

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. 7
CAUSE NO. 49D07-0804-CC-018081

JASON BOND, DAVID LEAR,)
and LESLIE BRIDGES, individually)
and as class representatives of all those)
similarly situated,)

Plaintiffs,)

vs.)

VEOLIA WATER NORTH AMERICA)
OPERATING SERVICE, LLC, VEOLIA)
WATER INDIANAPOLIS, LLC,)
and)
THE CITY OF INDIANAPOLIS,)
DEPARTMENT OF WATERWORKS,)

Defendants.)

**DEPARTMENT OF WATERWORKS' BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Defendant, Consolidated City of Indianapolis, Department of Waterworks ("DOW"), by counsel, respectfully submits this brief in opposition to the Plaintiffs' Petition for Certification of Class ("Plaintiffs' Petition"). For the reasons discussed below, Plaintiffs' Petition should be denied.

Factual Background

The City of Indianapolis acquired the waterworks assets of the former IWC Resources Corporation in March 2002 pursuant to a settlement agreement approved by the Indiana Utility Regulatory Commission ("IURC"). (Second Amended Complaint ("Compl"), ¶ 3.) As a result, the City owns the water system which provides water service to its customers in Central Indiana, including Plaintiffs. *Id.* See March 28, 2002 Order of the IURC ("IURC Order"), a copy of which is attached as Exhibit A.

The DOW was established by the City to receive and operate the water utility assets, and as such is a department of the City and a municipally-owned utility. *See* Revised Code of the Consolidated City and County, Indianapolis, Marion County, 273-101, 273-102, 273-103, attached as Exhibit B. *See* IURC Order. *See also* Ind. Code § 8-1-2-1(a). As a municipally-owned utility, the DOW must set and charge its customers just and reasonable rates. Ind. Code § 8-1.5-3-8(b). These rates are subject to approval by the IURC. Ind. Code § 8-1.5-3-8(f). The IURC ordered the City to operate the water utility assets in accord with “the Commission’s Rules of Service and Main Extensions for Water Utilities, contained in 170 IAC 6-1 and 6-1.5.” (IURC Order at 5, 9.)

At this same time, in March 2002, the City entered into a Management Agreement with US Filter Operating Services, Inc., the predecessor of Veolia Water Indianapolis, LLC (“Veolia”), pursuant to which Veolia agreed to manage and operate the water utility assets for a period of twenty years. (Compl., ¶¶ 4, 8.)

In August 2002, the City filed with the IURC a tariff, articulating the rules that would govern its relationship with its customers, a copy of which is attached to Plaintiffs’ Second Amended Complaint as Exhibit B (“Tariff”). (*Id.*, ¶ 11.) As Plaintiffs acknowledge, this Tariff establishes the terms of the City’s relationship with its customers. (*Id.*, ¶¶ 11, 12, 17, 20, 43).

The Tariff provides:

The rules of the Department of Waterworks of the Consolidated City of Indianapolis, as set forth here and as amended and supplemented from time to time, shall govern all water service rendered or to be rendered by the Department. They shall be binding upon every customer and constitute a part of the terms and conditions of every contract for water service, whether expressly incorporated therein or not.

See Compl., Ex. B at 5.

The Tariff also states that customers' water consumption will be determined from actual meter reads bi-monthly, and from estimated consumption in the months their meters are not actually read. (Compl., ¶ 17; Ex. B at 11.) The Tariff also describes the methodology for estimating customer consumption. (Compl., ¶¶ 11, 17, 20; Ex. B at 11.)

The Tariff provides an administrative remedy consisting of a dispute resolution procedure. *See* Compl., Ex. B at 33. That procedure requires a customer first to give the City notice of his or her complaint. *Id.* After receipt of such notice, the City will investigate and provide the customer with its proposed disposition. *Id.* If the customer is not satisfied with the City's proposed disposition, the customer must, within 7 days, seek review of the complaint and proposed disposition with the IURC. *Id.* None of the named Plaintiffs availed themselves of this dispute resolution mechanism.

