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IN THE INDIANA COURT OF APPEALS
CAUSE NO. 18A-EX-95

Citizens Action Coalition of Indiana, Inc.,	)	
	)	
Appellant (Intervenor below),	)	**Appeal from the Indiana Utility Regulatory Commission**
	)	
v.	)	
	)	**Cause No. 44645**
Southern Indiana Gas & Electric Company	)	
d/b/a Vectren Energy Delivery of Indiana, Inc.,	)	**The Hon. David E. Ziegner**
	)	**Commissioner**
Appellee	)	
(Petitioner below)	)	**The Hon. Loraine L. Seyfried,**
	)	**Chief Administrative Law Judge**
	)	
	)	
	)	

APPELLANT CAC'S BRIEF

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I. STATEMENT OF THE ISSUES

This case is about the Indiana Utility Regulatory Commission's ("Commission" or "IURC") approval of a rate proposal to collect roughly $25.9 million from ratepayers to account for reduced energy sales due to energy efficiency programs. This lost revenue rate recovery greatly exceeds the actual cost of the energy efficiency programs themselves, roughly $16.8 million. The IURC's decision is unlawful and departs from its original decision, the available precedent, its own rationale defending its original order, and the governing law. The issues on appeal include:

1. Whether the Commission's approval of the lost revenue rate recovery is just and reasonable;
2. Whether the Commission's Order ignores a critically material issue that unjustifiably deviates from past precedent;
3. Whether the Commission's approval of the lost revenue rate recovery is supported by substantial evidence; and
4. Whether the Commission's approval of the lost revenue rate recovery is consistent with Ind. Code § 8-1-8.5-10 (2015).

II. STATEMENT OF THE CASE

On June 29, 2016, Vectren filed an application requesting that the Commission approve its energy efficiency plan, including cost recovery composed of recovery for (1) program costs for actually delivering the programs, (2) performance incentives to motivate Vectren's achievement in capturing energy savings, and (3) recovery of lost revenues to make a utility whole by compensating it for reduced energy sales associated with efficiency programs. The Commission approved Vectren's energy efficiency plan but concluded that it was appropriate to limit the recovery of lost revenues for installed measures to a period of four (4) years, life of the measure, or Vectren's next rate case, whichever is shorter. *In re Verified Petition of S. Ind. Gas*

& Elec. Co. d/b/a Vectren Energy Delivery of Ind., Inc., Cause No. 44645, Order at 24-26 (I.U.R.C. March 23, 2016) (App. I,[1] vol. 2, at 29-30) [hereinafter "2016 Order"].

This Court reversed and remanded part of that decision with instructions, holding that the Commission only "implicitly" found Vectren's proposal to be unreasonable, and the 2016 Order lacked sufficiently specific factual findings that more limited recovery would be reasonable. *S. Ind. Gas & Elec. Co. v. Ind. Util. Regulatory Comm'n, et al.*, 2017 WL 899947 (Ind. Ct. App. March 7, 2017). Construing I.C. § 8-1-8.5-10, the Court agreed with Vectren that the statute calls for a single reasonableness determination on the energy efficiency Plan as submitted, and therefore the implicit finding that the lost revenue proposal was unreasonable was inconsistent with the finding that the overall Plan was reasonable. *Id*. On June 13, 2017, Vectren filed testimony on remand, and CAC filed testimony on July 26, 2017. Vectren filed rebuttal testimony on remand on August 16, 2017. An evidentiary hearing was held on September 5, 2017.

The Commission issued the Order on Remand on December 20, 2017, reversing itself and dramatically deviating from its initial order by approving a completely new formula that, nevertheless amounts to life of the measure recovery for all measures. *In re Verified Petition of S. Ind. Gas & Elec. Co. d/b/a Vectren Energy Delivery of Ind., Inc.*, Cause No. 44645, Order (I.U.R.C. Dec. 20, 2017) (App. II,[2] vol. 2, pp. 9-20) [hereinafter "2017 Order"]. CAC filed a notice of appeal on January 19, 2018.

[1] References to "App. I" are to the Appendix in the first appeal in this cause, No. 93A02–1604–EX–914, and references to "Tr. I" are to the Transcript in the first appeal. CAC has filed a motion to incorporate the appendix, transcript, and case record from the prior appeal into the record for this appeal.
[2] References to "App. II" are to the appendix prepared for this appeal. References to "Tr. II" are to the Transcript prepared for this appeal.

III. STATEMENT OF THE FACTS

The order being appealed addresses I.C. § 8-1-8.5-10 ("Section 10"), which was enacted into law on May 6, 2015, through Senate Enrolled Act 412 ("SEA 412"). It requires electricity suppliers, all of which are monopoly, investor-owned service providers, to submit energy efficiency plans once every (3) years for evaluation and approval by the Commission. Section 10 (h).

The Commission has long valued investment in energy efficiency as a method by which to reduce energy use and to provide ratepayers with an opportunity to save money, both on an individual basis by investing in energy efficiency in their homes and businesses and on a system-wide basis by reducing the need to build expensive generation plants. *See, e.g*, *In re Investigation of DSM Programs,* Cause No. 42693 at 31, 2008 WL 9832664 (Ind. Util. Reg. Comm., April 23, 2008) ("...effective DSM Programs act to reduce energy costs and can provide overall economic benefits...and lessen the costs associated with new or increased regulatory requirements regarding energy generation"); *In re Investigation of DSM Programs*, Cause No. 42693 at 30-32, 2009 WL 4886392 (Ind. Util. Reg. Comm., Dec. 9, 2009) ("While the Commission recognizes the need to approve additional generation capacity as necessary to meet the needs of customers and ensure Indiana's ongoing economic success, it also recognizes that an important component of long-term planning for Indiana's generation needs is the effective utilization of DSM programs by jurisdictional utilities that have a duty to serve their ratepayers in a cost effective manner. Saving energy is the most cost effective way of meeting future energy supply needs and has the corresponding benefit of reducing the need to build additional generation capacity...ensure that every Indiana energy consumer has the opportunity to benefit from the energy cost reductions that can be achieved through energy efficiency improvements…Accordingly, over time, reductions in sales will reduce participating customers' energy bills and defer the need for future generation.") *See also* Tr. I, vol. 1, at 933 ("Energy efficiency is one of the lowest-cost, cleanest, most reliable options available to utilities to meet customer demand.")

Section 10 altered the legal framework for the approval of energy efficiency plans delivered by electric monopoly utilities in the State, but still allows for the recovery of (1) program costs necessary to actually deliver and evaluate the programs, (2) performance incentives to reasonably motivate the utility to achieve and exceed the energy efficiency savings goals, and (3) lost revenues to reasonably compensate the utility for a lower amount of sales and revenue it may be collecting due to the successful implementation of energy efficiency programs. Sections 10(g) and (o). In other words, lost revenues are designed to address lost sales for customers using less electricity because of utility implementation of programs that help to push "measures" such as more efficient lightbulbs, pumps, motors, insulation, etc. that use less energy.

