

The undersigned Hearing Judge having reviewed the evidence submitted and the matters of which notice was taken now tenders his Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

I. PROCEDURAL HISTORY

1. On December 19, 2023, the Commission held its annual permit auction. (ATC File)
2. Applicant was the successful bidder for forty permits state-wide, three of which are in Ms. Lieber's territory. One of those is a Type 115 beer and wine dealer grocery store permit for the Town of Cayuga in Vermillion County, which is the permit in question in this matter. (Hearing testimony.)
3. On January 18, 2024, Applicant submitted its application to the ATC to obtain the Permit. (ATC File)
4. On April 11, 2024, the Local Board held a hearing at which it considered the Applicant's permit application: two remonstrators who also have alcoholic beverage permits in Cayuga participated in that LB Hearing and testified against the granting of the permit. The Local Board voted 4-0 to deny the Permit. (ATC File; LB Transcript.)
5. On April 16, 2024, the Commission adopted the Local Board's recommendation and denied the Permit. (ATC File)
6. On April 25, 2024, Applicant timely filed its Objections and Notice of Appeal at the ATC. (ATC File)
7. On August 19, 2024, both remonstrators who had participated at the LB Hearing communicated to the Commission that they were withdrawing their remonstrance and would not be participating further in the proceedings, which communication was noted in the Commission's Order on Pre-Hearing Conference of September 16, 2024, Setting the Appeal of the Denial of the Permit for Hearing. (ATC File)

8. On October 10, 2024, the Hearing Judge conducted the Appeal Hearing and, at the conclusion of the evidence and argument, took the matter under advisement and ordered Mr. Kirkman to submit proposed findings and conclusions. (ATC File)

II. TESTIMONY BEFORE THE COMMISSION

1. Nicole Lieber, District Manager for Casey's Marketing Company, was the only individual who testified before the Commission.
2. No one testified before the Commission against the Applicant in this case.

III. EXHIBITS BEFORE THE COMMISSION¹

1. Copy of Ind. Code § 7.1-1-3-18.5 (Exhibit #1).
2. Figures for average alcoholic beverage sales per day for Casey's General Store, Clay City, Indiana, for September 2024 (Exhibit #2).
3. Aerial photograph of Casey's General Store, Cayuga, Indiana (Exhibit #3).
4. Photograph of the hot food area of Casey's General Store, Cayuga, Indiana (Exhibit #4).
5. Figures for average per-day sales of prepared food and beverages for Casey's General Store, Cayuga, Indiana, for September 2024 (Exhibit #5a).
6. Figures for average per-day sales of general merchandise (tobacco excepted) for Casey's General Store, Cayuga, Indiana, for September 2024 (Exhibit #5b).
7. Figures for average per-day sales of non-taxable items for Casey's General Store, Cayuga, Indiana, for September 2024 (Exhibit #5c).
8. List of alcoholic beverage permits Casey's Marketing currently holds in the state

¹ Exhibits numbered 1 through 17 as admitted and referenced herein were contained in one binder, thus the binder was also admitted and referred to during the hearing as Exhibit #1 in 17 parts.

of Indiana (Exhibit #6).

9. "LISTING OF REMONSTRATORS" at the LB Hearing (Exhibit #7).²
10. Alcoholic beverage permit information for SAM'S PUB, LLC, Cayuga, Indiana (Exhibit #8).
11. Alcoholic beverage permit information for LYLE W MARSHALL, Cayuga, Indiana (Exhibit #9).
12. Copy of Ind. Code § 7.1-3-9-9 (Exhibit #10).
13. Aerial map of alcoholic beverage permit locations in Cayuga, Indiana (Exhibit #11).
14. Findings of Fact and Conclusions of Law from Family Express, Inc., Permit No. DL50-27313 (hereinafter "*Family Express*"). (Exhibit #12)
15. Meeting minutes of the Indiana Alcohol and Tobacco Commission for the meeting held on March 19, 2024 ("3/19/24 ATC Meeting Minutes") (Exhibit #13).
16. Findings of Fact and Conclusions of Law from Hook-SupeRx, Inc., Permit Nos. DL34-93345, DL34-93346, DL34-93347, and DL34-93348 (hereinafter "*Hook-SupeRx*") (Exhibit #14).
17. "PETITIONS TO OPPOSE CASEY'S GAS STATION in CAYUGA, INDIANA" and "PETITIONS TO OPPOSE BEER AND WINE LICENSE CASEY'S GAS STATION in CAYUGA, INDIANA" submitted at the LB Hearing marked as Remonstrance Exhibit #1 and Remonstrance Exhibit #2 (Exhibit #15).

