

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

JOINT PETITION OF THE TOWN OF)
CUMBERLAND, INDIANA, GEM)
UTILITIES, INC. AND GEM WATER, INC.)
FOR APPROVAL OF THE TRANSFER OF)
WATER AND SEWER UTILITY ASSETS,)
FACILITIES AND CERTIFICATES OF)
TERRITORIAL AUTHORITY, INITIAL)
MUNICIPAL RATES AND CHARGES FOR)
WATER SERVICE, AND ISSUANCE OF)
WATERWORKS REVENUE BONDS)

CAUSE NO. 43892

APPROVED: JUN 30 2010

BY THE COMMISSION:

Carolene R. Mays, Commissioner
Angela Rapp Weber, Administrative Law Judge

On April 26, 2010, the Town of Cumberland, Indiana (“Cumberland”) and GEM Utilities, Inc. and GEM Water, Inc. (collectively, “GEM Utilities”) filed a Verified Joint Petition (“Verified Petition”) initiating this Cause. The Joint Petition requested that the Indiana Utility Regulatory Commission (“Commission”) approve (1) the transfer of GEM Utilities’ water and wastewater assets, facilities, and certificates to Cumberland; (2) the use of GEM Utilities’ existing rates and charges by Cumberland; and (3) the issuance of waterworks revenue bonds by Cumberland to fund the purchase of GEM Utilities’ water assets and facilities. On May 3, 2010, Cumberland filed the Verified Direct Testimony and Exhibits of its witnesses D. Jeffrey Sheridan and Gregory T. Guerrettaz.

On May 10, 2010, the Commission published legal notice of a Prehearing Conference for June 2, 2010 at 1:30 p.m. On May 21, 2010, Cumberland filed with the Commission a Motion to Vacate Prehearing Conference and Establish Procedural Schedule (“Motion”). The Motion explained that Cumberland and the Office of the Utility Consumer Counselor (“OUCC”) had agreed to a procedural schedule. As a result, the Presiding Officers issued a Docket Entry on May 25, 2010, which established a procedural schedule in this matter. Pursuant to the May 25, 2010 Docket Entry, the OUCC filed the Prefiled Testimony of Charles E. Patrick on June 3, 2010 and Cumberland filed the Verified Rebuttal Testimony of Gregory T. Guerrettaz on June 9, 2010.

Pursuant to notice as required by law and the May 25, 2010 Docket Entry, an Evidentiary Hearing in this Cause was scheduled for June 15, 2010 at 10:00 a.m. in Room 222, 101 West Washington Street, Indianapolis, Indiana. However, on June 14, 2010, GEM Utilities, Cumberland, and the OUCC filed with the Commission a Joint Stipulation and Settlement Agreement (“Settlement Agreement”). Also on June 14, 2010, the OUCC filed the Testimony of Charles E. Patrick in support of the Settlement Agreement. Therefore, the Presiding Administrative Law Judge continued on the record the June 15, 2010 Evidentiary Hearing to

June 23, 2010 to commence at 10:00 a.m. in Room 224. Cumberland, GEM Utilities, and the OUCC were present and participated. The Verified Testimony and Exhibits of Cumberland, GEM Utilities, and the OUCC were admitted into the record without objection. No members of the general ratemaking public appeared or sought to testify.

The Commission, having considered the evidence in this Cause, now finds as follows:

1. **Notice and Commission Jurisdiction.** Due, legal, and timely notice of these proceedings was given and published as required by law. Although GEM Utilities has withdrawn from Commission jurisdiction pursuant to Ind. Code § 8-1-2.7 *et seq.*, it is a public utility as defined in Ind. Code § 8-1-2-1 and is therefore subject to the Commission's jurisdiction with respect to certain matters. Cumberland proposes to acquire the water and sewer assets, facilities, and certificates of GEM Utilities and thereafter operate such assets as part of Cumberland's municipally-owned utility. Accordingly, the Commission has jurisdiction over the parties and subject matter of this Cause pursuant to Ind. Code § 8-1-2-83, Ind. Code § 8-1-2-89(j), Ind. Code § 8-1.5-2-19, and Ind. Code § 8-1.5-3-8.

2. **Joint Petitioners' Characteristics.** Both GEM Utilities, Inc. and GEM Water, Inc. are for-profit Indiana corporations engaged in the business of providing sewer and water utility service in Hancock County, Indiana. GEM Utilities, Inc. currently serves 854 sewer customers and GEM Water, Inc. serves 542 water customers. Collectively, GEM Utilities owns and operates various equipment, materials, supplies, land, land rights, and other assets that are used and useful in providing sewer and water service to their customers. Cumberland proposes to acquire such assets. Cumberland is a municipality located in Hancock and Marion Counties in Indiana. Cumberland currently provides municipal sewage works services to its inhabitants. However, Cumberland does not currently provide water service.

3. **Relief Requested.** GEM Utilities and Cumberland seek the Commission's approval for: (1) the transference of GEM Utilities' sewer and water assets from GEM Utilities to Cumberland; (2) the use by Cumberland of GEM Utilities' existing rates and charges; and (3) the issuance by Cumberland of revenue bonds in an aggregate principal amount not to exceed \$2,100,000 to consummate the proposed purchase of the water assets.