SUMMARY OF ARGUMENT

Plaintiffs claim that they are entitled to the benefit of the doubt as the Court addresses the issues presented by their Petition. They are not; Plaintiffs are obligated to prove that they meet the requirements of Rules 23(A) and 23(B) of the Indiana Rules of Trial Procedure, and the Court is obligated to examine closely those questions. Plaintiffs do not meet the tests of either Rule 23(A) or 23(B) for either of the proposed classes because they are not adequate class representatives as required under Rule 23(A), and their claims here do not satisfy the predominance test for Rule 23(B)(3) classes. As will be demonstrated, the Court should deny the relief sought by the Petition.

DISCUSSION

I. Plaintiffs Are Not Entitled to the Benefit of Doubt.

In Plaintiffs' Petition, Plaintiffs reach back four decades and all the way to the Tenth Judicial Circuit to find case law suggesting that doubts as to whether a case should be certified for class treatment should be resolved in favor of certification. *See* Plaintiffs' Petition, p. 6. Such a reach is necessary because that proposition is not Indiana law. There is no such laxness here. While "[t]he determination of whether an action is maintainable as a class action is committed to the sound discretion of the trial court," *NIPSCO v. Bolka*, 693 N.E.2d 613, 615 (Ind. Ct. App. 1998), that discretion is tempered by the knowledge that "[t]he potential for prejudice to litigants is great and an overriding consideration prevails in class actions: Absentees' interests are being resolved and quite possibly bound by the operation of res judicata even though most of the plaintiffs are not the real parties to the suit." *Hefty v. All Other Members of Certified Settlement Class*, 680 N.E.2d 843, 848 (Ind. 1997).

Wariness is further justified by the reality that "[c]lass actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest[, and] [t]his fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems." *Id.* at 849 (citation omitted). Hence, "[i]t is axiomatic that the burden of proof in such cases is upon the party seeking to establish the propriety of a class action." *Perfect Circle Corp. v. Case*, 444 N.E.2d 1211, 1213 (Ind. Ct. App. 1983) *quoted in* *Rene v. Reed*, 726 N.E.2d 808, 816-817 (Ind. Ct. App. 2000). "Failure to meet any one of the mandated requirements results in the denial of class status." *Id.* Plaintiffs fail to meet two of those requirements.

II. The Named Plaintiffs Are Not Adequate Representatives of the Proposed Classes.

“Trial Rule 23(A) lists the threshold requirements for certification of a suit as a class action.” *NIPSCO*, 693 N.E.2d at 615. They are: “(1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy).” *Id.* Here, the fourth Rule 23(A) requirement, adequacy of representation, is lacking.

“The Trial Rule 23(A)(4) adequacy requirement has three components: 1) the chosen class representative cannot have antagonistic or conflicting claims with other members of the class; 2) the named representative must have a sufficient interest in the outcome to ensure vigorous advocacy; and 3) counsel for the named plaintiff must be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously.” *Rene*, 726 N.E.2d at 818. In this instance, the second component, that the named representative(s) have a sufficient interest in the litigation to vigorously protect the rights of absent class members, is wanting.

The presence of class representatives with enough “skin in the game” to participate actively in the litigation is no small matter. As the Indiana Supreme Court has noted, “[t]he protection of the absentees’ due process rights depends in part on the extent the named plaintiffs are adequately interested to monitor the attorneys (who are, of course, presumed motivated to achieve maximum results by the prospect of substantial fees), and also on the extent that the class representatives have interests that are sufficiently aligned with the absentees to assure that the monitoring serves the interests of the class as a whole.” *Hefty*, 680 N.E.2d at 848-49. Here, the evidence developed to date is that the named class representatives lack the requisite interest,

financial or otherwise, to monitor their attorneys or to serve the interests of the class as a whole. These attributes lead to the conclusion that none of these individuals is an adequate class representative.

