

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF THE CITY OF FORT WAYNE,)
INDIANA, FOR APPROVAL OF RATE AND CHARGE)
DIFFERENCE BETWEEN PROPERTY WITHIN AND)
PROPERTY OUTSIDE THE CORPORATE)
BOUNDARIES OF THE CITY OF FORT WAYNE,)
INDIANA)

CAUSE NO. 44206

APPROVED:

DEC 19 2012

ORDER OF THE COMMISSION

Presiding Officers:

Carolene Mays, Commissioner

Loraine L. Seyfried, Chief Administrative Law Judge

On June 1, 2012, the City of Fort Wayne, Indiana (“Petitioner” or “Fort Wayne”) filed a petition seeking approval of the rate and charge difference for sewer and water service between property within and property outside the corporate boundaries of the city of Fort Wayne, Indiana.

On June 7, 2012, General Motors LLC (“GM”) filed a Petition to Intervene and a Motion to Dismiss Petitioner’s request for approval of its water service rates. A Docket Entry granting the Petition to Intervene was issued on June 25, 2012.

Pursuant to notice and as provided for in 170 IAC 1-1.1-15, a Prehearing Conference in this Cause was held at 1:30 p.m. on August 8, 2012 in Room 224 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. At the Prehearing Conference, Petitioner made an oral motion for automatic approval of its sewer service rates. In accordance with the Commission’s August 15, 2012 Prehearing Conference Order, Fort Wayne filed its response to GM’s Motion to Dismiss on August 23, 2012 and GM filed its reply on September 7, 2012. In addition, on September 7, 2012, GM filed its response to Fort Wayne’s motion for approval of its sewer service rates and Fort Wayne filed its reply on September 14, 2012.

1. Notice and Jurisdiction. Due, legal and timely notice of the Prehearing Conference in this Cause was given and published by the Commission as required by law. Petitioner operates a municipal sewer and water utility and requests Commission approval pursuant to Ind. Code § 8-1.5-3-8.3(c) of the rates and charges for sewer service established by Petitioner through an ordinance adopted on May 26, 2009 (“Sewer Ordinance”), and for water service established through ordinances adopted on November 22, 2005 and February 21, 2012 (“Water Ordinances”). Therefore, the Commission has jurisdiction over Petitioner and the subject matter of this Cause.

2. Petitioner’s Characteristics. Petitioner is a municipality that owns and operates plant and equipment within the State of Indiana for the furnishing of sewer and water utility service to customers located within and outside the corporate boundaries of the city of Fort Wayne, Indiana. Petitioner’s water utility is subject to the Commission’s jurisdiction for the approval of rates and charges pursuant to Ind. Code ch. 8-1-2 and Ind. Code art. 8-1.5. However, Petitioner’s sewer utility is not subject to the Commission’s jurisdiction for the approval of rates and charges.

3. GM's Motion to Dismiss. GM requests the Commission dismiss Petitioner's request for approval of its water rates because the Water Ordinances were not adopted pursuant to Ind. Code § 8-1.5-3-8.1 or Ind. Code § 36-9-23-26. GM argues that because Petitioner's water utility is subject to the Commission's jurisdiction for approval of its rates and charges, Ind. Code §§ 8-1.5-3-8.1 and -8.3 do not apply. In addition, Ind. Code § 36-9-23-26 is not applicable because it only pertains to rates and charges for municipal sewage works.

Fort Wayne, in its Response, argues that Ind. Code § 8-1.5-3-8.3 is applicable because Fort Wayne satisfies the definition of "utility" contained in Ind. Code § 8-1.5-3-8.1. Section 8.1 defines a "utility" as "a municipally owned: (1) water utility; (2) wastewater utility; or (3) combined water and wastewater utility; that is not under the jurisdiction of the Commission for the approval of rates and charges." Fort Wayne acknowledges that its water utility is subject to the Commission's jurisdiction for rates and charges and that its sewer utility is not subject to the Commission's jurisdiction. However, Fort Wayne argues that it qualifies as a "utility" for purposes of Ind. Code § 8-1.5-3-8.3 because it owns both a water utility and a sewer utility and the "combined water and wastewater utility" is not subject to the Commission's jurisdiction. In addition, GM's interpretation would result in an "unjust and absurd" result because an unregulated utility would have greater rights before the Commission than a regulated utility.