Importantly, Section 10 explicitly applied the reasonableness standard to the recovery of lost revenues, adding the "reasonable" modifier to lost revenues and to performance incentives. Indeed, as this Court found in the initial appeal, only if lost revenue recovery is reasonable, can the overall reasonableness test under Section 10(j) be satisfied. Besides the requirements in Indiana's Public Service Commission Act that every rate or charge be just and reasonable, Section 10's "reasonable" modifier to lost revenues and performance incentives was additional, explicit direction from the legislature that these rates, in particular, be "reasonable." Section 10(o)(2). Lost revenues are also a part of the overall reasonableness factor test applied to an energy efficiency plan put forth by a monopoly electric utility. Section 10(j)(8). Following the passage of SEA 412, the Commission issued a series of orders interpreting SEA 412, including its first order on Vectren's 2016-2017 energy efficiency plan ("2016 Order").

A. Vectren's Application

In Vectren's application filed on June 29, 2015, Vectren presented the following for cost recovery approval to deliver energy efficiency programs in 2016-2017: (1) $16.7 million to actually deliver and evaluate the programs; (2) $1.5 million for performance incentives assuming 100% achievement; and, (3) $2.5 million in lost revenue recovery. (Tr. I, vol. 1, at 902.)

Importantly, Vectren did not present a clear picture of its proposal for lost revenue at that time. (Mem. Op. at 17, noting that the "financial effect of the four-year cap is 'unknown to the Commission'"). In this original case, Vectren only provided the projection for lost revenue rate recovery to be collected during 2016-2017, which were the years of the actual energy efficiency plan. But Vectren was not asking for just two years of lost revenue recovery for the sales it lost due to the 2016-2017 energy efficiency programs; it was asking for authority to collect lost revenues from the 2016-2017 energy efficiency programs until Vectren itself decides to come in for a rate case or until the LED bulb and other energy efficiency measures are at the end of their useful lives, whichever comes sooner.[3]

In this original case, neither the Commission nor the consumer parties were provided the actual lost revenue amount Vectren was asking to recovery. *Id*. As parties later found out on Remand, Vectren's actual dollar request for this original lost revenue rate recovery proposal was $34.2 million for programs for programs that cost $16.8 million to deliver with an award of $2.1

[3] The decision to file for a rate case typically rests solely with the regulated utility. *See* Ind. Code § 8-1-2-42(a) (1913). Ind. Code § 8-1-39-9(d) (2013) also requires a utility to petition for review and approval of the utility's basic rates and charges before the expiration of the approved seven (7) year plan in that statute.

million in performance incentives, a total request for $53.1 million from ratepayers. (Tr. II, vol. 1, at 98, 103.)

B. Commission's First Proceeding and Order ("2016 Order")

CAC submitted extensive expert testimony, commenting on Vectren's proposal and suggesting a range of reasonableness for lost revenue recovery. (Tr. I at 896-899, 901-905.) CAC's witness presented information about how Vectren's lost revenue rate was, in prior years, limited to just two-years of recovery. (*Id*. at 893.) *See also In re Southern Ind. Gas & Electric Co.*, IURC Cause No. 43938, 2011 WL 4001131 (Ind. Util. Reg. Comm'n, Aug. 31, 2011) ("Vectren South Electric's requests to defer up to $1 million in lost margins associated with residential and small customer Core and Core Plus programs for the period of January 1, 2011 through December 31, 2011 and to recover, over a two year period, those deferred lost margins in a separately docketed proceeding, shall be and hereby are approved.") CAC's expert also sponsored a critical exhibit, a white paper that surveyed other states and outlined their similar issues with awarding a lost revenue rate in an environment like Indiana, where utility companies do not come in to reset base rates very often. (Tr. I at 893-905, 927-991.)

The Commission agreed with CAC's witness who testified and presented evidence about the problem of pancaking in the absence of regular rate cases that reset base rates. The 2016 Order read:

> Ms. Mims' and the other parties' concerns with pancaking and the increased length of time between base rate cases for utilities in Indiana raise a valid concern. Clearly, pancaking of lost revenue is much less of an issue in an environment where a utility comes in regularly, i.e., every three to five years, for a base rate case. When the Commission's [energy efficiency] Rules were adopted in the early 1990's, the previous 20 years was characterized by routine and sometimes almost back-to-back rate case filings where utilities' rates were reset on a regular basis. Consequently, recovery of lost revenues at that time was viewed as a tool of limited duration until the utility filed its next base rate case in the not too distant

> future. However, in the years after adoption of the [energy efficiency] Rules, utilities have been staying out for ten or more years before filing for a rate case.…Because we believe the parties raise a valid concern, we find that Vectren South's lost revenue recovery should be limited to: (1) four years or the life of the measure, whichever is less, or (2) until rates are implemented pursuant to a final order in Vectren South's next base rate case, whichever occurs earlier.

(2016 Order at 25-26; App. I, vol. 2, at 30-31.)

C. Court of Appeals' Decision Remanding Issues to the Commission

Vectren appealed the 2016 Order on the issue of lost revenue recovery. The Commission filed an Appellee brief[4] and the Industrial Group filed an amicus brief in defense of the Commission's ultimate conclusions that capped lost revenue recovery.

This Court reversed the Commission's 2016 Order and remanded with instructions. In its Memorandum Decision, the Court of Appeals did not endorse Vectren's position that the statute mandated lost revenue recovery for the life of the measure. The Court, furthermore, did not hold the Commission's determination of reasonable lost revenues was a violation of the statute or otherwise incorrect as a matter of law. What the Court did hold, rather, was that the Commission only "implicitly" found Vectren's proposal to be unreasonable, and the 2016 Order lacked sufficiently specific factual findings that the more limited recovery would be reasonable. *See* 2017 WL 899947 at *7. Construing Section 10, the Court agreed with Vectren that the statute calls for a single reasonableness determination on the Plan as submitted, and therefore the implicit finding that the lost revenue proposal was unreasonable was inconsistent with the finding that the overall Plan was reasonable. *Id*. at *6.

Thus, this Court reversed and remanded the 2016 Order with the following instructions:

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[4] References to "IURC-Br." are to the Commission's Appellee brief filed in the first appeal in this cause, No. 93A02–1604–EX–914. CAC has filed a motion to incorporate the appendix, transcript, and case record, including the Commission's brief, from the prior appeal into the record for this appeal.

> On remand, the Commission may either (1) issue specific factual findings to justify its implicit determination that Vectren South's lost revenue recovery proposals are unreasonable, determine that the Plan is not reasonable in its entirety pursuant to Section 10(m), and allow Vectren South to submit a modified plan within a reasonable time; or (2) issue specific factual findings to justify a determination that the Plan is in fact reasonable in its entirety pursuant to Section 10(k) and allow Vectren South to recover reasonable lost revenues in accordance with the Plan.

(Mem. Op. at 18) (internal citations omitted.)

The Court of Appeals also found that the "financial effect of the four-year cap is 'unknown to the Commission' because no party proposed a four-year cap or 'presented data about its economic effect'" and that the Commission must make "specific factual findings that the cap would allow Vectren South to recover reasonable lost revenues as provided in Section 10(o)" of I.C. § 8-1-8.5. (Mem. Op. at 17.)

D. Commission's Proceeding on Remand

On remand, the Commission first issued a docket entry noting that "the Indiana Court of Appeals reversed the Commission's Order and remanded this Cause for further proceedings consistent with its Opinion" and scheduling an attorneys' conference "to discuss the establishment of a procedural schedule that will allow for the submission of additional evidence concerning Southern Indiana Gas & Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc.'s proposal for lost revenue recovery." (App. II, vol. 2, at 28.) Subsequently, the Commission issued a prehearing conference order that established a "procedural schedule that will allow for the submission of additional evidence concerning Southern Indiana Gas & Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc.'s ('Petitioner') proposal for lost revenue recovery." (App. II, vol. 2, at 30.)

