

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE OUCC'S REQUEST ) CAUSE NO. 43853  
FOR INVESTIGATION OF CHA UTILITIES, LLC. ) APPROVED: MAR 30 2011

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**BY THE COMMISSION:**

**Larry S. Landis, Commissioner**

**Angela Rapp Weber, Administrative Law Judge**

On February 3, 2010, the Indiana Office of Utility Consumer Counselor ("OUCC") filed with the Indiana Utility Regulatory Commission ("Commission") its Verified Request for Investigation of CHA Utilities, LLC ("Verified Request"). The Verified Request stated the OUCC had been informed of certain facts indicating CHA Utilities, LLC ("CHA Utilities") had ceased operating its facilities and had charged a rate in excess of the \$41 approved by the Commission. Thus, pursuant to Indiana Code § 8-1-30-3, the OUCC requested the Commission to initiate an investigation into CHA Utilities' provision of sewage services to its customers.

Accordingly, pursuant to notice as required by law, the Commission held a prehearing conference on March 1, 2010 in Room 222 of the National City Center, 101 West Washington Street, Indianapolis, Indiana at 10:00 a.m. The OUCC and CHA Utilities appeared by counsel and participated in the prehearing conference. No members of the general public appeared. On March 17, 2010, the Commission issued a Prehearing Conference Order setting forth a procedural schedule. The Commission also held a public field hearing at 6:00 p.m. on April 5, 2010 at Faith Community Center, 5572 Mercy Way, Lafayette, IN 47905. Multiple residents of the Creekside Subdivision spoke at the field hearing.

On July 14, 2010, the Creekside Neighborhood Homeowners Association ("CNHA") filed a Petition to Intervene. The Presiding Officers granted CNHA's Petition to Intervene pursuant to a Docket Entry dated July 29, 2010. The Petition to Intervene indicated that CNHA was engaged in discussions with CHA Utilities concerning the acquisition by CNHA of the utility assets used to provide sewage disposal service within the Creekside Subdivision. On September 14, 2010, CNHA, Creekside Utility, Inc. ("Creekside Utility"), a nonprofit corporation formed by CNHA, and CHA Utilities jointly filed a Petition Seeking Transfer of Assets, Including Certificate of Territorial Authority, from CHA Utilities, LLC to Creekside Utility, Inc. ("Petition").

On September 29, 2010, Creekside Utility prefiled the Direct Testimony and Exhibits of David G. Meyer in support of the request in the Petition. On November 12, 2010, the OUCC prefiled the Direct Testimony of Scott A. Bell. On November 5, 2010, the Commission issued a Docket Entry directing Creekside Utility to respond to questions from the Presiding Officers by November 29, 2010, to which Creekside Utility responded on November 24, 2010. Also on November 24, 2010, Creekside Utility filed its Notice of Intent Not to File Rebuttal Testimony ("Notice"). The Notice indicated that rebuttal testimony was not necessary because Creekside Utility agreed with the OUCC's recommendations.

Pursuant to proper notice given as provided by law, the evidentiary hearing in this Cause was held in Room 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana at 9:30 a.m. on January 18, 2011. Creekside Utility and the OUCC appeared and participated in the evidentiary hearing. No members of the general public appeared. The direct testimony and exhibits of Creekside Utility and the OUCC were offered and admitted into evidence without objection.

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

1. **Notice and Jurisdiction.** Due, legal, and timely notice of the public hearings conducted in this proceeding was published by the Commission as required by law. CHA Utilities is an Indiana limited liability company, which currently has a Certificate of Territorial Authority (“CTA”) to provide sewage disposal service to approximately forty residential customers in the Creekside Subdivision in a rural area of Tippecanoe County, Indiana. CHA Utilities is a “public utility” as defined by Indiana Code § 8-1-2-1(a).

Creekside Utility is an Indiana nonprofit corporation, which was formed by CNHA to effectuate the transfer of sewer utility assets from CHA Utilities. Membership in Creekside Utility is comprised of the owners of the lots in the Creekside Subdivision. Upon approval of the Asset Purchase Agreement discussed herein, Creekside Utility will be a “public utility” as defined by Indiana Code § 8-1-2-1(a). The Commission has jurisdiction over the subject matter and the parties to this proceeding pursuant to Indiana Code §§ 8-1-2-83 and -89.

