

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

[Handwritten signatures and initials]

PETITION OF UTILITY CENTER, INC. d/b/a)
AQUA INDIANA, INC. ("PETITIONER") FOR)
APPROVAL OR DISAPPROVAL OF)
ENCUMBRANCE ASSOCIATED WITH PLANT)
EXPANSION AND CLOSURE AGREEMENT;)
AND, IF THE ENCUMBRANCE IS APPROVED,)
APPROVAL OF EXPENDITURES FOR)
CONSTRUCTION OF NEW WASTEWATER)
TREATMENT PLANT.)

CAUSE NO. 43666

APPROVED:

SEP 08 2010

BY THE COMMISSION:

David E. Ziegner, Commissioner
Angela Rapp Weber, Administrative Law Judge

On April 3, 2009, Utility Center, Inc. d/b/a Aqua Indiana, Inc. ("Petitioner" or "Utility Center") filed with the Indiana Utility Regulatory Commission ("Commission") its Petition in this Cause. Utility Center requested in its Petition approval or disapproval of a Plant Expansion and Closure Agreement dated April 7, 2000 (the "2000 Agreement"), which among other terms, would require Petitioner to retire and remove from service its Main Aboite Wastewater Treatment Plant (the "Aboite Plant") by April 7, 2009. Petitioner also requested, in the event that the Aboite Plant is required to be removed from service as a result of the 2000 Agreement, preapproval of the expenditures that would be needed to provide alternative treatment for the waste. By Docket Entry dated June 8, 2009 the Presiding Officers bifurcated this proceeding to first consider issues in dispute concerning Commission jurisdiction over, and approval of, the 2000 Agreement. In the event Petitioner would be required to remove the Aboite Plan from service pursuant to the 2000 Agreement, the Commission would then convene Phase II of this Cause to consider proposed expenditures.

Petitions to Intervene were filed on behalf of Hamlets West Homeowners Association, Inc. and Woodland Ridge Homeowners Association, Inc. (collectively, "HOAs"), which are the other parties to the 2000 Agreement at issue. A Petition to Intervene was also filed by the City of Fort Wayne ("City"). Pursuant to notice duly provided as required by law, a Prehearing Conference was convened on May 7, 2009 in Room 224, 101 W. Washington Street, Indianapolis, Indiana. Both Petitions to Intervene were granted orally at the Prehearing Conference. A Prehearing Conference Order was issued on May 13, 2009.

On September 25, 2009, the HOAs filed a Motion to Dismiss for Lack of Jurisdiction and in the Alternative Motion for Summary Judgment. The City also filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction on September 25, 2009. On November 13, 2009, Petitioner filed a Response to the respective Motions, and on December 7, 2009, both the HOAs and the City filed Replies to the Response. On November 9, 2009, the Office of Utility Consumer Counselor ("OUCC") filed a Motion for Commission Ordered Mediation. Each of the parties filed a response to this request for mediation. By a Docket Entry dated November 23, 2009, upon agreement of the parties, the Presiding Officers continued the Evidentiary Hearing scheduled for November 24-25, 2009 to January 19-20, 2010 in order to facilitate mediation. On January 5, 2010, the HOAs submitted additional

authority in support of their Motion to Dismiss and requested an attorneys conference. By Docket Entry dated January 7, 2010, the Presiding Officers vacated the Evidentiary Hearing scheduled for January 19–20, 2010 and set the matter for an attorneys conference to be held on January 19, 2010. Pursuant to a Docket Entry dated January 20, 2010, the HOAs filed a Motion for Leave to Amend Motion to Dismiss and in the Alternative for Summary Judgment and the City filed a Motion for Leave to Amend Motion to Dismiss on January 29, 2010. Petitioner filed a Response to these respective Motions on February 9, 2010, and both the HOAs and the City filed Replies to Petitioner’s Response on February 23, 2010. The January 20, 2010 Docket Entry also continued the Evidentiary Hearing to May 18, 2010.

HOAs also filed on October 30, 2009 a Motion for Protective Order with respect to a note memorializing a conversation between HOAs and their then counsel. The HOAs asserted that the note was inadvertently disclosed and attorney client privilege was not waived. Petitioner filed a Response to this Motion and requested *in camera* review of the note on November 6, 2009.

Prior to the May 18, 2010 Evidentiary Hearing, Petitioner and the HOAs submitted a Settlement Agreement for the Commission’s consideration on May 7, 2010, which would resolve all matters in this proceeding. The HOAs and Utility Center also filed Settlement Testimony in support of the Settlement Agreement on May 10, 2010. The Presiding Officers issued a Docket Entry on May 14, 2010 vacating the May 18, 2010 Evidentiary Hearing and scheduling this matter for a Settlement Hearing for June 7, 2010.

Pursuant to notice given as provided by law, a Settlement Hearing was held in this matter on June 7, 2010, at 2:00 p.m. in Room 222, 101 West Washington Street, Indianapolis, Indiana. At that Hearing, Utility Center, the HOAs and the OUCC offered their evidence into the record without objection. The Settlement Agreement was also offered into evidence without objection.

Based upon the applicable law and evidence, the Commission now finds as follows:

1. Commission Jurisdiction and Notice. Petitioner owns, operates, manages and controls plant and equipment that are used and useful for the provision of water and sewer utility service in Allen County, Indiana. As such, Petitioner is a public utility as that term is defined in Ind. Code § 8-1-2-1. Petitioner has filed this proceeding pursuant to Ind. Code §§ 8-1-2-83 and 84, seeking approval or disapproval of an encumbrance, and pursuant to Ind. Code § 8-1-2-61, making a complaint as to any manner affecting its service. The Aboite Plant is part of Petitioner’s used and useful property in the provision of utility service and therefore is part of the “plant equipment, apparatus, appliances, property, and facilities employed” by Petitioner in performing its service. It therefore falls within the definition of “service” in Ind. Code § 8-1-2-1, so the Commission has jurisdiction over this proceeding pursuant to Ind. Code § 8-1-2-61 and Ind. Code § 8-1-2-58.

2. Background. Petitioner serves approximately 12,000 customers in Allen County Indiana, and it does so through two wastewater plants: Aboite and Midwest. The Commission commenced an investigation in Cause No. 41187 because of, among other problems, repeated and chronic failure by Petitioner to comply with IDEM regulations (the “Investigation”). In this Cause, the Commission took administrative notice of the following from the Investigation: (1) Petitioner’s 2004–2006 Wastewater Master Plan filed on November 18, 2003; (2) the Order dated August 31, 2005 approving said Master Plan; (3) Preliminary Waste Water Master Plans Pursuant to Plan of Action filed November 28, 2000; (4) Wastewater Master Plans for the Utility Center, Inc. Aboite Township

Wastewater Collection and Treatment Facilities filed November 19, 2001; and (5) the Commission's 2d Interim Order dated December 1, 1999. None of these Master Plans or the Orders issued in the Investigation mentioned the 2000 Agreement, and all of these (except for the Final Order closing the Investigation) predated the change to the current ownership. The Master Plan, which the Commission subsequently approved, indicated that the Aboite Plant would remain in operation for at least the twenty-year planning horizon. Further, the Master Plan, which the Commission approved in the Investigation and which led to the dismissal of the Investigation, made no provision for how the Aboite Plant capacity would be replaced and depended upon the Aboite Plant remaining in service.

3. **The 2000 Agreement and Summary of the Evidence.** The 2000 Agreement was attached to the Petition and was executed by Petitioner's then President (when Petitioner was under prior ownership) in April 2000.¹ It was also executed by representatives of the HOAs. For purposes of the Petition, the two most relevant terms in the 2000 Agreement were (1) a provision requiring that Petitioner dismantle and remove from service the Aboite Plant by April 2009; and (2) restrictions on further expansion or construction activities at the Aboite Plant until its closure. There are numerous other provisions, including one indicating that the HOAs' remedy at law would be inadequate for any breach.