4. **Evidence of Parties.** According to the Verified Petition, Cumberland authorized condemnation proceedings in order to acquire the right to own and operate all utility assets of GEM Utilities, including the right to provide sewer and water service to existing and anticipated customers. The Verified Petition states that GEM Utilities and Cumberland ultimately agreed to a voluntary purchase of GEM Utilities' assets by way of an asset purchase agreement ("Agreement"). The Agreement provides for the transfer by GEM Utilities to Cumberland of substantially all utility-related assets and rights to provide service to its customers.

Cumberland offered the testimony and exhibits of its witnesses, Mr. Sheridan and Mr. Guerrettaz. Mr. Sheridan first described the relief requested by Cumberland and GEM Utilities. He testified that Cumberland's purchase of GEM Utilities will broaden the scope of services and increase control of those services that Cumberland is able to provide to its residents. The Agreement, which was attached as Petitioner's Exhibit 3, details the terms and conditions of the

sale. Mr. Sheridan explained that generally, Cumberland proposes to pay \$3,900,000 for the sewer assets and \$2,100,000 for the water assets. According to Mr. Sheridan, a portion of the water and sewer assets (\$2,400,000 for sewer and \$1,200,000 for water) will be funded by the State Revolving Fund (“SRF”) and cash-on-hand. The remainder of the purchase price (\$1,500,000 for sewer and \$900,000 for water) will be paid to GEM Utilities in the form of junior bonds. The payment of the junior bonds will be made as new customers connect to the water and sewer systems.

Mr. Sheridan explained that Cumberland hired Commonwealth Engineers, Inc. (“Commonwealth”) to evaluate GEM Utilities’ utility assets. A copy of Commonwealth’s evaluation report of GEM Utilities’s sewer and water assets was attached to Mr. Sheridan’s testimony. In its report, Commonwealth listed the current replacement value for the water assets as \$4,964,300 and the original cost as \$3,553,708. The Commonwealth study estimated the depreciated replacement value of \$3,425,860 and an original cost depreciated amount of \$2,452,295 for the water assets by depreciating those assets over a twelve-year period. The Commonwealth report further stated that the replacement value for the wastewater assets is \$7,330,912 and the original cost is \$6,422,143. Mr. Sheridan also provided a timetable demonstrating the tasks that would need to be completed in order for Cumberland to complete the purchase and a draft of a proposed agreement with the Hancock County Regional Water & Sewer District to provide sewer service in GEM Utilities’ service territory.

Mr. Sheridan stated that in his opinion, the Agreement is fair, reasonable, and in the public interest. Also, Cumberland will complete the necessary legal steps to complete the transaction detailed by the Agreement. Mr. Sheridan testified that Cumberland is prepared to operate the acquired utility assets once the transaction is completed. He explained that Cumberland owns a sewage system and therefore has experience with utility ownership and operation. He concluded by describing the benefits of municipal ownership.

Mr. Guerrettaz described his experience in dealing with municipal utilities, the issuance of bonds, utility acquisitions, and the setting of rates. Based on his experience and the analysis he completed in this case, Mr. Guerrettaz believed Cumberland’s proposed acquisition and future operation of GEM Utilities’ sewer and water assets to be reasonable. He cited as support for his assertion Cumberland’s tax-exempt status, non-profit status, ability to obtain low-cost financing and grants, and economies of scale achieved as a result of the transaction.

Mr. Guerrettaz testified concerning the initial rates and charges for Cumberland’s proposed water service and described the amount of long-term debt Cumberland must issue in waterworks revenue bonds to consummate the purchase of the water assets. Mr. Guerrettaz provided a copy of his water and sewer rate studies as Exhibit 8 and Exhibit 9, respectively, which demonstrated that the rates currently utilized by GEM Utilities, if authorized for Cumberland, would be sufficient to fund the debt and cover the ongoing operations of the utilities. In addition, he provided drafts of the sewer and water bond ordinances and sewer and water rate ordinances that would be adopted by Cumberland prior to closing. Mr. Guerrettaz noted, however, that he did not include the \$900,000 junior bonds in his calculations. He explained that these bonds will be funded from a portion of the system development charges collected by Cumberland as a result of future new connections to its system.

Mr. Guerrettaz said that Cumberland will use cash-on-hand and issue \$5,200,000 in long-term debt to fund the purchase of GEM Utilities. Cumberland will issue \$1,800,000 in sewage works revenue bonds and \$1,000,000 in water works revenue bonds to SRF. In addition, Cumberland will issue \$1,500,000 in junior sewage works revenue bonds and \$900,000 in junior water works revenue bonds, which Cumberland intends to sell at a competitive sale. Mr. Guerrettaz stated, however, that GEM Utilities agreed to bid on these bonds at an annual interest rate of 2.2% for twenty-one years. According to Exhibit 10 and Exhibit 11, the interest rate on the junior bonds will decrease to 0% for years twenty-two to forty.

In its prefiled testimony, OUCC witness Mr. Patrick first provided an overview of Cumberland's and GEM Utilities' proposal, including financing, and the utility system. In addition, Mr. Patrick presented several concerns regarding the proposed purchase and transfer of GEM Utilities' assets. Mr. Patrick testified that the OUCC was concerned that the purchase price of the water and wastewater assets included a considerable amount for contributions in aid of construction ("CIAC"). Mr. Patrick deducted net CIAC from net utility property in service, which reduced the value of GEM Utilities' water assets by \$1,534,644. Subtracting CIAC from the valuation of the wastewater assets resulted in a negative value of \$305,890. He stated that acquisition adjustments should be recorded for the water and wastewater transactions.

