

STATE OF INDAIA

INDIANA UTILITY REGULATORY COMMISSION

**COMPLAINT OF PROMENADE COMMERCIAL LLC,)
AGAINST CITIZENS ENERGY SERVICES.)**

CAUSE NO. 45282

**RESPONDENT: THE BOARD OF DIRECTORS FOR)
UTILITIES OF THE DEPARTMENT OF PUBLIC)
UTILITIES OF THE CITY OF INDIANAPOLIS d/b/a)
CITIZENS WATER)**

CLAIMANT'S CASE-IN-CHIEF

Claimant, Promenade Commercial LLC (hereinafter "Promenade"), by counsel and in accordance with the October 16, 2019 Prehearing Conference Order of the Commission, respectfully submits its Case in Chief and, in support thereof, would respectfully show the Commission as follows:

A. Introduction

Promenade constructed a water main extension (hereinafter, the "Main Extension") for the benefit of Defendant, The Board of Directors for Utilities of the Department of Public Utilities of the City of Indianapolis d/b/a Citizens Water or Citizens Energy Services (hereinafter, "Citizens"), and its water service customers. Promenade expended \$290,008.08 to complete the Main Extension.

During the years that followed, numerous residential and commercial customers directly or indirectly connected to the Main Extension and began to receive water service. The parties' contract, as well as well-established equitable principles, dictate that Citizens pay Promenade an amount not to exceed the \$290,008.08 that Promenade expended to complete the Main Extension. However, to date, Citizens has failed and refused to make any payment to Promenade. As such,

Promenade was left with no choice but to bring this action and now seeks to recover its losses arising from Citizens' breach.

B. Designation of Evidence

In support of its Case in Chief, Promenade designates the following evidence: (1) Plaintiff's Complaint for Damages and Declaratory Judgment ("Complaint"), which is attached hereto as Exhibit 1; (2) Defendant's Answer to Plaintiff's Amended Complaint for Damages and Declaratory Judgment, and Defendant's Affirmative Defenses and Jury Demand ("Answer"), which is attached hereto as Exhibit 2; and (2) the Affidavit of Greg Small ("Small Aff."), which is attached hereto as Exhibit 3.

C. Statement of Undisputed Material Facts

1. On July 12, 2007, Promenade entered into a certain Water Main Construction Agreement (the "Agreement") with Veolia Water Indianapolis, LLC ("Veolia") and the Consolidated City of Indianapolis Department of Water ("Department") in connection with the development of the Promenade of Noblesville (the "Development"). [Complaint, ¶4; Answer, ¶ 4; Small Aff., ¶ 4].

2. A true and accurate copy of the Agreement is attached to the Complaint as Exhibit A thereto. [Complaint, ¶ 4 and Exhibit A; Answer, ¶ 4].

3. The Development is located in Noblesville, Indiana and is bounded to the south by State Road 32, to the east by Mill Creek Road, to the west by Little Chicago Road, and to the north by another parcel of property. [Small Aff., ¶ 5].

4. As of July 2007, the Department owned the water system serving the greater Indianapolis area and certain surrounding areas, including Noblesville, Indiana and the Development (the "Waterworks"). [Small Aff., ¶ 6].

5. As of July 2007, Veolia operated and maintained the Waterworks under a contract with the Department. [Small Aff., ¶ 7].

6. Pursuant to the Agreement, Promenade agreed to construct the Main Extension to serve users within the Development at Promenade's expense. [*See generally*, Agreement; Small Aff., ¶ 8].

7. The Agreement also provides that, for a period of ten (10) years from the date the water main constructed by Promenade is in service, the Department would make certain revenue payments to Promenade as residential and commercial customers connected directly or indirectly to the Main Extension and received water service. [Agreement, ¶ 13].

8. Specifically, the Agreement requires that, for each residential customer in the Development who becomes directly or indirectly connected to the Main Extension and begins to receive water service, the revenue payment to Promenade was to be \$1,231.00 per unit per year. [*Id.*].

9. For commercial customers, the revenue payment to Promenade was to have been payment is product of three (3) times projected water revenue. [*Id.*].

10. Promenade completed construction of the Main Extension, incurring total costs of \$290,008.08. [Small Aff., ¶ 9].

11. The Main Extension was placed into service in February 2008. [Small Aff., ¶ 10].

12. Once the Main Extension was completed and placed into service, Promenade deeded the water main to Veolia, as required by the Agreement. [Small Aff., ¶ 11].

13. Promenade Villas is commercial portion of the Development, located in the northeast portion of the Development. Promenade Villas is located immediately adjacent to the water main constructed by Promenade. [Small Aff., ¶ 12].

14. Promenade Woods is a residential area located in the northeast portion of the Development, just north of the Promenade Villas. [Small Aff., ¶ 13].

15. Citizens concedes that it is the current operator of “the water utility at issue in this action and is the successor/assign to the entity” that executed the Agreement. [Answer, ¶ 17].

16. Shortly after Citizens assumed this role, it arranged for the primary home builder for the Promenade Woods residential development to connect to the Main Extension to supply water service to the homes constructed in the Promenade Woods neighborhood. [Small Aff., ¶ 14].

17. There are currently forty-four (44) total homes in the Promenade Woods neighborhood. [Small Aff., ¶ 15]. These homes are residential customers that have connected indirectly to the Main Extension and have received water service during the term of the Agreement. [*Id.*].

18. In addition, during the term of the Agreement, Embree (“Embree”) purchased property and constructed a neighborhood hospital facility adjacent to the Main Extension. [Small Aff., ¶ 16].

19. Embree and/or Embree’s tenant, St. Vincent Neighborhood Hospital, also connected to the Main Extension and began receiving water service during the term of the Agreement. [Small Aff., ¶ 17].

20. According to the plain terms of the Agreement, the payment due to Promenade for this customer is three (3) times the projected usage for the neighborhood hospital. [Agreement, ¶ 13].

