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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VEREIFIED PETITION OF DAMON RUN)
CONSERVANCY DISTRICT FOR AUTHORITY)
TO RENDER WATER AND SEWER SERVICE) CAUSE NO. 43966
TO CERTAIN AREAS OF PORTER COUNTY,)
INDIANA, AND FOR APROVAL OF RATES) APPROVED: OCT 19 2011
AND CHARGES FOR WATER AND SEWER)
SERVICE.)

BY THE COMMISSION:

On November 15, 2010, Damon Run Conservancy District (“Petitioner” or “Damon Run”) filed its Petition (“Petition”) requesting that the Indiana Utility Regulatory Commission (“Commission”) grant Damon Run authority to provide water and sewage disposal service to properties located outside of Damon Run’s boundaries pursuant to Ind. Code ch. 14-33-20 and for Commission approval of the rates and charges to the new customers located outside of its boundaries as provided by Ind. Code ch. 14-33-1 Indiana American Water Company, Inc. (“Indiana-American” or “IAWC”), the Town of Chesterton and the Town of Chesterton Utility Service Board (jointly “Chesterton”) and Porter Hospital, LLC (“Porter Hospital” or “Porter” or “Hospital”) filed Petitions to Intervene in the above captioned Cause, which were granted by the Presiding Officers.

On January 13, 2011, Petitioner pre-filed its direct testimony and exhibits. Intervenors IAWC, Chesterton and Porter Hospital pre-filed their respective cases-in-chief on April 27, 2011. The Indiana Office of Utility Consumer Counselor (“OUCC”) pre-filed its testimony on May 11, 2011. On May 13, 2011, IAWC and Chesterton pre-filed their cross-answering testimony. Petitioner pre-filed its rebuttal testimony on May 18, 2011. The OUCC pre-filed supplemental public comments received in connection with the Petition on May 31, 2011.

On June 1, 2011, pursuant to notice duly published according to law, an evidentiary hearing was convened at 9:30 A.M., EDT in Judicial Courtroom 222 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. At the hearing, Damon Run, IAWC, Porter Hospital, Chesterton, and the OUCC appeared and participated. No members of the general public sought to testify. The testimony and exhibits of the witnesses were admitted into evidence and the witnesses were made available for cross-examination.

Based upon the applicable law and the evidence presented herein, the Commission now finds as follows:

1. **Notice and Jurisdiction.** Proper, legal, and timely notice of the hearing in this Cause was given and published by the Commission as provided for by law. The proofs of publication of the hearing notice have been incorporated into the record of this proceeding. Pursuant to Ind. Code ch. 14-33-20 and Ind. Code ch. 14-33-1, this Commission has jurisdiction over conservancy district requests to serve customers located outside the boundaries of the district,

as well as authority to approve the rates to be charged to customers located outside the district. The Commission therefore has jurisdiction over the Petitioner and the subject matter of this Cause.

2. **Petitioner's Characteristics.** Damon Run is a conservancy district that was established by order of the Porter County Circuit Court on January 26, 2004 pursuant to the Indiana Conservancy District Act, Ind. Code art. 14-33. Damon Run provides water and sanitary sewage service in unincorporated portions of Porter County, Indiana. Damon Run uses its own infrastructure to provide water service to its customers and obtains water through a contract with IAWC. Petitioner provides sewage disposal service through its own infrastructure, and provides for treatment of wastewater through a contract with the City of Portage, Indiana. Petitioner presently serves approximately 259 customers which include residential and commercial customers.

Petitioner's original rates were established by its ordinances, which were attached to Damon Run's Petition and made a part of the record of this Cause. The Commission notes that while Damon Run should have filed with the Commission its initial schedule of rates and charges, pursuant to Ind. Code § 14-33-20-14, it has not done so.

3. **Relief Requested.** Pursuant to Ind. Code ch. 14-33-20, Petitioner seeks Commission authority to serve three (3) customers that are located outside of its boundaries: Liberty Intermediate School (the "School"); Porter Hospital; and Porter County Parks and Recreation Foundation (the "Park" or "Park Foundation"), (collectively the "Benefitted Properties"). Petitioner also seeks Commission approval of its proposed rates to the Benefitted Properties in accordance with Ind. Code ch. 14-33-1.

4. **Applicable Authority.** Pursuant to Ind. Code § 14-33-1-2, a conservancy district may request territorial authority from this Commission to collect, treat, or dispose of sewage or other liquid wastes produced outside of the district boundaries. According to Ind. Code § 14-33-1-2, upon notice and hearing, the Commission shall determine the following: (1) the territory outside of the boundaries from which sewage and other liquid wastes may be collected, treated, or disposed of; and (2) the rates and charges that the district may make for the services. As for Damon Run's request for authority to provide water service to the Benefitted Properties, we are guided by Ind. Code § 14-33-20-7(3) which provides in relevant part that "if a district proposes in implementation of its district plan to provide water supply to users outside of the territory to which the district has been granted territorial authority, the district must petition the Commission for territorial authority to serve the additional users." Pursuant to Ind. Code § 14-33-20-10, the Commission after hearing the evidence shall "enter a finding that the convenience and necessity of the public proposed to be served in the area in which the additional users are located" either will or will not be served by the district.

5. **Evidence Presented.** At the evidentiary hearing in this Cause, Damon Run's Petition was admitted into evidence along with the pre-filed direct and rebuttal testimony of Mr. John C. Barko; Mr. Eric Walsh; and Mr. Charles Ray.

A. **Petitioner's Direct Testimony.**

i. **John C. Barko.** Mr. Barko testified that he is responsible for the day-to-day operations of Damon Run and has been involved with Damon Run since its beginning, when he was the project manager for the installation of Damon Run's infrastructure. Mr. Barko stated that he is involved with customer relations, new customers and district growth, infrastructure coordination with IAWC and the City of Portage for water supply and sewer treatment coordination, respectively, Damon Run's tap inspections, management of the maintenance of Damon Run's infrastructure, and various day to day operational activities. Mr. Barko stated that, depending upon the nature of an inquiry, a matter is ultimately handled by him or Damon Run representatives with the relevant expertise. Mr. Eric Walsh with H.J. Umbaugh and Associates performs the accounting and regulatory functions for Damon Run. At the evidentiary hearing, Mr. Barko testified the developer that provided the initial investment for Damon Run's infrastructure was repaid by the Petitioner and Damon Run operates independently. Mr. Barko noted that Damon Run's customers include residents of subdivisions built by a number of different developers, as well as certain commercial customers.

Mr. Barko testified that Damon Run's existing customers will not pay to extend infrastructure to the Benefitted Properties. Instead, the owners of each of the Benefitted Properties will pay the construction costs associated with running the water and sewer lines to their respective properties.

Mr. Barko testified that Damon Run has the technical ability to serve the Benefitted Properties. He stated that Damon Run has retained a professional engineer, Mr. Charles Ray, to provide engineering services to Damon Run. Additionally, Damon Run has a contract with Utility Services Corporation ("USC"), a company with specific utility maintenance experience, to provide 24 hour maintenance service to Damon Run's infrastructure. Mr. Barko testified that USC performs weekly inspections of Damon Run's lift stations, manages all emergency services, and performs routine lift station maintenance to ensure compliance with the Indiana Department of Environmental Management ("IDEM") and other regulatory obligations. Mr. Barko noted that USC's contract also requires USC to assist with customer relations where appropriate. Mr. Barko testified that Damon Run employs capable and experienced professionals so that Damon Run will continue to provide excellent service to its existing customers and to the three Benefitted Properties.

Mr. Barko testified that by granting Damon Run's Petition, Damon Run, its existing customers, the new customers, and the general public will benefit. Damon Run and its existing customers will benefit by the addition of three new commercial customers, which will add significant revenue to Damon Run, thereby allowing Damon Run to keep rates to all customers reasonable. The new customers will benefit by receiving timely and excellent water and sewer service at reasonable rates. The general public will benefit by the addition of reliable, readily available, quality water and sewer service to an existing school and park. The general public will also benefit by the construction of a new, state of the art 225 bed hospital to serve the Porter County area, and by contracting with Damon Run, Mr. Barko noted that the Hospital's construction will not be delayed as it otherwise might be if it receives service from other providers.

ii. **Charles L. Ray, Jr.** Mr. Ray is a Professional Engineer with Duneland Group which provides engineering services to Damon Run. Mr. Ray testified that all of the Benefitted Properties have expressed a need for potable water and for sewer service. He noted

that the School desires to abandon its well and treatment facilities in favor of water and sewer service from Damon Run. Mr. Ray stated that the need for service is immediate. Mr. Ray testified that the Park Foundation does not presently have water or sewage disposal services, and it desires to receive those services from Damon Run. Mr. Ray testified that construction of Porter Hospital is underway, and there is an immediate need for water and sewer service infrastructure.

Mr. Ray testified that once construction of the infrastructure is complete, each of the new customers has agreed to dedicate the facilities to Damon Run. Damon Run's contract with IAWC allows for IAWC to maintain Damon Run's water lines. Mr. Ray testified that the sewer and water lines have been sized to adequately serve each of the new customers. He noted that IAWC reviewed the engineering done by Duneland Group and IDEM reviewed the design for the sewer. Mr. Ray testified that by working with IAWC, Damon Run has ensured that the sizing of the water lines is designed to adequately service future development. Additionally, he noted that through his work with the Portage Engineering Department and IDEM, he has ensured that the sizing of the sewer lines is designed to adequately service future development. Mr. Ray testified that with the addition of the infrastructure planned by the Hospital and the other Benefitted Properties, Damon Run will have adequate sanitary sewer infrastructure to serve the Hospital. Mr. Ray provided a letter to Damon Run from the Mayor of the City of Portage verifying that the City of Portage, who treats Damon Run's waste, has sufficient treatment capacity to service the Benefitted Properties. In addition to verifying that Portage has capacity to treat the sewage generated by the three Benefitted Properties, Mr. Ray stated that the sanitary infrastructure has been designed to a size that would be able to take in not only the three Benefitted Properties, but other properties in the area that may be developed in the future.

Mr. Ray testified that each of the Benefitted Properties is contiguous to the current service territory of Damon Run. He stated that there are no reasonable alternatives for the provision of combined water and sewer service to the three Benefitted Properties. As to water service only, and by virtue of water lines extended by Damon Run as it has grown, Mr. Ray testified that IAWC could be a reasonable alternative. Mr. Ray noted that he is not aware of any reasonable alternatives for sewer service to the Benefitted Properties. He testified that while the Benefitted Properties lie within ten (10) miles of the border of Chesterton, Chesterton is not currently serving any of the Benefitted Properties. Mr. Ray also stated that Chesterton does not have facilities readily available to provide service within the time frame desired by Porter Hospital, which has commenced construction. Mr. Ray noted that his understanding is that Porter Hospital reviewed proposals from both the Town of Chesterton and Damon Run. Based on their analysis, which included economic factors and timeliness issues, he testified that the Hospital decided to utilize Damon Run.

During the Evidentiary Hearing, Mr. Ray testified on cross-examination that his engineering firm has done the below ground engineering work for Porter Hospital on its sewer connection to the Damon Run system while simultaneously serving as the engineer for Damon Run. He testified that Porter Hospital will be a destination location in that it represents a major capital improvement project located near numerous highly developed state and federal highways. Mr. Ray further testified that without the availability of sewer and water service to the area where Porter Hospital is sited, development of that area would not occur. Mr. Ray also testified that Damon Run's sewer system would not be able to serve the 755 acre area surrounding Porter Hospital unless it performs modifications to the system. If Damon Run sizes the whole system to take in the entire 755 acres, it

will be oversized and create problems. Mr. Ray also testified there would be no reason to run lines through the 755 acres if there are no users there. He stated to do so would saddle Damon Run's customers with debt for an oversized system which Mr. Ray felt would not be used or useful to Damon Run for many years, if ever.

iii. **Eric J. Walsh.** Mr. Walsh is a Certified Public Accountant and Manager with H.J. Umbaugh Certified Public Accountants, LLP ("Umbaugh"). Mr. Walsh stated that Umbaugh has provided financial and rate making consulting services to Damon Run since its inception in 2005. Mr. Walsh stated that he has performed financial studies for regional sewer districts, municipally owned water, electric and sewage utilities, regional water districts and conservancy districts. He noted that these engagements have involved determinations of utility revenue requirements, cost-of-service studies, and financial planning associated with the issuance of tax-exempt bonds. Mr. Walsh provided his Accounting Report dated November 2, 2010, which is an analysis of Damon Run's financial capabilities. Mr. Walsh testified that Damon Run will not incur any expenses in order to provide service to the three Benefitted Properties. He noted that the water and sewer infrastructure to be constructed by the School and the Hospital will be dedicated to Damon Run upon completion and inspection and approval by Damon Run's engineer.

At the evidentiary hearing, Mr. Walsh explained the two elements of Damon Run's existing rates. The first element is the User Fee, which is a uniform rate that is applied based on an Equivalent Factor that is established to collect revenue in proportion to the cost to provide service to the customer. The User Fee includes the wholesale costs Damon Run pays to Portage for sewage disposal service and to IAWC for water service. The User Fee also pays for the operation and maintenance expenses of Damon Run and for part of Damon Run's annual Debt Service Requirement. The second element of Damon Run's existing rate is the Special Benefits Tax, which is a uniform tax rate applied to each customer inside Damon Run's boundaries and is paid based on the assessed value of each customer's property. The Special Benefits Tax pays for the remainder of Damon Run's debt service that is not funded from User Fees.

Mr. Walsh explained that Damon Run has established rates designed to put the School, Park, and Hospital on equal footing with Damon Run's customers. He noted that the Benefitted Properties will pay the User Fee applied at the same rate and using the same calculation method, as Damon Run's existing customers. Mr. Walsh testified that instead of paying the Special Benefits Tax that existing customers pay, customers that are outside the boundaries will pay a Payment in Lieu of Taxes that is also based on equivalent factors used for the calculation of the Special Benefits Tax.

Mr. Walsh testified that based upon his analysis of Damon Run's financial information, Damon Run is financially viable. He noted that the revenues from the Benefitted Customers, plus the revenue collected from the balance of Damon Run's customers, will provide Damon Run with sufficient revenues to fund operation and maintenance costs, pay debt service, and generate adequate cash balances. He also testified that the rates and charges for the Benefitted Properties have been designed so the Benefitted Properties pay in proportion to the cost of providing them service. By using Equivalent Factors to assign cost responsibility, the methodology for assigning proportionate responsibility to the Benefitted Properties and the methodology of assigning proportionate responsibility to all Damon Run's customers is consistent. Mr. Walsh stated that the

addition of the Benefitted Properties will allow for the fixed costs of Damon Run to be spread across a larger and more diverse customer base. Conversely, he noted that if the Benefitted Properties are not part of Damon Run, the loss of those revenues will result in existing Damon Run customers paying more for water and sewer service.