Mr. Patrick also noted a discrepancy concerning the valuation of GEM Utilities' sewer and water assets. He testified regarding a difference in what the owner represented as the value to Commonwealth and the value determined by examining GEM Utilities' general ledger. The net difference, according to Mr. Patrick, is \$131,767.

Mr. Patrick expressed his concern that GEM Utilities' ratepayers would be paying twice for utility assets. He stated that since much of GEM Utilities' assets were contributed by developers, the cost for the assets was included in the cost of the lots. Therefore, when paying for the financing of the purchase in rates, ratepayers will be paying twice for GEM Utilities' utility assets. Also, Mr. Patrick stated that Cumberland is assuming a substantial liability for prepaid connection fees and customer deposits because it has to fund (or refund) these fees since GEM Utilities collected them previously.

In his rebuttal, Mr. Guerrettaz stated that Cumberland does not intend to seek an acquisition adjustment or earn a return on its plant. Instead, Cumberland only requests authority to use GEM's existing rates and charges, which should be sufficient to cover the proposed debt service payments to the SRF Program and the ongoing expenses of the utility. With respect to the issue of prepaid connection fees and customer deposits, Mr. Guerrettaz explained that the prepaid connection fees were actually recoupment fees that must be collected from new customers. Thus, per agreement, Cumberland will collect such fees from future customers connecting to mains installed by developers. Mr. Guerrettaz also explained that the customer deposits were a relatively minor obligation that would be retained by GEM Utilities and would not be an ongoing obligation to Cumberland.

With respect to the discrepancy in the valuation the GEM Utilities' assets, Mr. Guerrettaz stated that he is not concerned. He added that the difference is not significant and will not be an

ongoing issue. According to Mr. Guerrettaz, Cumberland will record the correct amount of utility plant in service on its books.

Finally, Mr. Guerrettaz explained the status of the proposed transaction and presented exhibits demonstrating Cumberland's ability to finance and close on the proposed purchase of the sewer and water assets. Specifically, Mr. Guerrettaz presented a timetable of completed tasks, executed sewer and water bond and rate ordinances, an executed Agreement with the Hancock Regional Water & Sewer District, and the Approved Notice to Transfer NPDES Permit from GEM Utilities to Cumberland. He testified that the transfer is reasonable and in the public interest.

5. Settlement Agreement and Testimony. The OUCC filed the Settlement Testimony of Charles E. Patrick. Mr. Patrick stated that Mr. Guerrettaz's rebuttal testimony addressed his concerns regarding the purchase price, the unpaid connection fees and customer deposits, and the discrepancy in the valuation of the utility assets. However, Mr. Patrick disagreed with Mr. Guerrettaz's assertion that with respect to acquisition adjustments, it is incorrect to rely on ratemaking principles for investor-owned utilities. Mr. Patrick stated that municipalities may recover a purchase price in debt service, which is borne by the ratepayers. A difference in the purchase price and net original cost results in an acquisition adjustment on the books even if a utility is not seeking favorable ratemaking treatment.

Nonetheless, Mr. Patrick stated that he is satisfied that ratepayers will not be paying twice for a portion of GEM Utilities' assets because the junior bonds will be paid when new customers connect to the system through system development charges. Mr. Patrick also noted that the purchase price is significantly less than the amounts listed by Commonwealth's evaluations. He added that the SRF funding of this transaction is on very favorable terms and that the transfer is the result of an arm's-length negotiation. Mr. Patrick stated that with respect to these acquisitions, Cumberland will record the accompanying net CIAC with the transfer of depreciated utility plant in service. Thus, the annual depreciation expense will decrease, possibly reducing revenue requirements. Mr. Patrick believed it was in the public interest for the Commission to approve the relief requested by GEM Utilities and Cumberland in this Cause.

The Settlement Agreement reflects the agreement of the OUCC and GEM Utilities and Cumberland that the request to transfer the sewer and water assets from GEM Utilities to Cumberland should be approved. In addition, the settling parties agreed that Cumberland should be authorized to issue waterworks revenue bonds in an amount not to exceed \$2,100,000 for the purpose of consummating the sale. Finally, the parties agreed that Cumberland should be authorized to continue using the existing rates and charges of GEM Utilities.

6. Discussion and Findings. GEM Utilities and Cumberland requested that the Commission approve the (1) transfer of GEM Utilities' water and wastewater assets, facilities, and certificates to Cumberland; (2) the use of GEM Utilities' existing rates and charges by Cumberland; and (3) the issuance of waterworks revenue bonds by Cumberland in the amount of \$2,100,000 to fund the purchase of GEM Utilities' water assets and facilities.

The Commission begins with the general statement that 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.” *Citizens Action Coalition*, 664 N.E.2d at 406. Examinations of the public interest may include the impact of a given decision on customers of various classes, the interests of the utility and its ratepayers, and the impact on the State. The interest of the State may be “more comprehensive and take a longer range view than any of the parties’ interests.” *Nextel West Corp. v. Ind. Util. Regulatory Comm’n*, 831 N.E.2d 134, 156–57 (Ind. App. 2005.)

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, we must determine whether the evidence in this Cause sufficiently supports the conclusions that the Settlement Agreement is reasonable, just, and consistent with the purpose of Indiana Code § 8-1-2, and that such agreement serves the public interest.

