STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

FILED
August 27, 2019
INDIANA UTILITY
REGULATORY COMMISSION

PETITION OF NORTHERN INDIANA PUBLIC SERVICE COMPANY LLC PURSUANT TO IND. CODE §§ 8-1-2-42.7, 8-1-2-61 AND, IND. CODE § 8-1-2.5-6 FOR (1) AUTHORITY TO MODIFY ITS RATES AND CHARGES FOR ELECTRIC UTILITY SERVICE THROUGH A PHASE IN OF RATES; (2) APPROVAL OF NEW SCHEDULES OF RATES AND CHARGES, GENERAL RULES AND REGULATIONS, AND RIDERS; (3) APPROVAL OF REVISED COMMON AND ELECTRIC DEPRECIATION RATES APPLICABLE TO ITS ELECTRIC PLANT IN SERVICE; (4) APPROVAL OF NECESSARY AND APPROPRIATE ACCOUNTING RELIEF; AND (5) APPROVAL OF A NEW SERVICE STRUCTURE FOR INDUSTRIAL RATES.	)	**CAUSE NO. 45159**

JOINT BRIEF OF THE INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR, CITIZENS ACTION COALITION OF INDIANA, SIERRA CLUB, AND WALMART IN OPPOSITION TO THE RATE 831 AND RATE 831 SETTLEMENT

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FACTUAL BACKGROUND

For a detailed description of the factual and procedural background in this case, please refer to the Proposed Order Submission of NIPSCO.

LEGAL STANDARDS

1. The Commission's fundamental obligation to ensure just and reasonable rates that avoid discrimination applies with equal force to Alternative Regulatory Plans.

Indiana utilities are regulated through the Commission, which by statute acts with "technical expertise to administer the regulatory scheme designed by the legislature . . . to insure that public utilities provide constant, reliable, and efficient service to the citizens of Indiana." *N. Ind. Pub. Serv. Co. v. United States Steel Corp.*, 907 N.E.2d 1012, 1015 (Ind. 2009) [hereinafter, "*NIPSCO v. U.S. Steel*"] (citation omitted); *see generally* I.C. § 8-1-1-1 to 8-1-1-15. The Commission must ensure that NIPSCO, like all regulated utilities, meets its obligation to furnish reasonably adequate service and facilities, and that its charges for that service are reasonable and just. I.C. § 8-1-2-4. Unjust and unreasonable charges are prohibited and unlawful. *Id.*

In 1995, the Indiana Legislature provided the Commission some latitude "to flexibly regulate" the state's monopoly utilities, "giving due regard to the interests of consumers and the public, and to the continued availability of safe, adequate, efficient, and economical energy service." I.C. § 8-1-2.5-1(6). The Legislature found such flexibility necessary "to deal with an increasingly competitive environment for energy services," recognizing "that alternatives to traditional regulatory policies and practices may be less costly" for Hoosiers. *Id.* § 8-1-2.5-1(3). While the Alternative Utility Regulation Act allows some degree of flexibility, the Commission's fundamental obligation to ensure just and reasonable rates remains. *E.g.*, *id.* § 8-1-2.5-6(a). The Commission may not approve an Alternative Regulatory Plan that would result in unjust and unreasonable rates or discrimination between classes of customers. *Id.* § 8-1-2-4.

Beyond resulting in just and reasonable rates that avoid discrimination, alternative regulatory plans must also serve the public interest. In order to determine whether the public interest will be served through alternative regulation, the Commission is required to consider the following factors:

> (1) Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the commission unnecessary or wasteful.
>
> (2) Whether the commission's declining to exercise, in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility's customers, or the state.
>
> (3) Whether the commission's declining to exercise, in whole or in part, its jurisdiction will promote energy utility efficiency.
>
> (4) Whether the exercise of commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment.

Id. § 8-1-2.5-5(b). Finally, the Commission must consider whether the Alternative Regulatory Plan will "enhance or maintain the value of the energy utility's retail energy services or property." *Id.* § 8-1-2.5-6(a)(1)(B).

2. <u>Settlements must be supported by substantial evidence and serve the public interest.</u>

While Indiana law favors settlement, *e.g.*, *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140, 145 (Ind. 2000), the Commission cannot approve a settlement agreement unless it meets fundamental standards and serves the public interest. In the context of regulated utility ratemaking, settlement agreements are more than mere contracts between private parties. *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790, 803 (Ind. 2000) [hereinafter, "*Gypsym*"]. "[A] settlement approved by the Commission 'loses its status as a strictly private contract and takes on a public interest.'" *Id.* (citation omitted). The Commission "may not accept a settlement merely because the private parties are satisfied; rather, [the Commission] must consider whether the public interest will be served by accepting the settlement." *Citizens Action Coalition v. PSI Energy, Inc.*,

664 N.E.2d 401, 406 (Ind. Ct. App. 1996) (citing C. Koch, *Administrative Law and Practice* § 5.81 (Supp. 1995)). When, as here, the Commission evaluates a settlement agreement concerning an alternative regulatory plan under Chapter 2.5, determining whether the public interest is served must include consideration of the specifically enumerated factors found in Indiana Code section 8-1-2.5-5(b), set forth above.

