ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF INDIANA-AMERICAN WATER COMPANY, INC. FOR COMMISSION DETERMINATION IN A SUBDOCKETED PROCEEDING OF THE FOLLOWING REQUESTS PRESENTED IN CAUSE NO. 44450: (1) AUTHORITY TO ESTABLISH AND IMPLEMENT SYSTEM DEVELOPMENT CHARGES, (2) AUTHORITY TO ESTABLISH AND IMPLEMENT CERTAIN CONNECTION FEES AND POLICIES AND NEW RULES AND REGULATIONS APPLICABLE THERETO, (3) AUTHORITY TO ESTABLISH AND IMPLEMENT A REVENUE STABILITY MECHANISM, AND (4) APPROVAL OF A FAIR VALUE INCREMENT ASSOCIATED WITH PETITIONER'S ACQUISITION OF NORTHWEST INDIANA WATER CO. ("NORTHWEST") AND UNITED WATER WEST LAFAYETTE, INC. AND UNITED WATER INDIANA, INC. (COLLECTIVELY, "UNITED")	)	CAUSE NO. 44450 S1 APPROVED: MAR 25 2015

ORDER ON RECONSIDERATION

Presiding Officers:
Carol A. Stephan, Commission Chair
Carolene Mays-Medley, Vice Chair
Jeffery A. Earl, Administrative Law Judge

On February 17, 2015, the Indiana Office of Utility Consumer Counselor ("OUCC") filed a Petition for Reconsideration and Clarification ("Motion"). The Motion requests that we reconsider our decision to allow Indiana American Water Company, Inc. ("Indiana American") to eliminate refunds to developers for main extensions and to approve relevant changes to Indiana American's Rules and Regulations for Water Service. On February 24, 2015, Indiana American filed its response to the Motion. The OUCC filed its reply on March 3, 2015.

Having considered the Motion and briefs, we grant the Motion for Reconsideration and amend our Final Order in this Cause as set forth below.

1. **Final Order Language in Dispute.** In our Final Order in this Cause, we made the following findings and conclusions:

Under Indiana Code § 8-1-2-69, we have general authority to regulate utility service. *Wilfong v. Indiana Gas Co.*, 399 N.E.2d 788, 791 (Ind. Ct. App. 1980) (finding that "the general language of this provision is sufficient to permit the commission to authorize the gas company not to provide gas service to new customers"). We have relied on this statutory authority in other cases where circumstances warranted an exception from the rule. In *Indianapolis Water Co.*, Cause No. 41861, the Commission was asked to approve an agreement between Indianapolis Water and one of its customers that resolved a customer complaint by allowing a deviation from the normal main extension rules. The Agreement amended a prior main extension agreement between the parties and provided, among other things, that the time period during which the customer may collect subsequent connector refunds would be extended an additional ten years. The Commission, in approving the variance, explained:

> Applicants' Petition is a request for relief from the ten-year limit for collecting subsequent collectors' fees located in 170 IAC 6-1.5-35 and 170 IAC 6-1.5-36. The Agreement resulted from negotiations after Irsay filed a complaint with the Commission, and the Commission encourages parties to "fashion settlement agreements." General Administrative Order 1997-2. *Under Indiana Code § 8-1-2-69, the Commission is authorized to fashion remedies when the requirements of the statutes and administrative codes may produce results that are "unjust, unreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory, inadequate, or otherwise in violation of this chapter, as the case may be."* Based on the evidence presented and the record as a whole, the Commission finds that it is appropriate to extend the ten-year limit on the collection of subsequent connector fee in this case.

Cause No. 41861, Order at 2 (emphasis added).

We find that the circumstances under which we may grant a variance or exception from our promulgated rules exist in this Cause. Indiana American has provided sufficient evidence of the benefits to customers as a whole from ceasing to fund developer main extensions. There is no evidence of prejudice from Indiana American's requested change to its rules and, in fact, we note that, as Indiana American stated in rebuttal testimony, the majority of water utilities in the state are not subject to the developer refund requirement in our main extension rule.

Ind. Amer. Water Co., Cause No. 44450 S1, 2015 Ind. PUC LEXIS 19, at *21-23 (IURC Jan. 28, 2015).