² The list of "Remonstrators" also includes those in favor of the Applicant, notably Mr. Kirkman and Ms. Lieber.

18. Transcript of the LB Hearing dated April 11, 2024 ("LB Hearing Transcript") (Exhibit #16).
19. Transcript of a Prehearing Conference held in this matter on August 15, 2024 ("Prehearing Conference Transcript", Exhibit #17).

III. FINDINGS OF FACT

1. Ms. Lieber has been a district manager for Applicant for seven years, and her responsibilities include recruiting, hiring, training and ongoing responsibility for the stores under her management meeting their financial goals. She also grew up in Cayuga, the town in which this store is located. (Hearing Testimony)
2. Applicant is a publicly traded corporation headquartered in Iowa and operates over 2,600 stores nationwide. Applicant holds 101 alcoholic beverage permits in Indiana, all of which are Type 115 or Type 116 beer and wine dealer grocery store permits. (Hearing Testimony; ATC File)
3. None of Applicant's corporate officers are disqualified from holding an alcoholic beverage permit in Indiana. Prior to the LB Hearing, Applicant had never had an application for an Indiana alcoholic beverage permit denied. (Hearing Testimony)
4. At locations where Applicant has a permit to sell alcoholic beverages, it has a zero-tolerance policy for employees selling alcoholic beverages to minors or intoxicated persons. (Hearing Testimony.)
5. Applicant employs stringent training and monitoring of its employees to ensure compliance with laws relating to the sale of age-restricted products, including an online training program that all new employees must take and acknowledge prior

- to their first shift. Applicant's Point of Sale system requires that salesclerks check and scan IDs; if an ID is fake or if the individual is underage, the system locks down the transaction in a manner that cannot be overridden. (Hearing Testimony)
6. Applicant employs a secret-shopper program, called the BARS program, to randomly test different stores to ensure compliance with its policies. (Hearing Testimony)
 7. In the five years preceding the submission of this application, Applicant has only had four violations issued by the ATC across all its Indiana locations. (Hearing Testimony)
 8. The active store in which this permit would be located is in Cayuga and is not located within 200 feet of a church or school. (Hearing Testimony)
 9. The Cayuga store sells thousands of individual grocery and hot-food items, as well as gasoline. (Hearing Testimony; Exhibits 3, 4, 5a-5c)
 10. Applicant seeks to provide its customers with a "one-stop shopping experience" at its stores, including the Cayuga store. (Hearing Testimony)
 11. At a similarly situated Casey's store located in Clay City, Indiana, the location sells approximately \$97.00 in alcoholic beverages per day. (Exhibit #2; Hearing Testimony)
 12. Applicant regularly receives questions from customers about whether they sell beer and wine at the location. (Hearing Testimony)
 13. The Town of Cayuga has one Type 210 beer, wine and liquor restaurant with carryout privileges: SAM'S PUB, LLC, of which Cynthia Hawn, one of the

