

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF THE)
TOWN OF CEDAR LAKE FOR APPEAL AND)
COMMISSION REVIEW OF AN INFORMAL)
DISPOSITION RENDERED BY THE)
COMMISSION'S CONSUMER AFFAIRS)
DIVISION ON APRIL 14, 2010, REGARDING)
THE INTERPRETATION AND APPLICATION)
OF CEDAR LAKE'S TAP-ON FEE)

CAUSE NO. 43895

APPROVED:

AUG 25 2010

BY THE COMMISSION:

James D. Atterholt, Commissioner
Jeffery A. Earl, Administrative Law Judge

This matter comes to the Indiana Utility Regulatory Commission (the "Commission") as an appeal from a decision of the Commission's Consumer Affairs Division (the "CAD"). In July, 2009, Joe Lenahan, a representative of Centennial of Cedar Lake Development LLC ("Centennial"), contacted the CAD regarding the rates and charges on file with the Commission for the Town of Cedar Lake's municipal water utility ("Cedar Lake"). A CAD analyst sent Mr. Lenahan a copy of Cedar Lake's current tariff. On December 7, 2009, Mr. Lenahan contacted the CAD again to complain that Cedar Lake was overcharging for tap-on fees by requiring Centennial to pay the \$750 utility-installed fee rather than the \$150 developer-installed fee. A CAD analyst rendered an informal decision on January 7, 2010, concluding Cedar Lake should be charging the \$150 fee.

On January 14, 2010, Cedar Lake requested a review of the analyst's decision by the CAD Director. In its request for review, Cedar Lake argued Centennial's complaint was untimely because it did not comply with 170 Indiana Administrative Code ("IAC") 6-1-17(B)(1) (repealed May 25, 2010¹), which requires a party to file a complaint with the CAD within seven days after receiving written notification of a utility's resolution of a customer complaint. After requesting and receiving additional information from the parties, the CAD Director issued an Informal Disposition of the Consumer Affairs Division (the "CAD Decision") on April 14, 2010. The CAD concluded Centennial's complaint was timely because Cedar Lake did not advise Centennial of the deadline to request CAD review of the issue as required by then 170 IAC 6-1-17(A)(2) (repealed). The CAD also concluded Cedar Lake had improperly charged Centennial the \$750 utility-installed tap-on fee rather than the \$150 developer-installed fee. The CAD noted Cedar Lake's argument that it installed the meters at a cost of over \$300, and as such, the \$150 fee would not cover the utilities costs. The CAD advised Cedar Lake that if its current tariff charges were insufficient, it should file an updated

¹ 170 IAC 6-1-17 was repealed by the Commission effective May 25, 2010; however, the rule was in effect when Centennial filed its complaint.

tariff with the Commission. Therefore, the CAD ordered Cedar Lake to refund the overcharge paid by Centennial in the amount of \$12,600.

On May 5, 2010, Cedar Lake filed a Verified Petition with the Commission appealing the CAD decision. Pursuant to notice published as required by law, proof of which was incorporated into the record by reference and placed in the official files of the Commission, a public hearing was held in this Cause on July 8, 2010, at 9:45 a.m., in Judicial Courtroom 224 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. Cedar Lake, Centennial, and the Office of the Utility Consumer Counselor appeared by counsel and presented oral arguments on the issues. Pursuant to Indiana Code section 8-1-2-34.5 and 170 IAC 1-1.1-5, the record in this Cause is comprised solely of the information supplied by the parties and considered by the CAD in reaching its decision.

Based upon the applicable law and the record before the CAD, the Commission now finds:

1. Commission Jurisdiction. Due, legal, and timely notice of the public hearing in this Cause was given and published by the Commission as required by law. Cedar Lake is a municipality and its rates and charges are subject to the jurisdiction of the Commission to the extent provided in Indiana Code section 8-1.5-3-8. Pursuant to 170 IAC 1-1.1-5 and 1-6-17(B) (repealed), Centennial may complain to the CAD regarding any bill, security deposit, disconnection notice, or any other matter relating to water service or regarding any matter that is within the jurisdiction of the Commission. The Commission has authority to review any decision of the CAD upon the request of an affected party pursuant to 170 IAC 1-1.1-5(c). Therefore, the Commission has jurisdiction over the parties and the subject matter of this Cause.

