STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF COMMUNITY UTILITIES OF INDIANA, INC. FOR: AUTHORITY TO INCREASE ITS RATES AND CHARGES FOR WATER AND WASTEWATER UTILITY SERVICE; APPROVAL OF NEW SCHEDULES OF RATES AND CHARGES APPLICABLE THERETO; AUTHORITY TO RECOVER CERTAIN COSTS INCURRED IN CONNECTION WITH CAUSE NOS. 44724, 45342 AND 45389; AUTHORITY TO RECOVER COSTS INCURRED AND DEFERRED IN CONNECTION WITH THE COVID-19 PANDEMIC; APPROVAL OF A NEW RESIDENTIAL LOW-INCOME RATE FOR WATER AND WASTEWATER SERVICE; AND OTHER APPROPRIATE RELIEF	)	**CAUSE NO. 45651**

COMMUNITY UTILITIES OF INDIANA, INC.'S
PETITION FOR RECONSIDERATION

Community Utilities of Indiana, Inc. ("Petitioner" or "Company"), pursuant to 170 IAC 1-1.1-22, respectfully petitions the Indiana Utility Regulatory Commission ("Commission") to reconsider three sections of its February 1, 2023 Order ("Order") that improperly denied recovery of reasonable expenses incurred by the Company to comply with prior Commission directives and fulfill the Company's obligation to plan for and deliver reliable water and wastewater utility service to Indiana customers.

First, the Company requests reconsideration of Section 13 of the Order, which denied recovery of deferred engineering and legal expenses incurred to develop the System Improvement Plan ("SIP"). The SIP included, among other items, proposed capital projects presented for preapproval in Cause Nos. 45342 and 45389. The infrastructure investment identified in the SIP is also reflected in the Company's performance metrics, which track *inter alia* the status of the SIP

capital projects. The proposed capital projects were developed and presented for approval consistent with Cause No. 44724, which expressly required the Company to provide "proper documentation of engineering studies and detailed competitive bids from contractors to support Petitioner's proposals." *Comm. Utils. of Ind., Inc.*, Cause No. 44724 at 76 (IURC Jan. 24, 2018) ("44724 Order").

Second, the Company also seeks reconsideration of Section 14 of the Order, which disallowed $82,500 in rate case expense necessarily incurred in order to prepare and defend this case. And third, the Company seeks reconsideration of Section 6.A.iv of the Order, which disallowed a portion of the costs associated with the Company's meter replacement program. These disallowances result in a government taking that denies the Company recovery of costs incurred to comply with prior Commission orders. As a result, the rates approved in the Order are confiscatory and fail to provide the Company a reasonable opportunity to earn a fair return on its investment, contrary to law.

In support of this Petition, the Company states as follows:

1. Summary of Argument.

This case reflects the culmination of years of work undertaken by the Company, with continual oversight from the Commission, to comply with the 44724 Order. The 44724 Order compelled the Company to: 1) develop *and implement* a SIP that, as directed by the Commission, included documentation of engineering studies and detailed competitive bids from contractors for significant capital investments; 2) measure *and achieve improvement* (a "Performance Plan") using key performance metrics, which included engineering, pre-approval and construction timing metrics for the projects subsequently presented for preapproval; 3) present the proposed SIP and Performance Plan at a technical conference, which included Commissioners, Commission Staff,

the Administrative Law Judge, the Indiana Office of Utility Consumer Counselor ("OUCC") Staff, and the Lakes of the Four Seasons ("LOFS"); 4) incorporate the *Commission's comments* into the SIP and Performance Plan, file a revised SIP and performance plan *and then implement* the SIP and Performance Plan; 5) file quarterly reports on progress; 6) present quarterly updates at technical conferences with the Commission, OUCC Staff and representatives of the LOFS; and 7) meet quarterly with the LOFS. 44724 Order at 76 -78.

The Company heard the Commission and complied fully with the Commission's directive. It prepared and presented the SIP and Performance Plan, which included three capital projects – the Iron Filter Project, the Collection System Improvement Project ("CSIP"), and the Wastewater Treatment Plant Project ("WWTP"). In developing the SIP, the Company did not look solely at the collection system; rather, the Company's engineers looked at the system in totality and proposed projects that would be cost effective and beneficial in addressing inflow and infiltration ("I&I") and other system needs. The Company presented quarterly updates to the Commission, the Commission Staff, the Administrative Law Judge, OUCC Staff, and representatives of the LOFS identifying progress made on each capital project and other agreed performance metrics. The Company engineered the projects, obtained competitive bids, and presented the projects to the Commission in preapproval proceedings. The Commission subsequently approved one of the three projects – the Iron Filter Project.

