STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF DUKE ENERGY INDIANA, INC. FOR APPROVAL OF PETITIONER'S 7-YEAR PLAN FOR ELIGIBLE TRANSMISSION, DISTRIBUTION AND STORAGE SYSTEM IMPROVEMENTS, PURSUANT TO IND. CODE § 8-1-39-10 AND APPROVAL OF A TRANSMISSION AND DISTRIBUTION INFRASTRUCTURE IMPROVEMENT COST RATE ADJUSTMENT AND DEFERRALS, PURSUANT TO IND. CODE § 8-1-39-9, AND APPROVAL OF CERTAIN REGULATORY ASSETS	)	**CAUSE NO. 44526**

CAC'S REPLY IN SUPPORT OF MOTION TO STRIKE PREFILED TESTIMONY OF BRIAN DAVEY OR, IN THE ALTERNATIVE, TO RECONSIDER MOTION TO COMPEL DISCOVERY

COMES NOW, Citizens Action Coalition of Indiana, Inc. ("CAC"), by counsel, and states the following in reply to *Duke Energy Indiana, Inc's Response in Opposition to CAC's Motion to Strike Prefiled Testimony of Brian Davey or in the Alternative, to Reconsider Motion to Compel Discovery* ("Response"):

This Reply has four purposes:

1. To correct Duke's mistaken statement that CAC's Motion to Strike is untimely;

2. To correct Duke's mistaken assertion that CAC did not explain why each, individual section of Mr. Davey's testimony should be stricken;

3. To respond to Duke's proposed change to Indiana evidence law – i.e., Duke's suggested distinction between "retained" expert witnesses and "in-house" expert witnesses, a distinction never before recognized in Indiana; and

4. To respond to Duke's confirmation that Mr. Davey is a "skilled lay witness" – not an expert – and to reiterate that "skilled lay witnesses" cannot offer opinion testimony based in any part on information obtained from other individuals or hypothetical future facts (rather than facts the witness personally observed).

I. CAC's Motion Was Not Untimely.

The motion at issue is a motion to strike impermissible opinion testimony. According to the Docket Entry in this matter dated September 10, 2014, "Any objections to the admissibility of prefiled testimony or exhibits shall be filed with the Commission and served on all parties of record *no less than two business days prior to the date scheduled for commencement of the hearing*[.]" (Docket Entry, p. 4 (emphasis added).) CAC's Motion was filed on December 30, 2014. The hearing is scheduled for January 26, 2014. The motion is timely.

As for CAC's alternative relief – reconsideration of the Motion to Compel – this issue cannot be separated from the Motion to Strike. When Duke filed its response to CAC's Motion to Compel, CAC's counsel immediately recognized that Duke's decision to designate Mr. Davey as a "skilled lay witness" would render his opinion testimony inadmissible. However, CAC could not move to strike Mr. Davey's testimony until the Commission ruled on the Motion to Compel, which confirmed Duke's assertion.

Frankly, in this Motion, CAC's alternative request for relief – i.e., to compel production of the five sensitivities that were presented to Mr. Davey – was intended as an opportunity for a less draconian solution than striking Mr. Davey's testimony. However, in its Response, Duke "doubled down" on its decision to designate Mr. Davey as a "non-expert." Therefore, his testimony will have to be stricken.

II. CAC Specifically Identified Each Portion of Mr. Davey's Testimony That Was Improper and Specified the Legal Basis for Each.

In its Response, Duke claims that CAC's motion to strike all of Mr. Davey's testimony lacked sufficient specificity required for a motion to strike. *See Southern Ind. Gas & Elec. Co. v. Gerhardt*, 172 N.E.2d 204, 398-99 (Ind. 1961) (denying motion to strike witness testimony

where "motion was far too broad and was not limited to any specific testimony of [the] witness"). In making this argument, Duke has confused the *reasoning* behind CAC's motion (that Mr. Davey improperly relied on information he did not observe first-hand) with the logical *result* of that reasoning (that essentially all of his testimony must be stricken).

