ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF THE TOWN OF HUNTERTOWN, INDIANA FOR (A) REVIEW OF THE RATES AND CHARGES BEING IMPOSED BY FORT WAYNE OF FORT WAYNE, INDIANA FOR WHOLESALE SERVICE PURSUANT TO IND. CODE § 8-1-2-61.7; AND (B) APPROVAL OF REGULATORY ORDINANCES ESTABLISHING SERVICE TERRITORIES FOR THE TOWN'S MUNICIPAL WASTEWATER AND WATER SYSTEMS PURSUANT TO IND. CODE § 8-1.5-6 ET SEQ.	)	CAUSE NO. 44519
RESPONDENT: CITY OF FORT WAYNE, INDIANA	)	APPROVED: JUN 03 2015

ORDER OF THE COMMISSION

Presiding Officers:
Carolene Mays-Medley, Commission Vice Chair
Loraine L. Seyfried, Chief Administrative Law Judge

On May 27, 2015, the City of Fort Wayne, Indiana ("Fort Wayne") filed a Verified Emergency Motion to Stay Enforcement of Order Pending Appeal ("Motion") with the Indiana Utility Regulatory Commission ("Commission") requesting the Commission issue an order by noon on June 1, 2015, staying enforcement of Ordering Paragraph 3 and the Commission's Discussion and Findings in Part 7.B. of its May 20, 2015 Order in this Cause. On May 29, 2015, Fort Wayne filed a Supplemental Motion requesting a ruling by 2:00 p.m. The Town of Huntertown, Indiana ("Huntertown") filed its Verified Response to the Motion on May 29, 2015, and Fort Wayne filed its Verified Reply on June 1, 2015.[1]

Fort Wayne requests the Commission stay the portion of its May 20, 2015 Order that requires Huntertown to modify its Regulatory Ordinances to, among other things, reduce the regulated territory in which Huntertown has asserted exclusive authority to provide water and wastewater service before it may enforce those Regulatory Ordinances. Fort Wayne argues that the Commission should stay the effectiveness of the requirement to modify the Regulatory Ordinances because: (1) Whisper Rock and Timber Ridge subdivisions are in need of immediate service and Fort Wayne is the only utility capable of providing service; (2) absent a stay, Huntertown will be installing duplicate facilities that will be unnecessary if Fort Wayne prevails

[1] Also on June 1, 2015, Intervenor Twin Eagles Development II, LLC ("Twin Eagles") filed a Motion for Extension of Time to Respond to the Motion. Because we find Fort Wayne has failed to satisfy the requirements for a stay, we do not need to address Twin Eagles' Motion.

on appeal; and (3) absent a stay, Fort Wayne will be severely and irreparably harmed if it prevails on appeal.

Ind. Code § 8-1-3-7(e) provides that "[t]he supreme court and the court of appeals, as the case may be, have jurisdiction, upon application of the commission or any party, to order or enjoin...the enforcement of any...order of the commission...." While the Indiana Supreme Court has addressed this provision in the context of a Commission order issued after an appeal has been determined, it is unclear whether this statute vests exclusive jurisdiction in the Indiana Supreme Court and the Indiana Court of Appeals to enjoin or enforce a Commission order that has yet to be reviewed on appeal. *See N. Ind. Pub. Serv. Co. v. Citizens Action Coalition*, 548 N.E.2d 153, 162-163 (Ind. 1989).

In the event the Commission does have jurisdiction to rule on the Motion, we find it appropriate to consider the requirements typically used by the courts when analyzing requests for preliminary injunctions. Those requirements include: (1) irreparable harm; (2) likelihood of success on the merits; (3) balance of harms; and (4) public interest. *Doe v. O'Conner*, 781 N.E.2d 672 (Ind. 2003).

With respect to Fort Wayne's arguments concerning harm, we note that the Commission in its September 19, 2014 Prehearing Conference Order (at p. 4) expressed concern that duplicative water and/or wastewater facilities may be constructed within the regulated territory resulting in financial losses for either the utility or its customers depending on the outcome of this proceeding. We also noted that some of our concern was alleviated by the fact that Twin Eagles was paying for the cost of the water and wastewater infrastructure and had expressed an understanding of the risks involved if the Commission approved Huntertown's Regulatory Ordinances. However, in an effort to prevent or limit the potential for injury to others, we required both Fort Wayne and Huntertown to notify prospective customers of the dispute in this Cause and the potential financial risks to the customer if service is elected prior to a final order. Accordingly, both the developers of Whisper Rock and Timber Ridge have been aware of, and acknowledged, the potential risks should the Commission determine that service should be provided by Huntertown. It is these customers that have received actual notice of the potential risks that Fort Wayne is now asserting will be harmed.

Further, although Fort Wayne asserts that Huntertown may seek to adopt modified Regulatory Ordinances as early as June 1, 2015, and that upon such adoption Fort Wayne will be prohibited from providing service, no evidence was presented that this will occur.[2] Although Huntertown adopted modified Regulatory Ordinances establishing it with the exclusive right to provide water and wastewater service in the area, such right does not prohibit Huntertown from agreeing to Fort Wayne's provision of water and wastewater service to customers until Huntertown has the facilities in place to provide service. By our May 20, 2015 Order in this Cause, Fort Wayne is not automatically required to disconnect customers within the Regulatory Territory upon adoption of the modified Regulatory Ordinances by Huntertown.

[2] On June 1, 2015, Huntertown submitted a Compliance Filing containing amended Regulatory Ordinances that had been approved on May 29, 2015.

We would also note that although Huntertown may need to install additional facilities to provide wastewater service to Whisper Rock and Timber Ridge, Fort Wayne also needs to install additional facilities to provide such service. We have no evidence indicating that Huntertown could not make arrangements to pump and haul wastewater from these subdivisions as is currently being done by Fort Wayne. Nor do we have any evidence that water booster pumping will be required or even necessary to provide water service to the two customers currently receiving service from Fort Wayne.

Because Fort Wayne and prospective customers had notification of the potential financial risks, and due to the lack of evidence that service will be disconnected and that Huntertown would not be able to make arrangements to provide service in a timely manner, there does not appear to be irreparable harm in denying the Motion, nor does there appear to be a need to balance harms.

Regarding the likelihood of success on the merits, because this case is the first to have been decided under Ind. Code § 8-1.5-6-8, it raises many issues that have not been previously addressed by the courts. Consequently, we are unable to draw any conclusions regarding the likelihood of Fort Wayne's success on the merits of its appeal.

Finally, the Commission found in its May 20, 2015 Order in this Cause that defined service areas for water and wastewater service by Huntertown is necessary and in the public interest. The statements made in the Motion are not sufficient to change that public interest finding.

Therefore, having determined that approval of defined water and wastewater service areas for Huntertown is in the public interest and Fort Wayne having failed to sufficiently satisfy the requirements for demonstrating the need for a stay, Fort Wayne's Motion is denied.

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

1. Fort Wayne's Verified Emergency Motion to Stay Enforcement of Order Pending Appeal is denied.

2. This Order shall be effective on and after the date of its approval.

STEPHAN, HUSTON AND ZIEGNER CONCUR; MAYS-MEDLEY ABSENT; WEBER NOT PARTICIPATING:

APPROVED: JUN 03 2015

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

Brenda A. Howe

Brenda A. Howe, Secretary to the Commission