

STATE OF INDIANA)
) SS:
COUNTY OF LAGRANGE)

IN THE LAGRANGE CIRCUIT COURT
CAUSE NO. 44C01-0912-MI-040

IN THE MATTER OF THE OBJECTION TO)
ORDINANCE NO 2009-12-01-02 ADOPTED)
BY TOWN COUNCIL OF TOWN OF)
WOLCOTTVILLE, INDIANA)

**JUDGMENT FOLLOWING JUDICIAL REVIEW OF MUNICIPAL
RATE-MAKING ACTION**

Petitioners appear in person and/or by counsel, Patrick G. Murphy and Joshua C. Neal. Respondent appears by counsel, Steven W. Krohne and Philip B. McKiernan. Bench trial was conducted in this case on January 27 and 28, 2010. At the conclusion of the bench trial the Court took all matters under advisement. The Court at this time being duly advised in the premises finds and orders as follows:

1. On December 1, 2009, the Town of Wolcottville ("Town") adopted an Amended Rate Ordinance ("2009-ARO") which amended the service rates to be assessed against certain of its wastewater treatment customers.

2. Town's customers were placed into different rate paying classifications.

3. The two (2) rate paying classifications which are of significance in the case at bar are:

(a) Customers residing within Town's corporate boundaries; and,

(b) Customers residing outside of Town's corporate boundaries.

4. The out-of-town customers reside around several lakes

located in LaGrange County, Indiana.

5. Through Rate Ordinance adopted in 2000, Town established a flat rate for all of its unmetered customers, whether residing inside or outside of its corporate boundaries, in the amount of \$14.70 per month.

6. Through Rate Ordinance adopted in 2003, Town continued to keep a flat rate for its unmetered customers, whether residing inside or outside of its corporate boundaries, but increased the flat rate to \$20.95 per month.

7. Town's 2009 ARO kept the flat rate for its customers residing within its corporate boundaries at \$20.95, but increased the flat rate for its customers residing outside of its corporate boundaries to \$46.89 per month.

8. Town has 328 customers residing within its corporate boundaries, and has 661 customers residing outside of its corporate boundaries.

9. Approximately 42 percent of Town's out-of-town customers live on a lake year round. The remaining 58 percent of its out-of-town customers have a permanent residence elsewhere, and consider their lake home only as a vacation home.

10. On average, 60 percent of plant usage is generated by Town's customers who reside within Town's corporate boundaries, and 40 percent of plant usage is generated by Town's customers who reside outside of Town's corporate boundaries.

11. On a monthly average, Town receives approximately \$41,000.00 in revenue from its out-of-town customers, and

\$8,000.00 in revenue from its in-town customers.

12. The physical plant situated within Town's corporate boundaries was constructed during the late 1960's, and has subsequently been upgraded.

13. Approximately one-half of Town's customers residing within its corporate boundaries are on a gravity flow system. The remainder of Town's customers residing within its corporate boundaries require the assistance of five (5) lift stations to facilitate waste flow.

14. One lift station was put into service during 2003; one lift station was put into service during 2000; and, the remaining three (3) lift stations were put into service prior to the year 2000.

15. The flow system used by Town's out-of-town customers works through a combination of gravity, plus two (2) vacuum stations.

16. The infrastructure for Town's out-of-town customers, at least on average, is of more recent vintage than that servicing Town's customers located within its corporate boundaries.

17. Jeffrey A. Peters, Peters Municipal Consultants, P.C., had assisted Town since 2005 with some of its financial affairs.

18. Town invited Mr. Peters to assist it in addressing the financial problems it was experiencing with the operation of its wastewater treatment system.

19. It was costing Town approximately \$800,000.00 annually to operate its wastewater treatment system.

20. Town was generating approximately \$600,000.00 in annual revenue from its customers.

21. Town made the decision that customer rates would have to be increased.

22. Mr. Peters prepared for Town a "Special Purpose Report". See, Exhibit "8".

23. Mr. Peters also prepared a Power Point Presentation which is not part of Exhibit "8".

24. Upon presentation of the above information at a properly convened Town Council Meeting, Town proceeded to adopt its 2009 ARO.

25. The 2009 ARO provided, in part, that:

" . . . In that local and lateral sewers under applicable laws are the financial responsibility of the property owners to be serviced thereby; and, by virtue thereof of the Town of Wolcottville, it is necessary for connection and debt service charges to be paid by users of the sewage works, owners of property served or to be served by the sewage works located in the Wolcottville Sewage Works system in Phase I, Phase II, and New Town Service Areas..."