On pages 3-7 of CAC's Motion to Strike, CAC discusses each section of Mr. Davey's testimony, in the sequence in which Mr. Davey presented them. As enumerated over these four pages of CAC's Motion, *every purpose of Mr. Davey's testimony (purposes that Mr. Davey himself identified)* are proper subjects for expert opinion, not lay opinion. (*See* Motion to Compel, pp. 3-7; *see also* Davey Testimony, p. 2 (responding to the question, "What is the purpose of your testimony in this proceeding?").)

However, if the section-by-section review of Mr. Davey's testimony that CAC has already provided in its original Motion is insufficient, as Duke contends, here are the page and line numbers of the sections that should be excluded with a summary of CAC's reason for striking each:

Page and Line	Reason for Striking
Page 2, line 9 – page 3, line 2	This section summarizes upcoming sections of inadmissible testimony.
Page 3, line 3 – page 4, line 2	In this section, Mr. Davey explains what is required under the TDSIC statute and offers his opinion as to why Duke's T&D Plan complies. Mr. Davey's testimony that Duke's T&D plan complies with the statute constitutes an impermissible legal conclusion by a lay witness. I.R.E. 704(b). Such legal conclusions on ultimate issues *are* often permitted in Indiana ***if offered by expert witnesses***. *Major v. OEC-Diasonics, Inc.*, 743 N.E.2d 276, 284-85 (Ind. Ct. App. 2001) (Court noted Indiana is following a trend "to allow expert opinion testimony even on the

	ultimate issue of the case, so long as the testimony concerns matters which are not within the common knowledge and experience of ordinary persons and will aid" the trier-of-fact.") However, Duke contends Mr. Davey ***is not*** an expert witness. Therefore, this section of his testimony is inadmissible.
Page 4, line 3 – page 6, line 12	In this section, entitled, "Requested Ratemaking and Accounting Treatment Related to the Company's 7-Year T&D Plan," Mr. Davey expresses his opinion about how Duke's T&D Plan should be recovered through rates. As he explains on page 4, however, his opinions expressed in this section are based on information obtained from Duke witnesses Atkins, Kramer and Schneider, Jr. Opinions by skilled lay experts cannot be "based in part on information received from others[.]" *Averitt Exp., Inc.*, 18 N.E.3d at 613; and *Linton v. Davis*, 887 N.E.2d 960, 975 (Ind. Ct. App. 2008) ("Skilled witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge.") In contrast, "An expert witness need not base her opinion on personal knowledge if the opinion is based on evidence of a type normally found reliable and customarily relied upon by others in the witness's profession or area of expertise." *Halterman v. Adams Cnty. Bd. of Comm'rs*, 991 N.E.2d 987, 990 (Ind. Ct. App. 2013); *see also*, *Linton*, 887 N.E.2d at 975. Because Mr. Davey is only a "skilled lay witness" – not an "expert," according to Duke – and because the opinions expressed in this section were not "rationally based on the witness's perception," this section of his testimony must be stricken. IRE 701.

Page 6, line 13 – page 9, line 15	In this section, entitled, "Regulatory Treatment for Existing Meters," Mr. Davey states his opinion that Duke's proposed accounting treatment is appropriate under Generally Accepted Accounting Principles. However, this opinion – which would be appropriate for an expert witness – was based on data obtained from and statements made by other individuals such as Duke witness Mr. Donald L. Schneider, Jr. Opinions by skilled lay experts cannot be "based in part on information received from others[.]" *Averitt Exp., Inc.*, 18 N.E.3d at 613; and *Linton v. Davis*, 887 N.E.2d 960, 975 (Ind. Ct. App. 2008) ("Skilled witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge.") In contrast, "An expert witness need not base her opinion on personal knowledge if the opinion is based on evidence of a type normally found reliable and customarily relied upon by others in the witness's profession or area of expertise." *Halterman v. Adams Cnty. Bd. of Comm'rs*, 991 N.E.2d 987, 990 (Ind. Ct. App. 2013); *see also*, *Linton*, 887 N.E.2d at 975. Because Mr. Davey is only a "skilled lay witness" – not an "expert" – and because the opinions expressed in this section were not "rationally based on the witness's perception," this section of his testimony must be stricken. IRE 701.
Page 9, line 16 – page 14, line 12	In this section of his testimony, Mr. Davey sponsors Duke's proposed rate adjustment mechanism, Rider 65. However, again, Mr. Davey states his analysis was not based exclusively on his own observations, but based on information obtained from other sources including Mr. Atkins' testimony, Duke's filings in Cause No. 42061 ECR, Duke's filings in Cause No. 43114, Duke's filings in