After overseeing the Commission-established process to "reasonably address [its] desire to see continued cooperation" among stakeholders and provide for "the development and implementation of a comprehensive and thoughtful strategy by" the Company, the Commission cannot arbitrarily deny recovery of the costs the Company incurred to comply with that process. In short, the Company's actions were reasonable, appropriate, and followed the process established

by the Commission in Cause No. 44724. It is arbitrary and unlawful for the Commission to establish the process, receive numerous reports from the Company detailing the Company's compliance with the process, and then deny recovery of the foreseeable, logical and natural consequences of the process – prudently incurred external engineering and legal expenditures.

This complete denial of cost recovery unfairly punishes the Company for its good-faith efforts, discourages prudent, reasonable attempts to improve service (including the use of the preapproval process), and is inconsistent with prior Commission decisions—which have authorized recovery of legal costs supported by much *less* evidence than that presented here. It also constitutes confiscatory action that deprives the Company of a fair return on its investment and leaves the Company without a path forward that is free of future government taking. Similarly, the Commission's disallowance of certain rate case expenses and meter replacement costs denies the Company recovery of costs incurred to provide service, is inconsistent with prior Commission practice, constitutes a government taking of private property, and should be reconsidered and reversed.

2. Argument.

A. The Order improperly denied recovery of prudently incurred engineering and legal expenses.

On pages 65-66 of the Order, the Commission denied recovery of engineering expenses totaling approximately $1.6 million in connection with the development and design of the WWTP and CSIP presented for preapproval in Cause No. 45389, and legal fees totaling $434,463 for the prosecution of the two preapproval cases in Cause Nos. 45342 and 45389.[1] Denial of these actual

[1] While the Order on page 66 only references $1,100,289 in engineering expense, the total disallowance (as identified on page 62 of the Order) is $1,599,811.

expenses is confiscatory and should be reconsidered. As the Commission has previously explained:

> This Commission has the duty to assure that a utility provides adequate service to the public at fair and reasonable rates, but it also has the duty to assure that rates approved are sufficient to cover all legal expenses of the utility and to supply it with a reasonable profit on its investment. Rates too low to pay expenses and produce a reasonable return are confiscatory and illegal.

Re N. Ind. Pub. Serv. Co., Cause No. 35572, 1979 WL 445242 at *1 (Ind.P.S.C. Feb. 7, 1979).

Since the 44724 Order, the Company has undertaken significant activity (and incurred significant expense) to comply with the order's directives. These actions include retaining outside engineers, developing detailed plans, and preparing and filing two capital preapproval cases. In each instance, the Company's objective was to comply with the 44724 Order. Commission Staff was involved in the review of the Company's engineering and capital planning efforts and at no point was the Company led to believe its efforts were in vain or were contrary to the Commission's intent as expressed in the 44724 Order. To the contrary, Commission Staff specifically instructed in writing for the Company to continue with the work. Pet. Ex. 1R (Lubertozzi Rebuttal), Attachment SL-R04 (Staff recommending the Company "[c]ontinue to evolve Petitioner's capital planning efforts as better information becomes available through Petitioner's asset management program."). In addition, the Commission Staff recommended Petitioner "provide a status update" on the SIP and "[i]mplement the Petitioner's proposed metrics". *Id.* Those performance metrics specifically measured engineering, preapproval, and actual construction progress both in terms of dollars spent and timing of completion. Pet. Ex. 1R, Attachment SL-R02.

While the Commission can deny preapproval of projects it deems unnecessary, the Commission cannot arbitrarily deny recovery of the very costs the Company was required to incur

in order to follow the Commission's own directives. The determination by the Commission that the Company need not expend funds on the WWTP and CSIP at this time does not and cannot render the costs incurred by the Company to comply with the process established by the Commission unreasonable. The Order's disallowance of these reasonable and necessary costs ignores the history of these expenses, is inconsistent with public policy, and should be reconsidered.

1. The Company incurred engineering and legal expenses based on a good faith reading of the Commission's 44724 Order.

The Company incurred the engineering and legal costs at issue here as a direct result of the 44724 Order. Consider first the Company's engineering costs: the 44724 Order directed the Company to engage in substantial activity to improve water and wastewater service quality, which necessarily required retention of engineering experts. *See, e.g.*, p. 75 (encouraging Company to "incorporate proposed investments and actions to decrease wastewater bypasses and overflows into the Commission required System Improvement Plan"); p. 76 ("the SIP, should be well documented and include feedback from the OUCC and LOFS, *and then, most importantly, must be implemented* and progress measured and reported.") (emphasis added); p. 76 ("Petitioner shall provide detailed plans to measurably improve performance in the Three Key Aspects … [t]he detailed plans shall include descriptions of the activities, measureable [sic] outcomes, cost-benefit analyses, and timelines."); p. 76 ("Petitioner shall develop a comprehensive I&I program"); and p. 77 ("Petitioner shall develop a thorough program to decrease complaints of discolored drinking water").