There are three named class representatives: Jason Bond, David Lear, and Leslie Bridges. Each has been deposed. Jason Bond is a customer of the DOW; he lives in Zionsville and has been a customer for at least nine (9) years. Deposition of Jason Bond ("Bond Depo."), 9:8-21, attached hereto as Exhibit C. Mr. Bond's financial stake in the litigation is, generously, pennies. Mr. Bond acknowledges that his meter need only be read every other month and that estimating consumption is proper under certain conditions. Bond Depo., pp. 16-17. His only complaint against the DOW appears to be that his water bill allegedly was overestimated in March, 2007, leading to an overbilling and a credit balance of (\$3.02) on his April billing. Bond Depo., pp. 26-28. Mr. Bond received an appropriate credit thereafter (Bond Depo., 28:3-18). Mr. Bond infers from this credit balance that he overpaid based on an estimate of his consumption. Mr. Bond, like the other named plaintiffs and the putative class, has only a breach of contract claim against the DOW for the alleged failure to comply with the terms of the tariff. *See* Orders dated May 17, 2010 and August 2, 2010. Therefore, his only claim is for the amount of interest that might have been earned on the amount of his overpayment over the course of thirty (30) days. This tiny financial interest in the litigation is hardly sufficient to motivate him to discharge his responsibilities as a class representative.

Leslie Bridges does not know the actual nature of the claims made in the case, and she has paid little attention to her responsibility to monitor the case and her attorney's handling of it. Ms. Bridges lives in Indianapolis in a condominium residence and has been a customer of the DOW for at least twenty (20) years. Deposition of Leslie Bridges ("Bridges Depo."), p. 10:14-

25; p. 11:1-7; p. 12:7-13, attached hereto as Exhibit D. Importantly, Ms. Bridges testified that her only alleged claim is against Veolia, and not against the DOW. Bridges Depo., 54:12-25; 55:1-15. She was completely unaware until her deposition that her lawyers had sued two separate entities – the DOW and Veolia – and had no idea that the DOW and Veolia were in fact separate entities. Bridges Depo., 50:18-25; 51:1-3. Further, she does not know what Veolia does or who owns the waterworks. *Id.* at 14:1-16. Ms. Bridges is not an adequate class representative for any claims against the DOW.

David Lear lives in Indianapolis and has been a customer of the DOW for at least fifteen (15) years. Deposition of David Lear (“Lear Depo.”), p 10:19-25, attached hereto as Exhibit E. Mr. Lear is not an adequate class representative for any class proposed by plaintiffs involving the estimating methodology used by Veolia, because his only complaint here concerns the frequency with which his meter was read. He does not contend that the methodology to estimate consumption is unreasonable. Lear Depo., p. 13:6-10; pp. 35:1-36:1.

Further, as noted above, none of the three named plaintiffs utilized the dispute resolution procedures set forth in the tariff. Their failure to exhaust an available administrative remedy places in significant doubt the viability of their claims as individuals and is another reason that they are ill-suited to serve as representatives of a certified class (where their failure to exhaust would jeopardize the claims of an entire class of unrepresented persons). The failure is jurisdictional. “It is well established that, if an administrative remedy is available, it must be pursued before a claimant is allowed access to the courts.” *Town Council of New Harmony v. Parker*, 726 N.E.2d 1217, 1224 (Ind. 2000) (reversing trial court due to lack of subject matter jurisdiction). “If a party fails to exhaust administrative remedies, the trial court lacks subject matter jurisdiction.” *Turner v. City of Evansville*, 740 N.E.2d 860, 862 (Ind. 2001) (affirming

trial court's dismissal for lack of subject matter jurisdiction). *See also Haggard v. PSI Energy, Inc.*, 575 N.E.2d 687, 690 (Ind. Ct. App. 1991) ("The exhaustion of administrative remedies is the necessary precursor to judicial review.").