	Cause No. 44367, Duke's last rate case which was Cause No. 42359, and Duke's FERC Form 1. Mr. Davey admits that his opinions in Section V were based on these outside sources of information. Opinions by skilled lay experts cannot be "based in part on information received from others[.]" *Averitt Exp., Inc.*, 18 N.E.3d at 613; and *Linton v. Davis*, 887 N.E.2d 960, 975 (Ind. Ct. App. 2008) ("Skilled witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge.") In contrast, "An expert witness need not base her opinion on personal knowledge if the opinion is based on evidence of a type normally found reliable and customarily relied upon by others in the witness's profession or area of expertise." *Halterman v. Adams Cnty. Bd. of Comm'rs*, 991 N.E.2d 987, 990 (Ind. Ct. App. 2013); *see also*, *Linton*, 887 N.E.2d at 975. Because Mr. Davey is only a "skilled lay witness" – not an "expert" – and because the opinions expressed in this section were not "rationally based on the witness's perception," this section of his testimony must be stricken. IRE 701.
Page 14, line 13 – page 16, line 2	Section VI of Mr. Davey's testimony is entitled "Rate Impacts." In this section, Mr. Davey expresses his opinion on the estimated rate impacts of the T&D Plan. An issue is appropriate for expert witness testimony if "the subject matter is distinctly related to some scientific field, business or profession beyond the knowledge of the average lay person[.]" *Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674, 679 (Ind. Ct. App. 2000); *Norfolk S. Ry. Co. v. Estate of Wagers*, 833 N.E.2d 93, 101 (Ind. Ct. App. 2005). Mr. Davey's calculations of the ratemaking

	impact of Duke's proposed T&D plan on Duke's jurisdictional Indiana customers is precisely the type of specialized, technical issue that is "beyond the knowledge of the average lay person[.]" *Id.* Therefore, this section of his testimony also must be stricken as improper subject for lay opinion testimony.
Exhibits F-1 through F-5	Mr. Davey's testimony provides no foundation for these exhibits. Davey testifies only that the exhibits were "prepared by" him or "under [his] supervision[.]" There is no evidence that Mr. Davey personally observed the underlying data. As a "lay witness," Mr. Davey may only offer opinions based on facts he personally observed, not information supplied by others, as an expert witness would. *Averitt Exp., Inc.*, 18 N.E.3d at 613; *and Linton*, 887 N.E.2d at 975. Moreover, the preparation of these exhibits required specialized skill beyond the ability of the average lay person. *Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674, 679 (Ind. Ct. App. 2000); *Norfolk S. Ry. Co. v. Estate of Wagers*, 833 N.E.2d 93, 101 (Ind. Ct. App. 2005). Therefore, these documents are only admissible if they were prepared by an expert witness, qualified in the appropriate subject area. *See Think Tank Software Dev. Corp. v. Chester, Inc.*, 988 N.E.2d 1169, 1177 (Ind. Ct. App.) *transfer denied*, 993 N.E.2d 1149 (Ind. 2013) ("[B]efore an expert may testify about a subject, the proponent of the expert must show that the expert is competent in that subject.")