Based on these clear directives, the Company retained outside experts to evaluate the water and wastewater systems and develop the "detailed plans" required to address the concerns raised

by the Commission. The use of outside engineers was expressly foreseen (and indeed required) by the Commission's Order, which advised "[f]or proposed significant capital investments, Petitioner shall provide *proper documentation of engineering studies and detailed competitive bids* from contractors to support Petitioner's proposals." 44724 Order at 76 (emphasis added). The explicit requirement that the Company go above and beyond the statutory requirements and provide "detailed competitive bids" demonstrates the Commission's tacit understanding that the Company would, in fact, incur additional expenses as a result of the 44724 Order.

The Company's petitions for preapproval of its capital projects were likewise driven by the express language of the 44724 Order. More specifically, the Commission found that the Company "shall propose capital investments *that require Commission approvals* and suggested timetables for the filings and approvals." 44724 Order at 76 (emphasis added). In other words, the Company was required to seek preapproval of the projects, which in turn required the Company to incur the very engineering and legal expenses for which the Commission now denies recovery. As discussed below, denying costs required by the regulatory process represents a government taking, is contrary to Commission precedent, and unfairly denies the Company a reasonable opportunity to earn a fair return on its investment.

2. The Commission and parties knew the Company was incurring significant legal and engineering expenses in order to comply with the 44724 Order.

The 44724 Order was issued in January of 2018. As noted above, the Order directed the Company to develop and implement a comprehensive I&I program and address other water and wastewater service quality issues. Notably, the Company was directed to collaborate with both the OUCC and Intervenor LOFS in developing its plans. This collaboration took place through numerous meetings among the parties and Commission, culminating in the submission of the

Company's SIP in July of 2018. Pet. Ex. 1R, Attachment SL-R01. The SIP included the Iron Filter Project, CSIP, and WWTP. One month later, the Commission's Staff provided formal, written recommendations on the Company's SIP, recommending the Company "[c]ontinue to evolve Petitioner's capital planning efforts as better information becomes available through Petitioner's asset management program." Pet. Ex. 1R, Attachment SL-R04. The Commission's Staff further instructed the Company implement performance metrics measuring the Company's completion of the Iron Filter Project, CSIP, and WWTP project. The Company reasonably took this feedback and instruction to mean the Company was on the right track, and continued engineering and other efforts to develop the SIP would be reasonable.

Based on this feedback and instruction, the Company filed its revised SIP in October of 2018, which continued to recommend the CSIP and WWTP. Pet. Ex. 1R, Attachment SL-R05. For the following year, no meaningful feedback was received from the OUCC, LOFS, or the Commission even though the Company communicated frequently and consistently that it was implementing the revised SIP through quarterly meetings. *See* Pet. Ex. 1R (Lubertozzi Rebuttal), Attachment SL-R08 (April 2019 technical conference minutes discussing engineering progress and that Company anticipated filing one or more preapproval cases); Attachment SL-R09 (October 2019 technical conference meeting minutes updating status of engineering on the WWTP and CSIP projects and presenting updated project schedules).

The Company subsequently filed two preapproval cases based on the revised SIP. In Cause No. 45342, the Commission granted the Company's request and preapproved expenditures of up to $2.079 million for the Iron Filter Project. *Comm. Utils. of Ind., Inc.*, Cause No. 45342 (IURC Nov. 4, 2020). On page 10 of its Order in CN 45342, the Commission stated: "expenditures associated with AFUDC, Cap Time, and regulatory costs are approved to the extent reasonable,

which shall be determined in CUII's next rate case." Concerning legal expenses, the Commission continued:

> Notably, no party took issue with the reasonableness of the estimated regulatory costs or their direct connection to the proposed improvements at issue in this case. We agree with CUII that Commission precedent exists allowing for deferral of regulatory costs for subsequent recovery in a utility's next rate case. We find CUII's incurrence of such regulatory costs may be reasonable and may be included for consideration as O&M expenses in CUII's next rate case.

Id. at 13. Consistent with this language, the Company in the instant case sought recovery of $176,144 in deferred legal expenses incurred to prepare and prosecute Cause No. 45342. 45651 Order at 62. As discussed below, the Commission's rejection of these expenses is contrary to the record and should be reversed.