During cross-examination, Mr. Walsh testified that Damon Run will experience an increase of about \$400,000 in 2013 for its bond debt service. To generate funds to meet that increase in bond debt service between now and 2013, Mr. Walsh's financial report concludes Damon Run will need to increase its assessed value. If sufficient assessed value increases are not obtained, Mr. Walsh testified that taxes on real estate of customers in the Damon Run Conservancy District would have to be raised to cover any shortfall in needed revenue. Mr. Walsh also provided in his accounting report an assumption for increased assessed value due to Damon Run growth. When asked about the validity of such growth projections, Mr. Walsh testified that in the 2010 payable in 2011 cycle, Damon Run's actual assessed value increase was only 38.81% of its projection for increase in assessed value.

B. Intervenors' Testimony

i. Indiana American Water Company. Mr. Terry Atherton, the Director of Northwest Operations, pre-filed testimony on behalf of Intervenor, IAWC. Mr. Atherton made clear that IAWC has no interest in the provision of sewage disposal service to the Benefitted Properties. He testified that the physical connection for water services to the Benefitted Properties will not differ whether they are Damon Run's customers or IAWC's customers. Mr. Atherton testified that IAWC is ready to provide interim water service to the School, and he testified that the Hospital and Park Foundation did not yet need service as of the date his testimony was pre-filed. Mr. Atherton explained that IAWC's arrangement with Damon Run is a unique sale for resale arrangement whereby prospective customers are able to take advantage of favorable financing available to a conservancy district in order to extend the water system to an unserved area. He noted that IAWC is responsible for providing water service to Damon Run's customers and for the operation and maintenance of Damon Run's water distribution system. IAWC sends bills to Damon Run's customers and applies its rates generally applicable within its Northwest operation. In addition to IAWC's rates, Damon Run's customers pay a surcharge calculated to generate at least sufficient revenue to pay the debt service on Damon Run's bonds. He noted that once the bonds are repaid, IAWC has the option to purchase Damon Run's water distribution system for a nominal amount. Until then, IAWC has the right to transport water through Damon Run's water distribution system and make new connections to the system. Mr. Atherton went on to describe the amended contract between Damon Run and IAWC that addresses service to the Benefitted Properties at issue in this proceeding.

Mr. Atherton pre-filed cross-answering testimony on May 16, 2011 in response to the testimony of Mr. Galassini. Mr. Atherton testified that IAWC will not delay connection of water service to any of the Benefitted Properties due to the pendency of this proceeding. He noted that should Porter Hospital need service before the case is concluded, IAWC stands ready to provide that service. He described the remaining easement issues to be resolved in order for Porter Hospital to be connected to water service.

ii. **Porter Hospital.** Porter Hospital pre-filed testimony of John Galassini, who is the Senior Project Manager for Robins & Morton, which is the general contractor building Porter Hospital. Mr. Galassini testified that Porter Hospital is building a 225 bed hospital to serve Porter County and has already expended significant amounts of capital on the project for an expected opening date of September, 2012. He noted that Porter Hospital selected Damon Run to provide water and sewer service. Mr. Galassini testified that any delay in construction caused by Chesterton's opposition to the service of Porter Hospital by Damon Run will have financial and provision of health service implications for the Hospital and the Porter County community. Mr. Galassini testified that the installation of sewer is required by schedule to be online by mid-July 2011 to allow for testing of the Hospital's plumbing systems and discharge into the sewer system. He stated that the water systems must be online by June 1, 2011 so that space inside the building can be conditioned to accept final finishes. Mr. Galassini noted that if water is not available at that time, the Hospital will have to procure temporary chillers to condition the air in the building. He stated that the Hospital would also have to modify the current plumbing and electrical systems to accommodate temporary chillers and bring in water trucks to fill the chilled water loop. Additionally, Robins & Morton has a monthly cost for its management resources, so any delay in the project would delay the estimated time to build the job and add monthly costs.

iii. **Chesterton.** Chesterton pre-filed the testimony of Lawrence Brandt, Sharon Darnell, Jeff Ban, Mark O'Dell, and Theodore Sommer.

a. **Lawrence Brandt.** Mr. Brandt is the Chairman of the Chesterton Utility Service Board ("Board") and has served on the Board for eighteen (18) years. Mr. Brandt explained that Chesterton intervened in this proceeding because the construction of Porter Hospital represents the largest single construction project in Porter County in a generation. He testified Chesterton provides sanitary sewer service only, since Chesterton sold its waterworks to IAWC in 1995. He stated that Chesterton is the most logical provider of sanitary sewer service for the Hospital and the surrounding areas. He testified that Chesterton's boundaries extend to within a mile of the Hospital. He stated that connecting Porter Hospital with Chesterton makes the most sense from a planning perspective and avoids the potential for a patchwork quilt of various utilities in the areas adjacent to Porter Hospital. He testified that for more than three (3) years, Chesterton has provided Porter Hospital with information about connecting to Chesterton's sewer system in order to convince Porter Hospital that Chesterton offered the cheapest, most logical alternative. He noted that Chesterton has the plant capacity to serve the Hospital and surrounding area when it develops and its rates are less expensive than Damon Run's.

Mr. Brandt summarized the testimony of Chesterton's other witnesses. He also described the structure of Chesterton's sewer utility, noting that it serves users inside of Chesterton and users outside of its boundaries by agreement. Mr. Brandt provided Chesterton's current rate ordinance. Mr. Brandt identified the members of the Board, the Utility Superintendent, and noted there are twenty (20) full time employees at the plant. Mr. Brandt testified that the Chesterton wastewater treatment plant's ("WWTP") capacity is 4.6 million gallons per day, and it currently averages 2.3 million gallons treated per day. Mr. Brandt stated that the Town of Porter has a right to purchase 42,000 additional gallons per day of capacity, but must request such capacity and pay before September 1, 2011. He indicated one residential subdivision that has not been built has an allocation

of approximately 100,000 gallons per day. He noted however, that Chesterton currently has no plans to expand its WWTP.

Mr. Brandt provided the policy adopted by the Board in 2000 regarding annexation. He noted the policy is that if a property is capable of being annexed by virtue of contiguity, a petition for annexation must be filed. Chesterton analyzes whether there is a benefit to Chesterton to annex and if so, a utility services agreement is prepared. Mr. Brandt testified that Chesterton has always considered its service area to extend to the full extent of ten miles outside of its municipal boundaries unless there is another utility that has legally established jurisdiction. He testified that he was familiar with Damon Run's Petition and that Chesterton only has interest in servicing one (1) of the three (3) Benefitted Properties, Porter Hospital. Mr. Brandt stated that in 2008, the Board voted to recommend that the Town Council pursue an agreement with Porter Hospital to provide wastewater service. Mr. Brandt also described the application of a developer who at that time applied for a permit to bore under the Indiana Toll Road, and indicated that economic factors led to the expiration of the permit before construction could begin. Mr. Brandt indicated that Porter Hospital expressed little interest in Chesterton's proposals. He noted his belief that Porter Hospital was relying on advice of its local counsel and engineer, each of whom currently represent Damon Run. Mr. Brandt testified that in his opinion, Chesterton has the financial, technical and managerial ability to service Porter Hospital. He concluded by stating that the Commission should be concerned that the public convenience and necessity requires it to consider which utility service provider is capable of providing service not only to Porter Hospital but to the entire service area adjacent to Porter Hospital.

b. Sharon Darnell. Ms. Darnell is the current President of the Chesterton Town Council. She testified that Chesterton has no interest in providing water service to the Benefitted Properties or in rendering sewer service to the School or Park. Ms. Darnell testified that Chesterton intervened in this proceeding because it has an interest in the successful economic development related to Porter Hospital and the adjacent State Road 49 corridor. She noted that the inevitable development of the areas surrounding the Hospital can only occur if there is adequate sanitary sewer infrastructure, treatment facilities, and administrative staff to service the needs of commercial development at a reasonable cost, which Chesterton has. She noted that Chesterton is the most logical provider of sewer service to Porter Hospital since it has its own treatment facility, sufficient capacity, and can provide service without a resulting impact on its existing users. Ms. Darnell stated that Chesterton's WWTP is closer than the Portage facility used by Damon Run, and the Hospital is less than a mile outside of Chesterton's corporate limits. She stated that the School and Park will not produce any significant amount of future development. Ms. Darnell stated that the public convenience and necessity is not served by Damon Run providing sewer service to the Hospital because Damon Run was not formed to serve commercial customers. She noted there are properties identified in Damon Run's District Plan that have not been connected by Damon Run. She concluded that by serving the Hospital, Damon Run is taking away from the capacity allocation it has been provided from Portage to serve its originally identified users. Ms. Darnell testified that on February 1, 2011, the Porter County Board of Commissioners rezoned over 100 acres immediately west of the Hospital site to a combination of mixed uses to include office, technology, and moderate intensity commercial use. She indicated this area will also require sewer and water and contends that Damon Run fails to consider these other properties and reflects a lack of long-range planning.

Ms. Darnell commented on Chesterton's annexation policy and noted that Chesterton could provide sewer service to the Hospital without annexing the Hospital under Ind. Code § 36-9-23-36. She testified that Chesterton's comprehensive plan describes the annexation policy and recognizes there will be logical expansion of utility service to the south and east of Chesterton's current boundaries. She testified that Chesterton has never suggested to the Hospital that annexation would be required for connection to Chesterton's sewer system. Ms. Darnell summarized Damon Run's proposal to the Hospital and stated the proposal was a gross misrepresentation of Chesterton's position and its policy on outside users.

Ms. Darnell testified that Chesterton provided its first proposal to the Hospital in April 2008; that Chesterton representatives made a presentation to the Hospital in September 2009; and that Chesterton sent another proposal to the Hospital on May 10, 2010. She indicated that Chesterton's 2010 proposal identified four (4) options for funding the infrastructure which included a reimbursement agreement, two options using federal grant money for which Chesterton has applied; and the use of preferred financing. Ms. Darnell testified that another option is now available that includes the possibility of funding the infrastructure improvements with tax increment financing. Ms. Darnell stated that Chesterton received little to no response from Porter Hospital, and that there were never any discussions about the merits of Chesterton's proposals or the need for coordinated planning for the Hospital or the adjacent area. Ms. Darnell provided declaratory resolutions dated January 24, 2011 adopted by the Chesterton's Redevelopment Commission identifying the areas south of the Indiana Toll Road as an economic development area and adopting an economic development plan for the area. She indicated Chesterton will be resubmitting in its own name an application for a permit to extend sewer service lines beneath the Indiana Toll Road and that Chesterton has taken steps to extend its sewer service lines south of the CSX railroad. She testified that until the Hospital publicly announced its decision to contract with Damon Run, there were no discussions that timing was a critical factor in the decision.

c. **Jeff Ban.** Mr. Ban is the President of Development Visions Group, Inc., and provided a discussion of the potential needs for sewage capacity in the area adjacent to the Hospital. Mr. Ban testified to his previous involvement with property owners in the area that are now included in Chesterton's economic development area and are located 3,700 feet and 2,400 feet from the Hospital property, respectively. Mr. Ban described how Chesterton would extend sewer service south of the Indiana Toll Road to connect the Hospital. He also provided an analysis of the potential sewer service needs of the area adjacent to the Hospital. He indicated that he forecasted the potential development and defined a service area boundary (hereafter referred to as the "Potentially Developable Area") that could likely be served by a 15-inch sanitary sewer extension through the State Road 49 corridor. Mr. Ban testified that he calculated estimates of average daily and peak flows for the area and noted that Chesterton has adequately sized infrastructure in place to service the potential development in the areas adjacent to and including the Hospital.

Mr. Ban described the route for the proposed extension of Chesterton's facilities, which would extend due south from the Coffee Creek Development, beneath the Indiana Toll Road, then west along the south side of the Indiana Toll Road until it would turn south and run along the east side of State Road 49 until it crossed Calumet Avenue. He testified that the 15-inch sewer line at Calumet Avenue would receive flow from a force main coming from a sanitary sewer pump station

on the west side of State Road 49 on the west side of a borrow pit pond adjacent to State Road 49 and the CSX railroad right-of-way. The force main would run along the west side of State Road 49 and cross under State Road 49 to discharge into the 15-inch sanitary sewer line at Calumet Avenue. From the pump station, a 12-inch sanitary sewer line would run south and cross under the CSX right-of-way and County Road 900 North generally along the Hospital's west property line, and the Hospital would be served at the northwest corner of the parcel.

Mr. Ban testified that Chesterton has completed utility corridor route planning, preliminary extension design, scheduling and cost estimating for the extension to the Hospital site. He noted that Chesterton has provided the Hospital with technical designs and capital costs for design and construction, engineering, operational utility costs, and a schedule. He stated that Chesterton's Redevelopment Commission has established an economic development area and applied for a federal grant to provide funding for the proposed extension. He concluded by stating that Chesterton is capable of providing sanitary sewer service to the Hospital prior to September 2012.

d. Mark O'Dell. Mr. O'Dell is Chesterton's Town Engineer and Superintendent of Chesterton's Storm Water Department. He has served as the Town Engineer since 2002. He offered testimony regarding Chesterton's WWTP and noted in 2010 the WWTP operated at 51% of its treatment capacity of 4.6 million gallons per day. Mr. O'Dell provided a map of Damon Run's current service area and indicated his understanding of the original purpose for Damon Run was to provide sanitary service to previously unserved areas of unincorporated Porter County that were using septic systems, and to eliminate the use of small community package treatment plants or mound systems. He listed the future users identified in Damon Run's original plan and noted that Porter Hospital was not addressed by the original plan. Mr. O'Dell testified that Damon Run's boundaries have no contiguous connection with each other. He provided a map showing Chesterton's existing service area, Damon Run's existing boundaries, and the Benefitted Properties.