As with any Commission action, settlement agreements must be supported by specific findings of fact and substantial evidence. *Gypsum*, 735 N.E.2d at 795. The Commission has previously remained "mindful regarding a Settlement Agreement which has been entered by representatives of all customer classes, including [Office of Utility Consumer Counselor] (who represents all ratepayers), even though there may be some intervenor or group of intervenors who opposes it." Final Order at 82, *In re NIPSCO*, Cause No. 44688 (IURC July 18, 2016) (citing Final Order at 4-5, *Amer. Suburban Utils.*, Cause No. 41254 (IURC Apr. 14, 1999)). Inversely, the Commission should be skeptical that a settlement would serve the public interest if it is not supported by the OUCC. *See id.* Fundamentally, all settlement agreements must result in just and reasonable rates. *Id.*; I.C. § 8-1-2-4; I.C. § 8-1-2.5-6(a).

ARGUMENT

NIPSCO proposes a new Rate 831 that would allow six customers to move nearly 600 MW of load from a cost-based rate to a market-based rate.[1] The cost-based rate includes these six customers' share of the costs of constructing NIPSCO's current generation resources; the move to a market-based rate strands those costs. CAC's expert witness, Jonathan Wallach, estimates this shift at $66M annually.[2] As detailed in Part I, Rate 831 unfairly allows the six customers to shift these stranded costs to NIPSCO's other customers. Other jurisdictions have wisely allowed legislators to decide how to handle stranded costs caused by a shift to market-based rates. The Commission should do the same here.

What do Hoosiers get for allowing the six customers to escape this $66M annual cost? As detailed in Part II, the record contains no evidence to support the claim that this cost shift will maintain or enhance Indiana's economy, or retain or attract Indiana jobs.

If the Commission does sense some risk that these six customers may leave NIPSCO's system, then as detailed in Part III, Rate 831 does nothing to prevent or even delay that from happening. The proposal does not maintain or enhance the value of NIPSCO's service or property.

In addition, we recognize the 831 Settlement is presented to the Commission under exceptionally unusual circumstances—no other parties joined. No representative of any other customer or customer class found sufficient benefit in the 831 Settlement to participate. As the statutory representative of the all members of the ratepaying public, and a signatory to nearly all

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[1] Current Rider 775 allows large industrial customers to shift up to 530 MW annually from firm load to interruptible load. Rider 775, Sheet 1 of 9. "[U]nder 831, NIPSCO does not need to plan for Tiers 2 and 3 load which is true, but under the 700 Series of rates, the same amount of load is handled as interruptible load, and NIPSCO also does not need to plan for that load." Cross-Examination of Peter M. Boerger at D-40 to D-41 (Evidentiary Hearing Transcript).

[2] CAC Exhibit 1, Direct Testimony of Jonathan A. Wallach, p. 10; CAC Exhibit 5, Responsive Testimony of Jonathan A. Wallach, p. 5.

settlements presented to the Commission for its approval, the OUCC's absence is notable. While the OUCC's participation in a settlement is not required for approval, the agency's decision not to join, and the similar decision of all other non-831 parties, shows the level of concern from a substantial portion of the public interests included within "the public interest."

For all these reasons, the Commission must reject Rate 831 and maintain the current rate structure.

1. **Rate 831 violates fundamental ratemaking principles, by allowing six industrial customers to avoid their share of the already-incurred costs of NIPSCO's production system.**

The Commission must deny Rate 831 because it violates the principle of cost-causation, it improperly provides market access and benefits to six NIPSCO customers, denies comparable access and benefits to all other customer classes, shifts an estimated additional $40.2M - $66M annually of legacy production plant costs on to all other customer classes, is not supported by the evidence of record, utilizes an inappropriate cost of service study and it seeks Commission approval of radical policy changes more appropriately addressed by the Indiana legislature

a. **Rate 831 violates the principle of cost-causation.**

NIPSCO's rate design must follow the principle of cost-causation. *Citizens Action Coal. of Indiana, Inc. v. Indianapolis Power & Light Co.*, 74 N.E.3d 554, 565 (Ind. Ct. App. 2017) (quoting OUCC expert witness Glenn Watkins, "it is generally accepted that to the extent possible, joint costs should be allocated to customer classes based on the concept of cost causation," and rejecting certain rate design proposals as "divorced from any cost causation principles").[3]

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[3] Final Order at 78, *In re NIPSCO*; Cause No. 44988 (IURC Aug. 19, 2018) (Frank A. Shambo, Senior Vice President of Regulatory and Legislative Affairs with NIPSCO, explained that "costs incurred by utilities should be recovered in a manner consistent with cost causation"); Final Order at 27, *In re NIPSCO*, Cause No. 44688 (IURC July 18, 2016) (NIPSCO witness Shambo explained that "recovery of costs from customers that cause the costs" was a key aspect to improving alignment of cost recovery to cost causation).

The Alternative Utility Regulation Act allows utilities the flexibility to propose market-based prices, but cannot allow any subset of utility customers to shift costs that they caused onto other customers. Such a result would be unjust and unreasonable. Indiana Code section 8-1-2.5-1 requires that, in considering an Alternative Regulatory Plan, the Commission "give[] due regard to the interests of consumers and the public," not just the interests of a select few customers. The Federal Energy Regulatory Commission, when considering market-based pricing, has recognized that "the benefits of competition should not come at the expense of other customers."[4]

In this case, the costs at issue are the costs NIPSCO incurred to build its current generation resources.[5] NIPSCO built these resources to meet its obligation to provide "constant, reliable, and efficient service"[6] for the total demand of all customers in its service territory 24 hours a day, seven days a week. At the time these resources were being planned, NIPSCO faced the unique challenge of serving the total demand of several large, energy-intensive industrial customers. Final Order at 85, *In re NIPSCO*, Cause No. 43526 (IURC Aug. 25, 2010) ("NIPSCO's system was designed, planned, and built in material part to serve the loads of its energy intensive industrial customers.").[7] Ultimately, NIPSCO built these generation resources "with the reasonable expectation that its customers" would be served by them and "would pay their share of long-term investments and other incurred costs."[8] Under cross examination, Executive VP and President of