Vectren, however, took it a step further. Vectren not only finally presented the full projection of lost revenue recovery for its original proposal, although it took pains to offer an interpretation of the data that minimized the actual lost revenue projection (Tr. II, vol. 1, at 46); it also presented a new variation of that proposal, which requested a slightly lower amount. (*Id*. at 29.)

CAC's expert witness, a former Public Utility Commissioner of Texas, analyzed and presented evidence on these two proposals, but also specifically objected to the submission of this modified lost revenue proposal as inappropriate insofar as it expanded the scope of remand to allow Vectren to submit a new lost revenue proposal, and in that the previously agreed upon procedural schedule did not contemplate this modified proposal and thus consumer parties did not have adequate time to respond. (Tr. II, vol. 1, at 92, 111-112.)

On remand, CAC's expert witness testified as to the regulatory and principles guiding the Commission in the evaluation of Vectren's proposal, both in the design and operation of any approved lost revenue rate recovery. (Tr. II, vol. 1, at 95-111.) Insofar as the Commission has relied on the treatise of James Bonbright for other seminal decisions (*e.g.*, *L.S. Ayres & Co. v. IPALCO*, 351 N.E.2d 814 (Ind. Ct. App. 1976); *Evansville v. S. Ind. Gas & Elec. Co.*, 339 N.E.2d 562 (Ind. Ct. App. 1975)), CAC's witness listed principles from Bonbright's treatise for desirable rate attributes for the development of this lost revenue rate like simplicity, understandability, and feasibility in application and interpretation; rate stability; avoiding "undue discrimination"; and "advanc[ing] economic efficiency and send[ing] efficient price signals promoting efficient use of energy and competing products and services." (Tr. II, vol. 1, at 96.) CAC, and the other consumer parties, presented reasoned arguments and analysis as to why Vectren's two lost revenue proposals did not meet those thresholds, but how capping lost revenue collection at four years or less would. (Tr. II, vol. 1, at 95-111; App. II, vol. 2, pp. 32-53.)

CAC's witness testified to the unreasonableness of pancaking lost revenues, absent a 4-year cap. (Tr. II, vol. 1, at 103-105,107-109.) He pointed out that a term greater than 4 years would increase the difficulty of tracking the pancake effect, that measure life allowance arose from an era when the period between rate cases was typically four years or less, that the Commission by statute is charged with reviewing utility rates on a 4-year cycle, that 4 years is a period where measure lives could be expected to be highly coherent, but that longer range volatility and shifts in customer counts in and between rate classes would lead in later years to erratic and unpredictable impact in deviation from cost-causation principles. (*Id*. at 105-109.)

CAC presented expert analysis about how this proposal is "'piece-meal' or 'single-issue' ratemaking creat[ing] serious problems of fairness and reasonableness" if this recovery is used for the entire useful life of energy efficiency measures or if this recovery is used for the slightly lesser useful life as presented in Vectren's new, modified proposal. (*Id*. at 107.)

CAC's expert witness highlighted the prior testimony and exhibits supported by another CAC witness in the underlying case record, particularly the exhibit about pancaking which was a white paper surveying other state public utility commissions' treatment of lost revenue recovery proposals. And, consistent with the remand instructions from this Court, CAC's expert witness presented evidence on the "financial effect of the four-year cap," (Mem. Op. at 17), the financial effect of Vectren's original lost revenue proposal, and the financial effect of Vectren's modified lost revenue proposal as instructed by this Court. This included the following table along with accompanying visual graphical representations of the same and supporting workpaper spreadsheets:

Vectren Proposed Program Costs, Performance Incentives, and Various Lost Revenue Proposals for 2016-2017 Energy Efficiency Programs

	2016	2017	Totals
Program Costs	$8,606,195	$8,219,890	$16,826,085
Performance Incentives	$1,221,342	$861,280	$2,082,622
Vectren's Original Proposal for Lost Revenues (Lifetime)	$16,246,894	$18,016,905	$34,263,799
Vectren's Modified Proposal for Lost Revenues (9 Year Cap + 10% savings reduced)[5]	$12,441,506	$13,451,426	$25,892,931
Commission Original Order re Lost Revenues (with a 4 Year Cap)	$6,949,910	$7,426,884	$14,376,794

(Tr. II, vol. 1, at 98-111.) CAC's expert witness' analysis showed that Vectren's original lost revenue recovery proposal is $34,263,799, which is 64.4% of the 2016-2017 Plan total of $53,172,506 that Vectren requested from its captive ratepayers. Without a four-year lost revenue limit policy as shown in the last row of the above table, Vectren ratepayers would pay $34.3 million in lost revenues for a program that costs $16.8 million to implement. (*Id.*)

For the modified lost revenue rate proposal, which the Commission ultimately approved after Vectren withdrew its original lost revenue rate proposal, CAC's expert witness' analysis showed the request at $25,892,931 for lost revenues, which is 57.8% of the modified 2016-2017

[5] This modified proposal for lost revenues was ultimately approved by the Commission after Vectren effectively withdrew its original proposal at the evidentiary hearing. (Tr. II, vol.2 at 14-16.)

Plan total of $44,801,638 that Vectren requested from ratepayers. (*Id*.) He then presented evidence on how the pancake effect and same issues still exist with this modified proposal for lost revenue recovery, and how the sheer total of lost revenues presented here at $25.9 million for just $16.8 million in actual program delivery is unreasonable. (*Id*.)

There was also extensive cross-examination conducted by counsel for the Industrial Group and the counsel for the Office of Utility Consumer Counselor, which called into question Vectren's proposal and supporting evidence. Vectren admitted that it does not go back and re-evaluate programs after the first year and that there is no evaluation, measurement, and verification ("EM&V") analysis in 2020 for measures adopted under 2016 programs (Tr. II, vol. 2, at 21-22.) Vectren admitted that the computation of "savings" and "lost" revenues involves a comparison to a hypothetical world in which the utility programs were not offered. (*Id*. at 24.) Vectren testified as to the purpose and threshold for which EM&V is designed, among other functions, to eliminate "free riders" who "would have installed a measure anyway regardless of [the utility] program." (*Id*. at 26.) Vectren agreed that, for example, the average useful life of LED lights may be 15 years, but if a customer installs LEDs as a result of a program, Vectren would continue to count it as lost revenue even beyond a point when LEDs are the only lights available in the market. (*Id*. at 26-27.) Vectren conceded that it would be "taking credit for early adoption" of the LED light bulb, for example, but that only justifies lost revenue recovery through the early adoption period, not for the measure life. (*Id*. at 27.) Vectren agreed that a rate case effectively zeroes out lost revenue recovery, since consumption data is updated therein and consequently the utility no longer has any losses from reduced load attributable to efficiency programs since the prior rate case. (*Id*. at 28-30.) Vectren also admitted that because it was recently granted approval of an unrelated 7-year TDSIC plan pursuant to I.C. § 8-1-39-9(d) which requires a rate case at the end of that plan, the interval between Vectren's two rate cases could be as large as 14 years. (*Id*.) Vectren agreed that that the proposed 10% reduction to the modified lost revenue proposal is not compounded to reflect increasing uncertainty over time. (*Id*. at 18.) Vectren conceded that this modified lost revenue rate proposal does not offer ratepayers any actual savings from the original proposal because of the timing of its next rate case coming at 7 years pursuant to I.C. § 8-1-39-9(d), rather than the 9 year cap in Vectren's modified proposal. (*Id*. at 63-64.) Vectren agreed that "while EM&V activities in the Indiana evaluation framework rely on extensive computation and analysis, the methods and results also involve some degree of professional judgment." (*Id*.) Vectren also conceded that the EM&V evaluator received compensation to write testimony for Vectren's lost revenue proposal and also receives compensation for the work it does as the independent evaluator for the actual energy efficiency programs. (*Id*. at 69.) Finally, Vectren conceded that the Vectren energy efficiency program governance body (the Vectren Oversight Board of which CAC and the OUCC are voting members) was not consulted about the decision for the independent evaluation vendor to serve as an advocate for Vectren's lost revenue rate proposal. (*Id*. at 70.)