GM's reply asserts that Fort Wayne's argument must fail for several reasons. First, the Water Ordinances do not set forth "combined water and wastewater utility" rates. Rather, the Water and Sewer Ordinances establish separate rates and charges for water and sewer utility service. Second, both the Water and Sewer Ordinances were established prior to the 2012 amendment to Ind. Code § 8-1.5-3-8.1, which had previously defined a "utility" as "all municipally owned water utilities that have been taken out of the jurisdiction of the commission for the approval of rates and charges." Third, because Fort Wayne's water utility is subject to the Commission's jurisdiction, it cannot be a "combined water and wastewater utility" that is not subject to the Commission's jurisdiction. And, finally, the clear language of the statute contemplates different treatment between regulated and unregulated municipal utilities, and such a result is not "unjust and absurd."

The issue to be decided is whether Fort Wayne qualifies as a "combined water and wastewater utility" that is not subject to the Commission's jurisdiction for rates and charges so as to be considered a "utility" for purposes of Ind. Code §§ 8-1.5-3-8.1 and -8.3. The first step in statutory interpretation is determining if the legislature has spoken clearly and unambiguously on the point in question. *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.*, 746 N.E.2d 941, 947 (Ind. 2001). If a statute is clear and unambiguous on its face, we do not apply any rules of construction other than to require that words and phrases be given their plain, ordinary, and usual meanings. *City of Carmel v. Steele*, 865 N.E.2d 612, 618 (Ind. 2007). However, if a statute contains ambiguity that allows for more than one interpretation, it opens itself up to judicial construction to effect the legislative intent. *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 915 (Ind. 1993).

It is uncontroverted that Fort Wayne's water utility is subject to the Commission's jurisdiction for approval of rates and charges. Therefore, based on a plain reading of the statute, Fort Wayne simply cannot be a "combined water and wastewater utility that is not under the jurisdiction of the Commission" because the water utility is subject to the Commission's jurisdiction. The phrase "that is not under the jurisdiction of the Commission for the approval of rates and charges" modifies the entire phrase "combined water and wastewater utility."

This interpretation is entirely logical and does not lead to an “unjust” or “absurd” result. When Public Law 139-2012 (HR 1126) is viewed in its entirety, it is clear the Legislature intended to provide an avenue, under certain circumstances, for the Commission to review rates imposed by an unregulated municipal utility on customers located outside municipal boundaries. A municipal utility subject to the Commission’s jurisdiction for rates and charges would have no need to avail itself of the procedure provided in Ind. Code § 8-1.5-3-8.3(c) because all of its rates and charges, including those for customers located outside its municipal boundaries, would have already had to be reviewed and approved by the Commission pursuant to Ind. Code ch. 8-1-2 and Ind. Code § 8-1.5-3-8.

Accordingly, GM’s Motion to Dismiss Fort Wayne’s request for approval of its water service rates pursuant to Ind. Code § 8-1.5-3-8.3(c) is granted.

4. Fort Wayne’s Motion for Approval of its Sewer Ordinance. Fort Wayne requests the Commission automatically approve its petition filed pursuant to Ind. Code § 8-1.5-3-8.3(c) concerning the percentage difference between rates and charges established in the Sewer Ordinance for property within and property outside the corporate boundaries. Fort Wayne argues that its petition satisfies the statutory requirements set forth in Ind. Code § 8-1.5-3-8.3(c), and therefore, the Commission must approve its petition.

GM argues that a petition filed under Ind. Code § 8-1.5-3-8.3(c) requires the Commission conduct a substantive review of the justification for the rate differentials between property within and property outside the corporate boundaries to determine whether the rates are nondiscriminatory, reasonable and just, in accordance with Ind. Code § 8-1.5-3-8(b). Without a substantive review of the Sewer Ordinance, GM argues that the statute’s requirement to seek Commission approval would be a pointless exercise and the statute could have simply stated that any sewer ordinance satisfying the conditions enumerated in Ind. Code § 8-1.5-3-8.3(c) is automatically grandfathered. Finally, GM argues that its position is supported by Fort Wayne’s petition, which cites to Ind. Code § 8-1.5-3-8.3(h)(2) (a provision that only applies to an analysis of whether rates are discriminatory, reasonable and just under Ind. Code § 8-1.5-3-8) for its position that capital surcharges may not be considered in calculating the sewer rate differential.