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[4] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540, 21,550 (May 10, 1996).
[5] NIPSCO currently operates five coal-fired electric generating units with an installed capacity of 2,094 MW, four gas-fired plants with an installed capacity of 721 MW, and two hydroelectric plants with installed capability of 10 MW. Petitioner's Exhibit 1, Direct Testimony of Violet Sistovaris, pp. 4-5.
[6] *Indiana Payphone Ass'n v. Indiana Bell Tel. Co.*, 690 N.E.2d 1195, 1197 (Ind. Ct. App. 1997).
[7] "There is no doubt that NIPSCO planned and built its fleet of generation resources to meet the loads of all of its customers including the load requirements for the large industrial customers." (OUCC Public Exhibit 9, Direct Testimony of Glenn Watkins, p. 37: 8-10).
[8] 61 Fed. Reg. at 21,549.

NIPSCO Ms. Sistovaris admitted NIPSCO's generating facilities had to be designed and constructed to serve its large industrial load. She further agreed that if Rate 831 was approved, all of the fixed costs associated with those assets and their maintenance currently paid by Rate 831 customers (between $40.2M and $66M annually) must be paid for by other customer classes. Tr. A-46:2 – A-47:10. There can be no dispute that fixed generation costs remain part of a vertically integrated utility's regulated cost-of-service even if some of the utility's customers shop for electricity on the market. So the total demand of NIPSCO's customers, **especially** its large industrial customers, caused NIPSCO to incur the costs of building its current generation resources. Under the principle of cost-causation, all customers in NIPSCO territory, especially large industrial customers, must pay their share of these long-term investments. Any plan to shift load to market-based rates must address the stranded costs of NIPSCO's generation resources.

NIPSCO proposes to allow its largest industrial customers to take fixed rate service at contract demand levels well below total customer demand; and then further proposes to allocate production costs on the basis of the lower contract demand, not the total demand. This would lower the six Rate 831 customers' share of those costs significantly; NIPSCO would instead collect these costs from its other customers. Mr. Wallach conservatively estimated NIPSCO's proposal would shift $66 million annually from its largest industrial customers to all other customers.[9] NIPSCO does not dispute that there would be an annual cost shift benefiting the six Rate 831 customers; Mr. Kelly estimates the cost shift at $40 million to $66 million annually.[10] *See also* NIPSCO Response to OUCC Data Request 5-10 (OUCC Exhibit 8, Direct Testimony of Peter M. Boerger, Attachment PMB-1, p. 13) ("The magnitude of the shift of costs currently being recovered from

[9] CAC Exhibit 1, Direct Testimony of Jonathan A. Wallach, p. 10; CAC Exhibit 5, Responsive Testimony of Jonathan A. Wallach, p. 5.
[10] Petitioner's Exhibit 3-S2-R, Rate 831 Settlement Reply Testimony of Paul S. Kelly, p. 5.

the industrial customers to other customers as a result of the new market-sensitive rate structure is $40,244,957…"). For some perspective, NIPSCO's case-in-chief sought to increase annual electric retail revenue by $21,371,413 over current rates. NIPSCO Exhibit 4, Direct Testimony of Jennifer L. Shikany, p.12:14 – 13:8. The Rate 831 Settlement effectively shifts 2x to 3x that amount annually on to non-831 captive customers.

In sum, Indiana Code section 8-1-2.5-1 makes it clear that Alternative Regulatory Plans can be flexible, but must still follow the fundamental principles of rate-making, which were created to ensure that utility plans serve the public interest and result in just and reasonable rates for all customer classes.

b. Rate 831 unduly favors six NIPSCO customers over all of the rest.

NIPSCO's proposal unfairly gives six customers the undue advantage of avoiding their share of already-incurred production costs and subjects all other customer classes to the undue prejudice of paying more than their share of these costs, in violation of Indiana Code section 8-1-2-105(a), which prohibits any public utility from making or giving "any undue or unreasonable preference or advantage to any person, or subject[ing] any person to any undue or unreasonable prejudice or disadvantage in any respect." While subsection (b) permits a utility to provide service to employees, officers, and retired employees/officers for free or at reduced rates, as well as discounted heating assistance program, the 831 Settlement Agreement cannot be compared to these exceptions. Not only does the 831 Settlement deny other rate classes equal access to market-based prices, but compounds the unreasonable prejudice with the annual additional $40 - $66M in increases.[11] After "months of discussions with [their] largest industrial customers" (Petitioner's

[11] These same customers already have opportunity to avoid the costs of utility-sponsored energy-efficiency programs, yet they can take advantage of the system benefits that these programs provide. *See* Joint Exhibit 3, Kelly Stipulation of Facts, pp. 11-14.

Exhibit 3, Direct Testimony of Paul S. Kelly, p. 5:11), that would benefit from Rate 831, NIPSCO arrived at this radical proposal without any input from any stakeholders that would ultimately bear all of the costs. *See* Joint Exhibit 3, Kelly Stipulation of Facts, p. 2, para. 9.

In considering other Alternative Regulatory Plans, the Commission has prioritized the protection of customers that do not participate in the Plan, and the Commission has been especially sensitive to the potential of cross-subsidization between classes. For example, in Cause No. 44269, the Commission made it clear that an Alternative Regulatory Plan with a market-based rate must include production-based costs to protect non-participants, in accordance with the principle of cost-causation.[12] In Cause No. 45089, the Commission approved an Alternative Regulatory Plan only after finding that the plan "insulates non-participants from bearing the capital investment costs and operating costs of this … [Alternative Regulatory Plan] program, preventing cross-subsidization. This non-participating customer protection coupled with the evidence upon the statutory considerations support the public interest."[13] In Cause No. 44283, the Commission approved an Alternative Regulatory Plan with market-based pricing for clean energy blocks, noting that the utility structured the rate to prevent any possibility of cross-subsidization:

> Mr. Mather testified that below the line accounting eliminates any concern that voluntary participation in GoGreen may be subsidized by non-participating customers.

