

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF THE TOWN)
OF HUNTERTOWN, INDIANA FOR (A) REVIEW OF)
RATES AND CHARGES BEING IMPOSED BY FORT)
WAYNE OF FORT WAYNE, INDIANA FOR)
WHOLESALE SERVICE PURSUANT TO IND. CODE)
8-1-2-61.7; AND (B) APPROVAL OF REGULATORY) CAUSE NO. 44519
ORDINANCES ESTABLISHING SERVICE)
TERRITORIES FOR THE TOWN'S MUNICIPAL)
WASTEWATER AND WATER SYSTEMS PURSUANT)
TO IND. CODE 8-1.5-6 ET SEQ. RESPONDENT: CITY)
OF FORT WAYNE, INDIANA)

**INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR'S RESPONSE TO
HUNTERTOWN'S AND FORT WAYNE'S PROPOSED ORDERS**

Fort Wayne's Rates to Huntertown

Pursuant to Indiana Code § 8-1-2-61.7, as the utility providing wholesale sewage service to Huntertown, Fort Wayne has the burden of proving the rates and charges it imposes on Huntertown are just and reasonable. Fort Wayne currently charges Huntertown outside city retail rates pursuant to its 2014 rate ordinance. The question the statute directs the Commission to answer is whether Fort Wayne has met its burden of proving the outside city retail rates it imposes on Huntertown are just and reasonable. Fort Wayne has not met that burden.

Fort Wayne's witness Mr. Wirtz indicated that Fort Wayne began charging Huntertown according to its tariffed rates because its wholes water contract with Huntertown had terminated. (Wirtz, p.8) As such, the rate charged to Huntertown appears to have been applicable by default. This explanation does not justify the prospective application of the retail outside city rates to Huntertown. It is understandable that in the absence of a long-term contract, Fort Wayne would charge Huntertown a rate from its tariff. Fort Wayne believes it had "no basis or justification for

deviating from its rate ordinance and offering Huntertown the lower contractual rate.” (Walsh, p. 8) But whether Fort Wayne had a choice at that time, certainly it could have subsequently tailored a rate applicable to Huntertown in case it failed to enter into a long-term contract. And if Fort Wayne had no basis or justification to deviate from its rate ordinance when it began charging Huntertown according to its tariff, a final order in this Cause will be sufficient basis for Fort Wayne to deviate from its retail outside city rate.

Fort Wayne’s Accounting Report indicates the rate to be charged Huntertown as a contract customer is \$2.0314. Fort Wayne’s accounting witness, Mr. Walsh asserted that if Huntertown is a retail customer instead of a contract customer, Fort Wayne will incur additional costs. Mr. Walsh testified the Accounting Report did not account for these costs.¹ Mr. Walsh named three factors that would increase the cost of serving Huntertown. (Walsh pp.20 -21). First, he asserted that without a contract, which has penalty provisions for exceeding flow, Huntertown is not adequately incented to control peak wet weather flow. Second, he said Huntertown will not be contractually bound to provide information that will allow Fort Wayne to plan for future capacity needs of Huntertown, depriving Fort Wayne of the ability to engage in proactive planning. (Walsh pp.20 -21) Last, Mr. Walsh asserted Huntertown’s ability to depart at any time can result in stranded costs to the detriment of Fort Wayne’s other customers.

Neither of these first two *costs* (lack of incentive to avoid peak flow and lack of requirement to provide information) prove or otherwise support the proposition that the rates Fort Wayne charges Huntertown are just and reasonable. First, it is merely conjecture that Huntertown will take fewer

¹ Fort Wayne’s witness, Mr. Walsh explained why the Accounting Reports associated with the cost of service analysis did not treat Huntertown as a retail-outside city customer. He indicated that throughout 2013, Fort Wayne engaged in negotiations and settlement discussions with Huntertown, and anticipated a new contract would be signed. He explained that treating Huntertown as a retail-outside city customer would have resulted in an over-estimation of revenues if a long-term contract with Huntertown was ultimately reached. (Walsh, p. 11)

steps to address peak wet weather flow simply because it is not subject to a contractual penalty. Moreover, this justification fails to recognize that without a long-term contract Huntertown is nonetheless constructing a 750,000 gallon flow equalization facility and making other improvements to reduce flow to Fort Wayne during peak flows. (Huntertown Exhibit 8.) Fort Wayne's assumption that Huntertown will fail to address peak flow is unwarranted.

