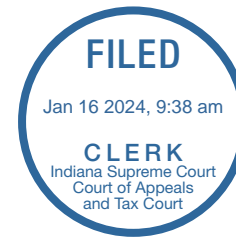


MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE
COURT OF APPEALS OF INDIANA

Community Utilities of Indiana,
Inc.,

Appellant-Petitioner,

v.

Indiana Utility Regulatory
Commission, Indiana Office of
Utility Consumer Counselor,
and Lakes of the Four Seasons
Property Owners' Association,

*Appellees-Administrative Agency,
Statutory Party, and Intervenor.*

January 16, 2024

Court of Appeals Case No.
23A-EX-458

Appeal from the Indiana Utility
Regulatory Commission

The Honorable Jim Huston,
Chairman

The Honorable Sarah Freeman,
The Honorable Stefanie Krevda,
The Honorable David Veleta,
The Honorable David E. Ziegner,
Commissioners

The Honorable Jennifer L.
Schuster, Sr. Administrative Law
Judge

IURC Cause No. 45651

Memorandum Decision by Judge Mathias
Judges Riley and Crone concur.

Mathias, Judge.

- [1] Community Utilities of Indiana, Inc. (“Community”) appeals an adverse decision of the Indiana Utility Regulatory Commission (“IURC”) in which the IURC denied Community’s request to increase service rates to recoup certain costs for engineering studies. Community raises a single issue for our review, namely, whether the IURC’s judgment is supported by the record.

- [2] We affirm.

Facts and Procedural History

- [3] Community is a northern Indiana water and wastewater utility and is regulated by the IURC. The Indiana Office of Utility Consumer Counselor (“OUCC”) is a state office that represents the public and ratepayers before the IURC. And the Lakes of the Four Seasons Property Owners’ Association (“LOFS”) is an intervenor here that represents a community of real property owners in Community’s service area.
- [4] In 2018, the IURC entered a final order against Community in a prior ratemaking matter. In the 2018 order, the IURC instructed Community in relevant part as follows:

1. Develop and Implement a System Improvement Plan [(“SIP”)] Focused on Three Keys Aspects of Service Quality for [Community’s] Water and Wastewater Systems. Based on our consideration of the evidence, we find that [Community] still needs to improve three key aspects of service quality and [Community] shall develop and implement the SIP to ensure that it makes these improvements. Accordingly, we direct [Community] to develop the SIP to achieve the following goals: (a) to decrease total incidences of wastewater backups in homes, (b) to decrease total incidences of manhole overflows, and (c) to decrease total complaints of discoloration of drinking water (“Three Key Aspects”).

In the SIP, [Community] shall provide detailed plans to measurably improve performance in the Three Key Aspects through use of two

primary components: a comprehensive inflow and infiltration (“I&I”)^[1] program and a multi-faceted program to decrease incidences of discolored water, as described below. The detailed plans shall include descriptions of the activities, measureable [sic] outcomes, cost-benefit analyses, and timelines. *Additionally, [Community] shall propose capital investments that require [IURC] approvals and suggested timetables for the filings and approvals. For proposed significant capital investments, [Community] shall provide proper documentation of engineering studies and detailed competitive bids from contractors to support [Community] proposals.*

a. Develop a Comprehensive Inflow and Infiltration Program to Decrease Total Incidences of Wastewater Backups and Manhole Overflows. [Community] shall develop a comprehensive I&I program to decrease wastewater backups in homes and manhole overflows and to eliminate water inflow and ground water infiltration into [Community’s] wastewater collection system. The I&I program shall specifically address how [Community] will decrease inflow of rain and storm water into the wastewater system by working with LOFS to eliminate improperly installed residential sump pumps and roof downspouts and illegally connected drains. The I&I program shall also utilize [Community’s] comprehensive asset program to decrease infiltration of groundwater into the wastewater system through leaky joints, cracked pipelines, and deteriorated manholes.

b. Develop a Multi-Faceted Program to Decrease Total Complaints of Discoloration of Drinking Water. [Community] shall develop a thorough program to decrease complaints of discolored drinking water through implementation of a comprehensive asset program to prudently maintain, repair, flush, and replace [Community’s] water infrastructure. Additionally, [Community] shall communicate with leadership

¹ “Inflow” and “infiltration” refer to two different types of water entry into a collection system, and both types of entry are common and expected to certain degrees.

and residents of LOFS regarding causes of discolored drinking water, steps [Community] is taking to decrease complaints, and how residents can help prevent discolored water.