As set forth below, We find that approval of the Settlement Agreement, a copy of which is attached hereto, is in the public interest, but with modifications. First, Ind. Code § 8-1-2-83 requires the Commission to review and appropriately approve the transfer of utility assets from a public utility to another entity. In addition, Ind. Code § 8-1-2-89(j) provides that sewer assets may be sold or transferred to a municipality if the municipality is prepared to offer continuous and comparable service and the terms of the sale are reasonable. The Commission finds that based on the evidence presented, GEM Utilities transfer of water and wastewater assets to Cumberland is in the public interest, is reasonable, and should be approved. However, Ind. Code § 8-1-2-89(j) states that once the Commission approves the transfer of sewer assets and the transaction is completed, the Commission “shall have no control over the sewage disposal service henceforth rendered by such municipality as a municipally owned utility” Accordingly, the transfer of GEM Utilities’ sewer CTA to Cumberland is not necessary.

Cumberland and GEM Utilities also request approval to issue long-term debt in the amount of \$2,100,000 to finance the purchase of GEM Utilities’ water assets. According to the evidence, Commonwealth listed the current depreciated replacement value for GEM Utilities’ water assets as \$3,425,860 and the original cost depreciated as \$2,452,296, and the parties agreed that \$2,100,000 is an appropriate price to pay for the water assets. However, Commonwealth’s valuation report and the agreed-to purchase price include value for contributed plant. If the Commission approves financing for the entire \$2,100,000, included in rates would be an amount for debt service that would include the purchase of contributed property, which should not be allowed when determining appropriate and just rates.

In *City of South Bend v. The Users of the Sewage Disposal Facilities of Clay Utilities, Inc.*, 402 N.E.2d 1267 (Ind. Ct. App. 1980), the City of South Bend (“City”) appealed the Public Service Commission’s (“PSC”), this Commission’s predecessor, determination that lease rental payments were unfair and unreasonable. The lease payment to be paid by the City to Clay Utilities for water and sewage facilities was based on a purchase price that the City argued was the utility plant’s fair market value. *Id.* at 1271. The PSC determined the lease payments to be unfair and unreasonable because of the inclusion of CIAC in the price. *Id.* at 1271–72.

The Court of Appeals in *South Bend* discussed the practice in Indiana of deducting CIAC when determining the rate base for an investor-owned utility. The Court of Appeals also explained that property included in rate base is that property on which the utility may earn a return. CIAC is excluded from rate base because the utility does not pay for such property, and the ratepayers should not be required to pay rates that allow the utility to earn a return on property that has been contributed. *Id.* The City argued that since municipal utilities have no rate base and operate on a cash-needs basis, this treatment of CIAC is not relevant. However, the Court of Appeals rejected this argument. *Id.* at 1273.

The lease payments, according to the Court of Appeals, are payable from rates and charges collected from ratepayers by the municipality, and rates must be sufficient to pay for expenses associated with the leased facilities. *Id.* The Court noted that an investor-owned utility essentially looks to itself for funding, while municipalities rely on ratepayers, “the very persons who directly or indirectly made the contributions in aid of construction” and can charge whatever is necessary. *Id.* The Court affirmed the PSC’s determination regarding the lease payments and state that “the lease-purchase agreements negotiated by the [City] would be repugnant to a private investor, and they are likewise repugnant to the users who must pay the negotiated price.” *Id.* at 1275.

In this Cause, debt service to fund the purchase of GEM Utilities’ water assets, like payments pursuant to a lease-purchase agreement, would be included in rates and paid by Cumberland’s ratepayers. Therefore, the inclusion of CIAC in the purchase price and long-term debt issuance is inappropriate. Accordingly, and as reflected below, the Commission has modified the Commonwealth study to include the value of CIAC as a reduction to the total value of water assets. The result is a valuation of \$909,186.

Description	Exhibit 9, Exhibit A Balance Sheet	2009 Asset Value – Table 3	Percentage increase in value
Land	Not provided	\$85,000	
Raw Water Supply	Not provided	107,000	
Water Treatment Plant	Not provided	717,500	
Elevated Tank	Not provided	375,000	
Distribution Mains	Not provided	3,679,800	
Original Cost of Plant	\$ 3,086,566		
Commonwealth's Value		4,964,300	60.84%
Less: Accumulated Depreciation	546,095	878,339	60.84%
Value Before CIAC	2,540,471	4,085,961	
Less: CIAC - Net	1,975,115	3,176,775	60.84%
Total Value	\$ 565,356	\$ 909,186	

In determining the appropriate level of CIAC to be considered in the valuation, the Commission finds that the original cost of the plant assets has increased by 60.84%. Therefore, the Commission increased net CIAC recorded on the books by the same amount because a direct correlation exists between the value of the assets contributed and their associated CIAC. The Accumulated Depreciation amount calculated by Commonwealth has been reduced to \$878,339 from \$1,538,440. This amount has been modified because the Commonwealth study calculated Accumulated Depreciation as if all of the assets were placed in service in 1997. Accordingly, the value for Accumulated Depreciation was 182% higher than the amount recorded on the books as compared to the 60.84% increase for the associated assets. Therefore, the Accumulated Depreciation amount recorded on the books of \$546,095 has also been increased by 60.84%, resulting in an Accumulated Depreciation amount at market value of \$878,339.

Further, in considering the appropriate level of long-term debt to fund the purchase of the water assets, the Commission finds that it would be appropriate to add \$200,000 to the utility value for the cost of issuance as indicated in Exhibit 9E attached to Mr. Guerretaz's direct testimony. Therefore, the Commission authorizes Cumberland to issue waterworks revenue bonds in the amount of \$1,109,186 to consummate the purchase of GEM Utilities' water assets by Cumberland. Finally, the Commission finds that GEM Utilities' current rates and charges for water service will provide sufficient revenues in accordance with Ind. Code § 8-1.5-3-8. Therefore, Cumberland is authorized to use GEM Utilities' existing rates and charges for water service.

