

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF AMERICAN SUBURBAN)
UTILITIES, INC. FOR APPROVAL OF)
COMPLIANCE FILING AND PHASE III) CAUSE NO. 44676 S1
RATES)

AMERICAN SUBURBAN UTILITIES, INC.'S
SUBMISSION OF PROPOSED ORDER

American Suburban Utilities, Inc., by counsel, hereby submits its Proposed Order in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the following via electronic email this 28th day of May, 2021 to:

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ORDER OF THE COMMISSION

Presiding Officers:

David Ziegner, Commissioner

Stefanie Krevda, Commissioner

David Veleta, Chief Administrative Law Judge

On November 7, 2019, American Suburban Utilities, Inc. (“ASU”) submitted its Compliance Filing and Phase III Rates in Cause No. 44676. By Docket Entry dated January 8, 2020, the Indiana Utility Regulatory Commission (“Commission”) created this Subdocket for the purpose of addressing the OUCC’s objection to ASU’s Phase III rate submission. A prehearing conference was held on January 27, 2020, a prehearing conference was held and a prehearing conference order was issued on January 29, 2020. ASU’s rates filed with its compliance filing were approved as of that date on an interim-subject-to-refund basis. While ASU contended that the improvements subject to the Phase III submission were in service as of November 7, 2019, construction of certain components (which did not affect the operation of the plant as designed) was not yet complete, and the schedule was therefore extended by Docket Entry dated March 4, 2020, to allow such completion. The schedule was again extended by Docket Entry dated July 2, 2020 due to the COVID-19 pandemic.

On September 30, 2020, American Suburban Utilities (“ASU” or “Petitioner”) filed a Notice of Completion of Construction, in compliance with the Commission’s July 2, 2020 Docket Entry in this Cause No. 44676 S1.

On February 24, 2021, the Indiana Office of Utility Consumer Counselor (“OUCC”) filed the testimony and attachments of James T. Parks – Utility Analyst II in the Water/Wastewater Division, Margaret A. Stull – Chief Technical Advisor in the Water/Wastewater Division, and Scott A. Bell - Director of the Water/Wastewater Division.

On March 24, 2021, ASU filed the responsive testimony of Scott Lods – President of ASU, Jennifer Leshney, P.E. – Director of Engineering for Christopher B. Burke Engineering, LLC, Marcene Taylor – President of Marcene Taylor Inc., Katelyn Shafer – Accountant/Financial Advisor for Reedy Financial Group, P.C., Dick R. Weigel, PE of HWC Engineering, Inc., and Elton A. Wagner of Schomburg & Schomburg Construction, Incorporated.

On April 16, 2021, the Presiding Officers issued a docket entry requesting additional information of ASU. ASU filed its response on April 20, 2021.

The Commission set this matter for an Evidentiary Hearing to be held on April 22, 2021, at 9:30 a.m. in Room 222 of the PNC Center, 101 W. Washington Street, Indianapolis, Indiana. On April 16, 2021, a docket entry was issued advising that due to the ongoing COVID-19 pandemic, the hearing would be conducted via WebEx videoconferencing and providing related participation information. ASU and the OUCC participated in the hearing by counsel, and the prefiled evidence of the parties was offered and admitted into the record without objection. No members of the general public appeared or sought to testify at the hearing.

Having considered the evidence of record as well as the applicable law, the Commission now finds that:

1. Notice and Jurisdiction. Due, legal, and timely notice of the hearings conducted in this Cause was given as required by law.

2. Petitioner's Characteristics. ASU is an Indiana corporation and a “public utility” as defined in Ind. Code § 8-1-2-1. ASU holds CTAs issued by the Commission over certain territory located in Tippecanoe County, Indiana, and provides wastewater disposal service within its certified territory. The Commission has jurisdiction to approve ASU’s wastewater utility rates and charges. Thus, this Commission has jurisdiction over Petitioner and the subject matter of this proceeding.

3. Background of Proceedings and Scope of Subdocket. The issues presented in this case began approximately nine years ago with the Petition filed by ASU in Cause No. 44272 on November 15, 2012. Petitioner's Exhibit No. 1, Attachment SLL-1. Among other relief, ASU was seeking preapproval of expenditures for construction of upgrades and improvements to the Carriage Estates wastewater treatment plant. Id. ASU was proposing to change the treatment process at that time. Id. After submission of the respective cases-in-chief and rebuttal in Cause No. 44272, it appeared that the parties had reached consensus that the proposed plant should be sized to a total capacity of at least 3.9 MGD. Id. Then ASU sought a continuance to allow the submission of additional evidence, given that IDEM had added new limits for phosphorus in the preliminary effluent limits that would be applicable to the plant. Id. ASU filed an updated case-in-chief seeking approval of expenditures to expand the capacity to 4.0 MGD, with a change in the proposed treatment process to a continuous sequencing batch reactor (SBR). Id. The OUCC submitted evidence that with the change in treatment process to continuous SBR, the capacity could be reduced to 2.9 MGD and that more time was needed to study options for phosphorus. Id. ASU then submitted rebuttal evidence on December 11, 2013, outlining four options for addressing the capacity needs at Carriage Estates, along with cost estimates for pursuing each. ASU withdrew its request for preapproval of expenditures for phosphorus treatment at that time. The four options and cost estimates were:

Option 1	Install enough equipment so the existing plant could be re-rated to 2.0 MGD	\$13,254,910
Option 2	Expand the existing plant to a capacity of 3.0 MGD	\$16,187,479
Option 3	Expand the existing plant to a capacity of 4.0 MGD, but do not install additional tankage for a later expansion	\$18,980,887

Option 4	Expand the existing plant to a capacity of 4.0 MGD, but build the tankage large enough so that it can later be expanded to 6.0 MGD	\$19,938,273
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Id.; Public’s Cross Exhibit 4. ASU presented the four options so that the Commission could decide the amount of expenditures that should be approved. Petitioner’s Exhibit No. 1, p. 7.