2. **Relief Requested.** The Petition jointly filed by Creekside Utility, CNHA, and CHA Utilities, seeks Commission approval of: (i) the transfer to Creekside Utility of all of CHA Utilities’ assets and all actions necessary to effectuate such a transfer; (ii) the transfer to Creekside Utility on the effective date of the acquisition of the operating rights of CHA Utilities, including without limitation the CTA granted to CHA Utilities in Cause No. 42244; (iii) the rendition of sewage disposal service by Creekside Utility within the area now served by CHA Utilities; (iv) to the extent necessary, the granting of licenses, permits, and franchises for the use of county roads and rights-of-way by the Board of Commissioners of Tippecanoe County; and (v) the adoption by Creekside Utility of CHA Utilities’ rates and charges and rules and regulations for service.

3. **Evidence Presented.**

A. **Creekside Utility’s Case-in-Chief.** David G. Meyer, a resident of Creekside Subdivision, co-chair of CNHA, and a member of Creekside Utility’s Board of Directors testified in support of the relief requested in the Verified Petition. Mr. Meyer stated that on December 4, 2002, the Commission issued an Order granting CHA Utilities a CTA, which, among other things, established an initial monthly rate of \$41.00 for CHA Utilities’ provision of sewage disposal service. According to Mr. Meyer, Doug Mennen is the creator, managing member, and primary interest holder of CHA Utilities. Mr. Mennen also is the primary stockholder of the company that developed the Creekside Subdivision, Mennen Builders, Inc., which recently filed Chapter 11 Bankruptcy in the Northern District of Indiana on August 5,

2010, Cause No. 10-40805. Mr. Mennen created CHA Utilities to own and operate the sewer utility servicing the Creekside Subdivision.

Mr. Meyer further explained in detail the way in which the wastewater in the Creekside Subdivision is treated. He testified the sewer utility system does not require a certified operator or a permit from the Indiana Department of Environmental Management because it does not discharge into the waters of the State of Indiana. The system was designed and permitted under the direction of the Indiana State Department of Health.

Mr. Meyer stated CHA Utilities began experiencing problems operating and maintaining the sewer system in 2007. CHA Utilities did not pay the first two service providers in a timely fashion and both prematurely terminated their contracts. As a result, the sewer utility was left without maintenance services beginning in mid-2007. In January 2008, CHA Utilities instituted an unauthorized rate increase from \$41.00 per month to approximately \$74.50 per month, which Creekside Subdivision residents paid. In June 2008, Mr. Mennen indicated he no longer had any interest in operating the sewer utility, offered to sell it to the Creekside Subdivision residents for \$1.00, and threatened to close the sewer utility if the residents did not assume its operations.

In response, Mr. Meyer stated the residents created CNHA to operate and maintain the sewer system, and CNHA informally assumed all responsibilities of operating and maintaining the sewer system on January 1, 2009. He said in late-2009, Mr. Mennen informed the residents that CHA Utilities intended to resume management and operation of the sewer utility beginning January 1, 2010. Additionally, Mr. Mennen indicated the sewer utility was no longer for sale. Mr. Meyer testified that on November 18, 2009, members of CNHA met with representatives of the OUCC to request that the OUCC file a formal complaint against CHA Utilities.

Mr. Meyer testified CNHA was aware that if it, or some other entity organized by the Creekside Subdivision residents, did not acquire the sewer utility assets, sewage disposal services in the neighborhood would be jeopardized. Therefore, CNHA, through counsel, created Creekside Utility to purchase the sewer system assets, drafted the Asset Purchase Agreement, and began formal negotiations with Mr. Mennen and CHA Utilities in July 2010.

Creekside Utility and CHA Utilities executed the Asset Purchase Agreement on September 13, 2010. According to Mr. Meyer, the purchase price consists of Creekside Utility's assumption of certain liabilities of CHA Utilities, which include unpaid property taxes on Outlot C and the outstanding balance of fees due to the previous maintenance service provider for the sewer system. Creekside Utility will pay the unpaid property taxes directly to the Tippecanoe County Treasurer once title to Outlot C is conveyed.

Mr. Meyer testified that, pursuant to Indiana Code § 8-1-2-89, Creekside Utility has the legal authority to obtain the relief requested in this proceeding. Creekside Utility is a not-for-profit utility as defined by Indiana Code § 8-1-2-125. Mr. Meyer said Creekside Utility's Bylaws and Creekside Utility's Certificate of Incorporation provide that Creekside Utility will be managed by a Board of Directors, with input from its members. Creekside Utility's members will elect the Directors, who will serve three-year terms. Mr. Meyer explained that the members of Creekside Utility are all of the owners of lots in the Creekside Subdivision.

