

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

**IN RE: VERIFIED EMERGENCY COMPLAINT BY)
THE HEALTH AND HOSPITAL CORPORATION OF)
MARION COUNTY, INDIANA, PUBLIC HEALTH)
DIVISION AGAINST THE BOARD OF DIRECTORS)
FOR UTILITIES OF THE DEPARTMENT OF)
PUBLIC UTILITIES OF THE CITY OF)
INDIANAPOLIS, AS TRUSTEE OF A PUBLIC)
CHARITABLE TRUST FOR THE WATER SYSTEM,)
D/B/A CITIZENS WATER RELATING TO THE)
PRACTICES AND ACTS AFFECTING OR)
RELATING TO THE SERVICE OF CITIZENS)
WATER AS BEING UNSAFE, UNREASONABLE,)
AND INSUFFICIENT PURSUANT TO I.C. 8-1-2-54,)
AND REQUEST FOR A COMMISSION)
INVESTIGATION PURSUANT TO I.C. 8-1-2-58 AND)
REQUEST FOR INTERIM STATUS QUO ORDER)**

CAUSE NO. 45760

**RESPONDENT: BOARD OF DIRECTORS FOR)
UTILITIES OF THE DEPARTMENT OF PUBLIC)
UTILITIES OF THE CITY OF INDIANAPOLIS, AS)
TRUSTEE OF A PUBLIC CHARITABLE TRUST)
FOR THE WATER SYSTEM, D/B/A CITIZENS)
WATER)**

**CITIZENS WATER’S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS AND
MOTION TO STRIKE**

The Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis (the “Board”), as Trustee of a Public Charitable Trust for the Water System d/b/a Citizens Water (“Citizens Water”), by counsel and in accordance with 170 IAC 1-1.1-12(a)(3)(C) and Ind. T.R. 12(B)(1) and 12(B)(6), hereby moves to dismiss the Health and Hospital Corporation of Marion County, Indiana’s (“HHC”) Complaint. First, Ind. Code § 8-1-2-54 does not give the Commission subject matter jurisdiction over Citizens Water with respect to the Complaint. In addition, Citizens Water moves to dismiss the Complaint because HHC lacks standing. HHC has

failed to allege a direct injury in its Complaint. Without experiencing a direct injury, there is no case or controversy, and the case is nonjusticiable. Accordingly, the Commission should dismiss HHC's Complaint for lack of standing. Finally, Citizens Water moves to dismiss the Complaint because the Complaint fails to state a claim upon which relief may be granted. The immediate threat of disconnection is moot as a result of a recent settlement agreement entered into by Citizens Water and Berkley Commons IN, LLC and JPC Affordable Housing Foundation, Inc. (the "JPC Customers"). Further, Citizens Water complied with all Commission rules regarding termination of service to the JPC Customers apartment complexes. HHC's Complaint is thus a challenge against the Commission's rules, not Citizens Water's actions. Accordingly, HHC's Complaint should be dismissed for failure to state a claim upon which relief may be granted.

In the event that the Commission does not grant its motion to dismiss, Citizens Water moves to strike certain inflammatory statements made by HHC in its Complaint. Specifically, Citizens Water moves to strike HHC's Complaint's characterization that Citizens Water is treating the residents of Customer's apartment complexes as "pawns" and using them as "leverage," as well as HHC's statements that Citizens Water has "threatened" to cause or is causing a health "crisis." These allegations are non-factual, gratuitous, and inaccurate – or, in the words of Indiana Trial Rule 12(F), "immaterial, impertinent, or scandalous" -- and should be stricken.

I. The Complaint should be dismissed because the Commission lacks subject matter jurisdiction in a Section 54 complaint against Citizens Water, a municipal utility.

HHC's Complaint explicitly states that jurisdiction is "pursuant to" Ind. Code § 8-1-2-54,¹ which states as follows:

¹ HHC also cites § 8-1-2-113, the "emergency statute," in its Complaint. However, the fact that Citizens Water recently reached a settlement with the landlord of the apartment complexes at issue (the JPC Customers), pursuant to which Citizens Water has withdrawn its proposed termination of service to the apartment complexes, eliminates any argument of an emergency within the meaning of Section 113.

Upon a complaint made against any **public utility** by any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by ten (10) persons, firms, limited liability companies, corporations, or associations, or ten (10) complainants of all or any of the aforementioned classes, or by any public utility, that any of the rates, tolls, charges or schedules or any joint rate or rates in which such petitioner is directly interested are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the service of any **public utility**, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practice or act, complained of, shall be entered by the commission without a formal public hearing.

(Emphasis added.)

Section 54 gives the Commission subject matter jurisdiction over certain complaints made against *public utilities*. Citizens Water, however, is not a public utility. Citizens Water is a municipally-owned utility as defined in Ind. Code § 8-1-2-1(h). *See Petition of the Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis, as Trustee of a Public Charitable Trust for the Water System, D/B/A Citizens Water*, Cause No. 44306 (IURC March 19, 2014) (“Petitioner is a municipally-owned water utility as defined in Ind. Code § 8-1-2-1(h).”) By its terms, the Public Service Commission Act’s definition of “public utility” excludes municipal utilities such as Citizens Water. *See* Ind. Code § 8-1-2-1(a) (defining “public utility” and stating that “[t]he term does not include a municipality that may acquire, own, or operate any of the foregoing facilities.”)