Petitioner's pre-filed case-in-chief included the testimony of Andrew P. Henry, Assistant General Counsel for Aqua America, Inc., Petitioner's parent company. Aqua America acquired the ultimate parent of Petitioner in 2003. Mr. Henry's pre-filed testimony identified and sponsored as an exhibit the 2000 Agreement. Mr. Henry stated that no one at Aqua America had any knowledge of the 2000 Agreement prior to May 2008.² He then outlined a number of reasons why he believed the 2000 Agreement was not enforceable. Finally, he contended that the 2000 Agreement constituted an encumbrance that required Commission approval.

The HOAs submitted pre-filed testimony of four witnesses, Larry Kattman, who was principally involved in the negotiation of the 2000 Agreement on the HOAs' behalf, Robert C. Nern and Jay Miller, the respective current Presidents of the two HOAs, and Daniel J. Deeb, who was counsel for the HOAs at the time the 2000 Agreement was executed. The pre-filed testimony described conversations that Mr. Kattman and Mr. Miller had with Petitioner's representatives following execution of the 2000 Agreement concerning the progress being made, and particularly, statements made by a Utility Center representative which they understood as indicating that Utility Center intended to comply with its obligations under the 2000 Agreement. The testimony from the HOAs' also described odor, noise and aesthetic issues that continue to be associated with the Aboite Plant. The HOAs' pre-filed testimony also responded to Mr. Henry's recitation of the reasons why he did not believe the 2000 Agreement was enforceable and provided the HOAs' reasoning as to why they believed the 2000 Agreement was enforceable. Further HOA witnesses responded to Mr. Henry's

¹ According to Ind. Code § 8-1-2-4, for example, public utilities are "required to furnish reasonably adequate service and facilities." Further, Ind. Code § 8-1-2-58 provides that the Commission may investigate a public utility if it believes "that any service is inadequate, or can not be obtained . . ." Thus, the Commission must ensure that a public utility has the appropriate facilities to provide utility service to the public. Because the terms of the 2000 Agreement could have affected Utility Center's ability to provide "reasonably adequate service and facilities," it should have been filed with the Commission for our review. The Commission understands, however, that the 2000 Agreement was executed prior to Petitioner's ownership and operation of the utility.

² However, Mr. Henry indicated Aqua America was aware of an unsigned copy of the 2000 Agreement in its due diligence documents from its purchase of Petitioner.

contention that the 2000 Agreement constitutes an encumbrance, and asserted Petitioner warranted that it had the required regulatory approval when it entered into the 2000 Agreement.

The City pre-filed the testimony of Thomas Theodore Nitza, Jr. Mr. Nitza stated that at the time the 2000 Agreement was executed, the Aboite Plant had been considered an interim solution to the problems at Utility Center, which ultimately led to the Investigation of Utility Center in Cause No. 41187. He further outlined various alternative options for treatment of the waste if the Aboite Plant were to be closed. One of these options included interconnection with the City.

The OUCC pre-filed the testimony of Harold L. Rees. Mr. Rees testified that he toured the Aboite Plant and found the Plant to be functioning properly. He did not believe that any decision to decommission the plant would be prudent because of the associated costs.

The HOAs pre-filed cross-answer testimony from Mr. Miller in response to Mr. Rees's pre-filed testimony. Mr. Miller stated that because of the existence of the 2000 Agreement, the Aboite Plant should be closed. In addition, costs associated with the closure should be paid by Utility Center's shareholders.

Petitioner also pre-filed the rebuttal testimony of Robert G. Liptak. Mr. Liptak is Regional President of Northern Indiana Operations for Aqua America. He stated that Aqua America had absolutely no idea of the existence of the 2000 Agreement until May 2008. He also stated that Aqua America acquired the parent company of Petitioner while Petitioner was still subject to the Investigation. Since then, Mr. Liptak asserted Aqua America has brought Petitioner, which was on the brink of receivership, into full compliance with all environmental regulations. He asserted that Aqua America did so without any knowledge or notice of the 2000 Agreement. Petitioner also pre-filed rebuttal testimony of Patrick Callahan, Utility Engineer for Petitioner. He previously worked for the City of Fort Wayne and his pre-filed testimony responded to the City's proposed alternatives to the plant.

4. Settlement Agreement and Supporting Testimony. The terms of the Settlement Agreement reached in this Cause are summarized as follows:

- (1) The 2000 Agreement is amended to eliminate the requirement that the Aboite Plant be removed from service.
- (2) Utility Center and the HOAs are to work cooperatively to identify improvements to be made to the Aboite Plant, which will cost-effectively and reasonably address noise, odor, public health and safety and visual effects. There is a dispute resolution process, using a neutral consultant, to the extent the parties are unable to agree on these improvements, and Utility Center ultimately must seek preapproval for rate base inclusion pursuant to Ind. Code § 8-1-2-23 of any improvements to be made. Only the improvements that are ultimately approved by this Commission will be required.
- (3) Utility Center is to make a cash payment of \$2.6 million to the HOAs for release of all claims related to the 2000 Agreement arising prior to the date of the Settlement Agreement. In addition, Utility Center is to convey a twenty-acre parcel to the HOAs that is adjacent to the Aboite Plant and for which it will receive a credit of \$50,000 against the settlement amount. Utility Center will not seek to recover the settlement payment to the HOAs through rates. Utility Center has agreed that it will not undertake

certain modifications to the Aboite Plant over the objection of the HOAs if such modifications would adversely effect noise, odor, health, safety, size or visual impacts of the plant. There is an arbitration provision to resolve disputes.

The Settlement Agreement, a copy of which is attached to and incorporated in this Order, provides for and consists of a comprehensive amendment to the 2000 Agreement. It resulted from, and was entered after, the conclusion of multiple mediation sessions. Jay E. Miller and Robert C. Nern provided settlement testimony on behalf of the HOAs and Terry J. Rakocy provided settlement testimony on behalf of Petitioner in support of the Settlement Agreement.

Mr. Miller testified on behalf of the HOAs and summarized the compromised reached as illustrated by the Settlement Agreement. He recommended the Commission approve the Settlement Agreement. Mr. Nern testified on behalf of the Hamlets West Homeowners Association, Inc. and stated that he concurs with Mr. Miller's testimony. Mr. Rakocy sponsored the Settlement Agreement. Mr. Rakocy described negotiations that occurred and the terms of the Settlement Agreement reached as a result of the negotiations. Mr. Rakocy concluded by stating that the Settlement Agreement is a reasonable resolution to a difficult dispute.

5. Commission Findings. Settlements presented to the Commission are not ordinary contracts between private parties. *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790, 803 (Ind. 2000). When the Commission approves a settlement, that settlement “loses its status as a strictly private contract and takes on a public interest gloss.” *Id.* (quoting *Citizens Action Coalition v. PSI Energy*, 664 N.E.2d 401, 406 (Ind. Ct. App. 1996)). Thus, the Commission “may not accept a settlement merely because the private parties are satisfied; rather [the Commission] must consider whether the public interest will be served by accepting the settlement.” *Id.* Furthermore, any Commission decision, ruling, or order—including the approval of a settlement—must be supported by specific findings of fact and sufficient evidence. *United States Gypsum*, 735 N.E.2d at 795 (citing *Citizens Action Coalition v. Public Service Co.*, 582 N.E.2d 330, 331 (Ind. 1991)). The Commission's own procedural rules require that settlements be supported by probative evidence. 170 IAC 1-1.1-17(d). Therefore, before the Commission can approve the Settlement Agreement in this Cause, we must determine whether the evidence in this Cause sufficiently supports the conclusions that the Settlement Agreement meets and serves the public interest.