Mr. Meyer testified the Creekside Utility has the financial capacity to operate the sewer utility. While operating the sewer utility, CNHA charged residents a rate lower than that charged by CHA Utilities. Mr. Meyer testified that, going forward, Creekside Utility will not intermingle sewer related costs with any other Creekside Subdivision costs. Creekside Utility will be solely responsible for all matters of the sewer utility, and CNHA will be solely responsible for all other Creekside Subdivision services.

Mr. Meyer testified Creekside Utility intends to charge Creekside Subdivision residents a flat rate of \$41.00 per month, which is the same rate approved for CHA Utilities. He said this rate will produce sufficient revenue to permit Creekside Utility to pay all legal and other necessary expenses as required under Indiana Code § 8-1-2-125. Residents will be billed on an annual basis (unless otherwise requested by an individual customer) because the residents prefer to receive an annual bill coinciding with the bill for homeowners' association costs.

Mr. Meyer testified Creekside Utility also has the managerial and technical capacity to effectively own and operate the sewer utility. CNHA has successfully operated the sewer utility since the beginning of 2009. The management structure will be very similar to CNHA's management structure, and both are comprised of the same individual members. Further, Mr. Meyer testified the proposed management structure ensures that all residents of the Creekside Subdivision have a stake and a voice in the operation of the sewer utility. CNHA reinstated remote monitoring and maintenance of the sewer utility facilities through Vericomm, which Creekside Utility will continue to use. Vericomm will notify Creekside Utility or the resident if it detects a problem with the sewer utility. Vericomm will also provide monthly reports that allow Creekside Utility to assess the long-term functionality of the sewer utility.

Mr. Meyer stated Creekside Utility has contracted with Gary Cheesman to work as the service provider for the sewer utility facilities. Mr. Cheesman will be exclusively responsible for all sewer maintenance, including inspecting, repairing, monitoring, and cleaning sewer utility facilities. Importantly, Mr. Cheesman was the original installer of the system, and he has received training from Orenco, the provider of the infrastructure used by the sewer utility, with respect to the facilities and is very familiar with the sewer utility facilities.

Finally, Mr. Meyer testified that the drip field known as Outlot C is subject to the Mennen Builders, Inc. Chapter 11 proceedings. Mr. Meyer explained CHA Utilities, Mr. Mennen, and Mennen Builders, Inc. have agreed to take all reasonable, diligent, and timely steps to obtain approval of the conveyance of title to the drip field to Creekside Utility from the Bankruptcy Court.

*B. The OUCC's Case-in-Chief.* Scott A. Bell, Director of the OUCC's Water/Wastewater Division, testified regarding the relief requested in the Petition. Mr. Bell testified that the OUCC's Verified Request was initially aimed at investigating CHA Utilities and its owner/member, Mr. Mennen. Due to the sale of the utility assets to Creekside Utility, CHA Utilities and Mr. Mennen will not have any further control over the utility assets and/or operations. Therefore, the OUCC's concerns regarding CHA Utilities have been resolved.

Mr. Bell testified that the OUCC's Verified Request for investigation of CHA Utilities identified three main areas of concern. However, the proposed sale of assets from CHA Utilities to Creekside has resolved all three issues. First, Creekside Utility has proposed to adopt the same \$41.00 monthly service charge previously approved by the Commission. Second, Mr. Bell explained that because the residents are essentially providing sewage services to themselves, Creekside Utility has a vested interest in providing safe, reliable, and affordable sanitary sewer service. Third, Creekside Utility is represented by competent counsel and is aware of the necessity to file an annual report with the Commission.

Mr. Bell testified he reviewed the Asset Purchase Agreement executed between Creekside Utility and CHA Utilities and found no problems. The transaction appeared to be arm's length and resolved all the issues regarding the sale of the utility assets. Mr. Bell testified that, pursuant to Indiana Code § 8-1-2-89, Creekside Utility has the lawful power and authority to acquire CHA Utilities' CTA and to provide sewage disposal services. Further, Creekside Utility's case-in-chief appropriately included copies of the Articles of Incorporation, Bylaws, and Certificate of Organization of the entity created to purchase CHA Utilities' assets. Creekside Utility's case-in-chief also described Creekside Utility's proposed management structure and indicated Creekside Utility provided proper notice to all sewer utilities within five miles.