26. Town utilized a return on investment ("ROI") methodology in setting the rates put forth in its 2009 ARO as proposed by Mr. Peters.

27. This method of rate making permitted Town to recoup its expenses, taxes, depreciation, and a reasonable rate of return on its capital investment.

28. Prior to the 2009 ARO being adopted Town had little, if

any, hard data before it to calculate and compare the actual costs of providing services to its in-town customers as compared to its out-of-town customers.

29. Mr. Peters, and Town, assumed these costs would be greater for Town's out-of-town customers.

30. The Superintendent of Town's wastewater system was not asked to contribute information he had at his disposal prior to enacting the 2009 ARO.

31. In order for the ROI methodology of rate-making to produce an accurate result, the number selected for plant and infrastructure, against which the selected rate of return number will be multiplied, must be correct.

32. The number found to be correct by Town for plant and infrastructure was \$7,695,152.00.

33. Town selected four (4) percent as its desired rate of return on its invested capital.

34. This having been accomplished, the rate set forth in the 2009 ARO was calculated as follows:

(a) $\$7,695,152.00 \times 4\% = \$307,806.00 \div 989$ total customers = $\$311.23$ per annum, per customer, $\div 12$ months = $\$25.94$ per month, per customer. See, Exhibit "9".

35. This would translate into in-town customers paying annually approximately \$102,192.00 of the rate increase, and out-of-town customers paying annually approximately \$205,614.00 of the rate increase.

36. Town determined that to allocate the \$307,806.00 ROI

among all of its customers would have resulted in Town realizing revenue much greater than necessary to maintain the operation of its waste water system on a sound financial basis.

37. Town needed approximately \$200,000.00 in increased revenues.

38. Town determined that it would eliminate this unnecessary revenue by removing its 328 customers residing within its corporate boundaries from the equation, and, assessing the entirety of the rate increase against its 661 customers residing outside of its corporate boundaries.

39. This disparity in the treatment of its customers was justified by Town as a remedy of what Town perceived as its in-town customers historically having subsidized its out-of-town customers through Town's general tax fund.

40, Indiana Code 36-9-23-25(a) and (b) provide as follows:

"(a) The municipal legislative body shall, by ordinance, establish just and equitable fees for the services rendered by the sewage works, and provide the date on which the fees are due.

(b) Just and equitable fees are the fees required to maintain the sewage works in the sound physical and financial condition necessary to render adequate and efficient service. The fees must be sufficient to:

(1) pay all expenses incidental to the operation of the works, including legal expenses, maintenance costs, operating charges, repairs, lease rentals, and interest charges on bonds or other obligations;

(2) provide the sinking fund required by section 21 of this chapter;

(3) provide adequate money to be used as working capital; and

(4) provide adequate money for improving and replacing the works. . ."

41. Indiana Code 36-9-23-25(e) provides as follows:

"(e) The municipal legislative body may exercise reasonable discretion in adopting different schedules of fees, or making classifications in schedules of fees, based on variations in:

(1) the costs, including capital expenditures, of furnishing services to various classes of users or to various locations; or

(2) the number of users in various locations . . ."

42. Additional facts will be set forth hereinafter as deemed necessary by the Court.

43. Town's out-of-town customers contend that the new rates assessed against them by virtue of the 2009 ARO are not just and equitable for the following reasons:

(a) The number put forth by Town as its net investment in plant and infrastructure is incorrect; and,

(b) It is in all events unjust to assess the entirety of the rate increase against Town's out-of-town customers.

44. Town contends that the new rates put forth in the 2009 ARO are just and equitable because the costs associated with Town providing services to its out-of-town customers exceeds the costs associated with providing services to its in-town customers. In support of its contention, Town cites to the Court the opinion of *Farley Neighborhood Ass'n v. Speedway*, 765 N.E.2d 1226 (Ind.

2002) ¹

45. The Court, for each of those reasons hereinafter set forth, concludes that the 2009 ARO adopted by Town is not just and equitable and is, therefore, invalid.

46. The ROI methodology utilized by Town in arriving at its new rate structure begins with the number \$7,695,152.00 as its net investment. If this number is not accurate, then the remainder of the ROI methodology likewise is inaccurate.

47. The Court concludes that the number \$7,695,152.00 does not, in fact, accurately reflect Town's true net investment for the following reasons:

(a) It does not reflect a reduction for depreciation for years ending 2007, 2008, and for eleven (11) months in 2009;

(b) It does not reflect a reduction for that portion of bond debt which, in fact, is being paid through a surcharge presently being assessed against its out-of-town customers; and,

(c) It does not reflect the fact that Town's out-of-town customers have heretofore paid \$429,107.00 for their up front infrastructure costs, and \$78,400.00 in connection fees.

