

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF NEWPORT CHEMICAL DEPOT)
REUSE AUTHORITY d/b/a VERMILLION RISE) CAUSE NO. 44699
MEGA PARK FOR AUTHORIZATION TO)
PROVIDE WATER UTILITY SERVICE IN)
VERMILLION COUNTY, INDIANA AND FOR) APPROVED: AUG 24 2016
APPROVAL OF INITIAL RATES AND CHARGES)

ORDER OF THE COMMISSION

Presiding Officers:

Angela Rapp Weber, Commissioner

Aaron A. Schmoll, Senior Administrative Law Judge

On October 29, 2015, Newport Chemical Depot Reuse Authority d/b/a Vermillion Rise Mega Park ("Petitioner" or "NeCDRA") filed its Verified Petition ("Petition") with the Indiana Utility Regulatory Commission ("Commission") seeking authorization to provide water utility service in Vermillion County, Indiana and for approval of initial rates and charges. On January 14, 2016, Petitioner filed its Amended Verified Petition ("Amended Petition"), seeking, in addition to the relief requested in the Petition, certain determinations regarding the Commission's jurisdiction over the water utility service.

On April 19, 2016, the Commission conducted a public evidentiary hearing at 9:30 a.m. in Room 224 of the PNC Center, Indianapolis, Indiana. During the hearing, evidence constituting Petitioner's case-in-chief and rebuttal was offered and admitted into the record and its witness was offered for cross-examination and questioning by the Commission. In addition, evidence constituting the respective case-in-chief of the Office of Utility Consumer Counselor ("OUCC") was offered and admitted into the record and its witness was offered for cross-examination and questioning by the Commission. No members of the public appeared or testified at the hearing.

Having considered the evidence presented and the applicable law, the Commission finds:

1. **Notice and Jurisdiction.** Due, legal, and timely notice of the hearing in this Cause was given and published as required by law. Petitioner owns, operates, and controls utility plant and equipment for the provision of water service and is operated as a "municipal water utility" pursuant to Ind. Code § 36-7-30-34 and the exemptions provided for in Ind. Code § 36-7-30-30. Petitioner is seeking certain determinations as to the Commission's jurisdiction over its water utility service.

2. **Petitioner's Characteristics.** Petitioner is a military base reuse authority organized under the laws of the State of Indiana pursuant to Ind. Code ch. 36-7-30, with its principal office and place of business at 1051 W. Indiana Ave., Hillsdale, Indiana 47854. Petitioner has redeveloped the former military base into a large commercial and industrial

development site owned and operated by Petitioner. Petitioner currently provides water utility service to customers located inside the NeCDRA property boundaries.

3. Relief Requested. Petitioner seeks the following relief: 1) authorization to provide water utility service to the Vermillion County Jail (the "Jail") under the same terms and conditions of service that apply to customers currently being served within the NeCDRA property boundaries; 2) authorization to charge the Jail the rates and charges currently in effect for water service to customers located within the NeCDRA property boundaries; 3) a determination from the Commission that Petitioner is exempt from the Commission's jurisdiction as to ratemaking, regulation, service delivery, or issuance of bonds or other forms of indebtedness for water utility service to customers located within the NeCDRA property boundaries pursuant to Ind. Code § 36-7-30-30 and will remain exempt if service is provided to the Jail; and 4) for service provided outside of the NeCDRA property boundaries, a determination from the Commission that Petitioner will be regulated as a municipal water utility in accordance with Ind.Code ch. 8-1.5-3. In its rebuttal case, Petitioner asserts that it should be exempt from regulation as a municipal water utility.

4. Petitioner's Evidence. Mr. William L. Laubernds, Executive Director of the Newport Chemical Depot Reuse Authority, testified that water service to the Jail is needed to comply with orders given to the Jail by the Indiana Department of Environmental Management ("IDEM") to create a viable drinking water system. He added that NeCDRA entered into an Agreed Order with IDEM that includes a schedule of agreed upon improvements to the NeCDRA water system. According to Mr. Laubernds, most of the improvements required by the IDEM Agreed Order have been completed, and he anticipates all improvements will be completed by March 2016.

Mr. Laubernds testified that the U.S. Army had for many years provided water utility service to the Jail and that there was a void left in the provision of water utility service when the Army base closed. NeCDRA sought to fill that void by continuing to provide the water utility service to the Jail. He included a water rate study conducted by Burns & McDonnell with his testimony, which showed that NeCDRA is currently providing a subsidized rate for water service.