Moreover, in relying on this justification for the rate it charges Huntertown, Fort Wayne asks the Commission to agree Fort Wayne will incur costs it would not incur if it had a long-term contract with Huntertown. Fort Wayne asks the Commission to accept two assumptions. First, the Commission must assume Huntertown will produce more wastewater than it would otherwise have produced solely because it has not entered into a long-term contract with Fort Wayne. Second, the Commission must assume Fort Wayne will react to this additional wastewater from Huntertown by building treatment plant it would not otherwise build. In addition, Fort Wayne asks the Commission to assume the additional costs it would incur justify a rate more than twice the rate indicated in its Accounting Report. This is unwarranted.

Fort Wayne has not quantified the additional peak flows to be attributed to Huntertown. Likewise, Fort Wayne has not quantified the costs it would incur in response to those additional peak flows. Fort Wayne has not shown those associated costs are even likely to occur. This reason does not support or prove the rates Fort Wayne charges Huntertown are reasonable or just.

Also, Fort Wayne has not quantified the cost of Huntertown not providing information to assist Fort Wayne in predicting its future capacity needs. Moreover, this justification relies on the faulty premise that a long-term contract is the *only* mechanism for procuring the information it may need to plan its future capacity needs. As Huntertown pointed out in its proposed order, Fort Wayne

can acquire such information through other mechanisms such as terms of service associated with an appropriate tariffed rate applicable to Huntertown.

These two *costs* Fort Wayne identified are neither measurable nor known to occur. Both of these cost bases, which Fort Wayne uses to justify Huntertown's *current* rates, depend on Fort Wayne taking action in the *future* to address capacity needs caused by Huntertown's future acts or omissions that may or may not occur. Fort Wayne's current rates should be based on its current costs. Moreover, to the extent it is appropriate to consider future costs, such costs must be quantified. The supposed costs associated with Huntertown's lack of incentive to address peak flow or lack of requirement to provide useful information are not quantified and are extremely speculative.

Fort Wayne's third argument to justify charging Huntertown an outside city retail rate is that Huntertown's ability to depart at any time can result in stranded costs to the detriment of Fort Wayne's other customers. Fort Wayne has attempted to quantify the cost of Huntertown being able to disconnect from its system. In its proposed order, Fort Wayne asserted Huntertown's prospective disconnection from Fort Wayne's system will result in stranded costs associated with treatment capacity:

Beginning in 2002, Huntertown and Fort Wayne engaged in conversations about Huntertown's future growth needs as part of Fort Wayne's process to develop its Master Plan. During the process, Huntertown requested capacity and, in good faith, Fort Wayne planned, designed, constructed, and is planning, designing, and is in the process of constructing capacity for Huntertown's (and other's) capacity needs. Huntertown now claims that it intends to disconnect from Fort Wayne's system. Fort Wayne argues that such a disconnection will cause Fort Wayne's investments to be stranded as the capacity originally planned, designed, and constructed to serve Huntertown will no longer be needed and the cost associated with constructing this capacity may never be recovered on a timely basis.

(Fort Wayne's Proposed Order, p.37)

Fort Wayne stated that during the master planning process, the bulk of Fort Wayne's facilities "were planned, designed, and built to comply with a mandate from the Environmental Protection Agency ("EPA") and IDEM to reduce combined sewer overflows from the wastewater system." Fort Wayne also asserted the treatment plant capacity improvements considered in that planning were designed with capacity to continue to serve Hometown. Fort Wayne argues that the Commission should find that "since Fort Wayne essentially bailed Hometown out of its own environmental regulation problems in 1985, Hometown cannot now avoid paying its portion of Fort Wayne's compliance mandates." (Fort Wayne's Proposed Order, p. 37)

The stranded cost argument and the quantification of any stranded cost depends on the validity of an assertion by Fort Wayne that the investment it claims to have made on behalf of Hometown cannot be used by any other customers. As Hometown pointed out in its proposed order, Fort Wayne has not identified any asset that will be rendered useless by Hometown leaving the system.