In re Duke Energy Indiana, Inc., Cause No. 44283, 2013 WL 3420597, *4-*7 (July 3, 2013). As in this case, the market-based rate was part of a Settlement Agreement. However, unlike this case, the OUCC was a party to that Settlement, and all parties agreed that the Settlement reasonably protected the utility as well as all customer groups, including program participants and non-participants:

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[12] *In re S. Indiana Gas & Elec. Co.*, Cause No. 44269, 2013 WL 3420593, at *3 (July 3, 2013).
[13] *In re Duke Energy Indiana, Inc.*, Cause No. No. 45089, 2018 WL 5924598, at *9 (Nov. 7, 2018).

> The Settlement Agreement creates a balanced framework, allowing for ongoing, collaborative discussions of potential improvements to the GoGreen program….Non-participants are protected from subsidizing GoGreen by its below-the-line accounting treatment. Accordingly, the Commission finds the Settlement Agreement is in the public interest as it reaches a reasonable result that provides benefits and protections to all stakeholders.

Id. at *8 (Commission Discussion and Findings, Section 7). Rate 831 does not include any protections for non-participants; it pushes tens of millions of dollars annually of the production-related costs avoided by the six Rate 831 customers onto NIPSCO's remaining captive customers. The sheer magnitude of this shift, coupled with the discriminatory preferences of market access offered to only a select few is sufficient justification for the Commission to find the 831 Settlement is not in the public interest.

c. Rate 831 is de facto deregulation; this is a radical policy change that is better initiated before the Indiana legislature.

Through the Alternative Utility Regulation Act, the Legislature gave the Commission leeway to consider market-based pricing when it was backed with substantial evidence of benefits to the entire utility customer base, and the state as a whole. The Commission has approved certain market-based pricing programs where the volume of load was limited, the number of eligible customers was large, and the utility applied the principle of cost-causation and took steps to protect non-participants. Rate 831 does not fit that mold: NIPSCO proposes to shift nearly 600 MW of its customers' annual load to market-based rates. Only the very largest are allowed to participate. And the proposal shifts $66 Million of costs caused by those customers to non-participants every year.[14] All parties agree that "it is atypical for a vertically integrated utility to propose allowing a significant portion of its load to have the ability to procure capacity and energy from wholesale market suppliers." Petitioner's Exhibit 3-S2-R, Rate 831 Settlement Reply Testimony of Paul S.

[14] CAC Exhibit 1, Direct Testimony of Jonathan A. Wallach, p. 10.

Kelly, p. 6. This atypical proposal does not include the protections for non-participants that the Commission has included in other market-pricing proposals, or that other jurisdictions have placed on market-pricing proposals for large customers.

The Commission has approved a reasonable approach to giving customers some market access: the current Rider 775 places a cap on the interruptible service that large industrial customers can take and requires those customers to pay a cost-based rate.[15] Rate 831 and the Rate 831 Settlement turn this approach on its head, setting a floor for how much firm load the six large industrial customers will buy from NIPSCO. Those six customers are then allowed to purchase the rest of their load, both firm AND interruptible, from MISO.[16] Any plan that allows just a few customers to access market-based pricing has the potential to unduly prejudice the captive customer classes, in violation of Indiana Code section 8-1-2-105(a).

d. <u>Rate 831 radically departs from Indiana's utility regulatory scheme, creating conflicts that cannot be reconciled by the Commission.</u>

NIPSCO's proposed unbundling of retail service for greater than 40% of its total load, results not only in unjust and unreasonable shifting of NIPSCO's fixed production costs, but also discord with other aspects of Indiana's overall scheme for utility regulation. Consider, for instance, the incongruence between NIPSCO's radical industrial rate restructuring proposal and fair allocation of transmission, distribution, and storage projects approved through the TDSIC statute. The TDSIC statute prescribes a single method for cost allocation, assuming Indiana utilities are providing traditionally bundled retail electric service, *i.e.*, energy, transmission, and distribution services provided by a single monopoly utility. However, should a utility unbundle its retail

[15] NIPSCO could have requested an increase to the current 530 megawatt cap for participation in its current Interruptible Industrial Service Rider, Rider 775, in this proceeding but chose not to do so. Joint Exhibit 3, Kelly Stipulation of Facts, p. 1, para. 2.
[16] Rate 831 customers can firm up their Rate 831 Tier 2 and Tier 3 load through purchases of capacity at MISO's annual capacity auctions or from a third party. CAC Exhibit 1, Wallach Direct, pp. 6-7.

service—as NIPSCO proposes here—the TDSIC cost allocation approach may lead to unjust and unreasonable results. This fundamental incongruence highlights another way in which NIPSCO's proposed restructuring is too great a policy change to be accomplished through a single rate case.