- remonstrators at the LB, is the Sole Member. (Exhibits #8 and #11; Hearing Testimony; ATC File)
14. The Town of Cayuga has one package liquor store: LYLE W MARSHALL d/b/a Marshall's Package Carryout Beer Liquor Wine, of which Lyle W. Marshall, the other remonstrator at the LB, is the sole owner (Exhibits #9 and #11; Hearing Testimony; ATC File)
15. Applicant participated in the ATC's 2023 permit auction on December 19, ²⁰²³~~2024~~, and was the successful bidder for forty (40) Type 115 and Type 116 beer and wine grocery store permits, including a Type 115 for the Town of Cayuga in Vermillion County. (Hearing Testimony; ATC File)
16. The ATC auctioned new grocery store permits in jurisdictions throughout the state of Indiana, including Cayuga, and a second Type 115 beer and wine grocery store permit for Cayuga was obtained at the auction by McClure Oil Corporation ("McClure's"). (Exhibit #13, 3/19/24 ATC Meeting Minutes)
17. At its meeting of March 19, 2024, the ATC approved the issuance of a Type 115 beer and wine grocery store permit to McClure's in Cayuga following a 2-2 vote at the Local Board. ATC recognized at its meeting that the remonstrators were competitors. (Exhibit #13, 3/19/24 ATC Meeting Minutes)
18. McClure's is just down the road from Casey's but is geared more toward a travel center, selling mostly to the travelers on State Road 63, whereas Casey's is geared more to the Cayuga community. (Hearing Testimony)
19. The following month, on April 11, 2024, Applicant appeared before the Local Board. (ATC File)

20. At the LB Hearing, Lyle Marshall, owner of the package liquor store, and Cynthia Hawn, owner of Sam's Pub, appeared as remonstrators ("Remonstrators").

21. The thrust of the Remonstrators' testimony related to the potential impact to Remonstrators' businesses. Marshall testified at the LB Hearing as follows:

People's [sic] chopping away at my income. It gets old after a while. I mean, when it's ... When Red and White got a license in Cayuga, they've got their beer and wine, they took half of our business. That's fine. I mean. That's what a small community is about. The big grocery is taking out the family business. It is what it is. It's not for you to stop it....

(Exhibit #16, LB Hearing Transcript at p. 6.)

22. Similarly, Cynthia Hawn testified at the LB Hearing, including:

I'm just a small bar and that's all I have.... I know it's probably useless like last month, but I just can't help for wonder why they need that much in Cayuga. I just don't understand the concept. Cause if we close down, your taxes are going to be like obscene because you are going to lose us and we're going to go under...."

Id. at pp. 10-11.

23. The Remonstrators also presented petitions to the Local Board that they represented as petitions in support of their remonstrance. Seven of the nine pages of the petitions contained the caption "PETITION TO OPPOSE CASEY'S GAS STATION in CAYUGA, INDIANA", and two of the pages were presented as "PETITIONS TO OPPOSE BEER & WINE LICENSE CASEY'S GAS STATION in CAYUGA, INDIANA"; blank spaces were provided for the person's name, phone number, and county of residence. (Exhibit #15).

24. Of the one hundred sixty-six (166) signatures, one hundred seven (107) did not provide a phone number. The petitions did not mention any reason that the person was opposed to the permit. (Exhibit #15; ATC File.) At the outset of the

Local Board deliberations, one of the Local Board members stated: "I hate to hurt small businesses. I'm torn between both of them." (Exhibit #16, LB Hearing Transcript at p. 15.)

25. The Local Board ultimately voted 4-0 to deny Applicant's application, citing as its reasons the (lack of) both the need for the services in the community and neighborhood desire for the services. (Exhibit #16, LB Hearing Transcript at p. 16.)
26. However, at a prehearing conference held in this appeal and prior to the Remonstrators' formal withdrawal from participation, Mr. Marshall, owner of the local package store, testified as follows:

It ain't going to affect my business. It's not going to affect my business. It's not about them selling beer and wine. It's about the morals of the thing. I sell the stuff. They do not want to send a customer down here. I've had customers say, "well I don't know why they wouldn't tell me where you are at." I said because they think they want that product. They think they are going to sell it and they are not. But I said if they get it, it's fine. It's not going to hurt me. It's not going to hurt my business. It's about morals.... I mean, it's not going to affect my business. I know this. It's not going to hurt me one bit. It's about morals.

(Exhibit #17, Prehearing Transcript at pp. 4-5.)