Both the Commission and the Indiana Supreme Court have recognized this distinction and held that § 8-1-2-54 does not give the Commission subject matter jurisdiction over complaints against municipal utilities such as Citizens Water. In affirming the Commission’s Order dismissing

a Section 54 complaint against Citizens Gas,² the Indiana Supreme Court noted previous cases where the Indiana Court of Appeals found the Commission’s authority to investigate complaints against public utilities under Section 54 does not extend to municipal utilities. *United States Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790 (Ind. 2000) (citing *Cities & Towns of Anderson v. Public Serv. Comm’n*, 397 N.E.2d 303, 310 (Ind. Ct. App. 1979) and *Citizens Gas & Coke Utility v. Sloan*, 196 N.E.2d 290 (*en banc*, *reh’g denied*, 197 N.E.2d 312, 313 (1964))). The complainants in the *United States Gypsum* case argued that “cross references to Chapter 8-1-2” in the Board’s enabling legislation “necessarily make a complaint about Citizens Gas the proper subject of a petition under Section 54.” *United States Gypsum*, 735 N.E.2d at 797. The complainants in that case also argued that “symmetry favors treating municipal utilities like public utilities.” *Id.* The Supreme Court disagreed, stating:

We are not persuaded. The legislature explicitly exempted municipal utilities from the definition of “public utility.” Other statutes’ explicit references to municipal utilities in conjunction with public utilities show that the legislature knows how to say and include municipal utilities when it so desires. *See, e.g.*, Ind. Code § 8-1-2-42(a), (g); *accord Stucker Fork Conservancy Dist. v. Indiana Utility Regulatory Comm’n*, 600 N.E.2d 955, 957-58 (Ind. Ct. App. 1992) (municipal utilities are subject to Commission’s jurisdiction “only when specifically provided for by statute.”).

Id.

Ultimately, the Court held that “the Commission correctly determined that its jurisdiction under Section 54 did not extend to Citizens Gas.” *Id.* Likewise, here, the Commission’s jurisdiction under Section 54 does not extend to Citizens Water, and HHC’s Complaint therefore must be dismissed.

² Citizens Gas is the natural gas utility serving the City of Indianapolis, which, like Citizens Water, is a municipal utility owned and operated by the Board.

II. The Complaint should be dismissed because HHC lacks standing.

The Indiana Administrative Code requires a petitioner filing a petition before the Commission have “the requisite standing to seek relief” from the Commission. 170 IAC 1-1.1-2(6). Standing means that a petitioner must be a “proper party” to invoke the Commission’s authority. *Solarize Ind., Inc. v. S. Gas and Elec. Co.*, 182 N.E.3d 212, 212 (Ind. 2022). A party’s standing to invoke this authority can be conferred either through common law or by statute. *Solarize*, 182 N.E.3d at 216. Either way, “Indiana law is clear that standing requires an injury.” *City of Gary v. Nicholson*, 190 N.E.3d 349,351 (Ind. 2022). If the complainant did not suffer an injury, then there is no case or controversy to resolve, and the claim is nonjusticiable. *Id.*

Here, HHC relies on Ind. Code § 8-1-2-54 as the basis for its ability to file its Complaint, claiming that as a “municipal organization,” it may bring a complaint under that statute. Complaint, ¶ 10. Even if Ind. Code § 8-1-2-54 provided HHC a cause of action (which it does not, for reasons stated previously), it does not confer standing. Standing—even where a statute provides an alleged cause of action—still requires direct injury as a result of the complained-of conduct. *Solarize*, 182 N.E.3d at 217; *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (“Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.”). A statute can confer standing only if the statute requires an injury. *Solarize*, 182 N.E.3d at 215, 218 n.4; In other words, although there may be a statutory cause of action to sue, that alone is insufficient to establish standing unless the complainant can demonstrate “that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct.” *Solarize*, 182 N.E.3d at 217.

HHC alleges no direct injury in its Complaint, only that it “was forced to react” to secure portable toilets and handwashing stations at each of the apartment complexes. Complaint, ¶ 4.

HHC's purported injury is indirect and based on its own actions and decisions. This is not enough. *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019) (standing requires a concrete injury even where there is an alleged statutory violation); Additionally, "it is not sufficient that [a party] has merely a general interest common to all members of the public." *Terre Haute Gas Corp. v. Johnson*, 45 N.E.2d 484, 486 (Ind. 1942). The party must instead have a personal stake in the litigation's outcome. *See id.* To establish standing, the Complainants still must show that the alleged statutory violation actually harmed the Complainants directly. HHC has not shown and cannot show a direct injury.