The parties agree that the Settlement Agreement should not be used as precedent in any other proceeding or for any other purpose, except to the extent necessary to implement or enforce its terms. However, with regard to future citation of the Settlement Agreement, the Commission finds that our approval herein should be construed in a manner consistent with our finding in *Richmond Power & Light*, Cause No. 40434 (*Ind. Util. Reg. Comm'n*, March 19, 1997).

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

1. The Joint Stipulation and Settlement Agreement is hereby approved, as modified by Paragraph 6, and the terms and conditions thereof are incorporated herein as part of this Order.

2. The Commission approves the transfer of the assets from GEM Utilities, Inc. and GEM Water, Inc. to the Town of Cumberland, Indiana.

3. The Commission authorizes the issuance of long-term debt in an amount of \$1,109,186 to consummate the proposed purchase of the water assets by Cumberland from GEM Water, Inc.

4. The Commission approves the use by Cumberland of the existing rates and charges of GEM Water, Inc.

5. Cumberland shall file a new tariff with the Water/Sewer Division of this Commission reflecting its implementation of the rates and charges authorized herein. These rates are effective for applicable water service on and after approval of the tariff by the Water/Sewer Division.

6. In accordance with Ind. Code § 8-1-2-70, Cumberland shall pay the following itemized charges within twenty (20) days from the date of this Order to the Secretary of this Commission, as well as any additional costs which were or may be incurred in connection with this Cause:

Commission Charges:	\$1,000.00
OUCG Charges:	\$2,000.00
Legal Advertising Charges:	<u>\$ 177.43</u>
TOTAL:	\$3,177.43

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

HARDY, ATTERHOLT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: JUN 30 2010

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



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

STATE OF INDIANA
INDIANA UTILITY REGULATORY COMMISSION

FILED June 14, 2010 INDIANA UTILITY REGULATORY COMMISSION
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JOINT PETITION OF THE TOWN OF)
CUMBERLAND, INDIANA, GEM UTILITIES,)
INC. AND GEM WATER, INC. FOR)
APPROVAL OF THE TRANSFER OF WATER)
AND SEWER UTILITY ASSETS, FACILITIES) CAUSE NO. 43892
AND CERTIFICATES OF TERRITORIAL)
AUTHORITY, INITIAL MUNICIPAL RATES)
AND CHARGES FOR WATER SERVICE, AND)
ISSUANCE OF WATERWORKS REVENUE)
BONDS)

JOINT STIPULATION AND SETTLEMENT AGREEMENT

This Joint Stipulation and Settlement Agreement ("Settlement Agreement") is entered into this 14th day of June, 2010, by and between the Town of Cumberland, Indiana ("Cumberland"), GEM Utilities, Inc. and GEM Water, Inc. (collectively, "GEM"), and the Office of the Utility Consumer Counselor ("OUCC"), who stipulate and agree for purposes of settling all matters in this Cause that the terms and conditions set forth below represent a fair and reasonable resolution of all issues in this Cause, subject to their incorporation in a final order of the Indiana Utility Regulatory Commission ("Commission").

Terms and Conditions of Settlement Agreement

1. **Requested Relief.** On April 26, 2010, Cumberland and GEM filed their Joint Verified Petition with the Commission requesting authority: (i) to transfer GEM's sewer and water assets to Cumberland; (ii) for Cumberland to continue to use GEM's existing rates and charges for water service; and (iii) for Cumberland to issue waterworks revenue bonds in a principal amount not to exceed \$2,100,000 to consummate the proposed purchase of GEM's water assets.

2. **Prefiled Evidence.** On May 3, 2010, Petitioners prefiled the Direct Testimony and Exhibits of D. Jeffrey Sheridan and Gregory T. Guerrettaz. The OUCC prefiled the Direct Testimony and Exhibits of Charles E. Patrick on June 3, 2010. On June 9, 2010, Petitioners

prefiled the Rebuttal Testimony and Exhibits of Gregory T. Guerrettaz. The OUCC filed the Settlement Testimony of Charles E. Patrick on June 11, 2010.

3. **Settlement.** Through analysis, discussion, and negotiation, as aided by their respective technical staff and experts, Cumberland, GEM, and the OUCC have now agreed on terms and conditions set forth herein that resolve all issues between them in this Cause.

4. **Transfer of Sewer and Water Assets.** The parties stipulate that Joint Petitioners should be authorized to transfer GEM's sewer and water assets to Cumberland. Upon transfer, Cumberland shall provide sewer and water service to GEM's customers.

5. **Issuance of Debt and Rates and Charges for Water Service.** The parties agree that Cumberland should be authorized to issue waterworks revenue bonds in a total principal amount of \$2,100,000 for the purpose of consummating the purchase of GEM's water assets. The parties further agree that Cumberland should continue to use GEM's existing rates and charges for water service.

6. **Admissibility and Sufficiency of Evidence.** The parties hereby stipulate that the prefiled testimony and exhibits of Joint Petitioners and the OUCC should be admitted into the record without objection or cross examination by either party. The parties agree that such evidence constitutes substantial evidence sufficient to support the Settlement Agreement and provides an adequate evidentiary basis upon which the Commission can make all findings of fact and conclusions of law necessary for the approval of this Settlement Agreement as filed.