On February 11, 2014, the OUCC and ASU submitted a Stipulation and Settlement Agreement in Cause No. 44272. Petitioner’s Exhibit No. 1, Attachment SLL-2. That agreement provided for “a stipulated preapproved amount that is derived from one of the alternatives (Option 2) The stipulated amount of \$10,000,000 is materially lower than Petitioner’s cost estimate for Option 2 and represents a compromise on the part of both parties. In entering into this stipulation, [ASU did not agree] that the CE-III Project [could] be completed for this amount, but rather the agreed preapproved amount provides sufficient assurance to allow [ASU] to proceed with a project.” Id., p. 5. The stipulated amount did not include any amounts for engineering or phosphorus treatment. Id., p. 7. The Stipulation also included a provision regarding construction of the upgrades through an affiliate of ASU, First Time Development Corp. (“FTDC”). The parties agreed that FTDC could complete the construction and that, for purposes of constructing the plant upgrades with the preapproved expenditures, ASU had satisfied the requirements of its affiliate agreement for construction with FTDC. Id., pp. 7-8. That agreement included the solicitation of an independent third party evaluation of FTDC’s bid. Petitioner’s Exhibit No. 1, Attachment SLL-3, pp. 31-32. We approved the Stipulation without material modification on April 9, 2014.

ASU was also at this time seeking a permit from IDEM to construct the plant. A construction permit application was submitted on January 7, 2014. Petitioner’s Exhibit No. 1, Attachment SLL-1. This permit was for the construction of a plant upgrade that would have been what had been described as Option 4 in ASU’s rebuttal testimony. That permit was issued on February 21, 2014, and thereafter appealed by several neighboring landowners on March 7, 2014. Id. Even though the appeal was ultimately denied, ASU did not start construction on the portions of the project affected by the appeal while the appeal was pending. This caused a 40-month delay in construction. Petitioner’s Exhibit No. 1, Attachment SLL-1, p. 13. ASU submitted project status reports in Cause No. 44272 in 2015 and 2016, indicating that it was pursuing the construction of what had been described as Option 4 but that construction was delayed due to the appeal. Public’s Exhibit No. 1, Attachment SAB-02, pp. 1-5.

ASU filed the petition in the general rate case giving rise to this subdocket on September 4, 2015. ASU proposed a hybrid test period of longer than twelve (12) months under Ind. Code §8-1-2-42.7 to allow rates to be phased-in over three steps as various projects constructed with amounts preapproved in Cause No. 44272 were placed in service. ASU indicated that it planned to construct what had been designated as Option 4 from Cause No. 44272 and that the total cost was now estimated at \$21,488,273, including phosphorus treatment. Nevertheless, ASU was holding the cost to be included for ratemaking purposes for the rate case at a total of \$11,500,000 (\$10,000,000 preapproved plus an additional \$1,500,000 for phosphorus.). Petitioner’s Exhibit No. 1, Attachment SLL-1. The OUCC’s position was that the expansion should be limited to 3.0 MGD, which corresponded to the capacity of Option 2 from Cause No. 44272. Id. We issued our

Order in the underlying Cause on November 30, 2016. Pertinent to the issues raised in the OUCC's objection giving rise to this Subdocket, there were three findings.

First, we found:

3) **CE-III.** In Cause No. 44272, the Commission pre-approved Petitioner's CE-III plant expansion for \$10 million. In this Cause, Petitioner requested that \$11.5 million be included in rate base related to this project (\$10 million in pre-approved costs plus the \$1.5 million for phosphorous removal). Petitioner stated the anticipated final cost for the CE-III plant expansion (Stages 1 and 2) is \$21,488,273. Petitioner proposed to include \$1,975,200 of the CE-III project expansion and \$1.5 million in phosphorous removal costs in Phase II rates and \$8,024,800 in Phase III rates. The Commission presumes the Petitioner will request additional rate base for costs above the \$11.5 million pre-approval amount for the CE-III plant in future proceedings.

The OUCC provided analysis to support its assertion that the proposed expansion of the CE-III plant from 1.5 MGD to 6.0 MGD is unwarranted. The OUCC pointed out that Petitioner is planning for growth that will simply double flows every ten years based on historical growth of housing unit connections between 2004 and 2015 rather than any population projection. Instead, the OUCC's methodology projected the design year population for 2030 by using data from the 2010 US Census, Indiana Business Research Center, Tippecanoe County Planning Department, and Tippecanoe County Transportation Plan, and then subtracts the current year population. Consistent with Ten States Standards, the OUCC multiplied the resulting population by 100 GPD to calculate the flow increase for the projected population growth. The flow increase was added to actual flows to arrive at the 2030 projected flows. Based on this methodology, the OUCC said that 3.0 MGD is the appropriate plant size.

Petitioner responded that the 3.0 MGD plant proposed by the OUCC is barely sufficient over the 20-year planning horizon and that it sees more value in planning for more aggressive growth.

The evidence in this case does not support the investments Petitioner is making regarding the CE-III project because Petitioner failed to project future flows based on any reasonable or acceptable methodology. Rather, the future flows were approximately doubled based on the past 15 years of historical housing development and were not adequately supported. Based on the evidence presented we believe the CE-III plant as proposed will be twice as large as it needs to be. The OUCC applied a growth projection to the Ten State

Standards to project future flows. Therefore, the total inclusion in rate base shall be limited to \$10,000,000 (\$1,975,200 in Phase II and \$8,024,800 in Phase III rates).