Even if the Commission were to conclude that the HHC did suffer a direct injury, for a petitioner to have standing, it must have suffered a "direct injury as a result of the [respondent's] complained of conduct." *Bd. of Comm'rs of Union County v. McGuinness*, 80 N.E.3d 164, 168 (Ind. 2017). Put differently, the respondent must have caused the injury. *See Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1269–70 (Ind. 2020) (Slaughter, J., dissenting) (discussing causation component of standing). Here, Citizens Water did not cause HHC's injury; non-parties to these proceedings did. In its Complaint, HHC alleges two buckets of injuries: one, that it secured "10 to 20 portable toilets and handwashing stations" for "approximately \$14,000 per week"; and two, that it was required "to devote significant resources to assessing the public health implications"; to "engage in emergency planning to strategize"; and "to implement a communications plan." *See* HHC's Complaint ¶¶ 4, 24–25. These allegations focus on certain non-parties' actions. *See id.* at ¶¶ 1, 18, 22, 26, 30, 33, 34–35. And HHC alleges that these non-party actions prompted Citizens Water's response. *See id.* at ¶22 (noting that Citizens Water's actions were "due to the [non-parties'] failure to pay delinquent water bills"). But HHC has not alleged that Citizen Water's response to the nonpayment either violated its governing tariff or that

the response was inconsistent with the rules under 170 Ind. Admin. Code 6-1-16 or 8.5-2-4. So, in short, because HHC's injuries were caused not by Citizens Water but by non-parties, HHC does not have standing to bring its claim here.

The Complaint should be dismissed for lack of standing.

III. The Complaint should be dismissed for failure to state a claim upon which relief may be granted.

Even if subject matter jurisdiction existed and HHC had standing (neither of which can be established), HHC's Complaint should be dismissed because it fails to state a claim upon which relief may be granted. Both Indiana's trial rules and the Commission's rules provide for motions to dismiss for failure to state a claim upon which relief may be granted. *See* Ind. T.R. 12(B)(6); 170 IAC 1-1.1-12(a)(3).

Citizens Water and the JPC Customers have entered into a settlement agreement, whereby the JPC Customers have agreed to pay a substantial portion of their arrearages to Citizens Water, and Citizens Water has agreed not to terminate service to the apartment complexes as previously planned, provided such arrearages are paid per the agreement. See attached copy of the settlement agreement, Attachment A. HHC's request for emergency relief relating to stopping the planned termination of service is thus moot, and those portions of HHC's Complaint seeking such relief should be dismissed for failure to state a claim upon which relief may be granted.³ Moreover, HHC's request for a so-called "temporary alteration" of Citizens Water's practices related to disconnection for non-payment are in reality a request for the suspension of Rule 6.4 of Citizens

³ The fact that HHC's Complaint is now moot also provides grounds for dismissal for lack of subject matter jurisdiction, under which the Commission may consider evidence not included in the Complaint (such as the attached settlement agreement). *See, e.g., Martinez v. Oaklawn Psychiatric Ctr., Inc.*, 128 N.E.3d 549, 554 (Ind. Ct. App. 2019) ("A trial court ruling on a motion to dismiss for lack of subject matter jurisdiction under Trial Rule 12(B)(1), unlike a trial court ruling on a motion to dismiss under Trial Rule 12(B)(6), may consider not only the complaint, but also any affidavits or other evidence presented and submitted on the issue of subject matter jurisdiction."); *Grdinich v. Plan Comm'n for Town of Hebron*, 120 N.E.3d 269, 274-75 (Ind. Ct. App. 2019) (discussing same).

Water's Commission-approved terms and conditions as well as Commission Rule 170 IAC 6-1-16. Section 113 provides the Commission authority to suspend the practices of a utility only with the consent of the utility concerned. Citizens Water does not consent to a suspension of its practices related to disconnection for non-payment. For that reason as well, HHC's request under Section 113 fails to state a claim upon which relief may be granted.

HHC's request for investigation and relief relating to Citizens Water's tariff provisions that provide for termination of service for nonpayment should also be dismissed. The facts demonstrate that Citizens Water complied with the Commission's rules for terminating service for nonpayment in all respects. HHC's complaint is thus, in reality, a complaint about the Commissions' rules, not Citizens Water's actions (which were taken in full compliance with and indeed, went above and beyond those rules). There is no relief which HHC may obtain against Citizens Water because there has been no violation of law. Accordingly, HHC's Complaint against Citizens Water seeking a change in Commission rules should be dismissed for failure to state a claim.

IV. Alternately, Citizens Water moves to strike scandalous statements in the Complaint.

Indiana's trial rules provide for motions to strike for any "scandalous matter" in a pleading. Ind. T.R. 12(F). A scandalous matter is an assertion or allegation that is improper in a court paper because it is both disgraceful or defamatory, and irrelevant to an action or defense. *Scandalous Matter*, Black's Law Dictionary (11th ed. 2019). Accordingly, if the Commission does not grant Citizens Water's motion to dismiss, the following statements included by HHC in its Complaint should be stricken:

- The statement that Citizens Water is using the apartment residents as "pawns." Complaint, ¶ 6.
- The statements that imply Citizens Water has in fact caused a public health crisis and would be the cause of another public health crisis. Complaint, ¶¶ 23, and 38.

- The statement that Citizens Water attempted to “use the innocent residents of the Affected Properties as leverage by threatening another potential public health crisis.” Complaint, ¶ 35.

These statements, which are scandalous, inflammatory, inaccurate, defamatory, intended to embarrass Citizens Water, and add nothing useful to HHC’s Complaint, should be stricken. *See Small v. Centocor, Inc.*, 731 N.E.2d 22, 30 (Ind. Ct. App. 2000) (affirming trial court’s granting defendants’ request to strike portions of amended complaint “due to its scandalous aspersions intended to embarrass and harass Defendants”).