21. To date, Citizens has not made any payment to Promenade in connection with the Agreement. [Small Aff., ¶ 18].

D. Argument

1. Citizens Breached the Agreement.

To prevail on its breach of contract claim, Promenade bears the burden of proving: (1) the existence of a valid, enforceable contract; (2) performance by Promenade of its obligations under the contract; (3) breach by Citizens; and (4) damages resulting from such breach. *See WESCO Distribution, Inc. v. ArcelorMittal Indiana Harbor, LLC*, 23 N.E.3d 682, 695 (Ind. Ct. App. 2014); *American Family Mut. Ins. Co. v. Matusiak*, 878 N.E.2d 529, 533 (Ind. Ct. App. 2007).

There is no dispute that the Agreement is a valid, enforceable contract. There is likewise no dispute that, in constructing the Main Extension in accordance with the terms of the Agreement and deeding the Main Extension back to Citizens, Promenade performed its obligations under the Agreement.

It is also beyond dispute that Citizens has breached the Agreement. The Agreement plainly provides that:

[Citizens] agrees that for a period of ten (10) years after the date the main is in service, [Citizens] shall make one (1) revenue allowance payment as indicated in Table 1 to [Promenade] for each residential or commercial customer who becomes directly or indirectly connected to the Main Extension and begins to receive water service, if any (“Revenue Allowance Payment”). For residential customers, such payment, if any, shall be no less than one time per year and shall be the product of the following: (i) the revenue allowance as indicated in Table 1; and (ii) the number of customers who become directly or indirectly connected to the main extension and begins to receive water service, if any, since: (a) the date the main was placed in service; or (b) the date of the most annual revenue allowance payment; whichever is later. For commercial customers, the revenue allowance shall be calculated on actual usage at the facilities served, and shall be the product of the following: (i) the projected water revenue from the particular customer; and (ii) three. In no event shall the aggregate Revenue Allowance Payment to the Developer exceed the total project cost.

[Complaint, Exhibit A at ¶ 13].

It is undisputed that forty-four (44) residential customers became indirectly connected to the Main Extension and began receiving water service during the ten (10) years after Promenade put the Main Extension into service. Per Table 1 of the Agreement, the Revenue Allowance is \$1,231 for each residential unit per year of connection and service. [Agreement, Table 1]. Applying this figure to the forty-four (44) residential units that became connected and began receiving water service during the term of the Agreement, yields a total Revenue Allowance due to Promenade of not less than \$54,164 for each year that these homes were connected and receiving service.

In addition, it is undisputed that, during the term of the Agreement, Embree Construction Group (hereinafter, “Embree”) purchased property and constructed a neighborhood hospital facility adjacent to the Main Extension. There is no dispute that Embree and/or Embree’s tenant, St. Vincent Neighborhood Hospital, connected to the Main Extension and began receiving water service during the term of the Agreement. According to the plain terms of the Agreement, the payment due to Promenade for this customer is three (3) times the projected usage for the neighborhood hospital. [Complaint, Exhibit A, ¶ 13].

The aggregate of revenue allowance amounts from the residential and commercial connections yields a total revenue allowance due in excess of the amount expended by Promenade to construct the main: \$290,008.08. However, notwithstanding the undisputed connection and use by both residential and commercial customers, Citizens has not made any payment to Promenade under the Agreement, thereby breaching the Agreement.

2. Citizens has been Unjustly Enriched.

To prevail on this claim, Promenade must show that: (1) it conferred a measurable benefit on Citizens; (2) it did so under circumstances such that it would be unjust for Citizens to retain the

benefit without payment; and (3) Citizens expressly or impliedly requested the benefits conferred. *See Coleman v. Coleman*, 949 N.E.2d 860, 866-67 (Ind. Ct. App. 2011).

The elements of this claim are undisputed. Promenade undeniably conferred a measurable benefit on Citizens – it constructed the Main Extension and deeded it to Citizens. It is undisputed that Citizens expressly requested that Promenade provide this benefit. Under the circumstances, *i.e.*, Promenade having invested \$290,023.08 to construct the Main Extension and having received no revenue payments to offset this cost, as well as Citizens’ full use of the Main Extension from early 2008 through the present and into the foreseeable future, it would be manifestly unjust for Citizens to retain the benefit conferred by Promenade without payment of a reasonable amount, *e.g.*, the amount Promenade expended to construct the Main Extension - \$290,008.08.

WHEREFORE, Plaintiff, Promenade Commercial LLC, respectfully requests that the Commission enter an Order: (1) concluding that Citizens has breached the Agreement; (2) requiring that Citizens pay Promenade the \$290,008.08 as damages for such breach; and (3) awarding any other appropriate relief.

Respectfully submitted,

/s/ Daniel K. Burke

Daniel K. Burke, #24572-49

DKB LEGAL LLC

1016 3rd Avenue SW, Suite 100

Carmel, IN 46032

(317) 709-4242

dan@dkblegal.com

Attorney for Claimant

CERTIFICATE OF SERVICE

The undersigned, hereby certifies that on December 2, 2019, a copy of the foregoing was served on all counsel of record via the Commission's online portal.

/s/ Daniel K. Burke

STATE OF INDIANA) IN THE HAMILTON SUPERIOR COURT NO. 1
) SS:
COUNTY OF HAMILTON) CAUSE NO. 29D01-1611-PL-009906

3. Venue is proper in this Court pursuant to Rule 75(A) of the Indiana Rules of Trial Procedure because the contract at issue in this lawsuit relates to real property located in Hamilton County, Indiana.

FACTS

4. On July 12, 2007, Promenade entered into a certain Water Main Construction Agreement (the “Agreement”) with Veolia Water Indianapolis, LLC (“Veolia”) and the Consolidated City of Indianapolis Department of Water (“Department”) in connection with the development of the Promenade of Noblesville (the “Development”). A true and accurate copy of the Agreement is attached hereto as Exhibit A.