III. Duke Manufactures a Legal Distinction Between "In-House" Experts and Experts Retained on a Contract Basis.

In its Response, after denying Mr. Davey is an "expert" witness (Duke Response, Sections I, IV, and VII), Duke reverses itself and argues that Mr. Davey *may* be an expert, but that he is somehow different from other experts because he is a Duke employee. Duke cites no

Indiana precedent for this distinction and, instead, relies entirely on one opinion written by an administrative law judge in Missouri. (Duke Response, pp. 6-7, relying on *In re Kan. City Power and Light*, No. ER-2012-0174, YE-2012-0405, 2012 WL 5383721 (Mo. Pub. Serv. Comm'n Oct. 16, 2012), *adopted by Commission*, 2012WL 2817949 (Mo. Pub. Serv. Comm'n Oct. 31, 2012).)

This distinction between "retained" expert witnesses and "in house" expert witnesses does not appear to have been recognized in any Indiana state or federal court. Indeed, every federal district court in the United States appears to proceed on the assumption that disclosures of information are required of *all* testifying "expert witnesses," *even if they are employees of a party*. Specifically, Federal Rule of Civil Procedure 26(a)(2) is entitled, "Disclosure of Expert Testimony." Subsection (B) of this rule states:

> *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case ***or one whose duties as the party's employee regularly involve giving expert testimony***.

F.R.C.P. 26(a)(2)(B)(emphasis added). This rule goes on to discuss all of the information that must be disclosed, without request, regarding such "in house" experts. As this Federal Rule shows, every federal trial court in this country presumes that "in house" experts are treated the same as experts "retained" to testify on a specific case. In fact, in federal trial courts, parties are obligated to provide a wealth of information about "in house" experts as part of routine disclosures without even being asked.

Similarly, Indiana has never recognized a distinction between "in house" and "retained" testifying experts for purposes of discovery. CAC has requested information relating to the subject matter of this case that was presented to Mr. Davey as he was preparing his testimony. Duke refused, and Duke has now invented a distinction between "in house" and "retained"

experts that does not exist under Indiana law. If Mr. Davey's testimony is admissible at all, it is admissible only as expert testimony. If that is the case, then the five sensitivity studies Mr. Davey reviewed are discoverable.

IV. The Subjects Addressed in Mr. Davey's Testimony Are Not Appropriate for a "Skilled Lay Witness."

The importance of Mr. Davey's qualification as an "expert witness" is neatly summarized in the Indiana Evidence volume of the Indiana Practice manual: "Only expert witnesses may testify without personal knowledge of the facts underlying opinions[.]" 13 Ind. Prac., Indiana Evidence § 701.105 (3d ed.).

A witness is ***required*** to be qualified as an "expert" under I.R.E 702 "if the witness's opinion is based on information received from others pursuant to [Evid. R.] 703 or on a hypothetical question." *Linton v. Davis*, 887 N.E.2d 960, 975 (Ind. Ct. App. 2008). This legal principle appears repeatedly throughout Indiana case law. *See e.g., Farrell v. Littell*, 790 N.E.2d 612, 617 (Ind. Ct. App. 2003); and *Cansler v. Mills*, 765 N.E.2d 698, 703 (Ind. Ct. App. 2002), *disapproved of on other grounds by Schultz v. Ford Motor Co.*, 857 N.E.2d 977 (Ind. 2006).

Throughout Mr. Davey's testimony, he offers opinions based on information received from others and based on hypothetical information (specifically, predictions of future events).

For the convenience of the Commission, we will again go through Mr. Davey's testimony, section-by-section:

> **Section II. Statutory Requirements.** As noted above, in this section, Mr. Davey improperly expresses a legal conclusion, which – while proper for a qualified expert witness – is improper for a "skilled lay witness."
>
> **Section III. Requested Ratemaking and Accounting Treatment.** As noted above, in this section, Mr. Davey offers opinion testimony about the T&D Plan based on descriptions of the plan provided by witnesses Russell Lee Atkins, Theodore H. Kramer, and Donald L. Schneider, Jr. (Davey Testimony, p. 4, lines 18-23.) In addition, he offers

opinion testimony about future events. (Page 4, line 3 – p. 6, line 12.) Predictions of future events are, by their very nature, based on "hypothetical" (not yet realized) facts.