Subsequently, in Cause No. 45389, the Company sought approval of the WWTP and CSIP, both identified in the revised SIP. *Comm. Utils. of Indiana, Inc.*, Cause No. 45389 (IURC May 5, 2021). Company witness Lubertozzi testified in that proceeding the Company would limit its request in any future case to dollar-for-dollar recovery for regulatory costs, which would allow the Company to recover its actual regulatory costs associated with this Cause, but without earning a return on such costs. *Id.* at 11. The Commission ultimately determined that pre-approval of the wastewater projects was not warranted, but with respect to regulatory costs stated:

> CUII's preapproval request in its direct testimony includes capitalization of approximately $150,000 of legal fees associated with this proceeding that would allow CUII to earn a return "of" and "on" this amount. We agree with Mr. Corey that capitalization of regulatory costs is not appropriate. However, on rebuttal, CUII agreed to limit its request in any future case to similar dollar-for-dollar recovery in its next rate case. We agree with CUII that Commission precedent exists allowing for deferral of regulatory costs for subsequent recovery in a utility's next rate case. We find CUII's incurrence of such regulatory costs may be reasonable and

> may be included for consideration as O&M expenses in CUII's next rate case.

Id. at 15. As with the legal expenses incurred in Cause No. 45342, the Company sought recovery of its actual regulatory costs (totaling $258,319) as part of the instant rate case proposal, consistent with the language in the 45342 Order. The Commission's determination to now disallow these reasonable and necessary regulatory costs, after the Company embarked on a years-long process to "develop[] and implement[] a comprehensive and thoughtful strategy" unfairly denies the Company recovery of the costs of providing service and prevents the Company from having a reasonable opportunity to earn a fair return on its investment.

3. The Company presented a *prima facie* case for recovery of at least <u>some</u> level of deferred legal expense.

In rejecting the recovery of <u>all</u> deferred legal expenses in this proceeding, the Commission's Order makes no mention of these prior orders and the language directing the Company to defer and present those costs for approval in this rate case. Rather, the Order contends that the Company failed to meet its burden of proof in demonstrating the legal costs were reasonable. 45651 Order at 65. This determination should be reconsidered; ample evidence supports a finding that the Company incurred legal costs in preparing and presenting its preapproval cases.

It is not necessary for the Company to prove a prima facie case by a "clear and convincing" evidentiary standard, let alone a "beyond a reasonable doubt" standard. *Re Indiana Michigan Power Co.*, Cause No. 39314 (IURC 11/12/1993) at 5. The Commission re-affirmed this position in *Re NIPSCO*, Cause No. 43526 (IURC 8/25/2010) at 76, stating:

> As we have said before, a petitioner's obligation is to submit "substantial evidence" sufficient for a *prima facie* case, not to satisfy a "clear and convincing" or "beyond a reasonable doubt" standard.

"A 'prima facie case' is one which presents 'such evidence as is sufficient to establish a given fact and which if not contradicted will remain sufficient.'" *Re Indiana Michigan Power Co.*, Cause No. 39314 (IURC 11/12/1993) at 4; *Plough v. Farmers State Bank of Henry County*, 437 N.E.2d 471, 475 (Ind. Ct. App. 1982); *Floyd v. Jay County Rural Elec. Membership Corp.*, 405 N.E.2d 630, 633 (Ind. Ct. App. 1980); *Rene's Restaurant Corp. v. Fro-Du-Co Corp.*, 210 N.E.2d 385, 387 (Ind. Ct. App. (1965). Once the Company has presented a prima facie case for relief, the opponents of the requested relief, such as the OUCC and LOFS, have the burden of going forward with their evidence. *City of Terre Haute v. Terre Haute Water Works Corp*. (1962), 133 Ind. App. 232, 180 N.E.2d 110, 117, 43 PUR 3d 278 citing *Cleveland, etc., R. Co. v. Miller* (1905), 165 Ind. 381, 385, 74 N. E. 509, 510 ("The general rule in Indiana is that 'a prima facie case must always stand until it is broken by the defendant's evidence.'"); also *Zakutansky v. State Bd. of Tax Comm'rs*, 758 N.E.2d 103, 2001 Ind. Tax LEXIS 40 ("Once the taxpayer carries the burden of establishing a prima facie case, the burden shifts to the State Board to rebut the taxpayer's evidence and justify its decision with substantial evidence," (citing *Clark v. State Bd. of Tax Comm'rs*, 634 N.E.2d 822, at 1233)).

Here, the Company presented detailed, itemized invoices identifying legal expenses incurred in both preapproval cases. Pet. Ex. 13 (Docket Entry Responses), Attachment 19. The Commission's order characterizes this evidence as "disorganized, possibly incomplete", but nothing suggests these expenses were not actually incurred, or were not associated with the

identified preapproval cases.[2] And while the Commission notes a minor discrepancy in the calculated total from the invoices versus the Company's workpaper (Order at 66), the Order does not explain why a difference of $3,000 (*i.e.* 1% of the total) warrants rejection of the *entire* expense.[3] Simply put, there is no basis to disallow the entire legal cost of both proceedings, and the Commission's Order on this point should be reconsidered.