Petitioner assumed the risk/reward associated with moving forward on the construction of a 6.0 MGD plant. Therefore, the excess expenditures above the amount approved in this Order shall not be included in rate base in future proceedings until Petitioner demonstrates that the excess expenditures are reasonable and prudent, and that the excess capacity is being utilized by its customers. The determination that the plant is used and useful shall be made based on average and peak flows at the plant compared to the plant rating as opposed to simply manipulating plant operations so the new plant components are operated or cycled in a manner that uses all of the new components.

Finally, Petitioner included \$1,500,000 in rate base for standby chemical phosphorous removal. The Commission understands that IDEM requires a supplemental chemical removal process in addition to the removal provided by the SBR process itself for the 6.0 MGD treatment plant that the Petitioner proposes. Since the Commission found that the investment in a 6.0 MGD facility is not supported in evidence, the need for the \$1.5 million of supplemental phosphorous removal must also be scrutinized. In response to the Commission's March 8, 2016 Docket Entry question Part B(3), the Petitioner says, "Biological phosphorous removal was proposed for either the 3.0 MGD or 4.0 MGD WWTP [wastewater treatment plant]." The Commission understands the supplemental removal is based on the use of a chemical feed system. The cost for the supplemental phosphorous treatment will be \$1.5 million regardless of the size of the plant.

Thus, we accept Petitioner's request to include \$1,500,000 in rate base, under Phase II rates, for standby chemical phosphorous removal upon the equipment being placed in service. The total amount to be included in rate base for the CE-III project is \$11.5 million.

Order, Cause Nos. 44676 & 44700, pp. 29-30.

Second, we found:

F. Phase-In of Rates. Petitioner is proposing to make adjustments to its revenue requirement in Phase II and Phase III through a compliance filing based on the actual cost of projects, additional actual accumulated depreciation, actual accumulated amortization

of CIAC, revenues from actual customer count, and the actual capital structure.

Prior to implementing the authorized rates for each Phase, we find that Petitioner shall provide certification that the new plant is in service and verification that the construction costs have been incurred and paid. Petitioner shall also file a report with the actual and approved amount of plant for the major projects by plant account. Any proposed adjustments to the costs associated with Petitioner's major projects will be limited to the project costs approved in this Cause. Petitioner shall also update accumulated depreciation, depreciation expense, property tax and income tax expense to account for the actual cost of the major projects to the extent actual costs do not exceed the approved amounts herein. Petitioner will not be allowed to update retained earnings/owner's equity. For customer count, Petitioner shall provide the actual customer count with an explanation on how it arrived at that figure. Similarly, for CIAC, Petitioner shall provide the actual amount of CIAC and an explanation on how it arrived at that figure. Petitioner shall update operating revenues, CIAC, and the Amortization of CIAC based on actual results. Petitioner shall also provide updated rate schedules and tariff sheets. If a material difference exists between the actual cost of the major project and the cost pre-approved, Petitioner shall file evidence to support the reasonableness of the material difference. After each submission, the OUCC and Intervenors shall have 30 days to review the compliance filing and submit any objections. We expect the parties to work cooperatively to answer any questions that may arise.

Id., pp. 39-40.

Finally, we found:

(2) **Affiliated Transactions.** A review of the invoices provided through Petitioner's Exhibit 6, CX-2 and CX-3 also raises serious concerns regarding Petitioner's relationship with its affiliated companies. At the hearing, the Presiding Officers questioned Mr. Skomp regarding the backhoe with a serial number T0310SG924411, as shown on several of L3 Corporation's invoices, an affiliated company. Based on the invoices received, the serial number shown was for a backhoe Petitioner purchased on Invoice Number 2200152 dated September 30, 2003, for \$67,250 from Holt Equipment Company. The Commission asked Mr. Skomp "[I]f you could explain if the backhoe was being put into rates . . . , why was it then also leased by an affiliate back to the utility?" Mr. Skomp answered "That I do not know." Hr.Tr., p. B-107. It appears that

Petitioner is paying for equipment it already owns. Furthermore, Petitioner appears to be allowing its non-utility affiliates to use equipment paid for by Petitioner's ratepayers.

Moreover, the L3 affiliate invoices totaling approximately \$70,011 were only a few of a handful of affiliate invoices received that provided more project detail than just the date of the invoice, the project name, the amount being requested, and the total amount invoiced to date for the specific project. We believe the documentation Petitioner maintains from its affiliate lacks sufficient details for an auditor to determine the reasonableness of the amount requested for recovery. Further, we are concerned with the lack of documentation maintained by Petitioner. Therefore, Petitioner shall require First Time or any other affiliated company to submit detailed invoices for all costs including unit costs for structures, materials, labor, equipment, and engineering, which should be compared to the cost estimate or contract entered into by Petitioner to complete the work. We expect to receive this level of detail regardless of whether the work performed was done so under a lump sum or time and materials contract.

The Commission concludes that the affiliate transaction process prescribed for Petitioner in the final order for Cause No. 43294 (Jan 23, 2008) may not be adequate in insuring that the affiliated transactions are competitive, reasonable, and in the public interest. The affiliate contract between Petitioner and First Time Development Corp. is set to expire in January of 2017. The Commission shall address these issues upon the filing of Petitioner's next affiliate contract provided to the Commission for review pursuant to Ind. Code§ 8-1-2-49(2)(g).

Id., pp. 41-42.