Based on the evidence presented, the Commission finds that the Settlement Agreement amending the 2000 Agreement constitutes a reasonable resolution of the issues in dispute and is in the public interest. Specifically, we find that the 2000 Agreement as it has now been amended by the Settlement Agreement to, among other things, remove the provision requiring closure of the Aboite Plant, should be approved. A substantial payment is being made to the HOAs, which will not impact rates, and a process is established which will reasonably and cost-effectively address the underlying complaints regarding the Aboite Plant. The Commission finds that the cash payment to the HOAs and the process for implementing improvements to the Aboite Plant now and in the future are an appropriate resolutions to the disputes among the parties over the 2000 Agreement and the closure of the Aboite Plant, which could have affected Petitioner's ability to provide adequate utility service to its customers. In addition, Utility Center will convey to the HOAs a twenty acre parcel of land for which it will receive a credit against the settlement amount. This original cost of the parcel of land, to the extent that this land has been included in rate base, shall be removed from Petitioner's rate base in Cause No. 43874, which is currently pending before the Commission.

The Commission also finds the HOAs' Motion to Dismiss for Lack of Jurisdiction and in the Alternative Motion for Summary Judgment, the City's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and the HOAs' Motion for Protective Order are mooted by the Settlement Agreement hereby approved, and the Commission need not issue rulings in this Order. This Order is entered for the sole purpose and to the extent necessary to terminate this Cause and give effect to the Settlement Agreement between the HOAs and Utility Center. This Order is not to be construed as approval for any ratemaking purposes of any expenses associated with this Cause. Likewise, this Order is not to be construed as approval of any capital improvements resulting from the Settlement Agreement. Those issues will be addressed in other cases where recovery of such expenses or approval of such expenditures has been placed in issue.

On June 8, 2010, Utility Center filed with the Commission proposed language finding the 2000 Agreement to be an encumbrance. The HOAs and the City filed objections to Petitioner's proposed encumbrance language on June 15, 2010. Petitioner filed a Reply on June 22, 2010 and stated that its proposed language is appropriate. Because of the execution and filing of the Settlement Agreement in this Cause, which we are approving, the Commission need not address whether the 2000 Agreement constitutes an encumbrance.

Finally, with regard to future use, citation or precedent of the Settlement Agreement, the Commission finds that our approval of the terms of the Settlement Agreement should be construed in a manner consistent with our finding in *In Re Richmond Power & Light*, Cause No. 40434, Order dated March 19, 1997.

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

1. The Settlement Agreement amending the 2000 Agreement shall be and hereby is approved in accordance with Finding Paragraph 4 above.
2. This Order shall be effective on and after the date of its approval.

HARDY, ATTERHOLT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: SEP 08 2010

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


Sandra K. Gearlds
Acting Secretary to the Commission

AGREEMENT AND RELEASE

This Agreement and Release (the "Agreement") is hereby entered into between Hamlets West Homeowners Association, Inc. and Woodland Ridge Homeowners Association, Inc. (collectively the "HOAs") and Utility Center, Inc. d/b/a Aqua Indiana, Inc. ("Utility Center").

WHEREAS, Utility Center constructed and subsequently operated, and continues to operate, a sewer treatment plant and appurtenances known as the Maine Aboite Waste Water Treatment Plant (the "Facilities") that was adjacent to and served the Hamlets West and Woodland Ridge subdivisions (the "Subdivisions") in Aboite Township, Indiana among other areas in Aboite Township;

WHEREAS, the HOAs and Utility Center executed a certain document entitled "Plant Expansion and Closure Agreement" on or about April 7, 2000 attached hereto as Exhibit A (the "2000 Agreement") that the HOAs assert required Utility Center to retire the Facilities and remove them from operation within nine years of the date of the 2000 Agreement;

WHEREAS, on April 3, 2009, Utility Center filed a petition with the Indiana Utility Regulatory Commission ("IURC") in Cause No. 43666 seeking approval or disapproval of the 2000 Agreement as an encumbrance of its used and useful utility plant and is seeking an order disapproving the 2000 Agreement to the extent it requires the Facilities to be removed from service (the "IURC Proceeding");

WHEREAS, on or about September 14, 2009, the HOAs filed a lawsuit against Utility Center in the Allen Superior Court No. 1 under Cause No. 02D01-0909-PL-338 (the "Lawsuit");

WHEREAS, the Lawsuit claimed, *inter alia*, that Utility Center breached the 2000 Agreement by failing to retire the Facilities and/or remove them from operation within nine years of the date of the 2000 Agreement;

WHEREAS, the Lawsuit sought to compel Utility Center to close the Facilities and remove them from operation;

WHEREAS, Utility Center denies any liability for the matters alleged in the Lawsuit and denies that the 2000 Agreement requires it to remove the Facilities;

WHEREAS, HOAs have asserted the 2000 Agreement is not an encumbrance subject to IURC jurisdiction amongst other claims with respect to Utility Center;

WHEREAS, the HOAs and Utility Center entered into a "Memorandum of Understanding" on February 22, 2010 in which they outlined terms for a settlement of the pending issues between the parties, including the Lawsuit and the IURC Proceeding;

WHEREAS, the Memorandum of Understanding contemplates that the parties would execute a subsequent agreement to memorialize their settlement of these disputed matters; and

WHEREAS, for settlement purposes and contingent upon certain terms of this Agreement the parties desire to amend the terms of the 2000 Agreement as provided by the terms of this Agreement and agree that the 2000 Agreement as so hereby amended now reflects the present agreement of the parties.

NOW THEREFORE, the parties agree as follows:

1. The Parties shall cooperate to as soon as reasonably possible obtain, upon the execution of this Agreement, an order from the IURC in the IURC Proceeding that is no longer subject to appeal in the form attached hereto as Exhibit B (the "Final Order") providing that: (a) this Agreement and the 2000 Agreement as amended hereby are approved by the IURC; and (b) that the Facilities are not to be removed from service, retired and/or closed as a result of the 2000 Agreement, any other Agreement with the HOAs or their representatives, or this Agreement. Except as provided in Paragraphs 3 and 5, this Agreement shall be voidable at the election of either party by the giving of written notice within 30 days if the IURC denies any of the approvals sought by Exhibit B or the if the IURC's approval of such an order alters the terms tendered by the Parties unless otherwise agreed by the Parties. The Parties agree that the Final Order shall be tendered as being the result of a settlement and that the tendered Final Order shall indicate that it not be cited as precedent in other proceedings before the IURC, except as necessary to enforce and/or carry out the terms of this Agreement. The parties shall mutually support the Agreement in any and all proceedings before the IURC or any other forum, but the HOAs shall not be obligated to expend any legal fees in support of the Agreement.

2. Pursuant to the terms of this Paragraph, Utility Center agrees to implement capital improvements to the Facilities which will reasonably improve noise, odor, public health and safety, and visual effects at the Facilities. All capital improvements to be made to the Facilities pursuant to this Agreement must first be approved for inclusion in rate base for ratemaking purposes by the IURC. Utility Center and its duly authorized representatives and the HOAs (and/or the HOAs' consultant) shall meet within 60 days of the execution of this Agreement to discuss and attempt to reach agreement concerning capital improvements that will reasonably improve the Facilities as specified above in this Paragraph. To the extent the Parties cannot reach agreement, the items in dispute shall be submitted to a neutral consultant jointly selected by Utility Center and the HOAs. Utility Center and the HOAs shall share equally (50% each) the costs of the neutral consultant, not to exceed a cost of \$25,000 per party. The neutral consultant shall make recommendations on the items in dispute. The parties agree jointly to go before the IURC (at Utility Center's expense, but excluding any legal or consulting fees of the HOAs) within 30 days of the neutral consultant's determination, if applicable, otherwise within 30 days of their agreement, to seek approval of the improvements to which they have agreed and improvements recommended by the third party consultant. Utility Center agrees that it shall implement the improvements approved by the IURC for inclusion in rate base, and Utility Center has no obligation to implement any other improvements under this Agreement. Except in the case of an act of God, force majeure, uncurable delays in obtaining necessary permits from the Indiana Department of Environmental Management and/or other necessary governmental approvals of and/or permits for such construction that are in no way related to action or inaction of Utility Center, or material and uncurable circumstances outside of Utility Center's reasonable control, if Utility Center fails to start construction of the improvements approved by the IURC for inclusion in rate base within six (6) months of such

approval and to complete the improvements within a commercially reasonable time, the HOAs shall be entitled to liquidated damages of \$1000.00 per week from the Utility Center for each week Utility Center fails to commence construction as provided herein or for each week it fails to complete the improvements within a commercially reasonable time. The Parties agree that \$1,000.00 per week constitutes a reasonable liquidation of HOAs' damages if Utility Center were to fail to commence construction or to complete improvements in a commercially reasonable time. In no event shall the liquidated damages provision amount to more than \$1,000 for each week. In the event of litigation seeking to enforce this paragraph, the prevailing party shall be entitled to a recovery of any attorneys' fees reasonably incurred.