Indeed, the Commission's conclusion is directly contrary with its prior decisions, which have approved recovery of legal costs on the basis of far less evidence than what the Company provided here. In Cause No. 45461, involving the acquisition of one water utility by another, the OUCC objected to the inclusion of legal fees to be incurred in connection with the acquisition. *Joint Petition of Indiana-American Water Co. Inc.*, Cause No. 45461 (IURC June 2, 2021). The OUCC argued the utility failed to provide sufficient evidence to support the reasonableness of the incidental expenses, stating the estimate consisted largely of outside legal fees, supported only by a copy of the engagement letter for those fees providing fixed fee billing by phase. *Id.* at 13. Unlike the current proceeding, the Commission in Cause No. 45461 found "the record evidence is sufficient to support the total anticipated legal fees to be incurred by Indiana American in connection with this proceeding." *Id.* The Commission further explained why total disallowance of legal fees as proposed by the OUCC was inappropriate:

> The OUCC's recommended disallowance of incidental expenses and other costs of acquisitions associated with this proceeding ignores the fact that without this proceeding, closing of the acquisition will not occur. Thus, it is unreasonable to think that legal expenses are not a cost of acquisition and we reject the OUCC's

[2] Each invoice identifies the specific matter associated with the expenses identified therein; the fact that for accounting purposes two separate "matters" were created for the wastewater preapproval case does not change the fact that these expenses were in fact incurred.

[3] The fact that the invoices presented to the Commission essentially matched the amount shown in the workpaper confirms that all of the legal invoices were, in fact, filed with the Commission, *contra* Order at 64.

> proposal to eliminate legal expenses. Further, when Indiana American files its next general rate case, the amount actually recorded on its books and records pursuant to the authority granted here will be subject to review for reasonableness.

Id. Similarly, the legal expenses incurred in seeking preapproval of the projects are a necessary cost of those projects.

Similarly, in a 2003 case involving Riverside Water Company, the Commission found the utility had failed to meet its burden of proof with respect to rate case expense where the utility "did not provide any invoices or detail related to legal fees as requested." *Re Riverside Water Co.*, Cause No. 42122, 2003 WL 21041242 (IURC Feb. 19, 2003). Nonetheless, the Commission did not reject all legal expense; rather, it initially adopted the OUCC's proposed level of expense "stayed, however, pending our receipt of a late-filed detailed itemization of these expenses." *Id.* at *7. More recently, the Commission approved a utility's proposed rate case expense over the OUCC's objection even though the utility failed to provide any workpapers or other support for the amount in its case-in-chief, and merely provided rebuttal testimony indicating it had already incurred $183,331 in rate case expense. *Re Stucker Fork Conserv. Dist.*, Cause No. 44687, 2016 WL 7407230 (IURC Dec. 14, 2016).

In short, the Company provided far more detail in the legal invoices submitted in this proceeding than utilities have in prior cases. It was thus error for the Commission to deny legal expense recovery on the basis of concerns with "vague" or in sufficiently organized invoices. There is no dispute the Company incurred significant legal expenses. That suffices to require recovery.

Further, a threshold safeguard as to the reasonableness of legal expense is that under the Indiana Rules of Professional Conduct a lawyer "shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Rule 1.5(a). If the legal fees incurred for the preapproval cases were unreasonable, it "shall not" be charged or collected. Any journal entry or rate case review is trued up to the actual expense, which must be professionally "reasonable." Indeed, in this proceeding the Company provided invoices showing activities and associated hours for each diary entry. While the Commission's Order found the invoices to be "vague", the Commission has previously approved legal expenses incurred on a fixed fee basis, *i.e.*, without any breakdown beyond phase of proceeding. *See, e.g.*, *Joint Petition of Indiana-American Water Co.*, Cause No. 45550 (IURC Dec. 22, 2021); *Joint Petition of Indiana-American Water Co. Inc.*, Cause No. 45461 (IURC June 2, 2021). There is no reasonable basis to now reject the legal expenses necessarily incurred in connection with those projects.

4. Recovery of pre-petition plan development costs is consistent with sound public policy and prior Commission decisions.