On January 13, 2017, ASU filed new affiliate agreements with the IURC. Petitioner's Exhibit No. 1, Attachment SLL-6. ASU explained that the construction services historically provided by FTDC were being divided into three separate contracts. The first to address the headworks (the part of the Carriage Estates Project not affected by the IDEM construction permit appeal), which construction was nearly complete, with most of the work done under the prior (but expiring) affiliate agreement. The second was for the construction of chemical phosphorus removal in the fixed amount of \$1,500,000 (corresponding to the preapproved amount). The third was for the balance of the Carriage Estates improvements, capped at \$8,024,800 (this amount plus the headworks contract equals a total of \$10,000,000). Id., pp. 3, 11. This third agreement also provided that the capacity of the plant would be limited to 3.0 MGD as found in the Commission's November Order rather than the larger plant expansion that ASU had been planning to build. Id., p. 20. The OUCC was copied, and ASU requested a meeting among all stakeholders if there were issues. Id. The Commission's General Counsel Office responded via letter dated February 15, 2017, indicating that the affiliate agreements did not appear to satisfy the Commission's concerns

stated in its November Order, and indicating that if the contracts were not withdrawn and replacement contracts submitted, a Commission investigation may be initiated. Public's Exhibit No. 1, Attachment SAB-16. Among several others, one suggestion was to obtain an independent third-party estimator for cost estimation purposes. Id., pp. 2-3. ASU responded to the letter from the General Counsel's office on March 30, 2017. Petitioner's Exhibit No. 1, Attachment SLL-7. The response indicated that the affiliate contracts would not be withdrawn. Instead, if an investigation were commenced, they would be withdrawn at that time and not replaced, and the project would then be submitted for competitive bidding. Information was also submitted concerning what the project might cost if it were competitively bid and the anticipated rate impact under that scenario. All stakeholders, including the OUCC, were copied on this correspondence. Id. The Commission General Counsel responded by letter on April 21, 2017, copying all stakeholders, and in anticipation of a meeting to discuss the issues. That meeting was held on April 27, 2017. The parties in attendance apparently reached consensus on the changes that could be made to the affiliate agreements that would satisfy Commission Staff and General Counsel concerns, and new affiliate agreements were submitted and accepted by the Commission for filing. Petitioner's Exhibit No. 1, Attachments SLL-8 through SLL-11. While the General Counsel cautioned that the decision by Commission Staff could not indicate a "predetermination" as to how the Commission would rule in future proceedings, at no point did the Commission initiate an investigation into the affiliate agreements. Id., Attachment SLL-9. Construction resumed almost immediately after the affiliate agreements had been accepted for filing by the Commission. Petitioner's Exhibit No. 1, p. 17.

IDEM issued a Notice of Violation on January 21, 2020 alleging that the upgrade ASU constructed did not comply with the IDEM construction permit issued in 2014. IDEM observed that the facilities actually constructed had significant differences from what had been permitted. Public's Exhibit No. 1, OUCC Attachment SAB-11, p. 5. ASU submitted as-built drawings for the plant as constructed to IDEM on September 30, 2020, and sought issuance of a construction permit for the plant that had been built. The as-built plans and design manual were approved by IDEM. Petitioner's Exhibit No. 2, p. 3.

On November 7, 2019, ASU filed Petitioner's Submission of Compliance Filing and Phase III Rates. ASU certified that its Carriage Estates Wastewater Treatment Plant Upgrades was in service. On December 9, 2019, the OUCC filed its Objection to ASU's Phase III Compliance filing. On December 19, 2019, ASU filed Petitioner's Response to OUCC's Objection. On December 23, 2019, the OUCC filed OUCC's Reply to Petitioner's Response to the OUCC's Objection to ASU's Phase III Tariff Compliance Filing. The issues raised by the OUCC's objection are:

1. Whether ASU was required by the Stipulation in Cause No. 44272 to build either Option 2 or Option 4 and not some other configuration.;
2. Whether ASU has installed the chemical phosphorus treatment equipment which had formed the basis for the expenditures that had been preapproved by the Commission;
3. Whether the Stipulation in Cause No. 44272 required that construction be "complete" before the facilities constructed with the amounts preapproved can be reflected in rates;

4. Whether ASU built the plant that has been permitted by IDEM's construction permit; and

5. Whether the affiliate agreements between ASU and FTDC comply with the Commission's November 2016 Order.

4. OUCC Objections.

Scott A. Bell, Director of the OUCC's Water and Wastewater Division presented the overall summary of the OUCC's objection to the Phase III rates. He claims ASU had not completed its CE-III WWTP project or Standby Chemical Phosphorus Removal project at the time it filed the compliance filing for Phase III rates on 11/7/2019. He testified ASU did not construct the CE-III WWTP project in accordance with the construction permit and that this had resulted in an enforcement action. Mr. Bell recommends refund of all Phase III interim revenues paid through September 30, 2020, and recommends Phase III rates collected effective as of 9/30/2020 be reflective of the cost of the preapproved project components ASU actually completed. Public's Exhibit No. 1, pp. 1-2. He testified that preapproval was tied to a specific project, and that ASU was required to build either Option 2 or Option 4 per the Stipulation approved in Cause No. 44272. Id., pp. 7-9. He also testified that the Micro Star Tertiary Filter, which had originally been part of the standby chemical phosphorus treatment had not been installed and that, as a result, \$1,020,000 should be deducted from rate base. Id., p. 11. Mr. Bell also testified that the Carriage Estates upgrades had not been complete as of November 7, 2019, and he included pictures and IDEM inspection reports he claimed showed there was work yet to do at that time. Id., pp. 12-13. He also testified that FTDC's records were inadequate and failed to comply with the language of the Commission's November, 2016 Order in the underlying Cause regarding affiliate agreements. He testified that the affiliate agreements between ASU and FTDC failed to satisfy the requirements of the Commission's Order. Id., pp. 24-30.