2. Standard of Review. This cause involves an appeal of issues that were considered and decided by the CAD pursuant to 170 IAC 1-1.1-5. Therefore pursuant to Indiana Code section 8-1-2-34.5, a record of information upon which the CAD based its decision already exists (the "Record"). Most of the Record consists of information supplied by the parties. Therefore, consistent with the Commission's authority as set forth in 170 IAC 1-1.1-5 and the procedures detailed in Indiana Code section 8-1-2-34.5, the decision in this proceeding shall be based upon: (1) a review of the Record; and (2) consideration of arguments by the parties based upon the existing Record.

3. Background. Cedar Lake acquired its municipal water utility from Utilities, Inc. through the power of eminent domain in April, 2009. The Commission approved the acquisition by Cedar Lake in its April 29, 2009, Order in Cause Number 43655. In that same order, the Commission allowed Cedar Lake to adopt the existing rates and charges of Utilities, Inc. Prior to the acquisition, Centennial began development of the Centennial Subdivision in Cedar Lake. Centennial constructed a water main extension for the subdivision pursuant to the terms of an Agreement with Utilities, Inc. According to Centennial, when it began construction of a new home, it would tap into the water main and run a service line to a junction box located on the property and from the box to the new home. Utilities, Inc. would then set the water meter in place and charge Centennial \$150 for the tap-on fee and \$580 for the system development charge. Utilities, Inc.'s Schedule of Rates and Charges, which it filed with the Commission, listed the following charges for new connections:

Charge for Connection (Tap-in) – less than 1”	
Utility Installed	\$750.00
Developer Installed	\$150.00
Charge for Connection (Tap-in) – 1” and greater	at cost.

After Cedar Lake assumed ownership of the utility, it filed its rates and charges, adopted from Utilities, Inc., with the Commission. That filing lists the following charges for new connections:

Tap-on Fee ²	
Less than 1”	
Utility Installed	\$750
Developer Installed	\$150
1” or greater	at cost.

Centennial paid the \$150 per unit developer-installed charge for the connection of four homes on June 10, 2009, and an additional five homes on June 15, 2009. A short while later, Cedar Lake informed Centennial it would charge \$750 for the connection fee because it was installing the meters and turning on the service. In July, 2009, Mr. Lenehan contacted the CAD to request a copy of Cedar Lake’s current schedule of rates and charges, which the CAD provided.

On August 4, 2009, counsel for Centennial sent a letter to Cedar Lake disputing Cedar Lake’s attempt to charge the \$750 connection fee. In the letter, Centennial argued it installed the entire infrastructure, including the taps on the water lines, for each of the new homes. Centennial argued Cedar Lake should, therefore, charge the \$150 developer-installed charge just as Utilities, Inc. had done previously. The letter requested that Cedar Lake confirm it will only charge \$150. The letter also explained that because the dispute over fees was holding up construction, Centennial would “pay the increased costs under protest to avoid damages caused by delay,” but that Centennial “reserves the right to obtain a refund, and ... would appreciate [Cedar Lake’s] expeditious review of this request.” In a January 22, 2010, letter to the CAD, Centennial claims it attempted to follow-up on its letter to Cedar Lake with a phone call on August 12, 2009, a message sent via fax and email on August 17, 2009, and a letter on September 21, 2009, but received no response to any of its communication attempts. The record does not contain any written response from Cedar Lake to Centennial’s August 4, 2009, letter.

On August 5, 2009, Centennial paid an additional \$600 each for three of the properties for which it had previously paid only \$150 on June 10, 2009, and \$750 each for an additional nine properties. On August 10, 17, and 21, 2009, Centennial paid \$750 each for three more properties. In early December, 2009, Mr. Lenehan contacted the CAD to complain about Cedar Lake overcharging for the connection fees. That same day, a CAD analyst contacted Cedar Lake by telephone and email to inform it of the complaint. The subject line of the email says, “Centennial of Cedar Lake

² Although the tariff language was changed from “tap-in” to “tap-on,” both terms are used interchangeably within the industry and have the same meaning.