There is a sound public policy reason for allowing recovery of the engineering and legal expenses: many projects performed by a public utility for purposes of compliance require preplanning, engineering, and site assessment work to be performed to ascertain how compliance may be completed and what that compliance will likely cost. The Commission expects projects to be prudently planned and for utilities to have reasonable cost estimates before it is asked to pass judgment on those plans.[4] Requiring a petition be filed before any recoverable funds are expended on planning and engineering could result in the unintended consequence of inferior quality

[4] *See* 44724 Order at 76 (requiring engineering studies and detailed competitive bids); *In re Duke Energy Ind., Inc.*, Cause No. 44720, 2016 Ind. PUC LEXIS 194, at *56-57, (Order, at p. 26) (reflecting that "we have encouraged utilities to improve the level of accuracy and completeness of their cost estimates prior to seeking Commission pre-approval for a project….").

regulatory proceedings with significant delays required while the utility attempts to plan its proposed compliance during the pendency of the proceeding.

Indeed, the Commission has repeatedly approved recovery of costs incurred prior to the filing of a preapproval petition when those costs were related to pre-petition analysis, preparation, and plan development activities necessary for the petitioning utility to determine its proposed compliance project(s) and to examine the alternatives. In other words, such activities were reasonable and necessary in order for the utility to provide the required evidentiary basis for its request and therefore appropriate for later recovery. *See, e.g., S. Ind. Gas & Elec. Co.*, Cause No. 45052 at 1 (IURC Apr. 24, 2019); *Ind. Mich. Power Co.*, 2013 WL 6092508, at 2; and *Duke Energy Ind.*, Cause No. 44765, 2017 WL 2306076, at 1 (IURC May 24, 2017). The engineering and legal costs at issue in this case are no different; they were reasonably incurred by the Company to evaluate the best path forward to comply with the requirement to "develop[] and implement[] a comprehensive and thoughtful strategy by Petitioner to create lasting improvements in wastewater and water service quality, value, and accountability[.]". 44724 Order at 76.

As to the legal fees associated with Cause No. 45389, mere disapproval of the projects does not warrant rejection of the costs incurred to present the projects in the first place. The approach taken by the Commission here suggests that only "successful" litigation expenses are recoverable. And again, this contradicts the Commission's prior decisions.

In a 2020 Order involving LMH Utilities, for example, the Commission rejected the OUCC's proposal to exclude legal expenses associated with LMH's participation in a prior Commission proceeding based on the fact that the utility did not win on every issue. *LMH Utils. Inc.*, Cause No. 45307-U. The Commission explained:

> Based on the evidence presented, we find that LMH provided sufficient information to support its requested rate case expense. Participation in regulatory proceedings is a reasonable and necessary cost of providing utility service and such cost is appropriately reflected in rates. The Commission required LMH's participation in the Tax Investigation and, although the Commission ultimately ruled against LMH on certain legal issues in that proceeding, we lack any evidence demonstrating LMH's participation or asserted legal arguments were unreasonable. Accordingly, we find that LMH shall be authorized to recover $66,934 in rate case expense.

Cause No. 45307-U, Order at 7.

Second, despite not being preapproved, the engineering expenses at issue here will continue to provide benefits to customers. The Commission's Order recognizes that the existing wastewater treatment plant is "aged." (Order at 66). As noted above, the Company's retained engineers identified projects that are cost-effective and beneficial for the system as a whole. The engineering work done to prepare for the inevitable need to replace the wastewater treatment plant was thus not done in vain and provides a significant benefit to customers when replacement is necessary. Moreover, the headworks design incorporates engineering done for the rejected WWTP, again providing benefits to customers. It is unreasonable to deny recovery of costs incurred to provide service, particularly where such costs continue to benefit customers.

The deferred engineering and legal expenses are akin to the nuclear decommissioning study costs the Commission approved in Indiana Michigan's 2013 rate case. There, the OUCC challenged the inclusion of costs incurred by I&M to perform a nuclear decommissioning study. *Ind. Mich. Power Co.*, Cause No. 44075, 2013 WL 653036 (IURC Feb. 13, 2013). The Commission approved recovery of the costs, explaining they were required by a prior Commission order:

> The record reflects that I&M incurred the cost of the nuclear decommissioning study to comply with the regulatory mandate and to provide for the efficient preparation of its rate case filing. Because I&M is required to provide a nuclear decommissioning study every three years, disallowing these costs would mean that the cost of service reflected in the revenue requirement is not representative of ongoing utility operations. It would also deny I&M the ability to recover the cost of the regulatory mandate imposed in Cause No. 36760-S1. Because the test year level of rate case expense is not representative we find this required part of rate case expense is appropriately recognized in the revenue requirement as an in-period test year adjustment. Accordingly, we reject the OUCC's recommendation to exclude of the nuclear decommissioning study expense from rate case expense.