The TDSIC statute provides a mechanism for utilities to seek preapproval of seven-year investment plans and to recover costs for approved projects as they are completed through a periodically adjusted "tracker." *See generally* I.C. ch. 8-1-36. As the Commission is aware, billions of dollars of utility-infrastructure projects have been approved through the TDSIC process, and those costs continue to be collected through TDSIC trackers. *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.* ("*NIPSCO 2018*"), 100 N.E. 3d 234, 236 (Ind. 2018), *modified on reh'g*. In order to calculate tracker adjustments, utilities allocate TDSIC costs among their distinct customer classes. *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.* ("*NIPSCO 2019*"), 125 N.E.3d 617, 620 (Ind. 2019). Per the statute, that allocation must "use the customer class revenue allocation factor based on firm load approved in the public utility's most recent retail base rate case order." I.C. § 8-1-39-9(a)(1). While allocation factors must be based on "firm load," the statute does not define that phrase. Doing so was arguably unnecessary if traditional utility service is presumed, as in that context, the concept is not complicated and can be an appropriate metric for fair TDSIC cost allocations. Under the proposed Rate 831, however, allocating transmission, distribution, and storage costs on the basis of firm load served by NIPSCO's generation units may result in further subsidization of NIPSCO's largest industrial customers.

Unfair TDSIC allocations could result under Rate 831 for the simple reason that Rate 831 customers may rely on NIPSCO's transmission and distribution system to deliver firm load served by third-parties without making corresponding contributions to TDSIC project costs. The Rate 831 tariff plainly allows that service through Tiers 2 and 3 may be "firm load" to the extent that it is

supported by customer-procured capacity via MISO's Planning Resource Auction or third-party contracts. Petitioner's Exhibit 19, Attachment 19-A, pp. 81-82. Yet, NIPSCO and its largest industrial customers ask that TDSIC allocations be based only on the "firm load" served by NIPSCO itself through Tier 1:

> For the purposes of recovery of any approved capital transmission, distribution, and storage system improvement charge ("TDSIC") expenditures and costs, only Rate 831 customers' Tier 1 load constitutes 'firm load' and the TDSIC revenue allocation shall only be applied to revenue associated with Rate 831 customers' Tier 1 load."

Rate 831 Implementation Agreement, Section B, Subsection 2.c; *see also* Rate 831 Implementation Agreement Exhibit A, Attachment 19-R-F. Though Rate 831 customers may use NIPSCO's transmission and distribution system to deliver firm load provided by third-parties under Tiers 2 and 3, there would be no associated contribution to NIPSCO's TDSIC project costs. In this way, Rate 831 customers would be escaping not only paying their fair share for NIPSCO's generation fleet, but also their fair share of TDSIC burdens, leaving NIPSCO's remaining customers to subsidize their use of NIPSCO's transmission, distribution, and storage systems for delivery of electricity generated by third-parties.

Frighteningly, if approved by the Commission, NIPSCO and the Rate 831 customers may find legal cover for this fundamentally unfair approach to TDSIC allocation. As mentioned above, the legislature apparently did not recognize the need to define "firm load" in the statute and could not foresee the radical industrial rate restructuring proposed in this rate case. Instead, the Legislature assumed traditional utility retail service, with monopoly utilities exclusively providing customers' generation, transmission, and distribution needs. It is only under such assumptions that just and reasonable allocations would result from the TDSIC statute's prescription to "use the

customer class revenue allocation factor based on firm load approved in the public utility's most recent retail base rate case order." I.C. § 8-1-39-9(a)(1).

Though presented through a rate case, NIPSCO and its largest industrial customers are seeking sweeping policy changes. *E.g.* Petitioner's Exhibit 2, Direct Testimony of Michael Hooper, p. 12 ("[T]his is a policy case . . ..."). As the TDSIC example illustrates, without greater adjustments to Indiana's overall utility regulatory scheme, Rate 831 will result in unjust, unreasonable, and discriminatory outcomes for non-Rate 831 customers. The Commission must leave such a sweeping and disruptive reconfiguring of Indiana's regulated retail electric service to the Legislature.

2. NIPSCO and the Rate 831 Settlement industrial customers failed to provide substantial evidence that Rate 831 is reasonable, necessary, or serves the public interest.

A fundamental threat pervades this proceeding: NIPSCO's largest industrial customers may develop and implement plans to reduce the amount of load served by NIPSCO, unless they can shift their share of the costs of NIPSCO's generation resources onto NIPSCO's other customers. From an evidentiary stand-point, however, this threat advanced by NIPSCO and prospective Rate 831 customers is almost entirely unsupported. For all of NIPSCO's hand-waving, it has offered slim to no evidence that each of the six customers benefiting from the proposed Rate 831 are actually planning to leave NIPSCO's system. Prospective Rate 831 customers similarly failed to fill that evidentiary void. The Commission cannot find any real risk of immediate and significant loss of firm load. In the absence of substantial evidence supporting the need for Rate 831, the Commission must deny NIPSCO's request.

a. Commission action must be supported by substantial evidence.

Commission actions must be supported by substantial evidence in light of the whole record. *Citizens Action Coalition of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610, 612 (Ind. 1985). That requirement extends to findings of basic fact. *Id.* Commission action will not survive judicial review if:

1) the evidence on which the Commission based its findings was devoid of probative value;
2) the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding does not rest upon a rational basis;
3) the result of the hearing before the Commission was substantially influenced by improper considerations;
4) there was not substantial evidence supporting the findings of the Commission;
5) the order of the Commission is fraudulent, unreasonable, or arbitrary."

NIPSCO v. U.S. Steel, 907 N.E.2d at 1016.

b. NIPSCO has provided insufficient evidence that any Rate 831 customer is actually moving forward with plans to leave NIPSCO's system.