Appellant's Addend. pp. 17-18 (*italics added*).

[5] Thereafter, Community spent approximately \$1.6 million in engineering studies to develop a collection system improvement project and a wastewater treatment plant improvement project. Most significantly, the collection system improvement project sought to upgrade two lift stations and to construct a new lift station to increase Community's system capacity. Community believed that this project would "reduce the incidences of basement backups and manhole overflows." *Id.* at 34. The wastewater treatment plant improvement project sought, in significant part, to increase the daily average flow capacity of Community's wastewater treatment plant from 1.1 million gallons per day to 1.6 million gallons per day. Community believed this project would "provide a long-term solution . . . to handle all incoming wastewater flow" *Id.*

[6] Based on those plans, Community initiated a new ratemaking case with the IURC in which Community sought preapproval for both projects. The IURC held an evidentiary hearing on Community's request, and Community presented its evidence in support of its position. The OUCC and LOFS also participated and presented evidence against Community's proposed improvements.

[7] Following the evidentiary hearing, the IURC found as follows with respect to Community's request for preapproval to develop the collection system improvement project:

The evidence is undisputed that one of the major causes for surcharges in [Community's] system is inflow. [Community's] preapproval request in this case is based on the assertion that [Community] is unable to remove more than 30% of the I&I in its system and that it must remove at least 60% of I&I to reduce the need for the [collection system improvement project]. However, the evidence of record in this Cause identified several areas within [Community's] collection system that have significant wet weather peaking factors associated with inflow. For example, [LOFS expert witness] Mr. Holden provided credible testimony that these areas present opportunities for a successful I&I removal program to remove more than 30% of the clearwater flow. [Community] did not present any contrary evidence that we found convincing on rebuttal.

We find that the evidence of record does not support [Community's] request for preapproval of the [collection system improvement project]. The evidence of record demonstrates that hundreds of thousands of gallons of I&I per day could potentially be removed if [Community] addressed inflow in several specific locations identified by credible evidence presented by the OUCC and LOFS. It would be premature for the Commission to approve any [collection system improvement project] when [Community] has not yet attempted to remediate, at a minimum, the inflow locations identified by Mr. Holden and [OUCC expert witness] Mr. Parks.

In addition, approving [Community's] [collection system improvement project] would put the [IURC's] stamp of approval on [Community's] failure to comply with the [2018] Order, in which we ordered it to "develop a comprehensive I&I program to

decrease wastewater backups in homes and manhole overflows and to eliminate water inflow and ground water infiltration into [Community's] wastewater collection system.” We find that [Community] should prioritize its I&I program so that we can assess the impact of the I&I removal on [Community's] request for preapproval, rather than guess about what percentage of I&I could be removed, as it has done.

. . . Because we are unable to find, based on the evidence of record in this Cause, that any expenditure for [a collection system improvement project] is currently necessary for [Community] to provide reasonable service to its customers, we deny [Community's] request for preapproval of its proposed [collection system improvement project].