James T. Parks, Utility Analyst II with the OUCC, also testified. He testified about the phosphorus treatment issue. He claimed that the original plans had included the installation of biological phosphorus treatment and that ASU later learned that, with the biological treatment, a standby chemical backup phosphorus treatment would be needed. He testified that the preapproval in the rate case was for backup chemical phosphorus, and the cost estimate included a MicroStar Tertiary Filter that had not been installed. Instead, ASU had eliminated the biological phosphorus treatment and the chemical phosphorus became the primary phosphorus treatment, which had eliminated this filter. He proposed to deduct the originally estimated cost of the filter from the \$1.5 million that had been approved in the underlying Cause. Public's Exhibit No. 2, pp. 2-18. He also testified that the phosphorus treatment had been installed on land owned by Scott Lods, which Mr. Parks claimed was a design error. Id., p. 19. Mr. Parks then proceeded to compare what ASU had actually constructed to what had been presented in Cause No. 44272 as Options 2 and 4. He then deducted from \$10,000,000 the estimated cost presented under Option 2 for every bit of work or piece of equipment that he claimed had not been installed. Id., pp. 24-55. Out of the \$10 million preapproved, he subtracted \$4.28 million. Id., p. 55.

Margaret A. Stull, Chief Technical Advisor in the Water/Wastewater Division presented the rate impacts of the OUCC's objections. She testified that, based on Mr. Bell's testimony that the project had not been completed until September 30, 2020, there should be a full refund of the

interim rates collected through September 30, 2020. Public's Exhibit No. 3, p. 2. She calculated the amount of refund for this period to be \$574,971. Id., p. 11. She also testified that, based upon the reductions from preapproved amounts recommended by Mr. Parks and updating the Phase III submission for additional contributions in aid of construction and accumulated depreciation through September 30, 2020, there would actually be a rate decrease of 2.72% from the Phase II rate level. She claimed that a refund should be ordered from October 1 through the date of an Order in this subdocket based upon this percentage reduction. Id., p. 14. She contended her proposed refunds should be ordered over a 12 month period. Id.

5. ASU Response.

Scott L. Lods, President of ASU, testified in response to the OUCC's objections. He disagreed that the Stipulation in Cause No. 44272 required ASU to construct only Option 2 or Option 4, and he provided citations to the Stipulation and to the Order in that Cause on which he relied. Petitioner's Exhibit No. 1, pp. 7-8. He testified that ASU built a plant that provided the same capacity and function as Option 2, but that it had a superior design. He testified that FTDC built the plant for a total price to ASU of \$11.5 million, a savings of \$3.4 million (almost 25%) of what it would have cost without FTDC. Id., p. 3. He testified that the four "options" presented on rebuttal in Cause No. 44272 had been developed because ASU could never get an amount that the OUCC believed was needed to address the capacity and treatment needs. There was agreement that capacity was needed, but the OUCC did not provide an estimate for what it believed should be built. The "options" grew out of rebuttal testimony so that the Commission could decide how much was reasonably needed. Id., pp. 6-7. He disagreed with the OUCC's approach of subtracting work or pieces of equipment from the preapproved amount. He testified the \$10 million had never been presented as an estimate of what it would cost to expand capacity to either 3.0 MGD or 4.0 MGD; instead this was the amount that ASU needed to place beyond risk so that it could attract the capital to build the plant. He quoted from a response to a Commission Docket Entry question directed to the parties in that Cause, which read in part: "[u]nder no scenario, however, does the OUCC believe that the needed upgrade could be constructed for less than \$10,000,000, regardless of how large the addition is or who builds it." Id., pp. 9-10.

He also testified about what led ASU to change the size and design of the plant. Up to the issuance of an Order in the underlying Cause, ASU had planned to build a plant sized at 4.0 MGD with flexibility to expand to 6.0 MGD, with reflection in rates at this time of only \$11.5 million. Id., p. 13. For this to work, Mr. Lods claimed FTDC would have to do the construction, because the cost of the project (even at 3.0 MGD) would be higher without FTDC. Id. The Commission's findings that any expansion beyond 3.0 MGD would be premature and disallowed and that a new affiliate agreement would be required that might need to include terms to which FTDC would not agree changed everything. Id. He testified that ASU was ready to pull the plug on the project, competitively bid the improvement, and file a new rate case, which he estimated would have produced a further increase in rates of approximately \$10 per month per residential customer simply for the new plant. Id., p. 14. He testified that they looked again at the Order, concluded that perhaps the Commission's concern was less about construction up to the preapproved amount (given that the Commission had already approved \$10,000,000 back in Cause No. 44272 and that FTDC could build the plant for that amount) and more about cost increases and future construction activities by FTDC. As such, ASU submitted construction affiliate agreements only covering the plant that were capped at the price of \$11.5 million (including phosphorus) and with the size scaled

back to 3.0 MGD. Id., pp. 14-15. This then started the process for review of affiliate agreements set forth in Ind. Code §8-1-2-49(2)(g) that is detailed in the correspondence between ASU and the Commission cited previously in this Order. Mr. Lods testified that if at any point during this four-month process the OUCC had raised any objection or otherwise indicated that it did not agree with the decisions being made, or the terms of the affiliate agreements, or that it wanted ASU to remain with Option 4, the agreements would have been pulled and the project would have been competitively bid. Id., p. 19.

Mr. Lods also responded to Mr. Bell's claims that the plant had not been "complete" as of November, 2019. He testified that the Order in the underlying Cause authorized rates for each phase upon "certification that the new plant is in service and verification that construction costs have been incurred and paid." Order, Cause No. 44676, p. 39. He explained that the IDEM inspection report attached to Mr. Bell's testimony (SAB-6) was of an inspection conducted on September 24, 2019, which was one month prior to the in-service certification. Petitioner's Exhibit No. 1, p. 21. He identified the components of the project that had yet to be complete as of the in-service certification. These included clearing and retiring old sludge lagoons, the installation of a direct drainage lines from the tanks for future maintenance, a redundant influent macerator, and chemical feed lines for phosphorus directly to the tanks (rather than the headworks, which is where they had been installed). Id., pp. 21-22. He testified that none of these interfered with the operation of the plant as it was designed. Id., p. 22.