Mr. Bell testified Creekside Utility included in its case-in-chief a spreadsheet marked as Petitioner's Exhibit DGM-10 that shows the estimated annual cost associated with operating the sewer utility. Mr. Bell recommended that Creekside Utility be granted approval of a flat monthly rate of \$41.00. Mr. Bell testified that the \$41.00 monthly rate will be sufficient at this time to pay all necessary expenses associated with providing adequate and efficient service. However, Creekside Utility may need to consider a rate increase in the future if operating expenses or capital project expenses increase. Mr. Bell testified Creekside Utility may find it necessary to impose other non-recurring charges in the future, such as a Connection Charge, Disconnection Charge, and Bad Check Charge. If so, Mr. Bell recommended that Creekside Utility submit a revised tariff for the Commission's consideration as part of its thirty-day filing procedures.

Mr. Bell testified concerning the wastewater treatment center. Specifically, Mr. Bell testified Creekside Utility does not provide electric power to the Orenco AX20 wastewater treatment systems shared by adjacent landowners. Rather, electric power is provided by one of the two customers to whom it provides service. It has been the past practice to provide a \$25.00 annual rebate to the customer providing the electric power. Mr. Bell testified this practice is not common, but recommended the practice be continued given the necessity of having electric power and the fact that customers provide it at their own cost. Mr. Bell recommended that this \$25.00 annual rebate be identified on the Creekside Utility's tariff.

Mr. Bell testified it is the OUCC's understanding that CHA Utilities did not have its own approved rules and regulations on file with the Commission. Mr. Bell therefore recommended that unless and until Creekside Utility submits its own rules and regulations for consideration by the Commission, Creekside Utility rely on the Commission's rules and regulations for sewer utility service, as provided in 170 IAC 8.5.

Mr. Bell testified that he does not have any concerns as to whether the public convenience and necessity require the rendering of the proposed service in the proposed rural area by this particular sewage disposal company. The forty existing residential customers are currently receiving sewage disposal service and need to continue receiving sewage disposal service in the future. Mr. Bell testified Creekside Utility should be granted approval by the Commission to receive transfer of the CTA from CHA Utilities. He believes said it is in the public interest that the Commission approve the requested relief.

**4. Response to November 5, 2010 Docket Entry.** Creekside Utility provided responses to the Presiding Officers' questions contained in the November 5, 2010 Docket Entry on November 24, 2010. Creekside Utility identified the known liabilities to be assumed by Creekside Utility as unpaid property taxes on Outlot C (two years in arrears) in the amount of \$1,961.20. With respect to rates and charges collected by CHA Utilities in excess of that authorized by the Commission, Creekside Utilities explained it does not believe CHA Utilities has any available capital with which to make refunds to customers. As a result, CHA Utilities' previous imposition of unauthorized rates is one factor, among many, that makes the transfer of sewer assets to Creekside Utility consistent with the public interest.

In response to the Presiding Officers' question concerning the Indiana State Department of Health's requirement for "set aside" property, Creekside Utility responded by stating to its knowledge, no "set aside" property has been required by the Indiana State Department of Health in the previously permitted design. Creekside Utility's response was based on documentation it obtained from CHA Utilities. Further, Creekside Utility has requested from CHA Utilities all system design specifications and drawings, as well as correspondence with State officials.

Creekside Utility explained the existing and proposed rates do not fully fund the eventual replacement of the subsurface drip irrigation ("SDI") lines. Prior to replacing the drip field infrastructure, two options will be explored: (1) replacing the drip lines with a chamber-based system, which should have a significantly longer lifetime and dramatically reduce the operations and maintenance costs associated with the community dispersal field; and (2) retrofitting residential treatment systems with local (private) dispersal fields. Creekside Utility explained option two would likely be funded by individual homeowners.

In addition, Creekside Utility explained it is in the process of retaining an expert to review the system and determine the estimated life of certain components and an estimated replacement cost. To the extent Creekside Utility determines it will need to replace costly system components, such as the SDI system, it may consider a rate increase to cover the expected capital cost of such a project. Creekside Utility's members also may determine it to be preferable to recover the costs through a special assessment authorized by the CNHA, rather than adjusting utility rates for a one-time expense.

Creekside Utility also explained that once it assumes control of the sewer utility, the SDI lines will be back flushed and cleaned manually on a quarterly basis. There currently is no means by which the SDI lines can be backflushed automatically. To Creekside Utility's knowledge, the emitters have not been recently checked for clogging.