Id. at *74. The Company was mandated to "propose capital investments that require Commission approvals and suggested timetables for the filings and approvals." 44724 Order at 76. Disallowing the deferred engineering and legal expenses would mean the cost of service reflected in the revenue requirement is not representative of ongoing utility operations. The Commission should reconsider this issue.

B. The Order's disallowance of rate case expense is improper.

The Commission's disallowance of actual expenses incurred to provide service goes beyond deferred engineering and legal expenses; the Commission also rejected $82,500 in forecasted costs incurred by the Company in the instant case, consisting of $50,000 in rebuttal witness expert fees and $32,500 in consultant support costs to prepare and file the Company's detailed MSFRs. Order at 68. Concerning the cost of rebuttal witnesses, the Order simply states the "unitemized $50,000 'consulting expense' added by CUII on rebuttal should be disallowed." *Id.* This conclusory statement fails to comport with the standard applicable to Commission orders and should be reconsidered.

Commission decisions must be supported by specific findings that reveal its determination of the various relevant sub-issues and factual disputes, which in sum, are dispositive of the claim or ultimate question. *Citizens Action Coalition of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 76 N.E.3d 144, 151-52 (Ind. Ct. App. 2017); *Bd. of Dirs. for Utils. of Dep't. of Pub. Utils. v. Office of Util. Consumer Counselor*, 473 N.E.2d 1043, 1047 (Ind. Ct. App. 1985) (citing *Perez v. U.S. Steel Corp.*, 426 N.E.2d 29, 33 (Ind. 1981)). While the Commission may weigh the evidence, not considering competent, uncontradicted evidence and clear language in standing Commission orders, and not making reasoned findings on these matters, is not weighing evidence; it is ignoring it. *Hancock Rural Tel. Corp.*, 137 Ind. App. 14, 43, 201 N.E.2d 573, 587, *reh'g denied*, 203 N.E.2d 204 (1964) (the "'evidence was uncontradicted and unimpeached, and the Commission was not at liberty to disregard such evidence and make no special findings upon it.'").

Findings are not only necessary for judicial review; they are reasonable as a matter of public policy. Basic findings of fact are important because they enlighten the reviewing court as to the agency's reasoning process and allow a rational and informed basis for review. *PSI Energy, Inc. v. Ind. Office of Util. Consumer Counselor*, 764 N.E.2d 769, 773 (Ind. Ct. App. 2002); *City of Evansville v. S. Ind. Gas & Elec. Co.*, 167 Ind. App. 472, 493-94, 339 N.E.2d 562, 576-77 (1975) (discussing requirement that Commission "illuminate its decision-making process with specific findings upon all material issues"). As the Court of Appeals has explained, "[t]he process of formulating basic findings on all material issues can also serve to aid the Commission in avoiding arbitrary or ill-considered action." *L.S. Ayres & Co. v. Ind. Power & Light Co.*, 169 Ind. App. 652, 662, 351 N.E.2d 814, 822 (1976). The basic findings also enable the regulated companies to better understand the Commission's decision.

Here, the Commission's single sentence fails to explain why it is reasonable to disallow expenses incurred to respond to complex issues raised by the other parties to this proceeding. Rate cases are broad in scope, and it is not unusual for parties to rely on outside consultants to assist in testifying on technical issues. Indeed, the intervenor LOFS retained two expert consultants to assist them in the presentation of their case. Notably, while the OUCC disagreed with some aspects of rate case expense, no party challenged the reasonableness of the costs associated with the three rebuttal expert witnesses. Disallowance of the additional consulting costs puts the Company in an untenable position where it must choose which issues to defend based on whether the Company has sufficient internal resources and expertise to address those issues.

Similarly, disallowance of costs incurred to respond to the OUCC's claim of deficient MSFRs is likewise unreasonable and contrary to prior Commission practice. As with the rejected consulting expenses, the Commission's disallowance is based on a single conclusory sentence suggesting the Company "should have been able to compile this information without such heavy involvement from an outside consultant." Order at 68. No authority or evidence is cited for this proposition, and it is insufficient as a matter of law. It is also inconsistent with prior Commission orders. For example, in a case involving Indiana Michigan Power Company, the Commission rejected an adjustment to rate case expense proposed by the OUCC that failed to consider the actual costs incurred by the utility:

> The Commission finds that I&M's estimated rate case expense is more reasonable than the OUCC's. The OUCC's adjustment fails to recognize the actual expense incurred by I&M during this case for the services of CSA. Moreover, the OUCC has proposed an estimate that it knew to be less than the actual level of expense already incurred by I&M and substantially below the amount I&M now expects to incur. I&M's costs of responding to these unforeseen matters and presenting its case in general are necessary business expenses that must be considered in determining I&M's revenue requirement.