According to NIPSCO, the proposed industrial rate restructuring is necessitated by an imminent threat that its largest industrial customers will reduce their reliance on NIPSCO's generation fleet.[17] Asked what evidence NIPSCO has to support its threat of impending industrial load loss, Witness Sistovaris pointed to two things: (1) BP's request to become a Qualified Facility and (2) a public permit filing from U.S. Steel to build a 54 MW system, which she claimed showed high potential U.S. Steel would leave NIPSCO's system after developing its own generation. Tr. A-51, lines 12-17. As explained below, this is far from substantial evidence that Praxair,

[17] Petitioner's Exhibit 3, Kelly Direct, pp. 4-5: "Q7. Is there a potential for other industrial customers to also reduce their firm loads?
A7. Yes. It is both possible and probable. Some large customers, like BP, may utilize co-generation systems whether new or existing to reduce their firm requirements. In fact, NIPSCO is already aware that other large industrial customers are considering expansion of their cogeneration facilities. Others may reduce those loads by shifting their industrial production to other locations outside Indiana that are more economic to operate."

ArcelorMittal, Cargill, U.S. Steel and NLMK are all in fact doing what NIPSCO threatens, much less that they would do so immediately and simultaneously if Rate 831 is not approved.

BP's purchase of the Whiting Energy facility a decade ago, and its more recent petition to treat Whiting Energy as a Qualified Facility, are not easily replicable events and not evidence of a trend of NIPSCO customers acquiring self-generation facilities. Further, there is nothing in the record identifying other existing facilities that could be economically acquired by any among the Rate 831 customers.

At one point, U.S. Steel explored another route to reducing firm load: building its own generation facility.[18] U.S. Steel submitted an application for the facility to the Indiana Department of Environmental Management, but subsequently withdrew it.[19] Apart from U.S. Steel, neither NIPSCO nor the other prospective Rate 831 customers provided concrete evidence of real plans to invest capital in new generation, or plans to reduce or relocate their operations. Regardless of whether Rate 831 is approved or denied, U.S. Steel may renew its plan to develop self-generation, but any associated loss of load would occur sometime in the future—permitting and construction are time-intensive processes. In the intervening months or years, U.S. Steel would continue as NIPSCO's retail customer, helping to shoulder its fair share of the costs of NIPSCO's generation fleet that were built to serve the Industrial Customers' load. During that time, NIPSCO could hold discussions, with **all** stakeholders, about proposals to give some customers greater access to market-based rates while protecting non-participants. With the industrial customers' real self-generation plans in hand, NIPSCO's proposal would be more closely tailored to the legitimate risks of load reduction and any legitimate issues faces by industrial customers.

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[18] Cross-Answering Testimony of Tony M. Georgis on behalf of U.S. Steel, p. 17.
[19] *Id.*

The actions of BP and the withdrawn proposal by U.S. Steel do not justify the proposal that NIPSCO's residential, municipal and commercial customers taken on tens of millions of dollars annually to subsidize six industrial customers. The effects of BP's move have already been baked into NIPSCO's rates. The effects of U.S. Steel's possible transition toward greater reliance on self-generation could affect rates one or two years from now—if it goes forward at all. But neither of these individual customers' actions provide substantial evidence to support NIPSCO's shift of $66M of annual costs away from the six large industrial customers through the proposed Rate 831. And the remaining four prospective Rate 831 customers offer no evidence that they are otherwise preparing to pursue self-generation investments, reduced operations, or departure from Indiana. NLMK's witness acknowledges that NLMK owns no self-generation equipment and did not testify that NLMK was actively exploring building or buying such equipment.[20] Nor did Industrial Group witnesses. Rather, their testimony focuses on vague and general assertions of industry dynamics, offering no specific claims that each company is actually planning to exit NIPSCO's system. During the pendency of this proceeding, a sixth customer was included in Rate 831. As with the others, neither that sixth customer nor NIPSCO offered any evidence suggesting the latest customer addition had any active plans to bypass NIPSCO's system.[21]

Even if the Rate 831 settlement is approved, U.S. Steel, or any of the 831 Settlement customers, could pursue self-generation and depart at their first opportunity, after having taken advantage of Rate 831's highly discounted rates. There is also no evidence in the record from NIPSCO or any 831 Settlement Party, committing those customers to NIPSCO's system for any

[20] Cross-Answering Testimony of James A. Lahtinen on behalf of NLMK Indiana, p. 7; Direct Testimony of James A. Lahtinen on behalf of NLMK Indiana.

[21] Importantly, nothing in the proposed Rate 831 tariff requires a customer to demonstrate that, without access to Rate 831, it would exit NIPSCO's system through self-generation, shuttered operations or relocation outside of Indiana. In this way, the tariff is dangerously disconnected from the rationale purportedly justifying its existence.

longer than NIPSCO's next base rate case, which could happen well before five years. The five year contracts signed by Rate 831 customers are required by NIPSCO's rules to terminate with NIPSCO's next rate case. The promise of a five year commitment is illusory.

Finally, standing alone, the rise and fall of production at large industrial businesses is not evidence of any trend, one way or the other. Companies make decisions about the level of their production operations on dozens of economic factors, only one of which is retail energy prices.

c. The evidence in support of Rate 831 would be insufficient to meet even the modest threshold required for economic development discounts, which are miniscule compared to the size and scope of the 831 Settlement and its future impacts across the entire State.

NIPSCO and the Legislature have created a method for Indiana's utility customers to lower their electric rates, if necessary to preserve Indiana jobs, through interruptible service and economic development rates. Unlike Rate 831 or the record in this proceeding, however, both of those methods require robust evidence of job and economic impact.