27. There was no evidence or testimony that Applicant is not qualified to hold the Permit, nor was there sufficient testimony or evidence to deny the Permit based on the particular location.
28. Any finding of fact may be considered a conclusion of law if the context so warrants.

IV. CONCLUSIONS OF LAW

1. Any conclusion of law may be considered a finding of fact if the context so warrants.
2. The ATC has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2; Ind. Code § 7.1-2-3-1, *et seq.*
3. The application for the Permit was properly submitted pursuant to Ind. Code § 7.1-3-1-4.
4. The ATC is commissioned to act upon proper application. *Id.*
5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. (905 IAC 1-36-7; Ind. Code § 7.1-3-19-11.5.)
6. The Hearing Judge may consider as evidence all documents in the ATC File, including the transcript of proceedings and exhibits before the Local Board. (905 IAC 1-36-7(a).)
7. The Hearing Judge may also consider as evidence Commission orders and any codes and standards that have been adopted by an agency of this state. (905 IAC 1-36-8(e).)
8. Evidence at the Appeal Hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceedings. (905 IAC 1-36-8(e); Ind. Code § 4-21.5-3-27(d).)
9. Casey's Marketing Company d/b/a Casey's General Store #1912, permit No. DL83-33588, is an applicant for a Type 115 beer and wine dealer grocery store permit issued by ATC.

10. The proposed Permit premises is an existing location for Applicant's business and is located more than two hundred feet from a church or school. (See Ind. Code § 7.1-3-21-11.)
11. The Commission may issue a beer dealer's permit to an applicant who is the proprietor of a grocery store. (Ind. Code § 7.1-3-5-2(b).)
12. The term "grocery store" means "a store or part of a store that is known generally as ... a convenience store or food mart and is primarily engaged in [] the retail sale of automotive fuels and the retail sale of a line of goods that includes milk, bread, soda, and snacks. (Ind. Code § 7.1-1-3-18.5(a)(2)(B).)
13. Applicant has established that the Cayuga store is a convenience store or food mart which is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda, and snacks ...", and is not a "gas station" as defined by Ind. Code § 7.1-1-3-18.5(c). (Exhibits 3, 4, 5a-5c; Hearing Testimony.)
14. Applicant expends significant resources in training and monitoring its employees in order to comply with Indiana's alcoholic beverage laws and those pertaining to other age-restricted products. (905 IAC 1-27-1; Hearing Testimony.)
15. Applicant is of good moral character and in good repute in the community in which it does business, has demonstrated compliance with Indiana's alcoholic beverage laws, and is qualified to hold the Permit. (905 IAC 1-27-1; Ind. Code § 7.1-3-4-2(a)(2); Ind. Code § 7.1-3-19-10.)
16. In determining whether to issue a permit, the Commission may consider the geographic desirability of the proposed permit location, the need for the permit at

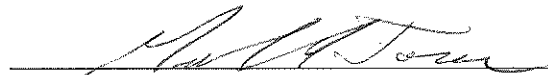
- the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. (905 IAC 1-27-4.)
17. "Need" means whether the services are available at the location or in some geographic proximity. (905 IAC 1-27-4(a); *see also* Exhibit #12, *Family Express*, p.8, #20.)
 18. "Desire" means whether individuals would purchase those products at that location, if they were available. (905 IAC 1-27-4(b); *see also* Exhibit #12, *Family Express*, p. 8, #21.)
 19. Where a business cluster serves the needs and desires of the community, it may be appropriate for the businesses located therein to offer similar services, including product lines of alcoholic beverages, as limited by that jurisdiction's quota. (Hearing Testimony; Exhibit #11.)
 20. Based on the foregoing, Applicant has proven that there is a need for a beer and wine grocery permit at the Applicant's premises. (905 IAC 1-27-4(a); Hearing Testimony.)
 21. Applicant submitted substantial evidence of its policies and practices regarding the sales of alcoholic beverages at stores with a grocery store beer and wine permit. No evidence was submitted to the contrary. Accordingly, the Permit will not negatively impact other businesses in the neighborhood or community. (905 IAC 1-27-4(c).)
 22. All laws shall be general and administered with uniform application throughout the State. (*Ind. Constitution*, Art. IV, Sec. 23; *see also*, *Ind. Alcoholic Beverage Comm'n v. Osco Drug Inc.*, 431 N.E.2d 823, 830 (Ind. Ct. App. 1982).)