Section IV. Regulatory Treatment for Existing Meters. Again, in this section Mr. Davey offers his opinion based on information provided by Duke witness Donald L. Schneider, Jr., rather than facts Mr. Davey personally observed. (Davey Testimony, p. 6, lines 17-19.) Moreover, Mr. Davey's explanation of the application of GAAP principles to future events is opinion testimony based on hypothetical (future) facts. (Davey Testimony, p. 6, line 13 – p. 9, line 15.)

Section V. Rider Design. As Mr. Davey observes, he designed the rate recovery mechanism based on cost information obtained from other sources, including Mr. Atkins and Black & Veatch. (Davey Testimony, p. 9, line 22 – p. 10, line 7.) Moreover, in this entire section, Mr. Atkins is expressing his opinion about the proper cost recovery mechanism to be applied going forward based on assumed future (i.e., hypothetical) facts. (Davey Testimony, p. 9, line 16 – p. 14, line 12.) This is improper testimony for a skilled lay witness (but not an expert witness).

Section VI. Rate Impacts. In this section, Mr. Davey expresses his opinions on the rate impact of the T&D Plan going forward. This section again predicts future events, which are, by definition, hypothetical in the present.

Exhibits. As noted above, the information on which Mr. Davey based his exhibits were obtained from other witnesses, not based on his own personal observations. Moreover, Mr. Davey does not even testify that he personally prepared the exhibits – just that they were prepared "under his direction." These exhibits constitute improper statements of opinion by a lay witness.

So, the distinction between a lay witness and an expert hinges on whether the data underlying the witness' opinion was developed *exclusively by the witness herself/himself or in part by other individuals*. "It is well-settled that under appropriate circumstances an expert witness may rely on information received or developed by another person." *Ninth Ave. Remedial Grp. v. Allis-Chalmers Corp.*, 141 F. Supp. 2d 957, 959 (N.D. Ind. 2001). Furthermore, "An expert witness is permitted to use assistants in formulating his expert opinion, and normally they need not themselves testify." *Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 612 (7th Cir. 2002). In contrast, a skilled lay witness may only offer opinions on facts he or she personally observed. *See, Averitt Exp., Inc.*, 18 N.E.3d at 613; and *Linton v. Davis*, 887 N.E.2d 960, 975 (Ind. Ct. App. 2008). *See also, Linton v. Davis*, 887 N.E.2d 960, 975 (Ind. Ct. App.

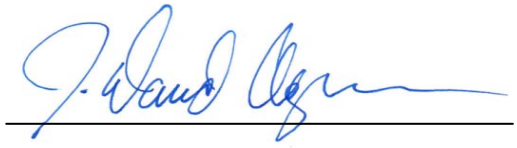
2008); *Farrell v. Littell*, 790 N.E.2d 612, 617 (Ind. Ct. App. 2003); and *Cansler v. Mills*, 765 N.E.2d 698, 703 (Ind. Ct. App. 2002).

In the present case, all of Mr. Davey's opinions and exhibits were based, in whole or in part, on data generated by other Duke employees or witnesses. Therefore, all of his testimony – beginning on page 2, line 9 with, "What is the purpose of your testimony in this proceeding?" and continuing through the end – must be stricken.

V. Conclusion

Mr. Davey himself summarizes the purposes of his testimony. (Davey Testimony, pp. 2-3.) Each of his stated purposes involves Mr. Davey expressing an opinion on one of four issues. In each section of Mr. Davey's testimony, he is either (a) expressing a legal conclusion, (b) expressing an opinion based on data created by other individuals, not observed first-hand and/or (c) expressing an opinion on the future impacts of the T&D plan based on assumed (i.e., not personally observed) future facts. In each case, this testimony would be proper if submitted by an expert witness qualified under IRE 702. But, it is improper if offered by a "skilled lay witness."

If Mr. Davey is only a "skilled lay witness," his testimony must be stricken. If he is an "expert," his testimony may only be admitted if CAC is given the five sensitivity studies that Mr. Davey was provided as he was preparing his testimony.



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The undersigned hereby certifies that the foregoing was served by electronic mail or U.S. Mail, first class postage prepaid, this 13th day of January, 2015, to the following:

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