Mr. O'Dell testified that Damon Run purchases capacity from the City of Portage for wastewater treatment. He stated that the Portage WWTP has a total capacity of 4.95 million gallons per day and operates between 70% and 130% of its total capacity. Mr. O'Dell expressed concern that Portage does not have sufficient capacity to service the existing contractual allocation to Damon Run. Mr. O'Dell testified that the system Damon Run proposes is sufficient to support the flow anticipated from the Hospital, but not the remainder of Damon Run's originally proposed users. He noted that Damon Run's system design is short-sighted and poor because it poses difficulties for additional connections to the south and east of the Hospital parcel. Mr. O'Dell testified that Chesterton's engineering department worked with Mr. Ban's firm to define a sewer service boundary for potential development and a total service area of 755 acres was defined as the State Road 49 corridor. Mr. O'Dell stated that Damon Run's proposed system was not designed to accommodate the development that typically occurs around a hospital and the system cannot support the capacity requirements of both Porter Hospital and the adjacent area.

In his cross-answering testimony, Mr. O'Dell stated that any delay caused by Chesterton's intervention in this proceeding can be avoided by pumping in water, drilling wells, or obtaining water on an interim basis. He noted that the Hospital's IDEM permit requires commencement of construction by October 4, 2010, which has occurred. He testified that the sewage system could be

tested by using a temporary plug in the manhole where sewage is heading and then using pump and haul to dispose of the wastewater. Mr. O'Dell noted that the June 1, 2011 deadline will not be met. Mr. O'Dell stated that after September 2009, Porter Hospital repeatedly ignored Chesterton's requests for any information about the location for the sanitary sewer and expressed no interest in meeting with Chesterton. Mr. O'Dell disagreed with Mr. Galassini's statement that a delay will create provision of health service implications and noted that Porter Hospital has not produced any study or analysis pertaining to the potential development of adjacent property.

e. **Theodore Sommer.** Mr. Sommer is a partner with London Witte Group, LLC, Certified Public Accountants and offered testimony on Chesterton's behalf including a comparison of the cost to serve Porter Hospital from Chesterton and Damon Run. Mr. Sommer concluded that the cost of monthly service to Porter Hospital from Damon Run is \$30,254.73 and the cost from Chesterton is \$6,040.25. Mr. Sommer offered his understanding of how the Hospital will be charged for service by Damon Run and noted that Damon Run is subsidizing the connection charge to be paid by the Hospital, which in Mr. Sommer's opinion is in conflict with the amount Damon Run is required by its ordinance to collect. Mr. Sommer also stated that if his understanding and calculations are correct, the Hospital is receiving a fifty percent (50%) subsidy in its Equivalent Dwelling Units ("EDU") calculations, which affects connection charges and monthly rates.

Mr. Sommer also explained how the debt service charges from Damon Run to the Hospital will vary annually based upon the assessed value within Damon Run and the budgeted debt service, the operating expenses used annually to develop the rate approved by the Department of Local Government Finance, and the Hospital's usage. Mr. Sommer explained how Damon Run's usage component is calculated. Mr. Sommer testified that there must be a rate tracker for sewer service to the Hospital that would reflect rate changes and EDU changes that the City of Portage and Damon Run agree to in contract amendments. Mr. Sommer testified that Damon Run's water tariffs do not match IAWC's tariffs filed pursuant to Cause No. 43680.

Mr. Sommer testified Damon Run's 2010 bond issuances have resulted in a heavy debt load and raise significant questions about its financial capability and ability to generate sufficient revenues to fund its operations. He testified that the growth originally envisioned for Damon Run has not occurred and it has spent more on infrastructure than it can reasonably afford. When asked if Damon Run is financially incapable of providing service to Porter Hospital, Mr. Sommer stated that Damon Run is skating on very thin ice and noted that it will find out over the next two years if its freeholders will pay the high levels of Ad Valorem taxes. Mr. Sommer stated that Chesterton has a stable and traditional rate structure that does not require Commission regulation. He also noted that, in his opinion, Damon Run's rates are not cost based as required by Ind. Code § 14-33-5-21(a)(1) or Ind. Code § 36-9-23-25, and are therefore not just and equitable.

C. **OUCC's Testimony.**

i. **Roger Pettijohn.** The OUCC pre-filed the testimony of Roger Pettijohn, who is a Senior Utility Analyst for the OUCC's Water/Wastewater Division. Mr. Pettijohn indicated that in preparation for his testimony, he conducted an on-site visit to Damon Run's service area, viewed the Porter Hospital expansion and other two Benefitted Properties, and met with and discussed issues with Damon Run's representatives. Mr. Pettijohn indicated on cross-

examination that he did not inspect Chesterton's facilities. Mr. Pettijohn described Damon Run's service area and arrangements with IAWC and the City of Portage for water supply and wastewater treatment respectively. He noted that Damon Run's infrastructure is only six (6) years old, and is relatively "new" when compared to most systems that have been in service for several decades. He noted that properly installed piping systems will exhibit little inflow and infiltration or root intrusion, which are symptomatic of older clay piping systems. With regards to the School and the Park, Mr. Pettijohn noted that service by Damon Run will benefit them and the public. He therefore recommended that the Commission grant Damon Run the authority to provide water and wastewater service to the School and Park. With regard to water service for Porter Hospital, Mr. Pettijohn indicated that no other party to this proceeding opposes Damon Run's proposal. He noted that, given testimony provided by Damon Run and IAWC, he recommends that the Commission grant the necessary authority for Damon Run to provide water utility service to Porter Hospital.

Mr. Pettijohn noted that Damon Run and Porter Hospital have entered into a contract for Damon Run to provide water and wastewater service to the Hospital. Under the contract, Porter Hospital is financially responsible for constructing all necessary wastewater utility infrastructure to connect to Damon Run's collection system. Mr. Pettijohn observed that a reliable sewer service provider is necessary for the Hospital's development. Mr. Pettijohn observed that there is no evidence of any Damon Run service quality issues or facility limitations. He noted that the City of Portage has provided a letter verifying that it has sufficient treatment capacity to serve the Benefitted Properties, and noted Damon Run's statement that the system is designed to take in not only the Benefitted Properties, but other properties in the area that may be developed in the future. Mr. Pettijohn indicated that Damon Run has the technical, financial, and managerial capacity to operate its facilities including the Benefitted Properties.

Mr. Pettijohn testified that Chesterton desires to provide sewage disposal service to the Hospital, though it is not interested in serving the other Benefitted Properties. He recounted Chesterton's testimony with regard to its ability to serve the Hospital and stated that based on the representations of Mr. Brandt, he believes Chesterton has the technical, managerial and financial capability to provide wastewater utility service to the Hospital. When asked why the Hospital chose Damon Run as its wastewater utility service provider, Mr. Pettijohn referenced Mr. Ray's testimony that based on the Hospital's analysis, which included economic factors and timeliness issues, it decided to use Damon Run. As a result, Mr. Pettijohn testified that the Hospital has contracted with Damon Run and according to Mr. Galassini, constructed over 50% of the service line with an in-service date of mid-July, 2011.

Ultimately, Mr. Pettijohn testified that the OUCC is not making any recommendation as to whether Damon Run should be granted authority to provide wastewater utility service to the Hospital. He notes that on one hand, Damon Run is the customer's choice and has the ability to serve in a more timely fashion. However, Chesterton has a statutory right to extend service to the Hospital. He concluded that the OUCC believes the Commission must weigh these competing priorities in making its decision in this case.

ii. **Supplemental Public Comments.** The OUCC also offered public comments that it received on May 11, 2011. The public comments include the minutes of the December 6, 2010 Chesterton Town Council meeting; articles posted by the Chesterton Tribune on

April 20, 2011 and May 24, 2011 regarding the cost of Chesterton's Long Term Control Plan ("LTCP") and Chesterton's contract with DVG Inc. to engineer a project to extend facilities to Chesterton's southern corporate boundary; and a letter from a citizen that generally supports service by Damon Run and opposes Chesterton's actions in this proceeding. The letter also attaches DLZ Indiana, LLC's draft Combined Sewer Overflow LTCP for Chesterton.

D. Petitioner's Rebuttal Testimony.

i. John Barko. In his pre-filed rebuttal testimony, Mr. Barko stated that after he pre-filed his direct testimony, he was elected to Damon Run's Board of Directors. He indicated that he continues to be primarily responsible for the day-to-day operations of Damon Run.

Mr. Barko disagreed with Mr. Brandt's assertion that granting Damon Run's Petition will create a patchwork of utilities in the area adjacent to the Hospital. Mr. Barko referenced the aerial photograph attached to Mr. Ray's pre-filed rebuttal testimony that shows how Damon Run's service to Porter Hospital does not create a patchwork. Instead, he noted that Damon Run's service of the Hospital creates a cohesive, symmetric area, particularly in light of the fact that the property owners adjacent to and immediately west of the Hospital have requested annexation into and service by Damon Run. Mr. Barko stated that if Chesterton had timely created and acted on a comprehensive plan to provide utility service to a widespread area of unincorporated Porter County, there would be no need for Damon Run to serve Porter Hospital. According to Mr. Barko, Chesterton is not ready and able to serve Porter Hospital on the timeframe that is essential to Porter Hospital.

Mr. Barko also disagreed with Mr. Brandt's statement that Chesterton is "the most logical" provider of sanitary sewer service for the Hospital as well as the surrounding area. Mr. Barko testified that Chesterton attempts to expand the issues in this case to include an evaluation of whether Damon Run should serve surrounding areas, the development of which is speculative and potentially decades away. Mr. Barko concluded that given the facts before the Commission, Damon Run is the only logical choice for service to Porter Hospital.

When asked what facts suggest that Damon Run should be granted authority to serve Porter Hospital, Mr. Barko listed several. First, he noted that deference should be given to the customer's choice of a service provider. He testified that Porter Hospital is a sophisticated business customer that is skilled at making complex business decisions based on all the factors that are important to its operations. Second, Mr. Barko stated that only Damon Run is able to provide service to Porter Hospital in accordance with the Hospital's construction schedule, noting that Chesterton admitted that the earliest it can provide sewage disposal services to the Hospital (other than via pump and haul) is August 31, 2012. He also provided evidence that Porter Hospital has recognized that Chesterton cannot provide service in time to meet the construction deadlines and that Chesterton has not yet applied for any of the permits it needs to extend lines to the Hospital. Mr. Barko noted that he found it difficult to fathom that Porter Hospital did not make its timing and schedule known to Chesterton. He testified that in Damon Run's meetings, the Hospital frequently mentioned its timing and schedule were critical to the project. Mr. Barko attached to his testimony photographs showing that as of April 29, 2011, the Hospital has completed a substantial amount of construction. Mr. Barko testified that if Porter Hospital had to wait more than a year for Chesterton to extend its lines, either the Hospital would be ready for business and be forced to sit vacant while Chesterton

extended the lines, or it would need to implement a costly interim solution such as pump and haul. Mr. Barko noted that in his opinion, this would not be consistent with the public interest.

Third, Mr. Barko testified that if the Hospital is forced to take service from Chesterton, duplicative infrastructure would need to be installed and the Hospital's infrastructure investments may well be wasted since different and/or additional line routing would be necessary. Fourth, Mr. Barko stated that as indicated in Mr. Pettijohn's testimony and as explained by Mr. Walsh and Mr. Ray, Damon Run has the technical, managerial and financial ability to serve the Hospital. Fifth, Mr. Barko attached as Exhibit JB-R4 to his testimony signatures of approximately 160 existing Damon Run customers indicating their support for including Porter Hospital as a customer of Damon Run. Sixth, Mr. Barko observed that the protracted discovery battle in this proceeding between Porter Hospital and Chesterton has not fostered the foundational, trusting business relationship that a customer would desire for the long term. Finally, Mr. Barko testified that Chesterton and the entire Porter County community have known since at least December, 2007 where the Hospital would be built. Mr. Barko indicated that now that the Hospital and its water and sewer lines are nearly completely constructed, it would be inequitable to deny Damon Run's Petition based on Chesterton's objections; particularly where Chesterton chose not to pursue service to the Hospital through annexation or other means.

In support of his testimony that Chesterton has known about the Hospital's decision to build on the existing site, Mr. Barko provided history surrounding the Hospital's selection of the property. Mr. Barko testified that on November 7, 2007, Porter Hospital filed an application before the Porter County Plan Commission requesting rezoning of the property where the Hospital is being constructed. After a series of widely reported and contested public hearings, on February 5, 2008 the Porter County Commissioners approved the rezoning request. Subsequently, a group of home owners appealed the Commissioners' decision to the Porter Superior Court and ultimately to the Indiana Supreme Court. The Supreme Court did not accept the case and on January 14, 2010 issued its final ruling. Mr. Barko testified that the litigation surrounding the zoning was of great public interest and reports of the matters were in the newspapers on a regular basis. He noted that the litigation delayed commencement of construction of the Hospital for approximately two years.

With regard to Chesterton's annexation policy, Mr. Barko stated that the current voluntary annexation policy can change at the whim of the Chesterton Utility Services Board. Mr. Barko stated that it is not unreasonable to expect that at some point over the anticipated 35 year or more life of the Hospital, the composition of the Utility Services Board will change and the Board will decide that annexation of the Hospital – even if involuntary – would provide an economic benefit that Chesterton must leverage. Mr. Barko stated that there are indications that Chesterton is interested in annexing the Hospital. He noted that in its April 17, 2008 letter to Porter Hospital Chesterton suggested that the Hospital consider building at two alternative locations, one of which was “in the preliminary phases of annexation” and the other was already within Chesterton's corporate limits. Mr. Barko noted these suggestions reveal Chesterton's desire to collect the taxes that annexation or relocation inside Chesterton's boundaries would bring.

In response to Mr. Brandt's statement that Porter Hospital was relying on advice of Damon Run's local counsel and engineer, Mr. Barko stated that to his knowledge, Damon Run's local counsel assisted Porter Hospital with its rezoning of the property as did Duneland Engineering.

With regard to Porter selecting Damon Run, Porter Hospital engaged its own attorney from a separate law firm and utilized its own personnel to review and determine who would provide utility services. He noted that Damon Run's local counsel and engineer met with Porter representatives and provided them with information related to Damon Run.