5. The Development is located in Noblesville, Indiana and is bounded to the south by State Road 32, to the east by Mill Creek Road, to the west by Little Chicago Road, and to the north by another parcel of property.

6. As of July 2007, the Department owned the water system serving the greater Indianapolis area and certain surrounding areas, including Noblesville, Indiana and the Development (the “Waterworks”).

7. As of July 2007, Veolia operated and maintained the Waterworks under a contract with the Department.

8. Pursuant to the Agreement, Promenade agreed to construct a water main to serve users within the Development at Promenade’s expense.

9. The Agreement also provides that, for a period of ten (10) years from the date the water main constructed by Promenade is in service, the Department would make certain revenue payments to Promenade as residential and commercial customers connected directly or indirectly to the water main and received water service.

10. Specifically, the Agreement requires that, for each residential customer in the Development who becomes directly or indirectly connected to the water main and begins to receive water service, the revenue payment to Promenade was to be \$1,231.00 per unit per year.

11. For commercial customers, the revenue payment to Promenade was to have been payment is product of three (3) times projected water revenue.

12. Promenade complete construction of the water main, incurring expense of \$290,023.08.

13. The water main was placed into service in February 2008.

14. Once the water main was completed and placed into service, Promenade deeded the water main to Veolia, as required by the Agreement.

15. Promenade Villas is commercial portion of the Development, located in the northeast portion of the Development. Promenade Villas is located immediately adjacent to the water main constructed by Promenade.

16. Promenade Woods is a residential area located in the northeast portion of the Development, just north of the Promenade Villas.

17. Upon information and belief, in or about 2010, the Department terminated its contract with Veolia and placed Citizens in charge of operating and maintaining the Waterworks.

18. Shortly after Citizens assumed this role, it arranged for the primary home builder for the Promenade Woods residential development to connect to the water main constructed by Promenade to supply water service to the homes constructed in the Promenade Woods neighborhood.

19. Through this connection, many residential customers have indirectly connected to the water main constructed by Promenade and begun to receive water service.

20. Upon information and belief, since the water main was placed into service in February 2008, over twenty-five (25) residential customers have indirectly connected to the water main constructed by Promenade and begun to receive water service.

21. Upon information and belief, there are over forty (40) total lots on which homes have been constructed in the Promenade Woods neighborhood. These will soon be – or may already be – additional residential customers who have connected indirectly to the water main constructed by Promenade and will begin – or may have already begun – to receive water service.

COUNT I
Breach of Contract

22. Promenade incorporates by reference and realleges each allegation set forth in paragraphs 1 through 21 as if fully set forth herein.

23. The Agreement is a valid, enforceable contract.

24. As discussed herein, Promenade performed all of its obligations under the Agreement.

25. Citizens has breached the Agreement by failing and refusing to pay Promenade the revenue allowances due.

26. As a direct and proximate result of Citizens' breach of the Agreement, Promenade has sustained considerable financial damages in an amount to be established at trial.

COUNT II
Unjust Enrichment

27. Promenade incorporates by reference and realleges each allegation set forth in paragraphs 1 through 21 as if fully set forth herein.

28. By constructing the water main at issue in this lawsuit, Promenade has conferred a real and measurable benefit on Citizens. Indeed, Promenade expended \$290,023.08 to construct the water main.

29. To date, Promenade has received no compensation for its work in constructing the water main.

30. Under these circumstances, it would be manifestly unjust to permit Citizens to retain this benefit without requiring that it compensate Promenade for the reasonable value of the benefit conferred.

COUNT III
Declaratory Judgment

31. Promenade incorporates by reference and realleges each allegation set forth in paragraphs 1 through 21 as if fully set forth herein.

32. In accordance with Ind. Code § 34-14-1, Promenade seeks a declaratory judgment that, for any residential units constructed in the Promenade Woods or elsewhere within the Development, the Agreement requires revenue payments to Promenade in the amount of \$1,231.00 per unit per year through February 2018.

33. This action for declaratory judgment is brought for the purposes of determining a question of actual controversy by and between the parties.

34. This declaratory judgment is sought because the parties have an interest in obtaining a declaration by the Court with respect to their rights in connection with obligations imposed by Agreement in connection with new residential units that connect directly or indirectly to the water main constructed by Promenade through February 2018.

35. In accordance with Indiana Code § 34-14-1-10, Promenade requests that the Court award its costs, including reasonable attorney's fees, incurred in seeking this declaratory judgment.

WHEREFORE, Plaintiff, Promenade Commercial LLC, respectfully requests that the Court enter judgment in his favor and against Citizens and that Court grant Promenade any other appropriate relief.

Respectfully submitted,

/s/ Daniel K. Burke

Daniel K. Burke (#24572-49)

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Carmel, IN 46032

317-709-4242

Email: dan@dkblegal.com

Attorney for Plaintiff,
Promenade Commercial LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following counsel of record via the Court's electronic filing system and by Certified Mail on February 24, 2017:

Alex Valle, Senior Legal Counsel
Citizens Energy Group
2020 North Meridian Street
Indianapolis, IN 46202

/s/ Daniel K. Burke



Water Main Extension Agreement
Department of Waterworks
Consolidated City of Indianapolis

TABLE 1 – CONTRACT PROVISIONS		
The form and content of this contract are as approved by the Board of Waterworks, Consolidated City of Indianapolis, by Resolution No. 24, dated April 22, 2002, and are in accordance with 179 IAC 6-1.5-29.		
PROJECT NUMBER: J-06-230	PROJECT/DEVELOPMENT NAME: Promenade Shoppes	
COUNTY: Hamilton	TOWNSHIP: Noblesville	CONTRACT AUTHOR: JLM
REVIEW AND INSPECTION FEE: \$5.50 per foot of main installed		DATE APPROVED BY DOW BOARD:
REVENUE ALLOWANCE: \$1231.00 for each residential unit		
SUBSEQUENT CONNECTOR FEE: To be Determined at Project Completion		
MAINTENANCE AND REPAIR BOND: Two Years Duration Following In-Service Date 20% of Cost Shown on Final Actual Cost Summary		
OTHER PROVISIONS:		
ATTACHMENTS:		