Mr. Lods also responded to the testimony about the MicroStar Tertiary filter for phosphorus treatment. He said this filter was contemplated when the plant was still proposed for biological phosphorus treatment with a chemical backup. When ASU agreed to not-to-exceed contracts with FTDC, the design was changed to chemical phosphorus removal as the primary treatment (rather than as backup treatment to biological treatment) with the new configuration of the plant. He testified that the equipment to which Mr. Parks was referring was not listed in the schedule of values attached to the affiliate agreement, and that if Mr. Parks or Mr. Bell had had a concern about the design change, they should have raised it at that time. Id., pp. 22-23.

In response to questions from the Presiding Officers, Mr. Lods testified that the phosphorus treatment building had been constructed on land owned by him personally so that ASU could preserve as much of its own property as possible in the event there is later a need to expand the plant. He also testified that the property will be transferred to ASU, and that he is open to suggestions as to how to determine price, including using condemnation. Tr., p. D-8. He also testified that additional valves had been installed in the chemical feed line connecting to the plant so that it can be washed so as to address the concerns raised by Mr. Parks. Id., pp. D-8 and 9.

Jennifer Leshney, P.E., Director of Engineering for Christopher Burke Engineering, LLC, also testified in response to the OUCC's objections. She testified that the plant has a capacity of 3.0 MGD, that it is in full compliance with the construction and NPDES permits that have been issued by IDEM, that it more closely resembles the preliminary design that would have been Option 4 in Cause No. 44272 (with capacity reduced to 3.0 MGD), and that construction was substantially complete as of October 18, 2019. Petitioner's Exhibit No. 2, p. 1. She testified that ASU's approach, which was to scale back Option 4 to a capacity of 3.0 MGD, was superior to Option 2 because it preserved ability for future expansion, was a responsible decision, and it overall presented a better design. Id., pp. 4-5. She explained the changes that were made to provide

chemical phosphorus treatment. Id., pp. 7-8. She testified that none of the items for which Mr. Parks had proposed a reduction were necessary or appropriate for the plant and that the plant is fully permitted as constructed. Id., p. 9. She also testified to the concept of substantial completion, which she defined as the point when the structure, plant work, etc. can be occupied or utilized for the purpose for which it was intended; and she provided sources that help guide the decision when a project has reached the point of substantial completion. Id., pp. 9-10. She testified that, as applied to a wastewater treatment plant, when it is on line and capable of treating the volume of wastewater it is designed to treat and comply with its limits, it is substantially complete. Applying this standard, the Carriage Estates upgrade was substantially complete on October 18, 2019. Id., pp. 10-11. In response to Commission Docket Entry Request Dated April 16, 2021, ASU provided construction documents that defined and used the term “substantial completion,” which defined the term in similar fashion. Petitioner’s Exhibit No. 7, Attachment 1, p. 11.

Marcene Taylor, President of Marcene Taylor, Inc. (“MTI”), also testified in response to the OUCC objections. MTI provides comprehensive construction cost planning, and Ms. Taylor is a Certified Professional Estimator. She provided a construction cost estimate based upon the September 28, 2020 as-built drawings and two site visits. Based upon the measured quantities, she estimated the plant, as built, would have cost within 5% of \$14,829,100 had it been competitively bid. Petitioner’s Exhibit No. 3, p. 6 and Attachment MT-1.

Dick R. Weigel, P.E., HWC Engineering, Inc., provided two engineering estimates that he had prepared for ASU. Petitioner’s Exhibit No. 5. The first of these had been prepared in March 2017 and had been included in the various correspondence between ASU and the Commission when the affiliate agreements had been submitted. Petitioner’s Exhibit No. 1, Attachment SLL-7, pp. 12-13. The second was based upon the as-built drawings dated September 28, 2020. The estimate for the plant based upon the as-built drawings is \$15,933,500. Petitioner’s Exhibit No. 5, Attachment DRW-2.

Elton A. Wagner, an independent contractor for Schomburg & Schomburg Construction Incorporated (“S&S”) also testified. Petitioner’s Exhibit No. 6. He submits bids on wastewater treatment plant projects for S&S. He sponsored a bid that he had submitted to build the Carriage Estates upgrades in 2017, which had been included in the various correspondence between ASU and the Commission when the affiliated agreements had been submitted. Petitioner’s Exhibit No. 1, Attachment SLL-7, pp. 6-11. He also sponsored a bid that he would submit for a wastewater treatment project that was designed as the actual plant, based on the as-built drawings. The bid to build the plant per the as-built drawings is for \$14,974,951.56.

Finally, Katelyn Shafer, accountant/financial advisor for Reedy Financial Group, P.C. sponsored ratepayer impacts from the various costs included in ASU’s evidence for the Carriage Estates upgrade. She had prepared the original calculations included in ASU’s Phase III submission, which was based upon the actual cost of the plant at a total of \$11,500,000. This produced a monthly rate for residential customers of \$64.82. Petitioner’s Exhibit No. 3, Attachment KS-1 (Rates Worksheet). The same worksheet in Attachment KS-2 calculates a monthly rate of \$71.34 using the estimate prepared by Marcene Taylor (\$14,829,100); Attachment KS-3 calculates a monthly rate of \$71.63 using the S&S bid (\$14,974,952); and Attachment KS-4 calculates a monthly rate of \$73.50 using the HWC estimate (\$15,933,500).