Id. at 42. And, as for Community's request for preapproval to develop the wastewater treatment plant improvement project, the IURC found as follows:

The evidence of record establishes that [Community's] existing 1.1 [million gallons per day, or MGD] capacity is sufficient to serve [Community's] existing and potential future customers and does not support [Community's] request to expand the [wastewater treatment plant] capacity to 1.6 MGD. [Community] has argued that it needs to increase the [wastewater treatment plant] capacity to 1.6 MGD to potentially serve 43 more homes within LOFS (approximately 13,000 [gallons per day, or GPD]) and to treat an additional estimated 500,000 GPD of sanitary overflows not accounted for in the flow metering. However, according to Mr. Holden's testimony, [Community's] overflow reports filed with IDEM indicate overflow levels that are far below 500,000 GPD (approximately 1,200 gallons per event). In addition, the OUCC presented credible evidence that issues exist with [Community's] Parshall flume influent flow meter that could directly affect the size of [wastewater treatment plant] expansion (if any) that [Community] needs, and we give

weight to this evidence. Thus, even ignoring I&I considerations, [Community] has not demonstrated a need to expand the [wastewater treatment plant] to 1.6 MGD.

Id. Accordingly, the IURC denied Community's request for preapproval of the two projects.

[8] Thereafter, Community filed a new petition with the IURC to increase its rates. As relevant here, in that petition Community sought to recover via increased rates the \$1.6 million Community had spent on the engineering studies underlying Community's proposed collection system improvement project and wastewater treatment plant improvement project.² According to Community, it had incurred those costs in compliance with the 2018 Order. The IURC held an evidentiary hearing on Community's petition, at which OUCC and LOFS participated.

[9] In February 2023, the IURC found as follows with respect to Community's request to recover the \$1.6 million:

The [costs incurred] . . . under [Community's] direction and [for] which [Community] sought preapproval . . . are not directly related to any attempt to implement a comprehensive I&I program or to decrease indices of discolored water. Those costs were incurred with the intent of replacing [Community's] aged [wastewater treatment plant] and increasing treatment capacity without first making a substantive attempt to quantify and

² The IURC suggests that a utility can never recover costs associated with studies for projects that themselves are not approved by the IURC. But we need not consider that question given our disposition of this appeal.

eliminate I&I as directed in the [2018] Order, resulting in a [wastewater treatment plant] that may be substantially overbuilt and not used and useful.

Nothing in the [2018] Order can be reasonably construed as a specific request that [Community] undertake the [wastewater treatment plant] improvements and [collection system improvement project] proposed in [Community's preapproval request]. For example, the [2018] Order never mentions increasing the size of the [wastewater treatment plant], upgrading lift stations, or installing [related new equipment]. The [2018] Order instructed [Community] to implement a comprehensive program to significantly reduce its I&I, which could potentially reduce or eliminate the need for increased capacity Therefore, we conclude that the [engineering cost] was not prudently incurred as the sizing requirements of needed . . . improvements (if any are, in fact, needed) are *still* unknown due to [Community's] continued failure to work toward the abatement of I&I. Thus, we deny [Community's] request to recover its engineering expenses

* * *

For these reasons, we find that [Community] has not presented persuasive evidence that its expenses . . . were reasonably incurred and deny its request

Appellant's App. Vol. 2, p. 74. Following that judgment, the IURC entered a *nunc pro tunc* order that made immaterial corrections to its order. The IURC

thereafter denied Community’s request for reconsideration in relevant part,³ and this appeal ensued.

Standard of Review

[10] As our Supreme Court has explained, in reviewing decisions of the IURC:

we apply three levels of review First, we uphold findings of fact supported by substantial evidence, which the court does not reweigh. Second, we “review the conclusions of ultimate facts, or mixed questions of fact and law, for their reasonableness, with greater deference to matters within the [commission]’s expertise and jurisdiction.” Third, we determine whether the commission’s decision is contrary to law. This third category of review asks “whether the Commission stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order.”

Ind. Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC, 183 N.E.3d 266, 268 (Ind. 2022) (citations omitted).

Discussion and Decision

[11] Community’s argument on appeal is that the IURC’s 2018 Order directed Community to obtain engineering studies on potential capital improvements. Thus, Community continues, the IURC’s ensuing denial of Community’s

³ In its order denying Community’s request for reconsideration, the IURC found that Community had engaged in bad faith. We need not consider that finding given our disposition of this appeal.

request to increase rates to allow Community to recover the costs for those studies is unreasonable.