Additionally, Mr. Laubernds testified regarding the importance of the relief requested to NeCDRA's economic development efforts and that such efforts seek to address the high rates of unemployment and severe economic disparity of Vermillion County and its residents. According to Mr. Laubernds, it is important for Petitioner to know the exact jurisdiction over its water utility for purposes of seeking new economic development projects and for purposes of negotiation with the owners of those projects that are presently seeking to locate significant economic development projects within the Vermillion Rise property. Mr. Laubernds testified that it is important for the Commission to grant the requested relief regarding the Commission's jurisdiction because the regulatory certainty would be good for the local communities, potential businesses, and NeCDRA.

Mr. Laubernds testified that NeCDRA plans on developing 1,118 acres in three separate projects, including a 750-acre option with an energy company and a 336-acre option with

another energy company. Both options would require large amounts of water. He also testified that the projects will be making substantial investments and major employment commitments.

5. OUCC's Evidence. Mr. Scott A. Bell testified on behalf of the OUCC. Mr. Bell testified that the purpose of his testimony is to recommend approval of Petitioner's request for authorization to provide finished water service to the Jail using the rates and charges and rules and regulations it has identified for that purpose. According to Mr. Bell, Petitioner will have the ability to provide potable treated water service to the Jail once it completes the capital improvement projects as described in this case. Mr. Bell believes it is in the public interest for Petitioner to provide treated water service to the Jail, and that Petitioner's proposal will eliminate the need for the Jail to operate and maintain its own water treatment facilities.

Mr. Bell also testified regarding the Commission's jurisdiction for water utility service within the NeCDRA property. According to Mr. Bell, Petitioner should qualify for the exemption from Commission regulation provided in Ind. Code § 36-7-30-30 when looking at the facts as a whole as presented in this particular proceeding. He testified that Petitioner's proposal to provide a small amount of water to the Jail should not, by itself, deprive Petitioner of its exemption from regulation. He testified that Petitioner should continue to qualify for the exemption because it will only be providing a small amount of finished water to the Jail through lines owned by Vermillion County, and not NeCDRA. As such, the utility property owned by Petitioner would terminate within or at Petitioner's geographic boundaries and no property of Petitioner would be located outside of its boundaries. Additionally, Mr. Bell testified that Petitioner will be providing the water to the Jail at a very subsidized rate. Considering all of these factors, Mr. Bell believes Petitioner should not be disqualified from the exemption.

Mr. Bell also testified that the OUCC's position that the exemption should continue to apply is fact based, and if the facts become materially different, the OUCC's position may change. Mr. Bell testified that the OUCC's position is based on the premise that the legislature did not intend the very limited provision of water service under these facts to disqualify Petitioner from the exemption it authorized.

Lastly, Mr. Bell testified regarding Petitioner's compliance with the IDEM Agreed Order. According to Mr. Bell, Petitioner has completed most of the projects required by the Agreed Order and the remaining unfinished projects are scheduled to be completed by the end of 2016. Therefore, he has no concerns with Petitioner's compliance with the Agreed Order. Mr. Bell recommended that Petitioner be required to inform the Commission and the OUCC if and when the IDEM Agreed Order is closed or amended.

6. Petitioner's Rebuttal Evidence. Mr. Laubernds testified that he agrees with Mr. Bell's conclusion that NeCDRA should be exempt from Commission regulation pursuant to Ind. Code § 36-7-30-30 based on the fact that NeCDRA will be providing a small amount of water to the Jail at subsidized rates. He also testified that he agrees that the exemption should apply because the water main used to provide the water service to the Jail is owned by Vermillion County and that therefore the water service to the Jail is provided at a point located inside NeCDRA's boundaries. According to Mr. Laubernds, the water service to the Jail is procured by Vermillion County within NeCDRA's boundaries, and therefore it is Petitioner's belief that all

water service currently provided by NeCDRA to Vermillion County is done within the NeCDRA property boundary. Mr. Laubernds testified that he agrees that based on the facts in this matter that the language of Ind. Code § 36-7-30-30 requires the exemption from Commission regulation.

According to Mr. Laubernds, if NeCDRA starts providing water service outside of its geographic boundaries, the service provided within NeCDRA's boundaries would continue to be exempt from Commission regulation. However, that is not something the Commission needs to decide in this proceeding because the water service is not being provided outside of NeCDRA's boundaries. The service connection is inside its boundaries or the service to the Jail through lines owned by Vermillion County is a small amount of water that should not be considered service sufficient to cause regulation of NeCDRA's total utility operating inside of its boundaries. He based his interpretation of Ind. Code § 36-7-30-30 on his experience with the various types of enabling legislation used by states in transforming former military bases and on his knowledge of the enabling legislation in Indiana.