Far from treating the apartment complexes’ residents as “pawns” or using them as “leverage by threatening another potential public health crisis,” Citizens Water has worked for over a year to avoid disconnection, and in so doing, has incurred substantial costs, both in terms of unpaid bills from the JPC Customers and legal costs in pursuit of the JPC Customers’ debt owed to Citizens Water. Citizens Water has treated disconnection as a last resort. And when Citizens Water decided to pursue termination of service, Citizens Water went above and beyond what is required by the Commission’s rules, by giving well over 60 days of advance notice of its planned termination of service (instead of seven days as required by the Commission’s rules), providing written notice in the English and other languages both to the JPC Customers and to the apartment complex residents, and informing other community stakeholders including the Commission and HHC itself.

The welfare of the apartment residents has been and will remain a priority for Citizens Water. To be sure, neither Citizens Water nor the apartment residents are the cause of the unfortunate situation that led to the possibility of water service to the apartments owned by the JPC Customers being disconnected. Rather, the JPC Customers’ failure to pay substantial amounts owed for water utility services rendered is the cause. Citizens Water worked to avoid

disconnection for as long as possible, and went above and beyond the Commission's rules for providing notice of termination of service. At the same time, Citizens Water has an obligation to its other customers, who will ultimately pay for any uncollectible expense through rates. Moreover, Citizens Water's customers as a whole bear the adverse impact the JPC Customers' failure to pay has had on Citizens Water's cash flow and funding available for needed investments in aging utility infrastructure. Far from causing a crisis, Citizens Water has worked to balance the interests of its customers as a whole with the interests of the JPC Customers and the apartment complex residents. Indeed, as evidenced by the recent settlement reached with the JPC Customers, which has removed any immediate threat of disconnection, Citizens Water's aim has always been to avert any potential crisis created by the JPC Customers, and Citizens was ultimately successful in this regard.

V. Conclusion

For the foregoing reasons, Citizens Water respectfully requests that the Commission grant its motion to dismiss or, alternatively, its motion to strike.

[Signature Page Follows]

Respectfully submitted,

ICE MILLER LLP



An Attorney for Citizens Water

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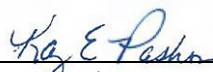
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was electronically delivered
this 14th day of September, 2022 to:

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SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement"), is made effective as of September 2, 2022 by and between the Board of Directors for Utilities of the Department of Public Utilities, doing business as Citizens Energy Group ("Citizens"), Berkley Commons IN, LLC ("Berkley Commons") and JPC Affordable Housing Foundation, Inc. ("JPC"). Berkley Commons and JPC are referred to collectively from time to time as "Defendants" and with Citizens as the "Parties"; each of these is a "Party." The Effective Date of this Agreement is the last date this Agreement is executed by the Parties.

RECITALS

A. Citizens operates a natural gas utility (doing business as Citizens Gas), water utility (doing business as Citizens Water) and wastewater utility (the latter owned by Citizens' affiliate, CWA Authority, Inc.) which provide, respectively, gas, water and wastewater utility services ("Services") to businesses, residents, and other customers in and around the City of Indianapolis ("City"); and

B. Defendants own Berkley Commons Apartments, Covington Square Apartments, Capital Place Apartments and Woods at Oak Crossing Apartments in Indianapolis (together, the "Apartments"); and

C. Citizens has provided and continues to provide Services to the Apartments and Defendants have failed to fully pay Citizens for these Services; and

D. On April 6, 2022, Citizens filed suit in the Indiana Commercial Court located in Marion County, Indiana ("Court") styled as *Department of Public Utilities of City of Indianapolis dba Citizens Energy Group v. Berkley Commons IN, LLC, JPC Affordable Housing Foundation, Inc.*, Cause No. 49D01-2204-PL-011246, asserting causes of action for Breach of Contract, Account Stated, Fraud/Constructive Trust, Accounting, Quantum Meruit and Conversion related to Defendants' failure to pay for the Services ("Lawsuit"); and

E. On May 17, 2022, the Court entered a Default Judgment against Defendants, which was subsequently set aside on July 21, 2022; and

F. In July, 2022, Citizens informed Defendants and the Apartments' residents that water and wastewater service at the Apartments (and also gas service at the Capital Place Apartments) would be subject to shutoff on or after September 30, 2022 unless Defendants took action with respect to Defendants' delinquent accounts ("Shutoff Notices"); and

G. U.S. Bank National Association, as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2020-KX04's ("BC Lender") made a loan and other financial accommodations to Berkley Commons related to the Berkley Commons Apartments which were guaranteed by JPC Charities ("BC Loan") and secured by, *inter alia*, a mortgage and security interest in the Berkley Commons Apartments as well as the leases, rents, issues and profits thereof ("BC Mortgage"); and

H. Fannie Mae ("JPC Lender") made a loan and other financial accommodations to JPC ("JPC Loan") related to the Covington Square Apartments, Capital Place Apartments and Woods at Oak Crossing Apartments which were secured by, *inter alia*, a mortgage and security interest in the Covington Square Apartments, Capital Place Apartments and Woods at Oak Crossing Apartments as well as the leases, rents, issues and profits thereof ("JPC Mortgage")(collectively BC Lender and JPC Lender are referred to from time to time as "Lenders"); and

I. As of August 28, 2022, Defendants owe \$1,973,730.51 for unpaid Services ("Delinquency"), broken down as follows:

a. Berkley Commons Apartments	\$571,263.63
b. Covington Square Apartments	\$ 58,674.05
c. Capital Place Apartments	\$847,188.00
d. Woods at Oak Crossing Apartments	\$496,604.83

J. To avoid the uncertainty and expense of litigation the Parties have agreed to compromise and settle all claims that any of the Parties may have against any of the other Parties as of the Effective Date, whether known or unknown, including but not limited to those related to, regarding, involving or arising out of the Services, Apartments, Delinquency and/or Lawsuit ("Released Claims") subject to the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and undertakings set forth herein, and for good and valuable consideration, the receipt and sufficiency of which are hereby irrevocably acknowledged, the Parties agree as follows:

AGREEMENT

1. **Incorporation.** The above Recitals are incorporated herein and made a part hereof as if restated in full.

