

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

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

CAUSE NO. 45043

PETITION FOR RECONSIDERATION OF ORDER ON REMAND

Comes now the Indiana Office of Utility Consumer Counselor and files its Petition for Reconsideration of Order on Remand and States as follows:

Pursuant to 170 IAC 1-1.1-22, the Office of the Utility Consumer Counselor (“OUCC”) requests the Commission reconsider its August 7, 2019 Order on Remand finding both that the Indemnification Clause Indiana American submitted with its Lead Service Line Replacement Plan (“LSLR”) is reasonable, and that any modifications as may be made without materially altering the substance of such provision are also approved.

The Commission issued its final order in this Cause on July 25, 2018. The OUCC appealed, and on May 10, 2019, the Court of Appeals held that Indiana American had submitted the License Agreement to the Commission as part of its LSLR Plan to fulfill its statutory obligations, indicating the License Agreement, with its Indemnification Clause, was part of Indiana American's Plan. The Court of Appeals held that the License Agreement and Indemnification Clause were part of the LSLR Plan submitted by Indiana American and directed the Commission to either approve or disapprove the License Agreement and Indemnification Clause. The Commission issued its Order on Remand On August 7, 2019.

In its order on remand, the Commission found Indiana American's required Indemnification Clause "to be reasonable under the circumstances." The Commission gave only one reason why the indemnification clause should be considered reasonable. It stated the "inability cited by [Indiana American's witness] to perform the calculus of risk in the absence of the protection afforded by the indemnification language seems to us likely to curtail the replacement of customer owned service lines if the Indemnification Clause is not approved." Order of the Commission on Remand, page 2 (approved 08/07/19). Thus, the Commission found it is reasonable for Indiana American to transfer to its individual customers an unknown level of risk caused by Indiana American's own acts and omissions, as well as those of the subcontractors Indiana American selects. If that level of risk is unknown to Indiana American, how it can then be determined reasonable for Indiana American's customers to be required to acquire that unknown level of risk? If Indiana American, which has the technical, financial, and managerial ability to operate its water utility is unable to perform the calculus of risk, these customers should not be placed in the position of accepting without recourse the uncalculated risk posed by the acts and omissions of their water utility and its subcontractors. It may further be noted that Indiana American also has the ability to be compensated for its business risk through its rate of return, which is established in every rate case. Indiana American's customers have no such recourse.

By its terms, the approved indemnification provision would indemnify Indiana American and its agents from their sole negligence or willful misconduct and require the customer to waive any claims it may have. The Commission should disfavor any provision that requires a customer to afford such a protection. For instance, such provisions in a construction or design contract are specifically declared by I.C. § 26-2-5-1 to be against public policy and are void and unenforceable. A contract for the installation of a service line seems to be such a contract, and even if it were not,

the Commission should embrace the principles that informed the Indiana General Assembly when it enacted that law. I.C. § 8-1-31.6-6 (b) conditions approval of Indiana American's plan on a determination that it is reasonable and in the public interest. An appropriate indemnification provision should make it clear that it does not apply to the sole negligence or willful misconduct of the utility or its agents.

Moreover, there is no evidence in the record to support the Commission's conclusion that Indiana American would choose not to replace customer owned lead service lines if it does not have an indemnification provision that protects it from its own acts and omissions. No witness testified to such a result. In the absence of evidence, there is no reasonable basis to conclude Indiana American would not proceed without risk protections the Indiana General Assembly declared to be against public policy. Moreover, this conclusion assumes Indiana American could not address this risk with appropriate indemnification by its sub-contractors or its own insurance.

For the foregoing reasons, authorizing Indiana American to require the indemnification language in the form proposed is unreasonable, is contrary to public policy as set forth by statute, and lacks evidentiary support.

The Order on Remand also made a second finding for administrative efficiency that the Commission's finding of reasonableness extends to future changes to the Indemnification Clause that contain substantially similar language. Again, I.C. § 8-1-31.6-6 (b) conditions approval of Indiana American's plan on a determination that it is reasonable and in the public interest. Whatever indemnification provision the Commission ultimately approves has been determined by the Court to be part of Indiana American's approved plan. Any change to the approved indemnification provision should be authorized by the Commission through an appropriate process. In conjunction with administrative efficiency, the Commission indicated

individual customers may avail themselves of the informal complaint procedure if regarding indemnification language issues. The informal complaint procedure is not an administratively efficient process, nor the proper place, for handling indemnification disputes. For example, there could be property damage or even personal injury due to negligence or willful misconduct. The overly broad language approved by the Commission could be used by a utility or its contractors in an attempt to limit the injured party's recourse.

WHEREFORE, the OUCC requests the Commission reconsider its order and find the indemnification as proposed by Indiana American is unreasonable and any modification to the indemnification language needs to be approved by the Commission in an appropriate process.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the *Office of Utility Consumer Counselor Petition for Reconsideration of Order on Remand* has been served upon the following counsel of record in the captioned proceeding by electronic service on August 27, 2019.

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