the service area of a regional district and the service area of a municipality, and absent a resolution during the IDEM permitting process, ... the district prevails unless the municipality was already providing services to the area at the time the district’s service area was created.” 829 N.E.2d at 4. But the Court was forced to resolve that dispute because there was “no ... statutory dispute resolution mechanism for territorial boundary disputes between municipalities and regional districts,” *id.* at 7, and so the Court turned to the applicable statutes and determined that a provision of the Home Rule Act controlled, *id.* at 4.

The legislature abrogated *Jennings* and all other prior cases involving territorial disputes when it enacted the Regulated Territories Statute. Not only does that statute vest the Commission with authority to settle territorial disputes between utilities, but it also imposes the “public interest,” as determined by the Commission, as the governing substantive standard, *See* I.C. §§ 8-1.5-6-8(g), -9(c), which differs from the inquiry the Court undertook in *Jennings*.

Simply put, *Jennings* and other cases predating the Regulated Territories Statute are beside the point. As the Court of Appeals correctly determined, the Commission's decision in this case comports with the new paradigm set out in the now-governing Regulated Territories Statute.

CONCLUSION

The Court should deny transfer.

Respectfully submitted,

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Dated: September 28, 2020

WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44, I verify that this response to the petition to transfer contains no more than 4,200 words.

/s/ Aaron T. Craft
Aaron T. Craft
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CERTIFICATE OF SERVICE

I certify that on September 28, 2020, I electronically filed the foregoing document using the Indiana E-filing System. I also certify that on September 28, 2020, I electronically served the foregoing document on the following persons through IEFS:

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