Here, Plaintiffs admit the Tariff governs the terms of their relationship with the City. (Compl., ¶ 11.) This Tariff provides a mandatory dispute resolution procedure. It requires a Waterworks customer to first give the City notice of his or her complaint. After receipt of such notice, the City will investigate and provide the customer with its proposed disposition. If the customer is not satisfied with the City's proposed disposition, the customer may, within 7 days, seek review of the complaint and proposed disposition with the IURC.¹ Such rules are enforceable against a utility's customers. *See Lindower v. City of South Bend*, 474 N.E.2d 123 (Ind. Ct. App. 1985). It is undisputed that none of the named plaintiffs exhausted the available administrative remedy, and it is necessary for at least one named plaintiff to have done so. *See In re Household Int'l Tax Reduction Plan*, 441 F. 3d 500, 501-502 (7th Cir. 2006).

Additionally, none of the named Plaintiffs present evidence that they are members of the Frequency class. Plaintiffs proposed definition requires members to have "had their water usage estimated in at least two consecutive months without a valid skip code terminating in an actual read with a negative consumption bill." Petition at 1. Only Mr. Bond presented evidence of negative consumption (Bond Depo., Ex. 1); no named plaintiff presented any evidence concerning skip codes or their validity.

¹ The word "may" does not make use of the dispute resolution procedure permissive. Rather, it is intended to communicate the customer's right to abandon his or her dispute. *See American Italian Pasta Co. v. The Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990); *See also Ceres Marine Terminals, Inc. v. Int'l Longshoremen's Assoc.*, 683 F.2d 242, 246 (7th Cir. 1982) (the use of the word 'may' in an arbitration clause does not give either party the option to by-pass arbitration and seek immediate relief from the courts; rather, it retains the aggrieved party's right to abandon its claim); *see also Akzo Chemicals, Inc. v. Anderson Dev. Co.*, No. 93 C 0498, 1993 WL 54548, at *2 (N.D. Ill. Feb. 26, 1993), *Moore v. Brotherhood of Locomotive Eng'rs*, No. 99-1214-JTM, 2000 WL 882374, at *4 (D. Kan. June 16, 2000).

For all of the foregoing reasons, Plaintiffs do not provide evidence of adequate representation of the proposed classes of claimants and the Court should deny Plaintiffs' Petition on that basis.

III. Class Issues Do Not Predominate Over Individual Issues and Questions.

In addition to the threshold requirements of Trial Rule 23(A), a putative class action “must also satisfy at least one prerequisite of Trial Rule 23(B).” *Rene*, 726 N.E.2d at 818. Here, the plaintiffs argue that they have satisfied the requirements of Trial Rule 23(B)(3) – under which “questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members.” Ind. T.R. 23(B)(3). As noted by the Indiana Supreme Court, “[p]redominance cannot be established merely by facts showing a common course of conduct, but the common facts must also actually ‘predominate over any questions affecting only individual members.’” *Assoc. Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 685 (Ind. 2005) (citing T.R. 23(B)(3)) (reversing class certification due to failure to satisfy predominance requirement).

Plaintiffs have proposed two distinct classes. According to Plaintiffs they are:

All residential customers of Indianapolis Water from September 11, 2002 to present who received and paid a water bill that incorporated an estimated water consumption value that was calculated using the higher of either a twelve month average or the average of the last two months (the “Estimation Class”); and

All residential customers of Indianapolis Water from January 1, 2007 to December 31, 2009 who had their water usage estimated in at least two consecutive months without a valid skip code terminating in an actual read with a negative consumption bill excluding the Judge in this case (the “Frequency Class”).

Plaintiffs' Petition, at 1. As in *Associated Medical*, the “common course of conduct” alleged by the plaintiffs (use of improper estimation formula and insufficiently frequent meter readings), if

proved, will leave essential elements of their claims to be determined on an individualized basis. *Associated Medical*, 824 N.E.2d at 686-67. The Plaintiffs assert breach of contract claims. The essential elements of any breach of contract claim are (1) a contract, (2) a breach, and (3) harm caused by the breach. *Niezer v. Todd Realty, Inc.*, 913 N.E.2d 211, 215 (Ind. Ct. App. 2009). Both proposed classes leave essential elements to be proved on an individual basis.