Ind. Mich. Power Co., Cause No. 39314, 1993 WL 602559 at *77 (IURC Nov. 12, 1993). In the instant case, the Company actually incurred more than the $82,500 disallowed in the Order. The Commission should reconsider and reverse its finding that actual costs incurred by the Company should not be recovered.

C. The Order incorrectly prescribed a ten-year life cycle for meter replacement.

The Company is obligated to maintain its meters in good working order and within a certain accuracy range. 170 IAC 6-1-8. The Company's evidence identified a large percentage of the Company's meters are in need of replacement. Pet. Ex. 3 (Grosvenor Direct) at 16-17. To address this need, the Company plans to replace customer meters in all three of the Company's water systems with Neptune Automatic Meter Reading ("AMR") meters. *Id.*; Order at 8. The OUCC's evidence shows the new meters are from a "well-established, widely-used meter manufacturer," and the Company expects "a 10%-15% discount on market value and annual pricing certainty." Pub. Ex. 3 at 6. These customer benefits are not being captured because of the Commission's disallowance. The basic findings underpinning the Commission's conclusion regarding the meter replacement costs are fundamentally flawed, and fail to satisfy the standard applicable to Commission decisions.

First, in Cause No. 42743 DSIC-2, the Company explained during the 2013-2014 period it was replacing nearly 1,710 meters within its system in order to install AMR meters. *Ind. Water Serv., Inc.*, Cause No. 42743 DSIC-2 (IURC May 28, 2014). The OUCC did not object to the Company's meter replacement program, although it did raise an objection to the recovery of costs for replacing meters less than ten years old through the DSIC. *Id.* at 2-3. The Commission's DSIC-2 Order generally approved the meter replacement program costs for recovery but directed

the Company to address the replacement of meters less than ten years old through "a different mechanism" than the Company's DSIC. *Id.* at 4. The Company has followed that directive by seeking recovery in this rate case for the going-forward replacement of its failing meters, which were on average eight years old in 2021 (Pub. Ex. 3, Attachment CNS-3) and are now reaching or exceeding the ten-year life cycle cost cited by the Commission (Order at 10). Now the Commission denies recovery; leaving the Company with no clear path forward to recover these reasonable and necessary costs.

Second, in its Order, the Commission incorrectly states (p. 10) that 170 IAC 6-1-10 prescribes a ten-year life cycle cost. The rule, however, recognizes that earlier replacement may be warranted:

> Each consumer water meter installed shall be periodically inspected and tested or replaced in accordance with the following schedule, *or more often if the results may warrant*, to ensure that the meter accuracy is maintained within the limits set out in section 9 of this rule:
>
> | | |
> |---|---|
> | 5/8 inch meters | 10 years, or for 100,000 cubic feet or equivalent units registered |
> | 5/8 by 3/4 inch meters | 10 years, for 100,000 cubic feet or equivalent units registered |

170 IAC 6-1-10(b) (emphasis added). Here, the record shows that replacement more often than every ten years is warranted. This is entirely consistent with 170 IAC 6-1-10, and the Commission should reconsider its finding limiting replacement costs to 10% of the total meter replacement cost identified by the Company, especially given the fact that most of the meters being replaced are now reaching their ten-year expected life.

Third, the Commission's statement that the meter replacement program "appears in part to be a response to poor planning and execution of prior meter replacements" is unsupported by the record. As noted above, the Commission was not only aware of the prior meter replacement project but it further allowed the Company to recover those costs through its DSIC. Given the widespread replacement of meters back in 2013, it should be no surprise that the Company must now systematically replace a significant proportion of its meters.

Finally, the Commission takes issue with the Company's comparison of the costs of meter repair versus replacement, yet the Order fails to cite any record evidence for this criticism. In particular, the Commission states that the assumption a repaired meter would be returned to the same customer location is "ultimately flawed", and accordingly rejects Mr. Grosvenor's cost comparison. No explanation is provided for why the Commission believes this assumption is flawed, or how this assumption renders the entire cost comparison unreliable. In any event, the record shows that the cost of meter replacement is comparable (if not cheaper) than repair, even if one assumes a repaired meter would not be returned to the same customer. The Order ignores this point, and further ignores the other benefits of replacement identified by the Company and the OUCC.

3. Conclusion.

For the reasons discussed herein, the Commission should reconsider and reverse its disallowance of engineering and legal expenses incurred to comply with Commission directives. The Commission should further reconsider its denial of rate case expense actually incurred in this proceeding and should also approve a level of meter replacement funding commensurate with the Company's need to address rapidly failing meter infrastructure.

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The undersigned certifies that the foregoing was served upon the following via electronic email this 21st day of February 2023:

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