Development LLC.” Following the CAD analyst’s informal decision, Cedar Lake sent a letter to the CAD Director requesting a review of the decision. That letter, dated January 14, 2010, contains the subject line “Centennial of Cedar Lake Development, LLC Consumer Complaint Against the Town of Cedar Lake Municipal Water Utility/Complaint I.D. No. 88344.” A subsequent letter from Cedar Lake, dated February 25, 2010, providing additional information to the CAD, contains the same subject line. Similarly, correspondence between the CAD and Centennial refers to Centennial as the source of the customer complaint.

4. Argument Presented by Cedar Lake. Cedar lake raises three objections to the CAD Decision: (1) Centennial did not file a timely complaint with the CAD regarding the overcharges allegedly incurred in the summer of 2009; (2) the CAD erred by determining the lack of the word “meter” in Cedar Lake’s tariff prevents it from charging the \$750 utility-installed rate; and (3) even if Cedar Lake improperly charged Centennial, the CAD erred by ordering Cedar Lake to refund the overcharge.

5. CAD Decision. The CAD found Cedar Lake did not provide notice to Centennial of its right to complain to the Commission within seven days of a written disposition of its complaint by Cedar Lake as then required by 170 IAC 6-1-17(A)(2)(b) (repealed). The CAD went on to determine that even though Centennial waited longer than seven days to contact the Commission, the CAD had discretion to accept the complaint, and in any event, the Commission had jurisdiction over the rates and charges of Cedar Lake pursuant to Indiana Code section 8-1.5-3-8(f).

Next, the CAD considered Cedar Lake’s tariff and concluded the question of who installed the meter could not serve as the basis for differentiating between a utility-installed and a developer-installed tap-on fee because the tariff did not include the word meter in the charge. The CAD concluded Cedar Lake could only charge Centennial the \$150 developer-installed tap-on fee. The CAD acknowledged Cedar Lake’s argument that a \$150 fee does not cover its costs in installing the meter; however, the CAD concluded the remedy for this deficiency is for Cedar Lake to file a new tariff with the Commission reflecting the increased charges.

Finally, the CAD ordered Cedar Lake to refund the difference between the \$750 utility-installed tap-on fee and the \$150 developer-installed tap-on fee (\$600). The CAD concluded Centennial had overpaid for a total of 21 properties and, therefore, ordered Cedar Lake to refund a total of \$12,600.

6. Commission Findings.

A. Timeliness

170 IAC 6-1-17(A) (repealed) allowed a customer to complain to a utility about any “bill ..., security deposit, disconnection notice, or any other matter relating to its service” Upon receiving such a complaint, the utility must promptly investigate the complaint and notify the customer in writing of its proposed disposition of the complaint. 170 Ind. Admin. Code 6-1-17(A)(2)(a)

(repealed). That written notification must advise the customer of its right to request, within seven days, Commission review of the utility's disposition of the complaint. 170 Ind. Admin. Code 6-1-17(A)(2)(b) (repealed). Centennial formally complained about Cedar Lake's intent to charge the utility-installed tap-on fee through the letter from its counsel dated August 4, 2009. The letter contains a specific request for Cedar Lake to review its schedule of rates and charges and confirm it will only charge the \$150 tap-on fee. The record contains no evidence of a formal response by Cedar Lake to Centennial's complaint or of a written disposition of the complaint containing the notice of a right to Commission review of the disposition. This is true despite numerous attempts by Centennial to follow-up on the letter. At oral argument, counsel for Cedar Lake argued the bills issued by Cedar Lake as well as discussions that occurred prior to the August 4th letter represented Cedar Lake's disposition of the complaint. The Commission finds this argument unpersuasive. The rule clearly requires a written notification of Cedar Lake's proposed disposition of Centennial's complaint. Even assuming, without accepting, the bills provided by Cedar Lake constituted such written notification, Cedar Lake has not shown, or argued, such bills contained the notice of the right to Commission review required by the rule. As a result, the seven day limitation on Centennial's ability to seek Commission review of the issue was never triggered and Centennial's complaint is timely under 170 IAC 6-1-17 (repealed).