E. Commission's Order on Remand ("2017 Order")

Despite this testimony presented by CAC's witness and extensive cross-examination that was conducted, Vectren's modified proposal for a 9 year cap based on a forecasted amount of savings without any regard to ratemaking principles was approved by the Commission. The approved lost revenue rate totals $25.9 million for just $16.8 million in actual program delivery. (2017 Order at 11-12.)

The Commission's 2017 Order did not perform the overall reasonableness test again, but rather found that, "Having previously reviewed the reasonableness of all other elements of the

Plan under Section 10, which were not challenged on appeal, the only issue we need to address in this proceeding is the reasonableness of Vectren South's proposed LRAM." (2017 Order at 9.)

The Commission's 2017 Order explicitly said that it provided "the opportunity to submit additional evidence on the issue of lost revenue recovery, and Vectren South and CAC chose to submit additional evidence." (2017 Order at 10.) Yet, it failed to mention the cross-examination conducted on the proposals anywhere in the Discussion and Findings of the 2017 Order, despite the fact this cross-examination discredited and impeached many of Vectren's arguments, witnesses, and evidence supporting the lost revenue rate that was ultimately approved.

The Commission's 2017 Order quickly summarized CAC's evidence and argument as it relates to the material issue of "pancaking" lost revenues and the relationship of lost revenues with rate cases and other ratemaking principles, but the 2017 Order failed to actually rule upon this material issue. It also failed to address the Commission's 2016 Order or other available precedent, which had relied upon those same arguments.

The 2017 Order found that "there will always be a range of what may be considered reasonable lost revenue recovery" but then failed to explain what that range of reasonableness is and how it reconciled this with the previously articulated principles in the 2016 Order and in other available precedent. (2017 Order at 10.)

The 2017 Order based its conclusion about the lost revenue rate on the fact that Vectren's modified proposal was "grounded in the EM&V processes" yet failed to address how the use of EM&V here is any different from any other lost revenue proposal since EM&V is a process required for <u>all</u> lost revenue projections. (*Id*.)

The Commission's 2017 Order said that,

> CAC offered no basis upon which we could make factual findings that a four-year cap would allow Vectren South to recover reasonable lost

> revenues. Rather than providing a reasoned explanation or analysis to support ending lost revenue recovery after four years regardless of measure life or evidence related to the financial effects of such a proposal on Petition, CAC instead offers a conclusory opinion that the magnitude of lost revenues exceeds the program costs, which makes the proposal unreasonable. CAC provided no factual basis to support its contention that lost revenues should not exceed program costs. It is inherent to EM&V that validated energy savings will create lost revenues. Consequently, cost-effective EE programs should have lower program costs with larger energy savings, which does result in higher lost revenues relative to program costs.

(2017 Order at 11.) The Commission's 2017 Order, however, failed to address the multitude of "reasoned explanation[s]" and analyses that CAC and the consumer parties put in the record through testimony, cross-examination, and in the post-hearing briefing, particularly the evidence presented with regard to the problem with "pancaking" and the relationship this type of rate recovery will have without regular rate cases to reset base rates for this monopoly electric utility. (2017 Order at 10-12.)

Finally, in addressing CAC's concern about whether the EM&V vendor's independence has been compromised in contravention to the requirement in I.C. § 8-1-8.5-10(h)(4), the Commission's 2017 Order found that this EM&V vendor's "testimony was largely limited to addressing the reasonableness of EM&V results over time and how the issues of uncertainty and persistence are accounted for in the EM&V process and methodology." (2017 Order at 11.) The Commission's 2017 Order notes the role of the oversight board in selecting the EM&V entity and the ongoing participation of the oversight board in reviewing the EM&V analysis and reports, but did not otherwise address the undisputed testimony by this witness that the Vectren oversight board was not involved in this decision to allow the EM&V vendor to put forth and support the utility's cost recovery methodology. (*Id.*) The Commission Order did note that "it may have been more prudent for Petitioner to retain an EM&V witness not associated with [the EM&V vendor delivering EM&V services]". (*Id*.)

IV. SUMMARY OF ARGUMENT

Utility-sponsored energy efficiency programs have the goal of helping ratepayers and the utility use energy and captive ratepayer monies more efficiently. The 2017 Order flies in the face of this goal and fails to consider the reasonableness of this lost revenue rate recovery for ratepayers. The total lost revenue rate recovery proposal approved amounts to $25,892,931, or 57.8% of the energy efficiency plan's cost recovery total of $44,801,638, i.e., $25.9 million in lost revenues for just $16.8 million in actual costs to deliver and evaluate the energy efficiency programs, which perversely award a utility to not file general rate cases. Although the Commission's 2017 Order summarizes CAC's expert witness testimony as it relates to pancaking lost revenue rates, the 2017 Order does nothing else with this material, contentious issue, leaving it and the conclusions reached in its 2016 Order, as well as other available precedent, unaddressed and unresolved. This leads to a series of collateral errors in interpretation, the most basic of which is that it created a rate in a vacuum and ignored the rest of the mandated considerations for ratemaking. At a minimum, the 2016 Order's conclusions and the departure from available precedent should have been addressed in this about-face in the Commission's 2017 Order.

V. ARGUMENT

A. Standard of Review

Pursuant to Ind. Code § 8-1-3-1, this Court reviews Commission decisions using a multi-tiered standard of review. First, "the order must contain specific findings on all the factual determinations material to its ultimate conclusions." *N. Ind. Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1016 (Ind. 2009). "Basic findings of fact are important because they enlighten the reviewing court as to the agency's 'reasoning process and subtle policy judgments' and allow for 'a rational and informed basis for review.'" *PSI Energy, Inc., v. Ind. Office of Util. Consumer Counsel*, 764 N.E.2d 769, 774 (Ind. Ct. App. 2002).

Second, this Court determines "whether there is substantial evidence in light of the whole record to support the Commission's findings of basic fact." *N. Ind. Pub. Serv. Co.*, 907 N.E.2d at 1016. At this stage, the reviewing court considers "all evidence, including evidence that supports the determination as well as evidence in opposition to the determination." *PSI Energy, Inc.*, 764 N.E.2d at 773-74. A court will set aside an agency's findings of fact if it "lacks a reasonably sound basis of evidentiary support." *Id.* at 774 (quoting *City of Evansville v. S. Ind. Gas & Elec. Co.*, 339 N.E.2d 562, 572 (Ind. Ct. App. 1975)).