Hometown has been a sale for resale customer of Fort Wayne for the last thirty years. Fort Wayne essentially argues it will continue to build treatment capacity for Hometown notwithstanding Hometown's plan to disconnect from Fort Wayne and operate its own treatment plant. It appears that Fort Wayne plans to build more plant for serving Hometown, which presumably will increase the amount of plant that it will consider stranded. As such, one may wonder when Hometown may ever disconnect from Fort Wayne without being charged with stranding Fort Wayne's treatment plant.

It is a good practice for a utility to have treatment capacity that exceeds what it presently

needs to serve its customers. Utilities are expected to plan for growth and build for the future needs of its system. As evidence of this practice being favored, it has rarely been the case in Indiana that a municipal utility, which has constructed more treatment capacity than what its current needs dictate, has been prohibited from including in rates its entire debt service simply because it has extra treatment capacity. Huntertown's departure will free-up capacity. Sooner or later Fort Wayne will need that capacity.

Moreover, basing Huntertown's rates on the wholesale contract rate used in the Accounting Report will not deprive Fort Wayne of its debt service. The Accounting Report on which Fort Wayne based its current wastewater rates was built on the premise that Huntertown is a contract customer. For the present, Fort Wayne's other customers are already paying rates based on revenues from Huntertown such as it paid before it terminated its contract with Fort Wayne. As such, charging Huntertown according to the Accounting Report will not be to the further detriment of other ratepayers. Those other ratepayers are already paying that rate.

During the past thirty years, Huntertown paid according to its wholesale contract with Fort Wayne. There is no real or quantifiable evidence Fort Wayne's cost of serving Huntertown has changed materially since Huntertown lost its status as a contract customer. Yet Fort Wayne now bills Huntertown more than twice the rate indicated in Fort Wayne's Accounting Report.

As noted above, Indiana Code § 8-1-2-61.7 establishes that Fort Wayne has the burden of proving the rates and charges it imposes on Huntertown are just and reasonable. Fort Wayne has not met that burden. The OUCC recommends the Commission require Fort Wayne to charge Huntertown according to the rate indicated in its Accounting Report.

Huntertown's Regulatory Ordinance

But for the enactment of IC § 8-1.5-6-1 et al, the Commission would not be in the position of deciding whether Huntertown should have the exclusive right to provide wastewater service in any given territory. As a municipal wastewater utility, Huntertown would otherwise compete for its new customers without the Commission's assistance. Huntertown is the first municipal wastewater utility that has asked for the relief authorized by IC § 8-1.5-6-1 et al.

Both the OUCC and the Commission have a great deal of experience considering whether a rural sewage disposal company should have exclusive territorial authority to provide its service. Start-up sewage disposal companies receive authority to provide sewage disposal service through grants of certificates of territorial authority or CTA's. By law, the public utility that receives a CTA has the exclusive right to provide the service in that territory. IC § 8-1-2-89. Pertinent statutes and administrative code provisions provide guidance to applicants, the Commission, the OUCC and any rival utilities that would prefer to serve those territories. Unfortunately, those statutes and rules do not apply to this Cause.

Indiana Code Chapter 8-1.5-6 has its own criteria for the Commission to consider. Unfortunately, that chapter does not provide the same level of guidance as the criteria listed in IC § 8-1-2-89. In IC § 8-1.5-6-8(g), the Commission is to consider the following:

- (1) The ability of another utility to provide service in the regulated territory.
- (2) The effect of a commission order on customer rates and charges for service provided in the regulated territory.
- (3) The effect of the commission's order on present and future economic development in the regulated territory.
- (4) The history of utility service in the regulated territory, including any contracts for utility service entered into by the municipality that adopted the regulatory ordinance and any other municipalities, municipal utilities, or utilities.
- (5) Any other factors the commission considers necessary.

While IC § 8-1-2-89 sets forth specific findings the Commission must make before granting a CTA, IC § 8-1.5-6-8 does not. Moreover, it is not entirely clear how the considerations listed above should affect the Commission's determination. For instance, the statute does not explain how the fact that another utility is able to provide service in the regulated area is to affect the Commission's determination. Should the fact that another utility can provide service suggest the regulatory ordinance should not be approved because service by the petitioner is unnecessary? Or should that fact indicate the regulatory ordinance should be approved because there *is* a need to exclude competitors?