3. If in the IURC Proceeding (to approve this settlement Agreement only) the IURC finds by the Final Order no longer subject to appeal that (i.) the 2000 Agreement is an encumbrance and (ii.) that the Facilities need not be removed from service, retired and/or closed as a result of either the 2000 Agreement, any other Agreement with the HOAs or their representatives, or this Agreement, but does not approve this Agreement in its entirety, then Utility Center agrees that it will pay the HOAs the entire Settlement Amount (as defined herein), and will be bound to comply with the capital improvement requirements in Paragraph 2. In that event, the Parties will honor the terms of this Agreement with respect to payment of the Settlement Amount, capital improvements and cost associated with implementation of this Agreement and also in good faith will take all actions necessary to ensure all other obligations owed under this Agreement shall be complied with by the HOAs and Utility Center. It is the intention of this paragraph that if the result of the IURC's Final Order is to render the 2000 Agreement unenforceable, then both Utility Center and the HOAs will still honor the terms of this Agreement. Utility Center agrees and stipulates that the payment of the Settlement Amount is not an encumbrance on its property that requires IURC approval. In the event of such an order by the IURC, Utility Center further agrees and stipulates that the capital improvements as required by this Agreement are not an encumbrance on its property that requires IURC approval, except Utility Center is not obligated to implement any improvements that are not approved by the IURC as provided in Paragraph 2.

4. The Parties shall take no further action in the Lawsuit and shall, if necessary, jointly ask the Court to stay the Lawsuit or vacate all deadlines therein pending the IURC's issuance of the Final Order. Upon the entry of the Final Order and the payment of the Settlement Amount, the HOAs will dismiss with prejudice their pending Lawsuit and any other litigation against Utility Center arising out of the 2000 Agreement, except those that arise out this Agreement or the terms of the 2000 Agreement which were not amended by this Agreement.

5. In consideration for this Agreement, Utility Center shall pay to the HOAs a collective settlement amount of \$2.6 million (the Settlement Amount). Within twenty (20) days of the execution of this Agreement by the HOAs, Utility Center shall pay to the HOAs the sum of \$200,000.00 payable to the Beckman Lawson, LLP Trust Account, half of which shall be non-refundable (except as provided in Paragraph 6 herein) and half of which shall be refundable as provided in this Paragraph. The remaining unpaid balance of the Settlement Amount shall be paid to the HOAs in a check payable to the Beckman Lawson LLP Trust Account within twenty (20) days of the Final Order becoming no longer subject to appeal. The disbursement of the Settlement Amount to the members of either of the HOAs, whether suspended, active or otherwise (the "Members") shall be within the sole discretion of the HOAs. The

part of the Settlement Amount that the HOAs in their discretion decide to distribute to Members shall be apportioned and distributed to Members of the HOAs in a fair and non-discriminatory manner approved by the Members pursuant to the HOAs' governing documents. Such manner of apportionment shall not favor those members who vote in favor of approval of this Agreement and/or execute the release discussed in this paragraph over those Members who do not. Solely for purposes of settlement and not otherwise, Utility Center agrees that the Settlement Amount payment is a return of capital for an agreed-upon aggregate loss of property value to the homeowners including reimbursement of expenses for legal, accounting and technical expert fees. The HOAs' tax advisor has advised that no Form 1099 is required to be issued and as such none will be issued to the HOAs. Any Member of either HOA receiving a share of the proceeds shall execute a release in the form attached hereto as Exhibit C. Any Member who does not execute a release shall not receive his/her share, which amount will be held in a restricted account by the HOAs until (a) the IURC determines the 2000 Agreement is an encumbrance, (b) the statute of limitations for any claim against Utility Center has expired or (c) September 18, 2018, whichever event occurs first. At that time, all amounts remaining in the restrictive account shall be released to HOAs; provided, however, that to the extent any homeowner brings any claim, lawsuit, litigation, administrative proceedings, demand, action or cause of action against Utility Center during the time period set forth in the preceding sentence in which certain funds are being held in a restricted account, the amounts identified by the HOAs for that homeowner shall be immediately paid over to Utility Center. Utility Center will not seek rate recovery of the \$2.6 Million. Utility Center shall convey to the HOAs title to the South Real Estate (as defined in the 2000 Agreement) by general warranty deed in a form attached hereto as Exhibit D (the "Deed"), subject to all matters of record and subject to the grant to Utility Center of necessary easements, in a form attached hereto as Exhibit E (the "New Easement"), that minimizes potential aesthetic impacts for currently existing (or replacement thereof) underground pipes that are necessary to the operation of the Facilities now or in the future. At the time of conveyance, Utility Center agrees to provide HOAs: (a) a boundary survey of the property being conveyed indicating the easements of record, and the New Easement to be granted per this Agreement; (b) a commitment for an owner's policy of title insurance in the amount of \$50,000, with the final policy to be delivered to the HOAs by the title insurer promptly after the Deed is recorded; and (c) certification of, and report from, an All Appropriate Inquiries conducted within the previous 30 days on the South Real Estate. The parties agree to execute such other documents as may be required to consummate the conveyance of the Deed and the grant of the New Easement, including sales disclosure forms, in accordance with the terms and conditions hereof. A credit of \$50,000.00 shall be applied to the Settlement Amount once Utility Center has conveyed to the HOAs the South Real Estate, which conveyance shall occur within 14 days of the Final Order becoming no longer subject to appeal. Utility Center agrees not to use its rights of eminent domain to reacquire an interest in the South Real Estate, once conveyed to the HOAs, except that Utility Center may use the power of eminent domain to acquire future easement rights for underground utility facilities that may be necessary or advisable in the future. In the event the IURC fails to issue the Final Order as required by Paragraph 1 or either party seeks to void the Agreement, HOAs shall refund \$100,000 to Utility Center, subject to the limitation provided in Paragraph 3 herein. If a Party seeks to void the Agreement, as provided in Paragraph 1, HOAs shall be entitled to retain and use free and clear the non-refundable \$100,000, which shall be an offset against any claims made by the HOAs in the Lawsuit.

6. It is a condition to this Agreement that within thirty (30) days of execution hereof, both HOAs convene special meetings pursuant to their bylaws and- including but not limited to Article 3 of the bylaws for each of the HOAs or any similar provision incorporated in any

successor bylaws – and that a majority of the Members present at the meeting where a quorum exists vote to approve the Agreement pursuant to the bylaws of the HOA. Members' votes shall be recorded by Member in each respective HOA's records which shall be retained by the HOAs. The results of the meeting shall be filed with the IURC in support of the Final Order. In the event that the Members fail to approve this Agreement, then the entirety of the \$200,000 payment made pursuant to Paragraph 5 herein shall be refunded to Utility Center.