48. The figure \$7,695,152.00 reflects an exaggerated number for Town's true investment costs. Town should not be permitted to recover a return on its investment which it in fact has not made. See, Exhibit "2", page 38.

49. In addition to using an incorrect number for its net

¹ The Court finds the facts in *Farley* are distinguishable from the facts in the case at bar. *Farley* did not involve the ROI rate-making methodology, nor did it involve assessing a rate increase entirely to only one (1) of its customer classifications.

investment in the wastewater system, Town determined that the ROI methodology it had utilized produced excess revenue. To eliminate this excess revenue, Town decided to forego recovering any of the four (4) percent ROI from its customers located within its corporate boundaries, and elected to place the entire burden of paying the rate increase upon its customers residing outside of its corporate boundaries. See, Exhibit "29" - (Interrogatory Answer "9").

50. Town seeks to justify this disparate treatment among its in-town and out-of-town customers by directing the Court's attention to its differing costs associated with providing services to these two (2) distinct customer classifications.

51. Town puts forth the following by way of example:

(a) Service costs (gas, oil and routine maintenance) for vehicle use in monitoring the wastewater treatment system to comply with all federal and state regulations have increased owing to the fact that Town services 661 out-of-town customers, while servicing only 328 in-town customers. What these costs might be are not set forth in the record. Further, some portion of these service costs necessarily must remain attributable to serving the needs of customers residing within Town's corporate boundaries.

(b) The costs associated with sludge disposal has increased. Historically, prior to adding out-of-town customers onto the system, sludge was spread upon the fields of farmers. Today, it costs approximately \$16,000.00 to dispose of this

sludge. Both in-town customers and out-of-town customers create sludge. No explanation has been offered to the Court why the entirety of future sludge removal should be borne solely by out-of-town customers.

(c) The costs associated with repairing and replacing infrastructure has increased. The amount of these costs were not introduced into evidence. If age and usage bear a correlation for the need to repair and/or replace infrastructure, then, it appears to the Court that in-town customers are much more likely, at least in the near future, to need infrastructure repair than out-of-town customers. Even if the infrastructure for in-town users and out-of-town users were put into service at the same time, no explanation has been offered to the Court as to why the entirety of this repair and/or replacement expense should be borne solely by customers located outside of Town's corporate boundaries.

(d) Out-of-town customers have unique water issues. These unique water issues are related to rising lake levels during times of excessive rainfall; water overflowing embankments; and, basements of out-of-town customers flooding. When this has historically occurred, out-of-town customers will attempt to remedy the problem by pumping the water in their basements out into the wastewater system. This, in turn, causes problems at the plant in processing excess flow. No evidence was put forth to establish the number of times this problem occurs, or the costs associated with remediating this problem.

(e) The quantity of water treatment chemicals; the costs associated therewith; and, the number of times wastewater must be tested prior to discharge have increased. The costs associated with testing and chemical usage were not introduced into evidence. A portion of these costs, in any event, must necessarily be attributable to servicing the needs of Town's in-town customers as well as its out-of-town customers.

(f) Town's electric bill for operating the five (5) in-town lift stations is \$395.00 per month. Town's electric bill for operating the two (2) out-of-town vacuum stations is \$1,082.00 per month. This might well justify a rate disparity between in-town customers and out-of-town customers. It does not explain why the entirety of the rate increase should be borne only by out-of-town customers.

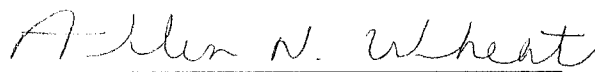
52. The Court is mindful that rate-making is a legislative and not a judicial function. Further, this Court's review of Town's rate-making actions should be highly deferential and limited to determining whether Town acted within its statutory authority. *See, Farley, supra*, at page 1229. With this standard of judicial review in mind the Court must, nonetheless, conclude that Town's out-of-town customers have overcome the presumption that Town's 2009 ARO is just and equitable, and that Town has abused its discretion by placing the entire burden of the rate increase upon its out-of-town customers when not justified by costs, or number of users in various locations, as required by Ind. Code 36-9-23-25(e).

53. It is unnecessary for the Court to address the additional arguments put forth by out-of-town customers regarding the purported invalidity of Town's 2009 ARO.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The 2009 ARO is invalid.
2. The 2003 Rate Ordinance remains in full force and effect.
3. Bond ordered released.

Dated this 11th day of February 2010.


Allen N. Wheat, Special Judge
LaGrange Circuit Court

Distribution to:

RJO
Krohne/McKiernam
Murphy/Neal
O.D.