7. **Non-Precedential Effect of Settlement.** The parties agree that the facts in this Cause are unique and all issues presented are fact specific. Therefore, the Settlement Agreement shall not constitute nor be cited as precedent by any person or deemed an admission by any party in any other proceeding except as necessary to enforce its terms before the Commission or any court of competent jurisdiction. This Settlement Agreement is solely the result of compromise in the settlement process, except as provided herein, is without prejudice to and shall not constitute a waiver of any position that either party may take with respect to any issue in any future regulatory or non-regulatory proceeding.

8. **Authority to Execute.** The undersigned have represented and agreed that they are fully authorized to execute the Settlement Agreement on behalf of their designated clients who will hereafter be bound thereby.

9. **Approval of Settlement Agreement in its Entirety.** As a condition of this settlement, the parties specifically agree that if the Commission does not approve this Joint Stipulation and Settlement Agreement in its entirety and incorporate it into the Final Order as provided above, the entire Settlement Agreement shall be null and void and deemed withdrawn, unless otherwise agreed to in writing by the parties. The parties further agree that in the event the Commission does not issue a Final Order in the form that reflects the Agreement described herein, the matter should proceed to be heard by the Commission as if no settlement had been reached unless otherwise agreed to by the parties in a writing that is filed with the Commission.

10. **Proposed Order.** The parties have agreed to the form and content of a proposed order, a copy of which is attached hereto as Exhibit A. The parties agree to file the proposed order simultaneously herewith.

11. **No Other Agreements.** There are no agreements in existence between the parties relating to the matters covered by this Settlement Agreement that in any way affect this Settlement Agreement.

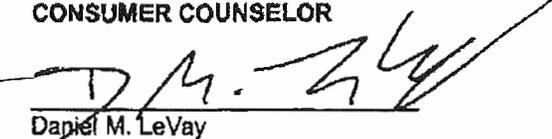
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TOWN OF CUMBERLAND, INDIANA



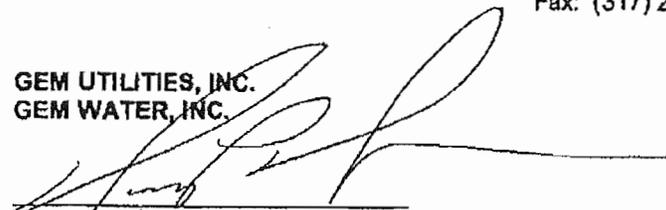
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**GEM UTILITIES, INC.
GEM WATER, INC.**

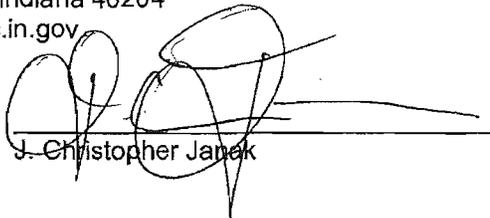


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Indianapolis, IN 46204
(317) 637-1321
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Joint Stipulation and Settlement Agreement" was served upon the following by electronic mail this 14th day of June, 2010:

Dan LeVay
Indiana Office of Utility Consumer Counselor
National City Center
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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

JOINT PETITION OF THE TOWN OF)
CUMBERLAND, INDIANA, GEM)
UTILITIES, INC. AND GEM WATER, INC.)
FOR APPROVAL OF THE TRANSFER OF) CAUSE NO. 43892
WATER AND SEWER UTILITY ASSETS,)
FACILITIES AND CERTIFICATES OF)
TERRITORIAL AUTHORITY, INITIAL) APPROVED:
MUNICIPAL RATES AND CHARGES FOR)
WATER SERVICE, AND ISSUANCE OF)
WATERWORKS REVENUE BONDS)

BY THE COMMISSION:

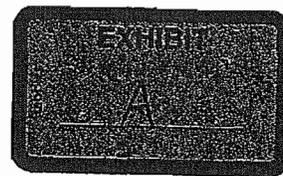
Carolene Mays, Commissioner
Angela Weber, Administrative Law Judge

On April 26, 2010, the Town of Cumberland, Indiana ("Cumberland") and GEM Utilities, Inc. and GEM Water, Inc. (collectively, "GEM Utilities") filed a Verified Joint Petition initiating this Cause. On May 3, 2010, Cumberland filed the Verified Direct Testimony and Exhibits of its witnesses, D. Jeffrey Sheridan and Gregory T. Guerrettaz.

On May 10, 2010, the Commission published legal notice of a Prehearing Conference on June 2, 2010, at 1:30 p.m. On May 21, 2010, Cumberland filed with the Commission a Motion to Vacate Prehearing Conference and Establish Procedural Schedule. The Motion explained that Cumberland and the Office of the Utility Consumer Counselor ("OUCC") had agreed to a procedural schedule. Thereafter, the Commission entered its docket entry establishing a procedural schedule for all parties in this matter. On June 3, 2010, the OUCC filed the Prefiled Testimony of Charles E. Patrick. On June 9, 2010, Cumberland filed the Verified Rebuttal Testimony of Gregory T. Guerrettaz. On June 11, 2010, the OUCC filed the Settlement Testimony of Charles E. Patrick.