7. The HOAs each individually and collectively and on behalf of the Members, do, effective upon the Final Order becoming no longer subject to appeal, hereby **RELEASE** and **FOREVER DISCHARGE** Utility Center and any of its successors, assigns, present or former employees, officers, servants, agents, directors, attorneys, controlling persons, insurers, indemnifiers, affiliated companies, and partnerships from any and all lawsuits, litigation, claims, administrative proceedings, demands, actions or causes of action on account of, arising out of the 2000 Agreement, and/or any matter that was or could have been raised in the Lawsuit, whether known or unknown, and accruing prior to the date of this Agreement; provided, however, that the release does not include claims arising out of this Agreement or the terms of the 2000 Agreement which were not amended by this Agreement. Likewise, the Utility Center, collectively and on behalf of its present or former officers, directors, shareholders, employees, servants, agents, attorneys, controlling persons, insurers, indemnifiers, and affiliated companies do, effective upon the Final Order becoming no longer subject to appeal, hereby **RELEASE** and **FOREVER DISCHARGE** the HOAs, and its present and former members, directors, officers, employees, agents and attorneys, from any and all lawsuits, litigation, claims, administrative proceedings, demands, actions or causes of action on account of, arising out of the 2000 Agreement, the Lawsuit and/or any matter that was or could have been raised in a Countersuit, whether known or unknown, and accruing prior to the date of this Agreement; provided, however, that the release does not include claims arising out of this Agreement or the terms of the 2000 Agreement which were not amended by this Agreement.

8. HOAs agree that they will accept the payment by Utility Center described in Paragraph 5, along with acceptance of the promises made in this Agreement by Utility Center in complete satisfaction of any damages, fees, costs, and any and all liens related to the Lawsuit.

9. Pursuant to Section 9.4 of the 2000 Agreement, this Agreement amends the 2000 Agreement with respect to Recital E and Paragraph 4 (concerning Plant Closure), Section 1 (concerning Expansion Limits), Section 2 (concerning Expanded Plant Construction), and Section 6.3 (concerning specific performance except as related to the obligations of this Agreement). Further Section 9.9 (Time of Essence) is deleted only to the extent it allows termination of this Agreement after the payment of the Settlement Amount. To the extent the terms of the 2000 Agreement are inconsistent with the terms of this Agreement, such terms are hereby superseded and amended by this Agreement. In all other respects, the 2000 Agreement shall remain in full force and effect and shall be binding upon the Parties. The HOAs and Utility Center agree that this Agreement and the 2000 Agreement as hereby amended supersede any and all other prior agreements between the parties, including but not limited to the Memorandum of Understanding. The Agreement and the 2000 Agreement as hereby amended evidence the entire and complete agreement between the Parties. There are no other warranties, representations, understandings, or agreements (whether written or oral) between the Parties relating to the

settlement of the Lawsuit or any other matter except as expressly set forth in this Agreement and the 2000 Agreement as hereby amended.

10. In return for payment of the Settlement Amount and all promises of Utility Center under this Agreement, the HOAs hereby covenant that, for the sole purpose of settlement upon the entry of the Final Order, they will not sue or bring any litigation, lawsuits, claims, administrative proceedings, demands, actions or causes of action to: (1) enforce the 2000 Agreement except as amended by this Agreement; and/or (2) compel the closure, retirement or removal of the Facilities as a result of the 2000 Agreement or this Agreement. The HOAs retain the right to sue or bring any litigation, lawsuits, claims, administrative proceedings, demands, actions or causes of action against the Utility Center necessary to enforce the provisions of this Agreement or the 2000 Agreement as amended hereby. The prevailing party shall be entitled to recovery from the other party any attorneys fees reasonably incurred for such enforcement.

11. The Parties agree that the 2000 Agreement is valid and enforceable as now amended hereby. The 2000 Agreement is expressly amended such that Utility Center shall not be required to cease operations of the Facilities or remove them from the site of the Facilities as a result of the 2000 Agreement or this Agreement. The parties further agree that to the extent the 2000 Agreement restricts the future construction activities and expansion at the site of the Facilities, such terms are expressly superseded and replaced with the terms of Paragraphs 12 through 14 of this Agreement. Nothing in this Agreement or the 2000 Agreement shall be construed as preventing Utility Center from performing maintenance on the Facilities, and/or replacing equipment and structures with like or similar equipment or structures as those equipment and structures exist after the implementation of capital improvements provided for in Paragraph 2.

12. To the extent the 2000 Agreement prohibits future construction activities or limits expansion at the site of the Facilities, the 2000 Agreement is amended as follows: Utility Center will be required to seek approval as provided in Paragraph 13 from the HOAs as to the Facilities only to the extent it engages in any of the following (the "Modifications") with respect to the Facilities:

- a) the construction of any additional buildings;
- b) a change in the current treatment process;
- c) the addition of exterior structures not currently existing at the Facilities or any modifications to one or more exterior structures currently existing at the Facilities that increases the size of any such structures; or
- d) construction producing an increase of the Facilities' capacity.

13. Except to the extent IDEM, the Environmental Protection Agency, or other governmental agency with jurisdiction over the Facilities orders Modifications without any initiative, action (except actions as may be required by law), inaction, or request of Utility

Center, prior to the commencement of any Modification of the Facilities, Utility Center will obtain the written approval of each of the HOAs. The HOAs shall have 60 days following receipt from the Utility Center of notice of the proposed Modifications to review the same and provide their approval or disapproval of the same. The HOAs shall approve a Modification unless they reasonably determine that the Modification will materially adversely affect the noise, odor, health, safety, or visual impacts of the Facility (as compared with those impacts after the improvements have been made as referenced in Paragraph 2) or increase the geographic size of the Facilities. If HOAs make such a determination, Utility Center shall not commence the Modifications except as provided in Paragraph 14.

14. Any dispute about a Modification or the HOAs' determination of material adverse impact will be resolved by binding arbitration submitted to a neutral arbitrator mutually selected by the Parties. If Utility Center requests arbitration under this Agreement, the dispute may be submitted to binding arbitration by one arbitrator qualified by education, experience or training to render a decision upon the issues in dispute, and who has not been employed by either party and does not have a direct or indirect interest in either party or the subject matter of the arbitration. Such arbitrator shall either be mutually agreed to by the parties within thirty (30) days after written notice requesting arbitration, or failing agreement, the arbitration shall be conducted by a panel of three arbitrators having the qualifications set forth in the preceding sentence, one to be selected by each party and the third arbitrator to be selected by the two arbitrators. If either party fails to notify the other party of the arbitrator selected by it within ten (10) days after receiving notice of the other party's arbitrator, or if the two arbitrators selected fail to select a third arbitrator, then such arbitrator shall be selected under the expedited rules of the American Arbitration Association (the "AAA"). Such arbitration shall be held in Fort Wayne, Indiana. Unless otherwise agreed by the parties, the commercial arbitration rules of the AAA shall apply to the extent not inconsistent with the rules specified above.

15. In addition to the terms of the proposed Final Order attached as Exhibit B, Utility Center reserves the right to ask the IURC to rule in the Final Order that the 2000 Agreement was an encumbrance which has not been approved and the HOAs, for purpose of giving effect to settlement only, will not object to this request.

16. Except as otherwise provided herein, each party shall bear its own costs and attorney's fees in connection with the Lawsuit, the IURC Proceeding, this Agreement, the dismissal of the Lawsuit and any other matter. HOAs and their counsel shall not be responsible for reimbursing Utility Center or its counsel for any copy or other costs incurred during the above proceedings, including, without limitation, the invoice dated July 7, 2009 totaling \$1,862. The consideration set forth in Paragraph 5 of this Agreement is the total monetary payment to which the HOAs shall be entitled from Utility Center and/or any of its successors, assigns, present or former employees, officers, servants, agents, directors, attorneys, controlling persons, insurers, indemnifiers, affiliated companies, and partnerships and, together with the promised capital improvement process and resulting improvements and other promises of Utility Center in this Agreement, is accepted by the HOAs as a full, complete, final, and binding compromise of all claims that were or could have been raised against Utility Center in the Lawsuit.