Mr. Barko disagreed with the allegation that service by Damon Run is not in the public interest and will leave the adjacent area unserved. He testified that service by Damon Run is entirely consistent with the public interest. He noted that the issue before the Commission is whether Damon Run is a suitable provider for the Hospital. Mr. Barko stated that the adjacent area has always been unserved and there is no evidence that any customers have requested service to the east of the Hospital, which is undeveloped. Mr. Barko testified that although Chesterton has stated the adjacent area may not be developed for twenty (20) years, Mr. Ray's testimony indicates that the widespread development predicted by Chesterton is optimistic and not likely to occur for at least thirty (30) to forty (40) years. In the event that the adjacent area does eventually develop, he noted that Mr. Ray's testimony explains that there are alternatives for serving customers in the adjacent area, depending upon the timing and customers' needs. Mr. Barko concluded that it is not in the public interest to prohibit Damon Run from serving the Hospital when Damon Run is ready, willing, and able to do so immediately, particularly where future adjacent development is speculative and where service by Chesterton could delay the opening of a Hospital that will bring critical medical services and jobs to Porter County.

Mr. Barko rejected Chesterton's assertions that Damon Run should not serve Porter Hospital because Damon Run was not formed for the purpose of commercial service. He noted that when a conservancy district is formed, it forms a plan based on the facts known to it at the time. Damon Run did not know that Porter Hospital would be constructed in its current location in 2005 when Damon Run's initial plan was filed. He stated that Chesterton admits that it, too, did not know this fact. Mr. Barko stated that Damon Run's original plan did include commercial businesses that were planned for development. On re-direct examination, Mr. Barko testified that Damon Run does serve several commercial customers. Damon Run prepared for a combination of several different possibilities depending on how growth would actually occur. He concluded that if the Commission finds that a conservancy district is properly suited to serve a particular customer, it should not be prevented from authorizing service simply because the district's original plan did not predict events that were not reasonably foreseeable.

Mr. Barko testified that Damon Run's service to Porter Hospital will not effectively take away service from other potential customers inside Damon Run's boundaries. He noted that several of Damon Run's originally intended users have not expressed a desire for service. He testified that the planned build out has changed drastically, so Damon Run prepared for this by being flexible and taking on new customers today that may have not been in previous plans. Mr. Barko testified that Damon Run's freeholders depend on this additional commercial development as well as new residential developments to keep their taxes in line.

As to Chesterton's four options for funding the extension of infrastructure to connect the Hospital with Chesterton's facilities, Mr. Barko observed that one option would have required Porter Hospital to pay substantially more to connect to Chesterton than to Damon Run. Two of the options relied on receipt of federal grant money, which has not yet materialized. Another option

would have required Chesterton to obtain preferred financing, but there is no evidence that Chesterton applied for (or would have received) such financing. He noted that he is not aware that Chesterton has received any tax increment financing since Chesterton only began taking steps to create such a taxing district in 2011. Mr. Barko opined that Chesterton's ability to finance the extension of lines to the Hospital is uncertain and would not be immediate. He stated this is supported by Chesterton's admission that, "because this proceeding is still pending, the scope of the project has not been defined and the exact method of financing cannot be determined."

ii. **Eric Walsh.** Mr. Walsh testified in rebuttal that in the errata to his testimony filed on February 7, 2011, he indicated that Damon Run's customers were paying the revised water rates adopted by Indiana American Water Company in May 2010, and that Damon Run was in the process of amending its ordinance to reflect those rates. Mr. Walsh stated that notice of Damon Run's revised ordinance was published on or about May 16, 2011, and a public hearing is scheduled for May 26, 2011.

Mr. Walsh noted that Mr. Sommer's estimate of the charges that Damon Run will assess to the Hospital is not an accurate and complete representation of the anticipated charges from Damon Run to Porter Hospital. He testified that Mr. Sommer's testimony that the \$100,000 connection charge creates a subsidy for Porter Hospital is incorrect in that it fails to account for the additional contribution the Hospital is making by paying for the cost of the sanitary sewers connecting the Hospital to Damon Run's collection system. He noted that other Damon Run customers have the financial advantage of having the collection system available at their property line. On re-direct examination, Mr. Walsh also noted that Mr. Sommer's calculations fail to mention that Porter Hospital is dedicating the infrastructure that it is constructing to connect to Damon Run's system.

Mr. Walsh disagreed with Mr. Sommer's conclusion that service from Chesterton will be "significantly less expensive for Porter Hospital than the proposal from Damon Run." He noted that Mr. Sommer's assumptions do not address how the cost of extending sanitary sewers to Porter Hospital will be funded. In contrast, how much that sanitary sewer extension will cost, who pays for the extension, and when that extension will be available has been addressed in Damon Run's rates to Porter Hospital.

Mr. Walsh testified that Mr. Sommer did not correctly explain Damon Run's charges for service to Porter Hospital in his testimony. He testified that Damon Run is charging the Hospital connection fees of \$100,000, as well as Damon Run's legal, administrative and engineering expenses incurred in connection with preparation and negotiation in an amount not to exceed \$25,000, per the Sanitary Sewer Service and Water Utility Agreement between Damon Run and Porter Hospital, LLC.

Mr. Walsh also disagreed with Mr. Sommer's characterization that Damon Run is "subsidizing" the connection charge paid by Porter Hospital in the amount of \$262,500. Mr. Walsh noted there is no subsidy when the Hospital's investment in the extension of Damon Run's sanitary collection system to the Hospital is accounted for. On re-direct examination, he also noted that the Hospital is dedicating these facilities to Damon Run, which also supports there is no subsidy.

With regard to Mr. Sommer's statement that Damon Run is not collecting the amount of collection fees required in its ordinance, Mr. Walsh responded that the ordinance addresses the scenario where Damon Run provides a collection sewer to connect at the customer's property line. The ordinance does not address the scenario where the user is required to provide a significant improvement to the sewer before connecting.

Mr. Walsh offered a clarification to Mr. Sommer's testimony regarding the composition of Damon Run's rates and the payment of debt service through the rates. Mr. Walsh testified that to keep the total amount Porter Hospital will pay for service consistent with what other sewer customers will pay for service, the Hospital will pay a service charge per EDU at the same rate as all other customers pay per EDU. To eliminate any issues regarding the Hospital's appropriate EDU count, actual meter readings will be used to calculate their EDU billing determinant. The second component of the Hospital bill for service will be a payment in lieu of taxes. This charge will be calculated using the same annual conservancy district special benefits tax rate as all other Damon Run customers pay. Mr. Walsh noted that Mr. Sommer incorrectly states this tax rate is for debt service and operating expense. Rather, he noted that Damon Run's tax rate is for debt service only.

With regard to Mr. Sommer's calculation of Damon Run's usage rate and its use of the Portage rate, Mr. Walsh testified that he is unaware of any proposed changes to be made to Portage's rates and charges. Mr. Walsh noted that if Portage intends to reduce Damon Run's costs by reducing Damon Run's EDU count via increasing the flow per equivalent connection, Damon Run will pass that change on to its customers the same as any increases in costs are handled.

In response to Mr. Sommer's testimony regarding the composition of Damon Run's charges, Mr. Walsh testified that Damon Run's rate ordinance was created to reflect the commitments Damon Run made to its prospective customers. Simply put, Damon Run's rate for service will be a flat monthly charge to cover its expense; plus the rates Portage and IAWC charge to provide sewer and water service, respectively.

Mr. Walsh disagreed with Mr. Sommer's opinion of Damon Run's financial ability to serve Porter Hospital. Mr. Walsh noted that last year Damon Run received an investment grade rating issued by Standard & Poor's, a highly respected, independent rating agency. Mr. Walsh noted that before Damon Run sold bonds in 2010, it asked Standard & Poor's to assign a rating to Damon Run's bonds. Standard & Poor's assigned Damon Run a rating of BBB+, which is an investment grade rating. Mr. Walsh noted that Standard & Poor's does not give investment grade ratings to issues that do not have the financial capability to pay their debt. Before Standard & Poor's assigns a rating, it investigates, among other things, the issuer's customer base, revenue streams, reserve balances and historical financial data. Mr. Walsh testified that Standard & Poor's found that Damon Run's financial status was stable, and it primarily focused on the fact that Damon Run has two distinct revenue streams. The first revenue stream is the conservancy district special benefits tax, which is used to pay the debt service obligations of the district. The second revenue stream is the district user fees, which are reviewed and managed locally with Commission oversight regarding water rates and rates to customers located outside Damon Run's boundaries. Mr. Walsh testified that Standard & Poor's also considered Damon Run's reserve balances, which are currently in excess of \$1 million. Collectively, these factors led to the stable outlook issued by Standard &

Poor's. Mr. Walsh testified that he agrees with the Standard & Poor's assessment. In his opinion, Damon Run has the mechanisms in place (via user fees and special benefits tax) to generate revenue to pay the revenue requirements of Damon Run. Therefore, it is Mr. Walsh's opinion that Damon Run has the financial ability to serve its current customers as well as the Hospital.

Mr. Walsh expressed concern with Mr. Sommer's Exhibit TS-4. He noted that it assumes Damon Run's assessed valuation remains at Pay 2011 levels for his estimated calculations. Mr. Walsh stated that Mr. Sommer's analysis ignores the fact that Pay 2011 assessed valuation figures are based on property assessments as of March 31, 2010. Further, the construction that has been completed since April 1, 2010 and will be assessed on March 31, 2011 will be used to calculate the tax rate for Pay 2012. He stated that Mr. Sommer also ignores the construction under way now that will be assessed on March 31, 2012 to calculate the tax rate for Pay 2013. Mr. Walsh disagreed with Mr. Sommer statement that his reasoning for using Pay 2011 assessed valuations for his estimated calculations is because "growth has been very low in Damon Run." Mr. Walsh testified that from Pay 2007 through Pay 2011, Damon Run has seen its assessed valuation grow from \$13,295,900 to \$66,104,500. This is an average annual growth of approximately 50% per year over that four-year period.

Mr. Walsh also disagreed with Mr. Sommer's suggestion that Damon Run has not established just and equitable rates and charges based upon cost as required by Ind. Code § 14-33-5-21(a). Mr. Walsh noted that the statute referenced by Mr. Sommer applies to a conservancy district that issues revenue bonds, which is not what Damon Run did. He testified that Damon Run issued conservancy district ad valorem special benefits property tax bonds. Mr. Walsh noted that Indiana Code § 14-33-5-21(a) states that "if the [conservancy district] board issues revenue bonds for the collection, treatment, and disposal of sewage and liquid waste, the board *may* do the following: (1) Subject to sections 21.1 and 21.2 of this chapter, establish just and equitable rates and charges and use the same basis for the rates as provided in Ind. Code § 36-9-23-25 through Ind. Code § 36-9-23-29." Mr. Walsh noted that the statute leaves it to the board's discretion to set rates as provided in Ind. Code § 36-9-23-25 through -29. Mr. Walsh also noted that in this case, and even though not required, Damon Run's rates are consistent with Ind. Code § 36-9-23-25(b), which states: "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." Mr. Walsh stated that the statute goes on to require that the fees 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.

Mr. Walsh testified that Damon Run's user fees are constructed to generate revenues to meet the requirements set forth in #1, #3, and #4 above. Requirement #2 is met by Damon Run via property tax revenues received to pay semi-annual debt service requirements. Damon Run has also accumulated a debt reserve in excess of \$1.2 million.

Mr. Walsh testified that Damon Run's rates and charges are sufficient to meet its financial requirements and assigns responsibility for costs of service in a non-discriminatory way. He noted that Damon Run should be able to support itself with the proposed rates. The rates for service are the same for customers within Damon Run Conservancy District and for the Hospital. Damon Run pays its debt obligations through a property tax rate. Since the Hospital is outside Damon Run Conservancy District, it does not pay the tax rate associated with Damon Run. Consequently, a rate needed to be established for the Hospital that reflects a proportionate allocation of Damon Run's debt service obligations. Mr. Walsh indicated that to accomplish this, Damon Run will charge the Hospital a payment in lieu of taxes that is calculated using the same tax rate used to determine the tax bill for a customer located within the Damon Run Conservancy District.

When asked about the financial impact on Damon Run if it were not authorized to provide service to the Hospital, Mr. Walsh testified that, as is the case when any utility or conservancy district loses a major customer, if there is no decrease in the revenue requirements to operate the system the lost revenue must be replaced with increased rates (user fees and conservancy district special benefits taxes) to the remaining customers. Mr. Walsh stated that based on the financial plan in his original testimony, he estimates the Hospital will contribute in excess of \$300,000 per year to Damon Run via user fees and payment in lieu of taxes. He stated that the reduction in operating costs from not having the Hospital as a customer would be minimal, so the majority of the lost revenue would need to be offset by payments from the remaining customers.

iii. Charles Ray. Mr. Ray testified that Chesterton's witness, Mr. O'Dell agrees that Damon Run has the technical ability to serve Porter Hospital. He noted that even though Chesterton admits that Damon Run is capable of providing service to the Hospital, Chesterton asks that the Commission deny Damon Run's Petition because it contends that Damon Run does not have the ability to serve undeveloped land outside of Chesterton's corporate limits that is adjacent to the Hospital. With regard to Damon Run's ability to serve a large area of Potentially Developable Property, Mr. Ray disagreed with Mr. O'Dell's statement that the design of Damon Run's system represents short-sighted, poor planning. Mr. Ray testified that Damon Run's system was designed to handle areas larger than the Hospital, including the adjacent St. Andrews area. He noted that the Damon Run system is also capable of extending east across Highway 49, if needed. Mr. Ray testified that IDEM will not allow an overdesign of the system to be able to accommodate all of this area. For this reason, he stated that Damon Run did not oversize its force main and pump station. However, he testified that Damon Run's lift station wetwell and the connecting pipes have been sized to accommodate the flows.

Mr. Ray disagreed with Mr. Ban's suggestions regarding the extent of future development and demand. Mr. Ray stated that he would not expect that future development would cover as large an area as Mr. Ban predicts. He also noted that Mr. Ban's drawing shows Chesterton adding new water and sewer lines to serve customers in existing subdivisions that are already served by Damon Run. Mr. Ray also observed that Mr. Ban's drawing shows Chesterton placing lines on the west side of Porter Hospital, which is not logical if Chesterton's goal is to serve future development that is primarily located on the east side of the Hospital and east of Highway 49. Additionally, Mr. Ray testified that based on Chesterton's past record of attracting businesses and the historic rate of development in Porter County, development in this area would take longer than twenty (20) years. Given the slow rate of development this area has historically experienced, Mr. Ray testified he

expects that the development described by Mr. Ban would take closer to thirty (30) to forty (40) years.