Third, this Court determines whether the agency decision is contrary to law, meaning that the agency "fails to stay within its jurisdiction and to abide by the statutory and legal principles that guide it." *Ind. Office of Util. Consumer Counselor v. Lincoln Utils., Inc.*, 834 N.E.2d 137, 142 (Ind. Ct. App. 2005) (quoting *N. Ind. Pub. Serv. Co. v. LaPorte*, 791 N.E.2d 271, 278 (Ind. Ct. App. 2003)).

Based on this multi-stage review, the reviewing court may vacate a Commission decision if the order lacks a factual basis or is contrary to law. *Ind. Bell Tel. Co. v. Ind. Util. Reg.*

Comm'n, 855 N.E.2d 357, 362 (Ind. Ct. App. 2006). This Court has remanded orders to the Commission where the Commission failed to make findings on contested issues that were material to the Commission's ultimate conclusions or where the Commission failed to reach any conclusion regarding a significant issue disputed by the parties, as it did with the 2016 Order in this case. *See, e.g.*, *Citizens Action Coalition of Ind., Inc. v. Duke Energy Ind., Inc.*, 16 N.E.3d 449, 460, 462 (Ind. Ct. App. 2014) (remanding an order because the Commission failed to make factual findings on issues disputed by the parties that were material to the Commission's ultimate conclusions); *City of Evansville*, 339 N.E.2d at 577 ("…[W]e are compelled to require the Commission to articulate the policy and evidentiary factors underlying its resolution of all issues which are put in dispute by the parties." (citing *Indianapolis & S. Motor Express, Inc. v. Public Serv. Comm'n*, 112 N.E.2d 864 (1953))). If a court finds agency action to be unlawful, a court may remand the matter to the agency, or, "where it would be pointless to remand, the trial court may compel agency action." *Ind. State Bd. of Health Facility Adm'rs v. Werner,* 841 N.E.2d 1196, 1209 (Ind. Ct. App.), aff'd on reh'g sub nom. *Indiana State Bd. of Health Facility Adm'rs v. Werner*, 846 N.E.2d 669 (Ind. Ct. App. 2006).

B. Whether the 2017 Order Is Just and Reasonable

Indiana law requires the Commission to set rates that are "just and reasonable." Ind. Code § 8-1-2-4 (1913) ("...The charge made by any public utility for any service rendered or to be rendered either directly or in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful.") A utility rate is defined as "every individual or joint rate, fare, toll, charge, rental, or other compensation of any utility or any two (2) or more such individual or joint rates, fares, tolls, charges, rentals, or other compensation of any utility or any schedule or tariff thereof." Ind. Code § 8-1-2-1(d) (1913).

As used in I.C. § 8-1-8.5-10 ("Section 10"), lost revenues (and other costs approved under this statute) are clearly rates. *See* Section 10(k) ("If, after notice and hearing, the commission determines that an electricity supplier's plan is reasonable in its entirety, the commission shall:…(2) allow the electricity to recover all associated program costs on a timely basis through a periodic rate adjustment mechanism..."); *see also* Section 10(o) ("If the commission finds a plan submitted by an electricity supplier under subsection (h) to be reasonable, the commission shall allow the electricity supplier to recover or receive the following:…(2) Reasonable lost revenues. A retail adjustment mechanism proposed by an electricity supplier under this section implement the timely recovery of program costs (including reasonable lost revenues) may be based on a reasonable forecast…"). Vectren itself noted that it "considers the provisions of the Public Service Commission Act, as amended, including IC §§ 8-1-2-4, 8-1-2-12, 8-1-2-42, 8-1-2-46, 8-1-2-61 and 8-1-8.5-10 to be applicable to the subject matter of this Petition, in addition to 170 IAC § 4-8-1 et seq. and believes that such traditional statutes and rules provide the Commission authority to approve the relief requested." (App. II, vol. 2, at 24.)

Just and reasonable rates are those which fairly balance the competing interests of the captive ratepayer and the monopoly utility investor. I.C. § 8-1-2-4. In this balance, the utility has a right to earn a reasonable level of compensation for its property, i.e. its capital investment, used to provide utility service. *Evansville v. Southern Indiana Gas & Electric Co*., 167 Ind. App. 472, 339 N.E.2d 562, 1975 Ind. App. LEXIS 1460 (Ind. Ct. App. 1975). The customer, on the other hand, has a right to be protected against rates that are excessive, i.e., rates that provide the utility with too large a return on its capital investment. *Citizens Action Coalition, Inc. v. Northern Indiana Public Service Co.*, 485 N.E.2d 610, 614-615 (Ind. 1985).

Thus the approval of any lost revenues rate is subject to the statutory "just and reasonable" rates standard and the Constitution's Takings Clause, which call on the Commission to satisfy the *legitimate* interests of both buyers and sellers. Justice Brandeis provided guidance for how this Takings analysis applies to the world of public utility ratemaking: "The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return." *Missouri ex rel. v. Southwestern Bell Tel. Co.*, 262 U.S. at 290 (1923) (Brandeis, J., concurring). Property is the shareholder's investment, the "taking" occurs when the utility invests capital to carry out its public service obligation, and the "just compensation" occurs when the regulator sets rates sufficient to "guarantee[] to the utility the opportunity to earn a fair return." *Id.*

In *Hope Natural Gas v. Fed. Power Comm'n*, 320 U.S. 591 (1944), the Federal Power Commission set Hope's rates using Justice Brandeis's approach which found that the focus must be on the rate order's "end result" and "total effect": "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so called 'fair value' rate base." *Id.* at 605. Other key language in Hope included:

> [T]he Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate making function, moreover, involves the making of 'pragmatic adjustments.'…And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. …Under the statutory standard of 'just and reasonable' it is the result reached not the

> method employed which is controlling. … It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.

Id. at 602.

Both the "just and reasonable" standard and Hope's focus on the "end result" lead to the same place: the IURC has discretion over the method it selects, but this discretion is not unlimited. It requires the Commission to exercise its judgment within a "zone of reasonableness." *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942), *Citizens Action Coal. of Ind., Inc. v. Pub. Serv. Co. of Ind.*, 571 N.E.2d 1270, 1277 (Ind. Ct. App. 1991). In applying these tests to the case at hand, it becomes clear that Vectren's DSM program proposal is unreasonable.

The Commission has exceeded its discretion in the 2017 Order. In this particular instance, the total lost revenue rate recovery proposal approved amounts to $25,892,931, or 57.8% of the energy efficiency plan's cost recovery total of $44,801,638, i.e., $25.9 million in lost revenues for just $16.8 million in actual costs to deliver and evaluate the energy efficiency programs, which perversely award a utility to not file general rate cases. (Tr. II at 101, 103.) Vectren, the monopoly electric utility, wants compensated for reducing demand in electricity. This property is supposedly "taken" in that the monopoly electric utility has been mandated by the state legislature to institute utility-sponsored energy efficiency programs to reduce demand in electricity within its monopoly-granted service territory. *See generally* Section 10. The requirement to provide "just compensation" or a "fair return" needs to satisfy *legitimate* expectations of shareholders, but lost revenue rates at 1.54 times greater than the cost to actually run the programs is far in excess of what is necessary to satisfy a monopoly utility's shareholders' *legitimate* expectations. This lost revenue guaranteed rate is outside the zone of reasonableness in light of the legal framework, ratemaking policy, regulatory history, objective of the required cost-effectiveness in the statute, and the appropriate degree of reliability in forecasting estimated savings out beyond a few immediate years. Similarly, Section 10(h) and (o) allow for the recovery of "reasonable" lost revenues, not for unreasonable lost revenues.