17. This Agreement shall be binding upon and inure to the benefit of the respective heirs, executors, administrators, assigns and successors in interest of each of the Parties. Utility Center agrees that it will not voluntarily sell or transfer the Facilities unless the party to which the Facilities are to be transferred has agreed to be obligated under the terms of this Agreement and the 2000 Agreement as amended hereby and has taken all actions (regulatory or otherwise) necessary to be so obligated.

18. The parties shall return or destroy all documents exchanged during discovery in the Lawsuit upon the Final Order becoming no longer subject to appeal.

19.

It is understood and agreed that (i) this settlement is a compromise of a disputed claim and petition, (ii) the payment described in Paragraph 5 is not to be construed as an admission of liability on the part of Utility Center, which expressly denies any such liability; and (iii) concessions herein of HOAs (including the agreement not to object if Utility Center requests that the 2000 Agreement is an encumbrance) shall not be construed as an admission on the part of the HOAs with respect to validity of Utility Center's petition and the relief thereby requested or Utility Center's defenses or the jurisdiction of the IURC. No past or present wrongdoing on the part of Utility Center shall be implied by anything contained in this Agreement. Nothing with respect to the validity of HOAs Lawsuit or response to the IURC Proceeding shall be implied by anything contained in this Agreement.

20. The HOAs hereby acknowledge and agree for themselves and for the Members they represent that the release of all claims as set forth in Paragraph 5 hereof is a release of all claims accruing prior to the date of this Agreement against Utility Center, whether known or unknown, arising out of the 2000 Agreement. The HOAs further agree that they have accepted payment of the sums specified herein, together with the promise of capital improvements and Utility Center obligations hereunder, as a complete compromise of matters specifically identified hereunder involving disputed issues of law and fact and they assume the risk that the facts or law may be otherwise than they believe. The HOAs acknowledge that the consideration received under this Agreement is intended to and does forever release and discharge Utility Center from all unknown damages or losses based on, connected with, arising out of, any or all of the released claims in the Lawsuit. The HOAs' release does not include claims accruing under this Agreement or the terms of the 2000 Agreement which were not amended by this Agreement.

21. Each of the parties to this Agreement represent and warrant that they have the sole right and exclusive authority to execute this Agreement and to receive the sums specified in it and that they have not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Agreement.

22. In entering into this Agreement, the HOAs represent that (1) they have relied upon the legal advice of their own attorneys, who are their attorneys by their own choice and the tax advice of an independent consultant; (2) the terms of this Agreement have been completely reviewed by them and explained to them by their attorneys; and (3) those terms are fully understood and voluntarily accepted by them. In entering into this Agreement, Utility Center represents that (1) it has relied upon the legal and tax advice of its own attorneys, who are its

attorneys by its own choice; (2) the terms of this Agreement have been completely reviewed by them and explained to it by its attorneys; and (3) those terms are fully understood and voluntarily accepted by it. Neither Utility Center nor its representatives or attorneys provided the HOAs with any advice, including tax or legal advice, regarding the Agreement and have made no representations regarding the state of the law or the tax consequences of this Agreement to the HOAs. The HOAs represent that they have not relied on any statement or representation of Utility Center or its counsel in entering into this Agreement other than those specifically included in this Agreement. Utility Center represents that they have not relied on any statement or representation of the HOAs or their counsel in entering into this Agreement other than those specifically included in this Agreement. The Parties understand, acknowledge, warrant, represent and agree that their respective obligations assumed hereunder shall remain binding and effective in all respects, notwithstanding the discovery of any additional or different facts or legal theories.

23. Although, Utility Center has no obligation to make capital improvements to the Facilities that are not approved to be included in rate base for ratemaking purposes, Utility Center agrees that it will be a good neighbor to the HOAs and their Members and will make reasonable effort to work cooperatively with the HOAs to respond to concerns they may have concerning the Facilities.

24. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Indiana.

25. The Agreement has been negotiated by the Parties, through their counsel. Neither of the Parties nor their counsel shall be deemed to have drafted, prepared, or otherwise written this Agreement, and this Agreement shall not be construed in favor of or against any of the Parties.

26. The Parties agree to cooperate fully and execute any and all additional documents and take all additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

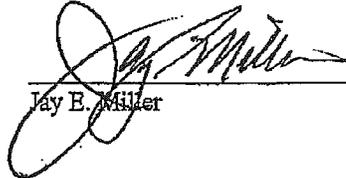
27. The Parties agree that this Agreement may be amended or modified only upon execution of a valid written document executed by all of the Parties.

28. The Parties agree that this Agreement may be executed in counterparts with the same force and effect as if the Agreement were executed at the same place and time by all of the signatories to the Agreement. The Parties further agree that this Agreement may be executed by facsimile signature, including without limitation PDF or other electronic document, which shall have the same force and effect as an original signature and is binding upon the Parties.

29. This Agreement shall become effective on the last date it is signed by any of the Parties.

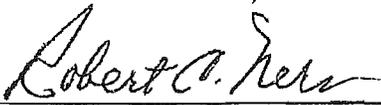
30. The persons signing this Agreement represent and warrant that they have authority to execute this Agreement on behalf of their respective party.

AGREED TO and EXECUTED by Jay E. Miller, in his capacity as the President of Woodland Ridge Homeowners Association, Inc., on this 7th day of MAY, 2010.



Jay E. Miller

AGREED TO and EXECUTED by Robert C. Nern, in his capacity as the President of Hamlets West Homeowners Association, Inc., on this 7th day of MAY, 2010.



Robert C. Nern

AGREED TO and EXECUTED by Terry J. Rakocy in his capacity as President of Utility Center, Inc. d/b/a Aqua Indiana, Inc., on this _____ day of _____, 2010.

Terry J. Rakocy

AGREED TO and EXECUTED by Jay E. Miller, in his capacity as the President of Woodland Ridge Homeowners Association, Inc., on this ____ day of ____, 2010.

Jay E. Miller

AGREED TO and EXECUTED by Robert C. Nern, in his capacity as the President of Hamlets West Homeowners Association, Inc, on this ____ day of ____, 2010.

Robert C. Nern

AGREED TO and EXECUTED by Terry J. Rakocy in his capacity as President of Utility Center, Inc. d/b/a Aqua Indiana, Inc., on this 7TH day of MAY, 2010.



Terry J. Rakocy

PLANT EXPANSION AND CLOSURE AGREEMENT

This Plant Expansion and Closure Agreement ("Agreement"), effective as of the 7th day of April, 2000, is entered by and between Utility Center, Inc. d/b/a AquaSource, an Indiana corporation ~~and State Indesco, Inc., an Indiana corporation~~ ("AquaSource"), Hamlets West Homeowners Association, an Indiana not-for-profit corporation ("Hamlets") and Woodland Ridge Homeowners Association, Inc., an Indiana not-for-profit corporation ("Woodland Ridge").

RECITALS

A. AquaSource is the owner in fee simple of the real estate located in Allen County, Indiana, described in the attached Exhibit "A" (the "AquaSource Real Estate").

AS AQUASOURCE'S PREDECESSOR
B. AquaSource acquired title in fee simple to a portion of the AquaSource Real Estate by virtue of that certain warranty deed dated November 30, 1966, and recorded on December 22, 1966 at Book 682, Pages 345-346 in the Office of the Recorder of Allen County, Indiana, and by virtue of that certain warranty deed dated December 2, 1966, and entered for taxation with the Office of the Auditor of Allen County, Indiana on December 22, 1966, as Instrument Number 10448. AquaSource acquired title in fee simple to the remaining portion of the AquaSource Real Estate pursuant to that certain warranty deed dated September 17, 1998, and recorded on October 14, 1998, as Document Number 980072014 in the Office of the Recorder of Allen County, Indiana.