In addition, 170 IAC 1-1.1-5(a) allows "[a]ny individual or entity [to] informally complain to the [C]ommission's consumer affairs division, with respect to any matter within the jurisdiction of the [C]ommission." (emphasis added). Under Indiana Code section 8-1.5-3-8(f), the rates and charges of a municipal utility are subject to the approval of the Commission in accordance with Indiana Code section 8-1-2. Cedar Lake sought and was granted approval of the specific charges at issue in this case in Cause Number 43655. Therefore, the Commission has jurisdiction over those charges, and Centennial may informally complain to the CAD regarding those charges. As a result, even if Centennial's complaint was untimely under 170 IAC 6-1-17 (repealed), its complaint would still be valid under 170 IAC 1-1.1-5.

B. Tap-on Fee Charge

In Cause Number 42733, Utilities, Inc. sought Commission approval of its rates and charges. The March 2, 2005, Order in that Cause authorized Utilities, Inc. to "charge \$150 for a tap fee ... instead of a \$750 tap fee, when the developer installs a connection equal to or less than 1" to the system. When [Utilities, Inc.] installs a connection less than 1" to the system, it should charge the \$750 tap fee" When Cedar Lake later sought Commission approval of its condemnation of the water utility from Utilities, Inc. in Cause Number 43655, it "also sought approval of its use of the existing rates and charges of Utilities, Inc." In granting approval for Cedar Lake to adopt the rates and charges of Utilities, Inc., the Commission found, "the evidence of record suggests that continuation of these rates will be sufficient ... to cover the cost of [Cedar Lake's] initial operation of these assets." The Commission further found "continuation of these rates will avoid confusion for existing customers." Finally, the Commission noted:

Cedar Lake has indicated it will seek further review by the Commission of these existing rates and charges within 12 months of [the Commission's] Order in this Cause, and given this stipulation, it is appropriate to authorize Cedar Lake to continue to use the rates and charges of Utilities, Inc. until the Commission determines rates and charges specific to Cedar Lake.

According to its tariff, Cedar Lake charges a developer two fees to connect a new home to the utility: (1) a "Tap-on Fee" of either \$750 (if utility installed) or \$150 (if developer installed); and (2) a System Development charge of \$580.³ Centennial argues it installed the tap on the water main, ran a service pipe from the tap to a box on the property, and ran a service pipe from the box to the home, and as a result, it should pay the developer-installed tap-on charge. Cedar Lake argues it installed the yoke and meter in the junction box, and therefore, Centennial should pay the utility-installed tap-on charge. The evidence of record is not clear whether Utilities, Inc. installed the yoke and meter when it previously charged the \$150 developer-installed charge. Similarly, there is no evidence of record defining the terms "Tap-on Fee", "utility installed", or "developer installed." However, the evidence shows Cedar Lake does not allow developers to install meters themselves. A plain reading of the tariff language supports Centennial's claim that the tap-on fee charge amount depends upon who installs the tap-on because the tariff does not make reference to a meter installation charge or a connection fee. This is especially true given the fact that Cedar Lake does not allow developers to install the meter, which, under Cedar Lake's interpretation of the tariff, would render the developer-installed charge meaningless.