6. Commission Discussion and Findings.

(a) Compliance with IDEM Construction Permit

At the time the plant upgrades began operations, it did not comply with the construction permit that IDEM had issued in 2014. Since that time, IDEM has issued a permit based on the as-built drawings dated September 28, 2020. There is no longer any issue regarding whether the plant upgrades are in compliance with the IDEM permit, and so this objection has been resolved.

(b) Option 2 v. Option 4

The OUCC's contention that ASU was required by the Stipulation and Settlement Agreement in Cause No. 44272 to build a plant designed like only either Option 2 or Option 4 is controlled by the language of that Stipulation. At paragraph 4, it states:

Option 2 differs from Petitioner's proposal in its supplemental case-in-chief (referred to in Mr. Serowka's supplemental rebuttal testimony as "Option 4") in that the latter includes a capacity expansion to 4.0 MGD (instead of 3.0 MGD) as well as the installation of additional tanks that would permit the plant to be readily expanded to treat 6.0 MGD if in the future ASU installs additional equipment. To the extent Petitioner builds something with a capacity greater than Option 2 and seeks to include such incremental costs in rate base in a future rate case, it will be Petitioner's burden, as in all cases to the extent plant additions have not been preapproved, to demonstrate the expenditures were reasonable and prudently incurred.

Petitioner's Exhibit No. 1, Attachment SLL-2, pp. 5-6 (emphasis added). There is also an agreed form of Proposed Order attached to the Stipulation which contained the following description of the agreement:

The OUCC and Petitioner have stipulated that the Commission should issue an order approving the expenditures associated with the proposed CE-III Project and the inclusion of the new facilities resulting from the project in Petitioner's rate base in future rate cases in an amount up to \$10,000,000, which amount is for construction only (inclusive of any allowance for funds used during construction ("AFUDC")). The parties agreed that ASU may proceed with construction of a plant with greater capacity than Option 2 (such as that included in Petitioner's proposed design – Option 4), but to the extent Petitioner seeks to include such incremental costs in rate base in a future rate case, it will be Petitioner's burden to demonstrate the expenditures were reasonable and prudently incurred. Option 2 consists of making the investment that is needed to replace aging equipment that is failing and causing operational issue, plus new equipment that would be needed to expand the capacity to 3.0 MGD. Petitioner's proposal differs from this option in that it consists of expanding the capacity to 4.0 MGD, while building tanks large enough to readily expand the capacity to 6.0 MGD if ASU in the future installs additional equipment.

Id., p. 19 (emphasis added). This language was picked up verbatim in our final Order. *American Suburban Utils.* Cause No. 44272 (IURC 4/9/2014), p. 8. Nowhere does the Stipulation require ASU to build either Option 2 or Option 4. The plant that was built provides the same treatment capacity as Option 2, but, as Ms. Leshney testified, “it offers more efficiency and flexibility for future expansion because of its resemblance to Option 4.” Petitioner’s Exhibit No. 2, p. 4. Neither Mr. Parks nor Mr. Bell testified otherwise. ASU retained full flexibility under the language of the Stipulation to build a better or bigger plant than Option 2. ASU “may” build Option 2; it “may” build Option 4; or it may proceed with a plant with greater capacity than Option 2 “such as that included in Petitioner’s proposed design – Option 4.” The key was to add the capacity to at least 3.0 MGD.

Moreover, the OUCC’s approach, which is to make deductions from \$10 million based upon equipment that was included in the original Option 2 estimate that was ultimately not needed is premised on the idea that there was evidence Option 2 could have been completed for \$10 million. No one has ever contended that it could have been done for that amount. In fact, we asked the OUCC in Cause No. 44272 to explain how \$10,000,000 was a reasonable cost for the project, and the OUCC did not answer. Petitioner’s Exhibit No. 2, Attachment SLL-4, p. 2. As a result, the only evidence on the OUCC’s views of the cost estimate was from ASU’s Response to our Docket Entry question, which was “[u]nder no scenario, however, does the OUCC believe that the needed upgrade could be constructed for less than \$10,000,000, regardless of how large the addition is or who builds it.” Petitioner’s Exhibit No. 1, Attachment SLL-5, p. 2.

Accordingly, we find that the OUCC’s objection based upon the comparison between what was built and Options 2 and 4 should be rejected.

(c) Affiliate Agreements

ASU’s affiliate agreements were originally submitted in the Winter of 2017, and issues concerning those agreements were discussed in plain sight of the OUCC in the Spring of 2017. The agreements were finally accepted as filed by the Commission in May, 2017. We cannot know how we would have ruled in the Spring of 2017, had there been a formal investigation commenced or complaint filed about the ASU/FTDC affiliate agreements. That case was not brought then, and it is not before us now.

Affiliate agreements are effective provided they “shall first have been filed with the commission.” Ind. Code §8-1-2-49(2)(g). Upon that filing, the Commission may initiate an informal and thereafter a formal investigation. Ind. Code §§8-1-2-58 and 59. Even where we do not initiate a formal investigation, the OUCC may file a complaint regarding the affiliate agreement submission pursuant to Ind. Code §8-1-2-54. When we found in our November 2016 Order that we would “address these issues upon the filing of Petitioner’s next affiliate contract provided to the Commission for review pursuant to Ind. Code § 8-1-2-49(2)(g),” (Order, p. 42) this is the process we intended would govern our review. We did not intend for the OUCC, having been fully advised of what was being discussed, to sit mute and allow the contracts to be filed and thereafter fully performed before it raised an objection that it apparently knew it had more than four years earlier. We frequently encourage utilities operating under our jurisdiction to work collaboratively with the OUCC. *See, e.g., City of Evansville*, Cause No. 45073 (IURC 12/5/2018),

pp. 8-9. The benefits of such collaboration depend upon the OUCC raising its objections when it becomes aware of them.