Ratemaking decisions are not to be viewed in a vacuum. Determining a fair rate of return involves looking at the "total effect" of program costs on the utility, while also balancing the interests of ratepayers. Under the *Hope* test, assessing the "end result" of Vectren's energy efficiency program on its overall financial integrity is what will lead to the creation of "just and reasonable" rates, not what the 2017 Order ultimately approved. Even the Commission argued in its brief defending the 2016 Order that "Vectren argues that the Commission is required by statute to allow recovery of lost revenues for the full predicted life of the energy efficiency measure; however, this argument reads the term reasonable out of the statute." (IURC-Br. at 13.) Additionally, energy efficiency programs create less risk than other utility load building options, therefore that fact should be considered when "compensating investors for the risks assumed."

It is the Commission's very purpose to prevent this kind of consumer exploitation. The Indiana Supreme Court has stated:

> Utilities are regulated in order to protect the consumers from the abuses of monopoly i.e. *artificially high prices*. The statutes which govern the regulation of utilities and which grant the PSCI its authority and power provide a surrogate for competition. *See Public Service Commission v. Indiana Bell Telephone Co.*, (1955), 235 Ind. 1, 130 N.E.2d 467. IC § 8-1-2-1 and IC § 8-1-2-4 insure that the responsibilities of utility investors and consumers are commensurate with the responsibilities of investors and consumers in a competitive market.

(emphasis added) *Citizens Action Coalition, Inc.*, 485 N.E.2d at 614-615. It is particularly wasteful and results in artificially high prices to award a utility 1.54 times more in revenue than costs to run the energy efficiency programs with no shown correlation that this extra revenue will equate to more energy efficiency services or savings. (Tr. I, vol. 1, at 955 (addressing the compounding nature of lost revenue rates without frequent rate cases, the white paper concludes that, "While the lost revenue adjustment can help make a utility whole by compensating it for reduced energy sales, it will do little to encourage investment in energy efficiency unless combined with other policy levers. Our analyses indicate that having an LRAM policy itself is not currently associated with higher levels of energy efficiency effort (program spending) or achievement (energy savings) than are found in states without an LRAM policy."))

Furthermore, as discussed further in Section E below, in determining what is a reasonable and just rate that a utility is permitted to charge, the Commission has always reviewed the utility's overall financial condition, including total revenue and expenses. *Prior v. GTE North Inc.*, 681 N.E.2d 768 (Ind. Ct. App. 1997). The lost revenue rate approved in the 2017 Order, however, was set merely on a forecasted estimation of the amount of lost sales attributable to the energy efficiency programs from an evaluation vendor with no cogent reference to the utility's overall financial condition. The approved lost revenue rate in the 2017 Order just guarantees rate recovery based on projected savings without any consideration for other ratemaking principles. It also disregards the distinction between a utility who comes in for regular rate cases, regularly zeroing out lost revenue totals when resetting rates, versus a utility who does not reset rates but for once every 10, 15, 20 years, resulting in exorbitant lost revenue rate recovery and millions of dollars in difference in terms of what the ratepayers is required to pay. (2016 Order at 25-26; App. I., vol. 2, at 30-31; Tr. II, vol. 1, at 95-96; IURC-Br. at 21-26.)

These legal conclusions by the Commission are not supported by any reasonable reading of Section 10 with Indiana's Public Service Commission Act ("PSCA"). As a preliminary matter, Section 10 and Indiana's PSCA concern closely related subject matters, i.e., the economic regulation of the State's monopoly investor-owned electric utilities. Therefore, these statutes must be read *in pari materia*, that is, in a way that harmonizes and gives effect to <u>all</u> provisions of each statute. *Sanders v. State,* 466 N.E.2d 424, 428 (Ind. 1984) ("... statutes relating to the same general subject matter are *in pari materia* and should be construed together so as to produce a harmonious statutory scheme.") Moreover, there is nothing in the specific language of Section 10 that evidences any intent to repeal or create an exception to the cost-based ratemaking required by Indiana's PSCA.

When interpreting Section 10 and Indiana's PSCA, the Commission does not have the authority to ignore decades of regulatory precedent. The Commission is bound by its enabling statute and its duty to the ratepayers of Indiana, which clearly forbids this revenue scheme. The Commission cannot contravene its own authority under Indiana's PSCA and allow Vectren customers to fall prey to artificially high prices and monopoly exploitation. Because the Commission has ignored the requirement that each utility's rates must be set on the utility's overall financial condition including total revenue and expense, the approval of Vectren's lost revenue rate recovery in the 2017 Order is not just and reasonable, and should be declared unlawful by this Court.

C. Whether 2017 Order Ignores a Critically Material Issue that Unjustifiably Deviates from Past Precedent

Although the Commission's 2017 Order summarizes CAC's expert witness testimony as it relates to certain ratemaking principles, the 2017 Order does nothing else to reconcile the approval of a lost revenue rate with ratemaking requirements. The 2017 Order ignores available precedent related to the relationship between lost revenues and general rate cases that articulated principles by which to ascertain the reasonableness of lost revenue recovery proposals. Relatedly, the relationship between rate cases and lost revenues, as articulated in the Commission's 2016 Order and other available precedent, was a material issue raised and put in dispute by the parties before the Commission in this remand proceeding, but it went unaddressed.

Where possible, the rule of decision should be governed by available precedent. *Dillard v. State*, 257 Ind. 282, 274 N.E.2d 387 (1971); *Butler University v. State Bd. of Tax Com'rs*, 408 N.E.2d 1286 (Ind. Ct. App. 1980); *Apple v. Apple*, 149 Ind. App. 529, 274 N.E.2d 402 (1971). The doctrine of *stare decisis* states that, when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. *Emerson v. State*, 812 N.E.2d 1090 (Ind. Ct. App. 2004). *Stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop in a principled and intelligible fashion; for that reason, any departure from the doctrine demands special justification. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). Beyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include (1) the antiquity of the precedent, (2) the reliance interests at stake, and (3) whether the decision was well reasoned. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

In addition to the longstanding requirements embodied in the Public Service Commission Act, the reasonableness of a lost revenue proposal in relation to periods between rate cases is established regulatory policy in Indiana. *See In re Northern Indiana Public Service Co.*, 2011 WL 3346770 (IURC 2011) (denying lost revenue recovery where utility had not filed a rate case in over twenty years); *In re Indianapolis Power & Light Co.*, 2010 WL 4499412 (IURC 2010) (denying lost revenue recovery in light of significant length of time since utility's last rate case); *In re Northern Ind. Public Service Co.*, 2015 WL 9605053 (Ind. Util. Reg. Comm'n, Dec. 12, 2015) (limiting lost revenue recovery to four years in light concern about pancaking of lost revenue); and *In re Duke Energy Indiana*, Inc., IURC Cause No. 43955 DSM 4, 2016 WL 1118794 (Ind. Util. Reg. Comm'n, Mar. 9, 2016) (limiting lost revenue recovery in light of concern about pancaking lost revenue and significant length of time since utility's last rate case). The Commission followed these same articulated principles in the 2016 Order underlying this appeal:

> Clearly, pancaking of lost revenue is much less of an issue in an environment where a utility comes in regularly, i.e., every three to five years, for a base rate case. When the Commission's DSM Rules were adopted in the early 1990's, the previous 20 years was characterized by routine and sometimes almost back-to-back rate case filings where utilities' rates were reset on a regular basis. Consequently, recovery of lost revenues at that time was viewed as a tool of limited duration until the utility filed its next base rate case in the not too distant future. However, in the years after adoption of the [energy efficiency] Rules, utilities have been staying out for ten or more years before filing for a rate case. E.g., Indianapolis Power & Light, 19 years between Cause No. 38664 (IURC 8/23/95) and pending Cause No. 44576; Southern Indiana Gas & Electric Co., 12 years between Cause No. 39871 (IURC 6/21/95) and Cause No. 4 3111 (IURC 8/15/07); Duke Energy Indiana, Inc., last rate case was filed 13 years ago in Cause No. 42359 (IURC 5/18/04, rh'g denied 7/28/04).