Additionally, Mr. Laubernds testified that it is important to NeCDRA that the Commission make a determination that NeCDRA's water service to existing and future water customers within the NeCDRA property boundary will not be regulated by the Commission due to NeCDRA providing water service to the Jail. He added that such a determination will help NeCDRA attract new businesses to the Mega Park and will enhance the Mega Park's economic development efforts. He indicated his primary concern is providing water service on an unregulated basis to areas all located inside NeCDRA's boundaries.

Mr. Laubernds also testified that he agrees with the OUCC's other recommendations and conclusions.

7. Commission Discussion and Findings. Petitioner requested that the Commission authorize it to provide water utility service to the Jail at the rates and charges and under the same terms and conditions of service currently in effect for water service to customers located inside the NeCDRA property boundaries. In its rebuttal case, Petitioner also requested a finding that the Commission does not have jurisdiction over Petitioner's service to the Jail.

Under Ind. Code § 36-7-30-30, utility service provided within a military base reuse district is exempt from Commission jurisdiction so long as the utility service is provided solely within the boundaries of the military installation. For utility service "generated, treated, or produced" outside of the boundaries of the district, such utility service shall be regulated by the Commission as if the district were a municipal utility. Ind. Code § 36-7-30-34.

In this case, with respect to its utility service within the NeCDRA boundaries, Petitioner is exempt from all aspects of the Commission's jurisdiction, including but not limited to ratemaking, regulation, service delivery, reporting, or issuance of bonds or other forms of indebtedness for water utility service. With respect to water service to the Jail, the Commission finds that the water service that extends beyond the NeCDRA boundaries is subject to jurisdiction as a municipal utility. While the connection to a county-owned pipe may be within the NeCDRA boundaries, the water service provided by Petitioner to the Jail generates or

produces drinking water for use outside of the boundaries of NeCDRA. Pursuant to the statute, such utility service should be treated as set forth under Ind. Code ch. 8-1.5-3, for municipal utilities.

Nevertheless, both Petitioner and the OUCC opine that Petitioner should be exempt from Commission jurisdiction in spite of the provision of utility service to the Jail, which is located outside of the NeCDRA boundaries. The OUCC reached its conclusion based on the fact that Petitioner will be providing a small amount of water to the Jail through lines owned by Vermillion County. Additionally, the OUCC concluded that Petitioner will be providing water to the Jail at a very subsidized rate.

Although not cited by either party, Indiana Code § 8-1-2-61.5 states that for a municipally-owned water utility that serves less than 5,000 customers, the Commission may enter an order providing for the use of regulatory procedures if the Commission finds that the regulatory procedure is in the public interest and promotes one or more of the following: (1) utility cost minimization; (2) Commission evaluation of utility needs; (3) less costly regulatory procedure for a utility; or (4) increased utility management efficiency.

In this Cause, Petitioner's main focus is providing utility service within the NeCDRA boundaries, and is only providing water service to the Jail as part of a long-standing relationship that the former military base had with the Jail. Petitioner provided cost-of-service evidence suggesting that the rate charged to the Jail is below actual cost and identical to the rate that would be charged to customers within the boundaries of NeCDRA. Accordingly, the Commission finds that declination of full Commission jurisdiction over what would otherwise qualify as a municipal utility service is in the public interest and provides a less costly regulatory procedure for a utility that is already providing service below cost.

Looking at the totality of facts, the Commission finds that Petitioner's provision of water service to the Jail using the same rates and charges as other NeCDRA customers is reasonable, and Petitioner should continue to be exempt from Commission jurisdiction pursuant to Ind. Code § 36-7-30-30.¹ The conclusion we reach with respect to our jurisdiction is specifically based on the particular facts of this case, which includes but is not limited to, the rates that will be applied to the Jail. If there are any material changes in that regard, or if Petitioner proposes to sell water to any other entities outside the NeCDRA property, the Commission will need to revisit the question of whether a declination of Commission jurisdiction over a municipal utility service should continue to apply.

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

1. Petitioner is hereby authorized to provide water service to the Jail at the rates and charges currently in effect for water service to customers located inside the NeCDRA property.

¹ While Petitioner also requested Commission approval of its rules and regulations, the Commission does not have jurisdiction over the rules and regulations for municipal utilities. See *Cities and Towns of Anderson et al. v. Public Service Comm.*, 397 N.E.2d 303 (Ind. Ct. App. 1979).

2. If in the future Petitioner seeks to expand water service to new customers located outside of the NeCDRA property boundaries, Petitioner shall seek Commission review prior to providing such service.

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

STEPHAN, HUSTON, WEBER, AND ZIEGNER CONCUR:

APPROVED: AUG 24 2016

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



**Mary M. Becerra
Secretary of the Commission**