2. **Agreed Final Judgment.** Contemporaneous with the execution of this Agreement, the Parties shall execute the Stipulated and Agreed Final Judgment ("Agreed Judgment")(attached hereto as **Exhibit A**) in the full amount of the Delinquency as of August 3, 2022. Defendants also authorize Citizens to e-sign on their counsel's behalf the Joint Motion for Entry of Agreed Judgment ("Joint Motion")(attached as **Exhibit B**). Upon receipt of the signed Agreed Judgment and fully executed Agreement and Citizens receipt of the Initial Payment (defined below), Citizens shall forbear from commencing or continuing efforts to pursue the Lawsuit or to file the Joint Motion or seek entry of the Agreed Judgment until the earlier to occur of: (a) any Defendant Default (as defined herein) under this Agreement that occurs and is not timely cured; and/or (b) Defendants failure to close on the sale of the Apartments by the Closing Date. If Citizens seeks the court's entry of the Agreed Judgment, Defendants shall be credited for any non-Monthly Payments (defined below) made pursuant to this Agreement. If Defendants timely pay all amounts required under this Agreement without Default, the Agreed Final Judgment shall be destroyed. *and the pending litigation dismissed with prejudice.*

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3. **Initial Payment to Citizens; Application of Payments.** Within one business day of Defendants' receipt of Citizen's return of its signature to this Agreement, Defendants shall pay to Citizens Three Hundred Seventy-Nine Thousand Fifty-Four and 97/100 Dollars (\$314,527.49) (the "Initial Payment"), consisting of an agreed-upon Delinquency reduction in the amount of Two Hundred Fifty Thousand Dollars (\$250,000.00) plus half of the monthly charges for Services for the period August 3, 2022 through August 28, 2022 in the amount of Sixty-Four Thousand Five Hundred Twenty-Seven Dollars and 49/100 Dollars (\$64,527.49). The Initial Payment shall be credited in reduction of the Delinquency. The Initial Payment, and all other payments required under this Agreement, shall be credited in a prorated manner consistent with each Apartments' percentage contribution to the Delinquency based on the figures in Recital I to this Agreement, without regard to the source of the payment. All payments shall be made by wire transfer to:


Citizens Energy Group
2020 N. Meridian St.
Indianapolis, IN 46202

JP Morgan Chase
1 Ohio St.
Indianapolis, IN 46204

ACH Routing # 074000010
Wire Routing # 021000021
Account # 653931761
Account Name: CEG Receipt
Stream Customer Payments

4. **Monthly Services Payments.** Defendants shall pay in full all monthly charges for Services at the Apartments (from August 28, 2022 going forward) within seventeen (17) business days of receipt of the invoices for charges incurred through the Closing of each Apartments ("Monthly Payments").

5. **Sale of Apartments and Closing Payment.** Defendants shall promptly pursue the sale of each of the Apartments (individually or collectively) to an unrelated, unaffiliated third-party purchaser. The purchaser shall have no involvement with any owner, board member, director, officer or employee of Defendants. Except as provided herein, the closing of the sale of each of the Apartments shall occur no later than December 31, 2022 ("Closing Deadline"). The Closing Deadline may not be extended by more than 90 days without the prior express written approval of Citizens and the respective Apartments' Lender(s), provided such consents are obtained prior to expiration of the original Closing Deadline. At the Closing of the sale of each of the four Apartments, Defendants shall pay Citizens an amount equal to seventy five percent (75%) of the Delinquency attributable the Apartment being sold plus any Monthly Payments then due in respect of such Apartment (together, the "Allocable Indebtedness").

6. **Escrow of Closing Payments.** Defendants shall, ~~immediately upon its receipt of~~ *within 3 business days of*  Citizen's signature to this Agreement, deposit One Million, Five Hundred Forty-Four Thousand Eight Hundred Twenty-Five and 37/100 Dollars (\$1,544,825.37) (the "Escrow Balance") with Madison Title Agency, LLC ("Madison") pursuant to an escrow agreement to be entered by and between Defendants, Citizens and Madison authorizing and directing Madison's immediate release of the Escrow Balance to Citizens at Closing to pay any amounts due to Citizens under this Agreement not paid from proceeds from the sale of the Apartments. The Escrow Balance shall be held until all four Apartments have been sold. If the Closing Payment is paid in full from sale

proceeds, or if the Closing Payment is satisfied with a combination of sale proceeds and a portion of the Escrow Balance, Madison shall return the remaining Escrow Balance to the Defendants or their designee.