Fort Wayne responded by reiterating that the plain language of Ind. Code § 8-1.5-3-8.3(c) provides that the Commission “shall” approve a petition if certain requirements are satisfied. Fort Wayne noted that unlike Ind. Code §§ 8-1.5-3-8.3(d) and (e), which specifically authorizes the Commission “to review and adjust, if necessary, the rates and charges” imposed on property outside municipal boundaries, there is no such language in Ind. Code § 8-1.5-3-8.3(c). Fort Wayne also argues that the Commission’s review under Subsection (c) is meaningful because the statute requires the Commission to determine whether the petition satisfies certain requirements, including the amount of the rate differential established in the ordinance. Fort Wayne stated its reference to Ind. Code § 8-1.5-3-8.3(h)(2) was simply to suggest that because capital surcharges are not considered in determining the differential under other provisions of the statute, then they also should not be considered under Subsection (c).

As previously noted, we first look to see whether the statute is clear and unambiguous on its face. We again conclude that Ind. Code § 8-1.5-3-8.3(c) is clear and unambiguous. It explicitly states that the Commission “shall” either approve or disapprove a petition filed by a municipality, depending on whether it meets certain requirements. That the rates and charges established in the

ordinance be nondiscriminatory, reasonable and just is not one of the statutorily identified requirements. The Commission's review under Subsection (c) is in stark contrast to that provided for when a petition is filed under Ind. Code §§ 8-1.5-3-8.3(d) and (e). This conclusion is further supported by Ind. Code § 8-1.5-3-8.3(g), which addresses who bears the burden of proving rates are nondiscriminatory, reasonable and just when a petition is filed under Subsections (d) and (e), but makes no mention of a petition filed under Subsection (c). In addition, as noted by Fort Wayne, Subsection (c) also appears to recognize that parties opposed to an ordinance adopted prior to March 31, 2012 had other available means to pursue any disagreement, *i.e.*, Ind. Code §§ 36-9-23-26.1 (for sewer) and 8-1.5-3-8.2 (for water).

Consequently, in reviewing Fort Wayne's petition regarding its Sewer Ordinance, the Commission need only determine whether: (1) the ordinance was adopted under Ind. Code § 8-1.5-3-8.1 or Ind. Code § 36-9-23-6; (2) the ordinance took effect prior to March 31, 2012; (3) the ordinance imposes rates and charges on users for property located outside the corporate boundaries that exceed by 15%, but less than 50%, the rates and charges on users for property located inside the municipality; (4) the works that is the subject of the ordinance is a water utility works, a wastewater utility works, or both a water and wastewater utility works; and (5) the petition was filed prior to September 30, 2012. Based on a review of Fort Wayne's petition, the Commission finds that it satisfies all five requirements. The petition, which was filed on June 1, 2012, indicates the Sewer Ordinance was adopted pursuant to Ind. Code § 36-9-23-6 and became effective on July 1, 2009. Exhibit A to the petition contains a copy of the Sewer Ordinance and indicates the subject is Fort Wayne's wastewater utility that is not subject to the Commission's jurisdiction for rates and charges. Finally, the petition also indicates that the Sewer Ordinance imposes a 25% rate differential between property located outside the municipal boundaries and property within the municipality. Because the Legislature did not specify the manner in which the Commission was to determine the amount of the differential, such determination is within our discretion. As noted by Fort Wayne, when other sections of Ind. Code § 8-1.5-3-8.3 require the Commission to determine the percentage of rate differential for purposes of determining the reasonableness of a rate, the statute provides that connection fees and capital surcharges should not be considered. *See* Ind. Code § 8-1.5-3-8.3(h). We see no reason not to exclude these costs from a similar determination (*i.e.*, the amount of the rate differential as opposed to the reasonableness of rate differential), particularly when the excluded costs are those specifically caused and incurred by those properties outside the corporate boundaries.

Accordingly, Fort Wayne's request for approval of its petition, including the percentage difference between rates and charges for sewer utility service as set forth in the Sewer Ordinance, is granted.

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

1. GM's Motion to Dismiss Fort Wayne's request for approval of water service rates pursuant to Ind. Code § 8-1.5-3-8.3(c) is granted.
2. Fort Wayne's Motion for approval of its sewer service rates and charges pursuant to Ind. Code § 8-1.5-3-8.3(c) is granted.

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

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

DEC 19 2012

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

Brenda A. Howe

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Secretary to the Commission