2. <u>OUCC's Argument</u>. The OUCC asserts that our decision to allow Indiana American to eliminate refunds to developers for main extensions is contrary to law because it grants an impermissible exception to the Commission's rules, which are codified in the Indiana

Administrative Code. The OUCC argues that our reliance on Ind. Code § 8-1-2-69 and the Commission's Final Order in Cause No. 41861 are misplaced because the order in Cause No. 41861 inserted the words "statutes and administrative codes" into the text of Ind. Code § 8-1-2-69. The OUCC argues that administrative rules have the force and effect of law and that the Commission cannot properly repeal such rules one utility at a time.

In the alternative, the OUCC requested that we clarify which administrative rules Indiana American does not have to comply with.

3. Indiana American's Response. Indiana American responds that the OUCC's Motion simply re-argues the OUCC's case-in-chief. Indiana American points out that it submitted evidence that eliminating refunds to developers would create a benefit to Indiana American's customers as a whole and that the majority of water utilities in the state are not subject to the developer refund requirement.

In addition to opposing the Motion, Indiana American also requested clarification regarding which of its Rules and Regulations for Water Service are to be modified in light of the Final Order in this Cause.

4. OUCC's Reply. In reply, the OUCC reiterated its original arguments. The OUCC also asserted that Indiana American's claim that the majority of water utilities in the state are not subject to the developer refund requirement is misleading because it includes utilities that are not regulated by the Commission. The OUCC argues that Indiana American is regulated by the Commission and it should not be exempted from following the Commission's administrative rules.

5. Commission Discussion and Findings.

A. Ind. Code § 8-1-2-69. The Commission has repeatedly relied on Ind. Code § 8-1-2-69 as the source of its general authority to regulate utility service. Ind. Code § 8-1-2-69 states:

> Whenever, upon investigation made under the provisions of [Ind. Code ch. 8-1-2], the commission shall find any regulations, measurements, practices, acts, or service to be unjust, unreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this chapter, or shall find that any service is inadequate or that any service which can be reasonably demanded can not be obtained, the commission shall determine and declare and by order fix just and reasonable measurements, regulations, acts, practices, or service to be furnished, imposed, observed, and followed in the future in lieu of those found to be unjust, unreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory, inadequate, or otherwise in violation of this chapter, as the case may be, and shall make such other order respecting such measurement, regulation, act, practice, or service as shall be just and reasonable.

Although the statute refers to regulations and acts, which are words sometimes used to refer to administrative rules and statutes, respectively, it is clear from the context of the statute

that those words refer to the regulations and acts of a utility or other entity and not to administrative rules or statutes. This was confirmed by the Indiana Supreme Court in *N. Ind. Pub. Serv. Co. v. Citizens Action Coalition of Ind., Inc.*, 548 N.E.2d 153, 160 (Ind. 1989) ("Nowhere is the commission's responsibility . . . more clearly delineated than it is in I.C. 8-1-2-69, which grants the commission wide authority to issue orders to remedy an 'act' or 'practice' of a utility that is 'unjust' or 'unreasonable.'"). As a result, we agree with the OUCC that the Commission's Final Order in Cause No. 41861 improperly found that Ind. Code § 8-1-2-69 authorizes the Commission "to fashion remedies when the requirements of the statutes and administrative codes may produce results that are 'unjust ....'" *Indianapolis Water Co.*, Cause No. 41861, 2001 Ind. PUC LEXIS 315, at *4 (IURC April 18, 2001) (emphasis added).

B. Authority to Grant Relief Requested. The Commission possesses only those powers conferred on it by statute. *Micronet, Inc. v. Ind. Util. Regulatory Comm'n*, 866 N.E.2d 278, 294 (Ind. Ct. App. 2007). Unless a grant of power can be found in the statute, we must conclude that there is none, and any doubt about the existence of authority must be resolved against a finding of authority. *Id.* However, the Commission does have "such implicit power and authority as is . . . necessary" to effectuate the regulatory scheme outlined in the statutes. *Id.* Indiana American did not cite, and we have not found, any statute other than Ind. Code § 8-1-2-69 as a source of authority for the Commission to authorize it to deviate from the Commission's administrative rules. Therefore such a deviation must be contemplated by or allowed by the administrative rules themselves.