7. **Rescission of Shutoff Notices.** Upon receipt of this Agreement, the Final Agreed Judgment, the Joint Motion (each executed by all Defendants) and the Initial Payment, Citizens shall rescind in writing its "Shutoff Notices" and shall provide Defendants with written notice of such rescission. Citizens agrees to forbear as set forth in Paragraph 7, below ("Rescission Notice").

8. **Service Shutoff Forbearance.** Upon receipt of this Agreement, the Final Agreed Judgment, the Joint Motion (each executed by all Defendants) and the Initial Payment, and so long as Defendants timely pay the Monthly Payments (i.e., stay current on post-August 28, 2022, invoice payments) and any other payments required under this Agreement, Citizens agrees to forbear from disconnection of utility service at the Apartments until the last to occur of (a) the closing of the sale on the last Apartment sold, or (b) January 30, 2023 ("Shutoff Forbearance Period").

9. **Payment Disgorgement.** In the event any of the Defendants' payments (e.g. Initial Payment, Monthly Payment, Closing Payment and/or Supplemental Closing Payment) are at any time required to be disgorged by Defendants, in whole or in part, whether by order of a state or federal court, including a bankruptcy court, or otherwise, and whether as a preferential transfer, a fraudulent transfer, or otherwise, Citizens' agreement to accept the Payments in satisfaction of the Delinquency shall immediately and irretrievably be vacated and Defendants shall jointly and severally be indebted to Citizens in the sum of (a) the Delinquency and (b) any attorney fees and expenses incurred by Citizens in defending against such disgorgement.

10. **Default.** Any breach of the terms of this Agreement, including Defendants' failure to timely pay any monthly payment, if not cured within three business (3) days of service of a written Default Notice as provided herein constitutes a Default under this Agreement. The non-defaulting party shall be required to give the other Party as well as the City and applicable Lender(s) written notice of the default ("Default Notice"). Upon Defendants' Default, Citizens may disconnect all or any portion of the Apartments' utility Services thirty (30) days after the written Default Notice. Upon the occurrence of Defendants' Default, Citizens may, in Citizens' sole discretion, file the Joint Motion seeking the court's entry of the Agreed Judgment and may pursue any other right and remedy permitted as a matter of law.

11. **Service Disconnection.** The Parties agree Citizens shall also have right to disconnect without further notice as provided by law in case of emergencies and other such circumstances pursuant to IURC-approved terms and conditions for the Services. Any such disconnect will not be deemed a breach of this Agreement.

12. **Notices.** Any notice, demand, request or statement required or permitted to be given or delivered by any party to this Agreement shall be made by certified mail and is effective upon being properly addressed and placed in the mail. Any notices required hereunder must be sent as follows:

If to Citizens:

Alex Valle or other Legal Counsel
Citizens Energy Group
2020 North Meridian Street
Indianapolis, Indiana 46202
Email: AValle@CitizensEnergyGroup.com

with a copy to:

Drew Miroff
Ice Miller LLP
One American Square
Suite 2900
Indianapolis, IN 46282-0200
Email: Drew.Miroff@icemiller.com

If to Defendants:

Berkley Commons IN, LLC
JPC Affordable Housing Foundation, Inc.
c/o Oran Zarum
47 High Street
Lakewood, NJ 08701

with a copy to:

S. Joshua Kahane
Glankler Brown PLLC
6000 Poplar Avenue, Suite 400
Memphis, TN 38119
E-mail: jkahane@Glankler.com

13. **Release of Defendants.** Except with respect to or arising from Defendants' failure to perform its obligations under this Agreement as well as any obligations and agreements related to the ongoing utility services at each Apartment, including payment obligations, Citizens, for itself and its subsidiaries, parents, divisions, affiliates, shareholders, officers, directors, employees, agents, attorneys, insurers, accountants, predecessors, successors, heirs, and assigns, both individually and in their representative capacities, whether past or present ("Citizens Releasing Parties") hereby release and forever discharge Defendants and their past, present, and future subsidiaries, parents, divisions, affiliates, trustees, shareholders, officers, directors, employees, agents, attorneys, insurers, accountants, predecessors, successors, heirs, and assigns, both individually and in their representative capacities ("Defendants Released Parties") from any and all rights, claims, demands, damages, actions, causes of action, or liabilities of whatsoever nature,

whether known or unknown, disclosed or undisclosed, that the Citizens Releasing Parties previously had, now has, or may have against the Defendants Released Parties ("Defendants Released Claims").

14. **Release of Citizens.** Except with respect to or arising from Citizens failure to perform its respective obligations under this Agreement as well as any obligations and agreements related to the ongoing utility services at each Apartment, Defendants, for themselves and their subsidiaries, parents, divisions, affiliates, shareholders, officers, directors, employees, agents, attorneys, insurers, accountants, predecessors, successors, heirs, and assigns, both individually and in their representative capacities, whether past or present ("Defendants Releasing Parties") hereby release and forever discharge Citizens, its subsidiaries, parents, divisions, affiliates, trustees, shareholders, officers, directors, employees, agents, attorneys, insurers, accountants, whether past or present, predecessors, successors, heirs, and assigns, both individually and in their representative capacities ("Citizens Released Parties") from any and all rights, claims, demands, damages, actions, causes of action, or liabilities of whatsoever nature, whether known or unknown, disclosed or undisclosed, that Defendants Releasing Parties previously had, now has, or may have against the Citizens Released Parties ("Citizens Released Claims").