C. Hamlets and Woodland Ridge (collectively, the "Associations") represent homeowners in the Hamlets of Woodland Ridge subdivision by virtue of the restrictive covenants recorded on January 11, 1978, April 23, 1984, May 23, 1985, July 26, 1985, June 23, 1987, June 2, 1986, July 25, 1988, and January 7, 1992, as Documents Numbered (or at the stated Plat Book and Page) 78-971, 84-008889, 85-012837, 85-019941, 87-032313, Page 114 of Plat Book 47, 88-029715, and 92-000850, respectively, in the Office of the Recorder of Allen County, Indiana.

D. AquaSource has long operated a wastewater treatment plant, commonly known as the Main Aboite Wastewater Treatment Plant, on the AquaSource Real Estate (the "Existing Plant"). To better accommodate sewage flows during wet weather and to allow for further development within AquaSource's sewer service area, AquaSource desires to temporarily expand the

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Existing Plant to include additional improvements, structures and facilities as shown on the drawing attached to this Agreement as Exhibit "B" (the "Expanded Plant"). As shown on Exhibit "B", the Expanded Plant consists of the Existing Plant modified to include additional improvements, structures and facilities.

E. At a later time and under certain terms and conditions, AquaSource also wishes to cease most operations at the Expanded Plant within a certain time frame and to remove most of the improvements, structures and facilities constituting the Expanded Plant. The improvements, structures and facilities that will remain at the AquaSource Real Estate following such removal activities (the "Closed Plant") are shown on the attached Exhibit "C". The Closed Plant shall not include any wastewater treatment equipment, structures, improvements or facilities other than the influent screen room currently shown on the attached Exhibit "C".

F. Under certain terms and conditions, the Associations wish to support and not remonstrate to stop or delay the governmental approvals necessary to allow AquaSource to construct and operate the Expanded Plant and/or the Closed Plant in accordance with this Agreement.

G. The Associations, as well as some of their individual members, are appealing (Cause No. 98-W-J-2142 before the Indiana Office of Environmental Adjudication) Permit Approval No. 12313 issued by the Indiana Department of Environmental Management ("IDEM") on October 22, 1998, authorizing AquaSource to expand the Existing Plant.

H. The Associations, as well as some of their individual members, also are appealing (Cause No. 02D01-9903-MI-1414 in the Allen Superior Court) the Contingent Use Permit (CU 284/99) granted by the Allen County Board of Zoning Appeals on February 10, 1999, allowing AquaSource to proceed with the expansion of the Existing Plant in accordance with Permit Approval No. 12313 issued by IDEM on October 22, 1998.

I. AquaSource no longer desires to expand the Existing Plant in the manner authorized by Permit Approval No. 12313 issued by IDEM on October 22, 1998 nor in the manner authorized by Contingent Use Permit CU 284/99 issued by the Allen County Board of Zoning Appeals on February 10, 1999.

AGREEMENT

1. *EXPANSION LIMIT.*

1.1 AquaSource agrees and covenants that it will not seek to construct or construct, or allow others to seek to construct or construct, improvements, structures or facilities on, under or at the AquaSource Real Estate other than those depicted on the attached Exhibit "B" and Exhibit "C" (which Exhibits may be modified in accordance with Section 1.2) or as specifically allowed by Sections 1.3 and 1.4.

1.2. *Plant Modifications.*

1.2.1 The parties acknowledge that for reasons beyond AquaSource's control, the Indiana Department of Environmental Management ("IDEM"), the Indiana Utility Regulatory Commission ("IURC") or other authorized governmental agencies may require AquaSource to construct new improvements, structures or facilities not shown on the attached Exhibits "B" and "C" or to modify the improvements, structures or facilities shown on the attached Exhibits "B" and "C" in connection with the issuance of permit(s) under 327 IAC 3 to construct the Expanded Plant and Closed Plant or at some other time to ensure compliance with new statutes or regulations (the "Required Facilities"). In such an event, AquaSource agrees to work in good faith to minimize the scope of any such Required Facilities and shall send Notice to the Associations describing the request or requirement of the governmental agency for any such Required Facilities within ten (10) days of AquaSource's knowledge of the request or requirement. For a minimum of thirty (30) days following such Notice, AquaSource shall not agree with the requesting governmental agency to provide the Required Facilities unless failure to do so within said thirty (30) day period would result in AquaSource being in violation of an order issued by the governmental agency. Within the first ten (10) days of said thirty (30) day period, AquaSource and the Associations shall meet to discuss the Required Facilities. Also, during the thirty (30) day period, AquaSource agrees to allow full disclosure to the Associations of all documents relating to the Required Facilities and to allow the Associations to discuss the matter with the requesting agency at any time without claims of privilege or confidentiality.

1.2.2 If Required Facilities are required by IDEM, IURC or another governmental agency for reasons beyond AquaSource's control following the Association's discussions with the requesting agency and AquaSource, subject to Section 1.2.3, the parties agree to amend Exhibit "B" and/or Exhibit "C" to reflect the Required Facilities. For the purpose of this Section 1.2, "beyond AquaSource's control" shall mean (a) an administrative or judicial order or a permit issued to ensure compliance with governmental regulations, or (b) action not caused or necessitated by AquaSource's unreasonable failure or refusal to construct other improvements to its waste water system at properties other than at the AquaSource Real Estate.

1.2.3 Notwithstanding any other provision of this Section 1.2, in no event will (a) any Required Facilities be constructed, installed or operated on the real estate owned by AquaSource and described on the attached Exhibit "D" (the "South Real Estate"), (b) any Required Facilities be constructed, installed or operated on the AquaSource Real Estate which would result in the treatment capacity of the Expanded Plant exceeding 4.25MGD (million gallons per day), or (c) the improvements, structures and facilities for the Closed Plant shown on the attached Exhibit "C" be modified to include any waste water treatment improvements, structures or facilities other than the influent screen room currently shown on the attached Exhibit "C".

1.3 AquaSource, or those authorized by AquaSource, may repair, maintain and replace, if necessary, the improvements, structures and facilities allowed under this Agreement at the Existing Plant, Expanded Plant or the Closed Plant. AquaSource may also install, repair, maintain

and replace, if necessary, underground sewer mains and piping not shown on Exhibit "B" or Exhibit "C" provided that such are completely underground and not on, under or at the South Real Estate.

1.4 AquaSource, or those authorized by AquaSource, may construct, or cause to be constructed, improvements on the AquaSource Real Estate which allow or facilitate pedestrian recreational activities at the AquaSource Real Estate, including landscaping, earthen berms, plants, walking/jogging trails, park benches, picnic tables, wetlands, ponds or other similar improvements.

2. **EXPANDED PLANT CONSTRUCTION.** AquaSource shall pursue and work diligently to obtain, in good faith, all governmental approvals necessary to construct and operate the Expanded Plant as soon as possible. The Associations agree to not directly or indirectly oppose or work to impair AquaSource's efforts to do so excepting, however, that the Associations may oppose the construction and operation of facilities, structures or improvements not depicted on the Exhibits "B" or "C" attached to this Agreement on the date of its execution. AquaSource may use this Agreement to demonstrate to governmental agencies that a cooperative agreement with the Associations has been achieved. Upon receipt of all necessary governmental approvals, AquaSource may construct and operate the Expanded Plant. AquaSource shall provide the Associations (in the manner identified in Section 7) with a copy of each issued governmental approval within 15 days of the date AquaSource receives such approval.

3. **MAINTENANCE.** While any part of the Existing Plant, the Expanded Plant or the Closed Plant is operating, AquaSource shall operate all facilities on, under or at the AquaSource Real Estate in full compliance with all applicable statutes, regulations, judicial orders and agreements.

4. **PLANT CLOSURE.** Within 9 years from the effective date of this Agreement, AquaSource shall cease operation of all improvements, structures and facilities at the AquaSource Real Estate except those constituting the Closed Plant. Within one year of the cessation of the operation of the Expanded Plant or within 9 years of the effective date of this Agreement, whichever occurs first, AquaSource shall remove all improvements, structures and facilities from the AquaSource Real Estate except those constituting the Closed Plant as shown on the attached Exhibit "C" and also except sewer mains and piping that is completely underground.