THIS AGREEMENT, entered into on the date indicated below, by and between:

Promenade Commercial LLC ("Developer"), the Consolidated City of Indianapolis Department of Waterworks ("Department"), and Veolia Water Indianapolis, LLC ("VWI") (individually a "Party," and collectively the "Parties"), WITNESS THAT:

WHEREAS, Department owns the water system serving the greater Indianapolis area and certain areas in the surrounding vicinity (the "Waterworks"); and

WHEREAS, VWI operates and maintains the Waterworks under a long-term contract with the Department; and

WHEREAS, the Developer is engaged in the project identified in Table 1 above, and has requested that the Department provide water service to the development and to future customers within the development; and

WHEREAS, Developer has provided VWI and the Department site plans that detail the desired water utility service, and the Department and VWI are willing to provide such service upon the following terms and conditions; and

WHEREAS, VWI, the Department and Developer agree that the Developer shall, at its own cost and expense, furnish the necessary design and engineering services, labor and materials, to install the Main Extension and obtain all necessary easements, permits, rights-of-way or other authority which is required to install the Main Extension and to provide water service to and throughout the development before the start of construction;

NOW, THEREFORE, in consideration of the premises, covenants, agreements and undertakings hereinafter provided, and each act to be performed pursuant hereto, the Parties agree that:

1. Site-Utility Plan. Developer shall provide VWI, via both paper and AutoCAD or DXF disk, with layer description (if AutoCAD, include release number, a site-utility plan; paper drawings shall be on 24-inch by 36-inch sheets at 1"= 30' to 1"= 50' scale indicating water mains contemplated). All main extensions installed to provide domestic water service shall also be sized and designed provide fire protection service. The Main Extension will be designed to deliver domestic water service at a rate sufficient to serve the number of parcels abutting the Main Extension and public fire protection service at a minimum rate of 1,000 gallons per minute at 30 pounds per square inch residual pressure at the projected maximum daily usage rate. In addition to the above, VWI will determine the size of main reasonably necessary to serve the applicant, consistent with maintaining the integrity of the overall distribution system.

2. Review of Site-Utility Plan. VWI shall review and approve Developer's site-utility plan, offsite main installation plan, and easement drawings (if required), and calculate the appropriate size of the indicated water mains, and shall locate fire hydrants, valves and other appurtenances with respect to the site-utility plan and offsite in accordance with the standards and specifications currently in place for the Waterworks, provided, however, that VWI may require mains larger than 16 inches in order to provide for future service. The additional cost of installing such larger mains shall be at Department's expense unless they are necessary for the development itself. Any additional cost for such oversizing shall be negotiated prior to execution of the contract. Should additional reviews of the same basic plan be required, the first and second reviews will be performed by VWI at no additional cost to the Developer, but subsequent reviews will require compensation to VWI for time expended.

The route and extension of any given water main shall be determined in accordance with 170 IAC 6-1.5-29 (Indiana Administrative Code governing water utility main extensions).

3. Contractor and Materials. VWI shall return the site utility plan to Developer, marked either "Approved," "Approved as Noted," or "Rejected." VWI and Developer shall promptly agree on any changes necessary to comply with Waterworks requirements. After approval, the Developer shall notify VWI in writing of the installation contractor Developer seeks to engage. VWI must approve the Developer's selected contractor, and VWI may withhold approval in its sole discretion. VWI shall inform Developer of any withheld approval within 14 days after Developer notifies VWI of the intended contractor. Failing timely notification to the contrary, approval shall be deemed granted.

The Developer shall purchase and provide pipe, fittings, valves, and hydrants and other appurtenances ("Materials"). All Materials must meet or exceed VWI's standards and specifications, and are subject to VWI approval.

4. Developer Installation. Upon approval of the contractor and the Materials, the Developer agrees to commence construction within one hundred and twenty (120) calendar days, and to prosecute construction to full completion in compliance with all applicable laws and governmental rules and regulations, with all reasonable diligence consistent with good business practices and the availability of required equipment, materials and labor. The Developer shall give VWI a minimum of one week's notice prior to commencing construction.

The Developer hereby agrees that during installation of the Main Extension, VWI will have the authority to inspect the installation for compliance with VWI standards at VWI's convenience and discretion, provided such inspection will not delay or impede the installation work. VWI shall have authority to halt construction if the installation is not consistent with the approved site plan, materials list, or generally accepted industry practices. Should the conditions along the proposed route of the water main be materially different from those indicated in the site plan or reasonably anticipated, the Developer further agrees to cooperate with VWI in modifying the actual construction to render the most efficacious result.

5. Unforeseen Circumstances. VWI reserves the right to terminate this agreement, without prejudice to VWI, in the event contaminated soil, significant archaeological material, or any other supervening underground inclusion is encountered. In such an event, VWI shall notify Developer of the termination in writing and may then propose (but is not required to) an alternative route or the use of substitute pipe materials and appurtenances as the situation, in VWI's sole discretion, requires. Developer assumes, with respect to the other Parties, any and all risk of additional cost, fines, penalties, or assessments relating to the uncovering, handling, transporting, environmental testing, or disposing of contaminated soils in the course of construction.