Pursuant to notice, a public hearing in this Cause was held in Room 222 of the National Center Center, 101 West Washington Street, Indianapolis, Indiana, on June 15, 2010, at 10:00 a.m. Proofs of publication of notice of such public hearing were incorporated by reference into the record and placed in the official files of the Commission. The Joint Petitioners and the OUCC were present and participated. The Verified Testimony and Exhibits of Cumberland, as well as the OUCC, were admitted into the record without objection. No members of the general ratemaking public appeared or sought to testify.

The Commission, having considered the evidence in this Cause, now finds as follows:



1. **Notice and Commission Jurisdiction.** Due, legal, and timely notice of these proceedings was given and published as required by law. Although Joint Petitioner, GEM Utilities, has withdrawn from Commission jurisdiction, it is a public utility as defined in Ind. Code § 8-1-2-1 and is therefore subject to the Commission's jurisdiction as to certain matters. Joint Petitioner, Cumberland, proposes to acquire the water and sewer assets of GEM Utilities and thereafter operate such assets as part of Cumberland's municipally-owned utility. Accordingly, the Commission has jurisdiction over the parties and subject matter of this Cause.

2. **Joint Petitioners' Characteristics.** Both GEM Utilities, Inc. and GEM Water, Inc. are for-profit Indiana corporations engaged in the business of providing sewer and water utility service in Hancock County, Indiana. GEM Utilities, Inc. currently serves 854 sewer customers and GEM Water, Inc. serves 542 water customers. Collectively, GEM Utilities owns and operates various equipment, materials, supplies, land, land rights, and other assets which are used and useful in providing sewer and water service to their customers. Such assets are being acquired by Cumberland.

Joint Petitioner, Cumberland, is a municipality located in Hancock County, Indiana. Consistent with Indiana law, Cumberland initiated the condemnation of GEM Utilities' sewer and water assets for the purposes of operating the same as part of the Cumberland municipal utility services. Cumberland currently provides municipal sewage works services to the inhabitants of the Town but does not currently provide water service. Cumberland has provided evidence demonstrating that it is ready, willing, and able to provide continuous service to GEM Utilities' customers immediately after transfer of the sewer and water assets and proposes to do so under GEM Utilities' existing rates and charges.

3. **Relief Requested.** Joint Petitioners seek, to the extent necessary, the approval of this Commission as to: (i) the transfer of the sewer and water assets from GEM Utilities to Cumberland; (ii) the continuing use by Cumberland of GEM Utilities' existing rates and charges for water service; and (iii) authority for Cumberland to issue waterworks revenue bonds in an aggregate principal amount not to exceed \$2,100,000 to consummate the proposed purchase of the water assets.

4. **Evidence of Parties.** Joint Petitioners have provided us a Verified Petition. In the Verified Petition, the parties stated that Cumberland had authorized condemnation proceedings in order to acquire the right to own and operate all utility assets of GEM Utilities, including the right to provide sewer and water service to existing and anticipated customers. The Verified Petition states that the parties ultimately agreed to a voluntary purchase of GEM Utilities' assets by way of a certain asset purchase agreement ("Agreement") which provides for the transfer by GEM Utilities to Cumberland of substantially all utility-related assets and rights to provide service to its customers.

Cumberland offered the testimony and exhibits of its witnesses, Sheridan and Guerretaz. As exhibits to his prefiled direct testimony, Mr. Sheridan presented copies of the Joint Verified Petition and Agreement. In support of the relief requested in the Verified Petition, Witness Sheridan provided a copy of an evaluation report of GEM's sewer and water assets that had been prepared by an independent engineering firm, Commonwealth Engineers, Inc.

("Commonwealth"). In its report, Commonwealth found that the current replacement value for the water assets was \$4,964,300 and the original gross cost was \$3,553,708. The Commonwealth report further found that the replacement value for the wastewater assets was \$7,330,912 and the original gross cost was \$6,422,143. Mr. Sheridan also provided a timetable demonstrating the tasks that would need to be completed in order for Cumberland to complete the purchase and a draft of a proposed agreement with the Hancock County Regional Water & Sewer District to provide sewer service to GEM Utilities' service territory.

Mr. Guerrettaz described his experience in dealing with municipal utilities, the issuance of bonds, utility acquisitions, and the setting of rates. Based on his experience and the analysis he completed in this case, Mr. Guerrettaz believed Cumberland's proposed acquisition, and future operation of, GEM Utilities' sewer and water assets is reasonable. Witness Guerrettaz testified as to the initial rates and charges for Cumberland's proposed water service and described the amount of long-term debt Cumberland must issue in waterworks revenue bonds to consummate the purchase of the water assets. Mr. Guerrettaz provided a copy of his sewer and water rate studies demonstrating that the rates currently utilized by GEM Utilities, if authorized for Cumberland, would be sufficient to fund the debt and cover the ongoing operations of the utilities. In addition, Witness Guerrettaz provided drafts of the sewer and water bond ordinances and sewer and water rate ordinances that would be adopted by the Town prior to closing.

In its prefiled testimony, OUCC Witness Patrick presented several concerns. Initially, Witness Patrick testified that the OUCC was concerned that the purchase price included an amount for contributions in aid of construction which Cumberland should not earn a return. Next, Witness Patrick explained that the OUCC had concerns that Cumberland was assuming a substantial liability for prepaid connection fees and customer deposits.

