

# UTILITIES SERVICE BOARD MEETING

May 11, 2009

***Utilities Service Board meetings are recorded electronically or stenographically and are available during regular business hours in the office of the Director of Utilities.***

Board President Swafford called the regular meeting of the Utilities Service Board to order at 5:01 p.m. The meeting was held in the Utilities Service Board room at the City of Bloomington Utilities Department Administrative Building in Bloomington, Indiana.

Board members present: Tom Swafford, Sam Frank, Julie Roberts, Pedro Roman and Jason Banach. Staff members present: Patrick Murphy, John Langley, Michael Horstman, Missy Walden, Jon Callahan, Phil Peden, Jackie Moore, Jane Fleig and Tom Staley. Others present: Geoff Grodner representing Mallor, Clendening, Grodner and Bohrer.

## MINUTES

***Board member Roberts moved and Board member Roman seconded the motion to approve the minutes of the April 27<sup>th</sup> meeting. Motion carried, 5 ayes, 2 members absent, (Ehman and Whikehart).***

## CLAIMS

***Board member Roberts moved and Board member Roman seconded the motion to approve the claims as follows:***

***Claims 0990585 through 0990653 including \$129,961.87 from the Water Operations & Maintenance fund for a total of \$129,961.87 from the Water Utility; Claims 0930323 through 0930367 including \$152,655.42 from the Wastewater Operations & Maintenance fund for a total of \$152,655.42 from the Wastewater Utility; and a total of \$1,194.73 from the Wastewater/Storm water Utility. Total claims approved – \$283,912.02.***

Board President Swafford asked about a claim for Everett J. Prescott. Superintendent of Operations Staley explained it is for a device that is put in a meter pit which allows the meters to be read electronically.

***Motion carried, 5 ayes, 2 members absent, (Ehman and Whikehart).***

***Wire transfers and fees for the month of April 2009:***

***Board member Roberts moved and Board member Roman seconded the motion to approve the wire transfers and fees for the month of April, 2009 in the amount of \$626,702.55.***

Board President Swafford asked Assistant Director of Finance Horstman when the Russell Road Corporation would be paid off. Mr. Horstman said the last payments for Russell Rd. would be in September.

***Motion carried, 5 Ayes, 2 members absent, (Ehman and Whikehart).***

**APPROVAL OF A MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF BLOOMINGTON DEPARTMENT OF UTILITIES AND THE CITY OF BLOOMINGTON DEPARTMENT OF PUBLIC WORKS FOR PAYMENT OF COSTS FOR RELOCATION OF UTILITIES ALONG WEST THIRD ST:**

Utilities Director Murphy introduced Counsel Moore with the City of Bloomington Legal Department. Ms. Moore said the Memorandum of Understanding shows the total amount of the project Utilities and Public Works will pay and the portion INDOT is contributing. Of the balance being paid by the City there is a portion for CBU and a portion for Public Works. Public Works will pre-pay \$771,771.00 initially. Utilities portion is \$294,612.50. CBU will pay that portion back to Public Works from the bond funds by June 30, 2010.

Board member Roberts asked what INDOT's timetable for this project is. Ms. Moore said she didn't know how long the construction would take but she had asked when the Notice to Proceed could be expected. She was told it could be within a week. Utilities Engineer Fleig said she does not have an exact timetable but she thinks it will be about an 18 month project. It will have to be phased so half of the road can remain open at any time. She went on to say the project itself will be managed by Public Works, it is a road widening project that will require the relocation of utilities for a part of the project.

Ms. Roberts asked if City of Bloomington Public Works Department will be managing it more than INDOT. Ms. Fleig said it will be. This is a City project, they just obtained some Federal funds for it through the Metropolitan Planning Organization. Anytime Federal funds are used for a project INDOT must be involved.

Board President Swafford asked when this project will start. Ms. Fleig said they have not set a date to begin construction but a pre-construction conference has been scheduled for next Wednesday. At that meeting they will probably find out when they will issue the Notice to Proceed. That can not be issued until the payments from Utilities and the Civil City have been made.