NIPSCO's Rider 775 requires customers to demonstrate that "job loss, plant closure, economic development and/or reliance on NIPSCO power supply" would occur unless NIPSCO allows a facility to convert firm load to interruptible load.[22] Also, by statute, Indiana utilities can seek approval of discounted rates in certain specific circumstances, **if** specific evidentiary showings are made. I.C. § 8-1-2-24(b). The individual customer would be required to demonstrate, both to the Commission and the Indiana Economic Development Corporation, that a discount is "necessary and essential for the customer to . . . create additional jobs or retain existing jobs at the facility." *Id.* § 8-1-2-24(b)(3). When presented with evidence of jobs impact and the approval of

[22] NIPSCO Rider 775, Sheet 1 of 9.

the Economic Development Corporation, the Commission has authority to provide temporary discounts. *Id.* § 8-1-2-24.

The Commission has required applicants to bring forward concrete analyses of the relative costs justifying discounts, rather than mere threats. For instance, when NIPSCO and Omni Forge pursued a discounted rate, Omni Forge provided concrete evidence that (a) it was actively considering relocating its expanding operations to Kentucky, where electric rates were lower, (b) an existing 100 Indiana jobs and potential for an additional 100 new Indiana jobs were at stake, and (c) including the specific costs to relocate, Omni Forge would still obtain overall savings as a result of the lower Kentucky electricity costs. *E.g.*, *In re N. Indiana Pub. Serv. Co.*, 146 P.U.R.4th 148, 1993 WL 13811980 (Aug. 11, 1993). With the benefit of specific evidence on the relative costs of relocating, the Commission was able to make a reasoned and factually supported determination that a discounted rate was just and reasonable and balanced the public interest. It did so while observing that "a much greater showing" would have been required for access to NIPSCO's Rider GA, which was reserved for industrial customers able to pursue cogeneration as a feasible alternative to acquiring power from NIPSCO. *Id.* Elsewhere, Indiana utilities have used eligibility requirements to ensure discounted rates are justifiably needed. *E.g.*, Order, *In re Indiana Gas Company, Inc.*, Cause Nos. 39117 and 39118, 1991 WL 501832 (IURC May 8, 1991) (Gas service Rate 70 included eligibility standard requiring that "an industrial or commercial customer must show that it can attain cost savings by bypassing Applicant's system, or that the customer has equipment in place to economically utilize an energy service other than natural gas, or a contract rate is necessary to preserve or attract the customer's load by the Applicant.").

The evidence offered by NIPSCO and the Rate 831 Settlement parties would not qualify them for an economic development discount or increased access to Rider 775. Yet NIPSCO and

the prospective Rate 831 customers want greater and permanent relief, effectuating an unprecedented cost-shift to NIPSCO's non-Rate 831 customers. None of the prospective Rate 831 customers have provided economic analyses proving that they can obtain cost savings by bypassing NIPSCO's system through self-generation. None of the prospective Rate 831 customers has provided analyses proving they can obtain cost savings by relocating their operations outside of NIPSCO's service territory. During his redirect examination, OUCC witness Dr. Boerger noted that while the 831 Settlement customers criticized him for not performing numerous analyses they felt were relevant and essential, none of the 831 Settlement parties (who carry the burden of proof) included any of those analyses in their direct cases, rebuttal or settlement evidence. Boerger Redirect, Tr. E26:3 – E28:8. NIPSCO never attempted to estimate any of the costs, benefits, or risks of the unsubstantiated threat that this proposal is based on. Verified Stipulation of Facts, Exhibits 1-3. NIPSCO's witness claimed that "[t]he reason NIPSCO is making this proposal . . . is because it is the best outcome that could be identified for all of its customers, employees, investors, and stakeholders." Petitioner's Exhibit 3-S2-R, Kelly Reply, p. 7: 11-13. But NIPSCO has nothing—no memoranda, no reports, no internal notes, presentations, or communications—to show that it did any analysis of outcomes or alternatives, much less that such analyses support their proposal and testimony. Joint Exhibit 3, CAC Request 14-003 (with attached exhibits). The Rate 831 customers also offer no analysis of outcomes or alternatives. The Rate 831 Settlement lacks a sufficient evidentiary basis to support a proposal of such unprecedented size and scope.

3. **<u>The Proposed Rate 831 and Implementation Settlement exposes all but six of NIPSCO's 468,590 customers to immediate harm and continued risk.</u>**

The Rate 831 Settlement fails to mitigate the risk of significant loss of firm load. Instead, it accelerates and concentrates loss of firm load—converting potential future load loss to an immediate certainty—while leaving NIPSCO's remaining customers exposed to continued risk

and uncertainty. Indiana Code section 8-1-2.5-6(a)(1)(B) prohibits the Commission from approving this Alternative Regulatory Plan unless it maintains or enhances the value of NIPSCO's services or property. The Rate 831 Settlement fails this standard because it (1) guarantees the immediate loss of firm load—something that may or may not gradually materialize otherwise; (2) fails to guarantee that NIPSCO's largest industrial customers will remain on NIPSCO's system; and (3) fails to mitigate risk of future unjust cost-shifting from large industrial customers to NIPSCO's remaining 468,584 captive customers.

a. <u>The proposed Rate 831 does not protect against the threat of possible future load loss—it guarantees the immediate loss of firm load.</u>

Concern that NIPSCO may lose firm load from some large industrial customers over an undefined timeframe is not an appropriate justification for guaranteeing immediate and simultaneous loss of firm load from all those customers. "[N]either NIPSCO nor any of the other Rate 831 Settling Parties has provided any evidence that the *potential* load loss under the current service structure would exceed the *certain* load loss under the proposed Rate 831 structure." CAC Exhibit 5, Wallach Responsive, p. 8:15-18 (emphasis in original). Nor could they. Critically, approving Rate 831 impacts the rates for NIPSCO's non-Rate 831 customers in much the same way as each of NIPSCO's largest industrial customers exiting NIPSCO's system would:

> Under the proposed Rate 831 service structure all rate classes, other than Rate 831, will be allocated additional revenue requirements due to the revenue reduction that will occur as a result of reduced utilization of NIPSCO's supply resources by Rate 831 customers, as well as a consequence of NIPSCO's Rate 811 mitigation proposal. The same would be true if there were a loss of load in the industrial classes due to the closure of facilities, shifts in production, increased reliance on self-generation, or other causes.