23. On 101 occasions, the ATC has determined that Applicant possessed the proper character and other qualifications to hold an alcoholic beverage permit. Applicant submitted substantial evidence at the LB Hearing and this Appeal Hearing that it is qualified to hold the Permit. (905 IAC 1-36-8; Hearing Testimony; ATC files.)
24. The Local Board should not deny an otherwise qualified permittee based solely on evidence submitted by a competing permittee. (Exhibit #12, *Family Express* at 9 (citing *Wine and Spirits Wholesaler of Indiana, Inc. v. Ind. Alcoholic Beverage Comm'n*, 556 N.E.2d 17 (Ind. Ct. App. 1990))).
25. Competition between permittees is not a valid reason for denying the Permit. Reasonable competition helps protect and promote economic welfare and is not inconsistent with Commission's purpose of *inter alia*, regulating and limiting the manufacture, sale, possession and use of alcoholic beverages. *Id.* (citing Ind. Code § 7.1-1-1-1.)
26. "[A] witness's bias, prejudice or ulterior motives are always relevant in that they may discredit him [or her or] affect the weight of [the] testimony." (Exhibit #12, *Family Express* at 9 (quoting *Standifer v. State*, 718 N.E.2d 1107, 1110 (Ind. 1999) (quoting *Pfeffercorn v. State*, 413 N.E.2d 1088, 1089 (Ind. Ct. App. 1980))).
27. The Remonstrators' testimony provided at the LB Hearing is contradicted by their subsequent statements that the granting of the permit to Casey's will not negatively affect their business, and further by withdrawals of their objections; consequently, the decision of the Local Board to deny the permit is now arbitrary and capricious.

28. Issues before the Hearing Judge include whether the Permit premises is a grocery store and, if so, whether the location is appropriate for a permit. No evidence was provided that the proposed Permit premises is inappropriate for a permit. 905 IAC 1-36-8.
29. The facts and law are with the Applicant.
30. The initial findings of the Local Board were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law as they are not now supported by substantial evidence. *Id.*
31. Because there is now no substantial or reliable evidence against the issuance of this permit, a decision by the undersigned Hearing Judge to deny this application would not be supported by substantial evidence and would be arbitrary and capricious.

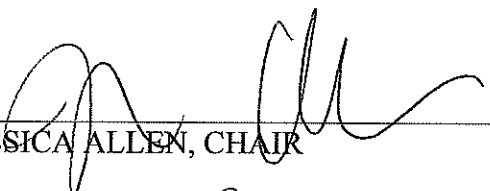
It is thereby **ORDERED, ADJUDGED AND DECREED** that the evidence produced at the Appeal Hearing is in favor of the Applicant, the appeal of Casey's Marketing Company d/b/a Casey's general Store #1912 for Permit No. DL83-33588 is granted, and the type 115 permit applied for at its location in Cayuga is hereby **GRANTED**.

DATED: 21 January 2025


Mark A. Jones, Hearing Judge

CC: Clark Kirkman, ckirkman@clarkquinnlaw.com

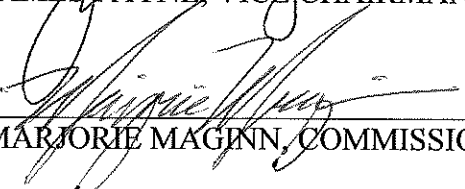
Approved this 18th day of February, 2025



JESSICA ALLEN, CHAIR



JAMES PAYNE, VICE CHAIRMAN



MARJORIE MAGINN, COMMISSIONER



MARK A. JONES, COMMISSIONER