Mr. Swafford asked if the contract had been awarded to a local firm. Ms. Fleig said Dave O'Mara was the low bidder.

***Board member Roberts moved and board member Roman seconded the motion to approve the Memorandum of Understanding between the City of Bloomington Department of Utilities and the City of Bloomington Department of Public Works for payment of costs for relocation of utilities along West Third Street. Motion carried, 5 ayes, 2 members absent, (Ehman and Whikehart).***

**OLD BUSINESS:**

Utilities Director Murphy introduced Attorney Geoff Grodner to give the USB an update on the PCB situation.

Mr. Grodner said he is the outside Attorney for the City of Bloomington with regards to PCB litigation. Last February the USB along with all the other parties approved and signed an amendment to the PCB Consent Decree. The US formally filed a notice of lodging of the proposed amendment to the Consent Decree which started a public comment period on the amendment. The comment period has been extended a couple of times. On March 20<sup>th</sup> of this year the US District Court filed its formal written responses to the comments. The responses are detailed environmental and legal responses to the comments raised by the public. At the same time the District Court filed a motion to enter the agreed amendment to the Consent Decree. Mr. Grodner explained the way the process works. The parties agree to the amendment, it gets lodged with the Court which starts the public comment period. At the end of the public comment period and after the responses are prepared the US Court can say, based on

those comments, they want to revisit the document filed or go forward with the amendment as it was filed and approved. On March 20<sup>th</sup> the Court agreed to go forward with it. Since that date CBS Corporation filed a memorandum in support of the motion to enter the Consent Decree amendment. Typically the Court would hold a hearing and would consider formal approval of the amendment at that time. If the Court approved the amendment would become effective. Over the last many years there has been a citizen law suit filed against the US EPA and CBS challenging the procedure used by the EPA in selecting remedies, approving and now entering into the Agreed amendment. That case has been to the 7<sup>th</sup> Circuit Court of Appeals once, was sent back to the District Court for some procedural reasons and it is pending there again. The citizen suit has been consolidated for administrative purposes with the original Consent Decree litigation so both cases are being handled together. The citizen's recently got an order from the Court approving their filing of an amended complaint which attempts to address issues that the 7<sup>th</sup> Circuit and the District Court had raised previously as being defects in their complaint. Now in response to the second amended complaint CBS and the US EPA have advised Mr. Grodner that they both intend to file motions for summary judgment which are legal pleadings intended to get the citizen suit dismissed. There will be a briefing period and an oral argument on that. Eventually the District Court Judge will rule on those motions and determine whether or not the case will be dismissed at this point or whether it will be set for trial.

It appears at this time that the Court has taken a wait and see approach on how all of this will unfold. Mr. Grodner speculated that the Court hopes the citizen suit will be disposed of prior to ruling on the motion to enter into the Consent Decree. However, there are some issues that are now making it more critical that the Court move expeditiously to consider formal approval of the amendment. Since 2004 until the middle of last year the Illinois Central Spring Water Treatment Plant, which was originally constructed by the EPA, has been operated with funding from 4 parties; the State of Indiana, the City of Bloomington (USB funds), CBS and the US EPA. Around the middle of last year the City decided it would no longer contribute to the operation of the Plant. At that point it became a 3 party funding agreement with the City providing contract management services and financial oversight for the contract implementation.

The State of Indiana has advised the other parties that they may no longer be in a position to participate in the funding. The funds on hand may be exhausted before the end of this month. That leaves the future of the operation of the Illinois Central Spring Water Treatment Plant in some serious danger. Later in this week Mr. Grodner will have a telephone conference with Counsel for all the parties where he will learn more about the position of the other parties. Based on the conversations he has been having with the attorney's for the other parties over the last few days there is no agreement on how this Plant will go forward. Under the agreed amendment that was filed, if it is approved, CBS assumes operation of the Plant at its own expense and puts in some significant enhancements of that plant including increased water storage capacity that will allow the plant to operate more efficiently. There will also be improvements to piping that will limit the re-contamination of Clear Creek and the downstream water.