Joint Exhibit 4, Phillips Stipulation of Facts, p. 1, para. 4. In other words, approving the Rate 831 Settlement does nothing to prevent future industrial load loss or protect other customers against tens of millions in cost shift increases

A more prudent, just and reasonable approach would require concrete evidence from each customer allegedly considering major capital investment in self- or co-generation or leaving Indiana, inherently staggering their exit from NIPSCO's system. As explained by witness Kelly, should firm load leave NIPSCO's system in the coming years, "NIPSCO will need to file multiple rate cases as chunks of firm load leave its system, and those rate cases are going to propose to reallocate the unrecovered fixed costs left behind by these customers from the remaining customer classes." Petitioner's Exhibit 3-S2-R, Kelly Reply, p. 5: 11-14. In other words, the reallocation of unrecovered fixed costs may still occur, but it would occur gradually over time. Such an approach would ensure the threat of exiting NIPSCO's system is more than mere bluster and would gradually—as opposed to immediately—shift portions of NIPSCO's production costs onto remaining customers. Better still, NIPSCO could restart the process of devising a way for its customers to gain access to market-based rates, with all stakeholders at the table and inclusion of a more appropriate resolution of legacy generation-related costs and protection for non-participants.

b. <u>Approval of the proposed Rate 831 does not guarantee that Rate 831 customers will remain on NIPSCO's system.</u>

NIPSCO's own witness concedes that, even if the Rate 831 Settlement is approved, Rate 831 customers may still pursue co-generation, self-generation, relocation outside of Indiana, or closure of their facilities:

> There is no guarantee that approving Rate 831 eliminates the possibility that large customers may elect to pursue co-generation or self-generation, shift work to other facilities or close plants. These customers' decisions will be shaped by many forces beyond the impact of this NIPSCO rate case or approval of Rate 831.

Joint Exhibit 3, Kelly Stipulation of Facts, pp. 1-2, para. 8. The hard truth here is that the threat of co-generation and industrial load loss cannot be controlled by the Rate 831 Settlement. The Rate 831 Settlement customers are sophisticated energy consumers and will always follow their

individual economic self-interests. Factors and developments occurring far beyond the terms of Rate 831 will shape the individual business decisions of these users, and it is folly to assert otherwise.

c. <u>The proposed Rate 831 fails to adequately protect against further cost-shifts.</u>

NIPSCO claims that requiring five-year contracts provides certainty, ensuring Rate 831 customers continue to purchase firm load from NIPSCO. *See* Petitioner's Exhibit 3-S 2-R, Kelly Reply, p. 7:6-9; Petitioner's Exhibit 3R, Q&A 17, Petitioner's Exhibit 3, Q&A 13; 831 Settlement Agreement, Section 3d. For all the talk of the protection garnered from 5-year contract terms, a simple reading of the Company's Rules reveals that these contracts could terminate much sooner. NIPSCO Rule 5.8.[23] All of NIPSCO's five-year Tier 1 contracts could be terminated when NIPSCO files its next rate case, which could be as soon as next year. Joint Exhibit 3, Kelly Stipulation of Facts, p. 2, para. 7.

Similarly, while the Rate 831 parties tout the collective 194 MW Tier 1 subscription level[24] agreed to in their settlement, nothing in Rate 831's design or their settlement protects against the risk that Rate 831 customers will race to minimum allowed firm demand levels. Collectively, the six Rate 831 customers could reduce their Tier 1 subscriptions to 60 MW at their earliest opportunity. Rate 831 Tariff, Petitioner's Attachment 19-A, Sheet No. 2. While those firm commitments could decrease with NIPSCO's next rate case or the second five-year contract term, the Rate 831 Tariff makes *increased* Tier 1 demand impossible in the near-term by requiring five years' notice. Rate 831 Tariff, Petitioner's Attachment 19-A, Sheet No. 12. These provisions make it clear that Rate 831, and the proposed Implementation Agreement, would leave NIPSCO's

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[23] "[U]nder NIPSCO Rule 5.8 in its current rate schedules, all such contracts immediately terminate upon the implementation of new base rates resulting from a general base rate case." Lahtinen Cross-Answering, p. 15.

[24] Stipulation and Settlement on Rate 831 Implementation, para. B(1).

remaining customers exposed to continued risk of increased cost-shifts, possibly as early as next year.

Rate 831 fails to maintain the value of NIPSCO's services or property, because the six Rate 831 customers could lower their collective Tier 1 subscriptions from 194 MW to 60 MW in as little as one year. Rate 831 actually precludes the enhancement of NIPSCO's services or property, because it does not include any mechanism to increase Tier 1 subscriptions without five-years notice. It is clear that their proposed settlement is just the beginning of the unjust and unreasonable cost-shifts that will result from NIPSCO's piecemeal unbundling of retail service. Rate 831 therefore fails the standard of Indiana Code section 8-1-2.5-6(a)(1)(B), and should be denied.

CONCLUSION

For all the reasons detailed above, the Commission must reject Rate 831 and maintain the current rate structure.