6. Other Requirements of Developer. Coincident with delivery of the Transfer of Ownership (as hereinafter defined), and other documents required from the Developer to the Department, there shall also be delivered to VWI by the Developer:

- a) All required permits, and any other information pertaining to the Main Extension requested by VWI;
- b) Copy of the final platted map that is to be recorded for the development and/or address listing;
- c) Copies of any easements, rights of way, deeds, options, and so forth, obtained by Developer to facilitate the Main Extension(s).
- d) Waivers of lien rights executed by all material suppliers, subcontractors, and contractors;
- e) Two (2) year Maintenance and Repair Bond on Main Extension for materials and workmanship. The Maintenance and Repair Bond shall be in an amount equal to twenty percent (20%) of the total project cost as indicated on the Final Actual Cost Form as submitted by Developer. Repair work performed during the warranty period must be coordinated with and inspected by VWI. Customers are to be notified prior to interruption of service. In emergency situations, the customers are to be notified of the approximate length of service interruption. Emergency repairs may be performed by VWI, and the developer/bonding company will be billed the cost of the repair; and
- f) Total itemized project costs, specifying pipe, valve, hydrant size, any engineering design costs, and any land rights (easements), certified by the Developer as being accurate; and
- g) "As built" drawings including materials listing, manufacture, and locations; and
- h) All VWI and Department fees, and any previous main extension subsequent connector fees, if applicable; and
- i) Recorded final platted map of the development, when available, from the County Recorder. However, if platted map has lot line changes that require Department facilities to be relocated (mains, hydrants, blowoff, etc.) the developer will be responsible for the cost of those relocations.
- j) Copy of all permit closures or acceptance from applicable agencies.

NOTE: All VWI materials removed at time of connection (sleeves, tees, blow off, valves, etc.) are to be returned to VWI Store Room before taps will be made.

7. Hydrostatic Testing and Disinfection. The installed water mains ("System") shall be hydrostatically tested by Developer's contractor to manufacturer's recommended specifications. Upon satisfactory completion of the hydrostatic testing, and deliverance of all items required under Sections 6 and 9, the Company or its affiliates shall disinfect the System.

8. Initiation of Water Service. Upon determination by VWI that installation has been in accordance with the approved plans and specifications, and after Developer conveys title to the Department by the execution and delivery of a Transfer of Ownership of the main extension and related easements, if applicable, ("Transfer of Ownership"), and delivery of all items required by Section 6, water service shall be initiated by VWI.

9. Timely Submittal of Transfer of Ownership. If the Developer fails to provide the Department with the Transfer of Ownership and all items required in Sections 6 and 8 within ninety (90) days following the completion of hydrostatic testing and disinfection, Developer shall be required to pay the cost for a new hydrostatic test, re-chlorination, and flushing of the main extension. Said cost will be on a time and materials basis and shall be paid to VWI concurrently with the Transfer of Ownership.

10. Ownership of Main Extension. Upon conveyance of the Main Extension by Developer to the Department (including all mains, fire hydrants, easements and other equipment), it shall become the sole property of the Department. After transfer, the Developer shall be responsible for maintenance of the System for 2 years from the date the System is placed in service ("In Service Date"), at Developer's sole expense. Thereafter, VWI shall be responsible for the maintenance and repair of the same.

The Developer shall have no residual property right or interest in the Main Extension or any part thereof by reason of or on account of the Developer having furnished a part or all of the funds used in the purchase of materials and equipment for, or the employment of labor in connection with, the construction of the Main Extension.

11. Determination of Cost of Main Extension. The Department and Developer agree that the Cost of Main Extension shall be the amount appearing on the Final Actual Cost Summary Form rendered by Developer to the Department and VWI.

12. Department Fees. The fees payable to the Department related to the Main Extension shall be in an amount as indicated in Table 1 per lineal foot of main appearing on the Transfer of Ownership form, to cover sizing, hydraulics, engineering, administrative costs, legal costs, direct labor costs, overhead and transportation costs.

13. Revenue Allowance. The Department agrees that for a period of ten (10) years after the date the main is in service, the Department will make one (1) revenue allowance payment as indicated in Table 1 to the Developer for each residential or commercial customer who becomes directly or indirectly connected to the Main Extension and begins to receive water service, if any ("Revenue Allowance Payment"). For residential customers, such payment, if any, shall be no less than one time per year and shall be the product of the following: (i) the revenue allowance as indicated in Table 1; and (ii) the number of customers who became directly or indirectly connected to the main extension and begins to receive water service, if any, since: (a) the date the main was placed in service; or (b) the date of the most recent annual revenue allowance payment; whichever is later. For commercial customers, the revenue allowance shall be calculated on actual usage at the facilities served, and shall be the product of the following: (i) the projected water revenue from the particular commercial customer; and (ii) three. In no event shall the aggregate Revenue Allowance Payment to the Developer exceed the total project cost.

14. Subsequent Connector Fees. If the owner or occupant of any unconnected lot abutting the main ("Owner"), requests water service any time within ten years after the completion date of the Main Extension, the Owner will be obliged, prior to the Department permitting the connection of said lot to the main, to pay to the Department a "subsequent connector's fee" for each lot for which service is requested. The amount of the subsequent connector's fee will be the cost of the Main Extension divided by the number of lots (or lot equivalents as provided in 170 IAC 6-1.5-30) abutting the main.

If the owner of land which abuts the Main Extension and said land was unplatted on the completion date of the Main Extension and said owner or his heirs, successors or assigns (hereinafter, collectively the "owner") subdivides said land within 10 years after the completion date of the Main Extension in such a manner that some or all of the lots will not require service directly from the Main Extension, and the owner requests a lateral Main Extension from the Main Extension to serve such land, the owner will be obliged to pay to the Department a subsequent connector's fee for each lot abutting the earlier Main Extension, regardless of whether such lots are to be served by the earlier Main Extension or by the lateral Main Extension.

Applicants for service connections for lots within the Developer's subdivision shall not be required to pay a subsequent connector's fee. The subsequent connector's fee shall be in addition to any other charges which the subsequent connector must pay to the Department or VWI in order to connect to and receive service from the Department.