CBS has resisted voluntarily assuming responsibility for operating the Plant until the amendment is formally approved by the Court. If the Court expedited an approval process for the amendment and formally approved the Agreed amendment, CBS would then be under a time line to assume operation of the Plant. There is a potential for interim funding during the 60 to 90 days between now and when CBS might take over if the Court expedites its approval.

The risk is that the Court may not expeditiously consider and approve the amendment. If the funding is exhausted the future operation of the plant is put at risk. The risk would involve the potential for higher level of release of PCBs from Illinois Central Springs Treatment Plant which would increase the contamination of Clear Creek and the downstream water sources. This is an environmental issue that needs to be addressed. The options are to enter into a new interim funding agreement that would be

likely to once again involve contributions by the City, possibly for an extended period of time while the Citizen's law suit moves toward resolution. That would mean contributions at least through the end of this year and possibly for much longer. That option would also delay the significant upgrades that are to be done to the plant in addition to delaying the removal of the interim storage facility property and its turn over back to the City. It would also delay the environmental benefits the community would receive from the new treatment systems to be put in at Bennet's Dump and Neal's Landfill. The best option at this time for the community and Utilities would be to go to the Court and say the agreed amendment has been prepared and filed and there are no legal impediments to entry of it. The Court has been pushing for 5 years to get it done and filed. The Court can be asked to enter it and do it as expeditiously as possible. All the parties have approved the amendment. This would put the financial burden on CBS to move these things forward. A motion for this was filed today.

Mr. Grodner said once it is known how the Courts are going to react it may be necessary for him to come back to the USB to brief them on where things are on operation of the Treatment Plant. Everyone who has worked on this project believes the operation of the Plant is critical to the environmental well fare of the community.

Board President Swafford asked Mr. Grodner when he thought he would hear from the courts. Mr. Grodner replied that he hopes to hear quickly. Tomorrow he will follow the protocol of calling the Judge's room clerk, who is the person in charge of scheduling, to explain the situation to him and ask that the case be moved along quickly. He is guessing that there will be a status conference with the magistrate assigned to the case relatively quickly, which could mean 10 days to 2 weeks.

Mr. Swafford said a decision will have to be made locally about what will happen by the end of the month if that is when the funding will run out. He confirmed with Utilities Deputy Director Langley that the contract for the operation of Illinois Central Spring Treatment Plant will expire by the end of the month of May.

Board member Roman asked if there would be any funding left to keep the Plant running a little bit longer. Mr. Swafford said if the Court hasn't made a decision by the end of May all the parties will have to agree to an extended contract. Mr. Grodner said the funding that is on hand may be slightly less than is needed to take the contract through the end of the month. The other 3 parties that are currently responsible for funding may have to make some additional payments to cover the operating costs through the end of this month. Beyond that there is no funding agreement in place.

Board President Swafford asked if an extended agreement happens is there any way CBS will reimburse Utilities for this extra time of funding. Mr. Grodner said they would certainly try to do that. One of the things he would hope for is when this goes before the Court the Court will exercise its influence to encourage CBS to assume that liability sooner, but he can't say what the Courts will do.

Board member Roman confirmed that until the amended Consent Decree is recorded by the Court CBS is under no obligation to provide any funding. Mr. Grodner agreed that is the case. Mr. Roman suggested having an Executive Session. He has some questions that he doesn't feel comfortable asking in a Regular Session. Mr. Swafford agreed.

Utilities Engineer Fleig said she had found the proposal for the West Third St. Project. It has a contract completion date of November 5<sup>th</sup>, 2010. The job will be phased.

**NEW BUSINESS:**

No new business was presented.

**SUBCOMMITTEE REPORTS:**

There were no subcommittee meetings.

**STAFF REPORTS:**

There were no staff reports.

Utilities Director Murphy said in a few weeks Assistant Director of Finance Horstman will be giving the USB an update on some discussions with the Civil City about moving away from the Oracle Financial System.

**PETITIONS AND COMMUNICATIONS:**

There were no petitions or communications.

**ADJOURNMENT:**

The meeting was adjourned at 5:28 p.m.

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**L. Thomas Swafford, President**