In its rebuttal, the Town of Cumberland stated that it had no intentions of seeking an acquisition adjustment or earning a return on its plant. Instead, Cumberland only requests authority to continue with GEM's existing rates and charges which should be sufficient to cover the proposed debt service payments to the SRF Program and the ongoing expenses of the utility. As to the issue of prepaid connection fees and customer deposits, Cumberland Witness Guerrettaz explained that the prepaid connection fees were actually recoupment fees that were owed to parties who had paid to extend sewer and water lines. Thus, the Town would have no ongoing liability other than to simply collect such fees from future connecting customers and paying such fees over to the developer. Mr. Guerrettaz also explained that the customer deposits were a relatively minor obligation (i.e. \$10,300) that would be retained by GEM, and would not be an ongoing obligation to Cumberland.

Finally, Witness Guerrettaz explained the status of the proposed transaction and presented exhibits demonstrating Cumberland's ability to finance and close on the proposed purchase of the sewer and water assets. Specifically, Mr. Guerrettaz presented a timetable of completed tasks, executed sewer and water bond and rate ordinances, an executed Agreement with the Hancock Regional Water and Sewer District, and the (approved) Notice to Transfer NPDES Permit from GEM to Cumberland.

5. **OUCC Settlement Testimony.** The OUCC filed the Settlement Testimony of Charles E. Patrick. The purpose of Mr. Patrick's testimony was to recognize that the concerns raised by the OUCC in its Prefiled Direct Testimony had been adequately addressed by the Rebuttal Testimony of Mr. Guerrettaz. Importantly, Mr. Patrick testified that based upon his review of the evidence as a whole, including the Rebuttal Testimony and Exhibits filed by Mr. Guerrettaz, and taking into account the unique factors of this case, Mr. Patrick believed it was in the public interest for the Commission to approve the relief requested by Joint Petitioners in this Cause.

6. **Overview and Consideration of the Settlement Agreement.** Settlements presented to the Commission are not ordinary contracts between private parties. *United States Gypsum, Inc. v. Indiana Gas Cop.*, 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." *Citizens Action Coalition*, 664 N.E.2d at 406.

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, we must determine whether the evidence in this Cause sufficiently supports the conclusions that the Settlement Agreement is reasonable, just, and consistent with the purpose of Indiana Code § 8-1-2, and that such agreement serves the public interest.

The Settlement Agreement reflects the agreement of the OUCC and Joint Petitioners that Joint Petitioners' request to transfer the sewer and water assets from GEM Utilities to Cumberland should be approved. In addition, the settling parties agreed that Cumberland should be authorized to issue waterworks revenue bonds in an amount not to exceed \$2.1 million for the purpose of consummating the sale, and Cumberland should be authorized to continue using the existing rates and charges of GEM Utilities.

7. **Discussion and Findings.** As we approach this Cause, review the various pleadings that have been filed, consider the Settlement Agreement and evidence that has been offered, we recognize that Ind. Code §§ 8-1-2-83 and 8-1-2-89 provide that the Commission must review and approve the transfer of the utility assets from one entity to another. While we recognize that condemnation proceedings have been authorized in this case, §§ 83 and 89 contain no disclaimer to or obligation to review and approve all transfers of utility assets. As such, and in keeping with our prior decisions on this issue (See, e.g., *Petition of Cedar Lake*, Cause No. 43655), we approve the transfer of the assets of GEM Utilities, Inc. and GEM Water, Inc. to the Town of Cumberland, Indiana, to the extent our approval is required.

Cumberland also seeks approval to issue long-term debt in an amount not to exceed \$2,100,000. The proceeds from the long-term debt will be used to purchase GEM Utilities' water assets. To have sufficient funds to cover the debt service on such long-term debt and the ongoing expenses of the utility, Cumberland also proposes approval to continue the existing rates and charges of GEM Utilities. Based on the evidence of record and the Settlement Agreement, it is appropriate to authorize the Town to issue long-term debt in an amount not to exceed \$2,100,000 and to authorize Cumberland to continue to use GEM Utilities' existing rates and charges.

The parties further agree that the Settlement Agreement should not be used as precedent in any other proceeding or for any other purpose, except to the extent necessary to implement or enforce its terms. Consequently, with regard to future citation of the Settlement Agreement, we find that our approval herein should be construed in a manner consistent with our finding in *Richmond Power & Light*, Cause No. 40434 (Indiana Utility Regulatory Commission, March 19, 1997).

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

1. The Joint Stipulation and Settlement Agreement is hereby approved and the terms and conditions thereof are incorporated herein as part of this Order.

2. We approve the transfer of the assets (including the CTA) from GEM Utilities, Inc. and GEM Water, Inc. to the Town of Cumberland, Indiana.

3. We authorize the issuance of long-term debt in an amount not to exceed \$2,100,000 to consummate the proposed purchase of the water assets by Cumberland from GEM Water, Inc.

4. We approve the use by Cumberland of the existing rates and charges of GEM Water, Inc.

5. Cumberland shall file a new tariff with the Water/Sewer Division of this Commission reflecting its implementation of the rates and charges authorized herein. These rates are effective for applicable water service on and after the Water/Sewer Division approval of the tariff.

6. In accordance with Ind. Code § 8-1-2-70, Cumberland shall pay the following itemized charges within twenty (20) days from the date of this Order to the Secretary of this Commission, as well as any additional costs which were or may be incurred in connection with this Cause:

Commission Charges:
OUCC Charges:
Legal Advertising Charges:
TOTAL:

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

HARDY, LANDIS, ZIEGNER, MAYS, AND ATTERHOLT CONCUR:
APPROVED:

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

Brenda A. Howe,
Secretary to the Commission

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