Mr. Ray testified that even if Mr. Ban's projections were correct, Damon Run currently has the ability to serve the property adjacent to and immediately west of the Hospital, which was shown in an aerial photograph admitted into this Cause as Exhibit CR-R1. Mr. Ray explained that the aerial photograph shows lines that generally demarcate the Hospital property (Area 1) and the parcels immediately surrounding the Hospital that are already served by Damon Run or that have requested service and annexation from Damon Run. Mr. Ray testified that the bulk of the area marked as Area 2 is undeveloped and is owned by St. Andrews, LLC. He noted that within Area 2 are four small parcels owned and occupied by existing homeowners. Mr. Ray stated that St. Andrews, LLC and three (3) of the homeowners inside of Area 2 have recently requested that Damon Run annex their property into the conservancy district and that Damon Run provide water and sewer service to them. Mr. Ray explained that Area 3 is the St. Andrews Subdivision, which is inside Damon Run's boundaries and Damon Run has facilities in place to serve it. Mr. Ray testified that Area 4 is the Timberland Subdivision, which is within Damon Run's boundaries and served by Damon Run. He noted that Area 5 is the undeveloped Timberland Farms East Subdivision, which is also inside Damon Run's boundaries. Mr. Ray indicated that the land north of Area 5 is also part of the Timberland subdivision and the land west of Area 5 is Timberland Farms West Subdivision, both of which are within Damon Run's boundaries and receive service from Damon Run. In addition to the areas shown on the aerial photograph, Mr. Ray testified that Damon Run has sized its system to accommodate additional flows for property on the east side of Highway 49 should there be future development.

When asked why Damon Run has not sized its system to accommodate flows to be generated by the Potentially Developable Area surrounding Porter Hospital, Mr. Ray testified that future development and demand for service are not likely in the foreseeable future (i.e., within the next 10-20 years) in the entire area. Mr. Ray stated it would be imprudent to saddle Damon Run's customers with debt for an oversized system that will not be used and useful to Damon Run for many years, if ever.

Mr. Ray disagreed with Ms. Darnell's statement that by serving Porter Hospital, Damon Run will be taking away from its capacity allocation to serve its originally intended users. Mr. Ray noted that Damon Run's original plan included a category that contemplated future service to undeveloped property. At the time Damon Run's plan was written, Damon Run identified planned development, including an area south of Route 6. However, Mr. Ray testified that economic conditions have deteriorated locally and nationally in recent years, and many of the originally identified projects are no longer viable. Therefore, the original allocations for those potential customers are now available to be used in other areas as needed to serve commercial or residential development.

With regard to Chesterton's stated concerns with capacity at the Portage wastewater treatment plant, Mr. Ray testified that Damon Run has an agreement with Portage that allows Damon Run to request additional capacity if needed. He indicated that Damon Run will exercise that option if Damon Run needs additional capacity to serve customers who in the future seek service from Damon Run. Mr. Ray testified that the Portage WWTP's current capacity is 4.9

million gallons per day (“mgd”). He stated that Portage currently treats 3.9 mgd, which is 80% of the WWTP’s average capacity, including any peaks and spikes. Mr. Ray stated that Portage will monitor its system and make future WWTP expansions if necessary. Mr. Ray concluded that there is no reason why Damon Run should not continue to partner with Portage for any additional needed capacity.

When asked to compare the ability of Chesterton and Damon Run to provide sewage service to areas of future development, Mr. Ray stated that Damon Run is better suited to serve areas of future development. He noted that Chesterton has experienced significant problems with its system. Mr. Ray provided evidence that Chesterton has experienced twelve (12) sanitary sewer overflows and five (5) sanitary sewer main collapses since January 2009. Mr. Ray testified that because of its problems with overflows, and as a condition of its IDEM NPDES permit, Chesterton has announced plans to construct a 1.2 million gallon storage tank designed to reduce overflows. Mr. Ray testified that Chesterton’s website (www.chestertonin.org) includes a report from DLZ Engineering describing the LTCP, which attaches recent related news articles that quote Mr. Brandt as saying, “Just off the top of my head, we’re looking at a 20 to 25 percent rate increase.” Mr. Ray provided evidence that when asked in discovery whether Chesterton would impose a rate increase to Porter Hospital in connection with the LTCP, Chesterton indicated the answer is unknown.

Mr. Ray found unreasonable Ms. Darnell’s suggestion that Chesterton should be the single service provider for the entire area labeled as the “Proposed Sanitary Service Area Boundary” shown in the drawing included with Exhibit JB-1. He noted that Chesterton’s proposal would result in duplication and abandonment of utility facilities that the Hospital has already constructed. Mr. Ray also explained that Chesterton’s plan contemplates the construction of miles of new pipe through areas where there would be no users.

Mr. Ray testified that in contrast to Chesterton’s proposed route, Damon Run’s infrastructure is situated at the right location and as such, results in a logical service area for Damon Run. Mr. Ray testified that the water lines will also serve the Park, and the system is configured so that it is capable of providing water and sewer service to customers to the south of the Hospital, such as the mobile home park. Mr. Ray testified that Damon Run’s lines are planned in a way that has the most users per foot of pipe installed for cost efficiency.

In response to Mr. Brandt’s assertion that Duneland Group was advising both Damon Run and Porter Hospital, Mr. Ray testified that Duneland Group was hired by the Hospital to do site work for drainage, landscaping, water, sewer, surveying and also offsite engineering work. He indicated that Duneland Group was asked to identify the closest sewer and water supply, and it identified Damon Run, which is within one mile. Mr. Ray testified that Duneland Group did not offer any advice to Porter Hospital regarding its choice between Chesterton and Damon Run.

In response to Chesterton’s allegation that Chesterton can provide service to Porter Hospital at a lower cost than Damon Run, Mr. Ray testified that Chesterton has ignored the comparative costs to the Hospital of installing infrastructure to connect with Chesterton versus Damon Run. Mr. Ray provided a Chesterton estimate of the costs to extend sanitary sewer and water infrastructure to the Hospital that showed the total hard and soft cost estimate was approximately \$5.9 million. By contrast, Mr. Ray estimated the cost to extend sanitary sewer and water infrastructure from Damon

Run to the Hospital at approximately \$2.2 million. Mr. Ray noted that Chesterton has not secured a funding source to extend its facilities to Porter Hospital and that there are at least two fairly likely events that would further increase Chesterton's rates to Porter Hospital. The first is the estimated rate increase necessitated by Chesterton's LTCP, which Chesterton's own witness indicated could be 20% to 25%. The second is the potential for increased rates caused by the addition of taxes that would result if and when Chesterton changes its policy and annexes Porter Hospital. Mr. Ray stated that Chesterton's ordinance would require Porter Hospital to sign a waiver of its right to remonstrate against annexation in the future.

Mr. Ray testified that Chesterton's estimate that it could provide sewer service to the Hospital by August 31, 2012 is optimistic based upon his recent experience with obtaining easements and permits. In addition to completing design work and obtaining permits (for which Chesterton admits it has not yet applied), Mr. Ray testified that Chesterton would need to deal with wetland delineations and soil borings. To complete the plans outlined by Mr. Ban, Mr. Ray indicated that Chesterton will have at least two challenging and time consuming hurdles: securing approvals from a foreign entity to bore underneath the Indiana Toll Road and securing necessary easements or licenses from a railroad. In contrast, Mr. Ray testified that Damon Run is ready to connect the Hospital as soon as it is given approval and when the Hospital's lines are constructed. At the time of the hearing, Mr. Ray indicated that the Hospital had already constructed approximately 80% to 90% of the lines necessary to connect to Damon Run for sewer service.

Mr. Ray testified that if Damon Run is not authorized to serve the Hospital, the Hospital would be forced to find alternate ways of supplying water. He testified that the Hospital would also need to find alternate ways to dispose of sewage, and would likely incur a large expense to pump and haul sewage until a permanent sewage disposal method was ready. Mr. Ray noted that these extra expenses need not be incurred if Damon Run is allowed to provide service to the Hospital as planned.

Finally, Mr. Ray disagreed with Chesterton's allegations that service by Damon Run will create a patchwork of service providers in the area. Mr. Ray indicated that Damon Run serves properties on the north and south sides of the Hospital, and has been asked to serve the property immediately west of the Hospital. He also noted that the Damon Run's boundaries include the area north of the proposed service area, which squares off the territory and creates a symmetric service area.

6. Commission Discussion and Findings. Pursuant to Ind. Code § 14-33-1-2, a conservancy district may request territorial authority from the Commission to collect, treat, or dispose of sewage or other liquid wastes produced outside of the district boundaries. According to Ind. Code § 14-33-1-2, upon notice and hearing, the Commission shall determine the following: (1) the territory outside the boundaries from which sewage and other liquid wastes may be collected, treated, or disposed of; and (2) the rates and charges that the district may make for the services. Unlike the provisions of Title 8 governing the issuance of certificates of territorial authority for public utilities wishing to provide sewage disposal service, the Conservancy District Act does not include a list of factors that the Commission should consider in determining whether a conservancy district should be granted territorial authority to customers outside its boundaries. Accordingly, the provisions of 170 IAC 8.5-3-1 that we apply to public utilities is not applicable to Damon Run.

Nonetheless, we note that Damon Run has provided a legal description of the area to be served; area maps; and plans and specifications for the infrastructure.

As for Damon Run's request for authority to provide water service to the Benefitted Properties, we are guided by Ind. Code § 14-33-20-7 which provides in relevant part that "if a district proposes in ... implementation of the district plan to provide water supply to users outside of the territory to which the district has been granted territorial authority, the district must petition the Commission for territorial authority to serve the additional users." Pursuant to Ind. Code § 14-33-20-10, the Commission after hearing the evidence shall "enter a finding that the convenience and necessity of the public proposed to be served in the area in which the additional users are located" either will or will not be served by the district.

We note that no party objects to Damon Run's request for authority to provide water service to any of the Benefitted Properties. We also note that our review of the record leads us to agree with Mr. Pettijohn that Damon Run has the financial, technical and managerial ability to provide water service to the Benefitted Properties. Our conclusion is supported by evidence that Damon Run has serviced nearly three hundred (300) customers since 2005 without a service quality complaint. The evidence indicates that Damon Run will continue to use the same team for management, billing, maintenance, engineering, and financial services that has served Damon Run. Based on the testimony offered by Mr. Barko at the evidentiary hearing, Damon Run will adjust its team as necessary to accommodate the needs of Damon Run as it grows. The evidence demonstrates that each of the Benefitted Properties has expressed a need for water service; they are each presently unserved by any other water utility; service by Damon Run is a logical growth of Damon Run's system; evidence presented suggests the utility has engineered its system to accommodate the requested water service; and the rates proposed for said service should be authorized, on an interim basis and subject to refund or other adjustment as discussed further below. Accordingly, we approve Damon Run's request to provide water service to the Benefitted Properties.

As for Damon Run's request for authority to provide sewage disposal service, which we note is uncontested save for the proposed service to Porter Hospital, the conservancy district statute is silent on specific criteria applicable to our review. While Ind. Code § 8-1-2-89(e) does not expressly apply to conservancy districts, we find its basic requirements to be relevant in determining whether Damon Run should be granted a certificate of territorial authority to provide sewage service to the three Benefitted Properties. Those requirements are: (a) legal authority; (b) financial ability; and (c) public convenience and necessity.

A. Legal Authority. Damon Run presented evidence that it has the lawful power and authority to request Commission approval to provide sewage disposal service to the three Benefitted Properties. In its Petition, Damon Run provided the Order of the Porter County Circuit Court dated January 26, 2004 that establishes the Damon Run Conservancy District pursuant to the Indiana Conservancy District Act. No party challenges Damon Run's legal authority to provide sewage disposal service or to seek the authority to provide sewage disposal service to the three Benefitted Properties. Accordingly, we find that Damon Run has the requisite lawful power and authority to seek Commission approval to render sewage disposal service to the three Benefitted Properties.

B. Financial Ability. Damon Run's witness Mr. Walsh presented evidence demonstrating Petitioner's financial ability to render sewage disposal service to the Benefitted Properties. Although he did not conclude that Damon Run lacks the financial ability to render sewage disposal service to the Benefitted Properties. Chesterton's witness, Mr. Sommer, opined that Damon Run "is skating on very thin ice." In support of this claim, Mr. Sommer points to his analysis of the homeowner property tax impact for taxes payable from 2010 through 2013 and claims that "Damon Run will find out over the next two years if its freeholders will pay these high levels of Ad Valorem taxes." As Mr. Walsh's rebuttal testimony points out, Mr. Sommer's analysis incorrectly assumes that Damon Run's assessed valuation will remain at current levels. Mr. Sommer's analysis does not account for the fact that the construction that has been completed since April 1, 2010 will be assessed on March 31, 2011 and will be used to calculate the tax rate for Pay 2012. The analysis also ignores the continued construction that will be assessed on March 31, 2012 to calculate the tax rate for Pay 2013. Mr. Walsh indicated that contrary to Mr. Sommer's claim that "growth has been very low in Damon run," Damon Run has seen its assessed valuation grow at an average annual growth rate of approximately 50% per year from Pay 2007 through Pay 2011. These factors suggest that Damon Run's tax base is growing and supports Mr. Walsh's conclusion that Damon Run has adequate financial ability to serve the Benefitted Properties.

Chesterton suggested on cross-examination of Mr. Barko that the 2010 State Board of Accounts audit of Damon Run identified areas of financial concern. Mr. Barko explained that the 2010 audit was for the period from Damon Run's inception to 2009, and it was undertaken at Damon Run's request on advice of its financial advisors and bond counsel. Mr. Barko testified that as a result of the audit, Damon Run has cured the areas of concern to the satisfaction of the State Board of Accounts.

Mr. Walsh also testified that an independent bond rating agency, Standard & Poor's, has issued an investment grade rating to Damon Run. Standard & Poor's considered Damon Run's reserve balances, as well as Damon Run's revenue streams and concluded that the financial outlook for Damon Run is stable. As such, we conclude that Damon Run has demonstrated the financial ability to render sewage disposal service to the Benefitted Properties.