The subsequent connector fee, if any, will be determined once the cost of Main Extension has been submitted to the Department along with the Transfer of Ownership by the Developer. The Department will issue a letter to the owner (with a copy to the Developer) specifying the amount of this subsequent connector's fee. Refunds shall be paid by the Department to Developer as provided in 170 IAC 6-1.5-36. Developer, at its sole discretion, may request that the Department reduce or waive the subsequent connector fee. This waiver or reduction in the subsequent connector fee must be in writing and submitted to the Department.

15. Set Off. The Department shall have the right to set off against any funds due the Developer in connection with Revenue Allowances and Subsequent Connector Fees for any actual or anticipated losses and/or expenses related to any claims, demands, causes of action, liabilities, losses, damages, penalties, costs or liens asserted by any party against the Department or VWI or their properties for which the Developer is required to defend, indemnify, hold harmless and protect the Department or VWI under the terms of paragraph 19 herein.

16. Connection to Main Extension. After the date the main is in service the Developer shall have the right to connect customers to the Main Extension in accordance with VWI and the Department's rates, rules and regulations, as approved by the Indiana Utility Regulatory Commission and in effect from time to time, without further installation charge. The cost of the service pipes from the Main Extension to the individual premises of the Developer or lot owner shall be borne by the Developer or lot owner as a separate expense, such service pipes shall remain the customer's property. The service taps to the Main Extension shall be made by VWI and owned by the Department.

17. No Refunds Based Upon Other Main Extension. Notwithstanding any other provisions of this Agreement, the Department shall have the absolute right at any time to construct and install other main extensions and appurtenant facilities connecting to the Main Extension, provided service to the subject Main Extension is not impaired. Neither the connection of any such other main extension nor any service furnished by or from such other main extensions shall be subject to or in any manner affect this Agreement, and the Developer shall not be entitled to any revenue allowance refund or other payment by reason of the connection of such other main extensions or connections for service therefrom.

18. Developer Safety Measures. The Developer and its contractor(s) shall take all steps necessary to ensure the safety of any VWI inspector or other employee at the worksite. VWI shall have no responsibility for identifying, eliminating or otherwise abating any safety, health, or environmental hazard created or otherwise resulting at the worksite from the activities of the Developer or any other person. Nothing in this Agreement shall be construed or interpreted, directly or indirectly, as requiring that VWI undertake any legal duty of the Developer or contractor (s) to the Developer's or contractor's employees, invitees or licensees or to any federal, state or local government agency.

19. Liability and Indemnity. The Developer and its contractor(s) shall be solely responsible for all labor, materials, equipment and work at the worksite. The Developer shall defend, indemnify, hold harmless and protect the Department and VWI, their affiliates, employees, agents, officers, and directors (the "Department Indemnified Parties"), from and against any and all claims, demands, causes of action, liabilities, losses, damage, penalties, liens asserted by any party against City, the Department Indemnified Parties, or their properties, costs (including reasonable attorneys' fees), and suits, including without limiting the generality of the foregoing, those claims, demands, causes of action, liabilities, losses, damage, penalties, liens, costs (including reasonable attorneys' fees), and suits for which the Department Indemnified Parties may be, or may be claimed to be, liable through negligence or otherwise, for death, personal injury, illness or loss or damage to property, or economic loss alleged to arise out of, result from, relate to, or be in any manner connected with activities of the Developer or the services provided by the Department Indemnified Parties under this Agreement. The Developer shall provide such defense and indemnity whether the claim, demand, cause of action, lien, or suit alleges that the occurrence, omission, action, liability, loss, or damage was caused or contributed to by the concurrent, joint comparative, active or passive negligent act or omission of any Department Indemnified Party, except that the Developer assumes no liability for the negligent acts or omissions of any Department Indemnified Party, their employees, agents, officers, and directors, which, without contributory fault on the part of the Developer, its contractor(s), subcontractor(s), or their employees, agents, officers, or directors, is the sole cause of loss, damage to person or property, or injury to or death of any person.

The Department Indemnified Parties shall give the Developer prompt written notice of any lien or claim for which indemnification is sought hereunder. The Developer shall at its own expense assume the defense of such lien or claim with counsel selected in consultation with the Department Indemnified Parties; provided, however, that the Developer shall not be entitled to settle any lien or claim against the Department Indemnified Parties without the prior written consent of the Department Indemnified Parties, which consent shall not be unreasonably withheld. The Department Indemnified Parties shall have the right, but not the duty, to employ, at its expense, its own counsel in any such case.

20. Insurance. The Developer and its contractor/subcontractors shall add the Department Indemnified Parties as additional insureds on a primary and non-contributory basis under all of the Developer's liability insurance policies covering work at the worksite. As additional insureds, the Department Indemnified Parties shall be provided the same extent and quality of coverage as the Developer and any other primary insured party. The Developer shall provide the Department Indemnified Parties a certificate of insurance evidencing such coverage prior to VWI's performance of any services under this Agreement. Such liability insurance coverage shall remain in full force and effect until the In-Service Date.

21. VWI Employees. Under no circumstances shall Department or VWI employees be deemed employees, agents or representatives of the Developer. Nor shall this Agreement be deemed to constitute any Party hereto as the agent or representative of another Party.

22. Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon the Parties hereto, including any subsequent connectors, and their respective successors and assigns.

23. Indiana Utility Regulatory Commission. This Agreement is entered into in conformity with the rules and regulations of the Indiana Utility Regulatory Commission and the Department's and VWI Rules, Regulations, and Conditions of Service on file with and approved by such Commission. In the event of any conflict between the terms of this Agreement and the rules and regulations of such Commission and the Department's and VWI Rules, Regulations and Conditions of Service, the rules and regulations of such Commission and the Department's and VWI Rules, Regulations and Conditions of Service shall control and shall supersede any inconsistent terms herein. The respective obligations of each of the parties hereunder shall be subject to all applicable laws, rules and regulations.

IN WITNESS WHEREOF, the Parties have properly executed this Agreement or caused the same to be properly executed as of the date herein below set forth.