5. **DISMISSAL OF APPEALS.** Within five (5) business days following the effective date of this Agreement as set forth at the beginning of this Agreement, the Associations and AquaSource shall file a joint motion with the Indiana Office of Environmental Adjudication requesting that Cause No. 98-W-J-2142 be dismissed and the Associations shall file a motion with the Allen Superior Court requesting that Cause No. 02D01-9903-MI-1414 be dismissed.

6. **REMEDIES.**

6.1 For the purpose of this Agreement, the term "Event of Default" shall mean the failure to observe or comply with any provision or covenant in this Agreement if such failure is not

cured to the reasonable satisfaction of the non-defaulting party within fifteen (15) days of the date Notice (as defined in Section 7 below) of such failure is given, which Notice shall specify with reasonable particularity the basis for the failure claimed.

6.2 If an Event of Default occurs, the party not in default may seek the following remedies, which shall be cumulative and are not mutually exclusive:

6.2.1 All legal and equitable remedies available.

6.2.2 The reasonable attorney fees, expenses and costs incurred in connection with an Event of Default.

6.3 The parties agree that it may be impossible to measure in money the damages which will accrue to a party by reason of a failure to perform any of the obligations under this Agreement. Therefore, if a party institutes any action or proceeding against the other party to specifically enforce the provisions of this Agreement, the party against whom such action or proceeding is brought shall be deemed to waive the claim or defense that such party has an adequate remedy at law.

6.4 The failure to enforce a breach of this Agreement shall not be construed as a waiver of the right to enforce such breach at a later time or to enforce any other breach.

6.5 If a party consists of more than one person, each person who is a party shall be jointly and severally liable for such party's defaults.

7. NOTICES.

7.1 *Written Notice.* Any notice designation, consent, approval, offer, acceptance, statement, request, or other communication required or allowed under this Agreement ("Notice") shall be in writing. Any action required under this Agreement that is a term within the definition of "Notice" also shall be in writing.

7.2 *Place of Notice.* Notice to a party shall be given at the party's address stated below, or at such other address as a party may designate in a Notice to the other party:

If to the Associations: Mr. Larry Kattman
6731 West Canal Point Lane
Fort Wayne, IN 46804

and to: The Burnell Group
c/o Mr. Bernie Burnell
503 West Wayne Street
Fort Wayne, IN 46802

with a copy to: Daniel J. Deeb, Esq,
Beckman Lawson, LLP
200 E. Main Street, Suite 800
Fort Wayne, IN 46802

If to AquaSource: Donald J. Clayton
President
Utility Center, Inc.
200 Corporate Center Drive; Suite 300
Corapolis, PA 15108

with a copy to: Richard S. Herskovitz
Chief Regulatory Counsel
AquaSource, Inc.
200 Corporate Center Drive; Suite 300
Corapolis, PA 15108

7.3 Manner of Giving Notice. Notice shall be deemed given when:

7.3.1 Personal service of the Notice is made on the party to be notified (but the party need not be at the address designated under Section 7.2 provided actual service is achieved);

7.3.2 The Notice is mailed to the party to be notified by means of certified or registered U.S. mail, return receipt requested, postage prepaid at the address designated; or

7.3.3 The Notice is sent to the party to be notified by express courier such as "Federal Express", "United Parcel Service", or such other similar carrier guaranteeing next day delivery at the address designated.

7.4 Refusal To Accept Notice. Refusal by a party to accept a Notice shall not affect the giving of the Notice.

8. AUTHORITY TO SIGN. Each person signing this Agreement in a representative capacity on behalf of a party warrants and represents to each other party that:

8.1 The person executing this Agreement has the actual authority and power to so sign, and to bind the person's respective principal to the provisions of this Agreement; and

8.2 All corporate or other entity action necessary for the making of this Agreement has been duly taken.

9. MISCELLANEOUS.

9.1 *Waiver.* AquaSource forever waives and relinquishes all right and power to condemn or otherwise exercise any powers of eminent domain relating to the AquaSource Real Estate or any activity on it, except to construct and operate the Expanded Plant and Closed Plant as permitted under this Agreement.

9.2 *Binding Agreement/Run with Land.* This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, heirs, successors, and assigns, and shall run with the AquaSource Real Estate.

9.3 *Invalid Provision/Severability.* The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions of it; and this Agreement shall be construed in all respects as if such invalid or unenforceable provision was omitted.

9.4 *Amendments.* No amendments, modifications, alterations, or additions to this Agreement shall be binding unless made in writing and signed by the parties.

9.5 *Governing Law.* This Agreement shall be governed in all respects whether as to validity, construction, capacity, performance, or otherwise by the laws of the State of Indiana.

9.6 *Rule of Construction.* The judicial rule of construction requiring or allowing a document to be construed to the detriment or against the interests of the document's maker or drafter shall not apply to this Agreement.

9.7 *Headings.* The section headings in this Agreement are included solely for convenience, and shall in no event affect or be used in connection with the interpretation of this Agreement.

9.8 *Entire Agreement.* This Agreement constitutes the entire agreement of the parties, all prior negotiations and agreements, whether written or oral, having been merged into this Agreement.

9.9 *Time of Essence.* Time is of the essence in this Agreement. The parties shall have the right to treat all time deadlines contained in this Agreement as material, and to terminate this Agreement or exercise such other remedies as may be provided in this Agreement in the event such time deadlines are not met.

9.10 *Computation of Time.* In computing a time period prescribed in this Agreement, the day of the act or event shall not be counted. All subsequent days, including intervening weekend days and holidays, shall be counted in the period.

9.11 *Recitals.* All recitals set forth at the outset of this Agreement are incorporated by reference in it and are true.

9.12 *Review By Counsel.* Each party has had the opportunity to have this Agreement reviewed by independent counsel before signing it.

This Agreement has been signed by the parties as of the date first written above.

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This document prepared by Daniel J. Deeb, Attorney at Law.

UTILITY CENTER, INC. d/b/a AquaSource and ~~PL~~
~~PL~~ d/b/a Inbelec, Inc. ACCEPTANCE IS SUBJECT TO MUTUALLY

ACCEPTABLE REVISIONS OF
RECITACS A AND B,

By: [Signature]
Its: President

STATE OF PENNSYLVANIA)
)
COUNTY OF Allegheny)

SS:

Before me, the undersigned, a Notary Public, in and for said County and State, on this 7th day of April, 2000, personally appeared Donald J. Clayton, the President of Utility Center, Inc. d/b/a AquaSource and ~~PL~~ d/b/a Inbelec, Inc., and acknowledged the execution of the foregoing.

My Commission Expires:
Sept. 22, 2001

[Signature]
Notary Public
Resident of Butler County, Pennsylvania

Notarial Seal
Finnee J. Cypher, Notary Public
Pittsburgh, Allegheny County
My Commission Expires Sept. 22, 2001
Member, Pennsylvania Association of Notaries

HAMLETS WEST HOMEOWNERS
ASSOCIATION, INC.

By: Sarah S. Kitch
Its: President

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

Before me, the undersigned, a Notary Public, in and for said County and State, on this 6 day of April, 2000, personally appeared Sarah S. Kitch the President of Hamlets West Homeowners Association, Inc., and acknowledged the execution of the foregoing.

My Commission Expires:
12/08/2000


Notary Public, Daniel J. Deeb
Resident of Allen County, Indiana

WOODLAND RIDGE HOMEOWNERS
ASSOCIATION, INC.

By: Ruth A Eudaley
Its: President Woodland Ridge Homeowners

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

Before me, the undersigned, a Notary Public, in and for said County and State, on this 6 day of April, 2000, personally appeared Ruth A Eudaley the President of Woodland Ridge Homeowners Association, Inc., and acknowledged the execution of the foregoing.

My Commission Expires:
12/08/2000

Daniel J. Deeb
Notary Public, Daniel J. Deeb
Resident of Allen County, Indiana