C. Public Convenience and Necessity. Chesterton's primary objections center on whether the public convenience and necessity will be served if Damon Run is authorized to provide sewage disposal service to Porter Hospital. The Indiana Court of Appeals has observed that, because the public's needs are gauged by many variables, specific evidentiary factors required to establish public convenience and necessity cannot be categorized or fixed. *South Haven Sewer Works, Inc.*, Cause No. 43007, 2007 Ind. PUC LEXIS 28, *25, (IURC January 31, 2007); *Ram Broadcasting v. Digital Paging Sys.*, 463 N.E. 2d 1104, 1111 n.4 (Ind. App. 1984); and *V.I.P. Limousine Serv. Inc. v. Herider-Sinders, Inc.*, 335 N.E.2d 441, 445 (Ind. App. 1975). Instead, the "evidentiary criteria which will aid the Commission in determining the presence or absence of the ultimate facts in a given ... case must be left in large measure to the informed discretion of the Commission." *Ram Broadcasting*, 463 N.E.2d at 1112-1113, (quoting *V.I.P. Limousine* 335 N.E. 2d at 445) (emphasis added). In analyzing cases where there is no specific statutory criteria for determining a territorial dispute, this Commission has stated:

We believe that the Legislature would have provided guidance as to any specific approach or criteria to be used in resolving such [water territorial] disputes if it intended us to use a particular approach. . . . the Commission should retain the flexibility to determine on a case-by-case basis the appropriate resolution to the dispute based upon the unique facts contained therein.

In re White River Valley Water Corporation, Cause No. 40719 at 6 (IURC January 7, 1998); *In re Morgan County Rural Water Corporation*, Cause No. 40757 at 6 (IURC January 7, 1998); *citing Flowing Wells, Inc.*, Cause No. 40446 at 9 (IURC July 16, 1997).

The Commission has recognized that determinations of whether granting a CTA will serve the public convenience and necessity can rest on many factors including: whether the area sought to be served is already receiving service; whether the public desires the requested service; and whether there is a need for service. *Consumers Indiana Water Company d/b/a Aqua Indiana, Inc.*, Cause No. 43125 at 21; *citing In re Utility Center, Inc.*, Cause No. 42332 at 21 (IURC March 3, 2004). In determining territory disputes between public utilities and municipally owned utilities, the Commission has also considered the competing municipality's growth and annexation plans; the proximity of the competing municipality's existing facilities and corporate limits; environmental concerns; and timing issues. *South Haven Sewer Works*, Cause No. 43007 (IURC January 31, 2007). We have also analyzed the following factors in water territorial disputes, which we find relevant to the instant inquiry: the existence of fair competition; duplication of facilities; adequacy and reliability of service; relative economic feasibility of the proposed service; customer preference; and logical growth of facilities. *White River Valley Water Corporation*; Cause No. 40719 (January 7, 1998); *Morgan County Rural Water Corporation*; Cause No. 40757 (January 7, 1998). With this authority in mind, and based upon the facts presented, we consider the following relevant factors in determining whether Damon Run's provision of sewage disposal service to the Hospital is consistent with the public convenience and necessity.

i. **Existing Service.** Porter Hospital is being constructed in an unincorporated area of Porter County that lies outside the corporate limits of Chesterton and outside the boundaries of Damon Run. There is no utility that presently has sewage disposal facilities in place to serve the Hospital, Park, or School. As such, we find that this factor favors Damon Run in that service by Damon Run would not interfere with service otherwise being offered by another sewage disposal utility.

ii. **The Public's Desire for the Requested Service.** Attached to Mr. Barko's pre-filed rebuttal testimony were signatures of approximately one hundred sixty (160) of Damon Run's existing customers expressing support for Damon Run's request for authority to provide water and sewage disposal service to the Hospital, Park, and School. The OUCC also offered into evidence its Supplemental Public Comments, which reflect support for Damon Run's provision of sewage disposal service to the Hospital and a specific objection to Chesterton's proposal from a member of the general public. On cross-examination, Mr. Barko testified that Damon Run's proposed arrangement with Porter Hospital was the subject of several public meetings and it was not a secret to Damon Run's freeholders. There was no evidence offered indicating that the general public does not support Damon Run's request. Accordingly, we find that

the record supports a finding that the public desires that Damon Run be authorized to provide sewage disposal service to the Benefitted Properties.

iii. **Customer Preference.** Attached to Damon Run's Petition was a copy of an executed contract between Porter Hospital and Damon Run dated October 7, 2010, for the provision of water and sewage disposal service. An executed contract between Damon Run and the School was also attached to Damon Run's Petition. Damon Run indicated in its Petition that no formal agreement has been entered between Damon Run and the Park Foundation, but the two parties have agreed upon general terms for the provision of water and sewage disposal service by Damon Run. There was no evidence offered suggesting that the three Benefitted Properties prefer service from a provider other than Damon Run. Evidence presented indicates that Porter Hospital was presented with proposals for sewage disposal service from Chesterton and chose to seek sewage disposal and water service from Damon Run. Chesterton has not offered to provide service to the Park or School. Based upon our review of the evidence, we find that consideration of customer preference favors Damon Run's provision of water and sewage disposal service to the Benefitted Properties.

iv. **Timing Issues.** Damon Run's and Porter Hospital's witnesses testified that construction of Porter Hospital is underway and there is an immediate need for water and sewer service. Porter Hospital's witness, Mr. Galassini, testified that the Hospital is scheduled to open in September, 2012, and that the Hospital needs the sewer system installed by mid-July, 2011 so that the plumbing can be tested and to allow for discharges into the sewer system. He indicated that the Hospital needs the water systems to be online by June 1, 2011 so that the Hospital can condition the air to accept final finishes. In his pre-filed rebuttal testimony, Mr. Ray stated that Damon Run is ready to connect the Hospital as soon as the Hospital's lines are constructed. He testified that as of May 18, 2011, the Hospital had constructed 80% to 90% of the lines necessary to connect to Damon Run for sewer service, and pending approval of the Commission, sewer service could be offered by July, 2011.

Chesterton suggests that if it were to provide service to the Hospital, it could do so by September, 2012. Chesterton states that the Hospital could implement interim solutions, such as pumping and hauling sewage and constructing water wells to test systems and otherwise function until Chesterton was able to run lines to the Hospital. On cross-examination, Chesterton's witness Mr. O'Dell admitted that he had not performed any analysis of the cost and timing involved to implement these interim solutions. Mr. Ray indicated in his pre-filed rebuttal testimony an estimate that the expense of well drilling and associated piping would be in the neighborhood of \$60,000, and that the Hospital would likely incur a large expense to pump and haul sewage until Chesterton provided a permanent sewage disposal method. On cross-examination, Mr. O'Dell stated that Porter Hospital would possibly have to pay for these interim solutions. We find this interim solution is not in the best interest of the Hospital or the public. We also find that Chesterton's suggestion that it could provide service by September, 2012 optimistic. The record indicates that in order to reach the Hospital, Chesterton plans to lay several miles of pipe, and it will need to secure permission to bore under the Indiana Toll Road and obtain an easement or license from a railroad. The record indicates that Chesterton has not applied for any of the permits necessary to run its infrastructure to the Hospital. These factors suggest that the timing considerations fall in favor of Damon Run.

v. **Need for Service.** As indicated above, the Hospital's need for service is immediate. Mr. Ray testified that the School desires to abandon its well and treatment facilities in favor of water and sewer service from Damon Run, and that the school's need for service is also immediate. Mr. Ray also testified that the Park Foundation does not presently have water or sewage disposal services, and it desires those services from Damon Run. He noted that construction of the Park Foundation's infrastructure was estimated to commence in March, 2011. Importantly, all three Benefitted Parties have engineered plans to construct infrastructure to connect to Damon Run. These factors suggest that granting authority for Damon Run to provide water and sewer service to the Benefitted properties is based upon demonstrated need.

vi. **Adequacy and Reliability of Service.** The evidence shows that Damon Run is an established conservancy district that has rendered water and sewage disposal service to nearly three hundred (300) residential and commercial customers since 2005. Damon Run's operating facilities include water mains supplying water to its existing customers. Damon Run purchases its water supply from IAWC and the evidence demonstrates that pursuant to Damon Run's contract with IAWC, the sizing of lines to be used in the provision of Damon Run's water service is approved by IAWC in advance of construction. Mr. Ray also testified that the IAWC contract allows for IAWC to maintain Damon Run's water lines. Damon Run also owns sewer lines and associated infrastructure for the collection of sanitary sewage. Damon Run employs Utility Services Corporation to maintain the sanitary infrastructure. By contract with the City of Portage, Damon Run has arranged for sewage treatment.

Chesterton suggested that Damon Run should not rely on Portage for sewage treatment due to questions of future availability of capacity. The record reveals that Portage has enough capacity to service Damon Run's existing customers, the Benefitted Properties, and additional development. Mr. Ray testified that Portage's average treatment flow is 80% of its rated capacity. Additionally, Mr. Ray testified that Damon Run is allowed to request additional capacity from Portage. We reject Chesterton's suggestion that we should deny Damon Run's request to provide sewer service to Porter Hospital because Damon Run does not have the ability to serve the Potentially Developable Area. As we discuss below, we find Chesterton's designation of the Potentially Developable Area to be speculative and not based on sufficient evidence. We also find that our grant of authority for Damon Run to provide sewage disposal service to the Hospital does not foreclose Chesterton from exercising the opportunity to provide utility service in the remainder of the Potentially Developable Area. Finally, we note that on re-direct examination, Mr. Ray stated that if necessary, Portage could construct additional capacity if needed to serve the demands of Damon Run in the future.

By contrast, the record reveals that Chesterton has experienced overflows and collapses of its sewage facilities in recent years. Since January 2009, Chesterton has experienced twelve (12) sanitary sewer overflows and five (5) sanitary sewer main collapses. The evidence indicates that as a condition of Chesterton's NPDES permit, Chesterton has announced plans to build a 1.2 million gallon storage tank as part of its Long-Term Control Plan designed to reduce overflows.

Accordingly, we find that Damon Run has demonstrated that it has configured its system to provide adequate and reliable water and sewage disposal service to the Benefitted Properties.

vii. **Logical Growth of Facilities.** Damon Run's proposal to provide water and sewage disposal service to the Benefitted Properties is a logical growth of Damon Run's existing system, as Mr. Ray testified. Chesterton's claim that service by Damon Run will create a patchwork of utilities is unsupported. In his pre-filed rebuttal testimony, Mr. Ray provided an aerial photograph that depicts the location of Damon Run's existing facilities in relation to the Hospital. Mr. Ray testified that the parcel immediately west of the Hospital (labeled as the St. Andrews LLC Property) has requested that it be served by Damon Run. The photograph establishes that service of the Hospital by Damon Run will result in a contiguous and logical configuration of facilities.

Chesterton's closest sewage facilities are much further from Porter Hospital than Damon Run's. On re-direct examination, Mr. Ray demonstrated the location of Chesterton's closest sewage infrastructure, which is considerably north of the Porter Hospital property. Mr. Ray demonstrated that between the Hospital and Chesterton's existing facilities are a railroad, the Indiana Toll Road, and a wetland area.

Based upon consideration of the evidence, we find that Damon Run's service to the Benefitted Properties is a logical growth of Damon Run's existing system.

viii. **Relative Economic Feasibility of Proposed Service.** Given the substantial amount of testimony dedicated to the relative costs to Porter Hospital of receiving sewage disposal service from Damon Run versus Chesterton, the unique facts of this case dictate that each party's project financing, connection costs, and rates be considered in determining public convenience and necessity in this case. We note similar considerations were evaluated by the Commission in *White River Valley Water*, Cause No. 40719 (IURC January 7, 1998) and *Morgan County Rural Water Corporation*, Cause No. 40757 at 6 (IURC January 7, 1998).

a. **Proposed Financing of Project.** The evidence shows that Chesterton has analyzed five different project financing alternatives, but to date, has not selected any of the options. Two of Chesterton's infrastructure funding options involve federal grants that are still pending after more than a year. One of the options requires Chesterton to obtain "preferred financing" but there was no evidence that such financing had been approved. In contrast, Damon Run has contracted with Porter Hospital and has not only established the funding for the infrastructure (which will be paid by Porter Hospital), but the construction has commenced. Similarly, Damon Run has finalized plans for the School and the Park Foundation to pay for construction of the infrastructure necessary to serve them. Each of the Benefitted Properties has also contractually agreed to dedicate the newly constructed infrastructure to Damon Run upon completion of construction. Based on the foregoing, we find that Damon Run began with, and has maintained, a cohesive, consistent financing plan for the project, based upon cost-effective arrangements with each of the Benefitted Properties.

b. **Rate Comparisons.** While not controlling, we have long recognized that comparative rates is a factor to consider in resolving territorial disputes and in determining what is required by public convenience and necessity. *White River Valley* and *Morgan County Rural Water Corporation*, Cause Nos. 40719 and 40757 at 11, citing *Public Serv. Co. of Ind.*, Cause No. 38219 (May 18, 1988). In this case, we consider the two rates to be borne by the Benefitted Properties: the cost to run infrastructure to connect with Damon Run and Chesterton respectively

("Connection Costs") and the monthly rates that the Benefitted Properties will pay once they receive service.

1. **Connection Costs.** According to the evidence of record, the contract between Damon Run and Porter Hospital estimates that the cost of construction for the new infrastructure necessary to connect to Damon Run's system is \$1.4 million. However, Mr. Ray testified in his pre-filed rebuttal testimony that he estimated the cost to extend sanitary sewer and water infrastructure from Damon Run to the Hospital to be closer to approximately \$2.2 million. By contrast, Mr. Ray stated in his pre-filed rebuttal testimony that Chesterton provided an estimate of the costs to extend sanitary sewer and water infrastructure to the Hospital with an estimated total cost of approximately \$5.9 million. The evidence reveals that the cost is substantially more for Porter Hospital to construct infrastructure to connect to Chesterton's system. As such, we find that consideration of this factor favors Damon Run.

There was also testimony regarding the respective connection fees. Mr. Sommer testified that Chesterton's connection fee to the Hospital would be \$378,290. Damon Run's contract with Porter Hospital states that the Hospital will pay a connection and tap fee of one hundred thousand dollars (\$100,000) and the Hospital will pay Damon Run an amount not to exceed twenty-five thousand dollars (\$25,000) for Damon Run's legal, administrative and engineering expenses incurred in connection with preparation and negotiation of the Agreement and matters related thereto. The contract states that the balance of Damon Run's usual and customary connection and tap fee shall be waived. Chesterton argues that by waiving \$262,500 of the connection and tap fee that would have otherwise been collected from the Hospital, that Damon Run has acted in a discriminatory fashion. We disagree. The Commission has found that discounted rate contracts are lawful if the Commission finds their provisions to be reasonable and just, practicable and advantageous to the parties, and not inconsistent with the purposes of the Public Service Commission Act. *Northern Ind. Public Service Company*, Cause No. 39623, 1993 Ind. PUC LEXIS 268 at *32-33, (IURC August 11, 1993). We have also found that charging different rates under differing circumstances is not necessarily discriminatory. *Id.* at *45.