170 IAC 6-1.5-12 defines a "Main" as "a pipe owned by the utility which delivers water to fire hydrants and service pipes." 170 IAC 6-1.5-13 defines a "Main Extension" as "the mains, hydrants, and appurtenances installed by the utility to provide water utility service requested by or on behalf of the applicant or prospective customer, but does not include service pipes." 170 IAC 6-1.5-20 defines a "Service Pipe" as "a supply line leading directly into the premises supplied or to be supplied from the main adjacent to such premises." 170 IAC 6-1.5-25 defines a "Tap" as "a fitting owned by the utility and inserted into the main to which a service pipe is attached." Although these rules are not applicable to municipalities, they are nonetheless instructive in understanding the terminology used in Cedar Lake's tariff. The plain language of the tariff read in light of the definitions in our rules supports a conclusion that the tap-on charge amount depends upon who installs the tap into the water main and runs service lines to the property rather than upon who installs the meter. In light of the discussion above, the Commission concludes Centennial should be charged the developer-installed tap-on fee when it has installed the tap into the water main and the service pipes to the home.

Cedar Lake argues the \$150 developer-installed fee is insufficient to cover its expenses in purchasing and setting the meter. Accepting this as true, it does not empower Cedar Lake to arbitrarily charge a utility-installed tap-on fee when it has not installed the tap-on. If Cedar Lake knew the developer-installed tap-on fee would be insufficient to cover its expenses it could have

³ These figures assume a meter size less than 1"

requested an increase in the fee when it sought Commission approval of its acquisition of the utility or sought Commission approval of an increase in the tap-on fee at any time thereafter.⁴

C. Refund

Cedar Lake argues even if the Commission finds Cedar Lake overcharged Centennial for the tap-on fee, the Commission lacks the authority to order Cedar Lake to refund the overcharge. Cedar Lake asserts such a refund would violate the rule against retroactive ratemaking and the doctrine of voluntary payment.

i. Retroactive Ratemaking

“Simply put, the rule against retroactive ratemaking requires that in fixing rates a regulatory commission must fix such rates prospectively and may not fix future rates to compensate a utility’s past losses.” *N. Ind. Pub. Serv. Co.*, Cause No. 39723, 1994 Ind. PUC LEXIS 548, at *77-78 (Nov. 2, 1994). The rule against retroactive ratemaking serves three basic functions: (1) to protect the public by ensuring current customers will not be required to pay for the past deficits of utilities through their future rates; (2) to prevent utilities from employing future rates to protect the financial investment of their stockholders; and (3) to require utilities to bear losses and enjoy gains depending upon their managerial efficiency. *Id.* at *79. Indiana Code section 8-1-2-68 authorizes the Commission, whenever it finds any rates, tolls, charges, schedules, or joint rate or rates to be unjust, unreasonable, insufficient, or unjustly discriminatory to fix just and reasonable rates, tolls, charges, schedules, or joint rates to be imposed in the future. Should the Commission attempt to change the amount of Cedar Lake’s tap-on fee, whether that change be to Cedar Lake’s benefit or detriment, and apply the change retroactively to the Centennial properties at issue here, such an action would clearly be prohibited as retroactive ratemaking.

In *Airco Indus. Gases v. Ind. Mich. Power Co.*, 614 N.E.2d 951, 953 (Ind. Ct. App. 1993), Indiana Michigan Power Company (“I&M”) filed a tariff with the Commission that did not comply with a prior Commission order. I&M proceeded to collect funds from its customers under the tariff. Airco, one of I&M’s industrial customers filed an objection to tariff and later requested a refund of funds I&M had invalidly collected. The Commission refused to order I&M to refund the monies concluding such an order would violate the rule against retroactive ratemaking. On appeal, the court squarely addressed the issue of ordering a utility to refund monies it improperly collected. The court held, “the grant of a refund does not necessarily amount to retroactive ratemaking.” *Id.* at 953. The court looked beyond Indiana Code 8-1-2-68, finding “the focus [of the case before us] is not on the unreasonableness or insufficiency of the rates or charges collected from Airco by [I&M]. Rather the focus is on [I&M’s] conduct in failing to follow the Commission’s directive.” *Id.* The court looked to Indiana Code section 8-1-2-69, which states in pertinent part:

⁴ In fact, the Commission ordered Cedar Lake to file a petition to establish new rates and charges within twelve months of its April 29, 2009, Order in Cause Number 43655.