VEOLIA WATER INDIANAPOLIS, LLC

By: C.S. Voltz
Printed Name: Charles Voltz
Title: Vice President - Capital Projects
Date Signed: 2-23-07

CONSOLIDATED CITY OF INDIANAPOLIS
DEPARTMENT OF WATERWORKS

By: Michael C. Forchers
Printed Name: Michael C. Forchers
Title: Acting Director
Date Signed: 2/26/2007

DEVELOPER

Firm Name: Promenade Commercial LLC
By: Dann H. Small
Printed Name: DANN H. SMALL
Title: MANAGING AGENT
Signed: 7/12/07
Taxpayer ID #: 37-1526728
Daytime Telephone Number: (317) 573-8100
Mailing Address: 9011 N Meridian, Suite 202
Indianapolis, IN. 46260
Project Location: State Road 32 Northside
Between Little Chicago & Millcreek Road

2. With respect to the allegations contained in Paragraph 2 of the Complaint, Defendant admits only that it is a water utility subject to the jurisdiction of the Indiana Utility

Regulatory Commission (“IURC”) and that its principal place of business is within Marion County, Indiana. Defendant denies any allegation in Paragraph 2 not expressly admitted.

3. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 3 of the Complaint, which set forth legal conclusions, and therefore Defendant denies same. Responding further, Defendant states that it does not contest venue in this action, but believes issues within this action should be referred to the IURC for resolution prior to any final adjudication by the court.

FACTS

4. Defendant admits the material allegations contained within Paragraph 4 of Plaintiff’s Complaint.

5. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 5 of the Complaint, and therefore Defendant denies same.

6. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 6 of the Complaint, and therefore Defendant denies same.

7. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 7 of the Complaint, and therefore Defendant denies same.

8. With respect to the allegations contained within Paragraph 8 of Plaintiff’s Complaint, Defendant admits only that the contract at issue speaks for itself. Defendant denies all allegations in Paragraph 8 of Plaintiff’s Complaint which are not expressly admitted.

9. With respect to the allegations contained within Paragraph 9 of Plaintiff’s Complaint, Defendant admits only that the contract at issue speaks for itself. Defendant denies all allegations in Paragraph 9 of Plaintiff’s Complaint which are not expressly admitted.

10. With respect to the allegations contained within Paragraph 10 of Plaintiff's Complaint, Defendant admits only that the contract at issue speaks for itself. Defendant denies all allegations in Paragraph 10 of Plaintiff's Complaint which are not expressly admitted.

11. With respect to the allegations contained within Paragraph 11 of Plaintiff's Complaint, Defendant admits only that the contract at issue speaks for itself. Defendant denies all allegations in Paragraph 11 of Plaintiff's Complaint which are not expressly admitted.

12. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 12 of the Complaint, and therefore Defendant denies same.

13. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 13 of the Complaint, and therefore Defendant denies same.

14. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 14 of the Complaint, and therefore Defendant denies same.

15. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 15 of the Complaint, and therefore Defendant denies same.

16. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 16 of the Complaint, and therefore Defendant denies same.

17. With respect to the allegations contained in Paragraph 17 of Plaintiff's Complaint, Defendant admits only that it currently operates the water utility at issue in this action and is successor/assign to the entity which entered into the contract at issue. Defendant denies all allegations in Paragraph 17 of Plaintiff's Complaint which are not expressly admitted.

18. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 18 of the Complaint, and therefore Defendant denies same.

19. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 19 of the Complaint, and therefore Defendant denies same.

20. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 20 of the Complaint, and therefore Defendant denies same.

21. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 21 of the Complaint, and therefore Defendant denies same.

Count I – Breach of Contract

22. Defendant incorporates by reference as if fully set forth herein its responses to the Complaint's Paragraphs 1-21, above.

23. Defendant admits the material allegations contained in Paragraph 23 of Plaintiff's Complaint. Responding further, Defendant states that the agreement at issue, by its express terms, was entered into in conformity with the rules and regulations of the IURC and the rules, regulations and conditions of service on file with and approved by such Commission.

24. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 24 of the Complaint, which set forth legal conclusions, and therefore Defendant denies same.

25. Defendant denies the allegations contained in Paragraph 25 of Plaintiff's Complaint.

26. Defendant denies the allegations contained in Paragraph 26 of Plaintiff's Complaint.

Count II – Unjust Enrichment

27. Defendant incorporates by reference as if fully set forth herein its responses to the Complaint's Paragraphs 1-21, above.

28. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 28 of the Complaint, which set forth legal conclusions, and therefore Defendant denies same. To the extent any allegation in Paragraph 28 of Plaintiff's Complaint does not set forth a legal conclusion, Defendant denies such allegations.

29. Defendant denies the allegations contained in Paragraph 26 of Plaintiff's Complaint, to the extent it alleges that Plaintiff has not received from Defendant all compensation due to it pursuant to the parties' agreement.

30. Defendant denies the allegations contained in Paragraph 30 of Plaintiff's Complaint.

Count III – Declaratory Judgment

31. Defendant incorporates by reference as if fully set forth herein its responses to the Complaint's Paragraphs 1-21, above.

32. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 32 of the Complaint, and therefore Defendant denies same.

33. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 33 of the Complaint, and therefore Defendant denies same.

34. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 34 of the Complaint, and therefore Defendant denies same.

35. Defendant denies that Plaintiff is entitled to receive from it the relief requested in this Paragraph 35 of Plaintiff's Complaint.

WHEREFORE, Defendant demands that the claims against it raised in Plaintiff's Complaint for Damages and Declaratory Judgment be dismissed in their entirety, with prejudice, that judgment be entered in its favor, and that Defendant recover its costs and expenses,

including reasonable attorney's fees, and such other and further relief to which it may be entitled at law or in equity, as this Court deems just and appropriate. Allegations not admitted are denied.