[12] Community's arguments on appeal fall into two general claims. First, Community asserts that the 2018 Order required it to obtain engineering studies on capital improvements like those for which Community sought preapproval. Second, Community asserts that the IURC implicitly approved Community's expenditures when IURC staff members did not object or otherwise redirect Community during various technical conferences and reports at which Community informed those staff members of Community's progress in satisfying the 2018 Order's requirements.

[13] We first address Community's claims regarding the language of the 2018 Order. As noted above, that order directed Community to engage in mitigation efforts focused on "Three Key Aspects"—wastewater backup in homes, total incidences of manhole overflows, and discoloration of drinking water. Appellant's Addend. p. 17. The order more specifically directed Community to "provide detailed plans to measurably improve" Community's performance in those three areas "through use of two primary components," namely, a comprehensive I&I program and a "multi-faceted program" to address water discoloration. *Id.* at 17-18. The order then added that, along with those plans, Community "shall propose capital investments," which, in turn, would include "proper documentation of engineering studies." *Id.* at 18.

[14] There is nothing ambiguous in that language. The IURC’s direction was for Community to obtain engineering studies for capital investments that would, as relevant here, mitigate I&I into Community’s system. Thus, the question as to the 2018 Order’s direction and the studies Community then obtained is a question of whether Community’s expenditures were reasonably related to that order. That question invokes our “second” level of appellate review, under which we afford the IURC deference where its judgment was within its expertise. *See Ind. Off. of Util. Consumer Couns.*, 183 N.E.3d at 268.

[15] Applying that standard here, we cannot say that the IURC’s conclusion that Community’s engineering studies were unrelated to the 2018 Order is unreasonable. Again, the 2018 Order directed Community to propose capital improvements related to I&I mitigation. Instead, Community obtained engineering studies that skipped over I&I mitigation efforts entirely and sought to revamp Community’s entire system capacity. Such a result was overkill and well beyond the scope of the 2018 Order. As the IURC aptly found in denying Community’s request to recoup these costs, a proper mitigation effort by Community could have “reduce[d] or eliminate[d] the need for increased capacity” in Community’s system altogether. Appellant’s App. Vol. 2, p. 74. Thus, we cannot say that the IURC acted unreasonably when it concluded that Community’s expenditures were “not prudently incurred” and not “reasonably incurred” in relation to the 2018 Order. *Id.*

[16] Still, Community also asserts that the IURC impliedly consented to, or otherwise should be estopped from denying, Community’s costs for the

engineering studies. According to Community, on various occasions between the 2018 Order and Community's request for preapproval of the two projects, it had informed IURC staff members at required technical conferences and in periodic reports of Community's studies and its likely forthcoming proposals. Community continues that, because the IURC staff members did not object to that information then, did not redirect Community's efforts, or otherwise informed Community to continue its efforts, the IURC could not have later reasonably denied Community's request to recoup its costs.

[17] We cannot agree. The intermittent technical conferences and reports between the 2018 Order and Community's request for preapproval of the two projects were not fact-finding hearings before the IURC. They were required simply to keep the IURC staff abreast that Community, which has a long history with the IURC of failing to mitigate I&I and other issues, was taking some affirmative steps to attempt to comply with the 2018 Order. The next fact-finding hearing before the IURC after the 2018 Order was on Community's preapproval requests; that hearing was the first time that the IURC had received multiple viewpoints on Community's proposals, and the IURC was entitled to assess the totality of the evidence at that hearing regardless of any information Community might or might not have presented to IURC staff members previously at technical conferences or in periodic reports. Likewise, the first time the IURC held a fact-finding hearing as to the reasonableness of Community's expenditures on the engineering studies was after Community had petitioned to increase its rates to recoup those costs. Again, the IURC was

entitled to base its judgment on the totality of the evidence presented at that fact-finding hearing. Community's arguments on this issue are not persuasive.

[18] Accordingly, for all of the above-stated reasons we affirm the IURC's judgment to deny Community's request to increase its rates to recoup its costs for the engineering studies.

[19] Affirmed.

Riley, J., and Crone, J., concur.