The Commission has also recognized that "it is appropriate to discount rates or provide other economic incentives to attract new large volume customers to Indiana if the rates are properly designed." *Id.* at *49; citing *Indiana Gas Company, Inc.*, Cause No. 39117, 1991 Ind. PUC LEXIS 168, (May 8, 1991); *Bartholomew County Rural Electric Membership Corporation*, Cause No. 38935, 1990 Ind. PUC LEXIS 296, (August 29, 1990);, *Northern Indiana Public Service Company*, Cause No. 38560, 1988 Ind. PUC LEXIS 345, at 96, (September 21, 1988). The Commission has also recognized that economic development will often occur at the expense of a competing community:

Economic development, whether in the form of attracting new business to the State of Indiana or retaining current business, will often occur at the expense of some other community. The condition that ... [economic development] rates should not adversely affect another community has never previously been imposed by this Commission. If we were to adopt [that] position, there would be no economic development program in the State of Indiana. . . . [T]he issue is not whether

economic development benefits come at the expense of some other community, but rather in which community can the load be served most efficiently.

Northern Ind. Public Service Company, Cause No. 39623, 1993 Ind. PUC LEXIS 268 at 53, (IURC August 11, 1993). We have also found that a discount is equitable where other customers are better off if the new customer takes service under the discounted rate than if it leaves the system. *Id.* at *51.

At the evidentiary hearing, Mr. Walsh testified that the customers of Damon Run would be better positioned as a result of Damon Run's service to Porter Hospital. The Hospital's payments in lieu of taxes will lessen the burden that Damon Run's existing customers would pay for Damon Run's debt service via the Special Benefits Tax. Additionally, the Hospital will dedicate the infrastructure to Damon Run upon completion of construction. Although the record does not reveal a precise value of the infrastructure to be dedicated, the evidence indicates that the cost to construct that infrastructure is between \$1.4 and \$2.2 million. It is reasonable to assume that value of the dedicated infrastructure will equal or exceed the \$262,500 waived connection fee. Based upon all of the foregoing considerations, we find that Damon Run's waiver of \$262,500 of its connection fee is reasonable, just, and not discriminatory.

2. Monthly Rates. Based on re-direct examination testimony of Mr. Walsh and Damon Run's Rate Ordinances, Damon Run's rate composition for water and sewer service consists of three components. The first element is the User Fee, which is a uniform rate that is applied based on an Equivalent Factor that is established to collect revenue for the day to day cost of operations, replacement, maintenance and other costs. Based on Damon Run's Water Rate Ordinance No. 2006-1, the User Fee also pays for part of Damon Run's annual Debt Service Requirement. The second element is the monthly volumetric rate for water wholesale service and a Sewage Treatment Tracker for wastewater treatment. The third component is the Special Benefits Tax, which is a uniform tax rate applied to each customer inside Damon Run's boundaries and is paid based on the assessed value of each customer's property. The Special Benefits Tax pays for the remainder of Damon Run's debt service that is not funded from the User Fee.

Mr. Walsh explained that Damon Run has established rates designed to put the School, Park, and Hospital on equal footing with Damon Run's customers. He noted that the Benefitted Properties will pay the User Fee applied at the same rate and using the same calculation method as Damon Run's existing customers. Mr. Walsh testified that instead of paying the Special Benefits Tax that existing customers pay, customers that are outside the boundaries will pay a payment in lieu of taxes that is based on equivalent factors used for the calculation of the Special Benefits Tax. The contractual agreement between Damon Run and Porter Hospital incorporates this requirement. In response to questions by the Presiding Officers at the evidentiary hearing, Mr. Barko testified that the payments in lieu of taxes to be paid by the Hospital will go to reduce Damon Run's debt service and will thereby benefit Damon Run's current customers by reducing their tax burden. The contract establishes a formula to calculate the Hospital's payment in lieu of taxes.

According to Mr. Sommer, Chesterton's monthly rate for service to the Hospital would be \$6,040.25. Chesterton's monthly rate does not take into account two (2) additional factors that could affect the Hospital's monthly sewer rate: taxes payable if Chesterton elected to annex the Hospital

property; and a rate increase of as much as twenty-five percent (25%) to pay for Chesterton's LTCP, which is estimated at \$11.4 million.

Even if we assume that Chesterton will not raise rates or impose additional taxes by annexing the Porter Hospital property, a long-term comparison of the combined connection costs and the monthly fees shows Porter Hospital's overall cost of service from Damon Run as compared to Chesterton for sewer service and Indiana-American for water service will be similar. The evidence reveals that the infrastructure cost of \$5.9 million to connect the Hospital with Chesterton for sewer service and Indiana-American for water service is approximately \$3.7 million more than the estimated \$2.2 million in infrastructure cost of to connect to Damon Run for water and sewer service. However, Damon Run's monthly charges for sewer service are higher than Chesterton's. Damon Run's monthly charge is approximately \$30,000 whereas Chesterton's monthly charge is approximately \$6,000; a difference of approximately \$24,000 per month. The monthly charges for water service by Damon Run would be approximately \$1,740 higher than Indiana-American due to Damon Run's User Fee charge of \$12 per EDU (145 EDU's X \$12 User Fee). However, even though the monthly charges of Damon Run are higher, if the Hospital paid the additional \$25,740 per month to Damon Run, it would take the Hospital approximately twelve (12) years before the Hospital could recoup the additional \$3.7 million necessary to connect with Chesterton and Indiana-American for service without considering the time value of money. Damon Run's debt should be paid off and the Hospital will no longer pay the estimated \$24,000 per year payment in lieu of taxes after twenty (20) years.

ix. **Duplication of Facilities.** We have frequently considered duplication of facilities in deciding territorial disputes. See e.g., *White River Valley* and *Morgan County Rural Water Corporation*, Cause Nos. 40719 and 40757 at 5, citing *Public Serv. Co.*, Cause No. 38219 (May 15, 1988); *Knox County REMC*, Cause No. 39587 (June 1, 1994); *Harbor Water Corp., Indiana American Water Co. and Indianapolis Water Co.*, Cause No. 40391 (May 1, 1996). Chesterton's Exhibit JB-1 to Mr. Ban's testimony provides a map showing the proposed route Chesterton would follow to connect the Hospital to its facilities. On re-direct examination, Mr. Ray explained that Chesterton's route would result in a duplication of facilities if constructed. Specifically, Chesterton proposes to run a sewer line in a southerly direction from Chesterton's closest sewage facilities, running parallel to State Road 49 to the Hospital. The record also shows that Chesterton's proposed route contemplates construction of miles of new pipe through wetland areas where there would be no users. In addition, Porter Hospital has already constructed pipe in a separate location running from the southwest side of the hospital property in a westerly direction. Based on this evidence, we agree with Mr. Ray's observation that Chesterton's proposal would result in duplication and abandonment of utility facilities that the Hospital has already constructed. We do not believe that the public convenience and necessity would be served by requiring the Hospital to abandon its constructed lines or by authorizing a duplication of sewage facilities. As such, our consideration of this factor weighs in favor of service by Damon Run.

x. **Chesterton's Growth & Annexation Plans.** The Commission has evaluated whether the growth and annexation plans of a nearby municipality support the denial of a request for territorial authority by a competing sewer utility. *South Haven Sewer Works*, Cause No. 43007, 2007 Ind. PUC LEXIS 28, *29, (IURC January 31, 2007). In *South Haven*, we noted that

the municipality's attempts to amend its comprehensive plan to extend its sewer facilities to the disputed territory were undertaken after the competing utility filed its case-in-chief. We found that:

Were the Commission to hold that a municipality could include rural areas within its comprehensive plan after a CTA proceeding has been initiated and thereby defeat a CTA application, we anticipate that municipalities would frequently engage in a comprehensive plan process during the proceeding solely to defeat a CTA request. Such a result would not be consistent with the intent of Ind. Code § 8-1-2-89, to promote the rendering of sewage disposal service in rural areas of the State.

Id., citing *Concerned Citizens of W. Boggs Lake v. W. Boggs Sewer Dist., Inc.*, 810 N.E.2d 720, 723 (Ind. Ct. App. 2004).

Chesterton asserts that due to its Utility Service Board's annexation policy, it does not plan to annex Porter Hospital without a request for annexation by Porter Hospital. Although Chesterton's witness Ms. Darnell referred to Chesterton's comprehensive plan, the plan itself was not provided. According to the map provided by Mr. Ban, Porter Hospital is south of County Road 900 North. In response to a question from the Presiding Officer at the evidentiary hearing, Mr. Ray testified that the distance from the Indiana Toll Road (which is south of County Road 900 North) and Route 6 (which is the southern boundary of Porter Hospital), is approximately six (6) miles. Collectively, this evidence suggests that as of 2010, Chesterton has not included the Porter Hospital area or the area delineated by Mr. Ban as Potentially Developable Area within the "reasonable planning boundaries for the long-range time horizon." Furthermore, Chesterton did not produce any evidence establishing that Chesterton's comprehensive plan has specifically identified either the Porter Hospital property or the Potentially Developable Area for the extension of utility facilities.

Chesterton also provided evidence that after Damon Run filed its January 13, 2011 case-in-chief in this proceeding, Chesterton passed a declaratory resolution on January 24, 2011 designating a certain area as an economic development area and adopting a plan for the economic development area. The resolution does not provide a map of the area so designated, so it is unclear whether the Hospital is included therein. Even if the designated area includes the Porter Hospital area and/or the Potentially Developable Area, we note that Chesterton passed the resolution after Damon Run filed its Petition and its case-in-chief in this proceeding. We find the facts here to be similar to the *South Haven* case and conclude that it would not be in the public interest or consistent with the goal of promoting the rendering of sewage disposal service in rural areas of the State to allow Chesterton's actions, taken during this proceeding, to effectively supersede Damon Run's request for authority to provide sewage disposal service to Porter Hospital.

Through the testimony of Mr. Ban and as shown on Exhibit JB-1, Sheet 2 of 2, Chesterton has identified a Potentially Developable Area including and surrounding the Hospital. One tract of the Potentially Developable Area is located immediately west of the Hospital. This area is identified as Area 2 on the aerial photograph provided by Mr. Ray as Exhibit CR-R1, and labeled on that photograph as St. Andrews LLC Property. It is this property that Ms. Darnell referenced in her pre-filed testimony as having been rezoned by the Porter County Board of Commissioners on February 1, 2011 from low density single family to a combination of mixed uses, including office and technology and moderate intensity commercial use. Mr. Ray's rebuttal testimony indicates that

the owners of this property have requested annexation and service by Damon Run and that Damon Run has sized its facilities and has sufficient capacity to serve the property. We find there is not sufficient evidence to support a finding that the remainder of the Potentially Developable Property identified by Mr. Ban will be developed or have a need for sewer service in the near-to-mid term.

We also reject any suggestion by Chesterton or the OUCC that Chesterton has an exclusive right pursuant to Ind. Code § 36-9-23-36 to serve Porter Hospital because the Hospital is within ten (10) miles of Chesterton's corporate boundaries. As discussed below, both the Commission and Indiana courts have confirmed that a municipality's extraterritorial sewer and water jurisdiction is not absolute. Indiana appellate decisions have recognized that municipalities lose sewer jurisdiction when they are not yet providing service to an area in which another utility has been granted authority to serve. *See* Ind. Code § 36-1-3-5(a). Moreover, when conservancy districts are at issue, those limits on municipal jurisdiction are reinforced by the recognition within the Conservancy District Act that the district may provide sewer and water service in areas immediately surrounding municipalities. *See* Ind. Code art. 14-33.

While a municipality has "exclusive" jurisdiction over sewers within its boundaries, it does not have similar exclusive authority outside of its boundaries, and its jurisdiction is limited to areas in which it is already providing service. Ind. Code § 36-1-3-9(a) provides that "a municipality has exclusive jurisdiction over ... sewers ... *inside* its corporate boundaries, unless a statute provides otherwise." (emphasis added). Under Ind. Code § 36-9-23-36, a municipality may provide sewer service within ten miles of its boundaries, but there is no similar "exclusive" language with respect to its extraterritorial sewer powers. Moreover, and even within the municipality's own boundaries, a city or town cannot exercise its power if the same power has been "expressly granted to another entity." Ind. Code § 36-1-3-5. In this context, three Indiana appellate cases highlight the principle that a municipality's sewer jurisdiction is not absolute, and particularly if the municipality is not already providing service.

First, in *Town of Plainfield v. Town of Avon*, 757 N.E.2d 705 (Ind. Ct. App. 2001), the Indiana Court of Appeals reaffirmed that a municipality does not have exclusive sewer jurisdiction outside its boundaries. The *Town of Plainfield* involved a sewer territory dispute between two municipalities. In rejecting Plainfield's claim that it had concurrent sewer authority with Avon, the Court recognized the limit on a municipality's extraterritorial sewer authority:

The power of a municipality to extend its sewer system from its corporate boundaries is a discretionary one. The right of a municipality to exercise its powers extraterritorially is not absolute.

Id. at 711. Consequently, the Court held that Plainfield did not have the authority to provide service outside its boundaries and in an area where Avon had the authority to serve.

In *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1 (Ind. 2005), the Indiana Supreme Court addressed a sewer territory dispute between a municipality and a regional sewer district. The city was already providing sewer service to the disputed area when IDEM authorized the creation of the regional sewer district for the same territory. The Court recognized that typically "most such territorial disputes are resolved during the IDEM permitting

process.” *Id.* at 5. Here, however, the city had apparently missed its opportunity to intervene at IDEM in “a breakdown of communications.” *Id.* The Court therefore adopted a rule granting the municipality jurisdiction only if it was already providing service to the area:

Where there is an overlap between the service area of a regional district and the service area of a municipality, and absent a resolution during the IDEM permitting process, under the “expressly granted” provision of the Home Rule Act, the district prevails unless the municipality was already providing service to the area at the time the district’s service area was created.

Id. at 7. A municipality therefore has the right to provide sewer service to an area outside its boundaries only if it is already providing sewer service to the area at issue, and if the municipality is not already providing service then it is subject to the “permitting process” that grants other utilities the right to serve.