Whenever ... the [C]ommission shall find any ... practices [or] acts ... to be unjust [or] unreasonable ... the [C]ommission shall determine and declare and by order fix just and reasonable ... acts [or] practices ... to be ... observed and followed in the future ... *and shall make such other order* respecting such ... act [or] practice ... as shall be just and reasonable.

Id. at 954 (citing Ind. Code § 8-1-2-69) (emphasis in opinion). The court found I&M unreasonably collected and retained monies from ratepayers to which it would not have been entitled but for the inappropriate tariff and concluded the Commission could order a refund of the unreasonably collected funds pursuant to Indiana Code section 8-1-2-69. Id.

Similarly here, the Commission does not find Cedar Lake's tap-on fee to be unjust, unreasonable, insufficient, or discriminatory. Rather, the Commission concludes Cedar Lake has unreasonably charged Centennial an improper fee under its approved tariff. Therefore, Indiana Code section 8-1-2-69 allows the Commission to order Cedar Lake to refund the amount of unreasonably collected funds to Centennial.

ii. Voluntary Payment Doctrine

Our Supreme Court set forth the three propositions of the voluntary payment doctrine in Time Warner Entm't Co. v. Whiteman, 802 N.E.2d 886, 889-90 (Ind. 2004):

[1.] As a general rule, money paid with a full knowledge of all the facts, and without any fraud or imposition on the payor, cannot be recovered back, although it was not legally due. [2.] Generally a voluntary payment made under a mistake or in ignorance of the law, but with a full knowledge of all the facts, and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered back. [3.] In general money paid under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered back, notwithstanding a failure to employ the means of knowledge which would disclose a mistake.

Cedar Lake's argument regarding the voluntary payment doctrine is misplaced. First, the payment of the tap-on fee by Centennial was not voluntary; Cedar Lake required payment of the fee before it would issue the permits needed by Centennial to construct new homes in the development. See Time Warner Entm't Co. v. Whiteman, 802 N.E.2d 886, 891 (Ind. 2004) ("In a business setting, it is at least paradoxical to suppose that the overpayment of an asserted (or any payment of a non-existent) liability could ever be 'voluntary'"). Centennial signaled as much in its August 4, 2009, letter challenging the charges: "This issue is holding up construction of additional units in the Centennial development" In addition, Centennial expressly informed it was paying the additional funds under protest and it reserved the right to seek a refund of the overpayment.

Second, as discussed above, Centennial's payment was induced by the improper conduct of Cedar Lake in unreasonably charging the utility-installed tap-on fee where the developer had actually

installed the tap and service lines. In Time Warner, our supreme court refused to apply the voluntary payment doctrine where a cable company charged an unreasonable fee and the customers sought a refund of the funds they had wrongfully been forced to pay the company. We are faced with an identical situation here where Cedar Lake charged an unreasonable fee and Centennial seeks a refund of the funds it has wrongfully been forced to pay, and we agree with our supreme court that the voluntary payment doctrine does not apply under the facts of this case.

iii. Amount of Refund

Although we uphold the CAD's decision to order Cedar Lake to refund the overpayment of the tap-on fee, we disagree with the CAD's calculation of the overpayment due. According to the spreadsheet and receipts supplied by Centennial, for six properties it paid Cedar Lake only \$150 total for the tap-on fee. For three properties, Centennial initially paid \$150 and later paid an additional \$600. For the remaining twelve properties, Centennial paid \$750 for the tap-on fee. Thus, out of the twenty-one properties in question, only fifteen resulted in a \$600 overpayment of the tap-on fee. Therefore, Centennial is entitled to a refund of \$9,000 (\$600 x 15 units).

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

1. The April 14, 2010, decision of the Consumer Affairs Division in this Cause is reversed with respect to the refund amount and affirmed in all other respects.
2. The Town of Cedar Lake is ordered to pay a refund to Centennial of Cedar Lake Development LLC in the amount of \$9000.
3. This Order shall be effective on and after the date of its approval.

HARDY, ATTERHOLT, MAYS AND ZIEGNER CONCUR; LANDIS ABSENT:

APPROVED: AUG 25 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**