AFFIRMATIVE DEFENSES

Pleading further, Defendant sets forth the following Affirmative Defenses to Plaintiff's Complaint:

1. Plaintiff has failed to state any claim upon which relief may be granted.
2. To the extent Plaintiff has failed to mitigate its alleged damages, its damage claims are barred, in whole or in part, by such failure.
3. Plaintiff's claims might be barred by the doctrines of laches and/or estoppel and/or waiver and/or unclean hands.
4. Plaintiff's claims against Defendant may be barred or limited to the extent applicable under the appropriate water utility terms and conditions, or tariff.
5. Defendant is entitled to set off or credit to the extent Plaintiff has already received payment against the claimed damages in this action.
6. Plaintiff's recoverable damages (if any) are capped as is set forth in the parties' agreement.
7. Issues in this action should be resolved by referral to the IURC prior to final adjudication of this action by the court based upon the doctrine of primary jurisdiction as set forth in *Austin Lakes Joint Venture v. Avon Utilities, Inc.*, 648 N.E.2d 641, 646 (Ind. 1995) and related case law.
8. Plaintiff has failed to exhaust administrative remedies.
9. Declaratory relief must be preceded by the court's consideration of alternative remedies available to the Plaintiff and assessment of whether the requested declaration would

terminate the uncertainty or controversy at issue.

10. All parties having an interest that would be affected by the declaration sought herein have not been made parties to this action.

11. Unjust enrichment is not a viable cause of action when there is a valid and enforceable contract in place between the parties with respect to the transaction at issue.

12. Denying the relief sought by Plaintiff herein would not be unjust. Indeed, requiring the payment sought by Plaintiff would be unjust against Defendant.

WHEREFORE, Defendant demands that the claims against it raised in Plaintiff's Complaint for Damages and Declaratory Judgment be dismissed in their entirety, with prejudice, that judgment be entered in its favor, and that Defendant recover its costs and expenses, including reasonable attorney's fees, and such other and further relief to which it may be entitled at law or in equity, and as this Court deems just and appropriate. Defendant furthermore reserves the right to assert additional affirmative defenses as they become known during the course of discovery or otherwise.

JURY DEMAND

Defendant, by counsel, respectfully demands trial by jury in this cause, on all issues so triable.

Respectfully submitted,

/s/ Alejandro Valle
Alejandro Valle (#22863-49)
Attorney for Defendant Citizens Water

CITIZENS ENERGY GROUP
2020 N. Meridian Street
Indianapolis, Indiana 46202
(317) 927-4317
avalle@citizensenergygroup.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document is being e-filed, and is being served automatically upon the following person *via* the court's electronic filing system, this 19th day of July, 2017.

Daniel K. Burke
DKB Legal LLC
1016 3rd Avenue SW, Suite 100
Carmel, IN 46032

/s/ Alejandro Valle
Alejandro Valle

STATE OF INDIANA) IN THE HAMILTON SUPERIOR COURT NO. 1
) SS:
COUNTY OF HAMILTON) CAUSE NO. 29D01-1611-PL-009906

5. The Development is located in Noblesville, Indiana and is bounded to the south by State Road 32, to the east by Mill Creek Road, to the west by Little Chicago Road, and to the north by another parcel of property.

6. As of July 2007, the Department owned the water system serving the greater Indianapolis area and certain surrounding areas, including Noblesville, Indiana and the Development (the "Waterworks").

7. As of July 2007, Veolia operated and maintained the Waterworks under a contract with the Department.

8. Pursuant to the Agreement, Promenade agreed to construct a water main to serve users within the Development at Promenade's expense.

9. Promenade complete construction of the water main, incurring expense of \$290,023.08. Attached hereto as Exhibit A are records reflecting payments expended by Promenade.

10. The water main was placed into service in February 2008.

11. Once the water main was completed and placed into service, Promenade deeded the water main to Veolia, as required by the Agreement.

12. Promenade Villas is commercial portion of the Development, located in the northeast portion of the Development. Promenade Villas is located immediately adjacent to the water main constructed by Promenade.

13. Promenade Woods is a residential area located in the northeast portion of the Development, just north of the Promenade Villas.

14. Shortly after Citizens assumed Veolia's role, it arranged for the primary home builder for the Promenade Woods residential development to connect to the water main

constructed by Promenade to supply water service to the homes constructed in the Promenade Woods neighborhood.

15. There are currently forty-four (44) total homes in the Promenade Woods neighborhood. These homes are residential customers that have connected indirectly to the water main constructed by Promenade and have received water service during the term of the Agreement.


16. In addition, during the term of the Agreement, Embree ("Embree") purchased property and constructed a neighborhood hospital facility adjacent to the Main Extension.

17. Embree and/or Embree's tenant, St. Vincent Neighborhood Hospital, also connected to the Main Extension and began receiving water service during the term of the Agreement.

18. To date, Citizens has not made any payment to Promenade in connection with the Agreement.

I AFFIRM UNDER THE PENALTIES FOR PERJURY THAT THE FOREGOING FACTS ARE TRUE AND CORRECT.

Date: 6/27/18


Greg Small

NATIONAL CITY BANK

APPLICATION AND CERTIFICATE FOR PAYMENT - CONSTRUCTION LOAN

SCHEDULE A- TOTAL COST

[illegible]

APPLICATION AND CERTIFICATE FOR PAYMENT - ESCROW ACCOUNT

CONSTRUCTION LOAN DRAW NO. 12

		Retainage	Retainage	Retainage	Retainage
	Balance	Held	Paid	Paid	Balance
%	to	previous	This	Previous	to
Complete	Complete	Applications	Application	Application	Date
K/F	=F-K				I+N-O-P

The Undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief, the Work covered by this Application for Payment has been completed in accordance with the contract documents, that all amounts have been paid by the Contractor for Work for which previous Certificate for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.																			
										Witness: _____									
By: Promenade Creek, LLC										Printed Name: _____									
Signature: _____ Date: _____										Date: _____									
Printed Name _____ Title _____																			

SCHEDULE A- TOTAL COST

[illegible]