(2016 Order at 26; App. I, vol. 2, at 31.)

Despite this Court reversing and remanding the Commission's 2016 Order on the subject matter of lost revenues, it did not appear to do so in a way that directed the Commission to ignore its available precedent and approve whatever Vectren put forward. Rather this Court merely required the Commission to put forth specific findings of fact and to correct the mechanics of its overall statutory interpretation (i.e., to reject the entire plan if the Commission finds the lost revenue proposal to be unreasonable, rather than altering the lost revenue proposal to make it reasonable for approval). In the 2016 Order, "The Commission took rate case frequency into account in determining reasonableness of future lost revenues because it underpins the rational for allowing those lost revenues; it was a short term solution never intended (or equipped) to increase rates for decades without a rate-case reset." (IURC-Br. at 23.) Yet, the Commission's 2017 Order makes no mention of this established regulatory policy and does not apply the previously articulated principles for examining the reasonableness of lost revenue proposals.

The reliance interests at stake are serious. *See Citizens United*, 558 U.S. at 913. Customers rely on the long-established ratemaking principles to protect them from harm with a utility decides to not file for a general rate case. Customers who are qualified to opt out of eligible energy efficiency rates pursuant to I.C. § 8-1-8.5-9 may have stayed in the programs, paying the rates, because they relied on the Commission's articulated ratemaking principles and the limitation of excessive lost revenues. Customer groups followed the articulated principles put forth by the Commission to inform its case on remand, updating evidence and refining arguments with specific facts prime for findings in hand. CAC objected to Vectren's modified request presented in the remand proceeding as improper and outside the scope of a remand (Tr. II, vol. 1, at 111-112), but still pointing out how this modified proposal contained the exact same problems the Commission rejected other proposals for in prior cases. (*Id*. at 111-114.) However, the Commission never performed that analysis in the 2017 Order and never applied the articulated principles from precedential cases. The 2017 Order also never otherwise addressed why ratemaking is no longer material when establishing a lost revenue rate. Furthermore, the Commission never brought its expertise to bear on this important question.

The decision in the 2017 Order also falls short of the standard of being well reasoned. *See Citizens United*, 558 U.S. at 938-939. Outside of the fact that the 2017 Order ignores this major articulated set of principles and does nothing to address its departure from precedent, the 2017 Order puts forth rationale that is neither reliable nor relevant. The 2017 Order concludes that the lost revenue proposal was reasonable because "EM&V is the most established approach to reasonably estimating energy savings and lost revenues associated with EE programs." (2017 Order at 11). Yet, the 2017 Order fails to explain how the application and use of EM&V is any different than what has been done in the past. EM&V has always been part of the lost revenue rate reconciliation process in terms of providing one component of the rate by assuring that savings were achieved a year after program delivery. This information is used to true up any savings that were forecasted to the actual amounts before plugging that figure into the lost revenue rate. But for the Commission to state that EM&V is somehow the new standard for judging the reasonableness of lost revenue rate proposals serves only to confuse and manufacture uncertainty in an already complicated subject area. It mischaracterizes the role of EM&V and ignores the purpose, creation, and mechanics of a lost revenue rate in the context of utility ratemaking.

Furthermore, CAC raised questions about the EM&V vendor's ability to maintain its independence when this vendor served as a witness on behalf of Vectren. (Tr. II, vol. 1, at 114-

119.) CAC also questioned why the decision to use the EM&V vendor, who was interviewed and selected by the consumer parties on Vectren's board overseeing program delivery and evaluation, was not brought to the Vectren oversight board for discussion or consultation. (Tr. II, vol 2, at 70, lines 4-7.) The 2017 Order disregarded these concerns, stating only that the Vectren oversight board can remove this EM&V vendor during the next round of programs. (2017 Order at 11.)

These previously articulated principles from the Commission, reinforced in Commission's brief in 2016 Appeal, were not applied to the proposal or modified proposal, and thus the precedent went unaddressed in its 2017 Order. Relatedly, the Commission must address material issues put into dispute by the parties. The Commission's 2016 Order, the available precedent, and relationship between rate cases and lost revenues were material issues raised before the Commission in this remand proceeding but went unaddressed by the Commission when it concluded the lost revenue rate recovery of $25.9 million was reasonable for a program that cost $16.8 million to administer. *See Citizens Action Coalition of Ind.*, 485 N.E.2d at 612. *See also L.S. Ayres & Co. v. Indianapolis Power & Light Co.*, 169 Ind. App. 652, 661, 351 N.E.2d 814, 822 (1976) (citing *General Tel. Co. of Ind. v. PSC*, 238 Ind. 646 (1958)); *Hidden Valley Lake Property Owners Association v. HVL Utilities,* 408 NE 2d. 622 (1980).

D. Whether 2017 Order Approving the Lost Revenue Rate Is Supported by Substantial Evidence

The 2017 Order lacks a reasonably sound basis of evidentiary support. The lost revenue rate was not set with reference to investor owned electric utility's financial data or any consideration for the relationship of the lost revenue rate with the resetting of rates in general rate cases. In addition, the Commission did not consider the complete record, even indicating that it categorized critical pieces of record as not evidence.

The substantial evidence standard for reviewing decisions of the Commission authorizes the Court of Appeals to set aside the Commission's findings of fact only when a review of the whole record clearly indicates that the Commission's decision lacks a reasonably sound base of evidentiary support. *Northern Indiana Public Service Co. v. Indiana Office of Utility Consumer Counselor*, 826 N.E.2d 112 (Ind. Ct. App. 2005); *Indiana Gas Co., Inc. v. Office Utility Consumer Counselor*, 675 N.E.2d 739 (Ind. Ct. App. 1997). The most fundamental problem with the evidentiary support for the approved lost revenue rate is the fact that there is no credible evidence that the investor owned electric utility experienced its claimed level of lost revenues or that the rate was established based on other financial aspects of the utility. The reliance upon EM&V as a basis for approving lost revenue rates is nonsensical and not cost- or rates-based.

The Commission also dismissed evidence, either by ignoring critical portions of the record or by implying in the 2017 Order that cross-examination is somehow not even evidence. In the 2017 Order, the Commission writes:

> CAC offered no basis upon which we could make factual findings that a four-year cap would allow Vectren South to recover reasonable lost revenues. Rather than providing a reasoned explanation or analysis to support ending lost revenue recovery after four years regardless of measure life or evidence related to the financial effects of such a proposal on Petitioner, CAC instead offers a conclusory opinion that the magnitude of lost revenues exceeds the program costs, which makes the proposal unreasonable. CAC provided no factual basis to support its contention that lost revenues should not exceed program costs.