In the case of the Estimation Class, simple probabilities suggest that, if certain persons were incrementally harmed by employment of an incorrect estimation formula, certain persons also benefited from use of the same protocol. For example, Plaintiffs focus on situations in which estimates might be overstated due to heavy water consumption during the preceding two months. However, that same estimation formula would benefit a person whose billing was estimated for a month in which usage proved to be unexpectedly high. This is not a remote possibility. A person whose July consumption was estimated based upon his May and June consumption, where May and June were rainy and July was dry, very likely paid less than if his actual July consumption had been read at the meter that month. Without harm, there is no claim. Certainly, the DOW is entitled to inquire whether purported class members and claimants actually benefited from employment of the allegedly incorrect estimating methodology and, as a result, have no claim.

The Frequency Class suffers from a similar deficiency. Proof of the alleged common course of conduct (infrequent meter readings), leaves unanswered the question of whether, in the case of each class member, there was a breach of contract. The Tariff, the contract that governs the relationship between the department and its customers, allows for monthly consumption to be estimated in the absence of a scheduled meter read under a host of circumstances. The Tariff expressly allows for estimation under the following circumstances: (1) weather preventing

access to the meter, (2) animals preventing access to the meter, (3) obstructions preventing access to the meter, and (4) the meter having been read in the prior month. Compl., Ex. B at 11. Under any of these circumstances, it would not be a breach of the Tariff not to read the meter in a particular month. Plaintiffs attempt to use the existence of a “valid skip code” as a proxy for whether there was a legitimate, Tariff-based reason for the lack of a meter read in a given month. That does not work.

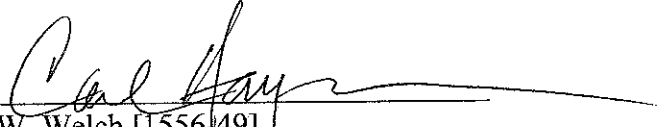
The Tariff requires that the meters be read at least every other month unless a customer requests that the meter be read more frequently. Compl., Ex. B at 11. Plaintiffs have presented no evidence as to the validity of skip codes or even their use. Accordingly, there is no evidence as to whether a “valid skip code” is or is not necessary in the circumstances where the meter is not read because it was read in the prior month. Thus, an individualized inquiry will be necessary to determine when the alleged skipped reading occurred in relation to the prior reading of that meter, whether any given class member owns a pet that may have prevented a scheduled meter reading, whether the estimate was weather-related, and/or whether there are obstructions on the class member’s property that prevented the scheduled reading. Such an inquiry is necessary to determine if a particular class member has a claim. Only through such an inquiry can it be determined if there was a breach. If there was no breach of the Tariff, there is no claim, and the DOW certainly is entitled to determine whether a purported claimant actually has a claim.

As in *Associated Medical*, the alleged common course of conduct leaves unresolved whether essential elements of the plaintiffs’ claims are satisfied. For that reason, class-wide issues do not predominate over the many substantial questions affecting individual class members.

CONCLUSION

Plaintiffs have not demonstrated that this matter should be certified as a class action under Rule 23 of the Indiana Rules of Trial Procedure, and the Court should deny Plaintiffs' Petition for all of the reasons discussed above.

Respectfully submitted,



Brian W. Welch [1556-49]
Carl A. Hayes [23605-49]
BINGHAM MCHALE LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204-4900
317.635.8900
317.236.9907 (facsimile)
bwelch@binghammchale.com
chayes@binghammchale.com

*Attorneys for Defendant,
Consolidated City of Indianapolis,
Department of Waterworks*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel of record, via first class mail, postage prepaid on this the 22nd day of October, 2010:

Peter S. Kovacs
STEWART & IRWIN, P.C.
251 E. Ohio Street
Suite 1100
Indianapolis, Indiana 46204

Robert D. MacGill
T. Joseph Wendt
Scott E. Murray
Matthew S. Winings
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204