15. **No Admission of Liability.** The Parties enter into this Agreement without any admission of liability or wrongdoing whatsoever.

16. **Agreement to be Construed as a Whole.** This Agreement has been jointly negotiated and is agreed to by the undersigned Parties. The language of this Agreement shall be construed as a whole according to its fair meaning and in accordance with its purpose and without regard to who may have drafted any particular provision herein.

17. **Binding Effect.** All of the terms and conditions of this Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns.

18. **Entire Agreement.** This Agreement (including the exhibit attached hereto) contains the entire understanding between the Parties as to all matters referred to herein. No other representations, covenants, undertakings or prior or contemporaneous agreements, whether oral or written, regarding any matters that are not specifically contained and incorporated in this Agreement, shall be deemed to have any effect or binding impact upon the Parties. The Parties acknowledge that they have not been induced to enter into this Agreement.

19. **Severability.** The Parties understand that this Agreement is intended to be in compliance with all laws and regulations and in the event that any one or more of the provisions or terms contained in this Agreement should be adjudged to be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions and terms contained in this Agreement shall not in any way be affected or impaired thereby, and shall be otherwise valid, legal, and enforceable.

20. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Indiana without regard to any choice of law principles. Any action involving the enforcement or interpretation of this Agreement shall be placed in the Indiana Commercial Court located in Marion County, Indiana or should that Commercial Court

no longer exist, then in a court of competent jurisdiction within Marion County, Indiana. The Parties acknowledge that Citizens is subject to the Indiana Access to Public Records Act, and that this Agreement is not confidential.

21. **Warranties and Representations.** Each of the Parties represent and warrant, and shall be estopped to deny, each of the following:

a. that they have had a reasonable opportunity to review and consider this Agreement and that they have read and understood the terms of this Agreement;

b. that they have been provided an opportunity to consult with an attorney of their own choosing prior to executing this Agreement;

c. The Parties are not relying upon any advice of another Party, or representatives or attorneys of another Party, as to the legal and tax consequences of this Agreement. Further, the Parties hereby release all other Parties and those representing them from any and all liability and obligations of any nature whatsoever that may hereafter arise by reason of the legal or tax consequences of this Agreement being other than as anticipated;

d. that the persons or parties signing on behalf of the Parties are fully authorized to sign on their behalf;

e. that they have not executed this Agreement in reliance upon any promises, representations, warranties, or statements except as specifically set forth in this Agreement. The Parties acknowledge that this Agreement is intended to be and is an integrated contract.

22. **No Assignment.** Each party hereby represents and warrants that it has not assigned or transferred to any other person, firm, or corporation any debt, claim, right, demand, obligation, cost, expense, cause of action, action or suit, in law or in equity, that it may have against the other, except for the assignment of the right to collection \$850,000 from Defendants which was assigned by Citizens to the City in February 2022 pursuant to that certain *Assignment Agreement* executed February 24, 2022, or any portion of any recovery or settlement arising out of the Lawsuit or the settlement that is the subject of this Agreement.

23. **Further Assurances.** Each of the Parties agree to execute, acknowledge, and deliver any and all such other agreements, documents, and instruments, and to perform any and all such acts and things as may be reasonably necessary and proper to consummate the transactions contemplated by this Agreement.

24. **Counterparts.** This Agreement may be executed by the Parties in counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same instrument.

IN WITNESS HEREOF, the parties hereto have executed this Settlement Agreement effective on the Effective Date, as set forth hereinabove.

**Board of Directors for Utilities of the Department
of Public Utilities, doing business as Citizens
Energy Group**

Date: 9-6-2022

By: Michael Strohl

Printed: Michael D Strohl

Title: Senior Vice President

Berkley Commons IN, LLC

Date: 9-6-2022

By: 

Printed: OREN ZARUM

Title: MANAGING MEMBER

JPC Affordable Housing Foundation, Inc.

Date: 9-6-2022

By: 

Printed: OREN ZARUM

Title: PRESIDENT

Exhibit A

INDIANA COMMERCIAL COURT

STATE OF INDIANA)	MARION SUPERIOR COURT NO. 1
)	COMMERCIAL COURT DOCKET
) SS:	
COUNTY OF MARION)	CAUSE NO: 49D01-2204-PL-011246
CITY OF INDIANAPOLIS ACTING BY)	
AND THROUGH ITS BOARD OF)	
DIRECTORS FOR UTILITIES OF THE)	
DEPARTMENT OF PUBLIC)	
UTILITIES, D/B/A CITIZENS)	
ENERGY GROUP,)	
)	
Plaintiff,)	
)	
vs.)	
)	
BERKLEY COMMONS IN, LLC, and)	
JPC AFFORDABLE HOUSING)	
FOUNDATION, INC.,)	
)	
Defendants.)	

AGREED FINAL JUDGMENT

This matter comes before the Court on Plaintiff, the City of Indianapolis acting by and through its Board of Directors for Utilities of the Department of Public Utilities, doing business as Citizens Energy Group ("Citizens" or "Plaintiff") and Defendants Berkley Commons IN, LLC ("Berkley Commons") and JPC Affordable Housing Foundation, Inc.'s ("JPC")(collectively "Defendants") Joint Motion to Enter Agreed Final Judgment ("Motion") and the Court having reviewed said Motion and otherwise being duly advised in the premises and matters before it, now GRANTS that Motion and, as evidenced by the Defendants' signatures below, accepts that the parties stipulate and agree that Berkley Commons is liable to Citizens in an amount equal to Five Hundred Seventy One Thousand Two Hundred Sixty Three Dollars and Sixty-Three Cents

(\$571,263.63) and JPC is liable to Citizens in amount equal to One Million Four Hundred Two Thousand Four Hundred Sixty Six Dollars and Eighty Eight Cents (\$1,402,466.88).