The administrative rules governing extensions of water mains are located at 170 IAC 6-1.5. The main extension rules define "refund" as:

> [T]he subsequent connector's fees,[1] subsequent connector's revenue allowances,[2] and revenue allowances from depositor-authorized connections[3] of lots included in the original depositor's main extension agreement that must be paid by the utility to the original depositor for ten (10) years after the completion date of the main extension.

170 IAC 6-1.5-18 (emphasis and footnotes added).

170 IAC 6-1.5-33 requires a utility to file with the Commission for approval its choice of one of three options for its rules regarding main-extension-costs. Options 1 and 2 each state that "the applicant shall receive refunds . . . ." 170 IAC 6-1.5-33(a)(1) and (2) (emphasis added). Only option 3 contains the provision that "the applicant shall forfeit all rights to immediate revenue allowances and to refunds, except for subsequent connector's fees." 170 IAC 6-1.5-33(a)(3). But option 3 requires the utility's rule to give the applicant the option of paying the cost of the extension plus taxes and receiving refunds or paying the cost of the extension exclusive of taxes and forfeiting the refund. None of the 3 options allows the utility to refuse to pay refunds without the consent of the applicant. Further, 170 IAC 6-1.5-36 states: "Refunds shall be paid for a period of ten (10) years after the completion date of the main extension to the original depositor . . . ." (emphasis added).

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[1] Defined at 170 IAC 6-1.5-23.
[2] Defined at 170 IAC 6-1.5-24.
[3] Defined at 170 IAC 6-1.5-19.

Our administrative rules provide one other alternative under which a utility might not be required to pay developer refunds. 170 IAC 6-1.5-40 allows a utility to enter into a special contract, which includes terms and conditions agreed on by the utility and applicant or set by the Commission, under certain extraordinary circumstances. However, 170 IAC 6-1.5-40 only applies to an agreement between the utility and a single applicant or group of applicants requesting an extension and does not allow the utility to create a blanket rule that it will not pay refunds for any extensions. Further, 170 IAC 6-1.5-40 requires the utility and the applicant to agree to the terms of the special contract or for those terms to be determined by the Commission.

We find no authority in 170 IAC 6-1.5 that allows Indiana American to eliminate developer refunds from its Rules and Regulations for Water Service. On the contrary, our administrative rules make clear that Indiana American is required to pay developer refunds except in very limited circumstances. Therefore, we deny Indiana American's request to eliminate developer refunds and order Indiana American to submit amended schedules of rates and charges and Rules and Regulations for Water Service consistent with this finding.

6. Conclusion on Motion. 170 IAC 1-1.1-22(e)(3)(B) allows the Commission, in response to a petition for reconsideration, to correct errors by modifying or clarifying its final order without further hearing based on the existing record. After reconsideration of the parties' arguments, we find that our approval of Indiana American's request to eliminate developer refunds for main extensions in the Final Order in this Cause was improper and we reverse that finding. The Final Order in this Cause is modified as set forth below in the ordering paragraphs.

Both parties also sought clarification in the event that the Commission denied the Motion. Because we grant the Motion and reverse our decision on the elimination of developer refunds, the OUCC's request for clarification is moot. Indiana American also requested clarification on which of its Rules and Regulations for Water Service were impacted by the Final Order in this Cause. In light of our decision to deny Indiana American's request to eliminate developer refunds, Indiana American shall submit amended Rules and Regulations consistent with our Final Order in this Cause as modified by this Order on Reconsideration.

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

1. The OUCC's Petition for Reconsideration and Clarification is Granted.

2. Paragraph 6.C. of the Final Order in this Cause (Commission Discussion and Findings on Developer Refunds) shall be replaced with Paragraph 5 above in its entirety, minus the subheadings.

3. Ordering Paragraph 2 shall be replaced with the following:

> Indiana American's proposal to eliminate refunds to developers for main extensions is denied.

4. Indiana American shall file appendices to its schedules of rates and charges and its amended Rules and Regulations for Water Service with the Water/Wastewater Division of the

Commission consistent with the findings set forth above. Such charges for water service will become effective upon approval by the Water/Wastewater Division of the Commission.

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

STEPHAN, MAYS-MEDLEY, HUSTON, WEBER, AND ZIEGNER CONCUR:

APPROVED: MAR 25 2015

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

Brenda A. Howe

Brenda A. Howe
Secretary to the Commission