As it is, we have three affiliate agreements, complete with schedules of values, whereby FTDC constructed a plant with capacity of 3.0 MGD, together with phosphorus treatment, for a fixed price of \$11.5 million. At no point in Cause No. 44272, Cause No. 44676, the affiliate agreement review process, or this Cause has anyone ever claimed that ASU's capacity needs could be addressed for a lesser amount. To the contrary, all we have heard throughout all of these proceedings is that it would have cost significantly more had an entity other than FTDC constructed the plant. During the affiliate agreement review process, we heard estimates that it would cost approximately \$3.5 million more to competitively bid the project. Petitioner's Exhibit No. 1, Attachment SLL-7, pp. 6-11. Our General Counsel's office urged that an independent construction estimate be obtained. Public's Exhibit No. 1, OUCC Attachment SAB-16, pp. 1-2. Such a construction estimate has now been obtained, and Ms. Taylor testified that had this project been competitively bid, the project would have cost approximately \$3 million more than FTDC charged.¹ ASU's customers were better off having the plant constructed pursuant to these affiliate agreements than they would have been under the alternative, which was for ASU to bid the project competitively.

Accordingly, we find that the OUCC's objections based upon the terms of the affiliate agreements submitted in May, 2017 should be rejected.

(d) In Service Date

Indiana Code §8-1-2-6 imposes a standard that property be "used and useful" before its value can be included in rate base. We are aware of no order requiring completion before it can be considered "used and useful." Our November 2016 Order required a "certification that the new plant is *in service*." Order, p. 39 (emphasis added). This distinction between the completion date and the in service date was explored in *Indiana American Water Co.*, Cause No. 37182, 1983 WL 883539 (PSCI 12/7/1983), where the issue concerned a new water treatment plant in the utility's Muncie operations that was not complete by the cutoff date but was providing water to the public in Muncie:

Concerning the first issue, a variety of evidence was presented at the hearing. Petitioner's witness Moon testified that the new treatment plant was placed in service and began serving the public at 7:30 a.m., on August 29, 1983. Moon also testified that the production of treated water from the old treatment plant was terminated on the same date. The Intervenor did not contest that the new plant began serving the public prior to the close of the record in this case, and therefore is in accordance with the Commission's Prehearing Conference Order. However, the Intervenor argued that various portions of the plant were incomplete, and therefore should not be included in the rate base calculation as those elements were not used and useful to

¹ On cross examination, Ms. Taylor testified that perhaps her estimate was overstated by approximately \$634,500 due to apparent double counting of certain site preparation work involving the prior sludge lagoon. Even if this deduction should be made, her estimate is still significantly higher than what FTDC charged for the work. Tr., p. A-28.

the public. According to Mr. Moon's testimony on September 15, 1983, considerable work remained to be done on a variety of projects at the plant, ranging from completion of the employee lunch room, the installation of telephones, completion of plant offices, final work on safety railings, and completion of landscaping and the parking lot, along with a number of other uncompleted projects. Petitioner's witnesses Mr. Moon and Mr. Harrison testified that they did not know if the cost of the materials required to complete the projects described above had been included in the rate base calculation, and Mr. Harrison went on to state some \$200,000 of work remains to be completed on the plant project. Staff Engineering Ken Vanderlaan testified in his prefiled testimony that he could not determine if the incomplete construction had been included in the Petitioner's rate base calculation. The Petitioner's accounting system seemed to be in order, but Vanderlaan could not determine if the incomplete construction items were being improperly included by the Petitioner in rate base.

Although the record in this case shows that various items of the new water plant were not completed by the close of the record in this case, there is no dispute and the evidence is clear that the new water treatment plant was performing the function for which it was designed, that is, providing water to the public in the Muncie Water District. Operations at the old plant had been terminated, and the new plant was providing water to the public. The incomplete items at the plant do not substantially affect the commercial operation of the plant and service it was performing for the public. Accordingly, the Commission finds that the new treatment plant was used and useful as of the time prescribed by the Commission in its Prehearing Order.

Id. at *6-7 (emphasis added).

"Performing the function for which it was designed" is consistent with Ms. Leshney's definition of the phrase "substantial completion." In addition, there are considerable parallels between what remained to be completed in *Indiana American* and what remained here. A redundant influent macerator, closure of the old sludge lagoon which was being retired and which witness Taylor described as "demolition" work,² drain piping so that the tanks could later be completely drained if need be for future maintenance, air piping for old sludge holding tanks, movement of the chemical phosphorus feed lines, catwalks, stairs, driveways, and final grading and seeding are what remained. Public's Exhibit No. 1, OUCC Attachment SAB-14; Petitioner's Exhibit No. 1, pp. 21-22. None of these related to the operation of the treatment plant as designed, and Mr. Bell did not testify otherwise. Petitioner's Exhibit No. 2, pp. 11-12; *see* Public's Exhibit No. 1, pp. 12-19. We find the Phase III improvements were "in service" as of October 18, 2019. The plant was in service as of the effective date that we approved the Phase III rates on an interim

² Petitioner's Exhibit No. 3, p. 5.

basis, January 29, 2020. We find that the OUCC's objection based upon the completion date should be rejected.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The OUCC's objections to ASU's Phase III tariff shall be and hereby are denied, and the rates set forth in ASU's tariff are no longer interim subject-to-refund.
2. This subdocket shall be and hereby is dismissed.
3. This Order shall be effective on and after the date of its approval.

HUSTON, FREEMAN, KREVDA, OBER AND ZIEGNER CONCUR:

APPROVED:

**I hereby certify that the above is a true
and correct copy of the Order as approved.**

Dana Kosco, Secretary to the Commission