It is therefore **ORDERED, ADJUDGED, and DECREED** that judgment is entered in favor of Plaintiff and against Defendants as follows:

1. Damages in the total amount of One Million Nine Hundred Seventy Three Thousand Seven Hundred Thirty Dollars and Fifty One Cents (\$1,973,730.51) broken down as follows:

i. Berkley Commons is liable to Citizens in an amount equal to Five Hundred Seventy One Thousand Two Hundred Sixty Three Dollars and Sixty-Three Cents (\$571,263.63); and

ii. JPC is liable to Citizens in amount equal to One Million Four Hundred Two Thousand Four Hundred Sixty Six Dollars and Eighty Eight Cents (\$1,402,466.88).

2. Post-judgment interest at the highest statutory rate allowed by law from the date of this Agreed Judgment until the date of collection.

SO ORDERED this _____ day of _____, 202_.

Judge, Marion County Commercial Court

Agreed:

**Board of Directors for Utilities of the Department
of Public Utilities, doing business as Citizens
Energy Group**

Date: 9-6-2022

By: Michael Strohl

Printed: Michael D Strohl

Title: Senior Vice President

Berkley Commons IN, LLC

Date: 9-6-2022

By: 

Printed: ORION ZARUM

Title: MANAGING MEMBER

JPC Affordable Housing Foundation, Inc.

Date: 9-6-2022

By: 

Printed: ORION ZARUM

Title: PRESIDENT

Distribution:

Per Odyssey Electronic Distribution

Exhibit B

INDIANA COMMERCIAL COURT

STATE OF INDIANA)	MARION SUPERIOR COURT NO. 1
)	COMMERCIAL COURT DOCKET
) SS:	
COUNTY OF MARION)	CAUSE NO: 49D01-2204-PL-011246
CITY OF INDIANAPOLIS ACTING BY)	
AND THROUGH ITS BOARD OF)	
DIRECTORS FOR UTILITIES OF THE)	
DEPARTMENT OF PUBLIC)	
UTILITIES, D/B/A CITIZENS)	
ENERGY GROUP,)	
)	
Plaintiff,)	
)	
vs.)	
)	
BERKLEY COMMONS IN, LLC, and)	
JPC AFFORDABLE HOUSING)	
FOUNDATION, INC.,)	
)	
Defendants.)	

JOINT MOTION TO ENTER AGREED FINAL JUDGMENT

Plaintiff, the City of Indianapolis acting by and through its Board of Directors for Utilities of the Department of Public Utilities, doing business as Citizens Energy Group (“Citizens” or “Plaintiff”) and Defendants Berkley Commons IN, LLC (“Berkley Commons”) and JPC Affordable Housing Foundation, Inc. (“JPC”)(collectively “Defendants”), by their respective counsel, jointly move the Court to enter the Agreed Final Judgment attached hereto as ***Exhibit A***. In support thereof the Parties state as follows:

1. The Parties entered into a Settlement Agreement effective September 2, 2022 (“Settlement Agreement”).
2. Pursuant to the Settlement Agreement, the Parties agreed that Citizens could file this Joint Motion to enter the executed Agreed Final Judgment upon the earlier to occur of: (a) any

Defendant Default under the Settlement Agreement that occurs and is not timely cured; and/or (b) Defendants failure to close on the sale of the Apartments by the Closing Date.

3. Defendant has defaulted under the Settlement Agreement and not timely cured and/or Defendants have failed to close on the sale of the Apartments by the Closing Date.

4. The Agreed Final Judgment should be entered.

WHEREFORE, the Parties, respectfully request the Court reopen the present matter, immediately enter the Agreed Final Judgment, set this matter for proceedings supplemental, and for all other relief that is proper.

Respectfully submitted,

Andrew J. Miroff, Atty. No. 21749-49
Adam M. Alexander, Atty. No. 35639-18
ICE MILLER LLP
One American Square, Suite 2900
Indianapolis, IN 46282-0200
Telephone: (317) 236-2100
Facsimile: (317) 236-2219
drew.miroff@icemiller.com
adam.alexander@icemiller.com

Alejandro Valle, Atty. No. 22863-49
Michael E. Allen Atty No. 20768-49
CITIZENS ENERGY GROUP
2020 North Meridian Street
Indianapolis, IN 46202
Telephone: (317) 927-4317
Facsimile: (317) 927-4317
avalle@citizensenergygroup.com
mallen@citizensenergygroup.com

Counsel for Plaintiff

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don@indyadvocate.com

S. Joshua Kahane (#7989-95-TA)
Glankler Brown, PLLC
6000 Poplar Ave., Suite 400
Memphis, TN 38119
901-576-701
jkahane@glankler.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on _____, I electronically filed the foregoing document using the Indiana EFiling System (IEFS), and the same was served upon all counsel of record.

Andrew Miroff