(2017 Order at 11.)

First, the 2017 Order fatally missed the point that lost revenues are a rate, so no matter how lost revenue projection of savings is determined, the duration by which a utility may collect lost revenues should depend on how often a utility resets its rates, especially when it is largely up to the utility to voluntarily make that decision. *See* Ind. Code § 8-1-2-42(a).[6]

Second, the 2017 Order fails to mention or weigh any of the critical cross-examination that was conducted by the other consumer parties. Rather, the Commission states that "CAC and other parties, in their post-hearing filing", put forth some arguments, but fails to mention the evidence informing these arguments. (2017 Order at 11.) The 2017 Order seems to imply that cross-examination is not evidence at all; however, traditional rules of evidence, Indiana caselaw, and IURC opinion deem that cross-examination is indeed evidence. According to Black's Law Dictionary, evidence is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact". Black's Law Dictionary (10th ed. 2014). Cross-examination is:

> The questioning of a witness at a trial or hearing by the party opposed to the party in whose favor the witness has testified. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony. The cross-examiner is typically allowed to ask leading questions but is traditionally limited to matters covered on direct examination and to credibility issues.

(*Id*.) Multiple sections of the Indiana Rules of *Evidence* govern the conduct & scope of cross-examination. *See* Ind. Evidence Rule 701, 702, 704, 801, 803, 804, 901, 903, and 1007. And, Indiana courts recognize cross-examination as evidence in their opinions. "The general rule is that cross-examination *and other evidence* is admissible to lay a basis for impeachment..." *Rondinelli v. Bowden*, 155 Ind.App. 582, 586, 293, N.E.2d 812, 814-15 (1973) (emphasis added).

[6] I. C. § 8-1-39-9(d) also requires a utility to petition for review and approval of the utility's basic rates and charges before the expiration of the approved seven (7) year plan in that statute.

The Commission's own regulations also state that content can be admitted into evidence through cross-examination. *See* 170 I.A.C. 1-1.1-21. Overall, the 2017 Order fails to recognize the cross-examination conducted at the remand hearing wherein or otherwise consider or weigh in when it made its determination.

Lastly, the 2017 Order makes no mention of the evidence in the record from the underlying proceeding, notably CAC Exhibit 1, which included Attachment NM-8, the ACEEE paper upon which the Commission based its 2016 Order. *See* Tr. I, vol. 1, pp. 862-1534, especially pp. 942-1005. Upon remand, the evidence from the underlying proceeding was part of the record, and there was no indication that this was not the case.

This Court should find that, in light of the whole record, it is apparent that the 2017 Order did not weigh certain, significant portions of the record. *PSI Energy, Inc*., 764 N.E.2d at 773-74. The Court should find that the Commission's findings in the 2017 Order "lacks a reasonably sound basis of evidentiary support." *Id*. at 774 (quoting *City of Evansville,* 339 N.E.2d at 572).

E. Whether the Approved Lost Revenue Rate Is Consistent with Indiana Code Section 8-1-8.5-10

The Commission's 2017 Order misinterprets and misconstrues I.C. § 8-1-8.5-10 ("Section 10"). As noted above, the Commission makes a fundamental error in establishing rates under Section 10 without any reference or consideration of ratemaking practices and the requirements of Indiana's Public Service Commission Act ("PSCA"). This has caused a number of collateral interpretation errors. As discussed at length above, the most basic error is the Commission's failure to reconcile its approval of a lost revenue rate without any reference or application of ratemaking practices. It also fails to consider ratepayers in making a determination as to the reasonableness of this rate.

In setting rates, the Commission must examine every aspect of the utility's operations and the economic environment in which the utility functions to ensure that the data it has received are representative of operating conditions that will, or should, prevail in future years. Ind. Code § 8–1–2–68 (1913). The Commission did not conduct this examination in setting lost revenue rates solely referencing an evaluator's projected, forecasted savings levels.

This Court should consider the persuasive authority from the New Mexico Supreme Court. *In AG of N.M. v. N.M. Pub. Regulation Comm'n*, 150 N.M. 174, 2011-NMSC-034, 258 P.3d 453, 2011 N.M. LEXIS 386, the New Mexico Supreme Court found in an analogous situation that the energy efficiency "adder" rates, awarded to address lost sales due to implementation of energy efficiency programs, were arbitrary and unlawfully adopted because New Mexico's Public Regulation Commission did not inquire into the utilities' revenue requirements or any of the traditional elements of the ratemaking process as part of determining whether these proposed adder rates were just and reasonable. (*Cf.* NMSA Sections 62-17-1 to 62-17-11 to Indiana's Section 10 and PSCA.)

The lost revenue rates approved in this 2017 Order hinders, rather than promotes, the overall goal of Section 10, which is to promote the implementation of energy efficiency by Indiana's investor-owned monopoly electric utilities. Other decisions from the Commission speak to the promotion of energy efficiency, and why it is within the public interest to promote saving customers money. *See, e.g., In re Investigation of DSM Programs*, Cause No. 42693 at 32, 2009 WL 4886392 (Ind. Util. Reg. Comm., Dec. 9, 2009). However, the Commission's recent departure from its previously articulated principles for judging lost revenue rate proposals, which reconciled lost revenue rates with the mechanics of resetting rates, provides utilities with windfall gains and a perverse motivation for utilities to not file for general rate cases. It also would not be appealing for an "industrial customer" as defined in I.C. §§ 8-1-8.5-9 and 10 to remain in and pay for administrative costs for utility-sponsored energy efficiency programs, knowing that 57.8% of the total request from ratepayers to run these programs is pure profit for the utility. In fact, the approval of this lost revenue rate does "little to encourage investment in energy efficiency unless combined with other policy levers. Our analyses indicate that having an LRAM policy itself is not currently associated with higher levels of energy efficiency effort (program spending) or achievement (energy savings) than are found in states without an LRAM policy." (Tr. I, vol. 1, at 955.) The Court should grant little deference to the Commission's interpretation of its authorizing statute, Indiana's PSCA. In this case, that lack of deference is amply justified too by the Commission's repeated failure in its 2017 Order to reasonably interpret Section 10 in a way that harmonizes the establishment of a rate pursuant to Section 10 with Indiana's PSCA and ratemaking basics.

VI. CONCLUSION

Wherefore, for all the reasons stated herein, CAC respectfully requests this Court to determine that the Commission's December 20, 2017 Order is (1) arbitrary and capricious or an abuse of discretion, (2) not supported by substantial evidence in the record, or (3) otherwise not in accordance with the law.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned hereby verifies, in accordance with Ind. Appellate Rule 44, that the foregoing Appellant's Brief contains no more than 14,000 words as calculated by the word count function of the word processing software used to prepare the brief, excluding those parts of the brief exempted by Ind. Appellate Rule 44C.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on May 3, 2018, the foregoing was filed electronically using the Court's IEFS pursuant to Rule 68(C) and that service was made on the following through E-Service using the Public Service Contact List in accordance with Rules 24(C) and 68(F)(1):

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CERTIFICATE OF SERVICE

The undersigned certifies that, on May 18, 2018, the foregoing was filed electronically using the Court's IEFS pursuant to Rule 68(C) and that service was made on the following through E-Service using the Public Service Contact List in accordance with Rules 24(C) and 68(F)(1):

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