Finally, in *Town of Merrillville v. Merrillville Conservancy District*, 649 N.E.2d 645 (Ind. Ct. App. 1995), the Indiana Court of Appeals specifically addressed a municipality’s authority to provide sewer service, even within its own boundaries, where a conservancy district was already established and providing service. Again recognizing that Indiana’s Home Rule Act prohibits a city or town from exercising a power that has been “expressly granted to another entity,” the Court of Appeals held that the town in that case could not even create a sewer utility within its own boundaries: “To the extent that the [conservancy district] had been granted specific powers under I.C. § 13-3¹ to provide for the collection, treatment, and disposal of sewage, including the creation of a taxing district, we agree that Merrillville is precluded from exercising conflicting powers under the Home Rule statute.” *Id.*

When considering the *Plainfield*, *North Vernon*, and *Merrillville* cases in total, it is evident that municipalities do not have exclusive extraterritorial sewer jurisdiction. Rather, its sewer authority “is not absolute,” *Plainfield*, 757 N.E.2d at 711, and is subject to a right expressly granted to another entity. *North Vernon*, 829 N.E.2d at 7; *Merrillville*, 649 N.E.2d at 652.

We also note that the Conservancy District Act itself recognizes that a district will be providing sewer and/or water service to areas surrounding municipalities. Ind. Code § 14-33-23-4 and Ind. Code § 14-33-23-5 provide that if an area served by a conservancy district is subsequently annexed by a municipality, the parties may agree to the purchase of the sewer or water facilities by the municipality. In other words, the statute confirms that conservancy districts can and do provide sewer and water service in the areas immediately surrounding a municipality. Municipal sewer and water service rights in that area are therefore not exclusive.

Based on the foregoing, we find that neither Chesterton’s planned growth, annexation plans, nor the provisions of Ind. Code § 36-9-23-36 support a finding that Chesterton’s extension of sewer service to Porter Hospital is required by law.

¹ Ind. Code ch. 13-3-3 concerning conservancy districts, was repealed by P.L.1-1995, § 91, effective July 1, 1995. For present similar provisions, see Ind. Code art. 14-33.

x. **Proximity of Existing Facilities & Corporate Limits.** Mr. Ray testified that Duneland Group was asked by the Hospital to identify the closest sewer and water supply. Duneland Group identified Damon Run, which is within one mile of the Hospital. While Mr. O'Dell testified that Chesterton's corporate limits are approximately 3,000 feet north of the Hospital property, Mr. Ray demonstrated that Chesterton's closest sewer infrastructure is further north, across the Indiana Toll Road. The record does not provide a precise distance between the existing facilities of Damon Run and Chesterton relative to the Hospital. Nevertheless, our review of the maps provided suggest that Chesterton's existing facilities are no closer to the Hospital property than Damon Run's existing facilities. We also find it important to note that Chesterton needs to secure a number of permits in order to extend its facilities to Porter Hospital. Attached to Mr. Barko's testimony is a list of permits that Chesterton needs to secure in order to extend its facilities to the Hospital. This list includes three (3) permits from IDEM, two (2) permits from the Indiana Department of Transportation to cross the Indiana Toll Road and State Road 49 respectively; a permit from CSX Railroad; a permit from ANR pipeline; and a permit to cross a NIPSCO overhead transmission line. The evidence also indicates that Chesterton has not yet applied for any of those permits. By contrast, the Hospital and Damon Run have secured all of the appropriate permits and easements to construct infrastructure to connect Porter Hospital to Damon Run's existing sewer infrastructure. In light of all of these facts, we find that consideration of the existing facilities factor favors Damon Run.

xii. **Environmental Concerns.** The Commission's prior considerations of public convenience and necessity in territorial disputes have included an evaluation of environmental compliance of the competing utility service providers. See *South Haven Sewer Works*, Cause No. 43007, 2007 Ind. PUC LEXIS 28, *32-33. The evidence establishes that Damon Run has operated since 2005 and there is no evidence of any environmental violations. In contrast, Mr. Ray's pre-filed rebuttal testimony establishes that from January 1, 2009 to present, Chesterton has experienced twelve (12) sanitary sewer overflows and five (5) sanitary sewer main collapses. Consequently, we find that the environmental compliance factor favors Damon Run.

xiii. **Fair Competition.** The Commission has previously considered the existence of fair competition in territorial disputes in water cases and has stated that where "competition has been fair and the customer has simply chosen one utility over another, we believe it is much less likely that our regulation should change the result." *Flowing Wells, Inc.*, Cause No. 40446 at 8 (IURC July 16, 1997). In evaluating the existence of fair competition, the Commission has examined whether the customers in the disputed territory had the opportunity to make an informed choice of their supplier. *White River Valley Water Corporation*, Cause No. 40719 at 5 (IURC January 7, 1998); *Morgan County Rural Water Corporation*, Cause No. 40757 at 5 (IURC January 7, 1999).

As an initial matter, we note that this case involves Porter Hospital, which is a sophisticated business customer. In contrast to some boundary cases involving residential customers who may prefer one utility over another without consideration of all relevant factors, the evidence suggests that Porter Hospital employed at least one professional, Mr. Galassini, to evaluate the competing utility service proposals. The evidence suggests that Porter Hospital had ample opportunity to make an informed choice of its supplier.

Chesterton seems to suggest that Damon Run has engaged in unfair competition because: (a) Damon Run waived a portion of its connection fee for the Hospital; (b) the Hospital did not meet with and provide Chesterton with sufficient detail to allow Chesterton to make a sufficiently tailored proposal; and (c) engineers and local counsel hired by Damon Run provided advice to the Hospital. We disagree and address each claim in turn.

As discussed above, Damon Run's waiver of a portion of its connection fee is not unreasonably discriminatory and is proper under the circumstances. Moreover, in a water territory dispute between a public utility and a municipality, this Commission has found that a public utility does not engage in a pattern of unfair competition when it offers a developer a free main extension consistent with the Commission's rules on main extensions, thereby providing more favorable terms to a developer that might otherwise consider the municipality. *Indiana-American Water Company, Inc.* Cause No. 43133, 2007 Ind. PUC LEXIS 349 at *51 (IURC December 5, 2007). Similarly, we do not find in this case that Damon Run engaged in unfair competition by waiving a portion of its connection fees to the Hospital.

We also reject Chesterton's suggestion that unfair competition exists because Porter Hospital did not meet with Chesterton and provide sufficient detail for Chesterton to make a meaningful proposal. In his testimony, Mr. O'Dell indicated that after September 2009, Porter Hospital representatives repeatedly ignored Chesterton's requests for any information about the location for sanitary sewer and expressed no interest in meeting with Chesterton. On cross-examination, Mr. O'Dell admitted that he did not dispute the existence of communications between Chesterton Town Council President Jeff Trout and representatives of Porter Hospital regarding a meeting between the parties as well as offers by Porter Hospital officials to discuss Chesterton's proposal. Ms. Darnell's testimony indicated that Chesterton gave Porter Hospital proposals in April 2008, September 2009, and May 2010. Based on this evidence, we cannot conclude that unfair competition existed.

We also do not find sufficient evidence to conclude that Porter Hospital's decision to contract with Damon Run was the result of engineering or legal advice from professionals who also worked for Damon Run. Mr. Ray testified that his firm's work for Porter Hospital consisted of doing site work for drainage, landscaping, water, sewer, surveying, and offsite engineering work. He testified that Duneland Group was asked to identify the closest sewer and water supply, and it identified Damon Run. Mr. Ray testified – and there was no evidence to the contrary – that his firm did not offer any advice to Porter Hospital regarding its choice between Chesterton and Damon Run. Mr. Barko testified that Damon Run's local counsel assisted Porter Hospital with rezoning, but that Porter Hospital engaged an attorney from a separate law firm and utilized its own personnel to review and determine who would provide utility services.

Furthermore, additional evidence suggests that fair competition existed. During cross-examination, Mr. O'Dell admitted that he was not aware of and did not dispute the existence of an email exchange between Jeff Ban (Chesterton's consultant) and Tom Clark (of Porter Hospital) wherein the Hospital advised that it had an expert reviewing the two options (Damon Run versus Chesterton) based on the summary previously provided. Attached to Mr. Barko's pre-filed rebuttal testimony as Exhibit JB-R1 is another email suggesting that Porter Hospital gave fair consideration to Chesterton's proposal. The email, dated May 25, 2010 between Mr. Galassini (of Robins &

Morton) and Mr. Clark (of Porter Hospital) indicates that Mr. Galassini and another individual reviewed the Chesterton utility schedule with two of the three site contractors who traveled to Nashville for post-bid interviews. Mr. Galassini states:

Both companies felt that based on the fact that the design and land acquisition process are in early stages, easements are not in place, permitting has not started for the railroad, toll road (owned by a Spanish company – not INDOT) and HWY 49 crossings, that it is highly unlikely that [Chesterton] can meet our construction schedule for water service. Both felt this was about a year out before construction could start based on their experience working in this region.

Based on the totality of the evidence, we cannot conclude that unfair competition existed. Rather, when viewed as a whole, the record suggests that competition was fair and the customer has simply chosen one utility over another.

D. Rates and Charges. In accordance with Ind. Code §§ 14-33-1-2(b) and 14-33-20-14, Damon Run also requests Commission approval of the rates and charges associated with the provision of water and sewer services to the Benefitted Properties. Based on the evidence presented, we find that Damon Run should be authorized, on an interim basis and subject to refund or other adjustment as discussed further below, to apply its proposed rates and charges for water and sewer service to the Benefitted Properties. A long-term comparison of the combined connection costs and the monthly fees, as we previously stated, shows Porter Hospital's overall cost of service from Damon Run versus Chesterton for sewer service and IAWC for water service will be similar.

However, we note that Ind. Code § 14-33-20-14 requires a water supply conservancy district to file its initial schedule of rates and charges with the Commission, as well as to seek Commission approval of any changes to those rates and charges. The Commission's records do not reflect that Damon Run ever made such an initial filing of its rates and charges. Nor do the Commission's records reflect that Damon Run sought approval for the subsequent changes in its water rates that occurred in 2009.

Therefore, the Commission finds that Damon Run shall file a rate proceeding with the Commission in accordance with Ind. Code §§ 14-33-20-14 and 8-1.5-3-8 within ninety (90) days of the date of this Order. Damon Run shall include in its filing the appropriate rate studies or other analyses to support its existing water rates and charges or a proposal for new rates and charges with supporting documentation. Records should also be provided that support the use and disbursement of the bond proceeds. In addition, because the Commission has not had the opportunity to review and approve Damon Run's existing water rates and charges, the Commission finds that its approval of Damon Run's rates and charges for water and sewer service to the Benefitted Properties should be approved on an interim basis and subject to further review in the rate proceeding.

E. Annual Reports. As noted above, Damon Run is subject to the Commission's jurisdiction for water service rates and charges in the same manner as municipal water utilities. Ind. Code § 14-33-20-12. Consequently, Damon Run should also be filing annual reports with the Commission in accordance with Ind. Code § 8-1.5-3-14. However, the Commission has no record of any annual reports being filed by Damon Run. Therefore, the

Commission finds that Damon Run shall file annual reports for the last five (5) years within ninety (90) days of the date of this Order.

F. Conclusion. In determining whether approval of the relief requested by Damon Run is consistent with the public convenience and necessity, we have considered a number of factors. While we agree with Chesterton that it is important to consider whether provision of service by a requesting utility will adversely affect the economic development of an area, there was not sufficient evidence to demonstrate that Damon Run's service to the Benefitted Properties will impede economic development in and around Porter Hospital. Damon Run is able to meet Porter Hospital's scheduled need for service as well as the other two Benefitted Properties. We also note that Porter Hospital made a business decision to seek service from Damon Run while considering Chesterton's proposal. Moreover, Chesterton cannot meet Porter Hospital's scheduled need for service and does not want to provide service to the other two Benefitted Properties. Ultimately, we find that Damon Run's service to the Benefitted Properties is logical and reasonable under the circumstances.

We find the evidence of record shows that no entity is currently providing sewer or water service to Liberty Intermediate School, Porter Hospital, and the Porter County Parks or Recreation Foundation, that there is an immediate need for water and sewer service, and Petitioner currently provides service to an area adjacent to the Benefitted Properties. Liberty Intermediate School, Porter Hospital, and the Porter County Parks and Recreation Foundation have requested water and sewer service from Damon Run. Damon Run has the legal authority and the financial ability to serve the Benefitted Properties. Chesterton does not have an exclusive right to provide sewage service to Porter Hospital that is within ten (10) miles of Chesterton's corporate boundaries where Chesterton did not act to exercise its opportunity before Damon Run filed its petition in this proceeding. In consideration of the totality of the evidence, we find that approval of Petitioner's request for authority to serve Liberty Intermediate School, Porter Hospital, and the Porter County Parks and Recreation Foundation will serve the public convenience and necessity, and Petitioner's request is hereby granted.

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

1. Damon Run Conservancy District is authorized to render water and wastewater service, as petitioned, to Liberty Intermediate School, Porter Hospital, and the Porter County Parks and Recreation Foundation.

2. The rates proposed by Damon Run Conservancy District for water and wastewater service to Liberty Intermediate School, Porter Hospital, and the Porter County Parks and Recreation Foundation as described in Damon Run's petition are hereby approved on an interim basis subject to further review in accordance with Finding Paragraph 6.D.

3. Damon Run Conservancy District shall file with the Commission's Water/Sewer Division a schedule of rates and charges in a manner consistent with this Order and Damon Run Conservancy District's rate ordinance. Such rates and charges will become effective for all water and sewer service usage upon approval thereof by the Water/Sewer Division of the Commission.

4. Damon Run Conservancy District shall file a rate proceeding in accordance with Finding Paragraph 6.D. within ninety (90) days from the date of this Order.

5. Damon Run Conservancy District shall file an annual report for the previous five (5) years in accordance with Finding Paragraph 6.E. within ninety (90) days from the date of this Order.

6. In accordance with Indiana Code § 8-1-2-70, Damon Run Conservancy District shall, within twenty (20) days from the date of this Order, pay into the Treasury of the State of Indiana, through the Secretary of this Commission, the following itemized charges, as well as any additional charges which were or may be incurred in connection with this Cause:

Commission charges:	\$ 8,782.45
OUCC Charges:	\$ 6,441.36
Legal Advertising Charges:	\$ <u>260.60</u>
 TOTAL	 \$ 15,484.41

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

ATTERHOLT, BENNETT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: OCT 19 2011

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



Brenda A. Howe
Secretary to the Commission