With respect to alarms, Creekside Utility stated restoration of the audible and visual alarms, as well as Vericomm analog phone line connections, is being done as part of the initial residential site maintenance currently underway. Further, Creekside Utility also has instructed Mr. Cheesman to adjust risers to grade level, repair decapitated air vents, and replace (and secure) broken/faulty lids. These initial repairs are being funded by a special assessment authorized by the CNHA. Finally, Creekside Utility explained that once transfer of the sewer system is approved, it intends to stock parts needed for critical repairs to ensure maintenance of the utility assets.

**5. Commission Discussion and Findings.** Based on the evidence presented in this Cause, the Commission finds Creekside Utility has the lawful power and authority to own and operate sewage disposal and treatment assets. Also, Creekside Utility has demonstrated it possesses the financial, technical, and managerial ability to install, commence, and maintain wastewater utility service in the Creekside Subdivision. According to the evidence, Creekside Utility will operate the sewer utility in the same manner as CNHA, which has effectively managed it since CHA Utilities abandoned its operation in 2009. The Commission notes Creekside Utility has hired a qualified monthly service provider to operate the sewer utility on a daily basis. The Commission also finds Creekside Utility has the financial capability to continue operating the sewer utility.

The Commission also notes CHA Utilities effectively abandoned the sewer utility located in the Creekside Subdivision in 2009, and the provision of sewer service to the residents of Creekside Subdivision is necessary. Accordingly, the public convenience and necessity would be served by transferring to Creekside Utility all of CHA Utilities' sewer utility assets, as set forth in the Asset Purchase Agreement, which the Commission approves in its entirety. The Commission further approves the transfer to Creekside Utility of all operating rights of CHA Utilities, including the CTA granted to CHA Utilities in Cause No. 42244. The Commission approves Creekside Utility's rendition of sewage disposal service within the area now served by CHA Utilities pursuant to Indiana Code § 8-1-2-83 and Indiana Code § 8-1-2-89.

Creekside Utility also seeks Commission approval of the adoption by Creekside Utility of CHA Utilities' rates and charges. According to the evidence presented, the proposed flat monthly rate of \$41.00 will be sufficient at this time for Creekside Utility to pay all necessary expenses associated with providing adequate and efficient sewer service. Thus, Creekside Utility is authorized to charge the proposed flat monthly rate of \$41.00 for sewer utility service.

The Commission also approves the continued use of a \$25.00 annual rebate to the resident providing electrical power to the system. However, Creekside Utility should identify this \$25.00 annual rebate on its tariff. If, in the future, Creekside Utility finds it necessary and appropriate to impose other non-recurring charges, including charges to fund the eventual replacement of the SDI line, Creekside Utility should submit a revised tariff for consideration by the Commission as part of its thirty-day filing procedures.

With regard to rules and regulations, the Commission notes CHA Utilities did not have its own approved rules and regulations on file with the Commission. The Commission finds Creekside Utility should rely on the Commission's rules and regulations for sewer utility service as provided in 170 IAC 8.5.

The Commission recognizes that the Chapter 11 Bankruptcy proceedings of Mennen Builders, Inc., filed in the Northern District of Indiana on August 5, 2010, Cause No. 10-40805, may present obstacles with respect to conveying title of the drip field to Creekside Utility. The Commission hereby orders CHA Utilities and its member Mr. Mennen to take all reasonable, diligent, and timely steps to obtain approval of the conveyance of title to the drip field to Creekside Utility from the Bankruptcy Court and to cooperate in the transfer of assets to Creekside Utility.

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

1. The Asset Purchase Agreement executed between Creekside Utility and CHA Utilities shall be and hereby is approved in its entirety.

2. CHA Utilities is hereby authorized to transfer all of its assets to Creekside Utility as set forth in the Asset Purchase Agreement and to take all other actions necessary to effectuate such a transfer.

3. Creekside Utility is hereby granted all operating rights of CHA Utilities, including without limitation a CTA to provide service to the area previously served by CHA Utilities.

4. Creekside Utility's rendition of sewage disposal service within the area now served by CHA Utilities shall be and is hereby approved.

5. Creekside Utility is hereby authorized to use the rates and charges as provided in this Order.

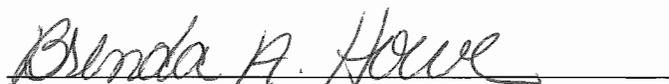
6. Creekside Utility shall file with the Commission's Water/Sewer Division a schedule of rates and charges, consistent with this Order.

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

**ATTERHOLT, BENNETT, LANDIS, AND MAYS, CONCUR; ZIEGNER ABSENT:**

**APPROVED: MAR 30 2011**

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



**Brenda A. Howe**  
**Secretary to the Commission**