Nonetheless, the Commission must determine whether Huntertown has met its burden and shown by a preponderance of the evidence that its regulatory ordinance should be approved and enforced. As set forth above, IC § 8-1.5-6-8(g)(5) states that the Commission may consider any factors it considers necessary. There are at least two other factors the Commission should consider.

First, the Commission should consider how granting Huntertown exclusive authority to provide services outside its municipal limits will affect the property owners and residents in the areas that Huntertown proposes to serve. Second, the Commission should recognize that municipal water and wastewater utilities do not generally have exclusive authority to operate outside of their municipal limits.

Through this process, the OUCC has received many comments from members of the public who reside in or near the area for which Huntertown has requested to be the sole provider of water or wastewater services. The OUCC has introduced these comments into the record at the field hearing and at the final evidentiary hearing. Most of these comments expressed opposition

to Huntertown extending service into the territory established by the regulatory ordinance. By amending its case and proposing certain conditions in its proposed order, Huntertown has mitigated against some of these concerns. It has promised that where it has the exclusive right to serve an area it will not mandate residences with properly working septic systems and wells to connect to Huntertown's wastewater and water lines or charge disparate out-of-town water or wastewater rates. But this does not address all concerns. The OUCC submits that if Huntertown is authorized any exclusive territory outside its municipal limits, Huntertown should not have the authority to require any resident to connect to its system. The OUCC recommends the Commission prohibit Huntertown from having the authority to determine whether an individual has an improperly functioning septic tank. The OUCC proposes that if Huntertown has any exclusive territory, only the local health department or other appropriate entity make that determination.

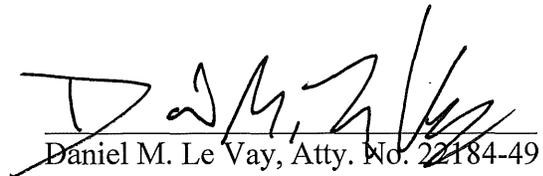
Huntertown has also addressed concerns expressed by members of the public by proposing a very significant reduction in the size of the area to be served exclusively by Huntertown. The OUCC sees that as a significant improvement. However, for those property owners still within the smaller area, none of those concerns that may have been expressed are lessened by that change. If such property owners are required to connect to a wastewater utility or if they desire to connect to a wastewater or water utility, Huntertown is their only option.

The relationship between Huntertown and Fort Wayne has been highly contentious. Fort Wayne has shown itself to be a vigorous contender for the areas near Huntertown. Indiana Code Chapter 8-1.5-6, presents an opportunity to prevent Huntertown from losing out to its much larger neighbor and wholesale provider under the existing regulatory paradigm. Practically

speaking, the prospect of giving Huntertown the exclusive right to serve the area requested is really the prospect of excluding Fort Wayne. The evidence before the Commission in this case may suggest that excluding Fort Wayne from the proposed area would allow Huntertown to move forward in becoming a viable provider of wastewater service. In granting such relief, the Commission should be cautious.

Typically, a municipal water or wastewater utility stakes its claim to an area by extending its lines to that area. Through its regulatory ordinance and by invoking the jurisdiction of the Commission under IC § 8-1.5-6-1 et al, Huntertown proposes to stake its claim through a Commission order. Granting exclusive territory in such a manner is problematic. While granting Huntertown the exclusive right to provide water and wastewater service in the area may assist it in becoming a viable water and wastewater treatment provider, the residents and property owners in that area would lose whatever choice they would otherwise have for those services. For that reason, the OUCC recommends the Commission not grant Huntertown any exclusive territory without appropriate safeguards described above and without establishing a point in time in which that exclusive right to serve would terminate.

Respectfully submitted,


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *OUCC's Response To Hometown's and Fort Wayne's Proposed Orders* has been served upon the following counsel of record in the captioned proceeding by electronic service on March 6, 2015.

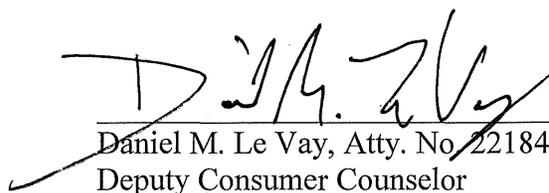
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